COURT FILE NUMBER	**25-3009380**
COURT	COURT OF KING'S BENCH OF ALBERTA, IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3 AS AMENDED
	AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ATHABASCA MINERALS INC., AMI SILICA INC., AMI AGGREGATES INC., AMI ROCKCHAIN INC., TERRASHIFT ENGINEERING LTD., 2132561 ALBERTA LTD., and 2140534 ALBERTA LTD.
APPLICANTS	ATHABASCA MINERALS INC., AMI SILICA INC., AMI AGGREGATES INC., AMI ROCKCHAIN INC., TERRASHIFT ENGINEERING LTD., 2132561 ALBERTA LTD., and 2140534 ALBERTA LTD.
DOCUMENT	**AUTHORITIES TO THE BRIEF OF THE APPLICANTS: APPROVAL OF SALE AND REVERSE VESTING ORDER**

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LIST OF AUTHORITIES

1. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.
2. *9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10.
3. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60.
4. *Target Canada Co (Re)*, 2015 ONSC 1487.
5. *Royal Bank of Canada v Soundair Corp*, 1991 CanLII 2727 (ONCA), 83 DLR (4th) 76.
6. *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, 2022 ONSC 6354.
7. In the Matter of the Notice of Intention to Make a Proposal of Payslate Inc, Supreme Court of British Columbia in Bankruptcy and Insolvency Court No. B-220504, Order of the Honourable Justice Walker, granted May 10, 2023.
8. In the Matter of the Notice of Intention to Make a Proposal of Ayanda Cannabis Corporation, Ontario Superior Court of Justice [Commercial List] Court File No. BK-22-02802344-0035, Order of the Honourable Justice Conway, granted March 1, 2022.
9. In the Matter of the Notice of Intention to Make a Proposal of Junction Craft Brewing Inc, Ontario Superior Court of Justice [Commercial List] Court File No. 31-2774500, Order of the Honourable Justice Penny, granted December 17, 2021.
10. *Quest University Canada (Re)*, 2020 BCSC 1883.
11. *Arrangement relatif à Blackrock Metals Inc*, 2022 QCCS 2828.
12. *Harte Gold Corp (Re)*, 2022 ONSC 653.
13. *Arrangement relatif à Nemaska Lithium Inc*, 2020 QCCA 1488.
14. *Fire & Flower Holdings Corp et al*, 2023 ONSC 4934.
15. *In the Matter of the Companies' Creditors Arrangement Act and In the Matter of CannaPiece Group Inc*, 2023 ONSC 841
16. *PaySlate Inc (Re)*, 2023 BCSC 608
17. *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314
18. *PaySlate Inc (Re)*, 2023 BCSC 977
19. Babe, Sam, "Recent Use of Statutory Discretion and Inherent Jurisdiction in Insolvency and Restructuring" (2020) 12 ARIL 1.

20. Jackson, Justice Georgina R & Sarra, Janis, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" (2007) 3 ARIL 1.

21. *Business Corporations Act*, RSA 2000, c B-9

22. *Validus Power Corp et al and Macquarie Equipment Finance Limited*, 2024 ONSC 250; In the Matter of a Plan of Compromise or Arrangement Involving Validus Power Corp et al, Ontario Superior Court of Justice [Commercial List] Court File No. CV-23-00705215-00CL, Order of the Honourable Justice Osborne, granted January 4, 2024.

23. *Lydian International Limited (Re)*, 2020 ONSC 4006.

TAB 1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Short Title

R.S.C. 1985, c. B-3, s. 1

s 1. Short title

Currency

1.Short title
This Act may be cited as the *Bankruptcy and Insolvency Act*.

Amendment History
1992, c. 27, s. 2

Currency
Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:21 (October 11, 2023)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Interpretation

R.S.C. 1985, c. B-3, s. 2

s 2. Definitions

Currency

2.Definitions
In this Act

"affidavit" includes statutory declaration and solemn affirmation; *("affidavit")*

"aircraft objects" [Repealed 2012, c. 31, s. 414.]

"application", with respect to a bankruptcy application filed in a court in the Province of Quebec, means a motion; *(Version anglaise seulement)*

"assignment" means an assignment filed with the official receiver; *("cession")*

"bank" means

(a) every bank and every authorized foreign bank within the meaning of section 2 of the *Bank Act*,

(b) every other member of the Canadian Payments Association established by the *Canadian Payments Act*, and

(c) every local cooperative credit society, as defined in subsection 2(1) of the Act referred to in paragraph (b), that is a member of a central cooperative credit society, as defined in that subsection, that is a member of that Association;

("banque")

"bankrupt" means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person; *("failli")*

"bankruptcy" means the state of being bankrupt or the fact of becoming bankrupt; *("faillite")*

"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a person; *("agent négociateur")*

"child" [Repealed 2000, c. 12, s. 8(1).]

"claim provable in bankruptcy,""provable claim" or **"claim provable"** includes any claim or liability provable in proceedings under this Act by a creditor; *("réclamation prouvable en matière de faillite"* ou *"réclamation prouvable")*

"collective agreement", in relation to an insolvent person, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the insolvent person and a bargaining agent; *("convention collective")*

"common-law partner", in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year; *("conjoint de fait")*

"common-law partnership" means the relationship between two persons who are common-law partners of each other; *("union de fait")*

"corporation" means a company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, insurance companies, trust companies or loan companies; *("personne morale")*

"court", except in paragraphs 178(1)(a) and (a.1) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act; *("tribunal")*

"creditor" means a person having a claim provable as a claim under this Act; *("créancier")*

"current assets" means cash, cash equivalents — including negotiable instruments and demand deposits — inventory or accounts receivable, or the proceeds from any dealing with those assets; *("actif à court terme")*

"date of the bankruptcy", in respect of a person, means the date of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment in respect of the person, or

(c) the event that causes an assignment by the person to be deemed;

("date de la faillite")

"date of the initial bankruptcy event", in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be:

(a) an assignment by or in respect of the person,

(b) a proposal by or in respect of the person,

(c) a notice of intention by the person,

(d) the first application for a bankruptcy order against the person, in any case

(i) referred to in paragraph 50.4(8)(a) or 57(a) or subsection 61(2), or

(ii) in which a notice of intention to make a proposal has been filed under section 50.4 or a proposal has been filed under section 62 in respect of the person and the person files an assignment before the court has approved the proposal,

(e) the application in respect of which a bankruptcy order is made, in the case of an application other than one referred to in paragraph (d); or

(f) proceedings under the *Companies' Creditors Arrangement Act*;

("ouverture de la faillite")

"debtor" includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt; *("débiteur")*

"director" in respect of a corporation other than an income trust, means a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called; *("administrateur")*

"eligible financial contract" means an agreement of a prescribed kind; *("contrat financier admissible")*

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

("réclamation relative à des capitaux propres")

"equity interest" means

(a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

("intérêt relatif à des capitaux propres")

"executing officer" includes a sheriff, a bailiff and any officer charged with the execution of a writ or other process under this Act or any other Act or proceeding with respect to any property of a debtor; *("huissier-exécutant")*

"financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account;

("garantie financière")

"General Rules" means the General Rules referred to in section 209; *("Règles générales")*

"income trust" means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event;

("fiducie de revenu")

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

("personne insolvable")

"legal counsel" means any person qualified, in accordance with the laws of a province, to give legal advice; *("conseiller juridique")*

"locality of a debtor" means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated;

("localité")

"Minister" means the Minister of Industry; *("ministre")*

"net termination value" means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; *("valeurs nettes dues à la date de résiliation")*

"official receiver" means an officer appointed under subsection 12(2); *("séquestre officiel")*

"person" includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person; *("personne")*

"prescribed"

(a) in the case of the form of a document that is by this Act to be prescribed and the information to be given therein, means prescribed by directive issued by the Superintendent under paragraph 5(4)(e), and

(b) in any other case, means prescribed by the General Rules;

("prescrit")

"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; *("bien")*

"proposal" means

(a) in any provision of Division I of Part III, a proposal made under that Division, and

(b) in any other provision, a proposal made under Division I of Part III or a consumer proposal made under Division II of Part III

and includes a proposal or consumer proposal, as the case may be, for a composition, for an extension of time or for a scheme or arrangement; *("proposition concordataire"* ou *"proposition")*

"public utility" includes a person or body who supplies fuel, water or electricity, or supplies telecommunications, garbage collection, pollution control or postal services; *("entreprise de service public")*

"resolution" or **"ordinary resolution"** means a resolution carried in the manner provided by section 115; *("résolution"* ou *"résolution ordinaire")*

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

(a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or

(b) any of

(i) the vendor of any property sold to the debtor under a conditional or instalment sale,

(ii) the purchaser of any property from the debtor subject to a right of redemption, or

(iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person's rights is subject to the provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights;

("créancier garanti")

Editor's Note: S.C. 2001, c. 4, s. 25 replaced the definition of "secured creditor". S.C. 2001, c. 4, s. 177(1) provides as follows:

(1) The definition of "secured creditor" in subsection 2(1) of the Bankruptcy and Insolvency Act*, as enacted by section 25 of this Act [i.e. 2001, c. 4], applies only to bankruptcies or proposals in respect of which proceedings are commenced after the coming into force of that section, but nothing in this subsection shall be construed as changing the status of any person who was a secured creditor in respect of a bankruptcy or a proposal in respect of which proceedings were commenced before the coming into force of that section.*

Immediately before the replacement, the definition of ***"secured creditor"*** *read as follows:*

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable.

"settlement" [Repealed 2005, c. 47, s. 2(1).]

"shareholder" includes a member of a corporation — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; *("actionnaire")*

"sheriff" [Repealed 2004, c. 25, s. 7(3).]

"special resolution" means a resolution decided by a majority in number and three-fourths in value of the creditors with proven claims present, personally or by proxy, at a meeting of creditors and voting on the resolution; *("résolution spéciale")*

"Superintendent" means the Superintendent of Bankruptcy appointed under subsection 5(1); *("surintendant")*

"Superintendent of Financial Institutions" means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; *("surintendant des institutions financières")*

"time of the bankruptcy", in respect of a person, means the time of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment by or in respect of the person, or

(c) the event that causes an assignment by the person to be deemed;

("moment de la faillite")

"title transfer credit support agreement" means an agreement under which an insolvent person or a bankrupt has provided title to property for the purpose of securing the payment or performance of an obligation of the insolvent person or bankrupt in respect of an eligible financial contract; *("accord de transfert de titres pour obtention de crédit")*

"transfer at undervalue" means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor; *("opération sous-évaluée")*

"trustee" or **"licensed trustee"** means a person who is licensed or appointed under this Act. *("syndic"* ou *"syndic autorisé")*

R.S.C. 1985, c. 31 (1st Supp.), s. 69; 1992, c. 27, s. 3; 1995, c. 1, s. 62(1)(a); 1997, c. 12, s. 1; 1999, c. 28, s. 146; 1999, c. 31, s. 17; 2000, c. 12, s. 8; 2001, c. 4, s. 25; 2001, c. 9, s. 572; 2004, c. 25, s. 7(1), (3)-(8), (10); 2005, c. 3, s. 11; 2005, c. 47, s. 2(1), (3)-(5); 2007, c. 29, s. 91; 2007, c. 36, s. 1; 2012, c. 31, s. 414; 2018, c. 10, s. 82

Note:

S.C. 2000, c. 12, s. 8, amended s. 2(1) by repealing the definition of "child", and adding definitions of "common law partner" and "common law partnership". Pursuant to S.C. 2000, c. 12, s. 21, the amendments apply only to bankruptcies, proposals and receiverships commenced after the coming into force of S.C. 2000, c. 12, s. 21 on July 31, 2000. Prior to its repeal, the definition of "child" read as follows:

"child" includes a child born out of marriage;

Currency

Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:21 (October 11, 2023)

End of Document

R.S.C. 1985, c. B-3, s. 50

s 50.

Currency

50.

50(1)Who may make a proposal

Subject to subsection (1.1), a proposal may be made by

(a) an insolvent person;

(b) a receiver, within the meaning of subsection 243(2), but only in relation to an insolvent person;

(c) a liquidator of an insolvent person's property;

(d) a bankrupt; and

(e) a trustee of the estate of a bankrupt.

50(1.1)Where proposal may not be made

A proposal may not be made under this Division with respect to a debtor in respect of whom a consumer proposal has been filed under Division II until the administrator under the consumer proposal has been discharged.

50(1.2)To whom proposal made

A proposal must be made to the creditors generally, either as a mass or separated into classes as provided in the proposal, and may also be made to secured creditors in respect of any class or classes of secured claim, subject to subsection (1.3).

50(1.3)Idem

Where a proposal is made to one or more secured creditors in respect of secured claims of a particular class, the proposal must be made to all secured creditors in respect of secured claims of that class.

50(1.4)Classes of secured claims

Secured claims may be included in the same class if the interests or rights of the creditors holding those claims are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts giving rise to the claims;

(b) the nature and rank of the security in respect of the claims;

(c) the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies;

(d) the treatment of the claims under the proposal, and the extent to which the claims would be paid under the proposal; and

(e) such further criteria, consistent with those set out in paragraphs (a) to (d), as are prescribed.

50(1.5)Court may determine classes
The court may, on application made at any time after a notice of intention or a proposal is filed, determine, in accordance with subsection (1.4), the classes of secured claims appropriate to a proposal, and the class into which any particular secured claim falls.

50(1.6)Creditors' response
Subject to section 50.1 as regards included secured creditors, any creditor may respond to the proposal as made to the creditors generally, by filing with the trustee a proof of claim in the manner provided for in

(a) sections 124 to 126, in the case of unsecured creditors; or

(b) sections 124 to 134, in the case of secured creditors.

50(1.7)Effect of filing proof of claim
Hereinafter in this Division, a reference to an unsecured creditor shall be deemed to include a secured creditor who has filed a proof of claim under subsection (1.6), and a reference to an unsecured claim shall be deemed to include that secured creditor's claim.

50(1.8)Voting
All questions relating to a proposal, except the question of accepting or refusing the proposal, shall be decided by ordinary resolution of the creditors to whom the proposal was made.

50(2)Documents to be filed
Subject to section 50.4, proceedings for a proposal shall be commenced, in the case of an insolvent person, by filing with a licensed trustee, and in the case of a bankrupt, by filing with the trustee of the estate,

(a) a copy of the proposal in writing setting out the terms of the proposal and the particulars of any securities or sureties proposed, signed by the person making the proposal and the proposed sureties if any; and

(b) the prescribed statement of affairs.

50(2.1)Filing of documents with the official receiver
Copies of the documents referred to in subsection (2) must, at the time the proposal is filed under subsection 62(1), also be filed by the trustee with the official receiver in the locality of the debtor.

50(3)Approval of inspectors
A proposal made in respect of a bankrupt shall be approved by the inspectors before any further action is taken thereon.

50(4)Proposal, etc., not to be withdrawn
No proposal or any security, guarantee or suretyship tendered with the proposal may be withdrawn pending the decision of the creditors and the court.

50(4.1)Assignment not prevented
Subsection (4) shall not be construed as preventing an insolvent person in respect of whom a proposal has been made from subsequently making an assignment.

50(5)Duties of trustee
The trustee shall make or cause to be made such an appraisal and investigation of the affairs and property of the debtor as to enable the trustee to estimate with reasonable accuracy the financial situation of the debtor and the cause of the debtor's financial difficulties or insolvency and report the result thereof to the meeting of the creditors.

50(6)Trustee to file cash-flow statement
The trustee shall, when filing a proposal under subsection 62(1) in respect of an insolvent person, file with the proposal

(a) a statement — or a revised cash-flow statement if a cash-flow statement had previously been filed under subsection 50.4(2) in respect of that insolvent person — (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the person making the proposal, reviewed for its reasonableness by the trustee and signed by the trustee and the person making the proposal;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the person making the proposal regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the person making the proposal.

50(7)Creditors may obtain statement
Subject to subsection (8), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

50(8)Exception
The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (7) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

50(9)Trustee protected
If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, he is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

50(10)Trustee to monitor and report
Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a proposal in respect of an insolvent person shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the proposal until the proposal is approved by the court or the insolvent person becomes bankrupt, and shall

(a) file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at any time that the court may order; and

(a.1) send a report about the material adverse change to the creditors without delay after ascertaining the change; and

(b) send, in the prescribed manner, a report on the state of the insolvent person's business and financial affairs — containing the trustee's opinion as to the reasonableness of a decision, if any, to include in a proposal a provision that sections 95 to 101 do not apply in respect of the proposal and containing the prescribed information, if any — to the creditors and the official receiver at least 10 days before the day on which the meeting of creditors referred to in subsection 51(1) is to be held.

50(11)Report to creditors
An interim receiver who has been directed under subsection 47.1(2) to carry out the duties set out in subsection (10) in substitution for the trustee shall deliver a report on the state of the insolvent person's business and financial affairs, containing

any prescribed information, to the trustee at least fifteen days before the meeting of creditors referred to in subsection 51(1), and the trustee shall send the report to the creditors and the official receiver, in the prescribed manner, at least ten days before the meeting of creditors referred to in that subsection.

50(12)Court may declare proposal as deemed refused by creditors
The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1 or a creditor, at any time before the meeting of creditors, declare that the proposal is deemed to have been refused by the creditors if the court is satisfied that

(a) the debtor has not acted, or is not acting, in good faith and with due diligence;

(b) the proposal will not likely be accepted by the creditors; or

(c) the creditors as a whole would be materially prejudiced if the application under this subsection is rejected.

50(12.1)Effect of declaration
If the court declares that the proposal is deemed to have been refused by the creditors, paragraphs 57(a) to (c) apply.

50(13)Claims against directors — compromise
A proposal made in respect of a corporation may include in its terms provision for the compromise of claims against directors of the corporation that arose before the commencement of proceedings under this Act and that relate to the obligations of the corporation where the directors are by law liable in their capacity as directors for the payment of such obligations.

50(14)Exception
A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors arising from contracts with one or more directors; or

(b) are based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors.

50(15)Powers of court
The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be just and equitable in the circumstances.

50(16)Application of other provisions
Subsection 62(2) and section 122 apply, with such modifications as the circumstances require, in respect of claims against directors compromised under a proposal of a debtor corporation.

50(17)Determination of classes of claims
The court, on application made at any time after a proposal is filed, may determine the classes of claims of claimants against directors and the class into which any particular claimant's claim falls.

50(18)Resignation or removal of directors
Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the corporation shall be deemed to be a director for the purposes of this section.

Amendment History
1992, c. 27, s. 18; 1997, c. 12, s. 30(1)-(4), (6); 2001, c. 4, s. 27; 2004, c. 25, s. 32(1), (2); 2005, c. 47, s. 34; 2007, c. 36, s. 16

Currency
Federal English Statutes reflect amendments current to December 6, 2023

Federal English Regulations Current to Gazette Vol. 157:21 (October 11, 2023)

End of Document

R.S.C. 1985, c. B-3, s. 50.4

s 50.4

Currency

50.4

50.4(1)Notice of intention

Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

50.4(2)Certain things to be filed

Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

50.4(3)Creditors may obtain statement

Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

50.4(4)Exception

The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

50.4(5)Trustee protected

If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

50.4(6)Trustee to notify creditors
Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

50.4(7)Trustee to monitor and report
Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

50.4(8)Where assignment deemed to have been made
Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

50.4(9)Extension of time for filing proposal
The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

50.4(10)Court may not extend time
Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

50.4(11)Court may terminate period for making proposal
The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

Amendment History
1992, c. 27, s. 19; 1997, c. 12, s. 32(1); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6

Currency
Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:21 (October 11, 2023)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 64

s 64.

Currency

64.

64(1)Removal of directors

The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor in respect of whom a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1) if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable proposal being made in respect of the debtor or is acting or is likely to act inappropriately as a director in the circumstances.

64(2)Filling vacancy

The court may, by order, fill any vacancy created under subsection (1).

Amendment History

1999, c. 31, s. 20; 2005, c. 47, s. 42

Currency

Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:21 (October 11, 2023)

End of Document

R.S.C. 1985, c. B-3, s. 65.13

s 65.13

Currency

65.13

65.13(1)Restriction on disposition of assets

An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

65.13(2)Individuals

In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

65.13(3)Notice to secured creditors

An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

65.13(4)Factors to be considered

In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

65.13(5)Additional factors — related persons

If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

65.13(6)Related persons

For the purpose of subsection (5), a person who is related to the insolvent person includes

(a) a director or officer of the insolvent person;

(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

(c) a person who is related to a person described in paragraph (a) or (b).

65.13(7)Assets may be disposed of free and clear

The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

65.13(8)Restriction — employers

The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

65.13(9)Restriction — intellectual property

If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Amendment History

2005, c. 47, s. 44; 2007, c. 36, s. 27; 2018, c. 27, s. 266

Currency

Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:21 (October 11, 2023)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part VII — Courts and Procedure(ss. 183-197)
Jurisdiction of Courts

R.S.C. 1985, c. B-3, s. 183

s 183.

Currency

183.

183(1)Courts vested with jurisdiction

The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed 2001, c. 4, s. 33(2).]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

(e) in the Province of Prince Edward Island, the Supreme Court of the Province;

(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench of the Province;

(g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

183(1.1)Superior Court jurisdiction in the Province of Quebec

In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

183(2)Courts of appeal — common law provinces

Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

183(2.1)Court of Appeal of the Province of Quebec

In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with the power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

183(3)Supreme Court of Canada

The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

Amendment History

R.S.C. 1985, c. 27 (2nd Supp.), s. 10 (Sched., item 2); 1990, c. 17, s. 3; 1993, c. 28, s. 78 (Sched. III, item 6) [Repealed 1999, c. 3, s. 12 (Sched., item 3).]; 1998, c. 30, s. 14(a); 1999, c. 3, s. 15; 2001, c. 4, s. 33(2), (3); 2002, c. 7, s. 83; 2015, c. 3, s. 9

Currency

Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:21 (October 11, 2023)

End of Document

TAB 2

9354-9186 Québec inc. and 9354-9178 Québec inc. *Appellants*

v.

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier *Respondents*

and

Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals *Interveners*

- and -

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited) *Appellants*

v.

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier *Respondents*

and

9354-9186 Québec inc. et 9354-9178 Québec inc. *Appelantes*

c.

Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier *Intimés*

et

Ernst & Young Inc., IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited), Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)), Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation *Intervenants*

- et -

IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) *Appelantes*

c.

Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier *Intimés*

et

Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc.,
Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals *Interveners*

Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc.,
Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation
Intervenants

INDEXED AS: 9354-9186 QUÉBEC INC. *v.* CALLIDUS CAPITAL CORP.

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.

Reasons delivered: May 8, 2020.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.

RÉPERTORIÉ : 9354-9186 QUÉBEC INC. *c.* CALLIDUS CAPITAL CORP.

2020 CSC 10

N° du greffe : 38594.

Audition et jugement : 23 janvier 2020.

Motifs déposés : 8 mai 2020.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Rowe et Kasirer.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Bankruptcy and insolvency — Discretionary authority of supervising judge in proceedings under Companies' Creditors Arrangement Act — Appellate review of decisions of supervising judge — Whether supervising judge has discretion to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose — Whether supervising judge can approve third party litigation funding as interim financing — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2.

Faillite et insolvabilité — Pouvoir discrétionnaire du juge surveillant dans une instance introduite sous le régime de la Loi sur les arrangements avec les créanciers des compagnies — Contrôle en appel des décisions du juge surveillant — Le juge surveillant a-t-il le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement si ce créancier agit dans un but illégitime? — Le juge surveillant peut-il approuver le financement de litige par un tiers à titre de financement temporaire? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11, 11.2.

The debtor companies filed a petition for the issuance of an initial order under the *Companies' Creditors Arrangement Act* ("*CCAA*") in November 2015. The petition succeeded, and the initial order was issued by a supervising judge, who became responsible for overseeing the proceedings. Since then, substantially all of the assets of the debtor companies have been liquidated, with the notable exception of retained claims for damages against the companies' only secured creditor. In September 2017, the secured creditor proposed a plan of arrangement, which later failed to receive sufficient creditor support. In February 2018, the secured creditor proposed another, virtually identical, plan of arrangement. It also sought the supervising judge's permission to vote on this new plan in the same class as the debtor companies' unsecured creditors, on the basis that its security was worth nil. Around the

En novembre 2015, les compagnies débitrices déposent une requête en délivrance d'une ordonnance initiale sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* »). La requête est accueillie, et l'ordonnance initiale est rendue par un juge surveillant, qui est chargé de surveiller le déroulement de l'instance. Depuis, la quasi-totalité des éléments d'actif de la compagnie débitrice ont été liquidés, à l'exception notable des réclamations réservées en dommages-intérêts contre le seul créancier garanti des compagnies. En septembre 2017, le créancier garanti propose un plan d'arrangement, qui n'obtient pas subséquemment l'appui nécessaire des créanciers. En février 2018, le créancier garanti propose un autre plan d'arrangement, presque identique au premier. Il demande aussi au juge surveillant la permission de voter sur ce nouveau plan dans la même catégorie que

(1) The Evolving Nature of *CCAA* Proceedings

[39] The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

[40] Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

(1) La nature évolutive des procédures intentées sous le régime de la *LACC*

[39] La *LACC* est l'une des trois principales lois canadiennes en matière d'insolvabilité. Les autres sont la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985 c. B-3 (« *LFI* »), qui traite de l'insolvabilité des personnes physiques et des sociétés, et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985 c. W-11 (« *LLR* »), qui traite de l'insolvabilité des institutions financières et de certaines autres personnes morales, telles que les compagnies d'assurance (*LLR*, par. 6(1)). Bien que la *LACC* et la *LFI* permettent toutes deux la restructuration de compagnies insolvables, l'accès à la *LACC* est limité aux sociétés débitrices qui sont aux prises avec des réclamations dont le montant total est supérieur à 5 millions de dollars (*LACC*, par. 3(1)).

[40] Ensemble, les lois canadiennes sur l'insolvabilité poursuivent un grand nombre d'objectifs réparateurs généraux qui témoignent de la vaste gamme des conséquences potentiellement « catastrophiques » qui peuvent découler de l'insolvabilité (*Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271, par. 1). Ces objectifs incluent les suivants : régler de façon rapide, efficace et impartiale l'insolvabilité d'un débiteur; préserver et maximiser la valeur des actifs d'un débiteur; assurer un traitement juste et équitable des réclamations déposées contre un débiteur; protéger l'intérêt public; et, dans le contexte d'une insolvabilité commerciale, établir un équilibre entre les coûts et les bénéfices découlant de la restructuration ou de la liquidation d'une compagnie (J. P. Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », dans J. P. Sarra et B. Romaine, dir., *Annual Review of Insolvency Law 2016* (2017), 9, p. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2e éd. 2013), p. 4-5 et 14; Comité sénatorial permanent des banques et du commerce, *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2003), p. 13-14; R. J. Wood, *Bankruptcy and Insolvency Law* (2e éd. 2015), p. 4-5).

[41] Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

[42] That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 ("*Essar*"), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

[41] Parmi ces objectifs, la *LACC* priorise en général le fait d'« éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable » (*Century Services*, par. 70). C'est pourquoi les affaires types qui relèvent de cette loi ont historiquement facilité la restructuration de l'entreprise débitrice qui n'a pas encore déposé de proposition en la maintenant dans un état opérationnel, c'est-à-dire en permettant qu'elle poursuive ses activités. Lorsqu'une telle restructuration n'était pas possible, on considérait qu'il fallait alors procéder à la liquidation par voie de mise sous séquestre ou sous le régime de la *LFI*. C'est précisément le résultat qui était recherché dans l'affaire *Century Services* (voir par. 14).

[42] Cela dit, la *LACC* est fondamentalement une loi sur l'insolvabilité, et à ce titre, elle a aussi [TRADUCTION] « comme objectifs simultanés de maximiser le recouvrement au profit des créanciers, de préserver la valeur d'exploitation dans la mesure du possible, de protéger les emplois et les collectivités touchées par les difficultés financières de l'entreprise [. . .] et d'améliorer le système de crédit de manière générale » (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 14; voir aussi *Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 (« *Essar* »), par. 103). Afin d'atteindre ces objectifs, les procédures intentées sous le régime de la *LACC* ont évolué de telle sorte qu'elles permettent des solutions qui évitent l'émergence, sous une forme restructurée, de la société débitrice qui existait avant le début des procédures, mais qui impliquent plutôt une certaine forme de liquidation des actifs du débiteur sous le régime même de la Loi (Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibium for Insolvency Law », p. 19-21). Ces cas, qualifiés de [TRADUCTION] « procédures de liquidation sous le régime de la *LACC* », sont maintenant courants dans le contexte de la *LACC* (voir *Third Eye Capital Corporation c. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, par. 70).

[43] Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

[43] Les procédures de liquidation sous le régime de la *LACC* revêtent différentes formes et peuvent, entre autres, inclure la vente de la société débitrice à titre d'entreprise en activité; la vente « en bloc » des éléments d'actif susceptibles d'être exploités par un acquéreur; une liquidation partielle de l'entreprise ou une réduction de ses activités; ou encore une vente de ses actifs élément par élément (B. Kaplan, « Liquidating CCAAs : Discretion Gone Awry? » dans J. P. Sarra, dir., *Annual Review of Insolvency Law* (2008), 79, p. 87-89). Les résultats commerciaux ultimement obtenus à l'issue des procédures de liquidation introduites sous le régime de la *LACC* sont eux aussi variés. Certaines procédures peuvent avoir pour résultat la continuité des activités de la débitrice sous la forme d'une autre entité viable (p. ex., les sociétés liquidées dans *Indalex* et *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (C.J. Ont., Div. gén.)), alors que d'autres peuvent simplement aboutir à la vente des actifs et de l'inventaire sans donner naissance à une nouvelle entité (p. ex., la procédure en cause dans *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, par. 7 et 31). D'autres encore, comme dans le dossier qui nous occupe, peuvent donner lieu à la vente de la plupart des actifs de la débitrice en vue de la poursuite de son activité, laissant à la débitrice et aux parties intéressées le soin de s'occuper des actifs résiduaires.

[44] *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

[44] Les tribunaux chargés de l'application de la *LACC* ont d'abord commencé à approuver ces formes de liquidation en exerçant le vaste pouvoir discrétionnaire que leur confère la Loi. L'émergence de cette pratique a fait l'objet de critiques, essentiellement parce qu'elle semblait incompatible avec l'objectif de « restructuration » de la *LACC* (voir, p. ex., *Uti Energy Corp. c. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, par. 15-16, conf. 1999 ABQB 379, 11 C.B.R. (4th) 204, par. 40-43; A. Nocilla, « The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada » (2014), 56 *Rev. can. dr. comm.* 73, p. 88-92).

[45] However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor

[45] Toutefois, depuis que l'art. 36 de la *LACC* est entré en vigueur en 2009, les tribunaux l'utilisent pour consentir à une liquidation sous le régime de la *LACC*. L'article 36 confère aux tribunaux le pouvoir

TAB 3

Century Services Inc. *Appellant*

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada *Respondent*

INDEXED AS: CENTURY SERVICES INC. *v.* CANADA (ATTORNEY GENERAL)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. *Appelante*

c.

Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

RÉPERTORIÉ : CENTURY SERVICES INC. *c.* CANADA (PROCUREUR GÉNÉRAL)

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Mary I. A. Buttery, *Owen J. James* and *Matthew J. G. Curtis*, for the appellant.

Gordon Bourgard, *David Jacyk* and *Michael J. Lema*, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

[1] DESCHAMPS J. — For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency*

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

Mary I. A. Buttery, *Owen J. James* et *Matthew J. G. Curtis*, pour l'appelante.

Gordon Bourgard, *David Jacyk* et *Michael J. Lema*, pour l'intimé.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] LA JUGE DESCHAMPS — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la *LACC* et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la *LACC*, et non la *LTA*, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la *LACC* et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

[15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[16] Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors*

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

[23] Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

[24] With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

[25] Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

les créanciers en les mettant tous sur le même pied. Cela évite le risque de voir un créancier plus combatif obtenir le paiement de ses créances sur l'actif limité du débiteur pendant que les autres créanciers tentent d'arriver à une transaction. La *LACC* et la *LFI* autorisent toutes deux pour cette raison le tribunal à ordonner la suspension de toutes les actions intentées contre le débiteur pendant qu'on cherche à conclure une transaction.

[23] Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. De plus, l'une des caractéristiques importantes de la réforme dont ces deux lois ont fait l'objet depuis 1992 est la réduction des priorités de la Couronne (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73 et 125; L.C. 2000, ch. 30, art. 148; L.C. 2005, ch. 47, art. 69 et 131; L.C. 2009, ch. 33, art. 25; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*).

[24] Comme les régimes de restructuration parallèles de la *LACC* et de la *LFI* constituent désormais une caractéristique reconnue dans le domaine du droit de l'insolvabilité, le travail de réforme législative contemporain a principalement visé à harmoniser, dans la mesure du possible, les aspects communs aux deux régimes et à privilégier la réorganisation plutôt que la liquidation (voir la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta L.R. (4th) 192, par. 19).

[25] Ayant à l'esprit le contexte historique de la *LACC* et de la *LFI*, je vais maintenant aborder la première question en litige.

TAB 4

CITATION: Target Canada Co. (Re), 2015 ONSC 1487
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-03-05

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jeremy Dacks, Tracy Sandler* and *Shawn Irving,* for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Jay Swartz, for the Target Corporation

D.J. Miller, for Oxford Properties Group Inc.

Jeff Carhart, for Hamilton Beach Corp. et al.

Alan Mark and *Melaney Wagner*, for the Monitor, Alvarez & Marsal Inc.

Leonard Loewith, for Solutions 2 Go et al.

Aubrey Kauffman, for Ivanhoe Cambridge Inc.

Ruzbeh Hosseini, for Amskor Corporation

Sean Zweig, for RioCan Management Inc. and Kingsett Capital Inc.

Lou Brzezinski and *Alexandra Teoderescu*, for Thyssenkrupp Elevator (Canada) Limited, Advitek, Universal Studios Canada Inc., Nintendo of Canada, Ltd., and Bentall Kennedy (Canada) LP Group

Melvyn L. Solmon, for ISSI Inc.

HEARD and RLEASED: March 5, 2015

ENDORSEMENT

[1] On February 11, 2015, Target Canada Co. ("TCC") received Court approval to conduct a real estate sales process (the "Real Property Portfolio Sales Process") to seek qualified purchasers for TCC's leases and other real property, to be conducted by the Target Canada Entities in consultation with their financial advisor, Lazard Fréres & Co., LLC (the "Financial Advisor") and their real estate advisor, Northwest Atlantic (Canada) Co. (the "Broker"), with the supervision and oversight of the Monitor.

[2] The Applicants bring this motion to approve a lease transaction agreement (the "Lease Transaction Agreement") that has been negotiated in response to an unsolicited bid by certain landlords (Oxford Properties Corporation ("Oxford") and Ivanhoe Cambridge Inc. ("IC") and certain others, together the "Landlord Entities").

[3] Under the Lease Transaction Agreement, TCC will surrender its interest in eleven leases (the "Eleven Leases") to the Landlord Entities in consideration for the purchase price and certain other benefits.

[4] The Target Entities decided, after considering the likely benefits and risks associated with the unsolicited offer by the Landlord Entities, to exercise their right under the terms of the Real Property Portfolio Sales Process to withdraw the applicable leases from the bidding and auction phases of the process. The Target Canada Entities contend that the decision to exercise this right was made based on the informed business judgment of the Target Canada Entities with advice from the Financial Advisor and the Broker, in consultation and with the approval of the Monitor.

[5] The Applicants submit that the process by which the decision was made to pursue a potential transaction with the Landlord Entities, and withdraw the Eleven Leases from the bidding and auction phases of the Real Property Portfolio Sales Process, was fair and reasonable in light of the facts and circumstances. Further, they submit that the process by which the benefits of the Lease Transaction Agreement were evaluated, and the Lease Transaction Agreement was negotiated, was reasonable in the circumstances.

[6] The Applicants contend that the purchase price being offered by the Landlord Entities is in the high-range of value for the Eleven Leases. As such, the Applicants contend that the price is reasonable, taking into account the market value of the assets. Moreover, the Applicants submit that the estate of the Target Canada Entities will benefit not only from the value represented by the purchase price, but from the release of claims. That includes the potentially material claims that the Landlord Entities may otherwise have been entitled to assert against the estate of the Target Canada Entities, if some or all of the Eleven Leases had been purchased by a third party or disclaimed by the Target Canada Entities.

[7] The Target Canada Entities submit that it is in their best interests and that of their stakeholders to enter into the Lease Transaction Agreement. They also rely on the Monitor's

approval of and consent to the Target Canada Entities entering into the Lease Transaction Agreement.

[8] The Target Canada Entities are of the view that the Lease Transaction Agreement secures premium pricing for the Eleven Leases in a manner that is both certain and efficient, while allowing the Target Canada Entities to continue the Inventory Liquidation Process for the benefit of all stakeholders and to honour their commitments to the pharmacy franchisees.

[9] The terms of the Lease Transaction Agreement are set out in the affidavit of Mark J. Wong, sworn February 27, 2015, and are also summarized in the Third Report of the Monitor. The Lease Transaction Agreement is also summarized in the factum submitted by the Applicants.

[10] If approved, the closing of the Lease Transaction Agreement is scheduled for March 6, 2015.

[11] One aspect of the Lease Transaction Agreement requires specific mention. Almost all of TCC's retail store leases were subleased to TCC Propco. The Premises were then subleased back to TCC. The Applicants contend that these arrangements were reflected in certain agreements between the parties (the "TCC Propco Agreements"). Mr. Wong states in his affidavit that it is a condition of the Lease Transaction Agreement that TCC terminate any subleases prior to closing. TCC will also wind-down other arrangements with TCC Propco.

[12] The Applicants contend that the TCC Propco Agreements have been terminated in accordance with their terms and an early termination payment is now owing as a result of this wind-down by TCC to TCC Propco, which, they contend, will be addressed within a claims process to be approved in due course by the Court. The claim of TCC Propco is not insignificant. This intercompany claim is expected to be in the range of $1.9 billion.

[13] The relief requested by the Target Canada Entities was not opposed.

[14] Section 36 of the CCAA sets out the applicable legal test for obtaining court approval where a debtor company seeks to sell assets outside the ordinary course of business during a CCAA proceeding.

[15] In deciding whether to grant authorization, pursuant to section 36(3), the Court is to consider, among other things:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the Monitor approved the process leading to the proposed sale or disposition;

(c) whether the Monitor filed with the Court a report stating that in its opinion, the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the asset is reasonable and fair, taking into account its market value.

[16] The factors listed in section 36(3) are not intended to be exhaustive, nor are they intended to be a formulaic check list that must be followed in every sale transaction under the CCAA (see: *Re White Birch Paper Holding Co.*, 2010 QCCS 4915; leave to appeal refused 2010 QCCA 1950.

[17] The factors overlap, to a certain degree, with the *Soundair* factors that were applied in approving sale transactions under pre-amendment CCAA case law (see: *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 ONSC 2870, citing *Royal Bank* v. *Soundair Corp.*, [1991] O.J. No. 1137 (C.A.) ("Soundair")).

[18] I am satisfied, having reviewed the record and hearing submissions, that -- taking into account the factors listed in s. 36(3) of the CCAA -- the Lease Transaction Agreement should be approved. In arriving at this conclusion, I have taken the following into account: in the absence of any indication that the Target Canada Entities have acted improvidently, the informed business judgment of the Target Canada Entities (as supported by the advice of the Financial Advisor and the consent of the Monitor) that the Lease Transaction Agreement is in the best interests of the Target Canada Entities and their stakeholders is entitled to deference by this Court.

[19] I am also satisfied that the process for achieving the Sale Transaction was fair and reasonable in the circumstances. It is also noted that the Monitor concurs with the assessment of the Target Canada Entities.

[20] The Target Canada Entities, the Monitor and the Financial Advisor are all of the view that the consideration to be received by TCC is reasonable, taking into account the market value of the Eleven Leases.

[21] I am also satisfied that the Transaction is in the best interest of the stakeholders.

[22] The Applicants also submit that all of the other statutory requirements for obtaining relief under section 36 of the CCAA have been satisfied. Having reviewed the factum and, in particular, paragraphs 46 and 47, I accept this submission of the Applicants.

[23] As referenced above, the relief requested by the Applicants was not opposed. However, it is necessary to consider this non-opposition in the context of the TCC Propco Agreements. The Applicants contend that the TCC Propco Agreements have been terminated in accordance with their terms, and that the early termination payment now owing as a result of this wind-down

by TCC to TCC Propco will be addressed within a claims process to be approved in due course as part of the CCAA proceedings.

[24] The Monitor's consent to the entering into of the Termination Agreement, and the filing of the Third Report, do not constitute approval by the Monitor as to the validity, ranking or quantum of the intercompany claim. Further, when the intercompany claims are submitted in the claims process to be approved the Court, the Monitor will prepare a report thereon and make it available to the Court and all creditors. The creditors will have an opportunity to seek any remedy or relief with respect to the intercompany claim in the claims process.

[25] In my view, it is necessary to stress the importance of the role of the Monitor in any assessment of the intercompany claim. It is appropriate for the Monitor to take an active and independent role in the review process, such that all creditors are satisfied with respect to the transparency of the process.

[26] Finally, it is noted that the actual consideration is not disclosed in the public record.

[27] The Applicants are of the view that the specific information relating to the consideration to be paid by the Landlord Entities and the valuation analysis of the Eleven Leases is sensitive commercial information, the disclosure of which could be harmful to stakeholders.

[28] The Applicants have requested that Confidential Appendices "A" and "B" be sealed. Confidential Appendix "A" contains an unredacted version of the Lease Transaction Agreement. The Applicants request that this document be sealed until the closing of the transaction. The Applicants request that the transaction and valuation analysis as contained in Appendix "B" be sealed pending further order.

[29] No party objected to the sealing requests.

[30] Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, I am satisfied that it is appropriate, in the circumstances, to grant the sealing relief as requested by the Applicants.

[31] In the result, the motion is granted. The approval and vesting order in respect of the Lease Transaction Agreement has been signed.

_____

Regional Senior Justice G.B. Morawetz

Date: March 5, 2015

TAB 5

Royal Bank of Canada v. Soundair Corp., Canadian Pension Capital Ltd. and Canadian Insurers Capital Corp.

Indexed as: Royal Bank of Canada v. Soundair Corp. (C.A.)

4 O.R. (3d) 1
[1991] O.J. No. 1137
Action No. 318/91

ONTARIO
Court of Appeal for Ontario
Goodman, McKinlay and Galligan JJ.A.
July 3, 1991

Debtor and creditor -- Receivers -- Court-appointed receiver accepting offer to purchase assets against wishes of secured creditors -- Receiver acting properly and prudently -- Wishes of creditors not determinative -- Court approval of sale confirmed on appeal.

Air Toronto was a division of Soundair. In April 1990, one of Soundair's creditors, the Royal Bank, appointed a receiver to operate Air Toronto and sell it as a going concern. The receiver was authorized to sell Air Toronto to Air Canada, or, if that sale could not be completed, to negotiate and sell Air Toronto to another person. Air Canada made an offer which the receiver rejected. The receiver then entered into negotiations with Canadian Airlines International (Canadian); two subsidiaries of Canadian, Ontario Express Ltd. and Frontier Airlines Ltd., made an offer to purchase on March 6, 1991 (the OEL offer). Air Canada and a creditor of Soundair, CCFL, presented an offer to purchase to the receiver on March 7, 1991 through 922, a company formed for that purpose (the 922 offer). The receiver declined the 922 offer because it contained an unacceptable condition and accepted the OEL offer. 922 made a

second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

Held, the appeal should be dismissed.

Per Galligan J.A.: When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer, and should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. The decision to sell to OEL was a sound one in the circumstances faced by the receiver on March 8, 1991. Prices in other offers received after the receiver has agreed to a sale have relevance only if they show that the price contained in the accepted offer was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. If they do not do so, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If the 922 offer was better than the OEL offer, it was only marginally better and did not lead to an inference that the disposition strategy of the receiver was improvident.

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no proof that if an offering memorandum had been widely

distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

Per McKinlay J.A. (concurring in the result): While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the assets involved, it was not a procedure which was likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): The fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C.

(2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (H.C.J.); Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473 (C.A.); Selkirk (Re) (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); Selkirk (Re) (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.)

Statutes referred to

Employment Standards Act, R.S.O. 1980, c. 137
Environmental Protection Act, R.S.O. 1980, c. 141

APPEAL from the judgment of the General Division, Rosenberg J., May 1, 1991, approving the sale of an airline by a receiver.

J.B. Berkow and Steven H. Goldman, for appellants.

John T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and Lawrence E. Ritchie, for Royal Bank of Canada.

Sean F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., receiver of Soundair Corp., respondent.

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

GALLIGAN J.A.:-- This is an appeal from the order of Rosenberg J. made on May 1, 1991 (Gen. Div.). By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

It is necessary at the outset to give some background to the dispute. Soundair Corporation (Soundair) is a corporation

engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the Royal Bank) is owed at least $65,000,000. The appellants Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively called CCFL) are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50,000,000 on the winding-up of Soundair.

On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the receiver) as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person ...

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale

to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers whether direct or indirect. They were Air Canada and Canadian Airlines International.

It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1991. On March 6, 1991, the receiver received an offer from Ontario

Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited (922) for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the 922 offers.

The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

IN AGREEING TO SELL TO OEL?

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

The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person". The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

As did Rosenberg J., I adopt as correct the statement made by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.R., of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

I intend to discuss the performance of those duties separately.

1. Did the receiver make a sufficient effort to get the best price and did it act providently?

Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

When the receiver got the OEL offer on March 6, 1991, it was over ten months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

TAB 6

CITATION: Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al., 2022 ONSC 6354
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20221114

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED	)	*Jeremy Dacks and Marc Wasserman*, Counsel to the Just Energy Group
	)	*Tim Pinos, Ryan Jacobs and Alan Merskey*, Canadian Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC
– and –	)	
	)	
IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC , HUDSON PARENT HOLDINGS LLC, DRAG	)	*David H. Botter and Sarah Link Schultz*, U.S. Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC
	)	*Heather L. Meredith and James D. Gage*, Canadian Counsel to the Agent and the Credit Facility Lenders
	)	*Howard A. Gorman and Ryan E. Manns*, Counsel for Shell Energy North American (Canada) Inc. and Shell Energy North America (U.S.)
	)	*Danielle Glatt*, Counsel to U.S. Counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in *Donin et al. v. Just Energy Group Inc. et al.* and Counsel to U.S. Counsel for Trevor Jordet, in his capacity as proposed class representative in *Jordet v. Just Energy Solutions Inc.*
	)	*David Rosenfeld and James Harnum*, Counsel for Haidar Omarali in his capacity

MARKETING LLC JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. and JUST ENERGY (FINANCE) HUNGARY ZRT.	)	as Representative Plaintiff in *Omarali v. Just Energy*
	)	*Robert Kennedy*, Counsel for BP Energy Company and certain of its affiliates
	)	*Jessica MacKinnon*, Counsel for Macquarie Energy LLC and Macquarie Energy Canada Ltd.
	)	*Bevan Brooksbank*, Counsel for Chubb Insurance Co. of Canada
Applicants	)	
– and –	)	*Alexandra McCawley*, Counsel for Counsel to Fortis BC Energy Inc.
MORGAN STANLEY CAPITAL GROUP INC.	)	*Robert I. Thornton*, *Rebecca Kennedy*, *Rachel B. Nicholson* and *Puya Fesharaki*, Counsel to FTI Consulting Canada Inc., as Monitor
Respondents	)	
	)	*John F. Higgins*, U.S. Counsel to FTI Consulting Canada Inc., as Monitor
	)	*Ganesh Yadav*, self-represented
	)	*Mohammad Jaafari*, self-represented
	)	**HEARD:** November 2, 2022

ENDORSEMENT

MCEWEN J.

[1] The Applicants (collectively the "Just Energy Entities") bring a motion seeking approval of a going-concern sale transaction (the "Transaction") for their business. They seek to implement the Transaction through a proposed draft reverse vesting order (the "RVO") and other related relief.

[2] The Just Energy Entities provided the court with two draft orders in furtherance of their position. The first is the RVO for the Transaction. The second is an order (the "Monitor's Order")

giving FTI Consulting Canada Inc. (the "Monitor") enhanced powers to implement the RVO and other related relief, including a stay extension, approval of the Monitor's reports and fees and a sealing order.

[3] I granted the two orders with reasons to follow. I am now providing those reasons.

BACKGROUND

[4] Just Energy Group Inc. ("Just Energy") and its subsidiaries collectively form the Just Energy Entities. Just Energy is primarily a holding company that operates subsidiaries in Canada and the U.S.

[5] Just Energy is incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"). It maintains dual headquarters in Ontario and Texas. Just Energy's shares are listed on the Toronto Stock Exchange and the New York Stock Exchange.

[6] The Just Energy Entities are a retail energy provider. Their principal line of business consists of purchasing retail energy and natural gas commodities from large energy suppliers and reselling them to residential and commercial customers. The Just Energy Entities service over 950,000 residential and commercial customers across Canada and the U.S. and employ over 1,000 employees.

[7] The Just Energy Entities' business is highly regulated. This is because of its nature. The business depends on many licenses, authorizations and permits across multiple jurisdictions in both Canada and the U.S. Without these approvals the Just Energy Entities cannot market or sell energy to its customers.

[8] On March 9, 2022, the Just Energy Entities obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36 (the "*CCAA*") pursuant to an Initial Order under the *CCAA*.

[9] The Just Energy Entities were forced to file for protection under the *CCAA* after an extreme winter storm in Texas. The February 2021 storm, together with Texas regulators' response to the storm, posed a significant liquidity challenge that precipitated the filing. In or about the time of the filing, the Just Energy Entities held an aggregate book value of approximately CDN $1.069 billion, with an aggregate book value of liabilities around CDN $1.28 billion.

[10] There is a complicated array of secured creditors. Insofar as the Transaction is concerned, the Pacific Investment Management Company LLC ("PIMCO") manages a number of funds which comprise a portion of the secured creditors and/or the DIP Lenders. These entities constitute the purchaser in the Transaction (the "Purchaser").

[11] There are also several other secured creditors, including the Credit Facility Lenders and secured suppliers. They have reached an agreement with the Just Energy Entities and the Purchaser with respect to the Transaction.

[12] In September 2021, this court granted a Claims Process Order to establish a process to determine the nature, quantum and validity of the claims against the Just Energy Entities.

[13] In May 2022, the Just Energy Entities brought a motion (the "Meetings Order Motion") seeking, amongst other things, authorization to hold a creditors' meeting to vote on their proposed Plan of Compromise and Arrangement.

[14] Some unsecured litigation claimants opposed the Meetings Order Motion: primarily, two uncertified U.S. class actions (together the "U.S. Class Actions"), a certified Ontario class action (the "Omarali Class Action") and plaintiffs in four actions brought in Texas by approximately 250 claimants (the "Mass Tort Claims").

[15] Following my June 10, 2022 Endorsement, the Plan Sponsor—that consisted of the DIP Lenders, one of their affiliates and other stakeholders—withdrew their support for the proposed Plan of Compromise and Arrangement.

[16] Thereafter, the Just Energy Entities, the Plan Sponsor and other supporting stakeholders pivoted to implementing a sales and investment solicitation process (the "SISP") in accordance with the new Support Agreement dated August 4, 2022 (the "SISP Support Agreement"). The SISP included a stalking-horse bid by the Purchaser.

[17] On August 18, 2022, I granted an order (the "SISP Approval Order") that, amongst other things, approved the SISP and SISP Support Agreement with modest modifications.

[18] The SISP was conducted over a 10-week period. It was conducted in accordance with the SISP Approval Order and was well-publicized. The Just Energy Entities negotiated non-disclosure agreements with potential bidders, facilitated access to the data room for those parties, responded to numerous due diligence requests and offered management presentation meetings. Four written notices of intention to bid ("NOIs") were received. Ultimately, however, no bids were received; therefore, the Transaction was declared the successful bid, subject to court approval.

[19] It bears noting that, in addition to the SISP, the business of the Just Energy Entities was broadly and extensively marketed over the past approximately three years. No meaningful proposals were ever received.

[20] Also, at the time of the SISP Approval Order, the Just Energy Entities had been negotiating with their key stakeholders for roughly 1.5 years.

[21] Further, U.S. Class Actions were involved in the SISP but ultimately did not file a NOI or engage in further discussions with the Just Energy Entities in the SISP.

[22] The value that the Purchaser is paying for the Just Energy Entities is approximately U.S. $444 million plus the assumption of several liabilities, all of which provides recovery for the approximately CDN $1 billion in secured claims.

[23] Last, all equity interests of Just Energy and Just Energy (U.S.) Corp. ("JEUS") that exist prior to the proposed implementation of the RVO will be deemed to be terminated, cancelled or redeemed following the closing. The Purchaser will own all the issued and outstanding shares of JEUS. In turn, JEUS will own all of the issued and outstanding shares of Just Energy and the other acquired entities. The Just Energy Entities will continue to control their own assets, other than the excluded assets, and will remain liable for their respective assumed liabilities.

THE ISSUES

[24] There are two issues on this motion:

- whether the Transaction should be approved, including the RVO and related relief; and
- whether the Monitor should receive the enhanced powers requested in the Monitor's Order with respect to the implementation of the RVO and the related relief, including the stay extension, approval of the Monitor's reports and fees and a sealing order.

[25] The secured creditors consent to the relief sought. Neither the U.S. Class Actions, the Omarali Class Action nor the Mass Tort Claims opposed the relief sought. The only opposition comes from Mr. Ganesh Yadav, a shareholder, and Mr. Mohammad Jaafari, a former employee of Just Energy who is pursuing a claim in the Tokyo District Court of Japan alleging wrongful termination.

[26] I will first deal with the issues surrounding the RVO and the Monitor's Order. Thereafter I will outline the two specific claims of Mr. Yadav and Mr. Jaafari and explain why I do not believe their claims affect the relief sought by the Just Energy Entities.

REVERSE VESTING ORDERS

[27] A reverse vesting order generally involves a series of steps, whereby:

(a) the purchaser becomes the sole shareholder of the debtor company;

(b) the debtor company retains its assets, including key contracts and permits; and

> (c) the liabilities not assumed by the purchaser are vested out and transferred, together with any excluded assets, into a newly incorporated entity or entities.[1]

The assets and liabilities are vested out in the separate entity or entities (which are referred to in the RVO as "Residual Cos.") which may then be addressed through a bankruptcy or similar process. The reverse vesting order is therefore contrasted with a traditional vesting order in which the assets of a debtor company that the purchaser acquires are vested in the purchaser free and clear of any encumbrances or claims, other than those assumed by the purchaser, as contemplated by s. 36(4) of the *CCAA*. The purchase price stands in place of the assets and is available to satisfy creditor claims, in whole or in part, in accordance with their pre-existing priority.

The Law relating to Reverse Vesting Orders

[28] I begin my analysis with a general review of the law.

[29] The jurisdiction to approve a transaction through a reverse vesting order is found in s. 11 of the *CCAA*. Section 11 gives this court broad powers to make orders that it sees fit, subject to the restrictions set out in the statute. There is no provision in the *CCAA* that prohibits a reverse vesting order structure: see *Quest University (Re)*, 2020 BCSC 1883, at para. 157.

[30] Some courts have also held that s. 36 of the *CCAA* confers jurisdiction. Section 36 contemplates court approval for the sale of a debtor company's assets out of the ordinary course of business: see *Black Rock Metals Inc.*; *Quest University (Re)*, at para. 40.

[31] In any event, it is settled law that courts have jurisdiction to approve a transaction involving a reverse vesting order. Moreover, courts agree that the factors set out in s. 36(3) of the *CCAA* should also be considered on a motion to approve a sale, including one involving a reverse vesting order. Section 36(3) stipulates that the court is to consider, among other things,

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

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[1] *Arrangement relatif à Black Rock Metals Inc.*, 2022 QCCS 2828, at para. 85, leave to appeal to QCCA refused, 2022 QCCA 1073.

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[32] In *Harte Gold Corp. (Re)*, 2022 ONSC 653, Penny J. held that the s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank of Canada v. Soundair Corp* (1991), 4 O.R. (3d) 1 (C.A) for the approval of the sale of assets in an insolvency. They are as follows:

- whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- the interests of all parties;
- the efficacy and integrity of the process by which offers have been obtained; and
- whether there has been unfairness in the working out of the process.

[33] Reverse vesting orders are relatively new structures. I agree that reverse vesting orders should not be the "norm" and that a court should carefully consider whether a reverse vesting order is warranted in the circumstances: see *Harte Gold Corp. (Re)*, at para. 38; *Black Rock Metals Inc.*, at para. 99. That said, reverse vesting orders have been deemed appropriate in a number of cases: see *Quest University (Re)*, at para. 168, *Harte Gold Corp. (Re)*, at para. 77 and *Black Rock Metals Inc.*, at para. 114.

[34] The aforementioned cases approved reverse vesting orders in circumstances where:

- The debtor operated in a highly-regulated environment in which its existing permits, licenses or other rights were difficult or impossible to reassign to a purchaser.
- The debtor is a party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser.
- Where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.

[35] Given the supporting jurisprudence, I will now discuss why the RVO should be granted and why the Transaction should be approved.

The RVO should be granted

[36] The Just Energy Entities' business, as noted, is highly regulated and depends almost entirely on a substantial number of licenses, authorizations and permits in multiple jurisdictions in Canada and the U.S.

[37] As set out in the affidavit of Mr. Michael Carter, the Chief Financial Officer to the Just Energy Entities (at para. 57), the value of the Just Energy Entities' business arises predominantly from the gross margin in their customer contracts. The business is wholly dependent on the Just Energy Entities holding several non-transferable licenses and authorizations that permit their operation in Canada and the U.S. and in their agreements with over 100 public utilities, which allow the Just Energy Entities to provide natural gas and electricity in certain markets to their customers.

[38] Currently the Just Energy Entities hold at least:

- Seventeen separate licenses and authorizations in five provinces in Canada which allows them to market natural gas and electricity in the applicable provincial markets, eight of which are non-transferrable and non-assignable, with the remaining nine only assignable with leave of the regulator.

- Five separate import and export orders issued by the Canadian Energy Regulator ("CER"), all of which are non-transferrable and non-assignable.

- Three separate registrations with the Alberta Electricity System Operator (the "AESO") in Alberta and with the Independent Electricity System Operator ("IESO") in Ontario, all of which are either non-transferrable or only assignable with leave.

- Six licenses in Nevada and New Jersey to allow them to market natural gas and/or electricity in the applicable states, all of which are non-transferrable.

- Twenty-five licenses in Connecticut, Delaware, Maine, Maryland, Ohio, Pennsylvania and Virginia to allow them to market natural gas and/or electricity in the applicable states, all of which may only be transferred with the prior authorization of the applicable regulator in each jurisdiction.

- Eighteen electricity and/or natural gas provider licenses or authorizations in California, Illinois, Massachusetts, Michigan, and New York, where no process for transferring the licenses or authorizations is prescribed in the applicable statutes.

- Five retail electricity provider certifications in Texas which may only be transferred with the authorization of the Public Utility Commission of Texas ("PUCT").

- Three separate export authorizations issued by the Department of Energy ("DOE") in the U.S., all of which may only be transferred with the prior authorization of the DOE's assistant secretary.

- Seven separate market-based authorizations issued by the Federal Energy Regulatory Commission ("FERC") in the U.S. which may only be transferred with the prior authorization of FERC.

[39] As further deposed by Mr. Carter, all the provincial, state, market participation, export and import orders, licenses and authorizations held by the Just Energy Entities are either non-transferrable, capable of transfer only with the approval of the applicable regulator, or provide for no clear regulatory process for the transfer of such authorizations.

[40] On Mr. Carter's analysis, the RVO would not hamper the existing licenses, authorizations, orders and agreements. As such, he deposes that the RVO structure is the only feasible structure for the Transaction (at para. 59). Any other structure would risk exposing most of the 89 licenses upon which the Just Energy Entities' business is founded. Mr. Carter also deposes (at para. 75) that if a traditional vesting order was granted, the Purchaser would be required to participate in a separate regulatory process in five Canadian provinces, 15 U.S. states and with federal agencies in both Canada and the U.S. to try and obtain transfers of the 89 licenses, authorizations and certifications or the issuance of new licenses, authorizations and certifications. This risk and uncertainty would affect the value of a sale to any other purchaser. For this reason, the benefit of the RVO is clear: it preserves the necessary approvals to conduct business.

[41] Additionally, Mr. Carter (at para. 60) deposes that the Just Energy Entities are party to a myriad of hedging transactions. This includes hedge transactions with commodity suppliers to minimize commodity and volume risk, foreign exchange hedge transactions and hedges for renewal energy credits, many of which are fundamental to the Just Energy Entities' ability to effectively operate their business and non-transferrable. Moreover, any U.S. tax attributes resident in the Just Energy Entities would generally be unable to be utilized in the go-forward business where the Transaction structure has a traditional asset sale vesting order.

[42] No stakeholder disputes Mr. Carter's evidence. More specifically, no stakeholder disputes the importance of maintaining the 89 current licenses, authorizations and certifications listed above. And, no stakeholder disputes the fact that under a traditional asset sale and approval and vesting order structure, a purchaser would have to apply to the various agencies and regulators for transfers of the aforementioned licenses, etc.

[43] I agree with the Just Energy Entities, who are supported by the Monitor. Given the above, the RVO sought is the only way to achieve the preservation of the licenses, authorizations and certifications necessary for the ongoing business operations of the Just Energy Entities. This includes transferring the excluded assets into the two Residual Cos., one in Canada and one in the U.S. as is typically the case in reverse vesting orders.

[44] The fact that the Just Energy Entities has been operating for approximately 19 months since the *CCAA* filing is critical. As noted by Penny J. in *Harte Gold Corp. (Re),* at para. 72, time is not on the side of a debtor company facing financial challenges. I agree.

[45] For all the reasons above, I am satisfied that the RVO is appropriate.

[46] I now turn to the s. 36(3) factors.

The Transaction is fair and reasonable

The process leading to the proposed sale was reasonable

[47] The Transaction was developed by the Just Energy Entities in consultation with the Monitor and its financial advisor, Mr. Mark Caiger, the Managing Director, Mergers & Acquisitions at BMO Nesbitt Burns Inc., as well as the Purchaser and other secured lenders. As noted, the SISP was approved by this court and thereafter conducted as per the provisions of the SISP Approval Order. As set out in Mr. Carter's affidavit, the SISP was undertaken in accordance with the SISP Approval Order in two stages.

[48] The overview of the SISP structure is well described in Mr. Caiger's October 19, 2022 affidavit. Amongst other things, in the first stage, the Just Energy Entities and Mr. Caiger prepared a list of potential bidders, established a data room and published a press release announcing the SISP. Mr. Caiger contacted 41 potential bidders, non-disclosure agreements were negotiated and four NOIs were received.

[49] The process then moved into the second stage. The Just Energy Entities prepared a form of transaction agreement that included a form of approval and RVO for completion by bidders as part of receiving submissions of a qualified bid. Three of the four second stage participants eventually indicated that they were not going to proceed. The remaining party did not submit a bid. It advised the Monitor that it saw no value beyond the stalking-horse bid.

[50] The Transaction before this court is therefore the only going-concern Transaction available to the Just Energy Entities. I am satisfied in the circumstances that the market was thoroughly canvassed and, as noted, in addition to the SISP, the business of the Just Energy Entities has been marketed broadly and extensively for approximately three years. The U.S. Class Actions previously indicated that they may advance their own restructuring plan for consideration and voting by the Just Energy Entities creditors. During this process, they were allowed full participation but ultimately did not file a NOI or further engage in the SISP process.

The Monitor has approved the process

[51] As noted, the Monitor approved the process that lead to the Transaction. The Monitor concluded that the RVO is the only efficient means to ensure that all the licenses, authorizations and agreements remain in place. The Monitor is also of the view that any potential prejudice to the individual creditors is far outweighed by the overall benefit of the Transaction. Importantly,

the Monitor also believes that the RVO represents the only viable alternative to implement the Transaction for the benefit of the Just Energy Entities' stakeholders.

The Transaction is more beneficial to the creditors than a sale or disposition in bankruptcy

[52] The Monitor assisted the Just Energy Entities in preparing a liquidation analysis when the Just Energy Entities were pursuing approval of the Plan of Compromise and Arrangement. The analysis has been updated. The Monitor and the Just Energy Entities concluded, on the basis of the updated liquidation analysis, that not only would a liquidation produce no recovery for unsecured creditors, but it would result in a shortfall to secured creditors. This, of course, would be less beneficial than closing the Transaction.

The creditors were consulted

[53] As noted in this endorsement, extensive consultation was undertaken both with the secured creditors, the U.S. Class Actions, the Omarali Class Action and the Mass Tort Claims. There is no suggestion in the record that any creditors were ignored or overlooked.

The effect of the Transaction on creditors and other interested parties

[54] I am of the belief that the RVO is the only viable option for a going-concern exit from the *CCAA* proceedings.

[55] No other offers have been obtained, not only during the SISP but also in the past three years when the Just Energy Entities' business was being broadly and extensively marketed. No other plan or proposal has been put forward.

[56] The Transaction, in my view, provides a number of positive benefits, including:

- preserving the going-concern value of the business for the benefit of stakeholders;
- maintaining the Just Energy Entities' relationships with the majority of its commodity suppliers, vendors, trade creditors and other counter-parties;
- providing for the continued operation of the Just Energy Entities across Canada and the U.S.;
- continuing to supply uninterrupted energy to the Just Energies Entities approximately 950,000 customers;
- preserving the ongoing employment of most of the more than 1,000 employees of the Just Energy Entities;

- maintaining the aforementioned regulatory and licensing relationships across Canada and the U.S.;

- satisfying or assuming in full all secured claims and priority payables;

- preserving U.S. tax attributes and tax pools; and

- permitting the Just Energy Entities to exit these proceedings with a significantly deleveraged balance sheet and a U.S. $250 million new credit facility bringing an end to the *CCAA* proceedings aside from the limited matters related to the Residual Cos.

[57] As discussed, the Transaction does not provide any recovery for unsecured creditors or shareholders. I accept the submissions of the Just Energy Entities, however, that this is not a result of the RVO structure. Rather, this reflects the fact that the Just Energy Entities' value, as tested through the market through the SISP and through previous marketing attempts over three years, is not high enough to generate value for the unsecured creditors and shareholders. This was also the situation in *Black Rock Metals Inc.* (see paras. 109, 120). I agree with the comments in *Black Rock Metals Inc.* wherein Chief Justice Paquette stated that the unsecured creditors and shareholders are therefore not in a worse position with the reverse vesting order than they would have been under a traditional asset sale. Either way, they have no economic interest because the purchase price would not generate any value for the unsecured creditors and shareholders.

[58] There is no other viable option being presented to this court. Further, it bears noting that the shareholders' interests amount to claims in equity. As noted in *Harte Gold Corp. (Re),* at para. 64, shareholders have no economic interest in an insolvent enterprise and therefore they are not entitled to a vote in any plan. The portion of the order requested relating to the cancellation of the existing shares is, therefore, justified in the circumstances.

[59] The consideration to be received for the assets is fair and reasonable. The Just Energy Entities' business was extensively marketed both prior to and during the *CCAA.* There have been no offers, except that put forth by the Purchaser. Therefore, I accept that the consideration is fair and reasonable.

[60] While it is unfortunate that there is no recovery for unsecured creditors or shareholders, this is a function of the market. In this regard, it is noteworthy that PIMCO holds over U.S. $250 million in unsecured debt that it will not recover.

[61] There is also evidence above that the purchaser is paying more than the Just Energy Entities would be worth in a bankruptcy. Furthermore, the Monitor is satisfied that the consideration is fair in the circumstances.

Other considerations

[62] Based on the foregoing analysis of the s. 36(3) provisions, I am also satisfied that the criteria set out above in *Soundair* have been met: there has been a sufficient effort to obtain the best price; the debtor has not acted improvidently; the interests of the parties have been properly considered; the process has been carried out with efficacy and integrity; and there is no unfairness in the circumstances.

[63] The Transaction will provide for a fair and reasonable resolution of the Just Energy Entities' insolvency and obtain the best value for its assets. In sum, employment is preserved for most employees and energy will continued to be provided for approximately 950,000 customers.

Related relief

[64] With respect to the shareholdings in the Just Energy Entities, it is reasonable to cancel the existing shares and issue new common shares to the Purchaser via JEUS. Similar approaches have been used in other reverse vesting order transactions: see *Black Rock Metals Inc.*, at para. 122; *Harte Gold Corp. (Re)*, at paras. 59-64. Since the existing shareholders have no economic interest in the company, there is no entitlement to recovery unless all creditors are paid in full: *Canwest Global Communications Corp. (Re)*, 2010 ONSC 4209, 70 C.B.R. (5th) 1.

[65] The *CBCA* provides that the share conditions of a *CBCA* corporation under *CCAA* protection can be changed by articles of reorganization. Section 191(1) of the *CBCA* recognizes that a "reorganization" includes a court order made under any Act of Parliament that affects the rights among the corporation, its shareholders and other creditors (see s. 191(1)(c)). This includes the *CCAA*: see *Canwest*, at para. 34; *Black Rock Metals Inc.*, at para. 122; *Harte Gold Corp. (Re)*, at para. 61 (dealing with the equivalent provision of Ontario's *Business Corporations Act*, R.S.O. 1990, c. B.16. (*OBCA*)).

[66] Pursuant to ss. 173, 176(1)(b) and 191(2) of the *CBCA*, courts have accepted that, under a *CCAA* proceeding, they can approve the cancellation of outstanding shares as part of a corporate reorganization that gives effect to a *CCAA* restructuring transaction and that the shareholders are not entitled to vote: see *Harte Gold Corp. (Re)*, at para. 62; *Black Rock Metals Inc.*, at para. 122; *Canwest*, at para. 34.

[67] There are also a number of other orders requested in the RVO that I have approved. I will briefly deal with the noteworthy ones below, as follows:

- It is appropriate that the RVO provides that all former employees of the Just Energy Entities be transferred to the Canadian Residual Cos. This will assist these former employees in relation to their entitlements under the *Wage Earner Protection Program Act*, S.C. 2005, c.47, s.1. Similar relief was granted in *Quest University (Re)*, which also involved a reverse vesting order.

- The releases sought are proportional in scope and consistent with releases granted in other similar *CCAA* proceedings. I have analyzed the factors set out by Penny J.

in *Harte Gold Corp. (Re)*, at paras. 81-86. As in that case, the releases are rationally connected to the purposes of the restructuring; the releasees contributed to the restructuring; the releases are not overly broad; the releases will enhance the certainty and finality of the Transaction; the releases benefit the Just Energy Entities, its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification; and all creditors on the service list were made aware of the releases sought and the nature and effect of the release.

- The specific relief in the RVO concerning the ongoing litigation with the Electric Reliability Council of Texas Inc. ("ERCOT") is fair and reasonable. The wording was negotiated with ERCOT and preserves the Just Energy Entities' and ERCOT's rights in the ongoing litigation between them as set out para. 11.

- Similarly, the paragraphs of the RVO concerning the Omarali Class Action are fair and reasonable and have been negotiated with the Omarali Class Action solicitors and are not prejudicial to the insurers noted therein.

- All remaining ancillary relief is fair and reasonable. I have simply touched upon the most significant ancillary relief above.

THE MONITOR'S ORDER

[68] As outlined, I granted the Monitor's Order.

[69] First, it is necessary that the Monitor carry on in order to implement the steps required with respect to the Residual Cos. in Canada and the U.S. and to implement the provisions of the RVO.

[70] Second, the stay extension to January 31, 2023 is also necessary given the steps that must be undertaken.

[71] I have reviewed the activities of the Monitor's reports and fees and they are fair and reasonable.

[72] Last, I agree that a sealing order should be issued with respect to confidential Exhibit "F" of Mr. Caiger's affidavit. Exhibit "F" is comprised of the four NOIs received by the Just Energy Entities. The NOIs contain confidential, commercially sensitive information regarding the identities of the four participants and their respective corporate, operational and financial information disclosed in support of the requirement of each NOI. Additionally, the NOIs contain confidential and commercially sensitive information regarding the scope and subject matter of each proposed bid. Dissemination of this information at this time, would pose a legitimate risk to the commercial interests of the SISP participants and the Just Energy Entities and their stakeholders should the Transaction fail to close. Thus, the public's interest in maintaining the confidentiality of this commercially sensitive information creates an important commercial interest. Accordingly, I am satisfied that the test set out in *Sierra Club of Canada v. Canada*

(Minister of Finance), 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53, as recast in *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361, at para. 38, has been met. The sealing order is being made on an interim basis pending further order of the court.

CLAIMS OF BP ENERGY COMPANY

[73] At the request of the Just Energy Entities and the BP Energy Company, I will now turn to agreed-upon terms as between the Just Energy Entities and the BP Energy Company.

[74] The Just Energy Entities and BP Energy Company and certain of its affiliates (collectively "BP") and the Just Energy Entities have reached an agreement, which is not opposed by any other stakeholders, that BP, being beneficiaries of the Priority Commodity/ISO Charge in these proceedings, are not opposing this motion on the basis that the New Intercreditor Agreement will be on terms consistent with those set forth in the term sheet included in Exhibit "I" to the Affidavit of Mr. Carter sworn August 4, 2022 (the "ICA Term Sheet").

[75] To the extent that the terms of the New Intercreditor Agreement are inconsistent with the ICA Term Sheet or contain material changes to the current Intercreditor Agreement that are not specifically set forth in the ICA Term Sheet, BP is reserving its rights to return to this Court to (a) oppose the future release of the Priority Commodity/ISO Charge contemplated by the Reverse Vesting Order and (b) take such action as it reasonably deems necessary to assure its future extensions and credit and accommodations are terminated.

[76] I have reviewed this agreement with counsel and find it to be fair and reasonable in the circumstances of the Transaction.

THE OPPOSING STAKEHOLDERS

[77] As noted, two stakeholders raised objections to the orders sought by the Just Energy Entities. I will deal with each in turn.

Ganesh Yadav

[78] Mr. Yadav is a shareholder.

[79] Mr. Yadav did not file any affidavit evidence or any other evidence in a proper form. Rather, he filed what he described as a "motion record" in which he attached various documents relating to the Just Energy Entities' financial performances and outlined his objections.

[80] Essentially, he submits that the Just Energy Entities have significant liquidity, far in excess of the stalking-horse bid and the calculations performed by the Just Energy Entities and the Monitor. He primarily submits that the Just Energy Entities have significant future equity in its hedges, that energy prices are increasing and that the hedges are placed at very attractive prices. To support this argument, he relies upon the Just Energy Entities' 2022 annual report describing

the derivative instruments. Mr. Yadav stresses that there are significant cash flows and that the future value of the Just Energy Entities is very promising.

[81] The difficulty with Mr. Yadav's submissions, however, is the fact that there is no evidentiary basis for these submissions other than a loose connection of documents that, in and of themselves, do not support his argument.

[82] More importantly, the Just Energy Entities' business was marketed for over three years and was widely canvassed during the SISP. During this entire time period there has not been a single offer in excess of the stalking-horse offer. Further, Mr. Yadav's submissions concerning value run contrary to the Just Energy Entities and the Monitor's valuation of the company and are unsupported by any other stakeholder.

[83] Based on the foregoing, there is no cogent evidence in the record to support Mr. Yadav's submissions, nor has he adduced proper evidence to this court by way of affidavit or expert's report.

[84] As a shareholder, he has an equity claim for which there is no recovery in the Transaction.

Mohammad Jaafari

[85] Mr. Jaafari also did not file any affidavit evidence at this motion. He, too, simply provided a number of documents.[2]

[86] Mr. Jaafari is a former Director and Representative Director of Just Energy Japan Kabushiki Kaisha ("JEJKK"), a former subsidiary of Just Energy. JEJKK operated the Just Energy Entities' businesses in Japan.

[87] Mr. Jaafari was terminated from his position in August 2018, allegedly for cause.

[88] In November 2018, he commenced litigation in the Tokyo District Court against Just Energy and JEJKK.

[89] In April 2020, the Just Energy Entities sold their Japanese business. Mr. Jaafari submitted a Proof of Claim in the *CCAA* proceeding that was disallowed by the Monitor.

[90] Mr. Jaafari apparently has continued his litigation in Tokyo. As noted above, although there is no affidavit evidence, the documentation that he has filed with this court includes apparent

[2] Mr. Jaafari continued to improperly send documents directly to me, after I signed the two orders, which I have not considered in preparing these reasons.

endorsements by the Tokyo District Court which, if accurate, accept that Mr. Jaafari was an employee of Just Energy.

[91] Mr. Jaafari submits that as part of the RVO, I should order that money be paid in trust until the litigation in Tokyo is resolved. As I understand it, he is seeking a payment of approximately CDN $2 million.

[92] The Just Energy Entities submit that Mr. Jaafari's ongoing litigation is in violation of the Initial Order and that he was never an employee of Just Energy. Counsel also advises that they recently heard from their former Japanese counsel (although there is no evidence to support this) that Mr. Jaafari's action against Just Energy was dismissed.

[93] In any event, the Just Energy Entities submit that, at best, Mr. Jaafari has an unsecured claim that is incapable of recovery since unsecured creditors are receiving no money as a result of the Transaction. Therefore, even if he is successful, there is no recovery.

[94] The Monitor, in support of the Just Energy Entities' submissions, confirms that there is no recovery for Mr. Jaafari even if he is successful. The Monitor further submits that a payment into court or into some sort of trust would constitute a preference, which is inappropriate where other unsecured creditors are not receiving any money as a result of the Transaction.

[95] Based on the incomplete record in front of me, there is no meaningful way to determine the status and legitimacy of Mr. Jaafari's claim for wrongful dismissal.

[96] In any event, I accept the submissions of the Just Energy Entities, supported by the Monitor, that Mr. Jaafari's claim constitutes an unsecured claim for which there will be no recovery in the circumstances of this case.

[97] As the Monitor points out, Just Energy no longer has any assets or operations in Japan and no longer owns JEJKK. The stay of proceedings does not extend to JEJKK, which is now owned by another corporation. The Monitor submits that Mr. Jaafari is free to pursue such claims in Japan without the involvement of the Just Energy Entities. To allow Mr. Jaafari's claim to continue against the Just Energy Entities in Japan would require the Just Energy Entities to incur expenses, perhaps make a payment into court or into trust and would deplete the Just Energy Entities' estate to the detriment of the other stakeholders with no foreseeable benefits to Mr. Jaafari.

[98] I therefore accept the Monitor's submission that this court order that Mr. Jaafari's claim can be addressed by the Just Energy Entities, in consultation with the Monitor, in accordance with the terms of the Claims Procedure Order. I am specifically not making an order that any money be paid into court or into a trust account.

CONCLUSION

[99] For the reasons above, the RVO and the Monitor's Order should be approved. A reverse vesting order is permitted pursuant to the above provisions of the *CCAA*. Given the nature of the

Just Energy Entities' business, the RVO structure is necessary and appropriate to preserve the going-concern value of the business. The Transaction is the only viable transaction that has emerged in the 19 months since the *CCAA* filing. It is currently the only option for a going-concern exit from the *CCAA* proceedings. The Transaction is the product of months of negotiations between the Just Energy Entities' key stakeholders as well as a robust court-approved SISP.

[100] Overall, the Transaction provides tangible benefits to the Just Energy Entities and their stakeholders. The fact that the Transaction provides no recovery for the general unsecured creditors or shareholders is a function of the market, not the RVO structure.

DISPOSITION

[101] For the reasons above, I grant both the RVO and the Monitor's Order.

McEwen, J.

Released: November 14, 2022

CITATION: Just Energy v. Morgan Stanley et. al., 2022 ONSC 6354
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20221114

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

IN THE MATTER OF THE *COMPANIES' CREDTORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

– and –

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC , HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. and JUST ENERGY (FINANCE) HUNGARY ZRT.

Applicants

ENDORSEMENT

Released: November 14, 2022 McEwen J.

TAB 7

District of British Columbia
Division No.: 03 - Vancouver
Court No.: B-220504
Estate No: 11-2891281
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE NOTICE OF INTENTION
TO MAKE A PROPOSAL OF PAYSLATE INC.

ORDER MADE AFTER APPLICATION

(APPROVAL AND REVERSE VESTING ORDER)

BEFORE THE HONOURABLE
MR. JUSTICE WALKER

May 10, 2023

ON THE APPLICATION of PaySlate Inc. ("**PaySlate**") coming on for hearing at Vancouver, British Columbia on the 10th day of May, 2023; **AND ON HEARING** Matti Lemmens and Jennifer Pepper, counsel for PaySlate, and those other counsel listed on **Schedule "A"** hereto; **AND UPON READING** the material filed including, among other things, Affidavit #7 of Gary Bentham sworn on April 18, 2023, Affidavit #8 of Gary Bentham sworn on May 2, 2023, Affidavit #1 of Alice Jarvis sworn May 8, 2023, Affidavit #2 of Alice Jarvis sworn May 8, 2023, Affidavit #1 of Ian Kennedy sworn April 19, 2023, the Confidential Affidavit of Ian Kennedy sworn April 19, 2023, the Sixth Report of Grant Thornton Limited ("**Grant Thornton**") in its capacity as the proposal trustee of PaySlate (in such capacity, the "**Proposal Trustee**") dated April 20, 2023, the Supplement to the Sixth Report of the Proposal Trustee dated April 21, 2023, and the Seventh Report of the Proposal Trustee dated May 8, 2023; **AND PURSUANT TO** the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (the "***BIA***"), the British Columbia Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court;

THIS COURT ORDERS AND DECLARES THAT:

SERVICE

1. The time for service of the notice of application for this Order is hereby abridged and deemed good and sufficient and this application is properly returnable today.

DEFINITIONS

2. Unless otherwise indicated or defined herein, capitalized terms used in this Order shall have the meanings given to them in the Subscription Agreement (hereinafter defined) or the order granted in these proceedings (the "**NOI Proceedings**") on December 9, 2022 (the "**NOI Order**"), as the context may require.

APPROVAL AND VESTING

3. The transactions (the "**Transactions**") contemplated by the Subscription Agreement dated as of May 2, 2023 (the "**Subscription Agreement**") between PaySlate and Ayrshire Real Estate Management Inc. (the "**Purchaser**"), a copy of which is attached as Exhibit "**A**" to Affidavit #1 of Jennifer Pepper, are hereby approved, and the Subscription Agreement is hereby declared to be commercially reasonable. PaySlate is hereby authorized and directed to perform its obligations under the Subscription Agreement and to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transactions, including the filing of the Articles of Reorganization, the cancellation of the Existing Shares and the issuance of the Subscribed Shares to the Purchaser, including any such additional documents contemplated in the Subscription Agreement.

4. This Order shall constitute the only authorization required by PaySlate to proceed with the Transactions and no shareholder or other approval shall be required in connection therewith.

5. The following shall occur and shall be deemed to have occurred at the Effective Time (as defined below), all in accordance with the Closing Sequence set out in the Subscription Agreement and the steps contemplated thereunder:

(a) the Purchaser shall pay the Cash Consideration to be held in escrow by the Proposal Trustee, on behalf of PaySlate, and the Cash Consideration shall be dealt with in accordance with this Closing Sequence;

(b) PaySlate shall transfer to and the Creditor Trust will assume the Excluded Assets, the Excluded Contracts, and the Excluded Liabilities;

(c) all of PaySlate's right, title and interest in and to the Excluded Liabilities, but specifically excluding the Assumed Liabilities, shall be channeled to, assumed by

and vest absolutely and exclusively in the Creditor Trust for the purpose of allowing the Creditor Trustee to continue to administer the Excluded Liabilities in accordance with the Trust Settlement, for the benefit of the existing creditors of PaySlate as at the Effective Date, and: (i) such Excluded Liabilities shall continue to attach to the Excluded Assets and the Excluded Contracts with the same nature and priority as they had immediately prior to the Effective Time, as set out in paragraph 9 of this Order; (ii) such Excluded Liabilities shall be transferred to and assumed by the Creditor Trust in consideration for the transfer of the Excluded Assets and Excluded Contracts, and the Cash Consideration, such that the Excluded Liabilities shall become obligations of the Creditor Trust which shall be deemed to have been party to the contracts and agreements giving rise thereto and which shall stand in place and stead of PaySlate in respect of any such liability or obligation, and shall no longer be obligations of PaySlate, and PaySlate shall be and is hereby forever released and discharged from such Excluded Liabilities and all related Claims (excluding, for greater certainty, the Assumed Liabilities);

(d) PaySlate shall amend its articles of incorporation to alter the provisions of the Existing Shares, making the same redeemable and retractable, at the nominal redemption price of $0.00001 per common share;

(e) all Equity Interests, including all Existing Shares, shall be redeemed at the nominal redemption price of $0.00001 per common share, and all redeemed Existing Shares, together with any agreement, contract, plan, indenture, deed, certificate, subscription rights, conversion rights, pre-emptive rights, options (including stock options or share purchase or equivalent plans), or other documents or instruments governing or having been created or granted in connection with the share capital of PaySlate shall be deemed terminated and cancelled in accordance with and pursuant to this Order;

(f) PaySlate shall have paid, assumed or otherwise satisfied the Assumed Liabilities, in accordance with the terms of the Subscription Agreement;

(g) PaySlate shall issue the Subscribed Shares and the Purchaser shall subscribe for and purchase the Subscribed Shares. All of the right, title and interest in and to the Subscribed Shares issued by PaySlate to the Purchaser shall vest absolutely in the Purchaser will be retained by PaySlate, in each case free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, pledges, mortgages, liens, trusts or deemed trusts (whether contractual, statutory or otherwise), reservations of ownership, royalties, options, rights of pre-emption, privileges, interests, assignments, actions, judgments, executions, levies, taxes, writs of enforcement, charges, or other claims, whether contractual, statutory, financial, monetary or otherwise, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the NOI Order or any other Order of the Court; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (British Columbia), or any other personal property registry system or pursuant to the *Lands Title Act* (British Columbia) (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule "C" hereto (the "**Permitted Encumbrances**") and, for greater certainty, all of the Encumbrances affecting or relating to the Subscribed Shares and/or the Retained Assets are hereby expunged and discharged as against the Subscribed Shares;

(h) the Retained Assets will be retained by PaySlate free and clear of all Encumbrances save and except Permitted Encumbrances and Assumed Liabilities;

(i) the Ayrshire Release shall be released from escrow and shall become effective;

(j) notwithstanding any other provision in this paragraph, the Cash Consideration, less the Cure Costs, shall vest in the Creditor Trust, and all existing Claims and Encumbrances shall attach to the Cash Consideration in accordance with paragraph 9 hereof;

(k) the Proposal Trustee shall deliver to the Purchaser an executed copy of the Proposal Trustee's certificate, substantially in the form attached as Schedule "**B**" hereto (the "**Proposal Trustee's Certificate**") confirming the transactions contemplated in the Subscription Agreement have closed (the time and date of such delivery being the "**Effective Time**");

(l) PaySlate shall cease to be an applicant in these NOI Proceedings and PaySlate shall be deemed to be released from the purview of the NOI Order and all other Orders of this Court granted in these NOI Proceedings, save and except for this Order the provisions of which (as they relate to PaySlate) shall continue to apply in all respects; and

(m) these NOI Proceedings shall have no further force or effect, and will be terminated upon the issuance and filing of the Proposal Trustee's Certificate.

6. The Proposal Trustee shall issue and file with the Court a copy of the Proposal Trustee's Certificate, forthwith after delivery thereof in connection with the Transactions.

7. Upon the delivery of the Proposal Trustee's Certificate, the Proposal Trustee shall be discharged, provided however that notwithstanding its discharge herein (a) the Proposal Trustee shall continue to administer the Excluded Assets, Excluded Contracts, and the Excluded Liabilities vested in the Creditor Trust in accordance with the Trust Settlement (and for the purposes of the Creditor Trust, the provisions of the *Wage Earner Protection Program Act*, S.C. 2005, c. 47 shall apply) (b) Grant Thornton Limited shall remain the Proposal Trustee for the performance of such incidental duties as may be required to complete the administration of these NOI Proceedings and the Transactions herein, and (c) Grant Thornton Limited shall continue to have the benefit of (i) the provisions of all Orders made in these NOI proceedings, as the same shall apply to the Cash Consideration, the Excluded Assets and Excluded Contracts vested in the Creditor Trust, and (ii) all approvals, protections and indemnities afforded to Grant Thornton Limited in its capacity as Proposal Trustee shall continue, including in its capacity as Creditor Trustee of the Creditor Trust as amended by this Order.

8. The Proposal Trustee may rely on written notice from PaySlate and the Purchaser regarding the satisfaction of the Subscription Price and satisfaction or waiver of conditions to closing under the Subscription Agreement and shall have no liability with respect to delivery of the Proposal Trustee's Certificate.

9. For the purposes of determining the nature and priority of Claims, from and after the delivery of the Proposal Trustee's Certificate, all Claims and Encumbrances shall attach to the Excluded Assets and the Excluded Contracts, including for greater certainty the Cash Consideration, with the same priority as they had with respect to the Retained Assets immediately prior to the sale, as if the Excluded Assets, the Excluded Contracts and the Excluded Liabilities had not been transferred to the Creditor Trust, as applicable, and remained liabilities of PaySlate immediately prior to the foregoing transfer.

10. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* (Canada), PaySlate or the Proposal Trustee, as the case may be, is authorized, permitted and directed to, at the Effective Time, disclose to the Purchaser all human resources and payroll information in PaySlate records pertaining to past and current employees of PaySlate. The Purchaser shall maintain and cause PaySlate, after Closing, to maintain and protect the privacy of such information in accordance with applicable law and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by PaySlate prior to Closing.

11. At the Effective Time and without limiting the provisions of paragraph 5 hereof, PaySlate and the Purchaser shall both be deemed released from any and all claims, liabilities (direct, indirect, absolute or contingent) or obligations with respect to any Taxes (including penalties and interest thereon) of, or that relate to, PaySlate, including, without limiting the generality of the foregoing, all taxes that could be assessed against PaySlate or the Purchaser (including its affiliates and any predecessor corporations) pursuant to section 160 of the *Income Tax Act* (Canada), or any provincial equivalent, in connection with PaySlate (provided, as it relates to PaySlate, such release shall not apply to (i) Transaction Taxes, or (ii) Taxes in respect of the business and operations conducted by PaySlate after the Effective Time).

12. Except to the extent expressly contemplated by the Subscription Agreement, or otherwise agreed by the Purchaser, all Retained Contracts to which PaySlate is a party upon delivery of the Proposal Trustee's Certificate will be and remain in full force and effect upon and following delivery of the Proposal Trustee's Certificate and no individual, firm, corporation, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") who is a party to any such arrangement shall make or pursue any demand, claim, action or suit or exercise any right or remedy under any Contracts (excluding the Excluded Contracts) relating to:

(a) PaySlate having sought or obtained relief under the *BIA*; or

(b) the insolvency of PaySlate,

and all such counterparties and persons shall be forever barred and estopped from taking such action.

13. The designation of any Claim as an Assumed Liability is without prejudice to PaySlate's right to dispute the existence, validity or quantum of any such Assumed Liability, and nothing in this Order or the Subscription Agreement shall affect or waive PaySlate's rights and defences, both legal and equitable, with respect to any Assumed Liability, including, but not limited to, all rights with respect to entitlements to set-offs or recoupments against such Assumed Liability.

14. From and after the Effective Time:

(a) the nature of the Assumed Liabilities retained by PaySlate, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of the Transactions or this Order;

(b) the nature of the Excluded Liabilities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to the Creditor Trust;

(c) any Person that prior to the Effective Time had a valid right or claim against PaySlate under or in respect of any Excluded Contract or Excluded Liability (each an "**Excluded Liability Claim**") shall no longer have such right or claim against

PaySlate but will have an equivalent Excluded Liability Claim against the Creditor Trust, in respect of the Excluded Contract and Excluded Liability from and after the Effective Time in its place and stead, and nothing in this Order limits, lessens or extinguishes the Excluded Liability Claim of any Person as against the Creditor Trust; and

(d) the Excluded Liability Claim of any Person against the Creditor Trust following the Effective Time shall have the same rights, priority and entitlement as such Excluded Liability Claim had against PaySlate prior to the Effective Time.

15. Nothing in this Order, including the release of PaySlate from the purview of these NOI Proceedings pursuant to paragraph 5(l) hereof shall affect, vary, derogate from, limit or amend, and Grant Thornton Limited shall continue to have the benefit of, any and all rights and approvals and protections in favour of the Proposal Trustee at law or pursuant to the *BIA*, the NOI Order, this Order, any other Orders in these NOI Proceedings or otherwise, including all approvals, protections and stays of proceedings in favour of Grant Thornton in its capacity as Proposal Trustee, all of which are expressly continued and confirmed.

16. Notwithstanding:

(a) the termination of these NOI Proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *BIA* in respect of PaySlate, and any bankruptcy order issued pursuant to any such applications; and

the Subscription Agreement, the implementation of the Transactions (including without limitation the transfer and vesting of the Excluded Assets, Excluded Contracts and Excluded Liabilities in and to the Creditor Trust, as applicable, and the issuance of the Subscribed Shares to the Purchaser), and any payments by the Purchaser authorized herein or pursuant to the Subscription Agreement shall be binding on any trustee in bankruptcy that may be appointed in respect of PaySlate, and shall not be void or voidable by creditors of PaySlate, nor shall they constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *BIA* or any other applicable federal or

provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

RELEASES

17. Effective upon the delivery of the Proposal Trustee's Certificate, (i) the present and former directors, officers, employees, legal counsel and advisors of PaySlate (ii) the Proposal Trustee and its legal counsel, and their respective present and former directors, officers, partners, employees and advisors, and (iii) the Purchaser, its directors, officers, employees, legal counsel and advisors (the Persons listed in (i), (ii) and (iii) being collectively, the "**Released Parties**") shall be deemed to be forever irrevocably released and discharged from any and all present and future claims whatsoever (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part and in connection with the Transactions in respect of PaySlate or these proceedings (collectively, the "**Released Claims**"), which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, and are not vested nor transferred to the Creditor Trust or to any other entity and are extinguished, provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim for gross negligence, fraud or wilful misconduct or any claim that is not permitted to be released pursuant to section 50(14) of the *BIA*.

18. Paragraph 17 of this Order shall not apply to (a) the Settlement Agreement dated February 9, 2023 between PaySlate, the Purchaser, Paysafe Merchant Services Inc. ("**PMSI**"), and Grant Thornton Limited, (b) the Escrow Agreement dated as of February 9, 2023 between PaySlate, PMSI, the Purchaser, and McCarthy Tétrault LLP, or (c) the indemnification claim that is the subject of the proof of claim in the amount of $2,211,957.53 submitted by PMSI in the within proceedings which has been admitted by PaySlate to be a proven claim for the purposes of the within proceedings.

19. Except to the extent expressly contemplated by the Subscription Agreement, or otherwise agreed by the Purchaser, no counterparty under any Retained Contract, nor any other person shall make or pursue any demand, claim, action or suit, or exercise any right or remedy under any Retained Contract against the Purchaser relating to:

(a) PaySlate having sought or obtained relief under the *BIA*; or

(b) PaySlate having been insolvent prior to Closing,

and all such counterparties and persons shall be forever barred and estopped from taking such action.

THE PROPOSAL TRUSTEE

20. The First Report of the Proposal Trustee dated December 7, 2022, the Second Report, of the Proposal Trustee dated January 11, 2023, the Third Report of the Proposal Trustee dated February 16, 2023, the Fourth Report of the Proposal Trustee dated March 8, 2023, the Supplement to the Fourth Report of the Proposal Trustee dated March 24, 2023, the Second Supplement to the Fourth Report of the Proposal Trustee dated March 27, 2023, the Fifth Report of the Proposal Trustee dated March 31, 2023, the Sixth Report of the Proposal Trustee dated April 20, 2023, the Supplemental to the Sixth Report of the Proposal Trustee dated April 21, 2023, and the Seventh Report of the Proposal Trustee dated May 8, 2023 (collectively, the "**Reports**"), and the activities of the Proposal Trustee set out in the Reports, are hereby approved, provided however, that only the Proposal Trustee, in its personal capacity and only with respect to its own liability, shall be entitled to rely upon or utilize in any way such approval.

21. The Proposal Trustee its employees and representatives shall incur no liability as a result of acting in accordance with this Order, other than any liability arising out of or in connection with the gross negligence or wilful misconduct of the Proposal Trustee.

22. No action lies against the Proposal Trustee by reason of this Order or the performance of any act authorized by this Order, except by leave of the Court following a motion brought on not less than fifteen (15) days' notice to the Proposal Trustee and its legal counsel. The entities related or affiliated with the Proposal Trustee or belonging to the same group as the Proposal Trustee

(including, without limitation, any agents, employees, legal counsel or other advisors retained or employed by the Proposal Trustee) shall benefit from the protection granted to the Proposal Trustee under the present paragraph.

23. The Proposal Trustee shall not, as a result of this Order or any matter contemplated hereby: (i) be deemed to have taken part in the management or supervision of the management of PaySlate, or to have taken or maintained possession or control of the business or property of PaySlate; or (ii) be deemed to be in possession of any property of PaySlate, within the meaning of any applicable environmental legislation or otherwise.

REDEMPTION OF SHARES OF PAYSLATE

24. Following delivery of the Proposal Trustee's Certificate, and notwithstanding anything to the contrary in its articles, under the *Business Corporations Act* (Canada) or otherwise in law, PaySlate is authorized and directed to forthwith:

(a) amend its articles of incorporation to alter the provisions of the issued and outstanding common shares, making the same redeemable and retractable, at the nominal redemption price of $0.00001 per common share; and

(b) immediately thereafter effect the redemption, retraction and cancellation of all common shares.

CURE COSTS

25. All Cure Costs payable in accordance with the Subscription Agreement shall be paid by or on behalf of PaySlate to the relevant counterparty to a Retained Contract on or before Closing or such later date as may be agreed to by PaySlate and the relevant counterparty to a Retained Contract.

THE CREDITOR TRUST

26. The Creditor Trust created pursuant to this Order and prescribed by the Subscription Agreement shall be named the "PaySlate Residual Trust".

27. The Creditor Trust shall be instituted and administered in accordance with the Trust Settlement attached as Schedule "**D**" hereto.

28. The administration of the Creditor Trust shall remain subject to the Court's oversight and this Order.

29. The Creditor Trustee shall be and is hereby authorized and directed to perform its functions and fulfill its obligations in accordance this Order and the Trust Settlement.

30. The Creditor Trustee and its employees and representatives shall not incur any liability as a result of acting in accordance with this Order or administering the Creditor Trust, save and except for any gross negligence or wilful misconduct on the part of any such party.

31. No action lies against the Creditor Trustee, in its capacity as Creditor Trustee, by reason of this Order or the performance of any act authorized by this Order, except by leave of the Court. Any persons related to the Creditor Trustee or belonging to the same group as the Creditor Trustee shall benefit from the protection arising under this paragraph.

GENERAL

32. Following the Effective Time, the Purchaser shall be authorized to take all steps as may be necessary to effect the discharge of the Claims and Encumbrances (each as described herein) as against the Subscribed Shares and the Retained Assets.

33. This Order shall have full force and effect in all provinces and territories in Canada.

34. PaySlate shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States or elsewhere, for orders which aid and complement this Order. All courts and administrative bodies of all such jurisdictions are hereby respectfully requested to make such orders and to provide such assistance to PaySlate and the Proposal Trustee as may be deemed necessary or appropriate for that purpose.

35. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this

Order and to assist PaySlate, the Proposal Trustee and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to PaySlate and the Proposal Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist PaySlate, the Proposal Trustee and their respective agents in carrying out the terms of this Order.

36. This Order and all of its provisions are effective as of 12:01 a.m. Prevailing Pacific Time on the date hereof, provided that the transaction steps set out in paragraph 5 hereof shall be deemed to have occurred sequentially, one after the other, in the order set out in paragraph 5 hereof.

37. Endorsement of this Order by counsel appearing on this application, other than counsel for PaySlate is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of ~~for~~ Matti Lemmens Jennifer Pepper.

☐ party ☑ lawyer for PaySlate Inc.

BY THE COURT

REGISTRAR IN BANKRUPTCY

CHECKED

136867864:v5

SCHEDULE "A"
LIST OF COUNSEL

NAME OF COUNSEL	PARTY REPRESENTED
Robyn Gurofsky	Grant Thornton Limited, in its capacity as the Proposal Trustee
Peter Bychawski	PaySafe Merchant Services Inc.
Sean Collins	Ayrshire Real Estate Management Inc. / 1410512 B.C. Ltd.

SCHEDULE "B"
FORM OF PROPOSAL TRUSTEE'S CERTIFICATE

District of British Columbia
Division No.: 03 - Vancouver
Court No.: B-220504
Estate No: 11-2891281
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE NOTICE OF INTENTION
TO MAKE A PROPOSAL OF PAYSLATE INC.

PROPOSAL TRUSTEE'S CERTIFICATE

RECITALS

A. Pursuant to the Notice of Intention to Make a Proposal of PaySlate Inc. ("**PaySlate**"), dated December 9, 2022, pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 as amended (the "***BIA***"), Grant Thornton Limited was appointed as the trustee of the proposal (the "**Proposal Trustee**") of PaySlate.

B. Pursuant to the Approval and Reverse Vesting Order granted by the Honourable Mr. Justice Walker on May 10, 2023 (the "**Approval and Reverse Vesting Order**"), the Court approved the transactions contemplated by the Subscription Agreement among PaySlate and Ayrshire Real Estate Management Inc. (the "**Purchaser**") dated May 2, 2023, which provided for, among other things: (i) the vesting out of PaySlate all Excluded Assets, Excluded Contracts and Excluded Liabilities (ii) the discharge of Encumbrances against PaySlate and the Retained Assets, except only the Permitted Encumbrances; (iii) certain ancillary relief, with the steps set out in paragraph 5 of the Approval and Reverse Vesting Order to become effective upon the Proposal Trustee filing a certificate confirming that the Proposal Trustee has been advised that the Purchaser has satisfied the Subscription Price and all conditions to Closing set out in the Subscription Agreement have been satisfied or waived by PaySlate and the Purchaser.

C. Unless otherwise indicated therein, capitalized terms used and not otherwise defined in this Proposal Trustee's Certificate have the meanings set out in the Approval and Reverse Vesting Order.

THE PROPOSAL TRUSTEE CERTIFIES that it was advised by PaySlate and the Purchaser that:

1. The Purchaser has satisfied the Subscription Price (as defined in the Subscription Agreement) in accordance with the Subscription Agreement;

2. The conditions to Closing as set out in the Subscription Agreement have been satisfied or waived by PaySlate and the Purchaser; and

3. The transactions contemplated in the Subscription Agreement have closed.

This Certificate was delivered by the Proposal Trustee at _____ **[TIME]** on _____ **[DATE]**.

Grant Thornton Limited in its capacity as Proposal Trustee of PaySlate Inc. and not in its personal capacity

Per: _____
Name:
Title:

SCHEDULE "C"
PERMITTED ENCUMBRANCES

Nil.

SCHEDULE "D"
CREDITOR TRUST SETTLEMENT

CREDITOR TRUST SETTLEMENT

RECITALS

A. On December 5, 2022, PaySlate Inc. ("**PaySlate**") initiated proceedings under the *Bankruptcy and Insolvency Act* (Canada) ("***BIA***") by filing a Notice of Intention to Make a Proposal pursuant to Section 50.4 of the *BIA* (the "**NOI Proceedings**").

B. On December 9, 2022, the time for filing PaySlate's proposal and the stay of proceedings in relation thereto, was extended to February 17, 2023 by way of an order granted by the Supreme Court of British Columbia (the "**Court**").

C. On December 9, 2022, the Court granted an order authorizing Grant Thornton Limited in its capacity as proposal trustee (the "**Proposal Trustee**") to conduct a sale and investment solicitation process (the "**SISP**").

D. As a result of the SISP, the Purchaser and PaySlate entered into negotiations for the subscription by the Purchaser for the Subscribed Shares, to be completed through a set of transactions between PaySlate and the Purchaser to proceed by way of reverse vesting order (the "**RVO Transaction**") which includes, among other things: (i) the establishment of a trust (the "**Creditor Trust**") for the benefit of the creditors of PaySlate (ii) the transfer to the Creditor Trust of certain assets and contracts of PaySlate (the "**Excluded Assets**" and "**Excluded Contracts**"); (iii) the transfer to the Creditor Trust of certain liabilities of PaySlate (the "**Excluded Liabilities**"); (iii) the payment by the Purchaser (as defined in the Subscription Agreement) of the Cash Consideration (as defined in the Subscription Agreement).

E. This Trust Settlement is intended to be appended to and form part of the Approval and Reverse Vesting Order granted in the NOI Proceedings on May 10, 2023 (the "**RVO**"), for the purpose of furthering the RVO Transaction, including but not limited to governing the manner in which the Creditor Trust shall be established, effective on the closing of the RVO Transaction, and administered thereafter.

ARTICLE 1
ESTABLISHMENT OF THE CREDITOR TRUST

1.1 Settling the Creditor Trust

The Creditor Trust shall be named the "PaySlate Residual Trust" and shall be settled by the delivery by the Purchaser of the Cash Consideration to the Proposal Trustee.

1.2 Appointment of the Creditor Trustee

The Proposal Trustee shall be the trustee of the Creditor Trust (the "**Creditor Trustee**") and shall hold the Cash Consideration in trust for the creditors of PaySlate (the "**Creditor Trust Beneficiaries**"), subject to the terms of this Trust Settlement. The Creditor Trustee shall have all

the rights, powers and duties set forth herein and pursuant to applicable law for accomplishing the purposes of the Creditor Trust.

1.3 Purpose of the Creditor Trust

The purpose of the Creditor Trust is for the Creditor Trustee to hold the Cash Consideration, the Excluded Assets and the Excluded Contracts, assume the Excluded Liabilities, and to distribute the Cash Consideration and any other realized assets to the Creditor Trust Beneficiaries, in accordance with their respective priorities, rights and entitlements as against PaySlate.

ARTICLE 2
THE CREDITOR TRUSTEE

2.1 Authority of Trustee

The Creditor Trustee shall have all powers and authorities necessary to carry out the purpose of the Creditor Trust as set out in Article 1.3. The Creditor Trustee may from time to time apply to the Court for advice and directions as to the discharge of its powers and duties hereunder.

2.2 Compensation of the Trustee

The Creditor Trustee shall be compensated for its services, and reimbursed for its expenses, including the reasonable costs and expenses of its legal counsel, first from the Cash Consideration and the Administration Charge granted pursuant to Order of the Court dated December 9, 2022 shall continue to attach to the Cash Consideration.

2.3 Standard of Care; Exculpation

In addition to the rights and protections afforded to the Creditor Trustee as Proposal Trustee under the *BIA* or as an Officer of this Court, the Creditor Trustee shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Trust Settlement, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Trust Settlement shall derogate from the protections afforded the Proposal Trustee by the *BIA* or any applicable legislation, or any Orders granted in these NOI Proceedings

ARTICLE 3
INDEMNIFICATION

3.1 Indemnification of Creditor Trustee and others

To the fullest extent permitted by law, the Creditor Trust, to the extent of its assets legally available for that purpose, shall indemnify and hold harmless the Creditor Trustee, and each of its respective directors, members, shareholders, partners, officers, agents, employees, counsel and other professionals (collectively, the "**Indemnified Persons**") from and against any and all losses, costs, damages, reasonable and documented out-of-pocket expenses (including reasonable fees and expenses of counsel and other advisors and any court costs incurred by any Indemnified Person)

or liability by reason of anything any Indemnified Person did, does, or refrains from doing for the business or affairs of the Creditor Trust, except to the extent that the loss, cost, damage, expense or liability resulted from the Indemnified Person's gross negligence or wilful misconduct.

ARTICLE 4
TERM; TERMINATION OF THE CREDITOR TRUST

4.1 Term; Termination of the Creditor Trust

(a) The Creditor Trust shall commence on the date that the RVO Transaction closes, and shall terminate no later than the first anniversary thereof; provided, however, that, on or prior to the date that is 90 days prior to such termination, the Creditor Trustee may extend the term of the Creditor Trust if it is necessary to the efficient and proper administration of the Creditor Trust in accordance with the purposes and terms of this Trust Settlement, by filing a notice of such extension with the Court, and serving such notice on interested parties.

(b) The Creditor Trust may be terminated by the Creditor Trustee earlier than its scheduled termination if the Creditor Trustee has distributed all assets of the Creditor Trust and performed all other duties required by this Trust Settlement. Upon termination of the Creditor Trust, any and all remaining portion of the Cash Consideration shall be paid to the Purchaser.

ARTICLE 5
AMENDMENT AND WAIVER

5.1 Amendment and Waiver

The Creditor Trustee may amend, supplement or waive any provision of this Trust Settlement, without notice to or the consent of the Creditor Trust Beneficiaries or the approval of the Court: (i) to cure any ambiguity, omission, defect or inconsistency in this Trust Settlement; (ii) to comply with any legal (including tax) requirements; and (iii) to achieve any other purpose that is not inconsistent with the purpose and intention of this Trust Settlement.

ARTICLE 6
MISCELLANEOUS PROVISIONS

6.1 Laws as to Construction

This Trust Settlement shall be governed by and construed in accordance with the laws of the Province of British Columbia and the federal laws of Canada applicable therein, without regard to whether any conflicts of law would require the application of the law of another jurisdiction.

6.2 Jurisdiction

Without limiting any Person's right to appeal any order of the Court with regard to any matter, (i) the Court shall retain exclusive jurisdiction to enforce the terms of this Trust Settlement and to

decide any claims or disputes which may arise or result from, or be connected with, this Trust Settlement, or the matters contemplated hereby; and, (ii) any and all actions related to the foregoing shall be filed and maintained only in the Court.

6.3 Irrevocability

The Creditor Trust is irrevocable, but is subject to amendment and waiver as provided for herein.

District of British Columbia
Division No.: 03 – Vancouver
Court No.: B-220504
Estate No.: 11-2891281
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE NOTICE OF INTENTION
TO MAKE A PROPOSAL OF PAYSLATE INC.

ORDER MADE AFTER APPLICATION

(APPROVAL AND REVERSE VESTING ORDER)

BORDEN LADNER GERVAIS LLP
Suite 1900 – 520 3 Ave SW Suite
Calgary, AB, T2P 0R3
Telephone: (403) 232-9511
Client/Matter: 564989/000009
Attn: Matti Lemmens

TAB 8

Court File No.: BK-22-02802344-0035

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
COMMERCIAL LIST

THE HONOURABLE	)	TUESDAY, THE 1st
	)	
JUSTICE CONWAY	)	DAY OF MARCH, 2022
	)	

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF AYANDA CANNABIS CORPORATION

ORDER
(Approval and Vesting Order)

THIS MOTION, made by Ayanda Cannabis Corporation (the "**Corporation**"), pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), for an order, among other things: (i) approving the Share Purchase Agreement (the "**SPA**") between the Corporation and 12830353 Canada Inc., or its assignee (the "**Purchaser**"), dated February 2, 2022, and the transactions contemplated thereby (the "**Transactions**"), (ii) vesting all of the right, title and interest in and to the New Common Shares (as defined in the SPA) in the Purchaser; (iii) transferring and vesting all of the Corporation's right, title and interest in and to the Excluded Assets, Excluded Contracts and Excluded Liabilities (as defined in the SPA) to and in a corporation to be incorporated ("**ResidualCo**"); and (iv) approving the Cannabis Consultant Agreement (as defined below), was heard this day by video conference due to the COVID-19 pandemic.

ON READING the Applicant's Notice of Motion, the affidavit of Michael Sioen sworn February 22, 2022, the affidavit of David Hyde sworn February 22, 2022 and the First Report of Richter Advisory Group Inc., in its capacity as Proposal Trustee of the Corporation (the "**Proposal Trustee**"), to be filed, and on hearing the submissions of counsel for the Corporation, counsel for the Proposal Trustee, and counsel for those other parties appearing as indicated by the counsel slip, no one appearing for any other

party, although duly served as appears from the affidavit of service of Darlene Moffett, filed.

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINED TERMS

2. **THIS COURT ORDERS** that capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the SPA.

APPROVAL AND VESTING

3. **THIS COURT ORDERS AND DECLARES** that the SPA and the Transactions be and are hereby approved and that the execution of the SPA by the Corporation is hereby authorized and approved, with such minor amendments as the parties thereto may deem necessary, with the approval of the Proposal Trustee. The Corporation is hereby authorized and directed to perform its obligations under the SPA and to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transactions and for the conveyance of the New Common Shares to the Purchaser.

4. **THIS COURT ORDERS AND DECLARES** that this Order shall constitute the only authorization required by the Corporation to proceed with the Transactions (including, for certainty, the Pre-Closing Reorganization), and that no shareholder or other approval shall be required in connection therewith.

5. **THIS COURT ORDERS AND DECLARES** that upon the delivery of the Proposal Trustee's certificate to the Purchaser (the "**Effective Time**"), substantially in the form attached as Schedule "A" hereto (the "**Proposal Trustee's Certificate**"), the following

shall occur and shall be deemed to have occurred at the Effective Time in the following sequence:

(a) first, all of the right, title and interest in and to the Excluded Assets shall vest absolutely and exclusively in ResidualCo, and all Claims and Encumbrances (each as defined below), shall continue to attach to the Excluded Assets and to the Proceeds (as defined below) in accordance with paragraph 8 of this Order, in either case with the same nature and priority as they had immediately prior to the transfer;

(b) second, all Excluded Contracts and Excluded Liabilities (which for certainty includes all debts, liabilities, obligations, indebtedness, contracts, leases, agreements, and undertakings of any kind or nature whatsoever, whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) of the Corporation (other than the Assumed Liabilities), including the obligations of the Corporation in connection with any proposal put forward in these proposal proceedings ("**NOI Proceedings**"), shall be channelled to, assumed by and vest absolutely and exclusively in ResidualCo such that the Excluded Contracts and Excluded Liabilities shall become obligations of ResidualCo and shall no longer be obligations of the Corporation, and the Corporation and all of its assets, licenses, undertakings and properties of every nature and kind whatsoever and wherever situate (including, for certainty, the Transferred Assets and the Retained Assets, the "**Corporation's Property**") shall be and are hereby forever released and discharged from such Excluded Contracts and Excluded Liabilities and all related Claims and all Encumbrances affecting or relating to the Corporation's Property are hereby expunged and discharged as against the Corporation's Property;

(c) third, all options, conversion privileges, equity-based awards, warrants, securities, debentures, loans, notes or other rights, agreements or

commitments of any character whatsoever that are held by any Person (defined below) and are convertible or exchangeable for any securities of the Corporation or which require the issuance, sale or transfer by the Corporation, of any shares or other securities of the Corporation and/or the share capital of the Corporation, or otherwise relating thereto, shall be deemed terminated and cancelled; and

(d) fourth, all of the right, title and interest in and to the New Common Shares shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**"), including without limiting the generality of the foregoing: (i) any encumbrances or charges created in these NOI Proceedings (including the Administration Charge and the DIP Lender's Charge); (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry systems; (iii) those Claims listed on Schedule "B" hereto (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule "C" hereto) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the New Common Shares are hereby expunged and discharged as against the New Common Shares.

6. **THIS COURT ORDERS AND DIRECTS** the Proposal Trustee to file with the Court a copy of the Proposal Trustee's Certificate, forthwith after delivery thereof in connection with the Transactions.

7. **THIS COURT ORDERS** that the Proposal Trustee may rely on written notice from the Corporation and the Purchaser regarding the fulfilment of conditions to closing

under the SPA and shall have no liability with respect to delivery of the Proposal Trustee's Certificate.

8. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the New Common Shares (including, for greater certainty, the Deposit and the Cash Purchase Price) (collectively, the "**Proceeds**") shall stand in the place and stead of the Corporation's Property, and that from and after the delivery of the Proposal Trustee's Certificate, all Claims and Encumbrances shall attach to the Proceeds and the Excluded Assets with the same priority as they had with respect to the Corporation's Property immediately prior to the sale.

9. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, as amended, the Corporation or the Proposal Trustee, as the case may be, is authorized, permitted and directed to, at the Effective Time, disclose to the Purchaser all human resources and payroll information in the Corporation's records pertaining to past and current employees of the Corporation. The Purchaser shall maintain and protect the privacy of such information in accordance with applicable law and shall be entitled to use the personal information provided to it in a manner that is in all material respects identical to the prior use of such information by the Corporation.

10. **THIS COURT ORDERS AND DECLARES** that, at the Effective Time and without limiting the provisions of paragraph 5 hereof, the Purchaser and the Corporation shall be deemed released from any and all claims, liabilities (direct, indirect, absolute or contingent) or obligations with respect to any Taxes (including penalties and interest thereon) of, or that relate to, the Corporation (provided, as it relates to the Corporation, such release shall not apply to Taxes in respect of the business and operations conducted by the Corporation after the Effective Time), including without limiting the generality of the foregoing, all Taxes that could be assessed against the Purchaser or the Corporation (including its affiliates and any predecessor corporations) pursuant to section 160 of the *Income Tax Act*, R.S.C. 1985 c. 1 (5th Supp.), or any provincial equivalent, in connection with the Corporation. For greater certainty, nothing in this

paragraph shall release or discharge any Claims with respect to Taxes that are transferred to ResidualCo.

11. **THIS COURT ORDERS** that except to the extent expressly contemplated by the SPA, all Contracts to which the Corporation is a party at the time of delivery of the Proposal Trustee's Certificate will be and remain in full force and effect upon and following delivery of the Proposal Trustee's Certificate and no individual, firm, corporation, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") who is a party to any such arrangement may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of set off, dilution or other remedy) or make any demand under or in respect of any such arrangement and no automatic termination will have any validity or effect, by reason of:

(a) any event that occurred on or prior to the delivery of the Proposal Trustee's Certificate and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of the Corporation);

(b) the insolvency of the Corporation or the fact that the Corporation sought or obtained relief under the BIA;

(c) any compromises, releases, discharges, cancellations, transactions, arrangements, reorganizations or other steps taken or effected pursuant to the SPA, the Transactions or the provisions of this Order, or any other Order of the Court in these NOI Proceedings; or

(d) any transfer or assignment, or any change of control of the Corporation arising from the implementation of the SPA, the Transactions or the provisions of this Order.

12. **THIS COURT ORDERS**, for greater certainty, that (a) nothing in paragraph 11 hereof shall waive, compromise or discharge any obligations of the Corporation in respect of any Assumed Liabilities, and (b) the designation of any Claim as an Assumed Liability is without prejudice to the Corporation's right to dispute the existence, validity or

quantum of any such Assumed Liability, and (c) nothing in this Order or the SPA shall affect or waive the Corporation's rights and defences, both legal and equitable, with respect to any Assumed Liability, including, but not limited to, all rights with respect to entitlements to set offs or recoupments against such Assumed Liability.

13. **THIS COURT ORDERS** that from and after the Effective Time, all Persons shall be deemed to have waived any and all defaults of the Corporation then existing or previously committed by the Corporation, or caused by the Corporation, directly or indirectly, or non-compliance with any covenant, warranty, representation, undertaking, positive or negative pledge, term, provision, condition, or obligation, expressed or implied in any Contract existing between such Person and the Corporation (including for certainty, those Contracts constituting Retained Assets) arising directly or indirectly from the filing of the Corporation under the BIA and implementation of the Transactions, including without limitation any of the matters or events listed in paragraph 11 hereof and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under a Contract shall be deemed to have been rescinded and of no further force or effect, provided that nothing herein shall be deemed to excuse the Corporation from performing its obligations under the SPA or be a waiver of defaults by the Corporation under the SPA and the related documents.

14. **THIS COURT ORDERS** that from and after the Effective Time, any and all Persons shall be and are hereby forever barred, estopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, whether directly, derivatively or otherwise, and including without limitation, administrative hearings and orders, declarations and assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against the Corporation relating in any way to or in respect of any Excluded Assets, Excluded Liabilities or Excluded Contracts and any other claims, obligations and other matters that are waived, released, expunged or discharged pursuant to this Order.

15. **THIS COURT ORDERS** that from and after the Effective Time:

(a) the nature of the Assumed Liabilities retained by the Corporation, including, without limitation, their amount and their secured or unsecured

status, shall not be affected or altered as a result of the Transactions or this Order;

(b) the nature of the Excluded Liabilities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to ResidualCo;

(c) any Person that prior to the Effective Time had a valid right or claim against the Corporation under or in respect of any Excluded Contract or Excluded Liability (each an "**Excluded Liability Claim**") shall no longer have such right or claim against the Corporation but will have an equivalent Excluded Liability Claim against ResidualCo in respect of the Excluded Contract or Excluded Liability from and after the Effective Time in its place and stead, and nothing in this Order limits, lessens or extinguishes the Excluded Liability Claim of any Person as against ResidualCo; and

(d) the Excluded Liability Claim of any Person against ResidualCo following the Effective Time shall have the same rights, priority and entitlement as such Excluded Liability Claim had against the Corporation prior to the Effective Time.

16. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these NOI Proceedings;

(b) any application for a bankruptcy order now or hereafter issued pursuant to the BIA in respect of ResidualCo and any bankruptcy order issued pursuant to any such application; and

(c) any assignment in bankruptcy made in respect of ResidualCo;

the SPA, the implementation of the Transactions (including without limitation the transfer and vesting of the Excluded Assets, Excluded Contracts and Excluded Liabilities in and to ResidualCo, the transfer and vesting of the New Common Shares in

and to the Purchaser) and any payments by or to the Purchaser, ResidualCo or the Proposal Trustee authorized herein shall be binding on any trustee in bankruptcy that may be appointed in respect of ResidualCo and shall not be void or voidable by creditors of ResidualCo, as applicable, nor shall they constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

CANNABIS CONSULTANT

17. **THIS COURT ORDERS** that the success fee agreement between the Corporation and Hyde Advisory & Investments Inc. ("**Hyde Advisory**"), dated November 11, 2021 ("**Cannabis Consultant Agreement**"), be and is hereby approved and the Corporation is authorized to pay Hyde Advisory the success fee payable under the Cannabis Consultant Agreement on the Closing of the Transaction.

RELEASES

18. **THIS COURT ORDERS** that, at the Effective Time, (i) the current directors, officers, employees, and independent contractors who provided legal or financial services to the Corporation, (ii) legal counsel and advisors of the Corporation, and (iii) the Proposal Trustee and its legal counsel (collectively, the "**Released Parties**") shall be deemed to be forever irrevocably released and discharged from any and all present and future claims (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part of any act or omission, transaction, dealing or other occurrence existing or taking place prior to the Effective Time and that relate in any manner whatsoever to the Corporation or any of its assets (current or historical), obligations, business or affairs, or these NOI

Proceedings, including any actions undertaken or completed pursuant to the terms of this Order, or arising in connection with or relating to the SPA or the completion of the Transactions (collectively, the "**Released Claims**"), which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties; *provided that* nothing in this paragraph shall waive, discharge, release, cancel or bar any claim that is not permitted to be released pursuant to section 50(14) of the BIA.

GENERAL

19. **THIS COURT ORDERS** that, following the Effective Time, the Purchaser shall be authorized to take all steps as may be necessary to effect the discharge of the Claims and Encumbrances as against the New Common Shares.

20. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

21. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist ResidualCo, the Proposal Trustee and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to ResidualCo and to the Proposal Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Proposal Trustee in any foreign proceeding, or to assist ResidualCo and the Proposal Trustee and their respective agents in carrying out the terms of this Order.

22. **THIS COURT ORDERS** that each of ResidualCo and the Proposal Trustee be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF AYANDA CANNABIS CORPORATION

Court File No.: BK-22-02802344-0035

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER
(Approval and Vesting Order)

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Counsel for Ayanda Cannabis Corporation

TAB 9

Estate File No.: 31-2774500
Court File No.: 31-2774500

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)

THE HONOURABLE MR.	)	FRIDAY, THE 17th DAY
	)	
JUSTICE PENNY	)	OF DECEMBER, 2021

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF JUNCTION CRAFT BREWING INC.

APPROVAL AND VESTING ORDER

THIS MOTION, made by Junction Craft Brewing Inc. (the "**Company**" or "**Junction**"), for an order, among other things: (a) authorizing and directing the Company to: (i) perform its obligations under Amended and Restated Stalking Horse Share Purchase Agreement between the Company and 1000003509 Ontario Limited (the "**Purchaser**") dated November 5, 2021 (the "**SPA**"), previously approved by order of this Honourable Court dated November 8, 2021; (ii) take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the transactions contemplated by the SPA (the "**Transactions**"); (b) transferring and vesting all of the Company's right, title and interest in and to the Excluded Assets, the Excluded Contracts and the Excluded Liabilities (each as defined in the SPA) in and to ResidualCo (as defined below); (c) releasing and discharging Junction from and in respect of all of the Excluded Liabilities; (d) cancelling and extinguishing all equity interests in Junction other than

the issued and outstanding common shares thereof; (e) authorizing and directing Junction to issue the New Class A Shares (as defined in the SPA); and (f) vesting in the Purchaser all right, title and interest in and to the New Class A Shares, was heard this day via video conference as a result of the COVID-19 pandemic.

ON READING the Notice of Motion, the Affidavit of Stuart Wheldon sworn December 14, 2021 and the exhibits thereto, the Second Report of Richter Advisory Group Inc. in its capacity as proposal trustee in this proceeding (the "**Proposal Trustee**") dated December 14, 2021 (the "**Second Report**") and the appendices thereto, and such other materials filed in respect of this motion, and on hearing submissions of counsel to the Company, the Proposal Trustee, the Purchaser, and such other counsel or persons listed on the Participant Information sheet, no one else from the service list appearing although properly served as appears from the affidavits of service filed,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion, the Motion Record and the Second Report is hereby abridged and validated such that this Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINITIONS

2. **THIS COURT ORDERS** that all capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the SPA.

APPROVAL OF TRANSACTIONS

3. **THIS COURT ORDERS AND DECLARES** that the Company is hereby authorized and directed to perform its obligations under the SPA and to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transactions, including the issuance of the New Class A Shares to the Purchaser.

4. **THIS COURT ORDERS AND DECLARES** that this Order shall constitute the only authorization required by the Company to proceed with the Transactions, and that no shareholder or other approval shall be required in connection therewith.

VESTING OF EXCLUDED ASSETS & LIABILITIES IN RESIDUALCO

5. **THIS COURT ORDERS AND DECLARES** that upon the delivery of a Proposal Trustee's certificate to the Purchaser and the Vendor (the "**Residual Co Vesting Time**"), substantially in the form attached as **Schedule "A"** hereto (the "**Proposal Trustee's ResidualCo Certificate**"), the following shall occur and shall be deemed to have occurred at the Residual Co Vesting Time in the following sequence:

(a) the directors and officers of 1000054770 Ontario Inc. ("**ResidualCo**") shall be deemed to have resigned;

(b) all of Junction's right, title and interest in and to the Excluded Assets shall vest absolutely and exclusively in and to ResidualCo, and any and all Claims and Encumbrances shall continue to attach to the Excluded Assets in accordance with paragraph 14 of this Order, in either case with the same nature and priority as they had immediately prior to the transfer;

(c) all Excluded Liabilities (which for greater certainty includes all Claims against Junction other than the Retained Liabilities) shall be channeled to, assumed by and vest absolutely and exclusively in ResidualCo such that the Excluded Contracts and Excluded Liabilities shall become obligations of ResidualCo, which shall be deemed to have been party to the contracts and agreements giving rise thereto and which shall stand in place and stead of Junction in respect of any such liability or obligation, and shall no longer be obligations of Junction, and Junction and the Retained Assets shall be and are hereby forever released and discharged from such Excluded Contracts and Excluded Liabilities and all related Claims (excluding, for greater certainty, the Retained Liabilities), and all Encumbrances in connection therewith or affecting or relating to Junction and the Retained Assets are hereby expunged and discharged as against Junction and the Retained Assets; and

(d) the Bankruptcy Costs shall be paid by the Purchaser, on behalf of the Company, to the Proposal Trustee, who shall provide same to the trustee in bankruptcy of ResidualCo (in such capacity, the "**Trustee**"), which Bankruptcy Costs shall be held by the Proposal Trustee and the Trustee free and clear of any Claims or Encumbrances.

BANKRUPTCY OF RESIDUALCO

6. **THIS COURT ORDERS AND DECLARES** that the Proposal Trustee is hereby authorized to file an assignment in bankruptcy on behalf of ResidualCo pursuant to the BIA.

7. **THIS COURT ORDERS AND DECLARES** that upon the delivery of the Proposal Trustee's ResidualCo Certificate, the Proposal Trustee shall forthwith cause ResidualCo to make an assignment in bankruptcy, naming Richter Advisory Group Inc. as Trustee.

VESTING OF NEW CLASS A SHARES IN PURCHASER

8. **THIS COURT ORDERS** that following the bankruptcy of ResidualCo and upon the delivery of a second Proposal Trustee's certificate to the Purchaser (the "**Effective Time**"), substantially in the form attached as **Schedule "B"** hereto (the "**Proposal Trustee's Share Sale Certificate**"), the following shall occur and shall be deemed to have occurred at the Effective Time in the following sequence:

(a) all issued and outstanding shares in the capital of Junction (for greater certainty, not including the common shares of Junction nor the New Class A Shares to be subsequently issued to the Purchaser pursuant to the SPA and subparagraph (c) hereof), and all options, conversion privileges, equity-based awards, warrants, securities, debentures, loans, notes or other rights, agreements or commitments, or any other equity interests in Junction of any character whatsoever that are held by any Person and are convertible or exchangeable for any securities of the Company or which require the issuance, sale or transfer by Junction, of any shares or other securities of Junction and/or the share capital of Junction, or otherwise relating thereto, shall be, and shall be deemed to be, terminated and cancelled without any payment or other consideration;

(b) the Purchaser shall have paid, assumed or otherwise satisfied the Priority Claims in accordance with the terms of the SPA, and, upon payment thereof, the Priority

Claims shall be and are hereby forever released, expunged and discharged as against the Retained Assets, Junction and the New Class A Shares; and

(c) in consideration for the Purchase Price, Junction shall issue the New Class A Shares to the Purchaser as fully paid and non-assessable shares of Junction, and all right, title and interest in and to the New Class A Shares shall vest absolutely and exclusively in the Purchaser, free and clear of any and all Claims and Encumbrances and, for greater certainty, this Court orders that all Claims and Encumbrances affecting or relating to the New Class A Shares are hereby expunged and discharged as against the New Class A Shares.

9. **THIS COURT ORDERS** that, from and after the Effective Time, the Purchaser and Junction shall be authorized to take all such steps as may be necessary to effect the releasing, expunging or discharging of all Claims and Encumbrances released, expunged or discharged pursuant to this Order, which are registered against the Retained Assets and the New Class A Shares, including the filing of such financing change statements in any personal property registry systems as may be necessary or desirable.

10. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, as amended, Junction or the Proposal Trustee, as the case may be, are authorized, permitted and directed to, at the Effective Time, disclose to the Purchaser all human resources and payroll information in Junction's records pertaining to past and current employees of Junction. The Purchaser shall maintain and protect the privacy of such information in accordance with applicable law and shall be entitled to use the

personal information provided to it in a manner that is in all material respects identical to the prior use of such information by Junction.

FILING OF PROPOSAL TRUSTEE'S CERTIFICATES

11. **THIS COURT ORDERS AND DIRECTS** the Proposal Trustee to file with the Court a copy of the Proposal Trustee's ResidualCo Certificate and Proposal Trustee's Share Sale Certificate (together the "**Proposal Trustee's Certificates**"), forthwith after delivery thereof in connection with the Transactions.

12. **THIS COURT ORDERS** that the Proposal Trustee may rely on written notice from Junction and the Purchaser regarding the fulfilment of conditions to closing under the SPA and shall have no liability with respect to delivery of the Proposal Trustee's Certificates.

REDEMPTION OF COMMON SHARES OF JUNCTION

13. **THIS COURT ORDERS** that, following delivery of the Proposal Trustee's Share Sale Certificate, and notwithstanding anything to the contrary in its articles, under the *Business Corporations Act* (Ontario) or otherwise in law, Junction is authorized and directed to forthwith:

(a) amend its articles of incorporation to alter the provisions of the issued and outstanding common shares, making the same redeemable and retractable, at the nominal redemption price of $0.01 per common share; and

(b) immediately thereafter effect the redemption, retraction and cancellation of all common shares.

CLAIMS & ENCUMBRANCES

14. **THIS COURT ORDERS** that all Claims and Encumbrances released, expunged, and discharged as against Junction, the Retained Assets and the New Class A Shares pursuant to paragraph 8 hereof shall attach to the Excluded Assets with the same nature and priority as they had immediately prior to the Transactions, as if the Transactions had not occurred.

15. **THIS COURT ORDERS AND DECLARES** that at the Effective Time and without limiting the provisions of paragraphs 5 and 8 hereof, the Purchaser and Junction shall be deemed released from any and all claims, liabilities (direct, indirect, absolute or contingent) or obligations with respect to any Taxes or any part thereof (including penalties and interest thereon) of, or that relate to, Junction (provided, as it relates to Junction, such release shall not: (i) effect a transfer or assignment to ResidualCo of Taxes where such transfer or assignment of such particular Taxes is prohibited by statute, but the Purchaser and Junction shall still be released therefrom; (ii) apply to Taxes that are Retained Liabilities; and (iii) apply to Taxes in respect of the business and operations conducted by Junction after the Effective Time), including without limiting the generality of the foregoing, all Taxes that could be assessed against the Purchaser or Junction (or their affiliates or any predecessor corporations) pursuant to section 160 of the *Income Tax Act*, R.S.C. 1985 c. 1 (5th Supp.), or any provincial equivalent, in connection with Junction. For greater certainty, nothing in this paragraph shall (i) release or discharge any Claims against ResidualCo with respect to Taxes that are vested in or assumed by ResidualCo; or (ii) affect any tax attributes of Junction, which shall be retained by Junction and used to the maximum extent possible as permitted by Applicable Law to reduce Junction's taxable income.

CONTRACTS, RETAINED ASSETS & RETAINED LIABILITIES

16. **THIS COURT ORDERS** that except to the extent expressly contemplated by the SPA, all Contracts to which Junction is a party at the time of delivery of the Proposal Trustee's Share Sale Certificate will be and remain in full force and effect upon and following delivery of the Proposal Trustee's Share Sale Certificate and no Person who is a party to any such arrangement may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of set off, dilution or other remedy) or make any demand under or in respect of any such arrangement and no automatic termination will have any validity or effect, by reason of:

(a) any event that occurred on or prior to the delivery of the Proposal Trustee's Share Sale Certificate and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of Junction);

(b) the insolvency of Junction or the fact that Junction sought or obtained relief under the BIA;

(c) any compromises, releases, discharges, cancellations, transactions, arrangements, reorganizations or other steps taken or effected pursuant to the SPA, the Transactions or the provisions of this Order, or any other Order of the Court in these proceedings; or

(d) any transfer or assignment, or any change of control of the Company arising from the implementation of the SPA, the Transactions or the provisions of this Order.

17. **THIS COURT ORDERS**, for greater certainty, that (a) nothing in paragraph 16 hereof shall waive, compromise or discharge any obligations of Junction in respect of any Retained Liabilities, and (b) the designation of any Claim as a Retained Liability is without prejudice to Junction's right to dispute the existence, validity or quantum of any such Retained Liability, and (c) nothing in this Order or the SPA shall affect or waive Junction's rights and defences, both legal and equitable, with respect to any Retained Liability, including, but not limited to, all rights with respect to entitlements to set offs or recoupments against such Retained Liability or to settle, dispute, appeal or compromise any such Retained Liability.

18. **THIS COURT ORDERS** that from and after the Effective Time, all Persons shall be deemed to have waived any and all defaults of Junction then existing or previously committed by Junction, or caused by Junction, directly or indirectly, or non-compliance with any covenant, warranty, representation, undertaking, positive or negative pledge, term, provision, condition, or obligation, expressed or implied in any Contract existing between such Person and Junction (including for certainty, those Contracts constituting Retained Assets) arising directly or indirectly from the commencement of this proceeding under the BIA and implementation of the Transactions, including without limitation any of the matters or events listed in paragraph 16 hereof and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under a Contract shall be deemed to have been rescinded and of no further force or effect, provided that nothing herein shall be deemed to excuse Junction from performing its obligations under the SPA or be a waiver of defaults by Junction under the SPA and the related documents.

19. **THIS COURT ORDERS** that from and after the Effective Time, any and all Persons shall be and are hereby forever barred, estopped, stayed and enjoined from commencing, taking,

applying for or issuing or continuing any and all steps or proceedings, whether directly, derivatively or otherwise, and including without limitation, administrative hearings and orders, declarations and assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against Junction, the Retained Assets or the New Class A Shares relating in any way to or in respect of any Excluded Assets, Excluded Liabilities or Excluded Contracts and any other claims, obligations and other matters that are waived, released, expunged or discharged pursuant to this Order.

20. **THIS COURT ORDERS** that from and after the Effective Time:

(a) the nature of the Retained Liabilities retained by Junction, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of the Transactions or this Order;

(b) the nature of the Excluded Liabilities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their vesting in and assumption by ResidualCo;

(c) any Person that prior to the Effective Time had a valid right or claim against Junction under or in respect of any Excluded Contract or Excluded Liability (each an "**Excluded Liability Claim**") shall no longer have such right or claim against Junction but will have an equivalent Excluded Liability Claim against ResidualCo in respect of the Excluded Contract or Excluded Liability from and after the Effective Time in its place and stead, and nothing in this Order limits, lessens or extinguishes the Excluded Liability Claim of any Person as against ResidualCo; and

(d) the Excluded Liability Claim of any Person against ResidualCo following the Effective Time shall have the same rights, priority and entitlement as such Excluded Liability Claim had against Junction prior to the Effective Time.

21. **THIS COURT ORDERS** that notwithstanding any other provision of this Order or the SPA, all claims, rights, and remedies of Top 5 Solutions Ltd. against Junction, its assets, and the Purchaser shall continue unaffected and be deemed to be a Retained Liability.

GENERAL

22. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the BIA in respect of one or more of any of Junction, ResidualCo or any of their respective predecessors, successors or heirs (collectively, the "**Identified Parties**"), and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of any of the Identified Parties;

the SPA, the implementation of the Transactions (including without limitation the transfer, assumption and vesting of the Excluded Assets, Excluded Contracts and Excluded Liabilities in and to ResidualCo, the issuance and vesting of the New Class A Shares in and to the Purchaser), and any payments by or to the Purchaser, ResidualCo, the Proposal Trustee or the Trustee authorized herein shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Identified Parties and shall not be void or voidable by creditors of any of the Identified Parties, as applicable, nor shall they constitute nor be deemed to be a fraudulent

preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

23. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist Junction, ResidualCo, the Proposal Trustee, the Trustee and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Company and ResidualCo and to the Proposal Trustee or the Trustee (as applicable), as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Proposal Trustee or the Trustee (as applicable) in any foreign proceeding, or to assist the Company, ResidualCo, the Proposal Trustee, the Trustee and their respective agents in carrying out the terms of this Order.

24. **THIS COURT ORDERS** that each of the Company, ResidualCo, the Proposal Trustee and the Trustee be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

25. **THIS COURT ORDERS** that that this order is effective from today's date and is enforceable without the need for entry and filing

SCHEDULE "A"

Estate File No.: 31-2774500
Court File No.: 31-2774500

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF JUNCTION CRAFT BREWING INC.

PROPOSAL TRUSTEE'S RESIDUALCO CERTIFICATE

RECITALS

A. On October 15, 2021, Junction Craft Brewing Inc. ("**Junction**" or the "**Company**") filed a Notice of Intention to Make a Proposal (the "**NOI**") pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B.-3, as amended (the "**BIA**").

B. Richter Advisory Group Inc. ("**Richter**") was appointed as trustee (in such capacity, the "**Proposal Trustee**") under the NOI.

C. On December 17, 2021, The Honourable Mr. Justice Penny of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") issued an order (the "**Approval and Vesting Order**"), among other things:

(a) authorizing and directing the Company to: (i) perform its obligations under the Amended and Restated Stalking Horse Share Purchase Agreement between the Company and 1000003509 Ontario Limited (the "**Purchaser**") dated November 5, 2021 (the "**SPA**"), previously approved by order of the Court dated November 8, 2021; and (ii) take such additional steps and execute such additional documents that may be necessary or desirable for the completion of the transactions contemplated by the SPA (the "**Transactions**");

(b) transferring and vesting all of the Company's right, title and interest in and to the Excluded Assets, the Excluded Contracts and the Excluded Liabilities (each as defined in the SPA) in and to 1000054770 Ontario Inc. ("**ResidualCo**");

(c) releasing and discharging Junction from and in respect of all of the Excluded Liabilities;

(d) cancelling and extinguishing all equity interests in Junction other than the issued and outstanding common shares thereof;

(e) authorizing and directing Junction to issue the New Class A Shares (as defined in the SPA), and

(f) vesting in the Purchaser all right, title and interest in and to the New Class A Shares.

D. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Approval and Vesting Order.

THE PROPOSAL TRUSTEE CERTIFIES the following:

1. The Company's right, title and interest in and to the Excluded Assets, the Excluded Contracts and the Excluded Liabilities have been transferred to and vested in ResidualCo by way of the following, by way of the following steps which have occurred in the following sequence:

(a) the directors and officers of ResidualCo have been deemed to have resigned;

(b) all of Junction's right, title and interest in and to the Excluded Assets have vested absolutely and exclusively in ResidualCo, and any and all Claims and Encumbrances shall continue to attach to the Excluded Assets in accordance with paragraph 5(b) of the AVO, in either case with the same nature and priority as they had immediately prior to the transfer;

(c) all Excluded Liabilities (which for greater certainty includes all Claims against Junction other than the Retained Liabilities) have been channeled to, assumed by and vested absolutely and exclusively in ResidualCo such that the Excluded

Contracts and Excluded Liabilities have become obligations of ResidualCo, who is deemed to have been party to the contracts and agreements giving rise thereto and who shall stand in place and stead of Junction in respect of any such liability or obligation, and are no longer obligations of Junction, and Junction and the Retained Assets have been forever released and discharged from such Excluded Contracts and Excluded Liabilities and all related Claims (excluding, for greater certainty, the Retained Liabilities) and all Encumbrances in connection therewith or affecting or relating to Junction and the Retained Assets have been expunged and discharged as against Junction and the Retained Assets; and

(d) the Bankruptcy Costs have been paid by the Purchaser, on behalf of the Company, to the Proposal Trustee, who shall provide same to the trustee in bankruptcy of ResidualCo (in such capacity, the "**Trustee**"), which Bankruptcy Costs shall be held by the Proposal Trustee and the Trustee free and clear of any Claims or Encumbrances.

2. This Certificate was delivered by the Proposal Trustee on the _____ day of _____, 2021.

RICHTER ADVISORY GROUP INC. solely in its capacity as the Proposal Trustee of the Company, and not in its personal capacity

Per: _____

Name:

Title:

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF JUNCTION CRAFT BREWING INC.

Estate File No.: 31-2774500
Court File No.: 31-2774500

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)
Proceedings commenced at TORONTO

PROPOSAL TRUSTEE'S RESIDUALCO CERTIFICATE

AIRD & BERLIS LLP
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Toronto, ON M5J 2T9

Miranda Spence (LSO #60621M)
Tel: (416) 865-3414
E-mail: mspence@airdberlis.com

Lawyers for Richter Advisory Group Inc. in its capacity as Proposal Trustee

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF JUNCTION CRAFT BREWING INC.

Estate File No.: 31-2774500
Court File No.: 31-2774500

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)
Proceedings commenced at TORONTO

PROPOSAL TRUSTEE'S SHARE SALE CERTIFICATE

AIRD & BERLIS LLP
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Toronto, ON M5J 2T9

Miranda Spence (LSO #60621M)
Tel: (416) 865-3414
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Lawyers for Richter Advisory Group Inc. in its capacity as Proposal Trustee

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF JUNCTION CRAFT BREWING INC.

Estate File No.: 31-2774500
Court File No.: 31-2774500

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)
Proceedings commenced at TORONTO

APPROVAL AND VESTING ORDER

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, ON M2N 7E9

Sam Rappos (LSO #51399S)
Tel: (416) 218-1137
E-mail: samr@chaitons.com

Lawyers for Junction Craft Brewing Inc.

TAB 10

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Quest University Canada (Re),* 2020 BCSC 1883

Date: 20201202
Docket: S200586
Registry: Vancouver

In the Matter of the *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

- and -

In the Matter of the *SEA TO SKY UNIVERSITY ACT*, S.B.C. 2002, c. 54

- and -

In the Matter of A PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST UNIVERSITY CANADA

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment (Sale Approval)

Counsel for the Petitioner:	J.R. Sandrelli V. Cross
Counsel for the Monitor PricewaterhouseCoopers Inc.:	V.L. Tickle
Counsel for Primacorp Ventures Inc.:	P. Rubin G. Umbach
Counsel for RCM Capital Management Ltd. and SESA-BC Holdings Ltd.:	K. Jackson G. Nesbitt
Counsel for Southern Star Developments Ltd.:	P. Reardon K. Strong
Counsel for Vanchorverve Foundation:	C.D. Brousson
Counsel for Dana Hospitality LP:	D.V. Bateman

Counsel for Halladay Education Group:	D. Lawrenson
Counsel for Capilano University:	K. Mak
Counsel for Landrex Ventures Inc.:	J. D. West
Counsel for Quest University Faculty Union:	J. Sanders S. Rogers
Counsel for Bank of Montreal:	K. Davies
Counsel for Her Majesty The Queen In Right of Province of British Columbia and the Ministry of Advanced Education Skills and Training:	A. Welch
Counsel for 1114586 B.C. Ltd.:	K.E. Siddall
Counsel for Association for the Advancement of Scholarship:	L. Hiebert
Place and Date of Hearing:	Vancouver, B.C. November 12-13, 16, 2020
Place and Date of Decision with Written Reasons to Follow:	Vancouver, B.C. November 16, 2020
Place and Date of Written Reasons:	Vancouver, B.C. December 2, 2020

essence, an agreement to agree. Those conditions included that Quest would decide to build a residence building on Lot E and that Southern Star would arrange financing to construct the building. In these circumstances, I readily conclude that this condition has not been satisfied and will never be satisfied by Quest given Quest's insolvency.

[39] Further, even assuming that this is a "disguised" disclaimer, I conclude that Quest is not a "lessor" as that term is used in s. 32(9)(d) of the *CCAA*. Quest agreed that, if certain conditions were satisfied, it would become a "lessor" under the Ground Lease; however, that has not come to pass.

[40] I conclude that I have the jurisdiction under s. 11 of the *CCAA* to grant the order sought by Quest to ensure that Southern Star does not assert any rights under the Lot E Ground Lease at a future date. In addition, I rely on s. 36(6) of the *CCAA* that allows the Court to exercise its jurisdiction to vest off "other restrictions".

[41] The exercise of the Court's jurisdiction under s. 11 and 36 of the *CCAA* requires that the relief sought be "appropriate". This is in the sense that it accords with the statutory objectives of the *CCAA*, not only in terms of what the order will achieve, but the means by which it employs to that end: *Century Services Ltd. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70.

[42] In this respect, the parties have advanced arguments as to equitable considerations in terms of whether such relief is appropriate in the circumstances, while taking into account the respective positions of the parties. While in the receivership context, Quest has referred to various authorities that discuss the balancing of interests in similar situations where leases (in these cases effective and enforceable) were vested off title: *Meridian Credit Union Ltd. v. 984 Bay Street Inc*., [2006] O.J. No. 3169 (Ont. S.C.J.) at paras. 19-23, citing *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154; *Romspen Investments Corp. v. Woods Property Development Inc*., 2011 ONSC 3648 at para. 66; rev'd other grounds *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817 at para. 25.

> ("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))
>
> In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.
>
> [76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.
>
> [Underline emphasis added; italic emphasis in original.]

[156] Quest is not seeking to bar Southern Star or Dana from voting on the Plan. It is seeking approval of a structure that would result in Guardian submitting its own plan to the unsecured creditors, which would include Southern Star and Dana, at which time they are generally free to vote their "self-interest" subject to any relevant constraint (for example, if the court finds that they are voting for an improper purpose): *Callidus* at para. 24 and 56.

[157] There is no provision in the *CCAA* that prohibits an RVO structure. As is usually the case in *CCAA* matters, the court must ensure that any relief is "appropriate" in the circumstances and that all stakeholders are treated as fairly and reasonably "as the circumstances permit": *Century Services* at para. 70.

[158] As with the sales considered in most of the above RVO cases, including *Nemaska Lithium*, this is the *only* transaction that has emerged to resolve the financial affairs of Quest. No other options are before the stakeholders and the Court that would suggest another path forward. As was noted by Gouin J. in *Nemaska Lithium* (at para. 12), it is not up to the Court to dictate the terms and conditions that are included in an offer. Primacorp has presumably made the best offer that it is prepared to make in the circumstances – that is the offer the Court must consider.

[159] I agree with the Monitor that, without the RVO structure, the Primacorp transaction is in jeopardy. The only other likely path forward for Quest is

TAB 11

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-060598-212

DATE: July 8, 2022 (**RECTIFIED July 13, 2022**)

BY THE HONOURABLE MARIE-ANNE PAQUETTE, Chief Justice

IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36 OF:

BLACKROCK METALS INC.
BLACKROCK MINING INC.
BRM METALS GP INC.
BLACKROCK METALS LP.
Debtors
-and-

DELOITTE RESTRUCTURING INC.
Monitor
-and-

INVESTISSEMENT QUÉBEC
OMF FUND II H LTD.
Secured Creditors
-and-

13482332 CANADA INC.
Shareholder Bidder
-and-

WINNER WORLD HOLDINGS LIMITED
4470524 CANADA INC.
GOLDEN SURPLUS TRADING
PROSPERITY STEEL
Intervenors

RECTIFIED JUDGMENT
ON THE AMENDED SHAREHOLDER BIDDER'S APPLICATION TO EXTEND THE PHASE 2 BID DEADLINE (SEQ. 23)
AND
ON THE DEBTORS' APPLICATION TO APPROVE A VESTING ORDER (SEQ. 17) [1]

OVERVIEW

[1] The debtors BlackRock Metals Inc., BlackRock Mining Inc., BlackRock Metals LP and BRM Metals GP Inc. (collectively: **BlackRock**) were established in 2008. They are developing a metals and materials manufacturing business with a mine in Chibougamau, and a metallurgical plant to be located at the Port of Saguenay (**Project Volt**).

[2] The mine and plant to be built under Project Volt will eventually supply vanadium, high purity pig iron and titanium products, three specialty metals which are, according to

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[1] Reasons in support of orders issued on May 31, 2022 and rectified on June 1, 2022

BlackRock, central to the green materials transition in North America. BlackRock's business plan contemplates a forty-one year project life generating strong returns, with a small-scale mining operation.

[3] As of now, BlackRock has been in the process of raising the necessary capital to start the construction and implementation of Project Volt, which is now being estimated to cost approximately US$1.02 billion. Considering the early stage of its development, no revenues have ever been generated by the project.

[4] BlackRock's only secured creditors are OMF Fund II H Ltd. (**Orion**) and Investissement Québec (**IQ**). On January 18, 2019, BlackRock signed a loan credit agreement with Orion and IQ to supply the necessary working capital required to continue Project Volt. This loan was due and payable on December 1, 2022 and, as of now, Orion and IQ's secured claim amounts to approximately $100M, which constitutes the best part of BlackRock's pre-filing obligations. Orion and IQ also own, respectively, 18% and 12% of BlackRock's shares.

[5] On December 22, BlackRock filed an Application for an Initial Order and other ancillary relief in the present *Companies' Creditors Arrangement Act* (**CCAA**)[2] restructuring proceedings.

[6] On January 7, 2022, the Court issued a two-part order in view of the sale of the assets of BlackRock. Firstly, the Court established the parameters of a sale and investment solicitation process (**SISP**) for the sale of such assets.

[7] Secondly, the Court approved the Agreement of Purchase and Sale signed by Orion and IQ as purchaser (**Stalking Horse Agreement**) and ordered that this agreement be considered as constituting the "Stalking Horse Bid" under the SISP. The agreed purchase price under the Stalking Horse Agreement is to be equal to the fair market value of BlackRock's secured debt towards Orion and IQ (approximately $100M).

[8] Pursuant to the January 7, 2022 orders, Phase 2 Bids under the SISP were to be submitted before May 11, 2022, as will be discussed below.

[9] Two Applications are before the Court in relation to the above:

9.1. Amended Application by the Shareholder Bidder, 13482332 Canada Inc. (**Canada Inc.**) to extend the Phase 2 Bid Deadline (**Bid Extension Application**); and

9.2. BlackRock' Application to approve a vesting order (**RVO application**)

[10] In the Bid Extension Application, Canada Inc. seeks to extend the deadlines provided for in the January 7, 2022 orders, with the view of continuing to canvass the

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[2] R.S.C. 1985, c. C-36.

market for financial partners that would allow it to submit a Phase 2 Bid after the Phase 2 Bid deadline.

[11] In the RVO Application, BlackRock seeks an order approving the sale of its assets essentially along the terms of the IQ and Orion's Stalking Horse Agreement (**Proposed Transaction**).

[12] On May 31, 2022, due to time constraints, the Court rejected the Bid Extension Application and granted the RVO Application, with reasons to follow. The reasons are found below.

1. PROCEDURAL BACKGROUND (COURT ORDERS)

[13] On December 22, 2021, BlackRock filed an Application for an Initial Order and other ancillary relief.

[14] On December 23, 2021, the Court issued a First Day Initial Order pursuant to the CCAA and, *inter alia*, appointed Deloitte Restructuring Inc. as the monitor (**Monitor**).

[15] On January 7, 2022, the Court issued an *Amended and Restated Initial Order* and an *Order Approving a Sale and Investment Solicitation Process (SISP) and Approving a Stalking Horse Agreement of Purchase and Sale*.

[16] The January 7, 2022 orders (**Initial Orders**) provided that BlackRock was authorized to borrow from Orion and IQ, as interim lenders, such amounts from time to time as BlackRock may consider necessary or desirable, up to a maximum principal amount of $2M outstanding at any time, to fund the ongoing expenditures of BlackRock and to pay such other amounts as may be permitted (**Interim Facility**). The Court also authorized a corresponding Interim Charge, for a maximum amount of $2.4M, in favor or IQ and Orion.

[17] The Initial Orders also approved a SISP to be conducted in accordance with the approved procedures (**Bidding Procedures**);

17.1. authorized the Monitor and BlackRock to implement the SISP;

17.2. approved the Stalking Horse Agreement, solely for the purposes of:

(i) constituting the "stalking horse bid" under the SISP; and

(ii) approving the Expense Reimbursement (as defined in the Stalking Horse Agreement), and subject to further Order of this Court.

[18] Pursuant to the Initial Orders and at the request of the Intervenors (shareholders), the Court extended the SISP by an additional 30 days beyond what was originally contemplated.

[19] The Stay of proceedings was thereafter extended to June 30, 2022, in accordance with further requests made and in accordance with the debate arising from the two Motions identified above.

2. PHASES OF THE SISP

[20] The objective of the SISP was to solicit interest either (i) in one or more sales or partial sales of all, substantially all, or certain portions of the BlackRock's business; and/or (ii) for an investment in a restructuring, recapitalization, refinancing or other form of reorganization of BlackRock or its business.

[21] The Bidding Procedures provide that a party interested in participating in the SISP must sign and deliver to the Monitor a non-disclosure agreement (**NDA**) and upon doing so, is considered a "**Phase 1 Qualified Bidder**", following which the Monitor will provide to such party a confidential information memorandum (**CIM**) and access to the confidential virtual data room (**VDR**) set up by BlackRock and the Monitor.

[22] The Bidding Procedures further provide that if a Phase 1 Qualified Bidder wishes to submit a bid, it must deliver to the Monitor a non-binding letter of intent (**LOI**) which must conform to certain specified requirements (**Phase 1 Qualified Bid**) no later than 5:00 p.m. on March 9, 2022 (**Phase 1 Bid Deadline**).

[23] Following the Phase 1 Bid Deadline, BlackRock shall determine, in consultation with the Monitor, if an LOI qualifies as a "**Phase 1 Successful Bid**", in which case the bidder is thereafter deemed a "**Phase 2 Qualified Bidder**".

[24] Phase 2 Qualified Bidders shall thereafter submit their Phase 2 Qualified Bid no later than 5:00 p.m. on May 11, 2022, or such other date or time as may be agreed by the Monitor in consultation with BlackRock and with the authorization of Orion and IQ as Stalking Horse Bidders, acting reasonably (**Phase 2 Bid Deadline**).

[25] Also pursuant to the Bidding Procedures, the Stalking Horse Bidders are Phase 2 Qualified Bidders for all purposes under the SISP.

[26] Therefore, Canada Inc. had until May 11, 2022, 5:00 p.m. (Eastern Standard Time) to submit its Phase 2 Qualified Bid (**Phase 2 Bid Deadline**).

3. TASKS PERFORMED BY THE MONITOR IN ACCORDANCE WITH THE SISP

[27] Further to the Initial Orders, the Monitor undertook the following steps to conduct the solicitation process in accordance with the SISP:

a. the Monitor contacted 415 potentially interested parties;

b. 374 potentially interested parties received the Teaser according to email confirmations received by the Monitor;

c. 232 potentially interested parties were contacted directly by the Monitor, in addition to the general distribution that occurred on January 10, 2022;

d. 65 potentially interested parties participated in more serious discussions about the opportunity or confirmed that they were not interested;

e. 7 interested parties executed an NDA and were granted access to the VDR; and,

f. 1 interested party (Shareholder Bidder) submitted a non-binding Letter of Interest (LOI) prior to the Phase 1 Bid Deadline.[3]

4. CANADA INC.'S LOI

[28] Canada Inc. was incorporated on March 8, 2022, as a special purpose vehicle to participate in the SISP and submit a bid.

[29] Canada Inc.'s shares are owned by 3 individuals, Mr. Edward Yu, Mr. Solomon (Sam) Pillersdorf and Mr. Leslie A. Wittlin, who, directly or through corporate entities under their control, own approximately 50% of the outstanding shares of BlackRock. Mr. Yu, Mr. Pillersdorf and Mr. Wittlin also act as directors and officers of the company. Canada Inc.'s representatives submit that they have well established links into the mining industry and, based on same, have assembled a team of experienced advisory professionals in the field.

[30] The Monitor did not receive any other LOI on or before the Phase 1 Bid Deadline. Therefore, Canada Inc.'s non-binding LOI[4] of March 9, 2022 is the only Phase 1 Successful Bid.

[31] In its LOI, Canada Inc. proposes a purchase price for BlackRock's shares that shall be either the sum of $100M or such greater amount as would be required to exceed the minimum purchase price as defined in the Initial Order.

5. ORDERS SOUGHT AND CONCLUSIONS OF THE COURT

5.1 The Bid Extension Application

[32] Canada Inc. argues that its tremendous efforts to submit a bid to the Monitor are on the verge of bearing fruit, albeit slightly past the Bid Deadline. Canada Inc. therefore begs the Court to extend the Phase 2 Bid Deadline (which expired on May 11, 2021) for an extra thirty days after the present judgment.

[33] The Monitor, BlackRock and Orion and IQ object to such extension.

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3 Fifth Report, par. 27.
4 Exhibits A-2, R-3.

[34] For the reasons below, the Court refused the extension sought.

5.2 The RVO Application

[35] The only pending bid therefore is the one made by Orion and IQ, the Stalking Horse Bidders. With the support of BlackRock and of the Monitor, they beg the Court to approve the drafted agreement.[5]

[36] The **Intervenors**, who own approximately 50% of the shares of BlackRock, object to the structure of the Proposed Transaction, as it would amount to an illegal appropriation of their shares, without their consent. They also object to the granting of a release to Orion and IQ, as contemplated under the Stalking Horse Agreement.

[37] For the reasons below, the Court dismissed the Intervenors' objection and approved the transaction in accordance with the RVO.

ANALYSIS

6. BID EXTENSION APPLICATION

6.1 Facts relevant to the issue

[38] As indicated above, Canada Inc.'s LOI[6] is the only Phase 1 Successful Bid. Therefore, only IQ and Orion (Stalking Horse Bidders) and Canada Inc. (Shareholder Bidder) were permitted to proceed to Phase 2 of the SISP.

[39] More particularly, on March 8-9, 2022, before the Phase 1 Bid Deadline, Canada Inc. was incorporated and delivered to the Monitor a non-binding LOI, which was confirmed as a Phase 1 Successful Bid. Canada Inc. therefore qualified for Phase 2 of the SISP.

[40] To assist in making such a decision, BlackRock and the Monitor requested and received clarifications, particularly with respect to the ability of Canada Inc.'s representatives to fund its bid from their own assets or from third-party financing (**Clarification Letter**)[7], which will be discussed below.[8]

[41] At a later meeting, held on May 9, 2022, Canada Inc. informed the Monitor and BlackRock that despite having initiated, with the help of its own financial advisors, a solicitation process to identify financial partners that would support its bid, it would not be in position to file a qualified bid by the Phase 2 Deadline.

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5 Exhibit R-2.
6 Exhibits A-2, R-3.
7 Exhibit R-5.
8 See par. [68] and following of the present judgment.

[42] Canada Inc. therefore verbally requested that the Phase 2 Bid Deadline be extended for an additional 30 days in order to continue to canvass the market for financing.[9]

[43] The Monitor consulted with BlackRock and requested the position of Orion and IQ, as Stalking Horse Bidders, in accordance with paragraph 21 of the approved Bidding Procedures. They expressed serious concerns but were agreeable to considering an extension of the Phase 2 Bid Deadline, subject to several conditions. These conditions included the financing (subordinate to the DIP and to the approximately $100M of secured debt held by the Orion and IQ) of the costs resulting from the extra 30-day extension (estimated at $500K) and the confirmation that no further extension would be sought in the future.[10]

[44] Canada Inc. replied that it was prepared to advance a first tranche of $200K of a DIP loan within one week of the acceptance date of their request for a SISP extension, and the balance of $300K as needed. Canada Inc. contemplated that this proposed loan totaling $500K was to be made on the same terms and conditions as the existing DIP loan of the Secured Lenders, and was to rank *pari passu* with them in all respects.

[45] The Monitor estimated that it was unlikely that the extension sought would allow Canada Inc. to provide a proper bidding offer at the end of the extension. After further consultation with BlackRock and the Stalking Horse Bidders and with their support, the Monitor denied the extension and informed Canada Inc. accordingly on May 12, 2022.

[46] On May 11, 2022, Canada Inc. filed the present Bid Extension Application.

6.2 Opposing arguments of the parties

[47] Canada Inc. submits that its LOI conforms with the requirements of the Bidding Procedures in that, without limitation, it meets the “Minimum Purchase Price” requirement of providing at closing net cash proceeds that are not less than the aggregate of (a) the amount of cash payable under the Stalking Horse Agreement together with the amount of obligations being credit bid thereunder, (b) the amount of expense reimbursement payable to the Stalking Horse Bidders, plus (c) a minimum overbid amount of $1M.

[48] Canada Inc. also pleads that there is equity for the stakeholders of BlackRock, including the shareholders, based on their knowledge of the company and on recent pre-money valuations performed by third parties which ranged between USD$175M and 350M. In order to assist in designing and financing its final bid, Canada Inc. has retained at its own costs the services of two consultants, FTI Capital Advisors Canada and ERG Securities US.

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9 Exhibit R-6.
10 Exhibit R-7.

[49] Canada Inc.'s consultants have contacted 156 investors to solicit interest in the opportunity. To date, seven remain highly interested in the opportunity and have executed NDAs and are continuing to perform due diligence on the asset. An additional three have expressed interest and are evaluating the opportunity internally before proceeding to execute an NDA. Investors that have executed NDAs have been added to the VDR and are actively analyzing and reviewing BlackRock's materials. The Consultants have prepared a report on the status of the financing process.[11] For example, Canada Inc. submits a signed non-binding letter of interest signed on May 6, 2022, from a serious investment fund for a USD$65M financing, conditional *inter alia* on a 30-day-due diligence.[12] Canada Inc. further argues that the recent events in Ukraine have improved the outlook of Project Volt and increased the value of its strategic metals.

[50] However, according to Canada Inc., based on the feedback provided to its consultants from investors and given the complexity of this transaction, the condensed timeframe of the SISP is a significant hurdle for investors to perform the necessary due diligence in order to provide a commitment to finance the its Phase 2 Qualified Bid. As such, the Consultants believe that additional time will have a material impact on the likelihood of raising the capital required.

[51] Canada Inc. argues that although it has made significant progress, it needs more time to pursue these various opportunities and finalize the business and financial terms which will form part of the its Phase 2 Qualified Bid.

[52] To that effect, Canada Inc. reminds the Court of its broad discretion under section 11 of the CCAA and points to case law[13] that suggests that the Court would be justified to refuse an asset sale in the presence of impropriety in the sales process.

[53] The Monitor, BlackRock, Orion and IQ and BlackRock's First Nation Partners[14] oppose to such extension of the Phase 2 Bid Deadline.

[54] BlackRock, the Monitor and Orion and IQ argue that such extension would run contrary to the clear rules of the Bidding Procedures and would break the integrity of the SISP, to the prejudice of all potential bidders who made their decisions based on the rules known to all. Moreover, the extension sought would maintain uncertainty for BlackRock for an additional period, with no realistic chance of obtaining a better offer. Also, the extension would increase the costs and the amounts to be advanced by the Orion and IQ as interim lenders while Canada Inc. is not ready to pay for those expenses for the requested additional period.

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11 Exhibit A-3.
12 Exhibit A-4, filed under seal.
13 *Royal Bank v. Soundair Corp.*, 1991 CanLII 2727 (Ont. CA); *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1 (N.S.C.A.); *Bank of Montreal v. Maitland* (1983), 46 C.B.R. (N.S.) 75 (N.S.S.C.).
14 Exhibit R-11.

6.3 Legal principles

[55] The CCAA primarily seeks to refinance and restructure insolvent companies rather than liquidate them.[15] When selling the assets of the company, one of the objectives is thus naturally to achieve the best possible price for the assets. This usually coincides with finding the best outcome for the company's creditors.

[56] To achieve this goal, the court benefits from a wide discretionary power pursuant to section 11 of the CCAA:

> **11 [General power of court]** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
>
> [Emphasis added]

[57] The three baseline requirements to meet for an order to be considered "appropriate in the circumstances" are appropriateness, good faith and due diligence.

[58] In addition, the order sought must advance the policy and remedial objectives of the CCAA to qualify as "appropriate" within the meaning of section 11.[16] The overarching remedial objectives pursued by the CCAA include:[17]

1. providing for timely, efficient and impartial resolution of a debtor's insolvency;
2. preserving and maximizing the value of a debtor's assets;
3. ensuring fair and equitable treatment of the claims against a debtor;
4. protecting the public interest; and
5. in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.

[59] Hence, although the objective of any sale process is obviously to obtain the best possible price from prospective purchasers, monetary considerations cannot be the only relevant factor when the Court determines if it is appropriate to deviate from a process that has been duly followed by all parties involved.

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15 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, par. 14-15.

16 *Canada v. Canada North Group Inc.*, 2021 SCC 30, par. 21; *9354-9186 Québec inc v. Callidus Capital Corp*, 2020 SCC 10, par. 48-51.

17 *9354-9186 Québec inc v. Callidus Capital Corp*, 2020 SCC 10, par. 40.

[60] On the contrary, it is well established that sale processes are important in CCAA proceedings and that modifying same *post facto* every time there is a chance of a better financial outcome could have a negative impact on all the parties involved. Therefore, Courts have often insisted on the importance of preserving the integrity of the sales process. As this court held in *Re Boutiques San Francisco Inc.*:

> [20] Dans le cadre des plans d'arrangement qu'elle autorise, le but de la LACC est, entre autres, de favoriser un processus ordonné et encadré où les paramètres choisis doivent par conséquent avoir un sens. Dans le contexte de cette loi, tout comme par exemple dans celui de la *Loi sur la faillite et l'insolvabilité*, la recherche du meilleur prix possible pour les créanciers ne peut se faire en vase clos, en ignorant la protection nécessaire de l'intégrité et de la crédibilité du processus choisi pour atteindre cet objectif.[18]

[61] The Bidding Procedures, which govern the SISP approved by this Court, are fundamentally important for assessing the Proposed Transaction as well as the arguments of the parties.[19]

6.4 Discussion

[62] The Monitor also explains that efforts have already been made for some years before the beginning of the CCAA proceedings in order to further finance Project Volt. BlackRock, with the assistance of its financial advisors at the time, have conducted a global search since 2015, but, and despite considerable time and effort, have not been able to secure the required funding.

[63] At the inception of the CCAA proceedings, the Court also modified the proposed Bidding Procedures to include a 30 day extension to the "Phase 1 Bid Deadline" based on a request from the Intervenors and their submission that such further time would suffice to ensure a fulsome and fair process. This extension has not led to the desired results.

[64] The Monitor then conducted a thorough solicitation process as part of the Phase 1 of the SISP, as mentioned previously, which culminated in a single LOI submitted by Canada Inc.:

> Based on the various discussions with prospective bidders during Phase 1 of the SISP, it was apparent to the Monitor that the BRM project, which had previously been promoted extensively in the market by BRM and its financial advisors for financing purposes, was already very well known by most of the strategic and industry leaders. This situation likely explains why many potentially interested

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18 *Boutiques San Francisco Inc., Re*, 2004 CanLII 480, par. 20 (QC CS). See also *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 3064, par. 70 (leave to appeal dismissed, 2015 QCCA 754).

19 See *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, par. 14 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999).

> parties declined the opportunity without signing an NDA and without performing due diligence of the VDR.[20]

[65] The lack of interest of other bidders in taking part in the Debtor's restructuring has thus been apparent since the very first stages of the SISP process. According to the Monitor, potential players who were contacted either found the opportunity too risky, or not strategic or profitable enough, or did not believe in the feasibility of the technology involved. It remains unlikely that this situation will change in the near future.

[66] Moreover, Canada Inc. was unable to secure financing of its own bid during the extended 60 days of Phase 1 of the SISP and waited all the way until that phase's deadline to execute an NDA and to enter into the process.

[67] In determining that Canada Inc.'s non-binding LOI constituted a Phase 1 Successful Bid, the Monitor relied on Canada Inc.'s reassurance that it had both the ability and the means required to pay the offered purchase price and to raise or contribute further capital resources to BlackRock's business to continue it as a going concern. The LOI went on to state that the net worth of the Bidder's representatives was, collectively, well above the said amount and that "[b]ased on their extensive experience and engagement in the industry", they were "well placed to obtain both direct and/or third party financing in an aggregate amount sufficient both to complete the Transaction and thereafter required to proceed with the Business and lead it to profitability as a going concern."[21]

[68] Canada Inc., in its Clarification Letter of March 14, 2022, refused to provide more details about its representatives' respective worth.[22] Still, it is not in doubt that they have enough assets to finance its bid if needed.

[69] However, Canada Inc. wrote that it was "unable to advise with certainty to what extent [its] three principals […] may contribute to the capital required to fund the transaction contemplated by the non-binding LOI." This issue would "clarify as [its] funding plan finalizes through [its] on-going efforts already well underway." Canada Inc. confirmed that it would "have its financing, to the extent necessary and sufficient for the purpose of the binding LOI, on or before the Phase 2 bid deadline", but added that "some or all" of the funds "may come from external sources", which was subject to further due diligence that could only be performed during Phase 2 of the SISP.

[70] These answers are evasive and, in retrospect, proved to include many loopholes. Still, the Clarification letter was considered and the Monitor nonetheless qualified Canada Inc. for Phase 2.

[71] The Monitor understood that Canada Inc.'s primary focus during Phase 2 of the SISP was to secure financing, through equity or debt, in order to submit a binding offer

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20 Fifth Report, par. 28.
21 Exhibit A-2.
22 Exhibit R-5, par. 3.

prior to the Phase 2 Bid Deadline. Indeed, the due diligence performed during that Phase was limited. Only one meeting occurred, at the request of Canada Inc.'s consultants, with BlackRock and the Monitor, to review the assumptions supporting the financial model of BlackRock. Also, all the groups that were granted access spent a relatively short amount time on the VDR reviewing the information available for this kind of project.[23]

[72] At the time of the meeting on May 9, 2022, despite some cursory interest manifested by certain potential capital partners, and except for a non-binding LOI received from a third party for an amount (USD$65M) significantly less than the one required to exceed the Stalking Horse Bid ($100M), Canada Inc. received no other letter of intent or confirmation of interest in writing from a potential capital partner during the SISP.

[73] Critically, Canada Inc. also revealed on May 9, 2022 that none of its representatives actually intended to participate in the financing of an eventual Phase 2 Qualified Bid, should there be such a bid.

[74] The Monitor testified that had he known in due time that the shareholders had no intention to finance the bid using their own personal assets, Canada Inc. would likely not have qualified for Phase 2 of the SISP. This aspect of the LOI was described as a key consideration in the Monitor's decision at the time.

[75] In addition, the failure by Canada Inc. to confirm that it would fund all of the Debtor's costs, including professional costs, during the extended 30-day period, indicates that it is not willing to put "skin in the game" as evidence of its *bona fide* intentions. It appears that Canada Inc. is unwilling to fund the costs of a further delay notwithstanding that any successful bid would necessarily have to cover those costs in order to exceed the value of the Stalking Horse Bid.

[76] The above findings remain, in spite of the letter from VanadiumBank Inc., which Canada Inc. filed the day before the hearing.[24] This letter is presented as a new "financing proposal" in favor of Canada Inc. for up to $125M in support of its bid.

[77] Actually, it appears that VanadiumBank was incorporated only a few weeks before the hearing.[25] Notwithstanding its name, it is not a bank. Its offer to Canada Inc. is not to lend funds out of its own pocket, but rather to arrange a loan facility after seeking and obtaining the required financing from third parties in the market.

[78] In other words, with VanadiumBank's proposal, Canada Inc. is nowhere closer to achieving its financial goals before the proposed extended Phase 2 Bid Deadline. The Court therefore gives no weight to VanadiumBank's letter.

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23 Fifth Report, par. 38-41.
24 Exhibit A-11.
25 Exhibit R-14.

[79] It now seems clear that, as it was unable to meet the requirements of the Initial order, Canada Inc. instead decided to launch what could be described as a parallel SISP, which was nowhere authorized and which runs contrary to the letter and spirit of the SISP as ordered by the Court.

[80] Although the Court recognizes Canada Inc. and its representatives' efforts in securing third party financing for their bid, and their belief in the potential of BlackRock's projects to attract new interest as the market evolves, it is time for the SISP to come to an end and for the CCAA proceedings to move forward.

[81] It is advantageous to the stakeholders generally that BlackRock complete the restructuring process as soon as possible in order to, in particular, end the negative narrative surrounding the company, to limit any further uncertainty and risk and facilitate the completion of the financing necessary for Project Volt, if possible.

[82] The SISP provided for a level playing field to all potential bidders. The rules were known to all parties and certain potential bidders might have decided not to participate in the SISP because of its duration (which is often the case in insolvency proceedings). Any modification of the rules after they are set and after all the players have made their choices accordingly should not be taken lightly. In the case at hand, there is no justification whatsoever to such a disruption of the fairness of the process. The overarching remedial objectives of the CCAA are better served by rejecting the Bid Extension Application.

7. RVO APPLICATION

[83] The Court's refusal to further extend the Phase 2 Deadline leaves the Stalking Horse Bid from IQ and Orion as the only Phase 2 Qualified Bid. Pursuant to the RVO Application, the Court shall now turn to the question of whether it should approve the Proposed Transaction as per the terms of his bid and, in particular, BlackRock's restructuration through a reverse vesting order (**RVO**).

7.1 Legal Principles

[84] In assessing the relevant criteria and determining whether the proposed transaction shall be approved, the Court is mindful not to modify the contractual terms that have been duly negotiated between the parties.[26] In this case, it takes the form of a RVO.

[85] RVOs are a fairly new way to achieve the remedial objective of the CCAA: instead of selling the assets of a debtor, a series of transactions will result in i) the purchaser becoming the sole shareholder of a debtor and ii) the unwanted liabilities be vested out

[26] *Mecachrome Canada Inc. (In the matter of the plan of compromise or arrangement of)* c. *Ernst & Young Inc.*, 2009 QCCS 6355, par. 28.

to a separate entity, thereby ensuring that the purchaser will not inherit the unwanted liabilities.[27]

[86] Albeit new, RVOs have been confirmed by the courts as an appropriate way for a debtor to sell its business when the circumstances justify such structure.[28] In particular, CCAA courts have approved RVO structures in several complex mining transactions and have recognized that their benefits, which include maximizing recovery for creditors, importantly limiting delays and transaction costs, and facilitating the preservation of the insolvent business' going concern, justify the use of this innovative restructuring tool.

[87] In addition to section 11, discussed above, section 36 of the CCAA has been interpreted as providing courts with the jurisdiction and the relevant criteria to issue an RVO:

> **36 (1) [Restriction on disposition of business assets]** A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> **(2) [Notice to creditors]** A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.
>
> **(3) [Factors to be considered]** In deciding whether to grant the authorization, the court is to consider, among other things,
>
> **(a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> **(b)** whether the monitor approved the process leading to the proposed sale or disposition;
>
> **(c)** whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> **(d)** the extent to which the creditors were consulted;

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27 Exhibit R-2.

28 See *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, par. 71-79 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999); *Quest University Canada (Re)*, 2020 BCSC 1883, par. 151-172 (leave to appeal dismissed, 2020 BCCA 364); *Clearbeach and Forbes*, 2021 ONSC 5564, par. 24-26; *Harte Gold Corp. (Re)*, 2022 ONSC 653, par. 36-39, 77.

> **(e)** the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> **(f)** whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
>
> […]
>
> **(6) [Assets may be disposed of free and clear]** The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.
>
> […] [Emphasis added]

[88] This Court approved an RVO in the face of opposition by a creditor in *Arrangement relatif à Nemaska Lithium inc.*[29]. It was held that section 36 should be interpreted broadly and in accordance with the policy and remedial objectives of the CCAA and the wide discretionary power vested to the supervising judge pursuant to section 11. The Court relied in part on the Supreme Court ruling in *9354-9186 Québec inc. v. Callidus Capital Corp.*[30] It added:

> [52] La *LACC* donne donc au juge surveillant la flexibilité nécessaire pour rendre les ordonnances «indiquées» afin de faciliter la restructuration d'une compagnie insolvable.
>
> [53] La nature des problèmes économiques contemporains commande que des solutions innovatrices soient envisagées et, si elles permettent que les objectifs fondamentaux de la *LACC* soient atteints, au bénéfice de tous, alors elles doivent être entérinées.
>
> […]
>
> [71] Le Tribunal est d'avis que les termes «disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires» / «sell or otherwise dispose of assets outside the ordinary course of business» de l'article 36(1) *LACC* permettent un grand éventail d'actes et modes de disposition, incluant, en partie ou en totalité, par voie de «dévolution inversée», une solution innovatrice, à être analysée au cas par cas.
>
> [72] L'article 36(1) *LACC* ne comporte aucune restriction à cet égard.

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29 2020 QCCS 3218 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999).

30 2020 CSC 10.

> [73] Sortir des sentiers battus n'est pas contre-indiqué, au contraire, surtout lorsque cela permet de meilleurs résultats.
>
> [74] D'ailleurs, dans l'Affaire *Callidus*, la Cour suprême mentionne ce qui suit quant au pouvoir discrétionnaire général du Tribunal prévu à l'article 11 *LACC* :
>
> > «[…] le pouvoir conféré par l'art. 11 n'est limité que par les restrictions imposées par la *LACC* elle-même, ainsi que par l'exigence que l'ordonnance soit « indiquée » dans les circonstances.»
>
> [75] Dans la présente affaire, la solution d'une «dévolution inversée», efficace et rapide, n'affecte pas le résultat final pour les créanciers des Débitrices, au contraire, elle l'améliore.
>
> [76] En effet, le maintien des permis, licences et autorisations existants et des contrats essentiels à l'exploitation des entreprises, et l'utilisation possible des divers attributs fiscaux disponibles, ont facilité l'obtention de concessions de la part des Offrants, et confirmées par le Contrôleur, ce qui devrait permettre qu'une distribution plus importante soit éventuellement effectuée au bénéfice des créanciers des Débitrices.

[89] The Court of Appeal refused leave in that case, while noting that some issues raised by the appeal did "appear to qualify as being significant to the practice of insolvency":

> [36] […] This is particularly the case regarding the issue of the scope of authority of the CCAA supervising judge in the context of an order that is not strictly limited to the "sale or disposition of assets" provided for under section 36 (6) CCAA, which, according to the Applicants, results in an outcome that would normally form part of an arrangement subject to prior approval by the creditors. There is also an issue of principle raised regarding the granting of broad third party releases (that are not limited to the transaction itself), outside the confines of an arrangement and without determining their appropriateness and submitting same to the required vote of creditors.[31]

[90] In *Re Quest University Canada*, the Supreme Court of British Columbia cautioned that in the case of an RVO, "the ability of a CCAA court to be innovative and creative is not boundless; as always, the court must exercise its discretion with a view to the statutory objectives and purposes of the CCAA […]."[32] On the other hand, the Court added that "[t]here is no provision in the CCAA that prohibits an RVO structure. As is usually the case in CCAA matters, the court must ensure that any relief is 'appropriate' in the

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[31] *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488 (leave to appeal to SCC dismissed, 2021 CanLII 34999).

[32] *Quest University Canada (Re)*, 2020 BCSC 1883, par. 154 (leave to appeal dismissed, 2020 BCCA 364).

circumstances and that all stakeholders are treated as fairly and reasonably 'as the circumstances permit' […]."[33]

[91] Similarly, the Ontario Superior Court of Justice relied on sections 11 and 36 of the CCAA to issue an RVO in *Clearbeach and Forbes*.[34]

[92] An RVO structure was approved most recently by the same court in *Harte Gold Corp*.[35] Although the Court was unconvinced that such an order could rely entirely on section 36 of the *CCAA*, it concluded that its discretion under section 11 was clearly broad enough to encompass it. Furthermore, the criteria set out at paragraph 36(3) provide an analytical framework that could be applied *mutatis mutandis* to an RVO transaction:

> [36] The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor 'selling or otherwise disposing of assets outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities.
>
> [37] I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.[36]

[93] It is true that a Canadian appeal court has yet to rule definitively on the legality of an RVO under the CCAA. This being said, and although the contexts might differ, the Court sees no compelling reason why it should set aside its reasoning in *Nemaska Lithium*.

[94] Even if this type of transaction was not contemplated by section 36 of the CCAA, section 11 could clearly step in as a basis for the Court's jurisdiction. The Supreme Court of Canada recently held that the other provisions of the CCAA, dealing with specific orders which the courts can issue, do not restrict the general language and power of section 11.[37]

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33 *Id.*, par. 157, citing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, par. 14-15.
34 2021 ONSC 5564, par. 24.
35 2022 ONSC 653.
36 *Harte Gold Corp. (Re)*, 2022 ONSC 653, par. 36-37.
37 *Canada v. Canada North Group Inc*., 2021 SCC 30, par. 23. See also *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, par. 70.

[95] The Court agrees with the judge in *Harte Gold Corp* that paragraph 36(3), in any event, lays out a useful analytical framework for the issue at bar. These criteria, which are laid out above, should be applied in conjunction with the factors enumerated in *Royal Bank v. Soundair Corp.*:[38]

95.1. "whether sufficient efforts to get the best price have been made and whether the parties acted providently";

95.2. "the efficacy and integrity of the process followed";

95.3. "the interests of the parties"; and

95.4. "whether any unfairness resulted from the process."[39]

[96] The Court also agrees that an RVO structure should remain the exception and not the rule, and should be approved only in the limited circumstances where it constitutes the appropriate remedy.

[97] Some authorities indeed call for caution. For instance, Professor Janis Sarra recently stressed the importance for courts to provide detailed reasons when approving RVOs.[40] Among other things, Professor Sarra reminds us that this type of order deviates significantly from the usual CCAA framework, which is meant to provide all creditors with an opportunity to be heard in the process:

> […] [T]here must be exceptional circumstances for the court to be persuaded to bypass provisions of insolvency legislation aimed at giving both secured and unsecured creditors a meaningful voice/vote in the proceedings, as they are the residual claimants to the value of the debtor's assets during insolvency. […]
>
> […]
>
> The CCAA, particularly in its various amendments over the years, has sought to achieve an appropriate balance between various interests affected by a debtor company's insolvency. Part I sets out the framework of the statute, well-known to practitioners and Canadian courts. It allows for a compromise or arrangement to be proposed between a debtor company and its secured and unsecured creditors, a meeting of the creditors to vote on the plan, and, if a majority in number representing two-thirds in value of the creditors, or the class of creditors, present and voting either in person or by proxy at the meeting, agree to any plan of compromise or arrangement, the plan may be sanctioned by the court and, if so sanctioned, is

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38 1991 CanLII 2727 (Ont. CA); *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742, par. 34-35.

39 See *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, par. 50 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999); *Clearbeach and Forbes*, 2021 ONSC 5564, par. 25.

40 Janis SARRA, "Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions", 2022 CanLIIDocs 431.

> binding. There are specific provisions addressing Crown claims, employees and pensioners, and treatment of equity claims, all designed to balance multiple interests in complex proceedings.
>
> […]
>
> This statutory framework represents a careful balancing of interests and prejudice, and gives voice and vote to the creditors that are the residual claimants to the value of the debtor company. Many of the provisions are aimed at mitigating the imbalance in power that secured creditors have in insolvency proceedings, at least during the period of negotiations for a plan, with a view to maximizing the value of the assets, preserving going-concern value, and protection of employees and the public interest.
>
> It makes sense, therefore, that in any application to bypass this carefully crafted statutory process, the court consider whether there are compelling and exceptional circumstances to justify this extraordinary remedy, even where the RVO is not specifically contested, as the court needs to be satisfied of the integrity of the system and the potential prejudice to creditors and other stakeholders that may not be appearing before it. Reasons are important for stakeholders to understand the benefits and prejudice that may accrue to any particular transaction.[41]

[98] As the Supreme Court of British Columbia held in *Quest University*:

> [171] I do not consider that an RVO structure would be generally employed or approved in a CCAA restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the CCAA.[42]
>
> [Emphasis added]

[99] In particular, the following comments made in *Harte Gold Corp* are enlightening:

> [38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an

41 *Id.*, p. 4, 26. See ss. 4-6 of the CCAA.

42 *Quest University Canada (Re)*, 2020 BCSC 1883, par. 171 (leave to appeal dismissed, 2020 BCCA 364).

> unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:
>
> (a) Why is the RVO necessary in this case?
>
> (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
>
> (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and
>
> (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?
>
> [Emphasis added]

7.2 Discussion on criteria to approve an RVO

[100] The Court will now apply the criteria set out in paragraph 36(3) of the CCAA to the RVO Application, keeping in mind the other relevant factors identified by the case law, and will analyze the appropriateness of the RVO structure in particular.

[101] The process leading to the proposed sale was reasonable in the circumstances (s. 36(3)(a) of the CCAA). As detailed in the Fifth Report, BlackRock and the Monitor have conducted the SISP in accordance with the Bidding Procedures approved by this Court on January 7, 2022. The market has been adequately canvassed through a fulsome, fair and transparent process. It should be reiterated that BlackRock had already deployed a global search for financing during the years leading up to the initiation of the CCAA Proceedings, to no avail.

[102] In the present circumstances, the Court concludes that sufficient efforts have been made to get the best price for BlackRock's assets and that the parties acted providently. The record also shows the efficacy and integrity of the process followed.

[103] The Monitor approved of the process leading to the proposed sale and filed with the court a report stating that in their opinion the sale would be more beneficial to the creditors than a sale or disposition under a bankruptcy (s. 36(3)(a) and (b) of the CCAA).

The Monitor not only approved the SISP but also participated in the negotiation and development of the Bidding Procedures and had primary carriage of the process throughout. In the course of the SISP, the Monitor consulted with BlackRock.

[104] The Fifth Report concludes that the SISP was properly conducted and that the Proposed Transaction is beneficial for all the stakeholders compared to a bankruptcy scenario. The Monitor "is of the view that creditors who will suffer a shortfall following the Purchase Agreement would not obtain any greater recovery in a sale in bankruptcy." "Furthermore, bankruptcy proceedings would: (i) [c]ause additional delays and uncertainty in the sale of [BlackRock]'s assets; (ii) [j]eopardize the going concern operations of [BlackRock]; and, (iii) [l]ikely result in employees to be unemployed."[43]

[105] BlackRock's creditors were duly consulted (s. 36(3)(d) of the CCAA). The secured creditors of BlackRock are Orion and IQ who are also the Stalking Horse Bidders. Obviously, they have been consulted extensively and they consent to the RVO Application.

[106] Importantly, the Grand Council of the Crees (Eeyou Istchee) and the Cree Nation Government also expressed support for the Proposed Transaction, as outlined by their counsel in a letter sent to the Monitor on May 19, 2022:

> Our clients consider that the approval of the Stalking Horse Agreement offers the most, and perhaps the only, viable prospect to bring the BlackRock Mining Project into successful commercial operation and hence to secure for the Cree Nation of Eeyou Istchee the critically important benefits of the BallyHusky Agreement.[44]

[107] The other creditors are unsecured creditors who have been duly advised of the Initial Application and Order, including the Bidding Procedures. They have decided not to participate in the SISP and nothing indicates that they would oppose to the RVO Application.

[108] The effects of the proposed sale or disposition on the creditors and other interested parties are beneficial overall (s. 36(3)(e) of the CCAA). The Stalking Horse Bid is the best available alternative for BlackRock's creditors and other interested parties and should allow for BlackRock to emerge as a rehabilitated business in a stronger position to complete the Construction Financing and move forward with Project Volt. This outcome is advantageous to BlackRock and its stakeholders, including their creditors, employees, trading partners and First Nations partners.

[109] It is true that the RVO will result in the claim of unsecured creditors being transferred to ResidualCo, an empty shell where all unassumed liabilities will be transferred. This transfer simply reflects the fact that the BlackRock's value, as tested in

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43 Fifth Report, par. 57-60.
44 Exhibit R-11.

the market through the SISP and for many years prior to the current restructuring, is not high enough to generate value for these unsecured creditors.

[110] As for the other stakeholders, they will benefit on the whole from the approval of the Proposed Transaction, as it will allow the Debtors' business to emerge in a position to move forward as a going concern. This will benefit the employees, trading partners and First Nations partners and it will have indirect socio-economic benefits in the province of Quebec.

[111] The consideration to be received for the assets is reasonable and fair, taking into account their market value (s. 36(3)(f) of the *CCAA*). The consideration being paid by Orion and IQ, which is in excess of $100M, is importantly linked to the preservation the Debtor's permits (crucial to the conduct of the contemplated mining activities), certain existing contracts and its tax attributes.

[112] The reasonableness of the consideration is well established. Given the amount of the secured debt held by Orion and IQ, the consideration which they will pay exceeds i) what the market would be willing to pay to inherit intangible assets BlackRock has been able to build over time and ii) the capacity to raise on the market the financing required for Project Volt.

[113] Nobody submitted a higher bid after extensive attempts to raise financing over many years.

[114] Exceptionally, the RVO structure is appropriate in the circumstances. In his Fifth Report, the Monitor outlines the reasons why, in his opinion, the reverse vesting order structure that would be implemented would be "more appropriate and beneficial than a traditional vesting order structure and that the reverse vesting order structure is necessary, reasonable and justified in the circumstances":[45]

> (i) Numerous agreements, permits, licenses, authorizations, and related amendments are part of the assets that have to be transferred as per the Purchase Agreements. It could be more complex to transfer the benefits of these assets in a traditional vesting order structure since consents, approvals or authorizations may be required. A reverse vesting order structure minimizes risks, costs or delays of having these assets transferred;
>
> (ii) The proposed reverse vesting order structure results in better economic results for some creditors of BRM who see their pre-filing claim being assumed and retained. Also, the reverse vesting order structure will avoid any delays or costs associated with the assignments of the assumed contracts;

[45] Fifth Report, par. 65-66.

(iii) The contracts or obligations of the creditors and the stakeholders that are considered Excluded Assets and Excluded Obligations according to Schedule B of the Purchase Agreement will not be in a worse position than they would have been with a more traditional vesting of assets to a third party;

(iv) Most assets of BRM are intangibles, such as agreements, permits, licenses, authorizations and related amendments, and their value depend on the capacity of the purchasers to complete the financing and achieve the project. These assets would have no or limited value if some of them were not being preserved. The reverse vesting order structure allows to avoid any potential risks around the transfer to the purchaser.

[115] The Court agrees with the Monitor's conclusions. RVO structures have been found by courts to be appropriate in situations such as the present case, where a traditional sale of assets would lead to uncertainty regarding the transfer of numerous agreements, permits, authorizations and other regulatory approvals that are required for the continuation of a company's business.[46]

[116] Indeed, BlackRock operates in the highly regulated mining industry. Their business is almost entirely constituted of such intangible assets, which provide a head start of several years to the purchaser. Some of these assets cannot be assigned or are at least difficult to assign. Therefore, the capacity to restructure BlackRock depends heavily on the capacity to keep the existing legal entities in place while restructuring the share-capital of BlackRock. That is exactly what the RVO provides for.

[117] If BlackRock was forced to proceed with a traditional asset sale, it could significantly increase the costs, generate uncertainties and reduce the value its assets, to the detriment of all parties involved.

[118] Moreover, despite the Intervenors' firm belief, the SISP has unequivocally demonstrated that there is no realizable value in BlackRock's business or assets beyond the secured debt of IQ and Orion, such that there is no equity left for its unsecured creditors, let alone its shareholders.

[119] The Court adds that Shareholders have little or no say in CCAA proceedings like the present one, where the debtor company is insolvent and its shares have lost all value. This goes to their legal interest in contesting an arrangement or transaction proposed by the company.[47]

[120] In any case, the shareholders and unsecured creditors of BlackRock are not in a worse position with an RVO than they would be under a traditional asset sale. Either way,

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46 See *supra*, note 28.

47 *Proposition de Peloton Pharmaceutiques inc.*, 2017 QCCS 1165, par. 65-78; *Forest c. Raymor Industries inc.*, 2010 QCCA 578, par. 4-6; *Stelco Inc., Re*, 2006 CanLII 1773, par. 18 (Ont. SC).

they would have no economic interest because the purchase price paid would not generate any value for the unsecured creditors (and even less so for the shareholders).

[121] This is consistent with the conclusions of the Ontario Superior Court of Justice in *Harte Gold Corp.*:

> [59] Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.
>
> [60] The evidence of Harte's financial problems and balance sheet insolvency, the unsuccessful prefiling strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.
>
> [61] Under s. 186(1) of the OBCA, "reorganization" includes a court order made under the Bankruptcy and Insolvency Act or an order made under the Companies Creditors Arrangement Act approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.
>
> [62] Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.
>
> […]
>
> [64] […] In circumstances like Harte Gold's, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed,

> inappropriate to require a vote of the shareholders […]. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances.[48]
>
> [Emphasis added]

[122] In particular, paragraphs 61 and 62 of the above excerpt answer the Intervenors' argument about the jurisdiction of the Court to cancel their shares under *the Canada Business Corporations Act*[49] (**CBCA**). The same logic applies with sections 173 and 191 of that statute. The power to cancel and issue shares in the context of an RVO is captures by the possibility for an court order to "change the designation of all or any of [the corporation's] shares, and add, change or remove any rights, privileges, restrictions and conditions […] in respect of all or any of its shares, whether issued or unissued", pursuant to 191(2) and 173(1)(g) of the CBCA.

[123] It should also be noted that the Intervenors' opposition to the RVO structure in particular appears to be new. Canada Inc.'s non-binding LOI had already conceded on March 9, 2022 that its proposed bid could itself "take the form of a reverse vesting order".[50] Ultimately, it seems that the Intervenors are not objecting to the use of an RVO *per se*, but only to the extinguishment of their equity interests, which would occur irrespective of the use of an RVO structure or of a traditional vesting order.

[124] Therefore, the fact that the transaction is structured as an RVO only has benefits and does not prejudice any of the stakeholders. The Court finds that in the specific circumstances of the present case, the proposed RVO is an appropriate arrangement.

7.3 Discussion on the releases

[125] The Proposed Transaction contemplates releases for various parties, including Orion and IQ, from all claims relating to, in particular, BlackRock, its restructuring or the Proposed Transaction.

[126] While the Intervenors do not object to a release being granted to BlackRock directors or to the Monitor, they argue that Orion and IQ's actions constitute an abuse of both their rights as shareholders and of the CCAA process. Thus, the effect of the requested releases in favour of Orion and IQ would be to dismiss the Intervenors' potential claims without the benefit of hearing any evidence allowing for the determination of their potential liability.

[127] For the reasons below, the Court holds that the releases in favor of Orion and IQ will form part of the Proposed Transaction.

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48 *Harte Gold Corp. (Re)*, 2022 ONSC 653, par. 59-64.
49 R.S.C. 1985, c. C-44.
50 Exhibit A-2.

[128] It is now commonplace for third-party releases, in favor of parties to a restructuring, their professional advisors as well as their directors, officers and others, to be approved outside of a plan in the context of a transaction.[51] In fact, similar releases have been approved by this Court in recent cases involving RVO transactions, including in *Nemaska Lithium*.[52]

[129] This being said, the courts should not grant releases blindly and systematically.

[130] In *Harte Gold Corp.,* the Court approved releases in favor of various parties that included the purchaser and its directors and officers and considered the criteria ordinarily canvassed with respect to third-party releases provided for under a plan, as articulated in *Re Lydian International Limited*[53] and elsewhere[54]. They are the following:

a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c) Whether the plan could succeed without the releases;

d) Whether the parties being released were contributing to the plan; and

e) Whether the release benefitted the debtors as well as the creditors generally.[55]

[131] In the present file, IQ's and Orion's participation was obviously instrumental to the restructuring of BlackRock's business. Considering the SISP and the opportunity given to BlackRock's stakeholders to participate in the process, it is reasonable for IQ and Orion to now start with a clean slate and not to be under the threat of potential claims as they will be leading BlackRock's efforts with Project Volt. The release will provide more certainty and finality.

[132] The release is thus reasonably connected and justified as part of the Proposed Transaction,[56] and it is to the benefit of BlackRock and its stakeholders generally as it will allow BlackRock to emerge as a solvent entity and be in the best possible position to,

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51 See *Re Green Relief Inc.*, 2020 ONSC 6837, par. 23-25; *8640025 Canada Inc. (Re)*, 2021 BCSC 1826, par. 43.

52 *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, par. 103-106 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999).

53 2020 ONSC 4006.

54 *Harte Gold Corp. (Re)*, 2022 ONSC 653, par. 78-86. See also *Re Green Relief Inc.*, 2020 ONSC 6837, par. 27-28.

55 *Re Lydian International Limited*, 2020 ONSC 4006, par. 54. See also: *Metcalfe & Mansfield Alternative Investments II Cord. (Re)*, 2008 ONCA 587;

56 See *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, par. 70 (leave to appeal to SCC dismissed, 2008 CanLII 46997).

hopefully, secure financing for Project Volt. They are also fair and reasonable in the present circumstances.

[133] The eventual claims for which Orion and IQ should not be released, according to the Intervenors, are based on allegations of abuse related solely to Orion's and IQ's Stalking Horse Bid and their conduct during the SISP.

[134] The Court was sensitive to the shareholders' submissions initially and extended the SISP delays to ensure that the process was as fulsome and fair as possible. Still, and in spite of all the efforts made over the years, IQ and Orion remain the only entities who are ready to take over the development of BlackRock and to further invest in same.

[135] In the process leading to the Bidding Procedures Order, to the refusal of the Bid Extension Application and to the approval of the Proposed Transaction (Reverse RVO), the Court was able to appreciate the context leading up to the final outcome ordered as per the present judgment and also found the Proposed Transaction, as proposed by Orion and IQ, to be fair and reasonable. The Court sees little to no room for a finding of abuse in the events leading to the CCAA proceedings, to the SISP or to the approved transaction.

[136] To the contrary, there is no good reason to leave the door open to the Intervenors' potential claims against Orion and IQ, to BlackRock's detriment.

[137] Therefore, the release provided for in the Proposed Transaction will be granted.

FOR THESE REASONS, THE COURT:

[138] **DECIDES** in accordance with the attached orders.

MARIE-ANNE PAQUETTE, Chief Justice

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Me Gilles Robert
Me Kloé Sévigny
MINISTÈRE DE LA JUSTICE DU CANADA
Attorneys For The Canada Revenue Agency

Hearing dates: May 30, 31, 2022

TAB 12

CITATION: *Harte Gold Corp. (Re)*, 2022 ONSC 653
COURT FILE NO.: CV-21-00673304-00CL
DATE: 2022-02-04

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED, Applicant

AND:

A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP., Applicant

BEFORE: Penny J.

COUNSEL: *Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais* for the Applicant

Joseph Pasquariello, Chris Armstrong, Andrew Harmes for the Court appointed Monitor

Leanne M. Williams for the Board of Directors of the Applicant

Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji for 1000025833 Ontario Inc.

Stuart Brotman and Daniel Richer for BNP Paribas

Sean Collins, Walker W. MacLeod and Natasha Rambaran for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited

David Bish for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates

Orlando M. Rosa and Gordon P. Acton for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)

Timothy Jones for the Attorney General of Ontario

HEARD: January 28, 2022

ENDORSEMENT

[1] This is a motion by Harte Gold for an approval and reverse vesting order involving the sale of Harte Gold's mining enterprise to a strategic purchaser (that is, an entity in the gold

mining business) and for an order extending the stay and expanding the Monitor's powers to include new entities to be created for the purposes of implementing Harte Gold's proposed restructuring. There was no opposition to the relief sought. All those who appeared at the hearing supported approval of the transaction.

[2] Following the conclusion of oral submissions on Friday, January 28, 2022, I issued the orders sought with written reasons to follow. These are the reasons.

Background

[3] Harte Gold is a public company incorporated under the *Business Corporations Act* (Ontario). Prior to January 17, 2022, its shares publicly traded on the Toronto Stock Exchange, Frankfurt Stock Exchange and over-the-counter. Harte Gold operates a gold mine located in northern Ontario within the Sault Ste. Marie Mining Division and approximately 30 km north of the town of White River. This mine, referred to as the Sugar Loaf Mine, produces gold bullion. Harte Gold has a total of 260 employees on payroll, as well as 19 employees retained through various agencies. Harte Gold's payroll obligations are current.

[4] Of some importance to the form of transaction proposed in this case, involving an approval and reverse vesting order (RVO), is the fact that Harte Gold has 12 material permits and licenses that are required to maintain its mining operations, 24 active work permits and licenses that allow the performance of exploration work on various parts of the Sugar Loaf property and many other forest resource licenses, fire permits and the like, all necessary in one way or another to Harte Gold's continued operations. Harte Gold also has 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The transfer of these permits and licenses etc. would involve a complex transfer or new application process of indeterminate risk, delay and cost.

[5] It is also important to note that Harte Gold is party to an Impact Benefits Agreement dated April 2018 between Harte Gold and Netmizaaggamig Nishnaabeg First Nation.

[6] Harte Gold has two primary secured creditors. They are: a numbered company (833) owned by Silver Lake Resources Limited (an Australian gold mine company). 833 is a very recent assignee of significant secured debt from BNPP; and, AHG Jersey Limited (AHG is part of the Appian group). Appian entities are also counterparties to a number of offtake agreements under which Harte Gold sells gold in exchange for prices determined by a pricing formula tied to the London bullion market. Orion is, similarly, a counterparty to additional offtake agreements. BNPP, following the assignment of its secured debt, has retained additional obligations in respect of certain hedging arrangements provided to Harte Gold. Harte Gold also has a number of trade and other unsecured creditors who are owed an estimated $7.5 million for pre-filing obligations and further amounts for services rendered post-filing.

[7] At the time of its initial application to the court, Harte Gold's assets were valued at $163.8 million. Its liabilities were valued at $166.1 million. On a balance sheet basis, therefore, Heart Gold was insolvent.

[8] Since about 2019, Harte Gold has been pursuing a number of measures to address a growing liquidity problem, a problem only exacerbated by the Covid-19 pandemic. Despite these efforts, in 2020 Harte Gold was obliged to seek agreement from its prime lender, BNPP, to defer debt payments and to seek a forbearance from enforcement of BNPP's security. In May 2021, Harte Gold initiated a strategic review of options to achieve the desired liquidity and to fund the acquisition of new capital. Harte Gold appointed a strategic committee of its board and, shortly thereafter, a special committee of independent directors. The special committee retained FTI as financial advisor (FTI was subsequently appointed Monitor by this Court) and developed a plan to attract new capital through a potential sale.

[9] This prefiling strategic process involved approaching over 250 potential buyers. 31 of these entities executed confidentiality agreements; 28 of those conducted due diligence through Harte Gold's virtual data room. Harte Gold received four nonbinding expressions of interest but, by the bid deadline in September 2021, no binding offers had been received.

[10] In the aftermath of this unsuccessful process, Silver Lake through 833 acquired BNPP's debt and advanced a proposal to acquire Harte Gold's operations by way of a credit bid and to provide interim financing in connection with any proceedings under the CCAA. An initial order under the CCAA issued from this Court on December 7, 2021.

[11] In the midst of this process, Harte Gold received a competing proposal to make a credit bid from Harte Gold's second secured creditor, Appian. As a result of these developments, Harte Gold resolved to conduct a further (albeit brief, given the extensive process that had just been completed) sale and investment solicitation process, this time with a stalking horse bid. Further competing proposals took place between Silver Lake and Appian over who would be the stalking horse bidder. As a result of this process, the stalking horse bid of Silver Lake was significantly improved. Appian was then content to let Silver Lake's credit bid form the basis of the SISP. I approved this process in an order dated December 20, 2021.

[12] The Monitor provided a new solicitation notice to a total of 48 known and previously unknown potential bidders (other than Silver Lake and Appian). None of the potentially interested parties signed a confidentiality agreement or requested access to the data room.

[13] Only one competing bid was received – a further credit bid from Appian with improved conditions over those proposed by Silver Lake. Ultimately, all parties agreed that the responding commitment from Silver Lake which was at least as favourable to stakeholders as the Appian bid would be, in effect, the prevailing and winning bid.

[14] This took the form of a Second Amended and Restated Subscription Agreement (SARSA) with 833, the actual purchaser. The improved terms were: (a) the assumption by the purchaser of Harte Gold's office lease at 161 Bay Street in Toronto; (b)(i) the proviso that

the $10 million cap on payment of cure costs and pre-filing trade creditors does not apply to the assumption of post-filing trade creditor obligations; and (ii) all amounts owing by Harte Gold to any of the Appian parties are subject to a settlement agreement between 833 Ontario, Silver Lake and Appian and excluded from the prefiling cure costs; and, (c) the undertaking to pay an additional cash deposit of US$1,693,658.72, equivalent to approximately 5% of the Appian indebtedness.

[15] In broad brush terms, the Silver Lake/833 purchase is structured as a reverse vesting order. The transaction will involve:

- the cancellation of all Harte Gold shares and the issue of new shares to the purchaser
- payment by the purchaser of all secured debt
- payment by the purchaser of virtually all prefiling trade amounts (estimated at $7.5 million but with a $10 million cap) and postfiling trade amounts
- certain excluded contracts and liabilities being assigned to newly formed companies which will, ultimately, be put into bankruptcy. The excluded contacts and liabilities include a number of agreements involving ongoing or future services in respect of which there is little if any money currently owed. They also include a number of contracts with Appian entities and Orion, both of which support approval of the transaction The emplyment contracts of four terminated executives will, however, be excluded liabilities, which will nullify the value of any termination claims. Notably, excluded liabilities does not include regulatory or environmental liabilities to any government authority
- retaining on the payroll all but four employees (the four members of the executive team whose employment contracts will be terminated), and
- releases, including of Harte Gold and its directors and officers, the Monitor and its legal counsel and Silver Lake and its directors and officers.

There is no provision for any break fee. Nor is there a request for any form of sealing order.

[16] I should add that the value of what the purchaser is paying for Harte Gold's business, including the secured debt, the pre and postfiling trade amounts, interim financing and the like, totals well over $160 million.

Issues

[17] There are three principal issues:

(1) Whether the proposed transaction should be approved, including the reverse vesting order transaction structure and the form of the proposed release;

(2) Whether the stay should be extended; and,

(3) Whether the Monitor's mandate should be extended to included additional companies (newcos) being incorporated for the purposes of executing the proposed transaction.

Analysis

[18] Section 11 of the CCAA confers jurisdiction on the Court in the broadest of terms: "the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances".

[19] Section 36(1) of the CCAA provides:

> A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

[20] Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. These include:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
> (d) the extent to which the creditors were consulted;
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[21] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp,* 1991 CanLII 2727 (ONCA) for the approval of the sale of assets in an insolvency scenario:

> (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which offers have been obtained; and
>
> (d) whether there has been unfairness in the working out of the process:

see *Target Canada Co. (Re),* 2015 ONSC 1487, at paras. 14-17.

[22] The purchase transaction for which approval is being sought in this case does not provide for a sale of assets but, rather, provides for a "reverse vesting order" under which the purchaser will become the sole shareholder of Harte Gold and certain excluded assets, excluded contracts and excluded liabilities will be vested out to new companies incorporated for that purpose.

[23] In determining whether the transaction should be approved and the RVO granted, it is appropriate to consider:

(a) the statutory basis for a reverse vesting order and whether a reverse vesting order is appropriate in the circumstances; and,

(b) the factors outlined in s. 36(3) of the CCAA, making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction.

The Statutory Basis (Jurisdiction) for a Reverse Vesting Order

[24] The first reverse vesting sale transaction appears to have been approved by this Court in *Plasco Energy (Re),* (July 17, 2015), CV-15-10869-00CL in the handwritten endorsement of Justice Wilton-Siegel. The use of the reverse vesting order structure was not in dispute (indeed, in most of the cases, reported and otherwise, there has been no dispute). Wilton-Siegel J. found "the Court has authority under section 11 of the CCAA to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the CCAA insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise."

[25] A few dozen of these orders have been made since that time, mostly in a context where there was no opposition and no obvious or identified unfairness arising from the use of the RVO structure. The frequency of applications based on court approval of an RVO structure has increased significantly in the past few years.

[26] More recently, two reverse vesting orders have been approved in contested cases and been considered by appellate courts in Canada. I cite these two cases in particular because, being opposed and appealed, there tends to be a more in-depth analysis of the issues than is usually the case in the context of unopposed orders.

[27] In *Arrangement relatif à Nemaska Lithium Inc, 2020 QCCS 3218* at paras. 52 and 71 (leave to appeal to QCCA refused, *Arrangement relatif à Nemaska Lithium Inc,* 2020 QCCA 1488; leave to appeal to SCC refused, *Arrangement relatif à Nemaska Lithium Inc,* 2021 CarswellQue 4589), Justice Gouin of the Quebec Superior Court approved a reverse vesting transaction in the face of opposition by a creditor. Following a nine day hearing, Gouin J. reviewed the context of the transaction in detail and carefully analyzed the purpose and efficiency of the RVO in maintaining the going concern operations of the debtor companies. He also found that the approval of the RVO should be considered under s. 36 CCAA, subject to determining, for example:

- Whether sufficient efforts to get the best price have been made and whether the parties acted providently
- The efficacy and integrity of the process followed
- The interests of the parties, and
- Whether any unfairness resulted from the process.

Gouin J. considered that these criteria had been met and found the issuance of the RVO to be a valid exercise of his discretion, concluding that it would serve to maximize creditor recoveries while maintaining the debtor companies as a going concern and allowing an efficient transfer of the necessary permits, licences and authorizations to the purchaser.

[28] In denying leave to appeal, the Quebec Court of Appeal noted that the CCAA judge found that "the terms 'sell or otherwise dispose of assets outside the ordinary course of business' under subsection 36(1) of the CCAA should be broadly interpreted to allow a CCAA judge to grant innovative solutions such as RVOs on a case by case basis, in accordance with the wide discretionary powers afforded the supervising judge pursuant to section 11 CCAA, as recognized by the Supreme Court in *Callidus*": *Nemaska* QCCA at para 19.

[29] Similarly, in *Quest University Canada (Re)*, 2020 BCSC 1883, Justice Fitzpatrick of the British Columbia Supreme Court extensively reviewed the caselaw related to a CCAA court's authority to grant a reverse vesting order. Fitzpatrick J. found that the CCAA provided sufficient authority to grant the reverse vesting order being sought, which was consistent "with the remedial purposes of the CCAA" and consistent with the Supreme Court of Canada's ruling on CCAA jurisdiction in *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10. She found, therefore, that the issue in each case is not whether the court has sufficient jurisdiction but whether the relief is "appropriate" in the circumstances and stakeholders are treated as fairly and reasonably as the circumstances permit.

[30] In *Quest*, the debtor was in the process of putting forward a plan of compromise under the CCAA. It encountered resistance from an unsecured creditor whose vote could potentially have prevented the necessary creditor approval of the plan. The debtor revised its approach, deleting all conditions precedent requiring creditor and court approval and proceeded with a motion for the approval of an RVO to achieve what it was really after; that is, a sale of certain assets to a new owner with Quest continuing as a going concern academic institution.

[31] Fitzpatrick J. relied on *Callidus* to the effect that:

- Courts have long recognized that s. 11 of the CCAA signals legislative endorsement of the "broad reading of CCAA authority developed by the jurisprudence". On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only

by restrictions set out in the CCAA itself, and the requirement that the order made be "appropriate in the circumstances"

- the CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company"

- Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no CCAA provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the CCAA context

- The exercise of the discretion under s. 11 must further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence

- Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the CCAA. The supervising judge is best positioned to undertake this inquiry.

[32] The SCC in *Callidus* made an important point in the context of the limits of broad discretion; all discretion has limits and its exercise under s. 11 must accord with the objectives of the CCAA and other insolvency legislation in Canada. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. Further, the discretion under s. 11 must also be exercised in furtherance of three baseline considerations: (a) that the order sought is appropriate in the circumstances, and (b) that the applicant has been acting in good faith and (c) with due diligence.

[33] Ultimately, Fitzpatrick J. held that, in the complex and unique circumstances of that case, it was appropriate to exercise her discretion to allow the RVO structure. Quest sought this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. She considered the balance between the competing interests at play and concluded that the proposed transaction was unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group.

[34] The British Columbia Court of Appeal refused leave to appeal, concluding that the appeal was not "meritorious", also noting that reverse vesting orders had been granted in other contested proceedings, namely *Nemaska*. The BCCA also stated that the reverse vesting order granted by Fitzpatrick J. "reflect[ed] precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising CCAA proceedings": *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364.

[35] It is worthy of note that, in both *Nemaska* and *Quest*, the *bona fides* of the objectors were front and centre in the judicial analysis and, in both cases, the motivations and objectives of the objectors were found suspect and inadequate.

[36] The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor 'selling or otherwise disposing of assets outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities.

[37] I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.

[38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[39] With this in mind, I will turn to the enumerated s. 36(3) factors. To the extent there are RVO specific issues of concern apart from those enumerated in s. 36(3), I will also address those in the following section of my analysis.

The Section 36 Factors in the RVO Context

Reasonableness of the Process Leading to the Proposed Sale

[40] Between the pre-filing strategic review process and the court approved SISP, the business and assets of Harte Gold have been extensively marketed on a global basis. While the SISP was subject to variation from the format contemplated in my earlier order, the ability of the applicant, in conjunction with the Monitor, to vary the process was already established in that order. I find, in any event, that the adjustments made were appropriate in the circumstances, given there were no new bidders and the only offers came from the two competing secured creditors who had already been extensively involved in the process and whose status, interests and objectives were well known to the applicant and the Monitor.

[41] Prior to its appointment as Monitor, FTI was intimately involved at all stages of the strategic review process, including the implementation of the pre-filing marketing process and the negotiation of the original proposed subscription agreement that was executed prior to the commencement of the CCAA proceedings and subsequently replaced by the stalking horse bid and the SARSA.

[42] Following the commencement of the CCAA proceedings, the Monitor was involved in the negotiations that resulted in the execution of the stalking horse bid and the SARSA. In addition, the Monitor has overseen the implementation of the SISP and is satisfied that it was carried out in accordance with the SISP procedures, including the Monitor's consent to the amendment of the SISP procedures to cancel the auction as unnecessary and accept the SARSA as the best option available.

[43] The Monitor's opinion is that the process was reasonable, leading to the best outcome reasonably available in the circumstances.

[44] I am satisfied that the sales process was reasonable. The transaction now before the Court was the culmination of approximately seven months of extensive solicitation efforts on the part of both Harte Gold and FTI as part of the prefiling strategic process and the SISP.

[45] Harte Gold and FTI broadly canvassed the market by contacting 241 parties regarding their potential interest in acquiring Harte Gold's business and assets. This process ultimately culminated in initial competing bids from Silver Lake and Appian and, subsequently, additional competing bids from both entities as part of the SISP. The competitive tension in this process resulted in material improvements for stakeholders on both occasions.

Comparison with Sale in Bankruptcy

[46] The Monitor has considered whether the completion of the transaction contemplated by the SARSA would be more beneficial to creditors of the applicant and stakeholders generally than a sale or disposition of the business and assets of Harte Gold under a bankruptcy. The Monitor is unambiguously of the view that the SARSA transaction is the vastly more beneficial option.

[47] The SISP has shown that the SARSA represents the highest and best offer available for Harte Gold's business and assets. The Monitor is satisfied that the approval and completion of the transactions contemplated by the SARSA are in the best interests of the creditors of Harte Gold and its stakeholders generally.

[48] In addition to anything else, a bankruptcy would jeopardize ongoing operations and the permits and licences necessary to maintain such operations. A sale in bankruptcy would delay and, again, jeopardize the approval and closing of the proposed transaction as it would be necessary to first assign Harte Gold into bankruptcy or obtain a bankruptcy order, convene a meeting of creditors, appoint inspectors and obtain the approval of the inspectors for the transaction prior to seeking a more traditional AVO or an RVO. Additional costs would also be incurred in undertaking those steps. Silver Lake would have to continue to advance additional funds to finance ongoing operations during this extended period. There is no indication it would be willing to do so. In any event, requiring such a process would fundamentally change the value proposition the purchaser has relied upon and is willing to accept.

[49] Taking all this into account, a sale or disposition of the business and assets of the applicant in a bankruptcy would almost certainly result in a lower recovery for stakeholders and would not be more beneficial than closing the RVO transaction in the CCAA proceedings.

Consultation with Creditors

[50] Harte Gold's major creditors are Silver Lake, the Appian parties and BNPP. BNPP still has potential claims of approximately $28 million in respect of its hedge agreements. Silver Lake has claims of approximately $95 million in respect of the DIP facility and the first lien credit facilities it acquired from BNPP. The Appian parties have claims of approximately US$34 million in respect of amounts owing under the Appian facility and additional potential claims in respect of obligations under royalty and offtake agreements.

[51] BNPP was consulted throughout the strategic review process and has executed a support agreement with the purchaser. In addition, as previously described, the purchaser and the Appian Parties have been extensively involved in the SISP.

[52] While there is no evidence of consultations with unsecured creditors, I do not regard that as a material deficiency given that virtually all creditors, secured and unsecured alike, are going to be paid in full under the terms of the SARSA.

[53] The Monitor is of the view that the degree of creditor consultation has been appropriate in the circumstances. The Monitor does not consider that any material change in the outcome of efforts to sell the business and assets of the Applicant would have resulted from additional creditor consultation.

[54] I find, on the evidence, that the Monitor's assessment of this factor is well supported and correct.

The Effect of the Proposed Sale on Creditors and Other Interested Parties

[55] The proposed transaction affords the following benefits to the creditors and to stakeholders generally:

(a) the retention and payment in full of the claims of almost all creditors of Harte Gold;

(b) continued employment for all except four of the Harte Gold's employees;

(c) ongoing business opportunities for suppliers of goods and services to the Sugar Loaf Mine; and

(d) the continuation of the benefits of the existing Impact Benefits Agreement with Netmizaaggamig Nishnaabeg First Nation.

[56] The Monitor's opinion is that the effect of the proposed transaction is overwhelming positive for the vast majority of Harte Gold's creditors and other stakeholders apart (as discussed below) from the shareholders who have no reasonable economic interest at this point.

[57] Unlike *Quest*, this is not a case in which the RVO is being used to thwart creditor opposition. Indeed, the evidence is that almost all creditors, secured and unsecured, will be paid in full. To the extent there might be concerns that an RVO structure could be used to thwart creditor democracy and voting rights, those concerns are not present here. This is not a traditional "compromise" situation. It is hard to see how anything would change under a creditor class vote scenario because almost all of the creditors are being paid in full.

[58] The evidence is that there is no creditor being placed in a worse position, because of the use of an RVO transaction structure, than they would have been in under a more traditional asset sale and AVO structure (or, for that matter, under any plausible plan of compromise).

[59] Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.

[60] The evidence of Harte's financial problems and balance sheet insolvency, the unsuccessful prefiling strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.

[61] Under s. 186(1) of the OBCA, "reorganization" includes a court order made under the *Bankruptcy and Insolvency Act* or an order made under the *Companies Creditors Arrangement Act* approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.

[62] Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.

[63] Section 36(1) of the CCAA contemplates that despite any requirement for shareholder approval, the court may authorize a sale or disposition out of the ordinary course even if shareholder approval is not obtained. While, again, s. 36(1) is concerned with asset sales, the underlying logic of this provision applies to an assessment of cancellation of shares as well. In this case, there is no prospect of shareholder recovery on any realistic scenario.

[64] Equity claims are subject to special treatment under the CCAA. Section 6(8) prohibits court approval of a plan of compromise if any equity is to be paid before payment in full of all claims that are not equity claims. Section 22(1) provides that equity claimants are prohibited from voting on a plan unless the court orders otherwise. In short, shareholders have no economic interest in an insolvent enterprise: *Sino-Forest Corporation (Re)*, 2012 ONSC 4377, paras. 23-29. In circumstances like Harte Gold's, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders: *Stelco Inc. (Re),* 2006 CanLII 4500 at para. 11. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances.

[65] Taking all this into account, I find that the effect of the transaction on creditors and stakeholders is overwhelmingly positive and the best outcome reasonably available in the circumstances.

Fairness of Consideration

[66] Harte Gold's business and assets have been extensively marketed both prior to and during the CCAA proceedings. At the conclusion of the SISP, two bids were available, which were equivalent in all material respects and represented the highest and best offers received. As described earlier, all parties concurred that the Silver Lake-sponsored SARSA should be determined to be the successful bid. As also described above, the closing of the SARSA transaction will provide a vastly superior recovery for creditors than would a liquidation of Harte Gold's assets in bankruptcy. Based on the market, therefore, the consideration must be considered fair and reasonable.[1]

[67] A further concern with an RVO transaction structure such as this one could be whether, in effect, a purchaser making a credit bid might be getting something (i.e., the licences and permits) for nothing (i.e., the licences and permits were not subject to the creditor's security). It is possible that in a bankruptcy, for example, the licences and permits might have no value. The evidence here is that the purchaser is paying more than Harte Gold would be worth in a bankruptcy. The evidence is also that the purchaser is paying considerably more than just the value of the secured debt. This includes cure costs for third party trade creditors and DIP financing to keep the Mine operational – both payments being made to bring about the acquisition of the Mine as a going concern.

[68] It is true that no attempt has been made to put an independent value on the transfer of the licences and permits. However, any strategic buyer (Silver Lake is a strategic buyer and acquired the BNPP debt for this purpose) would need the licences and permits. The results of the prefiling strategic process and the SISP constitutes evidence that no one else among the universe of potential purchasers of an operating gold mine in Northern Ontario was willing to pay more than Silver Lake was willing to pay. In the circumstances, I do not think it could be seriously suggested that Silver Lake is getting "something" for "nothing".

[69] The Monitor is satisfied that the consideration is fair in the circumstances. I agree with the Monitor's assessment for the reasons outlined above.

Other Considerations Re Appropriateness of RVO vs. AVO

[70] As noted, Harte Gold has twelve material permits and licenses that are required to maintain its mining operations, as well as twenty-four active work permits and licenses that allow the performance of exploration work and many other forest resource licences and fire permits.

[71] The principal objective and benefit of employing the RVO approach in this case is the preservation of Harte Gold's many permits and licences necessary to conduct operations at the Sugar Loaf Mine. Under a traditional asset sale and AVO structure, the purchaser would

[1] The total value of the consideration is, perhaps coincidentally, also roughly equivalent to the value of Harte Gold's assets as shown in its audited financial statements in the last full year prior to the commencement of these proceedings.

have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This is a process that would necessarily involve risk, delay, and cost. The RVO sought in this case achieves the timely and efficient preservation of the necessary licences and permits necessary for the operations of the Mine.

[72] It is no secret that time is not on the side of a debtor company faced with Harte Gold's financial challenges. It is also relevant that the purchaser has agreed to provide DIP financing up to $10.8 million and substantial cure costs of pre and post filing trade obligations. This is all financing required to be able to continue operations as a going concern at the Mine post closing and to fund the CCAA process.

[73] The position of the purchaser is, not unreasonably, that it will not both continue to fund ongoing operations and the CCAA process and undertake a process of application to relevant government agencies for transfers of the Harte Gold licenses and permits (or, if necessary, for new ones) with all of the risks and uncertainties of possible adverse outcomes and indeterminant delays and costs associated with such a process. The RVO structure will enable the transaction to be completed efficiently and expeditiously, without exposure to these material risks, delays and costs.

[74] The Monitor supports the use of the RVO transaction structure. The Monitor has also pointed out that the applicant holds some 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The reverse vesting structure avoids the need to amend the various registrations to reflect a new owner, which would add more cost and delay if the proposed purchase transaction was to proceed through a traditional asset purchase and vesting order.

[75] In addition, Harte Gold has a significant number of contracts that will be retained under the SARSA. Again, the RVO transaction structure will avoid potentially significant delays and costs associated with having to seek consent to assignment from contract counter-parties or, if consents could not be obtained, orders assigning such contracts under s. 11.3 of the CCAA. The Monitor has also pointed out that under the SARSA and the RVO, the purchaser will be required to pay applicable cure costs in respect of the retained contracts which has been structured in substantially the same manner as contemplated by s. 11.3(4) of the CCAA if a contract was assigned by court order.

[76] For all these reasons, I accept that the proposed RVO transaction structure is necessary to achieve the clear benefits of the Silver Lake purchase and that it is appropriate to approve this transaction in the circumstances.

Conclusion on RVO/Section 36 Issues

[77] In all the circumstances, I find that the RVO sought in the circumstances of this case is in the interests of the creditors and stakeholders in general. I consider the RVO to be appropriate in the circumstances. The RVO will: provide for timely, efficient and impartial resolution of Harte Gold's insolvency; preserve and maximize the value of Harte Gold's

assets; ensure a fair and equitable treatment of the claims against Harte Gold; protect the public interest (in the sense of preserving employment for well over 250 employees as well as numerous third party suppliers and service providers and maintaining Harte Gold's commitments to the First Nations peoples of the area); and, balances the costs and benefits of Harte Gold's restructuring or liquidation.

Release

[78] Harte Gold seeks a Release which includes the present and former directors and officers of Harte Gold and the newcos, the Monitor and its legal counsel, and the purchaser and its directors, and officers. The proposed Release covers all present and future claims against the released parties based upon any fact, matter of occurrence in respect of the SARSA transactions or Harte Gold and its assets, business or affairs, except any claim for fraud or willful misconduct or any claim that is not permitted to be released under s. 5.1(2) of the CCAA.

[79] CCAA courts have frequently approved releases, both in the context of a plan and in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of the parties, directors, officers, monitors, counsel, employees, shareholders and advisors.

[80] I find that the requested Release is reasonable and appropriate in the circumstances. I base my decision on an assessment of following factors taken from *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54. As is often the case in the exercise of discretionary powers, it is not necessary for each of the factors to apply for the release to be approved.

[81] Whether the claims to be released are rationally connected to the purpose of the restructuring: The claims released are rationally connected to Harte Gold's restructuring. The Release will have the effect of diminishing claims against the released parties, which in turn will diminish indemnification claims by the released parties against the Administration Charge and the Directors' Charge. The result is a larger pool of cash available to satisfy creditor claims. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Company's restructuring.

[82] Whether the releasees contributed to the restructuring: The released parties made significant contributions to Harte Gold's restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of Harte Gold were instrumental in the conduct of the prefiling strategic process, the SISP and the continued operations of Harte Gold during the CCAA proceedings. With a proposed sale that will maintain Harte Gold as a going concern and permit most creditors to receive recovery in full, these CCAA proceedings have had what must be considered a "successful" outcome for the benefit of Harte Gold's stakeholders. The released parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of a release.

[83] Whether the Release is fair, reasonable and not overly broad: The Release is fair and reasonable. Harte Gold is unaware of any outstanding director claims or liabilities against its directors and officers. Similarly, Harte Gold is unaware of any claims against the advisors related to their provision of services to Harte Gold or to the purchaser relating to Harte Gold or these CCAA proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow. Regulatory or environmental liabilities owed to any government authority have not been disclaimed and the language of the Release was specifically negotiated with the Ministry of Northern Development and Mines to preserve those identified obligations. Further, the Release carves out and preserves claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced and will allow Harte Gold and the released parties to move forward with the transaction and to conclude these CCAA proceedings.

[84] Whether the restructuring could succeed without the Release: The Release is being sought, with the support of Silver Lake and the Appian parties (the most significant stakeholders in these CCAA proceedings) as it will enhance the certainty and finality of the transaction. Additionally, Harte Gold and the purchaser both take the position that the Release is an essential component to the transaction.

[85] Whether the Release benefits Harte Gold as well as the creditors generally: The Release benefits Harte Gold and its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification, thus minimizing further claims against the Administration Charge and the Directors' Charge.

[86] Creditors' knowledge of the nature and effect of the Release: All creditors on the service list were served with materials relating to this motion. Harte Gold also made additional efforts to serve all parties with excluded claims under the transaction. Additionally, the form of the Release was included in the draft approval and reverse vesting order that was included in the original Application Record in these CCAA proceedings. All of this provided stakeholders with ample notice and time to raise concerns with Harte Gold or the Monitor. No creditor (or any other stakeholder) has objected to the Release. A specific claims process for claims against the released parties in these circumstances would only result in additional costs and delay without any apparent corresponding benefit.

Extension of the Stay

[87] The current stay period expires on January 31, 2022. Under s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.

[88] Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the Silver Lake transaction, while at the same time preserving the status quo and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.

[89] No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. Harte Gold is acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Harte Gold's cash flow forecast, it is expected to have sufficient liquidity to continue its operations during the contemplated extension of the stay.

[90] For these reasons the stay is extended to March 29, 2022.

Expansion of Monitor's Powers

[91] The CCAA provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the CCAA provides that the Monitor can "carry out any other functions in relation to the [debtor] company that the court may direct". In addition, of course, s. 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.

[92] The order for the Monitor's expanded powers is intended to provide the Monitor with the power, effective upon the issuance of the approval and reverse vesting order, to administer the affairs of the newcos (which is necessary to complete the transaction), along with powers necessary to wind down these CCAA proceedings and to put the newcos into bankruptcy following the close of the transaction. No creditor is prejudiced by the expansion of the Monitor's powers to facilitate the transaction and the wind-down of the CCAA proceedings. On the contrary, the granting of such powers is necessary to achieve the benefits of the transaction to stakeholders which have been described above.

[93] I approve the grant of the requested powers to the Monitor.

Conclusion

[94] For all these reasons, the motion for an order approving the Silver Lake transaction, including the RVO structure, is granted. The additional requests for orders extending the stay and expanding the Monitor's powers are also granted.

Penny J.

Date: 2022-02-04

TAB 13

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-029177-201, 500-09-029190-204
(500-11-057716-199)

DATE: November 11, 2020

BEFORE THE HONOURABLE GENEVIÈVE MARCOTTE, J.A.

***IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT OF*:**

Nº : 500-09-029177-201

VICTOR CANTORE
APPLICANT – Objecting Party
v.

NEMASKA LITHIUM INC.
and
NEMASKA LITHIUM WHABOUCHI MINE INC.
and
NEMASKA LITHIUM SHAWINIGAN TRANSFORMATION INC.
and
NEMASKA LITHIUM P1P INC.
and
NEMASKA LITHIUM INNOVATION INC.
RESPONDENTS – Debtors
and
PRICEWATERHOUSECOOPERS INC.
IMPLEADED PARTY – Monitor
and
INVESTISSEMENT QUÉBEC
and
THE PALLINGHURST GROUP
and
OMF FUND II (K) LTD.

OMF FUND II (N) LTD.
and
FMC LITHIUM USA CORP.
and
BRIAN SHENKER
IMPLEADED PARTIES – Impleaded parties

***IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF*:**

Nº : 500-09-029190-204

BRIAN SHENKER
APPLICANT – Impleaded party
v.

NEMASKA LITHIUM INC.
and
NEMASKA LITHIUM WHABOUCHI MINE INC.
and
NEMASKA LITHIUM SHAWINIGAN TRANSFORMATION INC.
and
NEMASKA LITHIUM P1P INC.
and
NEMASKA LITHIUM INNOVATION INC.
RESPONDENTS – Debtors
and
PRICEWATERHOUSECOOPERS INC.
IMPLEADED PARTY – Monitor
and
INVESTISSEMENT QUÉBEC
and
THE PALLINGHURST GROUP
and
OMF FUND II (K) LTD.
OMF FUND II (N) LTD.
and
FMC LITHIUM USA CORP.
IMPLEADED PARTIES – Impleaded parties
and
VICTOR CANTORE
IMPLEADED PARTY – Opposing creditor

JUDGMENT

[1] I am tasked with the determination of two applications for leave to appeal of a judgment rendered on October 15, 2020 by the Superior Court of Québec, district of Montreal (the honourable Louis J. Gouin) which approved a transaction and issued a reverse vesting order pursuant to sections 11 and 36 of the *Companies' Creditors Arrangement Act (CCAA)*.[1]

[2] The CCAA proceedings were commenced in December 2019 with respect to the debtor companies (the "Nemaska entities") which are involved in the development of a lithium mining project in Quebec

[3] In January 2020, the CCAA judge approved an uncontested sale or investment solicitation process (« SISP ») which led to the acceptance of an offer submitted by impleaded parties Investissement Québec, the Pallinghurst Group and OMG Fund II (K) Ltd. and OMG Fund II (N) Ltd (« Orion »), in the form of a bid that was made subject to the condition that a reverse vesting order (RVO) be issued.

[4] The proposed RVO provides for the acquisition by the impleaded parties of the shares of Nemaska entities free and clear of the claims of creditors which are transferred along with unwanted assets[2] to a newly incorporated non-operating company, as part of a pre-closing reorganization.

[5] The RVO allows the purchaser to continue to carry on the operations of the Nemaska entities in a highly regulated environment by maintaining their existing permits, licences, authorizations, essential contracts and fiscal attributes. It is essentially a credit bid whereby the shares of the Nemaska entities are acquired in return for the assumption of the secured debt[3].

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1 R.S.C., 1985, c. C-36.

2 They essentially consist of residual cash defined as follows in the Accepted bid:

> 38. The Residual Cash is comprised of: (i) the cash still on hand as at the closing date (to be determined and subject to adjustments), the amount of US$7M from the US$20M escrowed funds held in respect of the Livent litigation (plus accrued interest on US$20M), an amount under the Directors and Officers (the «**D&O**») trust of approximately $2M, less (ii) the sum of $12M to be retained by New Nemaska Lithium to cover its assumption of the secured claim of JMBM.

3 The Accepted bid provides for the following consideration:

> 36. The Accepted Bid is submitted as a credit bid and the full amount of the Orion Secured Claim is used as such by the Bid Group as consideration.

[6] Applicant Victor Cantore (Cantore) is a shareholder of Nemaska and a creditor of royalties (a 3% net smelter return royalty on all metals), following the sale of his original mining titles to the Nemaska entities in 2009.

[7] Cantore filed an application to have the Court recognize his "*bene esse* real rights" on the mining titles which the parties agreed to debate at a later date and have temporarily carved out of the proposed RVO.

[8] Cantore nonetheless formally objected to the approval of the RVO, raising multiple grounds of contestation, including the CCAA judge's lack of authority to grant a vesting order for anything other than a sale or disposition of assets, the impossibility under the CCAA for debtor companies to emerge from CCAA protection outside a compromise or arrangement, the violation of securities laws and the improper release stipulated in favour of directors and officers without prior approval from creditors.

[9] Applicant Brian Shenker ("Shenker") is a shareholder of Nemaska Lithium Inc. Along with other shareholders, he filed an *Application to declare certain claims as exempt and to permit the filing of certain claims in late September 2020*, namely against Nemaska entities' directors and officers for negligent misrepresentations.

[10] While the application had not been heard by the CCAA judge at the time of the approval hearing, Shenker was allowed to make oral submissions regarding the granting of releases in favour of the directors and officers in the context of the proposed RVO.

[11] Notwithstanding the Cantore objections and the Shenker representations, the CCAA judge approved the RVO following a 9 day hearing.

[12] In his reasons, the CCAA judge reviewed the context of the transaction in detail and insisted on the purpose and efficiency of the RVO to maintain the going concern operations of the debtor companies, while also emphasizing that it is not up to the courts to dictate the terms and conditions to be included in the offer which stems from the uncontested SISP order.

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37. The consideration offered under the Accepted Bid includes (i) the assumption by New Nemaska Lithium of the Orion Secured Claim ($134,500,000); (ii) the assumption by New Nemaska Lithium of the Johnson Matthey Battery Materials Ltd. («**JMBM**») secured claim ($12,000,000); (iii) the assumption of various liabilities and obligation (including the Livent obligations and all of the Debtors' obligations under the Chinuchi Agreement from the closing onwards) and (iv) the transfer to Residual Nemaska Lithium of Nemaska Lithium's cash on hand on closing, subject to certain adjustments (the «**Residual Cash**») and any Excluded Assets.

[13] He also reiterated that the approval of the RVO pursuant to s. 36 CCAA is subject to determining:

- Whether sufficient efforts to get the best price have been made and whether the parties acted providently;
- The efficacy and integrity of the process followed;
- The interests of the parties; and
- Whether any unfairness resulted from the process.[4]

[14] He considered that these criteria had been met and found the issuance of the RVO to be a valid use of his discretion, insisting that it would serve to maximize creditor recoveries while maintaining the debtor companies as a going concern and allowing an efficient transfer of the necessary permits, licences and authorizations to the purchaser.

[15] In coming to this conclusion, the CCAA judge relied extensively on the principles recently set out by the Supreme Court in the matter of *9354-9186 Quebec inc. c. Callidus Capital Corp.*[5] namely:

> 1. The evolution of CCAA proceedings and the important role of the CCAA supervising judge;
>
> 2. The remedial objectives of Canadian insolvency laws to provide timely, efficient and impartial resolution of a debtor's insolvency, preserve and maximize the value of a debtor's assets, ensure fair and equitable treatment of the claims against a debtor, protect the public interest, and balance the costs and benefits of restructuring or liquidating the debtor company;
>
> 3. The priority afforded by the CCAA to « "avoid [ing] the social and economic losses resulting from the liquidation of an insolvent company" by facilitating the reorganization and survival of the pre-filing debtor company, as a going concern;
>
> 4. The CCAA judge's wide discretion pursuant to s. 11 of the CCAA with a view to furthering the remedial objectives of the CCAA while keeping in mind three "baseline considerations," which the applicant has the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence.

---

4 *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742, para.34-35.

5 *9354-9186 Quebec inc. c. Callidus Capital Corp.[Callidus],* 2020 CSC 10, para. 38-52, 67-68.

[16] After reviewing the Monitor's report and uncontradicted testimony, the CCAA judge dismissed the Cantore objections and concluded that the Nemaska entities had acted in good faith and with the required diligence, and that the approval of the RVO was the best possible outcome in light of the alternatives, being : (i) the realization of the rights held by secured creditors, (ii) the suspension of the restructuring process to attempt a new SISP at a high cost with an uncertain outcome in an uncertain market that had previously been thoroughly canvassed and had led to a single acceptable bid, or (iii) the bankruptcy of the debtor companies.

[17] He underlined the catastrophical impact of these alternatives on all stakeholders being the employees, creditors, suppliers, the Cree community and local economies.

[18] As far as the various arguments raised by Cantore are concerned, the CCAA judge pointed out that his attorney had conceded that his client would not have continued to oppose the RVO if his *sui generis* rights had been settled and incorporated into an offer to be approved by the Court.

[19] The CCAA judge dismissed Cantore's argument regarding the Court's limited authority to grant a vesting order, stating that the terms « *Sell or otherwise dispose of assets outside the ordinary course of business* » under subsection 36 (1) CCAA should be broadly interpreted to allow a CCAA judge to grant innovative solutions such as RVOs on a case by case basis, in accordance with the wide discretionary powers afforded the supervising judge pursuant to section 11 CCAA, as recognized by the Supreme Court in *Callidus*.[6]

[20] He insisted that this would be particularly appropriate, where the proposed RVO brings an outcome to creditors more favourable than the alternatives and where available tax attributes contribute to significantly improve the offer, to eventually bring a greater distribution to the creditors.

[21] The CCAA judge also insisted on the fact that the expungement of real rights was contemplated by subsection 36(6) and was a necessary condition to the implementation of a solution, and served to prevent a veto on the part of the holders of those real rights.

[22] The CCAA judge further held that the offer did not constitute a plan of arrangement subject to prior creditor approval and that the residual companies would be submitting a plan of arrangement to the remaining creditors for a vote once the first step, being the acquisition of the Nemaska shares by the impleaded parties, is accomplished.

[23] He dismissed the argument of a potential violation of the applicable securities laws, insisting on the fact that the issue had become moot, given the written confirmation obtained from a representative of the Autorité des marchés financiers that

---

6 See Supra note 5.

they would not object to the interpretation of *Regulation 61-101 respecting Protection of Minority Security Holders in Special Transactions*[7] proposed in the context of the RVO.

[24] He dismissed the argument related to an « impermissible disguised substantive consolidation » of the Nemaska entities and the alleged lack of approval of a consolidation plan, insisting on the fact that the offer had been made by the impleaded parties in response to a SISP process which had not been contested and clearly contemplated the purchase of all or part of the assets of the debtor companies.

[25] Additionally, the CCAA judge held that the release in favour of the directors and officers of the debtor companies contained in the RVO was qualified in such a manner so as to protect the rights of shareholders and creditors whose claim is based on Section 5.1 (2) of the CCAA.

[26] Moreover, he concluded that Cantore's sui generis real rights were being fully protected by the reserve set out under the RVO and he dismissed his proposition that the proposed transaction was not fair and reasonable or that the Monitor had acted in a partial or improper manner, given the serious efforts put forward to salvage the operations of the companies, the rigorous SISP process carried out and the fact that the offer at issue was the only acceptable and serious bid received and that it allowed the mining project operations to resume.

[27] Lastly, he insisted on the urgency to approve the RVO and the fact that that any additional delay would work to the detriment of the impleaded parties as well as the debtor companies, their employees and suppliers, the Cree community and their local economies.

[28] In the applications for leave to appeal, Applicants Cantore and Shenker both argue that the CCAA judgment is flawed, in that the CCAA judge did not have the power to approve a transaction which is structured in such manner as to allow the debtor companies to emerge from CCAA protection free and clear of their pre-filing obligations outside the confines of a plan of compromise or arrangement and without the benefit of an approval by the required majority of creditors.

[29] Both Applicants add that the CCAA judge also erred in approving the broad releases in favour of third parties, including the directors and officers, outside the context of a plan of arrangement and without first determining whether they were fair, reasonable and necessary to the restructuring and whether they could prejudice creditor rights.

---

7 V-1.1, r. 33.

[30] In addition Cantore raises essentially the same arguments which were previously dismissed by the CCAA judge, being that:

1. The pre-filing obligations were essentially "novated" by the Court and consolidated (without prior determination of the need for such consolidation), and were illegally transferred to third parties without prior creditor consent;

2. The CCAA judge erred in law by approving the transaction and issuing the RVO on the basis of evidence given by the Monitor who was not neutral nor impartial;

3. The CCAA judge focused exclusively on the outcome of the proposed transaction which he qualified to be the "best and only alternative available in the circumstances", while failing to give any meaningful consideration to creditor rights.

4. The CCAA judge approved a transaction that violates applicable securities law, more precisely the minority shareholder approval requirements.

5. The CCAA erred in granting provisional execution and failed to support this order with sufficient reasons relating to the nature and the extent of the harm which could be suffered.

[31] In order to obtain leave to appeal a judgment pursuant to section 13 CCAA, the Applicants must demonstrate that they satisfy the following four-pronged test in that:

1. The point on appeal is of significance to the practice;

2. The point is of significance to the action or proceedings;

3. The appeal is prima facie meritorious;

4. The appeal will not unduly hinder the progress of the proceedings[8].

[32] Such leave is only granted sparingly given the nature of the powers afforded the CCAA judge.

---

[8] See *Bridging Finance inc c. Béton Brunet 2001 inc.*, 2017 QCCA 138 para. 14 and 15 (per Kasirer, J.A., in chambers); *Statoil Canada Ltd. (Arrangement relatif à)*, 2012 QCCA 665, para. 4 (per Hilton, J.A., in chambers).

[33] All parties agree that RVOs are a novelty and that, until now, they have only been granted by consent. They also agree that a delimitation of powers of the CCAA judge under section 11 of the *CCAA* where the RVO transaction is contested by certain creditors is a point of principle which could be of interest to the practice and could, in certain circumstances, justify granting leave to appeal[9].

[34] They claim, however, that in the particular context of the transaction, such leave should not be granted as it will serve to hinder the progress of the CCAA proceedings in a context where the great majority of creditors will be prejudiced.

[35] As underlined by the CCAA judge, the only determination that the courts are asked to make is whether or not to approve the RVO, without having the power to dictate its terms:

> [16] L'offre Orion/IQ/Pallinghurst est soumise au Tribunal telle que déposée, et il ne revient pas au Tribunal d'indiquer aux Offrants quels termes et conditions doivent en faire partie.
>
> [17] Le choix du Tribunal est le suivant : il approuve ou il refuse l'Offre Orion/IQ/Pallinghurst.

[36] Certain issues raised in appeal do appear to qualify as being significant to the practice of insolvency. This is particularly the case regarding the issue of the scope of authority of the CCAA supervising judge in the context of an order that is not strictly limited to the "sale or disposition of assets" provided for under section 36 (6) CCAA, which, according to the Applicants, results in an outcome that would normally form part of an arrangement subject to prior approval by the creditors. There is also an issue of principle raised regarding the granting of broad third party releases (that are not limited to the transaction itself), outside the confines of an arrangement and without determining their appropriateness and submitting same to the required vote of creditors.

[37] There is however reason to question the merit of the appeal in the particular context of the file. The CCAA judge's comments on Cantore's approach in the file (notwithstanding the parties' agreement to postpone the debate regarding the expungement of his "*bene esse* real rights" in the mining claims), provide the context in which his arguments are being advanced and somewhat affect their legitimacy:

> [30] Le report de ce débat, lequel avait essentiellement pour but que la Demande Cantore ne soit plus un obstacle à l'obtention urgente de l'approbation par le Tribunal de l'Offre Orion/IQ/Pallinghurst, dans la mesure où le Tribunal était disposé à aller dans ce sens, n'a pas mis fin à l'opposition du Créancier Cantore à la Demande pour ODI, loin de là.

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[9] *Aviva Cie d'assurance du Canada c. Béton Brunet 2001 inc.*, 2016 QCCA 1837, para. 16.

> [31] Ainsi, le Créancier Cantore a continué à prétendre que le Tribunal n'avait tout simplement pas l'autorité et la compétence pour accueillir la Demande pour ODI sauf, par contre, si elle incluait aussi un règlement de la Demande Cantore qui serait alors approuvé par le Tribunal.
>
> [32] Tel que discuté ci-après, il est apparu clairement au Tribunal, tout au long de l'audition, que le Créancier Cantore, par les arguments qu'il présentait, ne prenait nullement en considération ce qui avait été décidé par l'Ordonnance SISP, la Toile de fond de la Demande pour ODI.
>
> [33] Tout était décortiqué à la pièce par le Créancier Cantore, isolé du portait global, loin de ce que le Tribunal avait déjà autorisé.
>
> [34] **À plusieurs occasions, le Tribunal a eu l'étrange impression que l'opposition du Créancier Cantore était un exercice de négociation avec les Débitrices et les Offrants, portant ainsi ombrage à la légitimité des arguments qu'il avançait.**
>
> [35] À un tel point tel que, le 8 octobre 2020 05 :19, le Tribunal a fait parvenir un courriel aux procureurs présents à l'audition, mentionnant, entre autres, ce qui suit :
>
> […]
>
> I ask you all to be practical and don't take a legal position in front of the Court on this issue, or any other issue**, as a bargaining tool.**
>
> […]
>
> [Emphasis added]

[38] As it turns out[10], the value of the Cantore provable claims (setting aside the later debate regarding his potential real rights) stands at $8,160 million out of a total value of provable claims of $200 million. Thus, Cantore's provable claims represent at this point in time 4% of the total value of unsecured creditors' claims as determined by the Monitor. Yet, Cantore is the only creditor having voiced an objection to the RVO approval. This begs the question: whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?

---

[10] In May 2020, Cantore delivered to the Monitor 5 proofs of claims which were disallowed in part by the Monitor by way of a Notice of Revision or Disallowance dated October 22, 2020, leaving an outstanding provable claim of $8,160,000. Cantore has since filed an application to appeal from the Monitor's revision or disallowance of a claim dated October 29, 2020.

[39] In these circumstances, I am simply not convinced that the arguments that are advanced by Cantore are anything but a "bargaining tool", while he pursues multidirectional attacks on the RVO with the same arguments that were dismissed in first instance.

[40] That being said, the applicants have also failed to convince me that their appeal will not hinder the progress of the proceedings and that it is not purely strategic (insofar as Applicant Cantore is concerned) or theoretical (insofar as Applicant Shenker is concerned).

[41] Serious concerns were raised at the hearing regarding the fact that the RVO may be compromised if the closing (which has already been postponed on more than one occasion since the acceptance of the offer in June 2020) cannot take place as determined in the RVO by December 31, 2020. These concerns are compounded by the risk of a potential cash depletion as contemplated by the Monitor (in his Ninth Monitor's Report) at a monthly rate of $2.5 to $3 million. As well, the Monitor deems it unlikely that an alternative or any other new plan of arrangement could generate a distribution to unsecured creditors in the range currently estimated in the RVO (between $6 million and $14 million).

[42] This makes the leave to appeal a risky proposition that could turn into the potential "catastrophy" that the CCAA judge referred to in his reasons, one in which all stakeholders, including creditors, employees, suppliers, the Cree community and the local economies stand to lose. In such event, the rights being debated even if important may become theoretical.

[43] As far as Shenker is concerned, while the issues that he proposes to raise with respect to overreaching third party releases are not devoid of merit, granting leave is likely to seriously prejudice creditors, with limited gains to be had on the part of shareholders whose rights remain entirely subordinated to those of the creditors.[11] If the manner of constituting the releases makes them invalid or unopposable, then Shenker, and any other party with a claim against directors, may still have a recourse.

THEREFORE, THE UNDERSIGNED:

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[11] As highlighted by the CCAA judge during a management hearing held on September 18 2020 as reproduced at paragraph 37 of the judgment:

> De plus, le Tribunal tient à répéter que dans un contexte d'insolvabilité, tel que dans la présente affaire, les intérêts économiques des Actionnaires, si tant est que de tels intérêts existent encore, sont entièrement subordonnés à ceux de tous les créanciers des Débitrices, et ce, jusqu'à ce que ces créanciers aient été entièrement payés, ce qui n'est nullement envisagé dans le présent dossier et n'a, semble-t-il, jamais été envisagé par qui que ce soit. Il s'agit d'un principe fondamental en la matière et qui ne doit jamais être perdu de vue.

[44] **DISMISSES** the applications for leave to appeal;

[45] **THE WHOLE**, with legal costs.

GENEVIÈVE MARCOTTE, J.A.

Mtre Dimitrios Maniatis
ACCENT LÉGAL
Mtre Tom Provost
MLT AIKINS
For Applicant and impleaded party Victor Cantore

Mtre Neil Peden
Mtre Bogdan Catanu
WOODS
For Applicant Brian Shenker

Mtre Alain Tardif
Mtre Gabriel Faure
Mtre François Alexandre Toupin
Mtre Patrick Boucher
McCARTHY TÉTRAULT
For Respondents

Mtre C. Jean Fontaine
Mtre Nathalie Nouvet
STIKEMAN ELLIOT
For impleaded party Pricewaterhousecoopers inc.

Mtre Luc Morin
NORTON ROSE FULLBRIGHT CANADA
For impleaded party Investissement Québec

Mtre Denis Ferland
DAVIES WARD PHILLIPS & VINEBERG
For impleaded party The Pallinghurst Group

Mtre Christopher Richter
Mtre Marie-Ève Gingras
SOCIÉTÉ D'AVOCATS TORYS
For impleaded party OMF Fund II (K) Ltd. and OMF Fund II (N) Ltd.

Mtre Kevin Mailloux
Mtre François Gagnon
BORDEN LADNER GERVAIS
For impleaded party FMC Lithium USA Corp.

Date of hearing: November 2, 2020

TAB 14

CITATION: *Plan of Arrangement of Fire & Flower Holdings Corp. et al.*, 2023 ONSC 4934
COURT FILE NO.: CV-23-00700581-00CL
DATE: 20230829

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-25, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF FIRE & FLOWER HOLDINGS CORP., FIRE & FLOWER INC., 13318184 CANADA INC., 11180703 CANADA INC., 10926671 CANADA LTD., FRIENDLY STRANGER HOLDINGS CORP., PINEAPPLE EXPRESS DELIVERY INC., and HIFYRE INC, Applicants

BEFORE: Peter J. Osborne J.

COUNSEL: *Maria Konyukhova and Philip Yang*, for the Applicants

Jeffery Rosenberg and Jodi Porepa, for FTI Consulting Canada Inc., Court-Appointed Monitor

Leanne Williams and Rebecca Kennedy, for the Monitor

Natalie Renner and Christian Lachance, for 2707031 Ontario Inc (the DIP Lender)

Haddon Murray, for Turning Point Brands

Linda Galessiere, for RioCan, SmartREIT, Centrecorp and Northfield Equities Inc.

Maya Poliak, for Ontario Securities Commission

Gavin Finlayson and Patrick Corney, for Green Acre Capital LP

HEARD: August 29, 2023

ENDORSEMENT

1. The Applicants move for:

   a. approval of a subscription agreement dated August 17, 2023 between FFHC (as company) and 2759054 Ontario Inc. operating as FIKA Cannabis (as purchaser) (the "Subscription Agreement"), the contemplated Transactions and authorization to FFHC to complete the Transactions;

b. approval of the amended and restated subscription agreement to be entered into between FFHC and 2707031 Ontario Inc. ("ACT Investor") as purchaser (the "Back-up Subscription Agreement), the contemplated Back-up Transactions and authorization to FFHC to complete the Back-up Transactions only if, and to the extent necessary, that the Subscription Agreement and the Transactions contemplated therein do not close for any reason;

c. the granting of Releases as defined and described in the motion materials;

d. an extension of the Stay Period until October 15, 2023;

e. a sealing order in respect of the Confidential Appendix to the Third Report of the Monitor; and

f. approval of the proposed claims procedure.

g. Defined terms in this Endorsement have the meaning given to them in the motion materials, the Third Report of the Monitor dated August 26, 2023 or my earlier endorsements made in this proceeding, unless otherwise stated.

2. The Service List has been properly served. The relief sought today by the Applicants is fully supported and recommended by the Monitor. It is not opposed by any party.

3. For the reasons that follow, the requested relief is granted.

4. The Applicants rely upon the Affidavit of Stephane Trudel sworn August 23, 2023 together with Exhibits thereto, and the Supplementary Affidavit of Mr. Trudel sworn August 28, 2023, the latter of which relates primarily to the particulars of the executed Back-up Subscription Agreement. They also rely on the Third Report of the Monitor dated August 26, 2023.

5. It is not necessary to set out all of the background to, and context for, the motions before me today. On June 19, 2023, I approved a SISP, including a stalking horse agreement.

6. The Monitor conducted the SISP, in consultation with the Applicants, to solicit interest in sales for all or portions of the Property and/or Business. I emphasize, as I did in an earlier Endorsement and given the history of this matter, that the SISP was specifically and intentionally designed to be sufficiently broad so as to contemplate the possibility of an investment in, restructuring, recapitalization, refinancing or other form of reorganization of the Applicants and/or their Business. Accordingly, the possibility of asset and share transactions (including through a reverse vesting structure) were capable of being fully explored through the SISP.

7. The Monitor contacted 138 Known Potential Bidders. 33 Potential Bidders executed agreements to access the virtual data room. At the conclusion of Phase 1, there were 12 Phase 1 Qualified Bidders. Eight Binding Offers were received by the Phase 2 Bid Deadline, consisting of three Sale Proposals and five Partial Sales Proposals.

8. The Special Committee, in consultation with, and on the recommendation of, the Monitor and counsel to the Applicant, determined that the best interests of the Applicants and their stakeholders were to designate the FIKA Bid and one other Bid to be Phase 2 Qualified Bids, with

the result that those two Bidders, together with the Stocking Horse Bidder, participated in the Auction.

9. The Auction was held virtually on August 15, 2023. The FIKA Bid was declared to be the Successful Bid with ACT Investors' Bid declared as the Back-up Bid.

10. The Subscription Agreement was executed by FFHC and FIKA, subject to Court approval, on August 17, 2023. It contemplates a reverse vesting transaction, pursuant to which FIKA will purchase new shares of FFHC for a purchase price of $36 million. FFHC will, in turn, cancel and terminate all of its existing equity securities with the result that FIKA will be the sole shareholder of FFHC and ultimately each of its subsidiaries.

11. Excluded Contracts, Excluded Assets and Excluded Liabilities of the Applicants will be transferred to Residual Co.

12. The proposed reverse vesting structure will permit the Applicants to maintain their licences and permits which, in the highly regulated cannabis environment in which they operate, will avoid very significant additional delays, costs and uncertainty associated with the potential transfer of such licences and permits to a third party. In addition, maintaining contracts with provincially operated cannabis distributors, licenced cannabis producers, suppliers of strategic data sources and others whose services are required to maintain those licences and permits, will avoid the uncertainty, time and expense of obtaining the necessary consents to assign those rights or enter into new arrangements.

13. Finally, the reverse vesting structure permits the maintenance of the tax attributes of the Applicants, including operating losses.

14. The proposed Transactions will satisfy all of the secured liabilities of the Applicants and leave a surplus of some millions of dollars for recovery available to unsecured creditors. Certain unsecured and contingent liabilities are assumed, intellectual property licences and government entity contracts are maintained, and the Applicants will continue operations as a going concern.

15. The going concern result in turn provides the potential for many of the approximately 594 employees of the Applicants to continue, and it results in the ability to maintain business relationships with landlords and suppliers.

16. For all of the same reasons, the Back-up Subscription Agreement and contemplated Back-up Transactions are also appropriate but necessary only in the event that the Subscription Agreement and the Transactions contemplated therein do not close for any reason.

17. In the result, I am satisfied for all of these reasons that the Transaction and the Back-up Transaction (together with the respective corollary relief) should be approved. The evidence establishes that the Transaction, and if it fails to close the Back-up Transaction, provide the best and next best respectively outcomes for stakeholders. At the same time, the Transaction, and particularly the reverse vesting structure contemplated thereby, does not result in stakeholders being worse off than they would be under any other viable alternative.

18. In my view, this is reflected, at least in part, by the fact that the relief sought today is unopposed.

19. In the particular circumstances of this case, the reverse vesting structure is also appropriate. It is well-established that this Court has the jurisdiction to approve a reverse vesting transaction pursuant to ss. 11 and 36 of the CCAA. The bigger issue is whether it ought to do so, since they ought not to be the "norm" and the evidence must establish that such a structure is necessary in the particular circumstances of each case: *Just Energy Group Inc. et. al. v Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354; *Arrangement relatif à Black Rock Metals Inc.*, 2022 QCCS 282, leave to appeal to QCCA denied, August 5, 2022; and *Harte Gold (Re)*, 2022 ONSC 653.

20. I am satisfied for the reasons set out above that the reverse vesting transaction is appropriate and necessary in this case. The value of the business as a going concern, which is in turn dependent upon the transfer on an efficient basis of the appropriate licences, permits and critical agreements and arrangements, depends upon this structure. In short, the factors set out by the Court in *Harte Gold (Re)* are satisfied here. In addition, I have concurrently considered the non-exhaustive list of factors as set out under s. 36(3) of the CCAA which align with the principles established in *Royal Bank of Canada v. Soundair Corp*., 1991 CanLII 2727 (ONCA).

21. The consideration being paid pursuant to the Subscription is fair, reasonable, and also reflects a value of the assets being preserved under the reverse vesting structure.

22. Vesting relief will be required in the event, if it comes to pass, that the Back-up Transaction is implemented because the Transaction did not close. Approval of the Back-up Transaction now, however, reduces the required Court appearances and attendant costs, thereby preserving additional value for stakeholders.

23. Finally, with respect to the Transaction aspect of the relief sought today, I am satisfied that the Releases as contemplated by para. 28 of the draft order, and the more limited scope releases as contemplated by para. 29 of the draft order, are appropriate in the circumstances. They, too, are supported by all parties and I am satisfied that the Released Claims do not release claims not permitted to be released pursuant to s. 5.1(2) of the CCAA.

24. The parties to benefit from the releases have all contributed materially to the outcome achieved here and the value preserved thereby. The claims to be released are rationally connected to the purpose of the restructuring; the releases are fair, reasonable and not overly broad; the restructuring may be jeopardized without them; they benefit the Applicants as well as the creditors generally; and contract counterparties and creditors have knowledge of the nature and effect of the proposed releases.

25. In short, the proposed Releases are consistent with those that have been previously approved by this Court and importantly, align with the factors set out by Chief Justice Morawetz in *Lydian*.

26. In sum, the Transaction, the Back-up Transaction, including in each case the reverse vesting structure and the releases, are appropriate and are approved.

27. The proposed Claims Process establishes an appropriate process for the identification, quantification and resolution or determination of unsecured claims against the Applicants. Those will be transferred to Residual Co.

28. I am satisfied that the notification process will provide Claimants with adequate notice and an opportunity to prove their Claims prior to either the Pre-Filing Claims Bar Date or the Restructuring Claims Bar Date, as applicable.

29. As necessary, the proposed adjudication procedure will facilitate the expeditious and fair resolution or determination of any disputes regarding the status and/or quantum of any Claim. Mr. Neils Ortved has agreed to serve as Claims Officer and he is amply qualified to do so.

30. A claims process may be approved pursuant to s. 11 of the CCAA and is appropriate where it will streamline the resolution of the multitude of claims against an insolvent debtor in the most time-sensitive and cost-efficient manner: See *CanWest Global Communications Corp, Re*, 2011 ONSC 2215.

31. The particular claims process proposed here has been tailored to the specific context of this proceeding, and I am satisfied that it provides for the efficient, cost-effective and streamlined adjudication of Claims against the Applicants and their directors and officers.

32. The extension of the existing stay until and including October 15, 2023 is also necessary and appropriate. It will provide the necessary time for the Applicants to attempt to maximize value for all stakeholders through the CCAA Proceedings and the Claims Process. I observe that the Subscription Agreement contemplates an Outside Date of September 15, 2023 to close either the Transactions or the Back-up Transactions.

33. The Applicants continue to act in good faith and with due diligence. The Updated Cash Flow Forecast (Appendix "G") to the Third Report reflects that the Applicants are expected to maintain liquidity and fund operations up to October 15, 2023.

34. I am satisfied that the proposed stay extension will not materially prejudice any stakeholders and observe that the Monitor supports the proposed extension. It is granted.

35. The Monitor seeks a sealing order in respect of the Confidential Appendix to the Third Report which includes in summary form the economics of the competing Bids described above. Until the Transaction or Back-up Transaction is closed, it is critical, in order that the integrity of the process and the ability to remarket the Business and/or assets if need be, that the confidentiality of that economic analysis and the previous Bids, be maintained.

36. I am satisfied that the sealing relief, to be effective not permanently but only until further order of the Court which may be sought by motion on notice at any time, is appropriate and meets the test as articulated by the Supreme Court of Canada in *Sherman Estate*, refining the test as set out in *Sierra Club*.

37. Finally, I add the following at the request of the Ontario Securities Commission ("OSC"), and with the consent of all other parties. Nothing in the approval and reverse vesting order granted today shall affect the OSC's rights and ability to pursue any investigation, take any action, exercise any discretion or commence any proceeding in respect of the Applicants under the Securities Act (Ontario), R.S.O. 1990, c. S.5 (the "Securities Act") or Commodity Futures Act, R.S.O. 1990, c. C.20 (the "CFA") other than in connection with the enforcement of a payment ordered by the OSC prior to the date of the Initial Order dated June 5, 2023 (the "Filing Date"). In addition, nothing in the order shall release any claims by the OSC which may be advanced pursuant to the Securities

Act or CFA against the Released Parties (as defined in paragraph 28 of the order) other than the Monitor and its Counsel, who shall continue to benefit fully from the releases provided for in paragraph 28 of the Order. For greater certainty nothing in the Order is intended to or shall: (i) encroach on the jurisdiction of the OSC in the matter of regulating the conduct of market participants other than in connection with the enforcement of a payment ordered by the OSC prior to the Filing Date; or (ii) vary or amend paragraphs 53 and 54 of the Amended and Restated Initial Order dated June 15, 2023 pertaining to Relief from Reporting Obligations. Further, nothing in this order shall constitute or be construed as an admission by the OSC that the Court has jurisdiction over matters that are within the exclusive jurisdiction of the OSC under the Securities Act and CFA.

38. For all of the above reasons, the relief sought is approved. I am satisfied as to both the proposed claims procedure order and the proposed approval and reverse vesting order.

39. Both orders to go in the form signed by me today, and which are effective immediately and without the necessity of issuing and entering.

Osborne J.

TAB 15

CITATION: In the Matter of the *Companies' Creditors Arrangement Act*
And
In the Matter of CannaPiece Group Inc., 2023 ONSC 841
COURT FILE NO.: CV-22-689631
DATE: 20230202

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **In the Matter of the *Companies' Creditors Arrangement Act***

AND

In the Matter of CannaPiece Group Inc. et al

BEFORE: Osborne J.

COUNSEL: *David S. Ward, Larry Ellis, Sam Massie and Monica Faheim*, for the Applicants

Clifton Prophet, Heather Fisher, Haddon Murray, for 2125028 Ontario Inc.
David Preger, *Lisa S. Corne and David Seifer*, for Carmela Marzilli and 1000420548 Ontario Inc.
Jeremy Dacks, for Dream Industrial (GP) Inc.
Edward Park, Ministry of Finance
Robert Kennedy and Daniel Loberto, Monitor
Rory McGovern, Cardinal Advisory Services Limited

HEARD: January 31, 2023

ENDORSEMENT

1. The Applicants move for an approval and vesting order that would, among other things:

   a. Extend the stay up to and including February 17, 2023;

   b. approve the Share Purchase Agreement ("SPA") entered into between CannaPiece Group Inc. as Vendor, CPC, and 1000420548 Ontario Inc. ("548" or the "Purchaser") and the transaction contemplated therein;

   c. authorize and direct the Applicants to perform their obligations under the SPA and complete it;

d. vest all of Applicants' right, title and interest in the Excluded Assets, Excluded Contracts and Excluded Liabilities in a newly formed entity, 14707117 Canada Inc. ("Residualco");

e. vest in the Purchaser the Purchased Shares free and clear of Encumbrances other than Permitted Encumbrances upon the filing of the Monitor's Certificate;

f. approving a distribution to Cardinal Advisory Services Limited ("Cardinal") in respect of amounts owing pursuant to the DIP Term Sheet and Deposit Facility;

g. approving certain requested releases and expanding the powers and the duties of the Monitor to effectively perform those remaining steps in order that this proceeding might be concluded.

2. In the circumstances in which the Applicants find themselves, particularly from a cash flow position, this motion was heard on an urgent basis yesterday and the parties have implored the Court to release a decision on the motion as quickly as possible. Accordingly, these reasons have been prepared in the very limited time available. Defined terms in these reasons have the meaning given to them in the motion materials, the Second Report of the Monitor or the relevant agreements, unless otherwise indicated.

3. I indicated at the conclusion of the hearing yesterday that I was satisfied that the requested extension of the stay of proceedings (which was due to expire imminently) was appropriate in the circumstances. That relief was unopposed. Accordingly, I extended the stay to and including February 17, 2023. I took under reserve my decision with respect to the balance of the relief sought, all of which is opposed.

4. In short, the Applicants seek a reverse vesting order to transfer ownership of the Purchased Shares to the Purchaser free and clear, while transferring the Excluded Assets and Excluded Liabilities to Residualco.

5. For the reasons that follow, I decline to grant the reverse vesting order.

Background and Context

6. The Applicants operate a cannabis manufacturing business in Pickering, Ontario. There are two principal creditors or groups of creditors, and it is in many respects the competing priorities of those two groups that give rise to the motion today.

7. The first relevant creditor is 2125028 Ontario Inc. ("212"),. It advanced funds for manufacturing and processing equipment used by the Applicants in their day-to-day operations. The funds were advanced under two finance facilities, each for $3 million. According to the Monitor, the 212 debt owing as of November, 2022 is approximately $4 million.

8. 212 holds a first priority security interest over that equipment pledged as collateral. It registered that priority over that equipment on May 19, 2020.

9. The second relevant creditor is Carmela Marzilli ("Marzilli"). Marzilli entered into a loan agreement with CPC as of February 10, 2022 in connection with which and pursuant to related general security agreement, obtained a first ranking security interest in all of the present or after-acquired property of CPC, excluding certain excluded assets. Those excluded assets, in turn, carve out the 212 security over its equipment collateral. The debt owed to Marzilli is approximately $6.8 million as of November 2022, according to the Monitor.

10. The result is that 212 has a first position security interest over its equipment collateral but nothing else, while Marzilli has a first position security interest over effectively all other assets. The security interest of 212 over the equipment collateral was registered more than a year prior to the security interest of Marzilli.

11. It should be noted that Marzilli is related to 548, the Purchaser, which is an entity incorporated for the purpose of completing the transaction for which approval is sought today.

Relevant Events

12. The Applicants sought and received protection under the CCAA on November 3, 2022. Pursuant to the initial order of Penny J., interim DIP financing advanced by Cardinal was approved in the amount of $500,000. The typical charges were also approved. The relief sought and granted was unopposed.

13. The Applicants returned to Court one week later on November 10, 2022 at which time Penny J. extended the stay of proceedings and, among other things, approved a sales and investment solicitation process (the "SISP"), a central feature of which was a stalking horse agreement dated as of November 8, 2022 between CannaPiece Group Inc. as vendor, CPC, and Cardinal (or its nominee) as purchaser (the "Stalking Horse SPA"). That Stalking Horse SPA included an approved break fee and priorities for professional fees.

14. In addition, Cardinal, in its capacity as Stalking Horse Bidder, was granted a priority charge. Other charges previously granted or increased to an aggregate total of $3,500,000, of which most ($3 million) was a Deposit Facility that ranked in priority to all other claims against the Applicants.

15. The relief sought and granted on November 10, 2022, was also unopposed, although what occurred behind the scenes literally during that hearing is in part the beginning of the chronology giving rise to the opposition today.

16. However, as is not atypical in real time CCAA proceedings, the hearing in court was not the only event that occurred on November 10, 2022. 212 submits today that it indicated that it intended to oppose the relief sought on November 10, and particularly the increase in the priority charges, unless its debt was assumed by Cardinal, the Stalking Horse Bidder.

17. While there is a dispute among the parties today about the extent to which 212 indicated (to the Applicants and other parties, if not to the Court) its intended opposition absent the

assumption of its debt by Cardinal, there is no dispute that ultimately the relief was granted on an unopposed basis.

18. 212 submits that the reason for its ultimate lack of opposition on November 10 was the fact that, literally as the hearing before Penny, J. was underway, it entered into an assumption agreement (the "Assumption Agreement") with Cardinal pursuant to which Cardinal agreed to assume the 212 debt, pay to 212 the sum of $500,000 within six months of the stalking horse transaction closing, and issue to 212 certain shares in the Applicants.

19. The Monitor, as authorized and directed by the order made on November 10, 2022, then set about to implement the SISP, with the Stalking Horse SPA as the floor or minimum.

20. The Stalking Horse SPA, as approved, contemplated a purchase price of $3,500,000, together with "Assumed Liabilities" that, once finalized, would be made available to Potential Bidders. This feature flowed from the fact that, as of November 10 when the SISP was approved, Cardinal, as Stalking Horse Bidder, had not yet determined which liabilities of the Applicants it would be prepared to assume. Not surprisingly, featured in those negotiations were the liabilities comprised of the debt owed to the two principal creditors described above - 212 and Marzilli.

21. The SISP procedures are set out in a Schedule to the November 10, 2022 order, and included those steps generally applicable to such a sales process approved by this Court. Those steps included the following:

a. The Monitor would host a virtual data room with all relevant information made available to potential bidders;

b. the Monitor would evaluate, with the assistance of a Sales Agent and in consultation with the Applicants, all bids received to determine whether or not each bid was a Qualified Bid; and

c. the Monitor would then conduct an auction between or among Qualified Bidders and identify, in consultation with the Applicants and the Sales Agent, the highest or otherwise best bid received which would in turn be identified as the Successful Bid.

22. Qualified Bids were to be evaluated by the Monitor in consultation with the Applicants considering the factors set out in [the procedure approved in the order]. Those factors included: the amount of consideration being offered, and if applicable, the proposed form, composition and allocation of same; and the value of any assumption of liabilities or waiver of liabilities.

23. The sales process required the repayment of $3.7 million to Cardinal at closing, in the event another Qualified Bid was selected over the Stalking Horse Bid.

24. Ultimately, only one Qualified Bid was received despite extensive efforts by the Monitor to generate and maximize interest in the auction.

25. Marzilli submitted a bid comprised of the cash component of $4 million plus assumed liabilities. The assumed liabilities in the Marzilli Bid included the assumption of the Marzilli debt of the Applicants described above. It did not, however, include an assumption of the 212 debt.

26. The bid submitted by Marzilli provided, as required, for the repayment of $3.7 million to the DIP lender and Stalking Horse Bidder, Cardinal.

27. Since, according to the terms of the Marzilli Bid, the 212 debt would not be assumed by the Purchaser, it would be transferred to Residualco. There is no evidence in the record as to what, if any, assets or value Residualco will have.

28. The Monitor, in consultation with the Applicants, selected the Marzilli Bid as the Successful Bid. It is the Marzilli Bid that is the subject of the proposed transaction and reverse vesting order relief sought today.

Analysis

29. The primary issue is whether the approval and vesting order (which is a reverse vesting order) should be granted.

30. 212 submits that the requested relief should not be granted for a number of reasons, the principal ones of which are these:

a. the test for the extraordinary remedy of a reverse vesting order cannot be met here;

b. the test for determining whether a third party interest should be extinguished in a vesting order cannot be met here;

c. the Marzilli Bid was not the Superior Bid; and

d. neither the CCAA nor the doctrine of equitable subordination should apply so as to defeat the regime established by the *Personal Property Security Act*, which would be the effect of granting the order since the security interest of 212 over its equipment collateral ranks first and was registered more than a year before the registration of the security interest of Marzilli over what is effectively the balance of the assets.

31. Perhaps most fundamentally, 212 acknowledges that it did not oppose the approval of the SISP process, but argues that it took that course of action in express reliance on the Assumption Agreement entered into that same day with the Stalking Horse Bidder pursuant to which its debt was agreed to be assumed, and that when that debt assumption is considered to be part of the Stalking Horse Bid, it is clearly superior to the Marzilli Bid.

32. The Applicants submit that the Monitor ran a fair and transparent sales process and concluded that the Marzilli Bid was the Superior Bid and that 212 simply gambled on a bidder that was not ultimately successful. They argue that 212 supported the SISP process and that the bid requirements preserved "optionality" for bidders in terms of which liabilities would be assumed and which would not.

33. The Applicants further submit that the reverse vesting order is required to maintain the going concern value of the Applicants' business, and is in the best interests of stakeholders generally, whether or not 212 is in a less favourable position than it would be had the Stalking Horse Bid been determined to be the Superior Bid.

34. The Applicants submit in their factum and in argument that "the Transaction provides for the seamless continuity of the Applicants' business operations, preserves CPC's structure of perations, maintains its licences, and preserves the economic activity of supplier and customer relationships…. it secures enterprise value and preserves the jobs of approximately 150 employees." They state that "the Monitor believes that the transaction will be more beneficial to creditors than a bankruptcy".

35. The Applicants agree that the 212 debt would, together with other liabilities not assumed by the Purchaser, be vested out and transferred to Residualco, and claims against Residualco (which would include the claim of 212 for its debt) could then be addressed through "a distribution order, a bankruptcy or other similar process". They submit that the Purchase Price stands in place of the assets and is available to satisfy creditor claims, in whole or in part, in accordance with their pre-existing priority.

36. As noted, Cardinal fully supports the relief sought by the Applicants. It submitted a factum and made submissions at the hearing of the motion, both to the effect that it has been a critical part of this restructuring by providing interim financing, as a result of which "a transparent and fair sales and investment solicitation process resulted in the cannabis business of the Applicants living to see better days".

37. At paragraph 26 of its factum, Cardinal states that 212 initially opposed the SISP and took issue with the Purchaser's Charge. It goes on to state that subsequent to learning of 212 sought opposition to the SISP, Cardinal entered into negotiations with 212 to assume the debt owing to 212 by the Applicants ….. under the Assumption Agreement, but that its obligation to assume the 212 debt was subject to a condition precedent - namely, that Cardinal would be the successful bidder.

38. Cardinal submits that 212 "was aware or should have been aware" that there was a possibility that Cardinal would not be the successful bidder and there were no guarantees that any other bidder would assume the 212 debt.

39. Finally, if oddly in my view, Cardinal submits that the equities favour Cardinal and that "if the relief requested by 212 is granted, Cardinal will suffer irreparable financial and reputational harm" (factum, para. 60).

40. Naturally, Marzilli/548 support the motion.

41. The Monitor has filed the Second Report dated January 28, 2023 in connection with this motion and as noted at paragraph 7, it is filed for the purpose of providing information to the Court with respect to, among other things, its recommendations with respect t

42. Beginning at paragraph 24, the Monitor describes the SISP process undertaken pursuant to which potential purchasers were identified, marketed to, and given an opportunity to acquire or invest in CPC.

43. At paragraph 27, the Monitor describes the initial key dates in the process, including November 30, 2022 as the deadline to finalize the schedule of Assumed Liabilities in the Stalking Horse SPA and the bid deadline of January 9, 2023. The steps conclude with the motion before me now - the hearing of the sale approval motion. I observe that last step only to highlight the obvious; namely that the process is not complete unless and until a sale is approved by the Court.

44. The Monitor reports that of 14 potential bidders who executed non-disclosure agreements, only three were, according to the terms of the SISP, ultimately granted access to the data room upon providing their Statement of Qualifications.

45. Ultimately, however, and notwithstanding extensions to the SISP timetable (further described below), the only bid received was the Marzilli Bid.

46. The Monitor, the Sales Agent and the Applicants then evaluated the Marzilli Bid, clarified certain points, confirmed that it was a Qualified Bid, and determined on January 24, 2023 that it was the lead bid in the process.

47. The Marzilli Bid contemplated a cash purchase price of $4 million (being $500,000 higher than the Stalking Horse Bid) and other terms including that the Assumed Liabilities were composed of the Marzilli debt. It did not include assumption of the 212 debt.

48. The Monitor summarized the key differences between the Marzilli Bid in the Stalking Horse Bid in the c

49. The Monitor then inquired of Cardinal, as the Stalking Horse Bidder, whether it wished to increase the Stalking Horse Bid "by topping up (at minimum) the cash consideration portion". Cardinal advised the Monitor that it declined to participate in the auction, with the result that the Marzilli Bid was determined to be the Successful Bid.

50. The Monitor recommends approval of the Marzilli Bid and that the transaction be completed pursuant to a reverse vesting order. Part of the ancillary relief requested by the Applicants and recommended by the Monitor is the expansion of the Monitor's powers to, among other things, assign Residualco into bankruptcy and act if it wishes as a trustee in such bankruptcy and otherwise facilitate or assist the winding down of that entity.

The Applicable Tests

51. All parties are in general agreement about the legal tests to be applied here where the relief sought includes a reverse vesting order that has the additional feature of affecting third party rights (in this case, those of 212) as part of that vesting order.

52. This Court has jurisdiction to make a vesting order pursuant to section 100 of *the Courts of Justice Ac*t.

53. Beyond the general jurisdiction of the Court found in s. 11 of the CCAA to make any order that it considers appropriate in the circumstances, s.36(3) of the CCAA sets out the factors the Court is to consider in deciding whether to grant authorization to dispose of assets:

> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

54. Moreover, the well-known *Soundair* factors to be considered for approval of a transaction following a Court-supervised sales process, not surprisingly track many of the same principles. (see *Royal Bank of Canada v. Soundair Corp*., (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16):

> (a) whether the party made a sufficient effort to obtain the best price and to not act improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which the party obtained offers; and
>
> (d) whether the working out of the process was unfair.

55. The Court of Appeal for Ontario considered in *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2019 ONCA 508 ("*Third Eye*") what it described as a "cascading analysis" of the factors to be considered when determining whether a third party interest should be extinguished in a vesting order:

(a) first, the nature and strength of the interest that is proposed to be extinguished;

(b) second, whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency; and

(c) third, if the first two steps proved to be ambiguous or inconclusive, a consideration of the equities to determine if a vesting order is appropriate in the circumstances.

(see paras. 102-110)

56. A consideration of the equities contemplated in the third step includes consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition are sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith (*Third Eye*, para. 110).

57. Finally, Penny, J. considered the factors applicable to a determination of whether a reverse vesting order should be approved, in *Harte Gold Corp. (Re)*, 2022 ONSC 653. In that case, the Court considered the s.36(3) factors set out above, "making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction" since the very nature of a reverse vesting order is such that it does not contemplate a typical sale of assets.

58. Justice Penny observed that a reverse vesting order was both an equitable and an extraordinary remedy, and one that ought not to be regarded as the "norm" and concluded that the following factors are applicable to consideration of whether a reverse vesting order is appropriate in the circumstances:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure then they would have been under any other viable alternative? and

(d) does the consideration being paid for the debtor's business reflect the importance and value of the licenses and permits (or other intangible assets) being preserved under the RVO structure?

(see *Harte Gold*, para. 38).

The Approvals Sought

59. In considering what relief is appropriate here, I recognize that I must address the art of the possible rather than a theoretical perfect outcome which is antithetical to the very fact of the insolvency of the Applicants in the first place. Here, an analysis of the possible outcomes necessarily recognizes that not all stakeholders will enjoy a perfect result, and not all creditors will recover 100% of their debt.

60. If the Marzilli Bid and resulting transaction is approved, the 212 debt will not be assumed by the Purchaser and will be transferred to Residualco. If the Marzilli Bid is not approved, the SISP process yields the result that the Stalking Horse Bid of Cardinal will be the Successful Bid since there were no other bids, with the opposite result: the Marzilli debt will be transferred to Residualco.

61. The fact that this motion is so vigorously contested, the fact that the expanded powers sought for the Monitor contemplate a possible bankruptcy and winding down of Residualco, and the economics of either bid, are all indicative of the expectation that there will be little if any recovery through Residualco. There is no evidence before me that there will be any significant assets in that entity available for distribution.

62. That said, the prejudice to any one creditor is obviously not itself a determinative factor of whether a transaction should be approved. That is clear from the tests set out above. The effect on creditors, and other stakeholders, is certainly a factor to be taken into account, but it is only one of several factors.

63. All parties agree in this case that a reverse vesting order structure is necessary and appropriate since there is no other way to preserve the going-concern value of the business and particularly the continuity of the relevant cannabis licenses that are central to its operation and therefore the maximization of recovery for stakeholders. I accept that. Both the Stalking Horse Bid and the Marzilli Bid contemplate a reverse vesting order structure.

64. The SISP process approved by Penny J. on November 10, 2022 set out the steps to be followed to test the market and yield a bid that represented the best possible outcome for stakeholders in difficult circumstances. It contemplated an auction between or among competing bidders, although ultimately, only one bid was received.

65. Importantly, however, the SISP was carried out against a minimum, or floor, in the form of the Stalking Horse Bid. That provided certainty to stakeholders that even if the SISP did not yield a single bid, there was still a viable transaction that provided for a going concern outcome through a reverse vesting order structure.

66. Considering the *Third Eye* factors, I find they favour the position advanced by 212.

67. First, the nature and strength of 212's interest is significant, although limited to the equipment to which its security interest applies. It ranks in first position. The PPSA registration is

first in time as compared to the registration of the security for the Marzilli debt, although the two interests are not competing in the sense that the latter carves out the former.

68. I recognize that the 212 interest that would be vested out is a security interest, and further one that is limited only to certain assets, unlike the interests in land being considered by the Court of Appeal in *Third Eye* (mineral rights and surface rights). However, in my view, the same analysis applies since a third party interest is being extinguished. It cannot be that the *Third Eye* factors apply only to an interest in land or another proprietary right: the nature and quality of the right sought to be extinguished is exactly the first of the three factors to be considered.

69. Moreover, I reject the submission of the Applicants that the rights of 212 are not being extinguished, as occurred in *Third Eye*, but rather they are merely being transferred to Residualco. For the reasons noted above in respect of the evidence before me as to the assets in that entity, it cannot be argued on this motion that the rights of 212 are not being extinguished but rather continue on albeit through a new entity. That is not the practical reality here.

70. Second, 212 has not consented to the vesting out of its interest either in the insolvency process itself or in agreements reached prior to the insolvency. It is urged upon me by the Applicants and those parties who support them that by ultimately not opposing approval of the SISP process, 212 accepted and agreed to the vesting out of its interest in the event that the Successful Bid did not include an assumption of its debt.

71. They submit that the Assumption Agreement entered into between 212 and Cardinal as the Stalking Horse Bidder was a bilateral agreement between those two parties that effectively amounted to a wager on the part of 212 that the stalking horse bid would ultimately be the Successful Bid. It follows, they say, that since the Assumption Agreement was conditional upon the stalking horse bid being the Successful Bid, it was of no effect if that did not occur.

72. The Applicants, Marzilli and Cardinal all disagree with 212 that, fundamentally, the assumption of the 212 debt became an Assumed Liability as contemplated in the Stalking Horse SPA with the result that it became one component of the floor or minimum that other bids would be evaluated against.

73. I do not accept this submission. The SISP process was predicated on the Stalking Horse SPA. When both of those were approved on November 10, 2022, the ultimate value represented by the Stalking Horse SPA was not yet determined. It had a minimum value of $3.5 million (and other terms) but the Assumed Liabilities had not yet been agreed by Cardinal. The relevant schedule in the Stalking Horse SPA was blank.

74. The timetable of key milestones in the SISP process recognized this and set a deadline of November 30 for the finalization of the quantum of Assumed Liabilities if any. Accordingly, I find that all stakeholders and potential bidders knew that the ultimate value of that Stalking Horse Bid could not be determined until the time.

75. Cardinal, as the Stalking Horse Bidder, agreed on November 10, 2022 to assume the 212 debt. I do not find persuasive the submission by the Applicants to the effect that this commitment is irrelevant since it was of no force or effect if Cardinal was ultimately not the Successful Bidder. That is an accurate statement, considering the terms of the Assumption Agreement. However, it does not advance the analysis at all since, naturally, Cardinal had no obligation to close the transaction at all unless and until it was determined to be the Successful Bidder.

76. I do not have to address the hypothetical issue of whether the intended objections of 212 to the approval of the SISP in November would have been successful or whether the SISP would have been approved in any event. It was approved, and the Assumption Agreement was entered into.

77. Moreover, the chronology of how the SISP process in fact unfolded over the subsequent weeks supports, in my view, the position of 212 that the assumption of its debt became a component of the Stalking Horse Bid.

78. The Second Report of the Monitor sets out the SISP Results beginning at paragraph 33. Importantly, it states at paragraph 38 that on November 30, 2022, the Stalking Horse Bidder confirmed that it was assuming the 212 debt, and further, that it was in ongoing negotiations regarding the Marzilli debt. For that reason, it requested that the deadline to finalize the schedule of Assumed Liabilities be extended from November 30 to December 7, 2022.

79. The Monitor, in consultation with the Applicants and Sale Agent, approved this. Its website was updated and potential bidders were updated by the Sales Agent.

80. Then, on December 7 (the new deadline), the Stalking Horse Bidder requested a further extension to finalize the assumption of the Marzilli debt for an additional two days, and this also was approved. On December 12, the Stalking Horse Bidder confirmed to the Monitor that the Stalking Horse SPA was now inclusive of the $3,500,000 cash, and the assumption of the debt of both 212 and Marzilli. The website and potential bidders were updated accordingly.

81. However, that was not to be the ultimate result, since on December 23, 2022, the Stalking Horse Bidder informed the Monitor that the debt assumption agreement with Marzilli had been terminated and accordingly, the Marzilli debt no longer formed part of the consideration contained in the Stalking Horse SPA. As a result, the final consideration to be paid by the Stalking Horse Bidder was $3,500,000 in cash and the assumption of the 212 debt (Second Report, para. 41).

82. A copy of the final executed Stalking Horse SPA dated November 8 and revised January 9, 2023 to account for the removal of the Marzilli debt, was provided and included in the data room, reflected on the Monitor's website and again, the Sales Agent informed potential bidders.

83. Necessarily and appropriately given the turn of events, the Monitor extended the bid deadline until January 18, 2023, to provide additional time for this information to be disseminated to the market and bidders.

84. I pause here in the chronology to observe that as against these events, I have no difficulty in concluding that the assumption of the 212 debt was a component of the Stalking horse SPA consideration and further that it was recognized as such by all stakeholders and the Monitor. As to whether then, 212 could be said to have consented to the vesting out of its interest as contemplated in the second factor of the *Third Eye* analysis, I find that it did not.

85. However, further relevant events were yet to occur. On January 9, 2023, new counsel for Marzilli advised the Monitor, for the first time, that Marzilli wished to participate in the SISP. Marzilli ultimately requested another extension to the bid deadline to finalize due diligence and allow it to submit a bid. This too was agreed by the Monitor and conveyed to potential bidders. As set out above, Marzilli then submitted its bid which is sought to be approved today.

86. The third factor in the *Third Eye* analysis contemplates an evaluation of the equities, to the extent it is applicable here at all since it is to be considered if there is ambiguity resulting from a consideration of the first two factors.

87. For the above reasons, and in particular its first ranking security interest, the fact that the assumption of its debt was, to the knowledge of all stakeholders (importantly including but not limited to Marzilli) and Assumed Liability as part of the consideration of the Stalking Horse Bid, I find that the equities favour 212.

88. 212 relied on the SISP procedures. Those contemplated a finalization of Assumed Liabilities and that was both agreed to by Cardinal and conveyed through the Monitor to all stakeholders so that they could act accordingly. The sales process was extended repeatedly to accommodate exactly that. Marzilli participated in and benefited from this process and the extensions, the final extensions being sought by, and granted for, it.

89. The effect on 212, as a creditor, is of course also a factor to be considered under both the applicable CCAA test for the sale of assets (see s.36(3)(e)) and the reverse vesting order factors enumerated by Penny J. (i.e., is any stakeholder worse off?). As noted, it is certainly not the only factor, but it is one of the factors to be considered. Here, 212 is clearly and materially worse off.

90. I find that the process here was fair and reasonable, and indeed the Monitor did the best it could in a shifting landscape to maintain the integrity of the process but yield the best recovery for stakeholders. The process was fair and reasonable, however, only if it is understood that the assumption of the 212 debt is part of the consideration payable pursuant to the Stalking Horse Bid.

91. In the Second Report, the Monitor sets out the key terms of each of the Stalking Horse Bid and the Marzilli Bid and summarizes the differences between the two, ultimately recommending approval of the Marzilli Bid. It recognizes the fact that the Marzilli Bid contemplates an additional $500,000 as part of the Purchase Price as against the $3.5 million amount contemplated in the Stalking Horse Bid.

92. However, there is no real analysis of whether and how that compares to the consideration payable pursuant to the Stalking Horse Bid enhanced by the assumption of the $3.5 million value

of the 212 debt. This makes the conclusion that the Marzilli Bid is a Superior Bid, challenging in the circumstances.

93. Finally, it was urged upon me that the overall equities of the situation, and indeed the best interests of the stakeholders, favour approval of the Marzilli Bid since it represents an outcome materially more favourable for all stakeholders than a bankruptcy with the consequent loss of all that is dependent upon the Applicants continuing as a going concern. Consideration of the benefits of an asset sale as against the alternative of a bankruptcy is one of the factors specifically enumerated in s.36(3).

94. I reject this submission also. Bankruptcy is not the alternative here. It was precisely to guard against this potential (catastrophic) outcome that the SISP process included the Stalking Horse Bid. As recognized throughout - by the Applicants, by Penny J. in his November 10, 2022 endorsement approving the Stalking Horse SPA, and by the Monitor as reaffirmed in its Second Report, the whole point of the Stalking Horse SPA was to provide a minimum outcome for stakeholders.

95. The SISP was conducted against the backdrop of that minimum. Stakeholders knew that even if the SISP yielded no bids, they had the certainty of the knowledge that at least there would be a going concern through completion of the stalking horse transaction.

96. Similarly, other potential bidders knew that the consideration in the Stalking Horse SPA (which, as I have found, included the assumption of the 212 debt), was the minimum against which there potential bids would be measured and evaluated as part of the overall economics of any proposed transaction. Clearly, the quantum of consideration was not the only factor to be considered but it certainly was a significant factor.

97. Cardinal provided interim DIP financing. It was entitled to a break fee in the event that it was not the Successful Bidder.

98. The entire premise of the SISP process, and the expectation of this Court as well as the stakeholders, was and is that if no other bid is determined to be the Successful Bid, Cardinal will complete and perform the Stalking Horse SPA.

99. Accordingly, the stakeholders ought not to be left with the only alternative being a bankruptcy.

100. Considering both the process by which the Marzilli Bid was ultimately selected, as well as the original priority of the 212 security interest, all of which is referred to above, I cannot conclude that it is equitable in all the circumstances to approve this asset sale pursuant to a reverse vesting order.

101. For all of the above reasons, I decline to grant the proposed reverse vesting order vesting the assets of the Applicants in the Marzilli purchaser entity (548) and transferring the 212 debt to Residualco.

102. The motion is dismissed, save for the requested stay extension which as noted above is granted on the consent of all parties.

103. If the parties are unable to agree on the costs of this motion, any party seeking costs may provide to the other parties and to me written submissions not exceeding two pages in length within five days. Responding submissions, also not exceeding two pages in length, will be due five days thereafter.

Osborne, J.

Date: February 2, 2023

TAB 16

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *PaySlate Inc. (Re),*
2023 BCSC 608

Date: 20230414
Docket: B220504
Estate No.: 11-2891281
Registry: Vancouver

In Bankruptcy and Insolvency

In the Matter of the Notice of Intention to Make a Proposal of PaySlate Inc.

Corrected Judgment: The text of these Reasons for Judgment has been corrected at paras. 1, 11 and 86 on April 18, 2023.

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for PaySlate Inc.:	T. Bennett L. Beatch, Articled Student
Counsel for Paysafe Merchant Services Inc.:	P. Bychawski C.I. Hildebrand
Counsel for the Proposal Trustee, Grant Thornton Limited:	R. Gurofsky G.P. Nesbitt
Counsel for Ayrshire Real Estate Management Inc.:	S. Collins E. Wilson
Place and Dates of Hearing:	Vancouver, B.C. March 10, 22, 27, 28 and 31, 2023
Place and Date of Judgment:	Vancouver, B.C. April 14, 2023

(b) a significant number of Retained Contracts are with parties outside of the jurisdiction of the court;

(c) this Court does not have the jurisdiction to impose the relief provided for in the proposed paragraph on counterparties located outside of Canada; and

(d) in the absence of any service on affected non-Canadian counterparties, it is not appropriate for the RVO to request that foreign courts take steps that may be "necessary or desirable" to give effect to the RVO.

[71] The proposed amendment to the RVO is not an answer to avoid service. It forces counterparties to Retained Contracts to engage with the Proposal Trustee to lodge and pursue their objection in an undefined process in circumstances where their rights have been abrogated by court order. The amendment also raises the potential for increased expense through the objection process.

[72] Paysafe also points out that the RVO attempts to bar the ability of counterparties located in jurisdictions outside of this province to rely on legal defences prescribed by law in their home jurisdictions.

[73] I was advised that some counterparties to the Retained Contracts are based in Hong Kong, the Netherlands, Israel, the United Kingdom, Switzerland, and the United States. The provision in the RVO asking for aid and recognition from any court or tribunal in Canada or the United States to give effect to the RVO in the absence of service is, in my opinion, problematic.

[74] Issuing the RVO which bypasses providing service to a substantial group of counterparties to Retained Contracts also lacks procedural fairness.

[75] I agree with Paysafe's submissions that PaySlate's reason for not serving these counterparties is inconsistent with the amendment that PaySlate is proposing. If it is not "unduly burdensome" for PaySlate to provide service after the order is granted, why is it that it cannot provide service prior to this hearing, particularly when it has made efforts to serve counterparties to the Excluded Contracts.

[76] PaySlate's reason that providing service would negatively affect PaySlate's business relationship management is also inconsistent. If service would negatively affect PaySlate's business relationship management with the group of counterparties to Retained Contracts, what is the difference between providing it before the hearing and after the hearing?

[77] Even assuming PaySlate can establish there is no value to pay out unsecured creditors, service should have been effected on the counterparties to the Retained Contracts given the proposed waiver, release, and bar provisions and restrictions on their contractual rights.

When an RVO may be Ordered

Introductory Comments

[78] As mentioned at the outset, RVOs typically contemplate a purchase of shares in a debtor company wherein the "unwanted" assets, liabilities, and creditor claims are removed and vended to a residual company while the "good assets" remain with the debtor.

[79] In *Harte Gold*, Justice Penny described the purpose of an RVO in the context of the sale of Harte's mining enterprise to a strategic purchaser:

> [22] The purchase transaction for which approval is being sought in this case does not provide for a sale of assets but, rather, provides for a "reverse vesting order" under which the purchaser will become the sole shareholder of Harte Gold and certain excluded assets, excluded contracts and excluded liabilities will be vested out to new companies incorporated for that purpose.

[80] RVOs are often thought to be appropriate in situations where the debtor's licenses cannot be vested on an asset sale. By way of example, in *Blackrock Metals*, Chief Justice Paquette made this observation in the context of a case involving the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*]:

> [86] Albeit new, RVOs have been confirmed by the courts as an appropriate way for a debtor to sell its business when the circumstances justify such structure. In particular, CCAA courts have approved RVO structures in several complex mining transactions and have recognized that their benefits, which include maximizing recovery for creditors, importantly

> [21] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp*, 1991 CanLII 2727(ONCA) for the approval of the sale of assets in an insolvency scenario:
>
> (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which offers have been obtained; and
>
> (d) whether there has been unfairness in the working out of the process:
>
> see *Target Canada Co. (Re)*, 2015 ONSC 1487, at paras. 14-17.
>
> [Emphasis added]

[105] In *Blackrock Metals*, Paquette C.J.Q.S. also referred to the s. 36(3) *CCAA* factors as well as the additional factors discussed by Penny J. in *Harte Gold* when scrutinizing a proposed RVO: at paras. 100-124.

[106] Likewise, in *Nemaska*, Justice Gouin also said approval should be considered with the s. 36 criteria in mind, subject to determining, whether sufficient efforts to get the best price have been made and whether the parties acted providently, the efficacy and integrity of the process followed, the interests of the parties, and whether any unfairness resulted from the process: see, e.g., paras. 3-8, 46, 49-54, 57.

[107] In the context of the *BIA*, the following questions were outlined by Penny J. in *Harte Gold* as those that should be answered by the debtor, proposed purchaser, and the court's officer:

> [38] … The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:
>
> (a) Why is the RVO necessary in this case?
>
> (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
>
> (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and
>
> (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

TAB 17

CITATION: Acerus Pharmaceuticals Corporation (Re), 2023 ONSC 3314
COURT FILE NO.: CV-23-00693595-00CL
DATE: 2023-06-02

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ACERUS PHARMACEUTICALS CORPORATION, ACERUS BIOPHARMA INC., ACERUS LABS INC., AND ACERUS PHARMACEUTICALS USA, LLC

BEFORE: Penny J.

COUNSEL: *Elizabeth Pillon, Lee Nicholson* and *Philip Yang* for the Applicants

Stuart Brotman and *Mitch Stephenson* for the Monitor

Mervyn D. Abramowitz for the United States of America

Alex MacFarlane and *Xiaodi Jin* for First Generation Capital Inc.

D.J. Miller and *Alexander Soutter* for Jones Day

Kristina Bezprozvannykh for The Canada Life Assurance Company

Troels Keldmann as principal of Keldmann Healthcare and Keldmann Innovation

Brian Gilderman as principal of Precision Clinical Research, Inc.

HEARD: May 30, 2023

ENDORSEMENT

Overview

[1] On May 30, 2023 I granted a sale approval and reverse vesting order, extended the stay and granted other ancillary relief, with reasons to follow. These are my reasons. The capitalized terms used in these reasons reflect the meanings attributed to those terms in the relevant documents submitted to the court on this motion.

Background

[2] APC is an Ontario public company listed on the TSX and the OTCQB Exchange. APC operates out of its registered head office in Mississauga, Ontario. ABI and ALI are also OBCA corporations. APL was formed under the laws of the State of Delaware. There is a cross border component to these proceedings.

[3] Each of the subsidiaries (ABI, ALI, and APL) are wholly owned by APC. The applicants comprise one corporate group which is operated and controlled by the management of APC at its head office in Mississauga, Ontario.

[4] The applicants are in a specialized pharmaceutical business, focused on the commercialization and development of prescription men's health products. Their primary products are (a) Natesto, which is currently the sole source of revenue; and (b) Noctiva, which is currently not in distribution. There are also a number of secondary products.

[5] The procedural history is uncontroversial. It is well laid out in the supporting material, the Monitor's Third Report and the applicants' factum. I will not repeat any of that here, other than to note that the proposed transactions are the result of both a prefiling strategic process and SISP, initialed by the applicants and overseen by E&Y, and a subsequent court approved SISP, also overseen by E&Y, which had been appointed Monitor by the initial order in these proceedings.

[6] The proposed transactions which are before the Court are structured in the form of a Subscription Agreement, with the consideration or purchase price in the form of a credit bid of all secured debt obligations owing to First Generation Capital (FGC). FGC is the majority shareholder of APC. It is also the first in priority secured creditor of the applicants and the court approved DIP Lender. It is owed over $60 million in secured debt.

[7] The proposed transaction structure provides for available funding to remain with the applicants and court officers, as necessary, to implement the transactions, address ancillary post-closing steps, and emerge from the CCAA proceedings. The transactions contemplated in the Subscription Agreement have been structured as a "reverse vesting" (or RVO) transaction. The transactions provide for a share transaction under which:

(a) FGC will subscribe for and purchase new shares of APC, who will, in turn, cancel and terminate all of its existing shares so that FGC may become the sole shareholder of APC and ultimately, each of the subsidiaries of APC (including APL); and

(b) all excluded contracts, excluded assets, and excluded liabilities with respect to the Companies (including APL) will be transferred and "vested out" to corporations (Residual Cos.) to be incorporated by APC in advance of the closing date, so as to allow FGC to indirectly acquire APC's business and assets on a "free and clear" basis.

Issues

[8] The issues to be determined on this motion are whether this Court should:

(a) approve the Subscription Agreement and proposed transactions in the form of an Approval and Reverse Vesting Order;

(b) grant the requested releases in favour of the applicants' directors, officers, employees and advisors, FAAN as CRO, the Monitor and its advisors and FGC and its directors, officers and advisors;

(c) grant ancillary relief in respect of the shares being cancelled and the articles of reorganization;

(d) grant the sealing order over the bid comparison chart in the Monitor's Third Report; and

(e) extend the stay period.

Analysis

Jurisdiction and Factors

[9] Section 11 of the CCAA confers jurisdiction on the court in the broadest of terms: "the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances".

[10] Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. While this motion is not for approval of a traditional asset sale, the s. 36(3) factors have been applied in an ARVO context. The factors include:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[11] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp*, 1991 CanLII 2727 (ONCA) for the approval of the sale of assets in an insolvency scenario:

(a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers have been obtained; and

(d) whether there has been unfairness in the working out of the process: see *Target Canada Co. (Re)*, 2015 ONSC 1487, at paras. 14-17.

[12] Use of the ARVO structure is an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an ARVO structure must be preceded by close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of the ARVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must address questions such as:

(a) Why is the ARVO necessary in this case?

(b) Does the ARVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the ARVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the ARVO structure?

The ARVO Structure is Necessary

[13] The applicants operate in the pharmaceutical industry which is heavily regulated. In order for the applicants to carry on business, therefore, they are required to maintain various licenses. These licences are essential to the viability of the business. The insolvent circumstances of the applicants rules out a simple share purchase. In a traditional asset transaction, the purchaser would have to apply to transfer existing licences or apply for new ones. The purchaser in this case is not prepared to take the risk or invest the time and money to go through that process which is, by its very nature uncertain at best. There is no other comparable or viable transaction on offer.

[14] The Subscription Agreement was structured as an ARVO transaction which is necessary to provide the following benefits:

(a) the applicants will maintain the multiple licenses that are required to maintain operations;

(b) the applicants have several in-progress trials and testing programs that are proceeding under and in the name of the applicants;

(c) the applicants hold various contracts with government entities; and

(d) the applicants have net operating losses in the approximate amount of $215 million.

[15] The evidence is that it was not possible to structure the transaction in a different manner. The Monitor canvassed the possibility of structuring the transaction with FGC by way of a plan of arrangement. However, FGC was not willing to consider that approach.

More Favourable Economic Result

[16] The benefits of the transactions include:

(a) based on the price payable under the Subscription Agreement, all of the applicants' secured liabilities will be satisfied by way of the credit bid (which, including advances under the DIP Facility, totals over $65 million), which would not otherwise be satisfied by any other potential alternative;

(b) various unsecured and contingent liabilities will be assumed, in comparison to the other potential alternatives which do not; and

(c) sufficient liquidity to provide for post-filing obligations incurred to date and those necessary to exit the CCAA proceedings, in comparison to the other potential alternatives which do not provide comparable funding.

[17] The only other bid options available to the applicants were what is referred to in the material as Unsuccessful Bid 1 and Unsuccessful Bid 2. Neither of the unsuccessful bids was a better or even viable option because:

Unsuccessful Bid 1 offered nominal consideration for a minor asset owned by the applicants, where the consideration being offered was insufficient to cover even the expected professional fees related to closing that bid; and,

in respect of Unsuccessful Bid 2:

(i) the cash payment provided by Unsuccessful Bidder 2 was insufficient to repay the DIP Facility and amounts secured by charges in order to permit the applicants to exit the CCAA proceedings and the applicants are unable to generate liquidity from the excluded assets;

(ii) the vast majority of the offer value was driven by future sales, which are subject to a high degree of uncertainty and risk;

(iii) the Bid was only for a single product of the applicants and did not provide for a going-concern solution related to the remaining business of the applicants; and

(iv) the Bid does not assume any liabilities of the applicants nor provide for the potential employment of any existing employees.

The Transactions Do Not Disadvantage Any Stakeholder Relative to Any Other Viable Transaction

[18] Under the proposed transactions, the applicants, some of the unsecured creditors and all of the existing shareholders will have no recovery. However, the evidence makes it clear that these stakeholders would not realize any recovery in any other available restructuring alternative either (i.e., under either of the unsuccessful bids or in a bankruptcy/liquidation).

[19] The proposed transactions, by contrast, assure a going concern result. This will result in:

(a) an opportunity for each of the pharmaceutical products previously held by the applicants to be pursued and determine if they can be successfully brought to market at a future date;

(b) potential for several of the applicants' employees preserving their employment; and

(c) suppliers of goods and services having the opportunity to maintain their business relationship with the applicants on an ongoing basis in the future.

Is the Consideration Fair and Reasonable?

[20] The consideration payable for the purchased shares under the Subscription Agreement is fair, reasonable, and reflects the importance of the assets being preserved under the RVO structure. The purchase price for the purchased shares will be satisfied through FGC's credit bid and the financing of post-filing obligations, which, as noted, together total in excess of $65 million. The fairness and reasonableness of the consideration is confirmed by the results of the pre-filing strategic process, the pre-filing SISP, and the court approved SISP (discussed in more detail below). The consideration allows for the satisfaction of all the applicants' secured liabilities and assumption of some unsecured liabilities. Further, the consideration provides the applicants with the ability to implement the transactions and exit the CCAA proceedings as a going-concern.

[21] As noted earlier, the applicants' licenses and contracts with government entities may be difficult to transfer. Further, the applicants' tax attributes are also an important asset being preserved under the ARVO structure. The evidence is that the tax attributes were an important consideration for FGC in making its credit bid for all of the applicants' secured debt.

[22] The market (and the evidence) has shown that there is no other bidder out there who is willing to pay more for these assets.

Section 36 CCAA Factors

The Process Leading Up to the Subscription Agreement and the Transactions

[23] The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts for investments beginning from March 2022 and a robust sales process conducted by the applicants and E&Y beginning from September 2022. These efforts include:

(a) the applicants seeking refinancing or investment options;

(b) the pre-filing SISP which commenced in September 2022 and concluded in November 2022, with E&Y having canvassed its global network for prospective bidders;

(c) during the course of the CCAA the Monitor broadly canvassed the market under the SISP by approaching known potential bidders from prior processes and contacting 20 additional parties;

(d) the careful consideration of all the bids by the Special Committee, the applicants, the Monitor, the CRO, and their respective advisors and counsel of all available options; and

(e) negotiations between the Monitor, APC, and FGC in respect of the Subscription Agreement and the proposed transactions.

[24] The SISP appears to have been well structured and, when combined with the pre-filing strategic processes, resulted in a broad canvassing of the market for potential purchasers of the applicants' business.

The Monitor Approved the Process Leading up to the Subscription Agreement and the Transactions

[25] E&Y assisted with the pre-filing strategic initiative and the pre-filing SISP. The court approved SISP was developed in consultation with and supported by E&Y as Monitor. Further, the Monitor administered the SISP in accordance with its terms and the SISP order of this court. The Subscription Agreement is the product of the applicants' and the Monitor's continued efforts to solicit interest in the applicants' business and/or assets and is supported by the Monitor. It is the best alternative available.

More Beneficial to Creditors Than a Sale or Disposition Under a Bankruptcy

[26] The Monitor has conducted an analysis of whether the completion of the proposed transactions contemplated by the Subscription Agreement would be more beneficial to the applicants' creditors and other stakeholders as compared to a sale or disposition of the business and assets of the applicants under a bankruptcy. The Monitor determined that:

(a) a potential bankruptcy could cause significant disruption in operations and delay the market launch of Noctiva, thus adversely impacting the value of the business. The uncertainty surrounding the timeline for transferring the patents and license to a purchaser during bankruptcy proceedings adds to the uncertainty and complexity. This, coupled with the bankruptcy procedure itself, could result in a substantial delay in closing any transaction;

(b) the RVO structure is a condition of closing the Subscription Agreement. The reverse vesting structure is unlikely to be available in a potential bankruptcy given the vesting of the assets in the trustee. Furthermore, even if FGC was willing to proceed based on an asset sale structure, instead of the RVO, the Monitor believes it is unlikely that the recovery could be enhanced by pursuing a sale transaction in a bankruptcy;

(c) accordingly, it is the Monitor's view that a sale or disposition of the business and assets of the applicants in a bankruptcy would most likely result in a lower recovery. In the Monitor's view, the market has been sufficiently canvassed and the FGC bid is the only viable bid in the circumstances. It is unlikely that there is any material value to the assets of the applicants in any transaction other than the FGC bid.

Stakeholders Were Consulted During the Sale Process

[27] The applicants consulted with their largest secured creditor, FGC, throughout the pre-filing strategic process. FGC, and FGC in its capacity as the DIP Lender, was given the opportunity to submit a bid in respect of the applicants' business and assets, which FGC did. This was through a court approved process on notice to all stakeholders. In addition, notice of this motion was given to a broad spectrum of the applicants' stakeholders as well.

[28] In this context, I will address three specific situations which arose before and/or during the hearing of the motion.

Jones Day has an existing action against APL in the U.S. for outstanding professional fees owed by an APL predecessor. One of the issues raised by Jones Day in this CCAA proceeding involved a potential challenge to FGC's security beyond the amount advanced in December 2022 and pursuant to the DIP, in respect of the Applicants other than APC. The applicants, FGC and Jones Day were able to negotiate a specific carve-out of the Jones Day claim from the proposed releases and agreed that the following language would be approved by the court in this endorsement:

> For greater certainty, in providing the releases as outlined in paragraph 31 of the proposed Approval and Reverse Vesting Order, such relief shall not be used or raised by APL or any individual defendants in the course of the Jones Day Litigation, to limit or

> adversely affect the Jones Day Litigation as against APL or any individuals that have been named as defendants.

This language is so approved.

[29] Dr. Troels Keldmann attended the hearing. He is a principal of Keldmann Healthcare and Keldmann Innovation which sold certain product rights to a predecessor of APL in 2009. Part of the payment to Keldmann Innovation A/S was to be in the form of royalties under the Amended Product Development Agreement between Trimel Biopharma SRL, Keldmann Healthcare A/S and Keldmann Innovation A/S dated December 30, 2009. This agreement, however, is one of the Excluded Contracts being transferred to a ResidualCo under the terms of the Subscription Agreement. Dr. Keldmann was concerned that, although the Keldmann counterparties would lose the right to any future payments, should the product sold to APL be successfully developed at some future point, they would remain subject to a non-compete provision embedded in that agreement. The applicants immediately made it clear that they had no intention of relying on enforcement rights under this excluded contract and proposed that they would issue a formal disclaimer of rights under that contract. This appeared to satisfactorily address Dr. Keldmann's concern.

[30] Mr. Brian Gilderman also attended the hearing. Mr. Gilderman is a principal of Precision Clinical Research, Inc., which is conducting clinical trials on an APL product. Mr. Gilderman expressed concern about a potential mis-match between his obligation to continue to perform contractual services under the court's CCAA order while being at risk of not being paid for those services. This situation was complicated by the existence of "hold back" provisions in the service agreement. There was insufficient evidence before the court to address this issue properly. The applicants and the Monitor undertook to pursue the matter with Mr. Gilderman. If a satisfactory understanding cannot be reached, the parties may return to court for further direction.

<u>The Subscription Agreement and the Proposed Transactions Allow Various Stakeholders to Maintain their Rights</u>

[31] As noted earlier, the analysis of the applicants and the Monitor is that none of the applicants' creditors will be materially disadvantaged by the Subscription Agreement and the proposed transactions relative to any other viable alternative. In addition, the Subscription Agreement maintains many of the rights that creditors would otherwise have in an asset sale transaction. In the case of parties with existing contracts with the applicants, though no assignment of contracts (consensual or through an assignment order) is contemplated as part of the proposed transactions, the Subscription Agreement provides for all contracts, other than the Excluded Contracts, to remain with the applicants. The contracting parties, therefore, have the opportunity to continue supplying goods and services to the applicants post-CCAA proceedings if they choose to do so. While the Subscription Agreement does not require FGC to cure pre-filing arrears under the Retained Contracts, all contract counterparties have also been served with the applicants' motion record to provide them with notice that their contracts are either being retained or excluded as part of the proposed transactions.

[32] While the Excluded Contracts, Assets and Liabilities will be vested out into Residual Cos in this structure, this outcome is no different from the result that would obtain if the proposed transactions had been carried out using a typical asset purchase structure. Nor will there be any inter-company transfer of assets and liabilities among the existing applicants prior to closing. Therefore, the proposed transactions will not result in any material prejudice or impairment of any creditors' rights which might have been avoided in an asset purchase transaction.

Sufficient Effort has been Made to Obtain the Best Price and the Applicants have not Acted Improvidently

[33] The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts for investment or sale opportunities beginning in March 2022 and a robust sales process conducted by the applicants and E&Y from September 2022, both privately and under a court approved SISP post-filing. There is no evidence, or suggestion, that the process was less than fair and robust. Nor is there any prospect that a "better deal" was somehow available but not pursued.

The Share Transactions

[34] Consistent with ARVOs previously granted by this court, the proposed order in this case will terminate and cancel all options, securities and other rights held by any person that are convertible or exchangeable for any securities of APC. APC, previously publicly traded on the TSX, will be taken private as a result of the proposed transaction. The purchaser, FGC, currently holds approximately 89% of the issued and outstanding shares of APC. The other shareholders have been notified of the CCAA proceedings and the proposed transactions by way of various press releases and notices issued by the applicants and/or the Monitor.

[35] The jurisdictional and legal basis for these orders has been canvassed extensively in prior decisions of this court so I will not repeat that analysis here: *Harte Gold (Re)*, 2022 ONSC 653; *Just Energy Group Inc. v. Morgan Stanley Capital Group Inc.*, 2022 ONSC 6354. In essence, equity claims must be subordinate to the claims of creditors. In no possible scenario, on the record before me, would there be any recovery for the shareholders of APC. The OBCA provides the relevant authority to order the restructuring of the shares and the articles as contemplated in the proposed Approval and Reverse Vesting Order.

The Releases

[36] The Release covers any and all present and future claims against the Released Parties based upon any fact or matter of occurrence in respect of the transactions or the applicants, its assets, business or affairs or administration of the applicants, except any claim that is not permitted to be released under s. 5.1(2) of the CCAA. For avoidance of doubt, as noted above, the Releases will not release APL or the individuals named as defendants in the Jones Day litigation from liability in respect of that action.

[37] A non-exhaustive list of relevant factors to consider in determining court approval of proposed releases was laid out by Chief Justice Morawetz in *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54.

[38] Considering those factors, I conclude the Release is reasonable and appropriate in the circumstances and that they should be granted for the following reasons:

(a) The claims released are rationally connected to the applicants' restructuring. The Release will have the effect of diminishing claims against the Released Parties, which in turn will diminish indemnification claims by the Released Parties against the Administration Charge and the Directors' Charge. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the applicants' restructuring.

(b) The Released Parties made significant contributions to the applicants' restructuring, both prior to and throughout the CCAA proceedings. Among other things, the extensive efforts of the directors and management of the applicants were instrumental to the conduct of the pre-filing strategic process, the pre-filing SISP, the court-approved SISP and the continued operations of the applicants during the CCAA proceedings. The proposed transactions will maintain the applicants as a going concern; in this sense at least, the CCAA proceedings have had a successful outcome for the benefit of at least some of the applicants' stakeholders. This is an outcome which is, as discussed above, better than any other reasonably available alternative. The Released Parties have contributed time, energy and resources to achieve this outcome; they are deserving of the Release.

(c) The Release is fair and reasonable. The applicants, for example, are unaware of any statutory liabilities in respect of the Released Parties (particularly, the directors and officers of the applicants) and to date, no stakeholder of the applicants have made the applicants or the Monitor aware that they intend to assert a claim against any of the Released Parties in respect of any claims covered by the Release. Further, the Release is sufficiently narrow in circumstances as the Release carves out and preserve claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA, claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced to allow the applicants and the Released Parties to move forward with the Subscription Agreement and the transactions and work to conclude the CCAA proceedings.

(d) The Release will bring certainty and finality for the Released Parties. Additionally, the applicants, the Monitor, and FGC all believe that the Release is an essential component to the transactions.

(e) The Release benefits the applicants' creditors and other stakeholders by reducing the potential for the Released Parties to seek indemnification from the applicants, thus minimizing further claims against the applicants.

(f) Creditors had knowledge of the nature and effect of the Release. All creditors on the Service List were served with materials relating to this motion. The applicants also made additional efforts to serve all parties with excluded claims under the transactions. To date, no creditor has objected to the Release. At this point, and in these circumstances, requiring a specific claims process for claims against the Released Parties would only result in additional costs and delay without any apparent corresponding benefit.

Sealing Order

[39] The applicants seek a limited sealing order regarding the results of the bids under the SISP. Preservation of the confidentiality of bid information is recognized as meeting the requirements of the test for sealing court documents in *Sherman Estate*. It is in the public interest that the ability of the applicants and the Monitor to maximize value be preserved until the transactions contemplated by the Subscription Agreement have closed. The request for a sealing order of the bid information is granted.

Extension of the Stay

[40] The applicants need further time to close the proposed transactions and implement the remaining steps to bring these proceedings to their conclusion. As detailed in Updated Cash Flow Forecast at Appendix B to the Third Report of the Monitor, the applicants are expected to maintain liquidity to fund operations up to July 2, 2023. The stay is extended to June 30, 2023.

Monitor Support

[41] I will say, in summary fashion to the extent not specifically mentioned in connection with the issues addressed above, that the Monitor has deep familiarity and experience with the applicants and their circumstances, dating back to March 2022. The Monitor has worked closely with the stakeholders, the CRO and other players. The Monitor, appointed by the court and answerable to the court, fully supports all the relief being sought by the applicants and has explained the basis for its support in detail in its Third Report.

Conclusion

[42] For the forgoing reasons, the motion is granted. The Subscription Agreement and proposed transactions, including the ARVO, are approved. The sealing order regarding the bid summary is granted. The stay of proceedings is extended to June 30, 2023.

Penny J.

Date: June 2, 2023

TAB 18

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *PaySlate Inc. (Re),*
2023 BCSC 977

Date: 20230510
Docket: B220504
Estate No.: 11-2891281
Registry: Vancouver

In Bankruptcy and Insolvency

In the Matter of the Notice of Intention to Make a Proposal of PaySlate Inc.

Before: The Honourable Mr. Justice Walker

Oral Reasons for Judgment

In Chambers

Counsel for PaySlate Inc.:	M. Lemmens J. Pepper L. Beatch, Articled Student T. Haggstrom, Articled Student
Counsel for Paysafe Merchant Services Inc.:	P. Bychawski C. Hildebrand
Counsel for the Proposal Trustee, Grant Thornton Limited:	R. Gurofsky J. Cameron
Counsel for Ayrshire Real Estate Management Inc. and 1410512 B.C. Ltd.:	S. Collins E. Wilson
Place and Dates of Hearing:	Vancouver, B.C. April 24, 27 and May 10, 2023
Place and Date of Judgment:	Vancouver, B.C. May 10, 2023

THE COURT:

Introduction

[1] Let me start by saying I have no hesitation in approving the new proposed reverse vesting order ("RVO") as modified in oral submissions today and supported by Grant Thornton Limited, the proposal trustee ("Proposal Trustee"). The terms will be reflected in an affidavit to be prepared and filed by counsel, Ms. Pepper, on behalf of PaySlate Inc. ("PaySlate").

[2] Even though the approval application is now unopposed, it is important, as Professor Sarra reminds us, to provide reasons, even brief ones, explaining why the proposed transaction passes judicial scrutiny: Janis Sarra, "Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions", 2022 CanLIIDocs 431 at 1-2.

[3] The parties have now addressed all of the concerns I expressed in my reasons for judgment indexed as 2023 BCSC 608 ("Prior Reasons") about the RVO previously proposed and have satisfied the tests established in *Harte Gold Corp. (Re)*, 2022 ONSC 653, and *Arrangement relatif à Blackrock Metals*, 2022 QCCS 2828, leave to appeal ref'd 2022 QCCA 1073.

PaySlate has met the tests set out in *Harte Gold* and *Blackrock*

[4] PaySlate's value is unquestionably tied to its business as a going concern and its tax attributes and Scientific Research and Experimental Development ("SR&ED") credits.

[5] There is now an appropriate evidence-based rationale provided by the debtor with fulsome and most helpful information and analysis of value provided by the Proposal Trustee in its sixth and seventh reports. It establishes that the proposed consideration is appropriate or, as required by the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], "reasonable and fair" in relation to the value of the business being acquired through the proposed RVO.

[6] The administration and professional charges, cure costs, KERP charge, employee termination payments of $2,000 each, per the *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s. 1, and the debtor-in-possession ("DIP") financing will all be satisfied.

[7] The proposed RVO offer follows upon a well-structured, highly robust, and comprehensive marketing program (Sale and Investment Solicitation Process or "SISP") and follow-up efforts after the SISP failed (all conducted by the Proposal Trustee); the latter attracted offers demonstrating that the value in the company does not extend beyond its DIP financing.

[8] The parties have established that the proposed RVO offers better value to stakeholders than the asset vesting order ("AVO") offered as an alternative transaction in the event I did not approve the RVO, by approximately $357,000.

[9] The RVO also offers better value than the two other offers (received from Party A and Party B as discussed in the Proposal Trustee's sixth and seventh reports), both of which attract risk and completion delays.

[10] Stakeholders are not worse off if the proposed RVO is approved. In fact, not only does the RVO offer better value, as I have just said, some stakeholders are better off than under any other proposed transaction offered.

[11] Necessity has also been established. Not only does the share acquisition contemplated by the RVO preserve PaySlate's tax attributes and SR&ED credits, from additional evidence adduced by PaySlate and discussed by the Proposal Trustee, it is clear that the RVO is also necessary to preserve PaySlate's cyber security and cyber insurance policies.

[12] A vesting order, including the AVO proposed in the alternative, would require the new purchaser to secure that coverage which affords integral protection to PaySlate's business. The evidence establishes that such coverage may not be readily obtainable, if at all, and even if it is, operational delays for PaySlate would

result while coverage is being sought and placed. Customers may leave to other service providers.

[13] The proposed releases are now significantly restricted (more so than typically seen in other AVO transactions) and are, in any event, rationally connected to the proposed transaction and are in favour of those persons and entities who have been integrally involved in supporting the RVO and the alternate AVO transaction. Further, parties to retained contracts are not being asked to release pre-filing claims.

[14] Service has been properly effected on all requisite stakeholders, including parties to retained contracts, and all key stakeholders have been consulted.

[15] The rights of parties to retained contracts are not being abrogated other than they are not permitted to terminate on account of PaySlate's insolvency.

[16] The RVO and the related subscription agreement which contains that singular prohibition of termination rights, i.e., in respect of insolvency, are not opposed, and the RVO is now supported by the only party who previously opposed it, Paysafe Merchant Services Inc. (“Paysafe”). This is not a case where the RVO is a disguised attempt to rid PaySlate of a recalcitrant creditor.

[17] Paysafe and PaySlate have reached an agreement, where Paysafe, who is a critical supplier, will continue to provide services for 30 days beyond closing of the transaction, at which time the contract between the parties will terminate. In return, Paysafe’s indemnity claim of just over $2.21 million will be accepted and, in turn, comprised by the receipt of equity for approximately 4.8% of PaySlate's common shares, representing an approximate value of $350,000.

[18] However, the agreement between Paysafe and PaySlate does not involve a reordering of priorities and does not reduce the amounts that would otherwise be available to other creditors. I agree with the Proposal Trustee that the settlement with Paysafe represents a positive outcome for PaySlate and its stakeholders, as it allows PaySlate to pursue a transaction before the looming expiry of this “NOI” proceeding and avoids further court proceedings and their attendant drain on the

company's cash and a distraction to the company's intention to pursue a successful restructuring.

[19] I am satisfied that the parties have met the criteria set out in s. 65.13(4) and (5) of the *BIA*, as:

a) sustained good faith, comprehensive and robust efforts have been made to solicit offers from non-related parties;

b) the RVO offers a far better outcome than bankruptcy; and

c) no other viable alternative providing the same value to stakeholders exists.

[20] There is no funding available to conduct a further SISP, and even if there were, I am satisfied that all efforts have been undertaken by the Proposal Trustee after the failed SISP to obtain further and better offers from those expressing an interest in pursuing an acquisition.

Conclusion

[21] Before concluding, I wish to thank counsel and the parties for engaging in what I understand to have been further substantive negotiations following the release of the Prior Reasons to achieve this positive outcome for PaySlate and its stakeholders.

[22] I also wish to thank counsel for their most helpful, focused oral and written submissions and the Proposal Trustee, in particular, for providing me with the information, evidence, and analysis necessary when a reverse vesting order is sought.

[23] Anyone wishing to read a useful example of the type of information, evidence, and analysis required to pass judicial scrutiny to obtain a reverse vesting order should read the Proposal Trustee's sixth and seventh reports and the further

evidence adduced through Mr. Bentham's affidavit and the affidavits of service after the Prior Reasons were issued.

[24] In summary, I have approved the RVO as amended in submissions today that will be reflected in an exhibit attached to an affidavit to be sworn by Ms. Pepper. I also approve the order sought that is declaring service to be valid and effected and also approve the increase in the DIP amount.

[25] Is there anything arising?

[DISCUSSION RE: EXTENSION OF STAY]

[26] THE COURT: I am prepared to extend it to the end of the week if the parties agree to that. I will extend the extension of the stay to midnight, May 19, 2023.

“Walker J.”

TAB 19

2020 ANNREVINSOLV 12

Annual Review of Insolvency Law
Editor: ARIL Society

12 — Recent Use of Statutory Discretion and **Inherent Jurisdiction** in Insolvency and Restructuring

Recent Use of Statutory Discretion and Inherent Jurisdiction in Insolvency and Restructuring

Sam Babe [*]

I. — INTRODUCTION

The jurisdiction of provincial superior courts in Canada pre-dates Confederation and is continued by section 129 of the *Constitution Act, 1867*. [1] Section 96 of the *Constitution Act, 1867* contemplates and preserves the continued existence of superior courts and their jurisdiction by requiring that superior court judges be appointed by the Governor General rather than by the provinces. [2] This jurisdiction of superior courts is further confirmed in provincial statutes such as Ontario's *Courts of Justice Act* (*OCJA*) [3] and Alberta's *Judicature Act* (*AJA*). [4]

These same superior courts are given jurisdiction over federal insolvency and restructuring matters by section 183 of the *Bankruptcy and Insolvency Act* (*BIA*) [5] and section 9 of the *Companies' Creditors Arrangement Act* (*CCAA*). [6] Provincial statutes such as the *OCJA* and the *AJA* also give these superior courts jurisdiction over receiverships, including equitable receiverships not otherwise falling under section 243 of the *BIA*. [7] Such provincial statutes may also give a superior court explicit jurisdiction to make often-sought vesting orders. [8]

In the case of *BIA* proceedings, section 183 vests the superior courts with "such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction". [9] In *Sam Lévy & Associés Inc v Azco Mining Inc*, Justice Binnie, for the Supreme Court of Canada (the "SCC"), described the intent of what he viewed as a broad grant of powers:

> On the face of it, the intent of this provision is to confer on the bankruptcy court powers and duties co-extensive with Parliament's jurisdiction over "Bankruptcy" under s. 91(21) of the *Constitution Act, 1867* except insofar as that jurisdiction has been limited or specifically assigned elsewhere by Parliament itself.
>
> ... The broad scope of authority conferred on Parliament has been passed along to the bankruptcy court in s. 183(1) of the Act, which confers a correspondingly broad jurisdiction. [10]

The jurisdiction given to superior courts in section 183 has been interpreted to preserve the superior courts' **inherent jurisdiction**. [11] In particular, courts have pointed to the references to "auxiliary" and "ancillary" jurisdiction, [12] with the preceding reference to "original" jurisdiction meaning simply the court's supervisory role in bankruptcy. [13] The phrase "auxiliary and ancillary jurisdiction" dates back to the original *Bankruptcy Act of 1919*, [14] which "constituted" bankruptcy courts and placed the responsibility for such courts on the provinces. Where section 183(1) now begins with "The following courts are invested...", its predecessor section in the *Bankruptcy Act of 1919* began with "The following named courts are constituted Courts of Bankruptcy and invested..." [emphasis added]. In *Re Canadian Western Steel Corp*, the Ontario Court of Appeal (the "ONCA") held that creating federal (or, in its words, "Dominion") courts while manning them with provincial

courts and judges was *ultra vires*. [15] Parliament's solution was simply to delete the above-underlined words, such that the section no longer purported to "constitute" any court, [16] a solution that the courts accepted. [17]

This relevance of this history is that the phrase "original, auxiliary and ancillary jurisdiction" was originally part of a grant of statutory discretion to courts that the Act created, not a continuance of the jurisdiction of existing courts. As a vestige of this original *Bankruptcy Act of 1919* language, *BIA* subsection 183(1) still purports to "invest" the bankruptcy courts with jurisdiction, terminology that makes no sense where such jurisdiction is already inherent.

This article will explore the concepts of **inherent jurisdiction** and statutory discretion and how they are being applied and refined in recent insolvency, restructuring and related case law. Given the complexity and urgency of many insolvencies and restructurings, it is not only essential for the courts to rely on such fonts of judicial discretion, but also to do so with precision. In their seminal article from 13 years ago, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and **Inherent Jurisdiction** in Insolvency Matters", Professor Sarra and Justice Jackson of the Saskatchewan Court of Appeal (the "SKCA"), writing extrajudicially, urged continued discussion of the concepts and applications of **inherent jurisdiction** and statutory discretion. [18] This article attempts to contribute to that project.

II. — REFINING THE CONCEPT OF INHERENT JURISDICTION

Perhaps the most famous account of a superior court's **inherent jurisdiction** is that of Justice Cave in his 1667 decision in *Peacock v Bell and Kendall*: "And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specifically appears to be so..." [19]

Since at least that time, it has been the law in common law jurisdictions that where a right exists, a remedy exists and thus a court exists to enforce the right by granting such remedy. [20] The SCC has described the purpose of such jurisdiction as "simply to ensure that a right will not be without a superior court forum in which it can be recognized" and so jurisdiction will lie with a superior court unless statute states otherwise or grants jurisdiction to another court. [21] The SCC has described it as "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so", and which is derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law". [22] The SCC has also described the doctrine of **inherent jurisdiction** as "amorphous" in nature, [23] with the result that the parameters of what a superior court judge may do or not do under the power of **inherent jurisdiction** are not known. [24]

Modern SCC jurisprudence has, however, also described **inherent jurisdiction** in narrower terms, as simply ensuring that a superior court can function as a court of law to fulfill its mandate to administer justice and as including the authority to control its own process, to prevent abuses of such process and to "ensure the machinery of the court functions in an orderly and effective manner". [25] Other courts and commentators have urged that a superior court's **inherent jurisdiction** should be distinguished from, among other things, its general jurisdiction as a court of common law and equity; [26] its "inherent" independence, protected by the Constitution; [27] its equitable power to grant injunctions; [28] its supervisory jurisdiction over inferior courts and tribunals; [29] and application of the maxim "where there is a right there is a remedy". [30]

While such distinctions distill the concept of **inherent jurisdiction** down to jurisdiction over the court's own process, some have pushed further for a delineation between **inherent jurisdiction** and the inherent power that is ancillary to the substantive jurisdiction of any court or tribunal, allowing such body to regulate procedure within such substantive jurisdiction. [31] As stated by Justice Rothstein in *R v Cunningham*: "in the case of statutory courts, the authority to control the court's process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law". [32]

The distinction between the **inherent jurisdiction** that is exclusive to a superior court and the inherent power possessed by any court or tribunal is drawn in two recent decisions by Bankruptcy Registrar Balmanoukian of the Nova Scotia Supreme Court. In *Re Scotian Distribution Services Limited*, [33] Registrar Balmanoukian noted that a registrar has no **inherent jurisdiction** because

it derives its authority only from the *BIA* and the "Bankruptcy and Insolvency General Rules" (the Bankruptcy Rules). [34] Soon thereafter, in *Re Eastern Infrastructure Inc*, Registrar Balmanoukian found that he nevertheless had jurisdiction to control his Court's own process, under section 192 of the *BIA*, by which a registrar derives their powers and jurisdiction, and at common law. [35]

Is then the contrast between a superior court's **inherent jurisdiction** and a statutory court's inherent powers a distinction without a difference? In the recent Federal Court of Canada (the "Federal Court") decision in *Buck v Canada (Attorney General)*, Justice Strickland declined to apply British Columbia Supreme Court ("BCSC") interlocutory injunction precedent because, unlike that superior court, the Federal Court is a statutory court and not a court of **inherent jurisdiction**. [36] However, in a more recent judgment of the Federal Court in *Re Sections 12 and 21 of the Canadian Security Intelligence Service Act, RSC 1985, c C-23*, [37] Justice Gleeson applied the reasoning of the Federal Court of Appeal in *Minister of National Revenue v RBC Life Insurance Co*, where Justice Stratas had described the Federal Court's inherent powers as "analogous to" and "just like" **inherent jurisdiction**:

> [35] The Supreme Court has confirmed the existence of "plenary powers" in the Federal Courts, analogous to the inherent powers of provincial superior courts: *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626 at paragraphs 35 to 38 (a case arising in another context, but stating a principle of universal application). These plenary powers are especially live in situations where the Court is exercising its "superintending *v* power over the Minister's actions in administering and enforcing the Act.": *Derakhshani*, supra at paragraphs 10-11.
>
> [36] In my view, the Federal Courts' power to investigate, detect and, if necessary, redress abuses of its own processes is a plenary power that exists outside of any statutory grant, an "immanent attribute" part of its "essential character" as a court, just like the provincial superior courts with **inherent jurisdiction**: see *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725 at paragraph 30. The Federal Courts' power to control the integrity of its own processes is part of its core function, essential for the due administration of justice, the preservation of the rule of law and the maintenance of a proper balance of power among the legislative, executive and judicial branches of government. Without that power, any court — even a court under section 101 of the *Constitution Act, 1867* — is emasculated, and is not really a court at all. See *MacMillan Bloedel*, *supra* at paragraphs 30-38, citing with approval K. Mason, "The **Inherent Jurisdiction** of the Court" (1983) 57 A.L.J. 449 at page 449 and I.H. Jacobs, "The **Inherent Jurisdiction** of the Court" (1970), 23 CLP 23; and see also *Crevier v. Quebec (A.G.)*, 1981 CanLII 30 (SCC), [1981] 2 SCR 220. [38]

This view on the co-extensivity of the inherent powers of a statutory court with a superior court's **inherent jurisdiction**, at least in terms of controlling process, is consistent with the SCC jurisprudence surveyed by Justice LaForme of the ONCA in *R v Fercan Developments Inc*:

> The Supreme Court of Canada has discussed the power of statutory courts to control their process in *Cunningham* and in *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3. Other than noting that this power cannot contravene explicit statutory provisions or constitutional principles like the separation of power, the court did not discuss the outer limits of a statutory court's ability to control its own process in either decision. However, in both cases, the court treated a statutory court's ability to control its own process as largely parallel to a superior court's ability to control its own process. [39]

However, in a footnote at the end of the above passage, Justice LaForme clarifies that control of the process is but one aspect of **inherent jurisdiction**:

> For the sake of clarity, I am not saying that a statutory court's power to control its own process is the same as a superior court's **inherent jurisdiction**. A superior court's **inherent jurisdiction** is a reserve or fund of authority

> that provides a number of different powers, including the power to control the court's process: *Parsons v Ontario*, 2015 ONCA 158, 125 OR (3d) 168 (Ont CA), at paras 63--70. [40]

To the extent that a superior court's **inherent jurisdiction** is broader than the inherent power of a statutory court, the court possessing only inherent power will be somewhat handicapped in what solutions it can craft or relief it can grant. This would not be an issue in the case of a provincial bankruptcy master who can refer matters to a superior court where appropriate. It might also not be much of an issue in the Federal Court, where usually only a narrow set of insolvency-related questions are dealt with, such as priority disputes with the Crown or questions of director liability, which questions are often peripheral to the main insolvency or restructuring proceeding by the time they come to the Federal Court. One instance where the relatively narrow scope of powers of a statutory court could be of concern is in the case of the territorial courts. Although they are deemed to be superior courts, given jurisdiction under Part II of the *CCAA* and invested, under paragraph 183(1)(h) of the *BIA*, with jurisdiction in bankruptcy and other *BIA* proceedings, they are, like the Federal Court or courts of appeal, ultimately just statutory bodies without **inherent jurisdiction**. [41]

The restriction of **inherent jurisdiction** to a superior court's own procedure is seen in the ONCA's 2005 *Re Stelco Inc* ("*Stelco*") decision, where it ruled that the **inherent jurisdiction** of the Ontario Superior Court of Justice (the "OSCJ") in the context of a *CCAA* proceeding was limited to the court's own process, being the supervision of the restructuring, but did not extend to the company's processes, such the removal of directors. [42] Similarly, in 2006, the ONCA ruled in *Re Ivaco Inc* that the OSCJ did not have **inherent jurisdiction** to order a transfer of the head office of a *CCAA* company. [43]

Attorney General for Ontario v Persons Unknown is a recent decision involving the OSCJ's application of **inherent jurisdiction** to control its own process. [44] Certain tenant advocates moved before Justice Myers for an order setting aside an order of Chief Justice Morawetz whereby the latter had ended an effective moratorium on residential evictions imposed by an earlier order responding to the COVID-19 crisis. Since Chief Justice Morawetz's earlier order had been made to protect the health and safety of the Court's own enforcement officers, rather than to impose a moratorium on the evictions which those officers normally facilitated, Justice Myers, taking a perhaps expansive view of what constitutes "the court's own processes", held that Chief Justice Morawetz was, by both orders, simply exercising his jurisdiction to control the Court's own processes, and nothing more. [45]

Inherent jurisdiction can also only be exercised where it will not conflict with statute or rules of the court. In its 1976 decision in *Baxter Student Housing Ltd v College Housing Co-operative Ltd* ("*Baxter*"), the SCC held that the Manitoba Court of the Queens' Bench (the "MBQB") did not have **inherent jurisdiction** to grant a receiver what amounted to a mortgage borrowings charge ranking in priority to builders' liens because the Manitoba *Mechanics' Lien Act* [46] specified that such liens were to rank ahead of, among other things, "all payments or advances made on account of any conveyance or mortgage". [47] Justice Dickson, for the Court, expressed this limit to **inherent jurisdiction**:

> In my opinion the **inherent jurisdiction** of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of the order made in this case was to alter the statutory priorities, which a court simply cannot do. [48]

Petrowest Corporation v Peace River Hydro Partners is a recent decision that appears to push the limits of what is permitted on *Baxter* principles. [49] Justice Iyer of the BCSC was presented with a motion to have collection actions by a *BIA* receiver stayed pursuant to section 15 of the British Columbia *Arbitration Act* so that contractual arbitration clauses would be honoured. Relying on decisions that exercised discretion under section 11 of the *CCAA*, as well as two prior *BIA* decisions, one of which did not consider the conflict with the *Arbitration Act*, [50] and the other which only considered it in *obiter dicta*, [51] Justice Iyer held that **inherent jurisdiction** ought to be exercised to override the arbitration clauses and that the exercise of such jurisdiction was not prevented by the conflicting provincial statute. [52]

Curiously, Justice Iyer suggests that, to the extent her exercise of **inherent jurisdiction** conflicts with the *Arbitration Act*, paramountcy would require that her exercise of **inherent jurisdiction** should prevail. [53] Justice Iyer appears to be holding up an exercise of **inherent jurisdiction** in a *BIA* proceeding as equivalent, for purposes of a paramountcy analysis, to an exercise of discretion conferred by the *BIA*. The doctrine of paramountcy and its application to conflicts between provincial statutes and exercise of discretion under the *CCAA* or *BIA* is the focus of Part VII of this article. It suffices to say for now that paramountcy does not apply where no federal statute is engaged and so cannot be triggered simply by a conflict between a provincial statute and an exercise of **inherent jurisdiction**.

In *Total Traffic Services Inc v Kone*, Justice Christie of the OSCJ granted a *Mareva* injunction, on an *ex parte* basis, against a bookkeeper who was alleged to have misappropriated company funds. [54] While Justice Christie recognized that the Court had **inherent jurisdiction** to make such ancillary orders as would be necessary to give effect to the injunction or would otherwise be appropriate, she declined to exercise such **inherent jurisdiction** to grant the plaintiff a registrable purchase money security interest ("PMSI") in a mobile home trailer and a speed boat, which the defendant was alleged to have purchased with the funds. [55] Justice Christie was likely correct in that conclusion given that the PMSI is a creature of statute, being the Ontario *Personal Property Security Act*, [56] governed by very specific statutory rules about its creation and priority, and an ersatz PMSI granted by the Court could not have avoided conflict with those statutory provisions.

A recent, prominent example of the use of **inherent jurisdiction** by a court to control its own processes where no enactment of Parliament or the legislature prevents it is Chief Justice Morawetz's decision in *Podgurski*, [57] which accompanied an omnibus order made in response to the COVID-19 crisis. The motion, order and decision in *Podgurski* were the result of a carefully crafted and coordinated response to the COVID-19 crisis by the judiciary and the Superintendent of Bankruptcy, with analogous orders made in each province and territory. The history of this nationwide endeavor is set out in the parallel Quebec Superior Court decision in *Proposition de St-Pierre*. [58] Although, as discussed in Part IV below, Chief Justice Morawetz found sufficient statutory discretion in the *BIA* to make the suspensions of time periods and other changes required, [59] he relied on his **inherent jurisdiction** to make an omnibus order applicable to all applicable *BIA* proceedings before the OSCJ within the chosen time frame. [60]

Even matters directly relating to the court's own process may, however, be removed from the court's **inherent jurisdiction**. In its 2013 decision in *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, the SCC ruled that a rule of the BCSC limited the court's jurisdiction to admit documents in languages other than English. [61] More recently, in *Colon v The Director, Business Corporations Act, Province of New Brunswick, and H Michael Greer* ("*Colon*"), the New Brunswick Court of Appeal (the "NB CA") observed that **inherent jurisdiction** is "mostly dormant". The reasoning behind the NB CA's conclusion was that **inherent jurisdiction** of the superior court is primarily concerned with control of its processes, those processes are largely codified in the New Brunswick *Judicature Act* and the *Rules of Court* and **inherent jurisdiction** cannot be exercised in contravention of such legislation or regulations. [62]

The opposite view was taken by the Saskatchewan Court of Queen's Bench (the "SKQB") in *Poffenroth Agri Ltd v Brown* ("*Poffenroth Agri*"), [63] where Justice Robertson took the preservation of the Court's **inherent jurisdiction** in Rule 1-4(3) of "The Queen's Bench Rules" [64] to mean that such jurisdiction could be invoked to oust an otherwise absolute right under the Rules to discontinue a proceeding, where it was necessary to prevent an abuse of process. Rule 1-4(3) reads: "Nothing in these rules prevents or is to be interpreted as preventing the Court, as a superior court, from exercising its **inherent jurisdiction**." [65] Justice Robertson stated: "*The Queen's Bench Rules* are made by the court to serve the court. The court retains **inherent jurisdiction** to depart from and even to deviate from *The Queen's Bench Rules*. Rule 1-4(3) expressly recognizes that **inherent jurisdiction**..." [66]

Justice Robertson's decision was upheld by the SKCA, which found no reversible error in Justice Robertson's use of **inherent jurisdiction**. [67]

The key to reconciling the use of **inherent jurisdiction** to oust rules of the court in *Poffenroth Agri* with the seemingly contradictory British Columbia and New Brunswick jurisprudence or, for that matter, *Baxter* itself, is the unusual fact that, as Justice Robertson remarks, in Saskatchewan the "Queen's Bench Rules are made by the court". [68] Under the Saskatchewan *Judicature Act*, the judges of the SKQB "may make rules of court", without any requirement of ministerial approval and/or involvement of a rules committee partly composed of non-judges. [69] "The Queen's Bench Rules" are thus not expressions of legislative will that cannot be contradicted by application of **inherent jurisdiction**. Of the common law provinces, the only other to give superior court judges such a degree of independence and control is Nova Scotia. [70]

Jackson & Sarra note that courts will necessarily weigh equities in deciding how to exercise their discretion under the *BIA* or the *CCAA*, thereby drawing on their equitable jurisdiction, as distinct from their **inherent jurisdiction**. [71] The possible confusion between equitable and **inherent jurisdiction** is illustrated by the recent decision in *Paragon Capital Corporation Ltd v Starke Dominion Ltd* ("*Paragon*") where the Alberta Court of Appeal (the "ABCA") heard an appeal of a conditional charging order obtained in a foreclosure action by the mortgagor defendant's law firm in respect of fees owed to it. [72] Justice Yamauchi of the Alberta Court of Queen's Bench (the "ABQB") purported to draw on the Court's equitable jurisdiction to grant the charging order where the law firm had not provided evidence that it would not be paid in the absence of a charge, as required under the applicable Rule. [73] In dissent on the appeal, Justice Antonio interpreted the jurisdiction invoked to possibly be misidentified **inherent jurisdiction** and found that the ABQB ought not to have invoked such jurisdiction to, effectively, alter the test clearly set out in the Rule. [74]

Justice Bielby, for the ABCA majority, agreed that all the ABQB's jurisdiction to grant the order had to have come from the Rule itself and not from the equitable jurisdiction that Justice Yamauchi invoked. [75] Justice Bielby found, however, that the words used in the Rule, their context and their grammatical or ordinary sense did not answer the question of the scope of the discretion afforded by the Rule, and so consideration of the Rule's purpose was necessary. [76] Requiring counsel to establish at the outset of its application that a charge was the only way it would get paid would require an exhaustion of all collection efforts and other recourses. In the face of a client's deepening insolvency and resulting actions by secured and judgment creditors, that would leave counsel with no sources of payment of its unsecured claim, a result that would frustrate the very purpose of the Rule. [77]

The relationship between **inherent jurisdiction** and statute will be explored further in Part VI, below.

The *BIA* is a more specific and detailed statute than the *CCAA* and, except for its commercial proposal provisions, has different objectives than the *CCAA*. In broad strokes, the former is aimed at equitable or rateable distribution of assets, whereas the latter is aimed at preservation of a company. For those reasons, in his 2006 decision in *Re Residential Warranty Co of Canada Inc*, Justice Topolniksi of the ABQB espoused caution in applying *CCAA* **inherent jurisdiction** cases to *BIA* matters, [78] and the ABCA went on to caution that there should not be frequent resort to **inherent jurisdiction** in *BIA* matters. [79]

When exercising **inherent jurisdiction** in *CCAA* matters, courts might also bear in mind that the *CCAA* itself is now a more specific and detailed statute than it was prior to its 2009 amendments. Among other things, those amendments facilitated purposes other than preservation of a *CCAA* company, including asset sales akin to what would be seen in a receivership, without the requirement that the company be saved through a plan of arrangement. [80]

III. — THE STATUTORY CLOAK

In his 1999 decision in *Re Royal Oak Mines Inc*, Justice Farley, as he then was, applied the reasoning of *Baxter* in a *CCAA* context, holding that the priority given to builders' liens under the British Columbia *Builders Lien Act* (*BCBLA*) [81] eliminated

the *CCAA* court's **inherent jurisdiction** to subordinate such liens to court-ordered charges.[82] At that time, the view that the priority given to such charges was an exercise of **inherent jurisdiction** was shared by other courts.[83] However, that view shifted as the broad statutory discretion given to a court by section 11 of the *CCAA* to make orders "on such terms as it may impose" came to be seen to include the discretion to grant charges in priority not only to claims of contractually secured creditors, but also to statutory liens.[84] In 2002, in *Re Sulphur Corporation of Canada Ltd* ("*Sulphur Corp*"), Justice Lovecchio described then subsection 11(3) of the *CCAA* as giving **inherent jurisdiction** a "statutory cloak", such that the court could "use its **inherent jurisdiction** in the exercise of a discretion granted under the *CCAA*" to make charges in priority to liens under the *BCBLA*.[85]

The idea of **inherent jurisdiction** "cloaked" in statute did not, however, gain much traction, as both the British Columbia Court of Appeal (the "BCCA") in *Re Skeena Cellulose Inc* ("*Skeena Cellulose*")[86] and the ONCA in *Stelco*[87] held that, when making *CCAA* orders affecting the rights of third parties, a court was exercising the discretion given by section 11 of the *CCAA* and not the **inherent jurisdiction** that such discretion supplanted. Jackson & Sarra reached the same conclusion.[88] *Skeena Cellulose* and *Stelco* would subsequently be cited approvingly by the SCC in *Century Services Inc v Canada (Attorney General)* as authority for the proposition that where courts have "purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their **inherent jurisdiction** to fill gaps in the statute" they are "in most cases simply construing the authority supplied by the *CCAA* itself".[89] Most recently, the suggestion in *Stelco* that the discretion under section 11 of the *CCAA* "supplants" **inherent jurisdiction** was also cited approvingly by the SCC in *9354-9186 Québec inc v Callidus Capital Corp*.[90]

A similar observation with respect to a court's discretion under the receivership provisions of section 243 of the *BIA* was made by the ONCA in *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc*.[91] Subsection 243(1) gives a court the discretion to direct a receiver to, among other things, "take any other action that the court considers advisable", which language had been transferred in the 2009 *BIA* amendments from the prior interim receivership provisions of subsections 47(2) and 47.1(2). Whereas Justice Farley in *Canada (Minister of Indian Affairs & Northern Development) v Curragh Inc*[92] held that the language in then subsection 47(2)(c) preserved the court's **inherent jurisdiction** to do not only what "justice dictates" but also what "practicality demands", Justice Pepall noted in *Dianor* that the jurisdiction would have been more appropriately characterized as statutory.[93] Accordingly, *Dianor* confirmed that the court's broad discretion under *BIA* paragraph 243(1)(c) to appoint a receiver to "take any other action that the court considers advisable", and thus to do not only what "justice dictates" but also what "practicality demands", is not simply a preservation of the court's **inherent jurisdiction**.[94]

The description in *Stelco*[95] and *Callidus*[96] of statutory discretion under section 11 of the *CCAA* having supplanted **inherent jurisdiction** and the observations of the NB CA in *Colon*[97] that **inherent jurisdiction** of the Court of Queen's Bench was largely dormant because it had been codified in the enabling statute and rules of the court leaves the impression that Justice Lovecchio's description in *Sulphur Corp*[98] of a grant of statutory discretion giving **inherent jurisdiction** a "statutory cloak" might not be such a misnomer. This is consistent with the observation, made at the outset of this article, that where subsection 183(1) of the *BIA* is interpreted to preserve **inherent jurisdiction**, its statutory predecessor, using the same language, contained, instead, a grant of statutory discretion,

To convincingly shed the idea of a "statutory cloak", one would either have to show empirically that superior courts, in appealing to their statutory discretion, are making orders categorically different than they do, or formerly did, when appealing to **inherent jurisdiction** or one would have to (re)define **inherent jurisdiction** so narrowly, such as by limiting it to control of procedure, such that it cannot be as wide-ranging a power as the statutory discretions granted by the *BIA* and *CCAA*.

IV. — STATUTORY DISCRETION

The grant of statutory discretion is exemplified in provisions such as section 11 of the *CCAA*, which empowers a court to "make any order that it considers appropriate in the circumstances", and in subsection 243(1) of the *BIA*, which empowers a court to appoint a receiver "if it considers it to be just or convenient to do so" to "take any other action that the court considers

advisable". [99] Similarly, section 101 of the *OCJA* empowers a court to appoint a receiver "where it appear to a judge of the court to be just or convenient to do so" and on "such terms as are considered just". [100] The restructuring provisions of corporation statutes also grant a superior court discretion to approve arrangements and make any further order that it sees fit. [101]

In *Podgurski*, Chief Justice Morawetz found statutory discretion within section 66.31 of the *BIA* to increase the amounts of payment defaults and the time required to cause a deemed annulment of a consumer proposal under that section. [102] The section provides that a deemed annulment occurs "[u]nless the court has previously ordered otherwise". [103] He likewise found discretion under subsection 187(11) [104] of the *BIA* to extend the time periods for (1) holding meetings of creditors under sections 51, 66.15 and 102 of the *BIA*; (2) referring a matter to the court under subsection 170.1(3) of the *BIA*; and (3) holding mediation as required by paragraphs 105(4) and (10) of the "Bankruptcy Rules". [105] What Chief Justice Morawetz and the judges in the other provinces and territories who adopted his reasons in *Podgurski* could not achieve by statutory discretion was achieved by **inherent jurisdiction** or subsequent statutory amendments. As discussed in Part II, in order to make his order an omnibus order, Chief Justice Morawetz grounded it on his **inherent jurisdiction**. [106] In order to extend or suspend time periods in other sections of the *BIA* and the "Bankruptcy Rules" not dealt with in *Podgurski*, Parliament passed Bill C-20 as the *Time Limits and Other Periods Act (COVID-19)*. [107]

One of the *BIA* time periods not addressed in *Podgurski* is the subsection 50.4(9) five-month cap on the aggregate duration of extensions to file a proposal beyond the 30-day period following the filing of a notice of intention to make a proposal. [108] Before any order had been made under the *Time Limits and Other Periods Act (COVID-19)* extending this time limit, the issue of whether it could nonetheless be extended arose before the OSCJ in *Durham Sports Barn Inc Bankruptcy Proposal* [109]. In *Podgurski*, Chief Justice Morawetz had contrasted the time periods he did extend by exercise of his statutory discretion under subsection 187(11) with the time periods where there is, to use the words of Registrar Ferron in *Re IDG Environmental Solutions Inc*, an "intervening statutory event consequent upon default". [110] Pursuant to subsection 50.4(8), a deemed assignment in bankruptcy is the automatic consequence of a failure to file a proposal prior to the expiry of any extension granted pursuant to subsection 50.4(9). [111] Registrar Ferron had held that subsection 187(11) did not apply where there was a deemed assignment in bankruptcy or other intervening statutory event consequent upon default. [112] In addition to this general rule as to the application of subsection 187(11), subsection 50.4(10) of the *BIA* explicitly states that subsection 187(11) does not apply to allow any extension to the time limits imposed by subsection 50.4(9). [113]

In *Durham Sports*, Justice Gilmore granted a stay extension in excess of what is permitted under subsection 50.4(9) of the *BIA*. She purported to be relying on her **inherent jurisdiction**, but did not consider the specific prohibition in subsection 50.4(10) of the *BIA*. [114] Justice Gilmore held that an overly strict and technical compliance with subsection 50.4(9) would be contrary to the purpose of the *BIA*. In *Podgurski*, Chief Justice Morawetz had noted that technical objections in the interpretation of the *BIA* should be limited only to what is necessary because the Act is a commercial statute, the administration of which is largely in the hands of business people. [115] Applying section 50.4(10) to prohibit the application of subsection 187(11) to the subsection 50.4(9) extensions is not, however, overly strict or technical. On the contrary, by negating the unambiguous expression of the legislative will in subsection 50.4(10) of the *BIA*, Justice Gilmore's purported exercise of **inherent jurisdiction** seems to be a clear violation of *Baxter* principles.

The scope of the discretion given by section 11 of the *CCAA* was the central issue in *Callidus*, where the SCC allowed the appeal of the decision of the Québec Court of Appeal (the "QCCA") and reinstated the decision of the Québec Superior Court (the "QCSC") because it construed the statutory discretion given to the QCSC by section 11 of the *CCAA* more broadly than did the QCCA. [116] The QCSC had dismissed an application by a creditor group to permit a secured creditor ("Callidus") to vote on its own plan in the *CCAA* proceedings of its debtor ("Bluberi"). The plan had been brought by Callidus to compromise litigation claims threatened against it by Bluberi. Callidus had previously been the winning bidder, through a credit bid, of all of Bluberi's assets other than the claims against Callidus. Callidus had excluded $3 million of its secured debt from its credit bid so as to

remain the ranking secured creditor in the *CCAA* proceedings. Callidus's vote in favour of the plan was required in order to cross the two-thirds in value of claims voting threshold required under section 6(1) of the *CCAA*. Justice Michaud of the QCSC had held that allowing Callidus to vote on the plan would serve an improper purpose and give rise to a substantial injustice. He also approved, without any creditor vote, a litigation financing agreement to allow Bluberi to pursue its claims against Callidus.

Justice Schrager for a unanimous QCCA found that seeking a settlement of litigation for valuable consideration could not be considered an improper purpose, especially when it would result in substantial recovery for employees and smaller creditors. [117] Justice Schrager found that Justice Michaud's reliance on improper purpose was not based in any statutory discretion and resembled an application of the doctrine of equitable subordination, despite the fact that equity should not be used to exclude *CCAA* voting rights. [118]

Contrary to what the QCCA had found, the SCC held that the QCSC's decision not to allow Callidus to vote on its own plan was grounded in statutory discretion and, in particular, section 11 of the *CCAA,* which required Callidus to have exercised due diligence. The SCC found that Callidus had not exercised due diligence in valuing its claim and security. [119] Callidus's $3 million debt was secured by nothing more than Bluberi's only asset, its retained claims against Callidus. Where Callidus valued that security at zero in order to be able to vote in its plan, the SCC held that it ought to have made that valuation earlier. As a result, there was no justification for appellate intervention in the QCSC's decision to bar Callidus from voting based on its finding of improper purpose. [120]

The discretion granted to superior courts under the arrangement provisions of business corporation statutes has also been interpreted to be broad. In *Re Rifco Inc*, Justice Grosse found that section 193 of the *Alberta Business Corporation Act* grants the court a "broad, though not unbounded, discretion to approve the arrangement as proposed by the applicants or as amended by the Court, or to refuse to approve the arrangement, and, in either case, to make any further order the Court sees fit," which power "includes the power to make orders on at least some ancillary issues that arise and require a decision in order for the Court to carry out its function" under the section. [121] The concordant section 192 of the *Canada Business Corporations Act* was held by Justice Koehnen of the Ontario SCJ to provide a broad procedure aimed at restructuring that ought to be broadly and liberally interpreted. [122]

A significant reason why the distinction between statutory discretion and **inherent jurisdiction** is important is the different standard of review applicable to each upon appeal. As Jackson & Sarra note, appellate courts are likely to give deference to an appropriate exercise of statutory discretion but will apply the standard of correctness to exercises of **inherent jurisdiction**. [123] In the insolvency and restructuring context, this contrast may be especially pronounced, as *CCAA* and *BIA* courts are accorded a higher level of deference due to their expertise and presumed familiarity with the proceeding before them. In *Callidus*, the SCC held that deference owed by an appellate court to the factual findings of a motion judge is heightened in the case of a *CCAA* judge who has single-handedly overseen a lengthy proceeding since its inception, who has thereby obtained "extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings" and who is exercising the broad statutory discretion granted by section 11 of the *CCAA* to make any order that they consider appropriate to respond to the circumstances of the case. [124] This deference is owed as long as the *CCAA* judge exercises their discretion reasonably and in furtherance of the remedial purpose of the *CCAA*, and has given proper attention to the "baseline" considerations in section 11: (1) that the relief sought is appropriate in the circumstances and (2) that the moving party has been acting in good faith and with due diligence. [125] The ONCA had previously hinted at this heightened level of deference to a *CCAA* judge on a number of occasions. [126]

In *Re Harmon International Industries Inc*, Justice Jackson cited *Callidus* in extending a heightened level of deference to a SKQB judge presiding over a *BIA* receivership proceeding, stressing that the courts' practice was for a single judge to have carriage of such a proceeding. [127] Both the SCC and the SKCA therefore appear to view this heightened deference to *CCAA* and *BIA* judges as a rule of general application.

Not every jurisdiction, however, exercises the practice of designating a single judge to have carriage of such proceedings. As an example, in Ontario, it is not universally the case that a *CCAA* or *BIA* proceeding will be seized by a single judge, as was the case in each of *Callidus* and *Harmon International*. It is therefore not clear what level of deference would be owed to a superior court judge who has not been seized of a *CCAA* or *BIA* matter since its beginning or, for that matter, to any superior court judge at the outset of such a proceeding. Similarly, it is not clear if a *Callidus* or *Harmon International* level of deference should be accorded to a judge who has had carriage of a lengthy trial outside of the insolvency and restructuring context.

V. — THE HIERARCHY: DISCRETION BEFORE JURISDICTION

Based on decisions that have held **inherent jurisdiction** to be a special and extraordinary power to be exercised only sparingly and in clear cases, [128] Jackson & Sarra propose a hierarchy of "judicial tools" to be used in sequence. [129] Once a superior court has interpreted a statute and exercised its common law jurisdiction to fill any apparent gap in furtherance of the purpose of the statute, so as to discern what discretion the statute confers, the court should first exercise such statutory discretion and, only as a last resort, look to its **inherent jurisdiction**. [130]

Jackson & Sarra's hierarchy was embraced by the SCC in *Century Services*, where Justice Deschamps for the majority stated:

> I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and **Inherent Jurisdiction** in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94). [131]

In *Dianor*, Justice Pepall for the ONCA held that a court should follow the same hierarchy in a *BIA* receivership. [132]

Jackson & Sarra state: "It is only where broad statutory authority is unavailable that **inherent jurisdiction** needs to be considered as a possible judicial tool to utilize in the circumstances." [133] A number of recent decisions have adopted this restraint. In *Business Development Bank of Canada v Astoria Organic Matters Ltd*, the ONCA held that a finding of statutory discretion in *BIA* section 243 made consideration of **inherent jurisdiction** unnecessary. [134] In *Yukon (Government of) v Yukon Zinc Corporation*, the Yukon Supreme Court, citing the authority of *Dianor*, held that section 243(1) of the *BIA* conferred discretion broad enough to approve a receiver's partial disclaimer of an equipment lease, leaving the receiver with lease payment obligations in respect of only certain items deemed essential to the environmental integrity of a mine. [135] As in *Astoria Organic*, the finding of statutory discretion was held to make inquiry as to **inherent jurisdiction** unnecessary. [136] Finally, in *Re Accel Canada Holdings Limited*, Justice Horner of the ABQB found that she had the discretion under section 11.9 of the *CCAA* to order that certain information be disclosed and therefore declined to consider whether the order could also have been grounded on the court's **inherent jurisdiction**. [137]

In contrast to the courts in *Astoria Organic*, *Yukon Zinc* and *Accel*, in *Podgurski* Chief Justice Morawetz looked for, found and purported to exercise **inherent jurisdiction** even though he had already found and exercised statutory discretion to the same end. [138] Although he stated that the exercise of **inherent jurisdiction** was necessary, it is not clear why that was so. [139]

VI. — UNAMBIGUOUS EXPRESSION OF LEGISLATIVE WILL

In Part II, we discussed how the SCC in *Baxter* held that **inherent jurisdiction** cannot empower a judge to make an order "negating the unambiguous expression of the legislative will". [140] In *R c Caron*, the SCC clarified that a superior court may still exercise its **inherent jurisdiction** in matters that are regulated by statute or by rules of procedure, if it can do so without

contravening any such statutory provision. [141] Thus, in *Podgurski*, Chief Justice Morawetz of the OSCJ found that he had **inherent jurisdiction** to extend the times specified in the *BIA* for doing certain actions because the provisions in question did not explicitly state that the court could not make such extensions. [142] This principle, that only an unambiguous expression of legislative intent can oust the court's **inherent jurisdiction**, also entails that the maxim of statutory interpretation *expressio unius est exclusio alterius* ("to express one thing is to exclude another") does not apply to exclude exercise of a superior court's **inherent jurisdiction**. [143] Thus, in *Aldebert v Country Boy Services*, Regional Senior Justice Ricchetti held that the OSCJ had **inherent jurisdiction** to award the costs of enforcement of a judgment beyond those costs specifically enumerated in the applicable Rule of the court. [144] This analysis was, however, rejected by Justice Conlan in *MCAP Service Corporation v LPIC*, who was, apparently, caught in the grip of the *expressio unius* maxim:

> It makes no common sense that the Rules Committee would fashion a Rule that explicitly delineates judgment enforcement steps whose costs are recoverable if there is in fact no limit on the categories of enforcement costs that may be recovered as they are entirely discretionary as provided for by subsection 131(1) of the CJA. [145]

Even where an exercise of **inherent jurisdiction** would not contradict an unambiguous expression of the legislative will, the legislation still has to leave a functional gap for **inherent jurisdiction** to fill. In *Cerberus Business Financial, LLC v B & W Heat Treating Canada, ULC*, [146] the OSCJ rejected a trustee in bankruptcy's argument that the court had **inherent jurisdiction** to extend the limitation period set out in the Ontario *Commercial Tenancies Act (OTCA)* [147] for disclaiming, retaining or assigning a lease. Where the operation of the *OTCA* is preserved in bankruptcy by section 146 of the *BIA*, section 38(2) of the *OTCA* gives a trustee three months after the commencement of the bankruptcy to make its election as to how it will deal with a lease. Citing *Baxter*, Justice McEwen held that he did not have **inherent jurisdiction** to extend a time period so clearly set out in the provincial statute. [148] Justice McEwen did, however, accept the trustee's alternate argument that the court was given the discretion to extend the time period by an Order in Council made pursuant to subsection 7.1(2) of the Ontario *Emergency Management and Civil Protection Act* [149] in response to the COVID-19 crisis. [150] The Order in Council suspended, for the duration of the declared emergency, all statutory, regulatory or by-law time periods for taking steps in proceedings, subject only to the discretion of the court, tribunal or other decision-maker responsible for a proceeding. [151]

VII. — DISCRETION AND PARAMOUNTCY

One result of exercising statutory discretion under the federal *BIA* or *CCAA* before exercising **inherent jurisdiction** is that the exercise of such statutory discretion can prevail due to paramountcy in the case of conflict with a provincial enactment, whereas **inherent jurisdiction** would have to cede on *Baxter* principles. [152] The doctrine of paramountcy applies where a provincial enactment and a federal enactment are each valid enactments within the constitutional powers of the respective legislating government, but where concurrent operation of the two laws results in conflict in operation between the two and/or frustration of the federal statute's purpose. [153] In accordance with the principle of co-operative federalism, it is presumed that federal Parliament intended the federal law to co-exist without conflict with provincial laws and courts ought therefore exercise judicial restraint and look first to interpretations that avoid conflict. [154]

In *Royal Bank of Canada v Reid-Built Homes Ltd*, Justice Graesser of the ABQB invoked paramountcy to overcome what he saw as a conflict between the priorities for liens in the Alberta *Builders' Lien Act* [155] and the provisions of the *BIA* concerning priorities for a receiver's claims for fees, disbursements and borrowings. [156] Justice Graesser followed the conclusion of the BCCA in *Yorkshire Trust co v Canusa Const Ltd* [157] that a conflict exists between court-ordered, first-ranking receivership charges and lien statutes that give priority to builders' liens over, among other things, any "receiving order". This conclusion was based on an (incorrect) interpretation of the meaning of "receiving order" to encompass "receivership order". [158] Finding the statutory discretion in subsection 243(6) of the *BIA* to give a receiver "a charge, ranking ahead of any or all of the secured creditors" for payment of the receiver's fees and non-operational disbursements, [159] and the statutory discretion in

subsection 31(1) of the *BIA* to authorize a receiver to grant super-priority security for its borrowings for operation of the debtor's business, [160] Justice Graesser concluded that paramountcy justified the granting of such priorities in favour of a receiver's claims over *Builders' Lien Act* lien claims. [161]

In contrast to Justice Graesser's reliance in *Reid Built* on statutory discretion and paramountcy, in the 2013 decision *Re Comstock Canada Ltd*, Justice Morawetz, as he then was, felt that it was necessary to rely on **inherent jurisdiction** in order to grant an interim receiver's borrowings charge priority over construction lien claims:

> Section 50.6 of the BIA provides the authority to grant super-priority for interim financing for an insolvent debtor. There is no similar provision to provide such financing for an Interim Receiver under section 47.1[.] However, there is no provision that prohibits the granting of such super-priority. In view of the urgency of this situation, it seems to me that the objectives of PART III of the BIA and the expected proceedings under the CCAA would be frustrated if the Interim Receiver's Borrowing Charge was not granted. I was satisfied that, in these circumstances, the charge could be granted under the **inherent jurisdiction** of the court. [162]

Justice Morawetz recognized that his statutory discretion under subsection 47.2(1) of the *BIA* to grant a charge for the interim receiver's fees and disbursements was limited by subsection 47.2(2) to non-operational borrowings. [163] He did not, however, see the limitation in 47(2) as a general prohibition against super-priority charges for operational borrowings. Without considering subsection 31(1), which gives an interim receiver the power to grant security for borrowings, Justice Morawetz concluded that there was a gap in the *BIA* regarding charges for funding of an interim receiver's operational disbursements, a gap which the court's **inherent jurisdiction** could fill.

Although Justice Graesser granted the receiver's charges in *Reid Built* priority over builders' lien claims as well as over the claims of a secured creditor, he declined to give the receiver the same priority over a municipality's statutory lien claim for pre-receivership tax arrears. [164] While he found that he could give the charges created pursuant to *BIA* priority over a provincial lien, he declined to do so on the facts before him. In granting the receiver's appeal of that aspect of *Reid Built*, the ABCA held in *Edmonton v Alvarez* that the ABQB ought to have exercised its discretion under subsection 243(6) of the *BIA* to grant the receiver's charges priority over the property tax lien. [165] Although the ABCA spoke exclusively of statutory discretion without any reference to the ABQB's **inherent jurisdiction**, it made no mention of any conflict with the provincial lien statute or any appeal to paramountcy. The ABCA also did not note the restriction placed on *BIA* subsection 243(6) by subsection 243(7), and so did not specifically address the issue of from where the statutory discretion for a receiver's operational borrowings charge might be derived. [166] In the end, the SCC refused the municipality leave to appeal, without giving any reasons. [167]

The ABCA's avoidance of the issue of conflict between federal and provincial statutes and any resulting paramountcy is perhaps understandable given that the issue of paramountcy is to be approached with great caution. As discussed at the outset of this section, a court must look first to interpretations that avoid conflict in operation between a provincial enactment and a federal enactment or any frustration of the federal statute's purpose. In addition, even before a court can consider questions of paramountcy, provincial statutes require the party advancing the argument to give formal notice of the constitutional question being raised to both the federal and applicable provincial attorney generals. For example, subsection 24(2) of the *AJA* barred Justice Graesser from making the finding of paramountcy he did in *Reid Built* unless the federal and provincial Crowns had each received two weeks' notice of the constitutional question being raised. [168] Neither Crown is listed as having appeared before Justice Graesser or, subsequently, before the ABCA in *Edmonton v Alvarez*, and there is no mention in either decision of the Crowns having been served with notice of a constitutional question. At least in cases where the validity, rather than applicability, of a provincial enactment is being challenged, [169] failure to properly serve notice of constitutional question has been held to invalidate a court's decision. [170]

However, in *Re Indalex Ltd*, Justice Deschamps held that a failure to invoke paramountcy in the first instance when making an order under then section 11(3) of the *CCAA* (in that case a debtor-in-possession financing charge) that conflicts with a provincial

statute was not fatal to the paramountcy of the *CCAA* order. [171] She held that court-ordered priority based on the *CCAA* has the same effect as a statutory priority, and that paramountcy, as a question of law, can be invoked for the first time on appeal. [172]

Statutory discretion can, of course, also be relied on in cases where the conflict lies not between a federal and provincial statute, but rather between two statutes of the same jurisdiction. A recent example at the federal level is the ABCA's decision in *Canada v Canada North Group Inc*, where *CCAA* debtor-in-possession financing provisions were taken to limit the priority otherwise given to source deduction deemed trusts. [173] A recent example at the provincial level is *Cerberus*, as discussed in Part IV. [174]

VIII. — CONCLUSION

As is demonstrated in this survey of recent decisions, explicit consideration of issues of **inherent jurisdiction** and statutory discretion, and of the distinction between the two, is now common in insolvency and restructuring cases. While we are still seeing decisions that conflate **inherent jurisdiction** and statutory discretion, still apply **inherent jurisdiction** in conflict with statute and/or still fail to apply the court's "tools" in accordance with the hierarchy adopted in *Century Services* [175] and *Dianor*, [176] by and large, the courts are wielding these tools with increasing precision.

In the decisions and commentary reviewed in this article, **inherent jurisdiction** has been described as "dormant" and "supplanted" by statute. There is pressure to narrow it in scope to jurisdiction to control a court's process, indistinguishable from the inherent powers of a statutory court. **Inherent jurisdiction** also does not benefit from the heightened deference paid by courts of appeal to superior courts' exercises of statutory discretion. Nor can **inherent jurisdiction** benefit from paramountcy where conflict arises with provincial statutes. Combined with how broadly statutory discretion under the *CCAA* and *BIA* has been interpreted, there seems little opportunity or reason for a superior court to appeal to its **inherent jurisdiction** in insolvency or restructuring, other than in the narrowest sense as the power to control its own process.

Footnotes

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1 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II. See also *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 (SCC) at paras 26--27 [*Liberty Net*].

2 *Ibid*.

3 *Courts of Justice Act*, RSO 1990, c C.43, s 11 [*OCJA*].

4 *Judicature Act*, RSA 2000, c J-2, s 5 [*AJA*].

5 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 183 [*BIA*].

6 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, ss 2(1), 9 [*CCAA*]. See also *Winding-up and Restructuring Act*, RSC 1985, c W-11, ss 2(1), 12, 13.

7 *OCJA*, *supra* note 3, s 101. See also *AJA*, *supra* note 4, s 13(2).

8 See eg *OCJA*, *supra* note 3, s 100; *The Queen's Bench Act, 1998*, SS c Q-1.01, s 12.

9 *BIA*, *supra* note 5, s 183.

10 *Sam Lévy & Associés Inc v Azco Mining Inc*, 2001 SCC 92 (SCC) at paras 17, 38.

11 *BIA*, *supra* note 5, s 183(1). See also *Kingsway General Insurance Company v Residential Warranty Co of Canada Inc (Trustee of)*, 2006 ABCA 293 (Alta CA) at para 19 [*Residential Warranty*]; *Business Development Bank of Canada v Astoria Organic Matters Ltd*, 2019 ONCA 269 (Ont CA) at para 64 [*Astoria Organic*].

12 *Re Cheerio Toys & Games Ltd*, [1972] 2 OR 845, 27 DLR (3d) 24 (Ont CA) at paras 6--7. For a lengthy discussion of the auxiliary nature of **inherent jurisdiction** generally, see *Gillespie v Manitoba (Attorney General)*, 2000 MBCA 1 (Man CA) at paras 17--29. Also see subsection 31(2) of the *Interpretation Act*, RSC 1985, c I-21, which, under the heading "Ancillary Powers", reads: "Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given".

13 *Re Wiggins Limited*, [1931] OR 573, [1931] 4 DLR 338 (Ont CA) at para 27. It should also be noted that the term "court", as now used in 183(1) of the *BIA*, was initially defined to mean "the court which is invested with original jurisdiction in bankruptcy under this Act" [emphasis added]. See *The Bankruptcy Act of 1919*, 9 & 10 Geo V, SC 1919, c 36, s 2(l) [*Bankruptcy Act of 1919*].

14 *Bankruptcy Act of 1919*, *supra* note 13, s 63(1).

15 *Re Canadian Western Steel Corp* (1922), 2 CBR 494, 51 OLR 615 (Ont CA) at paras 24--31.

16 *The Bankruptcy Act Amendment Act*, 1922, Can, ch 8, s 8.

17 *Re Messervey's Ltd* (1922), 3 CBR 480, 23 OWN 41 (Ont SC).

18 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: Carswell, 2008) at 2--3, 33 [Jackson & Sarra].

19 *Peacock v Bell and Kendall* (1667), 85 E.R. 84, 1 Wms. Saund. 73 (Eng. K.B.) at 74 [Wms. Saund.].

20 *Board v Board*, [1919] A.C. 956 (Jud. Com. of Privy Coun.).

21 See *Liberty Net*, *supra* note 1, at paras 29, 32.

22 *R c Caron*, 2011 SCC 5 (SCC) at para 24 [*Caron*], citing I H Jacob, "The **Inherent Jurisdiction** of the Court" (1970) 23 Current Leg Probs 23, at 27, 51.

23 *Ontario v Criminal Lawyers Association of Ontario*, 2013 SCC 43 (SCC) at para 22; cited in *Endean v British Columbia*, 2016 SCC 42 (SCC) at para 23.

24 *Re Stephen Francis Podgurski*, 2020 ONSC 2552 (Ont SCJ) at para 66 [*Podgurski*].

25 *R v Cunningham*, 2010 SCC 10 (SCC) at para 18 [*Cunningham*].

26 *Makis v Alberta Health Services*, 2020 ABCA 168 (Alta CA) at para 31 [*Makis*].

27 *Jonsson v Lymer*, 2020 ABCA 167 (Alta CA) at para 26 [*Jonsson*].

28 *Ibid*, at para 28.

29 *Ibid*, at para 27; William H Charles, "**Inherent Jurisdiction** and its Application by Nova Scotia Courts: Metaphysical, Historical or Pragmatic?" (2010) 33:2 Dal LJ 63, at 70, 72 [Charles].

30 Charles, *supra* note 29, at 70, 72--73.

31 *Makis*, *supra* note 26, at para 31; Jonnette Watson Hamilton, "Three Leaves to Appeal the Claimed Jurisdiction of Court of Queen's Bench Over Vexatious Litigants" (9 July 2019) at 7--9, online (PDF): *University of Calgary Faculty of Law Blog* <ablawg.ca/wp-content/uploads/2019/07/Blog_JWH_VexatiousAppeals.pdf>.

32 *Cunningham*, *supra* note 25, at para 19. See also *407 International Inc v The Queen*, 2019 TCC 245 (TCC [Informal Procedure]) at paras 15--16 [*407 International*]; *Silver Wheaton Corp v The Queen*, 2019 TCC 170 (TCC [General Procedure]) at paras 52--54 [*Silver Wheaton*].

33 *Re Scotian Distribution Services Limited*, 2020 NSSC 158 (NS SC) at paras 23--24. With respect to masters generally, see *Balasubramaniam v RBC General Insurance Company*, 2020 ONSC 1627 (Ont SCJ) at para 32.

34 "Bankruptcy and Insolvency General Rules", CRC, c 368.

35 *Re Eastern Infrastructure Inc*, 2020 NSSC 220 (NS SC) at paras 21--23. This echoes what was said by Registrar Holmested almost a century earlier in *Re Tlustie* (1923), 3 CBR 654, 23 OWN 622 (Ont SC) at para 5:I am of the opinion that for the purpose of carrying out the Act there must be deemed to be vested in the Court the necessary power and jurisdiction to authorize and sanction acts necessary to be done by the trustee for the due administration and protection of the estate even though there be no specific provisions in the Act expressly conferring such power and jurisdiction.Similar observations have recently been made by the Tax Court of Canada in *407 International*, *supra* note 32, at paras 15--16, and *Silver Wheaton*, *supra* note 32, at paras 52--54.

36 *Buck v Canada (Attorney General)*, 2020 FC 769 (FC) at paras 50--51, affirmed 2021 CarswellNat 44 (FCA).

37 *Re Sections 12 and 21 of the Canadian Security Intelligence Service Act, RSC 1985, c C-23*, 2020 FC 616 (FC) at para 205.

38 *Ibid*, citing *Minister of National Revenue v RBC Life Insurance Co*, 2013 FCA 50 (FCA) at paras 35--36 [emphasis in original].

39 *R v Fercan Developments Inc*, 2016 ONCA 269 (Ont CA) at para 52, additional reasons 2016 CarswellOnt 8610 (Ont CA) [*Fercan*]. See also *Reference re Public Services Sustainability (2015) Act*, 2020 NSCA 53 (NS CA) at paras 13--18.

40 *Fercan*, *supra* note 39, n 2.

41 See the recent discussion, in a non-insolvency or restructuring context, in *R v Komoartok*, 2020 NUCA 12 (Nun CA) at para 17.

42 *Re Stelco Inc*, 2005 CarswellOnt 1188, [2005] OJ No 1171 (Ont CA) at para 38 [Stelco], reversing 2005 CarswellOnt 742, [2005] OJ No 729 (Ont SCJ [Commercial List]). For the historical distinction between **inherent jurisdiction** to control process in an existing proceeding and **inherent jurisdiction** to control a new proceeding, see *Jonsson*, *supra* note 27, at para 18. See also *Bluteau v Griffiths*, 2020 ONSC 2576 (Ont SCJ) at para 29.

43 *Re Ivaco Inc*, 2006 CarswellOnt 6292, [2006] OJ No 4152 (Ont CA) at paras 79--80, leave to appeal allowed 2007 CarswellOnt 2855, 2007 CarswellOnt 2856 (SCC). The ONCA did find that the court had discretion to do the same through section 191 of the *Canada Business Corporations Act*, RSC 1985, c C-44 [*CBCA*].

44 *Attorney General for Ontario v Persons Unknown*, 2020 ONSC 4676 (Ont SCJ), appeal quashed *Ontario (Attorney General) v Nanji*, 2020 CarswellOnt 13242 (Ont CA).

45 *Ibid*, at para 34.

46 *The Mechanics' Liens Act,* RSM 1970, c M80, s 11.

47 *Baxter Student Housing Ltd v College Housing Co-operative Ltd* (1975), [1976] 2 SCR 475 (SCC) [*Baxter*]. The Manitoba QB has **inherent jurisdiction** pursuant to section 32 of *The Court of Queen's Bench Act*, CCSM, c C280.

48 *Baxter*, *supra* note 47, at 480.

49 *Petrowest Corporation v Peace River Hydro Partners*, 2019 BCSC 2221 (BC SC) [Petrowest], affirmed 2020 BCCA 339 (BC CA).

50 *Re Pope & Talbot Ltd*, 2009 BCSC 1552 (BC SC).

51 *Industrial Alliance Insurance and Financial Services Inc v Wedgemount Power Limited Partnership*, 2018 BCSC 970 (BC SC), affirmed 2018 CarswellBC 1788 (BC CA).

52 *Petrowest*, *supra* note 49, at paras 42, 52.

53 *Ibid*, at para 42.

54 *Total Traffic Services Inc v Kone*, 2020 ONSC 4402 (Ont SCJ).

55 *Ibid*, at paras 21--22.

56 *Personal Property Security Act*, RSO 1990, c P10, s 20(3).

57 *Podgurski*, *supra* note 24.

58 *Proposition de St-Pierre*, 2020 QCCS 1374 (Que Bktcy) at paras 4--10. An unofficial translation is provided on the website of the Office of the Superintendent of Bankruptcy of Canada, "Quebec - Superior Court (Commercial Division)" (30 April 2020), online: *Government of Canada* <ic.gc.ca/eic/site/bsf-osb.nsf/eng/br04279.html>.

59 *Podgurski*, *supra* note 24, at paras 50, 64.

60 *Ibid*, at paras 72--73.

61 *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2013 SCC 42 (SCC) at para 63.

62 *Colon v The Director, Business Corporations Act, Province of New Brunswick, and H Michael Greer*, 2019 NB CA 81 (NB CA) at paras 44, 46 [*Colon*].

63 *Poffenroth Agri Ltd v Brown*, 2020 SKQB 31 (Sask QB) at paras 15--22, affirmed 2020 CarswellSask 521 (Sask CA) [*Poffenroth Agri*].

64 "The Queen's Bench Rules", Sask Gaz 27 December 2013, 2684.

65 *Ibid*, s 1-4(3).

66 *Poffenroth Agri*, *supra* note 63, at para 15.

67 *Poffenroth Agri Ltd v Brown*, 2020 SKCA 121 (Sask CA) at para 9.

68 *Poffenroth Agri*, *supra* note 63, at para 15.

69 *The Queen's Bench Act, 1998*, SS c Q-1.01, s 28. Contrast with, among others, *Court Rules Act*, RSBC 1996, c 80, s 1; *Judicature Act*, RSNB 1973, c J-2, ss 73, 73.1.

70 *Judicature Act*, RSNS 1989, c 240, s 46.

71 Jackson & Sarra, *supra* note 18, at 3.

72 *Paragon Capital Corporation Ltd v Starke Dominion Ltd*, 2020 ABCA 216 (Alta CA) [*Paragon*].

73 *Paragon Capital Corporation Ltd v Starke Dominion Ltd*, 2018 ABQB 351 (Alta QB) at para 56, affirmed 2020 CarswellAlta 979 (Alta CA).

74 *Paragon*, *supra* note 72, at paras 119, 127.

75 *Ibid*, at para 24.

76 *Ibid*, at para 39.

77 *Ibid*, at paras 40--45.

78 *Re Residential Warranty Company of Canada Inc (Bankrupt)*, 2006 ABQB 236 (Alta QB) at paras 78--79, affirmed 2006 CarswellAlta 1354 (Alta CA).

79 *Residential Warranty*, *supra* note 11, at para 21.

80 *CCAA*, *supra* note 6, s 36.

81 *Builders Lien Act*, RSBC 1996, c 41.

82 *Re Royal Oak Mines Inc*, 1999 CarswellOnt 792, [1999] OJ No 864 (Ont Gen Div [Commercial List]) at para 8.

83 See eg *Re Hunters Trailer & Marine Ltd*, 2001 ABQB 546 (Alta QB) at paras 32, 51.

84 The "on such terms as it may impose" language in then subsection 11(3) of the *CCAA* would be replaced in September 2009 with the current "any order that it considers appropriate" language in section 11 of the *CCAA*.

85 *Re Sulphur Corporation of Canada Ltd*, 2002 ABQB 682 (Alta QB) at paras 24, 37 [*Sulphur Corp*].

86 *Skeena Cellulose Inc v Clear Creek Contracting Ltd*, 2003 BCCA 344 (BC CA) at para 46 [Skeena Cellulose], affirming 2002 BCSC 1280 (BC SC).

87 *Stelco, supra* note 42, at paras 33, 36.

88 Jackson & Sarra, *supra* note 18, at 3.

89 *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 (SCC) at para 64 [*Century Services*]. See, however, the ABQB's decision in *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550 (Alta QB) at paras 22, 105, affirmed *Canada v Canada North Group Inc*, 2019 CarswellAlta 1815 (Alta CA), leave to appeal allowed *Her Majesty the Queen v Canada North Group Inc, et al*, 2020 CarswellAlta 549, 2020 CarswellAlta 550 (SCC), where Justice Topolniski refers to *CCAA* orders made prior to the 2009 amendments as having been exercises of **inherent jurisdiction**, despite elsewhere citing the exact passage from *Century Services* wherein the SCC rejected that view.

90 *Arrangement relatif à 9354-9186 Québec inc (Bluberi Gaming Technologies Inc) -and- Ernst & Young Inc*, 2018 QCCS 1040 (CS Que), reversed 2019 QCCA 171 (CA Que) [Callidus CA], reversed 2020 CarswellQue 236, 2020 CarswellQue 237 (SCC), reasons in full 2020 SCC 10 (SCC) at para 68 [*Callidus*].

91 *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc*, 2019 ONCA 508 (Ont CA) at paras 52--53, additional reasons 2019 CarswellOnt 13563 (Ont CA), affirming 2016 ONSC 6086 (Ont SCJ [Commercial List]) [*Dianor*].

92 *Canada (Minister of Indian Affairs & Northern Development) v Curragh Inc*, 1994 CarswellOnt 294, [1994] OJ No 953 (Ont Gen Div [Commercial List]) at para 22.

93 *Dianor*, *supra* note 91, at para 53.

94 *Ibid*, at paras 53, 57--58, 72.

95 *Stelco*, *supra* note 42, at para 36.

96 *Callidus*, *supra* note 90.

97 *Colon*, *supra* note 62.

98 *Sulphur Corp*, *supra* note 85.

99 *CCAA*, *supra* note 6, s 11; *BIA*, *supra* note 5, s 243(1).

100 *OCJA*, *supra* note 3, s 101.

101 See eg: *CBCA*, *supra* note 43, s 192(4).

102 *Podgurski*, *supra* note 57, at para 50.

103 *BIA*, *supra* note 5, s 66.31.

104 Subsection 187(11) reads: "Where by this Act the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof on such terms, if any, as it thinks fit to impose."

105 *Podgurski*, *supra* note 57, at para 64.

106 *Ibid*, at paras 72--73.

107 *Time Limits and Other Periods Act (COVID-19)*, SC 2020, c 11, s 11, ss 7(1)--(2). The affected provisions of the *BIA* are ss 50.4(2), (6), (8)--(9), 51, 66.12(5), 66.15, 66.31(1), 102, and 170.1(3), as well as the "Bankruptcy Rules".

108 *BIA*, *supra* note 5, s 50.4(9).

109 *Durham Sports Barn Inc Bankruptcy Proposal*, 2020 ONSC 5938 (Ont SCJ) at paras 59--62 [*Durham Sports*].

110 *Podgurski*, *supra* note 57, at paras 57--61, citing *Re IDG Environmental Solutions Inc*, 1993 CarswellOnt 181, [1993] OJ No 771 (Ont Bktcy) at paras 7, 9, 12 [*IDG*].

111 *BIA*, *supra* note 5, s 50.4(9).

112 *IDG*, *supra* note 110, at para 7. See also *Re Wiggins*, 2003 CarswellOnt 3514, [2003] OJ No 3685 (Ont SCJ) at paras 7--8.

113 *BIA*, *supra* note 5, s 50.4(10). See also *Re Royalton Banquet & Convention Centre Ltd* (2007), 33 CBR (5th) 278 (Ont SCJ) at para 8.

114 *Durham Sports*, *supra* note 109, at para 61. Although not considered by Justice Gilmore, Justice Dunphy did essentially the same thing in *Re Dundee Oil and Gas Limited*, 2018 ONSC 1070 (Ont SCJ) at paras 13--15, also without considering s 50.4(10).

115 *Podgurski*, *supra* note 57, at para 49.

116 *Callidus*, *supra* note 90.

117 *Callidus* CA, *supra* note 90, at paras 63--65.

118 *Ibid*, at para 68.

119 *Callidus*, *supra* note 90, at para 80.

120 *Ibid*, at paras 81--82.

121 *Re Rifco Inc*, 2020 ABQB 366 (Alta QB) at paras 24--26.

122 *Re Sherritt International Corporation*, 2020 ONSC 5822 (Ont SCJ [Commercial List]) at para 28.

123 Jackson & Sarra, *supra* note 18, at 3, 12, 33.

124 *Callidus*, *supra* note 90, at paras 47--48.

125 *Ibid*, at para 49.

126 See *Algoma Steel Inc v Union Gas Ltd*, 2003 CarswellOnt 115, [2003] OJ No 71 (Ont CA) at para 16; *Stelco*, *supra* note 42, at paras 33, 36.

127 *Re Harmon International Industries Inc*, 2020 SKCA 95 (Sask CA) at paras 40--41 [*Harmon International*].

128 *Residential Warranty*, *supra* note 11, at para 20.

129 Jackson & Sarra, *supra* note 18.

130 *Ibid*, at 33.

131 *Century Services*, *supra* note 89, at para 65.

132 *Dianor*, *supra* note 91, at paras 31, 53, 57--58, 72.

133 Jackson & Sarra, *supra* note 18, at 19.

134 *Business Development Bank of Canada v Astoria Organic Matters Ltd*, 2019 ONCA 269 (Ont CA) at paras 61--65 [*Astoria Organic*].

135 *Yukon (Government of) v Yukon Zinc Corporation*, 2020 YKSC 16 (YT SC) at paras 47--50, 78, reversed in part 2021 CarswellYukon 18 (Y.T. C.A.).

136 *Ibid*, at para 79.

137 *Re Accel Canada Holdings Limited*, 2020 ABQB 116 (Alta QB) at para 10 [*Accel*]. It appears, however, that Justice Horner is a little undisciplined in her use of the terminology, as what she declines to consider is the use of what she variously calls the court's "**inherent jurisdiction** under s. 11 generally" (at para 6) and the court's "general jurisdiction in s. 11" (at para 10).

138 *Podgurski*, *supra* note 57, at paras 50, 64.

139 *Ibid*, at para 70.

140 *Baxter*, *supra* note 47, at 480.

141 *Caron*, *supra* note 22, at para 32.

142 *Podgurski*, *supra* note 57, at paras 69--70.

143 See *R c Hajian* (1995), 104 C.C.C. (3d) 562 (CS Que) at para 15; *R v Osborn* (1968), [1969] 1 OR 152 (Ont CA) at para 15, reversed (1970), [1971] SCR 184 (SCC). In contrast, see *Re Bolfan Estate* (1992), 87 DLR (4th) 119 (Ont Gen Div) at para 12.

144 *Aldebert v Country Boy Services*, 2020 ONSC 3136 (Ont SCJ) at paras 24--25 [*Country Boy*].

145 *MCAP Service Corporation v LPIC*, 2020 ONSC 4104 (Ont SCJ) at para 14.

146 *Cerberus Business Financial, LLC v B & W Heat Treating Canada, ULC*, 2020 ONSC 3781 (Ont SCJ) [*Cerberus*].

147 *Commercial Tenancies Act*, RSO 1990, c L7.

148 *Cerberus*, *supra* note 146, at paras 19--20. Contrast this with Justice Gilmore's decision in *Durham Sports*, *supra* note 109.

149 *Emergency Management and Civil Protection Ac*t, RSO 1990, c E9.

150 *Cerberus*, *supra* note 146, at para 21. Although Justice McEwen speaks of the court having "jurisdiction" under the Order in Council, it is clear that what he means is what we refer to as statutory discretion.

151 O Reg 73/20.

152 See *Skeena Cellulose*, *supra* note 86, at para 42.

153 *Alberta (Attorney General) v Moloney*, 2015 SCC 51 (SCC) at paras 17--18 [*Moloney*]. It should also be noted that the provincial enactment will only be inoperative to the extent of the conflict, and not absolutely: *Re Urbancorp Cumberland 2 GP Inc*, 2020 ONCA 197 (Ont CA) at para 70, additional reasons 2020 CarswellOnt 4921 (Ont CA).

154 *Moloney*, *supra* note 153, at para 27; *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13 (SCC) at para 21.

155 *Builders' Lien Act*, RSA 2000, c B-7.

156 *Royal Bank of Canada v Reid-Built Homes Ltd*, 2018 ABQB 124 (Alta QB) at paras 130, 134 [Reid Built], reversed *Edmonton (City) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109 (Alta CA) [Edmonton v Alvarez], leave to appeal refused *City of Edmonton v Alvarez & Marsal Canada Inc, in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of Reid-Built Homes Ltd, et al*, 2019 CarswellAlta 2139 (SCC) [*Reid Built* SCC leave].

157 *Yorkshire Trust co v Canusa Const Ltd* (1984), 54 BCLR 75, 10 DLR (4th) 45 (BC CA) at paras 6--12.

158 This interpretation is incorrect because "receiving order" is simply pre-2005 terminology for a bankruptcy order, and thus categorically different from an order appointing a receiver. See *Cirillo v Royal Bank*, 2008 CarswellOnt 5942, 48 CBR (5th) 69 (Ont SCJ [Commercial List]) at para 24, affirmed 2009 CarswellOnt 1381 (Ont CA).

159 *Reid Built*, *supra* note 156, at para 27.

160 *Ibid*, at para 28. Where the grant of a receiver's charge under subsection 243(6) is limited by subsection 243(7) to non-operational borrowings, borrowing for the operation of a debtor's business is not explicitly excluded from the discretion under subsection 31(1), and subsections 31(2) through (4) all specifically contemplate operation of the debtor's business. In addition, the line-by-line analysis of Bill C-55 prepared by Industry Canada (as it was then named) makes it clear that the new powers to be granted to a receiver under the proposed revisions to subsection 31(1) were intended to be supplemental to the receiver's powers under the new Part XI of the BIA. See Industry Canada, "Archived — Bill C-55: clause by clause analysis: Bill Clause No. 24: Section No. 31(1) and (2)", online: *Government of Canada* <www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h_cl00790.html#bill24>:The reforms are technical amendments to reflect concurrent amendments to the interim receiver provisions and the receiver provisions. The role of interim receivers is to be reduced and, as such, they will not be granted powers under this section. At the same time, the role of receivers is expected to expand. By adding receivers to the parties that may use this provision will give receivers more flexibility in carrying on their duties.Justice Graesser effectively glosses over the distinction between a court granting a priority charge for a receiver's borrowings for operation of the debtor's business, which is what he ends up doing, and the priority given to such borrowings in section 31(1) of the *BIA* itself, where such borrowings have been authorized by the court. This gloss is perhaps forgivable because even though subsection 31(1) does not speak of a court giving security or giving a charge as do *BIA* subsections 47.2(1) and 243(6), a court-ordered charge is unnecessary because subsection 31(1) itself sets out the priorities, stating that such borrowings *must* be repaid in priority to creditor claims.

161 *Reid Built*, *supra* note 156, at paras 130, 134. Similar reasoning had previously been applied by the ABQB in *Sulphur Corp*, *supra* note 85, at paras 29--32, where Justice Lovecchio distinguished *Baxter* as being a decision dealing with conflict between a court's **inherent jurisdiction** and a provincial statute, rather than, as in the case before him, a conflict between a provincial statute and the federal *CCAA*.

162 *Re Comstock Canada Ltd*, 2013 ONSC 4700 (Ont SCJ) at para 20.

163 *Ibid*, at para 16.

164 See *Hamilton Wentworth Credit Union Ltd (Liquidator of) v Courtcliffe Parks Ltd*, 1995 CarswellOnt 374, [1995] OJ No 1482 (Ont Gen Div [Commercial List]) at para 41, additional reasons 1995 CarswellOnt 3559 (Ont Gen Div [Commercial List]) [*Hamilton Wentworth*].

165 *Edmonton v Alvarez*, *supra* note 156, at para 26.

166 The ABCA's confirmation of statutory discretion to grant receivership charges in priority to municipal tax liens stands in contrast to the view previously taken by Justice Blair, as he then was, in *Hamilton Wentworth*, *supra* note 164, at para 41, that a court had no **inherent jurisdiction** to grant a receiver priority for its fees and disbursements over a municipality's lien claim under provincial statute for pre-receivership tax arrears. *Hamilton-Wentworth* pre-dated both the 2009 enactment of section 243 of the *BIA* and the discretion given thereunder to grant a priority receivership charge for non-operational borrowings, and the contemporaneous 2009 amendments to subsection 31(1) of the *BIA*, which included, for the first time, receivers and interim receivers in the power to give security for operational borrowings. As a result, *Hamilton Wentworth* is not a counter-authority to the ABCA's decision in *Edmonton v Alvarez*.

167 *Reid Built* SCC leave, *supra* note 156.

168 *AJA*, *supra* note 4, s 24(2): When in a proceeding a question arises as to whether an enactment of the Parliament of Canada or of the Legislature of Alberta is the appropriate legislation applying to or governing any matter or issue, no decision may be made on it unless 14 days' written notice has been given to the Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta.Other examples include *OCJA*, *supra* note 3, s 109; and *The Constitutional Questions Act*, 2012, SS 2012, c C-29.01, s 13.

169 The requirement of notice in such cases is, in Alberta, set out in subsection 24(1) of the *AJA*, *supra* note 4.

170 *Eaton v Brant County Board of Education* (1996), [1997] 1 SCR 241 (SCC) at para 53. A finding of paramountcy in the absence of notices of constitutional question would, at very least, diminish the precedential value of such a decision: *D & K Horizontal Drilling (1998) Ltd (Trustee of) v Alliance Pipeline Ltd*, 2002 SKQB 86 (Sask QB) at para 39, affirmed 2002 CarswellSask 825 (Sask CA).

171 *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 (SCC) at para 60.

172 *Ibid*, at paras 55, 60.

173 *Canada v Canada North Group Inc*, 2019 ABCA 314 (Alta CA), leave to appeal allowed *Her Majesty the Queen v Canada North Group Inc, et al*, 2020 CarswellAlta 549 (SCC).

174 *Cerberus*, *supra* note 146.

175 *Century Services*, *supra* note 89.

176 *Dianor*, *supra* note 91.

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TAB 20

2007 ANNREVINSOLV 3

Annual Review of Insolvency Law
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3 — Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters

Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters

Madam Justice Georgina R. Jackson and Dr. Janis Sarra. [1]

I. — Introduction

The judicial tools used by Canadian courts to advance the enabling objectives of corporate commercial law, and in particular, insolvency law, are the focus of this paper. We address the recurring case where an insolvent corporation, creditor or other interested party asks a court to apply or extend the terms of legislation to circumstances not previously contemplated. A number of tools have been used by the courts to meet the evolving needs of corporate commercial law. These tools include: statutory interpretation, both in determining the extent of judicial authority and the basis of any exercise of judicial discretion to decide a particular case or grant a particular remedy; the gap-filling power of judges; the common law or the evolution of the common law to meet modern cases; equitable jurisdiction; and inherent jurisdiction. We examine the nature of these tools and their appropriate use in the insolvency law context.

The paper advances the thesis that in addressing the problem of under-inclusive or skeletal legislation, there is a hierarchy or appropriate order of utilization of judicial tools. First, the courts should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal the authority. We suggest that it is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Examination of the statutory language and framework of the legislation may reveal a discretion, and statutory interpretation may determine the extent of the discretion or statutory interpretation may reveal a gap. The common law may permit the gap to be filled; if it does, the chambers judge still has a discretion as to whether he or she invokes the authority to fill the gap. The exercise of inherent jurisdiction may fill the gap; if it does, the chambers judge still has a discretion as to whether he or she invokes the authority revealed by the discovery of inherent jurisdiction. This paper considers these issues at some length.

In the past 25 years, we have seen a burgeoning interest in the judicial role in the economy. The resolution of commercial disputes through judicial pronouncements has facilitated commercial activity in Canadian society, and the courts' willingness to recognize the need for practical, effective and expeditious proceedings has been a hallmark of recent developments. One of the first Canadian pronouncements to note and speak of this new reality comes from Saskatchewan on an application to lift the stay on a judgment obtained in a contracts case. Tallis J.A. wrote:

> [10] I am of the opinion that recent authorities in Western Canada display a willingness to re-examine the older authorities in the light of modern economic conditions and commercial practices: vide *Rockwood Enterprises Ltd. v. Grain Ins. & Guar Co.*, [1980] M.J. No. 20, [1980] 4 W.W.R. 319; *Powell v. Guttman*, [1977] M.J. No. 3, [1977] 6 W.W.R. 106; *Robitaille v. Vancouver Hockey Club Ltd.*, [1980] B.C.J. No. 872; (1981), 26 B.C.L.R. 1; *Morrison-Knudsen Co. v. B.C. Hydro & Power Authority* (March 15, 1976) (B.C.C.A.) (unreported). [2]

> members; (3) success for one class member means success for all; and (4) the proposed representative adequately represents the interests of the class. If these conditions are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh the benefits of allowing the class action to proceed. [116]

Arguably many of these uses of inherent jurisdiction find their thrust in "procedural law ... and not ... substantive" law to use the words of Master Jacob above quoted, but several involve findings of substantive law or, perhaps, an expression of the court's willingness to use its inherent jurisdiction to modify or extend the common law in order to fill gaps in legislation or otherwise do justice to the parties and to comply with prevailing social conditions and values.

In commercial matters, there has been, at least until recently, a particular willingness at least by trial courts to use inherent jurisdiction to fill gaps in legislation, particularly in restructuring matters. The early history of this exercise of jurisdiction has been gathered elsewhere.[117] Of this early history, we note *Re Westar Mining Ltd.*; [118] MacDonald J. of the British Columbia Supreme Court used inherent jurisdiction to find authority to grant a secured charge to suppliers that continued to supply during a CCAA proceeding to ensure that the company could carry on business pending development of a plan:

> 17. The issue is whether or not those suppliers who are prepared (or have been compelled, between May 14 and June 10) to extend the credit which will hopefully keep the Company operating during the period of the stay, should be secured. I have concluded that "justice dictates" they should, and that the circumstances call for the exercise of this court's inherent jurisdiction to achieve that end. (See, *Winnipeg Supply & Fuel v. Genevieve Mortgage Corp.*, [1972] 1 W.W.R. 651 at p. 657 (Man. C.A.).
>
> 18. *The circumstances in which this court will exercise its inherent jurisdiction are not the subject of an exhaustive list*. The power is defined by Halsbury's (4th ed., volume 23, para. 14) as:
>
> > ... the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so ...
>
> 19. *Proceedings under the CCAA are a prime example of the kind of situations where the court must draw upon such powers to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects*.
>
> The analogy to the powers and priority which may be granted by the court to a receiver-manager is not necessary to support the exercise of this court's inherent jurisdiction to create the charge in question here. (See, *Lochson Holdings. v. Eaton Mechanical* (1984), 55 B.C.L.R. 54 at pp. 57/8 (B.C.C.A.)). Indeed, different considerations apply. In the receiver-manager cases it is the property which is being safeguarded by the court. *Under the CCAA it is the survival of the company which owns the property, for long enough to present a plan of reorganization, that is the court's concern*. In my view, the three exceptions to the "general rule" discussed in *Lochson Holdings* do not exhaust the circumstances, under the CCAA, in which the court may "authorize expenses for the carrying on of the business".
>
> . . . . .
>
> 23. *This court "has inherent powers in respect to any matter within its jurisdiction ... and may draw [thereon] to give effect to the provisions of [a] statute"*. [119]
>
> . . . . .
>
> 25. Whether a reorganization plan for the Company can be successful remains to be seen. In the meantime, this court should do whatever can be done to provide such an opportunity. The importance of the Company's operations

> to the south-east corner of the province in particular, and to the economy of the province as a whole, justifies that approach. [Emphasis added.]

This reasoning was subsequently endorsed by Farley J. of the Ontario Court of Justice (General Division) in *Re Dylex Ltd.*:

> In the interim between the filing and the approval of a plan, the court has the inherent jurisdiction to fill in gaps in legislation so as to give effect to the objects of CCAA, including the survival program of a debtor until it can present a plan: see *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 at pp. 93-4 (B.C.S.C.). [120]

Consistent with this earlier authority, we note the decision of Topolniski J. in *Residential Warranty Co. of Canada Inc., Re* in 2006. [121] In *Re Residential Warranty*, the applicant insurance company sought an order declaring that the trustee in bankruptcy was not entitled to use the realization of any property for the purpose of paying its fees in respect of the proceedings relating to a disputed trust claim. The Alberta Court of Queen's Bench held that the BIA expressly preserves the court's equitable and ancillary powers and that accordingly, inherent jurisdiction is maintained and available as an important but sparingly used tool. [122] The Court held that there are two preconditions to the court exercising its inherent jurisdiction: the BIA must be silent on the point or not have dealt with it exhaustively; and after balancing the competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it. [123] The Court held that: "inherent jurisdiction is available to ensure fairness in the bankruptcy process and fulfillment of the substantive objectives of the BIA, including the proper administration and protection of the bankrupt's estate". [124]

The Court held that while the BIA is detailed legislation, Parliament did not take away any inherent jurisdiction from the court, but in fact provided that the court may direct an interim receiver "to take such other action as the court considers advisable" to do not only what justice dictates, but practicality demands. [125] The trustee's responsibility is to ensure that only valid claims to the assets under administration are recognized. [126] The Court held that the trustee was a necessary party to the appeal, in order to participate as an officer of the court and present the relevant facts in a non-adversarial manner; and that "to rule otherwise would be to open the door for possible abuse of the system by rogue claimants filing spurious proprietary claims". [127] The Court contrasted exercise of inherent jurisdiction under the BIA and the CCAA: [128]

> [78] Except in the context of commercial restructuring cases under the BIA, caution must be exercised when considering developments concerning inherent jurisdiction emanating from the CCAA. The BIA and CCAA are very different in degree of specificity and the policy considerations involved. For example, courts in CCAA proceedings routinely rationalize financing for commercial restructuring that compromises creditors' traditional interests in the name of the greater good. There is an overarching policy concern favouring the possibility of a going concern solution and the potential of a long-term upside value for a broad constituency of stakeholders. Arguably, in some cases, super-priority financing and priming charges must be available if restructuring is to be a possibility. [Footnotes omitted.]

Here, the policy consideration was not to facilitate a potential business survival, but rather, to maintain the integrity of the bankruptcy system and to be fair, while recognizing established trust law. [129] On the facts, it was appropriate to fashion a charge that respected the limitations previously imposed by the courts in terms of the trustee's work for the general estate administration. [130]

The Alberta Court of Appeal, in affirming this judgment, held that the judge had inherent jurisdiction pursuant to the BIA to permit the trustee's fees to be paid from property that was subject to undetermined trust claims in appropriate circumstances, and that she did not err in the exercise of jurisdiction in the circumstances. [131] The Court of Appeal held that the ultimate purpose of the administrative powers granted a trustee under the BIA was to manage the estate in order to provide equitable satisfaction of the creditors' claims. As a result of the assistance that the trustee provided to the court and all of the claimants in the bankruptcies, it was just and practical that inherent jurisdiction be used to grant the charge for its fees.

The Court of Appeal noted that section 183(1) of the BIA preserves the inherent jurisdiction of the superior court; it specifies that the courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by the BIA. The Court of Appeal held that inherent jurisdiction is not without limits, and that it cannot be used to negate the unambiguous expression of legislative will. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case. [132] The Court observed that further limitations are based on the nature of the BIA, which is a detailed and specific statute providing a comprehensive scheme aimed at ensuring the certainty of equitable distribution of a bankrupt's assets among creditors. In this context, there should not be frequent resort to the power. [133] The Court of Appeal held that inherent jurisdiction has been used where it is necessary to promote the objects of the BIA; [134] where there is no other alternative available; and to accomplish what justice and practicality require. [135]

The Court of Appeal held that generally, inherent jurisdiction should only be exercised where it is necessary to further fairness and efficiency in legal process and to prevent abuse. The Court listed the non-exhaustive factors that should be considered before invoking inherent jurisdiction:

> [37] Generally, inherent jurisdiction should only be exercised where it is necessary to further fairness and efficiency in legal process and to prevent abuse. The following non-exhaustive factors should be considered before invoking inherent jurisdiction here:
>
> > 1. The strength of the trust claim being asserted. The mere assertion of a trust claim is not determinative of the validity of the trust and cannot preclude the trustee from investigating concerns. In some cases, the trust claim may be obvious, as was the case in *C.J. Wilkinson*, where the claim was based on statutory trusts in favour of employees or tax authorities and the interim receiver conceded their validity. In other circumstances, a trustee will have no choice but to have the issue of the trust determined in order to further the administration of the bankruptcy. In that event, the ultimate beneficiary of the trust may have to shoulder the costs of the determination;
> >
> > 2. The stage of the proceedings and the effect of such an order on them. For example, the ability of the trustee to make distributions and their amount may depend on the determination of the issue;
> >
> > 3. The need to maintain the integrity of the bankruptcy process. The equitable distribution of the bankrupt estate must remain at the fore-front. The court should recognize the expertise of the trustee in this regard and in effective management of bankruptcy: see *GMAC* at para. 50 [*GMAC Commercial Credit Corp. v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123]. Also, the court should assess the extent to which the determination is necessary to administer the bankruptcy and discourage academic or potentially unrewarding litigation;
> >
> > 4. The realistic alternatives in the circumstances. This could include a s. 38 order, deferring a decision or empowering a court to review the decision in the future, for example, after final determination of the claims and the extent of the property available for distribution. The court should consider whether there is an existing guarantee of the trustee's fees, whether the party ultimately determined to be the beneficiary might bear some responsibility for the costs, and whether counsel might be hired on contingency;
> >
> > 5. The impact on the trust claimants and on the trust property as well as on other creditors. The court should examine the breadth of the trust claims, the existence of competing proprietary claims, and whether the trust claims leave any assets in the estate for unsecured creditors in assessing which stakeholder is going to suffer most from the trustee's disputing of the trust claim. In that exercise,

accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretive function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

Courts must clearly articulate the basis for their authority in order to create transparency, certainty and predictability for parties, having regard to commercial realities and public policy notions of the public interest in a fair and timely resolution of commercial disputes. A driving principle of commercial law is that courts should do what makes sense commercially in the context of what is the fairest and most equitable in the circumstances. Courts need to be as specific as possible on the source of the authority. If the statute confers discretion on the court, the basis for the choices made should be clearly articulated so as to ensure appropriate appellate treatment. This means judges must tighten the language they utilize in exercising their authority. When courts are making a determination pursuant to a statute, they are exercising their power or authority, not their discretion. As noted in the introduction, there is a difference between the court exercising its power or authority under a statute and the exercise of its discretion under a statute, although the difference is not always apparent. There may be an element of discretion, particularly when the courts are choosing from a range of remedies, but for the most part, their judgment is based on their authority to resolve the dispute and should be articulated as such. This clarity in language will assist with the transparency and certainty of their decisions, a benefit for the parties before them and of assistance to the appellate court in engaging in any review.

Appellate courts are more likely to accord deference to the appropriate exercise of discretion granted under a statute. It is important to draw a clear distinction between the court's exercise of power pursuant to the statute or its equitable jurisdiction to fill gaps in insolvency legislation and the exercise of inherent jurisdiction. Where inherent jurisdiction is invoked, appellate courts are more likely to scrutinize the basis of the lower court's authority and whether it advances the principles that have been articulated for the use of inherent jurisdiction as a gap-filling technique. In respect of statutory authority, it is also important to distinguish when a choice is being made from a range of remedies authorized by the statute, based on what is the most fair and reasonable in the circumstances and the exercise of a discretion where there may be two equally compelling remedies or outcomes, based on the statutory language and the facts as found.

As noted at the outset, this discussion of selecting the appropriate judicial tool is ongoing and our understanding of the use of tools such as gap-filling powers under legislation, inherent jurisdiction, and judicial discretion is evolving. Much more can be written on many of the points raised in this paper. A conscious effort over the next period to define more clearly the source of authority will continue the process of enhancing the insolvency law regime, having regard to fairness, equity, the public interest and commercial reasonableness.

> 12. Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.
>
> 183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancilliary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers: ... (d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench; ...

Footnotes

1 Madam Justice Georgina R. Jackson, Court of Appeal for Saskatchewan; Dr. Janis P. Sarra, University of British Columbia Faculty of Law and Director, National Centre for Business Law. An earlier version of this paper was presented in discussion format at the National Judicial Institute's annual Civil Law Seminar. The authors would like to thank NJI for that opportunity. Justice Jackson

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2 *Bank of Nova Scotia v. Omni Construction Co.* (1981), 14 Sask. R. 81 (Sask. C.A.).

3 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended.

4 *Canadian Airlines Corp., Re* (2000), [2000] A.J. No. 771, 2000 CarswellAlta 662 (Alta. Q.B.); leave to appeal refused (2000), 2000 CarswellAlta 919 (Alta. C.A. [In Chambers]); affirmed (2000), 2000 CarswellAlta 1556 (Alta. C.A.); leave to appeal refused (2001), 2001 CarswellAlta 888 (S.C.C.).

5 *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (Ont. C.A.).

6 *Stelco Inc., Re* (2005), [2005] O.J. No. 1171, 75 O.R. (3d) 5, 2005 CarswellOnt 1188 (Ont. C.A.).

7 D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1990) at 40. Footnotes omitted but see in particular P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law* (Oxford: Clarendon Press, 1978).

8 *Ibid.* at 40.

9 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (BIA).

10 *Re Skeena Cellulose Inc.* (2003), [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (B.C. C.A.).

11 *Stelco*, *supra*, note 6.

12 *GMAC Commercial Credit Corp. — Canada v. TCT Logistics Inc.* (2006), [2006], 2 S.C.R. 123, 2006 CarswellOnt 4621 (S.C.C.).

13 Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002).

14 Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd. ed. (Toronto: Carswell, 2000).

15 Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974), at 67.

16 Sullivan, *supra*, note 13 at 1 to 18; Ruth Sullivan "Statutory Interpretation in the Supreme Court of Canada" (1998-1999) 30 Ottawa L.Rev. 175.

17 Côté, *supra*, note 14 at 287 to 294.

18 Stephane Beaulac and Pierre-Andre Côté, "Driedger's Modern Principle at the Supreme Court of Canada: Interpretation, Justification, Legitimization" (2006) 40 R.J.T. 131. Available at SSRN: http://ssrn.com/abstract=987199. In brief capsule, Beaulac and Côté point out that Canadian courts have not been consistent in the application of the principle. Much more could be said about this article, which merits close reading. See, too, Randal N. Graham *Statutory Interpretation* (Toronto: Emond Montgomery Publications Limited, 2001) at 110, 111.

19 *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 (S.C.C.).

20 Ontario *Employment Standards Act*, R.S.O. 1980, c. 137, as amended.

21 *Re Rizzo & Rizzo Shoes Ltd.*, *supra*, note 19, at para. 21.

22 *Ibid.*, at para. 27.

23 Ontario *Interpretation Act*, R.S.O. 1990, c. I.11.

24 Coté, *supra*, note 14 at 375 to 405. See, for example, s.12 of the federal *Interpretation Act*, R.S.C., 1985, c. I-21:

25 *Ibid.*, at 399.

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*, at 403.

29 Sullivan, *supra*, note 13 at 195.

30 *Ibid.*, at 228.

31 *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1989] 1 S.C.R. 1722 (S.C.C.).

32 *Ibid.*, at 1762.

33 Coté, *supra*, note 14 at 380.

34 *Ibid.*, at *386*.

35 *Ibid.*, at 387.

36 *Ibid.*, at 388.

37 *Ibid.* at 390.

38 *Ibid.* at 375 to 405.

39 Sullivan, *supra*, note 13 at 123 to 150.

40 *Ibid.* at 135.

41 *Ibid.* at 125 and 136.

42 *Ibid.* at 136.

43 *Ibid.*

44 *Ibid.*

45 *Magor and St. Mellons Rural District Council v. Newport Corp.*, [1950] 2 All E.R. 1226 at 1236 (Eng. C.A.). But note what Lord Simonds said about this when the matter was heard in House of Lords: “This proposition. ... cannot be supported. It appears to me to be a naked usurpation of the legislative function under the thin guise of interpretation.” *Magor & St. Mellons Rural District Council v. Newport (Borough)*, [1952] A.C. 189 at 191.

46 *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 at 1193 (S.C.C.).

47 Sullivan, *supra*, note 13 at 138, 139.

48 Coté, *supra*, note 14.

49 *Ibid.* at 405.

50 Ontario *Judicature Act*, R.S.O. 1970, c. 228.

51 *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.* (1972), 25 D.L.R. (3d) 386 (Ont. C.A.).

52 *Ibid.* at 388-390.

53 Sarra, *supra*, note 1.

54 *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 at 110 (Ont. Gen. Div. [Commercial List]); *Olympia & York Developments Ltd.* (2001), [2001] O.J. No. 3394, 2001 CarswellOnt 2954 (Ont. S.C.J. [Commercial List]); additional reasons at (2001), 2001 CarswellOnt 4739 (Ont. S.C.J. [Commercial List]); affirmed (2003), 2003 CarswellOnt 5210 (Ont. C.A.). *NsC Diesel Power Inc., Re* (1990), 79 C.B.R. 1 (N.S. T.D.); *Westar Mining Ltd., Re* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.); *Interpretation Act*, R.S.C. 1985, c. I-21, s.12.

55 Sarra, *supra*, note 1.

56 David M. Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980) *s.v.* discretion.

57 See: J.A.G. Griffith, *The Politics of the Judiciary* (5th ed.) (London: *Fontana Press*, 1997) at 340 where the author quotes "And in Duport Steels Ltd. v. Sirs Lord Scarman said: 'If people and parliament come to think that the judicial power is to be confined by nothing other than the Judge's sense of what is right ... confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of the judges.'". There is also the old saying that "Capital is a coward; money flees uncertainty."

58 Aharon Barak, *Judicial Discretion* (New Haven: Yale University Press, 1987) at 7.

59 *Ibid.* at 7-9.

60 B. McLachlin, "Rules and Discretion in Governance of Canada", (1992) 56 Sask.L.Rev. 167 at 170-171.

61 *Doiron v. Haché*, 2005 NBCA 75, 290 N.B.R. (2d) 79, ¶57 (N.B. C.A.). Borins J.A quotes Chief Justice Barak in his dissenting judgment in *Wong v. Lee* (2002), 58 O.R. (3d) 398 (Ont. C.A.).

62 The Honourable Mr. Justice Robert J. Sharpe, "The Application and Impact of Judicial Discretion in Commercial Litigation" (1997-98) 17 Advocates' Soc. J. No. 1, 4-11.

63 *Wong v. Lee*, *supra*, note 61.

64 *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 (S.C.C.)

65 *Royal Oak Mines Inc., Re* (1999), 1999 CarswellOnt 792 (Ont. Gen. Div. [Commercial List]). *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); affirmed (2000), [2000] B.C.J. No. 409, 16 C.B.R. (4th) 141, 2000 CarswellBC 414 (B.C. C.A.); leave to appeal allowed (2000), [2000] S.C.C.A. No. 142, 2000 CarswellBC 2132, 2000 CarswellBC 2133 (S.C.C.). In the matter of a Bankruptcy Proposal of *Bearcat Explorations Ltd.* (2004), 2004 CarswellAlta 1183 (Alta. Q.B.); *Charon Systems Inc. / Charon Systemes inc., Re* (2001), [2001] O.J. No. 5129, 2001 CarswellOnt 4556 (Ont. S.C.J.). In exercising its discretion, the court will consider: adequate notice to affected creditors; sufficient disclosure; timeliness of the request; the prospects for a viable restructuring; balancing the prejudice to stakeholders; and the principle of granting priority financing as an extraordinary remedy; *Les Boutiques San Francisco Incorporées, Re* (2003), [2003] Q.J. No. 18940, 2003 CarswellQue 13882 (Que. S.C.).

66 *United Used Auto & Truck Parts Ltd., ibid.*

67 The Hon. R. P. Kerans, "Standards of Review employed by Appellate Courts" (Edmonton: Juriliber, 1994) at 134. See also the Hon. R.P. Kerans and K.M. Wiley *Standards of Appellate Review Employed by Appellate Courts* (2d ed.) (Edmondton: Juriliber, 2006) at 228.

68 *Ibid.*

69 Lord Diplock in *Hadmor Productions Ltd. v. Hamilton* (1982), [1982] 1 All E.R. 1042 at 1046, [1983] 1 A.C. 191 at 220 (U.K. H.L.), cited by Bayda C.J.S. in *Smart v. South Saskatchewan Hospital Centre* (1989), 75 Sask. R. 34 (Sask. C.A.) beginning at para. 22.

70 *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (Ont. C.A.).

71 Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 248.

72 *Naneff v. Con-Crete Holdings Ltd.*, *supra*, note 70 at 488-91.

73 *Ibid.*, at 491, 492.

74 *Ibid.*, at 493.

75 Stephen Waddams, "Judicial Discretion", (2001) 1 Oxford University Commonwealth Law Journal 58 at 60. See *Skeena*, *supra*, note 10 and *Stelco*, *supra*, note 6 as examples.

76 *Waddams, ibid.*, at 64.

77 *Algoma Steel Inc., Re* (2001), [2001] O.J. No. 1943, 25 C.B.R. (4th) 194, 2001 CarswellOnt 1742, ¶8 (Ont. C.A.); *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]); *Stelco*, *supra*, note 6 at para. 24, citing *Country Style Food Services Inc., Re* (2002), [2002] O.J. No. 1377, 158 O.A.C. 30, 2002 CarswellOnt 1038, ¶15 (Ont. C.A. [In Chambers]).

78 *Stelco*, *ibid.*

79 *Algoma*, *supra*, note 77 at para. 8.

80 *Sullivan*, *supra*, note 13 at 229.

81 [1995] 1 S.C.R. 3 at 24 (S.C.C.).

82 *Stelco*, *supra*, note 6 at paras. 35-36, citing *Skeena*, *supra* note 10.

83 *Stelco*, *ibid.*, at para. 38.

84 *Ibid.*, at para. 44.

85 *Ibid.*

86 Waddams, *supra*, note 75 at 59.

87 *Ibid.*

88 *Ibid.*

89 R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).

90 R. Dworkin, *Hard Cases* (1975) 88 Harv. L. Rev. 1057.

91 R. Dworkin, *Taking Rights Seriously*, (Cambridge: Harvard University Press, 1977, 1978 re-printing) at 81.

92 H.L.A. Hart, *The Concept of Law* (2d ed.) (Oxford: Clarendon Press, 1994) at 272-273.

93 Kerans and Willey, *supra*, note 67 at 215 & 216.

94 Waddams, *supra*, note 75 at 59.

95 *Skeena*, *supra*, note 10 at para. 46.

96 Sarra, *supra*, note 1.

97 *Ibid.*

98 *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2001), [2001] O.J. No. 3394, 2001 CarswellOnt 2954 (Ont. S.C.J. [Commercial List]); additional reasons at (2001), 2001 CarswellOnt 4739 (Ont. S.C.J. [Commercial List]); affirmed (2003), 2003 CarswellOnt 5210 at 1 (Ont. C.A.).

99 *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 at 314 (B.C. C.A.); leave to appeal refused (1991), 7 C.B.R. (3d) 164 (note) (S.C.C.).

100 Waddams, *supra*, note 75 at 61.

101 *Re Canadian Airlines Corp.* (2000), [2000] A.J. No. 771, 2000 CarswellAlta 662 (Alta. Q.B.); leave to appeal refused (2000), [2000] A.J. No. 1028, 2000 CarswellAlta 919 (Alta. C.A. [In Chambers]); affirmed (2000), 2000 CarswellAlta 1556 (Alta. C.A.); leave to appeal refused (2001), 2001 CarswellAlta 888, ¶144 (S.C.C.); *Anvil Range Mining Corp., Re* (1998), 1998 CarswellOnt 5319, ¶2, Blair J. (Ont. Gen. Div. [Commercial List]). See also *Skydome Corp., Re* (1998), 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List]); *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 1999 CarswellOnt 2213, ¶21, 22 (Ont. S.C.J. [Commercial List]); *Royal Bank v. Fracmaster Ltd.* (1999), 1999 CarswellAlta 539, ¶36, 40 (Alta. C.A.).

102 Janis Sarra, *Creditor Rights and the Public Interest, Restructuring Insolvent Corporations* (Toronto, University of Toronto Press, 2003).

103 *Skydome Corp., Re* (1998), 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List]).

104 *MEI Computer Technology Group Inc., Re* (2005), [2005] Q.J. No. 5744, 2005 CarswellQue 3675 (Que. S.C.) at para. 18, citing the Court of Appeal in *Stelco.*, *supra*, note 6 at para. 32 and *United Used Auto & Truck Parts Ltd., Re* (2000), [2000] B.C.J. No. 409, 2000 CarswellBC 414 (B.C. C.A.); leave to appeal allowed (2000), 2000 CarswellBC 2132, ¶12, 19-20 (S.C.C.).

105 I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems 23. This article has been quoted with approval in *Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch v. Société des Acadiens du Nouveau-Brunswick Inc.*, [1986] 1 S.C.R. 549 (S.C.C.) and in numerous lower court decisions.

106 *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, ¶29 (S.C.C.).

107 Jacob, *supra*, note 105 at 27-28.

108 *Ibid.* at 23-24.

109 *Ibid.*, at 50-52.

110 *Ibid.*

111 *Ibid.*

112 *Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch v. Société des Acadiens du Nouveau-Brunswick Inc.*, [1986] 1 S.C.R. 549, 27 D.L.R. (4th) 406 (S.C.C.).

113 *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739, 183 N.R. 184 (S.C.C.).

114 *St. Anne-Nackawic Pulp & Paper Co. v. C.P.U., Local 219*, [1986] 1 S.C.R. 704; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.).

115 *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129 (S.C.C.).

116 *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.)

117 K. Yamauchi: *The Court's Inherent Jurisdiction and the CCAA: A Beneficent or Bad Doctrine*?, (2004) 40 C.B.L.J. (Part Number 2) at 250; Janis P. Sarra: *Judicial Exercise of Inherent Jurisdiction Under the CCAA*, (2004) 40 C.B.L.J. (Part Number 2) at 280.

118 *Westar Mining Ltd., Re* (1992), [1992] B.C.J. No. 1360, 1992 CarswellBC 508, [1992] 6 W.W.R. 331 (B.C. S.C.).

119 *Ibid.*

120 *Dylex*, *supra*, note 54.

121 *Residential Warranty Co. of Canada Inc., Re* (2006), [2006] A.J. No. 349, 2006 CarswellAlta 383, 21 C.B.R. (5th) 57 (Alta. Q.B.); affirmed (2006), [2006] A.J. No. 1304, 25 C.B.R. (5th) 38, 2006 CarswellAlta 1354 (Alta. C.A.).

122 *Ibid.*, at para. 26, citing s.183(1) of the BIA, which reads, in material part:

123 *Ibid.*, at para. 26.

124 *Ibid.*

125 *Ibid.*, at para. 27, quoting from Mr. Justice Farley in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 27 C.B.R. (3d) 148 (Ont. Gen. Div. [Commercial List]).

126 *Ibid.*, at para. 36.

127 *Ibid.*, at para. 59.

128 *Ibid.*, at para. 78.

129 *Ibid.*, at paras. 79, 80 and 81.

130 *Ibid.*, at paras. 80, 81, citing *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 21 C.B.R. (N.S.) 201 (Ont. C.A.).

131 *Residential Warranty Co. of Canada Inc.*, *supra*, note 121 (C.A.).

132 *Ibid.*, at para. 20, citing *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.* (1975), [1976] 2 S.C.R. 475 at 480 (S.C.C.); *Wasserman, Arsenault Ltd. v. Sone* (2002), 33 C.B.R. (4th) 145 (Ont. C.A.); additional reasons at (2002), 2002 CarswellOnt 3230 (Ont. C.A.). In *Wasserman*, the trustee applied for an increase in fees in a summary administration bankruptcy. Rule 128 of the BIA Rules caps the trustee's fees in summary administration bankruptcies with no permissive or discretionary language. Both the Ontario Superior Court and the Ontario Court of Appeal concluded that inherent jurisdiction could not be used to conflict with that legislative expression.

133 *Ibid.*, at para. 21.

134 *Ibid.*, citing *Tlustie, Re* (1923), 3 C.B.R. 654 (Ont. S.C.); *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 27 C.B.R. (3d) 148 (Ont. Gen. Div. [Commercial List]).

135 *Ibid.*, citing *Olympia & York Developments Ltd., Re* (1997), 18 C.B.R. (4th) 243 (Ont. Bktcy.); affirmed (1998), 1998 CarswellOnt 3408 (Ont. C.A.); leave to appeal refused (1999), 123 O.A.C. 399 (note) (S.C.C.); *City Construction Co., Re* (1961), 2 C.B.R. (N.S.) 245 (B.C. C.A.); *Canada v. Curragh*, *supra*, note 125.

136 *Ibid.*, at para. 41.

137 *Re United Used Auto*, *supra*, note 65.

138 *Skeena*, *supra*, note 10.

139 *Stelco*, *supra*, note 6 at para. 34.

140 *Ibid.*, at para. 35, citing Farley J. in *Royal Oak Mines Inc., Re* (1999), [1999] O.J. No. 864, 1999 CarswellOnt 792, ¶4 (Ont. Gen. Div. [Commercial List]).

141 *Ibid.*, at para. 52; *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (CBCA).

142 *Ibid.*, at para. 48.

143 *Ivaco Inc., Re* (2006), 275 D.L.R. (4th) 132 (Ont. C.A.); leave to appeal allowed (2007), 2007 CarswellOnt 2855 (S.C.C.).

144 *Mine Jeffrey inc., Re* (2003), [2003] Q.J. No. 264, 2003 CarswellQue 90, 40 C.B.R. (4th) 95 (Que. C.A.).

145 Coté, *supra*, note 14 at 27-28.

146 *GMAC*, *supra*, note 12 at para. 2.

147 *Ibid.*, at para. 45. There was one dissenting opinion by Deschamps, J.

148 *Ibid.*, at para. 47.

149 *Ibid.*, at para. 50.

150 *Ibid.*, at para. 51.

151 *Big Sky Living Inc., Re* (2002), 37 C.B.R. (4th) 42 (Alta. Q.B.), in which the court held at para. 57 that an applicant had established that it is entitled to an interim receivership order in accordance with s. 47 of the BIA. However, the court held that the order tendered was overly broad, and overly declaratory and legislative in nature, and that it purported to affect in general terms the rights of broad and undefined classes of parties that had not received notice of this application. It went far beyond what was necessary for the protection of the estate of the debtor and attempted to provide the interim receiver with immunities and protections that are not authorized by statute.

152 *Skeena*, *supra*, note 10; *Stelco*, *supra*, note 6.

153 Sarra, *supra*, notes 1 and 102.

154 See for example, the oppression remedy provision discussed earlier.

End of Document

TAB 21

Alberta Statutes
Business Corporations Act

Most Recently Cited in: Green Theme Design Ltd v. 0974016 B.C. Ltd, 2024 ABKB 7, 2024 CarswellAlta 49 | (Alta. K.B., Jan 4, 2024)

R.S.A. 2000, c. B-9

Currency

R.S.A. 2000, c. B-9, as am. S.A. 1992, c. M-20.1 s. 63 [Not in force at date of publication. Repealed R.S.A. 2000, c. T-6, s. 214(c).]; R.S.A. 2000, c. H-7, s. 136; R.S.A. 2000, c. T-6, s. 193; R.S.A. 2000, c. 8 (Supp.) [Not in force at date of publication. Repealed 2005, c. 8, s. 62.]; 2001, c. C-28.1, s. 447 [s. 447(2) amended 2001, c. 23, s. 1(8).]; 2002, c. A-4.5, s. 22; 2005, c. 8, ss. 1-60; 2005, c. 40; 2006, c. S-4.5, s. 106; 2007, c. U-1.5, s. 68; 2008, c. A-4.2, s. 121; 2008, c. 7, s. 2; 2009, c. 7, s. 2; 2009, c. 53, s. 30; 2011, c. 13, s. 1; 2014, c. 8, s. 17; 2014, c. 13, s. 49; 2014, c. 17, s. 57; 2016, c. 18, s. 1; 2018, c. 20, s. 2; 2020, c. 25, s. 1; 2021, c. 3, s. 1; 2021, c. 16, s. 3; 2021, c. 18, ss. 1-74; Alta. Reg. 217/2022, s. 27; 2023, c. 3, s. 5 [s. 5(3), (4) not in force at date of publication.]; Alta. Reg. 75/2023, s. 11.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Currency
Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

End of Document

Alberta Statutes
Business Corporations Act
Part 9 — Directors and Officers (ss. 101-125)

R.S.A. 2000, c. B-9, s. 106

s 106. Election and appointment of directors

Currency

106.Election and appointment of directors

106(1) At the time of sending articles of incorporation, the incorporators shall send to the Registrar a notice of directors in the form required by the Registrar.

106(2) Each director named in the notice referred to in subsection (1) holds office from the issue of the certificate of incorporation until the first meeting of shareholders.

106(3) Subject to subsection (9)(a) and section 107, shareholders of a corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the next annual meeting of shareholders following the election.

106(4) If the articles so provide, the directors may, between annual general meetings, appoint one or more additional directors of the corporation to serve until the next annual general meeting, but the number of additional directors shall not at any time exceed 1/3 of the number of directors who held office at the expiration of the last annual meeting of the corporation.

106(5) It is not necessary that all directors elected at a meeting of shareholders hold office for the same term.

106(6) A director not elected for an expressly stated term ceases to hold office at the close of the first annual meeting of shareholders following the director's election.

106(7) Notwithstanding subsections (2),(3) and (6), if directors are not elected at a meeting of shareholders, the incumbent directors continue in office until their successors are elected.

106(8) If a meeting of shareholders fails to elect the number or the minimum number of directors required by the articles by reason of the disqualification or death of any candidate, the directors elected at that meeting may exercise all the powers of the directors if the number of directors so elected constitutes a quorum.

106(9) The articles or a unanimous shareholder agreement may provide for the election or appointment of a director or directors

(a) for terms expiring not later than the close of the 3rd annual meeting of shareholders following the election, and

(b) by creditors or employees of the corporation or by a class or classes of those creditors or employees.

Amendment History
2021, c. 18, s. 19

Currency
Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

TAB 22

CITATION: *Validus Power Corp. et al. and Macquarie Equipment Finance Limited*, 2024 ONSC 250
COURT FILE NO.: CV-23-0070521500CL
DATE: 20240105

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VALIDUS POWER CORP., IROQUOIS FALLS POWER CORP., BAY POWER CORP., KAP POWER CORP., VALIDUS HOSTING INC. AND KINGSTON COGEN GP INC., EACH BY THEIR COURT APPOINTED RECEIVER AND MANAGER, KSV RESTRUCTURING INC.

BEFORE: Peter J. Osborne J.

COUNSEL: *Jennifer Stam*, for the Monitor, Moving Party

David Sieradzi, representative of the Monitor

Susan Philpott, for Power Workers Union

Scott Bomhof and Mike Noel, for Macquarrie Equipment Finance Limited, Respondent

Jessica Cameron, for TransCanada Pipelines

Jesse Mighton, for Hut 8 Mining Corp. / Far North Power Corp.

HEARD: January 4, 2024

ENDORSEMENT

OSBORNE J.:

1. The Monitor seeks an order:

   a. approving the Transaction Agreement and the acceptance and execution by the Validus Entities thereof, each by KSV in its capacity as Monitor, in respect of the transaction with Macquarie Equipment Finance Ltd. (“Macquarie”) and Far North Power Corp. (“Far North”, and collectively with Macquarie, the “Purchasers”) as reflected in the Transaction Agreement;

   b. adding 1000745924 Ontario Inc. (“5924” or “Residualco”) as a company to these CCAA proceedings and as a Debtor as defined in the Receivership Order made in

the companion receivership proceedings bearing Ct. File No. CV-23-00703754-00CL;

c. vesting in 5924 all right, title and interest, and all liabilities and obligations of, the Purchased Entities in and to the Excluded Assets, the Excluded Contracts and the Excluded Liabilities, as applicable;

d. discharging the Claims and Encumbrances as against the Purchased Entities and the Retained Assets;

e. authorizing and directing the Validus Entities, by the Monitor, to issue the IFPC Interests and vesting all right, title and interest in them to the Assignee, as nominee and designated assignee of Macquarie;

f. vesting all of Validus Parent's right, title and interest in and to the Purchased Validus Parent Assets in the Assignee;

g. authorizing and directing the Validus Entities, by the Monitor, to issue the IFPC Notes 1, 2 and 3, and vesting all right, title and interest in and to Notes 1 and 3 in Macquarie, and Note 2 in the Assignee;

h. redeeming, terminating and cancelling the IFPC Legacy Shares and the other Subject Interests for no consideration;

i. granting the Priority Payments Indemnity Charge and providing for the automatic termination thereof upon specified terms;

j. confirming that Continuing Contracts and Permits and Licenses to which any of the Validus Entities (other than the Validus Parent) are a party at the Effective Time, will be and shall remain in full force and effect upon and following the Effective Time;

k. authorizing but not obligating the Monitor to take all required steps to rectify the minute books of the Validus Entities and filing annual returns on their behalf;

l. authorizing Ryan Chua to act as the First Director of 5924 and confirming that he shall have no liability as a result of becoming the First Director save and except his own gross negligence or wilful misconduct;

m. granting relief from certain statutory requirements applicable to Ontario corporations in favour of the First Director in accordance with the terms of the Transaction Agreement and Reverse Vesting Order;

n. approving the third report of the Monitor dated December 15, 2023 (the "Third Report") and the fourth report of the monitor dated December 22, 2023 (the "Fourth Report");

o. approving the fees and expenses of the Monitor, the Receiver and their legal counsel (the same firm); and

p. extending the Stay Period until February 29, 2024.

2. Defined terms in this Endorsement have the meaning given to them in the motion materials, the reports of the Monitor and particularly the Third Report and the Fourth Report, and/or my previous Endorsements made in this matter, unless otherwise stated.

3. The relief sought today is unopposed. It has been served on the Service List in this CCAA Proceeding and on the Service List in the Receivership Proceeding referred to above, in which proceeding certain of the relief requested today is being sought. Moreover, and as further described below, all contract counterparties on the Continuing Contracts List (excluding those with easements tied only to real property) as well as all of the Regulatory Authorities referred to below have received notice of this motion. In short, I am satisfied that service was appropriate.

4. The background to, and context for, this motion is not repeated here and has been set out in my previous Endorsements made in this matter as well as in the reports of the Monitor and in particular the Third Report and the Fourth Report (as defined below).

5. The Validus Entities own and operate electricity generation facilities that provide capacity to Ontario's electricity grid, controlled by Ontario's Independent Electricity System Operator ("IESO"). The Validus Entities are indebted to Macquarie pursuant to a secured sale-leaseback transaction. IFPC sold certain Leased Property to Macquarie pursuant to a Participation Agreement, which Leased Property was then released back to IFPC pursuant to the terms of a Lease Agreement.

6. Macquarie holds general security including a collateral mortgage from IFPC, guarantees and general security from Bay Power, Kap Power, Kingston LP and Kingston GP, a guarantee and pledge of shares/units of IFPC, Bay Power, Kap Power, Kingston LP and Kingston GP from Validus Parent, and a limited recourse guarantee and pledge of material agreements from Validus Hosting.

7. On November 2, 2023, I granted the SISP Approval Order, following which the Monitor commenced the sales process. That sales process is fully set out in the Third and Fourth Reports.

8. The sales process included a stalking horse agreement with the Purchasers. Ultimately, only one other party remained active in the process as of the Bid Deadline and while that other prospective purchaser indicated to the Monitor that it planned to submit a bid, it did not do so prior to the Bid Deadline. The Bid Deadline was subsequently extended to December 11, 2023. The other prospective purchaser submitted an offer but provided no deposit nor evidence sufficient to the Monitor as to the ability to finance the proposed transaction. In any event, the Monitor confirms that that other prospective purchaser received notice of this motion and has not appeared to oppose the relief sought.

9. Ultimately, the Monitor concluded that upon the expiry of the extended Qualified Bid Deadline, no Qualified Bids, other than the Stalking Horse Offer, had been received and the Monitor declared the Stalking Horse Offer to be the Successful Bid.

10. The key terms of the Successful Bid are also set out in the Reports and in the motion materials. The Purchased Assets include the shares/units of Validus Parent in Kap Power, Bay Power, Kingston LP and Kingston GP, newly issued shares of IFPC, and certain assets of Validus Parent that are not subject to the security held by Macquarie.

11. The consideration payable under the Transaction Agreement is comprised of a payment by the Assignee of $1.5 million in respect of certain estimated "priority payments" owing by Validus Parent in respect of unremitted employee source deductions (together with an indemnity for any amounts which are subsequently assessed as priority amounts to be secured by a proposed charge); payment by the Assignee of an amount to be determined by the Monitor in respect of administrative expenses; Macquarie releasing the Validus Entities from all outstanding obligations under the Participation Agreement, Lease Agreement and security; and Macquarie transferring the Leased Property to IFPC (collectively the "Credit Bid Consideration").

12. IFPC will also issue the IFPC Notes 1, 2 and 3 to the Purchasers as partial consideration of the conveyance of the Leased Property.

13. The Monitor submits that in addition to the Credit Bid Consideration, the Successful Bid provides additional benefits including the opportunity for ongoing employment for employees of the Validus Entities and the assumption of all pre-and post-filing liabilities relating to Continuing Contracts and for certain municipal property taxes. The Successful Bid is subject to certain conditions including an agreement with respect to Implementation Steps and approval of the transactions pursuant to a reverse vesting order ("RVO") structure.

14. Importantly for today's motion, the only remaining condition of materiality is the approval of the proposed RVO. The Terms and Conditions provide for an Outside Date for the Transaction of February 15, 2024.

15. The RVO structure contemplates that, upon satisfaction of all conditions, the Purchasers will acquire the Purchased Assets and the Excluded Assets, Excluded Contracts and Excluded Liabilities will be vested into 5924, such that the Purchasers will acquire shares and units of the Purchased Entities free and clear.

16. To address the delay and uncertainty relating to transferring various permits held and used by the Validus Entities in its highly regulated business, including the Technical Standards and Safety Authority, Ontario Energy Board, Ministry of the Environment, Innovation and Science, and Economic Development Canada, the RVO structure is being sought and contemplated.

17. Some 56 permits and licenses have been identified that are proposed to be preserved through the proposed RVO.

18. As set out in the motion materials and as has been addressed in previous motions in this CCAA proceeding, there were significant deficiencies in the books and records of the Validus Entities. There was effectively no continuing management, although the Monitor retained on a consulting basis a former officer to assist.

19. The deficiencies in the books and records resulted in, among other things, the Monitor conducting an Unknown Contract Bar Process as provided for in the SISP Approval Order referred to above. That Process was an effort to identify contracts to which the Validus Entities were or may have been parties but were unknown to the Monitor and/or which were not reflected in any identifiable way in the books and records.

20. Notices were put in relevant press media requesting any party who had a contract with one or more of the Validus Entities, and whose contract was not listed on the Monitor's website, to contact the Monitor on or before the Deadline. The motion materials reflect that no party contacted the Monitor regarding unknown contracts.

21. All contract counterparties on the Continuing Contracts List (excluding those with easements tied only to real property) as well as the Regulatory Authorities have been provided notice of this motion.

22. The Monitor submits that extensive good faith efforts were made by it to sell the businesses and assets of the Validus Entities, and the proposed Transactions represent the best and highest recovery available to the Validus Entities.

23. Pursuant to the RVO, if granted, the liabilities of the Purchased Entities excluded from the Transaction will vest in 5924. 5924 would become a debtor company subject to the receivership and the CCAA proceedings. Mr. Chua has agreed to act as the First Director of 5924 but has required the additional protections and the release proposed in the RVO as a condition of so acting. The Monitor supports the granting of those protections.

24. In addition, an order to convey the Purchased Assets, certain rectifications to various minute books of the Validus Entities are required and those are steps contemplated to be taken pursuant to the Implementation Steps, with the result that today, the Monitor seeks the authority to take such steps.

25. The proposed RVO provides for Releases of all Released Claims in favour of the Released Parties. Those Released Parties include KSV, the Receiver and Monitor, its legal counsel, Macquarie and the Assignee and their respective current and former directors, officers, employees, legal counsel, representatives and advisors, and Mr. Chua in his capacity as the First Director of 5924.

26. The Monitor submits that the proposed Releases are a condition to the obligations of the Purchasers to complete the Transaction under the Successful Bid, that the Released Parties have contributed substantial value to these proceedings and through the Successful Bid will provide significant benefit for numerous stakeholders, and that granting the Releases will assist in the final administration of the CCAA proceedings and avoid the potential need to run a claims process for such Released Claims.

27. The activities of the Monitor are set out in detail in the Third and Fourth Reports and approval of those activities is sought.

28. The fees of KSV in its dual capacities as Receiver and Monitor are described in the affidavit of Mr. Robert Kofman sworn December 22, 2023 together with the exhibits thereto. The

Monitor submits that its fees and those of its counsel (in the dual capacities) are reasonable and appropriate in the circumstances.

29. Finally, the Monitor seeks a further stay extension to February 29, 2024 to close the Transaction and allow the Monitor to complete additional residual matters in these proceedings. The cash flow forecasts show that the Validus Entities are forecasted to have sufficiently liquidity to fund their operations through the proposed stay extension period.

30. I am satisfied that the relief sought should be approved in the particular circumstances of this case.

31. This Court has jurisdiction to approve the sale pursuant to section 36 of the CCAA. Subsection 36(3) sets out the non-exhaustive factors that the Court is required to consider in deciding whether to authorize such a sale.

32. Those factors dovetail with the criteria established in the case law colloquially referred to as the Soundair Principles: *Royal Bank of Canada v. Soundair Corp.*, [1991] 46 OAC 321 at para. 16.

33. In this case, I am satisfied that the section 36(3) factors have been satisfied. The process leading to the proposed sale was reasonable in the circumstances. It was approved, and indeed conducted by, the Monitor. The Monitor has set out fully in the Fourth Report its strong recommendation that the proposed Transaction be approved, and the basis for that recommendation.

34. All creditors have been consulted. Macquarie, as the senior secured creditor, (naturally) supports the transaction. Macquarie was also supportive of the SISP process. The effects of the proposed sale on the creditors and all other interested stakeholders have also been considered.

35. Finally, I am satisfied that the consideration to be received for the assets is reasonable and fair, taking into account their market value.

36. The proposed sale is the result of the SISP process previously approved. I was, at the time of the approval of that process, and I am now, satisfied that it was commercially reasonable and appropriate in the circumstances. I am also satisfied that the Monitor conducted the sales process in accordance with the mandate previously approved and in particular, the terms of the SISP Approval Order. In short, the process allowed the opportunity for the market to be broadly canvassed and provided an opportunity for interested parties to perform due diligence.

37. I pause to observe that the assets were not “new to the market” in the sense that earlier sales processes had been attempted and were unsuccessful. By that, I mean that potentially interested parties were aware that the assets and businesses were available for acquisition. Moreover, in a highly regulated market such as this, the universe of potentially interested buyers was relatively small.

38. The Transaction provides a going concern solution for the Purchased Entities. It contemplates the continuation of operations and preserves and maximizes continuing

employment opportunities for employees of the Purchased Entities. As observed by the Monitor, this is particularly beneficial in this case as certain of the plants operate in remote or rural communities where the Validus Entities are significant employers.

39. The Monitor has confirmed that it does not believe that further time spent marketing the businesses and assets of the Validus Entities will result in a superior transaction. Nor is there sufficient funding to continue any marketing process. In the absence of approval of this transaction, Macquarie is not prepared to continue to fund the Validus Entities and current funding is projected to be exhausted on or around the proposed Outside Date of February 15, 2024.

40. The Monitor has expressed its professional opinion that the terms and conditions of the Transaction Agreement are commercially reasonable. I draw further comfort that the value of the proposed Transaction, and the consideration being paid for the Purchased Entities and otherwise pursuant to the Transaction Agreement is beneficial relative to the fair market value of the assets being transferred.

41. The value of the consideration being paid pursuant to the Transaction materially exceeds the amount paid for all four powerplants within the last two years of approximately $45 million. In addition, I observe that the total consideration being paid of well in excess of $60 million, is favourable when considered as against the outstanding debt owing to Macquarie which is itself approximately $61 million. That Macquarie debt is extinguished as part of the consideration paid, and other debts of the Validus Entities are being assumed.

42. None of that would occur in a liquidation scenario, which is clearly the only alternative to approval of the Transaction. I am satisfied that the value and consideration being paid is appropriate and is in the best interests of all stakeholders since it represents the maximum value that can be realized following a transparent, fair and comprehensive sales process. In particular, existing employees and Continuing Contract Counterparties would be materially worse off in a liquidation scenario.

43. As noted above, the Transaction for which approval is sought contemplates an RVO structure. It is recognized, and indeed conceded by the Monitor, that RVOs continue to represent, and properly so, the exception and not the norm.

44. While the Court has the jurisdiction to approve RVO transactions pursuant to sections 11 and 36 of the CCAA, the question of whether such relief is appropriate in the circumstances of any case is a very real one.

45. Justice Penny of this Court has articulated clearly the factors to be considered by a court in respect of a proposed RVO transaction: See: *Harte Gold Corp., (Re),* 2022 ONSC 653.

46. I am satisfied that this particular case represents one of those exceptional circumstances where an RVO is appropriate. The electricity generation business is highly regulated and highly complex. In *Just Energy Group Inc.et al. v. Morgan Stanley Capital Group Inc. et al.*, 2022 ONSC 6354, Justice McEwen of this Court recognized that RVOs had properly been granted in circumstances where the debtor operated in a highly regulated environment in which its existing permits, licenses or other rights were difficult or impossible to reassign to a purchaser; the debtor is a party to certain key agreements that would be similarly

difficult or impossible to reassign to a purchaser; and where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.

47. That is precisely the situation here, where there are at least 56 licenses and permits, the transfer of which would be difficult and time-consuming at best, with the attendant increase in professional fees, all to the detriment of the stakeholders. Moreover, there is no viable alternative. No party has been identified or emerged who is prepared and willing to sponsor a CCAA plan of arrangement. Employee flight risk has been highlighted to the Court throughout this proceeding. The RVO here will effectively provide most if not all of the benefits of a plan, while doing so with more certainty, and less cost, time, risk and instability.

48. The Purchasers have insisted on the RVO structure. There are no other Qualified Bids with the result that, as noted above, and liquidation is the only alternative.

49. I agree with the opinion of the Monitor that no stakeholders are prejudiced by the issuance of an RVO relative to any other structure for a transaction and indeed, the Monitor is of the view that many stakeholders will have an improved outcome given the treatment of prefiling liabilities and the ongoing employment opportunities for employees. Priority amounts are also accounted for.

50. As to the value of the Transaction, the value of the permits and licenses held by the Validus Entities represent, in a practical sense, the key critical consideration in structuring the Transaction, and those are preserved, together with their value, through an RVO structure.

51. For all of these reasons, I am satisfied that the RVO should be approved in this case.

52. Moreover, I am satisfied that the Purchased Validus Parent Assets, consisting of the shares of Hosting, the litigation claim of Hut 8 and certain contracts in VPC's name but used in the business of the Purchased Entities, are appropriately included in the sale notwithstanding that Macquarie does not have security in respect of those assets. All of those assets were made available for sale under the SISP and no Qualified Bids were received for those assets. There is significant consideration and benefit provided under the proposed Transaction over and above the release of the Macquarie debt and security and those are summarized above.

53. Moreover, the Monitor is of the view that there is little evidence to support VPC's claim against Hut 8, but that there is considerable merit to the claim of Hut 8 against VPC. The Monitor is unaware of any material value in Hosting, which to its knowledge is inactive and has no assets. The Transaction Agreement requires an allocation of the consideration to be paid, and it provides that the consideration payable for the Purchased Validus Parent Assets will be satisfied by the assumption (by the Purchasers) of certain of the Priority Payments of Validus Parent.

54. I am further satisfied that the Continuing Contracts and Permits and Licenses have been addressed appropriately. They will continue with the Purchased Entities after the Effective Date as a result of which all counterparties will have the benefit of having an ongoing

counterparty, and both prefiling and post-filing arrears will be assumed and continued post closing.

55. Counsel for TransCanada appears today and confirmed that to waste heat contracts with the Validus Entities have already terminated or expired according to their own terms, with the result that Tran Canada does not oppose the relief sought today.

56. In short, no contractual counterparty is being subjected to a forced or opposed assignment of their contract.

57. I am satisfied that the concerns expressed by the Court in *PaySlate Inc. (Re)*, 2023 BCSC 608 with respect to the extent to which notice has been provided to all parties whose contracts are affected by the proposed RVO have been satisfied here. Indeed, that is in large part why I approved the Unknown Contract Bar Process on November 2, 2023, in order that (given the poor state of the books and records of the Validus Entities), the Monitor could identify any unknown contractual counterparties.

58. That process was conducted. No such parties came forward. The Monitor has served the motion materials on all known counterparties, with the appropriate exception of those who hold only a pure right in land evidenced by an easement registered against property, as well as the primary service list and all additional PPSA registrants.

59. I am also satisfied that, as contemplated in the Transaction, it is appropriate that the existing shares of Bay, Kap, Kingston and Hosting will be purchased and the existing shares of IFPC will be cancelled and new shares of IFPC issued and conveyed to one of the Purchasers, Far North. Other than that, all equity interest in the Purchased Entities will be cancelled for no consideration to ensure that upon the completion of the Transaction, the relevant Purchaser is the equity holder of each of the Purchased Entities. This relief is appropriate here particularly given the deficient state of the records, and is contemplated by sections 11 and 36 of the CCAA such that they may be approved notwithstanding any requirement for shareholder approval.

60. With respect to 5924, or Residualco, it is appropriate that that entity, which will become a debtor company, be added as a party to this CCAA proceeding. It satisfies the definition of a "debtor company" in section 2(1) of the CCAA. I am further satisfied that Mr. Chua, the former general counsel of the Validus Entities, is an appropriate First Director of 5924, the appointment of whom is required as a condition of incorporation.

61. Finally in this regard, I am satisfied that given the anticipation that he will resign prior to the anticipated bankruptcy of the company, relief from the requirement of section 119 of the Ontario *Business Corporations Act* which provides that a director named in the articles of incorporation may not resign until the first meeting of shareholders, is appropriate here. I am further satisfied that I have the discretion pursuant to my inherent jurisdiction and the statutory jurisdiction conferred under section 11 of the CCAA to grant that relief which in my view in this case is also consistent with section 11.5 of the CCAA, which permits directors to be removed by court order. Such relief has been granted in other cases where necessary to facilitate a transaction: See, for example, *Just Energy*.

62. With respect to the treatment of HST and Input Tax Credits, the relief sought contemplates that the prefiling HST Claim will be vested into 5924, any entitlement to ITCs generated in respect of HST paid prefiling, continues in that company, and indeed IFPC has already claimed approximately $3.4 million of the prefiling ITCs and the Monitor understands that further prefiling ITCs may be available to claim by IFPC.

63. ITCs generated in respect of HST being paid to Macquarie on closing will before the benefit of the restructured IFPC.

64. While setoff is preserved under the CCAA, the right to set off is, generally, restricted temporally (i.e., prefiling to prefiling; and post-filing to post-filing). The proposed Transaction here preserves such rights in that prefiling HST liabilities may be set off against prefiling ITCs, and post-filing HST liabilities (arising from the Transaction) are not set off against prefiling ITCs but rather are for the benefit of IFPC or other Purchased Entities, post closing.

65. Counsel for the Department of Justice (Canada Revenue Agency) appears on this motion and does not oppose the relief sought.

66. I am also satisfied that the proposed Releases are appropriate in this case. The rationale and basis for those releases, including both the scope of the releases and the proposed Released Parties, were extensively addressed in the Fourth Report, the submissions of the Monitor (both written and oral) and were the subject of extensive questions by the Court during the hearing of this motion.

67. The proposed Releases appropriately carve out claims not permitted to be released pursuant to section 5.1(2) of the CCAA. The proposed Releases are consistent with the scope and nature of releases granted by CCAA courts in other cases, and in my view the proposed Releases here satisfy the factors set out in *Lydian International Limited (Re)*, 2020 ONSC 4006, as subsequently considered by the Court in *Harte Gold* (See paras. 178-9).

68. The *Lydian* factors include whether the parties to be released were necessary and essential to the restructuring; whether the claims to be released were rationally connected to the purpose of the plan and necessary for it; whether the plan could succeed without them; whether the parties being released were contributing to the plan; and whether the releases benefit the debtors as well as the creditors generally.

69. For all of the above reasons, I am satisfied that these factors are met here. The proposed Released Parties have been important to the proceedings including but not limited to the conduct of the SISP and negotiation and implementation of the Transaction. The benefits to stakeholders are fully set out in the Third Report (in respect of the SISP) and in the Fourth Report (in respect of the Transaction). I also accept the submission that Macquarie had significant contractual indemnifications pursuant to the Participation Agreement which it is giving up as part of the consideration for the Transaction. Macquarie, as well as Hut 8 are not new to this proceeding or to the Validus Entities as the Purchasers, but rather had significant pre-existing relationships with those parties with the result that there is a basis for a rational connection to the relief being sought all of which is accretive to the Validus Entities continuing as going concerns.

70. The scope of the proposed Releases is reasonable, particularly given by the significant opposition throughout this proceeding from the Validus Entities (although recognizing that those Entities neither appeared on this motion in person or represented by counsel who has been involved to date in this proceeding and nor do they oppose any of the relief sought today), and recognizing the incomplete state of the books and records of the Validus Entities. The Releases assist in completing, in a cost-effective and efficient way (without the necessity of, for example, a directors and officers claims process), the administration of the estate.

71. The activities of the Receiver and Monitor respectively, as set out in the Third and Fourth Reports, are appropriate, consistent with the respective mandates of each Court Officer, and are approved. Similarly, the fees and disbursements of the Receiver, the Monitor, and their counsel, are appropriate, fully substantiated by the fee affidavits filed, and are appropriate.

72. Finally, the stay extension to February 29, 2024 is appropriate. The cash flow forecasts, filed, reflect that there should be sufficient liquidity to fund operations through that proposed stay extension period. The extension is approved.

73. For all of the above reasons, the relief sought is approved.

74. Orders to go (vesting order and ancillary order) in the form signed by me today. These orders are effective immediately and without the necessity of issuing and entering.

75. Counsel for the Power Workers Union has requested that this Endorsement make clear the effect of the vesting order in respect of issues of particular importance to the members of that union, and I agree that such is appropriate in this case. The Monitor consents and no party opposes.

76. Accordingly, nothing in the vesting order, including for greater certainty the Release and Exculpation set out in paragraphs 29, 30 and 31 thereof, shall: (i) negatively affect or alter the rights of any of the Power Workers' Union, Canadian Union of Public Employees, Local 1000, C.L.C (the “Union”), Atlantic Power Services Canada LP (“Atlantic”), SNS Power Corp. (“SNS”), Validus Power Corp. (“VPC”), Kap Power Corp. (“Kap”), and Bay Power Corp. (“Bay”) (together with the Union, each a “Party”) in the Amended Application Under Section 69 and/or Subsection 1(4) of the Labour Relations Act, 1995 currently pending before the Ontario Labour Relations Board (“OLRB”) having case reference No. 1670-21-R (Power Workers’ Union, Canadian Union of Public Employees, Local 1000, C.L.C v. Atlantic Power Services Canada LP, SNS Power Corp., Validus Power Corp., Kap Power Corp., and Bay Power Corp.) (the “69/1(4) Application”) or in the grievance dated November 28, 2022 filed by the Union against Atlantic, SNS, VPC, Kap, and Bay (the “Grievance”); (ii) prejudice the position of any Party in the 69/1(4) Application and/or the Grievance; (iii) prejudice the right, if any, of the Union to amend the 69/1(4) Application and/or the Grievance to protect their collective agreement and/or bargaining rights; or (iv) prevent any Party from seeking any relief from the OLRB or Grievance arbitrator that can be granted in any of the foregoing.

Osborne J.

Court File No. CV-23-00705215-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	THURSDAY, THE 4th
	)	
JUSTICE OSBORNE	)	DAY OF JANUARY, 2024

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT INVOLVING VALIDUS POWER CORP., IROQUOIS FALLS POWER CORP., BAY POWER CORP., KAP POWER CORP., VALIDUS HOSTING INC. AND KINGSTON COGEN GP INC.

APPROVAL AND VESTING ORDER

THIS MOTION, made by KSV Restructuring Inc. ("**KSV**"), in its capacity as monitor (in such capacity, the "**Monitor**") of Validus Power Corp. ("**Validus Parent**"), Iroquois Falls Power Corp. ("**IFPC**"), Bay Power Corp. ("**Bay Power**"), Kap Power Corp. ("**Kap Power**"), Validus Hosting Inc. ("**Validus Hosting**"), Kingston Cogen Limited Partnership ("**Kingston LP**") and Kingston Cogen GP Inc. ("**Kingston GP**", and collectively with each of the foregoing entities, the "**Vendors**"), for an Order, among other things, at the time and in the manner set out herein:

(a) approving: (i) the acceptance and execution by the Vendors, each by KSV in its capacity as the Monitor, of the Transaction Agreement (as amended and restated, and as may be further amended from time to time, the "**Transaction Agreement**", and the acceptance and execution by the Vendors thereof, each by KSV in its capacity as the Monitor, the "**Vendors' Acceptance**") that was submitted by Macquarie Equipment Finance Ltd. ("**MEFL**") and Far North Power Corp. (the "**Assignee**") along with the offer letter delivered by MEFL and the Assignee to the Monitor on October 16, 2023 (the "**Offer Letter**"); and (ii) the consummation of the transactions contemplated in the Transaction Agreement (collectively, the

"**Transactions**"), including the Implementation Steps, upon the satisfaction of the Offer Conditions (as defined in the terms and conditions set forth in Schedule "B" to the Offer Letter (as amended and restated, and as may be further amended from time to time, the "**Terms and Conditions**");

(b) adding 1000745924 Ontario Inc. ("**Residualco**") as a Debtor Company (as defined in the Initial Order of this Court dated August 29, 2023 (the "**Initial Order**")) to these CCAA proceedings and as a Debtor (as defined in the Appointment Order of this Court dated August 10, 2023 (the "**Appointment Order**") issued in the receivership proceedings in Court File No.: CV-23-00703754-00CL (the "**Receivership Proceedings**")), effective as of the issuance of this Order;

(c) vesting in and to Residualco, as and to the extent applicable, absolutely and exclusively, all of the right, title and interest of, and all liabilities and obligations of, IFPC, Bay Power, Kap Power, Validus Hosting, Kingston LP and Kingston GP (collectively, the "**Purchased Entities**") in and to the Excluded Assets, the Excluded Contracts and the Excluded Liabilities, as applicable;

(d) discharging the Claims (as defined herein) and Encumbrances (as defined herein) against the Purchased Entities and the Retained Assets (as defined herein);

(e) authorizing and directing the Vendors, by KSV in its capacity as the Monitor, to issue the IFPC Interests, and vesting all of the right, title and interest in and to the IFPC Interests absolutely and exclusively in and to the Assignee, as nominee and designated assignee of MEFL, free and clear of any Claims and Encumbrances;

(f) vesting all of Validus Parent's right, title and interest in and to the Bay Power Interests, the Kap Power Interests, the Kingston LP Interests and the Kingston GP Interests absolutely and exclusively in and to the Assignee, as nominee and designated assignee of MEFL, free and clear of any Claims and Encumbrances;

(g) vesting all of Validus Parent's right, title and interest in and to the Purchased Validus Parent Assets absolutely and exclusively in and to the Assignee, free and clear of any Claims and Encumbrances;

(h) authorizing and directing the Vendors, by KSV in its capacity as the Monitor, to issue the IFPC Note 1, the IFPC Note 2 and the IFPC Note 3, and vesting: (i) all of the right, title and interest in and to the IFPC Note 1 and the IFPC Note 3 in and to MEFL, free and clear of any Claims and Encumbrances; and (ii) all of the right, title and interest in and to the IFPC Note 2 absolutely and exclusively in and to the Assignee, as nominee and designated assignee of MEFL, free and clear of any Claims and Encumbrances;

(i) redeeming, terminating and cancelling the IFPC Legacy Shares and the other Subject Interests (as defined herein) for no consideration;

(j) granting the Priority Payments Indemnity Charge;

(k) confirming that all Continuing Contracts and Permits and Licenses to which any of the Validus Entities (other than Validus Parent) are a party at the Effective Time will be and shall remain in full force and effect upon and following the Effective Time;

(l) authorizing the Monitor to take all required steps to rectify the minute books of the Validus Entities including, without limitation, signing directors' and/or shareholders' resolutions on behalf of the Validus Entities;

(m) authorizing Ryan Chua (the "**First Director**") to act as the first director of Residualco and confirming that the First Director shall have no liability as a result of becoming the First Director save and except his own gross negligence or wilful misconduct; and

(n) granting certain related relief,

was heard this day by judicial video conference via Zoom in Toronto, Ontario.

ON READING the Monitor's Motion Record in respect of this motion, filed, the fourth report of the Monitor dated December 22, 2023 (the "**Fourth Report**") and the affidavit of Katie Parent sworn December 29, 2023, filed;

AND UPON hearing the submissions of counsel for the Monitor and for the Receiver, counsel for MEFL, counsel for the Assignee, and such other counsel who were present, no one

else appearing although duly served as appears from the affidavit of service of Katie Parent sworn December 22, 2023, filed, and the affidavits of service of Katie Parent sworn December 29, 2023, filed.

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that all capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Transaction Agreement.

APPROVAL AND VESTING

3. **THIS COURT ORDERS** that, without derogating in any way from the relief contained in the SISP Approval Order of this Court dated November 2, 2023 (the "**SISP Approval Order**"), the Transaction Agreement and the Transactions (including the Implementation Steps) are hereby approved and the acceptance and execution of the Transaction Agreement by the Vendors, each by KSV in its capacity as the Monitor, is hereby authorized and approved, with such minor amendments thereto as the Monitor, MEFL and the Assignee may deem necessary. The Vendors, each by KSV in its capacity as the Monitor, are hereby authorized and directed, upon the Vendors' Acceptance, to perform their respective obligations under the Transaction Agreement (including, for greater certainty, the Implementation Steps), including the issuance of the IFPC Interests, the IFPC Note 1, the IFPC Note 2 and the IFPC Note 3, and the redemption, termination and cancellation of the IFPC Legacy Shares, and to take such additional steps and execute such additional documents (including the Transaction Documents) as may be necessary or desirable for the completion of the Transactions.

4. **THIS COURT ORDERS** that this Order shall constitute the only authorization required by the Vendors, each by KSV in its capacity as the Monitor, to proceed with the Vendors' Acceptance and the Transactions and that no other approval shall be required in connection therewith.

5. **THIS COURT ORDERS** that, subject to the occurrence of the Effective Time, the following shall occur and shall be deemed to have occurred in the sequence and at the effective times set out in this paragraph:

(a) the transactions regarding Pre-Filing Intercompany Claims (as defined in the Implementation Steps) described in sections 3.2, 4.1 and 4.2 of the Implementation Steps shall, and shall be deemed to, be effected at the times set out therein;

(b) immediately prior to the Effective Time, all of the right, title and interest in and to the Excluded Assets of IFPC, Bay Power, Kap Power, Validus Hosting, Kingston LP and Kingston GP shall vest absolutely and exclusively in Residualco, and, in each case, all applicable Claims and Encumbrances shall continue to attach to such Excluded Assets with the same nature and priority as they had immediately prior to their transfer; provided that, for certainty, the Excluded Assets transferred hereby shall not include the Administrative Expense Closing Amount, which shall be paid to and held by the Monitor in accordance with paragraph 23 hereof;

(c) immediately prior to the Effective Time, all of the Excluded Contracts and the Excluded Liabilities (which, for certainty includes all debts, liabilities, obligations, indebtedness, contracts, leases, agreements, and undertakings of any kind or nature whatsoever, whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) of IFPC, Bay Power, Kap Power, Validus Hosting, Kingston LP and Kingston GP (in each case, other than the liabilities of the Purchased Entities to be retained or assumed by the Purchased Entities at the Effective Time in accordance with the Transaction Agreement (such liabilities of the Purchased Entities, together with those liabilities of Validus Parent to be assumed by the Assignee in accordance with the Transaction Agreement, collectively, the "**Assumed Liabilities**") shall be transferred to, assumed by and vest absolutely and exclusively in Residualco, and shall no longer be obligations of any of the Purchased Entities, and the Purchased Entities and all of the Purchased Entities' remaining assets, permits, licenses, undertakings and properties of every nature and kind whatsoever and wherever situate (collectively,

the "**Retained Assets**") shall be and are hereby forever released and discharged from all of the Excluded Contracts and the Excluded Liabilities, and all related Claims and Encumbrances, other than the permitted encumbrances, easements and restrictive covenants affecting or relating to the Retained Assets or the Purchased Assets listed on Schedule "B" (the "**Permitted Encumbrances**"), shall be expunged and discharged as against the Retained Assets and the Purchased Assets;

(d) at the Effective Time, concurrently with the acceptance and execution by the Vendors, each by KSV in its capacity as the Monitor, of the Transaction Agreement, each of the following actions described under this paragraph 5(d) and those in paragraphs 5(e) and 5(f) shall occur concurrently: (i) the IFPC Interests shall be issued as fully paid and non-assessable shares; and (ii) all right, title and interest in and to the IFPC Interests and the IFPC Note 2, and all of Validus Parent's right, title and interest in and to the Bay Power Interests, the Kap Power Interests, the Kingston LP Interests, the Kingston GP Interests and the Purchased Validus Parent Assets shall vest absolutely and exclusively in the Assignee, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), pledges, assignments, hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, preferential arrangements of any kind or nature whatsoever or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (x) any encumbrances or charges created by the Appointment Order, the SISP Approval Order, or any other Order of this Court; and (y) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the Permitted Encumbrances) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Retained Assets or the Purchased Assets (other than the IFPC Note 3) are hereby expunged and discharged as against the Retained Assets and the

Purchased Assets, as applicable (other than the IFPC Note 1 and the IFPC Note 3, which are dealt with in accordance with paragraph 5(e));

(e) at the Effective Time, concurrently with the acceptance and execution by the Vendors, each by KSV in its capacity as the Monitor, of the Transaction Agreement, each of the following actions described under this paragraph 5(e) and those in paragraphs 5(d) and 5(f) shall occur concurrently: all right, title and interest in and to the IFPC Note 1 and the IFPC Note 3 shall vest absolutely and exclusively in MEFL free and clear of and from any and all Claims and Encumbrances and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the IFPC Note 1 and the IFPC Note 3 are hereby expunged and discharged as against the IFPC Note 1 and the IFPC Note 3;

(f) at the Effective Time, concurrently with the acceptance and execution by the Vendors, each by KSV in its capacity as the Monitor, of the Transaction Agreement, each of the following actions described under this paragraph 5(f) and those in paragraphs 5(d) and 5(e) shall occur concurrently: all right, title and interest in and to the Leased Property shall vest absolutely and exclusively in IFPC, free and clear of and from any and all Claims and Encumbrances and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Leased Property are hereby expunged and discharged as against the Leased Property;

(g) upon the assignment and issuance of the Purchased Assets to MEFL and/or the Assignee, the Vendors shall be and are hereby forever released and discharged from all liabilities and obligations flowing from, or in respect of, the Participation Agreement Documents including all amounts and obligations owing by the Vendors in connection therewith, and all related Claims and Encumbrances are hereby expunged and discharged including any rights of subrogation of Validus Parent in respect of any of the payment or transfers under the Transaction Agreement;

(h) immediately following the Effective Time, all equity interests of the Purchased Entities existing prior to the Effective Time (for greater certainty, including the

IFPC Legacy Shares), but excluding the IFPC Interests, the Bay Power Interests, the Kap Power Interests, the Kingston LP Interests, the Kingston GP Interests, the general partner unit(s) that Kingston GP holds in the capital of Kingston LP (the "**GP Units**") and the Validus Hosting Interests, as well as all options, conversion privileges, equity-based awards, warrants, securities, debentures, loans, notes or other rights, agreements or commitments of any character whatsoever that are held by any Person (as defined herein) and are convertible or exchangeable for any securities of the Purchased Entities, or that require the issuance, sale or transfer by the Purchased Entities of any shares or other securities of the Purchased Entities, or otherwise evidencing a right to acquire the IFPC Interests, the Bay Power Interests, the Kap Power Interests, the Kingston LP Interests, the Kingston GP Interests, the Validus Hosting Interests and/or the share or unit capital of the Purchased Entities, as applicable, or otherwise relating thereto (but excluding, for greater certainty, the IFPC Interests, the Bay Power Interests, the Kap Power Interests, the Kingston LP Interests, the Kingston GP Interests, the GP Units, the Validus Hosting Interests, the IFPC Note 1, the IFPC Note 2 and the IFPC Note 3) (collectively, the "**Subject Interests**"), shall be deemed redeemed, terminated and cancelled; and

(i) the Purchased Entities shall and shall be deemed to cease to be Debtor Companies in these CCAA proceedings and Debtors in the Receivership Proceedings, and the Purchased Entities shall be deemed to be released from the purview of the Appointment Order, the Initial Order and all other Orders of this Court granted in respect of these CCAA proceedings and the Receivership Proceedings, save and except for this Order, the provisions of which (as they relate to the Purchased Entities) shall continue to apply in all respects.

6. **THIS COURT ORDERS** that, for greater certainty: (i) each of the steps provided for in paragraphs 5(b) and (c) are deemed to have occurred contemporaneously with each other and immediately prior to the occurrence of the Effective Time; and (ii) each of the steps provided for in paragraphs 5(d), 5(e), and 5(f) are deemed to have occurred contemporaneously with each other and at the Effective Time.

7. **THIS COURT ORDERS** that, at or after the Effective Time, MEFL is hereby authorized to assign to the Assignee, and the Assignee is hereby authorized to assume, all of MEFL's right, title and interest in and to the Receiver's Certificates that the Receiver has, as of the Effective Time, issued pursuant to the Appointment Order; for greater certainty, upon such assignment and assumption, the Assignee shall enjoy the benefit of the Receiver's Borrowings Charge (as defined in the Appointment Order) as security for the payment of the monies borrowed pursuant to such Receiver's Certificates, together with interest, fees and charges thereon, in accordance with the Appointment Order.

8. **THIS COURT ORDERS AND DIRECTS** that upon the registration in the Land Registry Offices for the Land Titles Divisions of Cochrane (No. 6), Lennox (No. 29) and Nipissing (No. 36) (collectively, the "**LRO**") of an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario), together with the Monitor's Certificate, the LRO is hereby directed to delete and expunge from title to the applicable Property (as defined in the Fourth Report) all of the Claims listed in Schedule "C" hereto pertaining to the applicable Property (as defined in the Fourth Report).

9. **THIS COURT ORDERS AND DIRECTS** the Monitor to file with this Court a copy of the Monitor's Certificate forthwith after delivery to MEFL and the Assignee thereof in connection with the Transactions as well as a copy of the final form of the Transaction Agreement and all related schedules.

10. **THIS COURT ORDERS** that the Monitor may rely on written notice from MEFL and/or the Assignee regarding the satisfaction or waiver of conditions to closing under the Transaction Agreement and shall have no liability with respect to delivery of the Monitor's Certificate.

11. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, from and after the Effective Time, subject to the retention or assumption of the Priority Payments of the Purchased Entities by the Purchased Entities or the Priority Payments of Validus Parent by the Assignee, as the case may be, and the satisfaction of the Administrative Expense Closing Amount in accordance with the Transaction Agreement and paragraph 23 hereof, all Claims and Encumbrances released, expunged and discharged pursuant to paragraph 5 hereof, including as against the Purchased Entities, the Retained Assets and the Purchased Assets, shall

attach to the Excluded Assets with the same nature and priority as they had immediately prior to the Transactions, as if the Transactions had not occurred.

12. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* (Canada), the Vendors, by KSV in its capacity as the Monitor, are authorized, permitted and directed to, at the Effective Time, disclose to MEFL and/or the Assignee all human resources and payroll information in the Vendors' records pertaining to past and current employees of the Vendors. MEFL and the Assignee shall maintain and protect the privacy of such information in accordance with applicable law and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Vendors prior to the Effective Time.

13. **THIS COURT ORDERS** that, at the Effective Time and without limiting the provisions of paragraph 5 hereof, MEFL, the Assignee and the Purchased Entities shall be deemed released from any and all claims, liabilities (direct, indirect, absolute or contingent) or obligations with respect to any Taxes or any part thereof (including penalties and interest thereon) of, or that relate to, the Vendors (provided, as it relates to the Purchased Entities, such release shall not: (a) effect a transfer or assignment to Residualco of Taxes where such transfer or assignment of such particular Taxes is prohibited by statute, but MEFL and the Assignee shall still be released therefrom; (b) apply to Taxes in respect of the business and operations conducted by the Purchased Entities concurrent with or after the Effective Time and, for greater certainty, shall not restrict or affect in any manner any right, title and interest of the Purchased Entities in and to any amounts that may become due and payable thereto from any governmental authority on or after the Effective Time as a result of Taxes paid concurrent with or after the Effective Time, notwithstanding that they relate to supplies arising prior to the Effective Time for which payment was made concurrent with or after the Effective Time and not prior thereto; or (c) apply to Taxes expressly assumed as Assumed Liabilities pursuant to the Transaction Agreement), including, without limiting the generality of the foregoing, all Taxes that could be assessed against MEFL, the Assignee or the Purchased Entities (including their affiliates or any predecessor corporations), or for which they could otherwise have joint or several liability, in respect of Taxes of Validus Parent or the Purchased Entities. For greater certainty, nothing in this paragraph shall: (i) release or discharge any Claims or Encumbrances against Residualco with respect to Taxes that are vested in or

assumed by Residualco; or (ii) affect any tax attributes of the Purchased Entities, which shall be retained by the Purchased Entities and may be used to the maximum extent possible as permitted by Applicable Laws to reduce the Purchased Entities' taxable income.

14. **THIS COURT ORDERS** that all Continuing Contracts and Permits and Licenses (as defined in the Terms and Conditions) to which any of the Purchased Entities are a party at the Effective Time will be and shall remain in full force and effect upon and following the Effective Time, except to the extent expressly contemplated by the Transaction Agreement and no individual, firm, corporation, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") who is a party to any such Continuing Contracts or Permits and Licenses may, as applicable, accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of set-off, dilution or other remedy) or make any demand under or in respect of any such arrangement and no automatic termination will have any validity or effect, by reason of:

(a) any event that occurred on or prior to the Effective Time and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of any of the Vendors);

(b) the insolvency of any Vendor or the fact that the Receiver was appointed as receiver in respect of the Vendors or the commencement of these CCAA proceedings;

(c) any compromises, releases, discharges, cancellations, transactions, arrangements, reorganizations or other steps taken or effected pursuant to the Transaction Agreement, the Transactions or the provisions of this Order, any other Order of this Court in CCAA proceedings or any Order of this Court in the Receivership Proceedings; or

(d) any transfer or assignment, or any change of control of the Purchased Entities arising from the implementation of the Transaction Agreement, the Transactions or the provisions of this Order.

15. **THIS COURT ORDERS**, for greater certainty, that: (a) nothing in paragraph 14 hereof shall waive, compromise or discharge any obligations of the Purchased Entities in respect of any Assumed Liabilities, including, for greater certainty, the Priority Payments of the Purchased Entities; (b) the designation of any Claim as an Assumed Liability is without prejudice to the Purchased Entities' and the Assignee's right to dispute the existence, validity or quantum of any such Assumed Liability; and (c) nothing in this Order or the Transaction Agreement shall affect or waive the Purchased Entities' or the Assignee's rights and defences, both legal and equitable, with respect to any Assumed Liability, including, but not limited to, all rights with respect to entitlements to set-offs or recoupments against such Assumed Liability.

16. **THIS COURT ORDERS** that, from and after the Effective Time, all Persons shall be deemed to have waived any and all defaults of any Vendor then existing or previously committed by any Vendor, or caused by any Vendor, directly or indirectly, or noncompliance with any covenant, warranty, representation, undertaking, positive or negative pledge, term, provision, condition or obligation, expressed or implied, in any Continuing Contract or a Permit and License, existing between such Person and any Purchased Entity directly or indirectly from the appointment of the Receiver as receiver in the Receivership Proceedings, or the commencement of these CCAA proceedings, in respect of the Vendors and the implementation of the Transactions, including without limitation any of the matters or events listed in paragraph 14 hereof, and any and all notices of default, notice of non-compliance or similar notice, and demands for payment or any step or proceeding taken or commenced in connection therewith under a Continuing Contract or a Permit and License shall be deemed to have been rescinded and of no further force or effect; provided that, nothing herein shall be deemed to excuse MEFL, the Assignee or the Vendors from performing their obligations under, or be a waiver of defaults by MEFL, the Assignee or the Vendors under, the Transaction Agreement and the related agreements and documents, or affect the validity of the Implementation Steps.

17. **THIS COURT ORDERS** that, from and after the Effective Time, any and all Persons shall be and are hereby forever barred, estopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, whether directly, derivatively or otherwise, and including without limitation, administrative hearings and orders, declarations and assessment, commenced, taken or proceeded with or that may be commenced,

taken or proceeded with against MEFL, the Assignee or the Purchased Entities relating in any way to or in respect of any Excluded Assets, Excluded Contracts or Excluded Liabilities and any other claims, obligations and other matters which are waived, released, expunged or discharged pursuant to this Order; provided that, nothing herein shall affect the validity of the Implementation Steps.

18. **THIS COURT ORDERS** that, from and after the Effective Time:

(a) the nature of the Assumed Liabilities assumed by the Assignee or retained by the Purchased Entities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of the Transactions or this Order;

(b) the nature of the Excluded Liabilities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to Residualco;

(c) any Person that prior to the Effective Time had a valid right or claim against the Purchased Entities under or in respect of any Excluded Contract or Excluded Liability (each an "**Excluded Liability Claim**") shall no longer have such right or claim against the Purchased Entities but will have an equivalent Excluded Liability Claim against the Residualco in respect of the Excluded Contract and Excluded Liability from and after the Effective Time in its place and stead, and nothing in this Order limits, lessens or extinguishes the Excluded Liability Claim of any Person as against Residualco;

(d) the Excluded Liability Claim of any Person against Residualco following the Effective Time shall have the same rights, priority and entitlement as such Excluded Liability Claim had against the applicable Purchased Entity prior to the Effective Time; and

(e) the Receiver's Charge (as defined in the Appointment Order) and the Receiver's Borrowings Charge shall continue to apply to the Property (as defined in the Fourth Report) of Validus Parent and Residualco in accordance with the provisions of the Appointment Order, the Initial Order and paragraph 7 herein.

19. **THIS COURT ORDERS** that following the Effective Date, the Assignee may seek a further order, on notice to the Monitor and any affected party, declaring that any contract of a Purchased Entity that is not identified as a Continuing Contract is an Excluded Contract and that the provisions of paragraphs 5(b), 17 and 18 apply to such contract.

20. **THIS COURT ORDERS** that, effective as of the issuance of this Order, Residualco shall be added as a Debtor Company in these CCAA proceedings and all references in any Order of this Court in respect of these CCAA proceedings to: (i) a "Debtor Company" or the "Debtor Companies" shall refer to and include Residualco, *mutatis mutandis*, and (ii) "Property" shall be interpreted to mean the current and future assets, licenses, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, of Residualco, including the Administrative Expense Closing Amount and the Priority Payments Closing Amount (the "**Residualco Property**").

21. **THIS COURT ORDERS** that, effective as of the issuance of this Order, Residualco shall be added as a Debtor in the Receivership Proceedings and all references in any Order of this Court in respect of the Receivership Proceedings to: (i) a "Debtor" or the "Debtors" shall refer to and include Residualco, *mutatis mutandis*, and (ii) "Property" shall be interpreted to mean the Residualco Property, and, for greater certainty, any remaining charges, shall constitute charges on the Residualco Property.

22. **THIS COURT ORDERS** that, upon the occurrence of the Effective Time, the Bid Protections Charge (as defined in the SISP Approval Order) shall be and is hereby terminated, released and discharged.

23. **THIS COURT ORDERS** that the Administrative Expense Closing Amount held by the Monitor shall be subject to the Receiver's Charge and the Receiver's Borrowings Charge, and any remaining portion of the Administrative Expense Amount after payment of the Administrative Expense Costs (as defined in the Transaction Agreement) shall be paid to the Assignee in accordance with the terms of the Transaction Agreement.

CHARGES

24. **THIS COURT ORDERS** that the Monitor shall be entitled to the benefit of and is hereby granted a charge (the "**Priority Payments Indemnity Charge**") on the Bay Power Interests, the Kap Power Interests and the IFPC Interests (but excluding for greater certainty the Kingston LP Interests and the Kingston GP Interests) as security in respect of the Priority Payments Indemnity (as defined in the Transaction Agreement) in accordance with the terms of the Transaction Agreement.

25. **THIS COURT ORDERS** that the Priority Payments Indemnity Charge shall terminate automatically upon the later of (i) the payment in satisfaction of all of the Priority Payments of Validus Parent in excess of the Priority Payments Closing Amount, as determined by Canada Revenue Agency (if any), or (ii) receipt of confirmation from Canada Revenue Agency by the Assignee, on notice to the Monitor, that no Priority Payments of Validus Parent in excess of the Priority Payment Closing Amount are owing.

POST-CLOSING RESERVE

26. **THIS COURT ORDERS** that the Monitor is hereby authorized and directed to establish a cash reserve (the "**Post-Closing Reserve**") that consists of Administrative Expense Closing Amount, which shall be held in a segregated account and shall be used to pay costs and fees reasonably incurred by the Monitor following the Effective Time in connection with completing these CCAA proceedings, the Receivership Proceedings and any BIA proceedings commenced in respect of Residualco, including payment of the Administrative Expense Costs (collectively, the "**Post-Closing Costs**").

27. **THIS COURT ORDERS** that the Monitor is hereby authorized to pay any Post-Closing Costs as it, acting reasonably, deems necessary, appropriate or desirable.

28. **THIS COURT ORDERS** that the Monitor is hereby authorized and directed to return to the Assignee any balance remaining in the Post-Closing Reserve that is funded by the Assignee pursuant to Section 6.4 of the Transaction Agreement following payment in satisfaction of all reasonably incurred Post-Closing Costs.

RELEASES AND OTHER PROTECTIONS

29. **THIS COURT ORDERS** that, effective as of the Effective Time: (a) KSV, in its personal capacity and in its capacities both as the Receiver in the Receivership Proceedings and as the Monitor in these CCAA proceedings, and its legal counsel; (b) MEFL, the Assignee and their respective current and former directors, officers, employees, legal counsel, representatives and advisors; and (c) the First Director (in such capacities, collectively, the "**Released Parties**") shall be deemed to be forever irrevocably released by the Releasing Parties (as defined herein) and discharged from any and all present and future claims (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the Effective Time or undertaken or completed in connection with or pursuant to the terms of this Order in respect of, relating to, or arising out of: (i) the Vendors, the business, operations, assets, property and affairs of the Vendors wherever or however conducted or governed, the administration and/or management of the Vendors and/or these CCAA proceedings or the Receivership Proceedings; or (ii) the Offer Letter, the Transaction Agreement, the Transaction Documents and/or any agreement, document, instrument, matter or transaction involving the Vendors arising in connection with or pursuant to any of the foregoing, and/or the consummation of the Transactions (collectively, subject to the excluded matters below, the "**Released Claims**"), which Released Claims shall be deemed to be fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties; provided that, nothing in this paragraph shall waive, discharge, release, cancel or bar: (x) any claim that is not permitted to be released pursuant to section 5.1(2) of the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") or claim with respect to any act or omission that is determined by a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence; (y) any obligations of any of the Released Parties under or in connection with the Offer Letter, the Transaction Agreement, the Transaction Documents and/or any agreement, document, instrument, matter or transaction involving the Vendors arising

in connection with or pursuant to any of the foregoing; or (z) any obligations under or related to any agreement: (i) to which MEFL and the Assignee are both party (whether or not any of their respective affiliates are also party thereto) entered into before the Effective Time; or (ii) to which MEFL, the Assignee, the Purchased Entities or any of their respective affiliates (in any combination thereof) are party entered into on or after the Effective Time (collectively, the "**Assignee Arrangements**"). "**Releasing Parties**" means any and all Persons, and their current and former affiliates' current and former members, directors, managers, officers, investment committee members, special committee members, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, assigns, participants, subsidiaries, affiliates, partners, limited partners, general partners, affiliated investment funds or investment vehicles, managed accounts or funds, and each of their respective current and former members, equity holders, officers, directors, managers, principals, members, management companies, advisory board members, investment fund advisors or managers, employees, agents, trustees, investment managers, financial advisors, partners, legal counsel, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such.

30. **THIS COURT ORDERS** that, without affecting or limiting the release set forth in paragraph 29 hereof, effective as of the Effective Time, none of: (a) KSV, in its capacities both as the Receiver and as the Monitor, and its legal counsel; (b) MEFL, the Assignee and their respective current and former directors, officers, employees, legal counsel, representatives and advisors; and (c) the First Director (in such capacities, collectively, the "**Exculpated Parties**"), shall have or incur, and each Exculpated Party is released and exculpated from, any Causes of Action (as defined herein) against such Exculpated Party for any act or omission in respect of, relating to, or arising out of the Offer Letter, the Transaction Agreement, the Transaction Documents and/or the consummation of the Transactions, these CCAA proceedings, the Receivership Proceedings, the formulation, preparation, dissemination, negotiation, filing or consummation of the Offer Letter, the Transaction Agreement, the Transaction Documents and all related agreements and documents, any transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Transactions, the pursuit of approval and consummation of the Transactions and/or the transfer of assets and liabilities pursuant to this Order, except for: (x) Causes of Action related to any act or omission that is determined by a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence; and (y) the

Assignee Arrangements. "**Causes of Action**" means any action, claim, cross-claim, third-party claim, damage, judgment, cause of action, controversy, demand, right, action, suit, obligation, liability, debt, account, defense, offset, power, privilege, license, lien, indemnity, interest, guaranty, or franchise of any kind or character whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, contingent or non-contingent, liquidated or unliquidated, disputed or undisputed, secured or unsecured, assertable directly or derivatively, matured or unmatured, suspected or unsuspected, in contract or in tort, at law or in equity, or pursuant to any other theory of law or otherwise.

31. **THIS COURT ORDERS** that all Persons are permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Time, with respect to any and all claims or Cause of Actions released pursuant to this Order (including but not limited to the Released Claims), from: (a) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any of the Released Parties; (b) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against any of the Released Parties or their respective property; (c) commencing, conducting, continuing or making in any manner, directly or indirectly, any action, suit, claim, demand or other proceeding of any nature or kind whatsoever (including any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes a claim or might reasonably be expected to make a claim, in any manner or forum, including by way of contribution or indemnity or other relief, against one or more of the Released Parties; (d) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any Encumbrance of any kind against the Released Parties or their respective property; or (e) taking any actions to interfere with the consummation of the Transactions; and any such proceedings will be deemed to have no further effect against the Released Parties and will be released, discharged or vacated without cost.

32. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these CCAA proceedings or the Receivership Proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the BIA in respect of any of the Vendors or Residualco, and any bankruptcy order issued pursuant to any such applications; or

(c) any assignment in bankruptcy made in respect of any of the Vendors or Residualco,

the Offer Letter, the Transaction Agreement, the Transaction Documents, the consummation of the Transactions (including without limitation the transfer and vesting of the Excluded Assets, the Excluded Contracts and the Excluded Liabilities in and to Residualco, the transfer and vesting of the Purchased Assets in and to the Assignee or MEFL, as applicable, the transfer of title in and to the Leased Property from MEFL to IFPC, the assumption or retention of the Priority Payments of Validus Parent by the Assignee or the Priority Payments of the Purchased Entities by the Purchased Entities, as the case may be, and any payments by or to MEFL, the Assignee, the Receiver, the Monitor or the Vendors authorized herein or pursuant to the Offer Letter, the Transaction Agreement and/or the Transaction Documents) shall be binding on any trustee in bankruptcy that may be appointed in respect of Validus Parent or Residualco, and shall not be void or voidable by creditors of Validus Parent or Residualco, as applicable, nor shall they constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the CCAA, the BIA or any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

33. **THIS COURT ORDERS** that nothing in this Order, including the release and discharge of the Purchased Entities from the purview of these CCAA proceedings or the Receivership Proceedings pursuant to paragraph 5(i) hereof and the addition of Residualco as a Debtor Company in these CCAA proceedings and as a respondent in the Receivership Proceedings, shall affect, vary, derogate from, limit or amend, and KSV shall continue to have the benefit of, any and all rights and approvals and protections in favour of the Receiver and the Monitor at law or pursuant to the BIA, the Appointment Order, the Initial Order, this Order, any other Orders in these CCAA proceedings or the Receivership Proceedings or otherwise, including all approvals, protections and stays of proceedings in favour of KSV in its capacity as Receiver and in its capacity as the Monitor, as applicable, all of which are expressly continued and confirmed.

EMPLOYEES

34. **THIS COURT ORDERS** that Residualco shall be deemed to be the former employer of any former employees of the corresponding Purchased Entities who were terminated between the date of the Appointment Order and the Effective Time, if any, whose claims against the Purchased Entities are transferred to Residualco pursuant to this Order, provided that such deeming: (i) shall be effective immediately after the Effective Time; and (ii) will solely be for the purposes of termination pay and severance pay pursuant to the *Wage Earners Protection Program*.

ADDITIONAL MATTERS

35. **THIS COURT ORDERS** that in addition to the powers and authorities afforded to the Monitor pursuant to the CCAA, the Initial Order and all other orders in these proceedings (the "**CCAA Orders**"), the Monitor is hereby authorized, but not directed, to take any steps reasonably required to rectify the minute books of the Validus Entities including, without limitation, signing directors' resolutions and/or shareholders' resolutions on behalf of the Validus Entities and that in doing so, and without limiting the protections afforded to the Monitor pursuant to the CCAA and other CCAA Orders, the Monitor shall not incur any liability, save and except any liability or obligation incurred as a result of gross negligence or wilful misconduct on its part.

36. **THIS COURT ORDERS** that Ryan Chua (the **"First Director**") is hereby authorized, *nunc pro tunc*, to act as a director and officer of Residualco and, in such capacity, is hereby authorized to take such steps and perform such tasks are necessary or desirable to facilitate the Transactions.

37. **THIS COURT ORDERS** that notwithstanding Section 119 of the *Business Corporations Act* (Ontario), the First Director shall be entitled to tender his resignation as a director and officer upon the appointment of the Receiver in respect of Residualco in the Receivership and the granting and issuance of this Order.

38. **THIS COURT ORDERS** that the First Director shall not incur any liability as a result of becoming a director or officer of Residualco, save and except any liability or obligation incurred as a result of gross negligence or wilful misconduct on his part.

GENERAL

39. **THIS COURT ORDERS** that, following the Effective Time, the Assignee shall be authorized to take all steps as may be necessary to effect the discharge of the Claims and Encumbrances (other than the Permitted Encumbrances) as against the Purchased Interests, the Purchased Entities, the Retained Assets and the remainder of the Purchased Assets.

40. **THIS COURT ORDERS** that the Monitor be and is hereby authorized to distribute the Priority Payments Closing Amount to such parties as may be entitled to payment to satisfy the Priority Payments of Validus Parent known at the Effective Time and, after such obligations are paid in full, such amounts as may be required to satisfy the Priority Payments of the Purchased Entities known at the Effective Time, in accordance with the Transaction Agreement.

41. **THIS COURT ORDERS** that, following the Effective Time, the style of cause of these CCAA proceedings shall be hereby amended by being deleted and replaced in its entirety by the following:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT INVOLVING VALIDUS POWER CORP. and <u>1000745924 ONTARIO INC.</u>

42. **THIS COURT ORDERS** that, following the Effective Time, the style of cause of the Receivership Proceedings shall be hereby amended by being deleted and replaced in its entirety by the following:

MACQUARIE EQUIPMENT FINANCE LIMITED

Applicant

- and -

VALIDUS POWER CORP. <u>and 1000745924 ONTARIO INC.</u>

Respondents

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

43. **THIS COURT ORDERS** that, following the Effective Time, the Appointment Order is amended by deleting Schedule "A" thereto in its entirety.

44. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

45. **THIS COURT ORDERS** that the Receiver and the Monitor shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada or elsewhere, for orders that aid and complement this Order. All courts and administrative bodies of all such jurisdictions are hereby respectfully requested to make such orders and to provide such assistance to the Receiver and/or the Monitor as may be deemed necessary or appropriate for that purpose.

46. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body, having jurisdiction in Canada or elsewhere, to give effect to this Order and to assist the Receiver, the Monitor and/or its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver and/or the Monitor, in each case as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver and/or the Monitor in any foreign proceeding, or to assist the Receiver and its agents in carrying out the terms of this Order.

47. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Prevailing Eastern Time on the date hereof without any need for entry and/or filing; provided that the transaction steps set out in paragraph 5 hereof shall be deemed to have occurred in the order set out therein.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

Court File No. CV-23-00705215-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VALIDUS POWER CORP., IROQUOIS FALLS POWER CORP., BAY POWER CORP., KAP POWER CORP., VALIDUS HOSTING INC. AND KINGSTON COGEN GP INC., EACH BY THEIR COURT APPOINTED RECEIVER AND MANAGER, KSV RESTRUCTURING INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

APPROVAL AND VESTING ORDER

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Lawyers for the Monitor

TAB 23

CITATION: Lydian International Limited (Re), 2020 ONSC 4006
COURT FILE NO.: CV-19-00633392-00CL
DATE: 2020-07-10

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Elizabeth Pillon*, *Maria Konyukhova*, *Sanja Sopic*, and *Nicholas Avis*, for the Applicants

D. J. Miller and *Rachel Bergino*, for Alvarez & Marsal Inc.

Robert Mason and *Virginie Gauthier*, for Osisko Bermuda Limited

Pamela Huff and *Chris Burr*, for Resource Capital Fund VI L.P.

David Bish and *Michael Pickersgill*, for Orion Capital Management

Alexander Steele, for Caterpillar Financial Services (UK) Limited

Bruce Darlington, for ING Bank N.V./Abs Svensk Exportkredit (publ)

John LeRoux, *Hasan Ciftehan*, *Mehmet Ali Ekingen and Atilla Bozkay*, each in their capacity as a Shareholders of Lydian International Limited

HEARD by ZOOM Hearing and DECIDED: **June 29, 2020**

REASONS RELEASED: **July 10, 2020**

ENDORSEMENT

[1] Lydian International Limited, Lydian Canada Ventures Corporation and Lydian U.K. Corporation Limited (the "Applicants") bring this motion for an order (the "Sanction and Implementation Order"), among other things:

a) declaring that the Meeting of Affected Creditors held on June 19, 2020 was duly convened and held, all in accordance with the Meeting Order;

b) sanctioning and approving the Applicants' Plan of Arrangement (the "Plan") as approved by a requisite majority of Affected Creditors at the Meeting, in accordance with the Plan Meeting Order (each as defined below), a copy of which is attached as Schedule "A" to the draft Sanction and Implementation Order; and

c) granting various other related relief (as more particularly outlined below).

[2] The Applicants submit that the Plan represents the culmination of the Applicants' restructuring efforts and allows for the resolution of these CCAA Proceedings. The Monitor and the majority of the Affected Creditors are supportive of the Plan and if sanctioned and implemented, the Plan will provide a path forward for Lydian Canada and Lydian UK as part of a privatized Restructured Lydian Group (as defined in the Plan) and ultimately lead to the termination of these CCAA Proceedings.

[3] Shortly after the conclusion of the hearing on June 29, 2020, which was conducted by Zoom, I granted the motion with reasons to follow.

[4] The facts with respect to this motion are more fully set out in the Affidavit of Edward A. Sellers sworn June 24, 2020 (the "Sellers Sanction Affidavit"), the Affidavit of Edward A. Sellers sworn June 15, 2020 (the "Sellers Meeting Affidavit") and the Affidavit of Mark Caiger sworn June 11, 2020 (the "BMO Affidavit"). Mr. Sellers and Mr. Caiger were not cross-examined. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Sellers Sanction Affidavit, the Sellers Meeting Affidavit, and the Plan. All references to currency in this factum are references to United States dollars, unless otherwise indicated.

Background

[5] The Applicants are three entities at the top of the Lydian Group. The Lydian Group owns a development-stage gold mine in south-central Armenia through its wholly owned non-applicant operating subsidiary Lydian Armenia. The Applicants contend that they have been unable to access their main operating asset, the Amulsar mine, since June 2018 due to blockades and the associated actions and inactions of the Government of Armenia ("GOA"), and as a result, this has prevented the Applicants from completing construction of the mine and generating revenue in the ordinary course.

[6] The Applicants further contend that the effects of the blockades, amongst other factors, caused the Applicants to seek protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). An Initial Order was granted on December 23, 2019. Alvarez & Marsal Canada Inc. was appointed as Monitor.

[7] In the two years since the blockades began, the Applicants contend that they have used their best efforts to resolve the factors that led to their insolvency, including engaging in negotiations with the GOA, defending their commercial rights and commencing legal proceedings in Armenia to attempt to remove the blockades but these efforts have yet to result in the Applicants re-gaining access to the Amulsar site.

[8] In early 2018, the Applicants retained BMO to canvass the market for potential refinancing or sale options. BMO has conducted multiple rounds of a sales process to market the Lydian Group's mining assets. BMO also ran a process to solicit interest in financing the Applicants' potential Treaty Arbitration. These efforts have not yet resulted in a transaction capable of satisfying the claims of the Applicants' secured lenders.

[9] Since the blockades began, the Senior Lenders have been funding the Applicants' efforts to find a solution to the situation caused by the blockades. The Senior Lenders provided additional financial support to the Lydian Group totalling in excess of $43 million.

[10] As of March 31, 2020, the Lydian Group owed its secured lenders more than $406.8 million.

[11] According to the Applicants, the secured lenders are no longer willing to support the Applicants' efforts to monetize their assets. The Equipment Financiers CAT and ING have taken enforcement steps and Ameriabank has issued preliminary notice of enforcement.

[12] Further, the Applicants point out that the liquidity made available to the Applicants since April 30, 2020 has been conditioned on the Applicants: (i) proposing a restructuring that would be equivalent to the Senior Lenders enforcing their security over the shares of Lydian Canada; and (ii) meeting a deadline to exit the CCAA Proceedings imposed by a majority of the Applicants' Senior Lenders, or further enforcement steps would be taken.

[13] The Applicants submit that the Plan represents the most efficient mechanism to effect an orderly transition of the Lydian Group's affairs. The Applicants contend that the Plan minimizes adverse collateral impacts on Lydian Armenia, provides for winding down the proceedings before this court and the Jersey Court and avoids uncoordinated enforcement steps being taken on the Lydian Group's property to the detriment of the Lydian Group's stakeholders generally.

The Plan

[14] The Plan recognizes and continues the priority position of the Senior Lenders in the Restructured Lydian Group. The Senior Lenders make up the only class eligible to vote on the Plan and receive a distribution thereunder.

[15] According to the Applicants, secured creditors and unsecured creditors with claims at or below Restructured Lydian will continue to maintain their claims in the Restructured Lydian Group, including Lydian Armenia, with the same priority as they previously had, ranking behind the Senior Lenders. Stakeholders with claims at the Lydian International level will continue to have their claims on the Plan Implementation Date, which are intended to be addressed through

the proposed J&E Process in Jersey. Equity claims and unsecured claims against Lydian International will not be assumed by Restructured Lydian as part of the Plan.

[16] The purpose of the Plan is to (a) implement a corporate and financial restructuring of the Applicants, (b) provide for the assignment or settlement of all intercompany debts owing to the Applicants prior to the Effective Time to, among other things, minimize adverse tax consequences to Lydian Armenia and its stakeholders, (c) provide for the equivalent of an assignment of substantially all of the assets of Lydian International to an entity owned and controlled by the Senior Lenders ("SL Newco"), through an amalgamation of Lydian Canada with SL Newco resulting in a new entity ("Restructured Lydian"), and (d) provide a release of all of the existing indebtedness and obligations owing by Lydian International to the Senior Lenders. The Plan will result in the privatization of the Lydian Group to continue as the Restructured Lydian Group.

[17] The steps involved in the Plan's execution are described in detailed in paragraphs 71 to 74 of the Sellers Meeting Affidavit.

[18] The Plan provides for certain releases. The releases are more fully described in the Sellers Meeting Affidavit at paragraph 83.

[19] Mr. Sellers in the Sellers Sanction Affidavit at para. 16 states that the releases were critical components of the negotiations and decision-making process for the D&Os and Senior Lenders in obtaining support for the Plan and resolving these CCAA Proceedings for the benefit of the Restructured Lydian Group, including Lydian Armenia, and all of its stakeholders.

[20] Mr. Sellers further states that the Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings, which resulted directly in the preservation of the Lydian Group's business, provided numerous opportunities for the Applicants to seek to monetize their assets for the benefit of stakeholders generally and led to the successful negotiation of the Plan for the benefit of the Restructured Lydian Group.

[21] The Plan provides for a Plan Implementation Date on or prior to June 30, 2020. The majority of the Applicants' Senior Lenders have agreed to fund the costs associated with implementing the Plan and termination of the CCAA Proceedings and the J&E Process in Jersey, through the DIP Exit Facility Amendment, which will make a DIP Exit Credit Facility available to the Applicants totalling an estimated additional $1.866 million.

[22] The test that a debtor company must satisfy in seeking the Court's approval for a plan of compromise or arrangement under the CCAA is well established:

a) there must be strict compliance with all statutory requirements;

b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA and prior Orders of the Court in the CCAA proceedings; and

c) the plan must be fair and reasonable.

Issues

[23] The issues for determination on this motion are whether:

a) the Plan is fair and reasonable and should be sanctioned;

b) the releases contemplated by the Plan are appropriate;

c) the increase to the DIP Charge to capture the amounts to be advanced under the DIP Exit Credit Facilities is appropriate;

d) the Stay Period should be extended;

e) the unredacted Sellers Sanction Affidavit should be sealed; and

f) the Monitor's activities, as detailed in the Fifth Report, Sixth Report and Seventh Report, should be approved and the fees of Monitor and its counsel through to June 23, 2020 should be approved.

LAW AND ANALYSIS

Approval of the Plan

[24] To determine whether there has been strict compliance with all statutory requirements, the court considers factors such as whether: (a) the applicant meets the definition of a "debtor company" under section 2 of the CCAA; (b) the applicant has total claims against it in excess of C$5 million; (c) the notice calling the creditors' meeting was sent in accordance with the order of the court; (d) the creditors were properly classified; (e) the meeting of creditors was properly constituted; (f) the voting was properly carried out; and (g) the plan was approved by the requisite majority.

[25] The Applicants submit that they have complied with the procedural requirements of the CCAA, the Initial Order, the Amended and Restated Initial Order, the Meeting Order and all other Orders granted by this Court during these CCAA Proceedings. In particular:

a) at the time the Initial Order was granted, the Applicants were found to be "debtor companies" to which the CCAA applied and that the Applicants' liabilities exceeded the C$5 million threshold amount under the CCAA;

b) the classification of the Applicants' Senior Lenders into one voting class (namely, the Affected Creditors class) was approved pursuant to the Meeting Order. This classification was not opposed at the hearing to approve the Meeting, nor was the Meeting Order appealed; the Applicants properly effected notice in accordance with the Meeting Order prior to the

Meeting. In addition, the Applicants issued a press release on June 15, 2020 announcing their intention to seek an Order of the Court to file the Plan and call, hold and conduct a meeting of the Senior Lenders;

c) the Meeting was properly constituted and the voting on the Plan was carried out in accordance with the Meeting Order; and

d) the Plan was approved by the Required Majority.

[26] Sections 6(3), 6(5) and 6(6) of the CCAA provide that the Court may not sanction a plan unless the plan contains certain specified provisions concerning Crown claims, employee claims and pension claims. The Applicants' submit that these provisions of the CCAA are satisfied by the Plan. Crown claims and employee claims are treated by the Plan as Unaffected Claims, meaning that such claims, if any, are not compromised or otherwise affected. The Applicants do not maintain any pension plans, and thus section 6(6) of the CCAA does not apply. In compliance with s. 6(8) of the CCAA, the Plan does not provide for any recovery to equity holders.

[27] I accept the foregoing submissions. I am satisfied that the statutory prerequisites to approval of the Plan have been satisfied, and that there has been strict compliance with all statutory requirements.

[28] The Applicants submit that no unauthorized steps have been taken in these CCAA Proceedings and throughout the entirety of these CCAA Proceedings, they have kept this Court and Monitor appraised of all material aspects of the Applicants' conduct, activities, and key issues they have worked to resolve. I accept this submission.

[29] The Applicants' submit that when considering whether a plan of compromise and arrangement is fair and reasonable, the court should consider the relative degree of prejudice that would flow from granting or refusing to grant the relief sought. Courts should also consider whether the proposed plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available (see: *Re Canadian Airlines Corp*, 2000 ABQB 442 at paras. 3, 94, 96, and 137 – 138; and *Re Canwest Global Communications Corp*, 2010 ONSC 4209).

[30] The CCAA permits the filing of a Plan by an Applicant to its secured creditors. The Applicants' submit the fact that unsecured creditors may receive no recovery under a proposed plan of arrangement does not, of itself, negate the fairness and reasonableness of a plan of arrangement (*Anvil Range Mining Corp. (Re)*, 2002 CanLII 42003 (ONCA); and *1078385 Ontario Ltd., (Re)*, 2004 CanLII 55041 (ONCA) at paras 30-31 (CanLII), affirming 2004 CanLII 66329 (ONSC)).

[31] The Plan was presented to the Senior Lenders, who are the Applicants' only secured creditors and they voted on the Plan as a single class. The Senior Lenders voted in favour of the Plan by the Required Majority. The value of the claims of Orion and Osisko, who voted in

favour of the Plan comprise 77.8% of the total value of the Affected Creditors who were present and voting.

[32] RCF, a secured lender and 32% shareholder, did not vote in favour of the Plan. RCF has advised that it "does not intend at this time to propose or fund an alternative to the Plan, and in the absence of such an alternative we expect that the Court will have no choice but to issue the Sanction and Implementation Order."

[33] I have been advised that an issue as between the Senior Lenders and ING has been resolved and for greater certainty this Plan does not compromise any claim that ING may have in respect of proceeds from a successfully-asserted arbitration claim. In addition, the Senior Lenders have agreed that, after payment of all claims of the Senior Lenders to proceeds from a successfully-asserted arbitration claim whether on account of: (i) claims of the Senior Lenders prior to the Plan Implementation Date; or (ii) further advances made by the Senior Lenders (or their affiliates) after the Plan Implementation Date, (whether such further advances are made as equity, secured debt or unsecured debt), the proceeds will be paid to Lydian Armenia in an amount sufficient and to be used to pay ING's claims against Lydian Armenia prior to any further monies being returned to equity holders.

[34] The Applicants submit that the structure and the nature of the releases in the Plan recognizes and continues the priority position of the Senior Lenders. Secured creditors and unsecured creditors with claims at or below Restructured Lydian will continue to maintain their claims in the Restructured Lydian Group, including Lydian Armenia, with the same priority as they previously had, ranking behind the Senior Lenders.

[35] The Applicants state that they have considered and believe the Plan is the best available outcome for the Applicants, and the interests of the stakeholders generally in the Lydian Group.

[36] As noted in the BMO Affidavit, despite multiple rounds of the SISP and the Treaty Arbitration financing solicitation process, the Applicants submit that no transaction which would satisfy the Lydian Group's secured obligations is currently available to the Applicants.

[37] The Applicants submit that the monetization of Treaty Arbitration is also not open to the Applicants at this time, and if initiated would require an extended period to litigate and significant additional financial resources.

[38] The Applicants submit that for the purposes of valuing an estate at a plan sanction hearing, the "value has to be determined on a current basis. […] It is inappropriate to value the assets on a speculative or (remote) possibility basis." A relevant consideration in this analysis is the scope and extent of previous sale or capital raising efforts undertaken by the company and any financial advisors. In support of this submission, the Applicants reference: *Anvil Range Mining Corp. (Re)*, 2002 CanLII 42003 (ONCA), para 36 (CanLII); *Philip Services Corp., Re*, 1999 CanLII 15012 (ONSC) at para 9 (CanLII) *1078385 Ontario Ltd., (Re*), 2004 CanLII 55041 (ONCA) at paras 30-31 (CanLII), affirming *1078385 Ontario Ltd. (Re)*, 2004 CanLII 66329 (ONSC) (CanLII).

[39] The Applicants submit that the outcome of the Plan, that being the distribution of the Applicants' estates to the Senior Lenders, is essentially identical to what would be achieved with any other options available in the circumstances. Without the Plan, the Senior Lenders could (a) privatize the Applicants' assets through the enforcement of share pledges and other security, or (b) could credit bid their debt to acquire the shares or assets; or (c) enforce their secured positions following the Applicants filing for bankruptcy, administration, or liquidation proceedings across multiple jurisdictions. In each scenario (as with the Plan), the Applicants' assets are transitioned to the Senior Lenders.

[40] The foregoing submissions were not challenged.

[41] The Monitor supports the Plan. As noted in the Monitor's Seventh Report, "it is the Monitor's view that the Plan represents a better path forward than any other alternative that is available to the Applicants and is fair and reasonable."

[42] I am aware that concerns with respect to the fairness of the Plan have been raised by numerous shareholders of Lydian International and oral submissions were made by John LeRoux, Hasan Ciftehan, Mehmet Ali Ekingen and Atilla Bozkay.

[43] In addition, a number of emails were sent directly to the court, which were forwarded to counsel to the Monitor. In addition, certain emails were sent to the Monitor. None of the emails were in a proper evidentiary form.

[44] The concerns of the shareholders included criminal complaints of activities in Armenia, the content of certain press releases and the impact of the COVID-19 pandemic. Some shareholders requested a delay of three months in these proceedings.

[45] As previously noted, equity claims and unsecured claims against Lydian International will not be assumed by Restructured Lydian as part of the Plan. Simply put, the shareholders of Lydian International will not receive any compensation for their shareholdings. This is a reflection of the insolvency of the Applicants and the priority position afforded to shareholders by the CCAA.

[46] I recognize that the shareholders' monetary loss will be crystalized if the Plan is sanctioned. However, a monetary loss resulting from the ownership, purchase or sale of their equity interest is an "equity claim" as defined in s. 2(1) of the CCAA. This definition is significant as s. 6(8) of the CCAA provides:

> 6(8) Payment – equity claims – No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[47] The Plan does not provide for payment in full of claims that are not equity claims. Consequently, equity claimants are not in the position to receive any compensation.

[48] The economic reality facing the shareholders existed prior to the COVID-19 pandemic. The Applicants were insolvent when they filed these proceedings on December 23, 2019. The financial situation facing the Applicants has not improved since the filing. In fact, it has declined. The mine is not operating with the obvious result that it is not generating revenues and interest continues to accrue on the secured debt. The fact that shareholders will receive no compensation is unfortunate but is a reflection of reality which does not preclude a finding that the Plan is fair and reasonable for the purposes of this motion.

[49] The Senior Lenders have voted in sufficient numbers in favour of the Plan. I am satisfied that there are no viable alternatives, and, in my view, it is not feasible to further delay these proceedings.

[50] Section 6.6 of the Plan provides for full and final releases in favour of the Released Parties, who consist of (a) the Applicants, their employees, agents and advisors (including counsel) and each of the members of the Existing Lydian Group's current and former directors and officers; (b) the Monitor and its counsel; and (c) the Senior Lenders and each of their respective affiliates, affiliated funds, their directors, officers, employees, agents and advisors (including counsel) (collectively, the "Ancillary Releases"). A chart setting out the impact of the releases is attached as Schedule "A" to these reasons.

[51] The Applicants submit that the releases apply to the extent permitted by law and expressly do not apply to, among other things:

a) Lydian Canada's, Lydian UK's or the Senior Lenders' obligations under the Plan or incorporated into the Plan;

b) obligations of any Existing Lydian Group member other than Lydian International under the Credit Agreement and Stream Agreement, and any agreements entered into relating to the foregoing, from and after the Plan Implementation Date;

c) any claims arising from the willful misconduct or gross negligence of any applicable Released Party; and

d) any Director from any Director Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

[52] Unsecured creditors' claims, other than the Ancillary Releases in favour of the Directors, are not compromised or released and remain in the Restructured Lydian Group.

[53] The Applicants submit that it is accepted that there is jurisdiction to sanction plans containing releases if the release was negotiated in favour of a third party as part of the "compromise" or "arrangement" where the release reasonably relates to the proposed restructuring and is not overly broad. There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan (see: *Re Canadian Airlines Corp*, 2000 ABQB 442

at para 92 (CanLII) CCAA at s. 5(1); *Re Metcalfe & Mansfield Alternative Investments II Corp*., 2008 ONCA 587 at paras 61 and 70 (CanLII); *Re Canwest Global Communications Corp*, 2010 ONSC 4209 at para 28-30 (CanLII); and *Re Kitchener Frame Ltd*, 2012 ONSC 234 at paras 85-88 (CanLII).

[54] The Applicants submit that in considering whether to approve releases in favour of third parties, courts will consider the particular circumstances of the case and the objectives of the CCAA. While no single factor will be determinative, the courts have considered the following factors:

a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c) Whether the plan could succeed without the releases;

d) Whether the parties being released were contributing to the plan; and

e) Whether the release benefitted the debtors as well as the creditors generally.

[55] The Applicants submit that the releases were critical components of the decision-making process for the Applicants' directors and officers and Senior Lenders' participation in these CCAA Proceedings in proposing the Plan and the Applicants submit that they would not have brought forward the Plan absent the inclusion of the releases.

[56] The Applicants also submit that the support of the Senior Lenders is essential to the Plan's viability. Without such support, which is conditional on the releases, the Plan would not succeed.

[57] The Applicants submit that the Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings. The extensive efforts of the Applicants' directors and officers and the Senior Lenders and Monitor resulted in the negotiation of the Plan, which forms the foundation for the completion of these CCAA Proceedings. The Senior Lenders financial contributions through forbearances, additional advances and DIP and Exit Financing were instrumental.

[58] The Applicants also submit that the releases are an integral part of the CCAA Plan which provides an orderly and effective alternative to uncoordinated and disruptive secured lender enforcement proceedings. The Plan permits unsecured creditors future potential recovery in the Restructured Lydian Group, which may not exist in bankruptcy (*Re Metcalfe &Mansfield Alternative Investments II Corp*., 2008 ONCA 587 at paras 71 (CanLII); and *Re Kitchener Frame Ltd*, 2012 ONSC 234 at paras 80-82 (CanLII).

[59] The Applicants submit that this Court has exercised its authority to grant similar releases, including in circumstances where the released claims included claims of parties who did not vote on the plan and were not eligible to receive distributions (*Target Canada Co. et al*. (2 June 2016), Toronto CV-15-10832-00CL (Ont. Sup. Ct. [Comm. List]) Sanction and Vesting Order at Schedule "B" art. 7 (Monitor's website); *Rubicon Minerals Corporation et al*. (8 December 2016), Toronto CV-16-11566-00CL (Ont. Sup. Ct. [Comm. List]) Sanction Order at Schedule "A" art. 7 (Monitor's website); and *Nortel Networks Corporation et al*. (30 November 2016), Toronto 09-CL-7950 (Ont. Sup. Ct. [Comm. List]) Plan of Compromise and Arrangement at art. 7 (Monitor's website)).

[60] Full disclosure of the releases was made in (a) the draft Plan that was circulated to the Service List and filed with this Court as part of the Applicants' Motion Record (returnable June 18, 2020); and (b) the Plan attached to the Meeting Order. The Applicants also issued the Press Releases. This notification process ensured that the Applicants' stakeholders had notice of the nature and effect of the Plan and releases.

[61] The foregoing submissions with respect to the releases were not challenged.

[62] In my view, each of the Released Parties has made a contribution to the development of the Plan. In arriving at this determination, I have taken into account the activities of the Released Parties as described in the Reports of the court-appointed Monitor. I am satisfied that it is appropriate for the Plan to include the releases in favour of the Released Parties.

[63] The development of this Plan has been challenging and as the Monitor has stated, "the Plan represents a better path forward than any other alternative that is available to the Applicants and is fair and reasonable".

[64] I accept this assessment and find that the Plan is fair and reasonable in the circumstances.

DIP Charge

[65] The terms of the DIP Exit Facility Amendment are described in the Sellers Sanction Affidavit. The DIP Exit Facility Amendment provides for exit financing totalling $1.866 million to assist in implementing the Plan and taking the necessary ancillary steps to terminate the CCAA Proceedings and support the J&E Process.

[66] This Court has the jurisdiction to authorize funding in the context of a CCAA restructuring pursuant to s. 11.2(1) and 11.2(2) of the CCAA. In considering whether to approve DIP financing, the Court is to consider the non-exhaustive list of factors set out in s. 11.2(4) of the CCAA. These same provisions of the CCAA provide this Court with the authority to approve amendments to a DIP agreement and secure all obligations arising from the amended DIP loans with an increased DIP charge.

[67] The Applicants submit that, based on the following, the DIP Amendment should be approved and the increase to the DIP Facility should be secured by the DIP Charge:

a) the DIP Exit Credit Facility is necessary to enable the Applicants to implement the Plan;

b) the Monitor is supportive of the DIP Exit Facility Amendment;

c) the DIP Exit Facility Amendment is not anticipated to give rise to any material financial prejudice; and

d) the DIP Lenders are the majority of Senior Lenders.

[68] I am satisfied that the requested relief in respect to the DIP Amendment is reasonably necessary and appropriate in the circumstances.

Sealing Request

[69] The Applicants seek to seal the unredacted Sellers Sanction Affidavit on the basis that the redacted portions of the Sellers Sanction Affidavit contain commercially sensitive information, the disclosure of which could be harmful to stakeholders.

[70] The redactions currently being sought are consistent with previous Orders in these CCAA Proceedings. In my view, the documents in question contain sensitive commercial information. Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, 2002 Sec. 41 at para. 53 I am satisfied that the request for a sealing order is appropriate and is granted.

Stay Period

[71] On the Plan Implementation Date, the CCAA Proceedings with respect to Lydian UK and Lydian Canada will be terminated, such that Lydian International will be the only remaining Applicant in the CCAA Proceedings. The Applicants are requesting an extension of the Stay Period for Lydian International until and including the earlier of (i) the issuance of the Monitor's CCAA Termination Certificate and (ii) December 21, 2020 to enable the remaining Applicant and the Monitor to take the steps necessary to implement the Plan and terminate the CCAA Proceedings and initiate the J&E Process. The Applicants are also requesting an extension of the Stay Period for the Non-Applicant Stay Parties (other than Lydian US) until and including the earlier of the issuance of the Monitor's Plan Implementation Certificate.

[72] I am satisfied that the Applicants in requesting the extension of the Stay Period have demonstrated that circumstances exist that make the order appropriate; and that they have acted and are acting in good faith and with due diligence such that the request is appropriate.

Approval of Monitor's Activities

[73] The Applicants are seeking an order approving the Monitor's activities to date, as detailed in the Fifth Report, Sixth Report and the Seventh Report (collectively, the "Reports").

This Court has already approved the activities of the Monitor that were detailed in its previous reports. There was no opposition to the request.

[74] I am satisfied that the Reports and the activities described therein should be approved. The Reports were prepared in a manner consistent with the Monitor's duties and the provisions of the CCAA and in compliance with the Initial Order. The Reports are approved in accordance with the language provided in the draft order.

Approval of Monitor's Fees

[75] The Applicants further seek approval of the fees and disbursements of (i) the Monitor for the period April 14, 2020 to June 23, 2020, inclusive, and (ii) counsel to the Monitor for the period April 16, 2020 to June 23, 2020. The Applicants have reviewed the fees of the Monitor and its counsel and support the payment of the same.

[76] I am satisfied that the fee requests are appropriate in the circumstances and they are approved.

DISPOSITION

[77] The Applicants' motion is granted. The Plan is sanctioned and approved. The ancillary relief referenced in the motion is also granted and an Order reflecting the foregoing has been signed.

Chief Justice Geoffrey B. Morawetz

Date: July 10, 2020

SCHEDULE "A"

Lydian International Limited et al.

Impact of the Releases Described in s. 6.6 of the Plan

Lydian Jersey		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Released	Section 6.3(n)
Unsecured Guarantee of Equipment Lessors ING, CAT, Ameriabank	Not Released. Addressed in the J&E Process in Jersey	Section 6.6 (carve-out (E))
Other Unsecured Claims Includes Maverix Metals claim against Lydian Jersey	Not Released. Addressed in the J&E Process in Jersey.	Section 6.6 (carve-out (E))
Equity Claims Held by RCF, Orion, and public Shareholders	Not Released. Addressed in the J&E Process in Jersey.	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Intercompany Claims Claims by Lydian Jersey against Lydian Canada and other subsidiaries	Assigned to Lydian Canada	Section 6.3(h)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

Lydian Canada		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims of Equipment Lessors[1] ING, CAT, Ameriabank	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Jersey in Lydian Canada	Not Released (but subject to amalgamation with SL Newco)	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

[1] This includes contractual rights as outlined in the Waiver and Consent Agreement between Lydian Jersey, Lydian Canada, Lydian UK and Lydian Armenia dated November 26, 2018 (the "**Waiver**").

Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

Lydian UK		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims of Equipment Lessors ING, CAT, Ameriabank[2]	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Canada in Lydian UK	Not Released	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

[2] This includes the contractual rights outlined in the Waiver.

11910728 Canada Inc. ("DirectorCo")		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Canada in DirectorCo	Not Released	Section 3.5
D&O Claims Claims against the Directors and their legal cousnel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii) of the Plan
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian International Holdings Limited, Lydian Resources Armenia Limited, and Lydian Resources Kosovo Limited		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Other Secured Claims Includes claim of Maverix Metals in shares of Lydian Resources Armenia Limited, which is subordinated to claims of Senior Lenders	Not Released	Section 6.6
Unsecured Claims Includes Maverix Metals claim against Lydian International Holdings Limited	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian UK in Lydian International Holdings Limited, and shareholdings of Lydian International Holdings Limited in Lydian Resources Armenia ("**BVI**") and Lydian Resources Kosovo Limited Includes Maverix Metals' share pledge in BVI	Not Released	Section 6.6 (carve-out (E))
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii) of the Plan
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian Armenia		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Equipment Lessor Secured Claims ING, CAT and Ameriabank (to the extent secured by their collateral)	Not Released	Section 6.6 (carve-out (E))
Equipment Lessor Unsecured Claims ING, CAT and Ameriabank (unsecured deficiency claims)	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims e.g. Trade creditors	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings held by BVI / DirectorCo (as sole shareholder representative of BVI	Not Released	Section 3.5
D&O Claims Claims against the Directors	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6 (i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian US Lydian Zoloto, Lydian Resources Georgia Limited ("Lydian Georgia") and Georgian Resource Company LLC ("Lydian GRC", and collectively with Lydian US, Lydian Zoloto and Lydian Georgia, the "Released Guarantors" under the Plan)		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Released	Section 6.3(n)
Unsecured Claims	Not Released	Section 6.6
Equity Claims (a) Shareholdings of Lydian Jersey in Lydian US, Lydian Georgia and Lydian Zoloto; and (b) Shareholdings of Lydian Georgia in Lydian GRC	(a) Not Released. Per s. 6.4 of the Plan, Lydian US and Lydian Zoloto to be wound-up and dissolved pursuant to the laws of Colorado and Armenia, respectively. (b) Lydian Georgia shares held by Lydian Jersey to be transferred to Lydian Georgia Purchaser on Plan Implementation Date. (b) Shares of Lydian GRC held by Lydian Georgia not released. See note re: Lydian Georgia above.	Section 3.5 and section 6.4
D&O Claims, Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)