

SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v.
Yukon Zinc Corporation*, 2020 YKSC 26

Date: 20200626
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.

SUPPLEMENTARY REASONS FOR JUDGMENT (Application to Elevate Priority of Receiver's Charge)

INTRODUCTION

[1] These are supplementary reasons in the application by PricewaterhouseCoopers Inc. (the "Receiver") to elevate the priority of its increased borrowing charge over the

Master Lease Items. I reserved my decision on this part of the application until I received further written submissions from counsel on two issues.

Additional Submissions

[2] The further submissions requested were:

- i) the scope of relevance of the characterization of the Yukon Zinc Corporation (“YZC”) lease of the Welichem equipment either as a true lease or financing lease; and
- ii) whether the Master Lease Items could be considered fixtures.

[3] These submissions related primarily to questions surrounding the directions sought by the Receiver to include the Master Lease Items in the Sale and Investment Solicitation Process (“SISP”). However, they also relate to the proposed elevation of the Receiver’s increased borrowing charge over the Master Lease Items. It was unclear if the true lease/financing lease characterization would affect the nature of the property to be subjected to the charge. Further, if these items are found to be fixtures, then they are considered the property of the debtor, and pursuant to s. 243(6) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “BIA”), the Receiver is able to have a priority charge over them.

ANALYSIS

Original Charges Over Essential Items

[4] The issue of the priority of the Receiver’s charges over the Master Lease Items arose in *Yukon (Government of) v. Yukon Zinc Corporation, 2020 YKSC 17* (“Application #3”). In that application, I concluded that the priority of the Receiver’s charges be elevated over the YZC property and the Essential Items of the Master

Lease, even though they are the property of Welichem, according to the lease document. I stated that my decision on the elevation of the priority charge of the Receiver raised in that application over the remainder of the Master Lease Items would be addressed in the fourth application once further submissions were considered.

[5] The reasoning for this conclusion on the elevation of the charge over the Essential Items was that the second exception, and in the alternative, the third exception set out in the decision of *Robert F. Kowal Investments Ltd. et al. v. Deeder Electric Ltd.*, [1975] 9 O.R. (2d) 84 (O.N.C.A.) ("*Kowal*"), were applicable. The second and third exceptions are:

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

[6] I did not address specifically how the property of the debtor, YZC, includes the Essential Items in the Master Lease, under s. 243(6) of the *BIA*. The Master Lease agreement provides that the "Equipment is and will at all times be [Welichem's] property and [Welichem] will at all times retain title to the Equipment unless and until such time as [Yukon Zinc] satisfies all purchase obligations ... [Yukon Zinc] will have no right, title or interest in the Equipment except as expressly set forth in the Lease." The lease and

the security agreement were registered under the *Personal Property Security Act*, R.S.Y. 2002, c. 169 (“PPSA”).

[7] The necessary ongoing use of the Essential Items by the Receiver to carry out the urgent environmental remediation and required care and maintenance, combined with the discretion afforded to the Court by the wording in s. 243(1) of the *BIA* (and s. 26 of the *Judicature Act*, R.S.Y. 2002, c. 128), explained in the decision in *Yukon (Government of) v. Yukon Zinc Corporation*, 2020 YKSC 16, allows for these Essential Items to be subject to the priority charge of the Receiver. Section 243(1) of the *BIA* provides:

... 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:

...

(c) take any other action that the court considers advisable.

[8] As stated in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*, [1994] O.J. No. 953 (O.N.C.J.), at para. 22, this section has been judicially interpreted to allow the Court to:

... 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 ...

[9] In this case, as noted above, I have found that two of the exceptions in *Kowal* were met. As noted by the British Columbia Court of Appeal in *Integrus Credit Union v. Mercedes-Benz Financial Services Canada Corp.*, 2016 BCCA 231, if one or more of

the *Kowal* exceptions are met, the clear rules of the *PPSA* may be circumvented. The application of the *Kowal* exceptions, combined with the discretion in s. 243 of the *BIA*, provides authority for the elevation of the priority of the Receiver's borrowing charge over the Essential Items.

Increased Borrowing Charge Over Essential Items

[10] In this fourth application, the Receiver requests that the priority of the increased borrowing charge also be elevated over the Master Lease Items. I will first consider the elevation of the priority increased charge over the Essential Items.

[11] As noted in Application #3, the work of the Receiver has been necessary to stabilize the Mine site, which was in a chaotic state. The Receiver's ongoing work on site, where all of the equipment leased from Welichem is situated, is ensuring that untreated contaminated water does not flow freely into the environment; that trespassing and theft are reduced or eliminated; that ongoing fuel and power supply is maintained; that contractors are able to move on and off the site easily because of maintained transportation routes; that the Essential Items are maintained in a workable state in order to continue the care and maintenance and remediation work. Although the same degree of urgency may not be present now as there was when the Receiver initially entered the site, there remains significant urgency to ensure that a potential environmental disaster does not occur because of the contaminated water and the inadequate tailings storage facility. Without the Receiver on site managing this concern and continuing the care and maintenance work to ensure stability, all of the creditors, including Welichem, would suffer.

[12] As a result the priority of the increased borrowing charge will be elevated over the Essential Items as identified from the Master Lease, for the reasons noted above and in Application #3.

Increased Borrowing Charge Over Other Master Lease Items

[13] The remainder of the Master Lease Items are in a different category than the Essential Items. They are not being used by the Receiver for care and maintenance or remediation. The Receiver has not put any money into their repair or upkeep and has not paid Welichem anything for them; in fact, they have disclaimed the lease allowing for their use. These other Master Lease Items have not been used by YZC since before the Mine stopped operating in January 2015. The exceptions set out in *Kowal* are not applicable to the remainder of these Master Lease Items. On this analysis, then, they are not part of the priority charge of the Receiver.

Fixtures Analysis

[14] If, however, the Master Lease Items are found to be fixtures on the property, then this changes their character not only for the purpose of including them in the SISF, but also for determining if they are property that could be subject to the priority charge of the Receiver.

[15] The analysis of the fixtures argument is set out in the supplementary reasons for decision in Application #3. It applies here. To summarize, without more evidence, I am unable to find that the Master Lease Items are fixtures. This is not to say that some or all of them may be fixtures or constructive fixtures. However, at this stage, I find that the Receiver's increased borrowing charge does not have priority over the remainder of the Master Lease Items.

Characterization of Lease

[16] The other submissions requested were whether the characterization of the lease between Welichem and YZC for the equipment as either a true lease or a financing lease has any relevance if I find that Part V of the *PPSA* does not allow the Receiver to sell the equipment leased from Welichem. This is also analyzed in the supplementary reasons for decision in Application #3.

[17] To summarize, I do not find that this characterization has any relevance once it is clear that the Part V remedies of the *PPSA* do not allow the Receiver to sell the Welichem equipment. As set out in the previous supplementary reasons, I have found that the Part V remedies do not help the Receiver. Therefore, the true lease/financing lease characterization has no relevance to this application.

CONCLUSION

[18] The Receiver's increased borrowing charge is elevated in priority over the Essential Items. It is not elevated in priority over the remainder of the Master Lease Items. If there is a ruling or agreement at a later time that some or all of the Master Lease Items are fixtures, this conclusion could change.

[19] I am indebted to all counsel in this matter and all previous applications to date for their high quality written and oral submissions.

DUNCAN J.