

TAB 7

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Anvil Range Mining Corp., Re

In the Matter of Anvil Range Mining Corporation

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as Amended

In the Matter of the Courts of Justice Act, R.S.O. 1990 c. C-43, as Amended

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, C.B-3, as Amended

In the Matter of a Plan of Compromise or Arrangement of Anvil Range Mining Corporation, Applicants

Ontario Superior Court of Justice [Commercial List]

Farley J.

Heard: March 22, 2001

Judgment: March 29, 2001

Docket: Doc. 98-BK-001208

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Counsel: *Kenneth Kraft* and *George Karayannides*, for Deloitte & Touche Inc. in its capacity as Interim Receiver of Anvil Range Mining Corporation and Anvil Mining Properties Inc.

Tony Reyes, for Golden Hills Ventures Ltd., MacMillan Mining Contractors Ltd., and Vortex Mining Inc.

John Porter, for Her Majesty the Queen in Right of Canada as represented by the Department of Indian Affairs and Northern Development

Kevin R. Aalto and *David Estrin*, for Cumberland Asset Management, Berner Company Inc., Global Securities Corporation, Peel Brooke Inc., Robert N. Granger, Adrian M.S. White, and Hyundai Corporation

Derek T. Ground, for Ross River Dena Council and Ross River Development Corporation

Richard B. Jones, for Rose Creek Vangorda Mines and Pelly River Mines Limited (NPL)

David Hager, for Cominco Ltd.

Geoffrey B. Morawetz, for Yukon Energy Corporation and as agent for James Grout representing "Leitch Lien

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Claimants"

Frederick L. Myers, for Government of Yukon

Subject: Insolvency; Corporate and Commercial

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Interim receiver brought motion for sanctioning of plan of arrangement pursuant to Companies' Creditors Arrangement Act — Motion granted — Plan of arrangement was fair and reasonable — Plan had to be evaluated based upon what was known at time and what was realistic in future — Approval of plan of arrangement would allow secured and unsecured creditors and shareholders of company to move on with activities while mining properties would be under proper stewardship — Mere fact that opponents of plan were advocating alternative did not mean interim receiver had lost its neutrality — Plan was compromise of claims of those creditors who had true stake in company — Secured claims were far in excess of value of assets — Valuation of assets on speculative basis, such as possibility of spike in mining prices, was not appropriate — Plan proposed solely to secured creditors is not unfair where insolvent's assets are of insufficient value to yield any recovery to unsecured creditors — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by *Farley J.*:

J.S. McMillan Fisheries Ltd., Re (1998), 1 C.B.R. (4th) 226, 50 B.C.L.R. (3d) 167 (B.C. S.C.) — considered

Kostiuk, Re, 2000 BCSC 1115, 2000 CarswellBC 1523, 19 C.B.R. (4th) 109 (B.C. S.C.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) — considered

New Quebec Raglan Mines Ltd. v. Blok-Andersen (1993), 9 B.L.R. (2d) 93 (Ont. Gen. Div. [Commercial List]) — considered

Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, 34 B.C.L.R. (2d) 122, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363 (B.C. C.A.) — considered

Olympia & York Developments Ltd., Re (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]) — considered

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re*) 12 O.R. (3d) 500 (Ont. Gen. Div.) — considered

Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp., 106 D.L.R. (4th) 132, 67 O.A.C. 49 (Ont. C.A.) — considered

Philip Services Corp., Re, 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — considered

Royal Bank v. Fracmaster Ltd., 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 209 W.A.C. 93, 11 C.B.R. (4th) 230, [1999] A.J. No.

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675 (Alta. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — considered

Miners Lien Act, R.S.Y. 1986, c. 116

Generally — referred to

MOTION by interim receiver for sanctioning of plan of arrangement pursuant to *Companies' Creditors Arrangement Act*.

Endorsement. Farley J.:

1 This hearing involved the return of the motion of the Interim Receiver ("IR") which I adjourned on February 21, 2001 as a result of the Cumberland Group's complaint that the IR had not provided a "valuation" pursuant to Cameron J.'s Order of January 16, 2001 [properly December 19, 2000] required the IR's "report to include and updated valuation of the assets". The IR's motion was for the sanctioning of a plan of arrangement (the "Plan") of Anvil Range Mining Corporation and Anvil Mining Properties Inc. (collectively, "Anvil") as approved by certain classes of creditors of Anvil pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") or in the alternative, the approval of a sale of the assets of Anvil on terms substantially similar to those provided in the Plan. The IR's further motion record served on March 14th, contained a March 12, 2001 Anvil Range Mining Corporation Valuation Assessment of Strathcona Mineral Services Limited prepared by Graham Farquharson, together with a March 13, 2001 valuation of the assets of Anvil Range Mining Corporation of Deloitte & Touche Corporate Finance Canada Inc. prepared by Jim Horvath and Mark Keuleman. The Strathcona and Deloitte & Touche reports were advanced by the IR in satisfaction of its obligations to provide the updated valuation of assets.

2 The IR also sought approval of its budgets and authorization for expenditures for the operating period April 1, 2001 - March 31, 2002 and authorization for the funding of special environmental projects for the period January 1 - March 31, 2001. This aspect was not opposed. This request appears reasonable in the circumstances and is therefore approved.

3 As I expressed in my February 21st reasons:

Certainly, the cited paragraphs in Farquharson's letter would point it to being unlikely that there was any significant value for the assets in question. Certainly Mr. Farquharson's letter is a gloomy one as to the prospect for the mining operations. (emphasis in original)

It should not come as a surprise to anyone then that the updated valuation of Strathcona and Deloitte & Touche do not present a rosy picture. Farquharson concludes:

Consequently, for Anvil Range the Plimsoll Line as a continuing mining operation is well below the current water

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level. It is most unlikely that any mining company would purchase the property on the basis of obtaining value from the resumption of mining operations and without considering the assumption of any portion of the environmental liabilities. Anvil Range, therefore, has no value to the beneficiaries of the estate under this scenario.

.....

The total amount realized from the sale or disposition of the foregoing assets on a salvage basis would appear to be in the order of \$10 - \$15 million without making any contribution towards the ongoing care and maintenance costs for the property or the reclamation requirements which we understand have become the responsibility of DIAND. There may also be some value ascribed to tax pools that remain from operating losses, capital expenditures and exploration expenditures by Anvil Range. However, presumably most of the value, if any, of those tax pools would only be applicable upon the resumption of mining operations on the property, and the Interim Receiver would be best positioned to comment on this item.

The Deloitte & Touche report concluded:

Based on the scope of our review, assumptions and analysis, the estimated fair market value of all the assets of Anvil Range is in the range of \$11.1 million - \$19.9 million (Schedule 1), as at January 31, 2001. If asked to be more specific, we would suggest the mid-point of the foregoing range being \$15.5 million. Based on the above, there is no value remaining for the unsecured creditors as the amount owed to secured creditors of over \$90.0 million exceeds the value of the assets of Anvil Range.

4 This was not good news for the Cumberland Group as unsecured creditors nor for Hyundai Corporation as a holder of more than 20% of the shares of Anvil. Certainly it cannot have been unexpected news although one can readily appreciate that human nature may often lead those who have suffered great losses (as the unsecured creditors and shareholders of Anvil certainly have) to hope for a miracle to happen or to present hope as fact and speculation as a firm foundation and to ignore probability in opting for (remote) possibility.

5 The Plan was unanimously approved by the three classes of secured creditors of Anvil on February 2, 2001. Given the Strathcona and Deloitte & Touche valuations, it was concluded that there was no material change to the circumstances under which these three classes voted and therefore it would be redundant to hold a fresh vote. The unsecured creditors were not part of the Plan and were not eligible pursuant to the Plan to vote.

6 The Cumberland Group and Hyundai urged that the Plan should not be approved by this Court for a variety of reasons. Chief among these was the proposition that the secured debt really ahead of the unsecured may not be great as \$90 million and that under certain scenarios there may be more value in the Anvil assets than the range of \$10 - \$19.9 million. *However, what must be appreciated is that one has to look at the situation based upon what is currently known as to existing facts and what is realistic in the foreseeable future.*

7 On December 7, 1999, Blair J. granted leave to the IR or the secured creditors to file a plan of arrangement. The decision amongst them eventually was made amongst all the secured creditors was that the IR should prepare such a plan, with the costs being shared among the secured creditors including DIAND.

8 The three general criteria which must be met for the Court to sanction a plan of arrangement under the CCAA are:

1. Has there been compliance with all statutory requirements and with all Court orders?
2. To determine, based on all materials filed and procedures carried out, if anything has been done or purported to be done that is not authorized by the CCAA; and

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3. Is the Plan fair and reasonable?

See *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 506; *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) at p. 201.

9 Dealing with the first two elements, it appears that the meetings called for voting on the Plan were held pursuant to an order of the Court with the classification of creditors being as approved by this Court. The voting was as contemplated and the Plan was unanimously approved. However, an objection was raised by Messrs. Jones and Aalto that the CCAA did not allow a plan of arrangement to be advanced by an interim receiver and further according to Mr. Aalto that this role being assumed by the IR destroyed the neutrality of the IR. However I would note that similarly there is no provision specifically in the *Bankruptcy and Insolvency Act* for an interim receiver to file a proposal under that legislation. Notwithstanding that in *Re J.S. McMillan Fisheries Ltd.* (1998), 1 C.B.R. (4th) 226 (B.C. S.C.), Tysoe J. stated at p. 231:

As the Company had no management, the Order appointing Ernst & Young Inc. as Interim Receiver authorized it to negotiate and file a Proposal in relation to the Company.

Further, Blair J. authorized the filing of a Plan by either the IR or the secured creditors and there was no appeal of his order. See the Court of Appeal decision in *Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.*, [1993] O.J. No. 2102 (Ont. C.A.). I would further point out that while the secured creditors had the opportunity of filing a Plan, they did not do so but rather they agreed amongst themselves that the authorized alternate, the IR, do so. The IR is an officer of the Court and pursuant to this court appointment, it owes a duty to be objective and neutral as amongst all of the affected parties in this insolvency, including the unsecured creditors and the shareholders. Given where the Plimsoll Line is in this situation, it is extremely inappropriate for the objectors to assert, without any evidence of substance, that the IR has adopted an adversarial role. Given my reasons of February 21, I would not have expected that barrage to have been repeated. That is not to say that, merely because the IR files a Plan, it should be taken by this Court as being fair and reasonable and further that objections not be received on this point. However, merely because the objectors (Cumberland Group) were advocating an alternative plan (a plan which in my view is unrealistic in the circumstances in light of the unsecureds being so far under water, the unworkability of this alternate, the concerns for remediation and the retention of \$600,000 as working capital out of the purse of those who have a look at the Plimsoll Line) does not mean that the IR has lost its neutrality. Rather, this demonstrates in my view that the IR has exercised its judgment in a reasoned, practical and functional way, as it should.

10 The Plan as presented is a compromise of the creditor claims of those creditors who have now (on a foreseeable future and realistic basis) a true or "actual" stake in Anvil — as opposed to those claims of the unsecured creditors and shareholders who unfortunately have only a chimera. Therefore although in *Northland McEachern C.J.B.C.* at p. 205, was not dealing with a situation where a class of creditors, as here, the unsecured, were not participating, when he observed:

First, the authorities warn us against second-guessing businessmen (see *Re Alabama, supra* at p.244). In this case, the companies and their advisors, the bank and its advisors, and all the creditors except the two appellants, all voted for the Plan. As the authorities say, we should not be astute in finding technical arguments to overcome the decision of such a majority.

it would seem to me that his observation would hold true in these circumstances.

11 While it is recognized that the main thrust of the CCAA is geared at a reorganization of the insolvent company — or enterprise, even if the company does not survive, the CCAA may be utilized to effect a sale, winding up or a

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liquidation of a company and its assets in appropriate circumstances. See *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p. 32; *Re Olympia & York Developments Ltd.* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]) at p. 104. Integral to those circumstances would be where a Plan under the CCAA would maximize the value of the stakeholders' pie.

12 The CCAA permits a debtor to propose a compromise or arrangement with its secured creditors. A Plan proposed solely to secured creditors is not unfair where the insolvent's assets are of insufficient value to yield any recovery to unsecured creditors. It is not unreasonable for a court in such circumstances to sanction a plan which is directly solely at secured creditors. See *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), *supra* at pp. 513-8; *Re Philip Services Corp.*, [1999] O.J. No. 4232 (Ont. S.C.J. [Commercial List]) at paras. 20-1. That the plan does not include any agreement with a class a creditors does not, by virtue solely of that omission, make it unfair where that class is not being legally affected. Nothing is being imposed upon the unsecureds; none of their rights are being confiscated. See *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), *supra* at pp. 508, 517-8.

13 I have concluded that the secured claims are far in excess of the value of the assets. That value has to be determined on a current basis. See *Re Kostiuk*, 2000 CarswellBC 1523, 2000 BCSC 1115 (B.C. S.C.) at paras. 38-41. It is inappropriate to value the assets on a speculative or (remote) possibility basis. The Strathcona report used reasonable assumptions as to future metal prices. This should be contrasted to the Cumberland Group's assertions that it is possible that prices may spike at some future time. What must be appreciated is that the Anvil ore body as developed presently has a very short life but that the prices must be viewed as sustainable over that period. See my views about spike prices in *New Quebec Raglan Mines Ltd. v. Blok-Andersen* (1993), 9 B.L.R. (2d) 93 (Ont. Gen. Div. [Commercial List]).

14 The Watts, Griffis & McOuat letter of March 21, 2001 has been hastily prepared in an attempt to throw doubt on some of the Strathcona observations and conclusions — but not to discredit them. In fact in numerous instances letter concurs with the Strathcona report. Rather the author of the letter has some questions. It must be appreciated that Strathcona/Farquharson has had significant involvement with the Anvil mining facilities over the past several years, whereas Watts, Griffis & McOuat has only had this rather peripheral engagement. I do not find it unusual that two experienced consultants in this mining field may have different views or approaches, nor that one may feel the need for more information than it was able to glean from reviewing the listed documents before reaching a conclusion. In the result, I think it reasonable to accept the views of Farquharson, an established and recognized expert in this field, who has had, as indicated, considerable experience with this matter over the past several years. Further, I think it inappropriate and unnecessary to further delay and incur additional costs to engage upon a further study.

15 It appears that Mr. Aalto's clients have accepted the Cominco secured claim of \$24 million. The *Miners Lien Act* ("MLA") claims of \$18 million appear also to be undisputed. There was argument as to the DIAND claims since part of DIAND's claim is and always has been acknowledged as contingent since it relates to reclamation costs in the future. However, it has approximately \$6 million of claims as to monies already expended. As a side note, I would observe there appears to be every likelihood to a certainty that every dollar in the budget for the year ending March 31, 2002 earmarked for reclamation will be spent. If one were to ignore any future remediation costs, the secured creditors in all three classes would have claims in excess of \$50 million. This is 2 1/2 times the highest value of the assets. The Cumberland Group in another tack then asserts that DIAND and any other governmental authorities should not look to settle the remediation costs onto these assets at the present time based upon the recognized philosophy of "polluter pays" present in the environmental legislation. Ralph Sultan, a former director of Anvil, swore a March 21, 2001 affidavit (i.e. the day before this hearing) that:

11. Prior to Anvil Range, which operated the Faro Mine for approximately 3 years, there had been a number of operators of the Faro Mine. Prior operators created the basic mine plan for the development and operation of the site which is subject to reclamation. Among those prior operators are Curragh, Cypress Anvil Mining Corporation, and Dome Petroleum. I believe that Cypress Anvil Mining Corporation is a subsidiary of Cyprus Amax Minerals Company which is now owned by Phelps Dodge Corporation a huge international mine conglomerate

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based in the United States. I believe that Cypress Amex held insurance for environmental reclamation costs which may include the Faro Mine. Others of the predecessors or their successors may also have some form of insurance for this type of claim. So far as I am aware, DIAND has taken no steps to pursue prior operators or insurance which may be available to satisfy any reclamation costs relative to the Faro Mine. Nor am I aware of any efforts made by the Interim Receiver to require DIAND to pursue other avenues of recovery apart from ascertaining a reclamation claim in these proceedings. Attached hereto is Exhibit "F" is a copy of a reference to insurance held by Cypress Amex in a report on Mining prepared by KPMG.

It is always, of course, important to test the theoretical against the real world. It is not disputed by anyone that each of the predecessors would have contributed in part to the overall environmental condition of the Anvil property as such condition now exists. Each successor has "inherited" not only the benefit of the assets but the obligations inherent or attached to those assets — for our purposes, the environmental liability existing as of acquisition. Should DIAND go after the predecessors, *to the exclusion* of looking to the present assets. The answer must reasonably be "no". The most it could do on a reliance solely of "polluter pays" would be to go after each predecessor for what it contributed. It is recognizable that Anvil contributed for 3 years. Curragh and Dome Petroleum have evaporated. Sultan only alludes to insurance which a parent of Cypress Anvil Mining Corporation may hold which might extend to their subsidiary whose continued existence has not been indicated, together with insurance other predecessors may have had. He has no direct knowledge of this insurance being in existence or being able to be called on in accordance with its terms and conditions at this date. It does not appear that the board and management of Anvil, of which Sultan was a member, concerned themselves with establishing what insurance of others it might call upon if Anvil were required during its regime to do reclamation work including these contributions of past polluters. For the purposes of this exercise then it seems to me that the objections as to the environmental concerns is a diversionary tactic. In any event, in or out, the environmental claims merely meant that the objectors are drowned either in 50 feet of water or at a depth of 100 feet after falling overboard from the heavily listing Anvil ship which was taking on water.

16 The other secured creditors-always recognized, as did DIAND, that the significant value of DIAND's claim was contingent in the sense it related to future obligations. To suggest that the vote of the secureds would be any different if they had the "advantage" of my observations above before voting is to my view underestimating their intelligence.

17 With respect to the tax pools, they only have value if there are profits from the mine. There does not appear to be any reasonable likelihood of this in the foreseeable future. The Memorandum of Understanding, dated August 10, 1999, among Cominco Ltd., Government of Yukon and DIAND in reciting its purpose should not be taken as establishing as a fact something which is not so established when it indicates:

This MOU is to facilitate the protection of the environment and the preservation and protection of assets referred to in this MOU so that the mining operation may recommence in a cost effective and economic manner.

That is not any foundation for concluding that the mining operation will ever be economic so that it may recommence. Further this MOU statement and the MOU itself does not contradict that there is no present value to the mine. It does not appear that anyone will restart the mine under foreseeable circumstances. But it is conceivable that unforeseen circumstances may occur especially the longer one goes out on the horizon.

18 In my view, the approval of this Plan will allow the creditors (both secured and unsecured) and the shareholders of Anvil to move on with their lives and activities while the mining properties including the mine will be under proper stewardship.

19 The objectors assert that no value was attributed to Anvil's interest in the Kassandra Mines in Greece. Aside from the fact that on December 30, 1999 I decided that Anvil had no such interest, which decision was affirmed by the Court of Appeal on November 1, 2000, in a short six paragraph decision which indicated that I had correctly decided

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the matters in issue, all that the Cumberland Group has to point to is that its leave to appeal to the Supreme Court of Canada has not been heard yet.

20 Mr. Aalto referred to *Royal Bank v. Fracmaster Ltd.*, [1999] A.J. No. 675 (Alta. C.A.) at para. 16 with respect to the CCAA not being used to provide for a liquidation in a guise of a CCAA reorganization. But see my views above. In any event, the IR has sought alternative relief allowing it to sell the assets, which sale would be on a commercially equivalent basis as the Plan under the CCAA contemplates. Given that the Plan would operate more efficiently in that respect, I see no reason to provide that this proceed as a sale by the IR.

21 In the end result, I am of the view that the Plan is fair and reasonable for the foregoing reasons and therefore the three part test has been met. The Plan is sanctioned and approved.

22 I may be spoken to as to costs if necessary by booking an appointment through the Commercial List Office.

Motion granted.

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Anvil Range Mining Corp., Re

IN THE MATTER OF ANVIL RANGE MINING CORPORATION; AND IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. c-36, AS AMENDED; IN THE MATTER OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C-43, AS AMENDED; AND IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, C. B-3, AS AMENDED; AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF ANVIL RANGE MINING CORPORATION

Ontario Court of Appeal

Morden, Borins, Feldman J.J.A.

Heard: March 6, 2002

Judgment: July 5, 2002

Docket: CA C36919

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Proceedings: affirming (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List])

Counsel: *Kevin R. Aalto, David Estrin*, for Appellants, Cumberland Asset Management, Berner & Company, Global Securities Corporation, Peel Brooke Inc, Inukshuk Resources Inc., Robert N. Granger, Adrian M.S. White

George Karayannides, Kenneth Kraft, for Respondent, Deloitte & Touche Inc., Interim Receiver of Anvil Range Mining Corporation and Anvil Mining Properties Inc.

David Hager, for Respondent, Cominco Ltd.

John Porter, for Respondent, Department of Indian Affairs and Northern Development

Jeremy Dacks, for Respondent, Yukon Territories Government

Derek T. Ross, for Respondent, Ross River Dena Council, Ross River Development Corporation

Geoffrey B. Morawetz, for Respondent, Yukon Energy Corporation

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

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Company purchased mine, refurbished it and operated mine until early 1998 — Company received protection from creditors under Companies' Creditors Arrangement Act and interim receiver was appointed — Secured creditors of company reached settlement which was to be implemented by plan under Act — Plan provided for distribution of company's assets among three classes of secured creditor — Affected creditors approved plan — Interim receiver's motion for sanction of plan of arrangement pursuant to Act was granted — Motions judge's findings were based on two reports valuing company's assets between \$10,000,000 and \$19,900,000 — Motions judge concluded that secured claims were far in excess of value of assets — Other creditors appealed — Appeal dismissed — In context of purchase price for mine, that mine's resources underwent depletion, cost of putting mine into state where it could recommence operations and that no one had expressed interest in purchasing mine, reports formed reasonable basis for motions judge's findings — Secured claims totalled far more than maximum possible total value of company's assets — Plan reflected compromise of priority issues among secured creditors and approval allowed creditors to move on while mining properties were under proper stewardship — Alternative plan by other creditors had no viability — As assets were insufficient to pay half of secured creditors' claims, approval occasioned no prejudice to other creditors — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered:

Equity Waste Management of Canada Corp. v. Halton Hills (Town), 1997 CarswellOnt 3270, 40 M.P.L.R. (2d) 107, 103 O.A.C. 324, 35 O.R. (3d) 321 (Ont. C.A.) — considered

Northland Properties Ltd., Re, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*) 34 B.C.L.R. (2d) 122, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*) 73 C.B.R. (N.S.) 195, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*) [1989] 3 W.W.R. 363, 1989 CarswellBC 334 (B.C. C.A.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — considered

s. 5 — considered

s. 6 — considered

APPEAL by creditors from judgment reported at 2001 CarswellOnt 1325, 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) sanctioning plan of arrangement under *Companies' Creditors Arrangement Act*.

The Court:

1 Cumberland Asset Management, and others, appeal from orders made by Farley J. dated March 29, 2001 and May 7, 2001. In the March 29, 2001 order Farley J. sanctioned a plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (C.C.A.A.) proposed by Deloitte & Touche Inc., the Interim Receiver of Anvil Range Mining Corporation and Anvil Range Properties Inc. In his May 7, 2001 order, Farley J. ordered that the appellants pay costs relating to the sanction motion in the total amount of \$28,500.

2 The facts respecting the sanctioning of the plan are set forth in Farley J.'s reasons which are reported at (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) and need not be repeated in detail. The following is an outline, which contains some history of this proceeding which is not included in Farley J.'s reasons.

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3 Anvil Range Mining Corporation is the owner of a lead and zinc mine, known as the Faro Mine, in the Yukon Territory. It bought this mine for about \$27,000,000 in 1994 from KPMG Inc., in its capacity as Interim Receiver of the then owner, Curragh Inc.

4 Anvil Range began production in August 1995 after conducting a nine-month \$75,000,000 pre-stripping and mill refurbishment program. It suspended mining operations in December 1996 and milling operations in the spring of 1997 because of falling metal prices. It recommenced operations in the fall of 1997 but ceased mining and milling early in 1998.

5 In January 1998, Anvil Range applied for and received protection from its creditors under the C.C.A.A. This was the beginning of the proceeding in which the orders under appeal were, eventually, made. In March 1998, Cominco Ltd., a secured creditor of Anvil Range, moved for the appointment of an interim receiver and termination of the stay provided for in the C.C.A.A. proceeding. Deloitte & Touche Inc. was appointed Interim Receiver and the court directed it to report to the court on certain matters, including seeking advice and directions respecting a marketing plan for the mine.

6 In response to this, the Interim Receiver filed its second report dated June 17, 1998 in which it recommended that "no funds be spent on marketing the mine for the present". This was based on several different facts, one of them being "the fact that no prospective purchasers had emerged to that date . . . to express even minimal interest in the mine site despite the well publicized facts in the industry press".

7 As part of the ongoing dispute among the parties, the Interim Receiver brought a motion before Blair J., which was heard on August 20, 1998, seeking approval to sell certain assets at the mine. Blair J. noted that the Interim Receiver had expressed the opinion on the basis of its market analysis that it was "unlikely that the Faro Mine can be reopened within the next 2-3 years and possibly as long as 5 years." He then said:

I agree that it is difficult to be very optimistic about the future prospects of the Faro Mine, including the chance of its re-opening. On the other hand, Strathcona (acknowledged by all to be expert in the field) seems to feel strongly that the best chance of recovery is if the Grum Pit at least is kept on a "standby-mode" ready to be made operative quickly when a period of good metal prices arrives. To do this the equipment in question will be necessary. To replace it would be costly and it may well be a non-starter if what is being considered is only a 3 year operation or so.

8 Blair J. did not dismiss the request for approval to sell the equipment but adjourned it to October 29, 1998 to enable the Yukon Territorial Government to do further analysis. This was because of the importance of the mine to the fabric of the Yukon Territory.

9 After extensive negotiations and a filing of the Yukon Territorial Government report, a funding formula was established in December 1998 whereby the Department of Indian Affairs and Northern Development ("DIAND") assumed most of the funding obligations of going forward. This funding was secured by a charge against the real property.

10 In December 1999, the court granted leave to the Interim Receiver or the secured creditors to file a plan of arrangement. About a year of negotiations among the secured creditors followed, eventually leading to an extensive settlement conference held in Vancouver under the direction of Justice Kierans, sitting as a justice of the Supreme Court of the Yukon Territory. The conference resulted in a settlement among three groups of secured creditors: (1) the Mining Lien Act Claimants; (2) Cominco Ltd.; and (3) DIAND, the Yukon Territorial Government and the Yukon Workers' Compensation, Health and Safety Board. The settlement was to be implemented by a plan under the C.C.A.A.

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11 As will be set forth in more detail later in these reasons, the three groups of secured creditors were the only parties with a legal and economic interest in the assets of Anvil Range. The plan settled a series of complex priority disputes both within creditor classes and among creditor classes and also dealt with allocating funds in the Interim Receiver's possession.

12 The plan divides the creditors who are affected by it (the "Affected Creditors") into three classes (the three groups mentioned above):

1. The Mining Lien Act Claimants.
2. Cominco Ltd.
3. The government creditors, DIAND, the Yukon Territorial Government, and the Yukon Workers' Compensation, Health and Safety Board.

13 The plan provides for the class 3 creditors to acquire the mine and the mill located on it and certain other assets (the "Excluded Assets") and to assume responsibility for funding the ongoing necessary environmental, maintenance and security programs. The other two classes of Affected Creditors are to share in the proceeds of the sale of the remaining assets (the "Realization Assets").

14 The Interim Receiver recommended approval of the plan as the best alternative for settling the outstanding priority issues in dispute and because there was no recovery possible other than to the Affected Creditors.

15 The class 1 creditors' secured claims against Anvil Range property, as judicially declared by judgments of the Supreme Court of the Yukon Territory, total \$18,312,169. The claim of the class 2 creditor, Cominco Ltd., was judicially determined by the Superior Court of Justice (Ontario) on January 27, 1999 to be \$24,353,657 with post-judgment interest accruing on this amount at 8.5% per annum.

16 With respect to the class 3 creditors, the Yukon Territorial Government and the Yukon Workers' Compensation and Health and Safety Board claim is about \$1,000,000. The claim advanced on behalf of DIAND is said to total over \$60,000,000 for funding the Interim Receiver's expenses and, also, the environmental remediation costs. We shall deal with the salient details of it shortly.

17 The Affected Creditors unanimously approved the plan which was then sanctioned by the order of Farley J. dated March 29, 2001.

18 The appellants' appeal is substantially based on the following submissions:

1. The plan is not "fair and reasonable" in all of its circumstances as it effectively eliminates the opportunity for unsecured creditors to realize anything.
2. The plan is contrary to the purposes underlying the C.C.A.A.
3. DIAND's reclamation claim is inconsistent with the "fair and reasonable principles" of the C.C.A.A. and environmental remediation legislation.

19 Underlying these submissions is the submission that Farley J. erred in not requiring a more complete and in-depth valuation of Anvil Range's assets be obtained by the Interim Receiver.

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20 This last submission should be dealt with first because it is fundamental to the success of the appeal. Farley J.'s findings were based on two reports, one by Strathcona Mineral Services Ltd. dated March 12, 2001 and the other by Deloitte & Touche Corporate Finance Canada, Inc. dated March 13, 2001. In preparing its report, Deloitte & Touche reviewed the Strathcona report, among other materials.

21 In its report Strathcona noted that in the Interim Receiver's 22nd report there was an estimate of the capital expenditures that would be required to resume mining activity at the Grum deposit (which was the only accessible resource base on the Anvil property) including the purchase of mining equipment, rehabilitation of the pit walls, and modifications and repairs to the process facilities. Strathcona said:

The total is estimated at \$80 to \$100 million before working capital requirements and we consider this estimate to be reasonable and in the general range of what could be expected. It is clear that the capital expenditures to restart mining operations are going to exceed, perhaps by a factor of two, the cumulative gross operating margins for three years of operation that are indicated.

22 Strathcona concluded its report as follows:

The total amount realized from the sale or disposition of the foregoing assets on a salvage basis would appear to be in the order of \$10-\$15 million without making any contribution towards the ongoing care and maintenance costs for the property or the reclamation requirements which we understand have become the responsibility of DIAND. There may also be some value ascribed to tax pools that remain from operating losses, capital expenditures and exploration expenditures by Anvil Range. However, presumably most of the value, if any, of those tax pools would only be applicable upon the resumption of mining operations on the property, and the Interim Receiver would be best positioned to comment on this item.

23 Deloitte & Touche Corporate Finance Canada, Inc. concluded that the established market value of all the assets to be "in the range of \$11.1 to \$19.9 million (Schedule 1), as at January 31, 2001" and that, if it were asked to be more specific, "[it] would suggest the mid-point of the foregoing range, being \$15.5 million." It concluded: "Based on the above, there is no value remaining for the unsecured creditors, as the amount owed to secured creditors of over \$90.0 million exceeds the value of the assets of Anvil Range."

24 The appellants submitted a letter from Watts, Griffis & McOuat, Consulting Geologists and Engineers, dated March 21, 2001 which reviewed several documents, "in particular" the Strathcona report dated March 12, 2001. In this letter, Watts, Griffis & McOuat stated "a number of questions about the methodology and logic that Strathcona is using". It did not state an opinion on the value of the Anvil Range property.

25 On these materials, Farley J. concluded that "the secured claims are far in excess of the value of the assets" and that the value had to be determined "on a current basis" and not "on a speculative or (remote) possibility basis." He dealt with the evidence submitted by the appellant as follows:

The Watts, Griffis & McOuat letter of March 21, 2001 has been hastily prepared in an attempt to throw doubt on some of the Strathcona observations and conclusions - but not to discredit them. In fact in numerous instances [the] letter concurs with the Strathcona report. Rather the author of the letter has some questions. It must be appreciated that Strathcona/Farquharson has had significant involvement with the Anvil mining facilities over the past several years, whereas Watts, Griffis & McOuat has only had this rather peripheral engagement. I do not find it unusual that two experienced consultants in this mining field may have different views or approaches, nor that one may feel the need for more information than it was able to glean from reviewing the listed documents before reaching a conclusion. In the result, I think it reasonable to accept the views of Farquharson, an established and recognized expert in this field, who has had, as indicated, considerable experience with this matter over the past

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several years. Further, I think it inappropriate and unnecessary to further delay and incur additional costs to engage upon a further study.

26 In our view, Farley J. did not err in accepting the respondent's evidence as affording a reasonable basis for his findings and, further, he did not make any error in his assessment of this evidence that would justify our interfering with his conclusions: *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (Ont. C.A.) at 333-336.

27 It may be that the Strathcona report, as a free standing document, could have been more detailed but this is far from saying that it was not capable, particularly in the context of this proceeding, which began in 1998, of forming a reasonable basis for Farley J.'s findings. This context includes the evidence that Anvil Range bought the property in 1994 for \$27,000,000, that its resources underwent depletion since then, that the cost of putting the property in a state where it could recommence operations was some \$80,000,000 to \$100,000,000 and, although it had been known for sometime in the industry that the property was "available", no one had expressed any interest in it.

28 We turn now to the three basic submissions of the appellant set forth in paragraph 18 of these reasons.

29 It will be helpful to deal with the third submission first, that relating to the DIAND claim. The total DIAND claim is for something over \$60,000,000. The appellants submit that by reason of the "polluter pays" principle, it is wrong that DIAND should have a secured claim against the assets of Anvil Range for environmental remediation at the expense of the unsecured creditors. There are several facets to this submission but, because of the particular facts of this case, we need not explore them. Of the total DIAND claim, some \$16,000,000 relates to funds expended under court orders for the Interim Receiver and this is, undeniably, a valid secured claim. As will be apparent, it is sufficient to resolve this appeal if only this part of DIAND's claim is taken into account - and it may well not be necessary to take any part of the claim into account.

30 We turn now to the first two of the appellant's specific submissions. The first is that the plan is not fair and reasonable because it effectively eliminates the opportunity for unsecured creditors to realize anything.

31 From the accepted valuation the maximum possible total value of Anvil Range's assets is \$19,900,000. After eliminating the portion of DIAND's claim for remediation costs, the secured claims total at least \$60,000,000. Accordingly, even after allowing for a fair margin of error on each side of the equation (the assets side and the claims side) it can be seen that the unsecured creditors have no legal or economic interest in the assets in question.

32 The second submission is that the plan is contrary to the purposes of the C.C.A.A. Courts have recognized that the purpose of the C.C.A.A. is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators. See, for example, *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) at 201. Farley J. recognized this but also expressed the view in paragraph 11 of his reasons that:

The CCAA may be utilized to effect a sale, winding up or a liquidation of a company and its assets in appropriate circumstances. See *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p. 32; *Re Olympia & York Developments Ltd.* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]) at p. 104. Integral to those circumstances would be where a Plan under the CCAA would maximize the value of the stakeholders' pie.

33 Further to this it may be noted that the plan in this case reflected a compromise of difficult priority issues among the secured creditors and, as stated later in Farley J.'s reasons, "the approval of this Plan will allow the creditors (both secured and unsecured) and the shareholders of Anvil to move on with their lives and activities while the mining properties including the mine will be under proper stewardship."

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34 It may also be noted that s. 5 of the C.C.A.A. contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors.

35 Relevant to this issue is the fact that the appellants put forward an alternative plan, which involved their receiving the corporate shell of Anvil Range together with \$500,000, and other terms. This plan, however, had no viability. As Farley J. noted in his reasons for the costs disposition it was "doomed to failure given the stated opposition to same [the alternate plan] of the secureds-Cominco Lien and Claimants and DIAND".

36 It is not necessary to resolve this issue to decide the appeal. If the order under appeal was not properly made under the C.C.A.A., there is no doubt that it could have been made by Farley J. in response to the alternative relief sought, which was that of approving a sale of Anvil Range's assets by the Interim Receiver on terms substantially similar to those provided for in the plan. Taking into account that the assets are insufficient to pay even half of the secured creditors claims, it is clear that the order under appeal occasioned no prejudice whatsoever to the appellants. Accordingly we do not give effect to this submission.

37 In the complex circumstances of the operation of the mine and given that there is no hope of the sale generating sufficient funds to satisfy the secured creditors, it cannot be said that Farley J. erred in approving the plan as being fair and reasonable.

COSTS

38 The other appeal is from Farley J.'s order requiring the appellants to pay costs relating to the motion which he fixed in the total amount of \$28,500 and allocated as follows:

\$15,000 to the Interim Receiver;

\$7,000 to Cominco;

\$5,000 to DIAND;

\$1,500 to Yukon Energy Corporation

39 The appellants submit that Farley J. erred in this costs disposition because parties with an interest in a company governed by the C.C.A.A. should be free to appear in court and oppose the sanctioning of a plan on legitimate grounds without the threat of the penalty of the costs being imposed against them.

40 The award of costs, of course, was a matter within the discretion of the judge and we are not entitled to interfere with the exercise of the discretion just because we may have exercised it differently. To succeed the appellants must show that the exercise of discretion was affected by some error in principle or by misapprehension of the facts. In this case, while we might have been inclined simply to deprive the appellant of costs relating to the motion, we cannot say that there was no principled basis for the disposition which Farley J. made. He was entitled to conclude, as he did, that there was no realistic basis supporting the appellants' opposition to the plan.

DISPOSITION

41 In the result, the appeal is dismissed with costs payable by the appellants to the respondents who delivered factums and appeared on the hearing of the appeal. These respondents should deliver their submissions respecting the

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costs of the appeal, in writing, within seven days of the release of these reasons and the appellants should deliver their submissions within fourteen days of the release of the reasons.

Appeal dismissed.

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