SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v. Yukon Zinc Corporation*, 2019 YKSC 39

Date: 20190807
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 Henderson — Counsel for the Petitioner
Kibben Jackson — Counsel for the Respondent
John Sandrelli — Counsel for the proposed receiver, Pricewaterhouse Cooper

REASONS FOR JUDGMENT

INTRODUCTION

[1] The following is my decision on the preliminary objection made by Yukon Zinc Corporation to the petition brought by the Government of Yukon to appoint a receiver for Wolverine Mine, a zinc-silver-copper-lead-gold mine owned by Yukon Zinc and located in the southeast Yukon. The mine has been temporarily closed since January 27, 2015.

[2] This objection raises the issue of the fairness of Yukon Zinc filing a Notice of Intention to make a proposal in bankruptcy ("NOI") in British Columbia the day before the Supreme Court of Yukon hearing of the Government of Yukon's petition to appoint a receiver for Yukon Zinc. The effect of the NOI is to create an automatic stay of the petition for up to six months (s. 50.4(9)). The bankruptcy proposal proceedings would occur in British Columbia, with the Government of Yukon making representations in that proceeding in British Columbia.

[3] The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), on its face allows Yukon Zinc to file a NOI under s. 69 of the *BIA*, creating a stay of legal proceedings against it, including the petition, unless the Government of Yukon can show it qualifies under one of the exemptions to the imposition of an automatic stay. The Government of Yukon says as a secured creditor it does qualify for an exemption under s. 69(2) of the *BIA* because it provided the 10 day notice of its intention to enforce security to Yukon Zinc under s. 244 of the *BIA*. Alternatively, the Government of Yukon says the stay should be lifted because the Government of Yukon is materially prejudiced by the stay (s. 69.4(a)) or it is equitable to lift the stay (s. 69.4(b)). Finally, the Government of Yukon says the NOI is a nullity because it was filed in British Columbia and following the "single control" model, it should have been filed in Yukon.

[4] Yukon Zinc says that the Government of Yukon is not a secured creditor so it does not qualify for an exemption. Yukon Zinc argued the Government of Yukon is not materially prejudiced by a stay because the purpose of the proposal is in part to allow for a potential sale of the shares of the company, currently being negotiated. Yukon Zinc says additional funding for the mine site has recently been provided and more

funds are likely to be forthcoming if and when a sale occurs. The proposal does not prevent the Government of Yukon from continuing to do work on site as a regulator under s. 147 of the *Quartz Mining Act*, S.Y. 2003, c. 14 ("*QMA*") and s. 37 of the *Waters Act*, S.Y. 2003, c. 19. Yukon Zinc says the Government of Yukon must bring its application to lift the stay in British Columbia as that is the jurisdiction of the proposal consideration and the locality of the debtor is British Columbia.

[5] The petition of the Government of Yukon arises from the failure of Yukon Zinc to pay approximately $25 million in security outstanding since May, 2018. As well the Government of Yukon is concerned about the continually deteriorating condition of the mine site, the capacity of Yukon Zinc to carry out care and maintenance at the site, the erosion of current security, and the breach of licence conditions and failure to comply with inspector's conditions for remedial actions by Yukon Zinc, resulting in the imposition of fines and a probation order by the Territorial Court of Yukon.

[6] Last minute filing by an insolvent entity in order to attempt a restructuring of the business, a sale, or a salvaging of the business in another way, in the face of litigation that could result in the loss of the business, or at least a decrease in its value, is common (see *Re Cumberland Trading Inc.,* [1994] 23 C.B.R. (3d) 225 (O.N.C.J.)). The automatic stay of any and all other proceedings provided by statute is part of the scheme of the *BIA* to protect the debtor, its creditors, and to allow it to explore its potential for survival. However, the statute also contemplates exceptions to this protection based on specific circumstances, and also on equitable grounds. In my view the circumstances of this case present sound reasons, consistent with the scheme of

the *BIA*, for an exception to be made (*Re Francisco* [1995] 32 C.B.R. (3d) 29 (O.N.C.J.) at 29-30; affirmed [1996] 40 C.B.R. (3d) 77 (O.N.C.A.)).

[7] For the following reasons I find that the Supreme Court of Yukon does have jurisdiction and the ability to hear the application to lift the stay. I further find that the Government of Yukon is materially prejudiced by the stay and it would be equitable to lift the stay to allow the petition to appoint a receiver to be heard.

BACKGROUND FACTS

[8] Yukon Zinc is incorporated under the British Columbia *Business Corporations Act*, S.B.C. 2002, c. 57, with a head office in Vancouver, BC. Its principal asset is the Wolverine Mine, a large zinc-silver-copper-lead-gold underground mine located in the traditional territory of the Kaska Nation in the southeastern region of Yukon. Yukon Zinc has approximately 3,000 mineral claims recorded under the *QMA*. It holds a quartz mining licence and Type A water licence. Infrastructure includes an airstrip, a 25 kilometre access road, an underground mine, a tailings storage facility, temporary waste rock storage areas, a process mill, camp facility and other buildings and equipment. Power is provided by on-site diesel generators.

[9] Since the temporary closure of the mine in January, 2015, the site has been under a care and maintenance program. In January, 2015, most employees were laid off. Since then only two Yukon Zinc employees per 12 hour shift, for a total of four employees, have remained at the mine site. Their primary role has been to monitor water levels, transport water from the underground mine to the tailings pond (when not being moved by pipeline), and maintain roads, equipment and buildings on site.

[10] The licence issued to Yukon Zinc under the *QMA* requires security to be furnished where there is a risk of adverse environmental effects from the activities of the licence holder. Reviews of the amount of security have been conducted approximately every two years by the Government of Yukon, around the same time as reviews of Yukon Zinc's updated reclamation and closure plans. Since 2006, the amount of security under the licence has increased based on the projected increased costs of care and maintenance and remediation. Yukon Zinc provided security (through letters of credit issued by the Bank of Montreal, its financial institution) of $10,588,966 after the completion of protection proceedings, commenced in March, 2015, under the *Companies Creditors Arrangement Act (Canada)* R.S.C., 1985, c. C-36 in October, 2015.

[11] Between 2016 and 2018, environmental conditions at the mine worsened. In 2017, the underground mine flooded, the flooded water became contaminated, and it was then diverted to the tailings storage facility, challenging the facility's capacity to contain the contaminated water. This led to a review of the reclamation and closure plan and the amount of security.

[12] From early May, 2018, to June 2019, Natural Resources Officer Sevn Bohnet along with other inspectors and engineers from the Government of Yukon visited the site on a regular basis. Seven reports from these visits set out ongoing concerns including:

i. The absence of on-site actions to manage the underground mine water.

ii. No attempt to establish a water treatment system for the underground mine water or the tailings facility.

iii. Difficulty in obtaining adequate fuel supplies to keep the care and maintenance operation at the site going.

iv. The poor condition of the tailings storage facility including slumps as well as rips and tears in the liner.

[13] The amount of security was increased to $35,548,650 in May 2018. Yukon Zinc did not appeal this increased amount. It did request an extension to pay, as it had done successfully in the past, but the extension request was denied by the Government of Yukon. The amount remains outstanding to date.

[14] More concerns arose in early July 2019, when the Yukon Zinc employees on site advised the Government of Yukon that they had not been paid since mid-May, 2019, that Yukon Zinc head office was not communicating with them and they had no choice but to leave the site. This has now been rectified after correspondence and meetings between the Government of Yukon and Yukon Zinc.

[15] Concerns arising from the inspections led to the Government of Yukon issuing written warnings to Yukon Zinc for failure to comply with their licences in June and July, 2018. The Government of Yukon then issued ‘determinations’ in October 2018, under ss. 147(1) of the *QMA* and s. 37 of the *Waters Act*. This authorized inspectors to “take any reasonable measures necessary to prevent, counteract, mitigate or remedy any resulting adverse effect on persons, property or the environment” (s. 147(1) *QMA*; s. 37 *Waters Act*).

[16] Since October 2018, Government of Yukon employees and contractors have been on site doing work including installing a system to collect and treat underground water; repairing impermeable liners in the tailings storage facility and other water

containment structures; re-establishing water conveyance lines; and implementing a site-wide environmental monitoring program. The Government of Yukon intends over the next year to install a water treatment system at the tailings storage facility designed to lower water levels within the facility through discharge of treated water. They also intend to implement an aquatic effects monitoring program, geotechnical inspection of water retaining structures and overall logistical support. Services of multiple contractors have been retained to do this work.

[17] The Government of Yukon has seized $1,442,000 of the security advanced by Yukon Zinc and as of July 15, 2019 has spent $635,758.14. They anticipate that the costs of their proposed activities this fiscal year (2019-20) and next will amount to $6 million.

ISSUES

[18] Is the Government of Yukon entitled to an exemption in the Supreme Court of Yukon from the automatic stay of its petition under s. 69 of the *BIA* because of its status as a secured creditor and its provision of notice under s. 244 of the *BIA*?

[19] If it is not entitled to an exemption from the stay, can the Government of Yukon apply in the Supreme Court of Yukon to lift the stay because of material prejudice or on equitable grounds (s. 69.4 of the *BIA*)?

Yukon Government was not a secured creditor for the purpose of obtaining an exemption from the stay

[20] The Government of Yukon in its petition applies under s. 243 of the *BIA,* which allows a court to appoint a receiver for an insolvent person on application by a secured creditor. Where notice of intention to enforce a security on property is to be sent by the secured creditor to the insolvent person under ss. 244(1) of the *BIA,* the court must wait

for the expiry of 10 days after the day on which the notice is sent unless the insolvent person consents to an earlier enforcement or the court considers it appropriate to appoint a receiver before then.

[21] Yukon Zinc is an insolvent person as defined in the *BIA* as it is not bankrupt, it carries on business in Canada, its liabilities to creditors are provable as claims under the *BIA* amount to $1,000 and it is unable to meet its obligations as they generally become due.

[22] The Government of Yukon did send notice to Yukon Zinc under ss. 244(1) of the *BIA* of its intention to enforce security on the property at the mine site.

[23] The Government of Yukon relies on ss. 14.06(7) of the *BIA* for its argument that it became a secured creditor at the time it filed the petition to appoint a receiver. Section 14.06(7) states:

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

[24] At the time the Government of Yukon filed the petition, there was no bankruptcy, proposal or receivership. I agree with Yukon Zinc that the Government of Yukon was not a secured creditor by virtue of this section at the time it filed its petition. The Government of Yukon cannot rely on its own petition to appoint a receiver to bring itself under the section. Thus it is not necessary to decide whether the notice provided by the Government of Yukon under ss. 244(1) allows for an exemption from the stay.

[25] The Government of Yukon brought its petition under s. 26 of the *Judicature Act*, R.S.Y. 2002, c. 128, and Rule 56 of the Supreme Court of Yukon *Rules of Court*, as well as under the *BIA*. Even though they may not have been a secured creditor at the time of the petition, their petition is still valid.

[26] Further, now that Yukon Zinc has filed a NOI, ss. 14.06(7) of the *BIA* can be relied on by the Government of Yukon, subject to Yukon Zinc's argument that the Government of Yukon is not yet a secured creditor because it has not used all of the security furnished by Yukon Zinc.

The Government of Yukon is entitled to bring an application to lift the stay in the Supreme Court of Yukon and a stay is warranted on the ground of material prejudice and other equitable grounds

[27] The next issue is whether the Government of Yukon can have its application to lift the statutory stay under s. 69.4 of the *BIA* heard in the Supreme Court of Yukon in these circumstances and if so, is it materially prejudiced by the stay or are there other equitable grounds to lift it.

[28] Section 26 of the *Judicature Act* allows the Supreme Court of Yukon to appoint a receiver where it is just and convenient to do so. The appointment of a receiver is also

permitted under Rule 56 of the *Rules of Court* (see *Ross v. Ross Mining*, 2009 YKSC 55 and *Yukon v. BYG*, 2007 YKSC 2).

[29] The Supreme Court of Yukon has the jurisdiction to decide bankruptcy matters, as a superior court of the territory (included in the definition of province under the *Interpretation Act.* R.S.Y. 2002, c. 125) and pursuant to para. 183(1)(h) of the *BIA*. There is an official receiver in bankruptcy in Yukon. The question is whether this application can proceed in the Supreme Court of Yukon now that Yukon Zinc has filed a NOI in British Columbia.

[30] As noted in *Andre Tardiff Agency Limited v. Burlingham Associates Inc.*, 2015 SKQB 87, ("*Tardiff*"), a party cannot choose the forum to hear proceedings under the *BIA* without regard to the location of the insolvency administration (para. 67). The Court in that case also wrote: "Nor does it follow that the location of the BIA filing automatically determines the proper forum to hear an application relating to that filing" (para. 68).

[31] The Supreme Court of Canada in *Re Eagle River International Ltd*., 2001 SCC 92, upheld a decision of the lower Court to maintain a petition by the trustee in bankruptcy to recuperate assets of the Quebec company in the Quebec court, instead of transferring it to British Columbia, where a mine financing agreement was entered into with a British Columbia venture capital company. The Court found that the only connection between British Columbia and the proceedings was that the financing agreement contained a choice of law clause in favour of British Columbia. Otherwise the business of the company was carried out in Quebec.

[32] The Court noted that the proper forum or venue for a bankruptcy application is generally determined by a substantial connection test (para. 77). This test has been

imported into the *BIA* through the definition in s. 2(1) of 'locality of the debtor'.

Parliament intended through the *BIA* statutory scheme to create an economical and efficient national system for the administration of bankrupt estates. The Court explained the rationale in para. 77 as follows:

> In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or "single control" (Stewart, supra at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts with the statutory definition of "locality of the debtor" in s. 2(1). The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The Act is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors.

[33] Section 50.4 of the *BIA* provides that an insolvent person may file a notice of intention with the official receiver in the insolvent person's locality. Locality of a debtor is defined in s. 2 of the *BIA* to mean the principal place

> (a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,
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> (b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or
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> (c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated.

[34] Courts have held that the factors in this test could lead to a conclusion that more than one forum may be appropriate. In *Re Flax Investments Limited,* [1979] 32 C.B.R. (N.S.) 65 (O.N.S.C.), the Court held at para. 12 that the petitioner "… can choose to bring it on the basis of either subparagraph (a) or sub-paragraph (b), and only if there is no principal place as described in either such sub-paragraphs may sub-paragraph (c) be resorted to." In that case the head office, accounts and records of the company, which was in the business of real estate and farming, was in Toronto and the company was incorporated in Ontario. One of the two main shareholders and directors, who was also the petitioning creditor, lived in Toronto, where most of the real estate business was carried out. The farming operation was in Manitoba and the other director lived and worked in Manitoba, with no evidence of him ever being in Ontario. After noting the connections with both Ontario and Manitoba, the Court determined that the principal residence of the debtor company in the preceding year was Toronto (head office, books of account, president in Toronto and the other officer and director, farm inventory and leasehold property, and two meetings a year in Manitoba). The Court based its decision only on its findings under (b) (residence of the debtor); it did not have to resort to the consideration of the location of property in paragraph (c), which would have resulted in a finding that Manitoba was the appropriate forum.

[35] In *Tardiff*, a consumer proposal was filed in Saskatchewan and an application to disallow a claim in the consumer proposal arising from a debt guarantee in Ontario was brought in Ontario. The debtor carried on business in Ontario, Saskatchewan and Alberta in the year before the consumer proposal; the debtor moved to Saskatchewan from Ontario at the time of the consumer proposal; the debtor had property in Ontario

and Saskatchewan; and the bulk of the relations between the debtor and the claimant originated and continued in Ontario until the insolvency in Saskatchewan. At the time of the hearing of this jurisdictional issue, the consumer proposal had already been administered by a trustee in Saskatchewan and the Ontario courts had transferred the file to Saskatchewan for a hearing. The Court found that although there were connections between Ontario and the debtor, Saskatchewan was the proper forum to hear the application for the disallowance of the claim.

[36] Yukon Zinc relies on the decision of *Cook v. Hunters Trailer & Marine Ltd.,* 2001 YKSC 533, in support of its argument that the Supreme Court of Yukon does not have jurisdiction to make an order under s. 69.4 of the *BIA* where the bankruptcy proceeding is occurring in another jurisdiction. In *Cook,* the plaintiffs brought a motion to lift the stay in effect as a result of the defendant's bankruptcy, in order to assess damages in their action in which they had obtained default judgment. The Court ruled that because the entire bankruptcy proceeding of the defendant had been dealt with by the Alberta Court of Queen's Bench, the motion to assess damages should be brought before the court in Alberta. However, despite this the Court still proceeded to assess the damages of the plaintiffs, finding at para. 7 that:

> … the Yukon Supreme Court is the *forum conveniens* in this matter, as the plaintiffs reside here and the motorhome, which is the subject of this litigation, is also in the territory. In addition, as Mr. Presley pointed out, the plaintiffs would have to go through the same trial process again in Alberta, which would be unfair to them, as they have already gone through one trial here.

By proceeding to assess damages, the Supreme Court of Yukon in *Cook* in effect did lift the stay.

[37] The "locality of the debtor" definition in the *BIA,* the analyses employed in *Tardiff* and *Re Eagle* were not considered by the Court in *Cook.* The Court in *J.R.B. v. Jimenez*, 2018 ABQB 847, noted the absence of authority and limited facts in the reasons in *Cook.* That Court also noted that it appeared in *Cook* that the court in Alberta was seized with the bankruptcy matter which was close to completion. The facts were different in *Jimenez,* as a consumer proposal had been recently filed by the defendant in Ontario, creating a stay of the civil action for damages for assault by the plaintiff against the defendant and the defendant's employers, proceeding in Alberta. The application in Alberta was to lift the stay in order to obtain summary judgment against the defendant and an assessment of damages. In its decision to lift the stay on the basis of material prejudice and other equitable grounds, the Court in Alberta wrote at para. 31:

> … it is my view that the choice of forum in an insolvency is somewhat more nuanced that only considering the locality of the debtor. The type of application matters as does the involvement of the competing venue. However, neither the Act nor the decided cases close the door to arguing that the appropriate forum for an application under the Act be somewhere other than where the insolvency is.

[38] The Court in Alberta further noted that the court in Ontario had not yet been engaged and the real and substantial connection existed between Alberta and the facts of the case. The Court found it was vital that the plaintiff's damages be assessed for her to obtain relief against the defendant as well as to advance her claim against the other defendants.

[39] I adopt the approach of the Court in *Jimenez*, including its noting of the gaps and distinguishing features in *Cook.*

[40] Here, Yukon Zinc's head office is in Vancouver and the company is incorporated in British Columbia. Two of the six directors have residential addresses in Vancouver. The other four directors have residential addresses in China. Wolverine Mine, the principal asset of Yukon Zinc, is located in southeast Yukon. Yukon Zinc's employees are in Yukon. Other assets used by Yukon Zinc for the mine operation and during the closure are on site in Yukon. The regulator who is carrying out significant work on site is the Government of Yukon. The costs and consequences of mine remediation and Yukon Zinc's insolvency will occur in Yukon. The NOI was filed in British Columbia by Yukon Zinc on July 31, 2019, one day before the hearing of the petition, which was filed on July 17, 2019 in Yukon, with notice of it provided by the Government of Yukon to Yukon Zinc on July 3, 2019. At the date of hearing of this objection, no substantive steps had been taken in British Columbia to advance the proposal, except to appoint a trustee. The Court in British Columbia has not yet been substantively engaged.

[41] Yukon Zinc has carried on business over the past year (to the extent of minimal care and maintenance of its principal asset) in Yukon (s. 2(a)). While it is true that the company's head office, accounts, corporate records, and incorporation status are in British Columbia, and the President and CEO who is the main contact for the Government of Yukon currently lives in Vancouver, and there may be creditors in British Columbia, I find there are more substantial connections to the Yukon in this matter on the basis of the facts set out above in paragraph 40. I also note from the affidavit material that Mr. Lu, the President and CEO of Yukon Zinc, advised in an email dated July 8, 2019 that he will be retired from the parent corporation of Yukon Zinc, by the end

of August, 2019. There is no evidence of who his replacement will be, or where they will reside.

[42] It is not necessary for me to decide whether the NOI is a nullity or not. The Court in British Columbia has the ability to transfer the proceeding to Yukon (s. 187(10) of the *BIA*), or a further argument can be made in this Court that the Yukon matters be transferred to British Columbia. I am restricting my decision to a finding that Yukon is the proper forum to hear the application to lift the stay created by the filing of the NOI in British Columbia.

[43] This is an appropriate case to lift the stay on the basis of material prejudice and other equitable grounds. The following facts as presented in the affidavit material before me support this finding:

i. The Government of Yukon in its capacity as environmental regulator is actively and pro-actively managing the mine site in order to contain environmental damage, since Yukon Zinc has refused to comply with the inspector's directions and its own licence terms, and has also not taken any steps towards providing a water treatment system to prevent contaminated water from being released untreated.

ii. The Government of Yukon still has security from Yukon Zinc to spend on remediation activities, but it has estimated its costs to ensure environmental integrity on the site over approximately 18 months to be $6 million. If this is spent, two thirds of existing security will be gone, without the assurance of additional security amounts to support the ongoing care and maintenance and remediation requirements. Under Yukon Zinc's

licence, it is required to furnish an addition $25 million in security in order to remedy the environmental issues and has not done so.

iii. The Government of Yukon currently relies on Yukon Zinc's four employees (two per shift) on site to provide basic care and maintenance assistance but in June and July 2019 the employees advised they had not been paid since mid-May. While this situation has been recently rectified, there remains uncertainty about Yukon Zinc's ongoing commitment to the site, even minimally.

iv. Section 14.06(7) of the *BIA* gives special security priority to government environmental regulators in situations of environmental risk where government may have to incur costs of remedying environmental damage created by a debtor. Although I have found that this section did not apply to the original circumstances of bringing this petition, the intent of this section in the scheme of the *BIA* is to make security for the purpose of environmental clean-up a priority.

v. The Government of Yukon is acting in the public interest and Yukon taxpayer dollars are at risk as Yukon Zinc continues to fail to provide the required security amount and the amounts continue to erode due to the needs of the deteriorating site. While it may be true that a sale of the company will result in additional funding, Yukon Zinc has advised on two previous occasions that a sale was imminent, and in the end neither materialized. In this most recent promise of a likely sale, the deal was to have been completed by the end of July, 2019, or by mid-August at the

> latest, but there was no evidence on August 1 that it has been completed. Further, Yukon Zinc has stated that no company wants to pay the outstanding security amount of $25 million up front, making a sale difficult.

[44] In this context, the Government of Yukon is entitled to a hearing of its case that it is just and convenient to appoint a receiver at this time in Yukon, where there is the most real and substantial connection to the facts.

[45] In deciding that the stay may be lifted, I make no comment on the merits of the petition to appoint a receiver.

[46] Finally, I note that at my request, counsel made supplementary oral submissions on August 2, 2019, based on the case of *Retail Merchants Association v. Melissa Derek Inc.,* [2002] 60 O.R. (3d) 547 (O.N.S.C.) that an application to lift a stay should be done on notice to the trustee with an opportunity for them to participate. Both counsel stated this was not necessary in this case. In particular, counsel for Yukon Zinc advised he had spoken to the trustee about this matter and they advised that as they had just been appointed they would have nothing substantive to add to this determination.

[47] I am grateful to counsel for their helpful written and oral submissions.

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DUNCAN J.