

SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v Yukon Zinc Corporation*,
2022 YKSC 58

Date: 20221116
S.C. No. 19-A0067
Registry: Whitehorse

BETWEEN:

GOVERNMENT OF YUKON
as represented by the Minister of the Department of
Energy, Mines and Resources

PETITIONER

AND

YUKON ZINC CORPORATION

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the Petitioner

John T. Porter (by video) and
Kimberly Sova

Yukon Zinc Corporation

No one appearing

Counsel for Welichem Research General Partnership

Forrest Finn (by video)

Counsel for PricewaterhouseCoopers Inc.

Emma Newbery

REASONS FOR DECISION

Introduction

[1] This is an application arising from the ongoing court-supervised receivership of the Wolverine Mine, located in southeastern Yukon.

[2] I granted two orders on November 1, 2022, for applications brought by the petitioner. One application was to amend the original Receivership order, dated September 13, 2019, to reflect the reduction of their activities given the transition of the care and maintenance activities to a contractor with the Yukon government effective

November 1, 2022. The other application was for approval of the activities and fees of the Receiver and their counsel. Both applications were unopposed. I advised the parties I would issue brief reasons for granting the application to amend the Receivership order, because of the significant step this represents in the history of this proceeding.

Background of Receivership

[3] The history of the Wolverine Mine (the “Mine”) and its journey to receivership is set out in the *Yukon (Government of) v Yukon Zinc Corporation*, 2020 YKSC 15, and I will not repeat it here except in summary form.

[4] Yukon Zinc Corporation (“Yukon Zinc”) is a company incorporated under the British Columbia *Business Corporations Act*, SBC 2002, c. 57. Yukon Zinc’s principal asset is the Mine located 282 kilometres northeast of Whitehorse, in the traditional territory of Ross River Dena Council, Liard First Nation, Dease River First Nation, and Kwadacha Nation (“the Kaska”). It is a large zinc-silver-lead mine with copper and gold by-products. It consists of 2,945 quartz mineral claims and exploration rights covering 700 kilometres.

[5] The Mine includes underground ramps, tunnels, ventilation and heating systems, a 26-kilometre access road, a 1,340-metre all-weather airstrip, a tailings storage facility, a 1,700-metric-ton-per-day processing mill and related structures, a full-service camp and administration buildings.

[6] Yukon Zinc held a quartz mining licence and a water licence issued under Yukon legislation.

[7] After exploration and development activities from approximately 2008 to 2011, Yukon Zinc began commercial production at the Mine in March 2012. The Mine

operated for approximately three years, employing 300 people at its peak. It was originally estimated to operate for nine years.

[8] However, in 2014, Yukon Zinc began to experience financial difficulties attributed to a downturn in global metal prices, the rising US dollar, and significant development, start-up and operational costs at the Mine. In November 2014, its parent company restricted borrowings and by January 2015, Yukon Zinc decided to put the Mine into care and maintenance because of insufficient funds. Ongoing lack of funds has meant the Mine has remained in care and maintenance since January 2015.

[9] The Mine's condition deteriorated after its closure in January 2015. In 2017, the underground part of the Mine flooded and contaminated underground water was piped to the Mine's tailings storage facility. This caused the tailings storage facility to fill up, with no means of water treatment or available discharge for the contaminated water. The absence of water treatment and the risk of untreated water flowing into the environment was a serious concern to the Yukon government.

[10] The deteriorating condition of the Mine led the Yukon government to increase its involvement at the Mine. Reports from multiple inspections noted concerns with inadequate water management; the inability of the company to undertake the necessary care and maintenance; and the failure to furnish the required security.

[11] Yukon Zinc's failure to rectify the deficiencies led the Yukon government to exercise their statutory authority to enter the Mine and start the necessary work to treat the water and prevent environmental damage.

[12] In July 2019, the Yukon government commenced proceedings under s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, and s. 26 of the *Judicature*

Act, RSY 2002, c. 128. This Court granted a Receivership order on September 13, 2019, to permit PricewaterhouseCoopers Inc. as Receiver to carry out care and maintenance activities at the Mine. This order was approved by the Yukon government.

[13] From that date to November 1, 2022, the Receiver has managed operations at the Mine on a day-to-day basis. They have been primarily concerned with preventing environmental damage caused by contaminated water at the Mine. They have ensured that water treatment has occurred and necessary equipment remained functional or was replaced.

[14] The Receiver has also carried out general receivership activities, such as engaging with stakeholders, negotiating with creditors, and developing and administering a process for selling the assets of the Mine.

[15] During this time, in its role as a court officer, the Receiver has provided a total of 12 reports to the Court, of varying lengths depending on the activities at the time.

Transition of Care and Maintenance Activities

[16] In the spring and summer of 2022, the Receiver and the Yukon government prepared a plan for the care and maintenance activities of the Mine to be transferred to a third-party contractor with the Yukon government. On October 4, 2022, as a result of a procurement process, the Yukon government awarded the care and maintenance activities contract to Boreal Engineering Limited (“Boreal”). Boreal will assume these responsibilities on November 1, 2022. Boreal has a close business relationship with Dena Nezziddi Development Corporation, the economic development corporation of the Ross River Dena Council, in whose traditional territory the Mine is located.

[17] As a result of this transition to Boreal, the Receiver's activities in relation to the Mine will be reduced. Their role will be limited to general receivership activities and assistance during the transition period.

[18] Beginning November 1, 2022, the Receiver's involvement at the Mine will consist of:

- a. general administration of the receivership such as entering into contracts in the name of Yukon Zinc, maintaining the books and records, facilitating conversations with stakeholders as required, and providing a historic knowledge of the Mine; and
- b. ensuring the settlement agreement among the major creditor Welichem Equipment Limited and Welichem Research General Partnership ("Welichem"), the Receiver, and the Yukon government is implemented by facilitating discussions in particular about the removal of Welichem equipment from the Mine.

[19] The Receiver will also maintain limited powers so that in an emergency it could re-assume care and maintenance activities, on application to the Court to increase its powers for that purpose.

[20] The Receiver's final operational activities will occur in November 2022 at the request of the Yukon government. They are the removal of two tailings treatment barges from the tailings storage facility and minor water testing.

[21] Boreal will be responsible for the following:

- a. maintenance of the access road, air strip, and other roads around the Mine;

- b. control of the water on site: that is, ground water, surface water, underground water, and the tailings storage facility;
- c. treatment of the underground water and environmental monitoring and reporting as required;
- d. maintenance of power generation on site to power the camp and equipment required to move and control the water;
- e. repair and maintenance of equipment used to carry out the care and maintenance; and
- f. provision of a continued supply of fuel for power generation, equipment operation, and camp needs.

Amendments to Receivership Order

[22] Given Boreal's assumption of these responsibilities, the Receiver asks this Court to amend the Receivership order to discharge them from the following powers related to care and maintenance:

- a. to take possession and control over physical assets at the Mine that are Yukon Zinc's property including equipment, buildings, inventory, goods and other real and personal property located at the Mine;
- b. to receive, preserve and protect this property by changing locks and security codes, relocating the property, hiring security, maintaining physical inventories, and obtaining insurance coverage;
- c. to manage, operate and carry on the business of Yukon Zinc, including the power to enter into agreements, incur obligations in the ordinary course of

- business, and cease to carry on all or part of Yukon Zinc's business or perform its contracts;
- d. to buy or lease any equipment, supplies, inventories, machinery or other assets to continue the business of Yukon Zinc;
 - e. to undertake environmental or workers' health and safety assessments of the assets, undertaking and property of Yukon Zinc, including all proceeds and operations of Yukon Zinc; and
 - f. to the extent authorized and approved by the Yukon government, to carry out care and maintenance activities at the Mine, and to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

[23] The power set out in (f) is the power that the Receiver will seek to use in an emergency situation.

[24] The powers sought to be retained by the Receiver are set out in detail in the amended Receivership order. Essentially, they are the powers that will permit the Receiver to carry out its receivership duties and facilitate a sale if such an opportunity arises in the future. These powers include: maintain books and records, deal with debts, enter into contracts in Yukon Zinc's name, market and administer any sale of the assets and other powers associated with any sale, apply for permits, licences, approvals or permissions as required in the name of Yukon Zinc, enter into any agreements with the trustee in bankruptcy appointed in respect of Yukon Zinc, and exercise any shareholder, partnership, joint venture or other rights Yukon Zinc might have. The amended Receivership order contains the full list of retained powers.

Legal Principles

[25] Any interested party may apply to the Court to amend or vary the Receivership order (s. 35 of the order).

[26] There is no statutory authority for the discharge of all or part of a receiver's powers. Courts have therefore recognized their role in determining whether a receiver should be discharged of some or all of their powers. This is of particular interest to receivers because of the absence of statutory protection from liability for any act or default done in the administration of the bankrupt's estate, except for protections in s. 14.06 of the *Bankruptcy and Insolvency Act*, (relating to personal liability in matters related to employees, and environmental issues, in specified circumstances).

[27] The court in *Ed Mirvish Enterprises Limited v Stinson Hospitality Inc* (2009), 181 ACWS (3d) 471 (Ont Sup Ct) at para. 8, said a receiver may wish "to be discharged once it has completed the substance of its mandate", unless there is gross negligence or wilful misconduct. That court also noted that a receiver requests a full release so that it does not have to spend time and money defending an action that may be unmeritorious, especially when it cannot recover costs from the estate once discharged.

[28] Similarly, the court in *Red Ash Capital Partners II Limited Partnership v Kraus Inc*, 2012 ONSC 6376 at para. 47, stated that on completion of its mandate, a court-appointed receiver should be granted a discharge, in the absence of the evidence of any improper or negligent conduct.

[29] These principles are reflected in the Receivership order in this proceeding which states at s. 20 that the Receiver:

... shall incur no liability or obligation as a result of its appointment or the carrying out of [the Receivership order], save and except:

(a) any gross negligence or wilful misconduct on [the Receiver's] part; or

(b) amounts in respect of obligations imposed specifically on receivers by applicable legislation.

Nothing in this Order shall derogate from the protections afforded the Receiver by Section 14.06 of the BIA or by any other applicable legislation.

Analysis

[30] In this case, the affidavit evidence in addition to the written and oral submissions show that the Receiver has fulfilled the care and maintenance and related operational activities in its mandate as set out in the Receivership order. The transition of these activities to Boreal commenced November 1, 2022. According to the Receiver's counsel's submissions, supported by the Yukon government counsel's submissions, the transition is proceeding well, especially given the end of the current water treatment season. There is no evidence of negligence or wilful misconduct by the Receiver. It is appropriate for them to be released from the discharged powers as indicated and to focus their activities on general receivership duties as well as to provide advice and assistance in the early stages of the transition.

[31] The amendment to the Receiver's powers is an economically sound approach. It reflects the current reality of the new assumption of responsibilities at the Mine. The amendment to the Receivership order that retains the Receiver's powers to carry out receiver's duties as well as care and maintenance activities in an emergency will allow the Court to continue to obtain reports as required. The Receiver's reports to date have

provided essential information for the court supervision of this receivership. This has been a difficult receivership because of the ongoing serious environmental risks and the litigation involving the Yukon government, the Receiver, and Welichem.

[32] The transition of the care and maintenance activities to Boreal is a significant step in this receivership and the life of the Mine. Boreal's experience in the Yukon and their business relationship with Dena Nezziddi Development Corporation, are positive elements as the necessary ongoing work continues. The involvement of the Ross River Dena Council in this work represents an important opportunity for the First Nation. The continuity provided by Boreal maintaining many of the employees who were working with the Receiver will also assist in the transition and ensure the care and maintenance activities are carried on appropriately.

[33] As noted by counsel for Yukon government, the next stage will be the development of a final closure plan. It is hoped that efforts to complete this stage will be appropriately timely.

[34] My thanks to all counsel for their helpful and professional submissions and especially to counsel for the Receiver for their thorough reports and submissions during this receivership to date.

DUNCAN C.J.