

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Peakhill Capital Inc. v. Southview Gardens  
Limited Partnership,*  
2023 BCSC 1476

Date: 20230825  
Docket: S-231065  
Registry: Vancouver

Between:

**Peakhill Capital Inc.**

Petitioner

And

**Southview Gardens Limited Partnership, Southview Gardens BT Ltd.,  
Southview Gardens Properties Ltd., Zhen Yu Zhong, Junchao Mo, Coromandel  
Properties (2016) Ltd., Baystone Properties (2016) Ltd., and Coromandel  
Holdings Ltd.**

Respondents

Before: The Honourable Justice K. Loo

## Reasons for Judgment

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Counsel for Cenyard Pacific Developments Inc.:	J. Schultz E. Newbery
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Counsel for Cenyard Southview Gardens Ltd.:	A. Teasdale
Place and Date of Hearing:	Vancouver, B.C. August 4, 2023

Place and Date of Judgment:

Vancouver, B.C.  
August 25, 2023

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**Overview**

[1] On this application in an ongoing receivership proceeding, this Court has been asked to approve a sale transaction (the "Transaction") in respect of lands legally described as Lot 14, District Lot 334, Plan 13993, PID 007-982-160, municipally known as 3240 East 58th Avenue, Vancouver, British Columbia, and the buildings thereon (the "Real Property") to Cenyard Southview Gardens Ltd. (the "Purchaser").

[2] The sole issue before the Court is whether the Transaction may be carried out by means of a Reverse Vesting Order ("RVO") or whether it must proceed by way of a standard Approval and Vesting Order ("AVO").

[3] An RVO is a type of transaction which is typically used as an alternative to transferring assets from an insolvent company to a creditor. Instead of having assets conveyed from the debtor to the creditor, the debtor company's shares are transferred to the creditor after unwanted assets and liabilities are removed from the debtor company and vended to a new "residual" company.

[4] RVOs were described by Justice Walker as follows in *PaySlate Inc. (Re)*, 2023 BCSC 608 [*PaySlate #1*]:

[1] Reverse vesting orders ("RVOs") are a relatively new method used in insolvency cases to avoid the purchaser assuming the insolvent debtor's unwanted assets and liabilities. Typically, an RVO contemplates the sale of the debtor company's shares through a transaction structured so that "unwanted" assets and liabilities (including in this case, certain unsecured creditor claims) are removed and vended to a residual company while the "good assets" remain with the debtor.

[5] In this case, an AVO would transfer legal title to the Real Property directly to the Purchaser from the company under receivership. That conveyance would trigger an obligation to pay property transfer tax ("PTT") pursuant to the *Property Transfer Tax Act*, R.S.B.C. 1996, c. 378 [*PTTA*] estimated to be approximately \$3.5 million.

[6] By contrast, if an RVO is employed, the shares of the debtor company which owns legal title to the Real Property, Southview Gardens BT Ltd., would be

conveyed to the Purchaser. In those circumstances, the Real Property would not be directly transferred and no PTT would be payable.

[7] Cenyard Pacific Developments Inc. ("Cenyard") is a major secured creditor of the respondents, which holds a second priority mortgage on the Real Property.

[8] The Transaction provides that if the PTT is payable, the purchase price will be reduced by the amount of the PTT. If PTT is payable, it is Cenyard who will suffer the shortfall, subject to any other security rights that it may have.

[9] Both Cenyard and the Purchaser (the "Applicants") seek to have the Transaction completed by way of an RVO, thus avoiding the PTT obligation.

[10] The Province of British Columbia (the "Province") opposes the Transaction by way of RVO, but does not oppose the Transaction by way of an AVO.

**Background**

[11] Pursuant to an application made by Peakhill Capital Inc., this Court made an order on February 16, 2023 appointing KSV Restructuring Inc. (the "Receiver") as the receiver of all of the assets, undertakings and business of various companies related to the Real Property, together with the Real Property itself.

[12] On March 23, 2023, this Court made an Order approving a sales process for the Real Property.

[13] The sales process was overseen by CBRE Limited who was retained and authorized by the Receiver to market the Real Property. Five offers were received, and the Purchaser submitted the highest offer.

[14] The Purchaser's offer contemplated completion of the Transaction in part by way of an RVO. It is uncontested that the purpose for structuring the Transaction in this way, as opposed to through a conventional AVO, was to avoid paying PTT of approximately \$3.5 million.

[15] On June 29, 2023, in its second report, the Receiver expressed some reservations about the Transaction proceeding by way of RVO on the basis that the Transaction did not include attributes that have been relied upon in the past by the courts in granting RVOs. In early July 2023, the Province expressed its opposition to the RVO.

[16] Consequently, the hearing of this application was set, and pending the contested hearing, the parties decided to seek approval of the AVO. I am advised by counsel for the Purchaser that this was done to achieve some commercial certainty.

[17] On July 13, 2023, this Court approved the Transaction by way of AVO, subject to: (i) the Court granting the RVO; and (ii) the closing of the Transaction being on or before September 12, 2023.

**Issues**

[18] In determining this application, there are two issues. In the circumstances of this case:

- (a) does the Court have jurisdiction to grant an RVO; and
- (b) if so, is it appropriate for the Court to grant an RVO?

**Jurisdiction**

[19] The receivership order in this case was sought pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*] and s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*].

[20] In *PaySlate #1*, Justice Walker found that an RVO may be granted under this Court's general jurisdiction under s. 183(1)(c) of the *BIA* which provides:

183 (1) 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 ...

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

[21] In *PaySlate #1*, Justice Walker held:

[84] Although many of the case authorities discussing the circumstances in which RVOs may be issued are in the context of the CCAA, RVOs are available tools in other insolvency cases as well. Similar considerations apply in the context of the *BIA*.

[85] In the *BIA*, s. 183 confers jurisdiction in accordance with legal and equitable principles to give effect to its purpose: *Re Olympia & York Developments Ltd.*, [1997] O.J. No. 591 at paras. 7, 10 (Gen. Div., in Bankruptcy); *Re Residential Warranty Company of Canada Inc. (Bankrupt)*, 2006 ABQB 236 at para. 26. Those purposes include those applying to proposals such as s. 65.13(4).

[86] In addition to *Blackrock Metals*, *Harte Gold*, and *Quest*, there are other case authorities finding jurisdiction to order RVOs, including a notice of intention to make a proposal under the *BIA* (case name is underlined), and receivership proceedings, such as: *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00 (Ont. S.C.J. [Comm. List]); *Stornoway Diamond Corporation* (October 7, 2019), Montreal 500-11-057094-191 (Q.C.S.C. [Comm. Div.]); *Wayland Group Corp.* (April 21, 2020), Toronto CV-19-00632079-00CL (Ont. S.C.J. [Comm. List]); *Comark Holdings Inc.* (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. S.C.J. [Comm. List]); *Beleave Inc.* (September 18, 2020), Toronto, CV-20-642097 (Ont. S.C.J. [Comm. List]); *JMB Crushing Systems Inc.* (October 16, 2020), Calgary 2001-05482 (A.B.K.B.); *Arrangement relatif à Nemaska Lithium Inc.*, 2020 QCCS 3218, leave to appeal refused, 2020 QCCA 1488; *In the Matter of a Plan of Compromise or Arrangement of Clearbeach Resources Inc. and Forbes Resources Corp.*, 2021 ONSC 5564; *In the Matter of the Notice of Intention to Make a Proposal of Junction Craft Brewing Inc.* (November 8 and December 20, 2021), Toronto, CV-31-2774500 (Ont. S.C.J. [Comm. List]); *Port Capital Development (EV) Inc. (Re)*, 2022 BCSC 1464, leave to appeal ref'd 1296371 *B.C. Ltd. v. Domain Mortgage Corp.*, 2022 BCCA 331; *In the Matter of CannaPiece Group Inc.*, 2023 ONSC 841; *In the Matter of CannaPiece Group Inc.* (February 10, 2023), Toronto CV-22-689631-00CL (Ont. S.C.J. [Comm. List]); *Credit Suisse AG, Cayman Islands Branch v. Southern Pacific Resource Corp. et. al.* (May 13, 2022), Calgary 1501-05908 (A.B.K.B.).

[22] In my view, the issue of whether this Court has jurisdiction to grant RVOs in proceedings under the *BIA* was raised squarely and decided in *PaySlate #1*. In my respectful view, the decision of Justice Walker was both correct and determinative of the issue.

[23] The Province raises two arguments regarding jurisdiction.

[24] First, it argues that the words of s. 183 of the *BIA* (or s. 243 which deals with receiverships) are insufficient to ground jurisdiction to grant an RVO.

[25] In my view, this argument is met by *PaySlate #1*. As stated, Justice Walker has decided that the general words of s. 183 *are* sufficient to ground jurisdiction.

[26] Second, the Province argues that even if s. 183 provides this Court with jurisdiction generally to grant an RVO, it does not do so in the context of this case. It says that that the *BIA* must be interpreted with regard to the *PTTA*, and it cites s. 72(1) of the *BIA* which states:

72 (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

[27] In my view, this submission is not one which relates to this Court's jurisdiction. Rather, it questions whether the granting of an RVO is appropriate in the particular circumstances of this case. The interplay between the RVO sought and the provisions of the *PTTA* will be addressed in detail below.

[28] As stated above, the Applicants also argue that this Court has jurisdiction to grant an RVO under s. 39 of the *LEA*. Given my conclusion that it has jurisdiction under the *BIA*, it is not necessary for me to decide whether the *LEA* provides an additional basis for this Court's jurisdiction to grant an RVO and I decline to do so.

### **Appropriateness**

[29] This case, insofar as I am aware, is unique in the sense that there is no reported decision of a Canadian court in a contested proceeding that has addressed whether an RVO may be granted *solely* for the purpose of achieving a tax benefit.

[30] In order to determine this issue, I will review the principles regarding the granting of RVOs, I will address the Province's argument that an RVO in this case would abrogate or supersede the provisions of the *PTTA*, and I will address the Province's argument that an RVO ought not to be granted in the face of reservations expressed by the Receiver about the Transaction proceeding by way of RVO.



### **Analysis of the Authorities Regarding RVOs**

[31] The Applicants argue that the case law supports the issuance of an RVO to support tax-related objectives. There are a number of cases in which tax benefits have been cited as reasons for granting an RVO.

[32] In *Port Capital Development (EV) Inc. (Re)*, 2022 BCSC 1464 [*Port Capital*], Justice Fitzpatrick held:

[58] Finally, I am satisfied that approval of the Solterra Offer in the form of an RVO is appropriate, just as it was in relation to the Solterra Backup Offer. In the *BCSC Sale Reasons*, I set out the reasons why such a structure would be beneficial, albeit in relation to Landa's offer:

[20] Landa Offer #1 was in the form of an asset purchase, although the parties allowed for the possibility of completion pursuant to a Reverse Vesting Order ("RVO"). That scenario was seen as beneficial in order to allow the existing Petitioners to continue under Landa's ownership and control while preserving existing contractual rights, such as the building permit (but not the pre-sale contracts). The RVO structure also avoided payment of substantial property transfer tax.

[emphasis added]

[33] Further, in *Quest University Canada (Re)*, 2020 BCSC 1883 [*Quest*], leave to appeal ref'd at 2020 BCCA 364, Justice Fitzpatrick cited two other cases in which courts found it appropriate to grant RVOs for tax planning purposes:

- a) At para. 131, she cited *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00C (Ont. S.C.J. [Comm. List]), in which an RVO was approved to implement an agreement "that 'effectively' transferred current tax losses and intellectual property to a purchaser"; and
- b) At para. 136, she cited *Comark Holdings Inc.* (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. S.C.J. [Comm. List]), wherein Justice Hainey granted the RVO involving a share sale that "preserved the tax attributes of the debtor, which the purchaser viewed as critical for the success of the future business".

[34] Moreover, in *PaySlate Inc. (Re)*, 2023 BCSC 977 [*PaySlate #2*], Justice Walker held:

[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.

[emphasis added]

[35] And in *Just Energy Group Inc. v. Morgan Stanley Capital Group Inc.*, 2022 ONSC 6354 at para. 34 [*Just Energy*], the court held that one of the circumstances in which RVOs have been approved is where “maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction”.

[36] The Province argues that, in those cases, the preservation of tax attributes or the saving of tax were not the only benefits arising from the RVOs which were granted. Further, it submits that an RVO is usually granted to preserve a going concern which would otherwise be lost.

[37] For example, in *Port Capital*, while the RVO structure did allow the parties to avoid property transfer tax, it also allowed the business to continue as a going concern and to preserve existing contractual rights such as a building permit.

[38] Similarly, in *PaySlate #2*, an RVO was granted to preserve the debtor's existing tax attributes, but it also preserved scientific research and experimental development tax credits, as well as cyber security and cyber insurance policies which would otherwise not be transferable.

[39] There is no doubt that a common use of RVOs is to preserve a going concern or to maintain licenses and permits which cannot be transferred easily: see *PaySlate #1* at para. 1, and *Harte Gold Corp. (Re)*, 2022 ONSC 653 [*Harte Gold*] at para. 71.

[40] It is also clear that the jurisprudence is replete with cautionary words regarding the granting of RVOs.

[41] In *PaySlate #1* at para. 87, Justice Walker held that “RVOs are not the norm and should only be granted in extraordinary circumstances”.

[42] Similarly, in *Harte Gold* at para. 38, Justice Penny stated as follows:

... 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.

[43] In *Quest*, Justice Fitzpatrick held at para. 171:

A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the CCAA.

[44] And in *Just Energy* at para 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...

[45] There is no doubt that careful consideration is required when an RVO is sought. It is important to observe, however, that much of the reluctance expressed by courts about granting RVOs has arisen because RVOs may be used to circumvent processes in insolvency proceedings which entitle creditors to vote on plans, or may otherwise prejudice creditors.

[46] In *PaySlate #1*, Justice Walker cited an article of Professor Janis Sarra for the proposition that "RVOs require special scrutiny by the courts, even where uncontested, since they deviate from [the] statutory framework intended to provide all creditors with an opportunity to be heard in the process".

[47] In Dr. Sarra’s article, “Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions”, 2022 CanLIIDocs 431 (the “Sarrah Article”), she stated:

[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...

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.

[48] And further:

Weighed against these benefits is the concern that the RVO approach bypasses key components of the statutory framework that balances multiple creditor rights and interests, including the ability of creditors to vote on a plan. While one benefit of an RVO is often described as cost savings if a plan vote is avoided, the cases reveal that RVO can be complex and costly to structure and implement. There is also a question of whether companies will be able to shed substantial environmental remediation and reclamation obligations under this new structure, leaving few assets to satisfy the obligations.

[49] In this case, there are three secured creditors who are collectively owed more than \$83 million: Peakhill, Cenyard, and a group of entities referred to as “Woodbourne”. The purchase price for the Real Property—which is the debtors’ principal asset—is \$72 million if the Transaction proceeds by way of RVO, and approximately \$3.5 million less if it does not.

[50] According to the Receiver's first report, the unsecured creditors are owed approximately \$124,000. It is clear that as residual claimants to the value of the debtors' assets, they are "out of the money".

[51] There is no suggestion in this case that the rights of creditors are being compromised or that their interests would be prejudiced by the granting of an RVO. There is no suggestion that any significant liabilities or obligations other than the PTT will be avoided. It appears that the only party by whom any prejudice will be allegedly suffered is the taxing authority. In the particular circumstances of this case, the reasons for caution typically considered when an RVO is contemplated do not weigh heavily.

[52] The Province suggested that the avoidance of PPT in this case is akin to the avoidance of environmental and reclamation obligations referred to in the Sarra Article. However, in my view, the potential tax liabilities are different in kind. The avoidance of environmental obligations brings into play a significant public interest. The Province's interest in collecting PTT will be addressed below in the discussion regarding the interplay between the granting of an RVO and the *PTTA*.

[53] Relatedly, the Province also advanced what might be characterized as a "floodgates argument". I understand its submission to be that if an RVO is granted in this case, there will be an excess of RVO applications.

[54] In response, the Applicants observed that an RVO to avoid PPT may only be applied for when the property at issue is already held in the name of a company whose shares can be conveyed.

[55] In any event, although it may well be true that the granting of an RVO in this context will cause them to be sought more often, I have been advised of no reason why this would be undesirable from a policy perspective or from the perspective of any stakeholder, other than the taxing authority, at least in the absence of prejudice to other stakeholders such as creditors.

[56] As stated at the beginning of this section, the issue in this case is somewhat uncharted territory. On one hand, it does not appear that a Canadian court has ordered an RVO in a contested proceeding when tax savings were the only benefit. On the other hand, in the circumstances of this case, and subject to the Province's arguments addressed below regarding the interplay between the *BIA* and the *PTTA*, there does not seem to be any specific reason not to employ an RVO to preserve value for the creditors.

[57] All of these issues must be viewed in the context of the objectives of insolvency law, one of which is to maximize recovery for creditors. In this regard, Chief Justice Paquette held as follows in *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828 at para. 86, leave to appeal ref'd 2022 QCCA 1073, leave to appeal to SCC ref'd, 40401 (4 May 2023):

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 limiting delays and transaction costs, and facilitating the preservation of the insolvent business' going concern, justify the use of this innovative restructuring tool.

### **The Interplay between the Granting of an RVO and the *PTTA***

[58] The foregoing analysis leads to the critical issue on this application: whether it would be contrary to the *PTTA* to grant an RVO which would have the effect of saving the creditors approximately \$3.5 million in PTT.

[59] The Province argues that “to exercise jurisdiction and approve the RVO would be to bless the objective of avoiding a tax liability”. Further, it argues:

77. Any statutory jurisdiction which could otherwise be found in the *BIA* or the *LEA* is negated in light of the specific provisions of the *PTTA*, which provide for (i) the payment of PTT when title is transferred (absent an applicable exemption), and (ii) mechanisms whereby the Province can assess PTT (and penalties) when a transaction or series of transactions are designed to avoid the payment of PTT.

[60] In my view, with respect, the Province's arguments on this issue are unpersuasive, for at least two reasons.

[61] First, I reiterate that in numerous cases, some of which are cited above, courts have granted RVOs which have conferred tax benefits on the parties in an insolvency proceeding. Those courts have already "blessed the objective of avoiding a tax liability", albeit in circumstances wherein the tax objective was not the only one. In all of these cases, it appears clear that the taxing authority became entitled to less tax than otherwise, either because tax credits or tax losses were preserved, or because taxes otherwise payable were avoided.

[62] Second, the Province's arguments on this issue appear to be based on the premise that the transfer of property by means of the sale of the corporate property owner's shares constitutes unlawful tax avoidance. However, it seems clear that, at least outside of the insolvency context, this proposition is not correct.

[63] To the extent that evidence on this point is required, the Applicants cite the Receiver's second report and an affidavit from an experienced corporate realtor for the proposition that it is common for a seller and purchaser to enter into a share purchase agreement for the sale of shares in a company whereby all of the issued and outstanding shares of the company are transferred by the seller to the purchaser so that the purchaser can own the seller company's real property. In particular, it is common for purchasers to acquire land in British Columbia by acquiring the shares of a nominee to avoid paying PTT.

[64] In a non-insolvency context, the parties would have been permitted to carry out the transfer of the property by means of the transfer of shares of the nominee company. Indeed, it seems evident that similarly situated parties in a non-insolvency context would have done so.

[65] Therefore, this is a tax liability which is readily avoided in a non-insolvency context. The Province has not been able to satisfactorily explain why, given that

premise, the proposed RVO transaction is unlawful or would attract the *PTTA*'s general anti-avoidance tax rules.

[66] In the Province's submission quoted above, it refers to "specific provisions of the *PTTA*...which provide for...the payment of PTT *when title is transferred*". It is important to emphasize that if an RVO is granted in this case, title to the Real Property will not be transferred. This is not a case in which the title will be transferred but the parties will be permitted nonetheless to evade or avoid the tax. The entire point of the RVO is to create an alternative arrangement in which there is no transfer of the property, as can readily be done without attracting tax when property is owned by a solvent company.

[67] In further support of its position on this issue, and in answer to the Province's argument that this Court's statutory jurisdiction to grant an RVO is negated by mechanisms in the *PTTA* by which the Province can assess PTT and penalties when a transaction is designed to avoid the payment of PTT, the Applicants point out that the Province has the ability to impose PTT on the transfer of property through the purchase of the shares of a nominee company by means of regulation and it has not done so.

[68] In particular, s. 2(3) and (4) of the *PTTA* contemplate that the Province has the power to tax the transfer of beneficial interests in land:

(3) The Lieutenant Governor in Council may prescribe that a transaction that consists of a purported transfer, by a prescribed method of a prescribed interest in land, is taxable under this Act, whether or not that interest is registrable under the Land Title Act.

(4) A regulation under subsection (3) may prescribe

(a) when the liability for the tax arises and when the tax is payable,  
and

(b) the method by which

(i) returns must be filed, and

(ii) the tax may be remitted and collected.

[69] At present, there are no regulations under the *PTTA* that would deem a sale of shares of a nominee holding real property to be a taxable transaction.



**The Lack of a Positive Recommendation from the Receiver**

[70] The Province argues that the application ought to be dismissed because of the Receiver's decision not to recommend the Transaction by way of RVO.

[71] There is no doubt that the recommendations of a court-appointed officer ought generally to weigh heavily in the deliberations of this Court. However, the Receiver did not recommend against the RVO. It simply declined to recommend it and it did not take a position on this application.

[72] Further, the reservations that it expressed were legal ones. In particular, it took the view that the facts of this case did not have many of the features found in other cases in which RVOs were ordered. In my view, these observations were generally correct and reflected the uncharted nature of this application.

[73] In my view, a receiver's recommendation is most valuable to the court when it reflects factual or other matters of which the receiver would have unique knowledge. In this case, while the Receiver's views on the application of the current jurisprudence are helpful, they do not weigh as heavily as they would in other circumstances.

[74] This is not a case in which the Receiver has opined on something that it is uniquely qualified to know. It has expressed reservations about whether the tests in the legal authorities have been met, which is a matter for this Court to determine.

[75] In my view, the fact that the Receiver declined to recommend approval of the Transaction by way of RVO does not preclude this Court from granting an RVO in the circumstances of this case.

**The *Harte Gold* Factors**

[76] In *Harte Gold* at para. 38, Justice Penny set out what are commonly referred to in the insolvency bar as the "*Harte Gold* factors" which are to be considered in determining whether an RVO is appropriate. As I have concluded that this Court is not precluded from granting an RVO by the present jurisprudence, the interplay

between an RVO and the *PTTA*, or the Receiver's decision not to recommend the RVO, I will turn to a consideration of those factors and their application to this case:

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?

[77] In my view, these factors lead to the conclusion that an RVO ought to be granted in this matter:

- a) While an RVO is not necessary to avoid foreclosure or bankruptcy, it is necessary to allow the parties to structure their affairs so as to preserve \$3.5 million in value for the creditors and to maximize the return for creditors.
- b) In my view, the RVO structure produces an economic result at least as favourable as any other viable alternative. It clearly creates more value for the creditors. To the extent that the Province is a stakeholder in the analysis, the overall economic result is at least as favourable overall, in the sense that the Province "loses" exactly the amount that the creditors gain.
- c) As to whether any stakeholder is worse off under the RVO structure, the Province is undoubtedly worse off. However, for the reasons set out above, it is my view that the Province's argument that it is entitled to the PTT because would be unlawful for the creditors to avoid the tax in these circumstances is belied by the regime currently in place in the non-

insolvency context. As stated above, it has not been suggested that any creditor or any other stakeholder is worse off.

- d) Finally, the question of whether the consideration paid for the assets reflect the importance and value of the assets being preserved under the RVO structure may be answered in the affirmative. In the event that an RVO is granted, the saved funds go to the creditors.

[78] In the circumstances of this case, and particularly in the absence of any suggestion that an RVO in this case would prejudice the rights of creditors, I find that the RVO sought ought to be granted, on the basis that the RVO will preserve and maximize the value of the assets available to creditors.

### **Releases**

[79] In considering whether to exercise the discretion to approve RVO release provisions, courts have considered the following factors set out in *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54:

- 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.

[80] The submissions of the parties regarding the release provisions in this case were very limited. The primary objection voiced by the Province was that the releases “serve to potentially inhibit the Province from collecting PPT”.

[81] As I have determined that the granting of an RVO is appropriate so as to allow the creditors to save the amount of the PTT, the fact that the releases would also have this effect does not weigh heavily in the analysis. As the purpose of the RVO is to maximize the creditors’ recovery by avoiding PPT, it would be inconsistent

with that purpose to permit the Province to collect the tax from the proposed releasees.

[82] In my view, the releases in this case are necessary to the Transaction if it is to be carried out by way of RVO, and they are rationally connected to it.

**Conclusion**

[83] For the reasons stated, the relief sought at paragraph 1(b) of the Receiver’s Notice of Application filed June 30, 2023—which includes an approval and reverse vesting order, substantially in the form attached to the Notice of Application as Schedule “C” thereto—is granted.

“Loo J.”