SUPREME COURT OF YUKON

Citation: *Chieftain Energy Limited Partnership v. Pishon Gold Resources Inc.*, 2019 YKSC 22

Date: 20190430
S.C. No.17-A0142
Registry: Whitehorse

BETWEEN

CHIEFTAIN ENERGY LIMITED PARTNERSHIP

PETITIONER

AND

PISHON GOLD RESOURCES INC., OKANAGAN CONTRACTOR SERVICES, WILLIAM McDONALD McKAY, ESTATE OF WILLIAM McDONALD McKAY, and SANDRA LEE McKAY

RESPONDENTS

Before Madam Justice S.M. Duncan

Appearances:

Charles Bois	Counsel for the petitioner
Aimin Liao	Appearing on behalf of the respondent, Pishon Gold Resources Inc.
Mark Wallace and Paul Di Libero	Counsel for the respondents, Okanagan Contractor Services, William McKay, Estate of William McKay and Sandra Lee McKay

REASONS FOR JUDGMENT

INTRODUCTION

[1] This petition arises from three unpaid invoices from August and October 2017, claimed to be owing to the Petitioner, Chieftain Energy Limited Partnership ("Chieftain") for fuel that they delivered to a placer mine site near Nansen Creek ("the mine"). The mine is owned by Pishon Gold Resources Inc. ("PGRI").

[2] Chieftain seeks to enforce a claim of miners' lien against 56 placer claims owned by PGRI in the amount of $58,547.61 plus interest. Chieftain also seeks judgment against PGRI and Okanagan Contractor Services ("OCS"), the operator of the mine for the amounts claimed.

[3] PGRI opposes enforcement of the lien and judgment. PGRI claims that by virtue of a contractual arrangement between it and OCS, a partnership between William McKay (now deceased) and his wife, Sandra McKay, OCS operated the mine, ordered all the fuel and was responsible for paying for it.

[4] OCS acknowledges their role in operating the mine and ordering the fuel. They deny responsibility for payment of almost all of the outstanding invoices on the basis that they already paid PGRI for the fuel ordered in August, and did not benefit from the majority of the fuel ordered in October, especially since a large amount was stored on site for use for the following season by PGRI. OCS did pay into court an amount of $5,263.74 representing the cost of fuel including interest, they calculated they used and benefitted from in October 2017 before they left the mine site.

[5] The issues before the Court are:

i. Is Chieftain entitled to a miner's lien for the sum of $58,547.61, plus pre and post judgment interest, on the mine owned by PGRI, the minerals in the ground, the minerals recovered and in the possession of PGRI, and all property at the mine?

ii. Is Chieftain entitled to judgment against all of the Respondents jointly and severally in the amount of $58,547.61?

iii. Alternatively, is Chieftain entitled to judgment of the full amount against PGRI alone; or judgment against all of OCS, William McKay, the Estate of William McKay and Sandra Lee McKay jointly and severally?

iv. Is PGRI entitled to its application to dismiss this Petition pursuant to Rules 2, 25, and 42 of the *Rules of Court*?

BACKGROUND FACTS

[6] Chieftain is a limited partnership under the Yukon *Partnership and Business Names Act*, R.S.Y. 2002, c. 166, with an office in Whitehorse, Yukon. The general partner is 535768 Yukon Inc.

[7] In or around July 2017, Chieftain acquired the assets of Environmental Refueling Services Inc. ("ERS"), including customer accounts and outstanding accounts receivables. Those customer accounts and outstanding accounts receivable included the account of PGRI. ERS had supplied fuel to the mine site and PGRI had made payments for fuel to ERS. After the purchase by Chieftain, Chieftain received payments from Aimin Liao for the PGRI account and Chieftain agreed to keep the account open and to continue to deliver fuel to the mine site when ordered. From July 2017 to October 2017, Chieftain sent its invoices for fuel delivered to the mine to PGRI and applied all payments received to the PGRI account.

[8] OCS is a general partnership established under the British Columbia *Partnership Act*, R.S.B.C. 1996, c. 348, with a registered address in Summerland, British Columbia. William McKay and Sandra Lee McKay were the sole partners of OCS at the operative time. William McKay was diagnosed with cancer on August 22, 2017. He left the mine site for the last time on September 21, 2017 and passed away on April 24, 2018. The

evidence of OCS in response to this Petition was provided by Sandra McKay who was the bookkeeper for OCS and not involved in the day-to-day operations of OCS at the mine.

[9] Between July 2017 and October 19, 2017, Chieftain delivered eight loads of fuel to the mine. William McKay usually ordered the fuel. On one occasion, Aimin Liao of PGRI telephoned Mr. Geoffrey Struthers, Operations Manager at Chieftain. Mr. Struthers said he could not understand Mr. Liao over the phone, so he called William McKay and received an order of fuel from him.

[10] Chieftain received full payments on five of the eight invoices sent to PGRI through the provision of credit card numbers, bank drafts or cheques. Chieftain did not receive payment for three invoices: #145 dated August 24, 2017; #386 dated October 2, 2017; and, #548 dated October 19, 2017.

[11] In November 2017, after Chieftain had registered a claim of lien at the Whitehorse Mining Recorder's Office, Aimin Liao texted Ben Ryan, Director and Chief Financial Officer of 535786 Yukon Inc. to advise that William McKay worked for OCS not PGRI, and that OCS operated the mine and was responsible for the fuel payments. Chieftain became aware of a written agreement between PGRI and OCS setting out these responsibilities in January 2018 at the time PGRI filed a response to this Petition.

[12] The agreement dated May 29, 2017, was entitled "Agreement for Okanagan Contracting Services to Mine Pishon Gold Property at Mt. Nansen YK at the confluence of noname and Summit creek" [as written]. Pishon Gold mine was referred to as the Client in the agreement and OCS was called the Contractor. The agreement was effective from June 1, 2017 to October 1, 2017. It provided:

> Okanagan Contractor Services will operate Pishon Gold's mine at Mt. Nansen YK using some of the processed gold to cover the operating and set-up costs according to the daily needs of the mining operation. Used at the operator's discretion, then split the rest of gold equally 50%-50% after. Both parties agree to use their first share of the 50%-50% split to pay for the set-up costs first.

[13] Neither this arrangement nor the agreement itself was registered by PGRI or OCS in the Yukon Mining Recorder's office.

[14] OCS's affidavit evidence of Sandra McKay, supported by exhibits, of the source and amounts of payments for fuel delivered by Chieftain to the mine between July 2017 and October 2017 is as follows:

i. July 17, 2017 - $15,452.80 for 20,500 L of fuel – paid to Chieftain by Aimin Liao by his credit card on August 4, 2017; OCS sent Aimin Liao a bank draft in the amount of $15,452.80 on July 31, 2017.

ii. August 1, 2017 - $16,806.38 for 20,000 L of fuel – paid to Chieftain by Aimin Liao by his credit card on August 14, 2017; OCS sent Ms Li, Aimin Liao's wife and bookkeeper a bank draft for $21,000 on August 14, 2017 for the fuel bill and some additional expenses (not identified).

iii. August 11, 2017 - $17,501.13 for 20,011 L of fuel - paid to Chieftain by OCS by bank draft on August 28, 2017 for $17,501.13.

iv. August 24, 2017 (#145-unpaid) - $21,506.54 for 24,500.5L of fuel – OCS sent a bank draft of $10,000 to Ms. Li on August 28, 2017 and another bank draft to Ms. Li of $12,000 on September 7, 2017.

v. September 1, 2017 - $21,488.02 for 24,479.4 L of fuel – paid to Chieftain by OCS by bank draft of $21,488.02 on September 19, 2017.

vi. September 19, 2017 - $20,898.20 for 23,116.2 L of fuel – paid to Chieftain by OCS by cheque for $20,898.20 on October 2, 2017.

vii. October 2, 2017 – (#386-unpaid) -$22,156.19 for 24,507.7 L of fuel – no payments to Chieftain.

viii. October 19, 2017- (#548-unpaid) - $14,884.88 for 16,000.1L of fuel – no payments to Chieftain.

[15] Although the agreement between OCS and PGRI was to have ended on October 1, 2017, OCS subcontractors processed pay dirt and operated the wash plant (owned by OCS) at the mine on October 8, 9, 10, 11, 2017. The subcontractors continued working until October 13, 2017, stockpiling pay dirt and stripping ground. They remained at the mine site until October 21, 2017.

[16] Aimin Liao remained at the mine site until October 16, 2017.

POSITIONS OF PARTIES

i) Chieftain

[17] Chieftain delivered fuel to the mine site as it was ordered. It did so on the basis of a prevenient arrangement or agreement it said existed between PGRI and ERS, whose assets Chieftain purchased around July 2017. Chieftain sent invoices to PGRI and attributed payments received to the PGRI account.

[18] Chieftain did not know until November 2017, after the lien was registered, that William McKay was not employed by PGRI. Chieftain did not see the agreement between PGRI and OCS until January 2018 when the response to this Petition was filed.

[19] Chieftain says that for the purpose of enforcing a lien under the *Miner's Lien Act*, R.S.Y. 2002, c. 151, it does not matter who orders the supplies. It has filed and perfected the lien within the appropriate time frame. This lien fits within the remedial purpose of the *Miner's Lien Act* to protect those who supply materials to a mine that contribute to the extraction of minerals.

[20] Chieftain argues it is entitled to judgment of the outstanding invoice amounts plus interest from either PGRI or OCS fully, or all of the Respondents, jointly and severally. In support of the joint and several liability argument, Chieftain says PGRI and OCS are *de facto* partners. Section 10 of the *Partnership and Business Names Act* in Yukon provides that every partner in the firm is liable jointly with the other partners for all debts and obligations.

ii) OCS

[21] OCS accepts liability for $5,263.74 of the outstanding invoices. OCS does not dispute that William McKay was responsible for operating the mine, and ordered the fuel. OCS says they made payments to PGRI for the outstanding August 2017 invoice. The October fuel deliveries included fuel that was stored at the mine over the winter for use by PGRI in the 2018 season. The $5,263.74 represents half of the value of the fuel, including tax and pre-judgment interest, OCS used in October when they ran the wash plant for four days, stripped the site and stockpiled pay dirt so processing could begin early in the next season while the ground was still thawing. This calculation is reached by subtracting from the 40,507.70 L of fuel delivered to the mine site in October, 28,800 L of fuel which OCS estimates was stored on site, on the basis of their knowledge of the fuel capacity of the various pieces of equipment. This results in a

balance of 11,700.7 L of fuel estimated to have been used between October 1 and 13, 2017. OCS assumes liability for half of that amount at an average price estimate of $0.86/L as it says that both OCS and PGRI benefitted from the profit activities in October.

[22] OCS argues that because they had no agreement with PGRI for the 2018 season, any fuel that was delivered in October 2017, not used and stored over the winter, was for the sole benefit of PGRI.

[23] OCS denies that PGRI and OCS were partners, pointing to the agreement between them as evidence. The agreement shows no intention for the parties to form a partnership. It calls PGRI the Client and OCS the Contractor, and there is no provision for sharing of liabilities. Ownership of the equipment at the mine site was not shared and most of it was owned by PGRI. All of the claims were owned by PGRI.

iii) PGRI

[24] Aimin Liao of PGRI contests whether fuel was in fact delivered by Chieftain in the amounts recorded on the invoices. He insists that Chieftain should have receipts from their fuel truck drivers for every delivery, showing the amounts delivered, dates of delivery and who signed for them. Without those receipts he asserts that Chieftain's claims are not credible.

[25] Aimin Liao says he never ordered any fuel for the mine site. It was always ordered by OCS. They were required to order it under the agreement as the operators of the mine. He argues that OCS paid the fuel invoices on every other occasion, either directly to Chieftain or to PGRI by way of reimbursement.

[26] Aimin Liao's response to OCS's claim that they paid PGRI for invoice #145 in August 2017 is that those bank drafts were for monies owing for other purposes, not for fuel.

[27] In response to the OCS argument that the October fuel deliveries primarily benefitted PGRI, because most of the fuel was stored on site, Aimin Liao denies there was any fuel stored in the equipment at the site. He left the mine on October 16, 2017 and agrees that OCS subcontractors were there until October 21, 2017. Aimin Liao further argues that the agreement between PGRI and OCS provides that any supplies used, including fuel, are required to be replaced by OCS and that the October fuel was to replace the fuel that was supplied in 2016 and used at the beginning of the 2017 season.

[28] Aimin Liao also denies that PGRI and OCS were partners.

ANALYSIS

i) Lien Claim of Chieftain

[29] I agree with Chieftain that the agreement between PGRI and Chieftain for the supply of fuel at the mine site was a prevenient arrangement, meaning "a series of transactions [that] are linked together by a preliminary understanding to become one continuing contract" (*Tage Davidsen Drywall Supplies Ltd. v. Alberta Natural Gas Company Ltd.*., [1991] 82 D.L.R. (4th) 1, para. 11). The leading case setting out the law of prevenient arrangements is *Board of Trustees Rocky Mountain School Div. No. 15 v. Atlas Lumber Co.*, [1954] S.C.R. 589. The Alberta Court of Appeal in following this case in *Tage Davidsen* said:

> … the supplier agrees to supply materials as ordered from time to time on terms then agreed upon or to be fixed later

> as the materials are supplied. The "preliminary understanding" may be sufficiently informal that it is not, itself, a binding contract, nor need it contain all the terms upon which the material is to be supplied. Nevertheless, the informal understanding serves to link together the later series of transactions into one continuing contract or open account … (para. 9).

The Court of Appeal in *Tage Davidsen* further stated "[i]t is a question of fact in each case whether the series of transactions are so linked …" (para. 11). Prevenient arrangements are not binding contractually as they are understandings. Lien dates run from the last delivery of materials so long as one project only is involved (*Dufferin Concrete Products v. Waterbrooke Development Ltd.*, [1992] 8 C.L.R (2d) 132, p. 2.).

[30] In this case, Environmental Refuelling Services (ERS) had been supplying fuel to PGRI at the mine site previously. Although Mr. Liao denies an account had been established between PGRI and ERS, there is evidence in his credit card statement of a payment to ERS in 2017. When Chieftain purchased the assets of ERS, to continue the same fuel supply business, it also purchased ERS customer accounts, including the PGRI account, and accounts receivables. There is no evidence provided by Mr. Liao to explain how else Chieftain began to supply fuel to the mine site. OCS agrees that there was a prevenient arrangement between Chieftain and PGRI. Chieftain continued to supply fuel to the mine site as it was ordered and continued to invoice PGRI.

[31] I do not accept Mr. Liao's contention that there is no evidence that the fuel was delivered in the amounts as set out in the invoices because Chieftain was unable to produce all of its receipts. While the preferable business practice would be to have signed copies of receipts for fuel delivered, the evidence of both Chieftain and OCS, the undisputed operator of the mine, was that the fuel was delivered in the amounts

invoiced. Chieftain did provide some evidence of fuel deliveries in its affidavit through a driver manifest form, delivery tickets and bills of lading. I note, as did counsel for OCS, that at no time during 2017 did Aimin Liao or anyone from PGRI question the amounts on the invoices or payments or the amounts of fuel delivered. The truckers also did not report any issues with deliveries.

[32] Section 2(1) of the *Miner's Lien Act* provides:

> 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. (emphasis added)

[33] I find that the delivery of fuel to the mine site does fit within the definition of s. 2(1). Fuel is clearly a material provided to a mine either preparatory to or in connection with the recovery of a mineral. As stated in *Access Mining v. United Keno*, 2000 YTSC 541, 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 (para. 5). In that case environmental consulting services were included in s. 2(1). Here, even on the restrictive interpretation, the supplier of fuel qualifies as a lien claimant under s. 2(1).

[34] Mr. Liao's contention that he did not order any fuel, saying it was the responsibility of and done by William McKay and OCS, is not a defence to the lien enforcement. I agree with Mr. Liao that the conversation between Mr. Struthers of Chieftain and Mr. Liao, in which Mr. Struthers said he could not understand Mr. Liao, is insufficient to establish that Mr. Liao ordered or tried to order fuel. However, for the purposes of s. 2(1) of the *Miner's Lien Act* it is not relevant because it does not matter who orders the supply of materials to the site in order for the lien to be valid.

[35] Section 6 of the *Miner's Lien Act* requires that a claim of lien must be registered before the expiration of 45 days from the last day on which the work or service or supply of material that is the subject matter of the claim, was performed. Section 8 provides that legal proceedings must be initiated in the Supreme Court before 60 days have expired since the registration of the claim of lien.

[36] Here the last fuel delivery was on October 19, 2017. The lien claim was registered on November 16, 2017. The Petition was commenced on January 8, 2018,

53 days after registration of the claim of lien, and the certificate of pending litigation was also filed on January 8, 2018.

[37] The statutory requirements of the *Miner's Lien Act* have been met. Chieftain is entitled to the relief claimed in paras. 3, 4, 5, 6, 7, 8 of the Amended Petition.

ii) Judgment against PGRI or OCS, and the McKays, or both

[38] The evidence in support of a determination of whether judgment can attach to OCS as well as to PGRI is incomplete. It is unfortunate that William McKay was unable to participate in these proceedings because of his untimely passing as he clearly had the best evidence to provide on behalf of OCS. In addition, there is a larger dispute between PGRI and OCS about proceeds from the mining operation, which all agreed should not form part of this Petition. I have weighed the evidence available to the Court in this Petition to arrive at the conclusions below.

[39] I do not agree with Chieftain's argument that OCS and PGRI are jointly and severally liable based on the existence of a *de facto* partnership among the respondents. I agree with OCS and PGRI that there was no intention among the respondents to create a partnership. Equipment ownership is not shared, liabilities or losses are not shared, and ownership of the claims themselves is not shared. The agreement dated May 29, 2017 between OCS and PGRI sets out the nature of their contractual relationship and it does not fit the legal definition of a partnership. (*Partnership and Business Names Act*, s. 1)

[40] Joint and several liability is most often a concept arising in tort actions, not contractual disputes. Here, there is no determination of negligence or fault to be made, but instead a determination of which entity is responsible for payments of a debt. That

determination is dependent on the nature of the relationship between the respondents, as well as the nature of the relationship between the respondents and the petitioner.

[41] The Alberta Court of Queen's Bench quoted from Halsbury's Laws of England in *Canadian Imperial Bank of Commerce v. Mom's Recipe Ltd.*, [1984] A.J. No. 137, para. 5, in explaining joint promises, several promises and joint and several promises:

> i. Joint Promises: Joint liability arises when two or more persons jointly promise to do the same thing: for instance, B and C jointly promise to pay $100.00 to A. In the case of a joint promise, there is only one obligation, namely that each of B and C is liable for the performance of the whole promise and by payment of $100.00 by one discharges the other. Joint liability is subject to a number of strict and technical rules of law which are discussed below.
>
> ii. Several Promises: Several liability arises where two or more persons make separate promises to another; for instance, B and C each promise to pay $100 to A. In this case, the several promises by B and C are cumulative, thus A may recover $200.00 and payment of $100.00 by one of them does not discharge the other. There are therefore two separate contracts, one between A and B and the other between A and C, and there is no privity between B and C.
>
> iii. Joint and Several Promises: Joint and several liability arises where two or more persons join in making a promise to the same person, and at the same time, each of them individually makes the same promise to that same promisee; for instance, B and C jointly promise to pay $100.00 to

> A, but both B and C also separately promise that $100.00 will be paid to him by either B or C. Joint and several liability is similar to joint liability in that the co-promisors are not cumulatively liable, so that the payment of $100.00 by B to A discharges C, but it is free of most of the technical rules governing joint liability.

[42] Here, in my view, none of these concepts applies in the determination of whether PGRI or OCS and the McKays are responsible for the debt. The prevenient arrangement which gives rise to the obligation to pay was between Chieftain and PGRI. OCS was not a party to this arrangement. Chieftain had no knowledge of OCS's involvement as operator at the mine site and did not know that William McKay was not an employee of PGRI. The Chieftain invoices were addressed to PGRI and payments received were applied to the PGRI account. The fuel tax exemption number was PGRI's, not OCS's. No information about OCS was provided to or investigated by Chieftain to ensure its credit-worthiness. As the Court of Appeal for Ontario wrote in *Warburg-Stuart Management Corporation v. DBG Holdings Inc*., 2016 ONCA 157, in overturning an order for joint and several liability, where claims arise under written engagement agreements, that liability "should be restricted to the contracting parties under each agreement" (para. 29). Although in this case the prevenient arrangement was not in writing, the agreement is evidenced by the payments made to Chieftain in July, August and September, the bills of lading, delivery tickets, and the actual delivery of the fuel.

[43] However, OCS's acknowledgement of the agreement between it and PGRI as well as their assumption of some liability for the outstanding invoice amounts based on

the terms of the agreement with PGRI, means I must consider the effect of that agreement on the obligation to pay. This consideration is about the requirement of OCS to pay PGRI, who in turn is liable to Chieftain.

[44] The agreement between PGRI and OCS is not clearly written and is not in the usual legal agreement format. It does provide that OCS was engaged to operate the mine for the 2017 season (June 2017 to October 1, 2017); and at their discretion some of the processed gold was to be used to cover the operating and set-up costs according to the daily needs of the operation. The remaining gold was to be split 50%-50% between PGRI and OCS and they agreed to prioritize payment of set-up costs before splitting any profits equally. They also agreed to use their first share of the 50%-50% split to pay for the set-up costs.

[45] The manner in which fuel payments were made between July and September 2017 – that is, all the costs were borne by OCS - provides evidence that this agreement was followed. Although the agreement ended on October 1, 2017, both parties appear to accept that it continued until OCS workers left the mine site on October 21, 2017 as neither argued that the terms of the contract did not apply after October 1.

a. August invoice

[46] The invoice #145 dated August 24, 2017, was for $21,506.54 for 24,500.5 L of fuel. OCS argues it paid PGRI for this fuel invoice amount by two bank drafts; one for $10,000 on August 28, 2017 and the other for $12,000 on September 7, 2017, for a total of $22,000, slightly more than the fuel invoice. PGRI says those payments were for other things, not the fuel bill. Mr. Liao did not provide any evidence of those other things.

[47] I find the OCS explanation that these drafts were for the August 24 fuel bill difficult to accept for the following reasons:

i. By August, OCS had started to pay Chieftain directly, instead of requiring PGRI to pay up front and reimbursing them. According to Mr. Liao, the reason for the reimbursement of the first two invoices dated July 17 and August 1 was that at the beginning of the season, OCS did not have the immediate necessary cash flow to pay the invoices, and needed assistance from PGRI to meet the payment obligations in a timely way. OCS paid the fuel invoice immediately before this one (August 11) directly to Chieftain, and OCS also made payments after this directly to Chieftain. For OCS to pay amounts in instalments to PGRI given this pattern seems anomalous.

ii. Unlike the other reimbursements to PGRI made by OCS in July and August, these were paid in two instalments, not one, on different dates, suggesting the monies may have been for other purposes.

iii. In the evidence provided by Sandra McKay, the two bank drafts on August 28 and September 7 did not have a Chieftain fuel bill attached to which the amounts could be attributed. The other payments did have the Chieftain bill attached in her affidavit, except for the October 2 cheque but it was addressed directly to Chieftain.

iv. The first bank draft OCS attributed to invoice #145 and provided to PGRI was dated the same date as another bank draft that OCS submitted directly to Chieftain for payment of a previous fuel invoice-

> August 28. It seems odd that OCS would not submit that partial payment directly to Chieftain, or wait another 10 days to pay the full amount directly to Chieftain.

[48] The preponderance of evidence – actual and circumstantial – suggests that Mr. Liao's explanation is more plausible and the bank drafts dated August 28, 2017 and September 7, 2017 were paid to PGRI by OCS for other reasons, not for fuel. OCS is required to pay PGRI for the August invoice in the amount of $21,506.54, plus interest.

[49] As OCS is a partnership with Sandra McKay and William McKay as sole partners, OCS, Sandra McKay and the estate of William McKay are jointly liable for these payments to PGRI.

b. October invoices

[50] OCS assumes partial responsibility for the payments owing on the two October 2017 invoices. There is no evidence of who ordered the fuel in October. William McKay had left the site in September 2017. OCS does not deny ordering it though, and does not deny it was delivered in the amounts noted on the invoices. This is consistent with the practice throughout the summer.

[51] The OCS affidavit evidence related to the use of the fuel delivered in October is hearsay. Counsel for OCS conceded at the hearing that the affiant, Sandra McKay, had never been on site and was relying on her sons who were working at the site, for the information about the work done in October and the equipment capacity for fuel storage. Her sons did not provide affidavit evidence.

[52] OCS says they used fuel to operate the wash plant for four days in October, and derived some benefit from that process. However, they say they did not benefit from any

use of the rest of the fuel as it was stored on site and OCS did not operate the mine after October 2017.

[53] OCS's conclusion about the amount of fuel that was stored was deduced from the fuel capacity of each piece of equipment on site, and the amount of fuel that was delivered and estimated to be used, and not from actual on site observation or measurement.

[54] Mr. Liao denies that any fuel was stored on site. However, he left the site before the last fuel delivery was made. Alternatively, he argues that even if fuel was delivered and stored, this was required under the agreement with OCS based on the clause providing that any supplies used during the term of the contract had to be replaced by OCS. Mr. Liao said this October delivery was to replace the supply of fuel that existed at the mine site at the beginning of 2017 from the 2016 season.

[55] There is no evidence of what if any fuel was on site at the beginning of the 2017 season. There is also no evidence that supplies that are to be replaced at the end of the season by the operator include fuel.

[56] I find on the evidence that fuel was stored on site and the only fuel used in October was as noted by OCS. Even though the evidence about the storage is hearsay, there was no other explanation provided of what happened to the fuel that was delivered, and OCS, the operator who was on site until the end does not dispute the October fuel deliveries in the amounts set out by Chieftain. Given that the agreement between PGRI and OCS ended in October 2017 and was not renewed for the 2018 season, the fuel left on site was for the benefit of PGRI.

[57] I find that the obligation to replace 'supplies' does not extend to fuel and in any event there is no evidence of the amount of fuel that may or may not have been there at the beginning of the 2017 season.

[58] As a result, I find that PGRI is responsible to pay the fuel invoices from October, less the $5,263.74 that OCS has paid into court. Chieftain provided an alternative calculation at the hearing in reply but given the fact that I have found that PGRI is responsible for the balance I do not find it necessary to consider this untested unsworn calculation.

iii) Application to Dismiss by PGRI

[59] Mr. Liao brought an application to dismiss the Petition pursuant to Rules 2(5), (6), (7), 25(24) and 42(7), (8), (9) (10). He argues that Chieftain failed to comply with the *Rules of Court* because they failed to produce all of the receipts for fuel delivery to the mine site. He argues that the fuel receipts setting out the name of the client, the delivery time, the amount of fuel, with the signature of the client should have been produced by Chieftain. He says these are necessary for the filing of the annual tax return to Revenue Canada so they must exist.

[60] Rules 25(24) and 42 apply to civil trials, not petitions. They are not applicable here.

[61] Rule 2 does provide that a court may dismiss the proceeding where the petitioner refuses or neglects to produce or permit to be inspected any document or other property.

[62] Chieftain has advised through its counsel on several occasions (through email and at case management conferences) that it has looked for these receipts in its

records without success. It did provide some documents (driver manifest, delivery tickets, bills of lading) from its records. OCS, the operator of the mine site and the party responsible for ordering and using the fuel, did not dispute the delivery amounts. At the Case Management Conference of January 17, 2019 Chief Justice Veale did not order specifically that the fuel receipts be disclosed, as argued by Mr. Liao, but instead ordered that each of the Petitioner and the Respondents produce a list of documents and serve the other parties with the list and copies of the documents.

[63] Rule 2 is discretionary, not mandatory. In these circumstances, specifically that Chieftain produced what records they said they could find, and more importantly that there is no dispute from the mine operator about amounts of fuel delivered, this is not a situation where the Court should exercise discretion to dismiss the Petition. Mr. Liao's application to dismiss is denied.

[64] I order as follows:

1. A declaration that by virtue of a prevenient arrangement between Chieftain Energy Limited Partnership and Pishon Gold Resources Inc, Pishon Gold Resources Inc. owes $58,547.61 plus pre and post judgment interest calculated under the *Judicature Act* from the applicable due date of each invoice to Chieftain Energy Limited Partnership.
2. Judgment in favour of Chieftain Energy Limited Partnership against Pishon Gold Resources Inc. in the amount of $58,547.61 plus interest calculated as set out in paragraph 1 and costs as agreed or assessed.

3. A declaration that Chieftain Energy Limited Partnership has a valid and subsisting miner's lien under the *Miners Lien Act* for the judgment amount upon Pishon Gold Resources Inc.'s estate or interest in and to:
    i. The mine located near Nansen Creek, Yukon, including all mining claims and leases itemized in Appendix A to the Petition and the structures thereon and appurtenances thereto;
    ii. The minerals concerned in the ground;
    iii. The minerals concerned, when severed and recovered, while in the hands of an owner; and
    iv. All fixtures, machinery, tools, appliances and other property in or on the mine.
4. A declaration that the miner's lien has priority over any mortgages or encumbrances.
5. Chieftain Energy Limited Partnership may apply to this Court for directions, if the minerals or ore produced from the mine are not sufficient to satisfy the registered lien, with respect to any order for the sale of Pishon Gold Resources Inc. estate or interest in the mine, the minerals and/or any material, equipment, machinery and chattels against which the lien attaches, to take place after three months from the recovery of judgment.
6. Okanagan Contractor Services shall pay to Pishon Gold Resources Inc. the amount of $21,506.54 plus pre and post judgment interest.

7. The payment by Okanagan Contractor Services into court of $5,263.74 shall be provided to Chieftain Energy Limited Partnership in partial satisfaction of the October invoices.

[65] Costs may be spoken to, if necessary.

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DUNCAN J.