IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Yukon and Canada* v. *B.Y.G. Natural Resources Inc.*, 2007 YKSC 02

Date: 20070103
Docket No.: S.C. No. 04-A0004
Registry: Whitehorse

IN THE MATTER OF THE *JUDICATURE ACT*, RSY 2002, c.128

AND IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*, RSC 1985, c. C-44

AND IN THE MATTER OF THE BANKRUPTCY *AND INSOLVENCY ACT*, RSC 1985, c.B-3

Between:

GOVERNMENT OF YUKON and HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AND NORTHERN AFFAIRS

Petitioners

And

B.Y.G. NATURAL RESOURCES INC.

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

John R. Sandrelli	Counsel for PricewaterhouseCoopers Inc.
David Mitchell	Counsel for the Government of Yukon
John T. Porter	Counsel for Her Majesty the Queen in Right of Canada as Represented by the Minister of Indian and Northern Affairs
Shelley C. Fitzpatrick	Counsel for Ellake Services Limited and Mark L. Cosman

REASONS FOR JUDGMENT

INTRODUCTION

[1] On April 6, 2004, this Court appointed PricewaterhouseCoopers Inc. as Receiver-Manager under the *Judicature Act*, RSY 2002, c. 128 and Interim Receiver under the

Bankruptcy and Insolvency Act, R.S., 1985, c. B-3, of all the assets, both real and personal property, of B.Y.G. Natural Resources Inc. (BYG) (the April 6, 2004 receivership order). For convenience, I will refer to PricewaterhouseCoopers Inc. as the Interim Receiver. The Interim Receiver applies for an order approving a sales and marketing process for the mining claims of BYG and authorization to file an assignment in bankruptcy naming PricewaterhouseCoopers Inc. as Trustee of the Estate. The Interim Receiver seeks various relief relating to its Third Report dated October 13, 2006.

[2] The Interim Receiver also seeks approval of its conduct with respect to sales of certain shares of YGC Resources Inc. (YGC) held by BYG. This approval is contested by Ellake Services Limited and Mark L. Cosman (Ellake/Cosman) who contend they are secured creditors with respect to the YGC shares. In addition, Ellake/Cosman apply to set aside the April 6, 2004 receivership order as it applies to the YGC shares and other personal property of BYG.

[3] Alternatively, Ellake/Cosman apply for leave to commence realization proceedings for the YGC shares and personal property of BYG and an order that the proceeds from the sale of YGC shares be paid to Ellake/Cosman. Two additional applications of Ellake/Cosman, one to be granted leave to commence action against the Interim Receiver for the BYG lapsed claims of 2005 and sale of YGC shares, and the other to cross-examine Hugh Copland and David Sherstone, were adjourned generally.

[4] Canada applies for leave to bring an oppression application against BYG pursuant to section 248 of the Ontario *Business Corporations Act* and that the Interim Receiver be directed not to distribute proceeds realized on the sale of BYG assets pending further order.

[5] I made the following order at the hearing on November 8, 2006:

[1] Approving the sales and marketing process set out in the Third Report of the Interim Receiver dated October 13, 2006, (the Third Report);

[2] Approving the Interim Receiver's budget to December 31, 2006 as set out in the Third Report and that the Petitioners advance such necessary sums to the Interim Receiver for expenditures, professional fees and disbursements to December 31, 2006;

[3] Approving the conduct of the Interim Receiver, excepting the issue of the lapsed BYG claims 2005, but including the sale of YGC shares, as set out in the Third Report;

[4] Directing the Interim Receiver not to distribute proceeds realized on the sale of BYG's assets without court approval;

[5] Amending paragraphs 8(p) of the April 6, 2004 receivership order to provide that the Interim Receiver shall have the right, power and authority to sell any or all of the securities of YGC owned by the Respondent in its discretion, provided that the proceeds of same be held by the Interim Receiver pending a further order of this Court;

[6] Requiring and directing AGT Financial Corp. (AGT) to deliver up to the Interim Receiver all of the securities of YGC owned by BYG in its possession or control for sale in accordance with paragraph 5 above, all on terms which shall preserve the rights of AGT to claim the proceeds thereof pursuant to their security;

[7] Authorizing and directing the Interim Receiver to file an assignment in bankruptcy for BYG naming PricewaterhouseCoopers Inc. as Trustee of the Estate;

[8] Granting leave to Canada to bring an oppression application against BYG pursuant to section 248 of the Ontario *Business Corporations Act* before the Commercial List in the Ontario Superior Court of Justice; and

[9] Dismissing the application of Ellake/Cosman except for adjourning generally the application to cross-examine Hugh Copland and David Sherstone and the leave application to commence proceedings against the Interim Receiver with respect to the BYG claims 2005.

[6] I also ordered the parties in this proceeding in the future to file their outlines and casebooks two days before any hearings. It was particularly vexing to have counsel for Ellake/Cosman file extensive Submissions, a Book of Authorities with 27 tabs and a Book of Authorities with 10 tabs on the first day of the hearing contrary to the Practice Directions of this Court.

BACKGROUND

[7] BYG is an Ontario incorporated mining company that operated a gold and silver mine about 60 kilometres west of Carmacks and 180 kilometres north of Whitehorse from 1996 to 1999. The mine consists of a mine site and certain mineral claims and leases on Mount Nansen.

[8] BYG began to violate the terms of its water licence almost immediately. An inspector under the Yukon *Waters Act,* SY 2003, c. 19 issued 16 formal directions between October 28, 1997 and February 10, 1999. BYG ceased operations on February 18, 1999

when ordered to do so by Canada for failing to follow directions to remedy its environmental problems and water licence violations.

[9] Three criminal charges were laid in the Territorial Court of the Yukon for violations of the BYG water licence. The offences were strict liability offences which means that as soon as Canada proved the act of breach or violation, the onus shifted to BYG to satisfy the court that it acted with due diligence, or reasonably in the circumstances. The receiver for BYG at the time did not participate in the proceeding.

[10] Judge Lilles, in *R.* v. *B.Y.G. Natural Resources Inc.*, [1999] Y.J. No. 34, at paragraph 15, convicted BYG on all three charges and listed seven examples to indicate that no real attempt had been made by BYG to comply with important provisions of the water licence. The following summarizes some of the examples:

(a) It failed to administer a simple treatment to stabilize the arsenic levels in its tailings pond;

(b) It used faulty materials to build its tailings pond dam which allowed seepage to weaken the dam by erosion;

(c) It improperly constructed the ditches which surrounded the tailings pond;

(d) It constructed the tailings pond haphazardly and without proper plans or supervision;

(e) It failed to assign one person to ensure compliance with its water licence.

Judge Lilles also stated at paragraph 23:

> “The above examples demonstrate an attitude consistent with "raping and pillaging" the resources of the Yukon, with little consideration for the detailed conditions of the water licences granted to B.Y.G.. They demonstrate a disregard of the legal requirements. There is little evidence of any diligence, let alone

> due diligence, in the circumstances of this case. Keeping in mind the dangerous and toxic materials involved - heavy metals such as copper and zinc and deadly chemicals such as arsenic and cyanide - the level of care or diligence reasonably expected from B.Y.G. greatly exceeded what the company provided.

[11] In a later point in his reasons for sentencing, Judge Lilles described BYG "to be inept, bumbling, amateurish and possibly negligent". He imposed the maximum fine of $100,000 on each count. He was of the view that the legislation should be amended to provide for piercing the corporate veil in order to permit the imposition of fines and imprisonment on senior officers and managers of the company. It has been estimated that the environmental clean-up costs in this case could be as high as $23 million.

[12] Canada took control of the mine site when it was abandoned in July, 1999. Canada managed the site from July, 1999 to April, 2003 when the Devolution Transfer Agreement between Canada and Yukon transferred the responsibility for care and management of the site from the government of Canada to the government of Yukon. Canada retains the financial responsibility for the cost of remediating the site. Between July, 1999 and April, 2003, Canada spent approximately $6.9 million. Between April, 2003 and March, 2006, Canada has spent approximately $3.8 million to fund the government of Yukon's management of the site.

[13] The April 6, 2004 receivership order appointed PricewaterhouseCoopers Inc. the Receiver-Manager and Interim Receiver over all the assets of BYG. The order was made on a without notice basis. Counsel for Ellake/Cosman appeared at the hearing, although they were not served, and opposed the application. I granted the order sought with the exception of adjourning generally, at the request of Ellake/Cosman, the Interim Receiver's application for its costs and expenses to rank as a first charge against all the assets of

BYG. That order was granted on October 26, 2004 with notice to all parties and the appearance of counsel for Ellake/Cosman. That order has yet to be formally filed and I trust this will be done promptly. I note that the April 6, 2004 receivership order, at paragraph 31, gave liberty to any interested person to apply to this Court to vary the order on 7 days' notice. Ellake/Cosman have taken two and a half years to pursue this application. They have previously appeared by counsel on October 26, 2004 and December 5, 2005 on applications by the Interim Receiver.

The Creditors and Ellake/Cosman

[14] The following is a summary of the potential creditors whose claims and priorities remain to be established at a future hearing:

Creditor	**$000s**
Federal Government	6,938
Yukon Government	4,800
Miners' Liens	2,386
Cosman et al	1,731
Ellake Services	524
AGT Financial Corp.	73
Property Taxes	83
Total	**16,538**

[15] The Ellake claim is based upon a May 29, 1996 US $2 million debenture to Gerald Metals Inc. (Gerald Metals). On August 30, 1999, after BYG abandoned the mine, Ellake purchased Gerald Metal's indebtedness and security interest in BYG. Ellake is a holding company of Robert Chafee and his spouse. Robert Chafee was a shareholder, former

director and Chairman of the Board of BYG. The principal amount of the claim is $524,395 with accumulated interest of $235,799, for a total claim of $760,194.

[16] The Cosman claim is based upon a loan agreement dated November 10, 1998 between Robert Chafee and Bryan Rowntree and BYG in the amount of $1.28 million. Cosman is the trustee of the loan. The Cosman claim consists of the shareholder loan, receivership costs of $384,664, and legal costs of $66,684 from the 1999 receivership of Cosman. The total claim to date is $3,471,173.

[17] Robert Chafee is the principal representative of both Ellake/Cosman creditor claims. He filed two affidavits in this application. In Chafee affidavit #1 he states that as a result of arms length negotiations, Robert Chafee, Nancy Chafee, Bryan Rowntree, Harold Irvine and Graham Dickson paid Gerald Metals $325,002 for certain shares in Trumpeter Yukon Gold Inc. On the same date, Gerald Metals assigned its security against BYG to Ellake for $50,000.

[18] What is clear from all of this is that Canada and Ellake/Cosman do not agree on the respective priorities and claims of the other. The result is this application by Ellake/Cosman to remove certain YGC shares held by BYG from the receivership. Canada, on the other hand, wishes to bring an oppression claim against BYG and others in Ontario to attack the claimed security of Ellake/Cosman. The Interim Receiver also has a claim on the YGC shares to the extent of its receivership costs.

[19] The Interim Receiver does not oppose the application of Canada because it has many concerns about the Ellake/Cosman security. These include:

> [1] Why were the claims not dealt with by their privately appointed receiver in 1999?

[2] Mr. Chafee has significant interests in the Ellake/Cosman claims. He was a director, Chair of the Board of Directors, and a significant shareholder of BYG at the time of the transaction. He is also involved with YGC.

[3] BYG may have been insolvent at the time certain transactions took place between Ellake/Cosman and BYG. Mr. Chafee was a principal of Ellake/Cosman and a director of BYG.

The YGC Shares

[20] YGC is a public gold exploration and mining company based in the Yukon. Its shares trade on the Toronto Stock Exchange.

[21] The Interim Receiver possessed 795,000 YGC shares owned by BYG, and to date, has sold approximately 364,000 shares of YGC at an average price of $1.29 per share for a total of $483,000. The power to sell these shares was granted to the Interim Receiver in the April 6, 2004 receivership order. It provides for such sales so long as the consideration does not exceed $500,000 for each transaction or an aggregate consideration of $2,000,000. The Interim Receiver still holds 439,000 YGC shares.

[22] A third party creditor, AGT Financial Corp. (AGT), possesses approximately 368,400 shares of YGC owned by BYG. The shares were pledged as security for the obligation of BYG to provide 240 ounces of gold and 800 ounces of silver for a delivery price of $100,000. BYG has not delivered all the gold, and the shares were to be held by AGT until all the gold and silver was delivered. AGT has apparently sold 18,500 shares for $9,200 and is holding these funds, along with the 349,900 remaining shares. AGT has agreed to turn over the balance of the YGC shares so long as their right to claim the proceeds is preserved.

[23] Ellake/Cosman have pursued a different approach. They wish to take action against the Interim Receiver for selling the YGC shares and apply to set aside the April 6, 2004 receivership order as it applies to the YGC shares and other personal property.

[24] Robert Chafee, in Chafee affidavit #2, provided the Court with the correspondence of his counsel relating to the YGC shares. He states that he "was absolutely surprised" to hear that the Interim Receiver had sold some YGC shares. He indicates that the share price has climbed to $1.70 per share and he expects it to continue to climb.

[25] At paragraph 15 of Chafee affidavit #2, he swears:

> "Ellake and Cosman have in the past, and continue to demand the delivery up of all YGC shares by the Interim Receiver which were delivered to the Interim Receiver by Graham Dickson in 2004. In addition, we are adamantly opposed to any further sale of the YGC shares. Once Ellake and Cosman are in a position to proceed under their security, Ellake and Cosman will consider what realization can be made on those shares (which may include a voluntary foreclosure of those shares under the provisions of the *Personal Property Security Act*)."

[26] Mr. Chafee did not address the letter of his counsel to the Interim Receiver dated September 2, 2005, attached as Exhibit E to Chafee affidavit #2, which stated:

> "Once again, we request that you take steps to realize on or transfer to our clients the 800,000 Y.G.C. shares that you hold."

[27] Counsel for the Interim Receiver advised that the YGC share price was $.60 on September 2, 2005. The Interim Receiver sold the shares in small blocks between May 5, and August 24, 2006 for a price range from as low as $1.15 to a high of $1.69, for an average price of $1.29.

ISSUES

[28] The following issues arise:

[1] Should the sales and marketing plan be approved?

[2] Should the YGC shares be removed from the receivership?

[3] Should leave be granted to Canada to pursue an oppression application against BYG in Ontario?

1. The Sales and Marketing Plan

[29] The Interim Receiver proposes to separate the BYG mining claims into a core area and a peripheral area. There are a total of 234 claims and 30 leases owned by BYG. The proposal is to remediate the core area which will take years, but offer the peripheral area for sale in the meantime while the mining economy is strong. The core area consists of 48 claims and 17 leases. It is the area where the mining and processing took place. The environmental liability of the core area could be as high as $23 million. The gross metal value of the core area is estimated to be US $21 million with a net recovery value of US $12.5 million. However, the extraction and milling of the ore would exceed the net recovery value without even considering the environmental liability. It would be futile to attempt to sell the core area until the clean-up is completed.

[30] The peripheral area consists of 188 claims and 13 leases. Twenty of those claims are on Category A Settlement Lands of Little Salmon/Carmacks First Nation. Another mining company is exploring the Category A Settlement Lands and holds an additional 20 claims. The First Nation does not oppose the sale of these claims in the peripheral area.

[31] The peripheral area claims have not been developed or mined. The Interim Receiver proposes to sell the claims en bloc as a stand-alone asset to a purchaser in the mining exploration business. It is believed that a higher price will be available if the peripheral area is unencumbered by the core area assets.

[32] Ellake/Cosman do not take issue with the proposed marketing plan except as follows:

> [1] They would like the mineral claims and leases to be marketed on both an individual and en bloc basis;
>
> [2] The only input and assessment of offers should be from Ellake/Cosman;
>
> [3] The Interim Receiver should fully disclose all aspects of the marketing to Ellake/Cosman; and
>
> [4] All the personal property and equipment at the mine site should be sold.

[33] While I am confident that the Interim Receiver will disclose its marketing efforts in its next report, I do not agree with the idea of selling peripheral claims individually. That would create a patchwork of ownership and speculation. It would be preferable to have a single serious mining developer as a purchaser who might also have a long term interest in the core area. The assessment of offers should also be made initially by the Interim Receiver and then be subject to input from all creditors when Court approval is sought.

[34] The principles to be applied to assess a sales and marketing plan were set out in *Yukon* v. *United Keno Hill Mines Ltd.*, 2004 YKSC 59 at paragraph 22, as follows:

> "The law in this area is generally found in cases where court approval is sought for the sale of assets by a Receiver in circumstances where some creditors will not be satisfied. There are three principles that I glean from *Crown Trust Co.* v. *Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.J.) and *Royal Bank of Canada* v. *Soundair Corp.*, [1991] O.J. No. 1137 (O.C.A.):
>
> 1. Generally speaking the court will not intervene when satisfied that the Receiver has acted reasonably, prudently, fairly and not arbitrarily.
> 2. The court should not proceed against the recommendations of the Receiver except in special

> circumstances, where the necessity and propriety of doing so are plain.
> 3. The wishes of interested creditors should be taken into consideration."

[35] I conclude that the sales and marketing plan is reasonable and fair and in the best interests of all creditors. It creates the possibility of a sale of a block of claims and leases while mineral prices are high. It wisely excludes the claims and leases where there will be no possibility of a sale until the environmental clean up takes place. When the clean up is concluded, the core area can be evaluated again to determine its marketability.

[36] I reject the Ellake/Cosman proposal to sell the personal property at the mine site as that has greater value to the Interim Receiver during the environmental clean up. The market value of the equipment is not significant and it would be more appropriate to sell it as a package with the core area.

[37] I approve the sales and marketing plan.

2. The YGC Shares

[38] Ellake/Cosman seek to set aside the April 6, 2004 receivership order with respect to the YGC shares and other personal property. It does so on the primary basis that section 14.06 of the *Bankruptcy and Insolvency Act* only permits Canada and Yukon to recover remediation costs from the real property or immovables of the debtor. It also states that Ellake/Cosman were not given notice of the original April 6, 2004 application. Finally, counsel for Ellake/Cosman submit that even if there is jurisdiction, the court should not have exercised its discretion to grant the April 6, 2004 receivership order over the YGC shares and personal property of BYG.

The Notice Issue

[39] Ellake/Cosman submit that they did not receive notice of the April 6, 2004 receivership order. Counsel submits that since they were not named as parties, nor given notice they are not bound by the April 6, 2004 receivership order. Counsel relies upon the recent decision in *Terra Nova Management Ltd.* v. *Halcyon Health Spa Ltd.,* 2005 BCSC 1017, which the British Columbia Court of Appeal confirmed in 2006 BCCA 458, and stated at paragraph 14:

> "In the circumstances of this case, BDC did not have a positive duty to apply to vary the order of Metzger J. in order to preserve its priority. Thus, BDC was entitled to wait until realization to deal with the difficulty created by the order. Having taken the order without naming BDC as a party, giving notice of the application, or securing its consent, Anderson took the risk of a shortfall."

[40] Counsel for Ellake/Cosman misunderstands the application of *Halcyon Health Spa.* In that case, BDC was claiming priority over the receiver with respect to a forfeited deposit to purchase the asset secured by BDC. Although BDC had knowledge of the receivership, the Court of Appeal ruled that it had no positive duty to apply to vary the receivership order to preserve its priority. By the same token, Ellake/Cosman does not have to set aside the April 6, 2004 receivership order to preserve its alleged priority. The issue of priority between the various creditors of BYG will be determined at a future hearing. There is no necessity to set aside the April 6, 2004 receivership order which was made to preserve BYG assets and remediate the mine site.

[41] In addition, Ellake/Cosman cannot play the lack of notice card. They were represented by counsel at the April 6, 2004 hearing and they have participated in each hearing since. They had actual notice of the hearing on October 26, 2004, which granted

the Interim Receiver priority for its costs and expenses against all assets of BYG. Ellake/Cosman did not appeal the April 6, 2004 receivership order or the October 26, 2004 order.

[42] Furthermore, the present opposition of Ellake/Cosman to the sale of the YGC shares must be distinguished from its claim to priority in the proceeds. Its right to advocate the priority of its claim exists and awaits the priority hearing. However, its claim that it had no notice of the sale of the YGC shares is contradicted by the letter of its own counsel dated September 2, 2005. Not only did it have actual notice of the April 6, 2004 receivership order and the right of the Interim Receiver to sell the YGC shares, it actively encouraged the sale of the YGC shares.

[43] Alternatively, Canada, Yukon and the Interim Receiver submit that Ellake/Cosman have acquiesced in the Interim Receiver's sale of the YGC shares. The principle of acquiescence is set out in the case of *M.(K.)* v. *M.(H.)*, [1992] 3 S.C.R. 6. In that case, delay in the sense of acquiescence was raised as a full defence to the pursuit of an historical sexual assault. The court described acquiescence as an equitable doctrine (page 47) synonymous with estoppel "wherein the plaintiff stands by and watches the deprivation of her rights and yet does nothing".

[44] This principle was applied in *Newfoundland Assn. of Public Employees* v. *Newfoundland (Treasury Board)*, [1995] N.J. No. 256 (S.C.) where the applicant had delayed for six months before bringing an application to set aside an arbitration award. Green J. found the delay of six months to be a reasonable period (paragraph 50). There is no doubt that a party must have a reasonable period to bring an application to set aside an order.

[45] I am of the view that two and a half years is an unreasonable period to bring an application to set aside a court order, particularly when Ellake/Cosman urged the Interim Receiver to sell the YGC shares. While two and a half years may be reasonable in some circumstances, it is not reasonable during the course of a receivership where large amounts of money are being spent to repair the environmental damage caused by a mine.

[46] Further, it is unreasonable for Ellake/Cosman to monitor the proceeding for some two and a half years without either appealing or bringing its present application with some timeliness in the face of the use and sale of the personal property it now claims should not be in the receivership.

The Jurisdiction Issue

[47] Counsel for Ellake/Cosman submit that the Court has no jurisdiction with respect to the BYG personal property (the YGC shares), as the shares are not subject to the potential secured claim of Yukon and Canada. However, the April 6, 2004 receivership order is also founded on section 26 of the *Judicature Act*, cited above, which states as follows:

> "26(1) A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and that order may be made either unconditionally or on any terms and conditions the Court thinks just."

[48] In my view, this is a complete answer to the application to set aside the April 6, 2004 receivership order. The order was a necessity given the dangerous and unsafe condition of the BYG mine site, which had been abandoned by the same principals now seeking to set aside the order. It is also just and convenient that all assets, both real and

personal, be brought into the receivership for the orderly preservation of the assets until priorities have been established.

[49] Counsel for Ellake/Cosman relied upon the gap in the federal legislation with respect to personal property. However, there is no gap at all in the *Judicature Act*, which applies to both real and personal property.

[50] Counsel for Ellake/Cosman submitted that the receivership was based upon the *Bankruptcy and Insolvency Act*, particularly section 72(1) which states:

> "72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act."

[51] Counsel submits that section 72(1) is not intended to extinguish legally protected rights unless those rights are in conflict with the *Bankruptcy and Insolvency Act*. Counsel relies upon the recent decision in *GMAC Commercial Credit Corporation-Canada* v. *T.C.T. Logistics Inc.*, 2006 SCC 35 which found that a receiver had no authority to make unilateral declarations about successor employer obligations found in section 69 of the Ontario *Labour Relations Act*, 1995, S.O. 1995, c. 1. It is worth noting that paragraphs 19 and 20 of the April 6, 2004 receivership order specifically limits the power of the Interim Receiver in employment and labour matters.

[52] I fail to see how the Interim Receiver in the case at bar offends the principle set out in section 72(1) of the *Bankruptcy and Insolvency Act* and which was confirmed in the *T.C.T. Logistics Inc.* case. The Interim Receiver was appointed under section 28 of the *Judicature Act* in addition to the *Bankruptcy and Insolvency Act* so as to grant a broad

jurisdiction to deal with all the assets of BYG. That power does not conflict with section 72(1) of the *Bankruptcy and Insolvency Act* but is "supplementary to and in addition to the rights and remedies" provided by the *Bankruptcy and Insolvency Act*.

[53] There are a number of reasons for the Court to grant this receivership order under its jurisdiction set out in the *Judicature Act*:

> [1] The mine site has been abandoned;
>
> [2] Public health and safety dictates that the environmental remediation of Yukon and Canada should proceed as soon as possible;
>
> [3] All the assets of BYG should be reserved for the benefit of all creditors until the priority hearing takes place;
>
> [4] The Interim Receiver can assist in assembling the facts to assist at the future priority hearing.

[54] In all the circumstances, and specifically reasons 3 and 4, the April 6, 2004 receivership order should not be set aside.

3. Leave to Pursue Oppression

[55] Since the granting of the April 6, 2004 receivership order, counsel for Ellake/Cosman has been in regular communication with the Interim Receiver about the YGC shares over which it claims priority. Nevertheless, the Interim Receiver has been unable to obtain answers to the questions arising out of the Ellake/Cosman security set out in paragraph 20 above.

[56] Canada is presently funding the environmental cleanup and no doubt wishes to recover the costs and expenses of the Interim Receiver. Canada is therefore applying to

bring an oppression application in Ontario, the incorporating jurisdiction of BYG, to set aside the Ellake/Cosman security, held directly or indirectly by former officers and directors of BYG. Canada will not claim any monetary relief against BYG. Such an action is expressly prohibited in paragraph 6 of the April 6, 2004 receivership order.

[57] There is no specific test for approval of leave to pursue an oppression application. However, some guidance is given in the test applied under section 215 of the *Bankruptcy and Insolvency Act* for approval to commence an action against an interim receiver.

[58] In *T.C.T. Logistics Inc.*, the Mancini test (*Mancini (Bankrupt)* v. *Falconi* (1993), 61 O.A.C. 332) was applied to determine whether the union could proceed to seek a declaration of successor employer at the Ontario Labour Relations Board. The Mancini test is set out at paragraph 57 as follows:

> "In the leading case of Mancini, the court summarized the accepted principles as being the following:
>
> 1. Leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.
> 2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted.
> 3. The court is not required to make a final assessment of the merits of the claim before granting leave."

[59] In my view, these principles are applicable to this application. I do not consider the application frivolous. The Ellake/Cosman creditors were officers and directors of BYG and

all the activity to purchase the security took place as the mine was in the process of being abandoned.

[60] The relationship between Ellake/Cosman has been of concern to the Interim Receiver who has been unable to obtain answers to its concerns about the security claimed. There is no doubt that aside from the mine, the YGC shares are the only other significant asset of BYG.

[61] The Court is not required to make an assessment on the merits of the leave application. It appears that BYG was in financial difficulty and defaulting on some of its financial obligations whether it be to the creditors under the miners' liens or Canada in the period when it granted the questioned security.

[62] Section 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B16, permits a complainant to apply to the court in respect of a corporation whose conduct is "oppressive or unfairly prejudicial" to, among others, a creditor. Canada is certainly a creditor as a result of the environmental mismanagement of BYG during the time that Chafee and Rowntree were members of BYG's management.

[63] Given the circumstances of BYG in operating this mine, the non-arms length relationship of Ellake/Cosman and BYG, the other competing creditors such as Canada and the miners' lien claimants, I am satisfied that there is sufficient evidence to approve the commencement of an oppression remedy in Ontario.

[64] I therefore order that Canada shall have leave to bring an oppression application against BYG in Ontario.

CONCLUSION

[65] I confirm the order set out at paragraph 5 above.

VEALE J.