SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v. Yukon Zinc Corporation*, 2020 YKSC 16

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

BETWEEN

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

PETITIONER

AND

YUKON ZINC CORPORATION

RESPONDENT

Before Madam Justice S.M. Duncan

Appearances:

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

REASONS FOR JUDGMENT
(Application by Welichem Opposing Partial Disclaimer)

INTRODUCTION

[1] Welichem Research General Partnership, (“Welichem”), is a secured creditor of the debtor company, Yukon Zinc Corporation (“YZC”). PricewaterhouseCoopers Inc.

(the "Receiver") was appointed by Court Order dated September 13, 2019, as the Receiver of YZC. Welichem brings an application for the following relief:

1) the Receiver's notice of partial disclaimer of the Master Lease is a nullity and of no force and effect;
2) the Receiver has affirmed the Master Lease and is bound by the entirety of its terms; and
3) the Receiver must pay to Welichem all amounts owing under the Master Lease from the date of the Receiver's appointment and ongoing.

BACKGROUND

[2] The background set out in *Yukon (Government of) v. Yukon Zinc Corporation*, 2020 YKSC 15, applies here, in addition to the following facts.

[3] On March 1, 2018, YZC sold 572 items, comprising most of the equipment, tools, vehicles and infrastructure at the Wolverine Mine (the "Mine") to Maynbridge Capital Inc. ("Maynbridge") for $5,060,000 (plus tax). Maynbridge and YZC entered into a Master Lease agreement also on March 1, 2018, for the lease of all 572 items.

[4] The term of the Maynbridge lease was six months, with a total rental payment of $331,603.30 (plus applicable taxes) to be prepaid on the commencement date. Interest was 13%. The lease contained a purchase option of $5,060,000 on or before September 2, 2018. It was secured by a general security agreement dated March 1, 2018, over all of YZC's present and after-acquired property, including the Master Lease items.

[5] On May 31, 2018, YZC and Welichem entered into an initial loan agreement in the amount of $1,000,000 as principal.

[6] On July 23, 2018, Welichem advanced a second $1,000,000 loan to YZC. YZC granted a General Security Agreement in favour of Welichem, dated July 23, 2018.

[7] On August 30, 2018, YZC and Welichem entered into a third loan agreement of $6,550,000 as principal. YZC granted a new General Security Agreement in favour of Welichem dated August 30, 2018.

[8] On September 3, 2018, YZC used the monies from the third loan to purchase from Maynbridge the 572 Master Lease items for the sum of $6,550,000, by exercising the purchase option under the lease agreement with Maynbridge.

[9] YZC sold these items to Welichem that same day, September 3, 2018, for $5,060,000. This reduced YZC's loan debt to Welichem to $3,490,000.

[10] Also on September 3, 2018, YZC and Welichem entered into a lease agreement (the "Master Lease"). Welichem leased to YZC all of the items purchased from Maynbridge and sold to Welichem. These are the same 572 Master Lease items that had been sold to Maynbridge and leased back to YZC, set out in Schedule A of the Master Lease (the "Master Lease Items"). The Master Lease and General Security Agreement with Welichem were in exactly the same form as those between YZC and Maynbridge.

[11] The terms of the Master Lease with Welichem include the following:

i) Rent of $338,430.82 plus taxes for each three-month period. Payment each month of $110,000.

ii) Interest at 25% per annum, increasing to 50% on default.

iii) Option to purchase the Master Lease Items for $5,060,000 plus taxes.

iv) YZC to grant security against all of its present and after-acquired property.

v) YZC to keep the items in good repair, condition and mechanical working order.

vi) YZC to deliver the Master Lease Items at its expense to a location specified by Welichem at the end of the term of the Master Lease, whether by expiry or termination.

vii) YZC required to insure the Master Lease Items against theft, loss or destruction.

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

[13] Welichem became the first-ranking secured creditor of the assets of YZC. They also held a first-ranking charge with the leasehold interest, as a result of subordination agreements with other parties with registered personal property security interests against YZC: namely, Jinduicheng Canada Resources Corporation Limited ("JDC Canada"), Jinduicheng Molybdenum Group Co. Ltd., Aihua Dang, Jingyou Lu, and Yu Luo.

[14] A reserve for the full three-month payment (until December 2018) was retained by Welichem from the purchase price. After December 2018, YZC made no further payments. Nor did it make repayments on the outstanding amount of the loan of $3,490,000. By December 1, 2018, Welichem began charging 50% interest, and at the date of the receivership, it claimed the outstanding amount under the loan agreement was $6,820,000.

[15] Since September 2019, the Receiver has been responsible for ensuring the care and maintenance at the Mine is carried out, and the site is stabilized. The Receiver is also developing a sale and investment solicitation plan ("SISP").

[16] When the Receiver initially entered the Mine it found the following:

i) The site crew consisted of two two-person teams for a two-week shift, the minimum number allowed for safety reasons. One shift did not have an individual with supervisor certification;

ii) The employees had been ready to leave the Mine site because they were not being paid their wages and they had safety concerns;

iii) The majority of the heavy equipment at the Mine was in need of repairs and subject to 10 outstanding work orders from YWCHSB;

iv) The Mine was in a state of permanent closure under the Water Licence; and a state of temporary closure under the Mining Licence; and

v) No lease payments had been made by YZC to Welichem since December 2018 and there was no insurance on any of the Master Lease Items.

[17] The Receiver has identified 79 of the 572 Master Lease Items that it views as essential for the continuing and necessary care and maintenance and environmental remediation of the Mine (the "Essential Items"). These items include trucks - pick-ups, dump trucks, water trucks, vacuum trucks - trailers for staff accommodations, water treatment plant, fuel tanks, glycol storage tanks, generators, graders, excavators, skid steers, quad, water compressor, incinerator, compactor, frost fighter, scissor lift, pumps and a transformer.

[18] The Receiver reported that without the Essential Items, it has no means to control water on site, no ability to generate electricity for Mine facilities, no equipment to maintain the road or airstrip, no vehicles and no living accommodations for staff to carry out care and maintenance.

[19] As of December 31, 2019, the Receiver incurred over $200,000 to repair Essential Items to a workable operating standard.

[20] After several months of unsuccessful negotiations with Welichem, the Receiver issued a notice of partial disclaimer to Welichem on November 8, 2019. It provided that the Receiver intended to disclaim or resiliate (defined below) the Master Lease but was preserving the Receiver's right to use the Essential Items, for a monthly payment of $13,500 as compensation for their use. The Receiver issued this notice after considering a number of factors, including the proportion of Essential Items in relation to all of the Master Lease Items; the feasibility of renting or purchasing alternate equipment; the amount spent by the Receiver on repairs to the Essential Items; and the projected wear and tear for use of the items during receivership.

ISSUES

[21] The issues in this application are:

i) whether the Receiver has the authority to use the Essential Items to carry out its duties (i.e. partially disclaim the Master Lease);

ii) if so, whether that authority was exercised properly in accordance with the Receiver's duties; and

iii) whether the use of these items constitutes an affirmation of the Master Lease, requiring the Receiver to make full payments to Welichem from the date of its appointment and ongoing.

POSITIONS OF THE PARTIES

[22] Welichem's grounds of objection are: first, at law the Receiver has a binary choice - affirm the entire contract or disclaim the entire contract. Second, the partial disclaimer was an attempt to alter unilaterally the material terms of the lease. This was beyond the Receiver's authority and beyond the terms of the Court Order appointing them as Receiver. The Court has no authority or jurisdiction to impose an agreement with new terms on the parties. Third, s. 243(1)(c) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "*BIA*"), does not include the ability to disregard property and civil rights, in this case Welichem's ownership of the Master Lease Items. This is reinforced by s. 72(1) of the *BIA*, which says the provisions of the *BIA* shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with the *BIA*. Finally, the Court's inherent jurisdiction does not allow it to alter the lease agreement. Alternatively, if inherent jurisdiction does apply, the Court should not exercise that inherent jurisdiction, given its limits, including jurisprudence that says it should be used sparingly and in exceptional circumstances. This is not one of those circumstances because alteration of the lease terms as set out in the partial disclaimer would prejudice Welichem.

[23] The Receiver agrees that generally a contract is disclaimed in its entirety. However, there is no legal authority prohibiting a partial disclaimer. The Receivership

Order contains several provisions authorizing its actions. The powers provided by s. 243 of the *BIA*, or s. 26 of the *Judicature Act*, R.S.Y. 2002, c.128, are broad enough to include this action in these circumstances, and the Court has discretion provided by s. 243 of the *BIA* and its judicial interpretation. Alternatively, the Receiver relies on Bennett's text on Receivership in which he writes "in the proper case, the receiver may move before the court for an order to breach **or vary** an onerous contract including a lease of premises for equipment" [emphasis added] (Frank Bennett, *Bennett on Receiverships*, 3rd ed (Toronto, Canada: Carswell, 2011) at p. 436 ("*Bennett on Receiverships*"). The Receiver's duties include acting honestly, fairly, in good faith, with transparency and in a commercially reasonable manner, all of which were fulfilled here. More specifically, the Receiver has a duty to protect all stakeholders, including Welichem, in the context of an urgent situation. The Receiver carefully considered its options, exercised its duties appropriately in the circumstances and did not act arbitrarily in issuing the notice of partial disclaimer.

BRIEF CONCLUSION

[24] The Court has the authority to authorize the Receiver to use the Essential Items it identified as necessary in order to continue the care and maintenance and environmental remediation, pursuant to the statutory discretion in s. 243(1)(c) of the BIA or in s. 26 of the Judicature Act. The Receiver has not affirmed the contract by its actions and is not required to pay the monthly lease amounts to Welichem, with the exception of the $13,500 per month for the use of the Essential Items.

ANALYSIS

The context

[25] "The nature of insolvency is highly dynamic and the complexity of a firm's financial distress means that legal rules are not fashioned to meet every contingency." (Janis P. Sarra, *Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters* (2007), 3 ANNREVINSOLV at 9 (WL) ("*Examination of Statutory Interpretation*")).

[26] The actions of the Receiver must be assessed in the context of this case. That context is the Receiver's appointment in September 2019 at a time when the Mine had not been operating for over four years; the Mine had flooded in 2017 and its condition was continuing to deteriorate; the regulator, Government of Yukon ("Yukon") as represented by the Department of Energy, Mines and Resources, had entered the property to manage environmental and safety issues in October 2018; and the Receiver's mandate was to stabilize the Mine and manage a process to transition the site to a responsible owner, if possible.

[27] The context also includes the involvement of Welichem for the first time in May 2018, when the Mine was in the deteriorated state described above. In addition, YZC had been successfully prosecuted twice for breaching its licence conditions; and it owed $25,000,000 in security to Yukon as of May 2018.

Definition of Disclaim, Resiliate and General Principles Applicable to Receivers Disclaiming Contracts or Leases

[28] To disclaim means to renounce or repudiate a legal claim or right. This means that the non-repudiating party is no longer obligated to perform the contract. To resile

means to draw-back from an agreement or contract (Bryan A. Garner ed. in chief, *Black's Law Dictionary*, (St. Paul, MN: Thomson Reuters, 2009) sub verbo "resile").

[29] In the insolvency context, the receiver's ability to disclaim or affirm contracts of the debtor is permitted by the operation of s. 243(1) of the *BIA*, the order appointing a receiver, and the common law. Where a receiver affirms a contract, it will be subject to its terms and liable for its performance (*Bennett on Receiverships*, at pp. 435-436). Where a receiver disclaims a contract, it will not be personally liable for its performance.

[30] The common law has confirmed a receiver's authority to disclaim a contract and sets out the principles that apply to a receiver in making its decision to do so. The decision of a receiver about the future of the contracts of the debtor is made after they analyze the specific fact situation before them, guided by their general duties set out in the *BIA*, applicable principles at common law and the terms of the order appointing them.

[31] The general duties of a receiver include acting fairly, honestly and in good faith and dealing with the property of the debtor in a commercially reasonable manner. A receiver acts in a fiduciary capacity with respect to all parties, including the debtor, and to all classes of creditors: *Toronto-Dominion Bank v. Crosswinds Golf & Country Club Ltd.*, [2002] O.J. No. 1398 (O.N.S.C.), at para. 15; *Philips Manufacturing Ltd., Re*, [1992] B.C.W.L.D. 1683 (B.C.C.A.), at para. 17, quoted in *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 527, at para. 21. It is trite law that a court-appointed receiver is an officer of the court and is not beholden to the secured creditor who caused its appointment (*Forjay*, at para. 21). It has a duty to the court to act in accordance with the

terms of the order and the law (*Bayhold Financial Corp. v. Clarkson Co.*, [1991] N.S.J. No. 488 (N.S.S.C.), at para. 30).

[32] The British Columbia Court of Appeal, in the case of *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, provided a thorough review of the common law in both England and Canada as well as the statutory authorities giving power to trustees to disclaim contracts. The Court concluded at para. 31:

> In view of the position in the English authorities pre-dating the English Act of 1869, there is a common-law power in trustees to disclaim executory contracts. This power has been relied on for many years by trustees, and in the absence of a clear statutory provision overriding the common law, in my view trustees should have this power to assist them fulfill the duties of their office.

[33] Similar conclusions and guidance were provided by the Nova Scotia Supreme Court Appeal Division in *Bayhold Financial Corp. v. Clarkson Co*., [1991] N.S.J. No. 488, at para. 53, quoting *Receiverships* by Frank Bennett (*Toronto: Carswell, 1985)*:

> ... In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor. However, that does not mean he can arbitrarily break a contract. He must exercise proper discretion in doing so since ultimately he may face the allegation that he could have realized more by performing the contract rather than terminating it or that he breached his duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a contract, he should seek leave of the court.

[34] In *bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, the Court noted that if the contracts were not disclaimed, the party seeking to uphold the contract would receive a significant preference not available to other creditors (para. 96). The receiver must consider whether failure to disclaim might result in an unjustified preference in favour of one stakeholder (*Forjay*, para. 41).

[35] The British Columbia Supreme Court in *Pope & Talbot Ltd*., Re, 2009 BCSC 17, at para. 17, described the process undertaken by a receiver in deciding what to do about the debtor's contracts:

> Typically, after a receiver is appointed, it will assess the various contracts under which goods or services are being supplied to the debtor and make a decision as to the ones it wishes to continue. Its decision is usually prompted by post-appointment deliveries of goods or services under various contracts. The decision to be made at that point by the receiver is whether it wishes to affirm the particular contract and continue receiving the supply or, alternatively whether it wishes to disclaim the contract, halt the supply and leave the contracting party with a claim provable in the insolvency proceeding.

[36] It is acknowledged by the parties and I accept that a partial disclaimer or variance of a contract by a receiver is at the very least unusual. Welichem argues there is no legal authority allowing it and that if it were permitted, receivers would be trying to do it all the time.

[37] The first question is whether there is authority from the Receiver's Order, the statute and the law sufficient to support the Receiver's actions in this case.

i) Does the Receiver Have Authority to Use the Essential Items

a) Receiver's Order

[38] The Receiver derives its power and authority from the Court Order made under the *BIA* appointing it as Receiver, dated September 13, 2019. The Order includes at para. 3 that the Receiver is:

> … empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
>
> …

> (c) to manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor,
>
> …
>
> (i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtor;
>
> …
>
> (p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if considered necessary or appropriate by the Receiver, in the name of the Debtor;
>
> …
>
> (s) to the extent authorized and approved by Yukon, to carry out care and maintenance activities with respect to the Mine and to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations; and
>
> (t) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations,

[39] Welichem argues that the wording in s. 3(c) of the Order supports its view that the Receiver has only a binary choice available to it. A partial disclaimer or variance would require the wording "cease to perform all or part of the contract", similar to the phrase "cease to carry on all or part of the business."

[40] This argument ignores ss. (s) and (t) of the Order, giving the Receiver general authority to take steps reasonably incidental to its powers and statutory obligations. It also ignores ss. (i) and (p) which set out the Receiver's powers to undertake

environmental and workers' health and safety assessments, and obtain any regulatory approvals or permits it considers appropriate or necessary. These sections are relevant to ensuring proper care and maintenance and environmental remediation are continued in the context of an unstable mine site.

[41] Section 3(c) which includes the Receiver's power to cease to carry on all or part of the business is also relevant to the use of Essential Items. The business of the company is the operation of a mine. The Receiver is not carrying on that business; it is carrying on care and maintenance and remediation in order to preserve the assets and allow the Mine to become operational in future. Most of the equipment and infrastructure covered by the Master Lease is for the purpose of carrying out the operation of mining. The Receiver has specifically identified the specific equipment and infrastructure it needs in order to carry on the work it is required to do - i.e. care and maintenance and environmental remediation. This is consistent with their powers as set out in s. 3(c).

[42] The Receiver's general powers under the Order include protecting and preserving the Property, defined in the Order as the assets, undertakings and property, including all proceeds, of the Debtor. The Receiver's responsibilities for the Property must be understood in the context of the definition of property set out in s. 2 of the *BIA*, which includes "**obligations arising out of or incidental to property"**. In this case the obligations arising out of or incidental to the Property necessarily include carrying out the care and maintenance and environmental remediation at the Mine. The Essential Items are necessary to carry out that work.

b) Statute

[43] The determination of the Receiver's authority to use the Essential Items and the Court's authority to permit it or not requires an interpretation of s. 243(1) of the *BIA* and s. 26 of the *Judicature Act*.

[44] The Receivership Order addresses what powers the Court has granted, based on the powers the Court may grant under the statute. These statutory powers found primarily in s. 243(1) of the *BIA* are:

> ... 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.** [emphasis added]

[45] Section 26(1) of the *Judicature Act* provides:

> 26(1) A *mandamus* or an injunction may be granted or a **receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made**, and that order may be made either unconditionally or **on any terms and conditions the Court thinks just.** [emphasis added]

[46] The modern rule of statutory interpretation is: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd

ed. 1983), at p. 87). It is a useful tool for construing legislation that grants broad powers to courts in general terms. By insisting on a purposive analysis, it helps to establish the scope of powers and discretion conferred by statutes on public officials, and on the court.

[47] The Ontario Court of Appeal in the decision of *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 ("*Third Eye*"), reviewed the history of s. 243(1) of the *BIA*, and in particular the scope of s. 243(1)(c). The Court noted Parliament imported the same broad general wording from s. 47(2)(c) of the *BIA* which was enacted in 1992 – that is, "take such other action that the court considers advisable." The broad powers provided to the interim receivers by courts pursuant to s. 47(2) of the *BIA* had been endorsed by judicial interpretation of the section. Justice Farley in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc*., [1994] O.J. No. 953 (O.N.C.J.) ("*Curragh*"), found that s. 47(2) of the *BIA* permitted the Ontario court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. His reasoning was as follows at para. 22:

> ... It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what **"justice dictates" but also what "practicality demands."** It should be 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. ...[emphasis added]

[48] The Court of Appeal in *Third Eye* went on to interpret Justice Farley's comment as follows at para. 53:

> Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

[49] The Jackson and Sarra hierarchy referred to by the Court of Appeal is from the paper *Examination of Statutory Interpretation* referenced at para. 25. The authors' thesis was that courts should first engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation to reveal that authority. Before accessing other judicial tools, courts should exercise their authority under the statute. Statutory interpretation may reveal a discretion, and the courts may determine its extent; or statutory interpretation may reveal a gap. If there is a gap, the common law may permit it to be filled, and the judge has discretion as to whether they invoke authority to fill the gap. The final step in the hierarchy is the exercise of inherent jurisdiction. It may fill the gap and the judge still has discretion to invoke the authority of inherent jurisdiction or not.

[50] Applying this hierarchy to Justice Farley's conclusion in *Curragh* that the Court can enlist the Receiver to do what justice dictates and practicality demands, the Court of Appeal in *Third Eye* observed that Justice Farley was exercising his discretion under the statute, not the court's inherent jurisdiction.

[51] The Court of Appeal noted that when Parliament enacted s. 243 of the *BIA*, it was evident courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates"

and "practicality demands" (para. 57). Thus they conclude that this meaning was imported into s. 243.

[52] The Court of Appeal then quoted from Professor Wood in his text *Bankruptcy and Insolvency Law* (Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at p. 510, who concluded the following about Parliament's intention for receivers appointed under s. 243:

> The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [emphasis already added] (para. 58)

[53] The Court of Appeal stated the importance in interpreting s. 243 of reviewing the purpose of receiverships generally. This is part of understanding the scheme and object of the *BIA*. The purpose of a receivership is to:

> "enhance and facilitate the preservation and realization of the assets for the benefit of creditors" (*Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Park Ltd*. [1995] O.J. No. 1482 (O.N.C.J.), at para. 18), … generally achieved through the liquidation of the debtor's assets: Wood, at p. 515. … 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": *National Trust CO. v. 1117387 Ontario Inc*., 2010 ONCA 340, at para. 77". (para. 73)

[54] Certainty of equitable distribution of a debtor's assets among creditors is also important. Further, the assets of an insolvent business must be managed responsibly, in compliance with regulatory requirements, in order to preserve the assets, the reputation of the insolvent and to maximize the value for creditors.

[55] The question becomes whether the authority provided by the statute is sufficient to allow the Receiver to use the Essential Items in this legal and factual context. Case law is of assistance in this assessment.

[56] Welichem relies on the case law in support of its argument that the Receiver has a binary choice only - to affirm the whole lease or disclaim the whole lease - saying this is consistent with the law of contract. Most of the cases referred to are in the context of supply contracts, not leases.

[57] Welichem refers to one case from 1896, *Re Lord and Fullerton's Contract*, [1896] 1 Ch. 228, in which the Court held that partial disclaimer was not permitted. This 124-year-old English case was decided in the context of a contested probate of a will, not in the context of an insolvency or the application of the *BIA*. The testator had appointed trustees, one of whom was the executor, to manage and distribute all of his property, which was located both in England and overseas. The executor disclaimed all the property in England, but not the testator's overseas property. In holding that the disclaimer was not valid, the Court noted that it was the testator's intention to have one trustee manage and deal with all of his property, regardless of its location.

[58] I agree with the Receiver this case has no applicability here because of its age, different context and facts.

[59] Welichem further argues that the Receiver's actions disregard Welichem's ownership of the equipment and cannot be justified by s. 243(1)(c) because of its remedial purpose and consequent limits. Welichem relies in part on the comments of the Nova Scotia Supreme Court in *Railside Developments Ltd., Re*, 2010 NSSC 13, at paras. 80 and 88, saying that the words of s. 243(1)(c) of the *BIA* are broad, but their

focus is remedial, since that section of the statute creates the remedy of receivership. The scope of this section cannot extend to affect existing property and civil rights, to the extent they are not overridden by the *BIA*. This is further supported by the wording in s. 72(1) of the *BIA* which states that the provisions of the *BIA* shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act.

[60] *Railside* dealt with whether s. 243(1)(b) of the *BIA* allowed the Receiver to register condominium units without consent of the owners required pursuant to s. 11(1)(b) of the Ontario *Condominium Act*, S.O. 1998, c. 19. Their justification was that selling individual units rather than a single complex would maximize value for stakeholders. The Court had to analyze whether there was an operational conflict between the provincial statute and the *BIA* that prevented s. 11(1)(b) from operating when s. 243 applies. The Court found that there was no operational conflict and held that the Receiver had to obtain consent of the lien holders in order to register the condominium units.

[61] In *Railside*, the focus was the ultimate goal of maximizing value of the condominium assets. In achieving that goal there was the potential for conflict with the legislative requirement to obtain consent (which may be withheld) of the owners to sell. In the case at bar, while maximizing value for all the creditors is the ultimate objective, the use of the Essential Items is not in conflict with that goal. The use of the Essential Items is necessary in order to preserve all of the debtor's assets at the Mine, and those related to those assets, and to enhance their value beyond their current state, in turn maximizing the value for all creditors. Unless the Receiver continues to carry out the

care and maintenance and environmental remediation, there is a risk of significant compromise to the debtor's property.

[62] The Receiver's actions are not an incursion on the property and civil rights of Welichem. The Receiver has paid and continues to pay Welichem monthly for their use of the Essential Items. It has invested over $200,000 in repairs (as of the date of this application) to bring the equipment to operational standards. This is more than Welichem received under its lease with YZC.

[63] Welichem argues it is prejudiced by the Receiver's attempt to retain the benefits of the Master Lease without the obligations. Welichem notes the Receiver has refused to pay insurance for the Essential Items; the use is causing wear and tear and subsequent depreciation of the equipment; and the compensation amounts are inadequate and arbitrary.

[64] The Receiver must act to benefit all creditors, not just Welichem, in preserving the debtor's assets by carrying on the necessary care and maintenance and environmental remediation. Welichem's interests are limited to preserving its position as first secured creditor and maximizing value for itself. While the Receiver owes a fiduciary duty to Welichem, it also owes fiduciary duties to the other stakeholders - Yukon, the unsecured creditors, the public, including affected First Nations. It must balance the interests of all.

[65] In my view, the unique circumstances of this case call for the application of the interpretation of s. 243(1)(c) of the *BIA* first set out in *Curragh*, a case with underlying facts similar to this one. *Curragh* was an insolvent lead-zinc-silver mine, albeit a much larger one than the Wolverine Mine, in Faro, Yukon. As noted above, Justice Farley

described the condition of insolvency as carrying its own internal seeds of chaos, unpredictability and instability, thus allowing the Court to enlist the receiver to do what justice dictates and practicality demands (*Curragh*, at para. 22).

[66] In the case at bar, the ongoing environmental instability at the Mine site; the Mine's remote location; and the chaotic circumstances that existed at the time of the Receiver's appointment, including employees who were on the verge of abandoning the site, unusable equipment due to neglect, workers' health and safety concerns, and the absence of sufficient funding to continue the most basic care and maintenance are all factors that distinguish this case from the others that are relied on by Welichem. Welichem's initial involvement with the Mine in May 2018, given the Mine's deteriorated and financially unstable state at that time raises questions about its commercial reasonability. The Receiver owes duties not only to Welichem but also to the other creditors. These are factors to be considered in determining what justice dictates and practicality demands.

[67] Topolniski J. in *Residential Warranty Co. of Canada Inc., Re*, 2006 ABQB 236, remarked that solutions to *BIA* issues will require judges to consider the realities of commerce and business efficacy:

> 27 Solutions to *BIA* concerns require consideration of the realities of commerce and business efficacy. A strictly legalistic approach is unhelpful in that regard. What is called for is a pragmatic problem-solving approach which is flexible enough to deal with unanticipated problems, often on a case-by-case basis. ...

[68] Here, the pragmatic problem-solving approach is to allow the Receiver to use the Essential Items, only 12.4% of the Master Lease Items, in order to ensure the care and maintenance and environmental remediation can continue.

[69] For the above reasons, I find there is authority under s. 243(1)(c) of the *BIA* for the Court to allow the Receiver to use the Essential Items for the purpose of carrying out necessary care and maintenance and environmental remediation.

[70] This analysis applies equally to the interpretation of s. 26 of the *Judicature Act*, which also contains broad language. Although no cases were discussed in this application that are similar to this one in which the Court interpreted and applied this section directly, the same principles apply if the *Judicature Act* were relied upon.

ii) Did the Receiver Exercise its Authority in Compliance with its Duties

[71] Upon its appointment in September 2019, the Receiver entered the Mine and did a full inventory of the items. The Receiver gave careful consideration to options available to it related to the existing lease in carrying out its mandate and the factors affecting those options. These factors included:

i) During the first three months, the Receiver had numerous discussions with Welichem about short-term rental of the Essential Items and long-term involvement of the Master Lease Items in the SISP. They were ultimately unsuccessful in achieving any agreement.

ii) The basic care and maintenance activities and necessary water treatment could not be carried out without the use of the Essential Items. Specifically the Receiver:

a) Could not control the water on site (ground water, surface water, underground water, water in the tailings storage facility);

b) Could not generate power for electricity for the site;

c) Could not maintain the 26 km access road or airstrip; and

d) Would not be able to have vehicles or living accommodations for staff to carry out care and maintenance activities.

iii) The Receiver considered the monthly lease payments of $110,000 to be high, given the poor or unusable condition of many of the Master Lease Items, due to the non-operation of the Mine and the restricted funding since 2015. Examples of the neglected items included:

a) All but one of the trucks was locked out by the Yukon Workers Compensation Health and Safety Board ("YWCHSB");

b) Only two of ten power generators were operating and on inspection one of the two was found to be a fire hazard;

c) The heat trace system was malfunctioning causing the pipes to freeze;

d) The YWCHSB had issued ten orders related to the safety certification of vehicles; the condition of emergency transport vehicles; the absence of emergency response plan; the inadequacy of fire suppression equipment; as well as stop work orders on various pieces of Master Lease equipment. The Receiver addressed all of these orders except for repairs on non-essential Master Lease Items.

iv) The Receiver considered the cost of insurance of $150,000 to be inordinately high, especially given the Receiver's use of only 79 items. It noted that insurance had not been maintained by YZC over Welichem's objections. The current continuous presence of more employees and

contractors on site, the remote location of the Mine and therefore the lower risk of access by others to the items were considered.

v) The Receiver was concerned about the potentially high cost of the end of lease requirement to return all Master Lease Items to a place of Welichem's choosing.

vi) The Receiver considered the cost and time to replace these Essential Items to be unreasonable given the remote location of the Mine and the need to continue the care and maintenance and remediation activities immediately. There was real potential for environmental damage and consequent risks to public health and safety if it became necessary to wait for replacement equipment to arrive.

[72] The Receiver calculated the $13,500 per month cost for the use of the 79 Essential Items on the basis of their percentage of the 572 Master Lease Items, as well as the percentage of their value based on the December 2017 appraisal. These Essential Items were only 12.4% of the Master Lease Items. The Receiver has made monthly payments in this amount to Welichem, since December 2019.

[73] In my view, the Receiver has not acted arbitrarily. It has exercised proper discretion in the circumstances. It carefully considered its options, was transparent about its intentions, and attempted to negotiate a mutually acceptable agreement with Welichem. It has been honest and fair. The Receiver provided legitimate reasons showing the onerous nature of the lease terms in the circumstances. In exercising its duty to maximize value for all of its stakeholders, the Receiver acted in a commercially reasonable manner in doing so.

[74] The ongoing deterioration of the condition of the Mine and the need for the Receiver to act quickly in order to prevent an environmental disaster were driving forces behind the Receiver's actions. Although not specifically contemplated in the legislation or precedents to date, the Receiver's carefully considered and fairly implemented decision to use the Essential Items in order to continue with the care and maintenance and remediation of the Mine site and to compensate Welichem for their use was justifiable and appropriate under the authority provided in s. 243(1) of the *BIA*.

[75] *Bennett on Receiverships* states at p. 436, "In the proper case, the receiver may move before the court for an order to break **or vary** an onerous or material contract including a lease of premises or an equipment lease where the payments are significant … [T]he receiver must act reasonably and exercise good business sense" in doing so [emphasis added].

[76] It is significant the term vary is used in the text in a discussion about leases of premises or equipment. The other cases referred to for the principles applicable to disclaimer are in the context of supply contracts, not leases, and vary is not mentioned in that context. Bennett also says "in the proper case" indicating the limits of its use.

[77] There is a significant body of law and legal principles explaining the meaning of 'vary' in contract law. It is not necessary here to pursue an analysis of that in this case because of the unique circumstances here.

[78] I view this text excerpt as general support for the Receiver's appropriate exercise of authority under s. 243(1) of the BIA in the proper case, such as this one, to use the Essential Items of the Master Lease.

[79] As noted at the hearing of this application by counsel for the Receiver, and explained above, it is not necessary to resort to the inherent jurisdiction of the Court in this circumstance as sufficient discretion is provided by the statute to both the Receiver and the Court.

iii) Did the Receiver Affirm the Lease, Making it Responsible for Lease Payments?

[80] Welichem argues that by using the Essential Items, the Receiver has affirmed the contract and should pay the entire monthly lease amounts and comply with all of the lease obligations.

[81] In order to fix a receiver with the burden of making payments under a contract existing at the time of the receiver's appointment, there must be an affirmation of that contract by the receiver, either expressly or by implication (*Pope & Talbot ltd.*, at para. 15).

[82] In the case at bar, the Receiver has not affirmed the contract by using only the Essential Items in the context of an urgent continuation of care and maintenance and environmental remediation. The result would be absurd in that if this amounted to an affirmation, the Receiver would be required to pay the full amount of $110,000 per month to Welichem, for the use of only 79 of the 572 items, after spending over $200,000 in repairs on those 79 items. This result also ignores the unique factual circumstances in this case and consideration by the Receiver of all the options available.

[83] The Receiver is not required to pay all amounts owing to Welichem under the Master Lease or comply with all of its obligations as a result.

CONCLUSION

[84] I find that the use by the Receiver of the Essential Items is a disclaimer of the Master Lease and a permissible variation for the reason that its terms are onerous and not commercially reasonable in the circumstances. The Receiver properly exercised its authority under s. 243(1) of the *BIA* and/or s. 26 of the *Judicature Act* to do so.

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DUNCAN J.