

SUPREME COURT OF YUKON

Citation: *P.S. Sidhu Trucking Ltd. v Yukon
Zinc Corporation*, 2016 YKSC 42

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
Kibben Jackson and Danielle Toigo

Counsel for the Petitioner
Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for a declaration that the petitioner, P.S. Sidhu Trucking Ltd. (“Sidhu”), holds a valid and subsisting miners lien against the Wolverine Mine (the “mine”) owned by the respondent, Yukon Zinc Corporation (“Yukon Zinc”) pursuant to the *Miners Lien Act*, R.S.Y. 2002, c. 151 (the “MLA”). Sidhu also seeks a declaration that its lien ranks equally with other valid miners liens against the mine. Finally, Sidhu seeks a declaration that its lien attaches to:

- a) all estates or interests in the mine;

- b) all minerals severed and recovered from the mine while they are in the hands of the owner; and
- c) the interest of the owner in the fixtures, machinery, tools, appliances and other related property at the mine.

[2] The basis for the lien claim is that Sidhu provided trucking services to Yukon Zinc by hauling processed ore concentrates from the mine to the port of Stewart, British Columbia over the period from July 2014 until January 30, 2015, when the mine ceased operating. Sidhu alleges that it is owed \$865,921.35 by Yukon Zinc for these trucking services.

[3] The main issue in this application is whether this transportation of minerals from the mine is a service “in connection with the recovery of a mineral” as set out in s. 2(1)(b) of the *MLA*. A secondary issue is whether Sidhu provided its trucking services to a “mine” as defined in the *MLA*, as opposed to Yukon Zinc, which is the business owning the mine. There is no issue with respect to Sidhu’s lien ranking equally with all other valid lien claimants against the mine. Finally, there is also no issue with respect to the formalities of the filing and perfecting of Sidhu’s lien claim under the *MLA*.

[4] Hy’s North Transportation Inc. (“Hy’s North”) is also a trucking business asserting a lien claim against the mine in a separate petition against Yukon Zinc, S.C. No. 15-A0019. The parties originally agreed to have both petitions heard together on February 17, 2016, with Sidhu proceeding first. However, there was insufficient time to complete both matters on that day and Hy’s North’s application had to be adjourned to February 29, 2016.

[5] In the meantime, Yukon Zinc made an application to cross-examine the principal of Hy's North, Don Halliday, on his affidavits filed in support of the petition. That application was heard on February 25, 2016, and I allowed the cross-examination to proceed for separate reasons cited as 2016 YKSC 39.

[6] Further, on May 20, 2016, Sidhu applied to reopen its application heard on February 17, 2016, for the purpose of adducing additional evidence to respond to certain submissions made by Yukon Zinc's counsel at that hearing. I allowed that application in separate reasons cited as 2016 YKSC 40.

[7] The parties have agreed that the evidence in each of the two petitions may be applied to each other. However, Yukon Zinc has specifically requested that I deliver separate reasons for the determination of the validity of each of the miners lien claims, as the facts are somewhat different as between Sidhu and Hy's North. Therefore my reasons regarding Hy's North are issued separately and are cited as 2016 YKSC 43.

FACTS

[8] The parties are substantially in agreement on the facts.

[9] Sidhu is a Yukon company that provides trucking and hauling services.

[10] Yukon Zinc is a British Columbia company that owns mineral claims in the Yukon. Its primary mining asset is the Wolverine Mine, which it owns and operates pursuant to Quartz Mining License QML-0006. (the "License"). It is located in the Watson Lake Mining District.

[11] The Wolverine Mine is a multi-metal underground mine that also has aboveground milling facilities. While in production, the mine produced primarily zinc,

copper and lead, with silver and gold as by-products. The infrastructure of the mine is extensive and includes, among other things:

- an underground mine shaft;
- a crusher;
- a conveyor and mill facility;
- a concentrate load-out building;
- waste rock storage pads;
- tailings facilities;
- water treatment ponds;
- an assay laboratory;
- a shotcrete plant;
- a power generation facility;
- explosive and cap magazines;
- a fuel farm;
- a warehouse;
- a truck shop;
- a mining office and administration complex;
- a sewage treatment plant;
- a dry camp; and
- an air strip.

[12] The process of recovering and transporting minerals from the mine was as follows:

- a) the ore was extracted from the underground shaft and transferred to the on-site mill;
- b) at the on-site mill, the ore was processed to recover the mineral concentrates from the ore;
- c) once the minerals were recovered in their concentrate form they were stored at the mine pending pickup and transportation down south;
- d) Yukon Zinc retained various trucking companies to haul the concentrates away from the mine to designated ports in British Columbia, where the concentrates were unloaded and stored for transfer onto ships that would then transport them to smelters in Asia.

[13] Pursuant to a letter agreement dated July 22, 2014 (the “Agreement”), Yukon Zinc contracted with Sidhu to have the latter haul concentrates from the mine to the port of Stewart, British Columbia.

[14] As stated, Sidhu transported concentrate away from the mine from sometime in July 2014 to January 30, 2015.

[15] The mine ceased operating at the end of January 2015 and has since been in care and maintenance. Certain pieces of owned and leased equipment remain on the mine site.

[16] On March 10, 2015, Sidhu filed its miners lien against the mine, alleging monies owing to it from Yukon Zinc totalling \$865,921.35. The lien was subsequently perfected by the filing of a petition and a certificate of pending litigation.

[17] On March 13, 2015, Yukon Zinc filed in British Columbia for protection from its creditors under the *Companies’ Creditors Arrangement Act*, R.S.C., 1985, c. C-36

(the “CCAA”) which, among other things, granted Yukon Zinc a stay of all proceedings against it, including the petition to enforce the Sidhu lien.

[18] On May 5, 2015, Sidhu filed this petition and obtained a certificate of pending litigation. On May 6, the certificate was registered with the office of the Mining Recorder at Watson Lake.

[19] On October 28, 2015, Madam Justice Fitzpatrick of the Supreme Court of British Columbia, lifted the stay of proceedings under the CCAA for the limited purpose of seeking the aid of this Court in determining the following specific issues:

- a) Do Hy’s North and Sidhu have valid liens under the *MLA*?
- b) What is the relative priority of all valid miners liens filed against Yukon Zinc, including by Hy’s North and Sidhu, under the *MLA*? and
- c) To what assets of Yukon Zinc in the Yukon, if any, do any valid liens attach under the *MLA*?

Fitzpatrick J. was also clear that she is not seeking the aid of this Court in respect of any contractual issues arising between Yukon Zinc and Sidhu, including the amount owing under the Agreement¹. The same applies with respect to Hy’s North.

[20] Sidhu’s claim of lien for \$865,921.35 includes charges for fuel tax remittances and worker accommodations which are disputed by Yukon Zinc as not being covered by the Agreement. However, I view that as a contractual matter between the parties and one which Fitzpatrick J. is seized of. Accordingly, I will not deal with it here.

¹ 2015 BCSC 1961

ANALYSIS

1. ***Does Sidhu have a valid lien?***

[21] Section 2 of the *MLA* sets out who is entitled to a lien under that

Act:

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. S.Y. 2008, c.17, s. 5; S.Y. 2002, c. 151, s. 2

[22] The parties are agreed that in interpreting s. 2(1)(b), I am to apply the “modern principle” of statutory interpretation referred to by Ruth Sullivan in her text, *Sullivan on the Construction of Statutes*, (6th Ed), (Markham: Lexis Nexis, 2014), at 2.1:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[23] In terms of the intention of the legislature, it is important to note that s. 2 of the *MLA* was amended in 2002 to its present form. The predecessor section referred to work or service “in respect of” mining or a mine:

2.(1) 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, by virtue thereof, have a lien for the price of such work, service or material upon 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 such work or service is performed or material furnished, limited however in amount to the sum justly due to the person entitled to the lien. (my emphasis)

[24] The Supreme Court of Canada held in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, that the words “in respect of” are to be given the widest possible interpretation:

The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. (my emphasis)

I pause here to observe that this statement arguably indicates that “in respect of” is broader in scope than “in connection with”.

[25] In any event, the words “in respect of” were dropped when s. 2 of the *MLA* was amended in 2008. The pertinent words in s. 2(1) now are:

A contractor or subcontractor who provides services or materials to a mine

...

in connection with the recovery of a mineral

...

is given a lien by this subsection...

In addition, s. 2(3), quoted above, provides that persons who rent equipment to an owner, contractor or subcontractor that is used as part of a mining operation are also deemed to have provided services to a mine, and are entitled to a claim of lien for the rental fees while the equipment is at or near the mine site.

[26] The words “in connection with”, while perhaps narrower in scope than “in respect of”, have nevertheless been held to have a “very broad meaning”: *Mantini v. Smith Lyons LLP* (2003), 64 O.R. (3d) 505 (CA) at para. 19. An earlier case from the British Columbia Supreme Court, *Re Nanaimo Community Hotel Ltd.*, [1944] B.C.J. No. 91, at para. 5, similarly held:

[5] ...One of the very generally accepted meanings of "connection" is "relation between things one of which is bound up with or involved in another"; or again "having to do with." The words include matters occurring prior to as well as subsequent to or consequent upon so long as they are related to the principal thing. The phrase "having to do with" perhaps gives as good a suggestion of the meaning as could be had.

[27] The Yukon Government *Hansard* of November 26, 2008 quotes the then Minister of Community Services, the Honourable Archie Lang, as stating the following with respect to the amendments to the *MLA*:

... The purpose of this amendment to the *Miners Lien Act* legislation is threefold: One, by modernizing the *Miners Lien Act*, which was first introduced in 1902 and amended in 1958, the Yukon government will continue to encourage investment in Yukon's mining sector; two, changes to the miners lien legislation will make the act easier to interpret and more in line with the newer legislation in other Canadian jurisdictions; three, these changes will assist mining companies, legal and financial firms, developers, contractors and suppliers that service the mining sector. Potential lien claimants, some of whom may be small Yukon businesses, should not need sophisticated legal aid to understand their rights.

...

... The change also provides necessary clarity to encourage investment in the territory.

...

As many of the developing mines will require debt financing, it is important to ensure that lenders and others 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...

[28] Notwithstanding the very broad meaning given to “in connection with” in other contexts, it might be concluded from the Minister's comments above that the intention of the Legislature was to clarify, and perhaps even narrow, the types of workers who can validly claim a miners lien from the broad range of workers who might fall within the “widest possible scope” of those performing work or a service “in respect of” mining or a

mine. I say this because the obvious intention of the Legislature was to increase the clarity of the legislation and decrease the need for contractors to seek legal advice to understand their rights. The Legislature chose to focus on workers providing services or materials to a mine in relation to “the recovery of the mineral”. For reasons which I will get to later, this presumably excludes, by implication, services provided post-recovery. If this is correct, then the scope of potential lien claimants is arguably narrower than it was under the former legislation. Having said that, I also recognize that the Legislature specifically added, as potential lien claimants, persons who rent equipment to owners, contractors or subcontractors, providing the equipment is being used, or is available for use, at the mine site.

[29] This latter point may have been what Veale J. had in mind when he made the following obiter comment in *Ross v. Ross Mining Ltd.*, 2011 YKSC 91:

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.

[30] In any event, the interpretation of lien legislation is subject to a rather different scrutiny than other legislation. This is because liens, including miners liens, are considered to be an abrogation of the common law in that they create a security right for one class of creditors which did not exist before the statute was enacted and give that class preference over other creditors. Therefore, when determining whether a claimant falls within the preferred class, the statute must be given a strict interpretation. Then, once the claimant has met the burden of establishing that it has the right to claim a lien,

the legislation should be liberally interpreted. This approach is further elaborated in the following cases.

[31] In *Re Anvil Range Mining Corp.*, [1999] Y.J. No. 129, Hudson J. of this Court was interpreting s. 2(1) of the previous *MLA* and commented:

63 As will be seen, it is my view that where a statute such as this creates a right which did not previously exist, then the provisions of the statute must be strictly interpreted. Where any party claims the right to a lien on an interpretation of the statute claimed to support such a right, when in fact the statute is silent on the point, the burden on the proponent is increased. (my emphasis)

[32] Further, in another case before this Court, *Access Mining v. United Keno*, 2000 YKSC 541, Veale J. was again interpreting s. 2(1) of the old *MLA* and stated:

5 It is a long established rule of interpretation that while the *Miners Lien Act* may merit a liberal interpretation generally, it must be given a strict interpretation in determining whether any lien claimant is a person to whom a lien is given by it. (See *L. Di Cecco Co. v. Ace Lumber Ltd.*, [1963] S.C.R. 110 and *Anvil Range Mining Corp. (Re)*, [1999] Y.J. No. 129.) (my emphasis)

[33] More recently, the Nunavut Court of Appeal was dealing with the miners lien legislation in that territory in *Diavik Diamond Mines Inc. v. Tahera Diamond Corp.*, 2009 NUCA 3. There, the Court of Appeal had this to say:

11 Miners' liens such as those created by the *Act* and the analogous builders' and mechanics' liens created by similar legislation are purely statutory rights; such liens were unknown to English common law. ..

12 The Supreme Court of Canada has termed such liens "an abrogation of the common law", that grants to one class of creditors a security or preference not enjoyed by all. Accordingly, lien statutes must be interpreted strictly in determining whether a claimant has brought itself within the terms of the statute so as to claim entitlement to a lien. When the claimant's right to a lien has been established,

however, the statute should be "liberally interpreted toward accomplishing the purpose of its enactment": *Clarkson Co. Ltd. v. Ace Lumber Ltd.*, [1963] S.C.R. 110 at 114 ("Clarkson").

13 The Supreme Court was interpreting the Ontario *Mechanics' Lien Act* in *Clarkson*. However, the same rule of statutory interpretation has been applied, properly in our view, to the *Yukon Miners Lien Act: Access Mining Consultants Ltd. v. United Keno Hill Mine s Ltd.*, 2000 YTSC 541, 17 C.L.R. (3d) 126 at para. 5. It is equally applicable to the *Act* at issue here.

14 Lien legislation is remedial, its purpose being to secure the parties entitled to its benefits for the value of work done and materials supplied to an improvement: *Curtis v. Richardson* (1909), 18 Man.R. 519 (K.B.). The primary purpose of lien legislation is to better enable the suppliers of work and materials to recover the amounts owing to them and to secure those amounts against the land which has been improved by their work: see, eg, *Wyo-Ben, Inc. v. Wilson Mud Canada Ltd.*, [1985] A.J. No. 1114, 23 D.L.R. (4th) 760 (Alta. C.A.); *Town-N-Country Plumbing & Heating (1985) Ltd. v. Schmidt* (1991), 86 D.L.R. (4th) 716, 93 Sask. R. 278 (C.A.). That is also the object of miners lien legislation generally, and of the *Act* in particular.(my emphasis)

[34] This last paragraph in *Diavik* says that the purpose of lien legislation generally, and miners lien legislation in particular, is that it seeks to protect those workers who improve an owner's property, or mine, by creating a preferential security interest for them. This theme was picked up by Veale J. in the *Ross Mining* decision, cited above :

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**....
(my emphasis)

[35] In *Ross Mining*, Veale J. also reiterated the need for a strict interpretation of a lien statute in determining who can claim a lien, but this time in the context of the amended *MLA*:

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

[36] It is interesting to note that, although Hudson J. in *Anvil Range*, cited above, was interpreting s. 2(1) of the old *MLA*, he nevertheless commented that the Legislature did not intend to expand the class of persons claiming a lien beyond those providing goods or services “directly to the property”:

71 It is not sufficient simply to take a word (person) [in the former s. 2(1)], 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. (my emphasis)

[37] I agree with Yukon Zinc’s counsel that the objective of miners lien legislation generally, including the *MLA*, is to protect those that enhance or improve the mine by

providing services or materials which contribute to the actual extraction of minerals from the mine.

[38] In the case at bar, we are talking only about services, as Sidhu did not bring materials to the mine.

[39] I also agree with the submission that one needs to distinguish between services benefiting, improving or enhancing the physical mine site, as opposed to the business or other operations of a mining company generally. This is because “mine” is defined in s. 1 of the *MLA* in terms of the land and physical plant located in whole or in part within the boundaries of the subject mining claim or claims, as opposed to the mining business operated by the owner.

“mine” means an opening or excavation in the ground which is located in whole or in part within the boundaries of a recorded claim, or a recorded claim which is subject to a lease, or which is located in whole or in part within the boundaries of a group of contiguous claims, and that is established or maintained for the purpose of mining and includes

(a) machinery, plant, buildings, premises, stockpiles, storage facilities, waste dumps or tailings, whether below or above ground, that are used for, or in connection with, mining,

(b) a crusher, mill, concentrator, furnace, refinery, processing plant or place that is used for, or in connection with, washing, crushing, sifting, drying, oxidizing, reducing, leaching, roasting, smelting, refining, treating or conducting research on mineral bearing substances, and

(c) an abandoned mine and abandoned mine tailings...

[40] In *Byer’s Transport Ltd. et al v. Terra Mining & Exploration Ltd.*, [1972] N.W.T.J.

No. 19, a trucking company which transported freight supplies, equipment and mining

materials to a mine in the Northwest Territories was held to be a legitimate lien claimant.

Section 3(1) of the *Miners Lien Ordinance* was at issue in that case:

(1) Any person who performs any work or service upon or 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, by virtue thereof, have a lien for the price of such work, service or material upon the minerals or ore produced from and the estate or interest of the owner in the mine or mining claim in or upon or in respect of which such work or service is performed or material furnished, limited however in amount to the sum justly due to the person entitled to the lien.

Counsel for the defendant in *Byers* referred to several cases in support of his argument that s. 3(1) was to be strictly construed since it was in derogation of the common law.

However, Morrow J. found in favour of the lien claimant, as follows:

24 Section 3(1) above must be examined carefully in the light of such decisions as the above. The section refers to performance of "any work or service upon or in respect of or places or furnishes any material". Such material is to be used in the mining. The lien is to affix to the minerals or ore produced as well as to the estate of the owner of the mine or mining claim "in or upon or in respect of which such work or service is performed or material furnished". As I read the above it seems to me that I do not have to stretch or exaggerate the meaning of "service in respect of or places ... material to be used ..." in order to find it includes the carrying or freighting of "necessary supplies, equipment" and so on. In this respect I am not unmindful of the general situation to be found in the Northwest Territories where ventures such as the one under consideration here cannot be serviced by roads or railways in the ordinary sense but only by a combination of winter road and air. (my emphasis)

[41] In the case at bar, Sidhu cannot be said to have enhanced the physical mine site by hauling concentrate away from that site. While Yukon Zinc concedes that Sidhu benefited the business operations of Yukon Zinc by doing so, that does not result in a direct enhancement to the mine itself. Rather, I conclude that s. 2(1)(b) the *MLA* is

concerned with protecting those whose services and materials contribute to the ultimate recovery of minerals from the ground, from which the concentrate is extracted.

[42] I find support for this conclusion in the three principles of statutory interpretation raised by counsel for Yukon Zinc.

[43] The first is the implied exclusion principle which arises from the maxim: to express one thing is to exclude another. This is referred to by Ruth Sullivan in her text, cited above, at 8.90:

An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failed to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied...

Thus, the fact that the *MLA* does not provide for post-recovery services and materials must be seen as the deliberate exclusion of such services and materials by the legislature. I conclude that Sidhu's services were post-recovery.

[44] The second principle of statutory interpretation applicable here is the presumption against tautology. This is referred to by Ruth Sullivan in her text at 8.23:

It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and have a specific role to play in advancing the legislative purpose....

...

... For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant.

[45] In the amended *MLA*, the Legislature made specific provision for services and materials that are “preparatory” to the recovery of a mineral [s. 2(1)(a)] and included a deeming provision extending lien rights to persons renting equipment to an owner, contractor or subcontractor [s. 2(3)]. This supports a narrower reading of the phrase “in connection with the recovery of a mineral in s. 2(1)(b) because, if this provision was intended to apply broadly to all those persons providing a service or furnishing materials to an owner of a mine in connection with a mining operation, the additional provisions of ss. 2(1)(a) and 2(3) would be rendered meaningless and redundant.

[46] The third principle of statutory interpretation which applies to this argument is that the Legislature can be presumed not to have intended to create absurd results. The broad interpretation of s. 2(1)(b) urged by Sidhu would result in lien rights being extended to anyone that provided services in connection with a mining operation, irrespective of whether such service had anything to do with the actual recovery of a mineral or the improvement of the mine. The resulting absurdity, in my view, is that this would extend lien rights to any contractor that provided services to Yukon Zinc, including warehouse operators, shipping companies, insurers, or even lawyers and financiers. In other words, virtually every creditor could assert a claim of lien against a mining company’s primary assets. This would increase uncertainty for lenders and detract from the “attractive investment climate” which the Legislature was trying to create through the amendments to the *MLA*.

[47] Sidhu argued 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 Licence for stockpiling concentrate in excess of the limits stipulated

by the License and the related Mill Operating Plan (the “Plan”). Thus, as I understood it, the point is that Sidhu’s trucking services were integral to the operation of the mine and therefore ought to be considered a lienable service.

[48] The evidence here begins with affidavit #5 of Mr. P. Sidhu. 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 that was fine.

[49] Mr. Lu is the Chief Executive Officer of Yukon Zinc and Ms. Yuan is the General Manager, Marketing and Sales of the company. As I noted in my reasons on the application to reopen, the truth of these statements attributed to Mr. Lu and Ms. Yuan were disputed by counsel for Yukon Zinc at the hearing on February 17, 2016. However, no application for an adjournment or cross-examination on the affidavit was made. Rather, counsel made a number of responsive submissions based on instructions received from Ms. Yuan. Because that information was never reduced to the form of an affidavit, it cannot be considered as evidence. Nevertheless, Sidhu felt it was necessary to adduce additional evidence in response. This was done 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.

[50] I allowed the application to reopen and permitted Sidhu to rely upon three additional pieces of evidence found as exhibits in the affidavit of Julie Hutchinson filed March 20 116:

- 1) A Second Report of the receiver, Ernst and Young Inc., dated July 28, 2014, filed in the British Columbia CCAA proceedings;
- 2) A Sale Order made July 31, 2014 in the British Columbia CCAA proceedings; and
- 3) The affidavit of Mr. Lu, sworn March 13, 2015 and also filed in the British Columbia CCAA proceedings.

[51] In his affidavit, Mr. Lu detailed the financial difficulties experienced by Yukon Zinc which ultimately led to the stay of proceedings against all creditors ordered by Fitzpatrick J. 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.

[52] 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)

[53] Although I risk repeating much of what I said in my reasons on the application to reopen, I feel it is necessary to do so in order to more fully explore Sidhu's argument here.

[54] Sidhu relies upon the evidence of Nancy 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...

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

3.5 - which states that zinc concentrate thickeners will produce 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.

[56] Sidhu submits that, reading these Plan provisions together should 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.

[57] 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. I disagree. Figure 3-8 does describe the volume of zinc concentrate stockpile at the mine, although it does not address what would happen if that volume were to be exceeded.

[58] In any event, Yukon Zinc 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, counsel points to affidavit #2 of Don Halliday in the parallel proceeding involving Hy's North, which indicates that Hy's North was hauling concentrates to terminals in Richmond, British Columbia (para. 9).

[59] Yukon Zinc further submits that neither the License nor the Plan include specific provisions mandating Yukon Zinc to haul concentrate away from the mine. I agree with this submission and would add that there are no provisions in the License or the Plan which specifically indicate that Yukon Zinc would be in breach if it exceeded the capacity of the zinc concentrate stockpile. Nor are there any provisions indicating the Yukon Government would intervene to cease operations at the mine for breach of conditions of the License or the Plan.

[60] Thus, I am not persuaded that the evidence shows, on a balance of probabilities that the mine was in danger of being shut down, but for the trucking services provided by Sidhu.

[61] However, even if I am wrong in this conclusion, and even if I accept for the moment that Sidhu's trucking services were integral to the operation of the mine, that is not the test for whether it is entitled to a miners lien. The test, in my view, is whether Sidhu provided a service in connection with the recovery of a mineral from the mine and, as I indicated above, I do not find that Sidhu has met this test. It also must be kept in mind that other service providers, contractors, agencies or institutions could also be described as integral to the operation of the mine, in the sense that the mine might not have been able to operate absent the provision of the service. Two examples of such services referred to above were insurance companies and lending institutions or

entities. Obviously, Yukon Zinc would not have been able to operate the mine without adequate insurance or financing. However, that does not make those services lienable under the *MLA*.

[62] In the result, I conclude that Sidhu did not provide the service in connection with the recovery of a mineral and therefore it does not have a valid miners lien against Yukon Zinc's Wolverine Mine.

2. *What is the relative priority of all valid miners liens filed against Yukon Zinc?*

[63] Given my conclusion immediately above, it is technically unnecessary for me to answer this question. However, in the event that I am wrong, I simply observe that Yukon Zinc takes no position with respect to Sidhu's submission that this Court should declare that its' lien ranks equally (*pari passu*) with all other valid miners liens against the Wolverine Mine.

3. *To which of Yukon Zinc's Yukon assets do any valid liens attach under the MLA?*

[64] Once again, having found that Sidhu does not have a valid miners lien, the answer to this question is rendered moot. However, in the event that I am wrong, I once again simply observe that the parties appear to be agreed that any valid liens against the Wolverine Mine would attach to:

- a) all the estates or interests in the mine and all minerals concerned with such mine;
- b) all of the zinc and other minerals severed and recovered from the Wolverine Mine while they are in the hands of the owner; and

- c) the interest of the owner in the fixtures, machinery, tools, appliances and other property in or on the mine or mining claims and the appurtenances thereto.

[65] Yukon Zinc noted in its written submissions that certain personal property on the Wolverine Mine site is leased and all personal property on the site is subject to the claims of secured creditors. Therefore, its interest in such property is limited to the equity in it after payment to the lessors and secured creditors. I did not understand Sidhu to take any serious issue with this submission.

CONCLUSION

[66] The application filed by Sidhu on February 2, 2016 is dismissed. Yukon Zinc shall have its costs for succeeding on the application.

GOWER J.