

Date of Release: August 27, 1992

NO. A921964

VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE COMPANIES'

CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, C. C-36

AND

IN THE MATTER OF WESTAR MINING LTD.

) REASONS FOR JUDGMENT
)
) OF THE HONOURABLE
)
) MR. JUSTICE B.D. MACDONALD
)
) (IN CHAMBERS)

J.E. Gouge & A.W. Carpenter	Counsel for the Petitioner
D.I. Knowles & C. Caverly	Counsel for the Bank of Montreal
M. Fitch	Counsel for B.C. Rail
F. Potts	Counsel for Greenhills Workers Association
D.S. MacKinlay	Counsel for Non-union employees
A.J. Macdonell	Counsel for Office & Technical Employees Union
S.R. Ross	Counsel for Pohang Steel Canada Ltd.
K.L. Johnston	Counsel for Director of Employment Standards
D.G. Batcheller	Counsel for Finning Ltd. and others
D. Chesman	Counsel for Carl Marks Strategic Investments

Date and place of hearing: August 26, 1992

Vancouver, B.C.

In the course of their final meeting on August 24, 1992, just prior to their resignations, the then remaining directors of the Petitioner instructed its counsel to apply for orders that:

1. The stay of proceedings against it be lifted; and

2. It be permitted to pay a further sum of \$3.7 million to the Director of Employment Standards for the payment of vacation pay owing to its employees.

On August 26, 1992, I granted the first order on terms, but refused the second in these words:

The Petitioner's motion filed August 25 and returnable today with short leave, for an order that it be authorized to pay \$3.7 million in trust to the Director of Employment Standards in respect of certain obligations for vacation pay is dismissed.

Based on Clause 11 of my interim stay order of May 14, which directed that no monies be disbursed by Royal Trust from the Trust Fund established pursuant to an agreement dated May 5, 1992 without further order of this court, the Director of Employment Standards is hereby ordered to apply the proceeds of that fund which are now in his hands so as to satisfy, as a first charge thereon, the entitlement of employees of the Petitioner to vacation pay which has accrued since May 14, 1992 and remains unpaid.

These are my reasons for refusing to authorize the \$3.7 million payment, and for imposing conditions on the use of the funds already received by the Director.

THE PAYMENT

On August 5, 1992, I heard and dismissed the Petitioner's application to secure its then remaining directors in respect of personal liabilities which might arise against them under the Employment Standards Act, S.B.C. 1980, c. 10. Although the subject of that application was primarily severance or termination pay, certain statements which I made in the course of delivering oral reasons for judgment on August 11, led counsel to enquire about the subject of vacation pay as well.

In response, I expressed the view that payment of vacation pay "in the ordinary course" was not prohibited, but that prepayment or payment on termination (voluntary or otherwise) was not permissible. That reaction was based on the underlying premise, stated in my August 11 reasons, that no expenditure not related to the continued operation of the Greenhills Mine, directly or indirectly, or to the preparation of a plan of reorganization, or necessary for preservation of the Balmer assets, was contemplated by the stay order.

Despite having expressed that view on August 11, I was prepared to hear argument on the Petitioner's application dealing with holiday pay. No order had yet been entered in that regard. The Greenhills employees, both union and non-union, were before the court for the first time. The holiday pay question was neither fully argued nor squarely before the court on August 5 and 11.

The Petitioner seeks to distinguish vacation pay from severance pay. I accept a distinction only to the extent that further vacation pay has accrued since my initial stay order of May 14, 1992 in these proceedings. Otherwise, they are both obligations (albeit contingent or accruing) of the Petitioner which existed on that date.

That initial stay order also permitted the Petitioner to maintain a \$4

million Trust Fund which had been established only a week earlier to cover the liability of directors under the Employment Standards Act and for remittances related to wages to the Minister of Finance under the Income Tax Act and for Unemployment Insurance and the Canada Pension Plan. According to the affidavit of Peter Dolezal filed May 14, 1992 in support of the petition, that \$4 million was the Petitioner's best estimate of the amount required to cover such liability and remittances due at that date. That affidavit (in paragraph 12) goes on to say that the amount may change as obligations are satisfied or new obligations accrue.

The present liability is estimated at \$7.7 million leading to the request for an additional \$3.7 million over and above the Trust Fund. No explanation was proffered for the almost 100% increase since May 14. While a further amount has accrued since that date as a result of wages due to Greenhills employees and office staff, some of that group have presumably taken their holidays since then, and have received vacation pay, resulting in a reduction of the liability accrued to May 14.

I am told that the Greenhills liability is a "revolving" sum of about \$3.4 million. I suspect that it was that amount which prompted the \$4 million Trust Fund. At the time of the May 14 petition and affidavits, Greenhills was operating, whereas the Balmer mine had been closed by a lock-out since May 1, 1992 with no apparent prospect of re-opening except in the context of a successful plan of reorganization.

The Petitioner argues that the additional payment which it wishes to make to the Director of Employment Standards will not "significantly prejudice" other creditors for two reasons:

1. If the Greenhills Mine is sold as a going concern, such accrued liabilities would normally be assumed by the purchaser. If such liabilities have been satisfied, that absence will be reflected in an enhanced purchase price.

2. Under the new (August 1, 1992) Bankruptcy Act, employees will be preferred for up to \$2000.00 each in past wages. The absence of any such claims will redound to the benefit of other creditors.

While there is some force to both of those arguments, they are not sufficient to persuade me that it is fair to make the order sought. There is no assurance here of the sale of Greenhills as a going concern. The most likely scenario is a sale by a Trustee in Bankruptcy with the active assistance of the present employees. No successor rights arise on such a sale. The \$7.7 million would appear, at least insofar as Greenhills employees are concerned, to reflect an average liability to each employee of almost three times the preference limit in the new Bankruptcy Act.

The payment of \$3.7 million would have to be funded by the Bank of Montreal out of the Petitioner's operating line of credit. Assuming that the margin requirements provide sufficient flexibility in that regard (a matter now in some doubt due to certain other demands on that line of credit) it is subsequent charge holders such as C.P. Rail which would be most directly affected. Even if the Petitioner had money in the bank with which to make such a payment, I would not authorize that payment in the present circumstances.

The Petitioner is without directors or officers. Their final act was to instruct counsel to advise the court that they have abandoned hope of a successful plan of reorganization and to give counsel the authority to accept service of a bankruptcy petition. To permit the \$3.7 million payment would be to create a preference not sanctioned by even the new Bankruptcy Act. Whether or not the initial stay order of May 14 would have been opposed if the Trust Fund had been \$7.7 million instead of \$4 million is impossible to say. What is certain is that the cash flow projections would have looked even more tenuous.

Despite further consideration and argument, I reach the same answer as I did on August 11 insofar as vacation pay is concerned. It is much too late in the day for the order which the Petitioner seeks. Except for holiday pay which has accrued since May 14, 1992, and which is dealt with below in the context of the application of the Trust Fund, payment of holiday pay accrued at May 14 in the manner suggested would change the *status quo* to a degree which is unacceptable.

THE TRUST FUND

Even those who opposed the order for payment (Bank of Montreal and C.P. Rail) expressed sympathy for the employees of the petitioner who have worked and accrued further rights to vacation pay since May 14. They are not secured by the charge which I created in favour of trades and suppliers. I share that sympathy, and it is expressed in the order noted earlier which requires the Director of Employment Standards to prefer such claims against the Trust Fund now in his hands.

The May 14 interim order, which first extended court permission to maintain the \$4 million trust fund, includes these words:

...without further order...no monies shall be disbursed from the Trust fund...

The subsequent order of June 10 (not yet entered) has been in draft form for some weeks. That draft, after continuing the Petitioner's right to maintain the trust fund, states:

...provided that nothing...shall entitle the Petitioner or the trustee...to apply the trust fund...to obligations which were payable prior to May 14, 1992 without further order...

While those provisions do not provide the answer, they do provide the opening which I require to protect employees for vacation pay which has accrued since May 14, 1992. I considered that to be the primary function of the trust fund from the outset. By protecting the directors against the ongoing, revolving obligation of the Petitioner for vacation pay and employee deductions, the employees would be protected if, for any reason, the Petitioner was unable to pay.

Even if the order of June 10 as drafted did not contemplate such a preference, the fact that it is not entered allows me to vary it, after the further submissions I heard on August 26, in the manner I have.

August 27, 1992

Vancouver, B.C.

"B.D. Macdonald, J."