

SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v.
Yukon Zinc Corporation*, 2020 YKSC 17

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 the Receiver re: SISP)

INTRODUCTION

[1] This is an application by PricewaterhouseCoopers Inc. (the “Receiver”) appointed as receiver by Order dated September 13, 2019, in the matter of the insolvency of Yukon Zinc Corporation (“YZC”), whose main asset is the Wolverine Mine, a lead-zinc-

silver-copper-gold mine (the “Mine”) located in southeast Yukon. The Receiver seeks the following relief in this application:

- i) an order elevating the priority of the Receiver’s Charge and Receiver’s Borrowing Charge;
- ii) an order approving the sale investment and solicitation plan (“SISP”) for the solicitation of offers to invest in YZC or to purchase any part of the property, assets and undertaking of YZC (the “Property”);
- iii) directions on including items listed in the Asset List attached to the SISP that are subject to the Master Lease Agreement between Welichem Research General Partnership (“Welichem”) and YZC in the Property (“Master Lease Items”) of YZC to be offered for sale pursuant to the SISP;
- iv) directions on which if any of the Master Lease Items included in the SISP are subject to the security conferred on the Government of Yukon (“Yukon”) pursuant to s. 14.06(7) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, (the “BIA”), the priority of such security (if any) and the amount of such security (if any).

i) Elevation of Priority of Receiver’s Charges

INTRODUCTION

[2] This part of the application is about whether this Court has the authority to exercise discretion through s. 243(6) of the *BIA* or s. 26 of the *Judicature Act*, R.S.Y. 2002, c.128, to give priority to the Receiver’s Charge and Borrowing Charge over the priority accorded to the first secured creditor, Welichem.

BACKGROUND

[3] In addition to the facts set out in *Yukon (Government of) v. Yukon Zinc Corporation, 2020 YKSC 15*, and *Yukon (Government of) v. Yukon Zinc Corporation, 2020 YKSC 16*, the following additional background facts are relevant.

[4] The Receivership Order granted on September 13, 2019, provided for the creation of a Receiver's Charge, to secure the fees of the Receiver and its counsel, as well as a Receiver's Borrowing Charge, of up to \$3 million, or an amount as otherwise authorized by the Court. The priority of both charges ranked subordinate to other valid and enforceable security interests, including security in s. 14.06(7), s. 81.4(4) and s. 81.6(2) of the *BIA*. The only section that is relevant in this case is s. 14.06(7) as the other two sections relate to pensions and other employee obligations not applicable here. Section 14.06(7) grants a priority charge to any claim by the Crown against a debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or damage affecting real property or an immovable, secured by that affected real property or immovable.

[5] Since its appointment, the Receiver has carried out many activities to stabilize the conditions at the Mine and to prepare for a SISF. These activities include:

- i) Termination of all employees of YZC;
- ii) Engagement by contract of key personnel to undertake ongoing care and maintenance activities at the Mine, to assist the Receiver with the administration of the Receivership, and to maintain a continuous presence on site;

- iii) Completion of outstanding tax returns and investigation of YZC's books and records in order to prepare reports to the Court as required;
- iv) Renewal of YZC's liability insurance;
- v) Attendance at the Mine site, meetings at head office of YZC, and daily calls with Government of Yukon ("Yukon") representatives to discuss deterioration of conditions at the Mine, and actions needed to stabilize the Mine and meet safety and environmental remediation regulatory requirements;
- vi) Engagement of safety professionals to address outstanding work orders from the Yukon Workers' Compensation Health and Safety Board ("YWCHSB") and to ensure ongoing compliance with occupational health and safety requirements;
- vii) Coordination of technical professionals to conduct environmental monitoring and other vendors to provide for continuation of essential services by personnel at the Mine site including: mechanical and electrical service providers (to do equipment repairs), communications service providers, transportation providers and food vendors;
- viii) Working with the Department of Energy Mines and Resources to extend YZC's temporary closure status pursuant to its Mining Licence to December 31, 2021;
- ix) Arranging for the funding of the receivership by Yukon, through advances secured by the Receiver's Borrowing Charge, currently the sole source of funding;

- x) Development of the SISP and preparation of marketing materials to solicit interest in YZC and its assets;
- xi) Providing information to representatives of Liard First Nation, Ross River Dena Council, Kwadacha Nation and Dease River First Nation about the Receivership and the SISP and requesting feedback;
- xii) Commencing the treatment and discharge of the contaminated underground mine water; engaged a third party contractor to conduct required environmental monitoring;
- xiii) Working with safety contractors, Yukon and external contractors to ensure compliance with COVID-19 restrictions in order to maintain safety of on-site contractors and visitors to the Mine; and
- xiv) Coordinating with Environment and Climate Change Canada and Yukon in order to conduct monitoring and reporting.

[6] Welichem is registered as secured creditor of YZC in both the British Columbia and Yukon Personal Property registries. Welichem made three loans to YZC between May and August 2018, totalling \$8.5 million. YZC used \$6.55 million to exercise the buy-out option under its lease agreement and general security agreement with Maynbridge Capital Inc. (“Maynbridge”), under which YZC had sold 572 items listed in a master lease to Maynbridge, who had leased them back to YZC. The items consisted of equipment, infrastructure and vehicles. The Welichem loan agreement provided for a discharge of Maynbridge security.

[7] Welichem then purchased the same 572 items listed in the Master Lease with Maynbridge on September 3, 2018, for \$5.06 million and that same day leased them to

YZC for \$110,000 per month, with a buy-out option of \$5.06 million and interest at 25% per annum and 50% due on default.

[8] The General Security Agreement between YZC and Wilchem dated September 3, 2018, provided security to Welichem of all of YZC's present and after-acquired property, including the Master Lease Items.

[9] The Receiver identified 79 items from the 572 in the Master Lease as essential for the continuation of the care and maintenance and remediation activities. They include staff accommodations, kitchen equipment, vehicles, generators, fuel tanks and pipes (the "Essential Items").

[10] The Receiver then disclaimed all of the lease except for the continuing lease of the 79 Essential Items, for the use of which it is paying \$13,500 per month to Welichem. Welichem's objection was heard in an application and this Court held that the lease was not affirmed and, recognizing the unusual nature of this remedy, the Receiver could continue to lease the Essential Items because of the urgent environmental situation and the remote location of the Mine (see *Yukon (Government of) v. Yukon Zinc Corporation, 2020 YKSC 16*).

ISSUE

[11] The issue is whether the circumstances in this case are sufficient to constitute a clear and specific exception to the general rule that a secured creditor should not be subject to liability for the Receiver's fees and disbursements.

POSITIONS OF THE PARTIES

Elevation of the Charge

[12] The Receiver says its Charges should have first priority and extend over the Mine and the Master Lease Items, because all the work it has done and continues to do to stabilize the Mine and ready it for a sale process is a benefit to Welichem. The Receiver relies in part on the Model Order for Appointing a Receiver in British Columbia, which contains standard wording that elevates the Receiver's Charges to first priority. It relies on the receiver's duties, which it says it is fulfilling. It also relies on the policy argument that receivers need to have reliability and predictability in knowing that their costs will be covered, so that they will be encouraged to act in these kinds of situations.

[13] Welichem objects to the elevation of the Receiver's Charges on the YZC property and more strenuously objects to the elevation of the charges on the Master Lease Items. Welichem argues that the Model Order is not authoritative or determinative, as it is from British Columbia, not Yukon, and is only a tool used as reference point. The Master Lease Items are not property under the Receivership Order so cannot be included in the charges. Welichem argues that the Receiver has not met the legal test of the exceptions in the decision of *Robert F. Kowal Investments Ltd. et al. v. Deeder Electric Ltd.*, [1975] 9 O.R. (2d) 84 (O.N.C.A.) ("*Kowal*"). There is no compelling and urgent reason for the Court to grant approval. Further, Welichem says the Receiver has not expended money for the necessary preservation or improvement of its equipment, and Welichem has not otherwise benefited from any of the Receiver's expenditures.

BRIEF CONCLUSION

[14] I find that the circumstances of this case are sufficient to constitute an exception to the general rule that creditors should not have liability for receivers' fees and disbursements. The priority of the Receiver's Charges shall be elevated over the charges on YZC property and the charges on the Essential Items.

ANALYSIS

General Principles for Payment of Receiver's Fees

[15] A court-appointed receiver's fees and disbursements are paid from the assets in the receivership. The reasons for this were well articulated by the Manitoba Court of Appeal in *Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. Ltd.*, [1972] 29 D.L.R. (3d) 373 (M.B.C.A.), at para. 4:

... The Court itself has no funds from which to pay a receiver. If [the Receiver's] fees cannot be [p]aid from assets under administration of the Court the Receiver would be in the untenable position of having to seek recovery from the creditor who, on behalf of all creditors, asked for the appointment. This could work a grave injustice on the Receiver and on the petitioning creditor. Why should the latter bear all of the costs in respect of an appointment made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property? ...

[16] As stated by the Alberta *Court of Appeal in Edmonton (City) v. Alvarez & Marsal Canada Inc.*, 2019 ABCA 109, at para. 23, one of the assumptions behind the appointment of a receiver is that in the context of an insolvency:

...collective action is preferable to unilateral action. The receiver maximizes the returns for the benefit of all creditors and streamlines the process of liquidation. As was noted recently in, *Royal Bank of Canada v. Delta Logistics Transportation Inc.*, 2017 ONSC 368 (Ont. S.C.J.) at para 26:

The whole point of a court-appointed receivership is that one person . . . is appointed to deal with all of the assets of an insolvent debtor, realize upon them, and then distribute the proceeds of that realization to the creditors.

Thus the receiver's duty is to act on behalf of all of the interested parties to ensure the assets are dealt with in an efficient and equitable manner. This duty to act on behalf of all must be taken into account in a consideration of payment of the receiver's fees.

Model Receivership Order

[17] The Model Receivership Orders, existing in a number of provinces, including British Columbia and Alberta, were developed by courts, bar associations and insolvency practitioners for the purpose of expediting the proceedings and to encourage the parties to focus on the issues in dispute in a particular proceeding.

...The intended purpose of the template...is to standardize receivership practice. It has provided guidance for practitioners and the judiciary since its inception. The standard receivership order does not bind the court, but serves as a standard form from which deviations must be blacklined before the court grants the initial receivership order. ... (*Alvarez & Marsal Canada Inc.*, para. 10).

[18] The practitioners and the courts have worked to ensure that the orders reflect commercial realities (*Janis Sarra, Rescue! The Companies' Creditors' Arrangement Act*, 2nd ed. (Toronto, Thomson Reuters Canada Limited, 2013), p. 87-88). The Model Orders can be changed to adapt to the individual fact situation before the Court and must be interpreted in the context of current and valid legal authority.

[19] The Model Orders from British Columbia and Alberta have the same provision: both the Receiver's Charge and the Receiver's Borrowing Charge rank as "a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, subject to ss. 14.06(7),

81.4(4) and 81.6(2) of the BIA” (*Alvarez & Marsal Canada Inc.*, at para 10). The rationale for this includes the need for reliability and predictability for the receiver and the creditors, and to address concerns that receivers may choose not to act if they do not have some security for their expenditure of fees and disbursements (*Alvarez & Marsal Canada Inc.*, at para 17).

[20] The explanatory notes to the template for the Model Receivership Order in Alberta state that the order should be modified so as not to provide for priority over a security interest holder if none of the exceptions set out in the decision of *Kowal* applies. (*Alvarez & Marsal Canada Inc.*, at para. 15). The template for the British Columbia Model Order does not contain this explanatory note, although it does contain a footnote saying “this model order is not in any way determinative of the applicant’s entitlement to the relief set out in this model order. It is the responsibility of counsel to ensure that the form of order they propose is appropriate in the circumstances and to justify the relief sought, including providing the necessary evidentiary support and judicial authority.”

[21] I accept that the Model Receivership Orders are helpful to the Court because they demonstrate a general acceptance by a cross-section of insolvency experts of the provisions that reflect commercial reality in insolvency proceedings. I also accept they provide guidance, are not binding, can be changed to reflect individual fact situations, and must be in accordance with current legal authority.

[22] In this case, the fact that the Model Receivership Orders in both Alberta and British Columbia provide for first priority of the receiver’s charges over the property shows there is a general acceptance of this proposition, as long as it is in accordance with valid legal authority.

Statutory Requirements and Legal Interpretation

[23] Subsection 243(6) of the *BIA* and s. 26 of the *Judicature Act* both provide broad authority for the Court's exercise of discretion. As set out by the Alberta Court of Appeal in *Alvarez & Marsal Canada Inc.*, and the British Columbia Court of Appeal in *Integrus Credit Union v. All-Wood Fibre Ltd.*, 2016 BCCA 231, that discretion must be exercised in accordance with the principles set out at common law.

[24] Subsection 243(6) of the *BIA* provides:

If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

[25] The leading authority on the priority of the receiver's charge is *Kowal*. In that case, the Court noted the general rule that a receiver cannot subject secured creditors to liability for the charges and expenses of a receivership because the general purpose of a receivership is to preserve and realize the property for the benefit of the creditors in general. However, the Court in *Kowal* did identify the following three non-exhaustive exceptions to the general rule, assuming the secured creditor is given notice of the proposed elevation of the charge and objects to it:

- i) If a receiver has been appointed at the request or with the consent or approval of the holders of security, the receiver will be given priority over the security holders;

- ii) If a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred; or
- iii) If a receiver has expended money for the necessary preservation or improvement of the property the receiver may be given priority for those expenditures over secured creditors.

[26] The Court in *Kowal* added a requirement to the second exception. If the secured creditor whose rights will be affected is opposed, the court will require compelling and urgent reasons to grant its approval. The Court in *Kowal* did not define compelling and urgent and most of the subsequent cases do not address it in the context of the second exception. The only two cases to which I was referred that interpret and apply the compelling and urgent nature of this second exception are *Re Comstock Canada Ltd.*, 2013 ONSC 4700, and *Eron Mortgage Corp. (Trustee of) v. Eron Mortgage Corp.*, [1998] 106 B.C.A.C. 211 (B.C.C.A.).

[27] In *Re Comstock*, the Court granted an urgent motion under the *BIA* appointing PricewaterhouseCoopers as interim receiver with an immediate priority charge of \$1.5 million to meet payroll and independent contractor amounts. Without these amounts the employees and contractors would not show up for work, in turn causing disruption that would have a wide-reaching, damaging effect on ongoing construction projects across the country, and would impair the ability of Comstock to restructure. The purpose of the interim receiver's borrowing charge was to maintain business and promote greater stability for Comstock. Significantly, the major secured creditor did not object to the

Receiver's priority charge; and the other creditors were found not to be affected by this order.

[28] In the case of *Eron Mortgage Corp.*, a judicial trustee proceeding and a foreclosure proceeding were occurring in the factual context of multiple contested mortgages and multiple construction liens held over an incompletely renovated building. The dispute arose from a challenge by one mortgagor over the priority of its security in relation to the payment of certain liens from funds advanced from the judicial trustee's borrowings charge. The Court found urgency was created by the fact that the anchor tenant of the building had a time-limited commitment. The Court concluded it was to the benefit of all stakeholders with an interest in the building to keep the general contractor and tradespeople paid so the project would be completed as quickly as possible. The priority of the judicial trustee's borrowing charge was upheld. Notably, the mortgagor did not oppose the priority borrowing of the judicial trustee to complete the building.

[29] In *Alvarez & Marsal Canada Inc.*, the receiver was appointed under the *BIA* over seven residential building companies, known as Reid-Built. The receiver's application for an order for authority to repair, maintain and complete the Reid-Built properties, with a corresponding first priority charge against each property for expenses incurred, was objected to by two secured creditors and the City of Edmonton. The City of Edmonton wanted its special lien for unpaid taxes to have priority ahead of the receiver's charge, saying it would gain no benefit from the receivership. Its claim would be paid out, so it should not have to bear any costs. The Chambers Judge dismissed the applications of the two secured creditors but granted the City of Edmonton's application. The Court of Appeal accepted the Chambers Judge's reasoning for his dismissal of the creditors'

applications, in granting the receiver's appeal. That reasoning was largely policy driven: super-priority is necessary to ensure receivers take on receiverships; and the creditor who brings the application should not bear the entire financial burden of the process, instead those costs should be shared equitably amongst all the creditors. The remedy for creditors, who have little to benefit from a receivership or whose security is eroding due to time and costs, is to apply to lift the stay. The Court of Appeal found that the City of Edmonton would in fact benefit from the receivership because all of its taxes would be paid out as the properties were sold in an orderly way, and it would not have to incur costs of auctioning off each property over which it had a tax claim.

Application of Law to Elevation of Receiver's Charges over YZC Property

[30] I accept that the second *Kowal* exception applies here to allow the elevation of the Receiver's charges over the property of YZC.

[31] The Receiver was appointed at a time when the Mine was in a seriously deteriorated state and facing an urgent environmental remediation need. Yukon was on site to ensure the care and maintenance was properly performed and that the necessary environmental remediation was being done. The Receiver has been required to manage this care and maintenance and environmental work since its appointment. It has preserved and maintained the condition of the Mine, thereby increasing the value of the YZC assets for the benefit of all the creditors. While it is accepted that realization proceeds are unlikely to satisfy all of the creditors, this is as yet unknown, and the Receiver is attempting to fulfill its obligations to maximize value for all creditors.

[32] I find that the work done to stabilize the Mine, given its deteriorated state, especially in light of the employees threatening to abandon the Mine site and the

environmental risks caused by the flooded Mine and the overfilling tailings storage facility with untreated, contaminated water, was a sufficiently compelling and urgent reason to justify the elevation of the Receiver's Charges over the property of the YZC.

[33] Although the cases cited above are not factually analogous to this case, they provide the necessary principles to support this finding.

[34] In *Comstock*, the failure of the employees to report for work for lack of funding threatened the completion of construction projects across the country, which would have reduced the value of Comstock, as it was undergoing restructuring. In the case at bar, when the Receiver was appointed, the few remaining YZC employees had recently threatened to leave the Mine as they were not being paid and had safety concerns. If the Mine had been abandoned, and the Receiver had not intervened, the significant assets of YZC may have all been compromised. I refer to this potential scenario in more detail below.

[35] In *Eron Mortgage Corp.*, the urgency was the need for the unfinished building to be completed within a certain time frame, in order to avoid a significant cost increase that would be borne by all creditors. In the case at bar, if the care and maintenance and environmental remediation at the Mine were not continued by the Receiver, there was a significant risk of further deterioration and devaluation of the assets, affecting all creditors.

[36] The Court of Appeal in *Alvarez & Marsal Canada Inc.* did not require compelling and urgent reasons to allow the priority of the receiver over the secured lienholder, the City of Edmonton. That priority was justified by the concerns that all creditors should be treated equitably, that the creditor who initiated the bankruptcy should not bear all the

costs, and the receiver should not be discouraged from assuming duties in such cases. In that case, unlike in *Comstock* and *Eron Mortgage Corp.*, the City of Edmonton did object to the receiver's motion. The Court found the City of Edmonton would benefit from the receiver's work and granted the receiver its priority.

[37] In the case at bar, as in *Alvarez & Marsal Canada Inc.*, the secured creditor does object to the elevation of the charge over the YZC assets. I find that elevation of the charge over the YZC Property is justified because the Receiver's work is necessary on an urgent and continuing basis. The Receiver is entitled to have some certainty and predictability in knowing its costs will be covered. All creditors will benefit, including Welichem, as a result of the stabilized Mine, and the increased value as a result, and it is unfair for Yukon to bear all the costs of the Receiver's work. Welichem's objection that it does not benefit from the Receiver's work at the Mine assumes its interests are separate from those of the Mine. This assumption does not take into account the work of the Receiver to maintain the transportation access routes to and from the Mine site, to repair the neglected equipment, and to maintain a significant presence on site with contracted workers. This work is for the Mine but also benefits Welichem. This analysis is addressed in more detail in the next section.

Application of Law to Elevation of Charges over Welichem Equipment - Essential Items

[38] The next question is whether any of the exceptions apply to elevate the priority of the Receiver's Charges over the Welichem equipment. I will first address the Essential Items. I find that the second exception and in the alternative, the third exception in *Kowal* apply to elevate the priority of the Receiver's Charges over the Essential Items.

[39] When the Receivership Order was granted in September 2019, the following conditions existed:

- i) The Mine had not operated for over four and half years;
- ii) The Mine had flooded in 2017, causing contaminated, untreated water to flow into the tailings storage facility, which was quickly filling up, with no outlet and no means to treat the water;
- iii) Yukon was so concerned by the neglect they observed during their regular inspections, as well as by YZC's breaches of their licence conditions, that they exercised their authority under the *Quartz Mining Act*, S.Y. 2003, c.14, ("QMA") and the *Waters Act*, S.Y. 2003, c.19 ("WA") to enter the Mine in October 2018 to ensure the basic care and maintenance and remediation work was being done;
- iv) By the summer of 2019, the YZC site crew was reduced to two people on shift every two weeks, the minimum number permitted for safety reasons. These crew members were only able to do the most basic care and maintenance work of power generation; keeping the roads clear; and essential water control;
- v) In July 2019, the remaining four YZC employees had not been paid for many weeks and threatened to leave the site;
- vi) The majority of the heavy equipment was in need of repair and subject to outstanding orders from the YWCHSB;
- vii) The power generators were in significant need of repair;

- viii) The Mine was in a state of permanent closure under the Water Licence;
and
- ix) The Mine was in a state of temporary closure under the Mining Licence.

[40] The Receiver was immediately required to:

- i) Ensure the employees who were threatening to leave stayed at work;
- ii) Remedy the various compliance issues, especially the neglected vehicles and equipment; and
- iii) Commence the water treatment system.

[41] If the Receiver were not present on site, there is a risk of the following consequences:

- i) Underground water may go untreated, flow freely on site and contaminate the environment;
- ii) Surface water which is increased by the heavy snowpack, could overflow from its collection system, mix with contaminated underground water and flow freely into the environment;
- iii) Overflow (which is anticipated) could cause catastrophic flooding to the surrounding areas, especially if the dam for the tailings storage facility fails;
- iv) Absence of monitoring or management of the tailings storage facility would put the integrity of the dam and other water retaining structures at risk;
- v) The water levels in the tailings storage facility would continue to rise and eventually overflow through the spillway, or cause failure of the dam, releasing contaminated water into the receiving environment;

- vi) Power generators would be shut down, meaning that water management, facilities operation, including accommodation and communication for site crew and site maintenance could not continue;
- vii) The infrastructure such as access road, airstrip, tailings storage facility would fall into disrepair. Road access is essential to allow for fuel supply for the power generation and equipment operation;
- viii) Power generators may not be repaired or maintained, as was the situation when the Receiver first came on site;
- ix) There could be thefts of property and increased trespassing; and
- x) The buildings and other support structure would be susceptible to water damage from freezing pipes or uncontrolled water from freshet melting.

[42] The Receiver notes the actions they have taken since September 2019 and continue to do have benefitted Welichem in the following ways:

- i) Repaired and maintained, in the amount of \$200,000 as of the date of this application, the Essential Items thereby preserving value over time;
- ii) Provided a level of security by having personnel on site;
- iii) Demonstrated the ability to respond promptly if any of the Master Lease Items are at risk for any reason; and
- iv) Paid Welichem \$13,500 per month for the use of the Essential Items since December 2019.

[43] Welichem argues that none of these activities of the Receiver benefits Welichem for these reasons:

- i) The value of the Essential Items through their use is being depreciated and any repairs were to bring them to minimal operating standards only, not to improve their value to benefit their sale, and are insufficient to outweigh the depreciation;
- ii) The failure of the Receiver to pay insurance on any of the Master Lease Items, including the Essential Items, leaves them vulnerable and is of concern to Welichem; the small number of employees on site are unable to supervise all of the Mine, it is not their responsibility to secure the equipment and Welichem is barred from doing so because of the stay;
- iii) The potential for prompt future action is hypothetical and ancillary to the duty of the workers on site, and therefore unreliable; and
- iv) \$13,500 per month payment is not a benefit to the equipment; it is a partial fulfillment of the contractual obligation to pay for the use of the equipment at the Mine.

[44] Welichem also says that all the work identified by the Receiver is for the benefit of the Mine, its creditors and stakeholders, and not the equipment. There is no urgent and compelling reason to justify the elevation of the charge ahead of Welichem because the preservation of the assets is all assets of the Mine, not any of the Master Lease Items.

[45] I find there are compelling and urgent reasons, as set out in the second exception in *Kowal*, and the cases following it, for the elevation of the Receiver's Charges on the Essential Items. I accept there is a significant risk of serious consequences if the Receiver were unable to carry on their work. The Receiver entered a situation that was chaotic, neglected and close to catastrophic. Through its work, it is

bringing the Mine to a more stable place. However, if the funding ceased and this work could not be done, then all the creditors, including Welichem, would suffer.

[46] In the *Comstock* decision, loss of jobs and uncompleted construction projects were found to be enough to justify urgency. Similarly, in *Eron Mortgage Corp.*, the need to save money and time by finishing construction of a building was considered to be urgent.

[47] In the case at bar, the urgency of averting a potential environmental disaster is greater than in these two cases. The Receiver's work means the Mine will not be abandoned. It will prevent untreated contaminated water from flowing freely into the environment. The Essential Items will be more secure because of the presence of more people on site. The maintenance of transportation access routes will ensure the ongoing fuel and power supply and the ability of contractors and equipment to move on and off the Mine site. There are compelling and urgent reasons for the court to grant approval based on the second *Kowal* exception.

[48] If I am incorrect and the second *Kowal* exception does not apply, I find that the third *Kowal* exception applies, in the alternative. The Receiver has spent monies to preserve and improve both the Mine and the equipment and infrastructure of Welichem. As of the date of this application, it had spent over \$200,000 in the repair of the Essential Items in order to bring them to operational standards. Further, the monies spent to ensure care and maintenance and remediation is carried out is an improvement of the Mine. By preserving its integrity all creditors will benefit because of the potentially enhanced value of the Mine on realization. However, if only the third exception applies, and not the second exception, the Receiver is entitled to a priority charge on the

amounts it has spent on the Essential Items, that is, the monthly payment of \$13,500 and the repair and maintenance amounts.

Application of Law to Elevation of Charges over Welichem Equipment - Master Lease Items

[49] The final question is whether the scope of the Charges should include the rest of the items in the Master Lease. I will leave this analysis and decision to the reasons in the fourth application in this matter that was heard on April 29, 2020. This fourth application by the Receiver was for an increase in its Borrowing Charge as well as the same issue that this application raises - the elevation of its priority over the Master Lease Items. The fourth application contains more recent evidence and further arguments from the parties so that it is more appropriate to address the issue there. It also requires the receipt of further submissions, which were requested in the fourth application.

CONCLUSION

[50] To conclude, the priority of the Receiver's Charges shall be elevated over the YZC Property and the Essential Items.

ii) Approval of SISP

INTRODUCTION

[51] This part of the Application is a request for Court approval of the SISP. The Receiver has developed the SISP, with the objective of obtaining strong bids in a reasonable time frame for the purchase of some or all of the YZC Property or an investment in YZC. The form of SISP included in the material incorporates the sale and marketing plan.

BACKGROUND

[52] The Receiver set out the following criteria in the SISP to be considered in the evaluation of bids:

- i) Price;
- ii) Structural complexity of the transaction;
- iii) Nature and sufficiency of funding for the transaction;
- iv) Probability of closing the transaction and relevant risks;
- v) Whether the transaction leaves YZC assets in the receivership;
- vi) Impact on former employees of YZC;
- vii) Bidder's financial strength, technical and environmental expertise and experience to carry out necessary work to maintain regulatory compliance;
- viii) Bidder's environmental safety record, operational experience with similar undertakings; record of successful restart of mines from care and maintenance;
- ix) Bidder's proposal for posting required reclamation or any other security required by the regulators;
- x) Bidder's willingness and demonstrated ability to obtain and maintain necessary regulatory approval to operate a mine, including care and maintenance, from Yukon (EMR) and Water Board;
- xi) Benefits to Yukon residents, businesses, affected First Nations - Ross River Dena Council, Liard First Nation, Kwadacha Nation and Dease River First Nation.

[53] The SISP also includes proposed flexible timelines for the various phases - pre-marketing, marketing, initial offer, final offer, pre-court approval, and court approval.

ISSUE

[54] The question to be decided is whether the draft SISP meets the criteria of an appropriate SISP in the circumstances. More specifically, does the involvement of Yukon in the SISP detrimentally affect the fairness, integrity, commercial efficacy and maximization of value of assets included in the SISP?

POSITIONS OF THE PARTIES

[55] The main objection of Welichem and Jinduicheng Canada Resources Corporation Limited (“JDC Canada”) is the over-emphasis in the evaluation criteria on regulatory approval and the inappropriate ongoing involvement and influence of Yukon in the proposal. Specifically, they say that the regulatory approval process has been imported into the SISP, and this calls into question the fairness and integrity of the proposed sale process as well as undermining its commercial efficacy.

[56] The Receiver’s response is that it is appropriate to consult with Yukon, and for it to have a role in the SISP for three reasons:

- i) Yukon represents the Yukon public, who have an interest because of the deteriorating condition of the Mine which could create an environmental and financial burden on the public, and one of the objectives of the SISP is to support a transition of ownership of the Mine from YZC to a responsible operator;
- ii) Licences are required to stabilize and operate the Mine and Yukon had authority over the licences and their conditions;

- iii) Yukon is arguably a creditor because of the large outstanding reclamation security owed.

BRIEF CONCLUSION

[57] The SISP does meet the requirements for approval by the Court. The involvement of Yukon does not affect its fairness, transparency, or commercial efficacy.

ANALYSIS

General Principles - Receiver's Ability to Sell and Factors to be Considered in a Sale Process Approval

[58] The purpose of receivership is to “enhance and facilitate the preservation and realization of the assets for the benefit of all of the creditors”: *Hamilton Wentworth Credit Union Ltd. (liquidator of) v. Courtcliffe Parks Ltd.*, [1995] 23 O.R. (3d) 781 (O.N.G.D.), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor’s assets: Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015) at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co.*, [1991] 108 N.S.R. (2d) 198 (N.S.C.A.), at para. 34, “the essence of a receiver’s powers is to liquidate the assets.” The receiver’s “primary task is to ensure that the highest value is received for the assets so as to maximize the return to the creditors”: *National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340, at para. 77 (see also, *Third Eye Capital Corp. v. Dianor Resources Inc.*, 2018 ONCA 253, para. 73, (“*Third Eye*”).

[59] The purpose is reflected in commercial practice - the power to sell is generally included in the receivership order.

[60] Section 246 of the *BIA* requires the receiver to prepare interim and final reports. Section 61(2) of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368, requires

at the time of discharge of the trustee that the trustee satisfy the court that all the property of the bankrupt for which the trustee was accountable has been sold, realized or disposed of in the manner described in the final statement of the trustee's receipts and disbursements. As noted by the Court of Appeal in *Third Eye*, para. 76:

It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis.

[61] The Court in *Royal Bank of Canada v. Soundair Corp.*, [1991] 4 O.R. (3d) 1 (O.N.C.A.) ("*Soundair*"), set out the factors to be considered by a court in determining whether to approve a sale by a receiver:

- i) Has the receiver made a sufficient effort to get the best price and not acted improvidently;
- ii) Has the receiver considered the interests of all the parties;
- iii) Has the receiver considered the efficacy and integrity of the process by which offers are obtained; and
- iv) Has there been unfairness in the working out of the process.

[62] Courts have also held that these factors should be considered in the determination of the court's approval of a sale process proposed by a receiver. The Court in *CCM Master Qualified Fund, Ltd. v. Blutip Power Technologies Ltd.*, 2012 ONSC 1750, at para. 6, described the *Soundair* factors that a court should consider when assessing a sale process as follows:

- i) The fairness, transparency and integrity of the proposed process;

- ii) The commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
- iii) Whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

This was followed by *Walter Energy Canada Holdings Inc. Re*, 2016 BCSC 107, at para. 20.

Application of Principles to Proposed SISP

[63] In this case, I find that the proposed sale process meets the legal requirements.

[64] First, the Receiver is empowered and authorized by s. 3(k) of the Receivership Order “to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver considers appropriate.”

[65] Courts must rely on the business expertise of the receiver, especially in complex or specialized situations such as this one (*Soundair*, at para. 14). In this case, the Receiver has significant experience in the mining sector. Its connections within the industry, combined with its plan to market broadly and publicize clearly the bid evaluation criteria, will ensure that appropriate potential bidders are given notice, and provide transparency and fairness. The timelines of each phase are reasonable and have built in flexibility, a useful inclusion, especially since the contentious nature of these applications and unexpected intervening circumstances that have delayed the Court’s decisions, will require adjustment of those timelines. The Receiver is attempting to be as efficient as possible, which is appropriate in the circumstances.

[66] The contextual circumstances of this receivership are relevant in the consideration of the role of Yukon. I do not agree that Yukon's involvement in the SISP affects its fairness or transparency. Nor does it detrimentally affect the commercial efficacy of the process or the chances of obtaining the best possible price.

[67] In 2015, YZC emerged from proceedings under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("CCAA"). It did not resume production, nor did it receive further funding from its parent or related companies. The Mine continued to deteriorate. YZC breached several regulatory orders, including an order for payment of \$25 million in outstanding security for the implementation of its closure and remediation plan. YZC demonstrated a lack of ability and willingness to perform the minimum care and maintenance. As a result, Yukon entered the Mine site to ensure the minimum care and maintenance was carried out and to prevent environmental harm. Since the Receiver was appointed, its major activities, other than preparing the SISP, have been to stabilize the Mine.

[68] These are the Receiver's specific circumstances to be taken into account when considering the commercial efficacy of the SISP (*CCM*, at para. 14; *Walter Energy*, at para. 22). It is appropriate to consider whether the successful bidder has the business experience to comply with the regulatory requirements as part of the sale process, so that this kind of environmental emergency with its significant costs does not occur again at this Mine. It is not a conflation of the regulator's imposition of licence conditions and permit requirements to include these provisions in the SISP, given how fundamental these factors are to the successful operation of a mine. Commercial efficacy requires an assessment not only of the bidders' financial ability and technical capabilities but also its

understanding of and ability to implement the regulatory requirements. Obtaining an optimal price for the assets can no longer be separated from a consideration of the bidder's ability to comply with environmental obligations.

[69] In the circumstances of this case, I do not see that Yukon has an over-reaching or inappropriate influence in the SISP. They are being consulted by the Receiver, and are not controlling the process to the detriment of other creditors. The Receiver has the ability to reject their suggestions. The Receiver is acting responsibly in the circumstances of the Mine. It is not inappropriate in these circumstances to assess the ability of any new owner to continue the care and maintenance, until it is ready to bring the Mine carefully out of care and maintenance and into production, forestalling any environmental emergency caused by escaping contaminated water, and complying with regulatory conditions including paying the necessary security for reclamation.

[70] I find that the Receiver has met the requirements in this case for approval of the SISP.

iii) and iv) Directions to Include the Master Lease Items in the SISP and if Included, Whether Those Master Lease Items are Subject to Security of Yukon from s. 14.06(7) of the BIA

[71] I have combined the next issues of the Receiver's request for directions to include the Master Lease Items in the SISP and if included, whether they are subject to security conferred on Yukon pursuant to s. 14.06(7) of the *BIA*. These are issues on which further submissions have been requested, and so I have reserved my decision until those submissions have been received and considered.

CONCLUSION

[72] The priority of the Receiver's Charges is elevated over the YZC Property and the Essential Items. The question of the elevation of priority over the rest of the Master Lease Items will be addressed in the fourth application once further submissions are received and considered.

[73] The SISP is approved. The Directions on whether the Master Lease Items should be included in the SISP and whether they are subject to security under s. 14.06(7) will be provided once further submissions are received and considered.

DUNCAN J.