IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Yukon (Government of)* v. *United Keno Hill Mines Limited*
2004 YKSC 59

Date: 20040910
Docket No.: 04-A0005
Registry: Whitehorse

IN THE MATTER OF THE
***JUDICATURE ACT,* R.S.Y. 2002, c. 128**
AND IN THE MATTER OF THE
***CANADA BUSINESS CORPORATION ACT*, R.S.C. 1985, c. C-44**
AND IN THE MATTER OF THE
***BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 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

UNITED KENO HILL MINES LIMITED and
UKH MINERALS LIMITED

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Douglas Knowles	PricewaterhouseCoopers Inc.
Mr. David Mitchell	Government of Yukon
John Porter	Her Majesty the Queen in Right of Canada
Paul Lackowicz	Yukon Energy Corp. and MacKenzie Petroleum Ltd.
Murray Leitch	Nacho Nyak Dun Development Corporation
	12094 Yukon Inc.
	Duncan's Limited
	Mayo Bigway Foods Ltd.
Keith Parkkari	Maverick Minerals Corp.
	Energold Minerals Inc.
James Tucker	Richter & Partners Inc.
	McCarthy Tetrault, Gowling Lafluer Henderson

REASONS FOR JUDGMENT

INTRODUCTION

[1] PricewaterhouseCoopers Inc, Receiver–Manager and interim receiver (Receiver) of the respondents (UKHM), makes an application for an order approving a marketing plan for the sale of the assets of UKHM in addition to other matters not in dispute. The proposed marketing plan results in no recovery for the Yukon Miners' lien claimants (the lien claimants). The lien claimants do not oppose the marketing plan, except to the extent that it results in no financial recovery for them.

BACKGROUND

[2] UKHM is a silver mine located at Elsa, Yukon. It has been in production since the 1920's and has produced significant amounts of silver and lead over the years. UKHM closed down in 1989 due to rising production costs, production shortfalls and declining silver prices.

[3] UKHM attempted to bring the mine back into production between 1993 and 1996. However, the required additional capital could not be raised and silver prices remained

low. The mine did not re-open and the site was eventually declared abandoned in January 2001 pursuant to s. 39 of the Yukon *Waters Act*, S.Y. 2003, c. 19.

[4] Although there may be further reserves contained in the property, the estimated mine life remaining is three years based on proven and probable reserves.

[5] On February 18, 2000, the Ontario Superior Court of Justice granted UKHM protection from its creditors, pursuant to the *Companies' Creditors Arrangement Act*, R.S. 1985, c. C-36, (the CCAA proceedings). Corinth Capital Inc., engaged as the financial advisor, was unable to complete a sale of UKHM and the CCAA proceedings were terminated in March 2001.

[6] On September 21, 1999, this court granted conduct of sale of the mine to MacKenzie Petroleum Ltd., one of the lien claimants. Upon the termination of the CCAA proceedings, the lien claimants actively pursued a sale of the mine.

[7] In May 2001, this court approved the sale of UKHM to AMT Canada Inc. (AMT) for $3.6 million. AMT paid $25,000 down and had until July 7, 2001 to conduct due diligence before completing the purchase. After granting of extensions, the UKHM assets were vested to AMT on September 26, 2001. On that date, AMT became responsible for all environmental costs and expenses on the property. Those liabilities had been the obligation of the government of Canada. However, AMT failed to obtain a water licence and failed to make further payments on the purchase price. On February 14, 2003, this court divested AMT of all the UKHM assets.

[8] In March 2003, this court approved a sale to Nevada Pacific Gold (Yukon) Ltd. (Nevada Pacific). Nevada Pacific also assumed all environmental costs and expenses

but was unable to reach an agreement with Canada regarding the pre-existing environmental liabilities. In May 2003, Nevada Pacific elected not to proceed with the purchase. Canada remains responsible for all environmental liabilities and commissioned a report on the reclamation costs of the UKHM site. Brodie Consulting Ltd. estimates this cost to be $65 million, based upon an annual cost of $2.5 million.

[9] The Devolution Transfer Agreement (DTA) is an agreement between the governments of Canada and Yukon to transfer the power and responsibility for mining and the environment, among other things, from Canada to the Yukon. It became effective on April 1, 2003, and the Yukon Government (YG) is now responsible for the environmental care and maintenance of the UKHM mine site. However, under the terms of the DTA, Canada remains financially responsible for environmental damage caused prior to April 1, 2003.

[10] YG determined that the UKHM mine site was abandoned on June 26, 2003.

[11] YG and Canada obtained an order in this court on April 6, 2004, appointing PricewaterhouseCoopers Inc. as receiver-manager under the *Judicature Act,* R.S.Y. 2002, c. 128, and the *Canada Business Corporations Act,* R.S.C. 1985 c. C-44, and interim receiver under the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 (the BIA).

[12] The priorities of the various creditors were established in the CCAA proceedings in an initial order, an order dated March 31, 2000 and an order dated March 31, 2001 (the CCAA orders) as follows:

a) three creditors' claims totalling $410,000 (the CCAA creditors) that rank in priority to any and all other liens, charges and encumbrances;

b) the amounts secured by Canada and Yukon's environmental charge amounting to $2.8 million to date and increasing by approximately $2.5 million a year with an estimated potential of $65 million;

c) the other UKHM creditors pursuant to the CCAA orders including but not limited to:

- CCAA claims greater than $410,000;
- Miners' lien claims;
- UKHM lien claimants;
- AMT lien claimants;
- Employment standards;
- DIP lenders' charge;
- Secure creditors; and
- Property taxes.

[13] As stated previously, the effect of the proposed marketing plan is that the lien claimants will not recover any money.

The Marketing Plan

[14] The Receiver has prepared the marketing plan based upon the priorities set out in the CCAA orders. The Receiver has assumed that the environmental claims of Canada and YG will rank in priority to the lien claimants.

[15] Based upon an operating life of three years, the net operating revenue is approximately $50 million. Given the estimated reclamation costs of $65 million and start up costs of $17 million, the Receiver has concluded that the UKHM mine assets have a negative value of approximately $32 million. The obvious conclusion is that the UKHM mine site will not be sold so long as the environmental reclamation costs are taken into

consideration. This has been known to all parties from the outset. Thus, Canada has accepted the proposition that there must be concessions for the pre-existing environmental liabilities.

[16] In order to develop an effective marketing plan, the Receiver had in-depth discussions with Canada, YG and 12 prospective purchasers. The Receiver concluded that there was significant interest in the purchase of the mine so long as some arrangements could be made to reduce the significant costs of the pre-existing environmental liabilities.

[17] The Receiver reports that Canada has agreed in principle to provide a qualified purchaser with an indemnity so the purchaser will not be obligated to pay for the pre-existing environmental liabilities. This agreement is based upon the understanding that the purchaser will assume the ongoing care and maintenance of the mine site.

[18] The essential aspects of the marketing plan are as follows:

1. establishing a fixed selling price for the UKHM mine assets in the amount of $410,000 to provide for the CCAA creditors that rank ahead of the environmental charge;

2. the application of any other compensation offered to the reclamation costs related to the pre-existing condition of the mine site.

[19] According to the marketing plan, the purchaser will contribute to the overall reclamation costs by way of up-front or deferred payments to a Mine Reclamation Trust. The purchaser will then obtain a water licence and enter into an agreement for all future site care and maintenance.

[20] The ultimate objective of the two-agreement process is to create a cooperative relationship between the purchaser and Canada and YG. This component has been lacking in the past and has no doubt been a sore point for the lien claimants in their unsuccessful attempts to sell the mine.

ISSUE

[21] The only issue before me is to determine whether the Receiver has acted reasonably, prudently, fairly and not arbitrarily.

THE LAW

[22] 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 of the 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.

[23] The principles change slightly when the context is the actual selection of the best bid or choosing between competing bids. In *Skyepharma PLC* v. *Hyal Pharmaceutical*

Corp., [1999] O.J. No. 4300 (Ont. S.C. of Justice) the court's duty was expressed at paragraph 3 to consider:

a) whether the receiver made a sufficient effort to obtain the best price and did not act improvidently;

b) the interests of all parties;

c) the efficiency and integrity of the process by which the receiver obtained offers; and

d) whether the working out of the process was unfair.

[24] The process in the case at bar is at a much earlier stage as no bids have been sought and the Receiver is simply setting out the ground rules. However, the fact that all the lien claimants are clearly not going to recover in the proposed marketing plan makes it very appropriate for this court to consider the process at the outset before any offers are received.

[25] The law that applies in this proceedings is found is s. 14.06(7) of the BIA:

> 14.06
>
> (7) Any claim by Her Majesty the Queen in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property of the debtor is secured by a charge on the real property and on any other real property of the debtor that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge
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> (a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and

> (b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or any thing in any other federal or provincial law.

[26] The exact wording is found in s. 11.8(8) of the *Companies' Creditors Arrangement Act* under which the priorities were established in the CCAA proceedings. The claims under both statutes apply to environmental damages that arose before or after the filing of the proposal, bankruptcy or CCAA proceedings.

[27] The CCAA proceedings also provided further comfort that the environmental charge continues beyond the termination of the proceeding in paragraph 2 of the March 31, 2001 order as follows:

> This Court declares that, notwithstanding the termination of this proceeding, the charge in favour of DIAND (the "Environmental Charge") pursuant to Section 11.8 (8) of the *Companies Creditors Arrangements Act,* R.S.C. 1985, c. C-36, as amended (the "CCAA") as recognized by the Order of this Honourable Court dated March 31, 2001 (the "March 31 Order") shall continue and DIAND shall continue to enjoy the benefits of the Environmental Charge in accordance with Section 11.8 (8) of the CCAA to the extent that DIAND incurs the costs of remedying any environmental condition or environmental damage affecting the real property of the Applicants, or either of them as the case may be, following the termination of this proceeding.

The reference to DIAND refers to the Department of Indian Affairs and Northern Development of the federal government.

[28] I should also note that one of the creditors is Nacho Nyak Dun Development Corporation, the development company of Nacho Nyak Dun First Nation. The UKHM mine is in the traditional territory of the Nacho Nyak Dun and the Receiver has agreed to encourage prospective purchasers to consider chapter 22 of the Final Agreement which

is entitled “Economic Development Measures” so that the Nacho Nyak Dun First Nation will participate in employment and business opportunities.

[29] Finally, Rule 43 of the *Rules of Court* provides for sales of property supervised by the court.

DECISION

[30] The Receiver submits that the marketing plan responds to the economic reality of the UKHM mine. In other words, it has a negative value unless Canada provides an indemnity for the pre-existing environmental damage. Counsel for the Receiver submits that this is an application to sell a mine and not to determine priorities. He takes the position that Rule 43 empowers the court to order and fix the terms of sale without determining priorities between creditors.

[31] Canada and YG on the other hand submit that the priorities have been established by the CCAA proceedings and are clearly set out in the statutes. Thus, counsel take the position that the priorities are fixed and the marketing plan simply follows the established priorities of recognizing the administrative charge of $410,000 and the environmental charge.

[32] The lien claimants are in agreement that the UKHM mines should be sold. They have no objections to the marketing plan except to the extent it is premised upon the recognition that the environmental charge ranks in priority to the lien claimants. The lien claimants simply say that the fixed selling price of $410,000 with the balance for the environmental charge predetermines the priorities among creditors. In other words, the

lien claimants object to the marking plan because it assumes the priorities established in the CCAA proceedings.

[33] The lien claimants submit that the statutory sections creating the environmental charge should be given a restrictive interpretation, particularly as to the meaning of “real property” and “contiguous”. Thus a marketing plan without a final sale price would produce a value that could be the subject of a priority application based on a restrictive interpretation of the statute in question.

[34] All of these submissions are very interesting. They arise because the lien claimants have expended considerable effort and financial costs to sell the mine and recover their claims and expenses.

[35] But that is not the issue before me today. The question to be addressed is whether the marketing plan of the Receiver is prudent, fair and not arbitrary. In my view, the past attempts to sell the UKHM mine failed because there was no agreement that Canada would provide an indemnity for the pre-existing environmental costs. This marketing plan addresses that reality in a fair and prudent manner.

[36] However, the marketing plan is not a priority ruling. The lien claimants may wish to challenge the priorities set out in the CCAA proceedings. However, it is not necessary to make a ruling on the interpretation to be given to section 14.06(7) of the *Bankruptcy and Insolvency Act* and section 11.8(8) of the *Companies’ Creditors Arrangement Act* unless such an application is before the court.

[37] I fail to see how the structuring of a sale price into two components prevents the Receiver from obtaining the highest price for the UKHM assets. Whatever value is

ultimately established, the lien claimants could present arguments on the value and priority of the environmental charges of Canada and YG. That application would require a challenge to the CCAA orders and the interpretation being given by the Receiver and the two governments. There is no necessity for the court to revise the marketing plan.

[38] To summarize, the marketing plan is approved for the following reasons:

1. the court has the power under Rule 43 to approve the marketing plan;
2. the marketing plan does not establish any priorities although it clearly adopts the priorities determined in the CCAA proceedings;
3. the marketing plan is prudent, fair and not arbitrary.

[39] There will be no costs ordered.

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VEALE J.