

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

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.

### **APPLICATION RESPONSE**

Application response of SCR Mining and Tunneling L.P. ("**SCR Mining**").

THIS IS A RESPONSE TO the notice of application of Sprott Private Resource Lending II Collector LP, Sprott Resource Lending Corp. and Sprott Resource Lending II (CO) Inc. (collectively, "**Sprott**") filed June 15, 2023 (the "**Notice of Application**").

#### **Part 1: ORDERS CONSENTED TO**

None.

#### **PART 2: ORDERS OPPOSED**

1, 2, 3, 4.

#### **PART 3: ORDERS ON WHICH NO POSITION IS TAKEN**

None.

#### **PART 4: FACTUAL BASIS**

#### **Background**

1. SCR Mining is a lien claimant to land owned by the Petitioner, Pure Gold Mining Inc. ("**Pure Gold**").

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*, RSO 1990, c C 30 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 on November 1, 2022; and
  - b. issuing a Certificate of Action and registering same against the property where the Project is located on November 2, 2022.

### **The Contract**

6. On or about June 1, 2022, SCR Mining submitted a proposal to Pure Gold for a time and materials contract for the supply and operation of a Boart StopeMate drill (“**StopeMate**”) at the Red Lake Mine located in Madsen, Ontario (the “**Mine**”). The proposal included, among other items, StopeMate drill rental, labour, and travel and living expenses.
7. On or about June 3, 2022, Pure Gold executed a Purchase Order with respect to the Drilling Work and Materials (“**StopeMate PO**”). The StopeMate PO was revised on June 8, 2022.
8. During SCR Mining’s performance of its work under the StopeMate PO, Pure Gold requested additional services from SCR Mining related to bolting at the Mine. On or about September 13, 2022, Pure Gold executed an additional Purchase Order with respect to the rental of bolters, labour, and materials (“**Bolter PO**”). The Bolter PO was revised on September 13, 2022.
9. SCR Mining provided labour and materials to Pure Gold at the Mine in accordance with the StopeMate PO and Bolter PO until late October 2022.

### Amounts Owing Pursuant to the Contract

10. Pursuant to the StopeMate PO and Bolter PO, SCR Mining rendered the following invoices to Pure Gold which amounts were not wholly paid:

Invoice #	Invoice Date	Billing Period	Associated Date Range	Invoice Amount (HST Incl.)
729	22-Jul-22	June	Jun 23 - Jun 30	\$47,401.41
768	25-Aug-22	July	Jul 1 - Jul 31	\$132,299.52
822	30-Sep-22	August	Aug 1 - Aug 31	\$120,758.63
830	20-Oct-22	September	Sep 1 - Sep 30	\$104,430.16
831	20-Oct-22	September	Sep 20 - Sep 30	\$77,439.91
908	28-Nov-22	October	Oct 1 - Oct 18	\$45,808.43
909	28-Nov-22	October	Oct 1 - Oct 23	\$251,044.13
943	05-Jan-23	November	materials only	\$10,635.03
			<b>Total</b>	<b>\$789,817.22</b>

11. Pure Gold only made partial payments as against the invoices rendered by SCR Mining. The total amount paid was \$372,206.03, leaving a balance owing of \$417,611.19 inclusive of HST, which is the amount now asserted as a claim for lien by SCR Mining.

### Nature of the Work Completed by SCR Mining to the Mine

12. Pursuant to the StopeMate PO, SCR Mining provided Stope Drilling services to the Mine. Stope drilling uses machines to drill long holes into the rock in the Mine. In this case, the drillers were used to create drill holes in the Mine, that could be blasted so that ore could be extracted.

13. Pursuant to the Bolter PO, bolts are driven and drilled into the roof and side walls of mine tunnels, for the purpose of ensuring that the Mine can operate without collapsing. In this case, Pure Gold was excavating a new mine tunnel and SCR provided the bolting for ground support to ensure mine safety.

### The Spratt Advances

14. Spratt pleads that it entered a financing package with Pure Gold on August 6, 2019 relating to the Mine.

15. On August 6, 2019 Spratt registered a mortgage on title to the Mine under Instrument No. KN91467.

16. A summary of the amounts that Spratt alleges it advanced to Pure Gold between August 6, 2019 and October 5, 2022 is as follows:

Advance	Funding Date	Amount (USD)
<b>Gold Stream</b>		
Advance 1	7-Aug-19	\$25,000,000
<b>Senior Facility</b>		
Advance 1	7-Aug-19	\$10,000,000
Advance 2	30-Apr-20	\$20,000,000
Advance 3	8-Dec-20	\$35,000,000
Advance 4	14-Apr-21	\$12,500,000
Advance 5	18-Jun-21	\$7,500,000
<b>2022 Advances</b>		
Advance 1	11-Jul-22	\$2,249,419
Advance 2	5-Aug-22	\$137,961
Advance 3	6-Sep-22	\$282,752
Advance 4	30-Sep-22	\$2,171,675
Advance 5	5-Oct-22	\$243,683
<b>TOTAL</b>		\$114,841,807

## PART 5: LEGAL BASIS

### I. SCR Mining’s Work to the Mine Constitutes Supply of Services and Materials to an “Improvement”

#### The *Construction Act* Applies to Mines

17. Section 171(1) of the *Mining Act* provides that the *Act* applies to mining:

Except as provided in this Act, the *Construction Act* applies to mines, mining claims, mining lands and connected works.<sup>1</sup>

There is minimal caselaw on lien claims regarding mines. However, in *Lake of the Woods v. Kenora Prospectors*,<sup>2</sup> the Court found that materials supplied to a mining site, even if not installed, are lienable:

*This court finds on the evidence that there was an improvement in fact and that the presence of the equipment supplied by the plaintiffs added to the ability of the mining program to be moved forward.*

<sup>1</sup> [R.S.O. 1990, c. M.14, s. 171.](#)

<sup>2</sup> [Lake of the Woods Electric \(Kenora\) Ltd. v. Kenora Prospectors & Miners Ltd.](#), 1996 CarswellOnt 1325 (Gen. Div.) at [para. 39.](#)

## SCR's Work Constitutes an "Improvement" under the Act

18. Section 14 of the *Construction Act* (the "**Act**") provides that anyone "who supplies services or materials to an improvement" has a lien upon the premises those materials or services were supplied to.
19. Spratt's position is that SCR's work to the Mine did not give rise to a lien, because it constitutes daily operational work, and not an "improvement" to the premises. Spratt submits that SCR's work did not provide "a permanent structure integral to the structure of the land", but rather "equipment and services for the daily operations of the business within the already-existing structure of the Mine". Spratt relies on *Kennedy Electric v. Rumble Automation Inc.*<sup>3</sup> in support of this position, which provides:

*In most cases, the installation or repair of machinery used in a business operated in a building, particularly where the machinery is portable, will not give rise to lien rights under the CLA. On the other hand, where machinery is installed in a building for the use of a business and is completely and permanently integrated into the building, a lien claim will arise.*

In *Kennedy Electric*, the work completed by the lien claimants was the design and installation of an assembly line to be used to manufacture truck frames.

20. At the time that *Kennedy Electric* was decided by the ONCA in 2007, the *Construction Lien Act* defined "improvement" as follows:<sup>4</sup>

*(a) any alteration, addition or repair to, or  
(b) any construction, erection or installation on,  
any land, and includes the demolition or removal of any building, structure or works or part thereof, and "improved" has a corresponding meaning;  
("améliorations", "amélioré")*

21. In 2010, Ontario amended what was then the *Construction Lien Act*, to expand the definition of improvement to include any construction or installation on the land, which is "essential to the normal or intended use of the land, building or structure or works." The *Act* now defines "improvement" as:

*in respect of any land,*

*(a) any alteration, addition or capital repair to the land,*

*(b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on*

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<sup>3</sup> [Kennedy Electric Ltd. v. Dana Canada Corporation, 2007 ONCA 664, at para 50.](#)

<sup>4</sup> [Construction Lien Act, R.S.O. 1990, c. C.30, s 1\(1\).](#)

the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or

(c) *the complete or partial demolition or removal of any building, structure or works on the land;*<sup>5</sup>

22. The *Act* does not require an improvement to create “permanent structures integral to the structure of the land”. The *Act* only requires construction on the land which is essential to the intended use of the land. Pursuant to the StopeMate PO, SCR Mining altered the Mine by drilling holes in the rock to in a desired drill pattern, in order to prepare for future blasting and collection of subsequent broken material. Pursuant to the Bolter PO, SCR Mining drilled bolters into the walls and roof of the mine to keep it from collapsing. SCR Mining’s work was essential to the land’s intended use as a mine.
23. Sprott also references *On Point Ltd v Conseil des Écoles Catholiques du Centre Est*,<sup>6</sup> to support their position that “equipment designed and used for the operations of the business within the structure, not integral to the structure, do not thus become improvements.” *On Point* does not stand for this proposition. In *OnPoint*, the Court found that the lien claimant’s work, constructing and installing 14 portables for a school, which were moveable and not integral to the structure (the school) constituted an “improvement”. In the quote from *On Point* cited by Sprott, Justice Doyle was referencing *Chubb Security Safes v. Larken Industries Ltd.*<sup>7</sup> in a summary of prior caselaw on this issue. *Chubb Security* is a 1990 case wherein the court interprets “improvement” under the prior definition under the *Act*.
24. Regardless, SCR Mining submits that its work constituted an improvement, even if this proposition in *Chubb Security* is applied, because its work was integral to the Mine. SCR Mining drilled bolts into the walls and roof of mine tunnels to ensure the mine could function without collapse. The very purpose of that work was therefore the integrity of the structure. Even if the old definition still applied, SCR Mining’s work would be lienable.
25. SCR Mining’s work also qualifies as an improvement as any “alteration to the land”. Pursuant to the StopMate PO, SCR Mining altered the Mine by drilling holes in the rock in a desired drill pattern, in order to prepare for future blasting and collection of subsequent broken material, which did not previously exist. Pursuant to the Bolter PO, SCR Mining drilled bolts into the walls and roof of specific mine tunnels to keep it from collapsing.

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<sup>5</sup> [R.S.O. 1990, c. C.30, s 1.](#)

<sup>6</sup> [On Point Ltd. v. Conseil des Écoles Catholiques du Centre Est, 2023 ONSC 1341, at para 58.](#)

<sup>7</sup> [Chubb Security Safes v. Larken Industries Ltd., 1990 CarswellBC 683, at para. 25.](#)

26. SCR asks this Honourable Court to find that it is entitled to a claim for lien, in the amount of \$417,611.19, and that provisions of the *Construction Act* apply to the resolution of the priority dispute before the Court.

## II. SCR Mining's Lien Has Priority Over the Sprott Advances

### SCR's Lien has Priority Pursuant to s 78(1)

27. Section 78(1) of the *Act* provides that liens have priority over all conveyances, mortgages or agreements, subject to a number of exceptions:

*78 (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.*

28. The Ontario Court of Appeal has confirmed that a mortgagee has the onus to persuade the court that a section 78 exception is triggered.<sup>8</sup> Given that Sprott is asserting priority over the lien claimants, Sprott has the onus to establish that the Sprott Advances have priority over the lien claims.

### Sprott Fails to Establish an Advance Was Made

29. Sprott's position is their advances made pursuant to their mortgage registered August 6, 2019 (the "**Sprott Advances**") have priority over SCR Mining's lien pursuant to subsection 78(3), because the mortgage was registered, and the funds were advanced to Pure Gold prior to when SCR Mining's lien arose. Subsection 78(3) provides that mortgages that are not building mortgages, that were registered prior to when the lien arose will have priority over the lien to the lien "to the lesser extent of,

(a) the actual value of the premises at the time when the first lien arose;  
and

(b) the total of all amounts that prior to that time were,

(i) advanced in the case of a mortgage, and  
(ii) advanced or secured in the case of a conveyance or other agreement."<sup>9</sup>

30. The *Act* provides that liens arise as soon as a party commences the work:

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<sup>8</sup> [Boehmers v. 794561 Ontario Inc., 1995 CarswellOnt 244 \(C.A.\)](#); affirming [1993 CarswellOnt 821 \(Gen. Div.\)](#) at para. 54.

<sup>9</sup> [Construction Act, R.S.O. 1990, c. C.30, s 78\(3\)](#).

15. *A person's lien arises and takes effect when the person first supplies services or materials to the improvement.*<sup>10</sup>

31. Sprott's position is that the mortgage was registered, and the first advance was made August 6, 2019. While the mortgage is clearly registered on title to the Premises, Sprott has not provided sufficient evidence that any advance was made. Sprott therefore fails to meet its onus under section 78(1) to establish priority over SCR Mining's claim for lien.

### **Sprott Leads No Admissible Evidence of "Actual Value" of the Premises**

32. Sprott has provided no evidence of the actual market value of the Premises to establish the extent of their alleged priority.

33. Caselaw suggests that a real estate appraisal from a qualified expert is required for the Court to determine "actual value" of a property in a priority dispute under Section 78. In *Cam Moulding & Plastering Ltd. v. Dupont Developments Ltd.*,<sup>11</sup> the Court ruled that the opinion of a real estate appraiser, who did not provide a formal appraisal, was unhelpful to the court. The lien claimants retained the appraiser only to provide an opinion on the "reasonable sale price" of a property, rather than a formal appraisal of value. In addition to the fact that report was not a formal appraisal, the court relied heavily on the principles outlined in the Canadian Uniform Standards of Professional Appraisal Practice ("CUSPAP") to determine the report was unhelpful.

34. In *Avenue Structures Inc. v. Pacific Empire Development Inc.*,<sup>12</sup> the court considered competing real estate appraisals from qualified experts to determine "actual value" where a mortgagee was asserting priority under s 78(3).

35. These cases suggest that anything short of formal appraisal of value of the property is inappropriate to assist the court in determining the actual value of the premises at the time the lien arose.

36. To establish the "actual value of the premises when the lien first arose", Sprott uses the market capitalization rate of Pure Gold. Sprott states that "traditional real estate appraisals cannot accurately gauge the value of a mine because they do not accurately reflect the value of the potential value of the underground minerals (with the minerals ultimately being the largest contributor to the value of the Mine)." Sprott provides no case wherein the Court considered market capitalization of a business as evidence of the "actual value" of the premises. The value of Pure Gold's business is not interchangeable with the market value of the property.

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<sup>10</sup> [Construction Act, R.S.O. 1990, c. C.30, s 15.](#)

<sup>11</sup> [Cam Moulding & Plastering Ltd. v. Dupont Developments Ltd., 2018 ONSC 3126 \(Master\), at paras 80-87.](#)

<sup>12</sup> [Avenue Structures Inc. v. Pacific Empire Development Inc., \[2000\] OJ No 3272, at paras 28-35.](#)



### **Sprott's Evidence of the Value of the Business Ought to be Struck**

37. Even if this Court were prepared to accept market capitalization as a means to determine the actual value of the premises, Sprott's evidence regarding market capitalization should be found inadmissible. SCR pleads that paragraphs 17 to 29 of the Affidavit of Narinder Nagra ("**Nagra**"), sworn June 15, 2023, ought to be struck from the record, or otherwise found inadmissible evidence in this dispute as opinion evidence from a fact witness. Nagra has not been qualified as an expert by this Court and is not entitled to provide opinion evidence.
38. Since Sprott has failed to meet its onus to establish sufficient grounds for priority pursuant to section 78(1), this application should fail on this basis alone. If Sprott has no basis under section 78 to assert priority over SCR, then SCR is entitled to full priority in the amount of \$417,611.19 as a result of having a valid claim for lien, pursuant to section 85 of the *Construction Act*.

### **III. Alternatively, the Sprott Advances Constitute a Building Mortgage Pursuant to s. 78(2)**

39. If this Court determines that the Sprott mortgage is entitled to priority under s. 78(3), SCR Mining pleads that the funds constitute a building mortgage under s. 78(2) of the *Act*. Section 78(2) provides:

*(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.*

40. SCR Mining submits that, at a minimum it is entitled to the 10% holdback owing to it pursuant to the StopeMate PO and Bolter PO. Section 22 regarding of the *Act* regarding the basis holdback, provides:

*(1) Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under this Act.*

SCR Mining has not been paid any of the 10% holdback it is owed from Pure Gold. The quantum of this holdback, pursuant to section 22 is 10% of the total price of the services and materials SCR actually supplied to the improvement. As set out in paragraph 17 above, the total price of the services and materials

supplied by SCR to the improvement is \$789,817.22. The total holdback claimed by SCR is therefore \$78,981.72.

41. There is no evidence that Pure Gold complied with its obligations to retain holdback pursuant to the *Construction Act*. In any event, there are no holdback funds available, and the sale of the mine has produced a shortfall. As a result, the holdback Pure Gold failed to retain from SCR is subject to a section 78(2) priority claim by SCR in the amount of \$78,981.72.
42. In order to claim priority under section 78(2), Sprott must show that the purpose of the mortgage is unrelated to financing the improvement at issue. The Court has held that when a mortgage is taken out with dual purposes, both to finance the purchase of the land and to finance an improvement, the advances to finance the improvement will be treated as a building mortgage pursuant to s. 78(2).<sup>13</sup>
43. SCR Mining submits that the Sprott Advances, or some part of them, were advanced to finance an improvement to the Mine. Regardless of how they are characterized by Sprott, the 2022 advances were made after the first lien arose on the improvement. A lien arises at the point where a lien claimant begins its supply of services. In the case of SCR this was on June 1, 2022, prior to the 2022 advances. The Court can infer from this record that Sprott was financing the improvement which SCR and the other lien claimants supplied services.
44. Simply put, Sprott was advancing funds to Pure Gold pursuant to its mortgage while the lien claimants were providing services and materials to the Mine. Sprott characterizes this work and the advances as being for the operation of the Mine, not an as an improvement. However, if their argument that SCR's services are not lienable is flawed, and SCR is entitled to a lien as it has demonstrated above, then it follows that financing advanced for the purpose of paying for lienable services is financing provided pursuant to a building mortgage, pursuant to s. 78(2).
45. Despite its s. 78(1) onus to establish its priority, Sprott has not produced the underlying mortgage documents, which may address the purpose of the advances. Sprott references a number of documents in the Second Affidavit of Narinder Nagra in connection with the Sprott Advances, including a:
  - a. Credit Agreement;
  - b. Production Payment Agreement;
  - c. Purchase and Sale Agreement;
  - d. Security Share Agreement;
  - e. Sprott Debenture;
  - f. Amended and Restated Credit Agreement; and
  - g. Second Amended and Restated Credit Agreement with Pure Gold.

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<sup>13</sup> [Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd, 2014 ONCA 500, at para 23.](#)

46. Despite referencing them in its materials, Sprott has produced none of these documents in this proceeding, wherein they are seeking a declaration that the Sprott Advances have priority over the lien claims. The only documents relating to the Sprott Advances which Spott has produced are the mortgage registered on title, and the Demand Debenture executed by the parties. SCR Mining requests that this court draw an inference adverse to Sprott's position for the failure to produce plainly relevant documents in this proceeding.
47. In the alternative to SCR Mining's claim that it is entitled to full priority for its lien claim in the amount of \$417,611.19, SCR states that it is entitled to priority over Sprott in the amount of the deficiency in Pure Gold's holdback obligation, \$78,981.72.
48. In any event, SCR Mining asks that this application be dismissed, with costs payable to SCR on a substantial indemnity basis.

**PART 6: MATERIAL TO BE RELIED UPON**

1. The Affidavit of John Paul Ventrella, sworn May 25, 2023.
2. The Affidavit of Jorge Bedoya, sworn June 6, 2023.
3. Such further and other material as this Honourable Court may permit.

Dated: June 23, 2023

Per:



as duly authorized  
agent for Brendan  
Bowles

Signature of Brendan Bowles

Lawyer for SCR Mining and  
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