SUPREME COURT OF YUKON

Citation: Golden Hill Ventures Limited Partnership v. Ross Mining Limited and Norman Ross, 2011 YKSC 91

Date: 20111206
Registry: Whitehorse

S.C. No. 09-A0014

Between:

NORMAN ROSS

PLAINTIFF

And

ROSS MINING LIMITED, MACKENZIE PETROLEUMS LTD. AND GOLDEN HILL VENTURES LIMITED PARTNERSHIP

DEFENDANTS

S.C. No. 09-A0087

Between:

GOLDEN HILL VENTURES LIMITED PARTNERSHIP

PETITIONER

And

ROSS MINING LIMITED, MACKENZIE PETROLEUMS LTD. AND NORMAN ROSS

RESPONDENTS

Before: Mr. Justice R.S. Veale

Appearances:

Murray J. Leitch	Counsel for Norman Ross
Michael Morgan	Counsel for Golden Hill Ventures Limited Partnership
Jocelyn Barrett	Counsel for Mackenzie Petroleums Ltd.

REASONS FOR JUDGMENT
(Validity of Miners Lien)

INTRODUCTION

[1] Golden Hill Ventures Limited Partnership ("Golden Hill") applies for a declaration that it has a valid miners lien claim pursuant to the *Miners Lien Act*, R.S.Y. 2002, c. 151, as amended (the "*MLA*"). Golden Hill claims a lien against the gold mine owned by Ross Mining Limited ("RML") on Dominion Creek (the "gold mine"), southeast of Dawson City, Yukon. The amount of the lien claimed is approximately $2,810,627.08. Golden Hill and RML are owned and controlled by the same person, Jon Rudolph.

[2] The validity of the miners lien claim is disputed by Norman Ross, the original owner of the gold mine, and Mackenzie Petroleums Ltd, who apply for an order that the Golden Hill lien claim be vacated pursuant to s. 11(6) of the *MLA.* Mackenzie Petroleums Ltd. also filed its own claim of lien against the gold mine, in the amount of $653,740.30 in a separate action.

[3] There are a number of validity and quantum issues. The main dispute is whether the owner of a gold mine can be a valid lien claimant under the *MLA* against his own mine.

BACKGROUND

The Norman Ross Mine

[4] Norman Ross was the founder and original operator of the gold mine, which is on Dominion Creek (approximately 50 miles southeast of Dawson City) and consists of 415 contiguous placer claims. A placer gold mine is not a quartz or hardrock mine. Placer mining recovers gold found in the sand and gravel of active or ancient stream or river beds. In the past, dredging or high pressure water was used to release the gold. Today,

earth-moving equipment is often used to push large volumes of material through sluice boxes to recover the gold in the form of flakes or nuggets.

[5] Norman Ross established the gold mine in 1979 and operated it under the name of RML with his wife.

[6] In November 2005, Norman Ross and his wife sold their shares in RML to 33890 Yukon Inc., a company owned by Jon Rudolph.

[7] The purchase price included an initial cash payment of $2 million and a further $7 million by way of a Loan Agreement dated November 1, 2005, between Norman Ross as lender and Ross Mining Limited and 33890 Yukon Inc. as borrower (“the Ross Loan”).

[8] The Loan Agreement included the following provisions for RML to protect and secure the Ross Loan:

(a) RML agreed to take all necessary actions to ensure that the Ross Loan and security for it will rank ahead of other indebtedness;

(b) RML agreed to keep proper books and records at all times for all financial transactions;

(c) RML would not create, incur, assume or suffer any indebtedness to exist (except for Permitted Liens which are not applicable here);

(d) RML would not permit repayment of a subordinated debt, except for certain loans or credit arrangements to fund the purchase price, unless the repayment was not reasonably anticipated to prevent RML from repaying the Ross Loan;

(e) RML would not create, incur or permit to exist any lien, charge, security interest or encumbrance on the property and assets of RML (except the Permitted Liens);

(f) RML would not make any investments, loan advances or extensions of credit without the prior written consent of Norman Ross.

As security for the Ross Loan, RML provided a Share Pledge Agreement, a General Security Agreement and an Assignment of Placer Claims.

[9] RML defaulted under several of the terms of the Loan Agreement and the total sum owing to Norman Ross as of July 2009 was $3,401,713.40.

[10] Jon Rudolph, the President and owner of RML, negotiated a Consent Order dated June 9, 2009 (“the Consent Order”) to allow RML to arrange a financing of $5 million to pay the outstanding indebtedness to Norman Ross. The Consent Order permitted Norman Ross to appoint a Receiver if RML had not arranged for financing by July 9, 2009 to bring the Ross Loan into good standing. Between June 9 and July 9, 2009, the gold mine was operated by RML under the terms of a monitorship supervised by PricewaterhouseCoopers Inc. (“PWC”).

[11] This Court ordered the appointment of PWC as Receiver on July 29, 2009.

Golden Hill and RML

[12] Jon Rudolph is also the owner of Golden Hill, which operates a road construction business in addition to the gold mine in the name of RML.

[13] As Jon Rudolph stated in his affidavit in support of the Golden Hill claim of lien: “I acquired a 100% interest in Ross Mining” on November 1, 2005. He did so by using

33890 Yukon Inc. to purchase the shares of RML and, on November 1, 2006, he amalgamated the numbered company to carry on the gold mine business as RML.

[14] I find that at all material times, after the purchase of the gold mine on November 1, 2005, Jon Rudolph was the principal owner and sole controlling and operating mind of the following corporate entities:

(a) Golden Hill Ventures Ltd. which Jon Rudolph used to negotiate the purchase of the gold mine;

(b) 33890 Yukon Inc. owned by Jon Rudolph and used to complete the purchase of RML on November 1, 2005;

(c) Golden Hill Ventures Partnerships Limited, which is a limited partnership with Golden Hill Ventures Ltd. as its general partner;

(d) Ross Mining Limited, which is an amalgamation of the company originally owned by Norman Ross and 33890 Yukon Inc., the latter being the numbered company used by Jon Rudolph to purchase the gold mine on Dominion Creek.

[15] I also find that as of April 1, 2006, all the assets of Golden Hill Ventures Ltd. were transferred to Golden Hill. This includes the equipment, land and buildings at 30 Laberge Road in Whitehorse. Golden Hill became the operating entity but title to the gold mine remained in RML.

[16] In the 2006 mining season, the RML gold mine was operated by employees of Golden Hill. On November 1, 2006, Golden Hill entered into a Consolidated Loan Agreement with RML to continue to provide loans for working capital and other purposes of RML. In that agreement Golden Hill agreed that the debt of RML to Golden

Hill as of November 1, 2006 was $4,215,414.12, representing Golden Hill's work on the mine in the 2006 operating season. Golden Hill agreed that RML would continue to borrow funds to operate the mine. It was agreed that the financial records of Golden Hill would be deemed to be conclusive evidence of RML's indebtedness to Golden Hill. The indebtedness was to bear interest at 8% per annum commencing November 1, 2006, and at a variable rate commencing January 1, 2007.

[17] Golden Hill and RML agreed that the indebtedness and accrued interest would be unsecured, subject to RML agreeing to sign and deliver such security documents as Golden Hill might request. No security documents were ever requested.

[18] Jon Rudolph signed the Consolidated Loan Agreement on behalf of both Golden Hill and RML.

[19] Golden Hill and RML signed a Set-Off Agreement dated November 2, 2006, acknowledging that Golden Hill agreed to provide loans for working capital to RML. Golden Hill delivered a Promissory Note dated December 8, 2005 to RML in the amount of $14,850,000. The parties agreed that as cash amounts came due by Golden Hill to RML under the Promissory Note, they would be paid by setting them off against the debt owed by RML to Golden Hill.

The Claim of Lien

[20] Golden Hill's claim of lien against RML for work, equipment, repairs, fuel and supplies provided between November 1, 2005 to August 26, 2009 in the amount of $4,713,543 was signed by Jon Rudolph on August 27, 2009, after the Receiver was appointed on July 29, 2009.

[21] The Petition of Golden Hill against RML and Norman Ross was filed on October 21, 2009 claiming $6,790,456.29. In his affidavit filed October 21, 2009, Jon Rudolph attached a “Statement of Account” which consisted of approximately 31 pages entitled “2006 Golden Hill Intercompany Account with Ross Mining Account 951-03 prepared by Golden Hill Ventures, October 15, 2009.” The first 26 pages list various supplies from third party suppliers such as Inland, Northern Industrial, Kal Tire and so on. It also includes equipment repairs and payroll from February 2, 2006 to December 31, 2008, all of which totals $6,129,254.57. An additional four pages cover January 2, 2009 to August 26, 2009 in the amount of $661,201.72, and includes equipment rental and fuel.

[22] In his Affidavit #2 filed December 1, 2009, Jon Rudolph states the following:

> 4. As stated previously, on November 1, 2006 GHVLP [Golden Hill] entered into a Loan Agreement with Ross Mining Limited by which GHVLP agreed to provide loans to Ross Mining Limited from time to time for working capital and other purposes.
>
> 5. Further, GHVLP had an agreement with RML, in part oral and in part by conduct, that GHVLP would provide, and did in fact provide, work or services and materials to RML for the operation of its mine, including but not limited to: GHVLP employees to work at the mine or in connection with the mine; rental of Golden Hills Ventures Ltd. or GHVLP equipment to RML for use at, in or in connection to the mine; and GHVLP ordering and paying for parts from its supplies and providing them to RML, or contracting with mechanics to repair RML equipment.
>
> 6. In practice what would happen is, for instance, RML through its employees, such as a mechanic or foreman, would contact GHVLP to indicate that it needed a part, or repair to its equipment. GHVLP would then order and pay for the part and deliver it to RML or hire and pay someone, such as Fred Cumming a contract mechanic to do work on RML’s equipment.

7. While GHVLP did not invoice RML for these services or materials, it was furthered agreed as stated previously, that the intercompany account, and the financial records kept by GHVLP of the transactions through this account, would be evidence of the amounts owed by RML to GHVLP for theses (sic) materials and services.

8. While the suppliers and mechanics themselves may have had liens against RML for the work and services they provided for the benefit of RML and the mine, but for GHVLP duly paying them, GHVLP is in an analogous relationship to a general contractor that has not been paid for the work or services and the materials that it provided to RML in connection with the mine.

[23] It should be noted that despite Jon Rudolph's statement in para. 7 of Affidavit #2, about not invoicing RML, the last three entries in the intercompany account for 2009 after the court-ordered monitorship are three invoices as follows:

(a) Invoice No 00000392 dated August 14, 2009 to RML care of PWC in the sum of $48,895.67;

(b) Invoice No 00000398 dated August 24, 2009 to RML care of PWC in the sum of $65,649.70; and

(c) Invoice No 00000395 dated August 14, 2009 to RML care of PWC in the sum of $160,651.43.

[24] Counsel for Norman Ross brought an application under Rule 18(6) to dismiss the Golden Hill Petition for a claim of lien on the ground that the pleadings failed to disclose a triable issue. In that application, an amended claim of lien was struck as being outside the 45-day period but the claim of lien for $4,713,543 was permitted to proceed.

[25] The original claim of lien in the amount of $4,713,543 has been reduced to $2,810,627.08 as a result of the discovery process and voluntary withdrawal of various invoices or charges by Golden Hill.

[26] Nevertheless, Golden Hill claims RML owes additional monies under the Consolidated Loan Agreement and reserves the right to pursue a judgment against RML in a separate proceeding.

[27] I find as a fact that prior to the appointment of PWC as Receiver and Manager on July 29, 2009, neither Golden Hill nor Jon Rudolph ever asserted that the work or services provided by Golden Hill to RML would entitle Golden Hill to a claim of lien against the gold mine.

[28] I further find that the intercompany account listing supplies and services for the years 2006, 2007, 2008 and 2009 was prepared for the first time on October 15, 2009 in the form presented in Jon Rudolph's Affidavit #2. In other words, there was no rendering of invoices or accounts between Golden Hill and RML over the four-year period of the claim of lien. There is no evidence from RML about the claim of lien. Golden Hill relies upon the Consolidated Loan Agreement which states that the financial records of Golden Hill would be deemed conclusive evidence of RML's indebtedness to it. The Consolidated Loan Agreement does not contain any agreement about the provision of services, repairs and materials.

[29] I also note that Golden Hill had other financial transactions with RML through a Gold Purchase Agreement and a Stripping Royalty Agreement, which further complicates the financial transactions between Golden Hill and RML and render it difficult to determine the amount of indebtedness between RML and Golden Hill.

The Financial Statements of RML

[30] In the RML Financial Statement for the two-month period ending December 28, 2006, Golden Hill is described in the Notes to Financial Statements as a commonly

controlled partnership. The total indebtedness to Golden Hill at that time was $5,696,442, representing stripping and overburden removal without any set repayment terms as stated in the Consolidated Loan Agreement. The Notes to Financial Statements also state:

> ... The related parties have indicated that they will not request repayment within the next fiscal year. Accordingly, the amounts have been described as a long-term liability. ...

[31] The same description is contained in RML's Financial Statements for the year ending December 28, 2008. However, the indebtedness had risen to $11,229,508 owed to Golden Hill.

[32] On March 2011, I ordered the Receiver PWC to attempt to reconcile the current amount of Golden Hill's claim for a lien of $2,810,627.08 and report to the parties on or before March 31, 2011. In its Receiver's Amended Fourth Report to Court, the Receiver worked with two Golden Hill employees in the Whitehorse office to review the records and documentation. The Receiver makes the following conclusions at para. 6:

> 6.1 The amounts now advanced in the Lien Claim are posted to an intercompany account which reflects cash advances, repayments, and interest charges between GHVLP and the Company [RML];
>
> 6.2 GHVLP has allocated all payments received to various opening balances arising from the amalgamation, interest, and current cash advances. The opening balances are questionable and particulars of these have not been supplied to the Receiver.
>
> 6.3 There are several duplications of claims advanced in the Lien Claim noted by the Receiver. There may be more.

6.4 The Receiver has identified a further $1.3 million of claims which are unsupported by the documentation supplied in the Binders.

6.5 It is noted that the original Lien Claim amount was $4.7 million. This was later increased to $6.8 million and then reduced to the $2.8 million which was reviewed by the Receiver.

6.6 The Receiver has found $226,301 of the current Lien Claim (the Terex claim and the fuel claim) to be unsupported by the documentary records provided by GHVLP.

6.7 Due to the lack of independent oversight of the management and records of the Company, there is no basis for assuring the equipment rental charges, payroll allocations and other costs claimed by GHVLP to have been paid by it on behalf of the Company.

6.8 Overall, it is not possible to reconcile the Lien Claim to the Company's books and records for several reasons, including;

6.8.1 No detail is provided in the 2006 general ledger postings,

6.8.2 No detail has been provided for most of the 2006 charges in the Lien Claim,

6.8.3 Most of the amounts claimed in 2007 (the stripping charges) cannot be reconciled to the schedules. The detail for that lien item is not supported by any documentation, and

6.8.4 The number of unexplained journal entries affecting the 1052-00 account.

[33] I find as a fact that the invoices underlying the "intercompany account", and therefore the claim of lien, are from third party suppliers to Golden Hill Ventures Ltd or Golden Hill Ventures Limited Partnership, but not to RML.

ISSUES

[34] There are a number of issues to be determined:

1. Does the *Miners Lien Act* permit an owner to claim a lien against the owner's mining property?
2. Is Golden Hill an owner of the gold mine?
3. Are there other grounds to invalidate Golden Hill's claim of lien?

Issue 1: Does the *Miners Lien Act* permit an owner to claim a lien against the owner's mining property?

[35] The *MLA* defines owner as follows:

> "owner" includes a person having any estate or interest in a mine or mineral claim on or in respect of which work is done or materials or machinery are placed or furnished, at whose request and on whose credit or on whose behalf or consent or for whose direct benefit the work is done or materials or machinery placed or furnished, and all persons claiming under the owner whose rights are acquired after the work has begun or the materials or machinery furnished have begun to be furnished.

[36] The definition of owner was amended on November 27, 2008, but it did not substantially change.

[37] Prior to the 2008 amendments, a lien claimant was described in s. 2(1) as follows:

> Any person who performs any work or service in respect of or places or furnishes any material to be used in the mining or working of any placer or quartz mine or mining claim shall, because of it, have a lien for the price of that work, service, or material on the minerals or ore produced from and the estate or interest of the owner in the mine or mining claim in or in respect of which the work or service is performed or material furnished, limited however in amount to the sum justly due to the person entitled to the lien.

[38] On November 27, 2008, s. 2 was repealed and replaced by the following:

> 2(1) A contractor or subcontractor who provides services or materials to a mine
>
> > (a) preparatory to the recovery of a mineral;
> >
> > (b) in connection with the recovery of a mineral; or
> >
> > (c) for an abandonment operation in connection with the recovery of a mineral,
>
> is given a lien by this subsection and, notwithstanding that a person holding a particular estate or interest in the mine or mineral concerned has not requested the services or materials, the lien given by this subsection is a lien on
>
> > (d) all the estates or interests in the mine or mineral concerned;
> >
> > (e) the mineral when severed and recovered from the land while it is in the hands of the owner;
> >
> > (f) the interest of the owner in the fixtures, machinery, tools, appliances and other property in or on the mines or mining claim and the appurtenances thereto.
>
> (2) In all other respects, this Act applies to the lien existing by virtue of subsection (1) notwithstanding that the lien extended by clauses (e) and (f) is a lien on an interest in personal property.
>
> (3) For the purposes of this section, a person who rents equipment to an owner, contractor or subcontractor is, while the equipment is on the mine site or in the immediate vicinity of the mine site, deemed to have performed a service and has a lien for just and reasonable rental of the equipment while it is being used or reasonably required to be available for the purpose of the mine.

[39] The application of Norman Ross to vacate the Golden Hill claim of lien is made pursuant to s. 11(6) of the *MLA,* which states:

> Applications may be made by originating application to the judge at any time by the owner or any person having an

> estate or interest in the mine or mining claim against which any lien is registered that the lien be vacated, and the judge may on the application make any order that to the judge seems just.

[40] In my view, it is evident that the *MLA* was created for the purpose of allowing persons who perform work, services or furnish materials to the owner of a mine to recover the price of the work, service or materials from the mining claim or property. The theory behind the *MLA* is that an owner should not receive the benefit of an improvement to the detriment of a lien claimant who has not been paid. Given that the reason for the *MLA* is the protection of the lien claimant, it becomes apparent that an owner cannot file a claim of lien against his own property. This would be completely contrary to the object and purpose of the *MLA*. This is so because it would be very simple for an owner to incorporate a service company, or use a commonly controlled corporation, to purchase and supply all the services and supplies of the mine and be able to file a claim of lien that would rank with all the other *bona fide* lien claimants who provided work and services that remain unpaid.

[41] The leading case on the interpretation of a lien statute is *Clarkson Company Limited v. Ace Lumber Limited*, [1963] S.C.R. 110. That case decided that a company that rented equipment to a subcontractor but used on the land of the owners, could not have a lien for rental services. The Court gave a liberal interpretation to the rights that the lien statute conferred, but a strict interpretation in determining who can claim a lien, as the statute represented an abrogation of the common law about giving a charge on an owner's land. I conclude that the definition of "owner" in the *MLA* should similarly be given a liberal interpretation, especially as it uses the word "includes", while the

provisions creating a lien should be narrowly interpreted. In my view, the same narrow interpretation applies to s. 2(1) of the *MLA*.

[42] The Supreme Court of Canada's decision has been followed in decisions in Yukon. In *Yukon Energy Corp. v. Curragh Inc.*, [1994] Y.J. No. 132 (Q.L.), Hudson J. stated at para. 32:

> I find that in interpreting the *Miners Lien Act*, I should accept that the statute is an expansive one; that its purpose is to protect contributors to a mine or mining venture or charging only their normal fees for their services, materials or labour, and not seeking the rewards of risk-takers. Interpretation should be as large and as encompassing as an interpretation can be which is not barred by the clear purpose of the *Act*.

[43] In that case, the mine included the entire Faro integrated operation which consisted of the mill, concentrator and ore bodies, and lien claimants did not need to identify the specific part of the mining operation that its service benefited.

[44] Again, in *Anvil Range Mining Corporation v. Yukon Energy Corporation et al.,* (1999), 1 C.L.R. (3d) 292 (Y.S.C.), persons who supplied work or services to a contractor or subcontractor of an owner were denied lien claims. In so doing, Hudson J. stated at para. 71:

> It is not sufficient simply to take a word (person), examine it and say that, "I am a person therefore I am included and I am entitled to the rights of the statute." It is necessary to look at the whole scheme of the statute and look at the issue from the point of view of whether or not the purpose of the statute is satisfied or whether or not the purpose of the statute is obliterated or avoided by the interpretations sought to be made. An examination of the whole of the statute persuades me that it was not the intention of the legislature to expand the rights of persons claiming a lien to include those who do not provide goods or service directly to the property, but provide them to intermediaries such as contractors.

[45] I conclude that an interpretation of the *MLA* permitting an owner to be a “person” or contractor claiming a lien against his own mine is contrary to and would defeat the object and purpose of the statute.

[46] In *Northern Thunderbird Air Ltd. v. Royal Oak Mines Inc.*, 2002 BCCA 58, the British Columbia Court of Appeal, in denying a claim of lien to an air carrier for transportation of construction personnel and their baggage to a construction site, reaffirmed that definitions are to be read as remedial, not limitless (para. 56).

[47] The 2008 amendments to the *MLA* definition of a lien claimant are intended to clarify and expand the persons entitled to a lien claim but limit the lien to 60 days of work, services or materials in priority over mortgages and encumbrances. Thus, the amendments give some assurance to financiers of mining claims that their security will not be subject to priority of unlimited amounts of lien claims.

[48] At the same time, the Yukon Legislative Assembly has deleted the word “persons” and more specifically defined lien claimants as contractors and subcontractors, including those who rent equipment to be used for the purpose of the mine. This does not expand the interpretation of a lien claimant to include an owner but, in my view, narrows the definition to exclude owners.

[49] There is no case law in Yukon that considers an owner claiming a lien against his own property. However, there are such cases under the *Construction Lien Act* of Ontario.

[50] In *Big Creek Construction Ltd. v. York Trillium Development Group Ltd* (1993), 8 C.L.R. (2d) 138 (Ont.C.J.Gen.Div.), Big Creek, the contractor, was controlled and beneficially owned by the owners of a real estate development (Hurst and Paloheimo),

for which Big Creek was working. Big Creek liened the owners' property and Farley J. exercised his discretion to discharge the liens. The facts there were complicated by reason of the owners' covenant not to have liens against the property and to indemnify the financiers of the real estate development in the event of a breach of that covenant. However, the case is still applicable to the situation here.

[51] Farley J. exercised his discretion to discharge the liens on the basis of the covenant and indemnification given by the owners and in so doing said:

> In my view they [the owners] are in a worse position when the lien has been put on by Big which Hurst and Paloheimo [the owners] control and for which they are the ultimate beneficiaries in the circumstances. I would therefore on this ground order that the liens be discharged and the registrations vacated.

[52] Counsel for Golden Hill submits that this is the ratio of the decision and points out that Farley J. stated earlier in his judgment:

> The moving parties say that Big is just another nameplate within the single business enterprise of Hurst and Paloheimo. I do not see it as simply as they do. There was no admission by Hurst and Paloheimo that Big was a bare trustee in the way that there was for YT and DY. I think it is all too dangerously easy for someone to say to the effect: "Well, I looked at the physical business operation and all I saw were Hurst and Paloheimo". Such a comment would ignore that a person may legally wear different hats from time to time in the sense of fulfilling various functions for different (corporate) entities. In fact a person may wear two hats at "exactly" the same time - e.g. signing as a corporate officer for the two sides to a contract. In my view this is perfectly proper, valid and legal.

[53] I interpret this comment as simply stating that it was perfectly legal for Hurst and Paloheimo to have their own construction company do the work on their project.

[54] However, under the part of the judgment that is entitled “Big’s Lack of Entitlement to a Lien Under the *Act*”, Farley J. says:

> Given those self stylings in relationships it seems to me that Big has [so] closely identified itself to the owner of the project that it would be inappropriate for liens to be placed on the property. The identification is so close it seems to me to run afoul of the concept that it would be inappropriate for an owner to lien its own property since it appears to me that there would be a merger of interests even if such were technically possible. Put another way, I would think it appropriate under these circumstances for me to exercise my discretion as I have in relationship to the covenant and indemnity situation against the liens. In this regard see Bore et al. v. Sigurdson et al., [1972] 6 W.W.R. 654 (B.C. Co.Ct.) at p. 666 where Cashman Co.Ct.J. said:
>
> > ... I must nevertheless ascribe to the word used in the section, that is to say "contractor", the meaning plainly given to it by the Legislature. While a contractor and an owner may in fact be one and the same person, and while it may be possible for an owner to employ himself as contractor, I am driven to the inescapable conclusion that by the very definition of "contractor" as contained in the statute the Legislature could only have dealt with "owners" and "contractors" as separate persons in light of the other definitions and, indeed, from the plain and unambiguous meaning to be ascribed to those words standing by themselves.

[55] Farley J. concluded the lien part of his judgment with the following:

> Again I think that it would be an appropriate use of my discretion to discharge the lien and vacate the registration to avoid a situation where a wholly owned corporation has the potential of defeating the very purpose for which it appears the Act was established. It would be unusual and difficult for the owner to be suing himself as owner as to his general contractor claims and being both the trustee and beneficiary under the trust provisions. While legally possible to maintain the distinction, I do not think in these circumstances that my discretion should not recognize the unreasonableness of the situation in practical terms.

[56] The *Big Creek* case cannot be read only as a narrow exercise of discretion to discharge a claim of lien based on the covenant not to lien and indemnify. In fact, the broader view of the case is confirmed in the Divisional Court judgment (*Big Creek Construction Ltd. v. York Trillium Development Group Ltd.* (1993), 107 D.L.R. (4th) 331, where McMurtry ACJOC, at para. 11, says:

> In his reasons for judgment, Farley J. carefully reviewed the factual background and (at p. 56-58 of the Record) concluded that Big had ..."[so] closely identified itself to the owner of the project that it would be inappropriate for liens to be placed on the property. ..." That identification was so close it contravened the concept an owner could not lien its own property and the individuals and their wholly owned corporations were defeating the purpose of the Act. He also found there was an absence of any valid duty on Big to lien the project.

[57] There is no significant distinction between the *Big Creek* principle and the facts in the case at bar. Owners cannot be lien claimants directly or indirectly for the purpose of claiming a lien against their own mine.

Issue 2: Is Golden Hill an owner of the gold mine?

[58] I have concluded that the ownership and control of Golden Hill and RML by Jon Rudolph prohibits Golden Hill from claiming a lien under the *MLA*. In effect, the contractor is the owner and permitting the owner to lien his own mine would be contrary to and defeat the purpose of the *MLA.*

[59] In my view, common control or ownership is in itself sufficient to prohibit an owner from liening his own mine. In this case, there are additional factors that could be considered:

a) Jon Rudolph is the sole principal and controlling mind of all the businesses comprised in Golden Hill, its General Partner Golden Hill Ventures Ltd. and RML;

b) the Head Office for all these businesses is 30 Laberge Road, Whitehorse, Yukon;

c) these businesses are all managed out of the same office;

d) all of these businesses use the same administration staff, being Golden Hill's management and administration staff;

e) blanket insurance is maintained in respect to all these businesses;

f) during the 2006 mining season, Mr. Rudolph operated the gold mine without any RML employees on the books, except five female employees;

g) even though after the 2006 mining season RML had its own employees on site operating the gold mine, Golden Hill's management and administration staff continued to maintain all the books and records of RML, managed many aspects of RML's business, and attended to many other administrative aspects of RML's business, including payroll and various governmental filings; and

h) the indebtedness of RML was determined by the records of Golden Hill.

[60] There may be circumstances where the principle in *Big Creek* is not applied because the common ownership was between a contractor and supplier but not the owner of the project. In *Trans Eastern Lumber Corp. v. Kingston Municipal Non-Profit Housing Corp.* (1996), 27 O.R. (3d) 84 (Gen. Div.), one of the issues was that a Mr. Lovelace was the contractor in question and also the principal of Trans Eastern, the

building and material supply company that liened the project. Trans Eastern was a separately operated company with multiple supply outlets. There was no written agreement between the contractor and Trans Eastern, but each time a shipment was made for the project, an invoice usually accompanied the delivery. When Trans Eastern received a payment, Lovelace, the building contractor, applied the money to the oldest account outstanding.

[61] Cunningham J. indicated that he carefully considered the relationship between the two companies, the nature of their respective businesses, the number of employees and the manner in which they operated. He considered the *Big Creek* principle but found that the facts in *Big Creek* were significantly different than in the case before him.

[62] In the result, Cunningham J. distinguished *Trans Eastern* from *Big Creek* because Lovelace was not an owner but rather a contractor and his supply company was separately operated and a completely separate business. I decline to follow the *Trans Eastern* case if it stands for the proposition that an owner can lien his own property merely by having two separate corporate structures that run independently. In my view, the preferred principle is that an owner cannot lien his own property. While *Trans Eastern* is arguably an exception to this principle, it may be different because Lovelace was the contractor rather than the owner. It still raises the same conflicts of interest that may occur. However, this is not the case before me.

[63] I conclude that in the case at bar, Golden Hill is both owner and supplier, both personally directed by Jon Rudolph, and I exercise my discretion under s. 11(6) of the *MLA* to order that the Golden Hill lien be vacated as it contravenes the principle that an owner cannot lien his own property.

Issue 3: Are there other grounds to invalidate Golden Hill's claim of lien?

[64] In addition to offending the principle that an owner cannot lien his own property, there are other grounds for vacating the Golden Hill lien.

[65] Firstly, Golden Hill entered into a Consolidated Loan Agreement with RML, thus establishing a relationship of lender and borrower. In my view there is no basis for permitting a lien which is based upon the financing of a project. The loan of money is not a service recognized by the *MLA*.

[66] Secondly, RML covenanted in the Ross Loan Agreement as follows:

a) RML would ensure that the Ross Loan ranked ahead of the other indebtedness;

b) RML would not permit any indebtedness to exist, other than the Permitted Liens which are not applicable;

c) RML would not create or permit a lien to exist against the property.

These covenants alone are enough to prevent the Golden Hill claim of lien, even if valid, from having any priority over the Ross Loan. The mechanism of a Golden Hill claim of lien under the *MLA* is a breach of the RML Loan Agreement under the Ross Loan.

[67] Thirdly, a miners lien claim must be verifiable based on delivery and invoicing, and there is no such evidence in this case. Golden Hill cannot rely on an "intercompany account" based on the financial records of Golden Hill to establish a claim of lien, particularly when the account was established for the sole purpose of determining the indebtedness between two commonly controlled companies.

[68] Counsel raised a number of other issues relating to the interpretation of the old versus amended *MLA*. I wish to limit myself to comments on s. 3 of the *MLA* as amended on November 27, 2008:

> 3. Any lien registered under this Act shall take priority over any mortgages or encumbrances to the extent that the lien arises from work, services or materials provided to the mine for a period of up to 60 days.

[69] Counsel for Golden Hill submits that the commencement of the 60-day period is not stated, and that therefore the lien claimant may choose any 60-day period or, alternatively, the 60 days preceding the date of filing the lien.

[70] Counsel for Norman Ross and Mackenzie Petroleum Ltd. submit that the 60 days must be immediately preceding the last day of the provision of work, service or materials.

[71] In my view, the appropriate interpretation is that the 60 days referred to in s. 3 of the *MLA* should be calculated from the last day of provision of work, service or materials. I say this because there must be some certainty given to s. 3 as it has some very serious limitations for lien claimants and financiers if a mining property is encumbered by a mortgage.

[72] The purpose of the s. 3 amendment can be found in the statements of the Minister of Community Services ((Yukon, Legislative Assembly, *Hansard*), No. 122 (26 November 2008) at 3540 (Hon. Archie Lang)):

> As many of the developing mines will require debt financing, it is important to ensure that lenders and other can quantify their risks through the amendments to this act while at the same time ensuring suppliers of goods and services clearly understand the extent of the protection provided. It is the commitment of this government to keep Yukon competitive and attractive for the mineral investment by amending

> outdated legislation and providing a more attractive investment climate.

[73] In the debate in the Yukon Legislative Assembly, reference was made to the 45-day period for registration of a lien “after the last day of work”. Reference was also made to the investment community knowing “how many months of possible liens might be out there”.

[74] In my view, the last day of the work, service or materials provided for the purpose of s. 3 is not one fixed date for all lien claimants, but rather the last day for each particular lien claimant. I find this interpretation provides comfort for the investment community, as it limits a lien to a specific two-month period that cannot be varied at the whim of the lien claimant. It also puts the suppliers of work, service or materials on notice that once its outstanding accounts exceed 60 days, that part of the lien claim in excess of 60 days will not have priority over mortgages and encumbrances on the mine.

[75] I recognize that this opinion is *obiter dicta* in the sense that it does not arise out of a specific finding of fact in this case. Thus, this opinion is not chipped in stone and may be reviewed or distinguished.

CONCLUSION

[76] The Golden Hill claim of lien is discharged and vacated for the reasons set out above. Counsel may address the issue of costs and security for costs in case management. Counsel for Mackenzie Petroleums Ltd. should proceed to a hearing on the validity of its miners lien claim.

VEALE J.