

SUPREME COURT OF YUKON

Citation: *Yukon v. B.Y.G. Natural Resources Inc.*
2020 YKSC 6

Date: 20200225
S.C. No. 04-A0004
Registry: Whitehorse

BETWEEN

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

PETITIONERS

AND

B.Y.G. NATURAL RESOURCES INC.

RESPONDENT

Before Chief Justice R.S. Veale

Appearances:

Thomas Isaac

Laurie A. Henderson

Cindy Cheuk

Counsel for Her Majesty the Queen

Counsel for the Plaintiff Government of Yukon

Counsel for PricewaterhouseCoopers Inc.

REASONS FOR JUDGMENT

INTRODUCTION AND SUMMARY

[1] On April 6, 2004, this Court appointed PricewaterhouseCoopers Inc. (“PwC”) as Receiver Manager under the *Judicature Act*, R.S.Y. 2002, c. 128, and Interim Receiver under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, of all of the assets, real and personal property of B.Y.G. Natural Resources Inc. (“BYG”). My previous reasons, *Yukon and Canada v. B.Y.G. Natural Resources Inc.*, 2007 YKSC 02 (BYG #1), and *Yukon v. B.Y.G. Natural Resources Inc.*, 2017 YKSC 2 (BYG #2), bring attention to the

environmental disaster following BYG's abandonment of the BYG Mount Nansen mine (the "Mine Site") and the financial consequences for the taxpayers of Canada. It is significant to note that the environmental clean up costs, originally estimated in 1999 to be \$4 to \$8 million rose to \$23 million in 2007 (*BYG #1*, at para. 11). I am now advised by counsel that Canada has incurred costs of \$40 million to date and a further \$110 million is estimated to complete the environmental remediation. Given the gross underestimation of remediation costs, I have little faith that the final tally for the taxpayers will be \$150 million. Further, as the liability for future mining disasters will be the obligation of the Government of Yukon, this case should serve as a wake-up call for the administrators of the Yukon *Waters Act*, S.Y. 2003, c. 19, amended by S.Y. 2007, c. 6 ("the *Waters Act*").

[2] In 1999, the Territorial Court of Yukon convicted BYG of three blatant breaches of its water licence. Lilles J. described these actions as "raping and pillaging" with a complete disregard for the legal requirements. See *R. v. B.Y.G. Natural Resources Inc.*, [1999] Y.J. No. 34, at para 23.

[3] While this Court has previously addressed BYG's operational mismanagement and abandonment of mining activities in the Mount Nansen area, it is necessary to provide a brief factual account of the property in order to enlighten federal taxpayers who continue to be fiscally responsible for remediation efforts. The full historical background of the Mine Site can be found in the Applicant's Outline, dated April 26, 2019.

[4] Canada is liable for all remediation costs related to mining activities prior to April 1, 2003. The tailings pond of the Faro lead-zinc mine is still considered to be one of

Canada's largest environmental disasters, costing the Canadian taxpayers between \$250 and \$350 million to date, and a lifetime of reclamation costs nearing \$1 billion.

[5] The Devolution Transfer Agreement (the "DTA") transferring the power and responsibility for mining and the environment to the Government of Yukon ("Yukon") after April 1, 2003, also makes Yukon responsible and liable for all environmental damage arising from mining operations commencing after April 1, 2003.

BACKGROUND

[6] BYG acquired the Mount Nansen Mine Site in 1984.

[7] Between 1985 and 1998, BYG conducted exploration and optioned third-party exploration of the Mount Nansen Mine Site.

[8] BYG was granted a water licence in March 1996, and commenced production of the mine in October 1996.

[9] Production was ceased in November 1997, when the mining operations were suspended as a result of blatant breaches of the terms of the company's water licence, under the *Yukon Waters Act*, S.C. 1992, c. 40 (now repealed). In February 1998, BYG was granted permission to restart production after taking steps to mitigate the issues.

[10] Repeated violations of the water licence terms shut down the mine again in 1999.

[11] On May 19, 1999, BYG was convicted of three regulatory charges under the *Yukon Waters Act* and the maximum fine of \$100,000 was imposed for each count.

[12] As I concluded in *BYG #1*, at para. 10, the BYG breaches included:

- (a) failing to administer a simple treatment to stabilize the arsenic levels in its tailings pond;
- (b) using faulty materials to build its tailings pond dam which allowed seepage to weaken the dam by erosion;

- (c) improperly constructing the ditches which surrounded the tailings pond;
- (d) constructing the tailings pond haphazardly and without proper plans or supervision;
- (e) failing to assign one person to ensure compliance with its water licence.

[13] Territorial Court Judge Lilles stated in *R. v. B.Y.G. Natural Resources Inc.*:

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

[14] In July 1999, Canada determined that BYG had abandoned the Mount Nansen Mine Site for the purposes of the *Waters Act* and Canada exercised its authority under the *Act* to take certain measures to address the environmental, health and safety concerns at the property.

[15] BYG entered into formal bankruptcy proceedings with this Court in 2004, resulting in PwC being appointed as Interim Receiver and Receiver Manager for the company. PwC promptly sold a portion of BYG mineral claims and assets to satisfy secured creditors.

THE MINE SITE

[16] In 2004, BYG owned the Mine Site consisting of 264 mineral claims and mining leases in the Mount Nansen area, located approximately 60 kilometers west of Carmacks and 180 kilometres north of Whitehorse.

[17] The Mine Site falls within the traditional territory of the Little Salmon Carmacks First Nation.

[18] The Mine Site is currently classified as a Type II mining site in accordance with the framework set out in the DTA. The DTA releases Canada from responsibility for the remediation of Type I sites, but not for Type II sites. While the DTA does not provide a definition of a Type II site relative to a Type I site, the Type II designation is limited to such areas as Keno Hill, Minto, Brewery Creek, Faro, and Clinton Creek. Four sites, Faro, Mount Nansen, Keno Hill and Clinton Creek, pose substantial damage to the environment and are a financial liability to the Federal government. Incidentally, the Wolverine Mine in southeast Yukon, which has environmental damage, is now the full responsibility of Yukon.

[19] In 2003, the *Waters Act* came into effect. Yukon has been responsible for implementing the care and maintenance of the Mine Site and Canada has been responsible for the costs.

[20] A procurement process took place to solicit Remediation Work, and in 2011, Yukon finalized an engineering report from Lorax Environmental Services Ltd. (the “Lorax Report”), which outlined a number of possible options for the remediation of the Mine Site.

[21] Additionally, Yukon commissioned technical work from AMEC Environmental and Infrastructure, now known as AMEC Foster Wheeler plc (“AMEC”).

[22] Option 4 of the Lorax Report and the AMEC 30% Design have informed the development of the “Mount Nansen Project Milestones” which sets out the tasks being required in the Remediation Work.

[23] On May 13, 2016, the Proposal Solicitation Procedure (“PSP”) was approved by this Court by way of the PSP Order.

APPLICATION

[24] PwC applies seeking two forms of relief:

- (a) The Approval Order approving the Proposal of Alexco Environmental Group Inc. and JDS Energy & Mining Inc. (the Alexco/JDS Group or the Preferred Proponent), recommended by the “Evaluation Committee” and selected by the Receiver as the “Preferred Proponent” pursuant to the Proposed Solicitation Procedure in the Order dated May 13, 2016; and
- (b) An Order sealing the Receiver’s Supplemental Eleventh Report to the Court, which attaches unredacted versions of the Preferred Proponent’s Proposal and the Asset Purchase Agreement.

[25] I granted the Approval Order on May 6, 2019, as there was no objection raised and it was approved by the Evaluation Committee. The approved Proposal is a complex document of several hundred pages, combining the asset purchase and remediation work, and containing financial information, past work product and work product expertise. The parties wish to redact the particularly sensitive portions and financial information details.

[26] The Asset Purchase Agreement to be signed upon obtaining the Approval Order contains a confidentiality clause limiting the disclosure of information and the Preferred Proponent has its own concerns about the financial and work product disclosures for commercial reasons.

[27] As a result, and considering paras. 58 and 59 of *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, I have approved the sealing of the unredacted versions of both the approved Proposal of the Preferred Proponent and the

Draft Asset Purchase Agreement. Thus, the Sealed document contains the unredacted Proposal of the Preferred Proponent and the unredacted Draft Asset Purchase Agreement. The Sealing Order dated May 6, 2019, is not time limited but subject to further Court Order.

[28] However, the complete Receiver's Supplemented Eleventh Annual Report to the Court has been filed on April 26, 2019, with specific redactions in the approved Proposal of the Preferred Proponent and the Draft Asset Purchase Agreement.

[29] I am aware of the negative effect that sealed Orders may have on the open court principle. In that regard, I concluded that the redactions are appropriate as they are limited to avoid prejudice to the Preferred Proponent in future commercial dealings.

CONCLUSION

[30] Canadian and Yukon taxpayers must be kept abreast of the tremendous cost and the decades of remediation work required for the BYG mining disaster.

VEALE C.J.