

1979

# Rio Algom Corporation v. Jimco Ltd et al : Appellant's Reply Brief

Utah Supreme Court

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James B. Lee; Kent W. Winterholler; Attorneys for Plaintiff-Appellant;

Fabian & CLendenin; Clinton D. Vernon; Van Cott, Bagley, Cornwall & McCarthy; Attorneys for Defendants-Respondents;

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## Recommended Citation

Reply Brief, *Rio Algom Corp. v. Jimco Ltd.*, No. 16032 (Utah Supreme Court, 1979).

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IN THE SUPREME COURT OF THE STATE OF UTAH

\* \* \* \* \*

RIO ALGOM CORPORATION, )  
 )  
Plaintiff-Appellant, )  
 )  
vs. )  
 )  
JIMCO LTD., HUMECA EXPLORATION )  
COMPANY, JIM L. HUDSON, )  
JUANITA J. MEYER AS EXECUTRIX )  
OF THE ESTATE OF DANIEL H. )  
MEYER, ELDON J. CARD, NORMA )  
HUDSON, JEAN L. CARD, JUANITA J. )  
MEYER, N. J. WHITE, AUDREY WHITE, )  
WILMA WHITE, OTIS DIBLER, DOROTHY )  
MAE DIBLER, GRACE DAVIS, and )  
MARLOWE C. SMITH, )  
 )  
Defendants-Respondents.)

CASE NO. 16032

\* \* \* \* \*

APPELLANT'S REPLY BRIEF

\* \* \* \* \*

Appeal from an Order of the Third  
District Court for Salt Lake County  
Hon. Dean E. Conder, Judge

\* \* \* \* \*

JAMES B. LEE  
KENT W. WINTERHOLLER  
of and for  
PARSONS, BEHLE & LATIMER  
Attorneys for Plaintiff-Appellant  
79 South State Street  
P. O. Box 11898  
Salt Lake City, Utah 84147  
Telephone: (801) 532-1234

Fabian & Clendenin  
Attorneys for the AUDREY Defendants-Respondents  
800 Continental Bank Building  
Salt Lake City, Utah 84101

Clinton D. Vernon  
Attorney for the JIMCO Defendants-Respondents  
415 Kearns Building  
Salt Lake City, Utah 84101

VanCott, Bagley, Cornwall & McCarthy  
Attorneys for the JIMCO Defendants-Respondents  
141 East First South  
Salt Lake City, Utah 84111

FILED

OCT - 5 1979

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J. CARD, NORMA HUDSON, JEAN L. )  
CARD, JUANITA J. MEYER, N. J. )  
WHITE, AUDREY WHITE, WILMA WHITE, )  
OTIS DIBLER, DOROTHY MAE DIBLER, )  
GRACE DAVIS, and MARLOWE C. )  
SMITH, )  
 )  
Defendants-Respondents. )

CASE NO. 16032

\* \* \* \* \*

APPELLANT'S REPLY BRIEF

\* \* \* \* \*

Appellant ("Rio") hereby files its reply brief in response to the briefs filed by "Respondent Audrey Defendants" and "Jimco Defendant-Respondents".

INTRODUCTORY STATEMENT

In Rio's opening brief and in the responsive briefs of both the Jimco and the Audrey Respondents, it is conceded that the following provisions of the Amended Audrey Lease governed the relationships between Rio-Audrey (as co-owner lessors) and Rio (as lessee) at all pertinent times until the court below approved the terms of the so-called "Settlement Agreement":

3.2

Irrespective of the provisions set forth in paragraph 3.1 above, Lessors shall have the election and option to have royalties due them under the terms of this Lease calculated and paid upon the basis of eight percent (8%) of the fair market value at the mine portal of crude ore mined and produced from the Audrey Group... [Emphasis added]

21.3

Rio Algom Corporation shall, by reason of its interest in this Lease as described in Section II hereof, be excluded from any vote or decision of the Lessors relating to royalties and requiring unanimity of the Lessors, as provided for in Section 3.2 hereof. The unanimous vote or decision of the remaining Lessors other than Rio Algom Corporation shall constitute unanimity for the purpose of the said Section 3.2.

The parties, however, part company on the interpretation of this language. Rio claims that through paragraph 21.3, it excluded itself only from a "vote or decision" in exercising the "election and option" ... "as provided for in Section 3.2". It did not waive or relinquish its contract right to the "election and option" or to participate in the resulting royalties whether the option were exercised or not. By withdrawing its prior election under paragraph 3.2 and by agreeing never to so elect again in the future, the Audreys effectively removed the election provision from the Amended Audrey Lease and diminished the amount of royalty that Rio could expect to receive as a Lessor thereunder, all without the consent of Rio as a co-lessor and co-tenant of the Audreys.

The Jimco and Audrey Respondents take the position, and continually restate it throughout their briefs, that through paragraph 21.3 Rio not only excluded itself from participating in the "vote or decision" with regard to the making of the election or exercising the option, but also that it waived all contract and property rights with respect thereto. Hence, the Audreys and Jimcos could effectively remove the "election and option" language from the lease without violating Rio's contract or co-tenancy rights.

#### ARGUMENT

##### POINT I

THE INESCAPABLE EFFECT OF THE "SETTLEMENT AGREEMENT" IS TO CHANGE THE TERMS OF THE "AMENDED AUDREY LEASE" BY DELETING THE "ELECTION AND OPTION" PROVISIONS OF PARAGRAPH 3.2

The factual setting which precipitated the litigation from which this appeal is taken is accurately stated at page 19 of the responding brief of the Audreys as follows:

By the very nature of the contractual relationship which Rio, one of the world's great mining empires, entered into voluntarily, it was theoretically possible that if the fair market price of raw ore suddenly soared, and Rio had contractually bound itself to sell all of its concentrate for a fixed price which did not allow for such an incredible fair market value increase, it could find itself to have made a very bad bargain. This is indeed what happened in the uranium market. Fortunately for the Audrey Defendants, they had reserved the right to compute their royalty on either the actual sales price, or if this did not reflect market value, at the actual fair market value of crude ore, if they so chose.

The Audrey Defendants so chose, thereby causing financial pain to both Rio and the Jimco Defendants.

Hence, it became apparent to the Audreys that, because of the long-term purchase contract, and the rapidly escalating market price, a peculiar set of circumstances had arisen wherein the actual fair market value of the underlying ore was greater than the long-term contract sales price received by Rio from Rio's purchaser. Thus, the Audreys determined that they could substantially increase their cash flow from the lease by exercising the option set forth in paragraph 3.2 which is quoted above. Pursuant to the provisions of paragraph 21.3, Rio could not, and did not, participate in that election. However, the availability of the election was a fundamental part of Rio's Amended Audrey Lease agreement and it was, and is, entitled to participate equally with the Audreys in the royalty payments pursuant to their underlying property interests as recognized and stated in the Amended Audrey Lease. The effect of this election, had it not been withdrawn, was:

1. The Audrey-Rio share of royalties paid under the Amended Audrey Lease and the Rio-Jimco Option Agreement would have been increased and Rio would have participated to the extent of one-fourth, or 25%, of that increase.

2. The amount of such royalties to be paid to the Jimco Group would have decreased.

When Jimco and Audrey reached impasse as to the mechanics of computing the royalty on the 3.2 election basis, Rio instituted



the action below as a declaratory judgment action in the nature of an interpleader seeking guidance from the court as to how its royalty payments should be divided under the provisions of the Amended Audrey Lease and the Rio-Jimco Option Agreement.

Rather than face that determination, the Audreys and the Jimcos got together, without the participation of Rio, and agreed:

1. Audrey would rescind the election which would have caused an increase in cash payments to itself and to Rio as lessors and would agree prospectively never to exercise that option in the future.
2. In consideration therefor, Jimco agreed, rather than to face substantial diminution of its cash flow, and possibly its elimination entirely, to pay privately to Audrey a sum equal to 2.5% of the proceeds received from the sale of yellowcake.

Hence, through the so-called "Settlement Agreement" Rio's cash flow as lessor under the terms of the Amended Audrey lease was diminished and the cash flow to the Audreys was correspondingly increased, all without Rio's participation or consent. Significantly, the Audreys and Jimcos did not offer to permit Rio to participate as a tenant in common in the 2.5% override. That was paid by the Jimcos solely to the Audreys to protect what otherwise was feared to be a severe, and possibly devastating, reduction in cash flow because of the election theretofore made by the Audreys.

It would be hard to imagine a clearer case of unilateral and material changes in the Amended Audrey Lease. Such changes,

effected by the Jimcos and the Audreys through the "Settlement Agreement" without the consent of Rio, brings into play each of the doctrines and principles which are set forth in Rio's opening brief. It unquestioningly follows that the order here appealed from is in error and should be set aside.

#### POINT II

#### THE AUDREYS AND JIMCOS HAVE NO RIGHT TO CHANGE THE TERMS OF THE "AMENDED AUDREY LEASE" WITHOUT RIO'S PARTICIPATION

As is shown above, the effect of the "Settlement Agreement", to which Rio is not a party, is to delete from the Amended Audrey Lease the election and option provisions of paragraph 3.2. Respondents' position, as stated in their briefs, is that by accepting the provisions of paragraph 21.3, Rio waived all rights under paragraph 3.2. Thus, Rio was not injured when the Jimcos and the Audreys joined forces to eliminate paragraph 3.2 from the agreement. Respondents argue that: (1) the Audreys, under paragraph 21.3 could elect the yellowcake royalty provisions of paragraph 3.2, without voting participation by Rio, and (2) under that option, Rio, as a lessor-co-tenant, would receive the same amount of royalty as results under the terms of the "Settlement Agreement"; Ergo, Rio has not been injured and the fact that Rio's co-tenants are given substantial additional royalty payments is of no legitimate concern to Rio. These arguments are fallacious.

The "election and option" set forth in paragraph 3.2 is not the exclusive right of the Audreys. Paragraph 3.2 provides that the "Lessors" shall "have the election and option". It is conceded by all that Rio is one of the Lessors under the provisions of the Amended Audrey Lease. It follows that Rio has election and option rights.

The fact that paragraph 21.3 excludes Rio as a lessor whose vote is necessary to exercise the option does not in any way rob or deprive Rio of its substantive rights set forth in paragraph 3.2. Rio's rights with respect to the "election and option", which are vital parts of the Amended Audrey Lease, are analogous to the property interests of the owner of non-voting corporate stock. By acquiring "non-voting" stock, it became "excluded" from exercising voting rights, but retained its property interests in the stock. Likewise, here, Rio negotiated and signed the Amended Audrey Lease which contained valuable option rights conferred upon Rio and the Audreys as lessors. The "exclusion" of Rio's voting rights regarding the exercise of that option, as provided in paragraph 21.3, certainly did not strip Rio of its option rights as lessor, as specifically stated in paragraph 3.2.

At page 19 of the Audrey responsive brief, the Audreys stress the importance of paragraph 3.2 under the "incredible" market situation which has developed by stating:

Fortunately for the Audrey Defendants, they had reserved the right to compute their royalty on either the actual sales price, or if this did not reflect market value, at the actual fair market value of crude ore, if they so chose.

In fact, they did so choose. Rio, as one of the lessors, then became entitled to have the "lessors" royalties computed on that basis. That right was forever abolished unilaterally by the Audreys when they contractually obligated themselves to the Jimcos never to exercise the paragraph 3.2 "election and option" in exchange for very substantial consideration not shared by Rio, their fellow co-tenant and lessor.

This action on the part of the Audreys effectively destroyed the specifically stated "election and option" rights of the lessors. By so acting without the consent of all lessors, the Audreys clearly violated Rio's rights as a lessor under the terms of the Lease. Rio concurs with the suggestion at page 19 of the Audrey brief that the lessors were fortunate to have reserved to themselves the very important "election and option" rights. With inflationary and speculative pressures continuing to push metal values "through the roof", this right becomes more valuable with every passing year. The Audreys were not entitled to sell that valuable right without the consent of all lessors, including Rio. This is particularly true, as here, where the Audreys pocketed the entire purchase price for themselves.

Thus, the election and option rights of paragraph 3.2 of the Amended Audrey Lease are rights belonging to all lessors, including Rio and as set out in Rio's initial brief, the Audreys may not sell those rights without Rio's participation. To say otherwise sanctions a breach of duties owed by the Audreys to Rio.

It should be noted that the "Settlement Agreement" through which this violation of Rio's rights as lessor was accomplished by the Audreys was conditioned specifically upon court approval and upon the substantive provisions of the order which is the subject of this appeal. Rio submits that this implementing order is erroneous for the numerous reasons set forth in its opening brief. It follows that said order should be reversed and set aside and this cause should be remanded for appropriate proceedings before the court below.

### POINT III

#### THE DISTRICT COURT'S SUMMARY APPROVAL OF THE SETTLEMENT AGREEMENT WAS IMPROPER

In their responding briefs, both the Jimcos and the Audreys cite numerous cases for the general proposition that the settlement of litigation is favored by the courts and that settlement agreements should be enforced where possible. We assume this argument was made with tongue in cheek because:

1. The Plaintiff below and the Appellant here, Rio, was not a party to the "Settlement Agreement", and
2. A necessary element of the "Settlement Agreement" was to dismiss Rio's complaint against the Audreys (over Rio's objection), but to leave standing counterclaims asserted by the Jimcos against Rio.

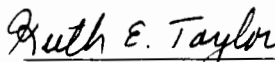
As set forth in Rio's opening brief, there are a plethora of fact issues involving the Settlement Agreement, its negotiation,

and its impact upon the various agreements at issue in this litigation. Rio submits that the existence of these fact questions would have made the "Settlement Agreement" here at issue an improper subject of summary approval and implementation by the trial court even if Rio had been a party to that settlement agreement, which certainly is not true in this case. This court recently treated this subject in Tracy-Collins Bank & Trust Co. v. Travelstead, 592 P.2d 605 (Utah 1979). In that case, where all parties to the litigation were parties to the settlement agreement, this Court cited and quoted with approval from Autera v. Robinson, 419 F.2d 1197 (D.C. Cir. 1969) wherein that court stated that summary enforcement of settlement agreements should be made "only to the extent that full and fair opportunities to prove one's point are substantially preserved." 419 F.2d at 1203. Rio respectfully submits that under this doctrine, the order here appealed from is erroneous and should be set aside.

#### CONCLUSION

For the reasons set forth above, as well as those set out in Rio's initial brief, the "Settlement Agreement" between the Audrey and Jimco Defendants must be rejected and the approval by the trial court of that agreement reversed.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of October, 1979.

  
\_\_\_\_\_  
KEITH E. TAYLOR

*James B Lee*  
JAMES B. LEE

*Kent W. Winterholler*  
KENT W. WINTERHOLLER

of and for  
PARSONS, BEHLE & LATIMER  
Attorneys for Plaintiff-Appellant  
79 South State Street  
Salt Lake City, Utah 84147

CERTIFICATE OF HAND DELIVERY

On this 5<sup>th</sup> day of October, 1979, I hereby certify that I caused to be hand-delivered two true and accurate copies of the foregoing APPELLANT'S REPLY BRIEF, to:

Fabian & Clendenin  
Attorneys for the AUDREY Defendants-Respondents  
800 Continental Bank Building  
Salt Lake City, Utah 84101

Clinton D. Vernon  
Attorney for the JIMCO Defendants-Respondents  
415 Kearns Building  
Salt Lake City, Utah 84101

VanCott, Bagley, Cornwall & McCarthy  
Attorneys for the JIMCO Defendants-Respondents  
141 East 1st South  
Salt Lake City, Utah 84111

*Kent W. Winterholler*