

SUPREME COURT OF YUKON

Citation: *Brad Paddison Contracting Ltd v Minto Metals Corp*,
2023 YKSC 67

Date: 20231128
S.C. No. 22-A0125
Registry: Whitehorse

BETWEEN:

BRAD PADDISON CONTRACTING LTD.

PETITIONER

AND

MINTO METALS CORP.

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the Petitioner

Morgan Burris

Counsel for Minto Metals Corp.

No one appearing

Counsel for Sumitomo Canada Limited

Kibben Jackson

REASONS FOR DECISION

Introduction

[1] This case arises as a result of the insolvency of Minto Metals Corp. (“Minto Metals”), owner of the Minto mine. The petition seeks to resolve, in the context of this insolvency, the competing priorities of a claim of Brad Paddison Contracting Ltd. (“BP Contracting”), a lienholder for \$200,000 worth of unpaid work performed at the mine, with the ownership rights of Sumitomo Canada Limited (“Sumitomo”), the purchaser of the mine’s mineral concentrate, and also a secured lender to the mine. It requires an

interpretation of the *Miner's Lien Act*, RSY 2002, c 151, including a balancing of its purposes – to protect unpaid workers at a mine, and to encourage commercial investment and certainty.

[2] The petitioner, BP Contracting, provided services between April 21, 2022, and September 29, 2022, to the Minto mine for which it has not been paid. It registered a lien claim against Minto Metals under the *Miners Lien Act* for this work and now seeks to enforce its lien against the copper ore concentrates produced at the Minto mine and sold to Sumitomo. BP Contracting registered the lien on November 9, 2022. After the lien registration, between December 1, 2022, and May 10, 2023, Sumitomo paid to Minto Metals approximately \$39 million for the concentrate, under the terms of an Offtake Agreement dated July 22, 2019.

[3] On May 13, 2023, Minto Metals abandoned the Minto mine, and on July 24, 2023, after an application brought by Sumitomo, PricewaterhouseCoopers Inc. was appointed receiver over all of the assets, undertakings, and property of Minto mine.

[4] The main issue in this petition is whether the registered lien of BP Contracting has priority over Sumitomo's ownership interest because Sumitomo acquired title to the concentrate after the registration of the BP Contracting lien claim. Subsection 2(1)(e) of the *Miners Lien Act* allows for a lien to be given on the concentrate "while it is in the hands of the owner". The first question is whether the lien attached to the concentrate. If it did, the next question is whether the transfer of title to the concentrate from Minto Metals to Sumitomo discharged BP Contracting's lien on the concentrate because it was no longer in the hands of the owner.

[5] A second issue is whether Sumitomo was a *bona fide* purchaser for value without notice of the lien, on the basis that they had no actual notice of the lien, and that they had no constructive notice because of the failure of BP Contracting to identify minerals on the form of registration.

[6] Each party advanced compelling policy and legal arguments in support of their position. After careful consideration, I find that BP Contracting's lien is a first charge against the severed and recovered mineral concentrate purchased by Sumitomo after the registration of the lien. I also find that Sumitomo was a *bona fide* purchaser for value without notice as a result of the inadequate notice provided on registration. As a result, the lien over the concentrate was discharged once title passed to Sumitomo.

Facts

[7] Minto Metals is the owner of an open pit and underground copper-gold-silver mine located approximately 250 kilometres northwest of Whitehorse, Yukon. BP Contracting provided skilled labour and services to Minto Metals for projects at the Minto mine including mine construction, industrial de-construction, shutdowns, teardowns, mine inspections, and mill maintenance between April 21, 2022, and September 29, 2022. As of October 11, 2022, BP Contracting was owed \$404,291.39 by Minto Metals.

[8] On November 9, 2022, BP Contracting registered in the Whitehorse mining recorder's office a claim of lien in the amount of \$404,291.39 against Minto Metals, and the mineral claims and leases held by Minto Metals and licensed under the *Quartz Mining Act*, SY 2003, c 14. This represented the outstanding value of work done but not paid for over a period of 60 days, the limitation set out in s. 3 of the *Miner's Lien Act*. In

the Form 1 under the *Miners Lien Act*, BP Contracting described the property as mineral claims and leases, and set those out in Schedule A attached to the Form. Minerals or concentrate were not referenced or described.

[9] BP Contracting initiated this petition to enforce the lien on January 3, 2023, and obtained and filed a certificate of pending litigation at the Whitehorse mining recorder's office. Minto Metals did not file an appearance or response to the petition.

[10] On May 13, 2023, Minto Metals abandoned the Minto mine. Sumitomo, the purchaser of the concentrate produced by Minto Metals at the Minto mine and a secured lender to Minto Metals with a first-ranking security interest in all concentrate produced at the mine, brought a court application for a court-appointed receiver. On July 24, 2023, PricewaterhouseCoopers Inc. was appointed receiver over all the assets, undertakings, and property of Minto Metals.

[11] Sumitomo and Minto Metals had entered into an Offtake Agreement on July 22, 2019, under which Sumitomo agreed to buy 100% of the copper concentrate produced at the Minto mine, until 325,000 dry metric tonnes ("DMT") of concentrate were delivered. An offtake agreement is a contract common in the resource industry in which a corporation agrees to buy a certain amount of the product produced. Offtake agreements are useful in the resource industry as they assure the producers of a market for the resource to be extracted and make it easier for the producers to secure financing for production. The advantages to the buyer in an offtake agreement include their ability to hedge against market volatility by fixing a purchase price and also to secure a date for delivery of the product.

[12] Under the Offtake Agreement, title to a load of concentrate passed from Minto Metals to Sumitomo once Sumitomo made the Provisional Payment, defined in the Offtake Agreement as 90% of the estimated purchase price of the concentrate. Once a load of concentrate was processed at the Minto mine, it was put into its storage facility at the mine, and Minto Metals issued an irrevocable holding certificate (“Holding Certificate”). The Holding Certificate set out details about the concentrate and the terms upon which Minto Metals held the concentrate in its storage facility pending receipt of the Provisional Payment and transportation to port. The concentrate remained in possession of Minto Metals as a bailee until it was loaded on to a ship for transportation to Sumitomo. The final 10% of the payment for the minerals was paid on delivery and adjusted after final weighing and assays.

[13] Usually offtake agreements provide that title passes from the seller to the buyer once the purchased material is loaded on board a vessel for shipment, at which time payment is made. Here, the parties agreed that title would pass earlier due to the unique logistics of transporting the concentrate from the Minto mine to port – by ice road in the winter, by barge in the summer, and for several weeks in both winter and summer not at all due to the absence of an ice road or a clear waterway.

[14] The Offtake Agreement contained an express term that Minto Metals would deliver the concentrate to Sumitomo free and clear of all encumbrances other than the encumbrances created by the Agreement.

[15] Between December 1, 2022, and May 10, 2023, Sumitomo paid \$39 million to Minto Metals as Provisional Payment for concentrate after receiving the provisional invoices from Minto Metals, and Holding Certificates were issued to Sumitomo for all of

the concentrate. As of May 13, 2023, the day the Minto mine was abandoned, approximately 10,877 DMT of copper concentrate were in the storage shed on the mine site, paid for and owned by Sumitomo.

[16] The Receivership Order made on July 24, 2023, provided among other things for the delivery to or removal by Sumitomo of the concentrates remaining at the mine site without prejudice to BP Contracting's right to enforce its lien against the concentrate.

[17] BP Contracting amended the relief sought in its petition to reflect the actual value of the claim of lien to \$202,145.39, the current balance owing, as it received payments since the amount of the claim was \$404,291.39. Alternatively, it claimed \$188,314.16, representing the value of the work provided in the 60-day period from July 14, 2022, to September 8, 2022, or \$165,282.31, the value of the work provided from July 31, 2022, to September 29, 2022, the final 60 days of the period for which invoices remained unpaid. The alternative amounts were claimed because it remains an open question under s. 3 of the *Miners Lien Act* as to which 60 days are selected for calculation of the amounts owing – the last 60 days, or any 60 days as chosen by the lienholder during which work was performed.

[18] On May 10, 2023, the date of Sumitomo's last payment to Minto Metals for the concentrate, it was unaware of the existence of any lien claims against Minto Metals or its assets, including the lien at issue in this case.

Issues

1. Does s. 2(1)(e) of the *Miners Lien Act*, combined with the transfer of title to the concentrate from Minto Metals to Sumitomo under the Offtake Agreement

- operate to discharge BP Contracting's registered lien on the mineral concentrate?
2. If the lien over the concentrate purchased by Sumitomo exists, was the notice provided by BP Contracting under the *Miners Lien Act* sufficient or is Sumitomo a *bona fide* purchaser for value without notice, thereby discharging the registered lien on the mineral concentrate?
 3. If the lien is found to exist, which 60-day period is used to calculate amounts owing under the lien?

Analysis

Issue #1 – Is the BP Contracting lien on the mineral concentrate discharged because of s. 2(1)(e) of the Miners Lien Act and the transfer of title to Sumitomo?

[19] This analysis requires an understanding of the purpose and nature of liens and their statutes in general, and of the provisions of the *Miners Lien Act* in particular.

Purpose, Nature, and Interpretation of Liens and Lien Legislation

[20] A lien is a remedy *in rem*, meaning a lien proceeding adjudicates rights to property for every potential rights holder, regardless of whether they are named in the proceeding or not.

[21] Originally, at common law, a lien was a possessory right – “a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied” (*British Columbia (Workers' Compensation Board) v Canadian Imperial Bank of Commerce* (1998), 157 DLR (4th) 193 (“WCB”) at para. 12 quoting *Chassey v May*, [1925] 2 WWR 199 (“Chassey”) at 202). Over time, the character of a lien expanded beyond only a possessory right and was described as “any charge of a payment of debt or duty upon either real or personal property”

(*Chassey* at 202). This liened property can at common law be followed or traced as long as it remains identifiable (*WCB* at para. 13). The essence of a lien is that it binds the property to which it attaches.

[22] A lien is an encumbrance on the asset. It does not in itself create a debt or an obligation to discharge the lien on the part of every person who takes title to the encumbered asset. The lien must be enforced against the asset.

[23] A statutory lien, as in this case, has the scope and enforceability set out in the statute, either expressly or by necessary implication (*WCB* at para. 42). A statutory lien has been described to “constitute[s] an abrogation of the common law to the extent that it creates, in the specified circumstances, a charge upon the owner’s lands which would not exist but for the Act, and grants to one class of creditors a security or preference not enjoyed by all creditors of the same debtor” (stated in the dissenting reasons of *Ace Lumber Ltd et al v Clarkson Co Ltd et al*, [1962] OR 748 (CA) at para. 45, and found by the Supreme Court to be “the proper approach to the interpretation of this statute”, *Clarkson Company Ltd v Ace Lumber Ltd*, [1963] SCR 110 at 114 (“*Clarkson*”), referenced in *Diavik Diamond Mines Inc v Tahera Diamond Corp*, 2009 NUCJ 5 at para. 49). This creation of new rights by statute gives rise to certain obligations with respect to statutory interpretation.

[24] 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. The strict interpretation also applies to the necessary procedure to be followed by the claimant in perfecting the lien (*Clarkson* at 114; accepting as persuasive Supreme Court of Oregon in *Timber Structures v CWS Grinding & Machine Works* [229 P. 2d 623 at

629.]; *Yukon Energy Corp v Curragh*, [1994] YJ No 132 (SC) (“*Curragh*”) at para. 10).

Once 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* at 114; *PS Sidhu Trucking Ltd v Yukon Zinc Corporation*, 2016 YKSC 42 (“*Sidhu*”) at paras. 30–34 and cases cited therein). This approach “is consistent with concern for certainty and fairness to all stakeholders in the ... industry” (*Bank of Montreal v Peri Formwork Systems Inc*, 2012 BCCA 4 (“*Bank of Montreal*”) at para. 62).

[25] While validly enacted legislation is paramount over the common law, there is also a presumption of statutory interpretation that “legislatures respect the common law and do not intend to interfere with common law rights, to oust the jurisdiction of common law courts, or generally to change the policy of the common law” (*Sullivan on The Construction of Statutes*, 7th ed. (Toronto: LexisNexis Canada, 2022) (“*Sullivan*”) at 531). Generally, courts require specific, precise and explicit wording in the legislation for the common law to be modified. Anything that is not addressed in the legislation is expected to be dealt with by the common law (*Sullivan* at 528).

[26] Lien legislation is remedial, with its primary purpose described as “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” (*Diavik Diamond Mines Inc v Tahera Diamond Corp*, 2009 NUCA 3).

[27] The *Miners Lien Act* in the Yukon came into force in 1902 (as *The Miners Lien Ordinance*, No 31 of 1902, s 1) and was amended in 1958. The next major amendments occurred in 2008. There are two significant amendments for the purpose of this case. First, in the *Miners’ Lien Ordinance*, 1958 c 74, s 3(2) provided:

3(2) The **lien shall attach upon** the estate or interest of the owner and of all persons having any interest in the mine or mining claim and all appurtenances thereto, **the minerals or ores produced therefrom**, the land occupied thereby or enjoyed therewith and the chattels, equipment and machinery in, upon or used in connection with the mine, mining claim or land. [emphasis added]

[28] Then, the *Miners' Lien Ordinance*, 1971 c M-8, s 3(3) provided:

3(3) **Upon registration, the lien shall attach and take effect as against persons purchasing** and mortgagees and other encumbrancers registering their mortgages or encumbrances subsequent to the commencement of performance of work or service or furnishing of material in respect of which the lien is claimed. [emphasis added]

[29] The 2008 amendments to the *Miners Lien Act* substantially changed several subsections. Most relevant for this case are the following subsections:

2 Lien for work and 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**; [emphasis added]

...

[30] Another significant change for the purpose of this case is to s. 3 entitled Priority of Lien. Under s. 4 of the 1958 Ordinance, any lien registered under the Act:

Shall, as to one-half of the output from the mine or mining claim in respect of which the lien is claimed, take priority over all mortgages and encumbrances registered subsequent to the 16th day of November, 1957.

[31] In the current statute, the parallel section states:

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

[32] There is no statement of purpose in the *Miners Lien Act*, although it has been identified in multiple court decisions, supported by the general history and understanding of lien legislation as well as the specific legislative scheme. Debates occurred in the legislature in 2008 at the stage of second reading, and the statements of Minister Lang who introduced the amendments are instructive in determining legislative intent:

... The purpose of this amendment to the *Miners Lien Act* legislation is threefold: One, by modernizing the *Miners Lien Act*, ... 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 parameters of what is the "lien able" are better defined so that all parties will have a clearer understanding and similar interpretation of the intent of the legislation.

The lien priority has been clearly defined to 60 days payable. The lien holder now has the opportunity to register his or her lien 45 days after the last day of work. ... The change also provides necessary clarity to encourage investment in the territory.

Along with much-needed changes, we were also able to retain some of the key characteristics of the act, such as clauses guaranteeing the priority of lien holders. ...

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. The amendment process was also government's response to requests from industry and the business community to modernize the act. ... [as written]

[33] As noted in *Sullivan*, most statutes have more than one purpose. "A statute or regulation rarely has a single purpose and even a single provision can have more than one purpose" (at 266). The *Miners Lien Act* is no different. Minister Lang's general explanation of the amendments, in addition to the text itself, shows that the *Miners Lien Act* strives to balance the protection of unpaid suppliers of goods and services to a mine with the need for commercial certainty for financial investors in a mine.

[34] These dual purposes have been noted in the jurisprudence interpreting the statute. In *Curragh*, Hudson J. wrote 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. [as written]

[35] This judicial interpretation was before the 2008 amendments, but there is nothing in the statute, Hansard debates, or later jurisprudence to suggest this purpose has

changed. For example, in *Ross v Ross Mining Ltd*, 2011 YKSC 91 (“*Ross Mining*”), the Court wrote at para. 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. ...

[36] In that same decision, the Court also wrote:

[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.

[37] These purposes are consistent with lien legislation in general. The court in *Bank of Montreal* at paras. 58-61, noted a purpose of lien legislation was to ensure that contractors and workers are paid for services or materials supplied. Another important goal was to bring about commercial certainty in terms of lien rights that might arise from projects where other stakeholder interests may also arise.

Did the lien attach to the concentrate and can it be followed to Sumitomo?

[38] The unique factual circumstances of this case are determinative of the analysis and outcome of this issue. Most important, it is uncontested that BP Contracting registered the lien at issue before title to the concentrate passed from Minto Metals to Sumitomo. The *Miners Lien Act* permits a lien to attach to concentrate produced by a mine. As a result, I find the lien was given to BP Contracting on the concentrate and attached to that concentrate while it was in the hands of the owner, Minto Metals.

[39] Sumitomo argues that s. 2(1)(e) of the *Miners Lien Act* operates to extinguish any lien in effect on the mineral concentrate once it leaves the hands of the owner. In this case, Sumitomo says title to the concentrate at the mine site began to pass from Minto Metals to Sumitomo on December 1, 2022, and was completed by May 10, 2023. They argue the lien was discharged on the concentrate once title passed.

[40] As noted above, a lien is a charge on the property and can be followed or traced as long as it is identifiable, pursuant to the common law. A constraint of the statute was identified by the Supreme Court of British Columbia in *Yukon Zinc Corporation (Re)*, 2015 BCSC 836 (“*Yukon Zinc*”), where it held:

[113] ... there is no intention – express or inferred – that the enforcement provisions have extraterritorial effect. ... these enforcement proceedings are required to be taken in the Yukon Territory Supreme Court, which has jurisdiction to make orders in relation to determining the validity of the lien, and also addressing the property interests against which the lien has been filed.”

The court concluded that “in the hands of the owner” in s. 2(1)(e) of the statute can only relate to enforcement against severed minerals within the jurisdiction of the Yukon. I accept this constraint in this decision.

[41] Sumitomo’s argument that the lien is discharged once the concentrate leaves the hands of the owner, ignores the common law principle that a lien can follow the property to which it attaches while it remains identifiable.

[42] The words “while in the hands of the owner” must have meaning in order to ensure the statutory interpretation principle of the presumption against tautology is upheld. As stated in the case of *Sidhu* at para. 44, quoting *Sullivan on the Construction of Statutes*, 6th ed., (Markham: Lexis Nexis Canada, 2014) 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.

[43] The phrase “while in the hands of the owner” is significant because of the change from the previous *Miners Lien Ordinance* where on registration a lien could attach and take effect against persons purchasing any of the property covered by the lien, to the current *Miners Lien Act* where purchasers are not referenced.

[44] If the lien in this case had been registered after the title to the concentrate passed to Sumitomo pursuant to a Provisional Payment and Holding Certificate, even if the concentrate remained physically at the Minto mine, the analysis and outcome may be different. Then the lien may not have been able to attach to the concentrate, because at that time there would be an argument that it was no longer in the hands of the owner.

[45] However, these are not the facts of this case. I find that “while in the hands of the owner” in the absence of any other statutory wording related to the purchase of concentrate, is not sufficiently clear and unambiguous to effect a discharge of a validly registered lien on the concentrate once it changed hands and became the property of Sumitomo. To abrogate the common law principle of a lien binding the property to which it attaches requires stronger statutory wording. Sumitomo’s argument that the lien is transitory does not address this. There is insufficient wording in the statute to support

the interpretation that “while in the hands of the owner” means the lien, once attached, is extinguished once title changes hands.

[46] Sumitomo relied on authorities about the expropriation of private property belonging to third parties and the need for clear legislative authority to do so, which they say does not exist here. These cases are distinguishable because in all of them title to or ownership of the property being expropriated were not an issue. The third party had unencumbered ownership of the property subject to expropriation. In the case at bar, the lien attached and took effect before title to the concentrate passed, and title passed subject to the lien, assuming notice was provided (addressed below).

[47] Sumitomo’s reliance on the findings in *Yukon Zinc* is similarly misplaced. In that case, Yukon Zinc Corporation owned a mine in the Yukon that became insolvent. There were competing claims between Procon, a lien claimant who performed unpaid underground mining and production work at the mine, and Transamine, the purchaser of the concentrate owned by Yukon Zinc Corporation and located in the mine, in a bulk terminal in Stewart, British Columbia, and in trucks in transit between the mine and the terminal. By the time the lien was registered, two days after operations stopped at the mine, all of the concentrate was on its way or had arrived in Stewart, for Transamine. The court found that all the concentrate at the mine had already been delivered to Transamine, or had been identified at the mine for Transamine’s appropriation under a contract. The evidence supported the intention of the parties that title to the concentrate would pass from Yukon Zinc Corporation to Transamine upon ascertainment of the concentrate under one contract, and by ascertainment or unconditional appropriation to the contract under the other contract. In addition, the overall intention under the

contracts, the conduct of the parties, and the overall circumstances led the court to conclude title to Transamine had passed before the lien was registered. As a result, Transamine was a *bona fide* purchaser for value who took title without notice of any lien rights arising from the registration of Procon's lien.

[48] Here, Sumitomo has confirmed that title to the concentrate did not pass until payments began to be made and Holding Certificates issued between December 2022 and May 2023. This is evidenced by the terms of the Offtake Agreement. While there may have been an argument if more evidence had been provided that the intention of the parties was that title passed earlier, especially given the agreement of Sumitomo to purchase 100% of the concentrate, this was not raised. As a result, *Yukon Zinc* is distinguishable from the case at bar.

[49] Sumitomo argued that BP Contracting's position creates commercial uncertainty and would discourage financing of and investment in mines, contrary to one of the stated purposes of the statute. They note that they will be required to pay twice if BP Contracting is successful. The commercial uncertainty stems from the ability of liens to attach to minerals before they are bought by the purchaser, without the purchaser's knowledge and for them not to be discharged upon change of title.

[50] However, there are ways to manage or reduce this uncertainty and in fact Sumitomo took one approach here. The Offtake Agreement contained a provision that obligated Minto Metals to provide the concentrate to Sumitomo free and clear of any encumbrances. Sumitomo allocated the risk of encumbrances on the concentrate to Minto Metals. As a result of the receivership, Minto Metals is no longer a party from whom Sumitomo can recover. However, in the normal course, the enforcement of the

lien on the concentrate registered before title passed to Sumitomo was the responsibility of Minto Metals, thereby reducing the uncertainty of Sumitomo's investment through the purchase.

[51] Similarly, Minto Metals is liable to BP Contracting for the unpaid work. Sumitomo argues that BP Contracting had two choices of action to recover under the lien, neither of which they pursued. They could have attempted to recover from Minto Metals once the sale of the concentrate was monetized, or they could have initiated an action against Minto Metals to seize the minerals. However, part of this contradicts Sumitomo's own argument. If the lien was discharged once the concentrate was purchased, starting in December 2022, then BP Contracting would be unable to attempt to seize the minerals as they would have no right to do so unless they were able to initiate and complete the action in one month. Presumably once the concentrate was monetized and part of the mine operation, they could attempt to satisfy the lien against Minto Metals on that basis as the third party interest of Sumitomo would no longer exist. Of course the insolvency of Minto Metals has complicated this approach.

[52] To conclude on Issue #1, in this fact situation, where the lien was registered before title to the concentrate passed under the terms of the Offtake Agreement, the lien attached to the concentrate and could be followed to the purchaser. This accords with the purpose of the *Miners Lien Act* to protect unpaid workers, and with a large and liberal interpretation of a remedial statute that exists alongside of the common law. Another purpose of the *Miners Lien Act*, to encourage investment by providing commercial certainty, is fulfilled in this factual circumstance in several ways: through the limits on the amounts a lienholder can recover under s. 3 of the *Miners Lien Act*; by the

fact that if title to concentrate passes without registration or notice of the lien to the purchaser the lien is discharged; and by the jurisdictional limits of enforcing the lien. If the legislature intended that the *Miners Lien Act* would operate to discharge a validly attached lien by mere change of ownership of the property at issue, it would have had to say so expressly.

Issue #2 – Was Sumitomo a bona fide purchaser for value without notice or did it have constructive notice of the lien once registered?

[53] A lien is extinguished if the property to which it attaches is purchased for value by a purchaser without notice of the lien:

Trust property may not ... be followed into the hands of a purchaser for valuable consideration without notice of the trust; in such a case the claim of the owner of the money is extinguished just as all other equitable interests are extinguished by a purchase for value without notice. [*Halsbury's Law of England*, vol 16, ed 4, *Equity*, at para. 1460]

This does not mean that the lien does not exist. It still prevails over any other lien, mortgage or charge, whenever granted, in respect of the affected property (*WCB* at para. 22).

[54] Sumitomo says it had no actual notice at any time of the registration of the lien.

This is conceded by BP Contracting. The issue is whether constructive notice was provided by the lien registration at the Whitehorse mining recorder's office.

[55] BP Contracting says registration under the *Miners Lien Act* in this case constitutes notice to the world. They rely on *Royal Bank of Canada v Lions Gate Fisheries Ltd* (1991), 76 DLR (4th) 289 (BCCA) ("*Lions Gate*") for this proposition. In that case, which addressed s. 178 of the *Bank Act*, RSC 1985, c B-1, the Court of Appeal for British Columbia reviewed the jurisprudence and relied in particular upon the case of

Acmetrack Ltd v Bank Canadian National (1984), 12 DLR (4th) 428 (ONCA). In that case, the court concluded that when the legislature enacted the registration provisions of the *Conditional Sales Act*, it intended that it would be notice to all persons. This marked an evolution of the law from earlier times when courts had held that registration under a statute did not constitute notice to the world. The more modern cases viewed the legislative intent in statutes requiring registration as ensuring creditors or subsequent purchasers could not defeat rights to be preserved by the registration by refusing to search. In *Kozak v Ford Motor Credit Co of Canada Ltd* (1971), 18 DLR (3d) 735 (SKCA), the court wrote at para. 54:

... [The Legislature] did not intend to provide a method by which third persons could readily discover the existence of a conditional-sale agreement and ascertain the amount thereunder owing unless it also intended that they would proceed at their own peril if they did not search.

[56] BP Contracting says the same policy considerations exist in this case. Their registration of the lien in the Whitehorse mining recorder's office fulfilled their statutory obligation and constituted constructive notice to the world. They rely on the general statements in *Lions Gate* about the changes in the law about constructive notice as well as the specific finding in that case.

[57] BP Contracting further argues that the prescribed Form 1 did not require a specification of the interests to which the lien can attach that are already set out the statute. Their argument is based in part on the principle stated in *Curragh* that the law does not require lien claimants to identify the specific components of the mine operation that benefitted from their contributions. This is in keeping with the broad and liberal interpretation of the statute to achieve its purpose of ensuring the priority of payment of

workers. BP Contracting's argument is also based on *Lions Gate* where the court found that registration of the notice of intention to claim security under s. 178 of the *Bank Act* was sufficient constructive notice of the security, even though there was no registration of the actual document describing the security. The court held that to require more than a simple and rudimentary notice would be contrary to the remedial purpose of the *Bank Act* (at 53-4).

[58] BP Contracting acknowledged the ambiguity resulting from the requirement to register the lien claim in a mining recorder's office, because there must be real property to which the lien can attach as that is within the jurisdiction of the mining recorder. The charge on mineral concentrates does not accord with the function and jurisdiction of the mining recorder, and is not provided for by the prescribed form. Yet s. 2 of the *Miners Lien Act* states that a lien can be given over the mineral when severed and recovered from the land while it is in the hands of the owner. BP Contracting says in the face of such ambiguity, it is necessary to look at the purpose of the legislation and adopt an interpretation consistent with that purpose. In this case, they say the purpose of ensuring workers for a mine are paid is consistent with a liberal interpretation of the notice provisions of a lien to ensure that payment.

[59] Sumitomo argues that registration is not constructive notice and the notice procedure was ineffective. The lien is against the owner for unpaid invoices, not against Sumitomo. As a third party purchaser of concentrate and secured lender, it had no reason to conduct a search for liens on the concentrate it was to purchase. Further, the Form 1 prescribed under the statute filed by BP Contracting did not describe the mined minerals or concentrate as claimed property subject to the lien. Sumitomo says that

each statute must be examined closely to determine the notice provisions. *Lions Gate* cannot be relied upon in the case at bar because it relates to a very specific provision in the *Bank Act*, a complex statute. By contrast, the *Miners Lien Act* is a simple statute which is silent on notice. Sumitomo finally says registration is a crystallizing of the lien and does not act as notice.

[60] While it may be possible for the registration of a lien to be constructive notice in some circumstances, in this case I find it was not. Constructive notice is a legal presumption that a party has notice when it can discover certain facts by due diligence or inquiry into public records. It also requires that the document constituting the notice is properly recorded in the public record.

[61] In the case of *Lions Gate*, as noted above, the court relied on a decision which referred to constructive notice occurring where the third party could “readily discover” the necessary information.

[62] Section 4(1) of the *Miners Lien Act* describes what is necessary for the registration of a lien:

4(1) A claim of lien may be deposited in the office of the mining recorder for the district in which the mine or mining claim is situated and shall state

- (a) the name and residence of the claimant and of the owner of the property to be charged and of the person for whom and on whose credit the work or service is performed or material furnished and the time or period within which it was or was to be performed or furnished;
- (b) the work or service performed or material furnished;
- (c) the sum claimed as due or to become due;

(d) **the description of the property to be charged;**
and

(e) the date of the expiry of the period of credit agreed to by the lien for payment for their work, service, or material if credit has been given. [emphasis added]

[63] The Form 1 and attached Schedule A filed on registration in this case made no reference to any charge on the mineral concentrate. Only mining claims and leases were listed. Even if Sumitomo had exercised due diligence to determine if encumbrances existed on the concentrate, it could not have discovered this fact by looking at the registered lien. Given that some of the property permitted to be covered by a lien by statute is listed on Form 1, but not all, it should not be the burden of a third party purchaser to assume its product may be subject to a lien. As a result, it is not proper constructive notice.

[64] Further, BP Contracting's reliance on the fact that the statute provides that mineral concentrate is property to which a lien attaches and, based on *Lions Gate*, that is sufficient to constitute constructive notice, does not accord with the appropriate statutory interpretation approach. Registration of the lien is part of the procedure necessary to enforce the lienholder's rights. Because the statute creates new rights for lienholders, not only is the determination of who is eligible for these new rights subject to a strict interpretation, but the procedure for perfecting the claim is also subject to a strict interpretation. The failure to describe anywhere on the lien registration that the lien was claimed over the mineral concentrate must be interpreted strictly.

[65] BP Contracting's additional reliance on the *Curragh* decision in support of its argument that it was not necessary to describe the concentrate is flawed. In *Curragh* all of the properties sought to be covered by the lien were listed and known to the

respondent. The lienholder argued the lien could attach to certain contiguous properties to the mine, roads, fences, buildings, as well as to ore bodies that had not yet been mined. The question was whether the lienholder had to prove they provided services or materials to a particular claim, ore body, or other asset in order to have their lien attach. In finding that each and every lien attached to the property described in each claim of lien the Court wrote at para 35:

It would, I find, be contrary to the expansive remedial and far-reaching wording of the Act and its purpose to require potential lien claimants to identify the component of the mining plan that their labour, their services or their materials were intended to benefit. In presenting themselves to what they saw and to what was represented to them, they could only have intended to benefit the whole.

[66] This is a different factual context and inquiry than in the case at bar. In *Curragh*, the registration clearly set out all of the property sought to be covered. Notice was not at issue. The issue instead was whether all of the property listed could be covered by which lienholder, because of the absence of a direct relationship in some cases between the lienholder's services and materials provided and the property sought to be covered by the lien.

[67] BP Contracting argued that the prescribed Form, introduced in 2008, set out no prompts for a description of mineral concentrate. This may be something for the legislature to consider in future amendments. However, I note that in *Yukon Zinc* one of the miners liens filed in September 2014 against the owner under the *Miners Lien Act* was asserted not only against certain quartz claims but also against:

[A]ll minerals severed and recovered from the Project, including but not limited to all of Yukon Zinc Corporation's present and after-acquired concentrates and inventory wheresoever situated. (at para. 31)

[68] The failure to give proper notice to allow a third party to know the potential encumbrances on his property intrudes upon one of the purposes of the statute – encouraging investment through commercial certainty. Encumbrances need to attach on appropriate and clear notice, actual or constructive, that can be found easily by due diligence, in order to accord with commercial realities and expectations. This conclusion is also consistent with the principle that statutes should not be broadly interpreted if that construction results in commercial uncertainty. “Courts have generally been reluctant to nullify the interests of innocent third parties except where the language is crystal clear on the point” (*WCB* at para. 23).

[69] To conclude on Issue #2, I find on the facts of this case notice was not provided to Sumitomo of the lien claim over the concentrate. The failure to describe the concentrate in the registration documents, in which other lien property was specifically described, and the absence of any other notice meant that no one, even on the exercise of due diligence, could know about this encumbrance. A strict interpretation of the procedure to be followed is in keeping with the creation of new rights for lienholders. A clear description of the property intended to be covered by the lien is not an onerous obligation on the lienholder and should not require sophisticated legal advice.

Issue #3 – How are the 60 days of work under s. 3 calculated?

[70] A third issue was argued by BP Contracting of how the 60 days of work provided by s. 3 of the *Miners Lien Act* should be calculated – that is, whether it should be the last 60 days as concluded *in obiter* by the Court in *Ross Mining*, or whether it can be 60

days of the lienholder's choosing. My conclusion on the discharge of the lien means I am not required to answer this question and it will be left for another day.

Conclusion

[71] This case raises competing policies created by the *Miners Lien Act*: 1) ensuring the lienholder gets paid for the work done at the mine by giving them priority over other creditors; and 2) ensuring third party lenders and purchasers have certainty in acquiring the minerals. The operation of the mine depends on both the workers who help to extract the mineral from the ground, and the purchaser of that mineral who also provides financing. The interests of both parties must be balanced, which is what the *Miners Lien Act* attempts to do. On the specific facts and insolvency context in this case, I have found that the lien attached to the concentrate because of the timing of its registration and was not extinguished by the fact of the purchase alone. However, the failure of the lienholder to provide proper notice of its claim means that Sumitomo was a *bona fide* purchaser for value without notice, and thus the lien on the concentrate was extinguished.

[72] My thanks to both counsel for their excellent thorough written and oral submissions.

[73] Costs may be spoken to in case management if necessary.

DUNCAN C.J.