SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v. Yukon Zinc Corporation*, 2020 YKSC 15

Date: 20200526
S.C. No. 19-A0067
Registry: Whitehorse

BETWEEN

GOVERNMENT OF YUKON
as represented by the Minister of the Department of Energy, Mines and Resources

PETITIONER

AND

YUKON ZINC CORPORATION

RESPONDENT

Before Madam Justice S.M. Duncan

Appearances:

John T. Porter and Laurie A. Henderson	Counsel for the Petitioner
No one appearing	Yukon Zinc Corporation
Kibben Jackson	Counsel for Jinduicheng Canada Resources Corporation Limited
H. Lance Williams	Counsel for Welichem Research General Partnership
John Sandrelli and Cindy Cheuk	Counsel for PricewaterhouseCoopers Inc.

REASONS FOR JUDGMENT
(Application of Yukon Government re: Security)

INTRODUCTION

[1] This application arises because of an irresponsible mining venture in the Yukon. It raises the tensions inherent in society's and the legislatures' quest to strike an appropriate balance between ensuring effective environmental regulation and

encouraging profitable, responsible resource development. It also demonstrates the limits in the applicable legislation and the need for the regulators to be vigilant in order to protect against potential burdens on taxpayers.

[2] This is an application by the Government of Yukon, as represented by the Minister of the Department of Energy, Mines and Resources ("Yukon"), the regulator of mining in the Yukon, for an order:

i) declaring it has a provable claim in the bankruptcy of Yukon Zinc Corporation ("YZC") in the amount of $35,548,650 for the costs of remedying the environmental damage affecting the real property of YZC;

ii) declaring the claim is secured by security on the real property of YZC affected by the damage and property contiguous with it, related to the environmental damage;

iii) declaring the security is enforceable in the same way as any other security on real property; and

iv) declaring that its provable claim ranks in priority above any other claim, right, charge or security against the property.

BACKGROUND

General

[3] YZC is a company incorporated under the British Columbia *Business Corporations Act*, S.B.C. 2002, c. 57. The addresses for four of the six directors are in Shanghai or Shaanxi, China, the remaining two directors have addresses in Vancouver, British Columbia. YZC's sole shareholder is Jinduicheng Canada Resources Corporation Limited ("JDC Canada"). JDC Canada is in turn a subsidiary of Jinduicheng

Molybdenum Group Ltd. (“JDC Group”) which, together with other Chinese shareholders, owns 66.5% of the shares of JDC Canada.

[4] YZC’s principal asset is the Wolverine Mine (the “Mine”), located in the southeastern region of the Yukon Territory, 282 km northeast of Whitehorse, in the traditional territory of Ross River Dena Council, Liard First Nation, Dease River First Nation and Kwadacha Nation (“the Kaska”). It is a large zinc-silver-lead mine with copper and gold by-products. It consists of 2,945 quartz mineral claims and exploration rights covering 700 km.

[5] The Mine includes underground ramps, tunnels, ventilation and heating systems, a 26 km access road, a 1,340 metre all-weather airstrip, a tailings storage facility, a 1,700 metric-ton-per-day processing mill and related structures, a full service camp and administration buildings.

[6] YZC holds a quartz mining licence issued under the *Quartz Mining Act*, S.Y. 2003, c. 14 (“*QMA*”), on December 5, 2006, by the Minister of Energy, Mines and Resources (the “Mining Licence”). It also holds a Type A Water Licence issued under the *Waters Act*, S.Y. 2003, c.19 (“*WA*”), on October 4, 2007 by the Water Board, (the “Water Licence”).

[7] After exploration and development activities from approximately 2008 to 2011, YZC began commercial production at the Mine in March 2012. The Mine operated for approximately three years, employing 300 people at its peak. The original estimated life of the Mine was nine years.

Financial Difficulties

[8] In 2014, YZC began to experience financial difficulties attributed to a downturn in global metal prices, and significant development, start-up and operational costs at the Mine. The rising US dollar, interruptions in inventory shipments, and obligations to make royalty payments also affected YZC detrimentally. In November 2014, JDC Canada restricted borrowings and by January 2015, YZC decided to put the Mine into care and maintenance because of insufficient funds.

[9] In March 2015, YZC sought relief from creditors under the *Companies' Creditors and Arrangement Act,* R.S.C. 1985, c. C-36, ("*CCAA*") in the Supreme Court of British Columbia. It successfully restructured its debt obligations and emerged from *CCAA* protection in October 2015. JDC Canada provided funding sufficient to allow YZC to exit from *CCAA* protection, but did not provide any funds to allow the company to resume operation. This absence of funding from JDC Canada or JDC Group has continued to the present.

[10] As a result, the Mine has remained in care and maintenance since January 2015. At that time, YZC terminated all its employees except for four: two for each 12-hour shift. Their primary roles have been to monitor water levels, transport water from the underground Mine to the tailings storage facility and maintain roads, equipment and buildings on site.

[11] During 2018 and 2019 there were at least two attempts by YZC to sell the Mine. In 2019, YZC advised Yukon several times it had been in discussions with one or more potential purchasers. None of these discussions resulted in a sale.

Condition of Mine

[12] The Mine's condition has continued to deteriorate since its closure in January 2015. The cash funding restrictions between 2016 and 2018 meant that proper care and maintenance was not being done. In particular, in 2017, the underground part of the Mine flooded. As a result, contaminated underground water was piped to the Mine's tailings storage facility. This caused the tailings storage facility to fill up, with no means of water treatment or available discharge for the contaminated water. The absence of water treatment and the risk of untreated water flowing into the environment was a serious concern to Yukon.

[13] The deteriorating condition of the Mine led Yukon to increase its involvement at the Mine. It began to inspect more regularly - May 1, 2018, September 18, 2018, January 16, 2019 and May 29, 2019. Reports from each of these inspections noted concerns with inadequate water management, including poor condition of the infrastructure and absence of progress on establishing a water treatment system; the inability of the company to undertake the necessary care and maintenance; and the failure to furnish the required security.

[14] Yukon warned YZC by letter dated July 11, 2018, it was deficient in its compliance with the conditions of its licences in the following ways:

i) Failure to implement the approved reclamation and closure plan;

ii) Failure to commence *in-situ* or batch treatment and discharge of the underground mine water to Go Creek;

iii) Failure to stop the transfer of underground mine water to the tailings storage facility; and

iv) Failure to establish a full-scale water treatment system for the tailings storage facility and discharge the treated water into Go Creek.

[15] The letter further advised that a full-scale water treatment plant needed to be built. Treatment and discharge of water from the tailings storage facility to Go Creek was required. If Yukon had to do this work, costs it incurred would be reimbursed from the security already furnished by YZC and if that were insufficient, the costs would be recovered from YZC as a debt due to the Commissioner of Yukon.

[16] By the fall of 2018, YZC had still not rectified the deficiencies. Yukon's concerns about water management in particular and YZC's capacity to carry out care and maintenance generally led them to decide to exercise statutory powers under s. 147(1) of the *QMA* and s. 37(1) of the *WA*. These provisions authorize Yukon to take reasonable measures necessary to prevent, counteract, mitigate, or remedy any adverse effect on persons, property or the environment (the "Determinations"). The Determinations are triggered by the inspector's reasonable belief that a person has terminated, temporarily or permanently, or has abandoned a production.

[17] Starting on October 2, 2018, and under the authority of the Determinations, Yukon has carried out the following responsibilities at the Mine site:

i) installation of a system to collect and treat water from the underground Mine;

ii) installation and operation of a water treatment plant to treat contaminated water before it is released from the tailings storage facility;

iii) repair of impermeable liners in the tailings storage facility and other water containment structures;

iv) re-establishment of water conveyance lines; and

v) implementation of a site-wide environmental monitoring program.

[18] Since the Receivership Order of September 2019, PricewaterhouseCoopers Inc. (the "Receiver") has been managing this work, funded by Yukon.

History of Security for the Mine

[19] Section 139(1) of the *QMA* allows the Minister of Energy, Mines and Resources to require a licensee to furnish and maintain security, where there is a risk of adverse environmental effects from the activities of the licence holder. The Licence sets out the amount of security to be furnished by the licensee and it may be revised based on the stage of development and production as well as the condition of the Mine. The amount is determined by the costs associated with implementation of an approved reclamation and closure plan. Reviews are generally conducted at two-year intervals.

[20] Between 2006 and 2018, Yukon reviewed seven different reclamation and closure plans submitted by YZC.

[21] Initially, in 2006, when the Mining Licence was issued, YZC was required to furnish security in the amount of $1,780,000.

[22] Security increased in 2008 by $1,990,498, for a total amount of $3,161,254. (All security amounts are taken from the affidavit #1 of Paul Christman). On May 21, 2010, the total amount of security was set at $8,331,997. In March 2012, Yukon granted YZC's request of an extension of time to pay this increased security, as an updated reclamation and closure plan was due on or before September 2012, including a security review.

[23] On March 26, 2013, Yukon approved the updated reclamation and closure plan and advised that the new security amount was $10,588,966. YZC made another extension request. It was granted, and a payment schedule of four payments to be made between July 1, 2013 and July 1, 2014 was established. YZC made only the first payment as required.

[24] In November 2013, YZC again requested relief from the next payment date and Yukon agreed that the next payment of $862,681 due December 1, 2013, could be postponed. By the end of 2013, YZC had paid $7,491,235 to Yukon.

[25] On March 24, 2014, a revised schedule of payments was issued, starting April 15, 2014 and ending April 30, 2015. Only one payment was made by YZC during that time, bringing the security amount paid by August 2014 to $7,741,235.

[26] It was not until YZC emerged from *CCAA* protection in October 2015 that the full amount of $10,588,966 was paid. It was considered a claim in the *CCAA* restructuring.

[27] In 2015 and 2016, YZC was updating the reclamation and closure plan. It was submitted to Yukon on December 30, 2016. While it was being reviewed by Yukon in 2017, the Mine flooded and water management plans needed to be changed significantly, requiring further revisions to the closure plan and security amount. Version 6 of the reclamation and closure plan estimated the cost of the reclamation and closure at $21,600,000.

[28] On May 3, 2018, Yukon advised YZC that security in the amount of $35,548,650 was needed, meaning that YZC owed an additional $24,959,034.

[29] As they had done in the past, YZC requested an extension to the security payment deadline. YZC did not dispute the amount. Yukon for the first time denied the

extension, noting that “no new work has been done at the mine site to reduce the risk of significant adverse environmental effects from previous development and production, and no new information has been provided to suggest the risks have changed.” No payment has been made by YZC on the additional security amount.

[30] Yukon has been using the security to fund the costs of the water treatment system as well as the care and maintenance activities at the Mine since July 2019. As of January 15, 2020, there was $5,006,555 remaining. This amount is being steadily reduced as a result of its use in funding the activities of the Receiver.

Regulatory Regime in Yukon and Actions taken by Yukon

[31] A mining project in the Yukon requires an environmental and socio-economic assessment and regulatory approvals, including a mining licence and a water licence.

[32] The mining licence issued by the Minister of Energy, Mines and Resources may include terms and conditions related to the area and mineral deposits to be mined; monitoring programs; design of mine workings, including underground production and waste dumps; site infrastructure; reclamation; financial security; and reporting requirements.

[33] The water licence conditions are issued by the Water Board and cover many technical areas related to the use of water and the deposit of waste into water.

[34] The development of a reclamation and closure plan is the responsibility of the mine owner/operator. It is a licence condition and must be submitted for review and approval in order to obtain a mining licence.

[35] Part of the remediation and closure plan includes the provision of financial security for the full cost of reclamation and closure on the basis of its current

status. Those costs are reassessed at minimum every two years to reflect the changing status of the mine and progress towards reclamation.

[36] Yukon's ability to determine the amount and form of financial security as well as to collect, hold and review it under a mining licence is set out in the *Security Regulation*, O.I.C. 2007/77, under the *QMA*.

[37] Other regulatory powers of Yukon include the ability to inspect (ss.144 and 145 of the *QMA*); the ability to instruct the mine operator to rectify a situation or cease activity that may contravene conditions or cause unnecessary danger to people, property or the environment (s. 146 of the *QMA*); the ability to enter on to a mine site that an inspector reasonably believes has been temporarily or permanently abandoned, and take reasonable measures or corrective action deemed appropriate at the operator's expense (s. 147 of the *QMA*); and to prosecute anyone who contravenes the *QMA* requirements (s. 150 of the QMA).

[38] In this case, YZC was prosecuted once in 2015 on two charges of failure to provide security as required by its Mining Licence. YZC was fined $5,000 for each charge. In 2016, YZC was prosecuted again for two breaches of licence conditions and two counts of failure to comply with the inspector's directions for remedial actions. In April 2018, YZC was fined $78,500 and a probation order was issued with conditions including the requirement to compensate Yukon for costs incurred.

[39] As noted above, after inspections in 2018, the issuances of a written warning and notice of intention to take measures, the Determinations, Yukon entered on to the Mine site to take corrective action on October 2, 2018.

Welichem and YZC

[40] Welichem Research General Partnership ("Welichem") is a clinical stage biotech company with a focus on early stage drug discovery and development. It engages in the discovery and development of novel small molecule therapeutics for unmet medical needs.

[41] Welichem is a partnership between Welichem Biotech Inc. and CaNickel Mining Limited, a publicly traded mining company with a 100% interest in Bucko Lake Nickel Mine in Wabowden, Manitoba. According to its website, the Bucko Lake Nickel Mine is currently in care and maintenance.

[42] On May 31, 2018, July 23, 2018 and August 30, 2018, Welichem advanced loans to YZC of $1,000,000, $1,000,000 and $6,550,000. As security for its indebtedness, YZC executed general security agreements in favour of Welichem dated July 23 and August 30, 2018.

[43] On September 3, 2018, YZC used the proceeds of the August loan to exercise its purchase option with Maynbridge Capital Inc. ("Maynbridge"). It purchased various items, comprising substantially all of the infrastructure tools, vehicles and equipment at the Mine site, and which are listed and described in Schedule A to the Master Lease (the "Master Lease Items").

[44] YZC sold all of the Master Lease Items to Welichem on September 3, 2018, for $5,060,000, plus taxes. That same day, September 3, 2018, YZC and Welichem entered into a Master Lease agreement, whereby Welichem leased to YZC all of the Master Lease Items, for a three-month term and payments of $110,000 per month.

[45] Welichem secured the obligations of YZC under the Master Lease with a general security agreement dated September 3, 2018.

[46] Welichem registered and perfected its interests as a secured creditor and lessor under the Yukon *Personal Property Security Act*, R.S.Y. 2002, c. 169, and the British Columbia *Personal Property Security Act*, R.S.B.C. 1996, c. 359, on September 26, 2018.

[47] Welichem entered into subordination agreements with other creditors, making Welichem the first ranking priority secured creditor in respect of the YZC assets. Welichem's leasehold interest is a first ranking charge.

Receivership Proceeding

[48] In July 2019, the proceedings under s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "*BIA*"), and s. 26 of the *Judicature Act*, R.S.Y. 2002, c. 128, were commenced on application by Yukon.

[49] This Court granted a Receivership Order appointing the Receiver as receiver of the assets, undertakings and property of YZC (the "YZC Property").

[50] On October 7, 2019, YZC failed to file a proposal to its creditors and was therefore deemed to have made an assignment into bankruptcy pursuant to the *BIA* on October 8, 2019.

[51] The sole source of funding for the receivership proceedings has been by way of receiver certificates, allowing for borrowing of funds from Yukon.

[52] The Receiver seeks court approval of a sale and investment solicitation plan ("SISP") in another application.

[53] These applications are premised on the assumption that there will be a successful sale of the YZC assets through the SISP.

ISSUES

[54] The issues in this application are:

i) Is the obligation on YZC to post security for the purpose of implementing the remediation and closure plan, as a condition of its licence to operate the Mine, a provable claim in the bankruptcy proceeding, and thus subject to the prioritization as set out in the *BIA?*

ii) If it is a provable claim in the bankruptcy, does s. 14.06(7) of the *BIA* apply, thereby providing a super-priority charge over affected real property or property contiguous to it, to Yukon, for the costs of remedying any environmental condition or damage affecting real property or an immovable of a debtor?

iii) If Yukon is found to have a provable claim, and s. 14.06(7) of the *BIA* applies, to what does it attach? Specifically, are mineral claims real property covered by s. 14.06(7)?

[55] This is a dispute between Welichem and Yukon. YZC has no money, is bankrupt, and is not able to do any work or pay for it. The resolution of these issues will determine whether the costs of any required remediation should be borne by the secured creditor, not the polluter, instead of by Yukon and ultimately the taxpayer.

POSITIONS OF PARTIES

Yukon

[56] Yukon situates its argument in the context of s. 14.06(7) of the *BIA*, which grants the Crown a priority right over affected real property for the costs of remedying any environmental condition or damage. The Crown (here, Yukon) must establish it has a provable claim in bankruptcy in order to exercise its priority right under s. 14.06(7). This section provides:

> Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security
>
> > (a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and
> >
> > (b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

[57] A claim provable in bankruptcy is defined in ss. 2 and 121 of the *BIA*.

> 2. includes any claim or liability provable in proceedings under this Act by a creditor;
>
> …
>
> 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any

> obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
>
> …

[58] Yukon says that s. 14.06(8) of the *BIA* modifies s. 121(1) of the *BIA*, allowing claims for costs of remedying an environmental condition or damage whether they arose before or after the filing of the proposal or date of bankruptcy. Section 14.06(8) provides:

> 14.06(8) Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

[59] Yukon says that the failure of YZC to post security, as required by the Mining Licence, creates a provable claim in bankruptcy, based on the three-part test set out by the Supreme Court of Canada in *Newfoundland and Labrador v. AbitibiBowater Inc.,* 2012 SCC 67 ("*Abitibi*"). That test is:

- First, there must be a debt, liability or obligation to a creditor.
- Second, the debt, liability or obligation must be incurred at a specific time.
- Third, it must be possible to attach a monetary value to the debt, liability or obligation.

[60] Yukon says the purpose of the financial security obligation was to prevent the occurrence of the current situation. Analogous to a contractual bargain, the Mining

Licence provides that YZC is entitled to exploit resources in exchange for the requirement to provide security to Yukon to pay for any reclamation and closure activities if and when required. A failure to provide the security is a breach of an enforceable promise for which there must be some remedy.

[61] Yukon dismisses the contention of Welichem and JDC Canada that no enforceable obligation arises until Yukon has incurred those costs. Although this has been the fact in many other cases, including *Yukon (Minister of Indian and Northern Affairs) v. B.Y.G. Natural Resources Inc.*, 2017 YKSC 2, and *Yukon v. United Keno Hill Mines Ltd*., 2004 YKSC 59, Yukon says this interpretation penalizes a prudent regulator who has taken some security already and is pro-active in resolving the bankruptcy. On the interpretation of Welichem and JDC Canada, Yukon says it would illogically be in a better position now if it had no security to access, but were already incurring out of pocket expenses to do the necessary environmental work.

[62] Yukon says that it is not necessary for a provable claim to be recoverable by legal process. A provable claim is not limited to a debt; it may also be a liability or obligation. The purpose of the obligation has been realized with the bankruptcy of YZC, as now Yukon is financially exposed. The bankruptcy has had the effect of crystallizing the claim and has created the provable claim.

[63] Applying the *Abitibi* test, Yukon says there is no dispute that YZC was obliged to provide the financial security, thus satisfying the first requirement that YZC has an obligation.

[64] That obligation must be to a creditor. In *Abitibi*, the Court found that a regulatory body is a creditor when it exercises its enforcement power against a debtor. Yukon says

it has done so here through the Determinations. The statutory provisions (s. 147(2) of the *QMA* and s. 37(2) of the *WA*) confirm costs incurred by Yukon not recovered from security already furnished may be recovered as a debt due to the Commissioner.

[65] The second part of the test is satisfied because the environmental condition or damage arose during the production and development at the Mine as well as during the care and maintenance process, and is ongoing. Section 14.06(8) of the *BIA* allows a provable claim to arise whether the condition or damage occurred before or after the filing of the proposal or date of bankruptcy.

[66] The third part of the test is met because a monetary value has been attached to the Mine closure costs, reflected in the amount of security to be furnished and maintained.

[67] Yukon's alternative argument is that the future obligation on Yukon of incurring expenses for the remediation and closure of the Mine can be characterized as a contingent, provable claim, based again on the *Abitibi* test.

[68] A contingent claim is found if there are "sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform the remediation work and assert a monetary claim to have its costs reimbursed" (*Abitibi*, at para. 36). This has been generally interpreted to mean that the claim for costs must not be too remote or speculative. Indications of sufficient certainty that the regulator may perform the work and claim for costs include: where the debtor is not in control of the property and has no means of complying with the order; and whether the regulator has already started doing some work.

[69] Here, Yukon notes that YZC is no longer in control of the Mine and is bankrupt, without the prospect of receiving funds from any other source. Yukon has already started funding the Receiver to do the care and maintenance as well as the remediation work at the Mine, by drawing on the security that has been posted. If a sale occurs, Yukon says the costs of the remediation are likely to exceed any value recouped from the sale. These factors make it sufficiently certain that Yukon will carry out the remediation work at its own expense. The estimated cost of reclamation and closure of $35,548,650 was not disputed by YZC. Thus the *Abitibi* test criteria are met on the alternative basis of a contingent claim, which Yukon says does not require the costs to be incurred.

[70] Since the requirements of a provable claim are met in this case, based on the *Abitibi* test, Yukon says s. 14.06(7) of the *BIA* applies. Yukon imports the contingency or sufficiently certain test into the interpretation and application of s. 14.06(7) to these circumstances. Given that it is sufficiently or even likely certain in Yukon's view that it will incur costs of remediation of environmental damage, it says it has a super-priority charge on the affected real property and that property contiguous to it.

[71] On the third issue of whether mineral claims are included in the charge under s. 14.06(7) of the *BIA*, Yukon says real property includes mineral claims because they are interests in land based on the courts' findings in *Third Eye Capital Corporation v. Resources Dianor Inc.*, 2018 ONCA 253, at paras. 59 and 60, and *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, at paras. 21 and 22.

[72] Further s. 52 of the *QMA* deems an interest in the holder of a mineral claim a chattel interest, equivalent to a lease of the minerals. This has been interpreted to

indicate an interest in land. Yukon also relies on the use of the term land and mineral claims in other federal statutes such as the *Bank Act*, S.C. 1991, c. 46, and the *Federal Real Property and Federal Immovables Act*, S.C. 1991, c. 50, to support its argument that mineral claims are real property.

Welichem

[73] Welichem says Yukon has no provable claim in the bankruptcy proceedings. Any substantive claims must arise under another statute, given that the *BIA* is procedural. In this case, the claims asserted by Yukon arise from ss. 139 and 147 of the *QMA* and ss. 15 and 37 of the *WA*. These provisions, which are similar in both statutes, allow Yukon to require a company to furnish security where there is a risk of a significant adverse effect from their activities. That security may be applied to reimburse the Commissioner for reasonable costs incurred by Yukon if they proceed with the Determinations. Any costs incurred that are not covered by the security become a debt owing to the Commissioner, to the extent that these measures were taken by Yukon as a result of the licence holder contravening or failing to comply with a condition of their licence, or any provision of the statutes or regulations.

[74] Under the *QMA* and the *WA*, there is no debt or liability owing to Yukon until it has incurred costs or expenses. Without a debt or liability that is recoverable by legal process, there is no provable claim. An obligation to provide security is not such a debt.

[75] Welichem agrees that a contingent claim may be a provable claim in a bankruptcy proceeding if it meets the legal criteria of not being too remote or speculative (*Orphan Well Association v. Grant Thornton Ltd.,* 2019 SCC 5 (“*Orphan Well*”), paras. 36 and 138).

[76] Welichem argues that the determination of a contingent claim is factual. In this case, there can be no debt or liability owing to Yukon until it incurs remediation costs beyond the existing posted security, based on the *QMA* and the *WA*. If a contingent claim exists, the contingency is the incurring of costs by Yukon beyond the existing security. This incurring of costs in turn depends on whether or not the Mine is sold. If the Mine is sold, a new owner will likely assume the licence and its conditions, including security for reclamation and closure. Yukon will not then have any costs, assuming it has used existing security for anything spent to date. If the Mine is sold after Yukon has incurred expenses beyond the existing security, then it will have a claim to the extent of the additional costs incurred. The factual uncertainties, including whether or not there is a sale; the timing of any sale; the extent of security obligations any new owner/operator may assume; and the actual extent and costs of remediation, all make any asserted contingent claim too remote or speculative.

[77] Welichem says that if Yukon does establish a contingent claim that is accepted as a provable claim, it is an unsecured claim unless there is some other statutory provision that elevates it to a secured claim (*Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.,* [2006] O.J. No. 3087 (SC), aff'd 2007 ONCA 600, at paras. 54 and 55).

[78] More specifically, Welichem says that if Yukon establishes a provable claim that is unsecured in the bankruptcy, it then must show how s. 14.06(7) of the *BIA* applies to elevate its claim to a super-priority status. Welichem says this is not possible because s. 14.06(7) only applies once Yukon has expended funds. Noting that the Supreme Court of Canada did not address s. 14.06(7) in its decision in *Orphan Well*, overturning

the Alberta Court of Appeal decision in *Grant Thornton Ltd. v. Alberta Energy Regulator*, 2017 ABCA 124, Welichem relies on that Court of Appeal decision at para. 55:

> … [s.14.06(7)] only comes into play where a government has actually remediated specific contaminated property. While that section operates through the use of a limited and focused super priority, it is based on the restitutionary principle that a party that discharges the obligation of another is entitled to be compensated for its efforts by the original obligee and its successors in title. It simply recognizes a type of subrogated claim, and is not a part of any broader "statutory compromise". If a government ends up having to incur the expense of remediating property, the previous defaulting owner or its secured creditor cannot insist on getting back the restored land without refunding those costs to the government. …

[79] Thus, Welichem says this section comes into play, for example, if the Mine is sold and Yukon has spent money beyond the existing security. In that case, s. 14.06(7) allows those costs to form a priority charge on the real property affected by the environmental condition or damage, or real property contiguous with it. The owner or creditors will not benefit from the remediation funds expended by Yukon because Yukon would be reimbursed first. Welichem knows of no cases where s. 14.06(7) of the *BIA* was applied to cover contingent, future obligations.

[80] On the third issue of whether mineral claims are included in the charge on real property set out in s. 14.06(7), Welichem says mineral claims are either personal property or an interest in land. An interest in land is not the same as real property. It includes such interests as a leasehold interest (similar to a mineral claim) or a profit-a-prendre. Based on statutory interpretation, s. 14.06(7) is not intended to include more than actual real property, not an interest in real property.

JDC Canada

[81] JDC Canada, the parent company of YZC, also made submissions on this application, similar to Welichem's, with the following additional arguments.

[82] A licence condition, in this case the requirement to post security, does not create a debt. It is a regulatory obligation and the remedies for a breach of a licence condition are provided in the regulatory regime. Remedies include such actions as cancelling the licence (possible under the *WA*, not under the *QMA*), by prosecuting the company for breach, or by inspection, issuing directions, and entering to do the necessary work. There is no reference in the *QMA* to the creation of a debt once the licence holder fails to post adequate security.

[83] The nature of security is different from a debt. Security is a secondary or collateral obligation to ensure the performance of a primary obligation, which is the debt. Security is a resource to be used in case of failure in the principal obligation.

[84] JDC Canada says that while Yukon may have a contingent claim, based on the *Abitibi* test, that claim is not secured so the inquiry is irrelevant. JDC Canada says the existence of a contingent claim does not arise in the analysis of the applicability of s. 14.06(7) of the *BIA* because Yukon's current claim is not a debt. Unless funds are expended by Yukon, s. 14.06(7) cannot be used to secure any obligations arising. JDC Canada does not deny that Yukon could have a contingent claim, but it would be an unsecured claim under s. 14.06(8) of the *BIA*. JDC Canada, like Welichem, interprets this section to confirm that any remediation costs not covered by the security of the real property can be claimed by the regulator as an unsecured creditor. JDC Canada interprets the *Abitibi* test to exclude claims where the costs have not yet been incurred.

[85] JDC Canada says the mineral claims are interests in land or chattel interests but not real property, meaning that s. 14.06(7) of the *BIA* does not apply. JDC Canada says this is supported by the notion that a mineral claim cannot be remediated. Parliament chose to use the words real property and not interest in land in s. 14.06(7).

BRIEF CONCLUSION

[86] Yukon does have a provable claim in bankruptcy once they have incurred costs of remedying the Mine's environmental damage, to the extent of the costs incurred beyond the security currently being used. This claim is secured by the real property of YZC affected by the environmental damage and any contiguous property that is related to the environmental damage. That security is a first priority on the affected and contiguous real property, which includes any mineral claims that are affected, pursuant to s. 14.06(7) of the *BIA*.

ANALYSIS

i) Is there a Provable Claim in Bankruptcy

[87] The first question is whether a regulator's licence condition obligation can become a provable claim subject to prioritization, compromise or discharge in insolvency proceedings.

a) Balancing of interests in environmental regulation and insolvency law

[88] The issues in this application engage the untidy intersection of environmental regulation and insolvency law (*Nortel Networks Corp. (Re),* 2012 ONSC 1213, at para. 8).

[89] The purpose of environmental regulation is to prevent and remedy environmental harm. To achieve this, responsibility for conduct is placed on the entity undertaking the activities that have the potential to or do cause the adverse environmental effects.

[90] The purpose of insolvency law is to ensure the orderly process of restructuring, or the distribution of assets of a failed venture, and to treat creditors equitably. Certainty of process and priority is desirable to allow lenders and debtors to assess risks and move forward in an economically viable manner. Both types of statutes are remedial and have public interest objectives.

[91] Parliament sought to balance the competing interests through its 1997 amendments to the *BIA*. These included:

1) the granting of a super-priority to the Crown against the contaminated property and/or contiguous property for the costs of remedying the environmental condition or damage (s. 14.06(7)); and
2) the acknowledgement that clean-up costs are provable claims under the *BIA* regardless of the time of occurrence of the damage (s. 14.06(8)).

b) Nature of obligation to post security

[92] I agree with Welichem and JDC Canada that the existence of an obligation to post security as a condition of a licence is not enough to create a provable claim in the bankruptcy proceeding. This is because of the nature of the requirement to post security.

[93] There are two characteristics of security that differentiate it from obligations, debts or liabilities that can be provable claims in bankruptcy: A) it is a secondary

obligation; B) it is not recoverable by legal process. The existing statutory scheme in the Yukon supports both of these characteristics.

A) Secondary obligation

[94] Security has been defined as: “protection; assurance; indemnification. The term is usually applied to an obligation, pledge, mortgage, deposit, lien, etc., given by a debtor in order to make sure of the payment or performance of his debt, by furnishing the creditor with a source to be used in case of failure in the principle obligation.” (Bryan A. Gardner, ed, *Black’s Law Dictionary, 10th ed.* (St. Paul, MN: Thomson sub verbo “security”).

[95] The Saskatchewan Court of Appeal held that security furnished in accordance with a security for costs order was not a debt for the purpose of a claim provable in bankruptcy, because it was not yet owing to anyone. It merely created a contingent liability that, if crystallized, would become owing (*JICO Holdings Inc. v. Lynco Construction Ltd*., 2016 SKCA 126, para. 9).

[96] The Mining Licence required YZC to issue security at the beginning of the Mine development and production, with a further requirement to have it reviewed at regular intervals. The purpose of the security is to assure costs are covered for the performance of a future obligation to remediate any conditions causing adverse effect to the environment, up to and including closure of the Mine once production is completed. If the corporation does not perform the necessary work, as directed by an inspector under s. 146 of the *QMA*, and the inspector performs it, the inspector may recover reasonable costs from the security. Where an inspector believes the production or development has been terminated or abandoned, temporarily or permanently and a condition of an

approved operating plan or licence has been contravened, the inspector may impose Determinations (s. 147 of the *QMA*). In both situations, where the security is non-existent or inadequate, the costs incurred become a debt due to the Commissioner.

[97] On the other hand, if the corporation performs the remediation and closure work as required, or for any other reason the amount of security is determined to be no longer required, the security may be returned to the corporation holding the licence (s. 139(6) of the *QMA*).

[98] The posting of security not only provides a costs remedy for Yukon if the licensee fails to do the work; it also provides an incentive for the licensee to complete the work because of the ability to obtain the return of the security.

[99] This statutory scheme supports the interpretation that security is a secondary assurance for the performance of a primary obligation. The preparation, implementation and funding of an acceptable environmental remediation and closure plan is the primary obligation assumed by the licensee, in exchange for the ability to develop the resources. The security required as a licence condition is an additional obligation to assure the completion of the primary obligation. Although the regulator has made the prudent decision to make posting of financial security a licence condition in all cases, it may in fact not be necessary for Yukon to draw on it if the licensee does what it is supposed to do.

B) Security not recoverable by legal process

[100] Sections 2 and 121 of the *BIA* define provable claim. The sections are set out above and for convenience I repeat them here:

> "provable claim" includes any claim or liability provable in proceedings under this Act by a creditor;
>
> 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> 121(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

[101] A "provable claim must be one recoverable by legal process": *Farm Credit Corp. v. Holowach (Trustee of)*, 1988 ABCA 216, at para. 7. In this leading case, the Court held that a deficiency claim under a mortgage was not a claim provable under the *BIA* because the applicable property statute prohibited a mortgagee from making a claim for a deficiency under the mortgage absent a bankruptcy.

[102] Similarly, in *Central Capital Corp. Re*., [1996] 27 O.R. (3d) 494, it was argued by the shareholders of a corporation undergoing *CCAA* reorganization that the corporation's promise to redeem the shares was a future contingent liability and therefore a provable claim. However, the solvency requirement in the companies' articles of incorporation prohibited shareholders from redeeming their shares in this context. Thus the right of redemption was not a debt or liability provable in bankruptcy. In that case, the Court of Appeal reviewed two definitions of debt and liability – one narrow and one broad. The narrow definition of debt was "a sum of money due by certain and express agreement" (Black's Law Dictionary). An obligation must be legally

enforceable to constitute a debt as narrowly defined. The broader definition of debt also encompassed obligation and liability:

> A fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future. In a still more general sense, that which is due from one person to another, whether money, goods, or services. In a broad sense, any duty to respond to another in money, labour or service; it may be even a moral or honorary obligation, unenforceable by legal action. … (para. 100)

[103] In the facts of *Central Capital*, the Court found that under either the narrow or broad definition, the corporation's promise to redeem the shares was not a provable claim in bankruptcy. The statutory overlay made this promise unenforceable.

[104] I agree with Yukon that these cases are distinguishable from the case at bar because here there is no statutory bar preventing the assertion of a claim. However, I do not agree with Yukon's analysis that their claim is a provable one because the bankruptcy has the effect of crystallizing the claim, making it legally enforceable. This argument assumes that Yukon will spend the full $35,548,650 requested as security. It does not take into account the uncertain contingent nature of the obligation. Even the broad definition of debt referred to in *Central Capital* was described as a "fixed and certain" obligation.

[105] Contingent claims can still be provable claims (see s. 121(2) of the *BIA*). However, in order to be a provable claim, the contingent claim cannot be too remote or speculative. As noted by the Court in *Wiebe (Re)*, 30 C.B.R. (3d) 109 (O.N.C.J.), at para. 7:

> … To establish that a contingent claim or unliquidated claim is a provable claim, a creditor must prove more than he has been sued, and that he has an indemnity agreement from the bankrupt. There has to be an element of probability of

> liability arising from the Court proceedings. If there are too many ifs about the action and the applicability of the indemnity agreement before a provable claim comes into being, the claim is not a provable claim under s. 121(2). …

[106] In this case, as is outlined in more detail below, the nature of an obligation to furnish security does not allow a breach of that obligation to be a provable claim because it is not recoverable by legal process. But even if that test is met, the obligation is too remote and speculative in the circumstances. There remain too many uncertainties, including: whether or not there will be a sale; the timing of any sale and how much security currently held by Yukon will be remaining; the extent of security obligations any new owner may assume; and the actual extent and costs of remediation by that time.

[107] The statutory scheme supports this interpretation. The remedy for a breach of the licence condition to post sufficient security is found in the regulatory statutes. The corporation can be prosecuted for breaches of its licence conditions (s. 38 of the *WA* and s. 150 of the *QMA*) and fined on conviction. The legislature did not provide that the Court could order the payment of the security, similar to the enforcement of a judgment, as the Newfoundland statute provides (see *Abitibi*). Sections 146 and 147 of the *QMA* provide Yukon with the ability to use any furnished security for costs incurred in implementing the Determinations.

[108] While it is possible for Yukon to decline to renew the *QMA* licence, or to assess the Mine as permanently closed, I agree with Yukon that these are not helpful remedies in the circumstances of this case. It would affect Yukon's ability to exercise authority over YZC to issue directions, and the absence of a valid and assignable mining licence may reduce the interest among potential purchasers.

[109] In this case, YZC was successfully prosecuted twice and fined on two counts of failure to post security. Yukon did inspect, issue directions and ultimately enter the Mine site to prevent, mitigate or remediate the adverse environmental conditions of untreated, contaminated water as well as inadequate care and maintenance. It has used and continues to use the posted security for costs it incurs.

[110] These statutory remedies are similar to remedies for failure to post security for costs as required in the litigation context. There the remedy is usually a dismissal of the litigation (*XY LLC v. IND Diagnostic Inc*., 2016 BCCA 469), not a requirement to pay the security in some form.

[111] The nature of the security obligation, reinforced by the statutory scheme in this case, means that the fact of its existence does not make it a provable claim.

c) The test in Abitibi

[112] I will address the applicability of the *Abitibi* test as Yukon relies *on Abitibi* for its argument that the obligation to post security is a provable claim. The requirement of the debtor to post security was not part of the facts of *Abitibi*. The question is whether there is anything in the reasoning or findings in the *Abitibi* judgment that affects the conclusion that the nature of the security obligation does not make it a provable claim.

[113] In *Abitibi*, the question before the Supreme Court of Canada was whether orders issued by a regulatory body with respect to environmental remediation work can be treated as monetary claims under the *CCAA*. The facts were that the Province of Newfoundland had expropriated three of five Abitibi industrial properties and issued environmental protection orders against the corporation after the *CCAA* proceedings had commenced. The same day the orders were issued, the province sought a

declaration that these non-monetary statutory obligations were not claims under the *CCAA* and so could not be stayed and be subject to a claims procedure order. Instead, they could be enforced outside of the *CCAA* process. Abitibi objected, saying that the environmental protection orders were monetary in nature and were claims under the *CCAA*. The majority decided that the province's claim was monetary in nature and it was therefore part of the claims procedure.

[114] The Supreme Court of Canada set out the test for the determination of a provable claim in bankruptcy, as noted above. For convenience, here it is again:

- First, there must be a debt, a liability or an obligation to a creditor.
- Second, the debt, liability or obligation must be incurred at a specific time.
- Third, it must be possible to attach a monetary value to the debt, liability or obligation.

[115] On the first part of the test, the Court held that an environmental regulatory body becomes a creditor once it exercises its enforcement power against a debtor. The second part of the test is there to ensure, for example, that claims arising as a result of the debtor's activities that continue after the *CCAA* reorganization, are exempted from the claims process. The third part of the test was the focus of the analysis in *Abitibi* - that is, whether orders not expressed in monetary terms could be translated into such terms. The Court said that the question was whether it was sufficiently certain that the regulatory body would perform the remediation work that was the subject of the orders and thus have a monetary claim in the *CCAA* process. Sufficiently certain was defined by reference to the definition of contingent claim in s. 121(2) of the *BIA*, and was described as a contingency that was not too remote or speculative.

[116] The Court found that it was sufficiently certain that the province would do the work, based on a number of facts: the province had started the work; Abitibi no longer had the means to do the work, nor was it in possession of many of the properties; the province had assessed the costs of remediation; the timetable the province had set for Abitibi to perform the remediation work was unrealistic; Abitibi was intentionally and unfairly targeted by the province since it was clear that other entities were responsible for several of the environmental protection orders issued against Abitibi. For these reasons amongst others, the *CCAA* Judge concluded that the province had never expected Abitibi to perform the work and the "intended, practical and realistic effect of the EPA Orders was to establish a basis for the Province to recover amounts of money to be eventually used for the remediation of the properties in question" (para. 56). The fact that the province had not acted in good faith in issuing the orders when it did, and had tried to manipulate the situation to its advantage weighed heavily in the decision of the *CCAA* Judge and to some extent at the Supreme Court of Canada majority decision. By including the province's regulatory orders in the *CCAA* proceedings, the Court did not give the province the preference it was attempting to obtain by exercising its regulatory power.

[117] The Court of Appeal in *Nortel Networks*, at para. 31, summarized the finding in *Abitibi* as follows:

> As I read it, the Supreme Court's decision is clear: ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in CCAA proceedings only where the province has performed the remediation work and advances a claim for reimbursement, or where the obligation may be considered a contingent or future claim because it is "sufficiently certain" that the province will do the work and then seek reimbursement.

[118] Of interest to the case at bar is the one area of disagreement between the majority and the two dissents. Chief Justice McLachlin found that the test for whether a non-monetary order can become a monetary one should be likely certain, instead of sufficiently certain, and found that standard was not met on the facts. Justice Lebel, while accepting the test set out by the majority, did not find on the evidence that it was sufficiently certain that the province would do the work.

[119] The *Abitibi* decision shows how important the facts are in these cases. The context and facts significantly influenced the *CCAA* Judge's decision, upheld by the Supreme Court of Canada, with two dissents based largely on the facts surrounding the certainty of expenditures, and how unique the facts were in *Abitibi*.

[120] Aside from the context, which affected the result and is very different in *Abitibi* from this case, there are at least two significant differences between the facts in *Abitibi* and the facts in this case. While none of the parties is relying on the facts in *Abitibi*, it is necessary to review the significant factual differences because of their impact on the understanding and application of the three-part test.

[121] First, in Newfoundland, the legislation permitted the province to calculate the costs of implementing the orders and issue a certificate of costs, which could then be enforced as a judgment (or debt) in the bankruptcy proceeding. This legislative recognition of and process for making future costs into the equivalent of an enforceable judgment removes the argument that those costs are not a debt. The provision of financial security to the regulator did not arise in *Abitibi*.

[122] Second, the possibility of a sale of the affected properties was not a factor in *Abitibi*. The context was a *CCAA* proceeding and the focus was on restructuring. Once

the Court confirmed on the facts that there was no possibility of Abitibi doing the remediation work, including the fact that its properties had been expropriated by the regulator before it made the orders, there was no other option to be considered by the Court except to have the province do the work.

[123] In the case at bar, the purpose of the application is to determine priorities in the event of a sale of the Mine.

[124] The $35,548,650 security amount comprises the estimated future costs for the entire remediation and final closure plan for the Mine. While it is clear that the debtor cannot do or pay for the necessary work, there remains uncertainty as to what will be done, when and by whom. For example, if the Mine were sold, it is safe to assume that not all of the closure plan would need to be implemented at that time (e.g. closing down road access, decommissioning all the buildings, removing equipment and infrastructure). Answers to these questions depend on whether or not there is a sale; whether there is an assumption by a new purchaser of the licence condition to provide security in whole or in part; whether or not all or part of the reclamation and closure work will be done; what those costs will be; when the amount of existing security will be spent. These are all questions of fact.

[125] Yukon says it is sufficiently certain, not too remote or speculative, that it will be doing the work. While Yukon supports a sale, it is not optimistic about recovery of value. Five years ago, when the Mine was in much better condition, an offer was received for $15 million. Since then at least three negotiations for sale have fallen through. Yukon questions whether it is realistic to expect a prospective purchaser to be interested in spending millions in reclamation and closure security, especially if much of the cost is

attributable to the previous owner's failure to act. In other words, Yukon says that even if some or all of the available assets are sold, the prospect of Yukon having to spend some money on clean-up is real.

[126] Yukon may be correct in its assessment. Its security is likely to be used up by the end of December 2020. But part of this application process is to obtain Court approval of a sale. If that happens, the situation may be different, or not: the point is it is speculative at this time. Different factual circumstances could change this assessment.

[127] Yukon does not the meet the test at this time of sufficient certainty that it will actually incur the $35,548,650.

ii) Application of s. 14.06(7) to Yukon's Claim

[128] As noted above and repeated here for convenience, s.14.06(7) of the *BIA* provides:

> (7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security
>
> (a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and
>
> (b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

[129] A review of the discussions of the 1997 amendments at both the House of Commons Standing Committee on Industry and the Standing Senate Committee on Banking, Trade and Commerce reveals that the impetus for the changes was to avoid orphaned or abandoned industrial sites, where no one (the trustee, the secured creditor, nor the bankrupt) took responsibility for the environmental clean-up. This abandonment was caused generally by the significant cost consequences in a situation where the property held no net economic value. Before the amendments, the costs of environmental clean-up were unsecured claims that ranked with all other unsecured creditors, a disincentive for any clean-up activity to be undertaken. The granting of a super-priority to the Crown for costs incurred of environmental clean-up allows for costs to be recouped through the charge on the real property. Mr. Jacques Hains, Director, Corporate Law Policy Directorate, Department of Industry, stated at the hearings on June 11, 1996, in describing the expected outcome where the environmental regulator would do the clean-up: “The contaminated land would then recover commercial value, it would be sold and the amount would first of all be used to refund the Department of the Environment.” On October 22, 1996, at the same Committee, Mr. Ron MacDonald (Parliamentary Secretary to Minister for International Trade, Lib.) said “we did not want companies to be able to walk away because of environmental liabilities and leave effectively the Crown or trustee … with the burden.” (Canada, Parliament, House of Commons Debates, 35th Parl, 2nd Sess, Vol 134, No 088 (22 October 1996)). This was a deliberate policy choice to broaden the test for when environmental liabilities would be subject to the insolvency process (Canada, Parliament, House of Commons Debates, 35th Parl, 2nd Sess, Vol 134, No 050 (27 May 1996 (Hon John Manley)).

[130] These amendments were a compromise between the environmentalists who wanted a priority charge on all or most of the debtor's property, and the lending community who wanted a narrowing of the super-priority, noting that it resulted in costs being borne by third party creditors, not the debtor, thereby negating the polluter-pay principle. Subsection 14.06(7) of the *BIA* struck a balance between the public interest in environmental protection and the interest in equitable treatment of creditors and debtors and the preservation of businesses, by limiting the super-priority charge to the Crown to the contaminated real property and property contiguous to it. The attempt was "to produce a level playing field, to give the environmental authorities better protection for the environmental clean-up costs and to give them a super-priority over the property itself." (Canada, Parliament, House of Commons, Standing Committee on Industry, Minutes of Proceedings and Evidence, 35th Parl, 2nd Sess, No 18 (18 September 1996), at p.1645).

[131] It was noted during the Standing Committee discussions, (see June 11, 1996; September 18, 1996) that the amendments have a neutral economic impact, because a degraded environmental condition of the property results in a loss of its value, regardless of who owns it. The remediation work must be done, before it can be resold, or the cost is assumed by the new purchaser. The intent of the amendments is that whoever spends the money to do the clean-up gets some value, through the charge on the property.

[132] In this case, Yukon is continuing to spend money on care and maintenance and environmental remediation at the Mine. There is every reason, once those costs are

incurred, or it is sufficiently certain that they will incur such costs, for Yukon to exercise its super-priority charge against the real property.

[133] This interpretation is supported in *Orphan Well*. The Supreme Court of Canada found that s. 14.06(7) of the *BIA* did not apply and so did not address it. The Alberta Court of Appeal in that case, in both the majority and the dissent, did address the meaning of s. 14.06(7) in their decision. It is instructive to look at the dissent, as the Supreme Court of Canada did overturn the majority decision (although, not on this point as it was not addressed). Martin J.A. (as she then was) noted that in enacting s. 14.06(7), Parliament intended to provide a meaningful source of recompense if the public incurs remediation costs to clean up a debtor's property.

[134] The majority of the Alberta Court of Appeal wrote the following about s. 14.06(7) at para. 55:

> …That section does not create any generalized priority or super priority for existing or contingent environmental liabilities; it only comes into play where a government has actually remediated specific contaminated property. While that section operates through the use of a limited and focused super priority, it is based on the restitutionary principle that a party that discharges the obligation of another is entitled to be compensated for its efforts by the original obligee and its successor in title. It simply recognizes a type of subrogated claim, and it not a part of any broader "statutory compromise." If a government ends up having to incur the expense of remediating property, the previous defaulting owner or its secured creditor cannot insist on getting back the restored land without refunding those costs to the government. For example, if a government remediates a site (say an industrial site, or an open pit mine) resulting in a parcel of land with some value (say a clean industrial site, or perhaps only pasture or parkland) the government has a security interest in that site. If the defaulting owner wants to get that parcel back, it has to pay the remediation costs.

[135] This interpretation is also consistent with the Yukon legislation, s. 146(8) of the *QMA* and s. 37(2) of the *WA*, both of which follow the restitutionary principle, allowing Yukon to recoup costs incurred in doing clean-up work authorized under the statutes as a debt owing to the Commissioner.

[136] I find that s. 14.06(7) of the *BIA* does apply once Yukon has incurred costs. I do not accept the arguments of Welichem and JDC Canada that s. 14.06(7) only provides Yukon with an unsecured claim, based on the limiting provision in s. 14.06(8) of the *BIA*. I agree with Yukon's interpretation of s. 14.06(8), that is, it broadens the temporal restrictions set out in s. 121 of the *BIA* in the environmental regulator context. It provides that a provable claim can arise for the costs of remedying any environmental condition or damage whether that condition or damage occurred before or after the date of the bankruptcy. In my view, it is clearly the intention of Parliament to provide a super-priority over the real property to the regulator, once it incurs costs of remediating the environmental damage or condition affecting that real property or contiguous property, related to the activity causing the damage or condition.

Response to Yukon's Policy Arguments

[137] I understand and have sympathy with Yukon's policy arguments in this application. Yukon says this restitutionary principle approach penalizes them for being a prudent regulator and obtaining a certain amount of security that they can now access for the costs of care and maintenance and the early stages of remediation. They also note that in the past this Court has criticized the regulators of mining in the Yukon (Canada, before Devolution in 2003, and now Yukon) for waiting too long before moving on to contaminated or abandoned property to remediate, and in seeking reimbursement

of those costs. Yukon says they should be rewarded for being pro-active in this case by allowing their claim for outstanding security to be a provable claim in the bankruptcy. Yukon says that not making the requirement to furnish security enforceable makes it meaningless.

[138] There is a balance to be struck in encouraging responsible economic development in the Yukon in the context of the competitive mining world, and ensuring that mining activities are completed to closure in a way that protects the environment, not at taxpayers' expense. The approach of seeking security for remediation and closure while a mine is in operation is an attempt to prevent taxpayers from having to pay the clean-up costs if the mine operator refuses to do so or becomes incapable.

[139] Although the security amount is reviewed every two years, in this case, it started at just over $1 million in 2006 and did not reach $10 million until 2013, seven years later, when the Mine was in full production. It was difficult or impossible for Yukon to obtain payments on the security from YZC during 2012, 2013 and 2014. Extension after extension was requested by YZC, and many payments were missed. It was only after *CCAA* reorganization that the full $10 million was finally paid. That is the amount currently being used to fund the Receivership activities.

[140] After the *CCAA* proceedings were completed in October 2015, the Mine never did enter into production again. It limped along in care and maintenance, with only four employees. The 2017 flood in the underground part of the Mine, that might have been prevented had plugs been inserted earlier into the Mine floor, significantly increased the remediation and closure costs because of the urgent and ongoing need for water treatment. Yukon did not enter onto the Mine site to inspect regularly until early 2018.

During this same time, there were indications expressed by YZC of imminent sales of the Mine, with no results. By early 2018, all of the infrastructure, equipment, and vehicles at the Mine were subject to leases that were secured by the property of YZC. Clearly no funds were forthcoming from JDC Canada or JDC Group.

[141] In all of these circumstances, was it realistic for Yukon to expect to be able to obtain from YZC an additional $25,000,000 in security by mid-May 2018, on two weeks' notice of the increase?

[142] Yukon argues that it is being penalized for being pro-active. While it was commendably pro-active in 2018-19, it may want to consider in future being more pro-active earlier - such as by seeking more security at the outset of mining development and production, by inspecting and issuing directions more often especially when it is clear a mine is in financial difficulties and indefinite care and maintenance, and by assessing risks and conditions early and often.

[143] In Alberta, monthly risk assessments are legislated in the context of abandoned oil wells, which can quickly become significant liabilities. Acknowledging that this is a different factual context, it is still useful to examine the legislated regulator approach as described by the Court of Appeal in *Orphan Well*. Each month, the Alberta Energy Regulator calculates a Liability Management Rating for all licensees. The rating uses a formula that estimates the nominal value of the oil and gas assets of the company and the estimated accumulated end-of-life obligations of the company. A licensee is required to maintain a ratio of at least 1.0 each month, meaning it has equal assets and liabilities. The regulator will not approve the transfer of any licensed assets unless it is satisfied

the purchaser or seller have the resources necessary to abandon (i.e. properly clean up) any depleted wells.

[144] Here, the Yukon legislation does not have these tools. Nor is there any provision in the legislation for means of enforcing the security obligation other than prosecution for breach of licence conditions.

[145] In the Northwest Territories, where the territorial mining regulatory regime is similar to that in the Yukon, the Government of the Northwest Territories ("GNWT") was in a similar situation as Yukon in this case. In the case of *North American Tungsten Corp., Re*, 2016 BCSC 12, the debtor mining company had failed to furnish adequate security to GNWT. As a result, the GNWT required the mining company to enter into a security agreement that had the effect of granting a security interest to the GNWT as well as ensuring that all debts would become immediately due and payable and the security interests created under it would become enforceable, if certain defaults occurred, including the commencement of formal insolvency proceedings. GNWT registered this agreement and could rely on it to enforce its security obligations, which, even if future and contingent, were turned into debts by the agreement. This protected GNWT's security interest where the legislation did not assist.

[146] This case then, serves to point out the limits of the current Yukon legislation, as well as the need for the regulator to be vigilant in ensuring environmental remediation costs do not escalate and become a burden on others, including taxpayers.

iii) Are Mineral Claims Real Property for the Purpose of s. 14.06(7) of the *BIA* ?

[147] The final issue in this application is whether the mineral claims are real property that can be charged under s. 14.06(7) of the *BIA* in the event that Yukon does incur costs of remediation. Section 14.06(7) states that the claim:

> … is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage …

[148] The *BIA* does not define real property or immovable.

[149] Mineral rights in Canada are generally retained by the government. Mineral claims on Crown land are obtained through a lease.

[150] Property law distinguishes between real property and personal property. Real property is generally, the land. Personal property is divided into chattels personal and chattels real. Chattel real is synonymous with a leasehold interest (*Rock Resources Inc. v. British Columbia*, 2003 BCCA 324, para. 109). Historically chattel real has been used to denote leases.

[151] As stated by the Supreme Court of Canada in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, at common law, an interest in land can issue from a corporeal hereditament, but not from an incorporeal hereditament. Corporeal hereditament has been defined in *The Dictionary of Canadian Law* (2nd ed. 1995) as: 1. a material object in contrast to a right. It may include land, buildings, minerals, trees or fixtures; 2. Land. Incorporeal hereditament is defined as: 1. [a right]..in land, which [includes] such things as rent charges, annuities, easements, profits a prendre and so on.

[152] Section 52 of the *QMA* provides:

> The interest of the holder of a mineral claim shall, prior to the issue of a lease, be deemed to be a chattel interest, equivalent to a lease of the minerals in or under the land for one year, and thence from year to year, subject to the performance and observance of all of the terms and conditions of this Part.

[153] It is accepted by all parties in this application that mineral claims are a chattel real, meaning they are an interest in land, not land itself. Authority for this is found in *Rock Resources; Commissioner v. Bedard*, [1987] Y.J. No. 48; *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2018 ONCA 253, and *Bank of Montreal v. Dynex*.

[154] The real question then is whether s. 14.06(7) of the *BIA* can include mineral claims as "interests in land" within the meaning of real property and immovables over which there is a super-priority charge for the Crown.

[155] JDC Canada argues that a chattel real is not real property, relying on *Rock Resources*, at para. 19, where the legislature intentionally amended the statute in 1977 to remove the phrase "equivalent to a lease" from the description of a mineral claim. The British Columbia statute provided that "the interest of a holder of a mineral claims shall be deemed to be a chattel interest." The Court concluded that the deletion of the phrase changed the nature of a mineral claim in British Columbia from an interest in land to a personal chattel. This amendment has not occurred in the Yukon, which still contains the phrase "equivalent to a lease" (s. 52, *QMA*).

[156] JDC Canada also relies on the definition in Halsbury's Laws of England in which a distinction is made between real property and chattels real. JDC Canada references *Rock Resources*, at para 70:

> ... “real property” denotes (1) land and things attached to land so as to become part of it, and (2) rights in land which endure for life or were, under the law before 1926, inheritable, whether these involve full ownership or only some partial enjoyment of the land or the profits. On the other hand, rights in land which endured for a term of years only were not specifically recoverable and were described as “chattels real”. [emphasis already added]

[157] Welichem and JDC Canada note that s. 14.06(4) of the *BIA* refers to an order made that has the effect of requiring a trustee to remedy an environmental condition or environmental damage affecting property involved in a bankruptcy proposal or receivership, the trustee is not personally liable for failure to comply with the order or for any costs, if the trustee “on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property or any right in any immovable, affected by the condition or damage” (s. 14.06(4)(a)(ii)). JDC Canada and Welichem argue that if Parliament intended the charge to be on interests in real property in s. 14.06(7), it would have inserted those words, based on the presumption of implied exclusion.

[158] The modern rule of statutory interpretation is that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed, LEXISNEXIS Canada Inc., 2014, at p. 7).

[159] While the words “interest in land” are not specifically included in s. 14.06(7), this does not end the inquiry. The scheme and object of the *BIA* and the intention of Parliament must also be evaluated.

[160] Here the intention of Parliament is clear. Whoever cleaned up the property had the ability to have that same property and property contiguous with it as security for the cost of the clean-up. It was intended that whoever cleaned up the property would be able to recoup their costs. This was one the purposes of the 1997 amendments, to ensure that there was incentive to do the environmental remediation (which had not existed prior to the amendments), in order to prevent abandoned and degraded environmental disasters. It was also to ensure that if the regulator did the clean-up the costs would not become a burden to the taxpayer. This intent is supported by the interpretation of the Alberta Court of Appeal in *Orphan Well* (see para. 78 above).

[161] As Welichem's counsel noted, s. 14.06(7) may not fit well with the mining regime. Mineral claims have commercial value as they allow for the resource to be extracted from land that belongs to someone other than the resource extractor, usually the Crown.

[162] In this case, the land is already Crown land; and the mineral claims have value. In order for value to be realized by Yukon, if they are in the end required to perform the remediation work on the property, mineral claims need to be included as part of the security provided by s. 14.06(7).

[163] In the Yukon, the case law supports the inclusion of mineral claims as part of the real property assets, admittedly with little or no analysis. In the *Commissioner of Yukon v. Bedard*, the Court held that the Sheriff was not authorized to sell mining claims as property included in an order for seizure and sale under the *Executions Act*. Claims staked under the *QMA* were not personal property. Referring to s. 49 (now s. 52) of the *QMA*, the Court noted that this language meant that the claims are interests in land, so there was no way that the plaintiff could effect a sale of those claims.

[164] In *Yukon (Minister of Indian and Northern Affairs) v. B.Y.G. Natural Resources Inc.*, 2017 YKSC 2, and *Yukon v. United Keno Hill Mines Ltd*., 2004 YKSC 59, mineral claims were included in the charges of the Receiver over the real property.

CONCLUSION

[165] Yukon has a provable claim in the bankruptcy of Yukon Zinc Corporation ("YZC") once it incurs costs, beyond the existing security it holds, of remedying the environmental damage affecting the real property of YZC. That claim is secured by security on the real property of YZC affected by the damage and property contiguous with it, related to the environmental damage, and is enforceable in the same way as any other security on real property. Additionally, it ranks in priority above any other claim, right, charge or security against the property. The real property includes mineral claims.

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DUNCAN J.