

No. S-228723
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT OF
PURE GOLD MINING INC.

PETITIONER

APPLICATION RESPONSE

Application response of SCR Mining and Tunneling L.P. ("**SCR Mining**") and Nuna Logistics Limited ("**Nuna**", together the "**Application Respondents**")

THIS IS A RESPONSE TO the notice of application of Pure Gold Mining Inc. (the "**Petitioner**" or "**Pure Gold**") filed May 18, 2023 (the "**Notice of Application**"). Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Notice of Application or the Sixth Report of the Monitor dated May 19, 2023 (the "**Sixth Report**").

Part 1: ORDERS CONSENTED TO

The Application Respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: None.

Part 2: ORDERS OPPOSED

The Application Respondents oppose the granting of the orders set out in paragraph 1 of Part 1 of the notice of application. Specifically, the Application Respondent opposes paragraphs 9, 10, 20 and 29 of the Approval and Reverse Vesting Order.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondents takes no position on the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: None.

Part 4: FACTUAL BASIS

Priority – Lien Claim

1. The Application Respondents are lien claimants with secured claims pursuant to Ontario's *Construction Act*, R.S.O. 1990, c. C.30. (the "**Construction Act**").

SCR Mining

2. SCR Mining supplied labour, material, and equipment to Pure Gold with respect to an improvement being carried out at the Property known as the “Red Lake Mine Project” (the “**Project**”), which is located in Madsen, Ontario. The labour, materials, and equipment were supplied between June 1, 2022 and October 31, 2022.
3. On October 31, 2022, when Pure Gold filed for protection pursuant to the CCAA, SCR Mining was owed substantial arrears in respect of the labour, material, and equipment supplied to the Project for the benefit of Pure Gold.
4. On November 1, 2022, SCR Mining registered a construction lien in the amount of \$577,053.22 (exclusive of HST) (“**SCR Lien**”) pursuant to the Construction Act against the property where the Project is located.
5. On November 7, 2022, SCR Mining perfected the SCR Lien by:
 - (a) Issuing a statement of claim in the Ontario Superior Court of Justice bearing Court File No. CV-22-00000100-000; and
 - (b) issuing a Certificate of Action and registering same against the property where the Project is located.

Nuna Logistics

6. Nuna supplied labour, materials, and equipment to Pure Gold with respect to an improvement being carried out at the Project. The labour, materials, and equipment were supplied between November 28, 2021 and October 26, 2022.
7. On October 31, 2022, Nuna registered a construction lien in the amount of \$3,828,741.92 (registered as Instrument No. KN111773) (“**Nuna Lien**”) pursuant to the Construction Act against the property where the Project is located.
8. On November 7, 2022, Nuna perfected the Nuna Lien by:
 - (a) issuing a statement of claim in the Ontario Superior Court of Justice bearing Court File No. CV-22-00000103-000; and
 - (b) issuing a Certificate of Action (bearing Instrument No. KN111895) and registering same against the property where the Project is located.

The Proposed Transaction

9. On May 18, 2023, the Application Respondents received the Notice of Application from the Petitioner seeking approval of the Transaction contemplated by SPA. Unlike a traditional purchase agreement in the insolvency context, the consideration being paid by the Purchaser almost wholly flows directly to Sprott in its capacity as mortgagee, rather than to the Petitioner or the Monitor while priority of claims that may be asserted is determined. The consideration being paid directly to Sprott rather than to the Petitioner and/or the Monitor, includes:
 - (a) \$4,732,500 of cash;

- (b) 40,730,677 common shares of the Purchaser;
 - (c) a convertible promissory note in the amount of US\$6,783,932; and
 - (d) a 1% net smelter royalty.
10. The value of the consideration is estimated to be \$49.4 million to \$58.4 million which is far in excess of the amounts outstanding under the Interim Financing Facility.
11. The Approval and Vesting Order also requests that:
- (a) the SCR Lien and Nuna Lien be discharged without any payment to the Application Respondents or reserve established with the Monitor while the validity and priority of the liens are determined; and
 - (b) the directors and officers be released from any claims, including statutory claims arising pursuant to the Construction Act for breach of trust.
12. The Petitioner is, in effect, seeking a distribution order disguised as the approval of the Transaction, which materially prejudices the Application Respondents and other lien claimants who, without sufficient evidence to the contrary, have priority over Sprott's mortgages pursuant to the *Construction Act* (other than in respect of the Interim Financing Facility).
13. The Monitor in its Sixth Report provides no comment or advice with respect the SCR Lien and Nuna Lien and appears to have given no consideration or assessment of the relative priorities between the liens and Sprott's security.
14. SCR Mining and Nuna have approached Sprott and have proposed delivering the proceeds to Pure Gold or the Monitor pending determination of the priorities between SCR Mining and Nuna's liens and Sprott's security. Sprott has not agreed to "park" the proceeds on the basis that the proceeds are not purely cash. Pure Gold and Sprott are seeking to avoid the scrutiny of an application for distribution by justifying the distribution based on the terms of the transaction they seek to approve.
15. Additionally, given that the SCR and Nuna Liens were not satisfied, the Petitioner did not fulfill its trust obligations under the *Construction Act* and, as result, the Application Respondents have statutory trust claims against the directors and officers of the Petitioner which appears could be released, both to the Application Respondents' detriment and the detriment of other claimants, unless the Petitioner acknowledges that such claims, if proven, would constitute wrongful conduct and therefore be excluded from the proposed release pursuant to Section 5(2) of the CCAA.

Part 5: LEGAL BASIS

Construction Liens Have Priority Over Mortgages

16. The Application Respondents support and adopt the application response of Veolia Water Technologies Inc. in respect of the priorities established by the Construction Act.
17. For greater certainty, SCR Mining and Nuna state:
 - (a) Sprott has failed to meet its onus to oust the priority of the lien claimants under section 78(1) of the Construction Act;
 - (b) Sprott has failed to meet its onus to establish priority under section 78(3) of the Construction Act;
 - (c) At minimum, the lien claimants have priority to the extent of the holdback Pure Gold failed to maintain pursuant to s. 78(2) of the Construction Act;
 - (d) There is no evidence of value of the property when the first lien arose; and
 - (e) SCR Mining and Nuna ask that an amount equal to the amount of the lien claims be held in reserve in the Monitor's trust account pending determination of the validity of the lien claims and the priority issues as between lien claimants and mortgagee, in accordance with the claims process.

Release of Statutory Trust Claims Is Not Appropriate

18. The Application Respondents do not oppose releases being included in the Approval and Reverse Vesting Order. Instead, the Application Respondents seek to revise the proposed Approval and Reverse Vesting Order ¹ to expressly account for the continuation of trust rights provided for by the Construction Act.
19. The Construction Act, Part II, contains a complete code of trust provisions intended to protect and assist construction claimants in claims against, among others, insolvent parties.
20. Section 7 of the *Construction Act* creates an owner's trust for the benefit of contractors:

**Owner's trust
Amounts received for financing a trust**

7 (1) All amounts received by an owner, other than the Crown or a municipality, that are to be used in the financing of the improvement, including any amount that is to be used in the payment of the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor [emphasis added].

21. We further refer the Court to s. 9 of the *Construction Act* which provides:

¹ Included at Schedule "A" to the SPA, which is attached as Exhibit "C" – "E" to Affidavit # 2 of Jonathan Singh made May 18, 2023.

Vendor's trust

Amounts received a trust

9 (1) Where the owners' interest in a premises is sold by the owner, an amount equal to,

(a) the value of the consideration received by the owner as a result of the sale,

less,

(b) the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any existing mortgage indebtedness on the premises, constitutes a trust fund for the benefit of the contractor.

Obligations as trustee

(2) The former owner is the trustee of the trust created by subsection (1), and shall not appropriate or convert any part of the trust property to the former owner's own use or to any use inconsistent with the trust until the contractor is paid all amounts owed to the contractor that relate to the improvement.

22. Section 13 of the *Construction Act* further provides for personal liability of a corporation's directing minds for a breach of trust:

**Liability for breach of trust
By corporation**

13 (1) In addition to the persons who are otherwise liable in an action for breach of trust under this Part,

(a) every director or officer of a corporation; and

(b) any person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities,

who assents to, or acquiesces in, conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.

23. Accordingly, to the extent that Pure Gold's officers and directors assented to or acquiesced in conduct that they knew or reasonably ought to have known amounts to breach of trust, they are subject to claims by trust beneficiaries that are not displaced by virtue of the CCAA proceedings.
24. Indeed, while section 5.1 of the CCAA allows for the "compromise" or release of claims against directors, any such releases are appropriately limited.

Claims against directors - compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

[emphasis added]

25. The Court in *Blue Star Battery Systems International Corp., Re*, [2000] OJ No 4587 has confirmed that wrongful conduct “is conduct which would be tortious (or akin thereto) as well as any conduct which was illegal”. Breach of statutory trust under the *Construction Act* is conduct analogous to tortious conduct, is illegal, and is properly excluded from any release granted under section 5.1(1) of the CCAA.
26. Under the *Bankruptcy and Insolvency Act*, a creditor’s debt and any claim and judgment relating thereto on the basis of a finding of liability for breach of trust under provincial construction lien legislation survives bankruptcy and the insolvency process. [Section 178\(1\)\(d\) of the Bankruptcy and Insolvency Act](#) provides as follows:

An order of discharge does not release the bankrupt from any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others.
27. An order of discharge does not release a bankrupt from any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others. It would be inconsistent to permit directors to avoid such liability by an order granted pursuant to the CCAA, which they would otherwise be liable under the *Bankruptcy and Insolvency Act*.
28. To the extent that the release is included in paragraph 29 of the Approval and Reverse Vesting Order, the release ought to expressly provide for the continuation of trust claims under the *Construction Act*.

29. The Application Respondents request that Paragraph 29(A) of the Approval and Reverse Vesting Order be revised as set out below:
- A) nothing in this paragraph shall waive, discharge, release, cancel or bar any claim against the directors and officers of the Petitioner that is not permitted to be released pursuant to section 5.1(2) of the CCAA, including trust claims commenced under Part II of the *Construction Act*, R.S.O. 1990, c. C.30.
30. Further, Nuna and SCR Mining take the position that there should be disclosure of the D&O Insurance policy(ies), and support and adopt the Application of Linda Larouche et al in respect of an Order for Pure Gold to disclose any and all insurance policies that may be available to the claims asserted against Pure Gold or its directors (D&O Insurance Policy).

Jurisdiction

31. The Application Respondents submit that there are jurisdictional issues with respect to the priority dispute pursuant to section 78 of the Construction Act being heard in British Columbia.
32. For example, in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*, Justice Farley, was asked to make determinations with respect to the rights of lien claimants in Yukon under the *Miners Lien Act*, R.S.Y.T. 1968, c. 116, within bankruptcy and insolvency proceedings in Ontario. Justice Farley held as follows:

It must be recognized that Yukon law and the Yukon courts will determine the amount of the MLA claims and their priority; however this must interface with the general aspect of the defendant's insolvency.

[...]

I am of the view that the mixed or compromise approach is the reasonable one to adopt in these circumstances. It seems to me that this can be achieved by having the Yukon court adjudicate the MLA claims but providing that this Court as the one involved in the insolvency proceedings grant an order that any MLA claims for which proofs of claim not filed with the IR for adjudication in the Yukon Court (assuming no excess problem) by a specific date will be barred. In this regard, I would request the aid of the Yukon Court in its bankruptcy capacity (see s. 188 BIA) to assist in the implementation of this to the extent necessary.

33. The British Columbia Court of Appeal, in *Ecco Heating Products Ltd. v. J.K. Campbell & Associates Ltd.*, 1990 CarswellBC 416, has also held that it should be a British Columbia rather than an Alberta court that would decide on whether the trust provisions of the BC Lien Act applied in the circumstances:

Of at least equal importance, I think, are the difficulties which would be imposed on the plaintiff were it to be obliged to deal with the interpretation of the British Columbia statute in the courts of another province.

The question whether the trust provisions of the Builders Lien Act apply in the present circumstances — where no lien could ever arise, by reason of the work having taken place on land belonging to a federally-regulated undertaking, and where the parties are not resident in the province — is one which may raise a constitutional issue and also issues of conflict of laws, but involves as well issues of statutory interpretation requiring consideration of the existing jurisprudence in this province. Its resolution would be more difficult in the courts of another province, where our law must be established through evidence, than in a British Columbia court where the cases are known and can be dealt with in the ordinary way.

34. In the circumstances, it is appropriate to have the Ontario Court determine the priority dispute and, in the interim, reserve an amount equal to the amount of the lien claims in the Monitor's trust account.

Part 6: MATERIAL TO BE RELIED ON

35. Affidavit of John Paul Ventrella sworn May 25, 2023.
36. Affidavit of Justin Morello sworn May 25, 2023.
37. Affidavit of Jonathan Singh sworn May 18, 2023.
38. Sixth Report.

The Application Respondent estimates that the application will take 15 minutes.

The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is: [\[Set out the application respondent's address\(es\) for service in compliance with Rule 4-1 \(1\) of the Supreme Court Civil Rules and any additional address\(es\) under Rule 4-1 \(2\) that the application respondent wishes to include\].](#)

Dated: May 25, 2023



Signature of John Paul Ventrella

Application Respondent
 Lawyer for SCR Mining and Tunneling L.P.

Glaholt Bowles LLP
Barristers & Solicitors
800 – 141 Adelaide St. W, Toronto,
Ontario, M5H 3L5

Phone: (416) 368-8280
Fax: (416) 368-3467

Dated: May 25, 2023



Signature of Spencer Norris

Application Respondent
 Lawyer for Nuna Logistics Limited

Miller Thomson LLP
Barristers & Solicitors
100 New Park Place, Suite 700
Vaughan, Ontario L4K 0H9

Phone: (905) 532.6617
