IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *MacKenzie Petroleums Ltd.* v.
United Keno Hill Mines Limited et al.
2003 YKSC 16

Date: March 7, 2003
Docket No.: S.C. No. 97-A0095
Registry: Whitehorse

Between:

MacKenzie Petroleums Ltd.

Petitioner

And:

United Keno Hill Mines Limited
and UKH Minerals Limited

Respondents

Appearances:

Daniel Shier and Paul Lackowicz	Counsel for the Petitioner and for Nevada Pacific Gold (Yukon) Ltd.
Keith Parkkari	Counsel for Maverick Minerals Corporation and Energold Minerals Inc.
Mark Radke	Counsel for Attorney General of Canada
Sheri Hogeboom	Counsel for Government of Yukon
Murray Leitch	Counsel for Duncan's Limited and 12094 Yukon Inc.

Before: Mr. Justice R.S. Veale

REASONS FOR ORDER

Introduction

[1] MacKenzie Petroleums Ltd. (MacKenzie) makes an application for sale of the mine assets (the assets) formerly owned by United Keno Hill Mines Ltd. and UKH Minerals Ltd. (United Keno) to Nevada Pacific Gold (Yukon) Ltd. (Nevada Pacific). The

assets had been previously sold to Advanced Mineral Technology Inc. (AMT) by court order dated September 26, 2001. By court order dated January 24, 2003, and following non-payment by February 10, 2003, AMT was divested of the assets.

[2] There was also an application by Maverick Minerals Corporation (Maverick Minerals) and Energold Minerals Inc. to examine Mr. Lackowicz, solicitor for Nevada Pacific, as to his alleged prejudice against potential purchasers other than Nevada Pacific.

[3] MacKenzie amended its application at the hearing to seek conduct of sale. As there was no objection to MacKenzie having conduct of sale, I ordered that conduct of sale be granted to MacKenzie on February 14, 2003. I denied the application to examine Mr. Lackowicz and approved the sale of the assets to Nevada Pacific. These are my reasons.

Issues

The issues to be determined are:

1. Should Mr. Lackowicz be examined as a witness in this proceeding?
2. Is MacKenzie, as the creditor with conduct of sale, required to undertake a marketing plan or advertise the assets before seeking court approval of the Nevada Pacific offer?
3. Does the Nevada Pacific offer represent the choice of the creditors and, if so, should it be accepted?

The Facts

I find the following facts:

1. On February 18, 2000, the Superior Court of Ontario granted United Keno protection from its creditors under the *Companies Creditors Arrangement Act*, R.S.C., 1985, c. C-36.
2. On March 31, 2000, the Superior Court of Ontario approved the appointment of Corinth Capital Inc. (Corinth) as financial advisor and agent in connection with the restructuring or sale of the assets.
3. On March 13, 2001, the Superior Court of Ontario, after the failure of the United Keno plan of arrangement or sale, terminated the protection order and released the report of Corinth on its efforts to market the assets.
4. Corinth prepared an “Investment Opportunity” sheet and identified potential investors, both nationally and internationally, over a ten-week period. Six companies signed a Confidentiality Agreement, but only two companies toured the mine site.
5. MacKenzie obtained a judgment on its miner’s lien in 1997 against United Keno and is the representative party of a group of creditors of United Keno (the original creditors).
6. On September 21, 1999, this court granted MacKenzie an order for the sale of the assets and the right to develop a marketing plan.
7. On February 15, 2000, the court ordered a marketing plan that included one advertisement in the *National Post*, the *Globe and Mail* and the *Northern Miner* and written notice to each person who had contacted the petitioner, or was recommended to be given notice by the agent.

8. Contacts and negotiations took place with several parties until AMT and Redcorp Ventures Ltd. submitted firm offers to purchase and filed sealed bids on or before May 3, 2001.

9. The original creditors preferred the AMT offer of $3,600,000 to the Redcorp Ventures Ltd. offer of $2,810,000. The outstanding debt against the assets was in excess of $3,000,000.

10. On May 8, 2001, the sale to AMT was confirmed by order of this court.

11. On September 26, 2001, this court finalized the sale to AMT with amendments to the original order of May 8, 2001. The purchase price was to be paid by way of $25,000 on May 8, 2001, $1,050,000 on December 31, 2002, and the balance on December 31, 2003, subject to a credit for the costs of environmental remediation.

12. On January 24, 2003, this court declared AMT in default of the September 26, 2001 order having failed to make the payment of $1,050,000 due December 31, 2002. AMT was given until February 10, 2003 at 12:00 noon to pay into court the $1,050,000 plus a $7,500 contribution to costs. Upon its failure to make the payments, AMT was divested of the assets.

13. The order of January 24, 2003, was appealed by AMT and Energold Minerals Inc. An application for a stay of the order was dismissed.

14. MacKenzie has proposed since January 13, 2003 that the assets be sold to Nevada Pacific for $3,600,000 without any marketing plan or national advertisement. The purchase price is to be paid by way of $50,000 on

acceptance, $150,000 within 60 days, $800,000 within 180 days and the balance in 18 months.

15. The law firm of Lackowicz & Shier represents some of the original creditors as well as the proposed purchaser, Nevada Pacific.

16. In an affidavit filed January 21, 2003, Philip Cash, the President of AMT deposed that its financial requirements would be assisted by “a strong United States operating corporation.” In response, Mr. Lackowicz filed an affidavit on January 23, 2003, stating that, after conversation with counsel for AMT and Maverick Minerals, the U.S. corporation Cash referred to was UCO Energy, Inc. He included as Exhibit A to his affidavit a very unflattering article, obtained from a computer source, about the Chairman Emeritus of UCO Energy, Inc.

17. By letter dated January 24, 2003, to Mr. Lackowicz, UCO Energy, Inc. expressed an interest in submitting an offer for the assets, in the event that AMT was divested of the assets. No offer to purchase has materialized from UCO Energy, Inc.

18. The proposed sale of the assets to Nevada Pacific is supported by the original creditors which includes the Government of Canada, the Government of Yukon and the Yukon Energy Corporation. It is also supported by the new creditors of AMT whose debt arose after the sale to AMT on September 26, 2001.

19. The monthly cost of maintaining the mine’s environmental remediation is $50,000, which Nevada Pacific proposes to assume upon acceptance of its offer.

20. The application is opposed by creditors Maverick Minerals and Energold Minerals Inc. Maverick Minerals is the parent company of Gretna Capital Corporation. AMT is the wholly owned subsidiary of Gretna Capital Corporation. Both Maverick Minerals and Energold Minerals Inc. are creditors of AMT, the company that was divested of the assets.

Issue 1: Should Mr. Lackowicz be examined as a witness in this proceeding?

[4] The application to examine Mr. Lackowicz in this proceeding arises primarily out of his affidavit of January 23, 2003. Counsel for Maverick Minerals and Energold Minerals Inc. allege that it can be inferred from his affidavit that Mr. Lackowicz is prejudiced against UCO Energy, Inc. and potentially against any purchasers other than his client, Nevada Pacific.

[5] Counsel for Maverick Minerals brings his application under Rule 28 of the *Rules of Court*. Rule 28 is discretionary and permits the court to order the examination of a person who is not a party to the proceeding but may have material evidence relating to a matter in question. The court must be satisfied that the application is not a “fishing expedition” and that, pursuant to Rule 28(3)(c), the proposed witness has refused, upon the request of the applicant, to give a responsive statement, either orally or in writing.

[6] I am not satisfied that the proposed evidence of Mr. Lackowicz would be material. In addition, there is no evidence before me that Rule 28(3)(c) has been complied with.

[7] The affidavit of Mr. Lackowicz was extremely imprudent and the court does not approve of the filing of such affidavits. It was inflammatory and an invitation to this very application. Further, the affidavit did not in any way assist the court and cross-examination on it would be of no value.

[8] I dismissed the application to examine Mr. Lackowicz. There shall be no order as to costs.

[9] Counsel for Maverick Minerals also alleges that the law firm of Lackowicz & Shier is in a conflict of interest in acting for both the proposed purchaser, Nevada Pacific, and the original creditors. It is not unusual for these conflict situations to occur in a jurisdiction like the Yukon, where there are a small number of law firms, particularly in cases like this where there are large numbers of creditors. The usual practice for a law firm in this situation would be to make full disclosure and obtain the consent of all the parties that it represents. Of course, there is always a risk that parties will change their minds and both law firms and the parties have some exposure when this occurs.

[10] The court always has the jurisdiction to intervene when conflicts are alleged and that usually occurs when a lawyer or law firm has two clients that are adverse in interest and one of the clients seeks the court's intervention. That is not the case here. Maverick Minerals and Energold Minerals Inc. are not clients of Lackowicz & Shier. There has been no application from any clients represented by Lackowicz & Shier and there is no reason for the court to intervene.

Issue 2: Is MacKenzie, as the creditor with conduct of sale, required to undertake a marketing plan or advertise the assets before seeking court approval of the Nevada Pacific offer?

[11] The power to order a sale is found in s.11(3) of the *Miners Lien Act,* R.S.Y. 1980 c. 116. The only statutory conditions are that the minerals or ore produced are not sufficient to satisfy the liens and that the sale cannot be ordered until three months after judgment. Other than that, there are no preconditions to a sale set out in the *Miners Lien Act, supra.*

[12] Rule 43 of the *Rules of Court* gives some further clarification as follows:

> **Conduct of sale**
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> **(3)** Where an order is made directing property to be sold, the court may permit any person having the conduct of the sale to sell the property in the manner as the person thinks just or as the court directs.
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> **Directions for sale**
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> **(4)** The court may give directions it thinks just for the purpose of effecting a sale, including directions
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> (a) appointing the person who is to have conduct of the sale,
> (b) fixing the manner of sale, whether by contract conditional on the approval of the court, private negotiation, public auction, sheriff's sale, tender or some other manner,
> (c) fixing a reserve or minimum price,
> (d) defining the rights of a person to bid, make offers or meet bids,
> (e) requiring payment of the purchase price into court or to trustees or to other persons,
> (f) settling the particulars or conditions of sale,
> (g) obtaining evidence of the value of the property,
> (h) fixing the remuneration to be paid to the person having conduct of the sale and any commission, costs or the expenses resulting from the sale,
> (i) that any conveyance or other document necessary to complete the sale be executed on behalf of any person by a person designated by the court, and
> (j) authorizing a person to enter upon any land or building.
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> **Application for directions**
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> **(5)** A person having conduct of a sale may apply to the court for further directions.

[13] It is clear that the court can give directions for all aspects of the conduct of sale and on the approval of the sale. As there are no specific directions guiding the court, it is appropriate to look at mortgage foreclosure and sale practices as a guide to the general principles that should apply. In all situations where court approval is sought or required, general principles to guide the process are helpful but they should never be interpreted

in a rigid way, as there are a myriad of circumstances that must be dealt with where fairness and reasonableness are the most appropriate principles.

[14] In general terms, the guiding principles are as follows:

1. The conduct of the sale must be exercised in good faith; see *Cuckmere Brick Co.* v. *Mutual Finance,* [1971] 2 A.L.L. E.R. 633 and *National Bank of Canada* v. *Desrosiers,* [1996] N.B.J. No. 9.
2. The sale price should, where possible, reflect the market value of the asset in question; *National Bank of Canada* v. *Desrosiers, supra,* and *Westcoast Savings* v. *Wachal et al.* [1988] B.C.J. No. 2257 (B.C.C.A.)(Q.L.).
3. The party with the conduct of sale should apply the appropriate marketing and advertising strategy for the asset to be sold; *National Bank of Canada* v. *Desrosiers, supra.* As set out in Rule 43(4)(b) this may be by private negotiation, public auction, sheriff's sale, tender or some other manner.

[15] These principles are not intended to be exhaustive nor do they set out the procedure to be followed. They are guidelines only and each court has the discretion to determine what is appropriate for each particular case.

[16] In this case, there is no doubt that the assets were extensively marketed, both nationally and internationally, by experts in the business of selling mines and mining assets. However, as Maverick Minerals submits, there has been no active marketing since the property was sold to its subsidiary AMT in September 26, 2001. That is hardly surprising as the creditors have carried on under the assumption that AMT would fulfill its legal obligation to make a substantial payment on December 31, 2002.

[17] This has not occurred and AMT is now recently divested of the assets. It is of interest to note that some of the original creditors were applying for approval of the Nevada Pacific offer even before AMT was formally divested by court order which indicates some marketing activity or private negotiation took place in anticipation of AMT's default. It would appear to be prudent to consider alternative purchasers in such circumstances.

[18] It must be recognized that even after extensive professional marketing took place nationally and internationally, there were only two bidders with a serious interest in the assets. This indicates that only a limited number of mining companies were interested in the assets. Further, there has been no reduction in the price to be paid and the terms of payment by Nevada Pacific are more favourable. It appears completely unnecessary to impose advertising and notice provisions on the original creditors who have been left without any payment on their debt for almost a year and a half. It should not go without notice that the party seeking these conditions is the parent company of AMT, the party unable to meet its contractual obligation.

[19] I am satisfied that no further marketing, advertising or notice is required.

[20] Maverick Minerals and Energold Minerals Ltd. made the further submission that the sale price to Nevada Pacific was not fair market value as AMT allegedly spent approximately $700,000 maintaining and upgrading the assets.

[21] It is extremely difficult to place a fair market value on an asset like this silver mine. However, without an expert evaluator to confirm this allegation, I am not prepared to say that the Nevada Pacific offer, which has the same price as AMT offered, should be

rejected or postponed on that account. In sales of bankrupt mines, the only true market value may be what a purchaser offers and the creditors are prepared to accept.

Issue 3: Does the Nevada Pacific offer represent the choice of the creditors and, if so, should it be accepted?

[22] The practice in court supervised sales is to ensure fairness and reasonableness in the process. Creditors do not always have the same interests. Often there are two competing offers with various creditors preferring one to the other. In this case, it is the original creditors and new creditors preferring a new purchaser with the creditors aligned with AMT, the divested purchaser, seeking more time.

[23] Courts are always reluctant to get involved in a business decision. The duty of the court is to ensure that the party with the conduct of sale has acted fairly, providently and taken into account the interests of all parties as stated in *Sun Life Savings and Mortgages Corp.* v. *Sampson*, [1991] B.C.J. No. 2799 (B.C.S.C.) (Q.L).

[24] It is obvious that the interests of the original and new creditors must be taken to be paramount. When the interests of creditors are divergent, the court must carefully scrutinize an offer to purchase to ensure that the process has been fair and open to all interested parties or potential purchasers.

[25] In this case, it is significant that the original creditors of the bankrupt United Keno and the new creditors (other than Maverick and Energold Minerals Inc.) of the now divested ATM are strongly supporting the Nevada Pacific offer. Those creditors who seek more time for further offer are aligned with the divested purchaser. It would be fair to say that these latter creditors have not been taken by surprise or short notice. They

have a close relationship with the divested purchaser and have had their opportunity to finance the divested purchaser or find a new purchaser.

[26] In these circumstances, I order that the Nevada Pacific offer be accepted. The petitioner has the right to bring a further application within seven days to include any other leases or claims in the assets. Costs are awarded to the petitioner on scale 3 against Maverick and Energold Minerals Inc.

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VEALE J.