SUPREME COURT OF YUKON

Citation: *P.S. Sidhu Trucking Ltd. v Yukon Zinc Corporation,* 2016 YKSC 40

Date: 20160830
S.C. No. 15-A0009
Registry: Whitehorse

Between:

P.S. SIDHU TRUCKING LTD.

Petitioner

And

YUKON ZINC CORPORATION

Respondent

Before Mr. Justice L.F. Gower

Appearances:

Geoff Bowman	Counsel for the Petitioner
Kibben Jackson and Danielle Toigo	Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the petitioner, P.S. Sidhu Trucking Ltd. ("Sidhu"), to reopen its application heard on February 17, 2016, in which it seeks a declaration that Sidhu has a valid miners lien against the Wolverine Mine ("the mine") owned by the respondent, Yukon Zinc Corporation ("Yukon Zinc"). The purpose of reopening is to adduce additional evidence, specifically a receiver's report, an order, and an affidavit which are on the record in collateral debtors relief proceedings in British Columbia. Sidhu provided trucking services to Yukon Zinc by hauling concentrates from the mine from July 2014 to January 2015. Yukon Zinc owes Sidhu over $850,000 for these

services and Sidhu has filed the lien against the mine in order to secure repayment of this debt. In Sidhu's application to declare the lien valid, the central issue is whether the provision of trucking services is a lienable service under s. 2(1) of the Yukon *Miners Lien Act*, R.S.Y. 2002, c. 151 (the "*MLA*"). Sidhu submits that the additional evidence supports its argument that, if it had not provided trucking services to Yukon Zinc, the Yukon Government would have shut down the mine because Yukon Zinc would have been in breach of its Quartz Mining License (the "Licence") for stockpiling concentrate in excess of the limits stipulated by the license and the related Mill Operating Plan (the "Plan"). Yukon Zinc opposes the application to reopen principally on the basis that Sidhu has not been duly diligent in seeking to adduce this evidence earlier, and also because the evidence is largely hearsay and therefore cannot be used for the truth of its contents.

TEST FOR REOPENING

[2] A court has inherent jurisdiction to reopen a hearing. The overarching concern is to avoid a miscarriage of justice: *R. v. Hummel*, 2003 YKCA 4, at paras. 14 and 25.

[3] The discretion to reopen is wider in cases where judgment has not yet been rendered. In *Vander Ende v. Vander Ende*, 2010 BCSC 597, Ballance J. summarized the test as follows:

> 84 The decision to permit or disallow reopening is a matter of judicial discretion. The discretion of the trial judge presiding over a civil trial to reopen the trial before judgment has been rendered is wide. The scope of the discretion is generally narrower where judgment has been issued, and the test becomes even more rigorous depending on whether the order has or has not been entered…While the ambit of the judicial discretion is acknowledged as being unfettered, it must be exercised cautiously so as to prevent an abuse of process…. In considering whether to reopen, the court

> should turn its mind to the relevance of the proposed evidence, the effect, if any, of reopening on the orderly and expeditious conduct of the trial at large, and **most fundamentally**, whether the other party will be prejudiced if the reopening is permitted… (underlining and bolding mine)

[4] In *Peier v. Cressey Whistler Townhomes Limited Partnership*, 2011 BCSC 773 (reviewed on other grounds), Butler J. clarified the difference between the test when a court is reopening after a judgment has been rendered as opposed to before judgment:

> 73 A trial judge has an unfettered discretion to reopen a trial after judgment has been pronounced but before an order is entered. The discretion is to be used sparingly to avoid fraud and abuse of the court process. The fundamental consideration in each case is to prevent a miscarriage of justice: *Clayton v. British American Securities Limited*, [1934] 3 W.W.R. 257 (B.C.C.A.). Where judgment has been pronounced, the test set out in *Scott v. Cook*, [1970] 2 O.R. 769 (H.C.) is often applied: *Brown v. Douglas*, 2011 BCSC 113. The test is, first, whether the evidence, if presented at trial, would probably have changed the result and second, whether the evidence could have been obtained before the trial by the exercise of reasonable diligence.
>
> 74 Here, of course, judgment was not pronounced when the application to reopen was brought. I agree with Cressey's submission that the test in *Scott v. Cook* may be relaxed when the application to reopen is brought before judgment has been pronounced. In these circumstances, there is less concern that the application to reopen is brought to re-establish a broken down case as the parties do not know the decision. If the new evidence relates to events that took place subsequent to the hearing, there is no issue regarding due diligence of the parties, and no concern that evidence was not presented solely as a result of tactical decisions of counsel. Where the application to reopen is made before judgment, it goes without saying that the applicant cannot possibly show that the new evidence would probably change the result because the result is unknown. (my emphasis)

[5] Further, where judgment has not yet been rendered, due diligence will be less of a concern, in that there will be less of an opportunity for the reopening to constitute an

abuse of process: *Mitsubishi Heavy Industries Ltd. v. Canadian National Railway Company*, 2011 BCSC 1536, at para. 31.

DEBTORS RELIEF PROCEEDINGS

[6] In 2014, Yukon Zinc's principal trucking and hauling company, Maple Leaf Loading Ltd. ("MLL"), went into receivership. As a result, Yukon Zinc had to scramble to find an alternative trucking company. In the course of MLL's receivership proceedings, Yukon Zinc obtained an order from the Supreme Court of British Columbia, on July 31, 2014, authorizing the court-appointed receiver, Ernst & Young Inc., to sell certain trucking equipment formerly owned by MLL to Yukon Zinc (the "Sale Order"), which it then in turn sold to Sidhu. In making the Sale Order, Smith J. relied upon a document entitled "Second Report of the Receiver", dated July 28, 2014. Paragraph 25 of that Report states as follows:

> The Receiver is seeking short leave to hear this application due to the urgency of completing the sale to [Yukon Zinc]. The Receiver understands that [Yukon Zinc] has not been able to replace the services provided by [MLL] prior to the Appointment Date and [Yukon Zinc] requires the [Yukon Zinc] Assets to resume hauling services at the [Yukon Zinc] mine site. [Yukon Zinc] further advises the Receiver that its storage facilities are at or near capacity and if they are unable to resume hauling services soon they will be forced to suspend production.

Yukon Zinc was represented by counsel and attended the hearing when the Sale Order was granted.

[7] At the same time, Yukon Zinc was experiencing severe financial difficulty because of a combination of a downturn in the global commodity market and restrictions in obtaining continuing financing from its parent company. It ceased operations at the mine on January 21, 2015. On March 13, 2015, the Supreme Court of British Columbia

granted Yukon Zinc an order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "*CCAA* proceedings") which included a stay of creditors proceedings against Yukon Zinc. On October 28, 2015, Fitzpatrick J. ordered that the stay be lifted for the limited purpose of allowing Sidhu (and another creditor in a parallel miners lien proceeding, Hy's North Transportation Inc.) to apply to this Court to determine the validity of its miners lien.

[8] In the course of the debtors relief proceedings in front of Fitzpatrick J., Yukon Zinc tendered an affidavit from its Chief Executive Officer, Mr. Jing Lu, detailing the financial difficulties experienced by the company. At para. 39, Mr. Lu deposed as follows:

> Yukon Zinc experienced serious problems in its shipping and distribution when its key transporter - Maple Leaf Loading… was put into receivership in June 2014 and terminated its contracts with the Company. The Company was unprepared for this and the transport and sale of its inventory was delayed while the Company sought out and contracted with a new general transporter. This had a serious negative impact on the Company's cash flow in the latter half of 2014, the same time that metal prices were falling.

[9] Earlier in his affidavit, Mr. Lu attached as an exhibit a copy of a presentation prepared by Yukon Zinc in December 2014, providing a general overview of its operations and the company profile. Sidhu seeks to rely on the following statements in that presentation:

- Meeting concentrate trucking/shipping schedule is critical (p. 92)
- Zinc concentrate maxed out (14k tonnes) and delayed sales (p. 94)

BACKGROUND

[10] On February 17, 2016, Sidhu began the hearing to determine the validity of its miners lien. Prior to that, counsel had agreed on a schedule for the exchange of materials relating to the proceeding. Sidhu had agreed to provide its application materials by January 22, 2016, which it did. Yukon Zinc had agreed to provide its response materials by February 8, 2016, which it failed to do. Rather, Yukon Zinc did not provide its response materials until February 11, 2016.

[11] On February 16, 2016, Sidhu delivered affidavit #5 of Mr. P. Sidhu, in response to issues raised in Yukon Zinc's materials. In paras. 7 and 8 of the affidavit, Mr. Sidhu deposed as follows:

> 7. In our discussions, Mr. Lu, Floyd, and Nancy Yuan each told me that Yukon Zinc had too much concentrate stored at the mine and needed to reduce the stockpiles quickly or the Yukon government might order Yukon Zinc to stop production.
>
> 8. We finalized our discussions for trucking services and it appeared to me that we would reach an agreement. Ms. Yuan told me that she was worried the mine would have to shut down production if too much zinc concentrate remained on the mine site and the trucking had to start right away. I told her that I would talk to YTG to ensure this wouldn't happen. Ms. Yuan said that when I contact YTG I should tell them that, "I [P.S.Sidhu Trucking Ltd.] would start hauling the concentrate out right away." I contacted the Minister, Wade Istchenko and informed him that I would be hauling the Zinc concentrate from the Wolverine Mine within a few days. He said that was fine.

Nancy Yuan is the General Manager, Marketing and Sales for Yukon Zinc.

[12] When Sidhu's counsel attempted to rely upon these statements at the hearing on February 17th, counsel for Yukon Zinc objected because of the late delivery of the

affidavit and the inability of Yukon Zinc to provide responsive evidence before the commencement of the hearing. Counsel for Sidhu insisted that this Court could rely on the entirety of the affidavit, and has argued in this hearing that the late delivery was due to the delay by Yukon Zinc in providing its responsive materials. No application for an adjournment or cross-examination on the affidavit was made by counsel for Yukon Zinc. Rather, during a break in the proceedings, Yukon Zinc's counsel was able to contact Ms. Yuan on the telephone. When the hearing reconvened, counsel paraphrased his conversation with Ms. Yuan as follows:

> This is roughly what she says. I'm paraphrasing. They needed a trucker or hauler to haul concentrate away because concentrate was building up at the mine, because their other hauler had gone into receivership. Ultimately, they could not just keep building up concentrate at the mine, obviously. What she says though is that she never said anything about the government being involved in that. She didn't think that the government would have any say in that. That is what she would put into an affidavit. Mr. Lu is mentioned. Mr. Lu is the main principle of Yukon Zinc. She doesn't know what Mr. Lu said about that to Mr. Sidhu - what Mr. Sidhu says in his affidavit. She is going to try and check. I can't promise you I can get an answer on that.

This information has never been reduced to the form of an affidavit and therefore cannot be considered as evidence. Nevertheless, it is in response to these submissions that Sidhu feels it is necessary to adduce the additional evidence to shore up its argument that the Yukon Government would have intervened to stop production at the mine in the event that Yukon Zinc exceeded its storage capacity limits under the Licence and the Plan.

[13] The application to reopen was heard on May 20, 2016.

ANALYSIS

[14] Sidhu relies upon the evidence of Ms. Yuan, in her affidavit #1, at para. 6, that "Yukon Zinc must operate the Wolverine Mine in compliance with the Plans pursuant to the terms of the License." Further, Sidhu relies upon the following provisions in the License which it says required Yukon Zinc to abide by subsequent provisions in the Plans:

> 6.1 Where the License calls for the submission of a plan, the plan must be approved by the [Yukon Government] before the Licensee is authorized to carry out any of the activities described in the plan.
>
> …
>
> 6.5 The Licensee is authorized to undertake only those activities that are authorized by this License and where these activities are described in an approved plan, the Licensee must undertake them in accordance with the plan.
>
> …
>
> 13.2 The Licensee must submit to the [Yukon Government] for approval a Mill Operating Plan which must include:
>
> …
>
> g) a description of concentrate storage, handling and transportation…

[15] Sidhu then points to the following provisions in the Plan:

> 3.5 - which states that zinc concentrate thickeners will be produced at the rate of 12.3 tonnes per hour;
>
> Table 4-2 - which states that the production of zinc concentrate would be 270.8 tonnes per day;
>
> Figure 3-8 - which indicates that the zinc concentrate stockpile would have a capacity of 3792 tonnes; and

> 5 - "Concentrate Storage and Haulage"
>
> …
>
> Concentrates will be trucked via the Robert Campbell Highway southward through Watson Lake to the existing Stewart Bulk Terminal in Stewart, BC. Concentrate will then be transported via ocean freighters to smelters in Asia.

[16] Sidhu submits that, reading these Plan provisions together will allow this Court to conclude that, if Yukon Zinc exceeded its stated storage capacity for zinc concentrate, the Yukon Government would have been authorized to stop production at the mine. Accordingly, the trucking services provided by Sidhu were essential to the operation of the mine and therefore should be considered a lienable service. Of course, that determination will only be made once this application to reopen is disposed of.

[17] Yukon Zinc submits that the License and the Plan do not include specific provisions regarding the volume of concentrate that could be stored at the mine, nor do they include provisions mandating Yukon Zinc to haul concentrate away from the mine. This will be resolved in the course of the larger application to determine the validity of the miners lien, but I note that Figure 3-8 arguably does specify the volume of zinc concentrate that can be stored at the mine.

[18] Yukon Zinc also submits that despite the stated stockpile capacity for the storage of zinc concentrate, it is apparent from the manner in which it departed from the provision in the Plan stating that it would truck concentrate to Stewart, British Columbia, that the Yukon Government was not strictly enforcing all of the provisions of the Plan. In this regard, she points to affidavit #2 of Don Halliday in the parallel proceeding involving Hy's North, the other trucking company retained by Yukon Zinc after the receivership of

MLL, which indicates that Hy's North was hauling concentrates to terminals in Richmond, British Columbia (para. 9).

[19] In any event, it is not for me to determine here whether Yukon Zinc was in danger of being shut down by the Yukon Government for exceeding its stockpile capacity. Rather, that is a factor that may be relevant in my subsequent determination of the validity of Sidhu's miners lien. Rather, at this stage, I view the arguments of Yukon Zinc's counsel about the impact of the additional evidence as simply going to the potential relevance of the evidence. I am satisfied that the additional evidence is sufficiently relevant to be adduced.

[20] Yukon Zinc's counsel further argued that Sidhu has known about the Receivers Second Report and the Sale Order since July 2014. In addition, Sidhu has known about the affidavit of Mr. Lu since March 2015. Finally, Yukon Zinc notes that all three pieces of the additional evidence are accessible on the Internet. Yukon Zinc's counsel submits that the application should be dismissed where there is no explanation for the failure to establish facts that could have been proven by exercising reasonable diligence. In this regard, counsel relies upon *Brown v Douglas*, 2011 BCSC 113, at para. 26.

[21] However, it must be remembered that *Brown* is distinguishable because, unlike the case at bar, it involved an application to reopen after judgment. As discussed earlier, when the application is made before judgment, the discretion of the court is wide: *Vander Ende*, cited above, at para. 84. Finally on this point, when judgment has not yet been rendered, due diligence will be less of a concern: *Mitsubishi*, cited above, at para. 31.

[22] The third argument made by Yukon Zinc's counsel opposing the admissibility of the additional evidence is that the statements relied upon by Sidhu in the Receiver's Second Report and Mr. Lu's affidavit are hearsay and therefore inadmissible. In the case of the Second Report, although we know that the court-appointed receiver was the accounting firm of Ernst and Young Inc., Yukon Zinc's counsel submits that we do not know the exact author of the statement in para. 25 of the Second Report. Similarly, counsel submits that although Mr. Lu was obviously the deponent of his own affidavit, we do not know the exact author of the presentation attached to the affidavit as an exhibit.

[23] This hearsay argument arises from the application of Rule 49(12) of the Yukon *Rules of Court*, which provides as follows:

> (12) An affidavit may state only what a deponent would be permitted to state in evidence at a trial, except that, if the source of the information is given, an affidavit may contain statements as to the deponent's information and belief, if it is made
>
> (a) in respect of an application for pre-trial order, or
>
> (b) by leave of the court under Rule 42(53)(a) or 50(9)(e).

[24] Yukon Zinc submits that Sidhu cannot rely upon the hearsay statements in the additional evidence because the application to determine the validity of its miners lien seeks a final order. Rather, it is only in interlocutory matters that hearsay is generally admissible: *Cobalt Construction Inc. v. Kluane First Nation*, 2013 YKSC 124, at para. 20.

[25] Sidhu's counsel submits that, while hearsay is presumptively inadmissible, Rule 49(12) does not make hearsay wholly inadmissible. Rather, the ordinary hearsay

exceptions continue to apply, as well as the principled approach to admissibility, involving the twin concepts of reliability and necessity. Counsel submits that in terms of reliability, at this stage the Court is concerned with *threshold* reliability and not *ultimate* reliability: *R. v. Baldree*, 2013 SCC 35, at paras. 83 and 84. In determining threshold liability, the Court is concerned only with whether the evidence exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. One way to do this is to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came about, such that even a sceptical caution would look upon it as trustworthy: *R. v. Khelawon*, 2006 SCC 57, at para. 62. This is referred to as an inquiry into the circumstantial guarantees of reliability: *Khelawon*, at para. 68.

[26] Once threshold reliability is established, ultimate reliability, including what weight, if any, to attach to the evidence, is a matter for the trier of fact at the conclusion of the case in the context of the entirety of the evidence: *Baldree*, cited above, at paras. 83 and 84.

[27] Sidhu's counsel further submits that the twin concepts of necessity and reliability work in tandem, such that if the threshold reliability of the evidence is sufficiently established, the necessity requirement can be relaxed: *Baldree*, at para. 72. Similarly, the criteria should not be considered in isolation because one may have an impact upon the other. Indeed, the very high reliability of the statement can render its substantive admission necessary: *Baldree,* at para. 96.

[28] In the case at bar, Sidhu's counsel argues that the threshold reliability of the hearsay statements is high because:

1. the Receivers Second Report was authored by a court-appointed receiver and was tendered in proceedings in which Yukon Zinc not only participated, but benefited by virtue of the Sale Order made by the Supreme Court of British Columbia, and was relied upon by that Court in making the Order; and
2. the presentation materials are attached as an exhibit to Mr. Lu's sworn evidence as Yukon Zinc's Chief Executive Officer, filed by Yukon Zinc, and put forward in support of its application for relief from its creditors.

[29] I agree with the submissions of Sidhu's counsel on this hearsay issue. In particular, I am satisfied that there are sufficient indicia of reliability in the circumstances to meet the threshold of admissibility. With respect to the Second Report, it is of no concern to me who actually authored the statements in para. 25, because they have been expressly or implicitly adopted as the statements of the court-appointed receiver when the Senior Vice President, Michelle Grant, signed off the Report on behalf of Ernst and Young Inc. With respect to the presentation materials attached as an exhibit to Mr. Lu's affidavit, it is reasonable to infer that these were prepared either by an employee or a contractor of Yukon Zinc, presumably with Mr. Lu's knowledge and approval, and were deemed sufficiently persuasive and reliable to be attached as an exhibit to his sworn evidence.

[30] As for the issue of prejudice, the only point raised by Yukon Zinc's counsel was that admitting the additional evidence would give Sidhu the opportunity to re-argue its application with the benefit of the new evidence, notwithstanding the fact that it has been readily available at all times. I did not hear a significant amount of re-arguing the

merits of the validity of the miners lien by Sidhu's counsel on this application. Further, at the close of the hearing, all counsel confirmed that no further submissions would be made by any of them in addition to what has already been argued. In other words, if the additional evidence is admitted, I will then be in a position to begin my deliberations on the merits of the main issue, which is the validity of the lien. Accordingly, I find that there is little or no prejudice to Yukon Zinc by admitting the additional evidence.

[31] Specifically, the three pieces of additional evidence are found as exhibits in the affidavit of Julie Hutchinson, sworn March 18, 2016, and filed by Sidhu. However, there are several additional exhibits in this affidavit which Sidhu does not seek to adduce as additional evidence. Accordingly, I will give them no consideration in determining the merits of whether its miners lien is valid.

COSTS

[32] Yukon Zinc has argued that costs are solely within the jurisdiction of the Supreme Court of British Columbia in the debtor's relief proceedings. I disagree. In *Yukon Zinc Corporation (Re)*, 2015 BCSC 1961, Fitzpatrick J. touched on the issue of costs in her analysis of the economics of whether the determination of the validity of the miners lien should take place in British Columbia or the Yukon:

> 43 I consider that the only real "saving" to the parties in having the hearing in Vancouver is in avoiding the cost and expense of flying counsel to Whitehorse for what is expected to be a one-day hearing. Presumably, Sidhu and Hy's are happy to bear this cost.
>
> 44 In my view, this is a relatively neutral factor, with a slight edge to British Columbia in terms of the costs of proceeding in the Yukon. That concern is alleviated to some extent, as I presume that Yukon Zinc, if successful, could seek an award of costs against Sidhu and Hy's. (my emphasis)

I take this as an implicit, if not explicit, reference to this Court's jurisdiction over the matter of court costs in this proceeding. Accordingly, as Sidhu was successful on the application to reopen, I order that it shall have its costs in the cause for the hearing on May 20, 2016.

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GOWER J.