Court File 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

Joint Factum of the "Class A LPs"

(YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, and TaiHe International Group Inc., 2504670 Canada Inc., 8451761 Canada Inc., and Chi Long Inc.)

(Sanction Hearing: June 23, 2021)

June 21, 2021

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PART I - OVERVIEW

1. This proceeding involves the "**YSL Project**", a condominium project controlled by Cresford. By way of the Debtors' proposal, as amended (the "**Proposal**"), Cresford will manage to transfer the YSL Project lands to the Proposal's sponsor, Concord Properties Development Corp. ("**Concord**"), and extract $22 million from the YSL Project in the process. The Proposal is not a restructuring of the Debtors. It is a pre-packaged liquidation designed primarily to benefit Cresford and Concord.

2. The Proposal should not be sanctioned. This proceeding has been tainted by **(a)** the Debtors' failure to make full disclosure of its financial circumstances and **(b)** by side deals entered into between unsecured creditors and Concord that determined the vote on the Proposal. These issues call into question the Debtors' good faith and the impact that approving the Proposal would have on the integrity of the bankruptcy system.

3. The Proposal should also not be approved because Cresford's $38.2 million in claims against the Debtors (the "**Cresford Claims**") are equity claims. If the Proposal is effected and Cresford receives a distribution on account of its claims, the priority scheme of the *Bankruptcy and Insolvency Act* (the "***BIA***") will be upended. Alternatively, if the Proposal is effected and the Cresford Claims are recognized as equity claims, then the YSL Project lands will have been sold for undervalue, as Concord will pay up to $22 million (58% of the Cresford Claims) less for the Property than it is willing to.

4. These issues are all raised further to Dunphy J's endorsement of June 1, 2021, which provided that the Class A LPs shall be heard on the question of whether the Proposal is fair and reasonable having regard to their interests and the issues raised in their Notices of Application.

PART II - BACKGROUND FACTS

5. The Partnership is governed by the terms of an Amended and Restated Limited Partnership Agreement dated August 4, 2017 (the "**Partnership Agreement**"). The Partnership is comprised of a general partner (9615334 Canada Inc., a Cresford entity) (the "**General Partner**") and two classes of limited partners: (a) holders of Class A Preferred Units (the Class A LPs); and (b) Cresford (Yonge) Limited Partnership ("**Cresford Yonge**"), which holds Class B Units.[1]

6. The General Partner holds all assets of the Debtor YG Limited Partnership (the "**Partnership**") on behalf of the Partnership. The Debtor YSL Residences Inc. is the General Partner's nominee corporation and holds title to the YSL Project lands as a bare trustee.[2]

7. 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 *before* any amount is paid to Cresford Yonge. Cresford Yonge holds the sole interest in the residual value (ie. ultimate profit) of the YSL Project.[3]

8. Since the YSL Project's financial difficulties became apparent in 2020, Cresford has engaged in several attempts to sell or refinance the project. Each potential transaction would have involved benefits accruing to Cresford that it is not entitled to:

(a) in May 2020, Cresford pursued a transaction with GFL Infrastructure Inc. that would have required the Class A LPs to waive their claim to returns on their capital

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[1] Affidavit of Lue (Eric) Li sworn May 3, 2021 (the "**First Li Affidavit**") at paras 2, 4-5 and 15, Evidentiary Record of the Applicants ("**ERA**"), Tab 2.

[2] Third Report of the Proposal Trustee dated June 18, 2021 (the "**Third Report**"), s.2.1(1, 3 and 4).

[3] First Li Affidavit at paras 16-17, ERA, Tab 2.

contribution so as to permit Cresford to receive $44-45 million from the proceeds of the YSL Project, including $15 million on account of its lower priority units in the Partnership;[4]

(b) in June-August 2020, Cresford pursued another transaction with Empire (Water Wave) Inc. which, in one version, would have required the Class A LPs to waive claims to the return on their capital contributions while Cresford extracted $40.2 million from the YSL Project, and in another version, would have required the Class A LPs to waive up to $8.1 million and release and indemnify Cresford entities, all while Cresford's principal, Daniel Casey, would personally receive $4.8 million;[5] and

(c) in November 2020, Cresford pursued a transaction with Concord which would have required the Class A LPs to waive significant returns on their investment so that Cresford could receive approximately $36.8 million from the proceeds of the YSL Project.[6] When the Class A LPs refused to consent to this transaction, Cresford stopped marketing the YSL Project and began devising this Proposal with Concord. There is no evidence that the YSL Project was marketed in the six months prior to the Proposal being announced.[7]

9. While seeking out transactions involving the YSL Project that were to its benefit, Cresford intentionally kept the Class A LPs in the dark regarding the YSL Project's financial circumstances.

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[4] First Li Affidavit at paras 25 and 28-32, ERA, Tab 2.

[5] First Li Affidavit at para 39 and 44-48, ERA, Tab 2; Exhibit "K" to the First Li Affidavit, ERA, Tab 2K.

[6] First Li Affidavit at para 62(c), ERA, Tab 2.

[7] Transcript of the cross-examination of Dave Mann held on June 11, 2021 (the "**Mann Cross**"), Q288-290, ERA, Tab 6.

Despite multiple requests,[8] and its obligations under the Partnership Agreement and at law,[9] the General Partner refused to provide documents relating to the financial status of the YSL Project until ordered to do so by this Court in January 2021.[10] For example, the General Partner represented to the Class A LPs that there:

(a) had been no repayments made to any related party,[11] when that was untrue;[12] and

(b) were no appraisals for the YSL Project lands,[13] when that was untrue.[14]

PART III - ISSUES & ARGUMENT

10. The issue on this motion is whether this Court should bless the Debtors' conduct by sanctioning the Proposal. This Court should refuse to do so and should reject the Proposal.

11. A determination must be made regarding whether the Cresford Claims are equity claims, because if they are, the Proposal is effected and Cresford receives a dividend on account of those claims, the distribution scheme of the *BIA* will be violated.

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[8] Exhibits "H" and "N" to the First Li Affidavit, ERA, Tabs 3H and N; Exhibit "F" to the Affidavit of Anthony Szeto sworn April 28, 2021 (the "**First Szeto Affidavit**"), ERA, Tab 1.

[9] The Partnership Agreement - Exhibit "C" to the First Szeto Affidavit, ss.9.1 and 9.3, ERA, Tab 1C.

[10] Order of Cavanagh J – Exhibit "V" to the First Szeto Affidavit, ERA, Tab 1V.

[11] Exhibit "T" to the First Li Affidavit, ERA, Tab 2T.

[12] Exhibit "C" to the Affidavit of Lue (Eric) Li sworn June 9, 2021 (the "**Second Li Affidavit**"), ERA, Tab 4C.

[13] October 29, 2020 letter from Paliare Roland – Exhibit "U" to the First Li Affidavit, ERA, Tab 2U.

[14] Appraisals – Exhibits "NN"-"QQ" to the First Szeto Affidavit, ERA, Tabs "NN"-"QQ".

12. Further, if the Proposal is sanctioned, but any meaningful amount of the Cresford Claims is recognized as an equity claim and is excluded from a distribution, then the YSL Project lands will have been sold for less than what the Concord (let alone the market) is willing to pay for them.

13. Finally, the Proposal is not reasonable, calculated to benefit the general body of creditors, nor made in good faith. The true value of the YSL Project lands was hidden from creditors, and the Proposal is tainted by secret deals between Concord and certain unsecured creditors. The Proposal is merely the newest tactic by Cresford to siphon millions from the YSL Project.

A. The Cresford Claims Are Equity Claims

14. The *BIA* subordinates equity claims to all other claims and prohibits proposals from providing for the payment of equity claims in advance of the full payment of all others.[15] The Cresford Claims are equity claims – they are all on account of advances made by Cresford to acquire or increase an interest in the YSL Project, or otherwise bear the hallmarks of ownership (equity) rather than debt.

15. This Court has the jurisdiction to characterize the Cresford Claims as equity claims. In determining whether to do so, the Court should focus on the substance of the transaction and have regard to the economic reality of the surrounding circumstances.[16]

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[15] *BIA*, ss.140.1 and 60(1.7).

[16] *Tudor Sales Ltd (Re)*, 2017 BCSC 119 at para 35, per Saunders J [*Tudor Sales*], citing *US Steel Canada Inc (Re)*, 2016 ONSC 569 at paras 167-168, per Wilton-Siegel J [*US Steel*], aff'd 2016 ONCA 662.

16. The difference between equity and a debt lies in the fundamental nature of their claims to the assets and cash flow of the company:[17]

(a) debt involves borrowing funds subject to a legal commitment to repay with interest at an agreed rate by a stated maturity date. The lender receives an agreed upon set of cash flows, typically through periodic interest payments and one or more principal repayments;

(b) equity involves a claim to the company's residual cash flows. The scope of an "equity claim" under the *BIA* is not confined to its definition under that Act and should be afforded the widest scope.[18]

i. Breakdown of the Cresford Claims

17. The Cresford Claims include amounts that Cresford: **(a)** borrowed to fund its capital contribution to the Partnership, and interest thereon; **(b)** borrowed to buy out the limited partner that it would have had to split the YSL Project's profits with, and interest thereon; and **(c)** periodically injected into the YSL Project, in part in order to stave off the Partnership's senior secured lender, Timbercreek Mortgage Servicing Inc.

18. The Partnership was formed in 2016. At that time, the limited partners were Cresford Capital Corporation ("**Cresford Capital**") and bcIMC Real Estate (Yonge) Limited Partnership ("**BCIMC**").[19] BCIMC and Cresford Capital each contributed $15 million to the Partnership in exchange for "Class C" units that entitled them to share in the ultimate profits of the Partnership.[20]

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[17] *Tudor Sales* at para 36, citing *US Steel* at para 183.

[18] *Sino-Forest Corporation (Re)*, 2012 ONCA 816 at paras 39-46.

[19] Exhibit "A" to the Second Li Affidavit, ERA, Tab 4A; Mann Cross, Q27-29, ERA, Tab 6.

[20] Exhibit "A" to the Second Li Affidavit, ERA, Tab 4A; Mann Cross, Q34, 36-37 and 40, ERA, Tab 6.

19. Cresford Capital's "Class C" units in the Partnership were later **(a)** transferred to Cresford Yonge,[21] and **(b)** reclassified as Class B units under the Partnership Agreement.[22]

20. Cresford Capital borrowed $15 million (the "**YSL Deposit Loan**") from OTB Capital Inc. ("**OTB**") in order to make its capital contribution.[23] In 2018, the YSL Deposit Loan, which had an outstanding balance of $15,096,604, was repaid from the proceeds of another Cresford project. Cresford Rosedale claimed that amount from the Partnership.

21. Later, in 2017, BCIMC's Class C units in the Partnership were bought out. Cresford funded that buy-out, in part, by borrowing $13.1 million from OTB (the "**Buyout Loan**"). In 2019, the Buyout Loan was repaid. Cresford Rosedale claims that $13.1 million from the Partnership.[24]

22. The Cresford Claims also include a $9,949,165.71 on account of interest that accrued on the YSL Deposit Loan and the Buyout Loan.[25]

23. Further, the Cresford Claims include approximately $9.2 million on account of what Cresford refers to as "net cash transfers" to or from Cresford Rosedale. From time to time, the General Partner would direct payments to be made to Cresford Rosedale or "someone in the Cresford Group" but credited to Cresford Rosedale. Those payments were sporadic and varied,[26]

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[21] Mann Cross, Q47, ERA, Tab 6.

[22] The Partnership Agreement, s.4.2(b) – Exhibit "C" to the First Szeto Affidavit, ERA, Tab 1C.

[23] Mann Cross, Q41, ERA, Tab 6.

[24] Mann Cross, Q62-64, ERA, Tab 6.

[25] Mann Cross, Q71 and 80-81, ERA, Tab 6.

[26] Mann Cross, Q95-99, ERA, Tab 6.

ranging from $9,700 relating to "Clover Décor", to $600,000 to the "CASA3 sale office", to $1.4 million to the "Cresford Fund".[27]

24. Cresford has confirmed that the impugned advances are non-interest bearing and have no maturity date.[28] There are no loan documents governing them.[29]

ii. Advances to buy into the Partnership, and to buy out BCIMC, are equity claims

25. At least $23 million of the Cresford Claims arises on account of amounts that Cresford borrowed from OTB to buy into the Partnership ($15 million)[30] and buy out the only limited partner (BCIMC) that Cresford would have had to share the ultimate profits of the YSL Project with ($13.1 million), and on account of interest paid to OTB on such amounts ($9,949,165.71).

26. The substance of these advances is that they are equity contributions. An advance that is in substance "consideration paid for [an] ownership stake", or an "increase in value of that interest" should be treated as a capital contribution, and therefore an equity claim.[31]

27. That was the conclusion drawn in *Tudor Sales*. In that case, an unsecured creditor challenged the characterization of advances made to the bankrupt by its sole shareholder. In finding that the advances represented equity contributions, Saunders J relied on the fact that the shareholder acquired or increased its ownership stake in the bankrupt in close temporal proximity

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[27] Exhibit "C" to the Second Li Affidavit, ERA, Tab 4C.

[28] Exhibits "U" and "BB" to the First Li Affidavit, ERA, Tabs 2U and 2BB.

[29] Exhibit "BB" to the First Li Affidavit, ERA, Tab 2BB.

[30] As an accounting exercise, Cresford Rosedale reduced the amount it would otherwise claim from the Partnership by $15 million, representing the value of Cresford Yonge's Class B units: see Mann Cross, Q49 and 59; Exhibit "A" to the Second Li Affidavit, ERA, Tab 4A.

[31] *Tudor Sales* at para 42.

to the dates of the advances, and commented that the variable nature of interest repayments, which were not calculated according to any schedule or formula, bore the "hallmark of ownership."[32]

iii. Cresford's other advances bear the hallmarks of equity contributions

28. The other advances underlying the Cresford Claims similarly bear the hallmark of ownership. The true substance of such advances, when considered in light of the Partnership's economic reality, is that they were capital contributions.

29. Where there is no written agreement governing the advances, as in this case, the following characteristics have led other Courts to conclude that transactions were, in substance, equity contributions: **(a)** there is no schedule for repayment; **(b)** there is no obligation to pay interest, which "implies equity disguised as debt"; **(c)** there is no maturity date; and **(d)** the advances were ultimately to the advantage of a parent company.[33]

30. All such characteristics are present here. Cresford's advances are not interest bearing and have no repayment date.[34] There is no schedule for repayment. To the contrary, repayments were sporadic and variable, and made to unspecified Cresford entities.[35] They appear to have been made on Cresford's whim alone, and were all credited to Cresford Rosedale. That context is analogous to the actions of an owner moving funds between members of a corporate group, not with a borrower repaying a lender.[36]

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[32] *Tudor Sales* at paras 38-40.

[33] *Alberta Energy Regulator v Lexin Resources Ltd,* 2018 ABQB 590 (ABQB) [*Lexin*] at paras 45-48; *Tudor Sales* at paras 35-38.

[34] Exhibits "U" and "BB" to the First Li Affidavit, ERA, Tabs 2U and 2BB.

[35] Mann Cross, Q99-100, ERA, Tab 6.

[36] *Lexin* at paras 45-48.

31. All of Cresford's advances to the Partnership are ultimately to the Cresford parent company: Oakleaf Consulting Ltd. ("**Oakleaf**"). Oakleaf is the limited partner of Cresford Yonge, the only entity with a right to the ultimate profits of the YSL Project, and the indirect parent of Cresford Rosedale Developments Inc. and East Downtown Redevelopment Partnership.[37]

32. The absence of any objectively reasonable expectation that Cresford would be repaid its advances from the cashflows of the Partnership (a defining feature of debt[38]) is another factor to consider.[39] The Partnership had no cashflow to speak of. The only real opportunity for repayment was from the ultimate profits of the Partnership.

33. Cresford's behaviour throughout illuminates the true substance of the transaction and is also a valid consideration.[40] During and after making advances to the Partnership Cresford represented that its contributions were equity:

(a) the Class A LPs were induced to invest in the Partnership based on representations by Cresford that the proceeds of the YSL Project would be distributed first to external lenders, then to the Class A LPs, then to Cresford;[41]

(b) Cresford's principal, Dan Casey, was asked squarely why Cresford should receive any amount ahead of the Class A LPs. He did not take the position that the Cresford

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[37] First Li Affidavit at paras 8-9, ERA, Tab 2.

[38] *Tudor Sales* at para 36, citing *US Steel* at para 183.

[39] *US Steel* at paras 184-191 and para 281.

[40] *Lexin* at para 40, citing *US Steel* at para 195 and *Canada Deposit Insurance Corp v. Canadian Commercial Bank,* [1992] 3 SCR 558, 1992 CanLII 49 at para 52.

[41] First Li Affidavit at paras 19-21, ERA, Tab 2; Exhibit "E" to the First Li Affidavit, ERA, Tab 2E; First Szeto Affidavit at paras 14-15, ERA, Tab 1; Exhibit "D" to the First Szeto Affidavit, ERA, Tab 1D.

advances were unsecured debts, but rather just said that "in life you don't always win on every investment";[42]

(c) when describing a potential transaction with Empire to the Class A LPs, Cresford listed its claims under the same heading as the Class A LPs' claims: "Equity";[43]

(d) Cresford's acting CFO, Dave Mann, confirmed in writing that the Class A LPs' capital and preferred return would "be paid in priority to Cresford";[44]

(e) another potential transaction with Empire would have seen Casey personally receiving $4.8 million as an advisory fee, which amount represented "the amount that Cresford funded to the project to service the Timbercreek Mortgage" over the prior 8 months.[45] If such advances really had been unsecured, there would have been no need to compensate Casey personally for an equivalent amount;

(f) Cresford's previous counsel confirmed that the amount claimed by Cresford,

> is non-interest bearing and has no maturity date. It is **subsequent in priority** to the LP investments. This loans (*sic*) was required as part of the lenders' equity requirements for the project […] (emphasis added)[46]

Later, when it became clear that the Class A LPs would refuse to enter into any transaction that required them to waive their entitlement under the Partnership Agreement in favour of Cresford,

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[42] First Li Affidavit at para 32, ERA, Tab 2.

[43] First Li Affidavit at para 36, ERA, Tab 2; Exhibit "J" to the First Li Affidavit, ERA, Tab 2J.

[44] Exhibit "K" to the First Li Affidavit, ERA, Tab 2K.

[45] First Li Affidavit at para 40, ERA, Tab 2; Exhibit "L" to the First Li Affidavit, ERA, Tab 2L; Empire APS – Exhibit 2 to the Mann Cross, ERA, Tab 7.

[46] Exhibit "U" to the First Li Affidavit, ERA, Tab 2U.

Cresford's counsel retracted the statement that Cresford's advances were subsequent in priority to the Class A LPs' investments;[47] and

(g) the Partnership's own records recorded the claims of Cresford Rosedale and EDPR in the same manner as the claims of the Class A LPs.[48]

34. It is not relevant that no new units were issued to Cresford in exchange for its advances. In cases involving corporations with is only one shareholder, there is no difference between an advance in exchange for new shares and a contribution to capital in respect of the existing shares.[49] That is because the sole shareholder is already entitled to the ultimate profits of the enterprise. The same reasoning applies to a limited partnership where there is only one limited partner (here, Cresford Yonge whose limited partner is Oakleaf) entitled to the partnership's ultimate profits.

B. The Proposal Fails the Test for Approval

35. The proper characterization of the Cresford Claims cannot be put off to another day. If they are equity claims, the *BIA* prohibits them from being paid until all other claims are paid in full. Their determination also affects the whether the test for approving the Proposal is met, as a proposal that provides for the payment of equity claims ahead of all other claims is not calculated to benefit the general body of creditors, nor is it reasonable.

36. To be approved, a proposal must be: **(a)** reasonable; **(b)** calculated to benefit the general body of creditors; and **(c)** made in good faith.[50] The Court must not mechanically sanction a

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[47] Exhibit "Y" to the First Li Affidavit, ERA, Tab 2C.

[48] Sept. 2020 Trial Balance – Exhibit "C" to the Second Li Affidavit, ERA, Tab 2C.

[49] *Lexin* at para 36, citing *US Steel* at para 154.

[50] *BIA*, s.59(2); *Kitchener Frame Ltd (Re)*, 2012 ONSC 234 at para 19 (Commercial List).

proposal just because it is approved by creditors. Where any branch of the test is not met, the Court must reject the proposal in order to maintain the integrity of the bankruptcy system.[51]

37. The Proposal is not reasonable. Concord has ensured that the appraised value of the YSL Project lands is skewed downwards by at least $**** million. Further, by assuming that the Cresford Claims are unsecured claims, the Finnegan Marshall report skews the estimated effective purchase price upwards by as much as $22 million.

i. The CBRE Appraisals and the Finnegan Marshall Report

38. The market value of the YSL Project lands is at least $291 million. That is what Concord is willing to pay, and what the YSL Project lands would have been appraised at, but for Concord's express direction that the appraiser disregard at least $**** million in construction activities undertaken to date. The true value of the YSL Project lands has been hidden.

39. The appraisals of the YSL Project lands set out the value of the Debtors' property. In July 2019, Cresford obtained an appraisal from CBRE (the "**2019 Appraisal**") that valued the YSL Project lands at $**** million.[52] In April 2021, *Concord* obtained another CBRE appraisal (the "**2021 Appraisal**") that valued the same property at $**** million.[53] As set out below, the 2021 Appraisal does not include all information that supports the value of the YSL Project lands; the appraised value has been improperly skewed downwards.

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[51] See, for example, *Mayer, Re*, 1994 CanLII 7461 (ONSC) [*Mayer*] (proposal not made with adequate disclosure as evidence of the debtor's assets withheld from creditors. Despite the proposal having been approved at a meeting of creditors, the proposal was rejected by the Court). *Mayer* was cited with approval by Farley J in *Lofchik, Re*, 1998 CarswellOnt 194 (SC) [*Lofchik*].

[52] 2019 Appraisal – Exhibit "QQ" to the First Szeto Affidavit, ERA, Tab 1QQ.

[53] 2021 Appraisal – Confidential Appendix 2 to the Third Report.

40. It is important to distinguish between these CBRE appraisals, which describe the value of the Debtors' assets, and the Finnegan Marshall report, which is limited to a description of: **(a)** an estimate of the sale price under the Proposal ($291 million); **(b)** opines on the reasons for the difference between the 2019 Appraisal and 2021 Appraisal; and **(c)** opines on whether value can be generated by disclaiming the unit purchasing agreements.[54] The value of the YSL Project lands is not to be assessed with regard to the Finnegan Marshall report, which was prepared by a cost consultant, not a licensed appraiser.

ii. Concord directed CBRE not to take all value into account

41. It is evident from reading of the 2021 Appraisal that Concord *directed the author* to disregard all construction costs incurred to date and to assume that the YSL Project lands are "vacant and unimproved". The YSL Project lands are not, however, "vacant and unimproved". Excavation at the property has commenced, and other "soft and hard costs have been incurred". Market participants are likely to recognize at least a portion of these costs.[55]

42. In the 2019 Appraisal, the value of costs incurred (as at that time) was nearly $**** million.[56] As the Cresford Claims include undefined amounts contributed to construction costs, the value of construction to date is likely much greater than that amount.

43. This omission from the 2021 Appraisal was not disclosed to creditors. In an insolvency context, the obligation to act in good faith requires that the debtor make full disclosure of its

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[54] Finnegan Marshal Report, pg 1 – Confidential Appendix 1 to the Third Report.

[55] 2021 Appraisal, pgs 6 and 9 – Confidential Appendix 2 to the Third Report.

[56] 2019 Appraisal, pg 57 – Exhibit "QQ" to the First Szeto Affidavit, ERA, Tab 1QQ.

financial circumstances to its creditors.[57] Yet the 2021 Appraisal, the core document upon which the fairness of the Proposal is based, hides the value of construction activity undertaken to date. That value would affect the appraised value of the YSL Project lands and was excluded from the 2021 Appraisal *at Concord's direction*.

44. It is also apparent that CBRE was not given details on any of the prior offers made in respect of the YSL Project.[58] Those prior offers, particularly the *pro forma* that accompanied Concord's offer of financing, which included a reasonable estimate[59] of total revenue from the YSL Project of $**** billion (nearly $70 million higher than CBRE's estimate of $**** billion).[60]

45. No explanation is given for why this evidence was withheld from CBRE; evidence of prior transactions involving the YSL Project lands are undoubtedly relevant to a determination of the market value of the property. In the same vein, no explanation is given regarding why CBRE's estimates are significantly lower than Concord's own November 2020 calculations of the YSL Project's value.

iii. Concord engaged in secret deals with unsecured creditors

46. It is uncontroverted that Concord has engaged in side deals with various unsecured creditors in order to secure their votes in favour of the Proposal.[61] The result of these side deals

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[57] *Re San Francisco Gifts Ltd. (Companies' Creditors Arrangement Act)*, 2005 ABQB 91, cited with approval by *Re Canada North Group Inc*, 2017 ABQB 508 at para 36; see also *Mayer* at para 3.

[58] Answers to Undertakings given at the Mann Cross, ERA, Tab 8.

[59] Mann Cross, Q258-263, ERA, Tab 6.

[60] Exhibit "X" to the First Li Affidavit, ERA, Tab 2X; Confidential Appendix 1 to the Third Report.

[61] Third Report, s.4.10.

was that Concord took control of nearly all votes on the Proposal. Unsurprisingly, Concord cast its votes in favour of the Proposal.[62]

47. The terms of these side deals were not disclosed to the creditors – only a summary of the terms was provided to the Proposal Trustee. Some unsecured creditors agreed to vote as directed by Concord in exchange for a guarantee that if the Proposal was approved they would receive 58% of their claims. Other unsecured creditors entered into "similar" agreements with Concord. Some creditors did not enter into such agreements at all. The terms of the agreements entered into were not disclosed, but merely summarized.[63]

48. In sum, not all unsecured creditors will be treated equally. Some are guaranteed 58% of their claims; others take the risk that they will receive less. Equality among creditors is a basic principle of insolvency law.[64] Side agreements that undermine that principle are antithetical to the open and transparent nature that should accompany all insolvency processes.

49. The principle is a long-standing one and has been applied since at least the early 1900s:

> It is of the essence of composition agreements that they shall be carried out in the utmost good faith, that **all creditors shall be treated equally and there shall be no secret arrangement** or transactions whereby one creditor shall have or obtain or be given any undue advantage over other creditors […] otherwise it is a fraud on the other creditors and a **ground for annulling the composition**.
>
> **It is a duty of the Court to guard against any invasion of the equitable rights of creditors** under a composition and to refuse to sanction or permit any transaction which has the effect of giving to

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[62] Appendix "M" to the Third Report; Third Report, s.4.10.

[63] Third Report, s.4.10.

[64] *Canadian Imperial Bank of Commerce v Cicoria*, 2000 CanLII 16990 at para 2 (ON CA).

> any one particular creditor any benefit or advantage over and above that which he is entitled to in common with the other creditors.[65]

50. The fact that the secret benefit is furnished by a third party (such as Concord) is immaterial. The Supreme Court of Canada has confirmed that side deals entered into between creditors and third parties are just as much a fraud on creditors.[66] Proposals tainted by secret deals are against public policy and should not be sanctioned.

iv. The Proposal offends the integrity of the bankruptcy process

51. The prohibition on side deals is not just for the protection of the creditors. The Court must be satisfied that a proposal meets the requirement of commercial morality and maintains the integrity of the bankruptcy system.[67] The integrity of the bankruptcy process requires complete disclosure so that Court can satisfy itself that it should sanction the Proposal.

52. In this case, **(a)** Concord acquired all votes necessary to pass the Proposal, by **(b)** entering into side arrangements (summarized, but not disclosed) with the Debtors' unsecured creditors in circumstances where **(c)** the true value of the YSL Project lands were hidden from creditors *at Concord's request*. In that context, and given that **(d)** Concord is to acquire the YSL Project lands, it cannot be said that the manner in which the Proposal was conducted accords with the requirements of commercial morality, nor respects the integrity of the bankruptcy system.

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[65] *Re Cobourg Felt Co, Ex Parte Weaver*, 1925 CanLII 392, [1925] 2 DLR 997 at 998 (ON SC), per Fisher J (SC) [emphasis added].

[66] L.W. Houlden and Geoffrey B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th Edition, The Bankruptcy and Insolvency Act - Proposals (ss. 50-66), E§80 – Secret Agreements with Creditors, citing *Brigham v La Banque Jacques-Cartier* (1900), 30 SCR 436 and *Hochberger v Rittenberg* (1916), 54 SCR 480, 1916 CanLII 49.

[67] *Lofchik* at para 10; *Kitchener Frame* at paras 20 and 22.

PART IV - CONCLUSION & ORDER SOUGHT

53. This Court should refuse to approve the Proposal for a number of reasons:

(a) the mechanics of the *BIA* are being used to further an improper purpose, being to extract $22 million on account of equity claims;

(b) the Proposal cannot be said to be reasonable or calculated for the benefit of the general body of creditors when considering **(i)** that the appraised value of the lands has been unduly skewed downwards, and ignores relevant market data indicating higher value, and **(ii)** that the estimate of Concord's purchase price ($291 million) is unduly inflated by the inclusion of the Cresford Claims; and

(c) the conduct of Concord in entering into undisclosed side deals with the Debtors' creditors in order to buy up all votes necessary to pass the Proposal is against public policy and contrary to the transparent process that is contemplated by the *BIA*.

54. The primary concern of the Court in this proceeding should be to preserve the integrity of the bankruptcy system, an object which will be frustrated if the Cresford Claims are not recognized as equity claims and an independent court-officer is not appointed to take over the YSL Project and run an open, competitive and transparent sales process for the benefit of all stakeholders.

55. The Class A LPs therefore seek the dismissal of the Debtors' motion and their costs against the Debtors' estates.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of June, 2021.

Thornton Grout Finnigan LLP
Lax O'Sullivan Lisus Gottlieb LLP

SCHEDULE "A"

List of Authorities

Tab No.	Case
1.	*Tudor Sales Ltd (Re)*, 2017 BCSC 119, per Saunders J
2.	*US Steel Canada Inc (Re)*, 2016 ONSC 569, per Wilton-Siegel J, aff'd 2016 ONCA 662
3.	*Sino-Forest Corporation (Re)*, 2012 ONCA 816
4.	*Alberta Energy Regulator v Lexin Resources Ltd*, 2018 ABQB 590
5.	*Canada Deposit Insurance Corp v Canadian Commercial Bank*, 1992 CanLII 49, [1992] 3 SCR 558
6.	*Kitchener Frame Ltd (Re)*, 2012 ONSC 234 (Commercial List)
7.	*Mayer, Re*, 1994 CanLII 7461 (ON SC)
8.	*Lofchik, Re*, 1998 CarswellOnt 194 (SC)
9.	*Re San Francisco Gifts Ltd (Companies' Creditors Arrangement Act)*, 2005 ABQB 91
10.	*Re Canada North Group Inc*, 2017 ABQB 508
11.	*Canadian Imperial Bank of Commerce v Cicoria*, 2000 CanLII 16990 (ONCA)
12.	*Re Cobourg Felt Co, Ex Parte Weaver*, 1925 CanLII 392 (ONSC)
13.	*Brigham v La Banque Jacques-Cartier*, (1900) 30 SCR 436
14.	*Hochberger v. Rittenberg*, 1916 CanLII 49 (SCC), 54 SCR 480
	Secondary Sources
15.	L.W. Houlden and Geoffrey B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th Edition, The Bankruptcy and Insolvency Act - Proposals (ss. 50-66), *E§80 – Secret Agreements with Creditors*

SCHEDULE "B"

Excerpts of Relevant Statutes

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

Court may refuse to approve the proposal

59(2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

[…]

Payment — equity claims

60(1.7) No proposal that provides for the payment of an equity claim is to be approved by the court unless the proposal provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[…]

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.

APPLICATION UNDER 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.**

Court File No.: 31-2734090

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

JOINT FACTUM OF THE "CLASS A LPs"
(Sanction Hearing: June 23, 2021)

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