

**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 Veolia Water Technologies Inc. (the "**Application Respondent**" or "**Veolia**")

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 Respondent consents 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 Respondent opposes 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 Respondent 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. Veolia and Pure Gold are parties to a series of purchase orders whereby Veolia installed a water treatment plant and provided associated materials in conjunction

with an improvement being carried out at the Property by Pure Gold known as the “Red Lake Mine Project” (the “**Project**”), which is located in Madsen, Ontario.

2. On October 31, 2022, when Pure Gold filed for protection pursuant to the CCAA, Veolia was owed substantial arrears in respect of items they had supplied and worked they had performed in respect of the Project for the benefit of Pure Gold.
3. On November 29, 2022, as result of Pure Gold’s failure to pay, Veolia registered a lien in the amount of \$317,973.35 (exclusive of HST) (the “**Lien**”) pursuant to the *Construction Act*, R.S.O. 1990, c. C.30. (the “**Construction Act**”) against the property where the Project is located. The Lien secures only part of the amount owed to Veolia which in total is approximately \$580,000. Subsequently, Veolia perfected its Lien by filing a statement of claim in the Ontario Superior Court of Justice and serving it on the counsel for the Petitioner. The filing of the action was specifically permitted by paragraph 15(iv) of the Amended and Restated Initial Order. As a result of the Lien, Veolia is a secured creditor of the Petitioner. The Monitor’s statement in the Sixth Report that there are no other secured creditors of the Petitioner is incorrect. Veolia immediately wrote to the Monitor to ask for the basis of that statement once it reviewed the Sixth Report.

#### The Proposed Transaction

4. On May 18, 2023, Veolia 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.
5. 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.
6. The Approval and Vesting Order also requests that:
  - (a) the Lien be discharged without any payment to Veolia or reserve established with the Monitor while the validity and priority of the Lien is 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.
7. The Petitioner is, in effect, seeking a distribution order disguised as the approval of the Transaction, which materially prejudices Veolia and other lien claimants who

Veolia believes have priority over Sprott's mortgages pursuant to the Construction Act (other than in respect of the Interim Financing Facility).

8. Additionally, given that the Lien was not satisfied, the Petitioner did not fulfill its trust obligations under the Construction Act and, as result, the Application Respondent has statutory claims against the directors and officers of the Petitioner it appears could be released to its detriment and the detriment of other lien claimants, unless the Petitioner acknowledges that such claims, if proven, would constitute wrongful conduct and therefore are not released pursuant to Section 5(2) of the CCAA.

## Part 5: LEGAL BASIS

### Construction Liens Have Priority Over Mortgages

9. Pursuant to Section 78(1) of the Construction Act, construction liens have priority over registered mortgages except in specific limited circumstances:

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.

10. Under the Construction Act, the burden is on mortgagee to prove they fall within an exception to the general rule that valid lien claimants have priority over mortgages. Neither the Petitioner, the Monitor nor Sprott has provided any evidence or support that the general rule should not be followed in these circumstances and the Monitor has provided no basis for their statement in the Sixth Report that it is not aware of any claims that "ranks or *may* rank in priority to Sprott..."

*Dal Bianco v. Deem Management Services et al.*, 2020 ONSC 1500 at para. 26.

11. The Petitioner is seeking to ignore this priority by distributing all the consideration received in the Transaction directly to Sprott. However, the Petitioner and the Monitor have provided no basis in law to ignore this priority or distribute funds in advance of the priority being determined.
12. Sprott may attempt to claim they have priority pursuant to Section 78(3) of the Construction Act, which provides that a mortgagee may have priority for advances made prior to lien arising, but such priority is only to the extent of the **lesser of** (a) **the actual value of the premises at the time when the lien arose**; and (b) the amount of prior advances [*emphasis added*]:

78 (3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser 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.

13. Even if the exception in Section 78(3) may apply (which is not accepted and has not been proven by Sprott), the exercise under Section 78(3) is contextual, fact dependent and requires specific findings regarding the value of the property at the time of the lien arose. No evidence has filed on this issue. However, it is clear that the value of the property and Project is less than the amounts advanced by Sprott and therefore, their priority is capped pursuant to Section 78(3)(a) of the Construction Act. It is Veolia's position that, to the extent Section 78(3) does apply, the value of the property at the time the lien arose was less than amount of consideration received in connection with the Transaction and its improvement at the property materially contributed to the value of the property now expected to be realized upon in connection with the Transaction, which Sprott seeks to take advantage of. Veolia's water treatment facility is crucial to ongoing environmental compliance at the Project and without it, the value of the Project of the mine could be questionable. In evaluating the value of the Project and property at the time the lien arose this is a factor that the court is required to evaluate before deciding priority.

*Park Contractors Inc. v. Royal Bank* (1998), 38 C.L.R. (2d) 255 at para. 28.

14. Alternatively, Sprott may attempt to claim their mortgages constitute building mortgages pursuant to Section 78(2) of the Construction Act, which provides an exception to the general rule that construction liens have priority over building mortgages (except in respect of required holdbacks):

78.(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.

15. However, again, even if Sprott claims they have a building mortgage, it requires specific factual findings regarding the intention of the financing and how the financing was used in relation to specific improvements made by the construction lien claimants. No evidence has been filed by the Petitioner, the Monitor or Sprott on this point. Additionally, even if Sprott's mortgage does constitute a building mortgage, construction lien claimants have priority in respect of required holdback amounts, which have not been determined.
16. Accordingly, neither the Petitioner, the Monitor nor Sprott have not discharged their burden to prove an exception to Section 78(1) applies.
17. In the alternative, even if the Court finds the burden has been satisfied that an exception to Section 78(1) of the Construction Act applies, Section 85 of the

Construction Act creates specific priorities for funds required to be held in trust, which Veolia believes applies in these circumstances.

85 (1) Where a payer becomes insolvent, the trust fund of which that payer is trustee shall be distributed so that priority over all others is given to a beneficiary of that trust who has proved a lien and a beneficiary of a trust created by section 8 that is derived from that trust, who has proved a lien.

#### Sprott Should Not Receive Any Distributions

18. Sprott should not be entitled to receive any amounts on account of pre-filing advances and loans in connection with the Transaction in advance of a proper process to determine who is entitled to such funds. Veolia acknowledges that the Interim Financing Facility has priority over its Lien. However, the value of the consideration as estimated by National Bank in Sixth Report is far in excess of the Interim Financing Facility, and Sprott is receiving significant distributions on account of its pre-filing advances and loans while other secured claims exist that have priority or may have priority over Sprott's security.
19. Seeking to bypass the priority of Veolia and other construction lien claimants without a priority claims process is inconsistent with the CCAA and insolvency practice generally. Paragraph 4 of the Model Approval and Vesting Order (the "**Model Order**") provides as follows:

For the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and from and after the delivery of the Receiver's Certificate all Claims shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having had possession or control immediately prior to the sale.
20. Veolia submits that the same principle as set out in the Model Order should apply in these circumstances. The consideration paid in respect of the Transaction, including the cash, shares, promissory note and net smelter royalty, should be delivered to the Monitor in trust (other than an amount to satisfy the Interim Financing Facility), while relative priorities of pre-filing creditors (including Sprott) can be determined and the proceeds of the sale should only be distributed once such determination is made. Secured claimants should have a proper opportunity to prove their claims and their relative priorities on a proper record with proper notice.<sup>1</sup>

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<sup>1</sup> The Application Respondent received the Notice of Application to approve the Transaction by the Petitioner on May 18, 2023, however, it contained no basis for Sprott's priority or proposed distributions and did not include any evidence or law on the topic. The Application Respondent understands Sprott may file evidence on the issue but only on May 25, 2023, which is one (1) clear business day prior to the application and Veolia will not have an opportunity to respond to any evidence filed.

- 21. To grant the relief as requested by the Petitioner, would be to ignore creditor entitlements, circumvent typical process for determining priorities and effectively determine the ranking of secured creditors without a full record and contrary to well established practice. The basis for support by the Monitor for distributions to Sprott is they were “not aware of any other secured creditors or any claims than ranks or may rank in priority to Sprott...”. This is clearly a false and incorrect assumption.

Release of Statutory Claims Is Not Appropriate

- 22. Veolia supports and adopts the application responses (to be filed) of other construction lien claimants in respect of the requested releases.

**Part 6: MATERIAL TO BE RELIED ON**

- 23. Affidavit of Jordan Wajs sworn May 25, 2023.
- 24. Affidavit of Jonathan Singh sworn May 18, 2023.
- 25. Sixth Report.

The Application Respondent estimates that the application will take 30 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:

Dated: May 25, 2023




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Signature of Jonathan Buysen

- Application Respondent
- Lawyer for Veolia Water Technologies Inc.

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Petitioner

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Proceeding Commenced at Vancouver

**APPLICATION RESPONSE**

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