Court File No./Estate No.: 31-2734090

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF **YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.**

APPLICATION UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

Factum of "YongeSL *et al*"

Dated: May 24, 2021

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(YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, and TaiHe International Group Inc.)

(Hearing: June 1, 2021)

OVERVIEW

1. This proceeding involves the "**YSL Project**", one of the Cresford Group's condominium projects in Toronto. The YSL Project lands are nominally owned by the Debtor YSL Residences Inc., but beneficially owned by the Debtor YG Limited Partnership (the "**Partnership**"). YongeSL *et al* are limited partners of the Partnership.

2. Over the last year, the Cresford Group has made several efforts to siphon millions of dollars from the YSL Project to the detriment of the project's investors and other creditors. This proposal proceeding is just the latest attempt to do so. If the Debtors' proposal is effected, the Cresford Group will receive payment of approximately $22 million on account of equity claims that it is disguising as unsecured claims.

3. When YongeSL *et al* learned that the Cresford Group intended on commencing this proceeding, they brought an application (the "**YongeSL Application**") for **(a)** a declaration

that the general partner of the Partnership (the "**General Partner**") was in breach of the partnership agreement and therefore ceased to have capacity to act as general partner; and **(b)** for the appointment of a receiver pursuant to the *Courts of Justice Act* (Ontario).[1]

4. The Debtors each filed a Notice of Intention to Make a Proposal ("**NOI**") pursuant to the *Bankruptcy and Insolvency Act* in order to avail themselves of a statutory stay of proceedings, in a further effort to prevent their conduct from being subject to review.[2] The Debtors have advised that their proposal (the "**Proposal**") will be sponsored by another developer, Concord Properties Development Corp. ("**Concord**"), and will involve the transfer of the YSL Project lands to Concord in exchange for Concord funding payment of (only) 58% of unsecured creditor claims.

5. The Cresford Group alleges that three of its members have combined unsecured claims of $38.2 million (the "**Cresford Claims**"), which are to be paid in the Proposal. Those claims, however, are properly characterized as equity claims, not unsecured claims.

6. The YongeSL Application is not stayed by the filing of the NOIs. The General Partner is not a proposal debtor so the stay of proceedings described in s.69(1) of the *BIA* (the "**Stay**") does not apply to it. The claim for the appointment of a receiver is also not subject to the Stay because it is not a remedy or proceeding for a claim provable in bankruptcy.

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[1] RSC 1990, c C43, s.101 (the "***CJA***"). CJA s.101

[2] RSC 1985, c B-3 (the "***BIA***"). BIA, RSC 1985, c B-3

7. Alternatively, if the Court determines that the Stay does apply, there are sound reasons to lift the Stay. It would be inequitable to allow the Cresford Group to hide behind the Stay, avoid scrutiny of the Cresford Claims and whether the Proposal was properly brought, and see the Cresford Claims paid at the expense of prior ranking creditors. The priority scheme of the *BIA* would be upended and its fundamental principles thwarted. The Debtors' unsecured creditors and YongeSL *et al* would all suffer material prejudice.

8. The usual purpose of proposal proceedings, being a debtor's restructuring, is not triggered here. The Debtors will not be restructured. This is a liquidation. The primary concern of the Court should be the equitable treatment of creditors, an object which will be frustrated if an independent court-officer is not appointed to take control of the YSL Project, properly review and determine the nature of the Cresford Claims, and run an open, competitive and transparent sales process for the benefit of all creditors.

9. The economics of the Proposal illustrate the unfairness of the Cresford Group's tactics.[3] If:

   (a) the Cresford Claims total $38.2 million;

   (b) the Debtors' unsecured creditors have claims of up to $25.8 million; and

   (c) the market value of the YSL Project lands is such that a purchaser would pay or assume all secured and lien claims, and pay 58% of the sum of the Cresford Claims and the Debtors' unsecured creditors (58% x [$38.2 + $25.8 million] = $37.1 million);

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[3] Amounts taken from the First Report of the Proposal Trustee, Appendix "B", Respondents' Motion Record ("**RMR**"), Tab 7.

then the Proposal would distribute $37.1 million to the Cresford Group and the Debtors' unsecured creditors as follows:

Cresford Claims: 58% x $38.2 million = $22 million

Unsecured claims: 58% x 25.8 million = $14.9 million

10. If, however, the Cresford Claims are recognized as equity claims, then the $37.1 million will be distributed as follows:

Unsecured claims: $25.8 million (**100% recovery**)

Equity claims: $11.3 million

UNCONTROVERTED FACTS

A. Relevant Parties & The Partnership Agreement

11. The Partnership was formed pursuant to an Amended and Restated Limited Partnership Agreement (the "**Partnership Agreement**"). The Partnership is comprised of the General Partner (9615334 Canada Inc.) and two classes of limited partners: **(a)** holders of Class A Preferred Units (the "**Class A LPs**"), like YongeSL *et al*, and; **(b)** Cresford (Yonge) Limited Partnership ("**Cresford Yonge**"), which holds Class B Units.[4]

12. Pursuant to the Partnership Agreement, the Class A LPs are entitled to be repaid their capital contributions, plus a "preferred return", from the net proceeds of the YSL Project

[4] Affidavit of Lue (Eric) Li (the "**Li Affidavit**") at paras 2, 4-5 and 15, Motion Record ("**MR**"), Tab 2.

before any amount is paid to Cresford Yonge. Cresford Yonge therefore holds the sole interest in the residual value (ie. ultimate profit) of the YSL Project.[5]

13. The limited partner of Cresford Yonge is Oakleaf Consulting Ltd. ("**Oakleaf**"). Oakleaf owns, indirectly, 100% of Cresford (Rosedale) Developments Inc. ("**Cresford Rosedale**") and its direct subsidiary, East Downtown Redevelopment Partnership ("**EDRP**").[6]

14. The Cresford Claims are advanced by Oakleaf, Cresford Rosedale and EDRP. That is, the Cresford Claims are advanced by the limited partner of the owner of the residual value of the YSL Project, and that limited partner's wholly owned subsidiaries.[7]

15. The General Partner, Cresford Yonge, Oakleaf, Cresford Rosedale, and EDRP are all members of the "**Cresford Group**", a group of real estate development companies controlled by Mr. Daniel C. Casey ("**Casey**").[8]

B. The Cresford Group's Financial Mismanagement Revealed

16. Until recently, the Cresford Group had four active real estate projects in Toronto, one of which was the YSL Project. After investigations by the Cresford Group's lenders into financial irregularities, Koehnen J appointed receivers over the three other real estate

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[5] Li Affidavit at paras 16-17, MR, Tab 2.

[6] Li Affidavit at paras 8-9, MR, Tab 2.

[7] First Report of the Proposal Trustee, Appendix "B", RMR, Tab 7.

[8] Li Affidavit at paras 5-9, MR, Tab 2.

projects, and refused the Cresford Group's application for protection under the *Companies' Creditors Arrangement Act*.[9]

17. Koehnen J found that the Cresford Group had: **(a)** diverted project funds to improper uses; and **(b)** maintained false books and records, among other things.[10] Koehnen J also rejected the Cresford Group's *CCAA* application, recognizing that the only stakeholder that would be protected "is Cresford as an equity stakeholder. It will receive $38,000,000 [from Clover] in a transaction beyond the scrutiny of the court."[11]

C. The Cresford Group Markets the YSL Project for its Own Gain

18. Following Koehnen J's decision, YongeSL *et al* began inquiring into the status of the YSL Project and learned that the Cresford Group was marketing it for sale. Each of the Cresford Group's proposed transactions, however, involved **(a)** the Class A LPs accepting less than their full entitlement under the Partnership Agreement, and **(b)** the Cresford Group receiving millions of dollars from the proceeds of the sale.

19. Until November 2020, the Cresford Group took the position that their right to the proceeds of the YSL Project was **subordinate** to the Class A LPs' rights to recovery. In an October 29, 2020, letter, the Cresford Group's lawyers confirmed that the Cresford Group's

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CCAA, RSC 1985, c C-36

[9] RSC 1985, c C-36 (the "***CCAA***"); Li Affidavit at paras 5-6 and 24, MR, Tab 2.

BCIMC v Clover paras 28-34

[10] *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc*, 2020 ONSC 1953 at paras 28-34 (Commercial List) [*BCIMC v Clover*].

BCIMC v Clover para 54

[11] *BCIMC v Clover* at paras 54 and 87. BCIMC v Clover para 87

advances: **(a)** were "subsequent in priority"; and **(b)** were required "as part of the lenders' **equity** requirements for the project".[12]

20. After a November 30, 2020, meeting between the Class A LPs and the General Partner, the Cresford Group began to take the position that the Cresford Group's alleged advances were unsecured loans that must be repaid in priority to the Class A LPs receiving any amount.[13] There are no written agreements governing these alleged loans by the Cresford Group, no interest is payable, nor is there a maturity date.[14]

D. Details of the Proposed Transactions

21. The details of the Cresford Group's prior attempts to effect a proposed transaction involving the YSL Project are described below. In each instance, the Class A LPs were asked to waive their right to interest, among other things, so that the Cresford Group could profit from the YSL Project. If the Cresford Claims were actually unsecured claims, there would have been no reason for the Cresford Group to ask the Class A LPs to waive their rights.

22. In May 2020, for example, the Cresford Group proposed a transaction involving GFL Infrastructure Inc. where the Class A LPs would waive all interest so that the Cresford Group could receive $44 - 45 million from the YSL Project. When asked to explain why the Cresford Group would receive any money ahead of the Class A LPs being paid in full,

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[12] Exhibit "U" to the Li Affidavit (**emphasis added**).

[13] Li Affidavit at paras 65 and 70, MR, Tab 2; Exhibit "BB" to the Li Affidavit, MR, Tab 2BB.

[14] Li Affidavit at paras 56 and 70; Exhibits "U" and "BB" to the Li Affidavit, MR, Tabs 2U and 2BB.

Casey did not take the position that the Cresford Group had legal priority as an unsecured creditor. Casey's response could be paraphrased as "that's life, be happy you are offered all of your capital contribution, I'm only getting $44 of the $50 million I put in".[15]

23. As at March 2020, according to a balance sheet dated December 31, 2019 for the Partnership, the figure that the Cresford Group was allegedly due was $44,519,311.[16] YongeSL *et al* later received a different version of the balance sheet, also dated December 31, 2019, which confirmed that the above figure *included* the $15 million capital contribution made by Cresford Yonge in exchange for its Class B units.[17]

24. In June-July 2020, the Cresford Group proposed another transaction, involving Empire (Water Wave) Inc., which provided that the Class A LPs waive all interest and the Cresford Group receive $40.2 million from the YSL Project.[18] At this time, the Cresford Group still acknowledged that the Class A LPs' investment had priority to the Cresford Group's advances.[19]

25. In mid-July 2020, another transaction was proposed requiring the Class A LPs to accept a lower return on capital, but still "receive their capital and guaranteed return before Cresford is paid its capital" (note, not "repaid its loans"). This proposed transaction would have seen

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[15] Li Affidavit at paras 28-32, MR, Tab 2.

[16] Exhibit "G" to the Li Affidavit, MR, Tab 2G; Li Affidavit at para 25, MR, Tab 2.

[17] Exhibits "S" and "T" to the Li Affidavit, MR, Tabs 2S and 2T.

[18] Li Affidavit at paras 35-37, MR, Tab 2.

[19] Li Affidavit at para 35(b), MR, Tab 2; Exhibit "J" to the Li Affidavit, MR, Tab 2J.

Casey receive $4.8 million personally, representing "the amount that Cresford funded to the project to service the Timbercreek Mortgage during the past 8 months."[20]

26. Yet another proposal followed in mid-August 2020. This one would have required the Class A LPs to waive up to $8.1 million and grant releases and indemnities in favour of the General Partner and Cresford Yonge. The Class A LPs were not given sufficient information to determine how much they were being short-changed, and what amount the Cresford Group or Casey personally would receive from the YSL Project.[21]

27. In late November 2020 one last proposed transaction was put to the Class A LPs, which was in the nature of a refinancing by Concord. The Class A LPs were asked to waive all interest on their capital contributions until January 1, 2021 and accept a lower rate of interest thereafter. The Cresford Group, on the other hand, would receive approximately $36.8 million from the proceeds of the YSL Project.

E. The General Partner Lacked Capacity to Direct the Filing of the NOIs

28. The Partnership Agreement provides that it is an event of default for the General Partner to have consented to the appointment of a receiver in favour of the Partnership's senior secured lender, Timbercreek Mortgage Servicing Inc. The Partnership Agreement also provides that where the General Partner is in default it shall cease acting as general partner of the Partnership.[22]

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[20] Li Affidavit at para 39, MR, Tab 2; Exhibit "K" to the Li Affidavit, MR, Tab 2K.

[21] Li Affidavit at paras 44-48, MR, Tab 2.

[22] The Partnership Agreement, ss.7.1(c) and 11.2(b)(vii): Exhibit "D" to the Li Affidavit, MR, Tab D; Consent to Order appointing a receiver: Exhibit "V" to the Li Affidavit, MR, Tab V.

29. When the General Partner is required to cease acting as general partner, a new general partner may be appointed by "Special Resolution", a unanimous vote of all limited partners in the Partnership, including Cresford Yonge.[23]

F. The Proposal

30. On April 23, 2021, the Cresford Group advised that it was negotiating an agreement with Concord whereby Concord would sponsor the Debtors' Proposal. In exchange for paying or assuming all secured liabilities, and paying up to 58% of all unsecured creditor claims, the YSL Project lands would be transferred to Concord.[24]

31. According to the Debtors' preliminary list of creditors, the Debtors list $64,091,776 in unsecured and lien claims, including the following amounts: **(a)** $13.1 million by Cresford Rosedale; **(b)** $5,810,053 by EDRP; and **(c)** $19,363,566 by Oakleaf. The sum of such amounts is $38,273,619.[25]

ISSUES & ARGUMENT

32. The primary issues on this motion are: **(a)** whether the Stay applies to the YongeSL Application for the appointment of a receiver by the Court; and if so, **(b)** whether it is appropriate to declare that the Stay does not operate in respect of YongeSL *et al*. Given the commercially sensitive information regarding the value of the YSL Project lands included

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[23] The Partnership Agreement, ss.1.1 (definition of Special Resolution) and 11.2(d): Exhibit "D" to the Li Affidavit, MR, Tab D.

[24] Li Affidavit at paras 77-78.

[25] First Report of the Proposal Trustee, Appendix "B", RMR, Tab 7.

in the motion record, YongeSL *et al* also request **(c)** an order sealing such information pending further order of the Court.

A. The Stay Does Not Apply to the YongeSL Application

33. The Stay does not apply to either form of relief sought in the YongeSL Application: a declaration that the General Partner has ceased acting as general partner; and the appointment of a *Courts of Justice Act* receiver.

I. Claims for Declarations Against the General Partner Are Not Stayed

34. YongeSL *et al*'s claims against the General Partner are not stayed for the simple reason that the General Partner has not filed any NOI or proposal under the *BIA*. Further, claims for a declaration are not provable claims within the meaning of the BIA.[26]

II. Receivership Is Not a Remedy or Proceeding for Recovery of a Provable Claim

35. An application for the appointment of a receiver should be treated as an application for a bankruptcy order, which is not a proceeding for a claim provable in bankruptcy.[27]

36. In *Provincial Refining*, the Newfoundland Court of Appeal held that the filing of a proposal did not stay an application for a bankruptcy order (at that time called a "receiving order"). The Court held that the purpose of the proposal stay of proceedings was to,

> prevent any creditor **with a claim provable in bankruptcy** from instituting or continuing any proceedings against a bankrupt or insolvent who has filed a proposal **which might otherwise gain him**

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[26] *Global Royalties Limited v David Brook*, 2015 ONSC 6277 at para 14 [*Global Royalties ONSC*], appeal quashed 2016 ONCA 50 [*Global Royalties ONCA*]. Global Royalties para 14 Global Royalties ONCA

[27] *Provincial Refining Co v Newfoundland Refining Co*, 1977 CarswellNfld 6 (CA) [*Provincial Refining*], aff'd [1978] 2 SCR 836. Provincial Refining 1977 Provincial Refining 1978 aff'd

> **an advantage** over other creditors without leave of the court. A petition is for the benefit of all creditors.[28] (emphasis added)

37. *Provincial Refining* was affirmed by the Supreme Court of Canada. There is no reason why an application for the appointment of a receiver should be treated differently than an application for a bankruptcy order. Like the applicant in that case, YongeSL *et al* are not seeking to gain any advantage over other creditors. Rather, they seek a proceeding (a receivership) that will be for the benefit of all creditors, with a court officer appointed on behalf of all creditors as their respective interests may appear.

III. Purposes of the Stay Not Triggered

38. The Debtors rely on *Emergency Door*[29] for the proposition that any proceeding that interferes with a proposal process is stayed. That decision does not support so broad a proposition.

39. The decision in *Emergency Door* turned on Newbould J's conclusion that the absence of a comma after the words "autre procedure" in the French translation of s.69(1)(a) of the *BIA* could only be reconciled with the English translation by concluding that the word "remedy" included "injunctive proceedings" and was not modified by the words "for the recovery of a claim provable in bankruptcy".[30] The two translations are:

69.1 (1) Subject to subsections (2) to (6) and sections 69.4, 69.5 and 69.6, on the filing of a proposal under subsection 62(1) in respect of an insolvent person,	**69.1 (1)** Sous réserve des paragraphes (2) à (6) et des articles 69.4, 69.5 et 69.6, entre la date du dépôt d'une proposition visant une personne insolvable et:

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[28] *Provincial Refining* at para 22. H Provincial Refining para 22

[29] *Re Emergency Door Service Inc*, 2016 ONSC 5284 (Commercial List) [*Emergency Door*] H Emergency Door

[30] *Emergency Door* at paras 37-39. H Emergency Door paras 37-39

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt;	**a)** soit sa faillite, soit la libération du syndic, les créanciers n'ont aucun recours contre elle ou contre ses biens et ne peuvent intenter ou continuer aucune action, exécution ou autre procédure en vue du recouvrement de réclamations prouvables en matière de faillite;

40. Newbould J did not consider that the French translation also does not include a comma after the words "ou contre ses biens" ("or the insolvent person's property"), nor that the grammatical effect of that missing comma is that the phrase "en vue du recouvrement de réclamations prouvables en matière de faillite" ("for the recovery of a claim provable in bankruptcy") modifies the word "recours" ("remedy").

41. To the extent that the *purpose* of a proposal influences the interpretation of s.69(1)(a), it does not support the conclusion that the YongeSL Application should be stayed. The purpose of a proposal is "to give a debtor some breathing space to negotiate a compromise with the debtor's creditors in the hopes of saving the debtor".[31] That is not what is happening in this case. The Debtors are liquidating, not restructuring.

B. Alternatively, the Stay Should Be Lifted

42. The Court may declare that the Stay no longer operates in respect of a creditor if it is satisfied that either **(a)** the creditor is likely to be materially prejudiced by the continued operation of the stay; or **(b)** that it is equitable on other grounds to make such a declaration.

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[31] *Emergency Door* at para 23. H› Emergency Door para 23

Whichever branch applies, there must be sound reasons, consistent with the scheme of the *BIA*, to lift the Stay.[32]

43. The moving party need not demonstrate a *prima facie* case in order to show "sound reasons" to lift the Stay. Unless the claim is plainly hopeless, the Court need not look into the merits of the claim at all. The moving party must simply plead specific facts which, if believed, show that there are sound reasons to lift the Stay.[33]

44. There is no closed list of categories in which the case must fall before the Stay is lifted. The Court has a "wide discretion" based on the "particular facts of the particular case" to declare that the Stay does not operate in respect of a creditor.[34]

45. YongeSL *et al* have plead specific facts demonstrating sound reasons to lift the Stay:

(a) the General Partner is in breach of the Partnership Agreement and therefore was required to cease acting as general partner, rendering its proposal proceeding a nullity;

(b) the Cresford Claims are properly characterized as equity claims. Permitting the Proposal to proceed without scrutiny of such claims would undermine the *BIA*'s scheme of distribution and overarching goal of treating creditors equitably;

H› Re Ma (2001) para 3 H› Global Royalties ONCA para 35

[32] *Re Ma* (2001), 24 CBR (4th) 68 at para 3 (ONCA); *Global Royalties ONCA* at para 35.

H› Global Royalties ONCA paras 18-19

[33] *Global Royalties ONSC* at paras 18-19 and 24. H› Global Royalties ONCA para 24

[34] *Fiorito v Wiggins*, 2017 ONCA 765 at paras 35 and 38 [*Fiorito*].

H› Fiorito v Wiggins para 35 H› Fiorito v Wiggins para 38

(c) this proceeding represents the Cresford Group's most recent bad faith attempt to extract value from the YSL Project, to the detriment of legitimate creditors;

(d) where related parties stand to obtain a benefit from a transaction to the detriment of arms-length creditors, a higher standard of scrutiny is required to ensure that justice is not only done, but is seen to be done.

I. The General Partner Lacked Authority to File the NOI

46. There is clear evidence that the General Partner consented to the appointment of a receiver, and that this was a breach of the Partnership Agreement. In such circumstances, the Partnership Agreement provides that the General Partner must cease acting as general partner.[35] It therefore lacked the authority to direct the filing of NOIs on behalf of the Partnership and its nominee corporation, YSL Residences Inc.

47. It would be inequitable, and an abuse of the *BIA*, to permit the Stay to continue where there was no authority to file the NOI or make a Proposal in the first place. Lifting the Stay will permit this Court to determine the General Partner's capacity to direct the Debtors to file the NOIs. It if had no such capacity, the Court would consider whether it would be just and convenient to appoint a receiver in all of the circumstances, given that the Cresford Group otherwise has a veto the appointment of a new general partner of the Partnership.[36]

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[35] The Partnership Agreement, ss.7.1(c) and 11.2(b)(vii): Exhibit "D" to the Li Affidavit, MR, Tab D; Consent to Order appointing a receiver: Exhibit "V" to the Li Affidavit, MR, Tab V.

[36] The Partnership Agreement, ss.1.1 (definition of Special Resolution) and 11.2(d): Exhibit "D" to the Li Affidavit, MR, Tab D.

II. The Cresford Claims Are Equity Claims

48. The Cresford Claims are equity claims, notwithstanding their present and most recent characterization as unsecured claims. The *BIA* is explicit that equity claims are subordinate to unsecured claims.[37] The Court has the jurisdiction to review, determine, characterize, or re-characterize alleged unsecured advances as equity claims.[38] The factors that the Court will consider include whether: **(a)** the advances were from a non-arm's length party; **(b)** a written agreement governs the advances; **(c)** interest is payable; **(d)** there is a maturity date; and whether **(e)** there is a schedule for repayment.[39]

49. In this case, all of these factors point to the Cresford Claims being properly characterized as equity claims. If they are, and the proposal is effected, the Cresford Group would receive approximately $22 million on account of equity claims in circumstances where unsecured creditors are not paid in full. That result flies in the face of the clear scheme of distribution required by the *BIA*.

50. If YongeSL *et al*'s allegations are accepted, the continued operation of the Stay means that the Class A LPs would lose $14.8 million plus any return on that capital contribution. The loss of such a sizeable claim gives rise to material prejudice.[40] Worse, the Class A LPs would recover $0 while the Cresford Group takes $22 million from the YSL Project.

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[37] *BIA*, s.140.1. H→ BIA, s.140.1

H→ Tudor Sales para 35 H→ US Steel Canada Inc, Re para 167

[38] *Tudor Sales Ltd, Re*, 2017 BCSC 119 at para 35 [*Tudor Sales*], citing *US Steel Canada Inc, Re*, 2016 ONSC 569 at paras 167 and 183. H→ US Steel Canada Inc, Re para 183

[39] *Tudor Sales* at paras 35-38. H→ Tudor Sales paras 35-38

[40] *Fiorito* at paras 15-16 and 31.

H→ Fiorito paras 15-16 H→ Fiorito para 31

Treating the Cresford Claims as unsecured claims causes material prejudice, as the Class A LPs would be treated "unfairly, differently or in some way worse than another creditor".[41]

51. It is equitable to lift the Stay, if necessary, and permit an inquiry into the true legal character of the Cresford Claims. The summary process for the proof of the Cresford Claims in a proposal does not permit that inquiry, particularly as a proposal proceeding under the BIA is a debtor-in-possession proceeding. It is well settled that where that summary procedure is inappropriate it may be inequitable to maintain the Stay.[42] A receivership is a far more appropriate procedure for an inquiry into the Cresford Claims rather than the Proposal, a proceeding controlled by the Cresford Group.

III. Proposal Proceeding Commenced for an Improper Purpose and in Bad Faith

52. The Debtors, the General Partner and the members of the Cresford Group asserting the Cresford Claims all have positive duties to act in good faith with respect to this proceeding.[43] Conduct in a proceeding under the *BIA* that furthers an improper purpose violates the duty of good faith.[44]

53. By advancing this proceeding, the Debtors, the General Partner and the members of the Cresford Group asserting the Cresford Claims are acting for an improper purpose:

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[41] *Fiorito* at para 30. Fiorito para 30

[42] *Global Royalties ONCA* at para 33, citing *Re Advocate Mines Ltd* (1984), 52 CBR (NS) 277 at para 4 (Ont Registrar). Global Royalties ONCA para 33 Advocate Mines para 4

[43] *BIA*, s.4.2. BIA, s.4.2

[44] *CWB Maxium Financial Inc v 2026998 Alberta Ltd*, 2021 ABQB 137 at para 59 [*CWB Maxium*]; *9354-9186 Quebec Inc v Callidus Capital Corp*, 2020 SCC 10 at para 42. CWB Maxium para 59 9354-9186 Quebec Inc v Callidus Capital para 42

attempting to usurp the *BIA*'s scheme of distribution and extract millions from the YSL Project outside of the priority that they and others bargained for.

54. The Court has wide discretion to make "any order that it considers appropriate in the circumstances" where it is satisfied that an interested person fails to act in good faith.[45] That discretion extends to making an order lifting the Stay, if required.

C. Sealing Order is Appropriate

55. The Court has the discretion to order that any document filed in a civil proceeding by treated as confidential, sealed and not form part of the public record. Such an order should be granted where: **(a)** necessary to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and **(b)** the salutary effects of the order outweigh the deleterious effects.[46]

56. Information contained in the Li Affidavit relating to the market value of the YSL Project is commercially sensitive. If the Proposal fails and there is a sales process initiated in respect of the YSL Project lands, such commercially sensitive information should not be available to potential bidders. YongeSL *et al* therefore request that the Li Affidavit be sealed pending further order of this Court.

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[45] *BIA*, s.4.2(2). H→ BIA, s.4.2(2)

H→ CJA s.137(2) H→ Sierra Club para 53

[46] *Courts of Justice Act*, RSO 1990, c C43, s.137(2); *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53 [*Sierra Club*].

CONCLUSION & ORDER SOUGHT

57. This proposal proceeding is an attempt by the Cresford Group at extracting $22 million from the YSL Project to the detriment of the Debtors' unsecured creditors and the Class A LPs. The Stay does not, or alternatively should not, stand as a barrier to YongeSL *et al*'s challenge to the Cresford Group's improper conduct.

58. YongeSL *et al* therefore seek an order sealing the Li Affidavit pending further order of this Court and declaring that the Stay does not apply to the YongeSL Application, or alternatively, declaring that the Stay does not operate in respect of YongeSL *et al*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of May, 2021.

Thornton Grout Finnigan LLP, per Alexander Soutter

Schedule "A" – List of Authorities

1. *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc*, 2020 ONSC 1953 (Commercial List).
2. *Global Royalties Limited v David Brook,* 2015 ONSC 6277, appeal quashed 2016 ONCA 50.
3. *Provincial Refining Co v Newfoundland Refining Co*, 1977 CarswellNfld 6 (CA), aff'd [1978] 2 SCR 836.
4. *Re Emergency Door Service Inc*, 2016 ONSC 5284 (Commercial List).
5. *Re Ma* (2001), 24 CBR (4th) 68 (ONCA).
6. *Fiorito v Wiggins*, 2017 ONCA 765.
7. *Tudor Sales Ltd, Re*, 2017 BCSC 119.
8. *US Steel Canada Inc, Re*, 2016 ONSC 569.
9. *Re Advocate Mines Ltd* (1984), 52 CBR (NS) 277 (Ont Registrar).
10. *CWB Maxium Financial Inc v 2026998 Alberta Ltd*, 2021 ABQB 137.
11. *9354-9186 Quebec Inc v Callidus Capital Corp*, 2020 SCC 10.
12. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41.

Schedule "B" – Rules and Statutes

Courts of Justice Act, RSO 1990, c C43

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Postponement of equity claims

140.1 A creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied.

Good faith

4.2 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstances.

APPLICATION UNDER the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c C-36, as amended
AND IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF **YG LIMITED PARNTERHISP AND YSL RESIDENCES INC.**

Court File No.: 31-2734090
Estate No.: 31-2734090

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

Factum of YongeSL *et al*
(Hearing: June 1, 2021)

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