

SUPREME COURT OF YUKON

Citation: *Hy's North Transportation Inc. v Finlayson Minerals Corporation dba Yukon Zinc Corporation*,
2016 YKSC 39

Date: 201600830
S.C. No. 15-A0019
Registry: Whitehorse

Between:

HY'S NORTH TRANSPORTATION INC.

Petitioner

And

**FINLAYSON MINERALS CORPORATION D.B.A. YUKON ZINC CORPORATION,
YUKON ZINC CORPORATION, ATNA RESOURCES LTD., EQUITY EXPLORATION
CONSULTANTS LTD., 8248567 CANADA LIMITED, ROYAL GOLD, INC.,
CATERPILLAR FINANCIAL SERVICES LIMITED/LES SERVICES FINANCIERS
CATERPILLAR LIMITEE, DE LAGE LANDEN FINANCIAL SERVICES CANADA INC.
SERVICES FINANCIERS DE LAGE LANDED CANADA INC., SANDVIK CUSTOMER
FINANCE LLC, FORD CREDIT CANADA LIMITED - CREDIT FORD DU CANADA
LIMITEE, PROCON MINING & TUNNELLING LTD., PROCON MINING
PARTNERSHIP, KASKA ALLIANCE/PROCON JOINT VENTURE, TRANSMINE
TRADING S.A., JINDUICHENG CANADA RESOURCES CORPORATION LIMITED,
MAYNARDS FINANCIAL LIMITED PARTNERSHIP, HONG KONG XIANGGUANG
INTERNATIONAL HOLDINGS LIMITED AND FORD CREDIT CANADA LEASING**

Respondents

Before Mr. Justice L.F. Gower

Appearances:

Alison M. Latimer
Kibben Jackson and Danielle Toigo
G. Bowman
H. Lance Williams

Counsel for the Petitioner
Counsel for the Respondent Yukon Zinc.
Counsel for P.S. Sidhu Trucking Ltd.
Counsel for PricewaterhouseCoopers Inc.

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application under Rule 50(9) of the Yukon *Rules of Court* for an order that the petitioner, Hy's North Transportation Inc. ("Hy's North" or "Hy's"): (1) produce

certain documentation; and (2) make its president, Don Halliday, available for cross-examination on the contents of the three affidavits sworn by him in this miners lien proceeding. In particular, the respondent, Yukon Zinc Corporation (“Yukon Zinc”) wants to know whether Hy’s North had assigned the debt owing to it by Yukon Zinc when it filed its miners lien claim on April 1, 2015, pursuant to the provisions of the Yukon’s *Miner’s Lien Act*, R.S.Y. 2002, c. 151 (“*MLA*”). It is this debt (approximately \$489,000) which underlies the claim of lien. Yukon Zinc says that if the debt had been assigned when the lien was filed, then the lien is not valid. Hy’s North says that Yukon Zinc is barred from raising this issue because of issue estoppel, a stay issued in collateral debtors relief proceedings in British Columbia, and because the assignment is not relevant to the validity of the miners lien.

BACKGROUND

[2] Hy’s North provided trucking services to Yukon Zinc between November 2014 and February 2015, transporting, among other things, copper, zinc, carbon and lead concentrate from Yukon Zinc’s Wolverine mine in the Yukon to ports and other transportation facilities in British Columbia. Yukon Zinc began experiencing financial difficulties over this time period, and fell behind in its payments to Hy’s North.

[3] In late November 2014, Hy’s North began issuing invoices to Yukon Zinc stating:

Please be advised that we have assigned, made over and sold to ACCUTRAC CAPITAL ITC INC. all of our rights and interests in and to the account receivable arising from this invoice and that all payments should be made to:
ACCUTRAC...

[4] On December 10, 2014, Hy’s North issued the first of many subsequent invoices containing the following notice:

NOTICE OF ASSIGNMENT

Please be advised that we have assigned, made over and sold to ACCUTRAC CAPITAL INC. all of our rights and interest in and to the account receivable arising from this invoice and that all payments should be made payable to: Accutrac...

[5] On December 11, 2014, Hy's North advised Yukon Zinc that it was going to "start factoring" its invoices with Accutrac Capital ITC Inc. ("Accutrac"), and that all future invoices were to be paid directly to Accutrac. It is undisputed that this involved some form of an assignment of the debt owing from Yukon Zinc to Hy's North for its trucking services.

[6] On February 10, 2015, Mr. Halliday sent an email to Yukon Zinc instructing it to pay past due invoices to the "finance company". Again, it appears to be undisputed that this was a reference to Accutrac.

[7] On March 13, 2015, Yukon Zinc commenced debtors relief proceedings in British Columbia, under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, and, on the same day, obtained an order which granted, among other things, a federal stay of all proceedings against it (the "initial order").

[8] On April 1, 2015, Hy's North filed its miners lien against Yukon Zinc, based upon what was then asserted to be a debt of over \$550,000.

[9] On May 15, 2015, Hy's North commenced this proceeding by filing a petition seeking a declaration that it has a valid and subsisting miners lien against Yukon Zinc's Wolverine Mine.

[10] On May 27, 2015, the parties entered into a letter agreement whereby Hy's North agreed to deliver concentrate to Richmond, British Columbia, in exchange for Yukon

Zinc agreeing to pay outstanding invoices totalling almost \$49,000. All of those invoices were stamped with the same notice of assignment referred to in para. 4 above.

[11] On June 26, 2015, Madam Justice Fitzpatrick, of the Supreme Court of British Columbia, issued a second order in the debtors relief proceedings approving a process for determining the claims of the creditors of Yukon Zinc.

[12] On July 21, 2015, Hy's North, through Mr. Halliday, submitted a proof of claim form within the debtors relief proceedings in British Columbia, asserting a claim of almost \$489,000 as a secured claim on the basis of its miners lien against the Wolverine Mine. The form asked whether the claim had been assigned by Hy's North to another party and Mr. Halliday answered "No".

[13] On August 17, 2015, Yukon Zinc filed a form entitled Notice of Revision on Disallowance (referred to by the parties by the acronym "NORD") in the debtors' relief proceedings accepting the quantum of Hy's North's claim, but stipulating that it should be referred to as an unsecured claim, pending the subsequent determination of the validity of its miners lien.

[14] On October 28, 2015, Fitzpatrick J. made an order lifting the stay of proceedings against Yukon Zinc for the limited purpose of allowing this Court to determine, among other things, the validity of Hy's North's miners lien. In doing so, she stated:

70 In substance, the issue here is to determine which court can better conduct a fair and efficient process to determine the validity of Hy's and Sidhu's lien claims. Needless to say, both courts can undertake that matter, but after considering all of the circumstances, I am satisfied that the Yukon court is clearly the more appropriate forum to achieve that result.

71 Accordingly, I am exercising my discretion to decline jurisdiction in relation to certain of the lien issues with a view to those issues being determined by the Yukon court. The order sought by Hy's and Sidhu to lift the stay of proceedings is granted; however, the stay is lifted only to a limited extent. I grant an order seeking the aid of the Yukon court to assist this Court by determining the following specific issues:

- a) do Hy's 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 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*?¹

[15] Counsel for Hy's North have taken the position that, although there was an assignment in place at one time, it was subsequently "unwound".² I assume this means it was rescinded.

[16] On February 17, 2016, Hy's North and the other lien claimant, P.S. Sidhu Trucking Ltd. ("Sidhu"), began the hearing in this Court to determine the validity of their respective miners liens. Counsel agreed that Sidhu would proceed first. At the close of those proceedings, counsel for Yukon Zinc made an application to cross-examine Mr. Halliday on his three affidavits in relation to the assignment issue. Counsel for Hy's North opposed the application and the matter came on for hearing on February 25, 2016.

[17] On February 25th, counsel for Yukon Zinc indicated that, if successful on the application, the document production and cross-examination would occur on February 26th, and a transcript would be available for the continuation of the application to

¹ P.S. Sidhu Trucking Ltd. is another trucking contractor which performed services for Yukon Zinc. It also claims a miners lien against the Wolverine Mine.

² See, for example, counsel's written outline filed February 23, 2016, at para. 35.

determine the validity of Hy's North lien, previously scheduled for Monday, February 29, 2016.

[18] Because time was of the essence, I issued my oral ruling on February 25th ordering the document production and allowing the cross-examination of Mr. Halliday, but only with respect to the time period from November 1, 2014, to July 31, 2015. I indicated that written reasons would follow, and these are those reasons.

ISSUES

[19] The principal issues in this application are as follows:

- 1) Is the assignment relevant?
- 2) Is there a conflict in the evidence about the assignment?
- 3) Has the assignment already been dealt with in the collateral debtors relief proceedings?
- 4) Is Yukon Zinc barred from raising this issue by the stay in the debtors relief proceedings?

ANALYSIS

1) Is the assignment relevant?

[20] This proceeding has been commenced by a petition to determine the validity of the miners lien. Accordingly, it is an application made in chambers, to which Rule 50 of the Yukon *Rules of Court* apply. Rule 50(9)(a) and(c) provide as follows:

Evidence on an application

(9) On an application, evidence shall be given by affidavit, but the court may

(a) order the attendance for cross-examination of a deponent, either before the court or before another person as the court directs,

...

(c) give directions required for the discovery, inspection or production of a document or copy thereof,...

[21] Cross-examination of the deponent on an affidavit in a chambers application is not a matter of right. Rather, it is a discretionary order. The court must exercise its discretion judicially in making such an order, including considering whether the issue on which the cross-examination is sought is relevant and whether the record indicates that there is a conflict in the evidence on the issue: *Harvey v. 5505 Yukon Ltd. et al*, 2011 YKSC 69, at paras. 6 and 7. Generally, if there are facts deposed to in the affidavit that are at issue, the deponent will be ordered to attend for cross-examination: *Brown v. Garrison*, [1967] B.C.J. No. 59 (C.A.), at para. 5. Indeed, it has been said that the right to cross-examine is an integral part of the adversarial process: *L.S. and S.S. v. British Columbia (Ministry of Children and Family Development)*, 2004 BCCA 244, at para. 62.

[22] Similarly, requiring the production of a document by a party or a witness on a chambers application requires the applicant to demonstrate that the relevance of the document outweighs the comparative prejudice: *Wilkie Garment Company Ltd. v. Interlock Holdings Ltd.*, [1993] B.C.J. No. 2604 (S.C.) at p. 4.

[23] Yukon Zinc says that the assignment issue is not only relevant, but it is potentially determinative of the validity of the miners lien. This is because, if there was an assignment in place when Hy's North filed its claim of lien, then, says counsel, Hy's no longer had any interest in the debt owed to it by Yukon Zinc and, there was no basis

for the lien. As authority for the former proposition, counsel relies upon *DiGuilo v. Boland*, [1958] O.R. 384. There, the Ontario Court of Appeal commented upon a provision in the *Conveyancing and Law of Property Act* of Ontario, having a purpose somewhat similar to that of s. 1(1) of the Yukon's *Choses in Actions Act*, R.S.Y. 2002, c. 33, which allows for the assignment of every debt and chose in action (essentially a form of debt) arising out of contract.³ The Court of Appeal in *DiGuilo* stated:

... A legal assignment is not effective or complete until the debtor is given notice... After it becomes effective, the assignor ceases, *vis-à-vis* the debtor, to have any interest in the chose [debt]...

[24] As for the relationship between the debt and the claim of lien, Yukon Zinc's counsel referred to *Esquire Heating & Air Conditioning Ltd. v. Hoffman* (1984), 56 A.R. 184 (Q.B.), where Master Funduk addressed a provision in the Alberta *Builders' Lien Act*. At paras. 18 and 19, he stated:

18 There can be no doubt that a lien claimant can accept something other than full payment, or even payment, in satisfaction of a lien. Properly, it is more correct to talk about satisfaction of the claim secured by the lien rather than satisfaction of the lien, because the lien does not stand on its own. The foundation for the lien is a debt owed to the lien claimant, which debt arises from a set of circumstances that fit into s. 4(1), (2) or (4).

19 The lien given by the *Act* is, at the risk of appearing redundant, a statutory lien. It makes the lien claimant a secured creditor. As indicated in *Wortman*, *supra*, the lien claimant has a charge on the land. The charge is merely

³ s. 1(1) *Choses in Action Act*. Every debt and every chose in action arising out of contract is assignable at law by any form of writing containing appropriate words to that effect, but subject to those conditions and restrictions with respect to the right of transfer as may relate to the original debt or as may be connected with or be contained in the original contract and subject to the *Personal Property Security Act*; and the assignee thereof may bring an action thereon in their own name as the party might to whom the debt was originally owing or to whom the right of action originally accrued, or may proceed in respect of the debt as though this *Act* had not been passed.

security for the payment of the claim. The distinction between the *in personam* claim (the debt) and the lien must be kept in mind. The debt is not dependent on the lien. It is the other way round. The lien is dependent on there being a debt. If there is no debt owed to the lien claimant, for whatever reason, there is no lien. (my emphasis)

[25] Yukon Zinc also relied upon *Henfrey & Co. Ltd. v. Poplar Properties Ltd. et al* (1986), 24 D.L.R. (4th) 313, where the British Columbia Court of Appeal dealt with the issue of the validity of an assignment of an inchoate claim of builders lien under the British Columbia *Builders Lien Act*. While much of the Court's discussion around that issue is irrelevant to the case at bar, the following comment, at para. 12, about the relationship between the debt and the lien claim echoes the words of Master Funduk in *Esquire Heating*:

... The lien claim and the debt are inseparable. The lien claim is not a separate chose in action. The lien claim is a collateral right attaching to the debt and cannot stand and be pursued independently of the debt...

[26] Counsel for Hy's North responded to these submissions with an argument that a claim of lien under the *MLA* cannot be assigned, as there is no provision in the *MLA* for that to happen, and, in any event, such an assignment would also be prohibited by s. 1(1) of the *Choses in Action Act*, cited above. She also referred to the *DiGuilo* case, cited above, at para. 6, for the proposition that, at common law, an assignee (in this case Accutrac) could generally not sue in its own name, but rather could enforce the rights assigned to it only in the name of the assignor (i.e. Hy's North). Therefore, says counsel, even if the debt was assigned to Accutrac at the material time, Hy's North would nevertheless still be the proper party to advance the claim of lien. Putting it another way, Hy's counsel submitted that because this claim of lien is not assignable

under the *MLA*, we are left with the common law position that the lien is properly pursued in the name of the assignor.

[27] With respect, I confess I simply fail to understand this argument. Even accepting for the moment that a miners lien is not subject to assignment⁴, that is not what Yukon Zinc is suggesting may have happened in this case. Rather, it is interested in knowing whether the debt underlying the lien, which gave rise to the lien, and is inseparable from the lien, may have been assigned as of April 1, 2015, when the lien was filed. If so, then there was no debt owed to Hy's North as of that date and, consequently, there can be no lien as of that date.

[28] I conclude Yukon Zinc's argument on this point makes the sought after document discovery and cross-examination relevant.

2. Is there a conflict in the evidence?

[29] Counsel for Yukon Zinc submits that nowhere in any of Mr. Halliday's three affidavits in this proceeding did he provide any evidence concerning the relationship between Hy's North and Accutrac, nor any evidence regarding the assignment of its invoices. As well, counsel states that Mr. Halliday did not give any explanation for the notice of assignment on the invoices. Although counsel has requested Hy's North to provide a copy of any assignment agreement between it and Accutrac, Hy's North has refused to provide any such documents or information.

[30] Yukon Zinc's counsel also points to Mr. Halliday's second affidavit in which he deposed that Hy's North accepted payment from Yukon Zinc pursuant to the letter

⁴ But see s.12 of the *MLA*, which arguably might authorize an assignment. See also *Yukon Energy Corp. v Yukon (Utilities Board)*, 2001 YKCA 2, where the Yukon Court of Appeal noted, with no apparent disagreement, that the facts in that case involved an assignment by Yukon Energy of \$1.5 million of its miners lien claims to the Yukon Government.

agreement of May 27, 2015, whereby Yukon Zinc agreed to pay outstanding invoices of approximately \$49,000. Counsel says this is inconsistent with the notice of assignment to Accutrac on all of the invoices pertaining to the letter agreement, as well as the specific instructions given by Hy's North to Yukon Zinc, by email, to make those payments to Accutrac.

[31] Finally, Yukon Zinc's counsel says that Mr. Halliday has been inconsistent in his affidavits about whether the last day of work (on which Hy's North provided trucking services to Yukon Zinc) was February 2 or 28, 2015.

[32] Counsel for Hy's North submitted in her written outline that there is no material conflict in the evidence in this case because it is uncontradicted that Yukon Zinc owes Hy's North \$485,869.70. I am not sure where this number came from. In the British Columbia debtors relief proceedings the amount that Yukon Zinc admitted it owes Hy's North was \$488,294.70.

[33] Counsel for Hy's North further submitted that the notices of assignment on most of its invoices to Yukon Zinc do not contradict Mr. Halliday's evidence because: "Assignments can be unwound. That is in fact what has occurred in this case." Once again, I am afraid I fail to understand this argument. If it is to suggest that at the time Mr. Halliday swore each of his three affidavits in this proceeding, that the assignment was not in place, then that suggestion was not clearly made by counsel. At the very least, given the tacit admission that such an assignment was at one time in place, it does strike me as reasonable that Yukon Zinc ought to be given an opportunity to explore that issue.

[34] The last point made by counsel for Hy's North on the issue of whether there is a conflict in the evidence is that the simple explanation for why no information is provided in Mr. Halliday's affidavits about the assignment is because "this issue...has already been finally determined" in the British Columbia debtors relief proceedings. This then leads directly to a discussion of the next issue.

3. Has the assignment issue already been dealt with in British Columbia?

[35] Hy's counsel argued that, in the British Columbia debtors relief proceedings, there is a procedure for how the various creditors of Yukon Zinc establish their claims. This is pursuant to the initial order of Fitzpatrick J. of June 26, 2015. In compliance with s. 27 of that Order, Hy's North submitted a "Proof of Claim" form which was dated July 21, 2015, (and not July 2, 2015, as stated in the outline of Hy's North's counsel) asserting that the debt was in the amount of \$488,294.70, as of the original filing date of the debtors relief proceedings, which was March 13, 2015. The Proof of Claim further asserted that the debt had not been assigned. This was responded to by Yukon Zinc when it filed its "NORD" form, accepting that the quantum of the claim was \$488,294.70, but disputing that the claim was secured by a lien claim under the Yukon *MLA*, pending a determination of the validity of the lien. In the "Notice of Dispute" form of Yukon Zinc dated August 18, 2015, it is specified that Hy's North has commenced proceedings under the Yukon *MLA* and has an outstanding application to lift the stay of proceedings in British Columbia to have the dispute resolved in the Supreme Court of Yukon.

[36] The upshot of all of this, says Hy's counsel, is that its claim became an "Allowed Claim", as defined by the initial order of Fitzpatrick J. of June 26, 2015:

“Allowed Claim” means the amount, status and validity of the Claim of a Creditor finally determined in accordance with the Claims Process which shall be final and binding for voting and/or distribution purposes under the Plan [to pay out the creditors] or otherwise.

Thus, submits counsel, the validity of Hy's North's claim has been finally determined and the matter is now *res judicata*. Putting it another way, Yukon Zinc's application in the case at bar constitutes a collateral attack on the Allowed Claim, and the doctrine of issue estoppel precludes it from advancing the application.

[37] Over the objection of Hy's counsel, I allowed counsel for PricewaterhouseCoopers Inc., the “monitor” in the British Columbia debtors relief proceedings, to make submissions on the status of those proceedings in relation to the assignment issue. Counsel was careful to explain that he is a neutral officer of the court overseeing the British Columbia debtors relief proceedings on behalf of all the stakeholders, and he did not take a position on the merits of the application at bar. However, he commented on the impact of Fitzpatrick J.'s order of October 28, 2015, which (paraphrasing) lifted the stay of proceedings against Yukon Zinc, declined jurisdiction to determine the validity of Hy's North's lien, and asked the Supreme Court of Yukon to determine:

- a) Whether Hy's had a valid lien under the Yukon *MLA*;
- b) The priority of the lien, if any; and
- c) What assets in the Yukon the lien would attach to, if any.

The monitor's counsel then concluded with the following submission:

The result of the *NORD* and the above decision in the [debtors relief proceedings] is that all matters regarding the validity of any lien claimed by Hy's are to be determined by the Supreme Court of Yukon. To the extent the timing of an assignment of debt may be relevant to the validity of a

corresponding lien, that matter remains to be determined by the Yukon Supreme Court and has **not** been determined in the [debtors relief proceedings]. (my emphasis)

[38] Yukon Zinc's counsel added that the process described above, leading to the determination of the Allowed Claim, only establishes what was the case as of the filing date of March 13, 2015, but has no bearing on what was the case when the claim of lien was filed on April 1, 2015.

[39] I am persuaded that the timing of the assignment of Hy's North's debt has not been finally determined in the British Columbia debtors relief proceedings. Accordingly, the matter is neither *res judicata* nor subject to issue estoppel.

4. Is Yukon Zinc barred from raising this issue by the stay in the debtors' relief proceedings?

[40] This issue is closely related to the one immediately above. Here, Hy's counsel submitted in her written outline that the issue of whether Yukon Zinc was indebted to Hy's North was not a matter referred to this Court, nor was Hy's "standing" ever raised at any earlier proceeding. Therefore, if Yukon Zinc wants to reopen "that issue", then it would have to do so in the British Columbia debtors relief proceedings.

[41] Once again, I am sorry to say that I do not understand the argument relating to "standing". If it is to say that the status of Hy's North as a creditor of Yukon Zinc was not disputed in the British Columbia proceedings, then I agree. However, that has little or nothing to do with whether Hy's North had a valid miners lien on April 1, 2015, when the claim of lien was filed.

[42] As to whether the issue of Yukon Zinc's indebtedness to Hy's was referred to this Court, I conclude that it was, at least insofar as whether Hy's was owed a debt by

Yukon Zinc when the claim of lien was filed. At that time, Mr. Halliday swore an affidavit stating that it was true that the claimant, Hy's North, "claims as due" the then-sum of \$550,869.70. For the reasons stated above, it is necessary to determine that issue in order to determine the validity of the lien.

CONCLUSION

[43] By 9 AM on February 26 2016, Hy's North shall produce and make available to Yukon Zinc for inspection the following documents pertaining to the period from November 1, 2014 to July 31, 2015:

- i. any agreements between Hy's and Accutrac or any of its related entities;
- ii. any correspondence and documents relating to such agreements, including any correspondence and documents relating to the assignment to Accutrac of Hy's claims against Yukon Zinc; and
- iii. any document evidencing or pertaining to any payments made by Accutrac to Hy's.

[44] Further, Don Halliday shall make himself available for cross-examination by Yukon Zinc at 2 PM on February 26, 2016, on the contents of the affidavit sworn by him on April 1, 2015, supporting the claim of lien filed in the Yukon Mining Records Office under registration RL09233, and the two affidavits sworn by him on April 30, 2015, and February 3, 2016, in this proceeding.

[45] Yukon Zinc shall have its costs in the cause.

GOWER J.