# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Orogenic Gold Corp. v. Mill,* 2023 BCSC 832

Date: 20230516
Docket: S229003
Registry: Vancouver

Between:

**Orogenic Gold Corp.**

Plaintiff

And

**Richard Mill**

Defendant

Before: The Honourable Madam Justice W.A. Baker

## Reasons for Judgment

| | |
|---|---|
| Counsel for Plaintiff: | M. Fancourt-Smith<br>J. Mayfield |
| Counsel for Defendant: | B. La Borie |
| Place and Date of Trial: | Vancouver, B.C.<br>March 31, 2023<br>April 6, 2023 |
| Place and Date of Judgment: | Vancouver, B.C.<br>May 16, 2023 |

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## Introduction

[1] This an application for summary trial, brought by Orogenic Gold Corp. ("Orogenic") against its former president, chief executive officer ("CEO") and director, Mr. Richard Mill, seeking specific performance of the Mackie/Eskay West/Rufus Property Option Agreement dated June 1, 2018. The current president of Orogenic is Mr. John Wonnacott, a professional engineer with extensive experience in the mining industry.

[2] At the time the agreement was made, Mr. Mill owned title to a number of mineral claims, or tenures, in an area of central British Columbia known as the "Golden Triangle". Mr. Mill was also at that time the president, CEO, sole director, and majority shareholder of Orogenic. Under the agreement, Mr. Mill granted Orogenic the option to a 100% right, title and interest in four mineral claim tenures numbered 1051761, 1051762, 1041376, and 1049772, subject to a reservation by Mr. Mill of a 3.5% net smelter royalty, in exchange for the issuance by Orogenic to Mr. Mill of certain shares and payments.

[3] Tenures 1051761 and 1051762 are referred to collectively as "Eskay West". Tenure 1041376 is referred to as "Eskay South". Tenure 1049772 is referred to as "Rufus". All four tenures are collectively referred to in this decision as the "Mineral Claims".

[4] The option agreement required Mr. Mill to deliver duly executed transfers of the Mineral Claims to Orogenic upon execution of the agreement. Mr. Mill did not execute any transfers of the Mineral Claims. This failure by Mr. Mill to deliver transfers of the Mineral Claims is the basis of the application by Orogenic before me.

[5] I note that Mr. Mill's response to this application included an argument that the option agreement was unlawful and therefore *void ab initio* and unenforceable, or void based upon mutual mistake. This argument was abandoned at the hearing of the application.

**Background facts**

[6] Mr. Mill is a prospector with 45 years experience in mineral exploration, particularly in the Golden Triangle in B.C.

[7] In 2016 and 2017, Mr. Mill acquired the Mineral Claims which are the subject of this dispute. The Mineral Claims are located in an area of British Columbia where there is significant mining activity. The two Eskay West Mineral Claims includes Albino Lake, which was previously used as a waste rock and tailings disposal site for many years by the former operators of the nearby Eskay Creek Mine. Based on preliminary drilling and sampling at Albino Lake, Mr. Wonnacott believes there may be very significant and valuable mineralization in these Mineral Claims. Mr. Mill confirms that the waste rock and tailings in Albino Lake contain waste gold and silver as a result of the previous mining operations, and the value of precious metals has escalated tremendously since the previous mine closed.

[8] There is some dispute in the evidence as to the likely value of the Mineral Claims. Mr. Wonnacott suggests the value may be as high as $800,000,000. Mr. Mill disputes this amount, and submits that expert evidence is required to truly establish the value of the claims. It is not necessary for me to determine the value of the Mineral Claims on this application. It is sufficient that the presence of precious metals in the waste rock and tailings makes these Mineral Claims potentially very valuable. The potential for a high value in relation to these Mineral Claims is not disputed by either party.

[9] Mr. Wayne Workun is a cousin of Mr. Mill. Mr. Workun is an investment broker at Leede Jones Gable Inc. (“Leede Jones”) with experience in funding mining transactions. Mr. Mill and Mr. Workun had worked together in the past on different investment opportunities in the mining sector.

[10] In 2017, Mr. Mill approached Mr. Workun to assist him in setting up a company to hold the Mineral Claims, and pursue an initial public offering. Mr. Mill says he asked Mr. Workun to set up the company, as well as accounting and legal services for the company, and Mr. Workun agreed to do so. Mr. Workun disputes

this, and says that all he agreed to do, and did do, was connect Mr. Mill with professionals who could assist him.

[11] The evidence on this application establishes that on July 27, 2017, Mr. Mill sent Mr. Workun an email stating “Wayne, Go ahead and set up the newco. make me president and you or your designee as vice president. Set up accounting legal etc I will pay for it or give shares for services.” Following this email, Mr. Workun connected Mr. Mill with Mr. Darren Fach, a lawyer in Calgary, to assist with legal matters. In February 2018, Mr. Mill asked Mr. Workun to find him an accountant, and Mr. Workun introduced Mr. Mill to Mr. Martin Aiello.

[12] On September 13, 2017, Orogenic was incorporated, with Mr. Mill being the sole shareholder, director, president, and CEO. Mr. Workun was not made an officer of Orogenic, and was not issued shares in Orogenic.

[13] In October 2017, Mr. Workun began liaising between Mr. Fach and Mr. Mill regarding the drafting of an option agreement.

[14] On October 5, 2017, Mr. Fach, Orogenic’s solicitor, provided information to Mr. Workun, on the requirements for mineral resource companies to list their shares on the Canadian Securities Exchange (“CSE”) and the TSX Venture Exchange (“TSXV”). Mr. Workun forwarded the email to Mr. Mill on the same day. Mr. Fach set out information on the minimum listing requirements for the CSE, which included a requirement that the company must have:

> A mineral resource company must have title to a property that is prospective for minerals and on which there has been exploration previously conducted including qualifying expenditures of at least $75,000 by the Issuer or predecessor during the most recent 36 months.

[15] Mr. Fach also provided information on the TSXV minimum listing requirements, namely the TSXV required the company to have a significant interest in a qualifying property, or a right to earn a significant interest in the qualifying property, and evidence of $100,000 of approved expenditures within 36 months of the application for listing and a work program with an initial phase of no less than $200,000 as recommended in a geological report.

[16] Between October 2017 and March 2018, Mr. Workun and Mr. Mill discussed terms for a proposed option agreement with Orogenic completing a going public transaction.

[17] On March 12, 2018 Mr. Mill outlined the rough option agreement concept for the Mineral Claims, including Orogenic being responsible for maintaining the Mineral Claims, and the Mineral Claims returning to the vendor if the option is terminated.

[18] On March 19, 2018, Orogenic appointed Mr. Aiello as its chief financial officer ("CFO"). Before the appointment Mr. Aiello acted primarily as a bookkeeper for Orogenic. In August 2018 he became a beneficial shareholder, through shareholdings acquired by Leede Jones.

[19] In March 2018, Orogenic retained Mr. Fach to begin preparation of the option agreement.

[20] On June 7, 2018, the first draft option agreement between Mr. Mill and Orogenic was sent to Mr. Mill. Mr. Fach prepared revisions on June 14, 2018.

[21] On June 14, 2018, Mr. Mill wrote to Mr. Workun questioning whether their plans would actually require the Mineral Claims to be transferred to Orogenic. He suggested that obtaining permits and other costs were more difficult for a corporation, versus a person. Mr. Mill suggested that the agreement would have him give the company permission on the claims until the option is bought, and then the claims would be transferred.

[22] Ultimately, the final draft of the option agreement was sent to Mr. Mill on June 27, 2018, and it did not contain the suggestions Mr. Mill had made on June 14, 2018.

[23] On June 28, 2018, Mr. Mill executed the option agreement, signing for himself as the owner of the Mineral Claims, and Mr. Aiello signing on behalf of Orogenic as its CFO. The option agreement is dated for reference June 1, 2018. For the purposes of this application, the critical terms of the option agreement are summarized as follows:

a) Mr. Mill gave and granted to Orogenic the sole, exclusive and irrevocable right and option to acquire a one hundred (100%) percent right, title and interest in and to the Mineral Claims, subject only to Mr. Mill's royalty interest, in accordance with the terms of the agreement;

b) Upon execution and delivery of the option agreement, Mr. Mill would deliver to Orogenic "… duly executed transfers of all interest in the [Mineral Claims] in favour of Orogenic, which transfers may be recorded by Orogenic in its sole discretion, it being understood that such transfers of legal and recorded title to the [Mineral Claims] will be for administrative convenience only, and that a beneficial interest in the [Mineral Claims] will pass to Orogenic only with the terms of this Agreement";

c) Orogenic agreed to pay consideration to Mr. Mill of 1,370,000 common shares in Orogenic, on or before the execution of the agreement;

d) Mr. Mill agreed to not transfer, or grant any option or right to purchase, or in any way transfer or alienate any of its interest in the Mineral Claims during the term of the option agreement, except with the written consent of Orogenic;

e) During the currency of the option agreement, Orogenic would pay for all materials, services and supplies purchased or delivered in connection with activities on or with respect to the Mineral Claims, and will keep the Mineral Claims in good standing;

f) If a party was in default of any requirement set out in the agreement, the other party is entitled to seek any remedy against the defaulting party if the defaulting party fails to cure a default within 30 days of receiving notice of default; and

g) The option agreement would terminate and Orogenic would have no further interest in the Mineral Claims if either of the following happened:

i. If Orogenic had not completed a going public transaction on or before the expiry of five years from the effective date of the option agreement, or

ii. if Orogenic failed to make further share disbursements to Mr. Mill equal to 30% of future share distributions from Orogenic's treasury at any time up to but not including a going public transaction, "which distributions are comprised of private placement financings, acquisitions of mineral properties or assets contiguous to or within a radius of five (5) miles of the [Mineral Claims] or any other transactions reasonably related to the [Mineral Claims]".

[24] On July 9, 2018, Mr. Mill executed a director's resolution of Orogenic approving the option agreement, confirming the agreement was in the best interests of the company, and approving the issuance of 1,370,000 shares to Mr. Mill pursuant to the terms of the option agreement.

[25] Mr. Mill remained the sole director, president and CEO until March 2022.

[26] It is common ground that Mr. Mill did not deliver to Orogenic duly executed transfers of all interest in the Mineral Claims in favour of Orogenic, as required by the agreement. Orogenic argues that, until March 2022, Mr. Mill was the sole director, president and CEO of Orogenic, and therefore, as Orogenic's representative in the execution and performance of the option agreement, Mr. Mill was the person who knew whether he had complied with his personal obligations under the agreement. Mr. Mill argues that Mr. Workun or Mr. Aiello could have requested the transfers at any time, but did not.

[27] Mr. Workun and Mr. Aiello state that they did not find out that Mr. Mill had not delivered the transfer documents until late November 2021, as will be discussed below.

[28] Mr. Mill, on behalf of Orogenic, maintained and explored the Mineral Claims, and Orogenic paid Mr. Mill over $85,000 as required by the agreement. On this application, Mr. Mill argues that Orogenic breached the payment term by failing to pay all invoices presented.

[29] Following execution of the option agreement, Mr. Workun, in his position at Leede Jones, assisted Orogenic in obtaining funding through share sales. By August 2018, Mr. Workun had raised $113,900 in investments, and on August 23, 2018, Mr. Mill executed a resolution authorizing the issuance of 2,278,000 shares in relation to these investments. 30% of these shares were issued to Mr. Mill, in accordance with the option agreement.

[30] In February 2019, Mr. Mill advised Mr. Workun and Mr. Aiello that he had entered into an option agreement with Auramex Resource Corporation (“Auramex”). with respect to the Rufus claim (tenure 1049772). Mr. Workun and Mr. Aiello understood that Mr. Mill entered into the option agreement on behalf of Orogenic, not himself personally. This belief was based on an email from Mr. Mill in February 2019 where Mr. Mill advised that that “Orogenic has a deal … for 75% of Rufus” and advised that the shares would be issued to Orogenic. In 2019 and 2020, Auramex issued the first of three tranches of shares to Orogenic. In 2021, Mr. Mill advised that he had received the third tranche of shares.

[31] On February 10, 2020, Mr. Mill advised Mr. Workun and Mr. Aiello that Orogenic had met the required expenditure for a going public transaction.

[32] The CSE required a technical report on mineral claims for the purposes of listing. Mr. Mill engaged Axiom Group of Companies Ltd. (“Axiom”) to prepare this report, which was completed on March 2, 2020. The Axiom report included the Mineral Claims which were the subject of the option agreement, but also included a number of additional mineral claims held by Mr. Mill. Orogenic takes the position that it is unable to use the Axiom report for the going public transaction because of the addition of claims owned by Mr. Mill which are not subject to the option agreement.

[33] In June 2021, Mr. Mill told Mr. Workun that he was in discussions with Mr. Barry Holmes and Mr. Ray Marks about the sale of rights to the waste rock and tailings in Albino Lake. Mr. Workun states that he understood that Mr. Mill was representing Orogenic in these discussions.

[34] In October 2021, Mr. Aiello reviewed expenses submitted by Mr. Mill to Orogenic for payment and asked Mr. Mill to explain to which of the Mineral Claims certain expenses should be attributed. Mr. Mill responded that the expense should be attributed to a claim known as “Sheelagh Creek”, which is not a tenure subject to the Orogenic option agreement. Mr. Aiello reviewed past expenses and was of the view that $10,341.69 had been paid to Mr. Mill in respect of the Sheelagh Creek claim, which was not included in the option agreement. Mr. Aiello issued an invoice in the name of Orogenic to Mr. Mill for repayment of the expenses paid to him in relation to the Sheelagh Creek claim. Mr. Mill has refused to pay this invoice.

[35] In and around October and November 2021, Mr. Mill was seeking reimbursement for expenses for other mineral tenures which he said were going to be vended into Orogenic, and form part of the initial public offering (“IPO”). In the evidence tendered by Mr. Mill on this application, this is the first time Mr. Mill began writing to either Mr. Workun or Mr. Aiello about his expectation that they start taking steps to begin the public offering process. Also at this time, Mr. Mill became frustrated with Mr. Aiello’s refusal to have Orogenic reimburse Mr. Mill for mineral tenures that did not form part of the option agreement. By December 2021, Mr. Mill was very frustrated and sought Mr. Aiello’s resignation, and in email to Mr. Workun he suggested that he was no longer satisfied with how the deal was progressing.

[36] In November 2021, Mr. Workun had a discussion with Mr. Marks where he learned that Mr. Mill, in his personal capacity, had purported to enter into an option agreement with a company incorporated by Mr. Marks and Mr. Holmes (1313720 B.C. Ltd.) with respect to the two Eskay West Mineral Claims, including Albino Lake, but that the deal had not completed. These Mineral Claims were subject to the

option agreement with Orogenic. Mr. Workun understood that Mr. Mill had failed to disclose Orogenic's interest in the Mineral Claims.

[37] Following the discussion with Mr. Marks, Mr. Workun and Mr. Aiello searched the B.C. Mineral Tenures Online website and discovered that the Mineral Claims remained registered in Mr. Mill's name. At this point, Mr. Workun and Mr. Aiello concluded that Mr. Mill had not delivered the transfers to Orogenic as required by the option agreement.

[38] On February 10, 2022, Mr. Workun and Mr. Aiello obtained a copy of the draft agreement between Mr. Mill and 1313720 B.C. Ltd. wherein Mr. Mill would have optioned the Mineral Claims for his own benefit.

[39] On February 17, 2022, Mr. Aiello registered the option agreement between Orogenic and Mr. Mill on the Mineral Claims with the B.C. Ministry of Energy, Mines, and Petroleum Resources Mineral Titles Branch.

[40] At an annual general meeting on March 9, 2022, the shareholders of Orogenic elected Mr. Aiello and Mr. Manish Bindal as additional directors of Orogenic, along with Mr. Mill.

[41] On March 21, 2022, the directors of Orogenic appointed Mr. Wonnacott as president.

[42] On June 11, 2022, a board meeting was called to discuss a number of matters, including the option agreement and the going public requirements for Orogenic. Mr. Mill declined to attend this meeting.

[43] On June 20, 2022, Orogenic sent a letter to Mr. Mill demanding that he deliver the transfers of the Mineral Claims. Mr. Mill did not respond.

[44] On July 6, 2022, Orogenic sent an email to Mr. Mill which repeated the demand for the transfer. Mr. Mill did not expressly respond to the demand, but on July 8, 2022 he purported to resign as a director of Orogenic.

[45] On July 15 and July 25, 2022, Orogenic again sent an email to Mr. Mill repeating the demand for the transfer. Mr. Mill did not respond.

[46] On August 20, 2022, the shareholders of Orogenic voted to remove Mr. Mill as a director.

[47] On September 22, 2022, counsel for Orogenic sent a letter to Mr. Mill demanding that he deliver the transfers of the Mineral Claims by September 29, 2022. On September 29, 2022, Mr. Mill advised he would respond to the correspondence on October 15, 2022. However, Mr. Mill did not provide any such response.

[48] On November 8, 2022, Orogenic commenced this action.

[49] On November 15, 2022, Mr. Aiello contacted a representative of Scottie Resources Corp., which had acquired Auramex, and requested a copy of the 2019 agreement between Orogenic and Auramex. The representative provided a copy of the agreement, and Mr. Aiello discovered that the agreement was actually made between Mr. Mill and Auramex. In that agreement, Mr. Mill represented that he owned 100% legal and beneficial interest in the Rufus tenure. The recital to the agreement states that Mr. Mill holds a 100% interest in the Rufus tenure, subject to the right of Orogenic to option an interest in it.

## Issues

[50] This application raises the following issues:

a) Is this application suitable for summary determination?

b) Did Orogenic waive Mr. Mill's compliance with the obligation to transfer the Mineral Claims?

c) Is Orogenic barred from bringing this application by virtue of operation of the *Limitation Act*, S.B.C. 2012, c. 13 [*Limitation Act*], or has Orogenic

delayed in seeking to enforce the agreement such that it would be unjust to now enforce the agreement?

d) Is Orogenic entitled to a declaration that Mr. Mill is in breach of the option agreement?

e) Is Orogenic entitled to specific performance of the agreement?

f) If the court orders specific performance, should it also order an extension of time to Orogenic for performance of its obligation to complete a going public transaction?

g) Is Orogenic entitled to damages with respect to overpayment to Mr. Mill of expenses?

**Is this application suitable for summary determination?**

[51] Mr. Mill argues that the matters raised on this application are premature for summary determination, and the matters are unsuitable for determination because the amount at stake is potentially immense, there are credibility issues and gaps in the record, and it would be unjust to grant partial judgment on the facts before me.

[52] Rule 9-7(15) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 states that where the court is able to find the facts necessary to decide the issues of fact or law raised on an application for summary trial, and the court finds that it would not be unjust to decide the issues summarily, the court may grant judgment generally, or on an issue.

[53] On this application, Orogenic seeks specific performance of the option agreement, and an extension of time for a requirement under that agreement. If this relief is awarded, the action will be at an end. If this relief is not awarded, the parties may be left to determine damages.

[54] While the amount at stake in the Mineral Claims is potentially very significant, that is not a bar to resolving the issues before me pursuant to R. 9-7.

[55] Mr. Mill identifies the following areas which he says give rise to credibility issues:

a) the incorporation of Orogenic, and the roles of parties in management,

b) the negotiation of the option agreement,

c) the status of the transfers and the knowledge of different parties as to the "discovery" of the alleged breach,

d) the effect of the delivery of the transfers on the going public transaction,

e) efforts by management to implement the going public transaction since 2018,

f) alleged damage to Orogenic, including the value of the Mineral Claims, and

g) the amounts claimed by Mr. Mill under the option agreement.

[56] I am not satisfied that any of these issues give rise to credibility issues which would prevent me from determining the application on a summary basis.

[57] With respect to the incorporation of Orogenic and the negotiation of the option agreement, Mr. Mill, on behalf of Orogenic, retained the solicitor who drafted the option agreement. He signed the option agreement on his own behalf, and signed a director's resolution approving the option agreement on behalf of Orogenic and stating the agreement was in the best interests of the company. There is nothing in the evidence before me which suggests he was naïve or unable to understand the intention of the agreement. His own email demonstrate he clearly understood what was intended, and that he hired the solicitor to do exactly what he intended. The fact that Mr. Workun was involved in passing emails and drafts between Mr. Mill and the

solicitor is not material. There is nothing in the evidence that would support an inference that Mr. Mill was induced to proceed with the agreement by some other party seeking to benefit at Mr. Mill's expense.

[58] As for the issues with respect to the status of the transfers, and when individuals knew the transfers were not made, are not material to the determination for the simple reason that the agreement as drafted required Mr. Mill to complete the transfers upon execution of the agreement. It was an obligation on him, and he does not deny that he failed to meet that obligation. I see no credibility issues on this point.

[59] With respect to the going public transaction, including whether Orogenic should have taken steps to begin the process earlier, or whether the transfers are required to complete a going public transaction, Mr. Mill has not raised any credibility issues that would prevent a determination on this application. The option agreement required Orogenic to complete a going public transaction within five years. There is no obligation to complete a going public transaction before that date.

[60] Further, the issue before me is not whether Orogenic can complete a going public transaction notwithstanding Mr. Mill's failure to perform his obligation to transfer title of the Mineral Claims to the company. The primary issue before me is whether Mr. Mill must be compelled to fulfil his obligations, such that Orogenic has what it bargained for in contemplation of its efforts to attempt a going public transaction. I see no credibility issues arising in respect of the material facts in issue before me.

[61] With respect to damage to Orogenic and the amounts claimed by Mr. Mill under the option agreement, these also do not give rise to credibility issues which would prevent me from granting judgment. If specific performance is granted, there is no need to determine damages to Orogenic. Damages only arise if specific performance is not granted and Orogenic is not seeking to have such damages quantified on this application. The amounts claimed by Mr. Mill are a separate claim,

and are not impacted by the claim for specific performance, as will be discussed below.

[62] I am not satisfied that Mr. Mill has identified any legitimate credibility issues which would prevent the resolution of the issues advanced by Orogenic on this application.

[63] Finally, counsel for Orogenic advised Mr. Mill in December 2022 that it intended to bring this application. Mr. Mill asserts that no discoveries have taken place and, therefore, the parties have not had an opportunity to fully explore the issues. However, the fact is that Mr. Mill took no steps to discover any representative of Orogenic before this application was heard.

[64] I am not prepared to delay resolution of this application simply because Mr. Mill asserts that discoveries should be completed before the application is determined. I am satisfied that Orogenic gave adequate notice to Mr. Mill of this application, and that Mr. Mill took no steps to complete any pre-trial procedures before the application came on for hearing: *Universe v. Fraser Health Authority*, 2022 BCCA 201 at paras. 16-18; *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 32-33.

[65] To allow this application to be delayed due to Mr. Mill's failure to avail himself of the processes he says should have been completed, would be to frustrate the timely resolution of the issues before me. This is particularly so when one of the driving forces of the application is the impending deadline to complete the going public transaction, as contained in the option agreement. If I were to accede to Mr. Mill's argument, the option agreement would terminate on its face before Orogenic could obtain the relief it seeks.

[66] I am satisfied that it is just to determine the issues before me on this summary trial.

**Did Orogenic waive Mr. Mill's compliance with the obligation to transfer the Mineral Claims?**

[67] Mr. Mill states in his affidavit that Mr. Workun and Mr. Aiello assured him, after the option agreement was signed, that the transfers did not need to be provided. This assertion is not confirmed by any correspondence or contemporaneous evidence. This assertion is also completely denied by both Mr. Workun and Mr. Aiello.

[68] Mr. Workun has never been an officer of Orogenic, and was only a director for approximately one month in the summer of 2022, after Orogenic had demanded that Mr. Mil comply with the option agreement. He had no role in the company which would have allowed him, on behalf of Orogenic, to waive Mr. Mill's compliance.

[69] Mr. Aiello became CFO in March 2018. However, he was not involved in the mineral tenure side of the business. It was Mr. Mill who was clearly engaged with the acquisition and transfer of mineral claims. Mr. Mill was the person dealing with the provincial mineral title office, dealing with and performing work on the Mineral Claims, retaining third parties to do work on the Mineral Claims and prepare reports.

[70] On this application, Orogenic submits, "… For [Mr.] Mill to argue that Orogenic should have known, via [Mr.] Aiello, that [Mr.] Mill had not delivered the Transfers, when [Mr.] Mill did not tell anyone, and would later refuse to respond on the issue, is disingenuous in the extreme". I agree with this submission.

[71] Both Mr. Aiello and Mr. Workun state in their affidavits that they only learned of Mr. Mill's failure to transfer the Mineral Claims in November 2021. Once Mr. Aiello learned the transfers had not been delivered, he took steps to register the option agreement on the Mineral Claims. Further, when Mr. Aiello and Mr. Bindal began asking Mr. Mill for the transfers in the summer of 2022, at no point did Mr. Mill respond to the effect Mr. Aiello and/or Mr. Workun had told him he did not have to provide the transfers. I reject entirely Mr. Mill's evidence that either Mr. Aiello or Mr. Workun, on behalf of Orogenic, advised Mr. Mill that he did not have to comply with his obligations under the option agreement.

[72] I find that at no time did Orogenic waive the obligation on Mr. Mill to deliver the transfers in accordance with the option agreement.

**Is Orogenic barred from bringing this application by virtue of operation of the *Limitation Act* and/or has Orogenic delayed in seeking to enforce the agreement such that it would be unjust to now enforce the agreement?**

[73] Mr. Mill argues that Orogenic is barred by the two-year basic limitation period in s. 6 of the *Limitation Act*, because the breach occurred in 2018 when he failed to transfer the Mineral Claims, in accordance with the option agreement. He argues that Orogenic ought to have commenced this action by June 2020.

[74] Orogenic argues that Mr. Mill's breach is a continuing breach of the option agreement. I do not agree that Mr. Mill's breach of contract can be construed as a continuing breach. The obligation in the option agreement arises at a fixed point in time, i.e. on the execution and delivery of the agreement. In this sense, it is unlike a cause of action in trespass, for example. In such cases of civil wrongs of a continuing nature, the limitation period arises on each new day for damages suffered on that day. As cited in *Brockman v. Valmont Industries Holland B.V.*, 2022 BCCA 80, at para. 30:

> [30] The judges went on to illustrate the general principle with a series of specific examples, referring as well to the Supreme Court of Canada's endorsement in *Roberts v. Portage La Prairie*, 1971 CanLII 128 (SCC), [1971] S.C.R. 481 at 491–92, of the following passage from R.F.V. Heuston, *Salmond on the Law of Torts*, 15th ed. (London: Sweet & Maxwell, 1969) at 791:
>
> > ... An injury is said to be a continuing one so long as it is still in the course of being committed and is not wholly past. Thus the wrong of false imprisonment continues so long as the plaintiff is kept in confinement; a nuisance continues so long as the state of things causing the nuisance is suffered by the defendant to remain upon his land; and a trespass continues so long as the defendant remains present upon the plaintiff's land. In the case of such continuing injury an action may be brought during its continuance, but damages are recoverable only down to the time of their assessment in the action.

[75] Similarly, in *Chancellor v. Maynes*, 2021 BCSC 391 and *Boulet v. Inventys Thermal Technologies Inc.*, 2019 BCSC 1416, this court has confirmed that in B.C.

continuing breaches do not create new causes of action which result in a restarting of a limitation period.

[76] However, I do not agree that Orogenic knew or reasonably ought to have known that Mr. Mill breached the option agreement on the day it was executed, or any time prior to November 2021.

[77] A claim is deemed to have been "discovered" on the first day when a person knows, or reasonably ought to have known, that injury, loss or damage has occurred which was caused by or contributed by an act or omission of the person against whom the claim is made, and that a court proceeding would be an appropriate means to seek a remedy: s. 8, *Limitation Act*.

[78] I am satisfied that, in this case, Orogenic's knowledge of Mr. Mill's failure to comply with his obligation under the option agreement arises at the point Mr. Aiello, as CFO, learned of Mr. Mill's failure to deliver the transfers (i.e., in November 2021). I cannot agree that Mr. Mill can be shielded by the operation of the *Limitation Act* during the time he was the sole director of Orogenic. To hold otherwise would be perverse. It would deprive Orogenic, a separate legal person, of its right to seek relief against Mr. Mill, as a separate party under the option agreement, simply because Mr. Mill was himself the sole director of Orogenic and the only representative of the company with knowledge of his own breach. In the circumstances of this case, to allow Mr. Mill to benefit from his personal wrong against the company during the time he was the sole director, would be akin to permitting a fraud on the company.

[79] I find this action is not barred by the *Limitation Act*. Orogenic's claim against Mr. Mill is deemed to have been discovered in November 2021. This action was commenced within one year of Mr. Aiello learning of Mr. Mill's breach of agreement.

[80] I am not satisfied that Orogenic has delayed in seeking to enforce the agreement. Further, I can see nothing unjust in permitting Orogenic to seek enforcement of Mr. Mill's obligations under the agreement. This is particularly so

where Mr. Mill's failure to perform his obligations would allow him to obtain all the benefits under the option agreement for himself while at the same time thwarting Orogenic's legitimate expectations under the agreement.

**Is Orogenic entitled to a declaration that Mr. Mill is in breach of the option agreement?**

[81] The option agreement required Mr. Mill to deliver to Orogenic "… duly executed transfers of all interest in the [Mineral Claims] in favour of Orogenic, which transfers may be recorded by Orogenic in its sole discretion, it being understood that such transfers of legal and recorded title to the [Mineral Claims] will be for administrative convenience only, and that a beneficial interest in the [Mineral Claims] will pass to Orogenic only with the terms of this Agreement". There is no dispute on the evidence that Mr. Mill failed to comply with this obligation.

[82] There is also no dispute that Orogenic complied with its obligations to pay consideration to Mr. Mill of 1,370,000 common shares in Orogenic, on the execution of the agreement.

[83] The obligation on Mr. Mill is a substantive obligation under the option agreement. Orogenic submits that it requires evidence of the duly executed transfers to allow it to complete the going public transaction. Mr. Workun states that Orogenic has been hampered in its ability to work towards a going public transaction. He states that no investors or resource companies have been willing to enter into a deal with Orogenic because Mr. Mill has not delivered the transfers and is taking the position that he will not do so.

[84] Mr. Mill disputes that the transfers are necessary for a going public transaction and argues that expert evidence is required to establish whether such transfers are required under the CSE and the TSXV.

[85] The advice provided to Orogenic by its solicitor in October 2017 certainly supports a finding that Orogenic must be able to show some kind of enforceable interest in the Mineral Claims as a minimum licensing requirement. However, I do

not have to determine the correctness of this requirement on this application. In my view, it is enough that the parties bargained for Mr. Mill to provide the transfers, in exchange for various consideration including the issuance of common shares in Orogenic, both after the execution of the agreement, and following later share issuances in August 2018. I am satisfied that it was in the contemplation of the parties when the option agreement was executed that the obligations of the parties would support a going public transaction of the company: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47.

[86] Mr. Mill has been requested to deliver the transfers, and has refused to do so. If the transfers are not provided, I am satisfied that there is a real risk that Orogenic will not be able to complete the contemplated going public transaction by the June 1, 2023 deadline, if no extension of time is granted, resulting in a termination of the option agreement to the benefit of Mr. Mill.

[87] I find that Mr. Mill is in breach of his obligation to provide Orogenic with duly executed transfers of the Mineral Claims.

**Is Orogenic entitled to specific performance of the agreement?**

[88] Specific performance may be awarded in circumstances where damages would not provide an adequate remedy. The adequacy of damages is a highly fact specific inquiry for the court. The uniqueness of the property in question is a significant factor, but not the sole factor. The essential questions for the court are whether damages will compensate for the loss, and whether an accurate assessment of damages is possible: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.,* 2014 BCCA 388 at para. 44; *Aulakh v. Nahal*, 2019 BCCA 57 at para. 10-11. Considerations include whether there is equivalent property available to the plaintiff, and whether there are characteristics which make the property unique to the plaintiff. The court must examine the subjective aspect of uniqueness through the point of view of the plaintiff at the time of contracting, and the objective aspect by assessing whether there are characteristics which make damages inadequate.

[89] Mr. Mill submits that expert evidence is required to prove the uniqueness of this property, and the views of the principals of Orogenic are not admissible as they purport to express opinion evidence. I disagree. The principals of Orogenic are entitled to provide the court with their subjective views on the uniqueness of the property, as part of the overall assessment of the appropriateness of specific performance. In the case before me, I find the Mineral Claims at issue are unique. They represent the right to access minerals in specific places, some of which have been assessed to include valuable tailings from previous mining operations, a fact which is advanced by both Orogenic and Mr. Mill on this application.

[90] I find that Orogenic was created for the purpose of acquiring the Mineral Claims, and taking the company through a public offering. The public offering is intended to be based on the right to exploit the Mineral Claims which are the subject of the option agreement. Subjectively, the right to these Mineral Claims is foundational to the creation and operation of Orogenic. As such, I am satisfied that the property is subjectively unique to Orogenic.

[91] I am also satisfied that the property (the four Mineral Claims) are objectively unique. Mr. Mill acquired these Mineral Claims by diligently reviewing the B.C. mineral title system to determine whether lapsed claims could be obtained. As he stated in his affidavit, “If an owner under [the B.C. mineral title system] does not pay the renewal assessment fee yearly (in cash or via work in lieu), or makes an error in renewal, the claims are lost.” Mr. Mill exhibited to his affidavit a map of the Golden Triangle area, which shows the entire area is covered by existing leases or claims. As such, I am satisfied that such mineral claims are not freely available, but require a lapse by a past owner before a new owner can obtain them.

[92] In addition, Mr. Mill obtained the Mineral Claims because of the potential they held for valuable metals. Mr. Mill stated, “I have visited [the Eskay Creek Mine area] numerous times over the course of my career and since I obtained title. It is clear to me that the waste rock and tailings in Albino Lake contain waste gold and silver as a result of the operations of the mine. As the value of precious metals has escalated

tremendously since the mine closed, there has been renewed interest in capitalizing on that material."

[93] The presence of waste gold and silver from a previous mining operation makes these titles objectively unique. I was not presented with any evidence which would suggest that the composition of metals in Albino Lake from the previous mine was duplicated in other mineral titles available to Orogenic. Further, the value of these Mineral Claims is not known, and is not easily ascertained. I am not satisfied that an accurate assessment of damages can be known without extensive work done to estimate the potential grade, quantity, and content of the exploration property represented by these Mineral Claims. Indeed, until the metals are actually extracted, an accurate assessment required to support a damages assessment may not be possible.

[94] I find that Orogenic has met the threshold for an order for specific performance. I will now consider whether there are any reasons why such an order should not be made.

***Is Orogenic in breach of the option agreement?***

[95] Mr. Mill submits that Orogenic ought not be awarded specific performance because it is not ready, willing and able to complete the option agreement in the manner fixed by the agreement. Mr. Mill submits that Orogenic has not made all the payments it is required to make under the option agreement, and Orogenic has not completed a going public transaction, as required under the option agreement.

[96] The option agreement required Orogenic to complete a going public transaction within five years of the execution of the agreement. That date has not yet come to pass. Orogenic was not required to complete the going public transaction as of the date of the hearing of this application and, therefore, cannot be said to be in breach of this term of the agreement. Further, Mr. Mill's failure to transfer the Mineral Claims interfered with Orogenic's ability to represent that it had a means to acquire the Mineral Claims, as required by the TSXV and CSE, and this has materially contributed to Orogenic's ability, or inability, to pursue an IPO.

[97] Orogenic argues that it has made all payments for materials, services and supplies purchased or delivered in connection with activities on or with respect to the Mineral Claims, as required under the option agreement. Mr. Aiello stated that he has authorized payment from Orogenic to Mr. Mill of repayment of expenses totalling almost $85,000. This is not disputed by Mr. Mill.

[98] In addition to these amounts, however, Mr. Mill submits that Orogenic owes him over $31,000 for invoiced costs, as well as additional assessment costs of maintaining and preserving the Mineral Claims. Mr. Mill admits that invoiced costs in dispute relate to other mineral claims he holds which he intended to "vend-into" Orogenic in the future. He states in his affidavit that the option agreement requires payment of these invoices because of his clear intention to bring those claims into Orogenic in the future.

[99] The difficulty with Mr. Mill's argument is that the option agreement clearly relates only to the four Mineral Claims which are specified in the agreement. At no time from the date the option agreement was executed, to the date of this application, has Mr. Mill in fact vended these additional claims into Orogenic. The only mineral claims Orogenic has any rights to are the four Mineral Claims which are the subject of the option agreement. Mr. Mill seeks to be reimbursed by Orogenic for expenditures relating to mineral claims which he says may in the future be acquired by Orogenic. Absent an agreement between Mr. Mill and Orogenic as to the acquisition of these other mineral claims, and agreement that such expenditures will be paid by Orogenic, I do not agree that Orogenic has any obligation to pay the expenditures advanced by Mr. Mill.

[100] Mr. Mill also states in his affidavit that the invoiced amounts do not include the "value of maintaining and preserving the Mineral Claims", and attaches printouts from the Mineral Tenures Office showing exploration and development work on a number of claims, only two of which are the subject of the option agreement. I assume these amounts relate to exploration or development work conducted by Mr. Mill himself, as opposed to work conducted by third parties.

[101] Mr. Mill does not attach a notice sent to Orogenic whereby he claimed that Orogenic was in default for failing to pay a specific amount related to exploration and development work. The option agreement itself has a clause setting out the obligations of the parties in the event of default. If Mr. Mill wishes to assert that Orogenic has defaulted in some way, he is obligated under the agreement to provide notice to Orogenic, and Orogenic has the ability to respond to the alleged default. The only demands for payment which Mr. Mill exhibited to his affidavit were those for the invoiced amounts, which I have discussed above.

[102] I am not satisfied that Orogenic has any legal obligation to pay expenses which Mr. Mill admits relates to mineral claims which are not specified in the option agreement, and so Orogenic is not in default in refusing to make such payments. Further, I am not satisfied that Mr. Mill has properly given notice to Orogenic of any amounts for exploration or development which he says Orogenic is obliged to pay pursuant to the agreement, other than the invoiced amounts. As such, I find that Orogenic is not in default of any obligations for payments to Mr. Mill pursuant to the agreement.

[103] I find that Orogenic is not in default of the option agreement, the Mineral Claims are unique, and Orogenic is entitled to an order for specific performance.

**Should Orogenic be granted an extension of time to complete its performance of its obligation to complete a going public transaction?**

[104] Orogenic argues that the deadline for it to complete the going public transaction ought to be extended, given the failure of Mr. Mill to execute the transfers as required under the option agreement. Orogenic submits that the deadline ought to be extended by a further five years, given that had Mr. Mill executed the transfers on completion of the agreement, Orogenic would have had five years from June 28, 2018 to complete the going public transaction. Fairness dictates that Orogenic should receive the five years it bargained for in the option agreement. Orogenic also argues that, at a minimum, it should receive an extension

equal to the period from the signing of the option agreement, until July 8, 2022 when Mr. Mill resigned as president of Orogenic.

[105] Mr. Mill submits that no extension should be granted, as option agreements must be strictly observed, and may only be released when the optionee has been clearly induced by the optionor to act otherwise by some unambiguous representation or conduct, relying on *Wonnacott v. Fraserview Mall Inc.*, 29 R.P.R. (2d) 104, 1993 CanLII 875 (B.C.S.C.).

[106] The facts in *Wonnacott* differ substantially from those in the case at bar. Significantly, in *Wonnacott*, the plaintiff was seeking an order that the defendant had no right to the enforcement of an option to acquire land. In the case before me, Orogenic is not seeking to enforce the option to acquire the Mineral Claims. Rather, at this stage, Orogenic is seeking performance of an obligation on Mr. Mill, which is a prerequisite to the condition on Orogenic under the agreement. Only once Orogenic has satisfied the conditions on it, will Orogenic be in a position to exercise the option granted under the agreement.

[107] In *Pierce v. Empey*, [1939] S.C.R. 247 at 252, 1939 CanLII 1, the Supreme Court of Canada stated:

> It is well settled that a plaintiff invoking the aid of the court for the enforcement of an option for the sale of land must show that the terms of the option as to time and otherwise have been strictly observed. The owner incurs no obligation to sell unless the conditions precedent are fulfilled or as the result of his conduct the holder of the option is on some equitable ground relieved from the strict fulfillment of them [citations omitted].

[108] I find this statement of law has application before me. I am satisfied that Mr. Mill's conduct provides a basis in equity to order an extension of time to the condition on Orogenic to complete a going public transaction. I am satisfied that Mr. Mill's failure to deliver the transfers, as he was obliged to, has interfered with Orogenic's ability to complete a going public transaction within the time frame required by the option agreement.

[109] I am satisfied that it is just and equitable to extend the deadline for the completion of the going public transaction, as set out in paragraph 4.1(a) of the option agreement. I find that Orogenic is entitled to the five years it bargained for in the option agreement, and I order the deadline is extended for a further five years. To be clear, the deadline is extended to June 1, 2028.

**Is Orogenic entitled to damages with respect to overpayment to Mr. Mill of expenses?**

[110] Mr. Mill submitted claims for reimbursement of expenses related to the Sheelagh mineral claim. Mr. Aiello, as CFO, previously authorized such reimbursement, not realizing that the Sheelagh claim was not one of the Mineral Claims included in the option agreement.

[111] The Sheelagh expenses total $10,341.69. Orogenic has demanded repayment of these funds, but Mr. Mill has refused to repay them. As I have already found that Orogenic had no obligation under the option agreement to pay for expenses relating to claims other than the Mineral Claims, I agree that Mr. Mill is obliged to repay Orogenic $10,341.69 in relation to expenses he improperly submitted, and for which he was mistakenly paid.

## Disposition

[112] I declare that the defendant Richard Mill is in breach of the Mackie/Eskay West/Rufus Property Option Agreement entered into between Orogenic Gold Corp. and Richard Mill on June 1, 2018, pursuant to which Mr. Mill granted Orogenic an exclusive option to a one hundred percent right, title and interest in mineral claim tenures 1051761, 1051762, 1041376 and 1049772 (collectively, the “Mineral Claims”).

[113] I order specific performance of Mr. Mill’s obligation to forthwith deliver to Orogenic duly executed transfers of all interest in the Mineral Claims in favour of Orogenic in accordance with the Option Agreement.

[114] I order that the deadline for Orogenic to complete a going public transaction in accordance with s. 4.1(a) of the Option Agreement is extended to June 1, 2028.

[115] I order judgment in favour of Orogenic in the amount of $10,341.69, plus interest in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

[116] I order ordinary costs in favour of Orogenic of this application and this Action.

"W.A. Baker J."