COURT OF APPEAL OF YUKON

Citation: *Yukon (Government of) v. Yukon Zinc Corporation*, 2021 YKCA 2

Date: 20210305
Dockets: 20-YU865; 20-YU866; 20-YU867; 20-YU868

Docket: 20-YU865

Between:

Government of Yukon, as represented by the Minister of the Department of Energy, Mines and Resources

Appellant
(Petitioner)

And

Yukon Zinc Corporation

Respondent
(Respondent)

And

Welichem Research General Partnership

Respondent

- and -

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Between:

Government of Yukon, as represented by the Minister of the Department of Energy, Mines and Resources

Respondent
(Petitioner)

And

Yukon Zinc Corporation

Respondent
(Respondent)

And

Welichem Research General Partnership

Appellant

Before: The Honourable Mr. Justice Tysoe
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Lyons

On appeal from: Orders of the Supreme Court of Yukon, dated May 26, 2020 (*Yukon (Government of) v. Yukon Zinc Corporation*, 2020 YKSC 15; 2020 YKSC 16; and 2020 YKSC 17, Whitehorse Docket 19-A0067).

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Counsel for the Receiver, PricewaterhouseCoopers Inc. (via videoconference):	J.R. Sandrelli T.R.M. Jeffries E.T.T.Y. Newbery
Place and Date of Hearing:	Vancouver, British Columbia November 17 and 18, 2020
Place and Date of Judgment:	Vancouver, British Columbia March 5, 2021

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Lyons

Summary:

These appeals relate to four orders arising from a proceeding in which the Government of Yukon (the "Government") petitioned Yukon Zinc Corporation (the "Debtor") into receivership. The Government appeals the order that it does not have a provable claim in bankruptcy with respect to the costs of remedying environmental damage. Welichem Research General Partnership, the Debtor's primary secured creditor and the lessor of certain mining equipment, has three appeals. First, it appeals the provision in the order granting the Government security over the Debtor's mineral claims. Second, it appeals the order dismissing its application for an order that a notice given by the receiver to disclaim the equipment lease was a nullity. Third, it appeals the order that certain of the leased items are subject to the receiver's charge and challenges the approval of the receiver's solicitation plan.

Held: Appeals allowed in part. The Government does not have a provable claim or contingent provable claim in bankruptcy. Mineral claims are an interest in real property, not real property, and thus the judge erred in including the mineral claims in the Government's charge over the Debtor's real property. The equipment lease was disclaimed in its entirety, and the receiver's purported appropriation of certain leased items is of no force or effect. As the leased items belong to Welichem, not the Debtor, the judge erred in extending the receiver's charge over the leased items. It is appropriate for the receiver to consider a bidder's ability to obtain regulatory approvals in assessing their bids, and the judge did not err in approving the solicitation plan.

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Introduction

[1] These appeals relate to four orders dated May 26, 2020, in a proceeding in which the Government of Yukon (the "Government") had successfully petitioned the court to appoint PricewaterhouseCoopers Inc. as the receiver (the "Receiver") of all of the assets, undertakings and property of Yukon Zinc Corporation (the "Debtor").

[2] The Government appeals the order made pursuant to its application that it does not have a provable claim in the bankruptcy of the Debtor until it incurs costs related to remedying the environmental damage affecting the Debtor's real property. In particular, the Government appeals the holdings that it does not have a provable claim in respect of the Debtor's obligation to post security pursuant to the *Quartz Mining Act*, S.Y. 2003, c. 14 [*Mining Act*], and that it does not have a contingent claim in respect of remediation costs.

[3] Welichem Research General Partnership ("Welichem") has three appeals. First, it appeals the provision in the order made pursuant to the Government's application that the security given to the Government for remediation costs by s. 14.06(7) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], on the real property of the Debtor includes the Debtor's mineral claims.

[4] Second, Welichem appeals the dismissal of its application for orders that a notice to lessor to disclaim or resiliate equipment lease given by the Receiver was a nullity and that the Receiver had affirmed the equipment lease.

[5] Third, Welichem appeals two aspects of an order made on application by the Receiver. The first aspect was an order making certain assets, referred to as the "Essential Master Lease Items", subject to the secured charge given to the Receiver for its fees, disbursements and borrowings. The second aspect was an order approving a sale and investment solicitation plan developed by the Receiver (the "Solicitation Plan").

Background

[6] The Debtor was incorporated in British Columbia and registered to carry on business in the Yukon Territory. Its principal asset is a zinc-silver-lead mine known as the Wolverine Mine located in the Yukon Territory (the "Mine"). It holds 2,945 quartz mineral claims, a quartz mining license issued under the *Mining Act* and a water licence issued under the *Waters Act*, S.Y. 2003, c. 19.

[7] Under s. 139 of the *Mining Act*, the Minister of the Department of Energy, Mines and Resources (the "Minister") may require a licensee to furnish security for adverse environmental effects from the licensee's activities. When its license was issued, the Debtor was required to furnish security in the amount of $1,780,000, and the amount of required security was subsequently increased from time to time (the "Reclamation Security").

[8] The Debtor performed exploration and developmental activities between 2008 and 2011, and the Mine commenced commercial production in March 2012. The estimated life of the Mine was nine years, but it only operated for approximately three years before it was put into care and maintenance in January 2015 when the Debtor encountered financial difficulties as a result of a downturn in metal prices.

[9] In March 2015, the Debtor made a filing in the Supreme Court of British Columbia pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*]. It successfully reorganized its financial obligations pursuant to the *CCAA* in October 2015 with funds provided by its sole shareholder. As part of the *CCAA* reorganization, the Minister was provided with the shortfall of slightly less than $3 million in the amount of the Reclamation Security, bringing it to a total of $10,588,966. The Debtor had been charged with two counts under the *Mining Act* for its failure to furnish the full amount of the Reclamation Security, and it was fined $5,000 in respect of each count in November 2015.

[10] The Debtor's shareholder did not provide it with the further funds required to operate the Mine, which remained in care and maintenance. The Debtor employed only four persons at the Mine to provide monitoring and maintenance services. Attempts to sell the Mine were not successful.

[11] In 2017, the underground portion of the Mine flooded, and contaminated water was diverted to the tailings storage facility. No water treatment was available, and the situation created a risk of untreated water being released into the environment.

[12] The Government became more involved in the Mine as a result of the flooding, and it inspected the Mine on a more frequent basis. The Government revised the Mine's reclamation and closure plan, and recalculated the amount of the Reclamation Security it required. In May 2018, the Debtor was notified that it was required to provide Reclamation Security in the amount of $35,548,650, an increase of approximately $25 million. None of this increased amount has been provided by the Debtor (the "Unfurnished Reclamation Security").

[13] In May, July and August of 2018, the Debtor received loans from Welichem in the amounts of $1,000,000, $1,000,000 and $6,550,000 on the security of general security agreements covering all of its assets. In September 2018, the Debtor used $5,060,000 of the loan proceeds (plus $27,000 for interest) to exercise a purchase option under a lease with Maynbridge Capital Inc. pursuant to which Maynbridge had leased to the Debtor the equipment used in the Mine. The Debtor then sold all of this equipment for the same amount to Welichem which, in turn, leased the equipment back to the Debtor under a master lease agreement (the "Master Lease") with payments of $110,688 a month.

[14] As a result of the deteriorating environmental conditions at the Mine, the Government began using the Reclamation Security to deal with the influx of contaminated water in the tailings storage facility. As of July 15, 2019, $635,758.14 of the Reclamation Security had been used by the Government.

[15] In July 2019, the Government commenced a petition proceeding for the appointment of a receiver of the Debtor's property. On July 31, 2019, the day before the scheduled hearing of the Government's petition, the Debtor filed a notice of intention to make a proposal in British Columbia under s. 50.4(1) of the *BIA*, with Alvarez & Marsal Canada Inc. named as the proposal trustee. The filing of the notice created an automatic stay of proceedings in respect of the Debtor pursuant to s. 69(1) of the *BIA*. In reasons for judgment dated August 7, 2019, and indexed as 2019 YKSC 39, the chambers judge held that the Supreme Court of Yukon had jurisdiction to lift the stay of proceedings, and she did lift it to allow the hearing of the Government's petition to proceed.

[16] The Government's petition was heard on September 13, 2019, and the chambers judge appointed the Receiver as receiver of all of the assets, undertakings and property of the Debtor. Paragraph 3 of the order appointing the Receiver (the "Receivership Order") set out the powers given to the Receiver, which included the following:

> (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;
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> * * *
>
> (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,
>
> …

[17] The Receivership Order also created charges as security for the Receiver's fees and disbursements, and borrowings by the Receiver up to the principal amount of $3,000,000 plus interest (the "Receiver's Charges"). The Receiver's Charges were fixed and specific charges against the assets, properties and undertakings of the Debtor ranking in priority subordinate to all valid security interests, trusts, liens, charges and encumbrances. The Receiver has borrowed funds from the Government, which has utilized the Reclamation Security for that purpose. As of January 15, 2020, the Government had expended or loaned the aggregate of $5,582,411 from the Reclamation Security, leaving a balance of $5,006,555.

[18] No proposal was filed within the time period stipulated in the *BIA* and, pursuant to s. 50.4(8) of the *BIA*, the Debtor was deemed to have made an assignment into bankruptcy. On October 11, 2019, the Supreme Court of British Columbia granted an order substituting PricewaterhouseCoopers Inc. as the trustee in bankruptcy in place of Alvarez & Marsal Canada Inc.

[19] Upon being appointed, the Receiver assumed responsibility for the care and maintenance of the Mine and rectified the majority of the initial deficiencies in the care and maintenance program. It worked with contractors engaged by the Government to deal with water treatment at the tailings storage facility, and it engaged a contractor to carry out environmental monitoring.

[20] The Receiver also made an assessment of the Debtor's assets, including the items leased to it under the Master Lease. The Receiver identified 79 of these items as being required for the essential care and maintenance at the Mine (the "Essential Lease Items"), including heavy equipment, motor vehicles, power generators, fuel storage, staff accommodation and pipes and pumps required for water treatment. The Debtor's equipment had not been properly maintained since 2015, and the Receiver took steps to bring essential heavy equipment up to minimum operating standards. As of December 31, 2019, the Receiver had expended approximately $200,000 for these repairs.

[21] The Receiver met with Welichem to discuss the short-term rental of the Essential Lease Items. As detailed in its second report to the court, the Receiver advised Welichem that: (a) the monthly lease payments of $110,688 were not appropriate because many of the leased items were unusable or in poor condition; (b) the insurance required by the Master Lease, estimated to be approximately $150,000 was similarly inappropriate; and (c) the obligation under the Master Lease for the lessee to pay for the transport of the leased items to any location at Welichem's discretion at the end of the lease represented a significant cost that was contrary to the best interests of stakeholders.

[22] As a result of these concerns and the inability to negotiate a new rental arrangement with Welichem, the Receiver sent a notice to Welichem on or about November 8, 2019. The notice was entitled "Notice to Lessor to Disclaim or Resiliate Equipment Lease" (the "Disclaimer Notice"). The main operative paragraph of the Disclaimer Notice reads as follows:

> 4. Pursuant to the Receivership Order, the Receiver hereby gives you notice of its intention to disclaim or resiliate the following agreement:
>
> Master Lease Agreement (the "**Master Lease Agreement**"), dated September 3, 2018, between Welichem Research General Partnership (as lessor) and YZC (as lessee)
>
> **except, however that the lessee's right to use the equipment and other items described in Schedule "A" to this Notice of Disclaimer shall survive the disclaimer of the Master Lease Agreement.**
>
> **For greater clarity, all obligations of YZC pursuant to the Master Lease are hereby exclaimed except, however, that the Receiver shall retain the right to use the equipment and other items described in Schedule "A" for the monthly rent of $13,500 (plus applicable taxes), as the only compensation to be required from the Receiver to you for the use of such equipment and other items.**
>
> [Emphasis in original.]

The Receiver explained in its second report to the court that it arrived at the figure of $13,500 as being a reasonable rental rate by computing a pro-rated amount of the monthly rental rate under the Master Lease according to the number and value of the Essential Lease Items in comparison to the number and value of all of the items leased under the Master Lease.

[23] The Receiver developed the Solicitation Plan for approval by the court. It was proposed in the Solicitation Plan that the Receiver would evaluate purchase bids on the basis of a number of factors, including several factors in relation to the bidder's environmental expertise and ability to obtain regulatory approval.

The Applications

[24] The Government, Welichem and the Receiver each brought applications that were heard at the same time by the chambers judge.

[25] The Government's application was for the following declarations:

a) the Government has a provable claim in the bankruptcy of the Debtor in the amount of $35,548,650 for the costs of remedying the environmental damage affecting the Debtor's real property; and

b) the Government's claim is secured in the manner described in s. 14.06(7) of the *BIA*.

[26] Welichem's application was for an order that (a) the Disclaimer Notice was a nullity, and (b) the Receiver affirmed the Master Lease and was required to pay the full lease payments to Welichem from the date of the Receiver's appointment.

[27] The Receiver's application was for:

a) an order elevating the priority of the Receiver's Charges so that they would rank in priority to all security interests, trusts, liens, charges and encumbrances, but still subordinate to the charges set out in ss. 14.06(7), 81.4(4) and 81.6(2) of the *BIA*;

b) an order approving the Solicitation Plan; and

c) directions from the court regarding whether the items covered by the Master Lease could be included in the property being offered for sale and, if so, whether those items were subject to the security of the Government pursuant to s. 14.06(7) of the *BIA*.

Reasons of the Chambers Judge

(a) Government Application Reasons (Appeal Nos. 20-YU865 and 20-YU867)

[28] In reasons for judgment indexed as 2020 YKSC 15 (the "Government Application Reasons"), the chambers judge first considered whether the Government had a provable claim in bankruptcy as a result of the failure of the Debtor to provide the Unfurnished Reclamation Security. She first tentatively concluded that the obligation to provide the Unfurnished Reclamation Security was not a provable claim because it was secondary in nature and it was not an obligation recoverable by legal process.

[29] The judge then considered whether this tentative conclusion was affected by the reasoning of the Supreme Court of Canada in *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67 [*Abitibi*], which involved a determination of whether future remediation costs were a provable claim under the *CCAA* on the basis of being a contingent claim. The judge held that *Abitibi* did not affect her conclusion because the third prong of the test set out in *Abitibi* (i.e., it must be possible to attach a monetary value to the obligation) had not been met. It was her view that it was not sufficiently certain that the Government would be performing remediation work as a result of the potential of a sale of the Mine.

[30] The judge did not specifically address the Government's alternate argument that it had a provable contingent claim for remediation costs (as opposed to a provable claim for the Unfurnished Reclamation Security). She did, however, implicitly reject the argument with her conclusion that the third prong of the *Abitibi* test had not been satisfied.

[31] The judge then turned to a consideration of the security provided for environmental remediation costs by s. 14.06(7) of the *BIA*. She concluded that s. 14.06(7) applied once the Government had incurred remediation costs and that the claim for remediation costs was not an unsecured claim as had been asserted by the Debtor's sole shareholder.

[32] Finally, the judge considered the issue of whether the term "real property" used in s. 14.06(7) included mineral claims such that the Government's security under that section would extend to mineral claims. Following three earlier decisions of the Supreme Court of Yukon, she held that the mineral claims constituted real property subject to the security in favour of the Government.

(b) <u>Disclaimer Reasons (Appeal No. 20-YU866)</u>

[33] In her reasons for judgment, which are indexed as 2020 YKSC 16 (the "Disclaimer Reasons"), the chambers judge began her analysis by reviewing the law generally in relation to a receiver's ability to disclaim contracts and the duties of receivers. She accepted that there was no legal authority allowing a receiver to partially disclaim a contract.

[34] The judge reviewed the Receivership Order, and rejected Welichem's argument that clause (c) of paragraph 3 (which set out the powers of the Receiver) supported the view that the Receiver had only a binary choice to either disclaim or affirm the Master Lease. She was of the view that this ignored the powers contained in clauses (i), (p), (s) and (t) of paragraph 3. She concluded that the Receiver's general powers under the Receivership Order to protect and preserve the Property (as defined in the Receivership Order) gave the Receiver the power to use the Essential Lease Items.

[35] The judge turned to a consideration of statutory powers and, in particular, s. 243(1) of the *BIA*. She concluded that the phrase "take any other action that the court considers advisable" in clause (c) of that section provided authority to allow the Receiver to use the Essential Lease Items for the purposes of the care and maintenance of the Mine and environmental remediation. She further stated that this conclusion also flowed from the wording of s. 26 of the *Judicature Act*, R.S.Y. 2002, c. 128, which empowers the court to appoint a receiver "on any terms and conditions the Court thinks just".

[36] The judge then considered whether the Receiver acted in compliance with its duties. She expressed the view that the Receiver had not acted arbitrarily and had acted in a commercially responsible manner in exercising its duty to maximize value for all of the stakeholders. In the same section of the Disclaimer Reasons, the judge quoted the following passage from Frank Bennett, *Bennett on Receiverships*, 3rd ed. (Toronto: Carswell, 2011) at 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.
>
> [Emphasis added in the Disclaimer Reasons.]

The judge stated her view that this passage provided general support for the Receiver's appropriate exercise of authority under s. 243(1) to use the Essential Lease Items.

[37] Finally, the judge held that the Receiver had not affirmed the Master Lease because it would be absurd for the Receiver to be required to pay the full amount of the $110,000 monthly lease payment for the use of only 79 of the 572 leased items after having spent over $200,000 in repairs on those 79 items.

(c) Receiver Application Reasons (Appeal 20-YU868)

[38] In her reasons indexed as 2020 YKSC 17 (the "Receiver Application Reasons"), the judge dealt with two of the three matters requested in the notice of application; namely, the elevation of the priority of the Receiver's Charges and the approval of the Solicitation Plan.

[39] The judge dealt first with the aspect of the application to elevate the priority of the Receiver's Charges. She made reference to s. 243(6) of the *BIA*, which authorizes the court to create a charge for a receiver's fees and disbursements. She then reviewed *Robert F. Kowal Investments Ltd. et al. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84 (C.A.) [*Kowal*], the leading authority on the issue of elevating a receiver's charge in priority to secured creditors. *Kowal* created three exceptions to

the general rule that the costs and expenses of a receiver do not have priority over existing security interests.

[40] The judge relied on the second *Kowal* exception (i.e., the receiver was appointed to preserve and realize the assets for the benefit of all interested parties) to elevate the Receiver's Charges on the Debtor's property in priority over Welichem and other secured creditors. She also relied on the second *Kowal* exception to elevate the Receiver's Charges on the Essential Lease Items in priority to Welichem. The judge added that, if she were incorrect, she would have held that the third *Kowal* exception (i.e., necessary preservation and improvement) applied to the extent that the Receiver would be entitled to a priority charge for the amounts it spent on the Essential Lease Items for repairs and monthly lease payments.

[41] Welichem did not oppose the general proposal of the Receiver to solicit investment or buyers for the Mine but objected to the factors set out in the Solicitation Plan for consideration in the assessment of any bids received by the Receiver. Welichem complained that the factors imported the regulatory process into the Solicitation Plan.

[42] The judge approved the Solicitation Plan without changing any of the factors for evaluating bids. She did not consider that the Government would have inappropriate influence in the solicitation process, and she was of the view that the Receiver was acting responsibly in consulting the Government.

[43] In the Receiver Application Reasons, the judge did not deal with the issue of whether the Receiver's Charges should attach to the balance of the items covered by the Master Lease (the "Non-Essential Lease Items") or with the Receiver's request for directions with respect to the issue of whether the Non-Essential Lease Items could be included in the property being offered for sale. She referred to a request for further written submissions, which she elaborated upon in her reasons for judgment indexed as 2020 YKSC 18 dealing with an application by the Receiver for an increase in its borrowing charge from $3 million to $7.5 million (which was granted). The issues on which she requested further submissions were: (a) whether

the true lease/financing lease dichotomy has relevance to the consideration of whether the items covered by the Master Lease could be considered the property of the Debtor; and (b) whether the items covered by the Master Lease are fixtures.

(d) Supplementary Reasons for Judgment

[44] The judge issued two sets of supplementary reasons for judgment after she received the written submissions she had requested. The orders flowing from these reasons are not the subject matter of these appeals, but one of the sets of reasons does touch on one of the issues under appeal. In addition, the reasons complete the backdrop of these appeals.

[45] The first set of supplementary reasons, indexed as 2020 YKSC 25, dealt with the issue of whether the items covered by the Master Lease could be included in the property being offered for sale. The judge first held that the issue of whether the Master Lease could be properly characterized as a financing lease was not relevant to this issue because the Receiver did not have the ability to avail itself of the remedy contained in s. 57(2)(a) of the *Personal Property Security Act*, R.S.Y. 2002, c. 169, of disposing of collateral by public sale.

[46] The judge then turned to the issue of whether the items covered by the Master Lease could be included in the property being offered for sale on the basis that they are fixtures and could be treated as part of the Debtor's property. She concluded that there was an argument the items were constructive fixtures even if they were not affixed to the land but that she required further evidence in order to decide the issue.

[47] The judge's second set of supplementary reasons, indexed at 2020 YKSC 26, dealt with the issue of whether the Receiver's borrowing charge should be elevated over Welichem on the Non-Essential Lease Items after consideration of the further submissions regarding financing leases and fixtures.

[48] At para. 6 of the second set of supplementary reasons, the judge stated that she did not specifically address in the Receiver Application Reasons how the property of the Debtor included the Essential Lease Items under s. 243(6) of the *BIA* in view of the fact that the Master Lease contained a reservation of title in Welichem. She then stated that s. 243(1) of the *BIA* (and s. 26 of the *Judicature Act*), as she had explained them in the Disclaimer Reasons, allowed the court to make the Essential Lease Items subject to the priority charges of the Receiver.

[49] The judge concluded that none of the *Kowal* exceptions applied to the Non-Essential Lease Items. Next, she reiterated her view that, without more evidence, she was unable to find that the Master Lease items were fixtures. Finally, she ruled that, as she had found in her first set of supplementary reasons that the remedies set out in the *Personal Property Security Act* do not help the Receiver, the true lease/financing lease characterization had no relevance to the issue before her. As a result, unless additional evidence established that the Non-Essential Lease Items were fixtures, the Receiver's borrowing charge could not be elevated in priority over them.

Discussion

(a) Government's Application (Appeal No. 20-YU865)

[50] I will deal with the declarations sought by the Government under this heading, and I will address the issue of whether the Government's security under s. 14.06(7) of the *BIA* charges the mineral claims under the next main heading because it is the subject matter of Appeal No. 20-YU867 (Mineral Claims).

[51] Before analyzing the grounds of appeal, I wish to make an observation with respect to the Government's application for a declaration that it has a provable claim in bankruptcy. I have reservations as to whether the Supreme Court of Yukon had the jurisdiction to make such a declaration. Section 124 of the *BIA* makes provision for the filing of proofs of claims in bankruptcy matters with the trustee in bankruptcy. Section 135(1) provides that the trustee in bankruptcy is to examine proofs of claim and s. 135(1.1) specifically provides that the trustee in bankruptcy must determine

whether a contingent claim or an unliquidated claim is a provable claim and, if it is, the trustee is tasked with the responsibility of valuing it. If the party filing the proof of claim is dissatisfied with the trustee's determination, it has 30 days to appeal to the court. In the present case, that court would presumably be the British Columbia Supreme Court.

[52] This is not a situation like existed in *Abitibi*, where the proceedings were under the *CCAA*. The *CCAA* authorizes the court to make any order it considers appropriate in the circumstances (s. 11), including making orders as to whether a person has a "claim" as that term is defined in s. 2 of the *CCAA*.

[53] When this point was raised at the hearing of the appeal, counsel advised that they agreed to have the status of the Government's claim determined in the receivership action as a matter of convenience. As no submissions were made as to the jurisdiction of the Supreme Court of Yukon, this Court will not make any determination on the issue. I mention the point so that these reasons for judgment will not be regarded as a considered precedent on the jurisdiction of a court which appoints a receiver to determine whether claims are provable in bankruptcy when there is a bankruptcy over which another court has jurisdiction.

i) Obligation to Provide Unfurnished Reclamation Security

[54] The judge's first ruling was that the obligation of the Debtor to provide the Unfurnished Reclamation Security was not a claim provable in bankruptcy. The Government says the judge erred in making this ruling on the basis that the requirement to provide the Unfurnished Reclamation Security was a secondary obligation and was not recoverable by legal process. The Government also says the judge erred in finding that the obligation to provide the Unfurnished Reclamation Security was not a contingent claim, a ground that the Government repeats with respect to the costs it may incur to remediate the environmental damage.

[55] Section 2 of the *BIA* defines the terms “claim provable in bankruptcy”, “provable claim” and “claim provable” to include “any claim or liability provable in proceedings under this Act by a creditor”. Section 121 of the *BIA* supplements the definition and also deals with contingent claims:

> **Claims provable**
>
> **121 (1)** All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt’s discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> **Contingent and unliquidated claims**
>
> **(2)** The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

Section 135(1.1), to which I referred above, provides that the trustee in bankruptcy must determine whether contingent or unliquidated claims are provable claims and must value them if they are provable claims.

[56] In finding that the obligation to provide the Unfurnished Reclamation Security was not a provable claim because it was secondary in nature, the judge relied on the decision of *JICO Holdings Inc. v. Lynco Construction Ltd.*, 2016 SKCA 126 [*JICO*]. In that case, a judge had dismissed JICO’s application for a bankruptcy order against Lynco on the basis that JICO was not owed a debt of more than $1,000 as required by s. 43(1)(a) of the *BIA*. One of the matters relied upon by JICO as establishing a debt was that it was a contingent beneficiary in respect of an order for security for costs made against Lynco in favour of a credit union in an unrelated action.

[57] The Saskatchewan Court of Appeal held that the order for security for costs did not constitute a debt for two reasons. First, it did not yet constitute a debt owing to anyone. Second, the security for costs order merely created a contingent liability that, if crystalized, would become owing to the credit union, not JICO.

[58] I do not find *JICO* to be particularly helpful in determining that an obligation to post security is not a claim provable in bankruptcy because it was a secondary obligation. The decision is clearly distinguishable on at least two bases. However, the case is useful in its finding that the obligation to post security for costs is not a debt.

[59] In discussing the present issue, the chambers judge focused on the word "obligation". I believe this is because, in making its submissions, the Government relied upon the test set out in *Abitibi* for determining whether there is a claim for the purposes of the *CCAA*:

> [26] These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation.
>
> [Emphasis in original.]

This passage refers to "a debt, a liability or an obligation". The Government submits the obligation to provide the Unfurnished Reclamation Security is an "obligation" and it matters not that it may be considered to be a "secondary obligation".

[60] However, one must be cautious in relying upon *Abitibi* in this regard. The definition of "claim" in the *CCAA* is slightly different than the definition of "claim provable in bankruptcy" in the *BIA*. In s. 2 of the *CCAA*, "claim" is defined as any "indebtedness, liability or obligation" that would be a claim provable in bankruptcy under the *BIA*. In contrast, the definition of "claim provable in bankruptcy" in s. 2 of the *BIA* refers to any "claim or liability" provable by a "creditor". Section 121(1) of the *BIA* provides that all "debts and liabilities" by reason of "any obligation" incurred before the date of bankruptcy are deemed to be claims provable under the *BIA*.

[61] I do not know why the wording is slightly different in the two statutes. What is important for this appeal, however, is that it is not sufficient for there to simply have been an "obligation" on the bankrupt in order to establish a claim provable in bankruptcy. What is required is a debt or liability to a creditor by reason of an

obligation incurred before the date of bankruptcy. Hence, it cannot be an obligation of any kind. It must be an obligation creating a debt or liability.

[62] As held in *JICO*, a requirement to post security certainly does not create a debt. The question becomes whether it creates a liability. In other words, is it something for which a court would have found the Debtor to be liable prior to the date of bankruptcy? This question leads to a discussion of the second basis on which the chambers judge found that the failure to provide the Unfurnished Reclamation Security did not give rise to a claim provable in bankruptcy.

[63] The jurisprudence in Canada is clear that a claim provable in bankruptcy must be one recoverable or enforced by legal process. The leading authority in this regard is *Farm Credit Corp. v. Holowach (Trustee of)* (1988), 51 D.L.R. (4th) 501 (Alta. C.A.), leave to appeal ref'd (1989), [1988] S.C.C.A. No. 291 [*Holowach*], a case in which a mortgagee filed a proof of claim in the bankruptcy of the mortgagor for the amount of the deficiency in the mortgage debt following the sale of the mortgaged property. The trustee in bankruptcy disallowed the claim on the basis that s. 41 of the *Law of Property Act*, R.S.A. 1980, c. L-8, prohibited proceedings on the covenant to pay.

[64] In agreeing with the trustee, the Alberta Court of Appeal said the following after acknowledging that s. 41 did not extinguish the debt (at 258–259):

> In our view a provable claim must be one recoverable by legal process. In *Ref. Re Debt Adjustment Act, 1937*, [1943] A.C. 356, [1943] 1 W.W.R. 378, 24 C.B.R. 129, [1943] 1 All E.R. 240, [1943] 2 D.L.R. 1 [Alta.], the Privy Council said (at p. 11):
>
> > In England it has always been held that, subject to the statutory exceptions as to debts payable at some certain future time, the petitioning creditor's debt and the debts provable must be debts recoverable by legal process. For example a debt barred by the *Statute of Limitations* is not a debt on which a bankruptcy petition can be presented, nor is it one provable in bankruptcy … The *Dominion Act* is very similar to the English *Bankruptcy Acts* so far as those matters are concerned and there appears to be no reason for thinking that a similar principle would not be applied in Canada to the words "debt due."

> The same reasoning was applied in *Re Kolodychuk* (1978), 6 B.C.L.R. 238, 27 C.B.R. (N.S.) 307 (S.C.), to hold a chattel mortgagee disentitled to a deficiency claim because of "seize or sue" limitations. Other examples are *Re Solmon* (1974), 19 C.B.R. (N.S.) 165 (Ont. S.C.) (Statute of Frauds); *Re Hamer (Hamar); Ex parte McGuinty & Co.* (1921), 2 C.B.R. 137, 63 D.L.R. 241 (Sask. K.B.) (Statute of Limitations); and *Re Morton; Ex parte Morton Bartling & Co.*, 15 Sask. L.R. 460, [1922] 2 W.W.R. 811, 3 C.B.R. 114, 66 D.L.R. 378 (K.B.) (Statute of Limitations). We agree with the conclusions that a provable claim must be recoverable.

Holowach has been accepted as the leading authority on this point in *Luscar Ltd. v. Smokey River Coal Limited*, 1999 ABCA 179 at para. 37, and *Asian Concepts Franchising Corporation (Re)*, 2018 BCSC 1022 at para. 115.

[65] *Holowach* dealt with a debt, and it was held that the debt must be recoverable by legal process in order to be a claim provable in bankruptcy. In *Central Capital Corp. (Re)* (1996), 132 D.L.R. (4th) 223 (Ont. C.A.) [*Central Capital*], the Ontario Court of Appeal applied the same principle to an obligation giving rise to a liability. In that case, a company reorganizing under the *CCAA* had issued retractable shares to the appellants, who asserted that they had a claim for the purposes of the reorganization. The appellants had given a notice of retraction to the company, which declined to redeem the shares on the basis that s. 36 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, prohibited the redemption of shares by a company that was believed to be insolvent. The appellants deposited their shares for redemption. Justice Weiler, for the majority, relied on *Holowach* to hold that the appellants did not have a claim provable in bankruptcy because the company's promise to redeem the shares was not enforceable.

[66] Although neither *Holowach* nor *Central Capital* are binding on this Court, they are persuasive authorities, and I see no principled reason to decline to follow them. Applying the principle of *Holowach* and *Central Capital* to the present circumstances, it is my view that the Government does not have a claim provable in bankruptcy as a result of the failure of the Debtor to provide the Unfurnished Reclamation Security because it is not a requirement that the Government could have enforced by legal action.

[67] The Minister is entitled to require reclamation security from an applicant for a license or a licensee pursuant to s. 139 of the *Mining Act*. However, the *Mining Act* contains no provisions by which a licensee's obligation to provide reclamation security can be enforced by legal action. The closest the *Mining Act* comes is to provide for prosecution for contravention of a condition of a license (s. 150(3)), and the Government did prosecute the Debtor on two occasions. Section 147(2) provides that, if the amount of the reclamation security is inadequate to pay for the reclamation costs incurred by the Government, the shortfall is recoverable as a debt by the Government. But the *Mining Act* does not provide that the Government can recover as a debt any required reclamation security that has not been furnished or that the Government can otherwise invoke legal process to enforce the obligation to provide required reclamation security.

[68] Accordingly, the Government does not have a provable claim of a liability because the obligation of the Debtor to provide the Unfurnished Reclamation Security is not enforceable by legal action. I agree with the conclusion of the chambers judge that the Government does not have a claim provable in bankruptcy in respect of the Unfurnished Reclamation Security.

[69] The judge also analyzed the obligation to post the Unfurnished Reclamation Security in terms of the *Abitibi* test. In my opinion, the *Abitibi* test does not apply to such an obligation because it is not a contingent obligation, which is what *Abitibi* was addressing. The obligation to provide the Unfurnished Reclamation Security arose as soon as the Minister required additional security, and it was not contingent on the happening of any other event. I will leave a consideration of *Abitibi* to the next issue, which is whether the Government had a claim provable in bankruptcy as a result of a contingent claim for costs of remediating the environment damage caused by the Mine.

ii) Contingent Claim for Remediation Costs

[70] In *Abitibi*, unlike the present case, the Government of Newfoundland and Labrador took the position that it did not have a provable claim in bankruptcy. The

reason is that it did not want its rights under environmental protection orders issued by it to be affected by the claims procedure order made in connection with Abitibi's proposed reorganization. In its decision, the Supreme Court of Canada held that the Government of Newfoundland and Labrador did have a claim for the purposes of the *CCAA*. The Government urged the chambers judge to reach a similar conclusion in this case.

[71] As in *Abitibi*, there are no issues in the present case with respect to the first two prongs of the three-part test established by the Supreme Court of Canada. By virtue of s. 147(2) of the *Mining Act*, any remediation costs expended by the Government are recoverable as a debt, with the result that the Government qualifies as a creditor under the first prong. The second prong is satisfied because some, if not all, of the environmental damage occurred prior to the Debtor's bankruptcy.

[72] The third prong is that it must be possible to attach a monetary value to the debt or liability. Justice Deschamps, for the majority, said the following about this prong:

> [36] The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (*Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process.

[73] The chambers judge held that it was not sufficiently certain that the Government would incur the remediation costs for the following reasons:

> [124] The $35,548,650 security amount comprises the estimated future costs for the entire remediation and final closure plan for the Mine. While it is clear that the debtor cannot do or pay for the necessary work, there remains uncertainty as to what will be done, when and by whom. For example, if the Mine were sold, it is safe to assume that not all of the closure plan would need to be implemented at that time (e.g. closing down road access, decommissioning all the buildings, removing equipment and infrastructure). Answers to these questions depend on whether or not there is a sale; whether there is an assumption by a new purchaser of the licence condition to provide security in whole or in part; whether or not all or part of the

> reclamation and closure work will be done; what those costs will be; when the amount of existing security will be spent. These are all questions of fact.

Although the judge made these comments in the context of deciding whether the obligation to provide the Unfurnished Reclamation Security was a provable claim, they apply equally to the issue of whether the Government had a provable claim in respect of the contingency that it would incur remediation costs (which the judge did not explicitly rule upon, although she did refer to it as an alternate argument at para. 67 of the Government Application Reasons).

[74] On appeal, the Government says the judge misapplied the third prong of the *Abitibi* test. It submits the judge relied solely on the speculative nature of the claim, and this was a legal error because all contingent claims by their nature are speculative. The Government argues that it is sufficiently certain that the Government will be using its own funds to remediate the environmental damage.

[75] In my opinion, the judge's conclusion was a finding on a question of mixed fact and law. As set out in *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36, such questions lie along a spectrum between fact and law. Where the issue is closer to the factual end of the spectrum and no error of law is extricable, the standard of review by an appellate court is one of palpable and overriding error.

[76] It is my view that the judge did not simply rely on the fact that the claim was speculative to conclude that it was not sufficiently certain that the Government would incur remediation costs. She considered all of the evidence, including the prospect of a sale of the Mine, in reaching her conclusion. The Government has not established that the judge made a palpable error, and her conclusion is owed deference by this Court. I would not disturb the judge's finding on this point, with the result that the judge did not err in finding that the Government's contingent claim for remediation costs was not a claim provable in bankruptcy.

iii) Secured Claim under Section 14.06(7) of the BIA

[77] Section 14.06(7) of the *BIA* reads as follows:

> **Priority of claims**
>
> **(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.

As noted by Deschamps J. at paras. 32 and 33 of *Abitibi*, s. 11.8(8) of the *CCAA* (which corresponds to s. 14.06(7)) represents a balance between the public's interest in enforcing environmental regulations and the interests of third-party creditors in being treated equitably. The security does not extend to all of the debtor's assets but is limited to the contaminated real property and related contiguous real property.

[78] The Government says the chambers judge correctly stated the law when she said the following at para. 132 of the Government Application Reasons:

> [132] In this case, Yukon is continuing to spend money on care and maintenance and environmental remediation at the Mine. There is every reason, once those costs are incurred, or it is sufficiently certain that they will incur such costs, for Yukon to exercise its super-priority charge against the real property.
>
> [Emphasis added by the Government.]

But, says the Government, the judge fell into error when she concluded in para. 136 that "s. 14.06(7) of the *BIA* does apply once Yukon has incurred costs" without noting that the "sufficiently certain" test applies to s. 14.06(7).

[79] In my view, there are two answers to this submission. The first is that in para. 132 the chambers judge conflated the *Abitibi* test for contingent environmental claims and the priority charge created by s. 14.06(7) for environmental remediation

costs. *Abitibi* was concerned with the question of whether the government had a claim under the *CCAA* for the purpose of the claims procedure order made in the *CCAA* proceeding. *Abitibi* did not deal with s. 14.06(7) and did not import the "sufficiently certain" test into s. 14.06(7).

[80] A claim under s. 14.06(7) does not need to be a claim provable in bankruptcy. Parliament has defined the terms "claims provable in bankruptcy", "provable claim" and "claim provable" in s. 2 of the *BIA*, but has not defined the word "claim" as used in s. 14.06(7). The distinction is made clear by s. 14.06(8) of the *BIA*, which provides that the charge created by s. 14.06(7) applies to costs for remedying an environmental condition or environmental damage that arose or occurred after the date of bankruptcy. This is in contrast to a claim provable in bankruptcy, which must relate to a debt or liability in existence before the date of bankruptcy. As Deschamps J. commented at para. 28 of *Abitibi* when contrasting the time requirements of s. 121(1) of the *BIA* and s. 11.8(9) of the *CCAA* (the provision corresponding to s. 14.06(8) of the *BIA*), s. 11.8(9) provides for "more temporal flexibility for environmental claims" (than for claims provable in bankruptcy).

[81] The second answer to the Government's submission is that on the plain reading of s. 14.06(7) the charge is created for costs that have been incurred for environmental remediation, not for anticipated future costs or contingent costs. The natural meaning of the words "Any claim … for costs of remedying" is a claim for actual remediation costs. If Parliament had intended to create a charge for costs that may be incurred in the future, one would have expected it to have used explicit language in that regard.

[82] In holding that s. 14.06(7) did not create a charge for anticipated future costs or contingent costs, the chambers judge relied upon the following passage from the majority's decision in *Orphan Well Association v. Grant Thornton Limited*, 2017 ABCA 124:

> [55] For example, s. 14.06(7) grants a security interest to a government that remediates property. That section does not create any generalized priority or super priority for existing or contingent environmental liabilities; it only comes into play where a government has actually remediated specific contaminated property. While that section operates through the use of a limited and focused super priority, it is based on the restitutionary principle that a party that discharges the obligation of another is entitled to be compensated for its efforts by the original obligee and its successors in title. It simply recognizes a type of subrogated claim, and is not a part of any broader "statutory compromise". If a government ends up having to incur the expense of remediating property, the previous defaulting owner or its secured creditor cannot insist on getting back the restored land without refunding those costs to the government. For example, if a government remediates a site (say an industrial site, or an open pit mine) resulting in a parcel of land with some value (say a clean industrial site, or perhaps only pasture or parkland) the government has a security interest in that site. If the defaulting owner wants to get that parcel back, it has to pay the remediation costs.

While that decision did not directly involve s. 14.06(7) and was overturned by the Supreme Court of Canada on other grounds (*Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 [*Orphan Well* SCC]), I agree with the chambers judge that it correctly summarizes the meaning of s. 14.06(7) and, in particular, that the charge arises when a government incurs costs to remediate an environmental condition or damage.

[83] In her concluding remarks in the Government Application Reasons, the judge said the following:

> [165] [The Government] has a provable claim in the bankruptcy of [the Debtor] once it incurs costs, beyond the existing security it holds, of remedying the environmental damage affecting the real property of [the Debtor]. That claim is secured by security on the real property of [the Debtor] affected by the damage and property contiguous with it, related to the environmental damage, and is enforceable in the same way as any other security on real property.

These two sentences were incorporated as orders and declarations in the first two paragraphs of the order entered pursuant to the Government Application Reasons.

[84] With respect, it is my view that, in making these remarks, the judge again conflated the concept of a contingent claim giving rise to a provable claim in bankruptcy and the concept of the priority charge created by s. 14.06(7). As she held that the Government's contingent claim did not meet the *Abitibi* test, the judge

should have dismissed the Government's application for a declaration that it had a provable claim in the bankruptcy of the Debtor. As I have discussed, a provable claim must be based on a debt or liability that came into existence prior to the date of bankruptcy. The judge did hold, at para. 136 of the Government Application Reasons, that s. 14.06(7) applies once the Government incurs costs of remediation, and that is the declaration that should have been included in the entered order. The judge did not give reasons for her comment about the Government exhausting the security it held (i.e., the Reclamation Security) and, as she made the comment in the context of her incorrect finding that the Government had a provable claim, her comment should not have been reflected in the entered order.

iv) Disposition

[85] I would allow Appeal No. 20-YU865 to the limited extent of correcting the entered order by deleting the first two paragraphs of it and replacing them with the following:

1. Yukon's application for a declaration that it has a claim provable in the bankruptcy of Yukon Zinc Corporation ("YZC") is dismissed.

2. A claim by Yukon for costs of remedying any environmental condition or environmental damage affecting real property of YZC will be secured on the real property of YZC affected by the environmental condition or environmental damage and on any other real property of YZC that is contiguous with that real property and that is related to the activity that caused the environmental condition or environmental damage.

I would not allow the appeal as it relates to any of the Government's grounds of appeal.

(b) Mineral Claims (Appeal No. 20-YU867)

[86] This appeal is also from the order entered pursuant to the Government Application Reasons. Welichem appeals the aspect of the order that, for the

purposes of the Government's security pursuant to s. 14.06(7) of the *BIA*, the Debtor's real property includes the mineral claims it holds.

[87] Under the *Mining Act*, every person who locates a mineral claim is required to record it with the mining recorder (s. 41(1)). The holder of a mineral claim is entitled to all minerals lying within the boundaries of the claim (and downward into the earth) (s. 50). Section 52 provides as follows:

> **Chattel interest for one year**
>
> **52** The interest of the holder of a mineral claim shall, prior to the issue of a lease, be deemed to be a chattel interest, equivalent to a lease of the minerals in or under the land for one year, and thence from year to year, subject to the performance and observance of all the terms and conditions of this Part.

Under s. 74, the holder of a mineral claim is entitled to a lease of the claim if the holder obtains a certificate of improvements under s. 70 that it has done work on the claim of at least $500.

[88] Under s. 56, the holder of a mineral claim is entitled to it for a period of one year and thence from year to year if the holder has done work on the claim of at least $100 per year unless the Minister has granted relief in respect of the annual representation work (s. 57) or the holder has paid $100 in respect of each claim to the mining recorder (s. 59). A mining claim expires at the end of the year in which the required work or payment is not done or made (s. 60). The holder pays annual royalties to the Government based on the value of the output of the mine (s. 102).

[89] In the Government Application Reasons, the chambers judge accepted that, as a result of the wording of s. 52, mineral claims under the *Mining Act* are chattels real, with the result that they are an interest in land: see *Rock Resources Inc. v. British Columbia*, 2003 BCCA 324, leave to appeal ref'd (2004), [2003] S.C.C.A. No. 375. She stated that the real question was whether the words "real property" in s. 14.06(7) includes an interest in land.

[90] The judge articulated the modern rule of statutory interpretation; i.e., the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21. The judge found the clear intention of Parliament in enacting s. 14.06(7) was to ensure that remediation costs would not become a burden to the taxpayer. She reasoned that, as mineral claims have value, they need to be included as part of the security under s. 14.06(7). She found her conclusion to be supported by the decisions of *Yukon Territory (Commissioner) v. Bedard*, [1987] Y.J. No. 48 (S.C.) [*Bedard*]; *Yukon v. B.Y.G. Natural Resources Inc.*, 2017 YKSC 2 [*B.Y.G.*]; and *Yukon (Government of) v. United Keno Hill Mines Limited*, 2004 YKSC 59 [*Keno Hill*].

[91] In my view, the judge made two errors in her analysis. First, in finding the intention of Parliament, she overlooked the comments of Deschamps J. at paras. 32 and 33 of *Abitibi*, to which I referred above. At para. 32, Deschamps J. found that, in enacting the corresponding section in the *CCAA* (s. 11.8(8)), Parliament struck a balance between the public's interest in enforcing environmental regulations and the interest of third-party creditors in being treated equally. At para. 33, she observed that, if Parliament had intended that the debtor would always satisfy all remediation costs, it would have created the security over all of the debtor's assets (and not just real property). Hence, it was incorrect for the judge to conclude that the intention of Parliament was to ensure that remediation costs would not become a burden to the taxpayer.

[92] Second, the judge did not consider the wording of the *BIA* to determine whether Parliament intended to distinguish between real property and interests in real property (although, in fairness to the judge, it is not clear that the following wording from the *BIA* was brought to her attention). The words "real property" are not defined in the *BIA*, but the word "property" is defined in s. 2 as follows:

> ***property*** means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;
>
> [Emphasis added.]

The use of the words "as well as" (rather than words to the effect of "including") indicates that the words "real property" are not intended to include an interest in real property.

[93] A similar distinction is made in s. 74(3) of the *BIA*:

> **Caveat may be filed**
>
> **(3)** If a bankrupt owns any real property or immovable or holds any charge registered in a land registry office or has or is believed to have any interest, estate or right in any of them, … a caveat or caution may be filed with the official in charge of the land registry by the trustee, …
>
> [Emphasis added.]

It is clear that the words "real property" in s. 74(3) do not include an interest in real property because, if they did, it would not have been necessary to add the reference to any interest in real property.

[94] Perhaps most importantly, s. 14.06(4), which deals with non-liability of a trustee in bankruptcy for environmental remediation costs in certain circumstances, uses the phrase "any interest in any real property". The phrase "any interest in any real property" is also used in s. 14.06(6) in stating that environmental remediation costs are not to rank as costs of administration if the trustee had abandoned or renounced any interest in any real property. It is evident that, in enacting s. 14.06(7) at the same time, Parliament was aware of the distinction between "real property" and "an interest in real property", and did not intend that the security created by s. 14.06(7) would extend to an interest in real property such as mineral claims.

[95] The Government submits that clause (b) of s. 14.06(7) supports its interpretation that s. 14.06(7) does create security against interests in land. For ease of reference, I set out clause (b) again:

> **(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.

Clause (b) is referring to the security created for environmental remediation costs, and the Government argues that the use of the word "property" in clause (b) includes interests in real property because they are included in the definition of "property" in s. 2 of the *BIA*. With respect, clause (b) is dealing with the priority of the security that is created earlier in the section and is simply referring back to the property over which the security is created (i.e., real property or immovables). Clause (b) does not expand the type of property over which the security is created.

[96] None of the decisions upon which the chambers judge relied to support her decision involved an interpretation of the *BIA*, and they are all distinguishable. The question in *Bedard* was whether mineral claims were personal property which could be sold by the sheriff in executing upon a judgment. The Court held the mineral claims were not personal property because, under the predecessor to s. 52 of the *Mining Act*, they were an interest in land.

[97] The chambers judge found support in *B.Y.G.* and *Keno Hill* because mineral claims were included in the charges of the receiver over the debtor's real property. However, the receiver was appointed over all of the assets and property of the debtor in each case, and this included their mineral claims. Each case involved an application to approve a marketing plan, and there was no discussion of whether a mineral claim constituted real property.

[98] I conclude for these reasons that the words "real property" in s. 14.06(7) do not include an interest in land such as a mineral claim. I would allow Appeal No. 20-YU867, and I would vary the entered order by deleting paragraph 5 of it and replacing it with the following:

> 5. Yukon's security under s. 14.06(7) of the BIA does not extend to YZC's mineral claims.

(c) Disclaimer of Master Lease (Appeal No. 20-YU866)

[99] In the emails between counsel following the giving of the Disclaimer Notice, counsel began referring to it as a "partial disclaimer". In its notice of application, Welichem defined the Disclaimer Notice as the "Partial Disclaimer". In the Disclaimer Reasons, the judge framed the first issue to be whether "the Receiver has the authority to use the Essential Items to carry out its duties (i.e. partially disclaim the Master Lease)".

[100] The judge did not analyze the Disclaimer Notice. Other than addressing Welichem's argument that clause (c) of paragraph 3 of the Receivership Order only gave the Receiver the binary choice to either cease to perform a contract (i.e., disclaim it), or to affirm it, the judge did not express her conclusions in terms of the Master Lease being partially disclaimed. In para. 69 of the Disclaimer Reasons, after discussing s. 243(1) of the *BIA* and a number of decisions, the judge found that there is authority under s. 243(1)(c) for "the Court to allow the Receiver to use the Essential Items". At para. 78, she stated her view that the passage from page 436 of *Bennett on Receiverships* quoted above was "general support for the Receiver's appropriate exercise of authority under s. 243(1) of the BIA … to use the Essential Items".

[101] In the concluding paragraph of the Disclaimer Reasons, the judge summarized her 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.

[102] I make these observations to illustrate that, despite the terminology used by counsel, the judge did not make her decision on the basis of a partial disclaimer of the Master Lease but, rather, she made it on the basis that the Receiver was entitled to use the Essential Lease Items. In my opinion, the judge was correct to characterize it in this fashion because the Disclaimer Notice did not constitute a partial disclaimer of the Master Lease. Rather, it constituted a disclaimer of the

Master Lease in its entirety but was coupled with an appropriation by the Receiver of the right to use the Essential Lease Items without complying with any of the terms of the Master Lease at a monthly rent unilaterally determined by the Receiver.

[103] The first four lines of paragraph 4 of the Disclaimer Notice is typical language to disclaim a contract in its entirety. Following the fourth line is an exception stating that the lessee's right to use the Essential Lease Items was to survive the disclaimer of the Master Lease and that all obligations of the Debtor pursuant to the Master Lease were disclaimed except for this right to use the Essential Lease Items.

[104] This was not a situation where the Receiver was agreeing to abide by the terms of the Master Lease as they related to the Essential Lease Items. As explained in its second report to the court, the Receiver decided to issue the Disclaimer Notice for several reasons, including the reasons that it did not want to pay the insurance required by the Master Lease and that it did not want to be obliged to return the leased items to a location of Welichem's choosing. The effect of the Disclaimer Notice was to disclaim all obligations under the Master Lease but to assert a right to use the Essential Lease Items.

[105] As a result, it is not necessary to discuss partial disclaimers of contracts by receivers. There was no authority before the chambers judge as to whether a receiver could or could not partially disclaim a contract. Welichem had relied on the decision of *Re Lord and Fullerton's Contract* (1895), [1896] 1 Ch. 228 (C.A.), where it was held that an executor under a will was not entitled to disclaim property located in one country while not disclaiming property located in other countries, but the judge found that it had no applicability. However, there is now some authority on the point.

[106] In a decision released after the hearing of this appeal, the British Columbia Court of Appeal had occasion to consider whether a receiver could disclaim the provision of a contract requiring disputes to be resolved by arbitration and could sue in court to recover monies allegedly owing under the contract. In *Petrowest Corporation v. Peace River Hydro Partners*, 2020 BCCA 339, the Court relied on the doctrine of separability to hold that the arbitration clause was an independent

agreement which could be separately disclaimed. In the course of his reasons for judgment, Justice Grauer said the following:

> [46] As we have seen, and as the *New Skeena* [*New Skeena Forest Products Inc., Re v. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154] case confirmed, the receiver is entitled to disclaim the debtor's executory contractual obligations. The respondents assert that nothing more is necessary to permit the receiver to avoid the effect of the arbitration clauses. The appellant submits, however, and I accept, that this concept does not form a basis for allowing the receiver freedom to pick and choose among the terms of a contract the receiver seeks to enforce. The question is whether arbitration clauses can be treated differently in the particular circumstances we are considering.
>
> [Emphasis added.]

[107] I also wish to comment on the reliance by the chambers judge on the passage from *Bennett on Receiverships* (in which the author discussed a receiver applying to court to "break or vary an onerous or material contract") and her comment in para. 84 of the Disclaimer Reasons (quoted above) about a "permissible variation". First, the Disclaimer Notice did not constitute a variation of the Master Lease – it was a complete disclaimer of it. Hence, the passage from *Bennett on Receiverships* was not relevant. Second, the text does not state that a receiver is entitled to unilaterally vary existing contracts, and no authority for such a proposition is cited in the text. The statement was made in a section of the text dealing with the advisability of receivers obtaining court approval for the disclaimer of contracts, and it may be that the statement was intended to deal with the situation of a receiver obtaining court approval of an amendment to an existing contract that the receiver has negotiated with the other party to the contract.

[108] Welichem framed its grounds of appeal in terms of the Disclaimer Notice being a partial disclaimer of the Master Lease. At the hearing of the appeal, when it was raised that the proper characterization of the Disclaimer Notice was a full disclaimer coupled with an appropriation by the Receiver of the Essential Lease Items for its use, Welichem responded that the analysis in its factum also applied to such a characterization of the Disclaimer Notice.

[109] Welichem's grounds of appeal, as reframed to reflect the proper characterization of the Disclaimer Notice, are as follows:

(a) the judge erred in interpreting s. 243(1)(c) of the *BIA* and s. 26 of the *Judicature Act* so broadly as to authorize the Receiver to use the Essential Lease Items;

(b) the judge erred in interpreting the Receivership Order so broadly as to authorize the Receiver to use the Essential Lease Items; and

(c) the judge erred in finding that the Receiver did not affirm the Master Lease.

It could be argued that the second ground is a threshold issue because the judge relied on the Receivership Order as permitting the Receiver to use the Essential Lease Items, and she did not make a specific order authorizing the use of the Essential Lease Items (in contrast to the following appeal which does involve a specific order under s. 243(6) of the *BIA*). However, I agree with Welichem that it is more appropriate to deal with the issues in the same order as they were set out in its factum.

[110] Section 243 reads as follows:

> **Court may appoint receiver**
>
> **243 (1)** 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.
>
> [Emphasis added.]

The other relevant provision of the *BIA* is s. 72(1):

> **Application of other substantive law**
>
> **72 (1)** The provisions of this Act 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, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

[111] The wording of clauses (a), (b) and (c) of s. 243(1) correspond to the wording of clauses (a), (b) and (c) of s. 47(2) of the *BIA* when it was first enacted in 1992 (S.C. 1992, c. 27, s. 16). At the time, s. 47(1) was added to the statute to provide for the appointment of an interim receiver as a companion provision to another new section, s. 244(1), which required a secured creditor to give advance notice to an insolvent person before enforcing its security against substantially all of the person's inventory, accounts receivable or other property. Section 47(1) empowered the court to appoint an interim receiver when such a notice was about to be sent or had been sent. Similar to clause (c) of s. 243(1), clause (c) of s. 47(2) empowered the court to direct the interim receiver to "take such other action as the court considers advisable".

[112] In its current form, s. 243(1) was enacted by s. 58(1) of *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36. Its enactment introduced a receivership regime in Canada that was national in scope. Interestingly, clause (c) of s. 47(2), as it had been enacted in 1992, was removed, first by s. 30(2) of S.C. 2005, c. 47 (not proclaimed) and then by s. 14(2) of S.C. 2007, c. 36.

[113] I mention this history because s. 47(2)(c), as initially enacted, has been considered by a number of cases, two of which were relied upon by the chambers judge and two of which are relied upon by Welichem on appeal. In my view, the most important of these cases for the purposes of this appeal is *GMAC Commercial*

Credit Corporation – Canada v. T.C.T. Logistics Inc., 2006 SCC 35 [*T.C.T. Logistics*].

[114] In *T.C.T. Logistics*, an interim receiver was appointed under s. 47(1). The order appointing the interim receiver provided that it was not a successor employer within the meaning of the *Labour Relations Act*, *1995*, S.O. 1995, c. 1. The union applied under s. 215 of the *BIA* for leave to continue with an application before the Labour Relations Board for a declaration that the interim receiver and the company which purchased the assets from it were successor employers. The judge amended the order to somewhat limit the scope of the provision, but denied the request for leave.

[115] The Supreme Court of Canada held that the bankruptcy court did not have jurisdiction to decide whether the interim receiver was a successor employer and that leave should have been granted to the union under s. 215 to continue with its application before the Labour Relations Board. After quoting s. 47(2) of the *BIA*, Justice Abella, for the majority, said the following:

> [45] These statutory parameters, though sufficiently flexible to authorize a wide range of conduct dealing with the taking, management, and eventual disposition of the debtor's property, are not open-ended. The powers given to the bankruptcy court under s. 47(2) are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes.

[116] After quoting s. 72(1) of the *BIA*, Abella J. commented that the effect of s. 72(1) was "not intended to extinguish legally protected rights unless those rights are in conflict with the [*BIA*]". She explained further:

> [51] If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all employment rights if the bankruptcy court thinks it "advisable" under s. 47(2)(*c*). Explicit language would be required before such a sweeping power could be attached to s. 47 in the face of the preservation of provincially created civil rights in s. 72.

T.C.T. Logistics was followed in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 [*Lemare Lake*], in which it was held that s. 72(1) prevented the appointment of a receiver under s. 243 of the *BIA* when provincial legislation required a notice period and a mediation process before enforcement proceedings could be commenced with respect to farm land.

[117] *T.C.T. Logistics* was also followed in one of the cases that the chambers judge did discuss, *Railside Developments Ltd. (Re)*, 2010 NSSC 13 [*Railside*]. In that case, a receiver was appointed over a building complex which was subject to a number of builder's liens. The receiver wanted to register the complex as condominiums but the *Condominium Act*, R.S.N.S. 1989, c. 85 required encumbrancers to consent to the registration.

[118] In *Railside*, Justice Moir dismissed the application of the receiver under s. 243(1)(c) to dispense with the consent of the encumbrancers in registering the complex as condominiums. He noted that s. 243 was a remedial right provided only for secured creditors and that the reasoning in *T.C.T. Logistics* on the scope of s. 47(2)(c) applied to s. 243(1)(c): *Railside* at paras. 80, 88. He held that the general provision for a receiver's powers under s. 243 was not a basis for finding a conflict between the *Condominium Act* and s. 243 for the purposes of s. 72(1) of the *BIA* and, hence, an order under s. 243 could not override the *Condominium Act*: *Railside* at para. 89.

[119] The chambers judge in the present case declined to follow *Railside*. She noted that the goal in each case was for the receiver to maximize the value of the assets for all creditors. However, she held that *Railside* did not apply because the actions of the Receiver in this case were not an incursion on the property and civil rights of Welichem because the Receiver was paying Welichem for the use of the Essential Lease Items and had paid over $200,000 to bring the Essential Lease Items up to operational standards.

[120] In my opinion, the reasoning of *T.C.T. Logistics* and *Railside* applies to the present case, and the chambers judge erred in failing to follow it. It is trite property law that one person cannot expropriate or appropriate for their own use the property of another person unless authorized by statute (such as, for instance, the *Expropriation Act*, R.S.Y. 2002, c. 81). Under s. 243, a receiver is appointed to take possession of property of an insolvent person or a bankrupt, and it does not, explicitly or implicitly, confer authority on the court to permit the receiver to make unilateral decisions to use the property of third parties.

[121] The right of a third party to possess its own property is not in conflict with the *BIA* and, hence, it is protected under s. 72(1). Explicit language would be required in the *BIA* to interfere with this right.

[122] With respect, the judge erred in concluding that the Receiver's actions were not an incursion on Welichem's property rights. The owner of property has the right to decide whether it wants to sell, lease or let another party use the property. No other party has the right to force the owner to let them buy, lease or use the property, even if the other party is prepared to pay what it considers to be fair value and even if it is considered to be "advisable" in the circumstances.

[123] On appeal, the Receiver seeks to distinguish *T.C.T. Logistics*, *Lemare Lake* and *Railside* on the basis that they all involved provincial statutes. However, that is not a basis to make the reasoning of those decisions inapplicable because s. 72(1) protects "the substantive provisions of any other law or statute relating to property and civil rights" that is not in conflict with the provisions of the *BIA* (emphasis added). The reasoning of those decisions applies as equally to common law property rights as it does to statutory rights.

[124] In deciding that s. 243(1)(c) did allow the court to authorize a receiver to use the assets of a third party without their consent, the chambers judge decided to follow the decision of *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. C.J. (Gen. Div.)) [*Curragh*], as interpreted in the recent decision of *Third Eye Capital Corporation v. Resources*

Dianor Inc./Dianor Ressources Inc., 2019 ONCA 508 [*Third Eye*]. On appeal, the Receiver argues that *Third Eye* is the governing authority.

[125] In *Curragh*, an interim receiver applied for an order that it be authorized to advertise for parties to file claims against a mine in Faro, Yukon, and that, if a claim was not made by a specified date, the claim would be barred. The issue was whether the court had the jurisdiction to make such an order pursuant to s. 47(3) of the *BIA*.

[126] *Curragh* was decided in the early days of s. 47(2)(c) and the relatively early days of the resuscitation of the use of the *CCAA*. In the early 1990s, prior to substantial amendments to it, the *CCAA* was considered to be a "bare-bones" statute and the court struggled to make it an effective mechanism to achieve successful reorganizations of financially distressed companies. Judges resorted to the use of the court's inherent jurisdiction to find authority to make orders. Over time, it was recognized that judges had stretched the bounds of the doctrine of inherent jurisdiction and that the use by judges of inherent jurisdiction was a misnomer for the exercise of statutory discretion (see Georgina R. Jackson & Janis Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*, (Toronto: Thomson Carswell, 2008) at 41).

[127] In deciding in *Curragh* that the court did have the jurisdiction to make the requested order, Justice Farley relied on the doctrine of inherent jurisdiction. After referring to several authorities, including my comments on inherent jurisdiction in *Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257 at 268 (S.C.), Farley J. reasoned as follows:

> [16] While the BIA is generally a very fleshed out piece of legislation when one compares it to the CCAA, it should be observed that s. 47(2)(*c*): "The court may direct an interim receiver ... to ... (*c*) take such other action as the court considers advisable" is not in itself a detailed code. 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."

[128] In *Third Eye*, the Ontario Court of Appeal observed that, after the enactment of s. 47(2), it became common for interim receivers to market and sell the debtor's property. The Court then discussed *Curragh*, quoting part of the above passage, and commented that, in view of the article by Justice Jackson and Professor Sarra, the reference by Farley J. to inherent jurisdiction might more appropriately be characterized as statutory jurisdiction.

[129] *Curragh* is distinguishable from this case on the basis that it dealt with the procedural matter of a claims process. It is frequently necessary in insolvency proceedings (albeit not usually in interim receiverships) to have a claims process that includes a deadline for the submission of claims.

[130] In the instant case, the chambers judge, having reviewed *Third Eye*, made it clear that she was not relying on the court's inherent jurisdiction (para. 79 of the Disclaimer Reasons). However, she did follow *Curragh* in holding that the circumstances of the case allowed the Court to enlist the Receiver "to do what justice dictates and practicality demands": Disclaimer Reasons at para. 65.

[131] The difficulty with the judge's holding is that it is apparent she considered the Court to be unfettered in doing what it considers to be dictated by justice and demanded by practicality. This is contrary to para. 51 of *T.C.T. Logistics* (quoted above). The discretion afforded by s. 243(1)(c) is constrained by s. 72(1), which preserves substantive property rights that are not in conflict with the provisions of the *BIA*.

[132] I turn now to *Third Eye*. At issue in the appeal was whether the court had the jurisdiction under s. 243(1) to grant vesting orders in receiverships and, if so, whether it was appropriate to grant an order vesting off a gross overriding royalty attached to mineral claims of the debtor that the receiver had arranged to sell. The Ontario Court of Appeal held that s. 243(1) does give jurisdiction to grant such orders on the bases that vesting orders are incidental and ancillary to a receiver's

power to sell and that the interests of efficiency dictate the ability for vesting orders to be granted in national receiverships rather than requiring them in each province in which assets are being sold. The Court did, however, note that the exercise of the jurisdiction is not unbounded: *Third Eye* at para. 82.

[133] In deciding when it is appropriate to exercise the jurisdiction to grant a vesting order, the Court made a distinction between a fee simple interest in land (i.e., an ownership interest), which should not be extinguished by a vesting order, and an interest in land that is more akin to a fixed monetary interest, which could be extinguished. In reviewing the case authorities, the Court noted the decision of *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.J.), in which the judge refused to authorize the sale of the debtor's property free of an undertaking given by the debtor that it would hold two lots in trust for third parties.

[134] In *Third Eye*, the Court held that it was not appropriate to exercise the jurisdiction under s. 243(1) to vest off the gross overriding royalties because they created an interest in the gross product extracted from the land and was not akin to a fixed monetary sum. The Court reached this conclusion despite the fact that the vesting order granted by the motions judge provided for payment to the holders of the gross overriding royalties of amounts that were agreed to represent their fair market value.

[135] I disagree with the Receiver's position that *Third Eye* is a governing authority that supports the holding of the chambers judge in this case. *Third Eye* dealt with a type of order that is commonly necessary in receiverships, and the Court held it was a necessary incident to a receiver's power to sell. It is not common in receiverships for receivers to take control of a third party's assets without their consent. Indeed, the conclusion reached by the Court that it was not appropriate to exercise the vesting order jurisdiction to extinguish ownership interests supports the position of Welichem that s. 243(1) does not give the court the jurisdiction to interfere with ownership rights of third parties.

[136] The chambers judge stated that her analysis of s. 243(1) of the *BIA* applied equally to the interpretation of s. 26 of the *Judicature Act*. Although no case authorities were cited to her, the judge stated that the same principles would apply if s. 26 was relied upon.

[137] Section 26(1) of the *Judicature Act* reads as follows:

> **Interlocutory mandamus or injunction**
>
> **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.

[138] I do not agree with the chambers judge that s. 26(1) is as equally broad as s. 243(1). Even if it were as broad, s. 26(1) is not sufficient to give the court jurisdiction to authorize a receiver to use the property of a third party without their consent. The comments of Abella J. at paras. 45 and 47 of *T.C.T. Logistics* apply to a provision like s. 26(1). The authority in s. 26(1) is not open-ended, and while it authorizes the appointment of a receiver over the property of a party, it does not, explicitly or implicitly, confer authority on the court to make unilateral determinations about the rights of third parties whose properties are not the properties over which the receiver has been appointed. Explicit language would be required to give the court the authority to interfere with the property rights of third parties.

[139] Welichem's second ground of appeal is that the judge erred in interpreting the Receivership Order so broadly as to authorize the Receiver to use the Essential Lease Items. As I mentioned above, this ground of appeal could be regarded as a threshold issue. To illustrate this point, this ground is now academic because, to the extent that the Receivership Order could be interpreted so broadly, it would have been made without jurisdiction for the above reasons dealing with the interpretation of s. 243(1)(c) of the *BIA* and s. 26 of the *Judicature Act*. However, I will express my view that the Receivership Order should not have been interpreted so broadly because it is not the normal function of orders appointing receivers to deal with the property rights of third parties. In my opinion, express language would have been

required to enable the Receivership Order to be interpreted so as to enable the Receiver to use the Essential Lease Items.

[140] Welichem's third ground of appeal is finding that the Receiver did not affirm the Master Lease. The chambers judge held there was no affirmation on the basis that it would be absurd for the Receiver to be liable for all of the obligations under the Master Lease for using only 79 of the 572 total number of the items covered by the Master Lease. While I do not agree that this is a legal reason for finding there was no affirmation, I agree with the result. As I have explained above, the proper characterization of the Disclaimer Notice is a full disclaimer of the Master Lease, coupled with an appropriation by the Receiver of the Essential Lease Items for its use. Welichem does not point to any evidence of affirmation before the Disclaimer Notice was given and does not argue that the Master Lease could not have been disclaimed because it had already been affirmed. The Receiver fully disclaimed the Master Lease, and none of its actions thereafter amounted to a withdrawal of the disclaimer and affirmation of the Master Lease.

[141] I have two final comments on this appeal. In her reasons for judgment indexed as 2020 YKSC 18, dealing with the Receiver's application to increase its borrowing charge, the chambers judge requested further submissions on whether the items covered by the Master Lease could be considered to be property of the Debtor or had become fixtures. The judge dealt to some extent with these further submissions in the second set of supplementary reasons I summarized above, but it appears that she has not made a final decision on the fixtures issue and it is unclear whether she has made a definitive decision on the financing lease issue.

[142] My first comment is that nothing I have said in these reasons should be interpreted as affecting these issues because my reasoning has been based on the premise that all of the items covered by the Master Lease are the property of Welichem.

[143] My second comment is that the judge was understandably sympathetic with the position in which the Receiver found itself and the Receiver's efforts to attempt to

maximize the recovery on the realization of the Debtor's assets. Despite whatever sympathy one may have for the Receiver's position, it is subject to general laws regarding property. To borrow the words of Chief Justice Wagner, for the majority, in *Orphan Well* SCC at para. 160, receivership "is not a license to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws" during receivership.

[144] For these reasons, I would allow Appeal No. 20-YU867 to the extent of setting aside the order dismissing Welichem's application and granting Welichem's application in part by declaring that the purported appropriation by the Receiver in the Disclaimer Notice of the right to use the Essential Lease Items is of no force or effect. I would not allow Appeal No. 20-YU867 as it relates to the aspects of Welichem's application for orders that the Receiver has affirmed the Master Lease and that the Receiver pay Welichem all amounts owing under the Master Lease since the date of the Receiver's appointment.

(d) Receiver's Application (Appeal No. 20-YU868)

[145] Welichem appeals two aspects of the order made in respect of the Receiver's application. First, it appeals the order that the Receiver's Charges were to be against the Essential Lease Items in priority to the interest of Welichem. Second, it appeals the order approving the Solicitation Plan.

[146] Welichem does not appeal the aspect of the order that the Receiver's Charges were to charge the Debtor's property in priority to Welichem and other secured creditors.

i) Receiver's Charges

[147] Welichem says that the chambers judge erred in relying upon s. 243(1) of the *BIA* and s. 26(1) of the *Judicature Act* to subject its property to the Receiver's Charges and, in the alternative, that the judge erred in applying the *Kowal* exceptions to its property.

[148] In the Receiver Application Reasons, the judge relied on s. 243(6) of the *BIA* and *Kowal* in elevating the Receiver's Charges against the Debtor's property in priority to the security held by the Debtor's secured creditors. Section 243(6) contains specific authority for the court to give a charge, ranking ahead of secured creditors, over the property of the insolvent person or bankrupt in respect of whom the receiver was appointed. The judge did not discuss the statutory or case authority she relied upon to make the ownership interest in the Essential Lease Items subject to the Receiver's Charges. She simply applied the *Kowal* exceptions to the Essential Lease Items.

[149] The judge did address the point in her second set of supplementary reasons (indexed as 2020 YKSC 26), in which she said the following:

> [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 …
>
> [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 [Disclaimer Reasons], allows for these Essential Items to be subject to the priority charge of the Receiver.

After making reference to *Curragh*, the judge stated the *Kowal* exceptions, combined with the discretion in s. 243, provided authority for the elevation of the priority of the Receiver's borrowing charge over the Essential Lease Items.

[150] As discussed in Appeal No. 20-YU866 (Disclaimer of Master Lease), the judge erred in her conclusion that s. 243(1) of the *BIA* and s. 26 of the *Judicature Act* gave the court jurisdiction to authorize the Receiver to use the Essential Lease Items, which are the property of Welichem, without Welichem's consent. The same reasoning applies in this appeal. Explicit language in the legislation would be required to give the court authority to interfere with the property rights of third parties, including the authority to give a receiver a charge for its fees and disbursements over the property of a third party without their consent. Such explicit language is contained in s. 243(6) to give such a charge priority over secured

creditors but it is limited to a charge over the property of the insolvent person or bankrupt in respect of whom the receiver was appointed.

[151] It is unnecessary to consider *Kowal* other than to note that *Kowal* dealt with giving a receiver's charges and expenses priority over secured creditors in relation to the debtor's property and that it did not deal with giving a receiver a charge against the property of third parties.

[152] For the reasons given in Appeal No. 20-YU866 (Disclaimer of Master Lease), I conclude that the judge erred in ordering that Welichem's ownership interest in the Essential Lease Items was subject to the Receiver's Charges. Similar to the comment I made in that appeal, my conclusion is based on the premise that the Essential Lease Items are the property of Welichem, and nothing I have said should be interpreted as affecting the fixtures and financing lease issues to the extent they remain outstanding.

ii) Solicitation Plan

[153] It was proposed that the Receiver would evaluate purchase bids received pursuant to the Solicitation Plan on the basis of numerous factors. Those factors included the following:

> (g) Bidder's financial strength, technical and environmental expertise and relevant experience to carry out work required to maintain regulatory compliance at the Wolverine Mine after closing of the proposed transaction;
>
> (h) Bidder's historical environmental safety record, operational experience with undertakings of similar nature and/or scale and record of successful restart of mines out of care and maintenance;
>
> (i) Strength of a bidder's proposal for posting required Reclamation Security as required by the DEMR and any other security required by any other applicable regulator;
>
> (j) Qualified Bidder's willingness and demonstrated ability to obtain and maintain any necessary regulatory approval in connection with ownership and operation or care and maintenance of the Wolverine Mine, including from but not limited to the Water Board and the DEMR;

[154] Citing *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178 at para. 32, Welichem says a receiver's obligation is to obtain the highest possible sale price for the assets. It asserts that the chambers judge erred when she stated, at para. 68 of the Receiver Application Reasons, that commercial efficacy requires an assessment of the bidder's ability to implement regulatory requirements and that obtaining the optimal price could not be separated from a consideration of the bidder's ability to comply with regulatory requirements.

[155] A receiver's obligation to obtain the highest possible sale price does not mean that it is required to accept the offer containing the highest price. A receiver is entitled to take into account the ability of the bidder to close the transaction (one of the factors listed in the Solicitation Plan for assessing bids was the bidder's probability of closing the transaction). It is not in the interests of stakeholders for the receiver to waste time, and possibly lose the interest of other bidders, in attempting to close a sale to the highest bidder if there are questions about the feasibility of the bidder satisfying conditions in its offer or arranging the funds necessary to complete the purchase.

[156] Under the *Mining Act*, no person may engage in production without a license (s. 135(1)). The Minister is not required to approve the assignment of a license unless he or she is satisfied that the assignment would not be likely to result in a contravention of the license (s. 143(2)). The Minister is entitled to require a prospective assignee to provide reclamation security (s. 139(1)) and, in assessing the risk of significant adverse environmental effect for that purpose, the Minister is entitled to consider the past performance of the prospective assignee (s. 139(2)).

[157] No bidder for the purchase of the Debtor's assets will be able to complete the transaction unless the Minister approves the assignment of the Debtor's license and the bidder is able to provide the required reclamation security. As a result, the factors that the Receiver proposes to consider are relevant to the ability of the bidder to complete the purchase of the assets. In my view, it is not inappropriate for the Receiver to take them into account in assessing bids.

[158] I am not persuaded that the judge erred in approving the Solicitation Plan as proposed by the Receiver.

iii) Disposition

[159] I would allow Appeal No. 20-YU868, in part, by deleting paragraph 4 of the order entered pursuant to the Receiver Application Reasons. I would not allow the appeal as it relates to the approval of the Solicitation Plan.

Conclusion

[160] I would allow each of Appeal Nos. 20-YU865, 20-YU866 and 20-YU868, in part, as set out in these reasons. I would allow Appeal No. 20-YU867.

[161] The parties agreed at the hearing of the appeals that it would not be appropriate for costs to be awarded in Appeal Nos. 20-YU865, 20-YU867 and 20-YU868. In contrast, Welichem and the Receiver were agreed that it would be appropriate for costs to be awarded in Appeal No. 20-YU866. As Welichem has been substantially successful in Appeal No. 20-YU866, I would award party and party costs of the appeal to Welichem.

"The Honourable Mr. Justice Tysoe"

I AGREE:

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Mr. Justice Lyons"