

SUPREME COURT OF YUKON

Citation: *Yukon v. B.Y.G. Natural Resources Inc.*
2017 YKSC 2

Date: 20170116
S.C. No. 04-A0004
Registry: Whitehorse

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

AND IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSBC 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:

Suzanne Duncan

Counsel for Canada (Minister of Indian and
Northern Affairs)

Laurie Henderson

Counsel for the Government of Yukon

Kate Blomfield

Counsel for the Little Salmon Carmacks First Nation

Cindy Cheuk

Counsel for PricewaterhouseCoopers Inc.

REASONS FOR JUDGMENT

INTRODUCTION

[1] On April 6, 2004, PricewaterhouseCoopers Inc. (“PwC”) was appointed Receiver Manager under the *Judicature Act*, R.S.Y. 2002, c. 128, and Interim Receiver under the *Bankruptcy and Insolvency Act*, R.S.C 985, c. B-3, of all of the assets, real and personal property, of B.Y.G. Natural Resources Inc. (“BYG”). These Reasons address the

environmental disaster following BYG's abandonment of the BYG mine property and the financial consequences for the taxpayers of Canada.

[2] PwC applies for an order approving its Proposal Solicitation Procedure ("PSP") developed in consultation with the Government of Canada ("Canada"), the Government of Yukon ("Yukon"), and Little Salmon Carmacks First Nation ("LSCFN"). The PSP sets out the process by which PwC will solicit proposals from qualified parties for the acquisition of the remaining assets of BYG and remediation of the BYG mining property in the Mount Nansen area.

[3] In addition to approval of the PSP, PwC seeks amendments to the Option Agreement attaching to a portion of the BYG Mount Nansen mineral claims, including an extension of the termination date of that option, and the Court's approval of an assignment of the Agreement from Sasko to 1011308 B.C. Ltd. ("BCco").

[4] Finally, the holders of other placer mining rights in the Mount Nansen area, namely Gilbert Tulk and 38857 Yukon Inc. (Orotec International Ltd.), seek this Court's clarification that their property interests remain separate, distinct, and unaltered by the PSP process.

[5] In response to the application of PwC, an order was issued by this Court on Friday May 13, 2016 (the "Order"), addressing the matters raised in the application and during the hearing at Whitehorse, Yukon, on May 13. Specifically, the Order:

1. Approved, substantially, the PSP put forward by the Receiver, and authorizing and directing the Receiver to carry out the PSP;
2. Clarified that the placer mining interests held by Gilbert Tulk and 38857 Yukon Inc. would not be affected by the PSP or the Order;
3. Amended the "Triggering Event" clause of the option agreement to reflect the appropriate location of the optioned claim;

4. Extended the termination date of the option agreement by a period of 10 years from October 31, 2018, to October 31, 2028;
5. Approved the assignment of the option agreement from Sasko to BCco.

A WAKE UP CALL

[6] Although the PSP was arrived at through a collaborative consultation process with the tacit support of the Department of Indigenous and Northern Affairs (Canada), Yukon, and LSCFN, I have reserved reasons for judgment to speak to the significant costs that Canada has incurred as a result of this mine abandonment, and will continue to incur well into the foreseeable future.

[7] The lasting harm brought about by BYG at the Mount Nansen site is set out in the Proposal Solicitation Procedure which is essentially a Request for Proposals to remediate the BYG mine property. Yukon will apply for a water licence for the care and maintenance of the BYG mining property which will ultimately be assigned to the Purchaser, should a Purchaser be found. Such a Purchaser will be paid by Canada and taxpayers to remediate the BYG mine property through the following procedures, among others:

1. Approval of a Remediation Plan by YESAA;
2. Approval of a Class A Water Licence by the Yukon Water Board;
3. Mobilization and Start-up Costs to implement the Remediation Plan;
4. The creation of a work plan for care and maintenance;
5. Construction of the non-acid generating waste rock platform in the open pit;
6. Mine Site Building Demolition;

7. Remediation of all tailings, contaminated soils and other wastes from the Tailings Storage Facility to the Pit Containment Structure;
8. Remediation of acid-generating waste rock piles, and other contaminated soils;
9. Dome Creek Valley Reconstruction after removal of the tailings and contaminated soils; and
10. Post Remediation and Monitoring with costs to be negotiated between a Purchaser and Canada.

[8] I take notice of the fact that this is not the first time in recent Yukon history that a mining company has conducted itself in bad faith, collapsed into bankruptcy and abdicated its reclamation responsibilities to the governments of Canada and Yukon. The tailings pond of the Faro lead-zinc mine, which was described as a “toxic blight” on its abandonment in 1998, is considered to be one of Canada’s largest environmental disasters at a price tag of between \$250 and \$350 million to date and a lifetime reclamation cost of \$1 billion.

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

[10] While this Court is no stranger to the unscrupulous history of BYG’s operational mismanagement, and subsequent abandonment of mining activity in the Mount Nansen area after 12 years of insolvency proceedings, it is my opinion that an account of BYG’s historical activity in the Yukon should be brought to the attention of the federal and

territorial taxpayers who remain fiscally responsible for remediation efforts associated with the contaminated site.

[11] Canada is liable for all remediation costs for mining remediation arising prior to April 1, 2003.

[12] The Devolution Transfer Agreement (the “DTA”) which transferred the power and responsibility for mining and the environment to the Yukon after April 1, 2003, also makes Yukon responsible and liable for all environmental damage arising from mining operations commencing after April 1, 2003.

[13] The point to be made is that the BYG disaster could happen again and the Yukon with approximate annual revenues of \$1,303,131,000, will be liable for the costs of the environmental cleanup. This case should be a wake-up call.

THE SITE

[14] At the height of its operations, BYG owned 264 mineral claims and mining leases in the Mount Nansen area, located approximately 60 kilometers west of Carmacks and 180 kilometers north of Whitehorse (“the Site”).

[15] BYG was not the first company to conduct mining exploration or activity in the area. Mining has taken place around Mount Nansen since as early as 1943, although large-scale exploration of the area mainly occurred throughout the sixties.

[16] Importantly, the Site falls within the traditional territory of LSCFN.

[17] In addition to the LSCFN interest in the area, several placer mining claims overlap the Site; notably, the Gilbert Tulk, Orotec, and BCco placer mining claims.

[18] In terms of environmental impact, the Site is currently classified as a Type II mining site in accordance with the framework set out in the DTA. Under the DTA,

Canada is released 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; all sites with considerable long-term contamination issues that require substantial financial assistance from the Federal government post-devolution to support remediation efforts.

[19] According to an environmental assessment prepared in July of 2011 by Lorax Environmental Services (the “Lorax Report”) and further assessment work carried out by AMEC Environment & Infrastructure (“AMEC”) it is estimated that the Site contains approximately 55,000 cubic metres of contaminated soil, 300,000 cubic metres of tailings, and 500,000 cubic metres of waste rock that require attention.

[20] At the date of the hearing for this matter, counsel for Canada estimates that \$20-\$25 million has been spent to-date by the government on site control and environmental protection measures.

The BYG Mining Operation

[21] B.Y.G. Natural Resources Inc. was incorporated in Ontario, Canada, on April 1, 1969.

[22] In 1984, the company acquired 264 mineral claims and leases covering 5,300 hectares of land in the Mount Nansen area. Shortly thereafter, between 1985 and 1998 BYG conducted and optioned third-party exploration of the property.

[23] On March 14, 1996, BYG was granted a water licence, and it began mining operations in October of that year. Production continued until November of 1997, when mining operations had to be suspended as a result of blatant breaches of the terms of

the company's water licence. After taking steps to mitigate known water licence issues, BYG was granted permission to restart production in February of 1998. Mine operations were shut down again, and for the last time, in 1999 for continued violations of water license terms.

[24] On May 19, 1999, BYG was convicted of 3 regulatory charges under the *Waters Act* and the maximum fine of \$100 000 was imposed for each count:

1. Zinc concentration in the tailings pond was 1.27 mg/L; 4 times the allowed limit of .30 mg/L. The standard toxicity test at the time required that 50% of exposed fish would survive for a minimum of 96 hours. The report from the Environment Canada Pacific Environment Center indicated that test fish died within 24 hours of exposure to the sample.
2. A chemical analysis report pertaining to the tailings and tailings effluent was never filed with Water Resources.
3. Cyanide concentration in the tailings pond ranged from 40 to 80 mg/L, with some samples reaching as high as 180 mg/L, well above the maximum stipulated limit of 25 mg/L set out in the terms of the water license.

[25] As I stated in *Yukon v. BYG Natural Resources Inc.*, 2007 YKSC 2, at para. 10, the BYG breaches can be summarized as follows:

- (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.

[26] Commenting on the criminal behaviour of BYG in relation to these counts, Judge Lilles had the following to say in *R. v. BYG 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 as arsenic and cyanide – the level of care or diligence reasonably expected from B.Y.G. greatly exceeded what the company provided.

[27] Shortly after Lilles J.’s decision was released, Canada determined that BYG had abandoned the Site. Accordingly, Canada exercised its powers under the *Waters Act* to begin addressing environmental and human health concerns with the Site.

[28] As noted, BYG entered formal bankruptcy proceedings with this court in 2004, at which point PwC was appointed as Interim Receiver and Receiver Manager for the company. Yukon and Canada were parties to the bankruptcy proceedings.

[29] Following its appointments, PwC promptly proceeded to sell a portion of BYG mineral claims and assets to satisfy secured creditors. At various stages of the bankruptcy management process, the court has convened with PwC, Canada, Yukon and LSCFN to assess and approve the actions of PwC as Receiver.

[30] At the present stage of the bankruptcy process, following the satisfaction of prioritized secure creditor distributions, 56 claims and leases, 1 surface license, and 1 surface lease remain of the 264 originally held claims and leases.

REMEDICATION

[31] It is important to note that between the 1999 decision of Judge Lilles and the 2004 appointment of PwC, the DTA was signed between Yukon and Canada on April 1,

2003. Consequently, responsibility for mining oversight was shifted from Canada to Yukon.

[32] Accordingly, it was Yukon that commissioned the Lorax Report and the AMEC assessment, with a view to developing a plan for remediating the Site.

[33] However, as the significant environmental damage to the Site occurred pre-devolution, Canada has taken fiscal responsibility for remediation efforts.

[34] Collaboratively, and with the endorsement of Yukon, Canada and LSCFN, PwC developed a draft PSP that was presented to this court for approval on May 13, 2016. The PSP was designed to, "...market the remaining assets and solicit proposals from potential proponents to carry out the Remediation Work..."

[35] The PSP will be circulated to prospective bidders with a financial interest in what will be, in essence, a government subsidized remediation project. PwC has made it clear that estimated costs of remediation work greatly exceed the value of remaining assets.

[36] This court has approved the PSP in light of the support it receives from Yukon, Canada, and LSCFN, and in the absence of viable alternatives that would address the Site's environmental hazards in a timely and effective manner.

CONCLUSION

[37] Although it is fair to say that there have been substantial changes to the mining approval and monitoring regime since BYG was granted the right to operate in the Territory in the late 1990's, this case stands as a painful reminder of the lasting and egregious damage that unscrupulous and unchecked profiteering can bring about in the mining sector. It is an embarrassment to Canada, Yukon and the responsible mining

community. It is the hope of this court that this case will provide a valuable lesson to future governments of Yukon and Canada, and the taxpayers who will pay the millions of dollars required to remediate the BYG mine property.

VEALE J.