SUPREME COURT OF YUKON

Citation: *Sumitomo Canada Limited v Minto Metals Corp.*, 2024 YKSC 28

Date: 20240614
S.C. No. 23-A0086
Registry: Whitehorse

BETWEEN:

SUMITOMO CANADA LIMITED

PETITIONER

AND

MINTO METALS CORP.

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the Petitioner	Kibben Jackson (by videoconference)
Counsel for PricewaterhouseCoopers Inc.	Bryan C. Gibbons (In person)
Counsel for Selkirk First Nation	Mark Wallace (In person)
Counsel for Government of Yukon	Dorothy J. Miller (by videoconference) and Julie DesBrisay (In person)
Counsel for Cobalt Construction Inc.	Scott Turner (by videoconference)
Counsel for Maynbridge Capital Inc.	Mary Buttery, KC (by videoconference)
Counsel for Capstone Mining Corp.	Claire Hildebrand (by videoconference)
Counsel for Dyno Nobel Canada Inc, Thyssen Mining Construction of Canada Ltd. and BQE Water Inc.	Charles Bois and Terrence M. Warner (by videoconference)
Counsel for Fountain Tire Mine Service Ltd.; Mueller Electric (Div II) Ltd.; Borealis Fuels & Logistics Ltd.; Guillevin International Co.; Suncor Energy Services Inc.; and Major Drilling Group International Inc.	Kyle Carruthers, agent for James R. Tucker (In person)

Counsel for Finning (Canada) a division of Finning International Inc.	Eamonn Watson (by videoconference)
Counsel for Yukon Energy Corporation	Jeffrey Bradshaw (by videoconference)
Counsel for Caterpillar Financial Services Corporation	John D. Leslie (by videoconference)
Counsel for JDS Energy & Mining Inc.	Gary W. Whittle (In person)

REASONS FOR DECISION

OVERVIEW

[1] Minto Metals Corp. ("Minto Metals"), has been the owner-operator of an open pit and underground copper-gold-silver mine ("Minto mine") located approximately 250 kilometres northwest of Whitehorse, Yukon, since 2021. On May 13, 2023, Minto Metals abandoned the Minto mine. These applications arise from the resulting receivership of the mine. The affected parties, with monies owing to them, are not in agreement with the Receiver's recommended path forward.

[2] The Minto mine is on Category A[1] settlement land of Selkirk First Nation, a self-governing Yukon First Nation that was a beneficiary of resource extraction while the mine was operating. Sumitomo Canada Limited ("Sumitomo"), the purchaser of all the concentrate produced at the Minto mine and a secured lender to Minto Metals, with a first-ranking security interest in the concentrate, brought a court application for a court-

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[1] Council of Yukon First Nations website, Umbrella Final Agreement Tab, Understanding of the Umbrella Final Agreement, Chapter 5, p. 11:

"(a) Category A Settlement Land

On Category A Settlement Land, a Yukon First Nation has complete ownership of the surface and subsurface. In other words, Yukon First Nations have rights equivalent to fee simple to the surface of the lands and full fee simple title to the sub-surface.

This means that Yukon First Nations have the right to use the surface of the land and the right to use what is below the surface, such as minerals and oil and gas."

appointed receiver after the mine was abandoned. On July 24, 2023, PricewaterhouseCoopers Inc., LIT ("the Receiver") was appointed by the Court as the receiver over all the assets, undertakings, and property of Minto Metals.

[3] The Yukon government conducted immediate care and maintenance on the mine to protect the environment and human health and safety and is now undergoing reclamation and closure activities. They are accessing a reclamation bond consisting of $75 million, earlier posted by Minto Metals. The Yukon government has calculated a $19 million shortfall between the amount of the bond and the amount it will take to complete the reclamation and closure activities.

[4] The Receiver seeks three orders from this Court: for the approval of the Receiver's activities as set out in its various reports; for the approval of the Liquidation Plan; and for the sealing of its Confidential Supplemental Fourth Report, containing the Liquidation Plan.

[5] The Receiver conducted a Sales and Investment Solicitation Process ("SISP") to market and sell the Minto mine property as a whole, from August 2023 to May 2024. The Receiver concluded the SISP was unsuccessful in identifying a bidder who could meet the necessary criteria of sufficient price; ensuring fulfillment of the reclamation and closure obligations; maintaining valid regulatory permitting; and satisfying Selkirk First Nation land lease requirements and royalty payments within a time period that would not prejudice the ongoing environmental remediation or diminish the value of the assets.

[6] The Receiver has proposed the immediate implementation of the proposed Liquidation Plan in order to maximize the value of the assets, and to ensure their removal from the mine site for auction in Whitehorse during the summer months. The

remote location of the mine, requiring a river crossing, has created a risk of further delay until the ice road construction in January 2025, or even until the following summer of 2025.

[7] The Receiver's applications were opposed by Selkirk First Nation, eight lienholders, Sumitomo, and two of the bidders (whose views were expressed through other parties). Two lienholders, the secured lender, and the primary secured creditor supported the Receiver's applications. Six lienholders and the Yukon government took no position.

[8] Selkirk First Nation, supported by others opposing the Receiver's application, proposed a court-supervised bidding process, allowing the successful non-binding bidder three months of exclusivity to negotiate terms of the sale. If there were no sale, the Liquidation Plan could be implemented in the fall or winter.

[9] On May 13, 2024, I advised the parties by email of my decisions to grant the orders approving the Receiver's activities, the proposed Liquidation Plan, and the sealing of the final two pages only of the Liquidation Plan, with reasons to follow. Here are those reasons.

BACKGROUND

History of Mine

[10] The Minto mine was purchased in 2005 by Sherwood Copper and began operating in 2007 as an open pit copper-gold-silver mine. Capstone Mining Corp. ("Capstone") bought the mine in 2008 and continued operating it until 2018, when it went into care and maintenance due to low copper prices and a lack of capital. Capstone then sold the mine to Pembridge Resources PLC in 2019. In 2021, Minto

Metals took over after a reverse take-over. It was traded on the Toronto Stock Exchange.

[11] The mine had significant infrastructure including a mill, camp, airstrip, and energy distribution and various other buildings. It was capable of processing 4,000-4,400 tonnes of concentrate a day but was operating in recent years at 3,000 tonnes a day. All concentrate was purchased by Sumitomo through an offtake agreement.

[12] The mine site is located near Pelly Crossing, Yukon. Access requires crossing the Yukon River, by barge in the summer and by ice road in the winter. Twice each year, in fall before the river freezes, and in spring before the ice melts, there is no access for approximately six weeks.

[13] The concentrate was for many years transported by truck to the port of Skagway, Alaska, a distance of approximately 450 kilometres. However, the port shut down in 2022 and is not expected to re-open for another one to two years. As a result, the concentrate was transported by truck to Stewart, British Columbia, a distance of approximately 1,325 kilometres. This represented a significant cost increase.

[14] In 2019, the reclamation security was set at $72 million, which was posted by way of a surety bond. Minto Metals' most significant liability associated with the reclamation security was its tailings ponds, which had an estimated capacity of 11 million dry metric tonnes ("DMT"). By the end of 2022, only 600,000 DMT of capacity remained.

[15] In 2022, the Yukon government increased the reclamation security to $91 million. Minto Metals paid approximately $3 million towards the increase but was unable to meet any further obligations. Due to the levels of the tailings ponds and Minto Metals' inability

to post the full reclamation security, the Minto mine was placed on restricted operating conditions. These restricted operating conditions prevented the generation of sufficient cash flow to pay its obligations as they became due.

[16] As a result of its financial and operational difficulties, on May 12, 2023, Minto Metals made the decision to abandon the Minto mine. The positions of all employees were terminated and the directors resigned the following day.

Initial Sales Process and Limited Receivership

[17] Minto Metals began a sales bidding process on June 13, 2023, with Ernst & Young Inc. as sales advisor. The process was unsuccessful in identifying a bidder.

[18] Thus on June 29, 2023, the Supreme Court of British Columbia granted Sumitomo's application for a limited receivership order. PricewaterhouseCoopers Inc., LIT was appointed as limited receiver and manager without security over all copper concentrates of Minto Metals and was authorized to sell for a certain price the unsold concentrate to Sumitomo, who was in turn authorized to remove the copper concentrate from the mine site.

[19] On July 5, 2023, the Supreme Court of British Columbia granted a further order amending the limited receivership order to confirm all claims attached to the net proceeds of sale from the unsold concentrate in the same priority as immediately before the sale. The court also authorized all lien claimants to take the necessary steps to preserve their rights as lien claimants.

[20] On July 24, 2023, after receiving a report from the limited receiver, the Supreme Court of British Columbia set aside the amended limited receivership order. It granted an order approving a settlement agreement between Sumitomo and the Yukon

government and directing the limited receiver to pay to the Yukon government the funds collected from the sale of concentrate to Sumitomo.

Receivership Order

[21] The court discharged the limited receiver upon payment of the settlement amount and appointed PricewaterhouseCoopers Inc., LIT as the receiver and manager without security of all the assets, undertakings and property of Minto (the “Receivership Order”). This Receivership Order dated July 24, 2023, governs these proceedings.

[22] On August 25, 2023, this Court granted an order transferring the proceedings from the Supreme Court of British Columbia to the Supreme Court of Yukon.

[23] The Receivership Order authorized a borrowing charge of $500,000 for the Receiver. This was increased by the Court authorization of another $500,000 on November 15, 2023.

[24] The Receivership Order, among other things, authorized the Receiver’s activities to market and negotiate the terms and conditions of sale of any or all of the property; to sell, transfer, lease or assign the property; and to engage property, financial and legal experts to assist in the execution of their duties.

Stakeholders

[25] During these proceedings, the Receiver identified the following three key stakeholders: 1) the Yukon government – the regulator and the entity responsible for ensuring the care and maintenance, reclamation and closure were carried out; 2) Selkirk First Nation – the landholder and creditor; and 3) Capstone – the primary secured creditor and indemnifier of the bond provided by Zurich Insurance Group (“Zurich”) that is accessed by the Yukon government for the implementation of

reclamation and closure. Other stakeholders included the lienholders, equipment lessors, Sumitomo, and Maynbridge Capital Inc. (“Maynbridge”).

[26] Maynbridge provides bridge financing to restructuring companies. On August 30, 2023, it agreed to make a senior secured super-priority Receiver’s Certificate credit facility available to the Receiver to fund the receivership, the Receiver’s activities and its counsel. The funding agreement authorized no more than $1 million, plus interest at 13% per annum calculated monthly and a standby fee of 2%. The agreement matured on March 31, 2024 and was not renewed.

Sales and Investment Solicitation Process (SISP)

[27] The Receiver began a SISP on August 28, 2023. It aimed to solicit bids for a purchase of all or substantially all of the assets of the Minto mine, *en bloc*, that is, as a whole. Alternatively, it aimed to obtain an investment into Minto Metals to facilitate negotiations for an agreement to sell. The Receiver determined an *en bloc* sale was the best way to maximize the value of the assets. The Receiver also determined that an expeditious process was preferable, in order to limit carrying costs, to capitalize on expressions of interest and to achieve a solution before winter.

[28] By October 9, 2023, after an initial three-day extension to the deadline for receipt of bids, six non-binding bids for an asset or share purchase of Minto Metals were submitted to the Receiver. Discussions occurred to clarify aspects of the bids. The deadline for non-binding bids was extended a second time for a limited number of bidders at their request to November 1, 2023. At that time three non-binding bids were submitted.

[29] Between October 6, 2023, and December 15, 2023, the Receiver reviewed and discussed each bid. An additional proposal provided outside of the SISP timelines was not pursued because of outstanding due diligence requirements.

[30] The Receiver entered into a term sheet with Granite Creek Copper Ltd. ("Granite Creek"), the most viable bidder in the Receiver's view, in early 2024. The other two bids were not pursued because of insufficient cash offers and ongoing uncertainties relating to reclamation and closure activities and permitting. Between January and March 2024, the Receiver facilitated and participated in numerous discussions among the key stakeholders and the bidder in an attempt to advance the proposal. By March 2024, the Receiver concluded that the complexities of land leases, royalties, assignments of permits and licences, reclamation security and environmental remediation could not be resolved in a reasonable time.

[31] On March 27, 2024, the Receiver proposed termination of the SISP and immediate liquidation, as it reported it had exhausted its efforts and monies available to it. One week later, Granite Creek submitted a new proposal, which the Receiver recommended for consideration. The proposal included a nine-month exclusivity period in exchange for $2.2 million in cash to allow Granite Creek to negotiate the outstanding issues surrounding their proposed acquisition of the property.

[32] At the court hearing on April 5, 2024 for approval of the Receiver's activities and next steps, including a consideration of the Granite Creek exclusivity agreement, and by follow-up letter dated April 8, 2024, Selkirk First Nation proposed a postponement of Court approval of the liquidation plan, or of the Granite Creek exclusivity agreement, until a court-supervised bidding process were held to assess any other proposed bids.

Selkirk First Nation stated they had received "credible indications" that other unidentified parties had a serious interest in acquiring the mine. They suggested a 30-day period for receiving sealed bids, assessment of the bids by some combination of the Court, the Receiver and the stakeholders, and a determination by the Court if any should be accepted. If so, the successful bidder would have the exclusive right for three months to negotiate and complete a definitive agreement for the purchase of Minto Metals or its assets within a reasonable time to be set by the Court. If no successful bid were received or agreement negotiated, the Receiver's proposed liquidation plan could be approved and implemented. The hearing was adjourned to early May to allow discussions about the alternatives to occur.

[33] During this time other parties expressed interest in purchasing the mine property as a going-concern or purchasing a subset of the property. However, no formal requests or proposals were forthcoming from these informal expressions of interest.

[34] The key stakeholders, the Receiver, and the bidder discussed the Granite Creek exclusivity agreement. They were unable to agree on the length of the proposed exclusivity period: the Yukon government was concerned about the impact of nine months on the implementation of the reclamation and closure plan and access to the reclamation bond, while Granite Creek needed the time to develop solutions to the outstanding issues. Selkirk First Nation agreed with the need for more time.

[35] After further discussion, the Receiver returned to its recommendation to terminate the SISP and proceed to liquidation. This is part of the applications currently before the Court.

[36] In the meantime, during the spring of 2024, Selkirk First Nation and some of the lienholders had initiated further discussions about the purchase of the mine by The Fiore Group ("Fiore"), one of the bidders whose bid was not pursued by the Receiver after December 2023. The Receiver was not aware of these discussions. Selkirk First Nation did not respond to the Receiver's request by letter dated May 1, 2024, for a discussion about their proposed sales process.

[37] Selkirk First Nation included in its court material for the current applications a letter from Fiore setting out a revised non-binding bid that substantially increased their financial offer. In response, the Receiver submitted another report to the Court, including Fiore's November 1, 2023 revised non-binding bid, Fiore's answers to the Receiver's questions sent during the SISP, further email exchanges between Fiore and the Receiver, concerns of the Receiver about Fiore's final non-binding bid, a summary of the positions of creditors and stakeholders on the Receiver's and Selkirk First Nation's proposals filed for the May 10th hearing, and answers to questions about the liquidation plan.

POSITION OF THE PARTIES

Receiver

[38] The Receiver states it spent eight months running a SISP and negotiating with interested bidders with the input and involvement of the key stakeholders. Their goal was to achieve an agreement primarily among Selkirk First Nation, the Yukon government, Capstone, and a bidder to allow for a sale of the mine. In the Receiver's view, no bidder succeeded in developing a proposal that satisfied the complexities raised by the state of the mine. The assessed risks of ensuring continued access by the

Yukon government to the reclamation security after a sale, given the unwillingness of any bidder to assume current reclamation liabilities; of the ability of a bidder to obtain regulatory permits for exploration and restart of the mine while reclamation and closure activities were continuing; and of the sufficiency of cash to support the transition, all outweighed the recognized benefits of an *en bloc* sale.

[39] The Receiver did not support Selkirk First Nation’s proposal. The delay would create further uncertainty and contribute to the depreciation of the assets. No new viable bidders had emerged and the two remaining interested bidders – Granite Creek and Fiore – had not been successful in proposing solutions to the outstanding issues. The Receiver assessed the information it received about the final non-binding bid from Fiore as not substantially different from its November 1, 2023 bid. Although Fiore offered a higher purchase price, it was still considered insufficient and there was no advancement of due diligence and discussions on the above-noted risks. Liquidation was the best way of maximizing the value of the assets.

Selkirk First Nation

[40] Selkirk First Nation opposed the proposed liquidation of assets based on prematurity, and unfairness in the way the Receiver conducted the SISP. Underlying their position was their belief in the benefits of the future operation of the mine for Selkirk First Nation and for the Yukon. Their proposal for a new court-supervised bidding process was to allow the consideration of the final non-binding Fiore bid which Selkirk First Nation said addressed a significant number of issues raised by the Receiver. The new bidding process could also consider potential bids from other interested parties. The downside of this process, if unsuccessful, would be minimal.

Liquidation could proceed at the latest in the latter half of September, before the freezing of the river. By contrast, liquidation of the assets at any time would mean the mine is unlikely ever to operate again.

[41] More specifically, Selkirk First Nation emphasized that the economic importance of an operating mine to them, through financial and employment benefits, was an overriding concern that was not sufficiently considered by the Receiver. The Receiver's plan did not support economic reconciliation or adequately appreciate the benefits under s. 5.6 of the Selkirk First Nation Final Agreement of royalty payments to the First Nation. The Receiver's view also failed to recognize sufficiently the alliance between Selkirk First Nation and Fiore for the purposes of shared equity and governance. The economic benefits of the mine accrued to many Yukon businesses and to the people of the Yukon, also stakeholders. The opposition to liquidation by eight priority lienholders, amounting to $20.9 million worth of lien claims, and thus with substantial risk, strengthened this view. The Receiver's failure to consider the interests in continuing the operation of the mine was unfair and unreasonable.

[42] Further, the existence of the mine on Selkirk First Nation Category A settlement land was an exceptional circumstance. A finding of exceptional circumstance precludes the requirement of Court deference to the Receiver's recommendations.

[43] Selkirk First Nation criticized the Receiver's conduct of disclosing the Fiore November 1, 2023 confidential non-binding bid in their court materials; and for assessing Fiore's non-binding bids as though they were final bids. Selkirk First Nation stated the Receiver and the Yukon government failed to meet with Fiore to discuss their

proposal in the fall of 2023; and the Receiver unfairly characterized Granite Creek's bid to enhance its advantages.

[44] Selkirk First Nation supported Fiore's final non-binding bid. They said it addressed concerns raised by the Receiver and the Yukon government. Fiore increased their cash offer to a $200,000 non-refundable deposit on acceptance of Fiore's bid, and $6 million payable on closing. $35.72 million of debt was to be settled directly with creditors. The $200,000 could fund the costs of the bidding process and Receivership over the next four months. The relatively short proposed three-month exclusivity period addressed Receiver and stakeholder concerns about undue asset depreciation as well as Yukon government timing concerns related to ongoing reclamation responsibilities. Fiore demonstrated commitment to the ongoing operation of the mine by their offer of significant controlling equity and governance participation to Selkirk First Nation and equity participation to the lienholders through the offer of share warrants as part of the debt settlement.

[45] Selkirk First Nation also offered, subject to due diligence, to purchase Maynbridge's position.

Yukon government

[46] The Yukon government took no position on Selkirk First Nation's proposed new bidding process, or the Receiver's recommendation to liquidate. The Yukon government stated they respected the views of the Receiver as an officer of the court, and they respected Selkirk First Nation's desire to have an operating mine. As a result of the immediate risks created to the environment and human health and safety by the

abandonment of the mine, they were required as a regulator to enter the site on an urgent basis to work towards remediation, reclamation, and closure.

[47] To this point their activities have been conducted in a way that does not foreclose a sale. The Yukon government is required to continue these activities until another party assumes full responsibility to close and reclaim the mine site. For this reason, the Yukon government needs to continue to access the reclamation security bond, and to limit their exposure to the approximate $19 million shortfall between the security of $75 million paid by Minto Metals, and the projected cost of $94 million to close and reclaim the mine. The Yukon government stated these requirements were of “primary importance” and they had significant concerns about any exclusivity agreement, sale, or liquidation that may have compromised them.

[48] Certainty around the timing of any sales process or liquidation was needed. Stephen Mead, Assistant Deputy Minister of Mineral Resources & Geoscience Services in the Department of Energy, Mines and Resources, deposed in his affidavit:

> 9. Any lack of certainty regarding the timing for removal of major assets … from the site due to an extended sale process or a prospective mine purchase will have significant impacts on remediation planning. If an extended exclusivity period is granted with no set plans for liquidation of assets, it would impede YG’s reclamation planning and execution.
>
> 10. If a new or extended sale process were approved by the Court, YG would engage in discussions with any potential Bidder to ensure the work of reclaiming and closing the site could be fully integrated with any future plans a Bidder may have, so as to ensure that YG’s reclamation and closure work, and the reimbursement of such costs from security, are not impeded or compromised in any way.

[49] The Yukon government advised that while they have had some conversations with Fiore about the reclamation and closure issues, those conversations have not

advanced beyond the conceptual stage, and no detailed plan has been discussed. Only during very recent conversations with Fiore has the Yukon government perceived that Fiore has gained an increased understanding of the reclamation, bond, and regulatory permitting issues they would need to address to move forward with a sale.

[50] The Yukon government and the Receiver have discussed the proposed liquidation plan and have agreed that any order for liquidation will not apply to assets required by the Yukon government for its closure and reclamation work.

Capstone Mining Corp.

[51] Capstone, Minto Metals' primary first ranking secured creditor, is owed approximately $5 million (USD) in secured debt, and is the guarantor of the reclamation security bond. From the outset of these proceedings, Capstone expressed concern about a prolonged sales process or receivership, because of the costs likely to be incurred to the detriment of stakeholders, and the erosion of value of creditors' security. Their view is that the lengthy and expensive sales process pursued by the Receiver has been exhausted, with no reason to believe a new bidding process will result in a different outcome, given the transaction's unresolved complexities. Capstone noted $1.2 million in professional fees have been expended to date and no party has offered to fund a new sales process. Finally, Capstone argued that a new court-supervised bidding process would not respect the integrity of the insolvency process run by the Receiver, thereby undermining commercial morality and the future confidence of businesspersons in dealing with receivers.

Maynbridge Capital Inc.

[52] Maynbridge and the Receiver entered into a funding agreement in which Maynbridge agreed to provide a credit facility of no more than $1 million to fund the Minto Metals receivership, the Receiver's activities and its counsel. The funding agreement matured on March 31, 2024, and was not renewed; the full $1 million plus interest at 13% per annum calculated monthly and legal fees are due.

[53] Maynbridge opposes a new sales process because of the delay and uncertainty it will cause. It supports the Receiver's recommendation for liquidation because it will prevent continued depreciation of Minto Metals' assets, and allow for the movement of Minto Metals assets across the Yukon River before 2025.

[54] Maynbridge would take no position if another party purchased its position.

Lienholders, Sumitomo, and Bidders who Support the New Sales Process

[55] Some of the lienholders who supported the new sales process proposed by Selkirk First Nation provided letters of support of the process to Fiore, who attached them to their final non-binding bid and who also supported a new sales process.

[56] Sumitomo supported a new sales process for the purpose of restarting the mine because it was in the best interest of their creditors and stakeholders.

[57] Granite Creek, through the lawyer for Sumitomo, expressed their continuing interest in pursuing a non-binding bid.

Lienholders who Support Liquidation

[58] Finning (Canada), a division of Finning International Inc., supported liquidation because of concerns that a further delay will cause a loss of asset value and will diminish recoveries for creditors; and because of a belief that the sales process was

exhausted to the extent that the numerous challenges could not be resolved in a reasonable time or at all.

[59] Caterpillar Financial Services Corporation supported the liquidation process as long as it retained control over the liquidation of its own equipment.

LAW

[60] The context of this matter is an insolvency. The court in *Canada (Minister of Indian Affairs and Northern Development v Curragh Inc.*) (1994), 114 DLR (4th) 176 (Ont. Gen. Div) ("*Curragh*"), recognized that where one is dealing with an insolvency situation one is "not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability" (at 185).

[61] In keeping with this reality, two overarching policy considerations in bankruptcy and insolvency proceedings are urgency and commercial certainty: "[d]elay fuels increased costs and breeds chaos and confusion, all of which risk adversely affecting the interests of parties with a direct and immediate stake in the sale process." (*1705221 Alberta Ltd v Three M Mortgages Inc*, 2021 ABCA 144 at para. 48). The *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*") is remedial legislation and should be given liberal interpretation to facilitate its objectives (*Third Eye Capital Corporation v Dianor Resources Inc*, 2019 ONCA 508 ("*Third Eye*") at para. 43).

[62] A receiver's powers derive from s. 243(1) of the *BIA*.

> Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an

> insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.

[63] It is generally accepted that when Parliament enacted s. 243 and imported the broad language set out in (c) from a previous section dealing with interim receivers, the wide-ranging orders available to interim receivers were similarly available to court-appointed receivers. Courts have adopted the approach that s. 243 allows the receiver to do what "'justice dictates' but also what 'practicality demands'" (*Curragh* at 185). Further, judges are given the "broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise" (*DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 226 at para. 20).

[64] The purpose of a court-appointed receiver is to "'enhance and facilitate the preservation and realization of the assets for the benefit of creditors': … Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515." [citations omitted] (*Third Eye* at para. 73). As noted in *Bayhold Financial Corp v Clarkson Co* (1991), 108 NSR (2d) 198 (CA) "the essence of a receiver's powers is to liquidate the assets" (at 15). The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors" (*1117387 Ontario Inc v National Trust Company*, 2010 ONCA 340 at para. 77). Or, put another way, "[i]n general terms, the function of a court-appointed receiver is to ascertain the assets of the debtor, get some fix on their approximate value, and determine the path

the receiver should follow in an attempt to yield the greatest return possible" (*Denison Environmental Services v Cantera Mining Ltd* (2005), 11 CBR (5th) 207 (Ont. SCJ) at para. 12).

[65] While the primary concern of a receiver is to protect the interests of the creditors, a secondary consideration in the sale context is the integrity of the process by which the sale is effected.

[66] A receiver seeks court approval for the following reasons:

- to allow the receiver to move forward with the next step in the proceedings;
- to bring the receiver's activities before the court; to allow the concerns of the stakeholders to be addressed and any problems rectified;
- to allow the court to be satisfied that the receiver's activities have been conducted prudently and diligently;
- to provide protection for the receiver not otherwise provided by the *BIA* or the appointing order; and
- to protect creditors from delay and disruption caused by re-litigation of issues and potential indemnity claims by the receiver.

[67] While this list was developed in the context of describing a Monitor's role in CCAA (*Companies' Creditors Arrangement Act*) proceedings, the principles apply equally to receivers in the context of a receivership. The court approval acts as a check and accountability mechanism on the receiver's activities.

[68] The court-appointed receiver does the work that otherwise the court would have to do. Courts have, over many years, shown deference to the expertise and

recommendations of the receivers. "[P]redictability and certainty are hallmarks of the legitimacy of a receiver to deal with assets … 'the court accords a high degree of deference to the implementation of the disposition strategy developed by a court-appointed receiver'" (*Atrium Mortgage Investment Corp v King Edward Apartments Inc*, 2018 SKQB 296 at para 59). The Court in the leading case of *Royal Bank of Canada v Soundair Corp* (1991), 4 OR (3d) 1 (CA) ("*Soundair*") at 6, wrote :

> Before dealing with that issue there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

ANALYSIS

[69] Selkirk First Nation, supported by some lienholders, has criticized aspects of the sales process undertaken by the Receiver, leading to their argument for a new court-supervised sales process. Part of the court approval process in this case requires an assessment of the Receiver's conduct of the SISP and ultimate reason to terminate. The principles in *Soundair* are equally applicable here even though in that case court approval was sought for a sales process. Both contexts require a review of the Receiver's conduct.

[70] *Soundair* sets out the following factors a court must consider in reviewing a sale by a court-appointed receiver:

- Has the receiver made a sufficient effort to get the best price and has it acted providently?
- Has the receiver considered the interests of all parties?
- The efficacy and integrity of the sales process by which offers are obtained; and
- Has there been unfairness in the working out of the process?

[71] I will address each of these factors in the context of this case.

i) Sufficient efforts to obtain best price and acting providently

[72] A review of the Receiver's development, implementation, and proposed termination of the SISP reveals its efforts to obtain the best price and its provident approach, also described as acting prudently, fairly, and not arbitrarily.

[73] The SISP was developed with input from the stakeholders. The Receiver imposed a tight timeline 1) to limit the ongoing carrying costs of the Minto mine; 2) to advance the process before the fall and winter seasons limited access to the Minto mine; and 3) to capture the current interests expressed. The SISP encompassed a due diligence period for the potential bidders, including access to a virtual data room (containing 40GB of data related to Minto Metals' exploration data, mine design, operations, financials, and general assets) and a site visit, a non-binding bid deadline, a time period in which to assess the bids, communication with qualified bidders and the performance of final due diligence, a binding bid deadline, final bid assessment and notification of selected bidder, and court approval of the successful bid.

[74] The Receiver engaged in extensive marketing by directly contacting 44 potential bidders, including those who participated in the June 2023 sales process, advertising the SISP publicly on its website, and encouraging stakeholders to identify interested parties. The data room included information from Minto Metals' de-activated server, and was available within less than two weeks of the beginning of the SISP. Eight of the 51 interested parties as of September 5, 2023, were able to obtain access to the data room to undertake due diligence.

[75] The evaluation criteria for the bids included:

- purchase price;
- non-cash consideration such as royalty payments, deferred payments, assumption of liabilities;
- the effect on the likelihood of closing the transaction of any condition and due diligence requirements;
- plan for ongoing care and maintenance of the Minto mine;
- the nature and sufficiency of funding for the proposed transaction;
- planned working relations with and expected benefits that may accrue to the Selkirk First Nation, including royalty payment assumptions;
- impact on former employees of Minto Metals and Yukon businesses;
- recognition of compliance bond requirements by the Yukon government and any other security required by other regulators;
- previous technical, financial, environmental, regulatory and operational experience of the bidder, including its willingness and ability to obtain and maintain any necessary regulatory approval and compliance in connection

with the ownership, development, exploration, operation or care and maintenance of the Minto mine, and its associated capital expenditures, timelines and mining targets; and

- historical health, safety and environmental record and operational experience with similar undertakings, and record of successful restart of mines from care and maintenance status.

[76] The SISP provided that the sale of assets would be “as is, where is”, and would require the transfer of licences, permits, and agreements necessary for ongoing operation.

[77] The Receiver’s rejection of all three non-binding bids demonstrated their attempts to obtain the best price and act providently. Acting providently in this context included a consideration of the benefits of an operating mine and the regulatory/permitting issues and continuation of the reclamation and closure activities, including ongoing access to the bond.

Bidder 1

[78] Bidder 1, a British Columbia company operating in critical minerals, with mining projects in and outside of Canada and a market capitalization of $30 million, did not offer enough cash. Their bid also required the Yukon government to continue to assume the remediation/reclamation liabilities and there was uncertainty about transferring the permits and licences to the Bidder. The Receiver’s rejection of this bid was prudent, fair, and not arbitrary.

Bidder 2 - Fiore Group

[79] Bidder 2, now known as Fiore, was a team of mine explorers, developers, and operators with over three decades of experience in starting up mining companies around the world. Between September 1 and October 9, 2023, the Receiver met on at least 12 occasions with Fiore virtually or through coordinated meetings with Fiore and other stakeholders. Despite the Receiver's assessment of Fiore's initial non-binding bid submitted on October 9 as economically unattractive as a result of not providing sufficient cash to fund the transaction, and inappropriately requiring the Yukon government to indemnify the closure liabilities, the Receiver continued discussions with Fiore at the request of Selkirk First Nation.

[80] During the discussions, Fiore presented several informal offers that conflicted with later non-binding offers, leaving the Receiver uncertain about Fiore's intentions.

[81] On November 1, 2023, Fiore submitted its third non-binding bid, proposing the acquisition of Minto Metals through an asset purchase or a share purchase by way of a reverse vesting order, at a purchase price of $15.25 million. This consisted of $2.25 million cash up front and $3 million or 75% of net proceeds of surplus asset sales within six months of closing. The remaining $10 million would be paid at three different times, conditional on the recommencement of commercial production and sale of certain amounts of copper. Conditions included:

- no obligation on Fiore for the indebtedness or liabilities of Minto Metals;
- the maintenance of all mining claims, leases, licences and permits until closing, and regulatory authorizations remaining in place;

- continuation by Yukon government of the reclamation and closure activities by using the reclamation bond secured by Zurich and indemnified by Capstone, separate from care and maintenance and future operations;
- the continuation or replacement by Fiore of the reclamation bond upon the restart of the Minto mine with a new mine plan and new reclamation and closure plan; and
- the continuation of the indemnification by Capstone of the reclamation bond, and their affirmation of support of the Fiore bid.

[82] Fiore's bid contained these additional aspects:

- provision of significant unspecified equity interests and governance responsibilities to Selkirk First Nation in the new company;
- commitment to work with Selkirk First Nation directors, officers, and senior management in the management and funding of the Minto mine upon restart;
- commitment to use qualified Yukon businesses and suppliers;
- discontinuance of the dewatering of the underground mine;
- initiation of an exploration and drilling program and completion of an updated feasibility study after reduction of environmental liabilities; and
- obtaining equity financing of $10-$20 million during the first year to fund care and maintenance and exploration.

[83] The Receiver's concerns with Fiore's proposal were: 1) the insufficiency of the cash commitment: the initial $2.25 million would result in minimal distribution to the

creditors, and uncertainty was created by a substantial portion of the cash consideration being conditional upon future events such as the commercial production of specific amounts of copper concentrate, over which the Receiver had no control; 2) it was unclear how the care and maintenance activities were to be carried out by Fiore and how the reclamation/closure activities to be continued by the Yukon government would be defined, separated and implemented in the context of the reclamation bond requirements and the regulatory permitting requirements; 3) Fiore’s general lack of familiarity with the Minto mine, and with the authorizations needed for exploration activities, as well as a significant amount of outstanding due diligence, mainly related to the ability of the completion of reclamation and closure activities, with bond access, and the exploration activities to occur simultaneously; 4) Fiore’s contacting of stakeholders and officials outside of the SISP process in an apparent attempt to create leverage for its bid, and Fiore’s request for disclosure by the Receiver of a minimum bid suggested a failure to respect and appreciate the need for integrity and fairness of the bidding process.

[84] These reasons for rejecting the Fiore revised bid of November 1, 2023, showed the Receiver’s attempt to get the best price and to act providently. The uncertainties created by the lack of due diligence on the issues affecting reclamation required the exercise of caution by the Receiver.

Bidder 3 – Granite Creek Copper Ltd.

[85] Bidder 3, now known to be Granite Creek, was a Canadian exploration company, familiar with operations in the Yukon. Their revised non-binding bid was to acquire Minto Metals through an asset purchase or through shares by way of a vesting order at the

Receiver's determination. Their price was $18 million consisting of $5 million in cash on closing, $3 million in cash, 180 days after closing, without conditions, and $10 million on the restart of the Minto mine or the occurrence of commercial production. They provided a commitment letter to the Receiver for the initial cash amount of $6 million. A material condition was the carrying out by the Yukon government of closure activities, utilizing the reclamation bond to reduce existing liabilities. Granite Creek would perform their exploration work once the Minto mine was ready for restart.

[86] On completion of the initial exploration work, Granite Creek would raise an additional $16 million for a 20,000 to 30,000 metre drilling program to expand the resource base and conduct a feasibility study, estimated to take 24 months. Then Granite Creek would seek a mine operator partner, raise additional capital for a restart of the mine, and on restart would assume all permits and licences associated with the mine, including those related to the existing reclamation bond, and assume or post new reclamation security as required by the regulatory assessors.

[87] Granite Creek offered Selkirk First Nation 12.5% interest in the new company and one of four seats at the board of directors.

[88] Noting Granite Creek's reasonable price offer, the Receiver commended their well-researched, flexible, and thoughtful approach to the complexities of the proposed transaction. Granite Creek respected the Yukon government concerns about the need to continue the reclamation activities with access to the bond.

[89] The Receiver negotiated a term sheet with Granite Creek in January 2024. In February 2024, the Receiver met with the key stakeholders to discuss the ability of the Yukon government to access the reclamation bond and the permits and licences to

continue with reclamation activities during the proposed transaction, how the permits and licences could be held by the Receiver on behalf of Minto Metals until Granite Creek was ready to assume them, what property would be transferred on closing to allow for exploration activities, what property and assets would be transferred to Granite Creek once it was ready to restart the mine, how would Granite Creek access the mine on closing, and what negotiations, meetings, and agreements with the Yukon government would be necessary to coordinate the continuing reclamation and closure plan with the proposed restart of the operations.

[90] The Receiver's concerns about the Granite Creek bid were: 1) the financial capability of Granite Creek as identified by the stakeholders; 2) uncertainty around the future mine operation because Granite Creek is an exploration company; 3) the absence of a regulatory framework to freeze or postpone the permits and licences while Granite Creek conducted exploration over the following two-to-three years, thereby increasing uncertainty and costs for Minto Metals because of, among other things, the permit requirement to report annually; 4) uncertainty about the delayed payment of $3 million and the valuation of the promised $10 million assumption of liabilities.

[91] After further meetings with the stakeholders to discuss these and other concerns, the Receiver renegotiated the term sheet with Granite Creek to reflect changes requested by the stakeholders: namely, that Granite Creek perform exploration and development activities to a certain standard; they create a mine operation restart plan; and that confirmation would be received that reclamation activities are not occurring on the property on which exploration would occur.

[92] Despite significant discussions, the Receiver nevertheless identified insurmountable concerns surrounding the Yukon government's ongoing ability to access to the reclamation bond and continue their reclamation and closure work under Granite Creek's proposed transaction. The Receiver was not confident of the support of the key stakeholders on this issue as well as on the issue of Granite Creek's financial capability. As a result it recommended rejection of the Granite Creek proposed transaction.

[93] However, Granite Creek presented to the Receiver a modification to their bid in March 2024 and the Court granted the Receiver's request for an adjournment to enable all stakeholders to consider the revised bid. As noted above, Granite Creek proposed a nine-month exclusivity agreement to allow them to make further efforts to address the Receiver and stakeholder concerns, especially around the reclamation bond and financial capability. They also included an option to negotiate the sale of any non-essential equipment from the mine, to split the proceeds with the Receiver, and receive a 20% commission.

[94] The Receiver ultimately rejected Granite Creek's revised bid, primarily because of the inability of key stakeholders to agree on the nine-month delay. As noted above, while Selkirk First Nation did not disagree with that time period, the Yukon government had concerns about its effect on the planning of the ongoing reclamation and closure work and access to the bond. Capstone and others were concerned about the diminishing value of the assets over that time period.

[95] The Receiver demonstrated a concern for obtaining the best price as well as prudence, reasonableness and foresight in negotiating for as long as reasonably possible but ultimately rejecting Granite Creek's bid. The concern about Granite Creek's

ability to meet the financial obligations it promised were considered. Their inability to address the regulatory permitting and environmental remediation concerns was also a sufficient reason to reject the bid. The Receiver acted fairly and prudently by helping to ensure the abandoned mine did not become a major liability upon the taxpayers of the Yukon, and reducing exposure to environmental risks.

ii) Consideration of Interests of all Parties

[96] Selkirk First Nation argued that the Receiver did not sufficiently consider its interests, or the economic interests of the Yukon (although it is not a party), in keeping the mine operational. They argued their interests as a self-governing First Nation with the mine on their settlement land and the significant equity and governance opportunities offered by Fiore constituted an "exceptional circumstance" as set out in the jurisprudence, allowing the Court to decline to follow the Receiver's recommendation. They noted the contribution to economic reconciliation with Selkirk First Nation that the continued operation of the mine would provide.

[97] Exceptional or special circumstances were referenced in the *Soundair* case (at 25-6):

> … The court should not proceed against the recommendations of its Receiver except **in special circumstances** and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.
>
> …
>
> It is equally clear, in my view, though perhaps not so clearly enunciated, that **it is only in an exceptional case** that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has

> acted reasonably, prudently and fairly and not arbitrarily.
> [*Crown Trust Co v Rosenberg* (1986), 39 DLR (4th) 526
> (“*Crown Trust*”) at 548 and 550 (my emphasis)

[98] The dissenting judgment described the facts in the *Soundair* case as exceptional in the sense that upon the application made for approval of the sale of the assets of the debtor, two competing offers were placed before the court. The two secured creditors were unanimous in their position that they desired the court to approve the sale to 922, the company that the Receiver did not recommend. This is a factual difference from the current case, in which the disagreement is about whether or not the bidding process should be continued. Further, although there is significant support for a new sales process in this case, that support is not unanimous among the creditors and interested parties.

[99] This Court was not provided with any other cases defining exceptional circumstances in the context of a receivership sales process.

[100] Here, Selkirk First Nation, supported by some lienholders and other stakeholders, are advocating for a new sales process, not court approval of a sale to Fiore, (although all supportive parties appear to favour Fiore’s most recent non-binding bid). This Court cannot accept the dissent in *Soundair* as a precedential legal principle, and in any event, as noted, there are significant distinguishing facts. Further, Selkirk First Nation’s argument about exceptional circumstance is not process-oriented as in the *Soundair* dissent, but is based on their status as a self-governing First Nation owner of the land.

[101] There is no doubt that as a self-governing First Nation owner of the land, Selkirk First Nation is in an enviable position of receiving royalty payments and profiting in

many other ways from an operating mine. Their desire to continue to discuss the possibilities of continuing the mine operation is easy to understand. As noted by counsel for Maynbridge, their interests are primarily economic and financial, like those of the other stakeholders. This is an undeniably valid interest but is not an exceptional circumstance as understood in law.

[102] Unlike Granite Creek, who specified that Selkirk First Nation would be getting a 12.5% interest, Fiore did not specify the proportion or type of interest offered to Selkirk First Nation in their November non-binding bid. While in their final non-binding bid Fiore advised they would be providing Selkirk First Nation with a controlling equity and governance interest, no details were provided. The Receiver had no way to assess it, except that they knew it was more than 12.5%.

[103] The significant involvement of Selkirk First Nation in a new entity planning to restart the mine operation was an important assessment factor and satisfied part of the evaluation criteria. But the outstanding concerns about the need to continue the environmental remediation with access to the security bond, and whether the regulatory permits could allow for simultaneous exploration and remediation were fundamental to the future mine operation.

[104] Consideration of interests of other parties by the Receiver was evident. They met regularly with key stakeholders – identified as Selkirk First Nation, Yukon government and Capstone – and bidders and held 40 meetings in total. The lienholders stated they had two meetings with the Receiver, confirming the Receiver’s focus upon the three key stakeholders, including Selkirk First Nation, but not to the exclusion of other stakeholders. These meetings, as well as the Receiver’s good faith assessment of the

modified Granite Creek bid, demonstrated their recognition of the interests of those stakeholders in continuing the mine operation.

[105] It is noteworthy that many of those who were in favour of another sales process have been promised an equity participation through a share warrant or other arrangements not yet known to this Court or the Receiver. Like Selkirk First Nation, they stand to benefit substantially from the mine reopening. Their support for a new sales process must be viewed in that context.

[106] The people of the Yukon are not a party to this proceeding, so there is no legal requirement for the Receiver to consider their interests. There is no doubt that businesses of the Yukon, as well as the population in general would benefit economically from the ongoing successful operation of the mine. The Receiver was aware of this; hence their efforts with the SISP to maximize asset value. Through its many meetings with all of the stakeholders, and its assessments of the bids, the Receiver necessarily considered the various interests of people of the Yukon: an operating mine's undoubted economic benefits, and an abandoned mine's proper reclamation and closure to ensure environmental remediation and taxpayer cost containment.

iii) Efficacy and Integrity of the Sale Process

[107] Selkirk First Nation raised several arguments about the Receiver's failure to conduct a sales process with integrity and efficacy:

- the Receiver's criticism of Fiore's lack of due diligence was inappropriate because it was a non-binding bid, not a binding bid;

- the Receiver and the Yukon government did not meet with Fiore enough in November 2023 to discuss bid expectations;
- the Receiver unfairly disclosed the confidential Fiore November bid before the May court hearing; and
- the Receiver enhanced the Granite Creek revised bid to the detriment of the Fiore bid.

[108] The lienholders did not express specific concerns about the conduct of the SISP.

a) Due diligence

[109] The Receiver's expressed concerns about Fiore's lack of due diligence were appropriate for a non-binding bid. In their third report, the Receiver wrote that by December 2023, over three months after the commencement of the process, it was clear Fiore was still unfamiliar with the Minto mine, and the authorizations related to Minto's permits and licences associated with their exploration plans. This level of expected due diligence is consistent with a non-binding bid, especially when the evaluation criteria are assessed – such as previous technical, financial, environmental, regulatory and operational experience of the bidder, including its willingness and ability to obtain and maintain any necessary regulatory approval and compliance in connection with the ownership, development, exploration, operation, or care and maintenance of the Minto mine, and its associated capital expenditures, timelines and mining targets; recognition of compliance bond requirements by the Yukon government and any other security required by other regulators; and historical health, safety and environmental record and operational experience with similar undertakings, and record of successful restart of mines from care and maintenance status. Further, counsel for the Yukon

government at the May 10 hearing confirmed two recent phone calls with Fiore revealed their clearer understanding of these criteria and existing issues and expectations; however Fiore had no proposals about how to meet the challenges.

b) Insufficient meetings

[110] As noted above, the Receiver met virtually with Fiore or facilitated meetings among stakeholders, including the Yukon government, and Fiore on at least 12 occasions after receiving their initial non-binding bid. The meetings resulted in at least one revised bid. There were also email exchanges for clarification. The Yukon government provided Fiore a copy of the implementation plan with details of the reclamation work immediately after a meeting on December 1 with Fiore, the Receiver, and Selkirk First Nation. It is not clear how more meetings would have made a difference, especially given Fiore's stated position in December that they would not be conducting further due diligence or addressing the reclamation, closure and bond questions, or providing a detailed proposal for its exploration plans and activities to determine their impact on the Yukon government's activities, until a price point was agreed. Fiore further stated in December they were unwilling to increase their price, which was unacceptably low. The initial amount would result in minimal distribution to the creditors and further sums were conditional upon events beyond the Receiver's control, such as production of concentrate.

[111] The Receiver conducted or facilitated a sufficient number of meetings with Fiore in the fall of 2023.

c) Unfair disclosure of November bid

[112] The Receiver did not unfairly disclose the Fiore November bid because: 1) the November bid was rejected by the Receiver, and Fiore was no longer part of the SISP; 2) in effect, Fiore disclosed the November bid themselves, by providing their similar final non-binding bid to the Court for the May hearing. The November offered price was included in the Receiver's reports, to explain their rejection of the offer and their efforts to obtain the best price, as required. It was used to compare to the Fiore disclosed final non-binding bid price offer. The integrity of the SISP was not compromised by this.

d) Unfair enhancement of Granite Creek bid

[113] The allegedly unfair enhancements by the Receiver of Granite Creek's bid referenced by Selkirk First Nation were: 1) the minimizing of their financial capabilities and 2) the unconditional characterization of the $2.2 million up-front cash payment, when the proposal was for Granite Creek to have the option to negotiate the sale of any non-essential equipment from the mine, split the proceeds with the Receiver, and receive a 20% commission.

[114] Both issues were set out clearly by the Receiver in their reports – concerns by stakeholders about Granite Creek's ability to raise financing formed one of the reasons for rejecting their bid, and the condition about sale of non-essential equipment in the modified bid was clearly stated in the supplement to the third report. This condition did not exist in Granite Creek's first non-binding bid and the Receiver did not unfairly describe or enhance it.

[115] These criticisms reflect Selkirk First Nation's disagreement with the Receiver's decision to terminate the SISP without assessing the Fiore bid. Selkirk First Nation

argued that the Fiore final non-binding bid addressed many of the Receiver's reasons for rejection set out in the third report.

[116] However, the final non-binding bid still contained no plan to address the reclamation and closure, bond, and regulatory permitting complexities. Fiore referred to further necessary discussions with YG, and the other regulators. The only changes were an increase in the purchase price and the inclusion of the lienholders in the equities, to address their debt. The reference to an equity interest and governance participation for Selkirk First Nation remained but was described as "controlling" without further detail.

[117] The final non-binding bid from Fiore group was developed well after the deadline for bids, at the request of Selkirk First Nation and certain lienholders. To replace the Receiver – conducted SISP with a new court-supervised sales process, at this stage, would undermine the integrity of the Receiver's process, and require significant justification.

[118] Where a receiver has not conducted a sales process properly, conducting a court-supervised process after the receiver's sales process may be appropriate. For example, the receipt by a court of a substantially higher offer after the receiver recommended another offer may justify another process, depending on the receiver's actions. However, as the Court of Appeal wrote in *Soundair* "that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court" (at 14).

[119] In assessing whether the receiver has properly conducted its activities, "[t]he court must exercise extreme caution before it interferes with the process adopted by a

receiver to sell an unusual asset" (*Soundair* at 20). While the court must ensure the process is fair, it "ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise" (*Crown Trust* at 548).

[120] Here, the criticisms of the Receiver's process were insufficient to justify a new court-supervised sales process. No party objected to the SISP, or to the Receiver's decision not to accept Fiore's non-binding bid in November 2023, or to the Receiver's continuing negotiation with Granite Creek. The only concerns expressed to the Court by Selkirk First Nation were ensuring the process was not rushed, and by some lienholders about the lack of timely information from the Receiver. These were addressed through court adjournments before approval orders, and Court directions to hold conference calls with all stakeholders to ensure they had the relevant information.

[121] The proposed new court-supervised process was described in general terms by Selkirk First Nation. A mine is an unusual asset, with complexities similar to those of an airline, the subject matter in *Soundair*. The Court is not equipped with the knowledge and expertise to assess and evaluate on its own an asset as complex as an abandoned mine, and Selkirk First Nation did not suggest this approach. However, the court-supervised process suggested by them did not contain any suggestions about the means of determination of a fair process, the selection of evaluation criteria, the development of a marketing process, the management of and access to the data room, answering questions from potential bidders, facilitating discussions with potential bidders and the stakeholders about the bids, in particular to address the environmental remediation and regulatory/permitting complexities, and assisting with finalizing or

clarifying the bids. Further, there was no information on how received bids would be assessed, by whom, and what weight would be given to each assessor's view, except Selkirk First Nation's acknowledgement that the Receiver's views should have greater weight. While ultimately in a court-supervised process, these decisions would fall to the Court, guidance and suggestions are necessary and helpful.

[122] Selkirk First Nation's proposed new bidding process is inconsistent with the overriding policy objectives of bankruptcies and insolvencies – urgency and commercial certainty. Optimistically, the delay created by the proposed sales process would be at minimum four months, but possibly longer. In the meantime, the assets would continue to depreciate, and stakeholders would continue to receive no return. Further, the asset liquidation window would be at risk of delay by 6-12 months, if the sales process were not successful. There would be ongoing uncertainty about the path forward until the sales process, also uncertain, were completed. The Yukon government is currently at the stage in the reclamation and closure process where decisions to implement next steps are required. If a change in direction requires changes to decisions, the financial implications for the Yukon government could be significant.

[123] It is not clear who will bear the risk and expense of a new sales process as no party has offered to fund it. There are two problems with Selkirk First Nation's suggestion that the $200,000 non-refundable deposit offered by Fiore could satisfy that funding need. First, the amount is unlikely to be sufficient, given what the Receiver has spent to date on its SISP and given the additional work required for a court-supervised process. Second, that amount would only be forthcoming if the Fiore bid is accepted for consideration, making it conditional.

[124] The criticisms levelled at the Receiver about the sales process it conducted and seeks to terminate do not affect its efficacy and integrity. There is no basis for a new court-supervised bidding process as the Receiver conducted an efficacious process with integrity. Implementation of the new sales process would undermine the integrity of the Receiver's process. As noted by the Court of Appeal in *Soundair*, the integrity of an insolvency process must be respected "in the interests of both commercial morality and the future confidence of business persons in dealing with receivers" (McKinley JA, in agreement with Galligan JA, at 1).

iv) Unfairness in the Working Out of the Process

[125] Objections related to unfairness in the working out of the process have been substantially addressed above and will not be repeated. No party has demonstrated the Receiver's unfairness in the working out of the SISP sufficient to justify not accepting the Receiver's recommendations.

CONCLUSION ON TERMINATION OF SISP AND IMPLEMENTATION OF LIQUIDATION PLAN

Termination of SISP

[126] The Receiver concluded that termination of the SISP was the best course of action because: 1) additional exploration and assessments were required before a restart of the mine, estimated to take between six months to three years; 2) the current authorizations and permits do not allow a purchaser to undertake mining operations in areas of the Minto mine subject to exploration and the current water licence does not authorize extraction of all the mineral resources within the claims, and this could delay any restart of the operation; 3) the new purchaser would have to address the $19 million shortfall in reclamation and closure security, and develop a new operations and

reclamation and closure plan with additional security, currently unknown until plans and permit amendments in place; 4) there were insurmountable transition issues relating to the use of infrastructure between the current ongoing reclamation and closure work and the restart of the mine; and 5) there is a significant risk of Yukon government losing access to the outstanding reclamation bond (approximately $50 million) to complete the reclamation and closure as a result of the bidders' activities.

[127] Despite significant discussions facilitated and encouraged by the Receiver among the key stakeholders and bidders to address these identified challenges, they remained unresolved, with no clear timing indication of their ability to be resolved.

[128] The new bidding process proposed by Selkirk First Nation was not recommended by the Receiver because any new bids would be unlikely to contain solutions to the complexities, within the proposed time, due to the large outstanding due diligence required. No entity has offered to fund the new process and the Receiver has exhausted the monies available to it.

[129] In sum, for the reasons noted above, the Receiver conducted the SISP fairly and acted prudently, reasonably, and without arbitrariness in its proposal to terminate it.

Liquidation Plan

[130] The Receiver has prepared an extensive assessment of the liquidation of assets. It provided the plan for review by the parties who signed confidentiality provisions and answered questions in several conference calls.

[131] The Receiver provided a liquidation analysis including estimated recoveries associated with the two bidders and the appraised liquidation values based on three

different assumptions: forced liquidation value, orderly liquidation value and fair market value.

[132] The Receiver has worked out an arrangement with counsel to several equipment lessors the release of their equipment subject to the Receiver's charges and borrowing charges and other priority claims. The Receiver has discussed with the Yukon government their intention to assert security over the assets for the costs of remedying environmental condition or damage affecting real property.

[133] There were no objections to the Receiver's liquidation plan and analysis from those who reviewed it.

Sealing Order

[134] Originally, the Receiver requested the entire confidential supplementary fourth report containing the details of the liquidation plan be sealed because of the harm to obtaining value from Minto Metals' assets created by revealing the liquidation value estimated by the Receiver. Their position was revised at the hearing to request only the last two pages of the confidential report be sealed. Those pages contained the financial information; the balance of the report set out the proposed process, which had been disclosed to the parties and the Court in the Liquidator's earlier report and did not contain confidentially sensitive economic information.

[135] Applying the three-step test for a restriction on court openness set out in *Sherman Estate v Donovan*, 2021 SCC 25 at para. 38, in this case the Receiver has satisfied the test for sealing the last two pages by establishing: 1) public disclosure of the value and pricing of the Minto Metals assets to be marketed for sale could result in reduced recoveries and a detrimental impact on creditors; 2) there is no reasonable

alternative to a time limited sealing order of the part of the report containing the asset value and pricing information; and 3) the benefits of maximizing recoveries for the creditors by sealing that information outweigh any negative effects on the open-court principle.

ORDER

[136] The Receiver has fulfilled its primary and secondary obligations with its proposal to terminate the SISP and liquidate the assets – to maximize value from the assets for the stakeholders, and to ensure the integrity of any sales process. The following orders are granted for the reasons set out in this decision:

1. The Order requesting approval of the Receiver's activities as set out in the Supplement to the Second Report and the Third Report is granted in the form submitted to the Court.
2. The Order requesting a Sealing Order over the Receiver's Confidential Supplement to the Fourth Report to Court dated May 6 is not granted. An order granting the sealing of the final two pages of that Confidential Supplement to the Fourth Report to Court dated May 6 is granted. With that amendment in the appropriate places of the form of Order submitted to the Court, that Order will be granted. The information currently in the Confidential Supplement to the Fourth Report except for the last two pages shall be filed with the Court and made publicly available.
3. The Order requesting approval of the Receiver's activities as set out in the Supplement to the Third Report, the Fourth Report, and the Confidential Supplement to the Fourth Report is granted in the form submitted to the

Court, except for the amendment needed to reflect the sealing of only the last two pages of the Confidential Supplement to the Fourth Report.

4. The Order requesting authorization to proceed with the Liquidation Plan is granted in the most recent form of order submitted to the Court that references the ongoing access of the Yukon government to the Minto mine site and use of Minto Metals' equipment in accordance with the Receivership Order dated July 24, 2023, with the appropriate amendment to reflect the sealing of only the last two pages of the Confidential Supplement to the Fourth Report.

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DUNCAN C.J.