

**IN THE SUPREME COURT OF THE YUKON TERRITORY**

BETWEEN:

MackENZIE PETROLEUMS LTD.

PETITIONER

AND:

UNITED KENO HILL MINES LIMITED  
AND UKH MINERALS LIMITED

RESPONDENTS

Timothy Preston, Q. C.

For the Petitioner

Keith Parkkari

For the Respondents

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**MEMORANDUM OF JUDGMENT  
DELIVERED FROM THE BENCH**

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[1] HUDSON J. (Oral): These proceedings today arise out of an order of the court made in this matter on September the 26<sup>th</sup>, 2001. That order deals with, like its predecessors, the purchase and sale of the assets therein described. The proceedings today are brought by the creditors of the judgment, debtor, United Keno Hill Mines, to enforce the terms of that order.

[2] The purchase price was \$3,600,000 and upon payment of \$25,000 and the entry into the terms of the court order, the assets described were vested in the

purchaser, subject to a charge for the balance of the purchase price in favour of the creditors, the petitioners.

[3] By the terms of the order the sum of \$1,050,000 was to be paid December 31, 2002. This sum has not been paid.

[4] There are other defaults in the obligations under the order including maintaining of the claims and reporting, and paying obligations. All of these have been admitted in evidence before me.

[5] The petitioner comes to court seeking an order under s. 21 of the court order, essentially, and I am quoting here:

For directions for the enforcement of the order.

[6] The evidence is that the purchaser, AMT, has expended some \$700,000 on the property. There is no clear demarcation of what is purely operational and what could be said to enhance the value of the property. The order provides for the payment of certain environmental expenses and also the evidence discloses that some monies have been spent to upgrade the property for use.

[7] The history of AMT's performance, that is the purchaser, who I will now call AMT, in the purchase pursuant to the court order and some of its predecessors is of successive failure to comply with its stated obligations; however, of course, not all of them, as has been indicated in the evidence before me.

[8] The petitioner has, 13 days after default, brought a motion to recover the

property or to divest the purchaser of those claiming under it of any interest and at the same time has embarked on a further transaction of sale with a new purchaser to be effective forthwith and which offer of sale is only valid to January 31, 2003.

[9] The purchaser finds this oppressive and is opposing.

[10] An adjournment was sought but on a balancing of the convenience as between the purchaser and the petitioner an adjournment was refused. The adjournment, of course, would leave all in limbo for the period and at the time of four weeks, or a month, was sought as a minimum.

[11] The court is, therefore, called upon to give directions for the enforcement of the court order. I have heard the parties on the issue of whether a period of time should be allowed to the purchaser to correct its default and the conditions to be attached to the granting of such a period of time.

[12] The petitioner takes the position that this would be unprecedented and is not required according to law or equity.

[13] There has been cited to me, and that I refer to paragraphs 12 and 13 of the *Judicature Act*, R.S.Y. 1986, c.96, and I quote:

12. The Court in the exercise of its jurisdiction in every cause or matter pending before it has power to grant and shall grant either absolutely or on such reasonable terms and conditions as to it seems just all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter, so that as far as possible all matters so in controversy between the said

parties respectively may be completely and finally determined and all multiplicity of legal proceedings concerning any such matters avoided.

Then:

13. Subject to appeal as in other cases, the Court shall have power to relieve against all penalties and forfeitures and in granting such relief to impose such terms as to costs, expenses, damages, compensation and all other matters as the Court sees fit.

Now whether it is called a redemption period or simply a condition of enforcement or some other title, it is my opinion that fairness and equity in the common sense of that word, dictate a period of time to at least enable the purchasers to consider its position and to do so with its advisors and decide on a course of action.

[14] I agree with the counsel and indicate that 10 days is not a sufficient time for that to happen under the circumstances.

[15] The breaches by the purchaser and the giving of undertaking it seems unable to perform, and the continuing frustration of the petitioners, the creditors, persuades me that such a period of time, however, should be somewhat short.

[16] It is therefore my order that there be allowed a period of time, and I suggest four weeks from the filing of this motion, that is to say February 10<sup>th</sup> be allowed, that unless the sum of \$1,050,000 is paid into court by 12:00, noon, that day together with the sum of \$7,500 on account of costs, and that the purchaser has complied with all the other obligations under the court order to that date that the purchaser, and those claiming under it, be debarred and divested of and from all right, title and interest in

either law or equity, in and to, the assets defined in schedule A of the order of September 26, 2001. I realize that this takes the matter beyond the date of January 31 referred to, but I find it appropriate to deal with the enforcement of the order of September 26 before entering into discussions of a sale.

[17] Of course there will also be a declaration sought in paragraph 1 of the notice of motion with respect to the defaults.

[18] The petitioner shall, upon the certificate of the registrar of the court, upon certifying to a failure to make the said payment into court, the petitioner shall be entitled to an immediate order of recovery of the assets into the name of such trustee as it may choose, since they cannot go into the name of United Keno Hill Mines.

[19] By this order I hope and I have tried to commence the passage of time which will lead to a clarification of the interest of the parties, and to put an end to the vague promises that have characterized this matter to this time.

[20] I said that I propose that four weeks from the time of the filing of the motion. I would hear anybody on that.

[21] MR. PARKKARI: That was February 10<sup>th</sup>, My Lord?

[22] THE COURT: Yes.

[23] MR. BUCHAN: So, My Lord, just for clarification, the deadline would be?

[24] THE COURT: February 10<sup>th</sup> at 12 o'clock noon.

[25] MR. BUCHAN: Twelve o'clock noon?

[26] THE COURT: Yes.

[27] MR. PRESTON: Now, My Lord, you indicated that, as I understand Your Lord, that the petitioner, sorry, AMT, must comply with all other obligations under the orders of September 26, 2001, is that correct?

[28] THE COURT: Yes.

[29] MR. PRESTON: One of those obligations related to the lapse of the claims. Did Your Lordship intend --

[30] THE COURT: No. No, that's -- you take your remedies for that and if you consider it waste then you can do --

[31] MR. PARKKARI: And another order that you made on September 26<sup>th</sup>, that was with respect to the filing of quarterly reports. Did Your Lordship, intend that the reports be filed by February 10<sup>th</sup>? I can tell Your Lordship, I do not think it is either here nor there in terms of --

[32] THE COURT: Yes, I think the breach is there. The remedy has been given for that breach and I will exempt that one from my order in this case.

[33] MR. PARKKARI: And, My Lord, costs of this motion to the

petitioner?

[34] THE COURT: Yes.

[35] MR. PARKKARI: Special costs? I can tell you that that has been the rule in the previous proceedings here and that is that special costs have been ordered.

[36] THE COURT: Yes. No, I do not think that you have -- you not made out what -- you are not getting an immediate sale order. I think that with the efforts here, costs are on the usual scale.

[37] MR. PARKKARI: All costs?

[38] THE COURT: Yes.

[39] MR. BUCHAN: My Lord, just for clarification, I understood you indicated \$7,500 for special costs?

[40] THE COURT: On account of costs.

[41] MR. BUCHAN: On account of costs?

[42] THE COURT: Yes, not for costs.

[43] MR. BUCHAN: So just towards the costs?

[44] THE COURT: Do not get me wrong. Yes, on account of costs.

[45] MR. BUCHAN: Not fixed costs. Sorry. All right.

[46] THE COURT: All right. Yes, Mr. Leitch?

[47] MR. LEITCH: My Lord, one further clarification. As I understood Your Lordship's order, if AMT were to fail to remedy the defaults by February 10<sup>th</sup>, they and all persons claiming by / through / under them --

[48] THE COURT: Yes.

[49] MR. LEITCH: -- would be foreclosed of interest and the motion that I had brought was of course that any order would be made without prejudice to my clients who are creditors of AMT --

[50] THE COURT: You are claiming through the lien provisions, are you?

[51] MR. LEITCH: Yes but a lien holder -- a lien complainant comes under AMT and I just want to --

[52] THE COURT: Yes. No, if your claim arises out of a statutory lien then it is not my intention that that be --

[53] MR. LEITCH: Thank you, My Lord.

[54] THE COURT: Yes. Yes.

[55] MR. PARKKARI: Likewise, My Lord, with respect to Gretna Capital Corporation who is claiming to be a secured creditor of AMT, that their rights to pursue their interests as secured creditor not be foreclosed, as for Mr. Leitch's clients?

[56] THE COURT: I think that application could be adjourned, could it?

[57] MR. PARKKARI: Yes, as long as AMT does not redeem and their interest is foreclosed. We just wanted to make sure that Gretna Capital Corporation's interest in the assets is not also foreclosed as they are claiming under.

[58] THE COURT: And you agree with your friend that you follow along after interest, if any, I take it, as appropriate.

[59] MR. PARKKARI: Well, the priority has not been set or determined and Gretna Capital Corporation has not even proven their claim as set out in our notice of motion.

[60] THE COURT: No, there is nothing in the materials to show me the passage of any money from Gretna, to accept a bare statement.

[61] MR. PARKKARI: And a promissory note in the affidavit --

[62] THE COURT: Well, what was it for \$4,000,000, was it?

[63] MR. PARKKARI: Yes, and the affidavit of Mr. Kinlock says the money has passed. I am not suggesting that we have proven that, we simply want that right to be adjourned without prejudice.

[64] THE COURT: Well, is that all right with you?

[65] MR. LEITCH: Well, My Lord, I assume that that will not affect the state of the title. I understand what my friend is saying is that if he is able to prove up a valid loan, then he may have a claim against the proceeds that are paid into court. But that is a different proposition than if the charge remains in the property.

[66] THE COURT: Yes.

[67] MR. LEITCH: The order that we seek that there be no charges remain on the property. That the creditors can fight over the proceeds in court but that the petitioner be able to pass good title, clear title on to a prospective purchaser.

[68] MR. PARKKARI: That makes sense, My Lord.

[69] THE COURT: So you would claim a right to be heard and then a distribution.

[70] MR. PARKKARI: Yes.

[71] THE COURT: All right. Can you draw it accordingly?

[72] MR. LEITCH: I believe we can, My Lord. My Lord, I wonder if we may have five minutes to --

[73] THE COURT: Yes. Your motion then is to amend the order?

[74] MR. LEITCH: Well yes, that motion, My Lord, I basically withdrew in light of the fact that I did not have the \$200,000.

[75] THE COURT: Thank you. Have we dealt with everybody else's application? Yes. Okay, we will stand down for 10 to 15 minutes.

(Proceedings adjourned)

(Proceedings reconvened)

[76] MR. PRESTON: My Lord, now My Lord, the only issue that the petitioner would like to raise is the issue about the trusteeship come February 10<sup>th</sup> if indeed there is a requirement for that. Counsel will attempt to work out the terms of the order but I would like a provision whereby the parties are at liberty to reapply before February 10<sup>th</sup> with respect to that issue, that is the trusteeship issue.

[77] THE COURT: Yes. Well, it is your choice really, is it not?

[78] MR. PRESTON: Yes, it is, My Lord. We are attempting to

figure out the legal ramifications of it.

[79] THE COURT: I think you could put that in the order that -- well, it just cannot be United Keno Hill Mines.

[80] MR. PRESTON: Yes.

[81] THE COURT: And, you have to list creditors, you do not want them to be on title, I suppose. They just want the proceeds.

[82] MR. PRESTON: That could well be, My Lord. We need time to sort out the ramifications of it.

[83] THE COURT: Yes, and do you have any problem with that, Mr. Buchan? It is not going to happen.

[84] MR. BUCHAN: I have no problem with it, My Lord, because if that comes to pass, my client is going to be out of the picture. But perhaps, the others down the line might have some comments.

[85] MR. PARKKARI: The only point of clarification in light, My Lord, is the environmental ongoing mediation responsibility that falls to the trustee, I assume.

[86] THE COURT: I have considered that. It seems to me that if all other things have failed it has to go back to Mr. Radke's client, I suppose.

[87] MR. PARKKARI: Well, if the property is vesting in the trustee.

[88] THE COURT: I don't know. Yes. Well that is what I say, we are talking about the money not the vesting perhaps. I guess, now we are talking about the property, are we not?

[89] MR. LEITCH: My Lord, I think Mr. Preston's suggestion that we simply reapply if we cannot --

[90] THE COURT: I think, yes. Thank you, I agree. The problem is obvious and I cannot come up with a solution at this moment. All right.

[91] MR. PRESTON: Thank you.

[92] THE COURT: Thank you.

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HUDSON J.