COURT FILE NUMBER	2501-06120
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

Clerk's Stamp

MATTER	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SUNTERRA FOOD CORPORATION, TROCHU MEAT PROCESSORS LTD., SUNTERRA QUALITY FOOD MARKETS INC., SUNTERRA FARMS LTD., SUNWOLD FARMS LIMITED, SUNTERRA BEEF LTD., LARIAGRA FARMS LTD., SUNTERRA FARM ENTERPRISES LTD., SUNTERRA ENTERPRISES INC
DOCUMENT	**BOOK OF AUTHORITIES TO THE BENCH BRIEF OF THE APPLICATION TO BE HEARD ON APRIL 28, 2026 AT 9:30 A.M.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	PARLEE MCLAWS LLP 3300 TD CANADA TRUST TOWER 421 – 7th AVENUE SW CALGARY, AB T2P 4K9 **Attention: Lenci J. Kadavil** Telephone: (403) 294-7022 Facsimile: (403) 265.8263 File: 59540.132 Email: lkadavil@parlee.com

TABLE OF AUTHORITIES

TAB	CASELAW
1	*National Bank of Canada v Sunterra Food Corporation*, 2026 ABKB 175 (CanLII) at para 51
2	*National Bank of Canada v Sunterra Food Corporation*, 2026 ABKB 206 (CanLII), at paras 71 to 76
3	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36, sections 11, 36(2), 36(4), 36(6)
4	*Canadian Overseas Petroleum Limited (Re),* 2024 ABCA 190 (CanLII), at paras 7, 29, and 44
5	*Tool Shed Brewing Company Inc (Re)*, 2024 ABKB 234 (CanLII), at paras 42, 101
6	*Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 (CanLII), at paras 102 to 110
7	*CannaPiece Group Inc. (Re)* (2023 ONSC 841), at paras 51 to 58, 66 to 73
8	*PaySlate Inc. (Re)* (2023 BCSC 608), at paras 77, 143 to 144
9	*Harte Gold Corp. (Re)* (2022 ONSC 653),at para 38
10	*McEwan Enterprises Inc.*, 2021 ONSC 6878 (CanLII) at paras 60 to 61
11	*Bellatrix Exploration Ltd. (Re),* 2020 ABQB 332 (CanLII), at para 9
12	*B+H Architects* SISP Process Order (October 27, 2025, Ontario) at para 3

1

Court of King's Bench of Alberta

Citation: National Bank of Canada v Sunterra Food Corporation, 2026 ABKB 175

Date: 20260309
Docket: 2501 06120
Registry: Calgary

Between:

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c-C36, as Amended

And in the Matter of a Plan of Compromise or Arrangement of Sunterra Food Corporation, Trochu Meat Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farms Ltd., Sunwold Farms Limited, Sunterra Beef Ltd., Lariagra Farms Ltd., Sunterra Farm Enterprises Ltd., and Sunterra Enterprises Inc.

]

Endorsement
of the
Honourable Justice Michael J. Lema

I. Introduction

[1] Is SPDI "entitled" within the meaning of s 73 of the *Law of Property Act* to pay off the balance of a mortgage in the circumstances here?

[2] The answer is no, as explained below.

II. Background

[3] SPDI owns a commercial property in Calgary.

[4] It entered into a long-term lease of the property with West Market Square Inc.

[5] SPDI is a 50 per cent shareholder in WMS. Sunterra Enterprises Inc. is the other (50 per cent) shareholder.

[6] WMS borrowed monies from Alberta Treasury Branches, secured in part on a mortgage of WMS's leasehold interest.

[7] At SEI's request, WMS borrowed additional monies from ATB for SEI's purposes.

[8] SPDI agreed to this, taking a pledge of SEI's shares in WMS as security for SEI's promise to repay those funds to ATB.

[9] SPDI, WMS, and ATB made a "tri-party agreement" defining their relationships in respect of the share pledge.

[10] SEI defaulted in repaying those monies, triggering ATB to seek repayment of all monies advanced to WMS.

[11] ATB has applied to appoint a receiver of WMS (decision heard and reserved on March 4, 2026).

[12] Also on March 4, 2026, SPDI applied for an order declaring that s 73 of the *Law of Property Act* applies to SPDI's recent tender of what it describes as full payment (i.e. tendered) to ATB of all monies owing by WMS to ATB.

[13] Flowing from such a declaration and, if granted, from clearance of ATB's claims against WMS, it seeks the assignment of ATB's secured position against WMS.

[14] SEI and other Sunterra entities are currently under *CCAA* protection.

[15] WMS is not currently under such protection; however, also on March 4, 2026, Sunterra applied for a declaration that WMS come into the *CCAA* proceeding and be sheltered by the *CCAA* stay of proceedings (recently extended on March 4, 2026 to May 1, 2026). That decision is also under reserve.

[16] This decision focuses on the s 73 *LPA* issue.

III. Legislation

[17] Here is s 73 *LPA*:

> (1) When a mortgagor becomes entitled to pay off the balance owing on the mortgage, the mortgagor may require the mortgagee on receiving payment, instead of giving a discharge, to transfer the mortgage to a third party and the mortgagee is bound to transfer the mortgage as the mortgagor directs.
>
> (2) When a person
>
> (a) becomes entitled or obligated to pay off the balance owing on a mortgage, and
>
> (b) pays to the mortgagee the balance owing on the mortgage,
>
> the mortgagee on receiving the payment, instead of giving a discharge, is bound on the request of the person who made the payment to transfer the mortgage as the person who made the payment directs.

> (3) Any waiver or release of the rights, benefits or protection given by this section is against public policy and void.

[18] SPDI invokes ss. 73(2). (WMS is the mortgagor here, not SPDI; accordingly, ss 73(1) is inapplicable.)

IV. Analysis

[19] SPDI asserts it is "entitled" to pay off the balance owing on WMS's mortgage to ATB. Here are its key arguments:

> Section 73 creates a mandatory right to assignment upon payment. When a person **entitled or obligated to pay off a mortgage** pays the balance owing, the mortgagee is *bound*, upon request, to transfer the mortgage as directed rather than provide a discharge [footnote 36 citing ss. 73(2) *LPA*]. Section 73(3) further provides that any waiver of this right is against public policy and void.
>
> **SPDQ falls squarely within the class of persons entitled under section 73. SPDI is the fee simple owner of the Lands encumbered by the leasehold mortgage structure, is a party to the Tri-Party Agreement, and is a surety for the Indebtedness. SPDI is therefore both a "mortgagor" under section 73(1) and a "person" entitled or obligated to pay under section 73(2)** [footnote 37 citing a commitment letter dated October 27, 2023, Exhibit "J" of the First Affidavit [of Peter Livaditis, sworn February 4, 2026], defining the "Project Lands" as the same lands of which SPDI is the fee simple owner at page 12, and Supplemental Affidavit [of Mr. Livaditis, sworn February 19, 2026] at paragraphs 24 and 21].
>
> SPDI has delivered a formal, unconditional tender of the full Payout Amount. The funds are held in its counsel's trust account, available for immediate release. **The statutory conditions are met**. [SPDI brief, paras 48-50] [emphasis added]

[20] I first note that "entitled" means "the right to do or receive something": ***Welsh v Ontario***, 2020 ONCA 210 (para 3). SPDI did not offer its own definition of "entitled" or argue that it should be interpreted otherwise i.e. than as having a right to do something i.e. here, a right to pay off ATB's mortgage balance.

[21] I turn to the circumstances identified by SPDI as giving it entitlement here.

[22] The parties to the commitment letter are ATB, which prepared it, and WMS, which accepted it. SPDI is not a party to the commitment-letter agreement.

[23] SPDI is referred to once in the commitment letter, namely, in paragraph 6 (catalogue of security documents i.e. in subparagraph (e): "Solicitor-prepared Tri-Party Agreement for consent to Leasehold Mortgage between [SPDI], Borrower [i.e. WMS], and Lender [i.e. ATB]).

[24] That reference does not make SPDI liable, directly or indirectly, for the borrowed funds.

[25] The commitment letter contemplates at various points that WMS's obligations may be guaranteed for one or more guarantors (e.g. reference in subparagraph 8(g) to "each Guarantor (if any)." "Guarantor" is a defined term in the commitment letter:

> "Guarantor" means any party that has provided a guarantee in favour of Lender [ATB] with respect to the Borrowings hereunder. [para 15 (Definitions)]

[26] SPDI provided no evidence that it provided a guarantee here.

[27] Lastly, SPDI emphasized the definition of "Project Lands":

> "Project Lands" means the lands legally described as Plan 9911775, Block 3 and municipally located at 1851 Sirocco Dr. SW Calgary AB.

[28] Per PDI this is the legal description and municipal address of the property on which the shopping centre in question is located.

[29] No party disputed that that is so or that SPDI is the fee-simple owner of that property.

[30] However, ATB's mortgage here is not registered against SPDI's fee-simple title, instead against the ground lease held by WMS.

[31] Imprecision in the Project Lands definition (i.e. showing as the centrepiece legal interest of ATB's security the fee-simple title i.e. instead of (as it should) the ground lease) does not make SPDI a party to the ATB-WMS lending arrangements, constitute SPDI a guarantor or other surety for WMS's obligations, or otherwise assist SPDI in making its s 73 *LPA* case here.

[32] To summarize here: nothing in the commitment letter shows or signals that SPDI is "entitled or obligated" to pay the ATB mortgage balance within the meaning of s 73 *LPA*.

[33] I next reproduce the two cited paragraphs from Mr. Livaditis's February 19, 2026 affidavit (paras 21 and 24):

> I understand from counsel that the Applicant, SPDI, is a "mortgagor" or "person entitled to redeem" within the meaning of Section 73 of the *Law of Property Act* because (a) Fee Simple Owner: The Applicant, SPDI's fee simple title is encumbered by the Tri-Party Agreement with ATB, attached hereto and marked as Exhibit "W", which attempts to restrict SPDI's ability to terminate the Lease; and (b) Surety/Guarantor: The Applicant, SPDI is a guarantor/surety for the debt. The ATB Commitment Letter … at page 12, defines the Project Lands as the same lands in Exhibit "T", wherein SPDI is the sole owner in fee simple. This Project Lands are pledged to secure the Borrower, WMS's debt, as stated at paragraph 6(b) and (c). 6(e) also indicate that a Tri-Party Agreement providing ATB with a Leasehold Mortgage between SPDI, WMS, and ATB.
>
> …
>
> The ATB Indebtedness is secured not only by recent instruments, but by a continuous chain of security dating back to 2009 (Exhibit "T" – Land Titles Search). I note that Clause 6 of the Commitment Letter … page 3/12, expressly focuses on Security Documents "currently held." The Mortgage Amending Agreement in 6(c) and the General Assignment of Leases and Rents in 6(d) and the Tri Party Agreement in 6(e) match the Title Search in Exhibit "T" and links the active security to the 2009 to 2011 instruments. These are not new security, but older security which ATB is relying on. Accordingly, the assignment of these specific instruments is required to preserve the priority of the security. [paras 21 and 24]

[34] None of this evidence assists SPDI in showing or signalling status under s. 73 *LPA*.

[35] SPDI's fee-simple ownership does not make it a party, express or implicit, to the lending arrangements on the ground lease here. Or otherwise create obligation or entitlement, within the meaning of s 73 *LPA*, to pay off ATB's mortgage.

[36] In any case, SPDI did not explain why.

[37] As well, SPDI's fee-simple title is not encumbered by any of ATB's security or at least not in the sense of exposing that title to ATB enforcement action if WMS defaults.

[38] It is true that, under the Tri-Party Agreement, SPDI's enforcement rights triggered by WMS defaults under the ground lease are deferred until ATB is notified of them and given an opportunity to cure them. However, if the defaults are not cured within specified periods, SPDI can enforce its rights against WMS.

[39] In other words, WMS's defaults are either cured (by itself or by ATB) and, if not, SPDI's security rights can be enforced.

[40] The limited deferral of SPDI's enforcement rights is not a material encumbrance on SPDI's fee-simple title. In any case, the deferral provisions do not make SPDI a mortgagor to ATB or a guarantor or other surety of WMS's debts to ATB.

[41] In fact, the Tri-Party Agreement gives ATB various rights, which SPDI recognizes, to enforce against the ground lease. For example, if ATB foreclosed on the ground-lease mortgage and sought to assign the unexpired portion to a third party, SPDI agreed that it would not unreasonably withhold consent to a proposed assignee.

[42] More generally, the Tri-Party Agreement comprehensively defines the rights and obligations of ATB, WMS, and SPDI respecting the ground-lease mortgage.

[43] Nowhere does it state or suggest that SPDI is obliged in any way to ATB in respect of the monies advanced to WMS or that it has a right to clear the mortgage balance in any circumstance.

[44] Finding an implicit right to clear the ATB balance would cut against its express provisions empowering ATB to take enforcement steps against the ground lease i.e. with nothing stating or showing that SPDI could impair or neutralize any such steps by paying off the mortgage itself.

[45] As well, SPDI did not explain how, even when the historical security documents are factored in, its fee-simple title is materially shadowed by ATB's security or that SPDI has any obligation for or entitlement to pay ATB's balance in any circumstance.

[46] SPDI did not point to any evidence that ATB has demanded or requested that SPDI pay WMS's balance e.g. somehow implicitly recognize SPDI as a guarantor or other surety.

[47] SPDI did not offer any other bases for being considered as a guarantor or other surety or for otherwise being "obligated or entitled" to clear ATB's mortgage balance.

V. Conclusion

[48] SPDI is not a mortgagor within the meaning of ss 73(1) *LPA*.

[49] Neither is it "entitled or obligated", within the meaning of ss 73(2) *LPA*, to clear WMS's debt to ATB.

[50] Accordingly, I decline to grant the declaration requested by SPDI.

[51] Incidentally, if SPDI had had status under either subsection, I would have found that the tendering of the mortgage balance and the calling for the assignment of ATB's security would have fallen outside the scope of the *CCAA* stay here, with such steps representing simply the substitution of one secured creditor for another.

[52] I thank the parties for their helpful written and oral submissions.

Heard via Webex on the 4th day of March, 2026.
Dated at Calgary, Alberta this 9th day of March, 2026.

Michael J. Lema
J.C.K.B.A.

Appearances:

Lenci J. Kadavil
Parlee McLaws LLP
For Signature Pointe Developments Inc.

Derek Pontin
Dentons Canada LLP
For ATB Financial

Robert J. Chadwick
Goodmans LLP
and
Scott Chimuk and David Mann
Blue Rock Law LLP
For the Applicants Sunterra Parties

Gunnar Benediktsson
Norton Rose Fulbright
For the CCAA Monitor

2

Court of King's Bench of Alberta

Citation: National Bank of Canada v Sunterra Food Corporation, 2026 ABKB 206

Date: 20260318
Docket: 2501 06120/2601 03434
Registry: Calgary

Between:

2501 06120

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c-C36, as Amended

And in the Matter of a Plan of Compromise or Arrangement of Sunterra Food Corporation, Trochu Meat Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farms Ltd., Sunwold Farms Limited, Sunterra Beef Ltd., Lariagra Farms Ltd., Sunterra Farm Enterprises Ltd., and Sunterra Enterprises Inc.

- and –

Between:

2601 03434

ATB Financial

Plaintiff

- and –

West Market Square Inc.

Defendant

Endorsement
of the
Honourable Justice Michael J. Lema

I. Introduction

[1] Should the *CCAA* stay of proceedings be extended to West Market Square Inc. (WMS), a company fifty per cent owned by Sunterra Enterprises Inc. (SEI), one of the Sunterra companies under *CCAA* protection?

[2] If not, should a receiver (or alternatively, an interim receiver) of WMS be appointed at the instance of ATB Financial, its secured creditor?

[3] I find that extending the stay to WMS is not warranted and that its receivership is albeit temporarily suspended until March 27, 2026, all as explained below.

II. Analysis

A. Extension of stay

[4] The Sunterra group provided the following background for its stay-extension request:

> Sunterra Enterprises [SEI] holds 50% of the voting shares of [WMS], with the other 50% held by Signature Pointe Developments Inc ("SPDI"). The Court in these proceedings previously confirmed that the stay of proceedings granted by the [Amended and Restated Initial *CCAA* Order] provides protection from and against any actions and proceedings taken by SPDI that affect the interest of Sunterra Enterprises in WMS [see *National Bank of Canada v Sunterra Food Corporation*, 2025 ABKB 742]. However, [the Sunterra group] believes that further clarify regarding the scope of the stay of proceedings in respect of WMS is required to ensure that there is proper protection in place for WMS and the interests of [SEI] in WMS. Among other things, ATB Financial, as secured lender to WMS, has advanced a potential receivership application in respect of WMS outside of these CCAA proceedings.
>
> The [Sunterra group is] requesting that the Court confirm that the stay of proceedings and related protections granted by the ARIO apply to WMS and tis business and property, *mutatis mutandis*. [Sunterra brief dated February 21, 2026 -- paras 10 and 11].

[5] Its arguments for the stay extension are here:

> Courts are authorized under Sections 11 and 11.02 of the CCAA to grant stay protection in favour of third parties that are not themselves applicants in a CCAA proceeding where **necessary and appropriate to facilitate restructuring efforts**. In determining whether or not such relief is appropriate, the factors to be considered include whether extending the stay to the third party in question would **help maintain stability and value during the restructuring proceedings**. [Footnote 16: McEwan Enterprises Inc., 2021 ONSC 6453 at para 42 …; *KEB Hana as Trustee v. Mizrahi Commercial (THE ONE) LP,* 2024 ONSC 1678 at para 28 …]
>
> As referenced above, the Court in these proceedings previously confirmed that the stay of proceedings granted by the ARIO provides protection from and against any actions or proceedings taken by SPDI that affect the interest of Sunterra Enterprises in WMS.
>
> The Applicants respectfully submit that it is appropriate to confirm in the proposed Second ARIO that the stay of proceedings and related protections granted by the ARIO apply to WMS and its business and property, *mutatis mutandis*.
>
> Absent clear stay protection in favour of WMS, its lender or other creditors may take enforcement or other adverse steps. In particular, **ATB Financial, as secured lender to WMS, has advanced a potential receivership application in respect of WMS**. This action and any other similar action against WMS or its business and property has the **potential to undermine the Applicants' efforts to preserve and maximize value** in these proceedings as they could: (i) **materially impact the value of WMS and, in turn, Sunterra Enterprises' interest therein**, to the detriment of the Applicants and other stakeholders; and (ii) **divert key personnel and resources from the Applicants' ongoing restructuring efforts**. There is **no material prejudice to SPDI or any lender of WMS** in confirming that the stay of proceedings applies to WMS and its business and property in order to protect value for all parties. Rather, it will **promote stability and potentially facilitate discussions amongst the relevant parties**. [Footnote 17: Arthur Price affidavit, paras 29-30]
>
> Additionally, Courts have **previously granted stays of proceedings over entities in which the applicants do not own a 100% interest**. [Footnote 18: See e.g., *In Re Hudson's Bay Company*, 2025 ONSC 1530 at para 46–48 [*HBC*] …; *Imperial Tobacco Canada Limited, Re,* 2019 ONSC 1684 at paras 11–12 …] [Sunterra brief, paras 20-24]

[6] Sunterra's evidence about WMS was provided by Arthur Price, who holds various director and executive roles with most of the Sunterra entities, albeit (at least per the available evidence) not with WMS. (Per an affidavit sworn February 4, 2026 by Peter Livaditis, SPDI's principal, he and Glen Price are the two directors of WMS.)

[7] Here is Arthur Price's WMS-focused evidence:

> Pursuant to the proposed Second ARIO, the Applicants are seeking to confirm that the stay of proceedings granted by the ARIO applies to WMS and extends its business and property.
>
> Sunterra Enterprises holds 50% of the voting shares of WMS, with the other 50% of the voting shares of WMS held by Signature Pointe Developments Inc. **("SPDI").** WMS owns the commercial property located at 185 l Sirocco Drive S.W., Calgary, Alberta, T3H 4R5, and is a sub landlord of a shopping facility.
>
> I understand that the Court in these proceedings has previously confirmed that the stay of proceedings granted by the ARIO provides protection from and against actions or proceedings taken by SPDI that affect the interest of Sunterra Enterprises in WMS. However, the Applicants believe that further clarity regarding the scope of the stay of proceedings in respect of WMS is required to ensure that there is proper protection in place for WMS and the interest of Sunterra Enterprises in WMS. Specifically, J am concerned that, **in the absence of the stay of proceedings extending to WMS** and its business and property, **the lender to WMS or certain other creditors of WMS may take enforcement step or exercise other rights against WMS, which would negatively impact WMS and Sunterra Enterprises' interest therein and materially affect the value of WMS to the detriment of the Applicants, WMS and its other stakeholders**. Any enforcement steps or other actions taken against WMS or its business and property **would necessarily involve the Applicants' key personnel and consume resources of the Applicants**, and could be counterproductive to the Applicants' efforts to preserve and maximize value in these proceedings. I believe there is **no material prejudice to SPDI or any lender to WMS** in confirming that the stay of proceedings applies to WMS and its business and property in order to protect value for all parties.
>
> ATB Financial, as secured lender to WMS, has advanced a potential receivership application in respect of WMS outside of these CCAA proceedings. I believe that matter with respect to WMS should be addressed within these CCAA proceedings. I also believe that commercial discussions are needed between the parties in order to reach agreement on matters with respect to WMS, and that confirming protection for WMS pursuant to these proceedings will allow for such discussions to take place.
>
> Given the foregoing, the Applicants are requesting the stay of proceedings be extended to WMS and its business and property. [paras 27-31] [emphasis added]

[8] Additional (albeit limited) evidence about WMS came from Mr. Livaditis, who detailed its incorporation, that it operates in Calgary and elsewhere in Alberta, and that (as noted) SEI and SPDI are its two 50 per cent shareholders.

[9] Courts have extended a *CCAA* stay to affiliated or otherwise connected parties or other entities (e.g. partnerships or limited partnerships) not originally under the stay umbrella where the latter are "**functionally integrated and embedded** within the overall corporate and business structure" (***Corus Entertainment Inc (Re)***, 2025 ONSC 6192 (Kimmel J.) at para 11), are "**inextricably intertwined** in the business of the debtor companies" (***Angus A2A GP Inc***, 2025 ABKB 51 (Feasby J.) at para 79), "carry on operations that are **integral and closely interrelated**

to the business of the [already-shielded] Applicants" and whose "operations and obligations … are **so intertwined** with those of the applicants that **irreparable harm would ensue if the requested stay [extension] were not granted**" (***Canwest Global Communications Corp (Re)***, 2009 CanLII 55114 (ONSC) (Pepall J. as she then was) at para 29, carry on a "[b]usiness [that] is **integrated** among the [already shielded] Applicants (***Cinram International Inc (Re)***, 2012 ONSC 3767 (Morawetz J. as he then was) at para 61), are "**highly integrated** into the business of the [already shielded] wholly-owned subsidiaries" (***BZAM Ltd Plan of Arrangement***, 2024 ONSC 1645 (Osborne J. as he then was) at para 43), are businesses and operations that "are **significantly intertwined** with those of the [already shielded] Applicant" (***Re Chalice Brands Ltd***, 2023 ONSC 3174 (Kimmel J.) as para 39), are "**significantly intertwined** with the [already shielded] Calpine corporations" (***Re Calpine Canada Energy Limited (CCAA)***, 2006 ABQB 153 (Romaine J.) at para 31), are "**highly integrated with and indispensable to the business** of the [already shielded] Applicants" (***In re Hudson's Bay Company***, 2025 ONSC 1530 (Osborne J. as he then was) at para 47), and same (as ***Hudson's Bay***) assessment in ***Imperial Tobacco Canada Ltd (Re)***, 2019 ONSC 1684 (McEwen J.) at para 12).

[10] Neither Arthur Price's affidavit nor those sworn by Mr. Livadistis on February 4 and 19, 2026 (i.e. to the extent the latter may have provided additional windows into the point) showed the degree of integration or connection between WMS's operations and those of the rest (or some of) the Sunterra group. Or even asserted high integration or anything akin. Or (as discussed further below) show the significance of WMS's (possible) equity in the ground lease (i.e. after factoring out ATB's claim) to Sunterra's overall restructuring plans.

[11] I understand that Sunterra operates a retail outlet in the property that SPDI owns and in respect of which WMS has a ground lease.

[12] But no evidence showed, even assuming some connection between that outlet and the rest of the Sunterra group, connection to the extent required by the above cases i.e. "functional integrated and embedded", "inextricably intertwined", "integral and closely interrelated", etc.

[13] Courts have extended *CCAA* stays to connected affiliates or other entities for other reasons, such as where the currently "outside" parties are **co-borrowers** with the *CCAA*-shielded parties or **guarantors** of their obligations (***Lydian International Ltd (Re)***, 2019 ONSC 7473 (CJ Morawetz) at paras 14-17 and 39; ***Corus Entertainment*** at para 11; ***Canwest Global*** at para 30; ***McEwan Enterprises Inc***, 2021 ONSC 6453 (CJ Morawetz) at paras 19 and 44(a)), and ***Imperial Tobacco*** at para 12).

[14] And where the inclusion of the outside party or parties is necessary for the **performance of critical reclamation obligations** (***Mantle Materials Group (Re)***, 2024 ABKB 19 (ACJ Nixon) at paras 59 and 60).

[15] And where the outsiders "**hold copyright and intellectual property rights** [apparently beneficial to the entire group], have **contractual relationships with critical suppliers and other third parties,** and are engaged in **important aspects of the overall [enterprise]" (*Corus Entertainment*** at para 11).

[16] And where the outsiders are **parties to agreements with an insider entity** (i.e. with an entity sheltered by the *CCAA* stay) and where **proceedings by third parties against the outsiders "would have a detrimental effect on the [insiders'] ability to restructure** and

implement [a proposed transaction] and **would lead to an erosion of value in the [overall enterprise]" (*Cinram International*** at para 61(b)).

[17] And where the outsiders have "**tax attributes** which could be beneficial to the [larger enterprise]" and where they will be **included in contemplated SISP [sales and investment solicitation] process**, such that "the stay should apply to them to give comfort to potential bidders that enforcement actions against those parties will be stayed while a sales process is being conducted" (***BZAM*** at paras 43 and 45).

[18] And where, absent a stay extension, "**enforcement proceedings ... against any of the [outsiders] ... would cause significant disruption to [the restructuring entity]**, would have a **detrimental effect on [its] restructuring efforts**, and ... could [result in] a **significant erosion of value to the Business** to the detriment of all stakeholders" (*McEwan* at para 44(b)).

[19] And where "**claims against the [outsider] entities ... are derivative of the primary liability of the Target Canada Entities [i.e. those already stay-sheltered]" (*Target Canada Co (Re)*,** 2015 ONSC 303 (RSJ Morawetz as he then was) at para 49.

[20] And where an outside entity "**acts as the only employer** within the Chalice Group [i.e. the sheltered entities] and funds payroll", where other outside entities "**hold [certain] cannabis licences** [apparently beneficial to the entire group], **operate the cultivation and production facilities** [apparently for the entire group][,] and operate **sixteen retail stores**", "certain creditor and landlord-driven **enforcement actions ... taken against [the outsiders] may put the licences at risk**" and may "**materially destroy value** and **negatively impact a going-concern sale of the [overall enterprise]**" (***Chalice Brands*** at para 38).

[21] And where "[a]ny proceedings commenced against the [outsiders] would **necessarily involve the [restructuring entities'] key personnel and consume [their] limited resources**" (***Hudson's Bay Company*** at para 48).

[22] And where declining to extend the *CCAA* stay would "**defeat the entire purpose" of a *CCAA* restructuring (*Hudson Bay Company*** at para 44) or "would **undermine the intent of the stay" (*Imperial Tobacco*** at para 12).

[23] And also where (as an additional material factor) extending the stay would not materially prejudice creditors of the outside entities (***McEwan Enterprises*** at para 44(c)) and ***Imperial Tobacco*** at para 12).

[24] Most of these pro-extension factors are not present here.

[25] Sunterra emphasized the following factors (outlined above and reproduced here for ease of reference):

> [The proposed ATB receivership] and any other similar action against WMS or its business and property [have] the **potential to undermine the Applicants' efforts to preserve and maximize value** in these proceedings as they could: (i) **materially impact the value of WMS and, in turn, Sunterra Enterprises' interest therein**, to the detriment of the Applicants and other stakeholders; and (ii) **divert key personnel and resources from the Applicants' ongoing restructuring efforts**. There is **no material prejudice to SPDI or any lender of WMS** in confirming that the stay of proceedings applies to WMS and its business and property in order to protect value for all parties. Rather, it will **promote**

> **stability and potentially facilitate discussions amongst the relevant parties**.
> [Footnote 17: Arthur Price affidavit, paras 29-30]

[26] I examine these in turn, starting with the **perceived negative impact of a receivership on WMS's value.**

[27] Sunterra did not explain the perceived "potential ... [material] impact to the value of WMS" i.e. from the receivership proposed by ATB.

[28] SEI's 50 per cent ownership of WMS (i.e. its equity stake in WMS) is necessarily net of ATB's secured claim, currently standing at approximately $8.4 million, plus interest and costs.

[29] Sunterra did not explain how the proposed receivership (whether standard or interim) would eclipse whatever net equity WMS has in the ground lease in question or in its assets overall i.e. if that is what Sunterra means by material impact.

[30] For its part, SPDI raised the spectre of the lease being terminated (by it) if a receivership occurred, with that as an event of default under the ground lease. However, under a tri-party agreement, SPDI cannot terminate the lease without ATB's consent. And with the ground lease as ATB's core security, it is hard to conceive why it would consent. As well, the tri-party agreement expressly contemplates survival of the ground lease under a receivership e.g. in s 3 (Covenants of Sublessor).

[31] To the extent Sunterra is concerned about equity diminishment (i.e. not full eclipsing) in the receivership, it did not explain how a court-supervised receivership could or at least would result in subpar realization on the ground lease or other WMS assets i.e. explain how realization on the lease and other assets in the receivership would yield subpar recoveries i.e. compared to the recoveries theoretically possible under the *CCAA* restructuring process. That is, explain why Sunterra would not be able, advancing its position at 50 per cent shareholder of WMS, to advance whatever positions and arguments and present whatever evidence it can in a receivership proceeding to maximize whatever net equity is available in WMS i.e. after clearance of ATB's secured claims.

[32] To the extent Sunterra is concerned about professional fees ATB would incur, Sunterra itself is incurring professional fees (with justification) in its efforts to restructure or arrange for new financing i.e. it should not fault ATB for engaging professional advisers to protects its interests as well. In any case, Sunterra (or, more specifically, WMS) can tax those fees if perceived as excessive.

[33] ATB's entire claim must be paid before SEI (and SPDI) can recover any equity out of WMS (i.e. failing coming to terms with ATB on arrears payment and reinstatement of ongoing payments). Sunterra has failed to show a materially better prospect of recovering such equity under the *CCAA* proceeding compared to the proposed receivership.

[34] Plus, Sunterra placed great emphasis on a ground-lease appraisal estimating that, if the lease's options to renew for a total of fifteen years (three sequential options to renew for five years each) are all exercised, the ground lease has a value ranging between $11,260,000 and $17,200,000 i.e. well above (even at the lower figure) ATB's current claim of the noted approximately $8.4 million (plus interest and costs).

[35] This contrasts to a value range of between $4,570,000 and $9,400,000 if the options are factored out.

[36] Sunterra noted that SPDI obtained the appraisal and had advised the appraiser that the options would not be exercised, putting the higher range out of reach (per SPDI).

[37] Sunterra argued that the option belongs to WMS and that, via a unanimous shareholders' agreement, SEI and SPDI have an equal say over such questions i.e. "non-exercise" is not SPDI's sole call to make. That is, the focus should be on the higher range and SEI's 50 per cent stake in that considerable net equity.

[38] However, that ignores the apparent fact (per Mr. Livaditis's February 4, 2026 affidavit) that:

> … WMS has failed to provide the rent payment and has defaulted on its rental agreement with SPDI [as landlord under the ground lease] for the subject property. [The] rental payment for February [2026], in the amount of $39,383.40 was not paid when it was due on February 1, 2026.

[39] Sunterra did not provide any evidence contradicting that evidence.

[40] Under the ground lease, WMS's option to renew for the noted three sequential five-year terms is conditional (in part) on full performance of its lease obligations:

> [WMS] shall have duly and regularly performed **each and every one of the terms, convenants and conditions contained in [the] Lease**. [part of article 1.2] [emphasis added]

[41] The current obligation to pay monthly rent (i.e. for the period June 1, 2024 to May 31, 2029) is detailed in article 2.1(b). Per article 6.1, WMS's obligation to pay the required monthly rent is one of its covenants.

[42] Sunterra did not explain how, in these circumstances, the options to renew and the associated additional value come into play i.e. with an express precondition to renewing no longer satisfiable and nothing in the lease providing for an effective erasure of a rent-payment default i.e. if it were later cured.

[43] I find that Sunterra has not demonstrated that a receivership would result in materially differential recoveries on WMS's net equity in the ground lease.

[44] As for "**diverting key personnel and consuming resources**", as noted above Sunterra did not explain its apparent refusal of SPDI's proposal to pay out ATB entirely i.e. why the "ATB crisis" should not have been addressed by that proposed payment.

[45] In any case, whether in a receivership or inside the *CCAA* proceeding, Sunterra (and SPDI) need to determine how to pay out ATB in full or, if possible, bring WMS current with ATB (and presumably cover ATB's enforcement-to-date costs) i.e. some person or persons inside Sunterra and some Sunterra resources will have to be dedicated to addressing the ATB issue either way.

[46] And no evidence shows any differential between the two processes on this aspect.

[47] In any case, and recognizing that SPDI was unsuccessful in arguing that that it was "entitled" to pay out ATB's balance within the meaning of s 73 of the *Law of Property Act*, as explained in ***National Bank of Canada v Sunterra Food Corporation***, 2026 ABKB 175 (with SPDI not a co-mortgagor, guarantor or other surety for WMS, and not otherwise having a legal right to clear ATB's balance i.e. in the sense of obliging ATB to accept the tendered payment),

SPDI apparently has sufficient funds on hand (i.e. its own funds) to pay out ATB's entire balance (including interest and costs) and can tender that payment to ATB. That is, not because it has legal standing (for whatever reason) to clear the debt (as contemplated in s 73 *LPA*) but because, even if viewed as a legal stranger to WMS's mortgage debt to ATB, SPDI can nonetheless tender payment to ATB. And the law recognizes that, as long as SPDI's intention via such payment is acquiring ATB's position (i.e. not discharging the mortgage debt), it can so acquire that position.

[48] That is not to say that ATB is obliged to accept the payment in the way it would be if SPDI were a co-borrower or a guarantor or other surety.

[49] But it is hard to conceive what commercial reason ATB would have to declining to accept a payout of its full balance, with interest and costs, or for thereafter declining to assign its position, including its security, to SPDI.

[50] Here I cite ***Winter (Re)***, 1954 CanLII 175 (SK CA):

> … In *Chitty on Contracts,* 20th ed., p. 1055, the learned author states:
>
> > **"Where a stranger pays off an existing mortgage such payment raises a *prima facie* presumption in equity that he does not thereby intend to amortise the debt but proposes to keep it alive for his own benefit."**
>
> *Vide* also *Leake on Contracts,* 8th ed., p. 705. In *Butler v. Rice* [1910] 2 Ch 277, 79 LJ Ch 652, it was held by Warrington, J. at pp. 653 and 655 that **if a stranger pays off a mortgage on an estate there is a presumption that he intends to keep it alive for his own benefit and the fact that the mortgagor, the owner of the property, has not requested him to make the payment is not material.**
>
> In *Halsoury,* 2nd ed., vol. 23, p. 348, it is stated:
>
> > "Although there has been no actual transfer of the mortgage a person who advances money for the purpose of paying it off and whose money is thus applied becomes an equitable assignee of the mortgage and is entitled to have it kept alive for his benefit."
>
> The authorities cited in support are *Cracknall v. Janson* (1879) 11 Ch D 1, 48 LJ Ch 168; *Chetwynd v. Allen* [1899] 1 Ch 353, 68 LJ Ch 150, and *Butler v. Rice, supra.*
>
> The authorities warrant the conclusion that, **the defendant having advanced the money to pay off the mortgage, a presumption arose that he intended to keep the mortgage alive for his own benefit. Moreover the evidence as a whole is to the effect that the defendant's object was to hold the mortgage and ultimately secure the land; there is no evidence which in any way defeats the presumption. …**
>
> …
>
> As before intimated **the *prima facie* presumption that the defendant intended to keep the mortgage alive for his own benefit is supported by the evidence; indeed there is no evidence which weakens the presumption.** [paras 7-11 and 17] [emphasis added]

[51] To the same effect, see also ***1413910 Ontario Inc (Bulls Eye Steakhouse & Grill) v McLennan***, 2008 CanLII 63994 (ONSC) (C. Campbell J.) (paras 8-14) and ***Richardson Securities of Canada v Perdicaris***, 1984 CanLII 2273 (SKQB) (MacLeod J.) (paras 14-23).

[52] All to say: with no evidence that SPDI has abandoned its intention to pay off ATB's balance or become unable to do so since the recent application where it sought to do so under s 73 *LPA*, it would not appear that much "time or attention" of key Sunterra personnel or any Sunterra resources are in fact required to defuse the ATB situation i.e. with the case law (i.e. outside of s 73 *LPA*) supporting SPDI's ability, as a stranger to the mortgage, to tender ATB's all-inclusive balance and, if ATB accepts that payment (and no evidence shows, practically, why ATB would decline), to step into ATB's shoes i.e. to become the holder of the ATB debt claim against WMS and the associated security. Which would result in ATB and its current enforcement intentions (including receivership of WMS) being replaced by SPDI, a self-described "friendly" creditor and one willing (per its evidence at the s 73 *LPA* application) to provide breathing space to WMS through the now-extended *CCAA* period i.e. up to May 1, 2026.

[53] As for "**no prejudice to ATB**" in extending the stay, the question is really whether, in the circumstances here, ATB is entitled to a receivership order or not.

[54] If it is, I see withholding a receivership (i.e. via a stay extending to WMS) as creating prejudice for ATB. If a receivership is not warranted, then no prejudice to ATB would appear to result from imposing a stay.

[55] Accordingly, before concluding on the stay-extension issue, I examine whether a receivership is warranted here.

III. Proposed receivership of WMS

[56] ATB emphasized these factors:

> a) [WMS] has a single purpose and a single secured creditor [i.e. ATB];
>
> b) [WMS] is in default of its obligations under the Security;
>
> c) ATB is entitled, under the Security, to the appointment of a receiver or receiver and manager;
>
> d) ATB's primary collateral is the Mortgage of the underlying leasehold. The ground Lease appears likely to be in arrears and in default. ATB is highly concerned about the depreciation of its collateral;
>
> e) There is evidence that [WMS] is at or near insolvency – the valuation evidence provided indicates there is no equity in [WMS] for its shareholders;
>
> f) If a bare [*CCAA*] stay is granted, it is a means to no end, as there is no possible plan, no restructuring or emergence that [WMS] had identified, and no ability of [WMS] to repay ATB's indebtedness;
>
> g) ATB has lost confidence and trust in the management of [WMS], who has never responded to ay of ATB's requests, demands and invitations, and appears clearly to have no ability to govern [WMS's] daily affairs; [and]

h) A bare [*CCAA*] stay, preserving the current *status quo*, prejudices ATB and benefits no party.

[57] It summarized its position:

> … there is no basis to restrain the exercise of ATB's rights. ATB's application is preservationary. Ongoing jeopardy to ATB's position will be brought under control, operations stabilized and supported by the Receiver, and rents collected and resporteed in a transparent process, under the Court's supervisory jurisdiction. … due to the rreal risk of dissipation to ATB's security, deference should be granted to ATB's concerns as the only secured creditor. All this mitigates in favour of the appointment of the Receiver.
>
> … there is no other remedy that will adequately protect [ATB's] interests. The balance of factors strongly favours ATB and, in the present circumstances, the appointment of a Receiver is just and convenient.

[58] Per SPDI, it (or an affiliate) is managing the property, with rents being collected, operating expenses being covered, and the "snow being cleared" i.e. the situation is normal.

[59] Per Sunterra, any communication breakdowns with and information shortfalls to ATB will not continue, with new advisers on board and a renewed, or new, commitment to transparency.

[60] Both also emphasized that WMS's premises are 99 per cent fully leased, with all subleases being paid in full and on time.

[61] I note the following in SPDI's evidence:

> … WMS has failed to provide the rent payment and has defaulted on its rental agreement with SPDI for the subject property [i.e. under the ground lease in question]. [The] rental payment for February, in the amount of $39,383.40 was not paid when it was due on February 1, 2026 [Livaditis affidavit sworn February 4, 2026, para 16].
>
> ATB has indicated an intention to tender a rent payment to … SPDI on behalf of WMS. …
>
> … SPDI accepted the rent without prejudice to its rights under the Lease. … [latter excerpts from Livaditis affidavit sworn February 19, 2026, paras 32 and 33]

[62] I accept ATB's core position that its collateral – principally the ground lease – may be insufficient to cover its debt. The key here is the no-renewals value range per the noted appraisal i.e. $4,570,000 to $9,400,000, compared to ATB's current claim of approximately $8.4 million, plus interest and costs. As explained above, it does not appear that the options to renew remain available. Here I also note the Monitor's view, in its fifth report, that the value of the shareholders' equity in WMS is "uncertain."

[63] Sunterra did present its own appraisal evidence e.g. to suggest more shareholder equity than per the SPDI appraisal.

[64] Even if SPDI is managing the property and the subleases are performing, with rents being collected and operating expenses being covered, the critical facts are that WMS has defaulted in

its obligations to ATB, ATB has had to pay (at minimum) the February rent under the ground lease, ATB may be in a shortfall position, ATB's security gives it the ability to appoint a receiver, WMS has (to date) been unwilling to engage with ATB (as detailed in the Greg Steidl affidavit for ATB sworn February 20, 2026, paras 15-21 and 26-34), and Sunterra has not proposed any particular plan for addressing ATB's debt i.e. other than (effectively) "discussions will continue [or start]."

[65] In these circumstances it is just and convenient that a receiver be appointed to ensure that WMS assets are in fact being properly managed, that any excess of revenues over operating expenses and receivership costs is paid to or earmarked for ATB, and that ATB's position as secured creditor is protected and same for the interests of WMS's shareholders i.e. to the extent any equity exists beyond ATB's secured claim.

IV. Conclusion

[66] I circle back to the stay extension and whether granting a stay would prejudice ATB.

[67] Having found that a receivership is warranted, I also find that blocking a receivership via a stay would prejudice ATB.

[68] Accordingly, and for the other reasons outlined above, I do not accept Sunterra's rationales, or those of SPDI, for extending the *CCAA* stay to WMS.

[69] As a result, the *CCAA* stay is not extended to WMS.

[70] On the receivership front, given the possibility that SPDI may pay ATB's claim in full (with interest and costs) or that the parties may otherwise come to terms on ATB's claims, I stay the operation of the order granted above for the appointment of a receiver and manager, until 12:00 pm (noon) on Friday, March 27, 2026. Here I emphasize the Monitor's perception that the parties were "tantalizingly close" to coming to terms on the ATB front and that nothing prevents the parties from making commercial arrangements (i.e. outside s 73 *LPA*) for clearance of ATB's debt.

V. Epilogue

[71] This decision was completed and ready for release yesterday morning (March 17). After completing it, I received a letter from ATB's counsel advising that ATB's claim against WMS had been resolved and that it was withdrawing its receivership application.

[72] SPDI's counsel, via separate letter yesterday, advised that it had acquired ATB's position through a related entity, albeit not including ATB's receivership application. On the WMS-stay-extension aspect, SPDI advised that a stay (if any) was no longer warranted, with the ATB receivership threat defused.

[73] Sunterra's counsel requested by letter today (March 18) that I should release my decision on both (WMS stay and receivership) aspects.

[74] I have decided to release my decision as it stood yesterday morning (with the addition of this epilogue).

[75] If the parties require any further directions on any aspect, they can request them via letter to my assistant.

[76] I thank the parties for their helpful written and oral submissions.

Heard via Webex on March 4, 2026.
Dated at Calgary, Alberta on March 18, 2026.

Michael J. Lema
J.C.K.B.A.

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3

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to March 17, 2026

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À jour au 17 mars 2026

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to March 17, 2026. The last amendments came into force on December 12, 2024. Any amendments that were not in force as of March 17, 2026 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 17 mars 2026. Les dernières modifications sont entrées en vigueur le 12 décembre 2024. Toutes modifications qui n'étaient pas en vigueur au 17 mars 2026 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

R.S., c. C-25, s. 9.

Un seul juge peut exercer les pouvoirs, sous réserve d'appel

(2) Les pouvoirs conférés au tribunal par la présente loi peuvent être exercés par un seul de ses juges, sous réserve de l'appel prévu par la présente loi. Ces pouvoirs peuvent être exercés en chambre, soit durant une session du tribunal, soit pendant les vacances judiciaires.

S.R., ch. C-25, art. 9.

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Restriction

(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

Net termination values

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

Priority

(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

2005, c. 47, s. 131; 2007, c. 29, s. 109, c. 36, ss. 77, 112; 2012, c. 31, s. 421.

Obligations and Prohibitions

Obligation to provide assistance

35 (1) A debtor company shall provide to the monitor the assistance that is necessary to enable the monitor to adequately carry out the monitor's functions.

Obligation to duties set out in section 158 of the *Bankruptcy and Insolvency Act*

(2) A debtor company shall perform the duties set out in section 158 of the *Bankruptcy and Insolvency Act* that are appropriate and applicable in the circumstances.

2005, c. 47, s. 131.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Restriction

(9) Aucune ordonnance rendue au titre de la présente loi ne peut avoir pour effet de suspendre ou de restreindre le droit d'effectuer les opérations visées au paragraphe (8).

Valeurs nettes dues à la date de résiliation

(10) Si, aux termes du contrat financier admissible visé au paragraphe (8), des sommes sont dues par la compagnie à une autre partie au contrat au titre de valeurs nettes dues à la date de résiliation, cette autre partie est réputée être un créancier de la compagnie relativement à ces sommes.

Rang

(11) Il ne peut être rendu, au titre de la présente loi, aucune ordonnance dont l'effet serait d'assigner un rang inférieur à toute garantie financière.

2005, ch. 47, art. 131; 2007, ch. 29, art. 109, ch. 36, art. 77 et 112; 2012, ch. 31, art. 421.

Obligations et interdiction

Assistance

35 (1) La compagnie débitrice est tenue d'aider le contrôleur à remplir adéquatement ses fonctions.

Obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité*

(2) Elle est également tenue de satisfaire aux obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité* selon ce qui est indiqué et applicable dans les circonstances.

2005, ch. 47, art. 131.

Restriction à la disposition d'actifs

36 (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Avis aux créanciers

(2) La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Factors to be considered

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

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

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

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

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

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

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

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

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

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

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

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

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

Facteurs à prendre en considération

(3) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Autres facteurs

(4) Si la compagnie projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la compagnie;

b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

Personnes liées

(5) Pour l'application du paragraphe (4), les personnes ci-après sont considérées comme liées à la compagnie :

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas a) ou b).

Assets may be disposed of free and clear

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

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2005, c. 47, s. 131; 2007, c. 36, s. 78; 2017, c. 26, s. 14; 2018, c. 27, s. 269.

Autorisation de disposer des actifs en les libérant de restrictions

(6) Le tribunal peut autoriser la disposition d'actifs de la compagnie, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

Restriction à l'égard des employeurs

(7) Il ne peut autoriser la disposition que s'il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 6(5)a) et (6)a) s'il avait homologué la transaction ou l'arrangement.

Restriction à l'égard de la propriété intellectuelle

(8) Si, à la date à laquelle une ordonnance est rendue à son égard sous le régime de la présente loi, la compagnie est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans la disposition d'actifs autorisée en vertu du paragraphe (6), cette disposition n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2005, ch. 47, art. 131; 2007, ch. 36, art. 78; 2017, ch. 26, art. 14; 2018, ch. 27, art. 269.

Preferences and Transfers at Undervalue

Application of sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

Interpretation

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

(a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";

Traitements préférentiels et opérations sous-évaluées

Application des articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*

36.1 (1) Les articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité* s'appliquent, avec les adaptations nécessaires, à la transaction ou à l'arrangement sauf disposition contraire de ceux-ci.

Interprétation

(2) Pour l'application du paragraphe (1), la mention, aux articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*, de la date de la faillite vaut mention de la date à laquelle une procédure a été intentée sous le régime de la présente loi, celle du syndic vaut mention du contrôleur et celle du failli, de la personne insolvable ou du débiteur vaut mention de la compagnie débitrice.

2005, ch. 47, art. 131; 2007, ch. 36, art. 78.

4

In the Court of Appeal of Alberta

Citation: Canadian Overseas Petroleum Limited (Re), 2024 ABCA 190

Date: 20240604
Docket: 2401-0132AC
Registry: Calgary

In the Matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended

And in the Matter of a Plan of Compromise or Arrangement of Canadian Overseas Petroleum Limited, COPL Technical Services Limited, Canadian Overseas Petroleum (UK) Limited, Canadian Overseas Petroleum (Bermuda) Limited, Canadian Overseas, Petroleum (Bermuda Holdings) Limited, Canadian Overseas Petroleum (Ontario) Limited, COPL America Holding Inc., COPL America Inc., Atomic Oil & Gas LLC, Southwestern Production Corp. and Pipeco LLC

Between:

BP Energy Company

Applicant

- and -

Canadian Overseas Petroleum Limited, COPL Technical Services Limited, Canadian Overseas Petroleum (UK) Limited, Canadian Overseas Petroleum (Bermuda) Limited, Canadian Overseas, Petroleum (Bermuda Holdings) Limited, Canadian Overseas Petroleum (Ontario) Limited, COPL America Holding Inc., COPL America Inc., Atomic Oil & Gas LLC, Southwestern Production Corp. and Pipeco LLC

Respondents

Reasons for Decision of
The Honourable Justice William T. de Wit

Application for Permission to Appeal

Reasons for Decision of
The Honourable Justice William T. de Wit

Introduction

[1] BP Energy Company (BP) seeks leave to appeal under section 13 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (CCAA) and a staying of orders granted by Justice Yamauchi on April 24, 2024.

Background

[2] Canadian Overseas Petroleum Limited (COPL) is a publicly traded oil and gas exploration, development and production company with headquarters in Calgary Alberta. COPL is in financial difficulties and as counsel for COPL advised in the hearing before Justice Yamauchi, as of February 2024, they were "days away from being fully depleted of -- any and all cash reserves".

[3] COPL has two senior creditors, collectively, Summit Partners Credit Fund III, L.P., Summit Investors Credit III, LLC, Summit Investors Credit III (UK), L.P., and Summit Investors Credit Offshore Intermediate Fund III, L.P. (Summit) and the applicant in this matter, BP. Summit and BP are secured and rank equivalently on a first priority, *pari passu* basis. Summit has a secured loan facility in the amount of $45 million and BP has hedge obligations or terminated swap agreements which result in obligations due and owing in the amount of $11.8 million.

[4] In February 2024, prior to the CCAA proceedings, COPL's interim chief executive officer and chief restructuring officer met with representatives from BP and Summit to request interim financing. He advised BP that the seniority of BP's debt would likely be impaired if it did not participate in the proposed interim financing and formally requested participation by BP. BP declined to participate. Summit was the only party that agreed to advance interim financing to COPL.

[5] On March 8, 2024, COPL obtained an initial protection order under the CCAA from Justice Sidnell. Prior to obtaining this order, BP was served with the application including documents which set out the details of the restructuring support agreement, the restructuring term sheet, the sale and investment solicitation process (SISP) and the stalking horse purchaser agreement (SHPA). As part of the initial protection order, Summit provided interim financing to COPL in the amount of $1.5 million.

[6] On March 19, 2024, the CCAA process was extended, and the interim financing was increased to $11 million and the SISP was approved by the order of Justice Johnston. BP was given notice of that application and did not oppose it. That order has not been appealed.

[7] Part of the SISP included the SHPA. On April 8, 2024, the SHPA was entered into by Summit and certain vendors of COPL. BP was aware of the proposed terms of the SHPA but did not oppose it.

[8] The SHPA allows Summit to acquire the COPL's assets for a base consideration of $55 million which is comprised by the $11 million interim financing and the assumption, by Summit, of its own portion of the *pari passu* secured indebtedness of approximately $45 million. BP's hedge obligations in the amount of $11.8 million is not being assumed. The Monitor, KSV Restructuring Inc (Monitor), an advisory, restructuring and valuations company, had contact with approximately 137 prospective purchasers, but received no qualified bids exceeding the SHPA offer and therefore, approved the SHPA.

[9] On April 24, 2024, Justice Yamauchi heard an application for an approval and vesting order (AVO) to confirm the SHPA. At this hearing BP opposed the AVO. Justice Yamauchi inquired whether BP had knowledge of the SISP and SHPA and canvassed with all counsel whether BP knew of the issues in place during the March 19, 2024 hearing on the SISP. He found that BP had knowledge but did not oppose the SISP or appeal Justice Johnston's order in that regard.

[10] During the hearing in front of Justice Yamauchi, counsel for BP raised a number of arguments but the main argument was that it was not proper to value the assets of COPL at $55 million, whether they be a cash consideration or assumption of debt, and then give all of the assets to Summit while BP would receive nothing on its debt of $11.8 million. According to BP, the assets should be apportioned according to Summit and BP's respective percentage of debt.

[11] Counsel for BP also argued that section 36(6) of the CCAA does not allow for a vesting of assets to only one of the creditors and not the other. Justice Yamauchi noted that Summit was assuming liability as opposed to receiving "a cheque" for its secured claims and that it was a "going concern transaction that will ultimately see Summit paid perhaps, depending on the success or failure of the corporation". In his reasons, Justice Yamauchi referred to section 36(6) and indicated that because there was no money in, section 36(6) did not apply and even if section 36(6) could apply to a credit deal, it did not apply in the circumstances of this case.

[12] In his reasons, Justice Yamauchi also indicated that this was not a roll-up because the stalking horse bidder is not paying cash and not rolling up the amounts that were previously owed to the Summit group but is simply assuming that obligation. He commented it is questionable whether they will get paid in the future, but they are not being paid now.

[13] Justice Yamauchi also indicated that an important consideration is that the SHPA was only part of a bigger transaction involving the entirety of the proceeding. He referred to the case of *White Birch Paper Holding Company* (*Arrangement relatif à*), 2010 QCCS 4915, for the proposition that BP could not be silent throughout the proceedings, including the SISP, and now at the last hour attempt to "scuttle" what had previously occurred.

Proposed Issues

[14] BP seeks leave to appeal the chambers judge's decision on the grounds that he erred:

A. in finding that section 36(6) of the CCAA did not apply to the circumstances of this case;
B. in finding that this was not a roll-up and failing to apply the *Royal Bank v Soundair Corp*, 1991 CanLII 2727 (ON CA), (1991) 83 DLR (4th) 76 and *Third Eye Capital Corporation v Dianor Resources Inc*, 2019 ONCA 508, principles and applying the *White Birch* principles; and
C. in fact by drawing a conclusion, in the absence of evidence, that it was BP's intention to delay its objection and spoil the SISP.

Leave to Appeal

[15] The test for leave to appeal under section 13 of the CCAA involves a four-part test:

1. Is the appeal *prima facie* meritorious and not frivolous?
2. Is the point on appeal of significance to the action?
3. Is the point raised of significance to the practice?
4. Will the appeal unduly hinder the progress of the action?

[16] Deference is granted to a chambers judge's decision regarding determinations under the CCAA. An applicant must point to an error of law or palpable and overriding error in fact or exercise of discretion: *BMO Nesbitt Burns Inc v Bellatrix Exploration Ltd*, 2020 ABCA 264 at para 8.

Parties' Positions

Is the Appeal *Prima Facie* Meritorious and Not Frivolous?

[17] The objective of the CCAA is to attempt to avoid the social and economic losses which result from the liquidation of an insolvent company. The typical CCAA case involves an attempt to facilitate the reorganization and survival of a prefiling debtor company so that it can remain in an operational state. Where such a goal cannot be accomplished liquidation, receivership or the *Bankruptcy and Insolvency Act* regime will apply. The CCAA also has the objectives of maximizing creditor recovery, the preservation of going concern value, the preservation of jobs and communities, and the enhancement of the credit system generally. See *9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10 at paras 40-42.

[18] Section 36(6) of the CCAA states:

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

[19] BP argues that section 36(6) must apply because the section authorizes the court to approve the bulk sale of assets in a CCAA proceeding and provides inherent protection for affected creditors. BP asserts that the stalking horse purchaser's assumption of the assumed liabilities are the assumption of "proceeds" and therefore section 36(6) applies. According to BP, the legislation rejects the premise that a vesting order can be made which strips the interest of a creditor, who is otherwise entitled to recovery, without their consent.

[20] The Monitor, COPL and Summit (respondents) argue that there is no precedent for such an interpretation. Section 36(6) explicitly applies to "proceeds". BP's interpretation requires characterizing an assumed liability as consideration and therefore something to which a lien should attach. Its interpretation assumes payment of all unsecured liabilities. They argue that it would be nonsensical to interpret the assumption of liabilities as proceeds such that the assumption of liabilities would not affect other creditors being fully paid out for their debts, if these creditors were higher ranking or as in this case, *pari passu* creditors.

[21] The respondents submit that many CCAA proceedings involve credit bidding which generates no cash proceeds and involves a purchaser assuming certain of the debtor's unsecured debts. BP disagrees with this submission but the respondents point to recent cases such as *Invico Diversified Income Limited Partnership v NewGrange Energy Inc*, 2024 ABKB 214, and *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 332. Similar credit bids in CCAA proceedings can be found in other jurisdictions, for example, *PCAS Patient Care Automation Services Inc (Re)*, 2012 ONSC 2778 and *Fire & Flower Holdings Corp et al*, 2023 ONSC 4048. None of these cases raise the interpretation of section 36(6) in the manner that BP seeks to argue.

[22] The respondents further submit that if debts and other obligations cannot be assumed without higher ranking or *pari passu* creditors first being paid out, purchasers would never assume unsecured trade contracts that are necessary for the operation of a business. The respondents take the position that such an interpretation would preclude any going concern sales transactions in CCAA proceedings because it would not be viable for the purchaser. If a purchaser was able to pay all the debtor's creditors in full, there would be no need for the CCAA process. Therefore, BP's interpretation is contrary to the purpose and objectives of the CCAA.

[23] BP also argues that the chambers judge erred by finding that the arrangement in question was not in effect a roll-up as it reordered the priorities among the senior secured *pari passu* creditors. Such an effect is impermissible under section 11.2 of the CCAA.

[24] The respondents argue that the chambers judge did not err in finding that this was not a roll-up. A "roll-up" generally refers to securing a prefiling debt with a court-ordered charge of higher priority granted as part of credit advanced after commencement of an insolvency proceeding. The transaction in this case did not reorder pre-insolvency debt priority among the secured creditors. Summit's credit bid and interim loan allowed COPL to continue operating during the CCAA proceedings. The interim loan, as part of the CCAA proceedings, was not used to pay prefiling debt and no charge securing prefiling obligations was granted. In granting the March 8, 2024 court order for the initial CCAA application, Justice Sidnell was satisfied that the order did not secure prefiling indebtedness of the lender. BP did not appeal that order. The interim loan was not in effect a roll-up as it was not used to pay prefiling debt, no agreement was disclaimed and no priorities reordered or recategorized. Therefore, the chambers judge made no error in finding that this was not a roll-up and was something completely different.

[25] BP further argues that the chambers judge did not consider the *Soundair* factors in coming to his determination that the AVO be granted. BP specifically took issue with the timing of the process and whether certain bids were "qualified bids" which could affect the fairness of the process.

[26] However, during the hearing in front of the chambers judge, submissions were made by both sides regarding the timing of the information being disclosed to BP and the effect that it would have on the fairness of the proceedings. Submissions included the *Soundair* principles, and the factors set out in section 36(1)-(5) of the CCAA. The chambers judge asked questions with respect to these factors and heard submissions from both sides. He found that the process was fair in the circumstances.

[27] In addition, the *Soundair* factors were also considered during the SISP hearing. The SISP order was a final order that was not appealed by BP.

[28] BP argues the sales process is distinct from the transaction. It says the SHPA as proposed in the SISP was non-binding and it was not until the AVO application that the terms were final.

[29] The respondents do not disagree that the sales process and the transaction are separate but the *Soundair* principles and the factors in section 36 of the CCAA apply to the sale process. The complaints of BP regarding the transaction are just a collateral complaint about the sales process. They submit that BP cannot complain about that process. The evidence shows that BP was aware that its security could be affected as early as February 20, 2024 when BP was asked to consider the possibility of BP participating by extending interim financing to COPL. The CCAA process usually occurs quickly because corporations that have financial difficulties may not be able to survive for any length of time without the restructuring that occurs in the CCAA process. In this case, BP had two months from the time it knew its security was at risk until the hearing at the end of April 2024. This was not such a short period of time that BP could not have been involved in the CCAA process. It knew about the matters dealt with in the March hearings but did not raise objections or appeal the orders.

[30] BP also argues that the chambers judge erred in fact and law by finding that BP's objection to the AVO was an intentional 11th hour maneuver to scuttle what has been going on for the past several months. BP argues that there is absolutely no evidence for such a finding. The comment of the chambers judge was in reference to the *White Birch* case. That case set out the principle that it is a factor to consider when a party, who has knowledge of the circumstances, but does not participate in the CCAA process or appeal prior determinations and only claims their disagreement at the very end. This does not make the process unfair.

Is the Point on Appeal of Significance to the Action and to the Practice?

[31] BP takes the position that the interpretation of section 36(6) is significant with respect to this case and significant with respect to the practice of insolvency law. It argues that a fundamental principle is that a secured creditor vested out of its collateral must receive consideration by vesting into the proceeds. It also argues that there is no more important stakeholder in a CCAA restructuring than a creditor in a senior secured security position. BP argues that the lack of case law interpreting section 36(6) to mean that it only applies to cash proceeds creates uncertainty for secured creditors in Canada.

[32] The respondents take the position that the chambers judge's determination that section 36(6) can only apply to proceeds that are cash is the only logical interpretation in the circumstances of this case. They cite *Bellatrix Exploration Ltd (Re)*, 2021 ABCA 85 at para 77, for the proposition that certain proposed grounds of appeal are novel because they lack merit. The chambers judge in this case indicated that he was not surprised that there was little case law on this issue as he found that BP's argument was meritless.

Will the Appeal Unduly Hinder the Progress of the Action?

[33] This element of the test is extremely important and can usurp the other factors and result in a denial of leave to appeal. BP takes the position that this is now a liquidating proceeding and that the disposition of the debtor's assets can occur now or later. The sale to the purchaser in the SHPA has an outside date of August 31, 2024. BP also indicates that the only affected stakeholders are the senior secured creditors that being itself and Summit. It claims that the only progress would be to the benefit of the only two impacted stakeholders and it is not progress where the advantage is to only one of the stakeholders.

[34] The respondents admit that the CCAA proceedings have become a liquidation proceeding but the SHPA is part of a much bigger deal. The AVO and approval of the SHPA did not only include the credit bid but also the interim financing provided by Summit. Without this interim financing, COPL would not continue to be offered as a going concern in the SISP and without the SHPA, Summit would not have offered interim financing. The SHPA and AVO would allow COPL to continue to operate which would facilitate one of the key objectives of CCAA proceedings, namely, to preserve a corporation's value. According to the respondents, based on the current cash flow forecast, COPL will not be able to continue operations beyond the end of

June. However, if the SHPA closes, Summit would be required to fund the go forward costs of the operations. The respondents state that without the SHPA, there will be no purchaser and there will be significant loss of jobs.

[35] If leave to appeal is granted, the delay would mean the end of the CCAA proceedings and COPL will be in bankruptcy. The expectation from the sale in bankruptcy of non-going concern assets is likely to result in insufficient proceeds to cover the interim financing debt and nothing to pay the prefiling obligations owed to Summit and BP.

[36] The respondents reject the suggestion by BP that a receiver could continue the operations as a going concern. The respondents point out the interim financing would still be required to continue operations and it will not be forthcoming from Summit without the SHPA. The fact that no bids were received during the sales process signifies that no other prospects for interim financing will be found.

[37] Additionally, delay also affects the chapter 15 *Bankruptcy Code* proceedings in the United States of America. A hearing for the recognition of the vesting order in the United States is currently scheduled for June 6, 2024.

Application of the Test

[38] With respect to whether the proposed grounds of appeal are *prima facie* meritorious, the only ground which appears to raise a question of law is the interpretation of section 36(6) of the CCAA. However, as described above, the respondents point out that BP's interpretation undermines the operation and objectives of the CCAA by overturning an historically accepted practice and giving BP a potential veto over the SISP. Additionally, the lack of merit to BP's interpretation of section 36(6) is demonstrated by the lack of support by any case authority. In any event, the chambers judge determined it did not apply in the circumstances of this case and his decision is accorded great deference in CCAA matters: *Uti Energy Corp v Fracmaster Ltd*, 1999 ABCA 178 at para 3.

[39] The issue of whether the SHPA is a roll-up does not raise a question of law but at best, disputes a question of mixed fact and law, in particular, how the chambers judge categorized the effect of the orders in the CCAA proceedings and the SHPA.

[40] As the respondent argues, the SHPA does not meet the general concept of a roll-up where a prefiling debt is granted a higher priority after insolvency proceedings commenced. In this case, no prefiling debt was secured with a charge that reordered priority. The chambers judge's conclusion was supported by the conclusion of the court at the initial CCAA application.

[41] To succeed on appeal on a question of fact or mixed fact and law, the applicant would have to show the chambers judge's conclusion, that this was not a roll-up, was a palpable and overriding error.

[42] The issue of the application of the *Soundair* and *Third Eye* principles questions the chambers judge's exercise of discretion. The principles require assessment of any unfairness in the process. The chambers judge's questions during the hearing showed he was extremely concerned about fairness to BP as he questioned counsel about notice to BP and its awareness and knowledge of the details of the SISP. Not only did he not find any unfairness, but he also had the recommendation of the Monitor whose duty to the court is to supervise a robust and transparent sales process pursuant to the terms of the SISP order. The SISP order was never appealed and there is no evidence that the SISP was not complied with.

[43] To succeed on appeal, the applicant would have to show the chamber judge exercised his discretion unreasonably: *Callidus Capital Corp* at para 53.

[44] With respect to BP's claim that the chambers judge concluded BP had the intention to delay its objection and spoil the SISP, in my view, this overstates the chambers judge's comments. He pointed out, correctly, that BP was aware that its security would be affected by the SISP, and the proposed SHPA, but it declined to participate in any interim financing, it did not object to nor appeal the SISP order and did not submit a qualifying bid in the SISP. Only at the hearing to approve the AVO, did BP object. The reference to *White Birch* was to make the point that the objecting party knew about the process but remained silent during the approval of the process and raised a late objection once the sales process had run. The court in *White Birch* as well as other courts have declined to reopen the sale process in such circumstances. This does not raise a ground of appeal.

[45] The proposed grounds of appeal show no or little merit. Even assuming the issue of the interpretation of section 36(6) raises a discrete question of law, appellate courts are to exercise the power to grant leave "sparingly": *BMO Nestbitt Burns Inc v Bellatrix Exploration* at para 8, quoting *Duke Energy Marketing Limited Partnership v Blue Range Resource Corporation*, 1999 ABCA 255 at para 3. The fact that an appeal is only with leave indicates that Parliament intended that most decisions made by the CCAA judge "should be interfered with only in clear cases": *Luscar Ltd v Smoky River Coal Limited*, 1999 ABCA 179 at para 61.

[46] In the absence of raising grounds of appeal of sufficient merit, the proposed appeal would not be of significance to the practice.

[47] The proposed appeal would not be of significance to the action itself in terms of the restructuring of COPL except that it could reopen the AVO and thwart the principles and objectives of the CCAA.

[48] Reopening a final order and an appeal itself would cause delay which would result in undue delay to the progress of the action, the fourth factor of the test for leave.

[49] Along with the merits of the proposed appeal, the factor of delay is ascribed the most weight: *Resurgence Asset Management LLC v Canadian Airlines Corporation*, 2000 ABCA 149

at para 46. The factor of delay goes to the root of the purpose of the CCAA: the need for a timely and orderly resolution of the matter and the effect on the interests of all parties. As has been noted in numerous decisions, orders under the CCAA "depend upon a careful and delicate balancing of a variety of interests and of problems" and an appeal "may well upset the balance, and delay or frustrate the process": *Resurgence Asset Management* at para 42, quoting *Re Pacific National Lease Holding Corp* (1992), 15 CBR (3d) 265 (BCCA).

[50] In this case, the practical reality is that delay is antagonistic to the purposes of the CCAA. As the Supreme Court commented in *Callidus*, even in a liquidating CCAA, the remedial objectives may be met by eliminating further loss for creditors or focussing on the solvent aspects of the business and even if the reorganization of pre-filing debtor corporation is not a possibility, preserving going-concern value, the ongoing business operations or maximizing creditor recovery of assets can be the focus (paras 45-46). None of that is possible if these proceedings are delayed.

[51] As the respondents have explained, the delay caused by an appeal would result in catastrophic effects to the restructuring. There are not sufficient funds for an additional SISP or to continue operations beyond the end of June. Without the SHPA closing, there will be a significant loss of jobs, COPL's assets may cease operating and one of the key objectives of the CCAA, preserving value, will be undermined.

Conclusion

[52] Having considered all the factors, I am satisfied that leave should not be granted. The application is dismissed.

Application heard on May 29, 2024

Reasons filed at Calgary, Alberta
this 4th day of June, 2024

de Wit J.A.

Appearances:

D.M. Pontin
for the Applicant

M. Wasserman
D. Rosenblat
L.K. Good
V. Nikolov
S. Irving (no appearance)
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J.L. Oliver
for the Monitor, KSV Restructuring

R. Zahara
J. Eeles
A.J. Roth-Moore
J.R. Alberto (no appearance)
for the Interim Lender, Summit Partners Credit Fund III, L.P., Summit Investors Credit III, LLC, Summit Investors Credit III (UK), L.P., and Summit Investors Credit Offshore Intermediate Fund III, L.P.

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Court of King's Bench of Alberta

Citation: Tool Shed Brewing Company Inc (Re), 2024 ABKB 234

Date: 20240423
Docket: B301 038201
Registry: Calgary

In the Matter of the *Bankruptcy and Insolvency Act*, RSC 1985, C B-3, as amended

And in the matter of the Notice of Intention to make a Proposal of
Tool Shed Brewing Company Inc

Reasons for Decision
of the
Honourable Justice EJ Sidnell

Introduction

[1] Tool Shed Brewing Company Inc (Tool Shed) seeks approval of a reverse vesting order for a stalking horse bid (the Stalking Horse Bid) made by 2582568 Alberta Inc, a company controlled by Tool Shed's current CEO, James Costello (the Costello Company).

[2] Tool Shed's application is opposed by two individual Tool Shed investors, who are also secured creditors, John Donovan and Juliana Bourne (collectively, the Investors). The Investors are also owners of 2594617 Alberta Ltd (the Donovan Group), which submitted a competing bid.

[3] Tool Shed brews craft beer and operates a restaurant. Tool Shed sells its alcoholic and non-alcoholic beverages through retailers and other restaurants and similar establishments. Tool Shed has nine non-transferable licenses and permits issued by the Alberta Gaming, Liquor and Cannabis Commission (the AGLC). Tool Shed submits that these licenses and permits are the key asset of its business. Tool Shed submits that a reverse vesting order is the only way to preserve the non-transferrable permits and licenses.

[4] In addition to amounts owed to trade and judgment creditors, lenders and other investors, Tool Shed owes a significant amount to the Canada Revenue Agency (CRA) in relation to source deductions dating back to January 2020.

[5] In 2023, under financial strain, Tool Shed obtained financing from, among others, the Investors, who became secured creditors.

[6] Tool Shed attempted to re-structure its debt and sought a sale of, or new investment in, the business. There were no offers arising from these efforts.

[7] On January 9, 2024, the CRA notified Tool Shed that it had obtained a writ against it in the amount of $564,237.84 and that, as of January 9, 2024, the CRA was owed $571,091.70.

[8] On January 31 2024, the CRA took steps to garnish Tool Shed's account with the AGLC. On that same day, Tool Shed filed a notice of intention to make a proposal under s 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, C B-3 (*BIA*) (the NOI Proceedings). KPMG Inc was appointed as Tool Shed's proposal trustee (the Proposal Trustee).

The SISP Order

[9] On February 12, 2024, Lema J, granted an order (the SISP Order) which, among other things:

(a) extended the time for Tool Shed to file a proposal to its creditors to April 15, 2024;

(b) approved an administration charge as security for the professional fees and disbursements of the Proposal Trustee and Tool Shed's counsel (the Administration Charge);

(c) approved an interim loan between Tool Shed and the Costello Company to a maximum of $250,000, together with a charge on the property of Tool Shed as security for the interim loan;

(d) approved a stalking horse sales and investment solicitation process (the SISP), which:

(i) was to be conducted in the manner described in Schedule A to the SISP Order (the SISP Process);

(ii) attached to the SISP Process the Stalking Horse Bid in the form of a "Stalking Horse Agreement" between Tool Shed and the Costello Company;

(iii) declared that the SISP Process was commercially reasonable and was ratified and approved;

(iv) authorized and directed Tool Shed and the Proposed Trustee "to do all things reasonably necessary to implement, conduct and give full effect to the SISP and to carry out the obligations thereunder, including taking any additional steps or executing additional documents as may be necessary or desirable in order to carry out and complete the SISP and a transaction"; and

(v) authorized Tool Shed to apply to the Court to approve the Stalking Horse Bid or a Superior Offer.

[10] Tool Shed brought an application, returnable on April 15, 2024 (the Approval Application), for a period of one hour, where it sought, among other things:

(a) an extension for Tool Shed to file a proposal to its creditors to May 6, 2024;

(b) approval of the transaction involving the Stalking Horse Bid;

(c) releasing certain parties from claims;

(d) annulling, or permitting the withdrawal of, Tool Shed's NOI Proceedings on the closing of the Stalking Horse Bid transaction;

(e) approving the Proposal Trustee's First Report and Second Report; and

(f) sealing two confidential appendices to the Proposal Trustee's Second Report.

Applications heard April 15 and 16, 2024

[11] Tool Shed would have become bankrupt on April 16, 2024, without a further extension of the time to file a proposal to its creditors. That portion of the Approval Application was urgent and heard on April 15, 2024. Tool Shed was granted an extension to May 6, 2024, to file a proposal.

[12] Given the financial condition of Tool Shed, the Court accommodated the parties by scheduling an additional two hours on April 16, 2024, to address the SISP transaction.

[13] Tool Shed was aware that the SISP transaction was opposed by the Donovan Group.

[14] In addition to two reports of the Proposal Trustee, both the Costello Company and the Donovan Group filed substantial briefs, the Costello Group relied on four affidavits, and the Donovan Group relied on one affidavit. One hour was clearly not enough time to hear the SISP transaction application, let alone the entirety of the Approval Application.

[15] Counsel for Tool Shed submitted that only one hour was booked for the Approval Application because that was all that was available on the Commercial List. However, on February 12, 2024, Tool Shed was granted the SISP Order so it knew then that an application for approval, even if not opposed, would be required. At that time, there would have been ample availability on the Commercial List in mid-April.

[16] Scheduling time on the Commercial List requires planning ahead because the number and length of available time slots increase with advance notice and the availability of counsel and other parties must be considered. Without knowing the particular constraints in this case, I will only comment that counsel should not create problems by knowingly booking insufficient court time.

[17] While many members of the bar carefully consider the amount of time required for their applications, booking insufficient time on the Commercial List is an invasive problem and reflects poorly on those who knowingly perpetrate it. Counsel should be aware of the procedure for booking and, if necessary, requesting adequate Court time on an urgent basis.

[18] In addition, agreed statements of fact are woefully underused. This hearing could have been more efficient, and required less time, if an agreed statement of facts had been prepared for the non-contentious background and chronology.

[19] These are my reasons on the proposed SISP transaction. I have considered all of the material relied on by the parties, but given the urgency, I will not set out the facts in detail. Rather, I will focus on the particular facts that the parties rely on as being pivotal.

[20] The unaddressed portions of the Approval Application are adjourned *sine die*. Tool Shed is at liberty to bring those portions back on the Commercial List with appropriate notice to all parties on the service list.

Standing

[21] At the initial hearing on April 15, 2024, the Court raised the issue of standing as it had not been addressed in the materials or briefs of the parties, and, in particular, the commentary in ***Skyepharma plc v Hyal Pharmaceutical Corp***, [2000] OJ No 467, at paras 25 and 26.

[22] Notwithstanding that a brief was filed on behalf of the losing bidder, Donovan Group, and not the Investors themselves, counsel for the Donovan Group and the Investors submitted that the Investors had standing as secured creditors of Tool Shed and that a distinction should not be made between them.

[23] Tool Shed submitted that there was no issue with granting the Investors and the Donovan Group standing.

[24] Based on Tool Shed's admission, and having heard no objection, the application continued on the basis that the Investors and the Donovan Group had standing.

[25] At the commencement of the hearing on April 16, 2024, the Donovan Group submitted that, in addition to the materials already provided, it also relied on ***Bloom Lake, gpl (Arrangement relatif à)***, 2015 QCCS 1920, para 85. In that case, the Court queried who would raise the issues of fairness and integrity if the losing bidder, sometimes referred to as the "bitter bidder", has no standing and cannot raise them. One option suggested by that Court, at para 86, was to have the objections given to the CCAA Monitor in that case. However, in ***Bloom Lake***, the CCAA Monitor had already filed its report by the time the objections were raised and did not address them. As a result, the Court in ***Bloom Lake*** found the submissions of the losing bidder useful. That is different from this case in that the Proposal Trustee addressed the issues raised by the Donovan Group in its correspondence attached to the affidavits and in its Second Report.

[26] The Investors and the Donovan Group also note that in ***Royal Bank of Canada v Keller & Sons***, 2016 MBCA 46, at para 13, the Court recognized that the unfairness of the process itself could prevent a party from obtaining a material interest in the sale process such that it did not have standing. However, the Court did not decide the issue. In this case, the SISP Process was set out in detail in the SISP Order, which was not appealed. The SISP Process cannot now be impugned. The Investors and the Donovan Group acknowledge the finality of the SISP Order but assert that the manner in which the SISP Process was implemented was unfair and lacked integrity.

[27] Based on Tool Shed's April 15, 2024 admission on standing, the further submissions of the Investors and the Donovan Group on standing were not made in full.

[28] For ease of reference, from this point forward, I refer only to the Donovan Group as the Investors' position was entirely aligned with the position of the Donovan Group.

[29] Towards the end of the hearing on April 16, 2024, counsel for the Costello Company said he had submitted the ***Skyepharma*** decision, together with two other decisions, before the hearing. However, they had not been sent to the Commercial Coordinator, or my office, and I did not receive any materials from the Costello Company. In any event, by the time this was raised, the points raised in ***Skyepharma*** had already been canvassed by the Court and the standing issue had already been addressed.

SISP Process

[30] Section 24 of the SISP Process sets out the requirements for a "Qualified Bid", emphasis in the original:

> A Bid will be considered a Qualified Bid only if it is submitted by a Qualified Bidder and the Bid complies with, among other things, the following (a "**Qualified Bid**"):
>
> (a) Timing: it is submitted on or before the Bid Deadline;
>
> (b) Sale Proposal: in the case of a Sale Proposal, it contains the following:
>
> (i) a duly authorized and executed definitive and binding asset purchase agreement, together with all completed schedules thereto, which includes all or substantially all of the material terms and conditions of the transaction, including identification of the Business or the Property to be acquired, the obligations to be assumed, the purchase price for the Business or Property to be acquired in Canadian dollars, and key assumptions supporting the valuation;
>
> (ii) a specific indication of the financial capability of the Qualified Bidder and the structure and financing of the transaction; and
>
> (ii) any other terms or conditions of the Sale Proposal that the Qualified Bidder believes are material to the transaction;
>
> . . .
>
> (k) Unconditional Bid: it is not conditional upon:
>
> (i) the outcome of unperformed due diligence by the Qualified Bidder;
>
> (ii) obtaining financing; or
>
> (iii) any other material closing conditions;
>
> (l) Superior Offer: the bid constitutes a Superior Offer; and
>
> . . .

[31] The SISP Process incorporates a definition of "Assumed Liabilities" by referencing the Stalking Horse Agreement, which defines "Assumed Liabilities" as those set out in Schedule E, together with other specified liabilities. Pertinent to this Application are the following Assumed Liabilities listed in Schedule E:

> 1. All Priority Payments, including but not limited to all amounts due and owing by the Company on account of source deductions to the Canada Revenue Agency, in the approximate amount of $571,091.70.
>
> . . .
>
> 5. All amounts owing to Miller Thomson LLP for pre-filing work prior to the Proposal Proceedings being approximately $80,000.00.

[32] After the bid deadline, initially March 11, 2024, under s 28 and 29 of the SISP Process, the Proposal Trustee, in consultation with Tool Shed, is obliged to assess the Qualified Bids and if there is a Qualified Bid which is a Superior Offer, then an auction process is launched:

> 28. Following the Bid Deadline, the Proposal Trustee, in consultation with the Company, will assess the Qualified Bids.
>
> 29. If the Proposal Trustee, in consultation with the Company, determines that one or more of the Qualified Bids constitutes a Superior Offer, the Proposal Trustee shall provide the parties making Superior Offers and the Stalking Horse Bidder the opportunity to make further bids through the auction process set out below (the "Auction").

[33] I note here that there appears to be some inconsistency in the drafting of the SISP Process. In s 24(l), a Qualified Bid is required to be a Superior Offer and in s 46 the Proposal Trustee is permitted to issue a waiver, except to the requirement that a Qualified Bid be a Superior Offer. On the other hand, s 28 and 29 require an assessment and determination as to whether a Qualified Bid is a Superior Offer. To give effect to s 27, 28 and 29 of the SISP Process, I find that the only reasonable interpretation is that the s 24(l) requirement that a Qualified Bid be a Superior Offer is premature and that each Qualified Bid must be assessed in accordance with s 28 and 29 of the SISP Process to determine if it is a Superior Offer.

[34] Relevant to determining whether there is a Qualified Bid, s 46 of the SISP Process grants the Proposal Trustee the authority to waive non-compliance. Further, under s 25, the Proposal Trustee has the right to reject bids:

> 46. The Proposal Trustee, in consultation with the Company, may waive compliance with any one or more of the requirements of the SISP Procedures, including, for greater certainty, waive strict compliance with any one or more of the requirements specified above and deem a non-compliant bid to be a Qualified Bid, excepting the requirement that the bid be a Superior Offer pursuant to Section 24(l).
>
> 25. All Bids will be considered, but the Proposal Trustee, in consultation with the Company, reserves the right to reject any and all Bids in its sole discretion.

[35] If there is another Qualified Bid, then a determination must be made as to whether there is a "Superior Offer", which is defined as follows:

> "Superior Offer" means a credible, reasonably certain and financially viable third party offer for the investment in, or acquisition of some or all of the Property, the Company, or the Business, the terms of which offer are, in the determination of the Proposal Trustee, in consultation with the Company, no less favourable and no more burdensome or conditional than the terms contained in the Stalking Horse

> Agreement, and which at a minimum includes: (i) payment in cash of the Purchase Price, the Recoverable Expenses, the Break Fee, one Minimum Incremental Overbid, any amounts outstanding under the Administration Charge and Interim Lender's Charge at the closing of such transaction; and (ii) assumption or satisfaction of the Assumed Liabilities.

[36] If no Qualified Bid is a Superior Offer, then the Stalking Horse Bid is successful:

> 27. If none of the Qualified Bids received by the Proposal Trustee constitute a Superior Offer, the Stalking Horse Bidder shall be declared the Successful Bidder and the Stalking Horse Agreement shall be declared the Successful Bid.

Test to be applied

[37] Tool Shed submits that the non-exclusive factors set out in s 65.13(4) of the *BIA* for approval of disposition of Tool Shed have been met, and that considering those factors ensures that the principles set out in ***Royal Bank of Canada v Soundair Corp***, 1991 CanLII 2727 (ONCA) are also assessed. In any event, Tool Shed submits that the ***Soundair*** principles are satisfied.

[38] The Donovan Group submits that the ***Soundair*** principles have not been met, that approval of the Stalking Horse Bid is not the best option for Tool Shed and that it should be rejected. In addition, the Donovan Group asserts that it should be entitled to seek approval of its bid at a subsequent application.

[39] As demonstrated in my analysis of the factors set out in s 65.13(4), below, Tool Shed conflates process with substance. The SISP Order approval of the SISP Process addressed the process considerations set out in s 65.13(4) of the *BIA*. The ***Soundair*** principles must be addressed independently.

[40] In applying the ***Soundair*** principles, I find the comments of the Manitoba Court of Appeal in ***Keller & Sons***, at para 11, before referring to ***Soundair*** and ***Crown Trust Co v Rosenberg***, 1986 CanLII 2760 (ONSC), helpful to set the scope of the analysis:

> The motion judge owed the decision of the Receiver significant deference. While it is the duty of the court to ensure the integrity of the process, it is not appropriate for the court to go into the minutia of that process. The court's role in reviewing the sale process in receiverships is not to second guess the receiver's business decisions, but rather to critically examine the procedural fairness in negotiations and bidding so as to ensure that the integrity of the process is maintained. The court should not intervene in the decision of the receiver except in an exceptional case. ...

[41] I find these comments equally applicable to this case were there is a proposal trustee rather than a receiver.

Consideration of s 65.13(4) of the *BIA*

[42] This Approval Application is not an opportunity to make a collateral attack on the SISP Order which was granted on February 12, 2024. Section 65.13(3) required the secured creditors

to have notice of the application to approve the SISP Process. The SISP Order was not appealed and the SISP Process cannot now be impugned.

[43] The Donovan Group submits that does not take issue with the structure of the SISP Process, rather the implementation of it. Contrary to this assertion, some of the submissions made by the Donovan Group did address the fairness of the underlying SISP Process.

Whether the process leading to the proposed sale was reasonable in the circumstances

[44] The SISP Process is detailed and incorporated into the SISP Order. This factor is met.

Whether the Proposal Trustee approved the process leading to the proposed sale

[45] As the SISP Process was granted as part of the SISP Order and the Proposal Trustee was involved in its implementation, I find that this factor has been met to the extent it relates to implementation of the SISP Process.

Whether the Proposal Trustee filed with the court a report stating that in their opinion the sale would be more beneficial to the creditors than a sale or disposition under a bankruptcy

[46] This would have been a matter for submissions by the parties, and for the Court to consider, in granting the SISP Order. I find that this factor is not relevant to this Approval Application.

The extent to which the creditors were consulted

[47] In relation to the SISP Process, this would have been a matter for submissions by the parties, and for the Court to consider, in granting the SISP Order.

[48] In relation to the implementation of the SISP Process, there does not appear to have been any consultation with the creditors, but then the SISP Process does not contemplate any involvement of the creditors in the implementation of the SISP Process.

[49] I find that this factor has been met.

The effects of the proposed sale on the creditors and other interested parties

[50] No one suggested that the SISP Process or Stalking Horse Agreement was not known to the parties in advance of the February 12, 2024 application. The SISP Order contemplated that Tool Shed could be sold in accordance with the Stalking Horse Agreement and that is what is now proposed.

[51] This would have been a matter for submissions by the parties, and for the Court to consider, in granting the SISP Order. I find that this factor is not relevant to this Approval Application.

Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value

[52] In approving the Stalking Horse Bid, this would have been a matter for submissions by the parties, and for the Court to consider, in granting the SISP Order. I find that this factor is not relevant to this Approval Application.

Soundair principles

[53] In ***Soundair***, Galligan JA, with McKinlay JA concurring in the result and on this point, followed ***Crown Trust Co v Rosenberg*** and set out four enquiries that an approving court should consider. This well-known analysis is applied when a court is considering an application for the approval of a sale: ***Pricewaterhousecoopers Inc v 1905393 Alberta Ltd***, 2019 ABCA 433, at para 10, and ***1705221 Alberta Ltd v Three M Mortgages Inc***, 2021 ABCA 144, at para 19. I find that this analysis is applicable in the context of the NOI Proceedings and this Approval Application.

[54] At the hearing, counsel for Tool Shed, the Donovan Group, the Proposal Trustee, the Costello Company, and the CRA, all made submissions. The main issues raised by those parties are set out below. Given the urgency of a decision on the SISP transaction application, I have not addressed every detailed point here but I have considered all of the parties' submissions.

1. Were there sufficient efforts to get the best price without acting improvidently?

[55] The SISP Process contemplated an advertising process to encourage interest in Tool Shed. Steps were taken by the Proposal Trustee in that regard and no issue is taken with them.

Access to Tool Shed information

[56] The Donovan Group asserts that it did not have timely, or full, access to the Tool Shed information. The Donovan Group further asserts that the information it received was summary and piecemeal.

[57] The Donovan Group also submits that it was at a disadvantage because it made its informational requests through the Proposal Trustee but the information actually came from Mr. Costello. The Donovan Group asserts that, due to Mr. Costello's role in providing information, it had asymmetrical access to information. In other words, the Costello Company had better access to information than the Donovan Group. As an example of this, counsel for the Donovan Group said that after the hearing on April 15, 2024, she received information from the Department of Justice that there was a $370,000 debt owed by Tool Shed for source deductions and GST accounts. The Donovan Group asserted that this was a deemed trust liability that had not been disclosed by Tool Shed.

[58] The Donovan Group's main concerns arise from Mr. Costello's dual role as CEO of Tool Shed and as an investor in the Costello Company which provided the Stalking Horse Bid. This tension between the individual insider (Mr. Costello) and the proponent of the Stalking Horse Bid (the Costello Company) is what runs through almost all of the issues raised by the Donovan Group. The difficulty with addressing this tension, and possible conflict of interest, on an application for approval of the SISP transaction, is that they are inherent in the SISP Process which has already been approved.

[59] On March 14, 2024, in what it referred to as its "Preliminary Bid", the Donovan Group articulated the points as follows:

> As the Proposal Trustee and the Company are aware, the principal of the Stalking Horse Bidder was interim CEO of the Company until January 1, 2024, when he became the CEO. This raises two issues.
>
> First, there is a significant information imbalance as between the Stalking Horse Bidder and the Bidder. The Bidder should be on an even playing field with the

> Stalking Horse Bidder in this regard, and therefore, the Company should take care to provide the same level of information to the Bidder as is available to the Stalking Horse Bidder.
>
> Second, the integrity of the SISP is affected by the fact that the person in control of the Stalking Horse Bidder is also informing the conduct of the SISP, the Company's responses to due diligence requests, and the Company's review of bids in the SISP. In our view, the CEO's involvement in the bid process puts him in a conflict of interest in conducting the SISP on behalf of the Company.

[60] Whether the integrity of the SISP Process is affected by the Costello Company providing the Stalking Horse Bid is something that the Donovan Group should have raised on the application where the SISP Process was approved. I do not think it is appropriate to raise this submission on this Approval Application as it seeks to undermine the SISP Order. As to the imbalance of information, this was asserted but not proven. The Proposed Trustee asserts that the Donovan Group had the same records that were available to the Costello Company.

[61] The Proposal Trustee submits that it worked diligently with Tool Shed "management" to provide information to the Donovan Group. Given the scarce resources that Tool Shed had at its disposal, I accept, for the purposes of the Donovan Group's submissions, that Mr. Costello was actively involved in the information provided by Tool Shed "management".

[62] The Proposal Trustee said in its Second Report that it populated and maintained a virtual data room (VDR) for the SISP Process and that:

> ... Management and the Proposal Trustee worked diligently to respond to all inquiries and provide company documents requested from the Donovan Group. Due to [Tool Shed] resource constraints, in particular a lack of adequate accounting and bookkeeping functions for the business, and due to the state of [Tool Shed's] records, certain inquiries and requests from the Donovan Group were unable to be fulfilled, although all available due diligence information was made available to the Donovan Group in the VDR.

[63] The Donovan Group submits that it is satisfied that the Proposal Trustee passed on the requests it made for further information and obtained all of the information that it was able to obtain in response to its requests. The Donovan Group casts no aspersions on the Proposal Trustee or the role it performed in the SISP Process.

[64] In its Preliminary Bid, on March 14, 2024, the Donovan Group set out a further request for due diligence information. The Proposal Trustee responded to that request on March 18, 2024, well after the initial and extended deadline. However, as can be seen in the Proposal Trustee's March 18, 2024 letter in response, there was no new substantive information provided; rather, a confirmation of previously provided information and a confirmation of the unavailability of further or better information.

[65] I find that the Donovan Group has not shown that the Costello Company had any different or better information upon which to base the Stalking Horse Bid which was incorporated into the SISP Order on February 12, 2024.

[66] In ***River Rentals Group Ltd v Hutterian Brethren Church of Codesa***, 2010 ABCA 16, at para 13, the Alberta Court of Appeal said that in considering the first ***Soundair*** principle the Court should consider:

(a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic;

(b) whether the circumstances indicate that insufficient time was allowed for the making of bids;

(c) whether inadequate notice of sale by bid was given; and

(d) whether it can be said that the proposed sale is not in the best interest of either the creditors or the owner.

[67] Because the SISP Order contemplated a Stalking Horse Bid, the considerations set out in (a), (c) and (d) have already been addressed.

[68] With regard to whether circumstances indicate that insufficient time was allowed for the making of bids, given the set schedule in the SISP Process, the question is more of whether the Proposal Trustee adequately granted an extension to the deadline to permit further bids.

Did the Proposal Trustee grant appropriate extensions?

[69] The SISP Process set the initial deadline for bids as March 11, 2024.

[70] On March 7, 2024, the Donovan Group requested a two-week extension of the bid deadline on the basis that Tool Shed's due diligence information was inadequate. The Proposal Trustee consulted with Tool Shed and determined that, given Tool Shed's limited liquidity, a three-day extension, to March 14, 2024, would be granted.

[71] In its Second Report, the Proposal Trustee states that to avoid delays relating to requests for information, it asked the Donovan Group to submit all of its requests no later than March 11, 2024. The Proposal Trustee states that one request was received from the Donovan Group on March 11, 2024 and that it was responded to by Tool Shed on March 12 2024.

[72] The Donovan Group submitted its Preliminary Bid on March 14, 2024. The Donovan Group clearly identified its bid as conditional on "due diligence inquiries". The Donovan Group said that the due diligence inquiries "include items that the [Donovan Group] requested prior to the March 11, 2024 12:00 p.m. deadline set by the Proposal Trustee, and items arising from new information provided by [Tool Shed] in response to the [Donovan Group's] requests".

[73] The Proposal Trustee said in its Second Report that the Donovan Group's Preliminary Bid was rejected for the following reasons:

(a) it was conditional, contrary to s 24(k) of the SISP Process;

(b) it required 50% of Tool Shed's full-time employees to accept offers of employment with the Donovan Group, a condition which Tool Shed and the Proposal Trustee were unable to enforce;

(c) there was a reduction in the amount payable to the CRA by approximately $116,000, which meant that it could not be a Superior Offer as it did not assume all of the Assumed Liabilities, which included a payment to the CRA of approximately $571,091.70; and

(d) did not include payment of professional fees of $80,000 owed to Miller Thompson LLP for pre-NOI Proceeding services, which meant that it could not be a Superior Offer as it did not assume all of the Assumed Liabilities.

[74] On March 14, 2024, the Donovan Group also requested a further extension to the deadline to March 22, 2024, so that it could submit an unconditional bid. This request was denied. As discussed above, at paragraph [64], the Donovan Group made a further request for due diligence information which, notwithstanding the deadline had passed for making such requests, was responded to on March 18, 2024.

[75] In the absence of any Qualified Bid, the Proposal Trustee declared the proponent of the Stalking Horse Bid to be the successful bidder and, on March 19, 2024, advised the Costello Company of that result.

[76] In the absence of any Qualified Bid, there was no need for the Proposal Trustee to consider whether there was a Superior Offer or to undertake an auction as set out in the SISP Process.

[77] However, as the counsel for the Proposal Trustee explained in a March 28, 2024 letter to counsel for the Donovan Group, the Proposal Trustee was prepared to consider another bid from the Donovan Group:

> ... on a further request from the [Donovan Group], the Proposal Trustee agreed to consider a further bid, noting it would be weighed as a late bid and in light of the Proposal Trustee's obligation to maintain a fair process.

[78] On March 22, 2024, the Donovan Group submitted an unconditional bid (the Revised Donovan Bid).

[79] Notwithstanding that it was submitted after the deadline, the Proposal Trustee reviewed the Revised Donovan Bid. However, the Revised Donovan Bid was rejected by the Proposal Trustee. Quoting directly from its Second Report, the Proposal Trustee states that the Revised Donovan Bid was rejected for the following reasons:

a) prejudice to the Stalking Horse Bidder after having been informed its bid was declared the Successful Bid in the SISP;

b) failure to comply with the SISP and the Extended Bid Deadline, in contravention of the integrity of the overall process;

c) while the Revised Donovan Bid contemplated a purchase price in excess of the Stalking Horse Bid, it is the Proposal Trustee’s view that it was not sufficiently greater to justify the contravention of the integrity of the overall process;

d) the late filing of the Revised Donovan Bid would deprive the Stalking Horse Bidder of the opportunity to better its offer in the proposed auction;

e) the Revised Donovan Bid reduced the amount payable to the CRA by approximately $116,000, in contravention of the [SISP Order];

f) the Revised Donovan Bid removed the payment of fees incurred prior to the NOI Proceedings [$80,000 to Miller Thomson LLP] in section 5 of Schedule “E” – Assumed liabilities, in contravention of the [SISP Order]; and

g) while as a secured creditor the Donovan Group would realize some benefit in regards to the credit bid portion of their secured debt amount, other stakeholders, namely the CRA, the Proposal Trustee, the Proposal Trustee’s

> counsel, and the Company's counsel, would see a reduction of amounts paid when compared to the Stalking Horse Agreement. As such, the Revised Donovan Group Bid is not considered a superior transaction for all involved stakeholders.

[80] The Proposal Trustee accepted the Revised Donovan Bid after the deadline and reviewed it. Having done so, it is not reasonable to then reject it for prejudice to the proponent of the Stalking Horse Bid, as set out in a), above. Having been accepted, it could not be rejected for failing to comply with the extended deadline as set out in b), above. If it had been rejected for failing to comply with the deadline, it did not need to be accepted or reviewed.

[81] Similarly, having implicitly extended the deadline a second time by accepting and reviewing the Revised Donovan Bid, it is not clear how the reason set out in d), above, has any merit. The SISP Process requires first a determination of whether a bid is a Qualified Bid, and second if it is a Superior Offer. If it is a Superior Offer, the auction process would follow and the proponent of the Stalking Horse Bid would participate.

[82] The evidence on the Approval Application is the Proposal Trustee implemented and followed the SISP Process. Subject to not accepting the Proposal Trustee's reasons for rejection described above, at a) and b), the Proposal Trustee extended the deadline twice for the Donovan Group which was more than fair in the circumstances.

[83] I find that there were sufficient efforts made to get the best price and the Proposal Trustee did not act improvidently.

2. Were the interests of all parties considered?

[84] The interests to be considered related to the losing bidder, the Donovan Group, and the proponent of the Stalking Horse Bid, the Costello Company, together with the creditors: CRA and Miller Thomson LLP. Tool Shed's interests were already considered when the SISP Order deemed the Stalking Horse Bid to be accepted if there was no Superior Offer.

Was the Revised Donovan Bid a Qualified Bid?

[85] The Proposed Trustee also rejected the Revised Donovan Bid for the reasons set out in e) and f), above at paragraph [78].

[86] The Donovan Group submits in its brief, footnotes omitted, that the Revised Donovan Bid complies with the requirement relating to the CRA Assumed Liabilities, set out at paragraph [31], above:

> 47. Tool Shed submits that the Stalking Horse Bid should be approved because it assumes liability for the penalties and interest on the amounts owing to the [CRA]. These amounts are unsecured, and the distribution of funds to an unsecured creditor in priority to a secured creditor runs contrary to the scheme of distribution set out in section 136(1) of the BIA.
>
> 48. Penalties and interest owing on CRA source deductions are not captured by the deemed trust established by s. 227(4) *Income Tax Act*. The Proposal Trustee and Tool Shed reference s. 60(1.1) of the BIA, which provides that no proposal shall be approved without the consent of the Crown if it does not provide for the payment in full of source deductions and related penalties or interest within 6 months of court approval. The application before this Court is not for approval of

> a proposal, but rather, for approval of a liquidation sale in NOI proceedings, which will be annulled if the order sought is granted.
>
> 49. Contrary to Tool Shed's submissions, the [SISP Order] does not require that any bid assume liability for the CRA source deductions and related penalties and interest. Rather, the [SISP Order] requires an assumption of liability for all priority payments, "including but not limited to all amounts due and owing…on account of source deductions to the Canada Revenue Agency."
>
> 50. The [Revised Donovan Bid] provides for all source deductions owing to the CRA as required by the [SISP Order], not the penalties and interest owing on those amounts.

[87] The CRA was represented at the Approval Application and disagreed with the submissions of the Donovan Group and noted that it supported the approval of the Stalking Horse Bid.

[88] Regardless of whether the wording of the CRA Assumed Liability included "penalties and interest", it included the amount of the liability as being in the "approximate amount of $571,091.70". The Revised Donovan Bid contains an amount for the CRA Assumed Liability that is materially different than is set out in the SISP Process and the failure to include it negatively impacts the creditor, CRA. The time to have challenged this requirement was at the hearing on February 12, 2024 when the SISP Order was granted; not on the Approval Application.

[89] In relation to the $80,000 due to Miller Thomson LLP, the Donovan Group submits in its brief, footnotes omitted, that the Revised Donovan Bid complies with the requirement relating to the Miller Thomson Assumed Liabilities, set out at paragraph [31], above:

> 52. The Proposal Trustee incorrectly states in the Second Report that "removing" the payment of the $80,000 due to Miller Thomson LLP contravenes the [SISP Order]. The [SISP Order] expressly provides that all fees due to Miller Thomson, both pre- and post-filing are captured by the Administration Charge. As such, the Final Bid is consistent with the [SISP Order], while the Stalking Horse Bid is not.

[90] Paragraph 4 of the SISP Order grants Miller Thomson LLP, as counsel to Tool Shed, security against the Administration Charge:

> 4. ... counsel to the Company, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "Administration Charge") on the Company's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof ("Property"), which charge shall not exceed an aggregate amount of $250,000, as security for their professional fees and disbursements ... both before and after the making of this Order in respect of these proceedings. ...

[91] While the wording of paragraph 4 of the SISP Order is not as clear as it could be, the final part of the quoted paragraph states that the security is "in respect of these proceedings". These "proceedings" must be taken to mean the NOI Proceedings. As a result, fees of Miller

Thomson LLP incurred for "pre-filing work prior to the Proposal Proceedings" are not covered by the Administration Charge.

[92] I reject the Donovan Group's submissions on the Miller Thomson LLP fees and find that the Revised Donovan Bid diverges materially from the required Assumed Liabilities by failing to include the $80,000 for Miller Thomson's pre-filing fees. This failure negatively impacts the creditor, Miller Thomson. This was a required term under the SISP Process. The time to have challenged this requirement was at the hearing on February 12, 2024 when the SISP Order was granted; not on the Approval Application.

[93] Lastly, the Proposal Trustee, for the reasons set out in c) and g), above at paragraph [78], declined to find that the Revised Donovan Bid was a Qualified Bid or a Superior Offer. These reasons of the Proposed Trustee should be accorded deference.

[94] I find that the Revised Donovan Bid was not a Qualified Bid. As a result, the Donovan Group has no interest to be considered.

Was the Revised Donovan Bid a Superior Offer?

[95] The Revised Donovan Bid is not, and cannot be, a Superior Offer because it was not a Qualified Bid.

3. The efficacy and integrity of the SISP Process

[96] The process itself was set out in the SISP Process and approved by the Court in the SISP Order. The Donovan Group's concerns regarding the tension, and potential for conflict of interest, between the insider (Mr. Costello) and the Stalking Horse Bidder (the Costello Company) should have been raised when the SISP Process was before the Court on February 12, 2024. Having obtained Court approval for the SISP Process is now too late for the Donovan Group to complain that Mr. Costello should not have been able to take on dual roles, one as CEO and one as an investor in the Costello Company.

[97] There was no evidence of a lack of integrity in the implementation of the SISP Process. The Donovan Group submits it takes no issue with the Proposal Trustee and I have already found that there was no imbalance in the information available to the Donovan Group.

[98] The Donovan Group asserts that Mr. Costello and Mr. Sherman, the former CEO of Tool Shed, used the NOI Process to serve their own interests and not to the benefit of Tool Shed. To support this allegation, the Donovan Group points to certain public statements made by Mr. Costello and Mr. Sherman where they indicate that they will buy-out Tool Shed and take it out of insolvency. I find that the statements do not evidence improper motives and that the Donovan Group's submissions are without merit.

[99] I find that the SISP Process was put in action when it was approved on February 12, 2024. There is no evidence to suggest that the Proposal Trustee took any improper steps in implementing the SISP Process. I find that the SISP Process has been implemented with efficacy and integrity.

4. Whether there has been unfairness in the working out of the process

[100] When viewed in totality, there is no unfairness. The SISP Process was approved by the Court and then followed by the Proposal Trustee. The Donovan Group takes no issue with the actions of the Proposal Trustee.

[101] When the layers of the submissions are peeled back, the Donovan Group contends that the SISP Process was fundamentally unfair as it set up a potential conflict of interest between Mr. Costello, as CEO, and as an investor in the Stalking Horse Bid proponent, the Costello Company. However, is too late to revisit the SISP Process is it was approved and not appealed. The other issues raised by the Donovan Group are not meritorious.

[102] I find that the Proposal Trustee met its obligation to implement the SISP Process and to act in a commercially reasonable manner in the circumstances, with a view to obtaining the best price having regard to the competing interests of the parties.

Conclusion

[103] The objection to the SISP transaction cannot succeed. The Revised Donovan Bid is neither a Qualified Bid nor a Superior Bid. In accordance with the SISP Process, the Stalking Horse Bid is successful and the SISP transaction, substantially in the form of the Stalking Horse Agreement, is hereby approved.

Costs

[104] If the parties cannot agree on costs, they may contact me by letter no later than May 2, 2024, to make arrangements for an appearance on May 9 or 10, 2024, at a time to be determined.

Heard on the 15th day of April, 2024 and the 16th day of April, 2024.
Dated at the City of Calgary, Alberta this 23rd day of April, 2024.

E.J. Sidnell
J.C.K.B.A.

Appearances:

James W Reid and Bryan A Hosking
for Tool Shed Brewing Company Inc

Alexis Teasdale
for 2594617 Alberta Ltd

Catrina Webster
for the KPMG Inc

Daniel Segal and Bertrand Malo
for the Canada Revenue Agency

Jeffrey N Thom, KC
for the 2582568 Alberta Inc

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COURT OF APPEAL FOR ONTARIO

CITATION: Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc., 2019 ONCA 508
DATE: 20190619
DOCKET: C62925

Pepall, Lauwers and Huscroft JJ.A.

BETWEEN

Third Eye Capital Corporation

Applicant
(Respondent)

and

Ressources Dianor Inc. /Dianor Resources Inc.

Respondent
(Respondent)

and

2350614 Ontario Inc.

Interested Party
(Appellant)

Peter L. Roy and Sean Grayson, for the appellant 2350614 Ontario Inc.

Shara Roy and Nilou Nezhat, for the respondent Third Eye Capital Corporation

Stuart Brotman and Dylan Chochla, for the receiver of the respondent Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.

Nicholas Kluge, for the monitor of Essar Steel Algoma Inc., Ernst & Young Inc.

Steven J. Weisz, for the intervener Insolvency Institute of Canada

Heard: September 17, 2018

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice dated October 5, 2016, with reasons reported at 2016 ONSC 6086, 41 C.B.R. (6th) 320.

Pepall J.A.:

Introduction

[1] There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty ("GOR") be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA") govern the appeal from the order of the motion judge in this case?

[2] These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc*., 2018 ONCA 253, 141 O.R. (3d) 192 ("First Reasons"). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

[3] The facts underlying this appeal may be briefly outlined.

[4] On August 20, 2015, the court appointed Richter Advisory Group Inc. ("the Receiver") as receiver of the assets, undertakings and properties of Dianor Resources Inc. ("Dianor"), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor's secured lender, the respondent Third Eye Capital Corporation ("Third Eye") who was owed approximately $5.5 million.

[5] Dianor's main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. ("381 Co.") to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor's properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. ("235 Co."), another company controlled by John Leadbetter.[1] The

[1] The original agreement provided for the payment of the GORs to 381 Co. and Paulette A. Mousseau-Leadbetter. The motion judge noted that the record was silent on how 235 Co. came to be the holder of these royalty rights but given his conclusion, he determined that there was no need to resolve this issue: at para. 6.

mining claims were also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. (“Algoma”). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least $32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

[6] Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. (“177 Co.”), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in

addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor.[2]

[7] Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

[8] On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

[9] The purchase price consisted of a $2 million credit bid, the assumption of certain liabilities, and $400,000 payable in cash, $250,000 of which was to be distributed to 235 Co. for its GORs and the remaining $150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement

[2] The ownership of the surface rights is not in issue in this appeal.

contemplated a closing prior to the expiry of any appeal period, be it 10 days under the BIA or 30 days under the CJA. Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under the BIA (pursuant to s. 195 of the BIA) or by applying for a stay under r. 63.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[10] On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the proposed terms of the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

[11] The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

[12] On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the BIA and the CJA to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic … why the jurisdiction would not be the

same whether the royalty rights were or were not an interest in land": at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment of $250,000 and $150,000 to 235 Co. and Algoma respectively, their interests were extinguished. The figure of $250,000 was based on an expert valuation report and 235 Co.'s acknowledgement that this represented fair market value.[3]

[13] Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge's decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under s. 195 of the BIA would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the BIA appeal provisions.

[14] For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the

[3] Although in its materials filed on this appeal, 235 Co. stated that the motion judge erred in making this finding, in oral submissions before this court, Third Eye's counsel confirmed that this was the position taken by 235 Co.'s counsel before the motion judge, and 235 Co.'s appellate counsel, who was not counsel below, stated that this must have been the submission made by counsel for 235 Co. before the motion judge.

absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

[15] On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that “an appeal is under consideration” and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.’s counsel had already had ample time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period “is what it is” but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same

day, the Receiver advised 235 Co. and Algoma that the transaction had closed and requested directions regarding the $250,000 and $150,000 payments.

[16] On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal. 235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

[17] Algoma's Monitor in its *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings received and disbursed the funds allocated to Algoma. The $250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

Proceedings Before This Court

[18] On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

> (1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under s. 100 of the CJA and s. 243 of the BIA, where s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply;

(2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and

(3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

[19] The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order

(1) Positions of Parties

[20] The appellant 235 Co. initially took the position that no authority exists under s. 100 of the CJA, s. 243 of BIA, or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under s. 100 of the CJA but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109, at para. 190, rev'd on other grounds, 2011 ONCA 817, 286 O.A.C. 189. It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish

the interest. However here, 235 Co. held complete and non-contingent title to the GORs and its interest had value.

[21] In response, the respondent Third Eye states that a broad purposive interpretation of s. 243 of the BIA and s. 100 of the CJA allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

[22] The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under s. 243 of the BIA and, in the alternative, the court's inherent jurisdiction.

[23] The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

[24] The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including interests in land, by utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent undesirable outcomes and to provide added certainty in insolvency proceedings.

(2) Analysis

(a) Significance of Vesting Orders

[25] To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order "effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction" (emphasis in original): David Bish & Lee Cassey, "Vesting Orders Part 1: The Origins and Development" (2015) 32:4

Nat'l. Insolv. Rev. 41, at p. 42 ("Vesting Orders Part 1"). The order acts as a conveyance of title and also serves to extinguish encumbrances on title.

[26] A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in "Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

> Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

[27] The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in "Vesting Orders Part 1", at pp. 41-42:

> Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement …
>
> Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern "restructuring" age of corporate asset sales and secured creditor realizations ... The vesting order is the holy grail sought by every

> purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

[28] The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, "Vesting Orders Part 2: The Scope of Vesting Orders" (2015) 32:5 Nat'l Insolv. Rev. 53, at p. 56 ("Vesting Orders Part 2"). They write that the statement describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal)[4] which relied on 1985 and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: "a more transparent and conscientious

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[4] To repeat, the statement quoted from Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Carswell, 2009), at Part XI, L§21, said:

> A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework understood by all participants."

(b) Potential Roots of Jurisdiction

[29] In analysing the issue of whether there is jurisdiction to extinguish 235 Co.'s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

[30] As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: s. 100 of the CJA, s. 243 of the BIA, s. 21 of the CLPA, and the court's inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

(c) The Hierarchical Approach to Jurisdiction in the Insolvency Context

[31] Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Century Services Inc. v. Canada (Attorney General)***,** 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters"' in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41. The authors suggest that in addressing under-inclusive or skeletal legislation, first one "should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority": at p. 42. Only then should one turn to inherent jurisdiction to fill a possible gap. "By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction": at p. 44. The authors conclude at p. 94:

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-

> inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

[32] Elmer A. Driedger's now famous formulation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141,

at para. 9. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone": *Rizzo*, at para. 21.

(d) Section 100 of the CJA

[33] This brings me to the CJA. In Ontario, the power to grant a vesting order is conferred by s. 100 of the CJA which states that:

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

[34] The roots of s. 100 and vesting orders more generally, can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the court had power to order the execution of a deed or conveyance of a property, it now also had the power to make a vesting order for such property.[5] In other words, it is a power to vest property from one party to another in order to implement the order of the court. As explained by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.), at para. 281, leave

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[5] Such orders were subsequently described as vesting orders in *An Act respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 63. The authority to grant vesting orders was inserted into the *The Judicature Act*, R.S.O. 1897, c. 51, s. 36 in 1897 when the Courts of Chancery were abolished. Section 100 of the CJA appeared in 1984 with the demise of *The Judicature Act*: see *An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario*, S.O. 1984, c. 11, s. 113.

to appeal refused, [2001] S.C.C.A. No. 63, the court's statutory power to make a vesting order supplemented its contempt power by allowing the court to effect a change of title in circumstances where the parties had been directed to deal with property in a certain manner but had failed to do so. Vesting orders are equitable in origin and discretionary in nature: *Chippewas*, at para. 281.

[35] Blair J.A. elaborated on the nature of vesting orders in *Re Regal Constellation Hotel Ltd.* (2004), 71 O.R. (3d) 355 (C.A.), at para. 33:

> A vesting order, then, had a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order).

[36] Frequently vesting orders would arise in the context of real property, family law and wills and estates. *Trick v. Trick* (2006), 81 O.R. (3d) 241 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 388, involved a family law dispute over the enforcement of support orders made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The motion judge in *Trick* had vested 100 per cent of the appellant's private pension in the respondent in order to enforce a support order. In granting the vesting order, the motion judge relied in part on s. 100 of the CJA. On appeal, the appellant argued that the vesting order contravened s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 which permitted execution against a pension benefit to enforce a support order only up to a

maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the CJA could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In *obiter*, she observed that s. 100 of the CJA "does not provide a free standing right to property simply because the court considers that result equitable": at para. 19.

[37] The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

> That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

[38] It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

[39] Based on the *obiter* in *Trick*, absent an independent basis for jurisdiction, the CJA could not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the CJA.

[40] In their article "Vesting Orders Part 1", Bish and Cassey write at p. 49:

> Section 100 of the CJA is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

[41] This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

[42] This leads me to consider whether jurisdiction exists under s. 243 of the BIA both to sell assets and to set the terms of the sale including the granting of a vesting order.

(e) Section 243 of the BIA

[43] The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Motor Company of Canada, Limited v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146, at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247, at para. 9; *Re Bell*, 2013 ONSC 2682, at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.), at para. 4. Within this context, and in order to understand

the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

[44] Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

[45] Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

> 243(1). Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> >
> > (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
> >
> > (c) take any other action that the court considers advisable.

[46] "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

> 243(2) [I]n this Part, ***receiver*** means a person who
>
> > (a) is appointed under subsection (1); or
> >
> > (b) is appointed to take or takes possession or control – of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt – under
> >
> > > (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
> > >
> > > (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver – manager. [Emphasis in original.]

[47] *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a

regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies. It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

The History of s. 243

[48] The origins of s. 243 can be traced back to s. 47 of the BIA which was enacted in 1992. Before 1992, typically in Ontario, receivers were appointed privately or under s. 101 of the CJA and s. 243 was not in existence.

[49] In 1992, s. 47(1) of the BIA provided for the appointment of an interim receiver when the court was satisfied that a secured creditor had or was about to send a notice of intention to enforce security pursuant to s. 244(1). Section 47(2) provided that the court appointing the interim receiver could direct the interim receiver to do any or all of the following:

> 47(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (a) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (c) take such other action as the court considers advisable.

[50] The language of this subsection is similar to that now found in s. 243(1).

[51] Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor's business, and market and sell the debtor's property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205; Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.

[52] Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs and Northern Development) v. Curragh***,** *Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Ct. (Gen. Div.)), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver … to … take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:

> It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of

> insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

See also *Re Loewen Group Inc.* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.)[6].

[53] Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

[54] In the intervening period between the 1992 amendments which introduced s. 47, and the 2009 amendments which introduced s. 243, the BIA receivership regime was considered by the Standing Senate Committee on Banking, Trade and Commerce ("Senate Committee"). One of the problems identified by the Senate Committee, and summarized in *Lemare Lake Logging*, at para. 56, was that "in many jurisdictions, courts had extended the power of interim receivers to such an extent that they closely resembled those of court-appointed receivers." This was a deviation from the original intention that interim receivers serve as "temporary watchdogs" meant to "protect and preserve" the debtor's estate and

[6] This case was decided before s. 36 of the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA") was enacted but the same principles are applicable.

the interests of the secured creditor during the 10 day period during which the secured creditor was prevented from enforcing its security: *Re Big Sky Living Inc.*, 2002 ABQB 659, 318 A.R. 165, at paras. 7-8; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Senate of Canada, 2003), at pp. 144-145 ("Senate Committee Report").[7]

[55] Parliament amended s. 47(2) through the *Insolvency Reform Act* 2005 and the *Insolvency Reform Act* 2007 which came into force on September 18, 2009.[8] The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.

[56] Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to "take such other action as the court considers advisable". At the same time, Parliament

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[7] This 10 day notice period was introduced following the Supreme Court's decision in *R.E. Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.) which required a secured creditor to give reasonable notice prior to the enforcement of its security.

[8] *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 ("*Insolvency Reform Act* 2005"); *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act*, *the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36 ("*Insolvency Reform Act* 2007").

introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

> 243(1). On application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> >
> > (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
> >
> > (c) take any other action that the court considers advisable. [Emphasis added.]

[57] When Parliament enacted s. 243, it was evident that courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates" and "practicality demands". As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140: "It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law". Thus, Parliament's deliberate choice to import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.

[58] Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

> The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [Emphasis added.]

[59] However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

[60] In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

[61] The language of s. 36(6) of the CCAA which deals with the sale or disposition of assets of a company under the protection of the CCAA is identical to that of s. 65.13(7) of the BIA.

[62] Section 243 of the BIA does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language “take any other action that the court considers advisable”.

[63] This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under s. 243 of the BIA. Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in 65.13(7) of the BIA and s. 36(6) of the CCAA impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

[64] In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est*

exclusio alterius) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

> An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

[65] However, Sullivan notes that the doctrine of implied exclusion "[l]ike the other presumptions relied on in textual analysis … is merely a presumption and can be rebutted." The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47, at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R*., 2011 SCC 63, [2011] 3 S.C.R. 721, at paras. 110-111.

[66] The Supreme Court noted in *Turgeon v. Dominion Bank*, [1930] S.C.R. 67, at pp. 70-71, that the maxim *expressio unius est exclusio alterius* "no doubt … has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context." In this vein, Rothstein J. stated in *Copthorne*, at paras. 110-111:

> I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader

> than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.
>
> However, the implied exclusion argument is misplaced where it relies exclusively on the text of the … provisions without regard to their underlying rationale.

[67] Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

[68] In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance "regarding minimum requirements to be met during the sale process": Senate Committee Report, pp. 146-148.

[69] Commentators have noted that the purpose of the amendments was to provide "the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse": Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

[70] These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

[71] In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do

not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 – Jurisdiction to Grant a Sales Approval and Vesting Order

[72] This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

[73] The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Gen. Div.), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co. Ltd. and Scouler* (1991), 108 N.S.R. (2d) 198 (N.S.C.A.), at para. 34, "the essence of a

receiver's powers is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340, 262 O.A.C. 118, at para. 77.

[74] This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (in Chambers), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230, *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.), aff'd (2000), 47 O.R. (3d) 234 (C.A.).

[75] Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that has not yet been sold or realized" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

[76] It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

[77] Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

[78] I should first indicate that the case law on vesting orders in the insolvency context is limited. In *Re New Skeena Forest Products Inc*., 2005 BCCA 154, 9 C.B.R. (5th) 267, the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Re Loewen Group Inc.,* Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the

basis of the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.,* 2014 NSSC 420, 353 N.S.R. (2d) 194 stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

[79] In *Anglo Pacific Group PLC v. Ernst & Young Inc.*, 2013 QCCA 1323, the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: “It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge.” Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or ‘real rights’, it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

[80] The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does

not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in "Vesting Orders Part 2", at p. 58, "[a] vesting order is a vital legal 'bridge' that facilitates the receiver's giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver – which did not hold the title – is legally valid and effective." As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

[81] The Commercial List's Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property "free and clear of any liens or encumbrances": see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court's advertence to the authority for such a term. As Bish and Cassey note in "Vesting Orders Part 1", at p. 42, the vesting order is the "holy grail" sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions in the insolvency context. Indeed, the motion judge observed that the granting of vesting orders in receivership sales is "a near daily occurrence on the Commercial List": at para. 31. As such, this aspect of the vesting order assists in advancing the purpose of s. 243 and of receiverships generally, being the realization of the debtor's assets. It is self-evident that purchasers of assets

do not wish to acquire encumbered property. The use of vesting orders is in essence incidental and ancillary to the power to sell.

[82] As I will discuss further, while jurisdiction for this aspect of vesting orders stems from s. 243, the exercise of that jurisdiction is not unbounded.

[83] The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

[84] If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

[85] In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an

agreement to sell Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

[86] Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency – it facilitates the maximization of proceeds and realization of the debtor's assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.

[87] In summary, I conclude that jurisdiction exists under s. 243(1) of the BIA to grant a vesting order vesting property in a purchaser. This jurisdiction extends to receivers who are appointed under the provisions of the BIA.

[88] This analysis does not preclude the possibility that s. 21 of the CLPA also provides authority for vesting property in the purchaser free and clear of

encumbrances. The language of this provision originated in the British *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict. ch. 41 and has been the subject matter of minimal judicial consideration. In a nutshell, s. 21 states that where land subject to an encumbrance is sold, the court may direct payment into court of an amount sufficient to meet the encumbrance and declare the land to be free from the encumbrance. The word "encumbrance" is not defined in the CLPA.

[89] G. Thomas Johnson in Anne Warner La Forest, ed.,*Anger & Honsberger Law of Real Property*, 3rd ed., loose-leaf (Toronto: Thomson Reuters, 2017), at §34:10 states:

> The word "encumbrance" is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as "every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee".

[90] The author goes on to acknowledge however, that even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances.

[91] That said, given that s. 21 of the CLPA was not a basis advanced before the motion judge, for the purposes of this appeal, it is unnecessary to conclusively determine this issue.

B. Was it Appropriate to Vest out 235 Co's GORs?

[92] This takes me to the next issue – the scope of the sales approval and vesting order and whether 235 Co.'s GORs should have been extinguished.

[93] Accepting that the motion judge had the jurisdiction to issue a sales approval and vesting order, the issue then becomes not one of "jurisdiction" but rather one of "appropriateness" as Blair J.A. stated in *Re Canadian Red Cross Society/Société canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299 (Ont. Ct. (Gen. Div.)), at para. 42, leave to appeal refused, (1998), 32 C.B.R. (4th) 21 (Ont. C.A.). Put differently, should the motion judge have exercised his jurisdiction to extinguish the appellant's GORs from title?

[94] In the first stage of this appeal, this court concluded that the GORs constituted interests in land. In the second stage, I have determined that the motion judge did have jurisdiction to grant a sales approval and vesting order. I must then address the issue of scope and determine whether the motion judge erred in ordering that the GORs be extinguished from title.

(1) Review of the Case Law

[95] As illustrated in the first stage of this appeal and as I will touch upon, a review of the applicable jurisprudence reflects very inconsistent treatment of vesting orders.

[96] In some cases, courts have denied a vesting order on the basis that the debtor's interest in the property circumscribes a receiver's sale rights. For example, in *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.), the receiver sought an order authorizing it to sell the debtor's property free of an undertaking the debtor gave to the respondents to hold two lots in trust if a plan of subdivision was not registered by the closing date. Wilton-Siegel J. found that the undertaking created an interest in land. He stated, at para. 68, that the receiver had taken possession of the property of the debtor only and could not have any interest in the respondents' interest in the property and as such, he was not prepared to authorize the sale free of the undertaking. Wilton-Siegel J. then went on to discuss five "equitable considerations" that justified the refusal to grant the vesting order.

[97] Some cases have weighed "equitable considerations" to determine whether a vesting order is appropriate. This is evident in certain decisions involving the extinguishment of leasehold interests. In *Meridian Credit Union v. 984 Bay Street Inc*., [2005] O.J. No. 3707 (S.C.), the court-appointed receiver had sought a declaration that the debtor's land could be sold free and clear of three non-arm's length leases. Each of the lease agreements provided that it was subordinate to the creditor's security interest, and the lease agreements were not registered on title. This court remitted the matter back to the motion judge and directed him to consider the equities to determine whether it was

appropriate to sell the property free and clear of the leases: see *Meridian Credit Union Ltd. v. 984 Bay Street Inc*., [2006] O.J. No. 1726 (C.A.). The motion judge subsequently concluded that the equities supported an order terminating the leases and vesting title in the purchaser free and clear of any leasehold interests: *Meridian Credit Union v. 984 Bay Street Inc*., [2006] O.J. No. 3169 (S.C.).

[98] An equitable framework was also applied by Wilton-Siegel J. in *Romspen*. In *Romspen*, Home Depot entered into an agreement of purchase and sale with the debtor to acquire a portion of the debtor's property on which a new Home Depot store was to be constructed. The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*, R.S.O. 1990, c. P.13. The debtor defaulted on its mortgage over its entire property and a receiver was appointed.

[99] The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot's interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest. Wilton-Siegel J. concluded that a vesting order could be granted in the circumstances. He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and

sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with.

[100] He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. Wilton-Siegel J. concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests.[9]

[101] As this review of the case law suggests, and as indicated in the First Reasons, there does not appear to be a consistently applied framework of analysis to determine whether a vesting order extinguishing interests ought to be granted. Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have

[9] This court allowed an appeal of the motion judge's order in *Romspen* and remitted the matter back to the motion judge for a new hearing on the basis that the motion judge applied an incorrect standard of proof in making findings of fact by failing to draw reasonable inferences from the evidence, and in particular, on the issue of whether Romspen had expressly or implicitly consented to the construction of the Home Depot stores: see *Romspen Investment Corporation v. Woods Property Development Inc*., 2011 ONCA 817, 286 O.A.C. 189.

considered the equities to determine whether a third party interest should be extinguished.

(2) Framework for Analysis to Determine if a Third Party Interest Should be Extinguished

[102] In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.

[103] First, the court should assess the nature and strength of the interest that is proposed to be extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.

[104] For instance, I agree with the Receiver's submission that it is difficult to think of circumstances in which a court would vest out a fee simple interest in land. Not all interests in land share the same characteristics as a fee simple, but there are lesser interests in land that would also defy extinguishment due to the nature of the interest. Consider, for example, an easement in active use. It would be impractical to establish an exhaustive list of interests or to prescribe a rigid test to make this determination given the broad spectrum of interests in land recognized by the law.

[105] Rather, in my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an

ownership interest in some ascertainable feature of the property itself. This latter type of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.

[106] Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. As Bish and Cassey note, vesting orders have become a routine aspect of insolvency practice, and are typically granted on consent: “Vesting Orders Part 2”, at pp. 60, 65.

[107] The more complex question arises when consent is given through a prior agreement such as where a third party has subordinated its interest contractually. *Meridian*, *Romspen*, and *Firm Capital Mortgage Funds Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067*

Ontario Ltd. (2008), 41 C.B.R. (5th) 81 (Ont. S.C.), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

[108] The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

[109] Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

[110] If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the

proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

[111] Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

[112] While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146, at para. 2 is instructive:

> … [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest.

> A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted. [Italics in original; underlining added.]

[113] Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

[114] The Receiver submits that the realities of commerce and business efficacy in this case are that the mining claims were unsaleable without impairment of the GORs. That may be, but the imperatives of the mining claim owner should not necessarily trump the interest of the owner of the GORs.

[115] Given the nature of 235 Co.'s interest and the absence of any agreement that allows for any competing priority, there is no need to resort to a consideration of the equities. The motion judge erred in granting an order extinguishing 235 Co.'s GORs.

[116] Having concluded that the court had the jurisdiction to grant a vesting order but the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs, I must then consider whether the appellant failed to preserve its rights such that it is precluded from persuading this court that the order granted by the motion judge ought to be set aside.

C. 235 Co.'s Appeal of the Motion Judge's Order

[117] 235 Co. served its notice of appeal on November 3, 2016, more than a week after the transaction had closed on October 26, 2016.

[118] Third Eye had originally argued that 235 Co.'s appeal was moot because the vesting order was spent when it was registered on title and the conveyance was effected. It relied on this court's decision in *Regal Constellation* in that regard.

[119] Justice Lauwers wrote that additional submissions were required in the face of the conclusion that 235 Co.'s GORs were interests in land: First Reasons, at para. 21. He queried whether it was appropriate for the court-

appointed receiver to close the transaction when the parties were aware that 235 Co. was considering an appeal prior to the closing of the transaction: at para. 22.

[120] There are three questions to consider in addressing what, if any, remedy is available to 235 Co. in these circumstances:

(1) What appeal period applies to 235 Co.'s appeal of the sale approval and vesting order;

(2) Was it permissible for the Receiver to close the transaction in the face of 235 Co.'s October 26, 2016 communication to the Receiver that "an appeal is under consideration"; and

(3) Does 235 Co. nonetheless have a remedy available under the *Land Titles Act*, R.S.O. 1990, c. L.5?

(1) The Applicable Appeal Period

[121] The Receiver was appointed under s. 101 of the CJA and s. 243 of the BIA. The motion judge's decision approving the sale and vesting the property in Third Eye was released through reasons dated October 5, 2016.

[122] Under the CJA, the appeal would be governed by the *Rules of Civil Procedure*, r. 61.04(1) which provides for a 30 day period from which to appeal a final order to the Court of Appeal. In addition, the appellant would have had to have applied for a stay of proceedings.

[123] In contrast, under the BIA, s. 183(2) provides that courts of appeal are "invested with power and jurisdiction at law and in equity, according to their ordinary procedures except as varied by" the BIA or the BIA Rules, to hear and determine appeals. An appeal lies to the Court of Appeal if the point at issue involves future rights; if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; if the property involved in the appeal exceeds in value $10,000; from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed $5,000; and in any other case by leave of a judge of the Court of Appeal: BIA, s. 193. Given the nature of the dispute and the value in issue, no leave was required and indeed, none of the parties took the position that it was. There is therefore no need to address that issue.

[124] Under r. 31 of the BIA Rules, a notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates."

[125] The 10 days runs from the day the order or decision was rendered: *Moss (Bankrupt), Re* (1999), 138 Man. R. (2d) 318 (C.A., in Chambers), at para. 2; *Re Koska*, 2002 ABCA 138, 303 A.R. 230, at para. 16; *CWB Maxium Financial Inc. v. 6934235 Manitoba Ltd. (c.o.b. White Cross Pharmacy Wolseley)*, 2019 MBCA 28 (in Chambers), at para. 49. This is clear from the fact that both r. 31 and s. 193 speak of "order or decision" (emphasis added). If an

entered and issued order were required, there would be no need for this distinction.[10] Accordingly, the "[t]ime starts to run on an appeal under the *BIA* from the date of pronouncement of the decision, not from the date the order is signed and entered": *Re Koska*, at para. 16.

[126] Although there are cases where parties have conceded that the BIA appeal provisions apply in the face of competing provincial statutory provisions (see e.g. *Ontario Wealth Management Corp. v. SICA Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (in Chambers), at para. 36 and *Impact Tool & Mould Inc. v. Impact Tool & Mould Inc. Estate*, 2013 ONCA 697, at para. 1), until recently, no Ontario case had directly addressed this point.

[127] Relying on first principles, as noted by Donald J.M. Brown in *Civil Appeals* (Toronto: Carswell, 2019), at 2:1120, "where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over provincial legislation providing for an appeal." Parliament has jurisdiction over procedural law in bankruptcy and hence can provide for appeals: *Re Solloway Mills & Co. Ltd., In Liquidation, Ex Parte I.W.C. Solloway*

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[10] *Ontario Wealth Managements Corporation v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (in Chambers) a decision of a single judge of this court, states, at para. 5, that a signed, issued, and entered order is required. This is generally the case in civil proceedings unless displaced, as here by a statutory provision. *Re Smoke* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.), that is relied upon and cited in *Ontario Wealth Managements Corporation*, does not address this issue.

(1934), [1935] O.R. 37 (C.A.). Where there is an operational or purposive inconsistency between the federal bankruptcy rules and provincial rules on the timing of an appeal, the doctrine of federal paramountcy applies and the federal bankruptcy rules govern: see *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited.*, 2013 ONCA 769, 118 O.R. (3d) 161, at para. 59, aff'd 2015 SCC 52, [2015] 3 S.C.R. 397; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 16.

[128] In *Business Development Bank of Canada v. Astoria Organic Matters Ltd*., 2019 ONCA 269, Zarnett J.A. wrote that the appeal route is dependent on the jurisdiction pursuant to which the order was granted. In that case, the appellant was appealing from the refusal of a judge to grant leave to sue the receiver who was stated to have been appointed pursuant to s. 101 of the CJA and s. 243 of the BIA. There was no appeal from the receivership order itself. Thus, to determine the applicable appeal route for the refusal to grant leave, the court was required to determine the source of the power to impose a leave to sue requirement in a receivership order. Zarnett J.A. determined that by necessary implication, Parliament must be taken to have clothed the court with the power to require leave to sue a receiver appointed under s. 243(1) of the BIA and federal paramountcy dictated that the BIA appeal provisions apply.

[129] Here, 235 Co.'s appeal is from the sale approval order, of which the vesting order is a component. Absent a sale, there could be no vesting order.

The jurisdiction of the court to approve the sale, and thus issue the sale approval and vesting order, is squarely within s. 243 of the BIA.

[130] Furthermore, as 235 Co. had known for a considerable time, there could be no sale to Third Eye in the absence of extinguishment of the GORs and Algoma's royalty rights; this was a condition of the sale that was approved by the motion judge. The appellant was stated to be unopposed to the sale but in essence opposed the sale condition requiring the extinguishment. Clearly the jurisdiction to grant the approval of the sale emanated from the BIA, and as I have discussed, so did the vesting component; it was incidental and ancillary to the approval of the sale. It would make little sense to split the two elements of the order in these circumstances. The essence of the order was anchored in the BIA.

[131] Accordingly, I conclude that the appeal period was 10 days as prescribed by r. 31 of the BIA Rules and ran from the date of the motion judge's decision of October 5, 2016. Thus, on a strict application of the BIA Rules, 235 Co.'s appeal was out of time. However, in the circumstances of this case it is relevant to consider first whether it was appropriate for the Receiver to close the transaction in the face of 235 Co.'s assertion that an appeal was under consideration and, second, although only sought in oral submissions in reply at the hearing of the second stage of this appeal, whether 235 Co. should be granted an extension of time to appeal.

(2) The Receiver's Conduct

[132] The Receiver argues that it was appropriate for it to close the transaction in the face of a threatened appeal because the appeal period had expired when the appellant advised the Receiver that it was contemplating an appeal (without having filed a notice of appeal or a request for leave) and the Receiver was bound by the provisions of the purchase and sale agreement and the order of the motion judge, which was not stayed, to close the transaction.

[133] Generally speaking, as a matter of professional courtesy, a potentially preclusive step ought not to be taken when a party is advised of a possible pending appeal. However, here the Receiver's conduct in closing the transaction must be placed in context.

[134] 235 Co. had known of the terms of the agreement of purchase and sale and the request for an order extinguishing its GORs for over a month, and of the motion judge's decision for just under a month before it served its notice of appeal. Before October 26, 2016, it had never expressed an intention to appeal either informally or by serving a notice of appeal, nor did it ever bring a motion for a stay of the motion judge's decision or seek an extension of time to appeal.

[135] Having had the agreement of purchase and sale at least since it was served with the Receiver's motion record seeking approval of the transaction, 235 Co. knew that time was of the essence. Moreover, it also knew that the

Receiver was directed by the court to take such steps as were necessary for the completion of the transaction contemplated in the purchase and sale agreement approved by the motion judge pursuant to para. 2 of the draft court order included in the motion record.

[136] The principal of 235 Co. had been the original prospector of Dianor. 235 Co. never took issue with the proposed sale to Third Eye. The Receiver obtained a valuation of Dianor's mining claims and the valuator concluded that they had a total value of $1 million to $2 million, with 235 Co.'s GORs having a value of between $150,000 and $300,000, and Algoma's royalties having a value of $70,000 to $140,000. No evidence of any competing valuation was adduced by 235 Co.

[137] Algoma agreed to a payment of $150,000 but 235 Co. wanted more than the $250,000 offered. The motion judge, who had been supervising the receivership, stated that 235 Co. acknowledged that the sum of $250,000 represented the fair market value: at para. 15. He made a finding at para. 38 of his reasons that the principal of 235 Co. was "not entitled to exercise tactical positions to tyrannize the majority by refusing to agree to a reasonable amount for the royalty rights." In *obiter*, the motion judge observed that he saw "no reason in logic … why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. Furthermore, the appellant knew of the motion judge's reasons for decision since October 5,

2016 and did nothing that suggested any intention to appeal until about three weeks later.

[138] As noted by the Receiver, it is in the interests of the efficient administration of receivership proceedings that aggrieved stakeholders act promptly and definitively to challenge a decision they dispute. This principle is in keeping with the more abbreviated time period found in the BIA Rules. Blair J.A. in *Regal Constellation*, at para. 49, stated that "[t]hese matters ought not to be determined on the basis that 'the race is to the swiftest'". However, that should not be taken to mean that the race is adjusted to the pace of the slowest.

[139] For whatever reasons, 235 Co. made a tactical decision to take no steps to challenge the motion judge's decision and took no steps to preserve any rights it had. It now must absorb the consequences associated with that decision. This is not to say that the Receiver's conduct would always be advisable. Absent some emergency that has been highlighted in its Receiver's report to the court that supports its request for a vesting order, a Receiver should await the expiry of the 10 day appeal period before closing the sale transaction to which the vesting order relates.

[140] Given the context and history of dealings coupled with the actual expiry of the appeal period, I conclude that it was permissible for the Receiver to close the transaction. In my view, the appeal by 235 Co. was out of time.

(3) Remedy is not Merited

[141] As mentioned, in oral submissions in reply, 235 Co. sought an extension of time to appeal *nunc pro tunc*. It further requested that this court exercise its discretion and grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and granting an order directing the Minings Claim Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated. The Receiver resists this relief. Third Eye does not oppose the relief requested by 235 Co. provided that the compensation paid to 235 Co. and Algoma is repaid. However, counsel for the Monitor for Algoma states that the $150,000 it received for Algoma's royalty rights has already been disbursed by the Monitor to Algoma.

[142] The rules and jurisprudence surrounding extensions of time in bankruptcy proceedings is discussed in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Thomson Reuters, 2009). Rule 31(1) of the BIA Rules provides that a judge of the Court of Appeal may extend the time to appeal. The authors write, at pp. 8-20-8-21:

> The court ought not lightly to interfere with the time limit fixed for bringing appeals, and special circumstances are required before the court will enlarge the time …
>
> In deciding whether the time for appealing should be extended, the following matters have been held to be relevant:

> (1) The appellant formed an intention to appeal before the expiration of the 10 day period;
>
> (2) The appellant informed the respondent, either expressly or impliedly, of the intention to appeal;
>
> (3) There was a continuous intention to appeal during the period when the appeal should have been commenced;
>
> (4) There is a sufficient reason why, within the 10 day period, a notice of appeal was not filed…;
>
> (5) The respondent will not be prejudiced by extending the time;
>
> (6) There is an arguable ground or grounds of appeal;
>
> (7) It is in the interest of justice, i.e., the interest of the parties, that an extension be granted. [Citations omitted.]

[143] These factors are somewhat similar to those considered by this court when an extension of time is sought under r. 3.02 of the *Rules of Civil Procedure*: did the appellant form a *bona fide* intention to appeal within the relevant time period; the length of and explanation for the delay; prejudice to the respondents; and the merits of the appeal. The justice of the case is the overarching principle: see *Enbridge Gas Distributions Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636 (in Chambers), at para. 15.

[144] There is no evidence that 235 Co. formed an intention to appeal within the applicable appeal period, and there is no explanation for that failure. The appellant did not inform the respondents either expressly or impliedly that it

was intending to appeal. At best, it advised the Receiver that an appeal was under consideration 21 days after the motion judge released his decision. The fact that it, and others, might have thought that a longer appeal period was available is not compelling seeing that 235 Co. had known of the position of the respondents and the terms of the proposed sale since at least August 2016 and did nothing to suggest any intention to appeal if 235 Co. proved to be unsuccessful on the motion. Although the merits of the appeal as they relate to its interest in the GORs favour 235 Co.'s case, the justice of the case does not. I so conclude for the following reasons.

1. 235 Co. sat on its rights and did nothing for too long knowing that others would be relying on the motion judge's decision.

2. 235 Co. never opposed the sale approval despite knowing that the only offers that ever resulted from the court approved bidding process required that the GORs and Algoma's royalties be significantly reduced or extinguished.

3. Even if I were to accept that the *Rules of Civil Procedure* governed the appeal, which I do not, 235 Co. never sought a stay of the motion judge's order under the *Rules of Civil Procedure*. Taken together, this supports the inference that 235 Co. did not form an intention to appeal at the relevant time and ultimately only served a notice of appeal as a tactical manoeuvre to engineer a

bigger payment from Third Eye. As found by the motion judge, 235 Co. ought not to be permitted to take tyrannical tactical positions.

4. The Receiver obtained a valuation of the mining claims that concluded that the value of 235 Co.'s GORs was between $150,000 and $300,000. Before the motion judge, 235 Co. acknowledged that the payment of $250,000 represented the fair market value of its GORs. Furthermore, it filed no valuation evidence to the contrary. Any prejudice to 235 Co. is therefore attenuated. It has been paid the value of its interest.

5. Although there are no subsequent registrations on title other than Third Eye's assignee, Algoma's Monitor has been paid for its royalty interest and the funds have been distributed to Algoma. Third Eye states that if the GORs are reinstated, so too should the payments it made to 235 Co. and Algoma. Algoma has been under CCAA protection itself and, not surprisingly, does not support an unwinding of the transaction.

[145] I conclude that the justice of the case does not warrant an extension of time. I therefore would not grant 235 Co. an extension of time to appeal *nunc pro tunc*.

[146] While 235 Co. could have separately sought a discretionary remedy under the *Land Titles Act* for rectification of title in the manner contemplated in *Regal Constellation*, at paras. 39, 45, for the same reasons I also would not

exercise my discretion or refer the matter back to the motion judge to grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and an order directing the Mining Claims Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated.

Disposition

[147] In conclusion, the motion judge had jurisdiction pursuant to s. 243(1) of the BIA to grant a sale approval and vesting order. Given the nature of the GORs the motion judge erred in concluding that it was appropriate to extinguish them from title. However, 235 Co. failed to appeal on a timely basis within the time period prescribed by the BIA Rules and the justice of the case does not warrant an extension of time. I also would not exercise my discretion to grant any remedy to 235 Co. under any other statutory provision. Accordingly, it is entitled to the $250,000 payment it has already received and that its counsel is holding in escrow.

[148] For these reasons, the appeal is dismissed. As agreed by the parties, I would order Third Eye to pay costs of $30,000 to 235 Co. in respect of the first stage of the appeal and that all parties with the exception of the Receiver bear their own costs of the second stage of the appeal. I would permit the Receiver to make brief written submissions on its costs within 10 days of the

release of these reasons and the other parties to reply if necessary within 10 days thereafter.

Released: “SEP” JUN 19, 2019

“S.E. Pepall J.A.”
“I agree. P. Lauwers J.A.”
“I agree. Grant Huscroft J.A.”

7

CITATION: In the Matter of CannaPiece Group Inc. et al., 2023 ONSC 841
COURT FILE NO.: CV-22-689631
DATE: 20230202

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: In the Matter of CannaPiece Group Inc. et al.

BEFORE: Osborne J.

COUNSEL: *David S. Ward, Larry Ellis, Sam Massie and Monica Faheim,* for the Applicants

Clifton Prophet, Heather Fisher, Haddon Murray, for 2125028 Ontario Inc.
David Preger, Lisa S. Corne and David Seifer, for Carmela Marzilli and 1000420548 Ontario Inc.
Jeremy Dacks, for Dream Industrial (GP) Inc.
Edward Park, Ministry of Finance
Robert Kennedy and Daniel Loberto, Monitor
Rory McGovern, Cardinal Advisory Services Limited

HEARD: January 31, 2023

ENDORSEMENT

1. The Applicants move for an approval and vesting order that would, among other things:

   a. Extend the stay up to and including February 17, 2023;

   b. approve the Share Purchase Agreement ("SPA") entered into between CannaPiece Group Inc. as Vendor, CPC, and 1000420548 Ontario Inc. ("548" or the "Purchaser") and the transaction contemplated therein;

   c. authorize and direct the Applicants to perform their obligations under the SPA and complete it;

   d. vest all of Applicants' right, title and interest in the Excluded Assets, Excluded Contracts and Excluded Liabilities in a newly formed entity, 14707117 Canada Inc. ("Residualco");

   e. vest in the Purchaser the Purchased Shares free and clear of Encumbrances other than Permitted Encumbrances upon the filing of the Monitor's Certificate;

f. approving a distribution to Cardinal Advisory Services Limited ("Cardinal") in respect of amounts owing pursuant to the DIP Term Sheet and Deposit Facility;

g. approving certain requested releases and expanding the powers and the duties of the Monitor to effectively perform those remaining steps in order that this proceeding might be concluded.

2. In the circumstances in which the Applicants find themselves, particularly from a cash flow position, this motion was heard on an urgent basis yesterday and the parties have implored the Court to release a decision on the motion as quickly as possible. Accordingly, these reasons have been prepared in the very limited time available. Defined terms in these reasons have the meaning given to them in the motion materials, the Second Report of the Monitor or the relevant agreements, unless otherwise indicated.

3. I indicated at the conclusion of the hearing yesterday that I was satisfied that the requested extension of the stay of proceedings (which was due to expire imminently) was appropriate in the circumstances. That relief was unopposed. Accordingly, I extended the stay to and including February 17, 2023. I took under reserve my decision with respect to the balance of the relief sought, all of which is opposed.

4. In short, the Applicants seek a reverse vesting order to transfer ownership of the Purchased Shares to the Purchaser free and clear, while transferring the Excluded Assets and Excluded Liabilities to Residualco.

5. For the reasons that follow, I decline to grant the reverse vesting order.

Background and Context

6. The Applicants operate a cannabis manufacturing business in Pickering, Ontario. There are two principal creditors or groups of creditors, and it is in many respects the competing priorities of those two groups that give rise to the motion today.

7. The first relevant creditor is 2125028 Ontario Inc. ("212"),. It advanced funds for manufacturing and processing equipment used by the Applicants in their day-to-day operations. The funds were advanced under two finance facilities, each for $3 million. According to the Monitor, the 212 debt owing as of November, 2022 is approximately $4 million.

8. 212 holds a first priority security interest over that equipment pledged as collateral. It registered that priority over that equipment on May 19, 2020.

9. The second relevant creditor is Carmela Marzilli ("Marzilli"). Marzilli entered into a loan agreement with CPC as of February 10, 2022 in connection with which and pursuant to related general security agreement, obtained a first ranking security interest in all of the present or after-acquired property of CPC, excluding certain excluded assets. Those excluded assets, in turn, carve out the 212 security over its equipment collateral. The debt owed to Marzilli is approximately $6.8 million as of November 2022, according to the Monitor.

10. The result is that 212 has a first position security interest over its equipment collateral but nothing else, while Marzilli has a first position security interest over effectively all other assets. The security interest of 212 over the equipment collateral was registered more than a year prior to the security interest of Marzilli.

11. It should be noted that Marzilli is related to 548, the Purchaser, which is an entity incorporated for the purpose of completing the transaction for which approval is sought today.

Relevant Events

12. The Applicants sought and received protection under the CCAA on November 3, 2022. Pursuant to the initial order of Penny J., interim DIP financing advanced by Cardinal was approved in the amount of $500,000. The typical charges were also approved. The relief sought and granted was unopposed.

13. The Applicants returned to Court one week later on November 10, 2022 at which time Penny J. extended the stay of proceedings and, among other things, approved a sales and investment solicitation process (the "SISP"), a central feature of which was a stalking horse agreement dated as of November 8, 2022 between CannaPiece Group Inc. as vendor, CPC, and Cardinal (or its nominee) as purchaser (the "Stalking Horse SPA"). That Stalking Horse SPA included an approved break fee and priorities for professional fees.

14. In addition, Cardinal, in its capacity as Stalking Horse Bidder, was granted a priority charge. Other charges previously granted or increased to an aggregate total of $3,500,000, of which most ($3 million) was a Deposit Facility that ranked in priority to all other claims against the Applicants.

15. The relief sought and granted on November 10, 2022, was also unopposed, although what occurred behind the scenes literally during that hearing is in part the beginning of the chronology giving rise to the opposition today.

16. However, as is not atypical in real time CCAA proceedings, the hearing in court was not the only event that occurred on November 10, 2022. 212 submits today that it indicated that it intended to oppose the relief sought on November 10, and particularly the increase in the priority charges, unless its debt was assumed by Cardinal, the Stalking Horse Bidder.

17. While there is a dispute among the parties today about the extent to which 212 indicated (to the Applicants and other parties, if not to the Court) its intended opposition absent the assumption of its debt by Cardinal, there is no dispute that ultimately the relief was granted on an unopposed basis.

18. 212 submits that the reason for its ultimate lack of opposition on November 10 was the fact that, literally as the hearing before Penny, J. was underway, it entered into an assumption agreement (the "Assumption Agreement") with Cardinal pursuant to which Cardinal agreed to

assume the 212 debt, pay to 212 the sum of $500,000 within six months of the stalking horse transaction closing, and issue to 212 certain shares in the Applicants.

19. The Monitor, as authorized and directed by the order made on November 10, 2022, then set about to implement the SISP, with the Stalking Horse SPA as the floor or minimum.

20. The Stalking Horse SPA, as approved, contemplated a purchase price of $3,500,000, together with "Assumed Liabilities" that, once finalized, would be made available to Potential Bidders. This feature flowed from the fact that, as of November 10 when the SISP was approved, Cardinal, as Stalking Horse Bidder, had not yet determined which liabilities of the Applicants it would be prepared to assume. Not surprisingly, featured in those negotiations were the liabilities comprised of the debt owed to the two principal creditors described above - 212 and Marzilli.

21. The SISP procedures are set out in a Schedule to the November 10, 2022 order, and included those steps generally applicable to such a sales process approved by this Court. Those steps included the following:

a. The Monitor would host a virtual data room with all relevant information made available to potential bidders;

b. the Monitor would evaluate, with the assistance of a Sales Agent and in consultation with the Applicants, all bids received to determine whether or not each bid was a Qualified Bid; and

c. the Monitor would then conduct an auction between or among Qualified Bidders and identify, in consultation with the Applicants and the Sales Agent, the highest or otherwise best bid received which would in turn be identified as the Successful Bid.

22. Qualified Bids were to be evaluated by the Monitor in consultation with the Applicants considering the factors set out in [the procedure approved in the order]. Those factors included: the amount of consideration being offered, and if applicable, the proposed form, composition and allocation of same; and the value of any assumption of liabilities or waiver of liabilities.

23. The sales process required the repayment of $3.7 million to Cardinal at closing, in the event another Qualified Bid was selected over the Stalking Horse Bid.

24. Ultimately, only one Qualified Bid was received despite extensive efforts by the Monitor to generate and maximize interest in the auction.

25. Marzilli submitted a bid comprised of the cash component of $4 million plus assumed liabilities. The assumed liabilities in the Marzilli Bid included the assumption of the Marzilli debt of the Applicants described above. It did not, however, include an assumption of the 212 debt.

26. The bid submitted by Marzilli provided, as required, for the repayment of $3.7 million to the DIP lender and Stalking Horse Bidder, Cardinal.

27. Since, according to the terms of the Marzilli Bid, the 212 debt would not be assumed by the Purchaser, it would be transferred to Residualco. There is no evidence in the record as to what, if any, assets or value Residualco will have.

28. The Monitor, in consultation with the Applicants, selected the Marzilli Bid as the Successful Bid. It is the Marzilli Bid that is the subject of the proposed transaction and reverse vesting order relief sought today.

Analysis

29. The primary issue is whether the approval and vesting order (which is a reverse vesting order) should be granted.

30. 212 submits that the requested relief should not be granted for a number of reasons, the principal ones of which are these:

a. the test for the extraordinary remedy of a reverse vesting order cannot be met here;

b. the test for determining whether a third party interest should be extinguished in a vesting order cannot be met here;

c. the Marzilli Bid was not the Superior Bid; and

d. neither the CCAA nor the doctrine of equitable subordination should apply so as to defeat the regime established by the *Personal Property Security Act*, which would be the effect of granting the order since the security interest of 212 over its equipment collateral ranks first and was registered more than a year before the registration of the security interest of Marzilli over what is effectively the balance of the assets.

31. Perhaps most fundamentally, 212 acknowledges that it did not oppose the approval of the SISP process, but argues that it took that course of action in express reliance on the Assumption Agreement entered into that same day with the Stalking Horse Bidder pursuant to which its debt was agreed to be assumed, and that when that debt assumption is considered to be part of the Stalking Horse Bid, it is clearly superior to the Marzilli Bid.

32. The Applicants submit that the Monitor ran a fair and transparent sales process and concluded that the Marzilli Bid was the Superior Bid and that 212 simply gambled on a bidder that was not ultimately successful. They argue that 212 supported the SISP process and that the bid requirements preserved "optionality" for bidders in terms of which liabilities would be assumed and which would not.

33. The Applicants further submit that the reverse vesting order is required to maintain the going concern value of the Applicants' business, and is in the best interests of stakeholders

generally, whether or not 212 is in a less favourable position than it would be had the Stalking Horse Bid been determined to be the Superior Bid.

34. The Applicants submit in their factum and in argument that "the Transaction provides for the seamless continuity of the Applicants' business operations, preserves CPC's structure of perations, maintains its licences, and preserves the economic activity of supplier and customer relationships…. it secures enterprise value and preserves the jobs of approximately 150 employees." They state that "the Monitor believes that the transaction will be more beneficial to creditors than a bankruptcy".

35. The Applicants agree that the 212 debt would, together with other liabilities not assumed by the Purchaser, be vested out and transferred to Residualco, and claims against Residualco (which would include the claim of 212 for its debt) could then be addressed through "a distribution order, a bankruptcy or other similar process". They submit that the Purchase Price stands in place of the assets and is available to satisfy creditor claims, in whole or in part, in accordance with their pre-existing priority.

36. As noted, Cardinal fully supports the relief sought by the Applicants. It submitted a factum and made submissions at the hearing of the motion, both to the effect that it has been a critical part of this restructuring by providing interim financing, as a result of which "a transparent and fair sales and investment solicitation process resulted in the cannabis business of the Applicants living to see better days".

37. At paragraph 26 of its factum, Cardinal states that 212 initially opposed the SISP and took issue with the Purchaser's Charge. It goes on to state that subsequent to learning of 212 sought opposition to the SISP, Cardinal entered into negotiations with 212 to assume the debt owing to 212 by the Applicants ….. under the Assumption Agreement, but that its obligation to assume the 212 debt was subject to a condition precedent - namely, that Cardinal would be the successful bidder.

38. Cardinal submits that 212 "was aware or should have been aware" that there was a possibility that Cardinal would not be the successful bidder and there were no guarantees that any other bidder would assume the 212 debt.

39. Finally, if oddly in my view, Cardinal submits that the equities favour Cardinal and that "if the relief requested by 212 is granted, Cardinal will suffer irreparable financial and reputational harm" (factum, para. 60).

40. Naturally, Marzilli/548 support the motion.

41. The Monitor has filed the Second Report dated January 28, 2023 in connection with this motion and as noted at paragraph 7, it is filed for the purpose of providing information to the Court with respect to, among other things, its recommendations with respect t

42. Beginning at paragraph 24, the Monitor describes the SISP process undertaken pursuant to which potential purchasers were identified, marketed to, and given an opportunity to acquire or invest in CPC.

43. At paragraph 27, the Monitor describes the initial key dates in the process, including November 30, 2022 as the deadline to finalize the schedule of Assumed Liabilities in the Stalking Horse SPA and the bid deadline of January 9, 2023. The steps conclude with the motion before me now - the hearing of the sale approval motion. I observe that last step only to highlight the obvious; namely that the process is not complete unless and until a sale is approved by the Court.

44. The Monitor reports that of 14 potential bidders who executed non-disclosure agreements, only three were, according to the terms of the SISP, ultimately granted access to the data room upon providing their Statement of Qualifications.

45. Ultimately, however, and notwithstanding extensions to the SISP timetable (further described below), the only bid received was the Marzilli Bid.

46. The Monitor, the Sales Agent and the Applicants then evaluated the Marzilli Bid, clarified certain points, confirmed that it was a Qualified Bid, and determined on January 24, 2023 that it was the lead bid in the process.

47. The Marzilli Bid contemplated a cash purchase price of $4 million (being $500,000 higher than the Stalking Horse Bid) and other terms including that the Assumed Liabilities were composed of the Marzilli debt. It did not include assumption of the 212 debt.

48. The Monitor summarized the key differences between the Marzilli Bid in the Stalking Horse Bid in the c

49. The Monitor then inquired of Cardinal, as the Stalking Horse Bidder, whether it wished to increase the Stalking Horse Bid “by topping up (at minimum) the cash consideration portion”. Cardinal advised the Monitor that it declined to participate in the auction, with the result that the Marzilli Bid was determined to be the Successful Bid.

50. The Monitor recommends approval of the Marzilli Bid and that the transaction be completed pursuant to a reverse vesting order. Part of the ancillary relief requested by the Applicants and recommended by the Monitor is the expansion of the Monitor’s powers to, among other things, assign Residualco into bankruptcy and act if it wishes as a trustee in such bankruptcy and otherwise facilitate or assist the winding down of that entity.

The Applicable Tests

51. All parties are in general agreement about the legal tests to be applied here where the relief sought includes a reverse vesting order that has the additional feature of affecting third party rights (in this case, those of 212) as part of that vesting order.

52. This Court has jurisdiction to make a vesting order pursuant to section 100 of *the Courts of Justice Act*.

53. Beyond the general jurisdiction of the Court found in s. 11 of the CCAA to make any order that it considers appropriate in the circumstances, s.36(3) of the CCAA sets out the factors the Court is to consider in deciding whether to grant authorization to dispose of assets:

> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

54. Moreover, the well-known *Soundair* factors to be considered for approval of a transaction following a Court-supervised sales process, not surprisingly track many of the same principles. (see *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16):

> (a) whether the party made a sufficient effort to obtain the best price and to not act improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which the party obtained offers; and
>
> (d) whether the working out of the process was unfair.

55. The Court of Appeal for Ontario considered in *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2019 ONCA 508 ("*Third Eye*") what it described as a "cascading analysis" of the factors to be considered when determining whether a third party interest should be extinguished in a vesting order:

(a) first, the nature and strength of the interest that is proposed to be extinguished;

(b) second, whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency; and

(c) third, if the first two steps proved to be ambiguous or inconclusive, a consideration of the equities to determine if a vesting order is appropriate in the circumstances.

(see paras. 102-110)

56. A consideration of the equities contemplated in the third step includes consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition are sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith (*Third Eye*, para. 110).

57. Finally, Penny, J. considered the factors applicable to a determination of whether a reverse vesting order should be approved, in *Harte Gold Corp. (Re)*, 2022 ONSC 653. In that case, the Court considered the s.36(3) factors set out above, "making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction" since the very nature of a reverse vesting order is such that it does not contemplate a typical sale of assets.

58. Justice Penny observed that a reverse vesting order was both an equitable and an extraordinary remedy, and one that ought not to be regarded as the "norm" and concluded that the following factors are applicable to consideration of whether a reverse vesting order is appropriate in the circumstances:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure then they would have been under any other viable alternative? and

(d) does the consideration being paid for the debtor's business reflect the importance and value of the licenses and permits (or other intangible assets) being preserved under the RVO structure?

(see *Harte Gold*, para. 38).

The Approvals Sought

59. In considering what relief is appropriate here, I recognize that I must address the art of the possible rather than a theoretical perfect outcome which is antithetical to the very fact of the

insolvency of the Applicants in the first place. Here, an analysis of the possible outcomes necessarily recognizes that not all stakeholders will enjoy a perfect result, and not all creditors will recover 100% of their debt.

60. If the Marzilli Bid and resulting transaction is approved, the 212 debt will not be assumed by the Purchaser and will be transferred to Residualco. If the Marzilli Bid is not approved, the SISP process yields the result that the Stalking Horse Bid of Cardinal will be the Successful Bid since there were no other bids, with the opposite result: the Marzilli debt will be transferred to Residualco.

61. The fact that this motion is so vigorously contested, the fact that the expanded powers sought for the Monitor contemplate a possible bankruptcy and winding down of Residualco, and the economics of either bid, are all indicative of the expectation that there will be little if any recovery through Residualco. There is no evidence before me that there will be any significant assets in that entity available for distribution.

62. That said, the prejudice to any one creditor is obviously not itself a determinative factor of whether a transaction should be approved. That is clear from the tests set out above. The effect on creditors, and other stakeholders, is certainly a factor to be taken into account, but it is only one of several factors.

63. All parties agree in this case that a reverse vesting order structure is necessary and appropriate since there is no other way to preserve the going-concern value of the business and particularly the continuity of the relevant cannabis licenses that are central to its operation and therefore the maximization of recovery for stakeholders. I accept that. Both the Stalking Horse Bid and the Marzilli Bid contemplate a reverse vesting order structure.

64. The SISP process approved by Penny J. on November 10, 2022 set out the steps to be followed to test the market and yield a bid that represented the best possible outcome for stakeholders in difficult circumstances. It contemplated an auction between or among competing bidders, although ultimately, only one bid was received.

65. Importantly, however, the SISP was carried out against a minimum, or floor, in the form of the Stalking Horse Bid. That provided certainty to stakeholders that even if the SISP did not yield a single bid, there was still a viable transaction that provided for a going concern outcome through a reverse vesting order structure.

66. Considering the *Third Eye* factors, I find they favour the position advanced by 212.

67. First, the nature and strength of 212's interest is significant, although limited to the equipment to which its security interest applies. It ranks in first position. The PPSA registration is first in time as compared to the registration of the security for the Marzilli debt, although the two interests are not competing in the sense that the latter carves out the former.

68. I recognize that the 212 interest that would be vested out is a security interest, and further one that is limited only to certain assets, unlike the interests in land being considered by the Court of Appeal in *Third Eye* (mineral rights and surface rights). However, in my view, the same analysis applies since a third party interest is being extinguished. It cannot be that the *Third Eye* factors apply only to an interest in land or another proprietary right: the nature and quality of the right sought to be extinguished is exactly the first of the three factors to be considered.

69. Moreover, I reject the submission of the Applicants that the rights of 212 are not being extinguished, as occurred in *Third Eye*, but rather they are merely being transferred to Residualco. For the reasons noted above in respect of the evidence before me as to the assets in that entity, it cannot be argued on this motion that the rights of 212 are not being extinguished but rather continue on albeit through a new entity. That is not the practical reality here.

70. Second, 212 has not consented to the vesting out of its interest either in the insolvency process itself or in agreements reached prior to the insolvency. It is urged upon me by the Applicants and those parties who support them that by ultimately not opposing approval of the SISP process, 212 accepted and agreed to the vesting out of its interest in the event that the Successful Bid did not include an assumption of its debt.

71. They submit that the Assumption Agreement entered into between 212 and Cardinal as the Stalking Horse Bidder was a bilateral agreement between those two parties that effectively amounted to a wager on the part of 212 that the stalking horse bid would ultimately be the Successful Bid. It follows, they say, that since the Assumption Agreement was conditional upon the stalking horse bid being the Successful Bid, it was of no effect if that did not occur.

72. The Applicants, Marzilli and Cardinal all disagree with 212 that, fundamentally, the assumption of the 212 debt became an Assumed Liability as contemplated in the Stalking Horse SPA with the result that it became one component of the floor or minimum that other bids would be evaluated against.

73. I do not accept this submission. The SISP process was predicated on the Stalking Horse SPA. When both of those were approved on November 10, 2022, the ultimate value represented by the Stalking Horse SPA was not yet determined. It had a minimum value of $3.5 million (and other terms) but the Assumed Liabilities had not yet been agreed by Cardinal. The relevant schedule in the Stalking Horse SPA was blank.

74. The timetable of key milestones in the SISP process recognized this and set a deadline of November 30 for the finalization of the quantum of Assumed Liabilities if any. Accordingly, I find that all stakeholders and potential bidders knew that the ultimate value of that Stalking Horse Bid could not be determined until the time.

75. Cardinal, as the Stalking Horse Bidder, agreed on November 10, 2022 to assume the 212 debt. I do not find persuasive the submission by the Applicants to the effect that this commitment is irrelevant since it was of no force or effect if Cardinal was ultimately not the Successful Bidder. That is an accurate statement, considering the terms of the Assumption Agreement. However, it

does not advance the analysis at all since, naturally, Cardinal had no obligation to close the transaction at all unless and until it was determined to be the Successful Bidder.

76. I do not have to address the hypothetical issue of whether the intended objections of 212 to the approval of the SISP in November would have been successful or whether the SISP would have been approved in any event. It was approved, and the Assumption Agreement was entered into.

77. Moreover, the chronology of how the SISP process in fact unfolded over the subsequent weeks supports, in my view, the position of 212 that the assumption of its debt became a component of the Stalking Horse Bid.

78. The Second Report of the Monitor sets out the SISP Results beginning at paragraph 33. Importantly, it states at paragraph 38 that on November 30, 2022, the Stalking Horse Bidder confirmed that it was assuming the 212 debt, and further, that it was in ongoing negotiations regarding the Marzilli debt. For that reason, it requested that the deadline to finalize the schedule of Assumed Liabilities be extended from November 30 to December 7, 2022.

79. The Monitor, in consultation with the Applicants and Sale Agent, approved this. Its website was updated and potential bidders were updated by the Sales Agent.

80. Then, on December 7 (the new deadline), the Stalking Horse Bidder requested a further extension to finalize the assumption of the Marzilli debt for an additional two days, and this also was approved. On December 12, the Stalking Horse Bidder confirmed to the Monitor that the Stalking Horse SPA was now inclusive of the $3,500,000 cash, and the assumption of the debt of both 212 and Marzilli. The website and potential bidders were updated accordingly.

81. However, that was not to be the ultimate result, since on December 23, 2022, the Stalking Horse Bidder informed the Monitor that the debt assumption agreement with Marzilli had been terminated and accordingly, the Marzilli debt no longer formed part of the consideration contained in the Stalking Horse SPA. As a result, the final consideration to be paid by the Stalking Horse Bidder was $3,500,000 in cash and the assumption of the 212 debt (Second Report, para. 41).

82. A copy of the final executed Stalking Horse SPA dated November 8 and revised January 9, 2023 to account for the removal of the Marzilli debt, was provided and included in the data room, reflected on the Monitor's website and again, the Sales Agent informed potential bidders.

83. Necessarily and appropriately given the turn of events, the Monitor extended the bid deadline until January 18, 2023, to provide additional time for this information to be disseminated to the market and bidders.

84. I pause here in the chronology to observe that as against these events, I have no difficulty in concluding that the assumption of the 212 debt was a component of the Stalking horse SPA consideration and further that it was recognized as such by all stakeholders and the Monitor. As to whether then, 212 could be said to have consented to the vesting out of its interest as contemplated in the second factor of the *Third Eye* analysis, I find that it did not.

85. However, further relevant events were yet to occur. On January 9, 2023, new counsel for Marzilli advised the Monitor, for the first time, that Marzilli wished to participate in the SISP. Marzilli ultimately requested another extension to the bid deadline to finalize due diligence and allow it to submit a bid. This too was agreed by the Monitor and conveyed to potential bidders. As set out above, Marzilli then submitted its bid which is sought to be approved today.

86. The third factor in the *Third Eye* analysis contemplates an evaluation of the equities, to the extent it is applicable here at all since it is to be considered if there is ambiguity resulting from a consideration of the first two factors.

87. For the above reasons, and in particular its first ranking security interest, the fact that the assumption of its debt was, to the knowledge of all stakeholders (importantly including but not limited to Marzilli) and Assumed Liability as part of the consideration of the Stalking Horse Bid, I find that the equities favour 212.

88. 212 relied on the SISP procedures. Those contemplated a finalization of Assumed Liabilities and that was both agreed to by Cardinal and conveyed through the Monitor to all stakeholders so that they could act accordingly. The sales process was extended repeatedly to accommodate exactly that. Marzilli participated in and benefited from this process and the extensions, the final extensions being sought by, and granted for, it.

89. The effect on 212, as a creditor, is of course also a factor to be considered under both the applicable CCAA test for the sale of assets (see s.36(3)(e)) and the reverse vesting order factors enumerated by Penny J. (i.e., is any stakeholder worse off?). As noted, it is certainly not the only factor, but it is one of the factors to be considered. Here, 212 is clearly and materially worse off.

90. I find that the process here was fair and reasonable, and indeed the Monitor did the best it could in a shifting landscape to maintain the integrity of the process but yield the best recovery for stakeholders. The process was fair and reasonable, however, only if it is understood that the assumption of the 212 debt is part of the consideration payable pursuant to the Stalking Horse Bid.

91. In the Second Report, the Monitor sets out the key terms of each of the Stalking Horse Bid and the Marzilli Bid and summarizes the differences between the two, ultimately recommending approval of the Marzilli Bid. It recognizes the fact that the Marzilli Bid contemplates an additional $500,000 as part of the Purchase Price as against the $3.5 million amount contemplated in the Stalking Horse Bid.

92. However, there is no real analysis of whether and how that compares to the consideration payable pursuant to the Stalking Horse Bid enhanced by the assumption of the $3.5 million value of the 212 debt. This makes the conclusion that the Marzilli Bid is a Superior Bid, challenging in the circumstances.

93. Finally, it was urged upon me that the overall equities of the situation, and indeed the best interests of the stakeholders, favour approval of the Marzilli Bid since it represents an outcome materially more favourable for all stakeholders than a bankruptcy with the consequent loss of all that is dependent upon the Applicants continuing as a going concern. Consideration of the benefits

of an asset sale as against the alternative of a bankruptcy is one of the factors specifically enumerated in s.36(3).

94. I reject this submission also. Bankruptcy is not the alternative here. It was precisely to guard against this potential (catastrophic) outcome that the SISP process included the Stalking Horse Bid. As recognized throughout - by the Applicants, by Penny J. in his November 10, 2022 endorsement approving the Stalking Horse SPA, and by the Monitor as reaffirmed in its Second Report, the whole point of the Stalking Horse SPA was to provide a minimum outcome for stakeholders.

95. The SISP was conducted against the backdrop of that minimum. Stakeholders knew that even if the SISP yielded no bids, they had the certainty of the knowledge that at least there would be a going concern through completion of the stalking horse transaction.

96. Similarly, other potential bidders knew that the consideration in the Stalking Horse SPA (which, as I have found, included the assumption of the 212 debt), was the minimum against which there potential bids would be measured and evaluated as part of the overall economics of any proposed transaction. Clearly, the quantum of consideration was not the only factor to be considered but it certainly was a significant factor.

97. Cardinal provided interim DIP financing. It was entitled to a break fee in the event that it was not the Successful Bidder.

98. The entire premise of the SISP process, and the expectation of this Court as well as the stakeholders, was and is that if no other bid is determined to be the Successful Bid, Cardinal will complete and perform the Stalking Horse SPA.

99. Accordingly, the stakeholders ought not to be left with the only alternative being a bankruptcy.

100. Considering both the process by which the Marzilli Bid was ultimately selected, as well as the original priority of the 212 security interest, all of which is referred to above, I cannot conclude that it is equitable in all the circumstances to approve this asset sale pursuant to a reverse vesting order.

101. For all of the above reasons, I decline to grant the proposed reverse vesting order vesting the assets of the Applicants in the Marzilli purchaser entity (548) and transferring the 212 debt to Residualco.

102. The motion is dismissed, save for the requested stay extension which as noted above is granted on the consent of all parties.

103. If the parties are unable to agree on the costs of this motion, any party seeking costs may provide to the other parties and to me written submissions not exceeding two pages in length within five days. Responding submissions, also not exceeding two pages in length, will be due five days thereafter.

Osborne, J.

Date: February 2, 2023

8

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *PaySlate Inc. (Re),*
2023 BCSC 608

Date: 20230414
Docket: B220504
Estate No.: 11-2891281
Registry: Vancouver

In Bankruptcy and Insolvency

In the Matter of the Notice of Intention to Make a Proposal of PaySlate Inc.

Corrected Judgment: The text of these Reasons for Judgment has been corrected at paras. 1, 11 and 86 on April 18, 2023.

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for PaySlate Inc.:	T. Bennett L. Beatch, Articled Student
Counsel for Paysafe Merchant Services Inc.:	P. Bychawski C.I. Hildebrand
Counsel for the Proposal Trustee, Grant Thornton Limited:	R. Gurofsky G.P. Nesbitt
Counsel for Ayrshire Real Estate Management Inc.:	S. Collins E. Wilson
Place and Dates of Hearing:	Vancouver, B.C. March 10, 22, 27, 28 and 31, 2023
Place and Date of Judgment:	Vancouver, B.C. April 14, 2023

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Introduction

[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. RVOs are not the norm. They have been used in appropriate circumstances to preserve non-transferrable assets such as licenses, permits, intellectual property, and non-transferrable tax attributes: see, e.g., *Arrangement relatif à Blackrock Metals Inc*., 2022 QCCS 2828 at paras. 85-86, leave to appeal ref'd 2022 QCCA 1073; *Quest University Canada (Re)*, 2020 BCSC 1883; *Harte Gold Corp. (Re)*, 2022 ONSC 653; Janis Sarra, "Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions", 2022 CanLIIDocs 431 at 1-2.

[2] In this case, the debtor seeking approval of an RVO is PaySlate Inc. ("PaySlate") in the context of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 [*BIA*], having filed a notice of intention ("NOI") to make a proposal to creditors pursuant to s. 50.4 on December 5, 2022.

[3] On March 7, 2023, PaySlate filed its notice of application seeking approval of a bid from its debtor-in-possession ("DIP") lender, Ayrshire Real Estate Management Inc. ("Ayrshire"), to purchase its shares through an RVO ("the RVO") with an outside closing date of March 31, 2023. PaySlate was intent on securing court approval on a fast-track basis and scheduled the hearing of its application for March 10, 2023.

[4] Despite some initial concerns, PaySlate's proposal trustee advised, in its fourth report dated March 8, 2023, that it approved of the proposed transaction.

[5] When PaySlate, Ayrshire, and PaySlate's proposal trustee appeared in court on March 10, 2023, one of PaySlate's critical suppliers (and an unsecured creditor), Paysafe Merchant Services Inc. ("Paysafe"), who provides payment processing services to PaySlate, sought an adjournment. Paysafe objected to the granting of

the RVO on account of insufficient notice and what it said were its initial substantive concerns regarding the propriety of the RVO.

[6] Based on what I heard from Paysafe, I decided to adjourn the hearing for a brief period to allow Paysafe to consider its position. When the parties returned to court, Paysafe continued to object to the transaction, on both substantive and procedural grounds. The hearing took longer than the initial half-day scheduled, and even after it finished, and two days before the proposed completion date, PaySlate and Ayrshire submitted an amended version of the RVO attempting to ameliorate one of Paysafe's objections concerning lack of service. That led to a further, brief hearing. In view of the impending proposed completion date, on March 30, 2023, I advised the parties of my decision to dismiss the application with reasons to follow. These are my reasons.

PaySlate

[7] PaySlate describes itself as a technology company, providing an online rental payment processing service for its customers who are primarily property owners and property managers. It is in financial distress. It has been operating at a loss since it began operations in April 2013.

[8] PaySlate earns revenue from software usage fees, tenant and condominium transaction fees, lease payments, and third-party partner service revenues. By way of example, its service allows for payments to be made by tenants and condominium owners either online or through mobile applications or by telephone.

[9] PaySlate's director and principal is Mr. Adam Rosenfeld.

[10] PaySlate operates virtually in Canada, and the United States through its wholly owned subsidiary, RentMoola Payment Solutions LLC ("RentMoola US"), whom it manages. PaySlate also owns a non-operating subsidiary in the United Kingdom called RentMoola Payment Solutions Limited.

[11] PaySlate is federally incorporated and extra-provincially registered in British Columbia and Alberta. PaySlate does not have any physical premises. Its employees operate entirely on a remote basis. Most of its employees are located in British Columbia. Its American-based employees are employed by PaySlate and not RentMoola US.

[12] According to PaySlate, its assets consist of its customer service agreements, intellectual property, its employees, what the parties refer to as "tax attributes" consisting of tax credits, and scientific research and experimental development tax credits ("SR&ED credits"). In his evidence, Mr. Rosenfeld deposed the value of the SR&ED credits to be approximately $341,000 for 2021, and a similar amount for 2022, after payment of fees to a third party for preparation of the required tax filings (subject to review by the CRA). The Proposal Trustee's first report estimates SR&ED credits to be approximately $716,000. As I discuss below, no specific information concerning the potential value of its tax attributes was provided until the late stages of the hearing, and only following Paysafe's continued objections concerning the insufficiency of valuation evidence.

[13] PaySlate's creditors are comprised of secured creditors, government creditors, and unsecured creditors.

[14] Its pre-filing secured creditors are:

(a) Novel Growth Partners Fund I LP ("Novel"), per a revenue financing agreement dated December 4, 2020; Novel is owed approximately US $416,000 plus interest and costs;

(b) a group of noteholders, including Ayrshire ("Noteholders"), per a convertible note purchase agreement dated June 10, 2022; the principal amount owing is approximately $2.6 million; and

(c) Ayrshire, per a SR&ED facility agreement dated November 25, 2022; the principal amount owing is $300,000.

[15] Ayrshire is PaySlate's DIP lender. Mr. Rosenfeld is also a director of Ayrshire and acts as its managing director. He is the key principal of both PaySlate and Ayrshire involved in the proposed transaction.

[16] PaySlate's government creditors are Canada Revenue Agency ("CRA"), owed approximately $13,375 for unremitted goods and services tax and excise tax, and British Columbia, owed approximately $33,689 for provincial sales and education and health tax.

[17] PaySlate's unsecured creditors fall into three categories in these approximate amounts:

(a) $96,000 owed to its chief executive officer and former vice president of finance for cash bonuses related to its 2021 fiscal year;

(b) $60,000 and US $25,000 owed to its Canadian and American employees, respectively; and

(c) $1,230,000 to various suppliers and service providers.

[18] Its other actual and contingent obligations include (in approximate numbers): (a) interest-free promissory notes issued to its former chief executive and chief operating officers in the principal amount of $275,000, maturing in 2027 and 2028; (b) debt prepayment agreements of $375,000; (c) a claim filed in this Court by the RFA Bank of Canada for alleged breaches of a sub-lease of office premises (no dollar amount disclosed); and of importance to the instant application, (d) a claim made by Paysafe for damages of approximately $2.2 million (on account of fraudulent merchant accounts) Paysafe says are owed to it per PaySlate's indemnification obligations in its contract with Paysafe.

Financial Difficulties

[19] According to Mr. Rosenfeld, PaySlate has incurred consolidated operating losses of approximately $39.4 million since it began operations in April 2013 ($33.8 million incurred by PaySlate and $5.6 million by RentMoola US).

RentMoola US, he deposed, owes PaySlate approximately US $4.2 million in intercompany loans and recovery is doubtful.

[20] In his affidavit evidence, Mr. Rosenfeld explained the primary reason for PaySlate's operating losses is its inability to generate sufficient revenue or gross margins from revenue to cover its operating expenses. Its main operating expenses are salaries and wages and third-party consulting expenses and software subscription expenses required for its ongoing development of its online rent collection platform.

[21] In the spring of 2022, PaySlate introduced a convertible note offering in an attempt to raise $4 million in capital. According to Mr. Rosenfeld, it raised far less, just over $2 million along with $600,000 from notes issued for services in kind or employee bonus supplements. In June 2022, PaySlate began what he described as ongoing "right-sizing and cost-reduction strategies" which included reducing the size of its workforce from 70 to 19 individuals. In November 2022, PaySlate obtained $300,000 from Ayrshire through the SR&ED facility agreement.

[22] Ultimately, Ayrshire and another investor advised PaySlate they would not contribute any further funds without a path towards restructuring or selling the business. As a consequence, PaySlate filed the NOI on December 5, 2022. It named Grant Thornton Limited as the proposal trustee ("Proposal Trustee"). PaySlate also proposed a court-approved sale and investment solicitation process ("SISP") to be conducted by the Proposal Trustee in order to identify a purchaser or an investor to allow it to then present a proposal to its creditors. PaySlate's proposed SISP called for marketing efforts to begin on December 5, 2022, with offers to be presented by February 3, 2023.

[23] In the interim, Ayrshire agreed to advance interim DIP financing to cover PaySlate's operating expenses.

[24] On December 9, 2022, Justice Fitzpatrick approved both the SISP and Ayrshire's DIP financing facility up to a maximum amount of $1.2 million with interest

at 15%, along with an administrative charge of $250,000 to cover professional fees (including those of the Proposal Trustee). An extension of the stay for the time for filing PaySlate's proposal per Part III, Division I of the *BIA* to February 17, 2023, was also granted (further extensions have been granted over time, to April 24, 2023).

[25] In January 2023, PaySlate became concerned that many, if not most, of its remaining employees would leave without some assurance that salaries would be paid (along with bonuses contingent on the outcome of the SISP). It sought court approval of a key employee retention program ("KERP") charge, which it grounded on its assertion that retention of its remaining workforce was not only vital to a successful outcome of the SISP but was also crucial to sustain its business as a going concern.

[26] Accepting the integrity of its evidence and submissions in this respect, and also in light of support from the Proposal Trustee, on January 23, 2023, I approved a charge in the amount of $604,000 covering all 19 remaining members of PaySlate's workforce, over the vehement objection of Paysafe, who argued that it was excessive and out of line with KERPs ordered in other cases.

[27] As will be seen from the discussion below, on the instant application, Paysafe argues that the evidence and submissions relied on by PaySlate on the KERP application belie the credibility of PaySlate's assertion that the RVO is necessary to maintain its business as a going concern.

[28] I also approved PaySlate's request in January 2023 to increase the DIP financing facility from $1.2 million to $1.45 million. On March 10, 2023, I granted PaySlate's request (unopposed by Paysafe) to increase the DIP financing facility from $1.45 million to $1.95 million.

The SISP Failed

[29] The Proposal Trustee advises that the SISP was structured to allow for an asset purchase or a transaction involving a restructuring of PaySlate's debt, share, or capital structure together with an asset bid. In consultation with PaySlate, the

Proposal Trustee conducted a robust sales and marketing process. It: (a) prepared a list of parties who may have a potential interest in and the financial means to make a bid; (b) prepared and sent an initial offering summary or teaser letter to 88 potential bidders; (c) created a virtual data room containing confidential information, including some of PaySlate's tax filings; (d) prepared a draft confidentiality and non-disclosure agreement; and (e) placed ads concerning the SISP in the Financial Post and Vancouver Sun on December 16, 2022. In all, twenty-three potential bidders signed the requisite documents to view the data room. Draft potential share purchase and asset purchase agreements were provided to potential bidders. The Proposal Trustee answered questions from potential bidders and coordinated 11 virtual meetings.

[30] Initially set to close on February 3, 2023, the SISP deadline was extended to February 10 at the request of a potential bidder who expressed serious interest in submitting a bid but said it needed more time to carry out its due diligence. However, by the expiry of the new bid deadline, only one bid was submitted. It was from Ayrshire and certain Noteholders in the form of: (a) a credit bid covering 50% of the DIP loan in the amount of $700,000 and convertible notes including accrued interest and fees of $2,791,370.17; (b) cash consideration to pay the administration charge and KERP charge of $258,545, cure costs for services from persons it viewed as critical suppliers, and bankruptcy costs; and (c) assumption of certain assumed liabilities including 50% of the DIP loan, the SR&ED obligations, post-closing liabilities, contracts with counterparties it deems to be critical suppliers, and debt obligations to Novel to be compromised in the amount of $557,000 (that part of the bid was later altered to offer a partial compromise and conversion of debt to equity).

[31] Although the Proposal Trustee was optimistic at that time that the proposed transaction would proceed, Ayrshire ultimately withdrew its bid when Novel refused to accept the conversion of debt-to-equity proposal. Ayrshire says that as a result, its credit bid was no longer feasible as it contemplated the crediting of debt subordinate to Novel's position. Ayrshire withdrew its bid and forfeited its deposit of $26,794

(reflecting a percentage of the cash portion of the proposed purchase price as opposed to the total consideration).

The RVO

[32] Ayrshire submitted a new bid, this time in its capacity as the DIP lender, proposing a share purchase transaction through an RVO. A subscription agreement ("Subscription Agreement") dated March 3, 2023 was executed by Ayrshire and PaySlate. The RVO contains provisions mirroring the language in the Subscription Agreement as well as specific language approving that agreement as commercially reasonable.

[33] Key features of the proposed transaction provided for in the RVO are discussed below.

Consideration

[34] Ayrshire proposes consideration that is comprised of part cash (of an anticipated maximum of $198,000), part credit bid of Ayrshire's DIP, and an assumption of certain pre-filing liabilities.

Retained Contracts

[35] Central to the transaction are orders mandating retention of some 176 pre-filing contracts with customers and suppliers (whom Ayrshire deems critical suppliers), who are also unsecured creditors, without recourse to certain termination rights, with accompanying releases, waivers, and bars to claims other than unpaid pre-filing services. Those contracts are called "Retained Contracts" in the Subscription Agreement and the RVO, and are included within the definition of "Assumed Liabilities".

[36] All outstanding amounts owed for pre-filing services are to be paid as "cure costs" out of a trust to be established and called a "Creditor Trust". Cure costs are defined as monetary defaults in respect of the Retained Contracts as at the time of closing:

> "**Cure Costs**" means all monetary defaults in relation to the Retained Contracts as at the date of Closing, other than those arising by reason only of PaySlate's insolvency, the commencement of the NOI proceedings by PaySlate or PaySlate's failure to perform a non-monetary obligation.
>
> [Bold in original]

[37] However, other terms of the RVO would bar or disclaim certain contractual rights and claims counterparties to Retained Contracts may have. As well, the RVO contains broad form waiver and release provisions that cover any pre-filing claims, other than cure costs, those counterparties may have against PaySlate and other persons (such as its directors and officers).

[38] For example, the RVO, which incorporates terms of the Subscription Agreement through reference, would bar counterparties to the Retained Contracts from relying on certain termination rights, such as termination for change of control or PaySlate's insolvency.

[39] Paragraph 12 of the RVO provides:

> 12. Except to the extent expressly contemplated by the Subscription Agreement, all Contracts (excluding the Excluded Contracts) to which PaySlate is a party upon delivery of the Proposal Trustee's Certificate will be and remain in full force and effect upon and following delivery of the Proposal Trustee's Certificate and no individual, firm, corporation, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") who is a party to any such arrangement may accelerate, terminate, rescind, refuse to perform or other wise repudiate its obligations thereunder, or enforce or exercise any right (including right of set-off, dilution or other remedy) or make any demand under or in respect of any such arrangement and no automatic termination will have any validity or effect, by reason of:
>
> (a) any event that occurred on or prior to the delivery of the Proposal Trustee's Certificate and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of PaySlate);
>
> (b) the insolvency of PaySlate or the fact that PaySlate sought or obtained relief under the BIA;
>
> (c) any compromises, releases, discharges, cancellations, transactions, arrangements, reorganizations or other steps taken or effected pursuant to the Subscription Agreement, the Transactions or the provisions of this Order, or any other Order of the Court in these proceedings; or

> (d) any change of control of PaySlate arising from the implementation of the Subscription Agreement, the Transactions or the provisions of this Order.
>
> [Bold in original]

[40] Although outstanding amounts claimed by, for example, counterparties to Retained Contracts for unpaid pre-filing services are to be paid as cure costs from the Creditor Trust, the RVO preserves to PaySlate all of its rights of contest, as seen from this term of the RVO:

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

[41] Waiver and discharge provisions applicable to all "Persons", which (per para. 12 in the RVO, excerpted above, includes counterparties to Retained Contracts), are also included:

> 14. From and after the Effective Time, all Persons shall be deemed to have waived any and all defaults of PaySlate then existing or previously committed by PaySlate, or caused by PaySlate, directly or indirectly, or non-compliance with any covenant, warranty, representation, undertaking, positive or negative pledge, term, provision, condition or obligation, expressed or implied, in any Contract, existing between such Person and PaySlate arising directly or indirectly from the filing by PaySlate under the BIA and the implementation of the Transaction, including without limitation any of the matters or events listed in paragraph 12 hereof, and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connecting therewith under a Contract shall be deemed to have been rescinded and of no further force or effect, provided that nothing herein shall be deemed to excuse PaySlate or the Purchaser from performing its obligations under the Subscription Agreement or be a waiver of defaults by PaySlate under the Subscription Agreement and the related documents.

[42] Once the Proposal Trustee files the Certificate, PaySlate is deemed, per para. 5 of the RVO excerpted below, to have satisfied or assumed the Assumed Liabilities in accordance with the terms of the Subscription Agreement, which in the case of the Retained Contracts, is payment of any money owed for services out of

the Creditor Trust (para. 5 also contains release and discharge provisions in respect of the Assumed Liabilities):

> 5. Upon the delivery of the Proposal Trustee's certificate (the "**Proposal Trustee's Certificate**") to the Purchaser (the "**Effective Time**"), substantially in the form attached as Schedule "**B**" hereto, the following shall occur and shall be deemed to have occurred at the Effective Time, all in accordance with the Closing Sequence set out in the Subscription Agreement and the steps contemplated thereunder: …
>
> > (h) PaySlate shall have paid, assumed or otherwise satisfied the Assumed Liabilities, in accordance with the terms of the Subscription Agreement, and upon payment or assumption thereof, other than as set out in the Subscription Agreement, the Assumed Liabilities shall be and are hereby forever released, expunged and discharged as against the Retained Assets, PaySlate, and the Subscribed Shares;
>
> [Bold in original]

[43] Thus, counterparties to Retained Contracts are required to carry on providing services to PaySlate, with restricted termination rights as well as loss of any right to claim for any other claims they may have against PaySlate's beyond cure costs (which, as pointed out above, may be contested by PaySlate). Those counterparties are required to carry on in circumstances where they risk not being fully paid for post-closing services by a debtor who has incurred significant operating losses since its inception and who also retains all of its rights to contest pre-filing cure cost claims.

[44] Using Paysafe as an example, except for the 60-day termination on-notice provision in its contract with PaySlate, it would lose its right to rely on its other contractual rights of termination (e.g., on account of PaySlate's insolvency) and lose its right to advance its claim for recovery of what it says are damages, calculated to be approximately $2.2 million, against PaySlate under the indemnity provisions of their contract.

[45] In respect of that claim, Paysafe threatened legal action to recover those losses and to terminate its contractual relationship with PaySlate if it is not paid. The claim remains outstanding, and the Proposal Trustee advises it is not in a position to evaluate the claim (it advises that the claim must be adjudicated in court).

[46] In the midst of this proceeding, PaySlate offered financial assurances to Paysafe in order to avoid termination of what it characterizes as Paysafe's critical services for its business as a going concern. The parties reached an agreement on February 9, 2023 that calls for PaySlate to pay $100,000 to Paysafe, comprised of an immediate partial payment of $25,000 (which was paid on February 13, 2023) with a further $75,000 to be paid on closing of the SISP, so long as Paysafe did not terminate its services prior to payment being made. I was advised their agreement also called for PaySlate to provide a guarantee of $100,000 for post-filing claims. However, Paysafe's extant claim under the indemnity provisions was not compromised in that agreement. During the hearing of this application, PaySlate and Ayrshire confirmed that even though the SISP has failed, they will honour the agreement with Paysafe if court approval of its current bid is granted. The language of the release and waiver provisions in the Subscription Agreement and RVO, they said, would be modified to the extent necessary to exclude that agreement from their ambit.

[47] Nonetheless, if the RVO is approved, Paysafe would lose its right to pursue its indemnity claim, something it is not prepared to give up particularly in light of the loss of its contractual termination rights, the preservation to PaySlate of all of its rights to defend pre-filing monetary claims for cure costs, an unsecured guarantee, and what it says is inadequate valuation evidence and evidence necessary to show that creditors are no worse off under the RVO than they would be under any other viable alternative.

Other Assumed Obligations

[48] Ayrshire will also assume all liabilities in respect of employees (except for terminated employees, for whom it will pay $2,000 per terminated employee), including KERP payments (approximately $258,545), tax obligations owed to the CRA and British Columbia, and PaySlate's SR&ED obligations (and corresponding benefits due to Ayrshire).

Creditor Trust

[49] PaySlate's other unsecured pre-filing liabilities, such as all pre-filing contracts with unsecured creditors (called "Excluded Contracts" in the Subscription Agreement and the RVO), professional fees, and cure costs would be channelled, assumed by, and vested into the Creditor Trust to be administered by the Proposal Trustee acting in its capacity as its sole trustee. PaySlate and the Proposal Trustee propose the Creditor Trust instead of an incorporated company because of what they say will be the vastly reduced costs of setting up a trust as opposed to a new corporate entity, and the near impossibility to find someone willing to act as a director with attendant potential liabilities in the circumstances.

[50] It is anticipated that the cash consideration to be paid by Ayrshire – said to be no more than approximately $198,000 – would be sufficient to pay professional fees and cure costs to counterparties to Retained Contracts, but nothing more. All other excluded liabilities, including Excluded Contracts, would be unpaid.

[51] Moreover, all excluded claims, including Excluded Contracts, are released as against PaySlate:

> 5. Upon the delivery of the Proposal Trustee's certificate…
>
> (e) all of PaySlate's right title and interest in and to the Excluded Liabilities, but specifically excluding the Assumed Liabilities, shall be channeled to, assumed by and vest absolutely and exclusively in the Creditor Trust for the purpose of allowing the Creditor Trustee to continue to administer the Excluded Liabilities in accordance with the Trust Settlement…such that the Excluded Liabilities shall become the obligations of the Creditor Trust which shall be deemed to be a party to the contracts and agreements giving rise thereto and which shall stand in place and stead of PaySlate in respect of any such liability or obligation, and shall no longer be obligations of PaySlate, and PaySlate shall be and are hereby forever released and discharged from such Excluded Liabilities and all related Claims (excluding, for greater certainty, the Assumed Liabilities);

Ayrshire Becomes the Sole Shareholder of PaySlate

[52] The RVO contains terms that see Ayrshire becoming the sole shareholder of PaySlate free and clear of any claims or liabilities. PaySlate's articles of

incorporation would be amended to provide for its issued common shares to be redeemed at the nominal price of $0.00001 per share, and then, along with all other subscription rights, conversion rights, options, plans, and instruments created or granted in connection with PaySlate's share capital, would be terminated and cancelled.

Claims Bar

[53] Claims bar language prohibits any person from commencing or continuing with a proceeding directly or derivatively against PaySlate, concerning, *inter alia*, any claims waived, released, expunged, or discharged by the terms of the RVO:

> 15. From and after the Effective Time, any and all Persons shall be and hereby forever barred, estopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, whether directly or derivatively or otherwise, and including without limitation…taken or proceeded with or that may be commenced, taken or proceeded with against PaySlate or the Retained Assets relating in any way to or in respect of any Excluded Assets, Excluded Contracts or Excluded Liabilities and any other claims, obligations and other matters with are waived, released, expunged or discharged pursuant to this Order.
>
> [Emphasis added]

Broad Form Release to Persons Associated with PaySlate

[54] A broad form release is provided for the protection of individuals associated with PaySlate, such as its past and present directors, officers, employees, legal counsel, the Proposal Trustee, and Ayrshire.

[55] Except for anything specifically preserved in the Subscription Agreement, the release encompasses any and all present, future claims, liabilities, indebtedness, actions, causes of action and suits related to the proceedings before the Court and the administration and management of PaySlate prior to these proceedings. The release language is not limited to the specific matters and claims in issue in this insolvency proceeding:

> 19. Effective upon the delivery of the Proposal Trustee's Certificate, (i) the present and former directors, officers, employees, legal counsel and advisors of PaySlate (ii) the Proposal Trustee and its legal counsel, and their respective present and former directors, officers, partners, employees and

> advisors, and (iii) the Purchaser, its directors, officers, employees, legal counsel and advisors…shall be deemed to be forever irrevocably released and discharged from any and all present and future claims whatsoever (including, but without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or in equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, offer, investment proposal, dealing, or other fact... or to any other entity and are extinguished, provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim for fraud or wilful misconduct or any claim that is not permitted to be released pursuant to section 50(14) of the BIA.

[56] To the extent that they are not covered by the release, the RVO limits recovery of claims against directors and officers to proceeds available from any applicable insurance policy.

Termination of this Proceeding

[57] This NOI proceeding will be terminated and PaySlate will be released from it when the Proposal Trustee issues and files with the court the Certificate confirming that Ayrshire has satisfied the subscription price set out in the Subscription Agreement and the conditions in that agreement have been satisfied.

Lack of Service

[58] One of the many concerns raised by Paysafe regarding the propriety of the RVO and transaction concerns service. Paysafe correctly points out that there is no court approved service list despite the continued reference to one in PaySlate's application materials. Moreover, the service list, Paysafe points out, does not include unsecured creditors.

[59] PaySlate's position throughout has been that service on unsecured creditors would be unduly burdensome and would negatively affect what they characterize as their business relationship management.

[60] Paysafe submits that given the extraordinary circumstances of an RVO, the service requirements found under s. 58 of the *BIA* concerning proposals, set out below, should be complied with:

> **Application for court approval**
>
> **58** On acceptance of a proposal by the creditors, the trustee shall
>
> **(a)** within five days after the acceptance, apply to the court for an appointment for a hearing of the application for the court's approval of the proposal;
>
> **(b)** send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor who has proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;
>
> **(c)** forward a copy of the report referred to in paragraph (d) to the official receiver at least ten days before the date of the hearing; and
>
> **(d)** at least two days before the date of the hearing, file with the court, in the prescribed form, a report on the proposal.

[61] Paysafe also points to Rule 3 of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368, which states that "in cases not provided for in the statute or its Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules." Thus, if the RVO in this case is not a proposal, which is the position taken by PaySlate, then Paysafe submits that Rule 8-1(7) and Rule 8-1(8) of the *Supreme Court Civil Rules* [*Rules*], which requires that the applicant must serve a notice of application and related documents "on each party of record and on every other person, other than a party, who may be affected by the orders sought", applies.

[62] In response submissions adopted by PaySlate, Ayrshire contended that in this case, where unsecured creditors are out of the money, there is no requirement to serve the entire body of unsecured creditors where it is demonstrated there is no value to them. Ayrshire submits that as there is no such requirement in a vesting order circumstance, there should be no requirement in the context of an RVO. That, of course, presumes that PaySlate has established there is, in fact, no value to the

unsecured creditors, a finding (as discussed in the next section) I am unable to make.

[63] During the late stages of the hearing, following Paysafe's continued objections concerning lack of service, I was advised that PaySlate had just served its application materials on most of the counterparties to Excluded Contracts, including counterparties outside Canada, by email. In many instances, it was to their generic customer service or information email addresses or website portals (no order was sought or made approving service in that manner).

[64] However, PaySlate did not attempt to serve or provide notice to counterparties to the Retained Contracts with its notice of application. It continues to say that it would be onerous to do so in the circumstances and would negatively affect its business relationship management. No evidence concerning any negative impact on its business management was provided.

[65] PaySlate's characterization of the circumstances does not take into account what I have pointed out above: the terms of the RVO require counterparties to the Retained Contracts, in particular those whom PaySlate views to be critical suppliers, to carry on providing services (with restrictions on their contractual termination rights accompanied by waiver, release, and claims bar language) with the risk of non-payment given that PaySlate has operated with significant losses since its inception, where PaySlate preserves to itself all defences to cure costs claims.

[66] There is no evidence from which I can determine if their contracts have provisions allowing them to terminate for change of control or insolvency or for other reasons that I am being asked to override in the RVO. Yet, I am being asked to approve a transaction that requires them to carry on providing goods and services to PaySlate relying on whatever other termination provisions may be contained in their contracts.

[67] Nor is there is any evidence from which I can determine whether any of the counterparties to the Retained Contracts other than Paysafe have or may have contingent claims that would be caught by those provisions.

[68] I am also being asked to make those orders in the absence of service, let alone evidence of notice, to those counterparties in circumstances unlike *Harte Gold*. In that case, absence of extensive discussions with creditors was not seen to be a material deficiency since virtually all creditors, including unsecured creditors, would be paid: *Harte Gold* at para. 52. Similarly, in *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354, Justice McEwen was satisfied that extensive consultation had taken place with all creditors, including the unsecured creditors (in his reasons, McEwen J. pointed out, at para. 53, “There is no suggesting in the record that any creditors were ignored or overlooked”).

[69] On March 29, 2023, after the hearing had concluded, and while my decision was under reserve, I received a letter from counsel for PaySlate addressing some of the concerns surrounding service. PaySlate and Ayrshire, in consultation with the Proposal Trustee, with a proposed amendment to the RVO. The amendment added a paragraph to the RVO that would allow counterparties to the Retained Contracts to object to the retention of their contract by serving notice on the Proposal Trustee within 30 days of service of the RVO:

> Notwithstanding the terms of this Order, any counter-party to a Retained Contract may object to the retention of their contract by providing written notice to the Proposal Trustee at Mark.Arzadon@ca.gt.com, within thirty (30) days of service of this Order, and shall include the bases of the counter-party’s objections. The Proposal Trustee in consultation with the Purchaser will attempt to resolve such objections with the objecting counter-party, and if not resolved shall bring the matter back before the Court for determination.

[70] Paysafe objects to the amendment on these grounds:

(a) the amendment paragraph is inconsistent with PaySlate’s earlier statement that providing notice was unduly burdensome;

(b) a significant number of Retained Contracts are with parties outside of the jurisdiction of the court;

(c) this Court does not have the jurisdiction to impose the relief provided for in the proposed paragraph on counterparties located outside of Canada; and

(d) in the absence of any service on affected non-Canadian counterparties, it is not appropriate for the RVO to request that foreign courts take steps that may be "necessary or desirable" to give effect to the RVO.

[71] The proposed amendment to the RVO is not an answer to avoid service. It forces counterparties to Retained Contracts to engage with the Proposal Trustee to lodge and pursue their objection in an undefined process in circumstances where their rights have been abrogated by court order. The amendment also raises the potential for increased expense through the objection process.

[72] Paysafe also points out that the RVO attempts to bar the ability of counterparties located in jurisdictions outside of this province to rely on legal defences prescribed by law in their home jurisdictions.

[73] I was advised that some counterparties to the Retained Contracts are based in Hong Kong, the Netherlands, Israel, the United Kingdom, Switzerland, and the United States. The provision in the RVO asking for aid and recognition from any court or tribunal in Canada or the United States to give effect to the RVO in the absence of service is, in my opinion, problematic.

[74] Issuing the RVO which bypasses providing service to a substantial group of counterparties to Retained Contracts also lacks procedural fairness.

[75] I agree with Paysafe's submissions that PaySlate's reason for not serving these counterparties is inconsistent with the amendment that PaySlate is proposing. If it is not "unduly burdensome" for PaySlate to provide service after the order is granted, why is it that it cannot provide service prior to this hearing, particularly when it has made efforts to serve counterparties to the Excluded Contracts.

[76] PaySlate's reason that providing service would negatively affect PaySlate's business relationship management is also inconsistent. If service would negatively affect PaySlate's business relationship management with the group of counterparties to Retained Contracts, what is the difference between providing it before the hearing and after the hearing?

[77] Even assuming PaySlate can establish there is no value to pay out unsecured creditors, service should have been effected on the counterparties to the Retained Contracts given the proposed waiver, release, and bar provisions and restrictions on their contractual rights.

When an RVO may be Ordered

Introductory Comments

[78] As mentioned at the outset, RVOs typically contemplate a purchase of shares in a debtor company wherein the "unwanted" assets, liabilities, and creditor claims are removed and vended to a residual company while the "good assets" remain with the debtor.

[79] In *Harte Gold*, Justice Penny described the purpose of an RVO in the context of the sale of Harte's mining enterprise to a strategic purchaser:

> [22] The purchase transaction for which approval is being sought in this case does not provide for a sale of assets but, rather, provides for a "reverse vesting order" under which the purchaser will become the sole shareholder of Harte Gold and certain excluded assets, excluded contracts and excluded liabilities will be vested out to new companies incorporated for that purpose.

[80] RVOs are often thought to be appropriate in situations where the debtor's licenses cannot be vested on an asset sale. By way of example, in *Blackrock Metals*, Chief Justice Paquette made this observation in the context of a case involving the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*]:

> [86] Albeit new, RVOs have been confirmed by the courts as an appropriate way for a debtor to sell its business when the circumstances justify such structure. In particular, CCAA courts have approved RVO structures in several complex mining transactions and have recognized that their benefits, which include maximizing recovery for creditors, importantly

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

Jurisdiction

[81] In *Harte Gold*, Penny J. described the jurisdictional basis to make the order in a *CCAA* context, at paras. 18-39, to be grounded in the court's discretionary power in s. 11 of the *CCAA* to further the objectives of the *CCCA* and other insolvency legislation in Canada, as discussed and approved of in other case authorities.

[82] It is clear from the reasons of Justice Fitzpatrick in *Quest*, leave to appeal denied, *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364, a *CCAA* case, and the case authorities reviewed in her decision at paras. 127-149, that this Court has authority to grant an RVO under its general statutory authority found in s. 11 of the *CCAA*.

[83] In this province, appellate approval of RVOs is gleaned from the reasons in *Southern Star*, where the Court of Appeal said that an RVO granted by Fitzpatrick J. reflected "precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising *CCAA* proceedings":

> [30] In arriving at her conclusion, Fitzpatrick J. considered and applied the principles recently set out by the Supreme Court of Canada in *Callidus,* which affirm the broad and flexible discretion of judges under the *CCAA* to make orders that are appropriate in the circumstances. She was also alive to the limits of her discretion; namely, that any order must conform to the objectives and purposes of the *CCAA*: at para. 154. She carefully evaluated each factor under s. 32(4) in making her determination that the Disclaimers were appropriate. With respect to the lease for Lot E, she found that no lease was in effect between Quest and Southern Star, so the prohibition in s. 32(9)(d) was inapplicable: at paras. 37–40. Finally, she recognized that this case presented unique and complex circumstances which made it appropriate to grant the RVO: at paras. 168, 172. While jurisprudential authority for making such an order in a contested proceeding is limited, it is notable that leave to appeal was refused in the one case in which it has been done, and under similar factual circumstances: *Nemaska*, *supra*.
>
> [31] Fitzpatrick J. acknowledged the negative impact to Southern Star arising from the relief she granted, though she questioned the extent of that damage; she gave some credence to the suggestion, as Quest argues in this application, that Southern Star's arguments were made strategically with a view to gaining leverage, while significant other interests hung in the balance:

> at paras. 46, 164–66. Whether that was so did not, however, drive her conclusions. Ultimately, she accepted that Southern Star would suffer harm but balanced that impact with the "myriad interests held by other stakeholders" and chose the best option for everyone involved, including Southern Star: at paras. 48, 111, 164.
>
> [32] The judge's order reflects precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising *CCAA* proceedings, and which forms the basis for the considerable deference their decisions are afforded on review. Respectfully, in my opinion, if a division of this Court were to set aside the order it would be acting contrary to the instruction of the Supreme Court of Canada in *Callidus* that appellate courts should defer to the exercise of discretion by supervising judges in these kinds of proceedings.

[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.).

Extraordinary Circumstances Must Exist

[87] RVOs are not the norm and should only be granted in extraordinary circumstances.

[88] In *Just Energy*, a *CCAA* case involving Just Energy's highly regulated business as a retail energy provider with assets including licenses, authorizations, and permits across multiple jurisdictions in Canada and the United States, McEwen J. noted that RVOs have been approved in specific circumstances:

> [33] Reverse vesting orders are relatively new structures. I agree that reverse vesting orders should not be the "norm" and that a court should carefully consider whether a reverse vesting order is warranted in the circumstances: see *Harte Gold Corp. (Re)* , at para. 38; *Black Rock Metals Inc.*, at para. 99. That said, reverse vesting orders have been deemed appropriate in a number of cases: see *Quest University (Re)* , at para. 168, *Harte Gold Corp. (Re)* , at para. 77 and *Black Rock Metals Inc.*, at para. 114.
>
> [34] The aforementioned cases approved reverse vesting orders in circumstances where:
>
> - The debtor operated in a highly-regulated environment in which its existing permits, licenses or other rights were difficult or impossible to reassign to a purchaser.
> - The debtor is a party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser.
> - Where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.
>
> [Emphasis added]

[89] In an article written by highly respected insolvency author and educator, Professor Janis Sarra, cited with approval by Paquette C.J.S.Q. in *Blackrock Metals* and Penny J. in *Harte Gold*, Professor Sarra wrote that RVOs require special scrutiny by the courts, even where uncontested, since they deviate from statutory framework intended to provide all creditors with an opportunity to be heard in the process:

> [T]here must be exceptional circumstances for the court to be persuaded to bypass provisions of insolvency legislation aimed at giving both the secured and unsecured creditors a meaningful voice/vote in the proceedings, as the 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.
>
> [Emphasis added]

[90] Those comments are echoed in the approach taken in the case authorities.

[91] For example, in *Harte Gold*, a *CCAA* case involving the sale of the debtor's mining enterprise (including its 12 materials permits and licenses allowing it to maintain its mining operations, 24 active work permits and licenses allowing it to perform exploration work, forestry licenses, mineral claims, and fire permits), Penny J. cautioned against the use of an RVO structure in an insolvency situation as the "norm" or something that is "routine or ordinary course". Close judicial scrutiny of the proposed transaction is required. RVOs, he wrote in comments apposite to this case as they include the *BIA* in his discussion, 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":

> [38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. …
>
> [Emphasis added]

[92] In *Blackrock Metals*, another *CCAA* case involving a distressed mining and metals manufacturing business, Paquette C.J.Q.S. approved, following a failed SISP, a proposed RVO that contemplated a share sale to allow licenses, permits, and authorizations to remain with the debtor while the claims of unsecured creditors are transferred to a shell company. Of critical importance was the monitor's advice that numerous agreements, permits, and licenses are vital assets that must be retained to facilitate the debtor's restructuring, and would avoid any need for consents required under a traditional vesting order:

> [114] … In his Fifth Report, the Monitor outlines the reasons why, in his opinion, the reverse vesting order structure that would be implemented would be "more appropriate and beneficial than a traditional vesting order structure and that the reverse vesting order structure is necessary, reasonable and justified in the circumstances":
>
> …
>
> > (iv) Most assets of BRM are intangibles, such as agreements, permits, licenses, authorizations and related amendments, and their value depend on the capacity of the purchasers to complete the financing and achieve the project. These assets would have no or limited value if some of them were not being preserved. The reverse vesting order structure allows to avoid any potential risks around the transfer to the purchaser.

> [115] The Court agrees with the Monitor's conclusions. RVO structures have been found by courts to be appropriate in situations such as the present case, where a traditional sale of assets would lead to uncertainty regarding the transfer of numerous agreements, permits, authorizations and other regulatory approvals that are required for the continuation of the company's business.
>
> [116] Indeed, BlackRock operates in the highly regulated mining industry. Their business is almost entirely constituted of such intangible assets, which provide a head start of several years to the purchaser. Some of these assets cannot be assigned or are at least difficult to assign. Therefore, the capacity to restructure BlackRock depends heavily on the capacity to keep the existing legal entities in place while restructuring the share-capital of BlackRock. That Is exactly what the RVO provides for.
>
> [Emphasis added]

[93] Nonetheless, and similar to Penny J., Paquette C.J.Q.S. cautioned that RVOs must be carefully scrutinized. Citing Professor Sarra's remarks, Paquette C.J.Q.S. wrote, at paras. 95-97, that, "Some authorities indeed call for caution. Professor Sarra recently stressed the importance for courts to provide detailed reasons when approving RVOs. Among other things, Professor Sarra reminds us that this type of order deviates significantly from the usual *CCAA* framework, which is meant to provide all creditors with an opportunity to be heard."

[94] Likewise, in a *BIA* context, an RVO avoids the statutory processes mandated by Parliament.

[95] In addition to those discussed above, I would also add these remarks from Professor Sarra's article as important considerations when considering whether RVOs should be approved.

[96] First, creditors should have the opportunity to have a voice in the workout strategy:

> [at 27-28]
>
> The guardrail should be what creditors are entitled to under all avenues to resolve the insolvency, including liquidation, unless the creditors agree otherwise to compromises for their benefit, and the framework should not be bypassed absent compelling circumstances. In analogous circumstances, courts have consistently held that the fact a secured creditor states it will not support a plan under any circumstances is no reason not to grant relief pursuant to the *CCAA*. <u>The entire structure of the statute is to allow the</u>

> claimants to the residual value of the assets a 'voice' in the workout strategy, and the value of claims under the voting procedure draws parties to the negotiation table. It raises the question of whether the court has authority to override a veto position, which is quite different than urging parties back to the bargaining table.
>
> [Emphasis added]

[97] Second, since the purchaser obtains all of the forward-value of the debtor's activities, RVOs remove the opportunity for negotiations that may lead to compromise and greater value for a broader group of creditors:

> [at 17]
>
> As many *CCAA* proceedings in the past have illustrated, negotiations and a creditor vote can lead to innovative and fairer outcomes in which parties compromise rights today for future upside value.70 Negotiations can lead to higher value being paid for the licenses and the shedding of liabilities; or the debtor can negotiate deferral or compromise of claims until such time as the debtor is once again a viable entity.
>
> Absent negotiations, the purchaser gets all the forward-value of the debtors' activities and the creditors whose claims are transferred to newco receive nothing of that forward-value for the value of their pre-filing claims. Yet the participation of creditors can enhance asset value in some cases. A presumption that the delay and costs of a vote are not worth it does not address the risk of opportunistic behaviour by debtors/secured creditors if they can bypass a vote.
>
> [at 19]
>
> … [After citing *McEwan Enterprises Inc*., 2021 ONSC 8423] Second, the reality is that when a court rules against commercial parties that claim they will not agree to any changes or compromises, they ultimately do bargain further and come to an agreement with creditors. The current practice of endorsing RVO without consideration of the policy and statutory framework of the *CCAA* undermines the ability of all creditors to bargain.
>
> [Emphasis added]

[98] Next, and of particular importance for this case, an evidence-based rationale should explain why an RVO is at least equivalent to outcomes under the statutory mechanisms:

> [at 29-30]
>
> At the very least, some sort of written endorsement should issue in each case, and that endorsement should address the key questions that the court has asked of the monitor and debtor. This procedural process is important to safeguard the transparency, accountability, and integrity of the system. The

> following are some initial suggestions as to questions the courts should be asking: …
>
> - Has the monitor in its report offered an evidence-based rationale as to why the proposed transaction is at least equivalent to respecting the rights and remedies of creditors under a plan of arrangement?
>
> …
>
> [Emphasis added]

[99] Lastly, and also important to this case, careful consideration should be given to proposed releases where creditors have no opportunity to vote (and to that I would add, in the instant circumstances where counterparties to Retained Contracts have not been served with the application):

> [at 23]
>
> Also of concern are the broad releases in respect of potential liability claims being granted against directors, officers, insolvency professionals, and third-parties, without the reasoning that usually underpins such broad releases, including contributions to the value of the assets that remain to satisfy creditors' claims. Prior to RVO, the courts had established clear tests for endorsing broad liability releases, which both protect the integrity of the insolvency system and encourage parties to negotiate in the shadow of liability risk. The tests have included: whether the claims to be released are rationally connected to the purpose of the plan; whether the plan can succeed without the releases; whether the parties being released contributed to the plan; whether the releases benefit the debtors as well as the creditors generally; whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and whether the releases are fair, reasonable, and not overly-broad.
>
> While willful misconduct and fraud liability are often excluded from the release, in a number of the RVO cases, releases are being granted in respect of a broad range of statutory claims without discussion of potential prejudice from such releases or reference to the developed jurisprudence. As one commentary observes, courts have granted broad releases in RVO transactions, thereby achieving third-party releases without creditors being asked to vote on this issue, undermining one of the key criteria for approval that the courts have used.
>
> [Emphasis added]

Factors to be Considered

[100] What other factors should be considered on an application to approve an RVO other than those discussed above?

[101] In *Quest*, Fitzpatrick J. was clear that RVOs should not be employed or approved in a *CCAA* restructuring "simply to rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests", nor should it be used to expedite the debtor's desired result without regard to the remedial objectives of the *CCAA*": para. 171. The analysis should consider whether the relief is appropriate in the circumstances and whether the stakeholders are treated fairly and reasonably as the circumstances permit.

[102] After considering the balance between competing interests and the good faith of the debtor Quest who acted with due diligence to promote the best outcome for all stakeholders, Fitzpatrick J. determined, in the absence of any other offers, that the proposed RVO in that case was the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group that includes Southern Star and Dana [who opposed the RVO]": para. 172.

[103] In *Harte Gold*, Penny J. said at para. 23, factors to consider when an RVO is sought in a *CCAA* context include those set out in s. 36(3) of the *CCAA*, excerpted below:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[104] Justice Penny also said the s. 36(3) *CCAA* criteria correspond to the principles set out in *Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No. 1137, 1991 CanLII 2727 (C.A.) for the approval of asset sales in an insolvency context. He did not confine his remarks to *CCAA* cases:

> [21] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp*, 1991 CanLII 2727(ONCA) for the approval of the sale of assets in an insolvency scenario:
>
> (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which offers have been obtained; and
>
> (d) whether there has been unfairness in the working out of the process:
>
> see *Target Canada Co. (Re)*, 2015 ONSC 1487, at paras. 14-17.
>
> [Emphasis added]

[105] In *Blackrock Metals*, Paquette C.J.Q.S. also referred to the s. 36(3) *CCAA* factors as well as the additional factors discussed by Penny J. in *Harte Gold* when scrutinizing a proposed RVO: at paras. 100-124.

[106] Likewise, in *Nemaska*, Justice Gouin also said approval should be considered with the s. 36 criteria in mind, subject to determining, whether sufficient efforts to get the best price have been made and whether the parties acted providently, the efficacy and integrity of the process followed, the interests of the parties, and whether any unfairness resulted from the process: see, e.g., paras. 3-8, 46, 49-54, 57.

[107] In the context of the *BIA*, the following questions were outlined by Penny J. in *Harte Gold* as those that should be answered by the debtor, proposed purchaser, and the court's officer:

> [38] … The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:
>
> (a) Why is the RVO necessary in this case?
>
> (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
>
> (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and
>
> (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[108] In my opinion, those same factors considered in the *CCAA* context apply to the RVO proposed in the context of PaySlate's NOI proceeding.

[109] With this discussion in mind, I turn now to consider whether, apart from the service issue, PaySlate has established that the RVO is appropriate in this case.

Determination

Position of PaySlate and Ayrshire

[110] I will begin this section by setting out PaySlate's position, supported by Ayrshire, that it has established the necessary prerequisites for the RVO.

[111] PaySlate says that its primary assets are its intellectual property, tax attributes, and value as a going concern (encompassing its Retained Contracts with its critical suppliers and customers). The proposed transaction, PaySlate and Ayrshire maintain, is structured as an RVO in order to enable PaySlate to continue its business operations under new ownership with minimal disruption and to avoid losing PaySlate's tax attributes, which they submit, are otherwise non-transferable. PaySlate's tax attributes, they say, are an important factor supporting the RVO. There are no licenses or permits as in other cases where RVOs have been granted.

[112] According to PaySlate and Ayrshire, the proposed transaction is the only viable option available to PaySlate and provides the greatest recovery available and greatest certainty to PaySlate's emergence from these proceedings as a going concern.

[113] They submit that since PaySlate has limited liquidity, its financial position does not allow it to meet its obligations to conduct a further SISP or use an alternative process to find an alternative transaction that could lead to a proposal. They submit that PaySlate has provided appropriate evidence of value to support the consideration offered by Ayrshire and to demonstrate there is nothing available for unsecured creditors in any other scenario.

Support from the Proposal Trustee

[114] Although the Proposal Trustee expressed some initial concerns, it is ultimately supportive of the relief sought by PaySlate. The Proposal Trustee submits that the transaction is structured pursuant to the RVO so that Ayrshire can assume and maintain the business as a going concern, ensure the continued ability to PaySlate to file claims for SR&ED credits, and preserve certain tax attributes that Ayrshire has indicated "may" hold value.

[115] That said, the Proposal Trustee agrees with Paysafe that the RVO is not the only means by which PaySlate's tax attributes and SR&ED credits may be acquired. The Proposal Trustee confirms that they may be acquired by a purchaser in a typical share acquisition and in that sense, on their own, they do not satisfy the necessity test. However, the Proposal Trustee says that the Ayrshire's bid, which is the only one available, meets the necessity test as it will allow PaySlate to continue as a going concern providing continued employment for certain employees. The Proposal Trustee also says that Ayrshire's bid provides greater recovery to PaySlate's stakeholders than could be obtained in a liquidation or bankruptcy.

Analysis

[116] For reasons set out below, I have determined that PaySlate has not established that the RVO should be approved.

Necessity

[117] Paysafe appropriately questions whether the proposed transaction is truly meant to facilitate the business as a going concern.

[118] Paysafe argues that the purpose of the RVO is not, as PaySlate says, to preserve the business as a going concern, and is, instead, an attempt by Ayrshire to obtain PaySlate's tax attributes well below market value without having to comply with the processes set out in the *BIA* (for example, the voting requirements for a proposal set out in s. 54(2)(d) of the *BIA*, stating that a proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors, other than

equity claimants, vote for acceptance by a majority in number and two thirds in value of the unsecured creditors of each class present).

[119] Paysafe asserts that PaySlate's statement that the RVO is necessary to preserve its business as a going concern is belied by the incongruity between its proposed termination of over half of its remaining 19 workforce (and possibly more) and the position it took and the evidence it adduced on the KERP application.

[120] On the KERP application, which was opposed by Paysafe, PaySlate argued, based on evidence it adduced from Mr. Rosenfeld and its chief financial officer, Gary Bentham, that it had no hard assets. Its assets and value as a going concern were its employees; retention of its then remaining 19 employees was critical.

[121] For example, Mr. Rosenfeld deposed in his affidavit no. 2, sworn January 10, 2023:

> **KERP and KERP Charge**
>
> **A. Management and Employees**
>
> 12. PaySlate does not have physical premises and its employees operate entirely on a remote basis. As set out in detail in the First Affidavit, the majority of PaySlate's employees are resident in British Columbia, Canada.
>
> 13. Shortly prior to the commencement of the BIA Proceedings, and as part of PaySlate's cost-reduction strategies, PaySlate had terminated certain employment contracts. As such, as at the time of filing of its Notice of Intention to Make a Proposal, PaySlate employed, and now continues to employ, a minimum number of employees necessary to continue business operations (and ideally, would have a larger complement of employees).
>
> 14. Since the execution of the First Affidavit on December 6, 2022, one employee has resigned from PaySlate. As of the date of this Affidavit, PaySlate has 19 employees. This does not include the Chief Financial Officer, Gary Bentham, who provides his services through an independent contractor arrangement.
>
> 15. PaySlate has identified certain key employees (the "**Key Employees**") whose continued involvement is necessary to maintain ongoing operations and business stability. Furthermore, the retention of the Key Employees is critical to the value of PaySlate's business as a going concern.
>
> **B. The KERP Terms and Conditions**

> *Development of the KERP*
>
> 16. As set out in further detail below, the Key Employees are a critical component of PaySlate's value and ability to operate as a going concern. Accordingly, PaySlate has been considering how it can best retain and incentivize those employees and whether the Key Employees could be retained without a formal KERP. Based on discussions with management and in consultation with the Proposal Trustee, PaySlate determined that a KERP was required to retain and incentivize the Key Employees (for the reasons described further below).
>
> …
>
> 19. The KERP includes only Key Employees where management has determined that their continued employment and participation is integral to the operation of PaySlate's business, the preservation of value, and the successful completion of the SISP and any potential restructuring transaction.
>
> 20. PaySlate reduced its employee headcount shortly before filing the NOI in order to reduce its operating expenses. As a result, PaySlate is operating on a very lean basis, and ideally would have a larger complement of employees. However, since PaySlate is already operating with minimal staffing, it is particularly important that it retain the Key Employees.
>
> 21. Each of the Key Employees has institutional knowledge and expertise in their respective roles, and cannot be easily replaced given PaySlate's current financial condition. …
>
> [Bold and italics in original; underlining added]

[122] Some of Mr. Bentham's evidence was admitted under seal given its confidential nature regarding key employees. His evidence that was not sealed was as equally pointed as Mr. Rosenfeld's: PaySlate's remaining employees were critical to its ability to operate as a going concern as well as to promote a successful SISP; any further reduction in staff would further diminish Paysafe's ability to deliver product to its customers on a timely basis. In his first affidavit sworn January 19, 2023, he also remarked on the essential role each employee brings to the company's ability to carry on business:

> 8. PaySlate's employees include individuals with highly specialized technical knowledge regarding PaySlate's product offering and intellectual property, and their roles include maintaining the technology platform, security, onboarding customers, and supporting existing customers. There is no overlap in responsibilities and each employee brings their specific skills and knowledge to the ongoing operations of PaySlate. Without those skills and knowledge, the ability for PaySlate to sustain operations and support a successful sale and/or restructuring of PaySlate will materially diminish.
>
> …

> 13. Based on my interaction with the employees and on my discussions with Mr. Brissot [a member of management] if the KERP is not approved, it is my view that employees will immediately being to leave PaySlate and PaySlate's ability to maintain operations through the SISP process will severely diminish and PaySlate may in fact not be able to sustain operations as a going concern. PaySlate's value to all stakeholders lies in its ability to remain operating as a going concern. The significant reduction in the workforce has also impacted the remaining employees because it has increased their workload. The demands on employees have further increased during these proceedings since several have also been asked to assist with gathering information for the sale process and will be asked to participate in meetings with bidders.
>
> …
>
> 15. In particular, as set out in the Affidavit #1 of Adam Rosenfeld, PaySlate's value is primarily as a going concern, and its revenue potential is based on (a) increased tenant adoption of the platform; (b) tenant screening, credit reporting, and rental insurance services; (c) renegotiation of legacy contract terms; and (d) signing new landlords and property managers. Realizing that potential requires PaySlate's employees, and the expertise and history of the participants in the KERP are integral to the going concern value and realizing on PaySlate's potential.
>
> [Emphasis and square bracket insertion added]

[123] The Proposal Trustee supported Paysafe's request for the KERP and provided this advice in its second report (mistakenly dated January 11, 2022, as opposed to 2023):

> *Development of the KERP*
>
> …
>
> 28. Management has advised the Proposal Trustee that PaySlate is currently operating with the minimum number of staff necessary to ensure continued business operations. The Proposal Trustee understands, based on discussions with management, that if there are any more departures from the Company, its operations and the SISP could be at risk.
>
> …
>
> *The Proposal Trustee's Opinion*
>
> 35. The Proposal Trustee is supportive of the proposed KERP Charge for the following reasons:
>
> > (a) The Company downsized its headcount shortly before the Filing Date to reduce operating expenses and is currently operating on a very lean basis. The number of Key Employees identified is proportionately reasonable to the size and nature of the business. …
>
> [Emphasis added]

[124] In these circumstances, I find myself unable to accept at face value PaySlate's contention that the RVO is intended to preserve the company as a viable going concern. Nor am I able to make that finding. That said, without more, I cannot go so far as to make the finding suggested by Paysafe – that the RVO is a disguised attempt by Ayrshire to obtain a valuable tax asset for improvident consideration while avoiding the statutory requirements imposed by Parliament. While I recognize that it is not uncommon for a purchaser of a distressed debtor to reorganize the debtor's affairs, and reduce the size of its workforce, I do find the inconsistency (pointed out by Paysafe) between PaySlate's present approach to the proposed reduction of at least half of its remaining workforce and its approach on the KERP application raises significant concerns about the reliability of submissions and evidence from PaySlate and Ayrshire regarding the purpose of the RVO.

Evidence of Value

[125] In this section, I address the insufficient nature of the valuation evidence provided by PaySlate and Ayrshire in the context of factors concerning no other viable alternative, whether any other stakeholder is worse off, and the appropriateness of the consideration paid.

[126] For most of the hearing, evidence of value of PaySlate's assets came from two sources: Ayrshire's view that PaySlate's tax attributes "may hold" value and from what was described as the "market has spoken" through the failed SISP.

[127] For the tax attributes, Ayrshire's position is contained in the Proposal Trustee's Fourth Report dated March 8, 2023, that they "may hold" value:

> 35. Although the Proposal Trustee has expressed some concerns, as noted above, the Proposal Trustee is supportive of the relief sought by the Company. In particular:
>
> (a) The Proposal Trustee understands that the transaction is structured pursuant to a reverse vesting order so that the proposed purchaser can assume the business as a going concern, ensure the continued ability of the Company to file claims for SR&ED credits and preserve certain tax attributes which the proposed purchaser has indicated may hold value; …
>
> [Emphasis added]

[128] Paysafe cautions that the advice comes from the proposed purchaser, i.e., Ayrshire, whose managing director and principal, Mr. Rosenfeld, is the director of and commands the same role with PaySlate.

[129] With that in mind, Paysafe brought to my attention written advice it received from the Proposal Trustee on March 13, 2023, five days after it issued its Fourth Report, answering an inquiry from Paysafe (both are excerpted below) that the value of the tax attributes may be in the range of $27 million:

> [From Paysafe's law firm]
>
> March 7, 2023
>
> On another issue, Robyn, could you please confirm with your client and RM , what the value of the non-transferrable tax attributes to which reference is made in paragraph 44 e) of the Motion?
>
> March 13, 2023
>
> Robyn, please see below. Can you provide me with this information?
>
> [From counsel for the Proposal Trustee]
>
> Bernard, we understand it is approximately $27 million.
>
> [Emphasis added; email descriptions in brackets added]

[130] The information in this email was, understandably, bought to my attention as a matter of significant concern. It also grounded, in part, Paysafe's challenge of the valuation of the tax attributes proffered by PaySlate on the application, which was essentially Ayrshire's view of value as reported in the Proposal Trustee's Fourth Report noted above.

[131] After this correspondence was admitted into evidence (by consent), the Proposal Trustee delivered a supplemental report dated March 24, 2023 with additional information concerning value, suggesting a range of $750,000 to $1.5 million:

> 24. Based on the Proposal Trustee's past experience, and in consultation with tax experts within its office, the market will typically pay approximately $0.03 to $0.06 per $1.00 of available tax attributes in similar transactions. The range is largely dependant on the type of attribute available. For example, resources pools which may be held

by oil and gas companies, typically carry greater value than non-capital losses as there is more certainty associated with their utility on a carry forward basis. In this case, PaySlate does not operate in that sphere and does not have any resource pools. Further, there is significant uncertainty associated with the value of non-capital losses as there are many variables that affect their use. For example:

(a) A company must generate profitability of $25 million on a go forward basis in order to use the tax losses (within a 20-year period when the non-capital losses expire);

(b) Tax losses cannot be sold to a third party, but if there is a change of control in a company, the company's business must be continuing; and

(c) To the extent there is any debt forgiveness in a company, the amount of that forgiveness reduces the amount of losses available for potential use (in this case, the tax losses of approximately $27 million may be reduced by debt forgiveness and conversion of debt to equity in the aggregate of approximately $5.5 million).

25. The realizable value of the tax attributes is never the face amount of the non-capital losses. Given the significant uncertainty surrounding the utility of the losses, the market is limited and deeply discounted.

26. Applying the range of value to the amount understood to be available in non-capital losses (even without the grind for debt forgiveness), the Proposal Trustee can attribute a value of $750,000 to $1,500,000 for the tax attributes (based on $0.03 to $0.06 per dollar of $27 million). The Proposal Trustee notes that this is well below the value associated with the proposed Transaction, which includes:

(a) The assumption of the DIP Loan of approximately $1.95 million;

(b) The assumption of the SRED Loan of approximately $300,000;

(c) The conversion of the Novel debt (approximately US $416,000 as at December 2020) to equity;

(d) The conversion of the Noteholder debt (approximately $2.6 million as at December 2020) to equity;

(e) The assumption of tax obligations to the Canada Revenue Agency and BC Ministry of Finance, which the Proposal Trustee understands are being paid as they could be set off against any SRED claim;

(f) The payment of arrears under Retained Contracts for services provided thereunder; and

(g) The payment of any amounts owing under the Administration Charge and in relation to Terminated Employee Claims.

[Emphasis added]

[132] Paysafe takes issue with the late provision of this information as it did not give it an opportunity for fair consideration, and further, that it was not, and should have been qualified as expert evidence. Paysafe also questions this valuation advice, reminding me that Novel and the CRA, who initially opposed the RVO, must see sufficient value in the proposed transaction sufficient to satisfy their claims since, in Novel's case, it agreed to convert secured debt to equity and for the CRA, to accept a post-closing indemnity.

[133] Paysafe correctly points out that in respect of any proposal that PaySlate proffered, ss. 65.13(1), (4), and (5) of the *BIA* require me to consider, in addition to other factors emphasized in s. 65.13(4)(d) and (e) in the excerpt below, whether (per s. 65.13(4)(f)) the consideration provided for the assets "is reasonable and fair, taking into account their market value":

> **Restriction on disposition of assets**
>
> **65.13 (1)** An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> …
>
> **Factors to be considered**
>
> **(4)** In deciding whether to grant the authorization, the court is to consider, among other things,
>
> **(a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> **(b)** whether the trustee approved the process leading to the proposed sale or disposition;
>
> **(c)** whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> **(d)** the extent to which the creditors were consulted;
>
> **(e)** the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> **(f)** whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
>
> **Additional factors — related persons**

> **(5)** If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that
>
> **(a)** good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
>
> **(b)** the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.
>
> [Bold in original; underlining emphasis added]

[134] Although those provisions do not specifically require a valuation opinion or liquidation analysis, either or both have been provided in other cases in appropriate circumstances.

[135] I disagree with PaySlate's contention that it is inappropriate to consider s. 65.13(4) in my analysis as it assumes there is a party willing to tender and fund a proposal in this case. I agree with Paysafe that that is in effect what is being sought on this application. Even if it is not construed as a proposal, the s. 65.13(4) factors are appropriate to the analysis in this case as they align with those discussed in the case authorities dealing with RVOs.

[136] Paysafe argues that both expert evidence of valuation along with a valuation and liquidation analysis should have been provided in this case in view of the extraordinary nature of an RVO, the stringent burden placed on an applicant seeking an RVO and the Proposal Trustee, and in particular, in view of the concerns it raised regarding the $27 million value for the tax attributes contained in the Proposal Trustee's March 13 email.

[137] I agree, to this extent.

[138] While not every case involving an RVO may require expert valuation opinions, at a minimum, fulsome evidence concerning the value of PaySlate's assets, including its tax attributes, should have been provided well before the hearing began. The information in the Proposal Trustee's supplemental report should not have had to be drawn out on account of Paysafe's objections during the hearing. I agree with Paysafe that the case authorities are clear that the onus rests with the

applicant, purchaser, and court's officer to provide the requisite evidence to demonstrate that the tests for issuing an RVO have been met.

[139] While I do not accept Paysafe's contention that expert valuation evidence tendered in accordance with the *Rules* is necessary in this case, I agree with Paysafe that the unidentified sources for much of the valuation information and advice are problematic. I also do not know the qualifications and expertise of the author of the Proposal Trustee's reports (their resume is not in evidence) nor that of the tax experts spoken to (let alone their identity). Nor is the nature, extent, and scope of the research grounding their analysis provided.

[140] I also agree with Paysafe that value in this case is not necessarily measured solely by what a third party might pay for the tax attributes (it points out there is no evidence concerning the specific information available in the data room to potential bidders concerning valuation including the tax attributes and SR&ED credits). In the specific circumstances of Ayrshire's stated purpose of its bid (i.e., to maintain it as a going concern), the value of the tax attributes is to PaySlate's business as a going concern. The value of those attributes based on a forward-looking cash flow analysis would be useful (in other cases, the court's officers have provided a comparative analysis, including a cash flow analysis to show the potential value of tax attributes). It would also address factors such as appropriateness of consideration and the extent of value to all stakeholders under the proposed transaction as opposed to bankruptcy).

[141] As Professor Sarra aptly points out, there must be an evidence-based rationale for value in the proposed transaction. In addition, given the heightened obligations on the court's officer, discussed in *Blackrock Metals* and in *Harte Gold*, analysis should have been provided in this case contrasting the impact of bankruptcy on all stakeholders to the RVO.

[142] Thus, in all, I am not satisfied that sufficient evidence of value has been provided. Without it, I am unable to determine the appropriateness of the

consideration proposed to be paid under the RVO, whether there are other viable alternatives, and whether other stakeholders are no worse off.

Release, Bars, and Restrictions on Contractual Rights

[143] In all of these circumstances, and in the absence of service on counterparties to Retained Contracts whose rights are affected and given insufficient evidence concerning value, I cannot accept that PaySlate and Ayrshire have demonstrated that the waiver, bar, release provisions as well as those restricting contractual rights of counterparties to Retained Contracts are fair and reasonable, as they must in accordance with the principles outlined in *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54; see also; *Blackrock Metals* at paras. 128-130; *Harte Gold* at paras. 78-86.

Disposition

[144] The case authorities are clear that RVOs are only to be granted in extraordinary circumstances following close judicial scrutiny and only after the applicant, purchaser, and court's officer have established that the factors set out in the case authorities are satisfied. In addition to significant issues arising from lack of service, they have not met that burden on the evidence available. I have no choice but to dismiss the application.

"Walker J."

9

CITATION: *Harte Gold Corp. (Re)*, 2022 ONSC 653
COURT FILE NO.: CV-21-00673304-00CL
DATE: 2022-02-04

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED, Applicant

AND:

A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP., Applicant

BEFORE: Penny J.

COUNSEL: *Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais* for the Applicant

Joseph Pasquariello, Chris Armstrong, Andrew Harmes for the Court appointed Monitor

Leanne M. Williams for the Board of Directors of the Applicant

Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji for 1000025833 Ontario Inc.

Stuart Brotman and Daniel Richer for BNP Paribas

Sean Collins, Walker W. MacLeod and Natasha Rambaran for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited

David Bish for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates

Orlando M. Rosa and Gordon P. Acton for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)

Timothy Jones for the Attorney General of Ontario

HEARD: January 28, 2022

ENDORSEMENT

[1] This is a motion by Harte Gold for an approval and reverse vesting order involving the sale of Harte Gold's mining enterprise to a strategic purchaser (that is, an entity in the gold

mining business) and for an order extending the stay and expanding the Monitor's powers to include new entities to be created for the purposes of implementing Harte Gold's proposed restructuring. There was no opposition to the relief sought. All those who appeared at the hearing supported approval of the transaction.

[2] Following the conclusion of oral submissions on Friday, January 28, 2022, I issued the orders sought with written reasons to follow. These are the reasons.

Background

[3] Harte Gold is a public company incorporated under the *Business Corporations Act* (Ontario). Prior to January 17, 2022, its shares publicly traded on the Toronto Stock Exchange, Frankfurt Stock Exchange and over-the-counter. Harte Gold operates a gold mine located in northern Ontario within the Sault Ste. Marie Mining Division and approximately 30 km north of the town of White River. This mine, referred to as the Sugar Loaf Mine, produces gold bullion. Harte Gold has a total of 260 employees on payroll, as well as 19 employees retained through various agencies. Harte Gold's payroll obligations are current.

[4] Of some importance to the form of transaction proposed in this case, involving an approval and reverse vesting order (RVO), is the fact that Harte Gold has 12 material permits and licenses that are required to maintain its mining operations, 24 active work permits and licenses that allow the performance of exploration work on various parts of the Sugar Loaf property and many other forest resource licenses, fire permits and the like, all necessary in one way or another to Harte Gold's continued operations. Harte Gold also has 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The transfer of these permits and licenses etc. would involve a complex transfer or new application process of indeterminate risk, delay and cost.

[5] It is also important to note that Harte Gold is party to an Impact Benefits Agreement dated April 2018 between Harte Gold and Netmizaaggamig Nishnaabeg First Nation.

[6] Harte Gold has two primary secured creditors. They are: a numbered company (833) owned by Silver Lake Resources Limited (an Australian gold mine company). 833 is a very recent assignee of significant secured debt from BNPP; and, AHG Jersey Limited (AHG is part of the Appian group). Appian entities are also counterparties to a number of offtake agreements under which Harte Gold sells gold in exchange for prices determined by a pricing formula tied to the London bullion market. Orion is, similarly, a counterparty to additional offtake agreements. BNPP, following the assignment of its secured debt, has retained additional obligations in respect of certain hedging arrangements provided to Harte Gold. Harte Gold also has a number of trade and other unsecured creditors who are owed an estimated $7.5 million for pre-filing obligations and further amounts for services rendered post-filing.

[7] At the time of its initial application to the court, Harte Gold's assets were valued at $163.8 million. Its liabilities were valued at $166.1 million. On a balance sheet basis, therefore, Heart Gold was insolvent.

[8] Since about 2019, Harte Gold has been pursuing a number of measures to address a growing liquidity problem, a problem only exacerbated by the Covid-19 pandemic. Despite these efforts, in 2020 Harte Gold was obliged to seek agreement from its prime lender, BNPP, to defer debt payments and to seek a forbearance from enforcement of BNPP's security. In May 2021, Harte Gold initiated a strategic review of options to achieve the desired liquidity and to fund the acquisition of new capital. Harte Gold appointed a strategic committee of its board and, shortly thereafter, a special committee of independent directors. The special committee retained FTI as financial advisor (FTI was subsequently appointed Monitor by this Court) and developed a plan to attract new capital through a potential sale.

[9] This prefiling strategic process involved approaching over 250 potential buyers. 31 of these entities executed confidentiality agreements; 28 of those conducted due diligence through Harte Gold's virtual data room. Harte Gold received four nonbinding expressions of interest but, by the bid deadline in September 2021, no binding offers had been received.

[10] In the aftermath of this unsuccessful process, Silver Lake through 833 acquired BNPP's debt and advanced a proposal to acquire Harte Gold's operations by way of a credit bid and to provide interim financing in connection with any proceedings under the CCAA. An initial order under the CCAA issued from this Court on December 7, 2021.

[11] In the midst of this process, Harte Gold received a competing proposal to make a credit bid from Harte Gold's second secured creditor, Appian. As a result of these developments, Harte Gold resolved to conduct a further (albeit brief, given the extensive process that had just been completed) sale and investment solicitation process, this time with a stalking horse bid. Further competing proposals took place between Silver Lake and Appian over who would be the stalking horse bidder. As a result of this process, the stalking horse bid of Silver Lake was significantly improved. Appian was then content to let Silver Lake's credit bid form the basis of the SISP. I approved this process in an order dated December 20, 2021.

[12] The Monitor provided a new solicitation notice to a total of 48 known and previously unknown potential bidders (other than Silver Lake and Appian). None of the potentially interested parties signed a confidentiality agreement or requested access to the data room.

[13] Only one competing bid was received – a further credit bid from Appian with improved conditions over those proposed by Silver Lake. Ultimately, all parties agreed that the responding commitment from Silver Lake which was at least as favourable to stakeholders as the Appian bid would be, in effect, the prevailing and winning bid.

[14] This took the form of a Second Amended and Restated Subscription Agreement (SARSA) with 833, the actual purchaser. The improved terms were: (a) the assumption by the purchaser of Harte Gold's office lease at 161 Bay Street in Toronto; (b)(i) the proviso that

the $10 million cap on payment of cure costs and pre-filing trade creditors does not apply to the assumption of post-filing trade creditor obligations; and (ii) all amounts owing by Harte Gold to any of the Appian parties are subject to a settlement agreement between 833 Ontario, Silver Lake and Appian and excluded from the prefiling cure costs; and, (c) the undertaking to pay an additional cash deposit of US$1,693,658.72, equivalent to approximately 5% of the Appian indebtedness.

[15] In broad brush terms, the Silver Lake/833 purchase is structured as a reverse vesting order. The transaction will involve:

- the cancellation of all Harte Gold shares and the issue of new shares to the purchaser
- payment by the purchaser of all secured debt
- payment by the purchaser of virtually all prefiling trade amounts (estimated at $7.5 million but with a $10 million cap) and postfiling trade amounts
- certain excluded contracts and liabilities being assigned to newly formed companies which will, ultimately, be put into bankruptcy. The excluded contacts and liabilities include a number of agreements involving ongoing or future services in respect of which there is little if any money currently owed. They also include a number of contracts with Appian entities and Orion, both of which support approval of the transaction The emplyment contracts of four terminated executives will, however, be excluded liabilities, which will nullify the value of any termination claims. Notably, excluded liabilities does not include regulatory or environmental liabilities to any government authority
- retaining on the payroll all but four employees (the four members of the executive team whose employment contracts will be terminated), and
- releases, including of Harte Gold and its directors and officers, the Monitor and its legal counsel and Silver Lake and its directors and officers.

There is no provision for any break fee. Nor is there a request for any form of sealing order.

[16] I should add that the value of what the purchaser is paying for Harte Gold's business, including the secured debt, the pre and postfiling trade amounts, interim financing and the like, totals well over $160 million.

Issues

[17] There are three principal issues:

(1) Whether the proposed transaction should be approved, including the reverse vesting order transaction structure and the form of the proposed release;

(2) Whether the stay should be extended; and,

(3) Whether the Monitor's mandate should be extended to included additional companies (newcos) being incorporated for the purposes of executing the proposed transaction.

Analysis

[18] Section 11 of the CCAA confers jurisdiction on the Court in the broadest of terms: "the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances".

[19] Section 36(1) of the CCAA provides:

> A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

[20] Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. These include:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
> (d) the extent to which the creditors were consulted;
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[21] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp,* 1991 CanLII 2727 (ONCA) for the approval of the sale of assets in an insolvency scenario:

> (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which offers have been obtained; and
>
> (d) whether there has been unfairness in the working out of the process:

see *Target Canada Co. (Re),* 2015 ONSC 1487, at paras. 14-17.

[22] The purchase transaction for which approval is being sought in this case does not provide for a sale of assets but, rather, provides for a "reverse vesting order" under which the purchaser will become the sole shareholder of Harte Gold and certain excluded assets, excluded contracts and excluded liabilities will be vested out to new companies incorporated for that purpose.

[23] In determining whether the transaction should be approved and the RVO granted, it is appropriate to consider:

(a) the statutory basis for a reverse vesting order and whether a reverse vesting order is appropriate in the circumstances; and,

(b) the factors outlined in s. 36(3) of the CCAA, making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction.

The Statutory Basis (Jurisdiction) for a Reverse Vesting Order

[24] The first reverse vesting sale transaction appears to have been approved by this Court in *Plasco Energy (Re),* (July 17, 2015), CV-15-10869-00CL in the handwritten endorsement of Justice Wilton-Siegel. The use of the reverse vesting order structure was not in dispute (indeed, in most of the cases, reported and otherwise, there has been no dispute). Wilton-Siegel J. found "the Court has authority under section 11 of the CCAA to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the CCAA insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise."

[25] A few dozen of these orders have been made since that time, mostly in a context where there was no opposition and no obvious or identified unfairness arising from the use of the RVO structure. The frequency of applications based on court approval of an RVO structure has increased significantly in the past few years.

[26] More recently, two reverse vesting orders have been approved in contested cases and been considered by appellate courts in Canada. I cite these two cases in particular because, being opposed and appealed, there tends to be a more in-depth analysis of the issues than is usually the case in the context of unopposed orders.

[27] In *Arrangement relatif à Nemaska Lithium Inc, 2020 QCCS 3218* at paras. 52 and 71 (leave to appeal to QCCA refused, *Arrangement relatif à Nemaska Lithium Inc,* 2020 QCCA 1488; leave to appeal to SCC refused, *Arrangement relatif à Nemaska Lithium Inc,* 2021 CarswellQue 4589), Justice Gouin of the Quebec Superior Court approved a reverse vesting transaction in the face of opposition by a creditor. Following a nine day hearing, Gouin J. reviewed the context of the transaction in detail and carefully analyzed the purpose and efficiency of the RVO in maintaining the going concern operations of the debtor companies. He also found that the approval of the RVO should be considered under s. 36 CCAA, subject to determining, for example:

- Whether sufficient efforts to get the best price have been made and whether the parties acted providently
- The efficacy and integrity of the process followed
- The interests of the parties, and
- Whether any unfairness resulted from the process.

Gouin J. considered that these criteria had been met and found the issuance of the RVO to be a valid exercise of his discretion, concluding that it would serve to maximize creditor recoveries while maintaining the debtor companies as a going concern and allowing an efficient transfer of the necessary permits, licences and authorizations to the purchaser.

[28] In denying leave to appeal, the Quebec Court of Appeal noted that the CCAA judge found that "the terms 'sell or otherwise dispose of assets outside the ordinary course of business' under subsection 36(1) of the CCAA should be broadly interpreted to allow a CCAA judge to grant innovative solutions such as RVOs on a case by case basis, in accordance with the wide discretionary powers afforded the supervising judge pursuant to section 11 CCAA, as recognized by the Supreme Court in *Callidus*": *Nemaska* QCCA at para 19.

[29] Similarly, in *Quest University Canada (Re)*, 2020 BCSC 1883, Justice Fitzpatrick of the British Columbia Supreme Court extensively reviewed the caselaw related to a CCAA court's authority to grant a reverse vesting order. Fitzpatrick J. found that the CCAA provided sufficient authority to grant the reverse vesting order being sought, which was consistent "with the remedial purposes of the CCAA" and consistent with the Supreme Court of Canada's ruling on CCAA jurisdiction in *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10. She found, therefore, that the issue in each case is not whether the court has sufficient jurisdiction but whether the relief is "appropriate" in the circumstances and stakeholders are treated as fairly and reasonably as the circumstances permit.

[30] In *Quest*, the debtor was in the process of putting forward a plan of compromise under the CCAA. It encountered resistance from an unsecured creditor whose vote could potentially have prevented the necessary creditor approval of the plan. The debtor revised its approach, deleting all conditions precedent requiring creditor and court approval and proceeded with a motion for the approval of an RVO to achieve what it was really after; that is, a sale of certain assets to a new owner with Quest continuing as a going concern academic institution.

[31] Fitzpatrick J. relied on *Callidus* to the effect that:

- Courts have long recognized that s. 11 of the CCAA signals legislative endorsement of the "broad reading of CCAA authority developed by the jurisprudence". On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only

by restrictions set out in the CCAA itself, and the requirement that the order made be "appropriate in the circumstances"

- the CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company"

- Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no CCAA provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the CCAA context

- The exercise of the discretion under s. 11 must further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence

- Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the CCAA. The supervising judge is best positioned to undertake this inquiry.

[32] The SCC in *Callidus* made an important point in the context of the limits of broad discretion; all discretion has limits and its exercise under s. 11 must accord with the objectives of the CCAA and other insolvency legislation in Canada. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. Further, the discretion under s. 11 must also be exercised in furtherance of three baseline considerations: (a) that the order sought is appropriate in the circumstances, and (b) that the applicant has been acting in good faith and (c) with due diligence.

[33] Ultimately, Fitzpatrick J. held that, in the complex and unique circumstances of that case, it was appropriate to exercise her discretion to allow the RVO structure. Quest sought this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. She considered the balance between the competing interests at play and concluded that the proposed transaction was unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group.

[34] The British Columbia Court of Appeal refused leave to appeal, concluding that the appeal was not "meritorious", also noting that reverse vesting orders had been granted in other contested proceedings, namely *Nemaska*. The BCCA also stated that the reverse vesting order granted by Fitzpatrick J. "reflect[ed] precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising CCAA proceedings": *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364.

[35] It is worthy of note that, in both *Nemaska* and *Quest*, the *bona fides* of the objectors were front and centre in the judicial analysis and, in both cases, the motivations and objectives of the objectors were found suspect and inadequate.

[36] The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor 'selling or otherwise disposing of assets outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities.

[37] I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.

[38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[39] With this in mind, I will turn to the enumerated s. 36(3) factors. To the extent there are RVO specific issues of concern apart from those enumerated in s. 36(3), I will also address those in the following section of my analysis.

The Section 36 Factors in the RVO Context

Reasonableness of the Process Leading to the Proposed Sale

[40] Between the pre-filing strategic review process and the court approved SISP, the business and assets of Harte Gold have been extensively marketed on a global basis. While the SISP was subject to variation from the format contemplated in my earlier order, the ability of the applicant, in conjunction with the Monitor, to vary the process was already established in that order. I find, in any event, that the adjustments made were appropriate in the circumstances, given there were no new bidders and the only offers came from the two competing secured creditors who had already been extensively involved in the process and whose status, interests and objectives were well known to the applicant and the Monitor.

[41] Prior to its appointment as Monitor, FTI was intimately involved at all stages of the strategic review process, including the implementation of the pre-filing marketing process and the negotiation of the original proposed subscription agreement that was executed prior to the commencement of the CCAA proceedings and subsequently replaced by the stalking horse bid and the SARSA.

[42] Following the commencement of the CCAA proceedings, the Monitor was involved in the negotiations that resulted in the execution of the stalking horse bid and the SARSA. In addition, the Monitor has overseen the implementation of the SISP and is satisfied that it was carried out in accordance with the SISP procedures, including the Monitor's consent to the amendment of the SISP procedures to cancel the auction as unnecessary and accept the SARSA as the best option available.

[43] The Monitor's opinion is that the process was reasonable, leading to the best outcome reasonably available in the circumstances.

[44] I am satisfied that the sales process was reasonable. The transaction now before the Court was the culmination of approximately seven months of extensive solicitation efforts on the part of both Harte Gold and FTI as part of the prefiling strategic process and the SISP.

[45] Harte Gold and FTI broadly canvassed the market by contacting 241 parties regarding their potential interest in acquiring Harte Gold's business and assets. This process ultimately culminated in initial competing bids from Silver Lake and Appian and, subsequently, additional competing bids from both entities as part of the SISP. The competitive tension in this process resulted in material improvements for stakeholders on both occasions.

Comparison with Sale in Bankruptcy

[46] The Monitor has considered whether the completion of the transaction contemplated by the SARSA would be more beneficial to creditors of the applicant and stakeholders generally than a sale or disposition of the business and assets of Harte Gold under a bankruptcy. The Monitor is unambiguously of the view that the SARSA transaction is the vastly more beneficial option.

[47] The SISP has shown that the SARSA represents the highest and best offer available for Harte Gold's business and assets. The Monitor is satisfied that the approval and completion of the transactions contemplated by the SARSA are in the best interests of the creditors of Harte Gold and its stakeholders generally.

[48] In addition to anything else, a bankruptcy would jeopardize ongoing operations and the permits and licences necessary to maintain such operations. A sale in bankruptcy would delay and, again, jeopardize the approval and closing of the proposed transaction as it would be necessary to first assign Harte Gold into bankruptcy or obtain a bankruptcy order, convene a meeting of creditors, appoint inspectors and obtain the approval of the inspectors for the transaction prior to seeking a more traditional AVO or an RVO. Additional costs would also be incurred in undertaking those steps. Silver Lake would have to continue to advance additional funds to finance ongoing operations during this extended period. There is no indication it would be willing to do so. In any event, requiring such a process would fundamentally change the value proposition the purchaser has relied upon and is willing to accept.

[49] Taking all this into account, a sale or disposition of the business and assets of the applicant in a bankruptcy would almost certainly result in a lower recovery for stakeholders and would not be more beneficial than closing the RVO transaction in the CCAA proceedings.

Consultation with Creditors

[50] Harte Gold's major creditors are Silver Lake, the Appian parties and BNPP. BNPP still has potential claims of approximately $28 million in respect of its hedge agreements. Silver Lake has claims of approximately $95 million in respect of the DIP facility and the first lien credit facilities it acquired from BNPP. The Appian parties have claims of approximately US$34 million in respect of amounts owing under the Appian facility and additional potential claims in respect of obligations under royalty and offtake agreements.

[51] BNPP was consulted throughout the strategic review process and has executed a support agreement with the purchaser. In addition, as previously described, the purchaser and the Appian Parties have been extensively involved in the SISP.

[52] While there is no evidence of consultations with unsecured creditors, I do not regard that as a material deficiency given that virtually all creditors, secured and unsecured alike, are going to be paid in full under the terms of the SARSA.

[53] The Monitor is of the view that the degree of creditor consultation has been appropriate in the circumstances. The Monitor does not consider that any material change in the outcome of efforts to sell the business and assets of the Applicant would have resulted from additional creditor consultation.

[54] I find, on the evidence, that the Monitor's assessment of this factor is well supported and correct.

The Effect of the Proposed Sale on Creditors and Other Interested Parties

[55] The proposed transaction affords the following benefits to the creditors and to stakeholders generally:

(a) the retention and payment in full of the claims of almost all creditors of Harte Gold;

(b) continued employment for all except four of the Harte Gold's employees;

(c) ongoing business opportunities for suppliers of goods and services to the Sugar Loaf Mine; and

(d) the continuation of the benefits of the existing Impact Benefits Agreement with Netmizaaggamig Nishnaabeg First Nation.

[56] The Monitor's opinion is that the effect of the proposed transaction is overwhelming positive for the vast majority of Harte Gold's creditors and other stakeholders apart (as discussed below) from the shareholders who have no reasonable economic interest at this point.

[57] Unlike *Quest*, this is not a case in which the RVO is being used to thwart creditor opposition. Indeed, the evidence is that almost all creditors, secured and unsecured, will be paid in full. To the extent there might be concerns that an RVO structure could be used to thwart creditor democracy and voting rights, those concerns are not present here. This is not a traditional "compromise" situation. It is hard to see how anything would change under a creditor class vote scenario because almost all of the creditors are being paid in full.

[58] The evidence is that there is no creditor being placed in a worse position, because of the use of an RVO transaction structure, than they would have been in under a more traditional asset sale and AVO structure (or, for that matter, under any plausible plan of compromise).

[59] Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.

[60] The evidence of Harte's financial problems and balance sheet insolvency, the unsuccessful prefiling strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.

[61] Under s. 186(1) of the OBCA, "reorganization" includes a court order made under the *Bankruptcy and Insolvency Act* or an order made under the *Companies Creditors Arrangement Act* approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.

[62] Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.

[63] Section 36(1) of the CCAA contemplates that despite any requirement for shareholder approval, the court may authorize a sale or disposition out of the ordinary course even if shareholder approval is not obtained. While, again, s. 36(1) is concerned with asset sales, the underlying logic of this provision applies to an assessment of cancellation of shares as well. In this case, there is no prospect of shareholder recovery on any realistic scenario.

[64] Equity claims are subject to special treatment under the CCAA. Section 6(8) prohibits court approval of a plan of compromise if any equity is to be paid before payment in full of all claims that are not equity claims. Section 22(1) provides that equity claimants are prohibited from voting on a plan unless the court orders otherwise. In short, shareholders have no economic interest in an insolvent enterprise: *Sino-Forest Corporation (Re)*, 2012 ONSC 4377, paras. 23-29. In circumstances like Harte Gold's, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders: *Stelco Inc. (Re),* 2006 CanLII 4500 at para. 11. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances.

[65] Taking all this into account, I find that the effect of the transaction on creditors and stakeholders is overwhelmingly positive and the best outcome reasonably available in the circumstances.

Fairness of Consideration

[66] Harte Gold's business and assets have been extensively marketed both prior to and during the CCAA proceedings. At the conclusion of the SISP, two bids were available, which were equivalent in all material respects and represented the highest and best offers received. As described earlier, all parties concurred that the Silver Lake-sponsored SARSA should be determined to be the successful bid. As also described above, the closing of the SARSA transaction will provide a vastly superior recovery for creditors than would a liquidation of Harte Gold's assets in bankruptcy. Based on the market, therefore, the consideration must be considered fair and reasonable.[1]

[67] A further concern with an RVO transaction structure such as this one could be whether, in effect, a purchaser making a credit bid might be getting something (i.e., the licences and permits) for nothing (i.e., the licences and permits were not subject to the creditor's security). It is possible that in a bankruptcy, for example, the licences and permits might have no value. The evidence here is that the purchaser is paying more than Harte Gold would be worth in a bankruptcy. The evidence is also that the purchaser is paying considerably more than just the value of the secured debt. This includes cure costs for third party trade creditors and DIP financing to keep the Mine operational – both payments being made to bring about the acquisition of the Mine as a going concern.

[68] It is true that no attempt has been made to put an independent value on the transfer of the licences and permits. However, any strategic buyer (Silver Lake is a strategic buyer and acquired the BNPP debt for this purpose) would need the licences and permits. The results of the prefiling strategic process and the SISP constitutes evidence that no one else among the universe of potential purchasers of an operating gold mine in Northern Ontario was willing to pay more than Silver Lake was willing to pay. In the circumstances, I do not think it could be seriously suggested that Silver Lake is getting "something" for "nothing".

[69] The Monitor is satisfied that the consideration is fair in the circumstances. I agree with the Monitor's assessment for the reasons outlined above.

Other Considerations Re Appropriateness of RVO vs. AVO

[70] As noted, Harte Gold has twelve material permits and licenses that are required to maintain its mining operations, as well as twenty-four active work permits and licenses that allow the performance of exploration work and many other forest resource licences and fire permits.

[71] The principal objective and benefit of employing the RVO approach in this case is the preservation of Harte Gold's many permits and licences necessary to conduct operations at the Sugar Loaf Mine. Under a traditional asset sale and AVO structure, the purchaser would

[1] The total value of the consideration is, perhaps coincidentally, also roughly equivalent to the value of Harte Gold's assets as shown in its audited financial statements in the last full year prior to the commencement of these proceedings.

have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This is a process that would necessarily involve risk, delay, and cost. The RVO sought in this case achieves the timely and efficient preservation of the necessary licences and permits necessary for the operations of the Mine.

[72] It is no secret that time is not on the side of a debtor company faced with Harte Gold's financial challenges. It is also relevant that the purchaser has agreed to provide DIP financing up to $10.8 million and substantial cure costs of pre and post filing trade obligations. This is all financing required to be able to continue operations as a going concern at the Mine post closing and to fund the CCAA process.

[73] The position of the purchaser is, not unreasonably, that it will not both continue to fund ongoing operations and the CCAA process and undertake a process of application to relevant government agencies for transfers of the Harte Gold licenses and permits (or, if necessary, for new ones) with all of the risks and uncertainties of possible adverse outcomes and indeterminant delays and costs associated with such a process. The RVO structure will enable the transaction to be completed efficiently and expeditiously, without exposure to these material risks, delays and costs.

[74] The Monitor supports the use of the RVO transaction structure. The Monitor has also pointed out that the applicant holds some 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The reverse vesting structure avoids the need to amend the various registrations to reflect a new owner, which would add more cost and delay if the proposed purchase transaction was to proceed through a traditional asset purchase and vesting order.

[75] In addition, Harte Gold has a significant number of contracts that will be retained under the SARSA. Again, the RVO transaction structure will avoid potentially significant delays and costs associated with having to seek consent to assignment from contract counter-parties or, if consents could not be obtained, orders assigning such contracts under s. 11.3 of the CCAA. The Monitor has also pointed out that under the SARSA and the RVO, the purchaser will be required to pay applicable cure costs in respect of the retained contracts which has been structured in substantially the same manner as contemplated by s. 11.3(4) of the CCAA if a contract was assigned by court order.

[76] For all these reasons, I accept that the proposed RVO transaction structure is necessary to achieve the clear benefits of the Silver Lake purchase and that it is appropriate to approve this transaction in the circumstances.

Conclusion on RVO/Section 36 Issues

[77] In all the circumstances, I find that the RVO sought in the circumstances of this case is in the interests of the creditors and stakeholders in general. I consider the RVO to be appropriate in the circumstances. The RVO will: provide for timely, efficient and impartial resolution of Harte Gold's insolvency; preserve and maximize the value of Harte Gold's

assets; ensure a fair and equitable treatment of the claims against Harte Gold; protect the public interest (in the sense of preserving employment for well over 250 employees as well as numerous third party suppliers and service providers and maintaining Harte Gold's commitments to the First Nations peoples of the area); and, balances the costs and benefits of Harte Gold's restructuring or liquidation.

Release

[78] Harte Gold seeks a Release which includes the present and former directors and officers of Harte Gold and the newcos, the Monitor and its legal counsel, and the purchaser and its directors, and officers. The proposed Release covers all present and future claims against the released parties based upon any fact, matter of occurrence in respect of the SARSA transactions or Harte Gold and its assets, business or affairs, except any claim for fraud or willful misconduct or any claim that is not permitted to be released under s. 5.1(2) of the CCAA.

[79] CCAA courts have frequently approved releases, both in the context of a plan and in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of the parties, directors, officers, monitors, counsel, employees, shareholders and advisors.

[80] I find that the requested Release is reasonable and appropriate in the circumstances. I base my decision on an assessment of following factors taken from *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54. As is often the case in the exercise of discretionary powers, it is not necessary for each of the factors to apply for the release to be approved.

[81] Whether the claims to be released are rationally connected to the purpose of the restructuring: The claims released are rationally connected to Harte Gold's restructuring. The Release will have the effect of diminishing claims against the released parties, which in turn will diminish indemnification claims by the released parties against the Administration Charge and the Directors' Charge. The result is a larger pool of cash available to satisfy creditor claims. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Company's restructuring.

[82] Whether the releasees contributed to the restructuring: The released parties made significant contributions to Harte Gold's restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of Harte Gold were instrumental in the conduct of the prefiling strategic process, the SISP and the continued operations of Harte Gold during the CCAA proceedings. With a proposed sale that will maintain Harte Gold as a going concern and permit most creditors to receive recovery in full, these CCAA proceedings have had what must be considered a "successful" outcome for the benefit of Harte Gold's stakeholders. The released parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of a release.

[83] Whether the Release is fair, reasonable and not overly broad: The Release is fair and reasonable. Harte Gold is unaware of any outstanding director claims or liabilities against its directors and officers. Similarly, Harte Gold is unaware of any claims against the advisors related to their provision of services to Harte Gold or to the purchaser relating to Harte Gold or these CCAA proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow. Regulatory or environmental liabilities owed to any government authority have not been disclaimed and the language of the Release was specifically negotiated with the Ministry of Northern Development and Mines to preserve those identified obligations. Further, the Release carves out and preserves claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced and will allow Harte Gold and the released parties to move forward with the transaction and to conclude these CCAA proceedings.

[84] Whether the restructuring could succeed without the Release: The Release is being sought, with the support of Silver Lake and the Appian parties (the most significant stakeholders in these CCAA proceedings) as it will enhance the certainty and finality of the transaction. Additionally, Harte Gold and the purchaser both take the position that the Release is an essential component to the transaction.

[85] Whether the Release benefits Harte Gold as well as the creditors generally: The Release benefits Harte Gold and its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification, thus minimizing further claims against the Administration Charge and the Directors' Charge.

[86] Creditors' knowledge of the nature and effect of the Release: All creditors on the service list were served with materials relating to this motion. Harte Gold also made additional efforts to serve all parties with excluded claims under the transaction. Additionally, the form of the Release was included in the draft approval and reverse vesting order that was included in the original Application Record in these CCAA proceedings. All of this provided stakeholders with ample notice and time to raise concerns with Harte Gold or the Monitor. No creditor (or any other stakeholder) has objected to the Release. A specific claims process for claims against the released parties in these circumstances would only result in additional costs and delay without any apparent corresponding benefit.

Extension of the Stay

[87] The current stay period expires on January 31, 2022. Under s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.

[88] Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the Silver Lake transaction, while at the same time preserving the status quo and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.

[89] No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. Harte Gold is acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Harte Gold's cash flow forecast, it is expected to have sufficient liquidity to continue its operations during the contemplated extension of the stay.

[90] For these reasons the stay is extended to March 29, 2022.

Expansion of Monitor's Powers

[91] The CCAA provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the CCAA provides that the Monitor can "carry out any other functions in relation to the [debtor] company that the court may direct". In addition, of course, s. 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.

[92] The order for the Monitor's expanded powers is intended to provide the Monitor with the power, effective upon the issuance of the approval and reverse vesting order, to administer the affairs of the newcos (which is necessary to complete the transaction), along with powers necessary to wind down these CCAA proceedings and to put the newcos into bankruptcy following the close of the transaction. No creditor is prejudiced by the expansion of the Monitor's powers to facilitate the transaction and the wind-down of the CCAA proceedings. On the contrary, the granting of such powers is necessary to achieve the benefits of the transaction to stakeholders which have been described above.

[93] I approve the grant of the requested powers to the Monitor.

Conclusion

[94] For all these reasons, the motion for an order approving the Silver Lake transaction, including the RVO structure, is granted. The additional requests for orders extending the stay and expanding the Monitor's powers are also granted.

Penny J.

Date: 2022-02-04

10

CITATION: McEwan Enterprises Inc., 2021 ONSC 6878
COURT FILE NO.: CV-21-00669445-00CL
DATE: 2021-11-01

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MCEWAN ENTERPRISES INC.

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Robert J. Chadwick, Caroline Descours, Trish Barrett and Peter Ruby,* for the Applicant

Sean Zweig and Joshua Foster, for the Monitor

Virginie Gauthier, for The Cadillac Fairview Corporation Limited

Catherine Francis and Kenneth L. Kallish, Counsel for Royal Bank of Canada

Steven L. Graff and Jeremy Nemers, for First Capital Holdings (Ontario) Corporation

David Ward, for Sayan Navaratnam

HEARD: October 15, 2021

RELEASED: November 1, 2021

ENDORSEMENT

INTRODUCTION

[1] McEwan Enterprises Inc. ("MEI") brings this motion for an order (the "Approval and Vesting Order"), pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA"), among other things:

(a) approving the purchase agreement dated September 27, 2021 (the "Purchase Agreement") between MEI and 2864785 Ontario Corp. (the "Purchaser"), a newly formed company owned by Mark McEwan and Fairfax Financial Holdings Limited ("Fairfax"), and the sale and transfer of substantially all of the assets and liabilities of the McEwan Group, with the Exception of the excluded locations (as defined below), to the Purchaser (the "Transaction");

(b) approving the transaction deposit under the Purchase Agreement (the "Transaction Deposit") up to the maximum amount of $2.25 million, and authorizing MEI to obtain the Transaction Deposit from the Purchaser in order to finance MEI's working capital requirements, other general corporate purposes and capital expenditures, and the costs of these CCAA proceedings, in accordance with the terms of the Purchase Agreement;

(c) ancillary relief required to complete the Purchase Agreement; and

(d) extending the stay proceedings granted pursuant to the Initial Order (the "Stay of Proceedings") to December 17, 2021.

[2] MEI commenced these proceedings on September 28, 2021.

[3] From the standpoint of MEI, the principal objectives of these CCAA proceedings are to ensure the ongoing operations of MEI for the benefit of its stakeholders and to effectuate a restructuring of MEI and its full-service restaurant, catering, gourmet grocery and events company (the "Business") in order to provide for a right-sized, sustainable business going forward. As part of its restructuring efforts, MEI indicated at the outset of the proceedings that it intends to seek to complete the sale and transfer of the business pursuant to the proposed Transaction.

[4] Section 36 of the CCAA imposes certain restrictions on disposition of business assets. It provides that a debtor company may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by court order.

ISSUES

[5] The issues for consideration on this motion are whether the court should:

(a) approve the Transaction;

(b) grant certain related relief pursuant to the proposed Approval and Vesting Order; and

(c) approve the Transaction Deposit and grant the Transaction Deposit Charge.

[6] Sections 36(3) and (4) read as follows:

s. 36 (3)

Factors to be considered. – In deciding whether to grant the authorization, the court is to consider, among other things,

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

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

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

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

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

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

s. 36 (4)

Additional Factors – Related Persons - If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

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

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

FACTS

[7] In determining whether to approve the Transaction, it is necessary to review the facts in detail.

[8] MEI is a private company incorporated under the laws of Ontario and is headquartered in Toronto. MEI is owned by Fairfax, through one of its subsidiaries, which holds a 55% equity interest in MEI, and by Mr. McEwan, through McEwan Holdings Co. Inc., which owns a 45% equity interest in MEI.

[9] Commencing in the summer of 2021, MEI engaged legal counsel to assist it in reviewing and assessing its various potential options and alternatives, in light of financial difficulties facing MEI.

[10] MEI contends that it made extensive efforts to seek consensual arrangements with its landlords in respect of its leases, to improve lease terms and reduce those lease obligations that are unsustainable and/or to exit certain locations, but is been unable to achieve a comprehensive out-of-court resolution that would result in the long-term viability of MEI in its Business.

[11] MEI then determined that the best available alternative that could be implemented that would preserve the value of the Business for the benefit of MEI's many stakeholders, would be a sale of substantially all the assets of the Business to MEI's current shareholders pursuant to the proposed Transaction, and the continuation of the Business with a reduced number of MEI locations to result in a rightsizing of the Business on a sustainable basis going forward.

[12] On September 27, 2021, the applicant entered into the Purchase Agreement, pursuant to which, subject to court approval, the parties would complete the Transaction.

[13] The proposed Transaction contemplates the transfer of substantially all of the assets and the assumption of substantially all of the liabilities of MEI, with the exception of locations not being assumed by the purchaser as part of the Transaction (the "Excluded Locations"), and an offer of employment to all of MEI's current employees (including those employees at the Excluded Locations).

[14] MEI believes that there would be a significant benefit to its stakeholders from the completion of the proposed Transaction as, without the support of Mr. McEwan, there is a significant risk that many parties could be negatively impacted both on a financial and overall business basis.

[15] MEI points out that the implementation of the Transaction will result in a sustainable business going forward for the benefit of MEI's many stakeholders, including its 268 employees whose jobs will be preserved, its secured creditors whose obligations will be unaffected and assumed by the Purchaser, and its many suppliers and service providers whose contracts and obligations will also all be assumed.

[16] As part of MEI's process to address its financial challenges, MEI stated that it reviewed in detail potential options and alternatives, duly considered a potential third-party sales process and determined that the Transaction is the best result for all parties. MEI believes that a third-party sales process poses potential risks to the business, and what ultimately not provide a better result that would benefit MEI's stakeholders. At the same time, the proposed Transaction leaves unaffected all claims against MEI and otherwise provides for the highest potential recovery in respect of the landlord preferred claim (as defined below).

[17] The relief requested by MEI is opposed by First Capital Holdings (Ontario) Corporation (the "Y & B Landlord"). The Y & B Landlord objects to the proposed Transaction on the basis that it does not comply with the provisions of s. 36(4) of the CCAA.

[18] MEI takes the position that it has been unable to achieve a consensual arrangement with the Y & B Landlord. With no consensual arrangement, and no possibility of the CCAA plan of arrangement (as the sole opposing creditor would have a veto), MEI contends there are only three ways to complete a going concern value maximizing transaction in the circumstances.

[19] The three alternatives are set out at paragraph 9 of the MEI Factum.

	Options	**Implications**
1.	Completion of the proposed Transaction in a CCAA proceeding.	• All creditor claims (except the Landlord Preferred Claim) are assumed in full at 100% of the amounts owed to such creditors. • Landlord Preferred Claims receive a cash payment in the maximum amount of such claim as calculated under the *Bankruptcy and Insolvency Act* (the "BIA") and is paid in full at 100% of such claim. • The proposed Transaction is superior in all respects including certainty and cost to compete, timing, continued operation of most locations, continued employment for all employees, continuation of experienced management and leadership with the Business, stability and continuation of long-standing stakeholder relationships, and strong shareholder support with financial ability to fund the Business going forward through the continued COVID-19 related challenges.
2.	A receivership and a current or subsequent no asset or bankruptcy process to complete the proposed Transaction.	• Same treatment as above for all creditors. • Bankruptcy proceeding statutorily limits an affected Landlord's claim to a preferred landlord claim pursuant to the BIA. Such landlord can recover no further amounts beyond its BIA preferred landlord claim. • Potential increased risk to the Business given additional time to complete, more costs for additional process, and potential impact on the stability of the Business and stakeholders support in the interim. • Same treatment for all parties and same result achievable as pursuant to #1 above, with no additional benefit to any stakeholders.
3.	A sale to a third party (by the Company or by a Receiver).	• Higher costs to complete and may result in discounted proceeds. • Risk that creditors do not receive payment in full, and creates a pool of unsecured claims (in respect of any excluded/non-assumed employee claims, trade obligations, additional lease claims, and outstanding debt obligations) to share in any

		remaining proceeds following payment of secured claims in priority. • All secured claims, interim financing to fund the Business until closing and professional fees incurred as part of the proceedings and transaction would be satisfied in priority to any unsecured pool. • Once assets are sold (or before), there would be a bankruptcy proceeding as unsecured creditors or the Company would not allow landlord claims to dilute the recovery to unsecured creditors where in a bankruptcy proceeding claims are limited to a preferred landlord claim. • Best possible result for an affected landlord is receiving the maximum amount of its BIA preferred landlord claim. • Many additional risks and uncertainty, including additional time and cost to complete, additional priority funding of operations, potential job losses, closure of additional stores, loss of founder as part of the go-forward business, and potentially less support of management, employees, landlords and trade creditors. • No third party can successfully acquire the Business without the termination of certain leases and amendments to other leases.

[20] MEI contends that under all circumstances, the maximum recovery in respect of an affected Landlord's claim is the maximum amount of a preferred landlord claim calculated under *Bankruptcy and Insolvency Act* ("BIA"), and the proposed Transaction guarantees the payment of such maximum claim amount to the Y & B Landlord.

[21] MEI also points out that the existing ownership group is willing to support the future funding requirements of the restructured company. Further, the Transaction is not subject to any financing due diligence conditions, has the support of the Cadillac Fairview Entities and Royal Bank of Canada, and can be completed efficiently to protect the Business for the benefit of MEI's stakeholders.

[22] Mr. McEwan swore affidavits in these proceedings on September 27, 2001 (the "First McEwan Affidavit") and October 1, 2021 (the "Second McEwan Affidavit").

[23] Of note in the First McEwan Affidavit are the following paragraphs:

> [5] The continuation of the McEwan Group under the ownership of its current shareholders is a critical aspect of any proposed restructuring. My continued involvement as chef and operator of the McEwan Locations (as defined below), which I believe to be fundamental to the value and success of the Busines going forward, is premised on a continuation of my partnership with Fairfax as co-owners of the McEwan Group.
>
> …
>
> [107] The aggregate consideration for the Purchased Assets to the Transaction is: (a) the assumption of the Assumed Obligations (as defined in the Purchase Agreement) by the Purchaser and/or, as applicable, one or more designees of the Purchaser, which as at the date hereof are estimated to be approximately $11 million (calculated based on amounts outstanding as at August 31, 2021, and taking into account additional amounts expected to be incurred and additional funding requirements anticipated until the closing of the Transaction, based on a closing date of October 3, 2021), and (b) a cash payment in an amount equal to the sum of (i) $520,000 (the "Base Purchase Price"), and (ii) an amount equal to the Cure Costs (as defined in the Purchase Agreement).
>
> [108] I am advised by counsel to the Company that the Base Purchase Price was calculated based on an amount equal to the damages in respect of the lease resulting to the McEwan Yonge & Bloor Location as determined pursuant to the formula set forth in section 136(1)(f) of the *Bankruptcy and Insolvency Act* (the "BIA"). As discussed above, the Company and the Cadillac Fairview Entities are continuing their ongoing discussions to reach mutually satisfactory arrangements in respect of the Cadillac Fairview Leases, and thus there is no claim amount included in respect of Fabbrica Don Mills Excluded Location as part of the purchase price under the proposed Transaction.
>
> …
>
> [111] The Company did not complete a third-party sale process to canvass potential interest from third parties in respect of acquiring the Company or the Business, and believes there is no prejudice to stakeholders from not having completed a third-party sale process based on all of the current circumstances. As discussed above, the Purchaser is acquiring and assuming substantially all of the assets and liabilities of the Company, with the exception of the Excluded Locations, and the Base Purchase Price provides for a cash amount in respect of the non-terminated Excluded Location based on the formula provided under the BIA.
>
> [113] As noted above, my continued involvement as chef and operator of the Business, which I believe to be fundamental to the success of the Business going forward, is premised on a continuation of my partnership with Fairfax as co-owners

> of the McEwan Group. I do not anticipate that I would remain with the Business if it were to be sold to a third party purchaser. The Company and its shareholders do not believe that a third party purchaser would be in a position to acquire the assets of the Business, without my continued involvement in the Business, for a similar or higher price.

[24] Of note in the Second McEwan Affidavit are the following paragraphs:

> [26] The Company did not complete a third-party sale process to canvass potential interest from third parties in respect of acquiring the Company or the Business, and believes there is no prejudice to stakeholders from not having completed a third-party sale process based on all of the current circumstances, including the following factors discussed below.
>
> [27] I believe that my continued involvement in the Business is fundamental to the value and success of the Business going forward. I founded the McEwan Group many years ago, and my name, my personal involvement in the Business and my creations as part of the McEwan Restaurants and catering busines are key aspects of the Business. In addition, my personal brand and television projects have become inextricably linked with the brand of the Business.
>
> [28] Accordingly, the Company and its shareholders do not believe that a third-party purchaser would be in a position to acquire the assets of the Business, without my continued involvement in the Business, for a similar or higher price.
>
> …
>
> [36] As a result, the Company determined, in consultation with its counsel, that a third-party sales process was not necessary in the circumstances and could have a negative effect on the ongoing Business of the Company.
>
> [Emphasis Added]

[25] The Monitor has filed a Prefiling Report, a First and a Second Report.

[26] The First Report references the proposed Transaction but does not articulate the Monitor's views on the merits of the proposed Transaction.

[27] The Second Report of the Monitor, filed the day before this hearing, comments on the proposed Transaction.

[28] The Monitor notes that in June 2021, MEI engaged legal counsel to assist it in reviewing and assessing its various strategic alternatives including exploring whether consensual arrangements with its landlords could be reached to improve lease terms, reduce lease obligations and/or exit certain unprofitable locations. The Monitor states that with respect to discussions and negotiations with landlords, that its comments are based on its understanding of the situation.

[29] The Monitor further comments, that after extensive review and consideration of its circumstances and available alternative, MEI ultimately determined to pursue the proposed Transaction. MEI and the Purchaser entered into the Purchase Agreement on September 27, 2021 and MEI commenced the CCAA proceedings on September 28, 2021.

[30] Although the Monitor is now familiar with the terms of the proposed Transaction, there is no indication that the Monitor was involved in any type of analysis at the time that the proposed Transaction was entered into.

[31] At paragraph 3.8 of the Second Report, the Monitor notes that subsequent to the comeback hearing held on October 7, 2021, the Monitor had separate discussions with counsel to MEI, and with the financial advisor and counsel to the Y & B Landlord. The Monitor relates that these conversations did not result in a resolution of the issues between the parties.

[32] At paragraph 3.9 of the Second Report, the Monitor references that the Y & B Landlord through its counsel, provided the Monitor with an email on the evening of October 11, 2021 which gave details as to a Purchase Agreement executed by the Yonge & Bloor Landlord (the "Y & B Landlord's Purchase Agreement") in substantially the same form as the proposed Purchase Agreement, subject to certain revisions.

[33] In paragraph 3.11, the Monitor outlines key differences between the Purchase Agreement and the Y & B Landlord's Purchase Agreement. These key differences are as follows:

(i) the addition of the Yonge and Bloor lease as a go forward operating location would appear to make the Yonge and Bloor Landlord's Purchase Agreement, on its face, financially superior;

(ii) the potential for employee severance and termination claims to arise as a result of Mr. McEwan's potentially other employees not accepting new employment offers from the Yonge and Bloor Landlord, which may be material; and

(iii) the inclusion of a due diligence period.

[34] At paragraph 3.12, the Monitor provides its views that the due diligence requirement introduces a higher level of execution risk and, given the complexities of MEI's business, could very well require more than 14 days to complete. These uncertainties include the prospect the Y & B Landlord would not be able to reach satisfactory arrangements in respect of the Cadillac Fairview leases, or that such arrangement could require significant time to settle. In addition, the Monitor notes that Mr. McEwan and possibly other key personnel are not prepared to accept new employment offers from the Y & B Landlord, and that the resulting disruption to the Business either prevents the Y & B Landlord from waiving the due diligence condition precedent, or requires extended time to allow the Y & B Landlord to identify and hire replacement personnel. Further, if Mr. McEwan and/or other key personnel choose not to accept new employment offers from the Y & B Landlord, that could create material employment related unsecured claims against MEI. The Monitor also notes that with respect to the Cadillac Fairview Entities, if the proposed Transaction

is not approved, third parties considering this opportunity should not expect to receive the same terms that have been agreed to with MEI.

[35] The Monitor also commented on the affected landlord claim. The Monitor notes that the applicant is close to finalizing its arrangements with the Cadillac Fairview Entities, including a settlement and termination payment in connection with Fabbrica at Don Mills (an Excluded Location). Accordingly, the only outstanding obligations to be excluded from the proposed Transaction are the obligations owing and potential claims in respect of the Yonge and Bloor Location [the "Affected Landlord Claim"].

[36] The Monitor includes an illustrative bankruptcy liquidation analysis and a comparison with the proposed Transaction and concludes that the proposed Transaction would provide a favourable outcome. The Monitor's comments with respect to the analysis are set out at paragraph 3.19 and 3.20 as follows.

> *Illustrative Bankruptcy Liquidation Analysis*
>
> 3.19 Having regard to claims that could arise in a bankruptcy liquidation, such as secured and unsecured creditor claims, employee termination and severance claims, lease termination/disclaimer claims and other damages claims for non-performance, the Monitor's Illustrative Liquidation and Valuation Range Analysis projects that in a bankruptcy liquidation scenario, creditor recoveries are estimated to be (all figures approximate):
>
> (i) full payment (100% recovery) in respect of RBC's secured claim of $2.2 million;
>
> (ii) full payment (100% recovery) in respect of the Cadillac Fairview Entities' secured claim, including: (a) a fixtures loan of $198,000; and (b) amounts totalling $1.1 million in respect of the Cadillac Fairview Leases (calculated pursuant to subsection 136(1)(f) of the BIA);
>
> (iii) <u>full payment (100% recovery) in respect of the remaining two lease claims totalling $540,000 (calculated pursuant to subsection 136(1)(f) of the BIA); and</u>
>
> (iv) <u>a recovery to remaining creditors in the range of approximately 1.8% to 26%</u> in respect of unsecured claims estimated to be $11 million in aggregate.
>
> 3.20 In comparison to the above bankruptcy liquidation analysis, the Monitor is of the view that the Proposed Transaction would provide a favourable outcome, for the following reasons:

(i) it is beneficial to MEI's secured and unsecured creditors as it provides for either a full settlement or the full assumption of the obligations owing, with the exception of the Affected Landlord Claim, and avoids the unfortunate termination and dislocation of MEI's 268 employees, which may result in unpaid wages and vacation pay as well as severance and termination claims estimated to be in excess of $4 million, termination of the Assumed Contracts, and termination of MEI's existing customer and trade relationships;

(ii) it is beneficial to the landlord group as a whole as it: (a) provides for the continued operation of six of MEI's eight locations;[1] and (b) provides for a cash payment of approximately $520,000 to the Yonge & Bloor Landlord in respect of the Affected Landlord Claim, which is estimated to be the maximum amount that it would otherwise receive in a bankruptcy; and

(iii) the Proposed Transaction is consistent with the rehabilitative intent of the CCAA by preserving the majority of the business to avoid liquidation.

[Emphasis Added]

[37] At s. 3.21 of the Report, the Monitor states that neither MEI nor the Monitor has completed any formal or informal third-party sale process. The Monitor references comments of Mr. McEwan in the Second McEwan Affidavit and specifically that MEI and its shareholders do not believe that a third party purchaser would be in a position to acquire MEI's Business absent Mr. McEwan's continued involvement (which is contingent upon the continuation of his partnership with Fairfax as co-owners of the Business) for a purchase price that is equal or superior to that provided under the proposed Transaction.

[38] The Monitor goes on to note that the Y & B Landlord Purchase Agreement, on its face, would appear to be financially superior to the proposed Transaction given that includes the assumption of an additional location resulting in fewer claims and accordingly, higher available recoveries. These potential benefits, according to the Monitor, are tempered by the additional risk factors set out in its Report.

[39] The Landlord also points out the following in s. 3.24(ii) as follows:

(ii) as there is no prescribed formula for determining a landlord claim in the CCAA, the claims that could be submitted by landlords within CCAA proceedings

[1] There is no lease arrangement or rent charged at the Diwan location, which is a restaurant located within the Aga Khan Museum in Toronto.

> in respect of one or more disclaimed lease may also range, but in most circumstances, it is expected that the submitted claim would be significantly larger than those in a bankruptcy. By applying such a higher claim amount (as compared to a bankruptcy claim) to the higher range of potential recoveries, there could be certain illustrative sale transaction scenarios where the recovery on the Affected Landlord Claim is greater than $520,000. Conversely in the lower range of potential recoveries, even with a higher claim amount, the recovery on the Affected Landlord Claim is less than $520,000. However, as described in the Second McEwan Affidavit, the Monitor understands that the Applicant has considered and is prepared to advance the Proposed Transaction through a concurrent receivership and bankruptcy process, which in the Applicant's view, effectively limits the Yonge & Bloor Landlord's recovery in any scenario to $520,000.
>
> [Emphasis Added]

[40] At s. 3.30 of its Report, the Monitor undertakes a review and assessment of the proposed Transaction and makes specific reference to be considered by the Court in s. 36(3) of the CCAA, specifically,

(i) *36(3)(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances*

(ii) *36(3)(b) whether the monitor approved the process leading to the proposed sale or disposition*

(iii) *36(3)(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy*

(iv) *36(3)(d) the extent to which the creditors were consulted*

(v) *36(3)(e) the effects of the proposed sale or disposition on the creditors and other interested parties*

(vi) *36(3)(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value*

1.2 As described in subsection 36(4) of the CCAA, if a proposed sale or disposition is to a related party, the court may, after considering the factors referred to in subsection 36(3) of the CCAA grant the authorization only if it is satisfied that subsections 36(4)(a) and 36(4)(b) of the CCAA have been satisfied.

1.3 The Monitor regards the provisions within subsection 36(4) of the CCAA, in light of the dispute before the Court between the parties, as a significant threshold issue to the Proposed Transaction's approval. Further, the Monitor views the determination as to whether the circumstances of this case and the Applicant's efforts to ensure that the proposed related

party transaction is in the best interests of MEI's stakeholders satisfy the requirement of subsection 36(4) of the CCAA as a question to be determined by the Court.

[41] At s. 3.32 of its Report, the Monitor outlined certain relevant considerations in respect of subsections 36(4)(a) and 36(4)(b) of the CCAA:

> *36(4)(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company*
>
> (i) no third-party sales process or other market test was conducted in or before these CCAA Proceedings;
>
> (ii) the Monitor understands the Yonge & Bloor Landlord's position to be that the Proposed Transaction cannot be approved absent a third-party sale process;
>
> (iii) the Monitor is aware that Canadian Courts have previously held that subsection 36(4)(a) of the CCAA may be satisfied, in appropriate circumstances, without a formal sale process having been conducted;
>
> (iv) as described in the Second McEwan Affidavit:
>
> (a) prior to entering into the Purchase Agreement the Applicant, in consultation with its legal advisors, considered, among other things, the alternatives available to MEI, the viability and value of MEI's business absent the involvement of Mr. McEwan, Fairfax and MEI's management and the likelihood that an independent third-party purchaser would propose a superior transaction; and
>
> (b) the Applicant has concluded that the Proposed Transaction is in the best interests of MEI and its stakeholders. More to the point, the Applicant has also concluded that the Purchaser is the only party likely to complete a going-concern transaction that would see substantially all of MEI's assets and liabilities acquired and assumed.
>
> *36(4)(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.*
>
> (vi) in the absence of a third-party sale process being conducted, potential enterprise values, transaction proceeds and ultimate creditor recoveries are necessarily theoretical, uncertain and difficult to predict.
>
> (vii) in the circumstances and under the process conducted by the Applicant, the Monitor regards the consideration to be received under the Proposed Transaction as fair and reasonable and offers a significant recovery to nearly all creditors. Moreover, it would appear to be the highest consideration that could be obtained without exposing MEI's busines to greater transaction risk, including the potential risks posed by diligence periods to conduct a sales process, and additional costs in the CCAA Proceedings. As discussed

previously, the Proposed Transaction currently results in substantially all of MEI's creditors being unaffected and the Affected Landlord Claim receiving the amount it would be entitled to if the Yonge & Bloor Lease were to be disclaimed in a bankruptcy; and

(viii) on its face (and if executable) the Yonge & Bloor Landlord's Purchase Agreement is financially superior to the Proposed Transaction. However, the Monitor notes that the Applicant's secured creditors view the Proposed Transaction as providing more certainty and less risk for the go forward business.

ANALYSIS

[42] MEI submits that it is well-established that the court has the jurisdiction to approve the sale of the assets of a debtor company in the CCAA proceeding in the absence of a plan of arrangement where such sale is in the best interests of stakeholders generally and that the sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA. (See: *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 40 – 43, 45 ("Callidus").

[43] The foregoing principle was recently confirmed by the British Columbia Court of Appeal in *Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd.*, 2021 BCCA 31.

[44] I accept this submission.

[45] However, the facts in this case give rise to a number of questions or concerns:

1. The equity interests of MPI will be the same as those of the proposed new entity.

2. Mr. McEwan has stated that he has no interest in being involved in an entity which is a different structure than MEI.

3. The monitor was not involved in the review process that led to the proposed Transaction.

4. The proposed Transaction results in the assumption of significant liabilities of MEI. MEI has reached an accommodation with Cadillac Fairview with respect to its obligations owing under a number of leases. The Y & B Landlord is the only significant party who has not reached a settlement or accommodation with MEI.

5. The Monitor has filed a report which states that the proposed Transaction would be more beneficial to the creditors than a sale or disposition under a bankruptcy. However, the report also sets out that the treatment being provided to the Y & B Landlord is the same as it would receive in a receivership and bankruptcy scenario. The receivership and bankruptcy scenario is referenced in the

> liquidation analysis and in the McEwan Affidavits and is summarized at paragraph 9 of the Factum submitted by MEI.

[46] MEI submits that the proposed Transaction satisfies the factors under sections 36(3) and (4) and is in the best interests of stakeholders.

[47] It is conceded that Mr. McEwan is a related person within the meaning of s. 36(5). Thus s. 36(4) is engaged.

[48] Having considered the factors set out in s. 36(3), it is arguable that the proposed Transaction could be approved.

[49] The Monitor has issued a report which summarizes the impact on creditors. The creditors have been consulted. The effect of the proposed Transaction on creditors suggests that, in the circumstances, the consideration to be received for the assets could be found to be reasonable and fair.

[50] However, I have not been persuaded that factors set out in s. 36(4) have been satisfied.

[51] It is important to note that authorization for the sale can be given **only** if the court finds that the s. 36(4) factors have been satisfied in that:

> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
>
> (b) the consideration to be received is **superior** to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.
>
> [Emphasis Added]

[52] In this case, MEI determined, prior to the commencement of the CCAA proceeding that there was no point in embarking on a sales process. The Monitor was not part of the decision making that lead to this determination. Although MEI may have valid reasons to support its decision, that is not the requirement set out in s. 36(4)(a). The statute references efforts being made to sell or otherwise dispose of the assets to persons who are not related the Company. In this case, no efforts were made.

[53] Turning now to s. 36(4)(b), the consideration to be received in the proposed Transaction is set out at paragraph 9 of MEI's factum, which is set out at paragraph 19 of these reasons.

[54] The question is whether the consideration is superior to the consideration that would be received under any offer made in accordance with the process leading to the proposed sale.

[55] In this case, two alternatives to the proposed Transaction are referenced.

[56] The first is an alternative proposal put forth by MEI of a receivership and a concurrent or subsequent no asset bankruptcy process to complete the proposed Transaction.

[57] This alternative provides for the same treatment for all creditors in the proposed Transaction. The Y & B Landlord would receive the same consideration in the bankruptcy ($520,000) as it would receive in the proposed Transaction where it receives $520,000 (the Base Purchase Price). No creditor receives superior consideration.

[58] Under the Y and B Landlord's Purchase Agreement, the details are set out in the Second Report of the Monitor at section 3.9. The Monitor's views and concerns are set out at s. 3.12. The consideration to be received by creditors may be superior but, in view of the concerns raised by the Monitor, it is too speculative to be considered in the analysis.

[59] Accordingly, the merits of the proposed Transaction have to be considered in comparison to the alternative of the receivership and concurrent bankruptcy referenced by the Monitor at section 3.24 of its Second Report.

[60] The two alternatives provide for the same treatment for creditors. The result of the foregoing analysis is clear. The consideration referenced in the proposed Transaction is not superior to the receivership/bankruptcy alternative. The s. 36(4) requirements have not been satisfied and the proposed Transaction cannot be approved.

[61] MEI had a choice. MEI could have proposed superior consideration to the Y & B Landlord, but they elected not to do so.

[62] The Monitor raised concerns with respect to the fact that no efforts were made to sell or otherwise dispose of the assets to persons who are not related to MEI. The Monitor also made reference in its Second Report to a proposal put forth by the Y & B Landlord which would result in an alternate structure and would possibly provide a greater return to the creditors of MEI.

[63] MEI responds that it is simply not practical to consider any sale or disposition to a third party as Mr. McEwan is not interested in pursuing or continuing in this type of a business operation. This explanation falls short of establishing that good faith efforts were made to sell or otherwise dispose of assets to persons who are not related to MEI.

[64] More importantly, there is no evidence that has been provided by either MEI or the Monitor that would allow me to arrive at a conclusion that the consideration to be received is superior to the consideration to be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

[65] The cases referenced by MEI are all fact specific and as such, are of no real assistance.

DISPOSITION

[66] The facts of this case are such that the mandatory requirements of s. 36(4) have not been established and the proposed Transaction cannot be approved.

[67] In the event that the alternative transaction proceeds and does not fulfil the expectations of the Y & B Landlord, that is a risk that the Y & B Landlord must assume. It is the sole party that is objecting to the proposed Transaction and if the return that the Y & B Landlord receives is less than the $520,000 promised under the proposed Transaction, it is only just that they suffer the adverse consequences of their actions. The motives of the Y & B Landlord in refusing to accept the proposed Transaction may be questioned, but that is not a question that issues is not before me today.

[68] The motion to approve the proposed Transaction is accordingly dismissed.

[69] Issues with respect to any extension of the Stay Period will be addressed at a hearing scheduled for 3:00 p.m. today.

_____

Chief Justice G.B. Morawetz

Date: November 1, 2021

11

Court of Queen's Bench of Alberta

Citation: Bellatrix Exploration Ltd (Re), 2020 ABQB 332

Date: 20200521
Docket: 1901 13767
Registry: Calgary

In the Matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c.C-36, as amended

And In the Matter of the Plan of Compromise or Arrangement of Bellatrix Exploration Ltd.

Reasons for Judgment of the Honourable Madam Justice M.H. Hollins

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[1] Bellatrix Exploration Ltd. is an oil and gas company involved in proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c.C-36 (*CCAA*). It has been soliciting offers to purchase its assets or shares over approximately the last six months. On Thursday, May 7, 2020, I heard Bellatrix' application for an Order approving the Asset Purchase Agreement it signed with Winslow Resources Inc. on April 22, 2020. Winslow's offer was backed by its parent company, Return Energy Inc. doing business as Spartan Delta Corp. For consistency with other material filed in this Action, that purchaser is referred to herein as Spartan.

[2] The Spartan Asset Purchase Agreement, if approved, would produce sufficient funds to pay the *CCAA* priority charges and a substantial portion of the first lienholder notes, as well as providing for the assumption of other contractual and statutory obligations. It would not be sufficient to pay the entire first lienholder debt and would leave nothing for the second or third lien note holders.

[3] The application to approve was opposed by a group of creditors holding the majority of the second lien notes of Bellatrix, namely FS/EIG Advisor LLC and FS/KKR Advisor LC (EIG/KKR), as well as the remaining minority of second lien noteholders, separately represented.

[4] EIG/KKR cross-applied for an adjournment of Bellatrix' application for a period of just less than 3 weeks in order to put an alternative, and in their opinion, better offer before the Court. The adjournment application was opposed by all the parties supporting the Spartan bid, namely Bellatrix, the Monitor PricewaterhouseCoopers Inc. (PWC), the first lien noteholders and their lenders, the prospective purchaser and by numerous other parties with which Bellatrix does business.

[5] I dismissed EIG/KKR's application for the adjournment and approved the Spartan Asset Purchase Agreement. I provided brief oral reasons on May 8, 2020 with these written reasons to follow.

Background

[6] Bellatrix Exploration Ltd. is a Calgary-based oil and gas company with assets in Saskatchewan, Alberta and British Columbia. Its President/Chief Executive Officer deposed to a number of market conditions which have depressed commodity prices and created uncertainty in the market, resulting in Bellatrix seeking *CCAA* protection. An Initial Order under the *CCAA* was granted on October 2, 2019. That was quickly followed by the Order approving the Sales and Investment Solicitation Process (SISP) on October 9, 2019.

[7] The first phase of the SISP was to solicit non-binding expressions of interest in the purchase of the assets or shares of Bellatrix. From those received, Bellatrix and the court-appointed Sale Advisor, Bank of Montreal Capital Markets (BMO), would then select parties to participate in second phase, during which those parties would complete their due diligence and formulate binding bids.

[8] Under the SISP, Phase I ran to November 13, 2019. The parties proceeding to Phase II were to submit binding bids by a date to be chosen by the Bellatrix, called the Binding Bid Deadline (ultimately February 6, 2020). The SISP required Binding Bids to be, *inter alia*, irrevocable and accompanied by an irrevocable financial commitment from any entity financing a particular bid.

[9] Bellatrix' existing creditors were also entitled to participate in the sales process. These creditor bidders were not required to participate in Phase I of the SISP and in fact were not required to submit their bid by the Binding Bid Deadline. They were entitled to be advised whether any third-party bids being considered would be sufficient to pay out the Secured Notes (defined as the first, second and third lien noteholders collectively) and to receive detailed information about any such third-party bids.

[10] Bellatrix and the Monitor were permitted, but not required, to consult with any bidders, including the potential creditor bidders, after the Binding Bid Deadline. Subject to consulting with the Monitor, Bellatrix retained discretion to reject any bid, regardless of compliance with the SISP.

[11] The second lien noteholders had negotiated some provisions into the SISP to protect their position in the bidding process. One, referred to above, was their ability to submit bids after the third-party bidding was concluded. A second advantage was their ability to include the value of their debt as part of an offer. However, any credit bid was still required to have any financing firmly in place. The language of Clause 13 of the SISP is as follows:

> For certainty, a Potential Credit Bidder shall provide written evidence of all required funding or financing to advance the cash consideration necessary to satisfy such priority payments and the New Money Notes [defined in the second note indenture] in full in cash or otherwise assume such obligations in full, and that any such credit bid shall not be conditional upon obtaining financing, acceptable to each of the Sale Advisor and the Monitor in their sole discretion.

[12] EIG/KKR had indicated as early as December of 2019 that they might participate in the bid process, depending on the extent to which the Binding Bids received addressed their financial interests.

[13] Bellatrix received no qualifying Binding Bids by February 6, 2020 but, along with BMO and the Monitor, continued to consult with interested parties, including EIG/KKR. The resulting bid from Spartan was to purchase substantially all Bellatrix' oil and gas assets for $87,357,000 (the Spartan Bid). This would pay all amounts owing under the Key Employee Retention Plan (KERP) approved in the Initial Order, all priority charges of BMO, the Monitor, the Bellatrix Directors and the Interim Financing (as described in paragraph 42 of the Initial Order) and a substantial portion of the first lien noteholders' debt, which totaled approximately $90M.

[14] On March 10, 2020, the Monitor advised EIG/KKR that the bid under consideration would not generate any payment to them as it was not likely to completely pay out the first lien noteholders. The second lien noteholders held approximately $197M in debt and the third lien noteholders approximately another $66M. Beginning April 1, 2020, counsel for EIG/KKR and for Bellatrix began to trade mark ups of the EIG/KKR proposal.

[15] On April 13, 2020, EIG/KKR submitted a draft term sheet proposing a purchase backed by financing from the First Lien Lenders (a syndicate of National Bank, Canadian Western Bank and Alberta Treasury Branches), which financing would be replaced within 12 months of closing, plus some new cash from the second lien noteholders. On April 20, 2020, a revised term sheet was provided by EIG/KKR which replaced the reference to financing from the First Lien Lenders to financing from unidentified third-party lenders with whom EIG/KKR was "in discussions". At some later point, a company name was inserted in that part of the EIG/KKR term sheet but by the time of this application, that had changed again and CIBC was the proposed financier of the EIG/KKR offer.

[16] After receipt of the third version of the non-binding bid of EIG/KKR on April 20, 2020, the Board of Directors of Bellatrix met to consider their options. They voted to approve the Spartan Bid and on April 22, 2020, signed the Asset Purchase Agreement, subject to the court approval now sought.

Adjournment

[17] The request of EIG/KKR for an adjournment was intertwined with its objection to Bellatrix' approval of the Spartan bid. The additional time requested was for the purpose of finalizing its offer so that it could be more fairly considered alongside the Spartan Bid. By the time of the court application, EIG/KKR confirmed that it was in discussions with Westbrick Energy Ltd, a local oil and gas operator owned mostly by EIG/KKR, about participating in the EIG/KKR bid. It was submitted that, even with financing, a successful purchaser would need to partner with a company with industry knowledge.

[18] Westbrick had been one of the early third-party bidders in its own right, having submitted several non-binding bids through Phases I and II but dropping out of the bidding in late February. When the Spartan Bid was received by Bellatrix on March 10, 2020, Westbrick was contacted again but did not participate further until its name came up as part of EIG/KKR's alternative non-binding bid.

[19] Westbrick's interest at this approval stage is still subject to confirmatory due diligence. In fact, one of the bases on which EIG/KKR sought the adjournment was the refusal of the Monitor to allow Westbrick into the data room in the days before the application, which EIG/KKR argued had delayed its progress. The Monitor provided no written explanation to EIG/KKR at the time but it became apparent during the course of argument that its reluctance to do so was based, at least in part, on the fact that Westbrick had participated in earlier phases of the process and so already had that information about the Bellatrix assets. The fact that it wanted to do further due diligence as part of a credit bid when it had already failed to capture the interest of Bellatrix, BMO or the Monitor earlier in the process was not compelling to the Monitor, nor to this Court.

[20] Westbrick's equivocal commitment was only part of EIG/KKR's problems, second to the lack of any firm financing commitment. As mentioned, CIBC was proposing to lend an amount sufficient to pay the priority charges plus the first lien noteholder debt, with the second lien noteholders proposing to then convert their debt to an equity position in the company. However, the borrower (presumably a partnership of EIG/KRR and Westbrick, or their respective designates) would still need to qualify to assume all the liabilities and obligations of the ongoing business of Bellatrix.

[21] More importantly, CIBC expressly was not yet committed to providing that funding. Its willingness to proceed was contingent on a number of outstanding items, including:

a. satisfactory final negotiations;

b. the absence of any material adverse change (which could include the claims already anticipated by at least two of the counterparties to Bellatrix contracts);

c. acceptable arrangements being made between CIBC and Westbrick or another operator; and

d. no adverse change in the capital markets generally.

[22] Against the backdrop of the precarious current oil and gas market, all these outstanding conditions limited EIG/KKR's ability to present this proposal as close enough to final to justify putting everything on hold for another few weeks in hopes that all the pieces would fall into place.

[23] EIG/KKR quite properly emphasized that they are significant stakeholders in the proceedings generally and the most significant stakeholders at this precise juncture, given the consequences to them if the Spartan Bid is effectively the only option left. EIG/KKR also pointed out that the company had sufficient short-term financing to continue operating during the requested adjournment, courtesy of their agreement to provide the interim financing under the Initial Order. EIG/KKR said that their willingness to provide that interim financing, without which the SISP could not have been conducted, was part of their plan to protect their position, should that become necessary.

[24] It appears that EIG/KKR thought they would have more time and more opportunity to finalize a competing proposal than what was afforded to them. They pointed out, legitimately, that the COVID pandemic has created logistical challenges and has introduced even more uncertainty into financial markets, making it more difficult to get the Westbrick bid in a final form.

[25] Bellatrix, along with all the other parties backing the Spartan Bid, argued that EIG/KKR had had more than ample time to negotiate the financing for a Binding Bid, having known from October of last year that they could end up needing to put a competing offer forward. More importantly, as of March 10, 2020, EIG/KKR knew unequivocally that the only offer in play was going to see them receive no recovery on their debt at all. From that point, if not before, it was incumbent on them to move quickly, presumably building on work done beforehand, to finalize their competing bid.

[26] They were unable to do this. I accept that the COVID pandemic, which was narrowly preceded by a severe and historic drop in the commodity prices for oil, made it very difficult to secure the missing financial and operational commitments. However, it is equally obvious that these factors may continue to affect market conditions negatively for some unknown period of time. Indeed, the uncertainty around the likely duration of these negative market forces is the reason given by the Bellatrix Board of Directors for approving the Spartan Bid. While the Spartan Bid is not ideal – certainly not for Bellatrix' creditors – it does allow the transfer of the company as a going concern to a bidder who had its financing secured and was ready to close on time, removing as much uncertainty around this transaction as possible. It is the proverbial bird in hand.

[27] This Court has discretion to allow or deny requests for adjournment of proceedings before it. However, that discretion, as all judicial discretion, must be exercised with a view to the fairness of the proceedings to all parties. The impact of denying EIG/KKR's adjournment application is devastating to them and to the investors they represent. However, putting the *CCAA* proceedings on hold for the next few weeks carries it owns costs and risks to the other participating parties.

[28] Spartan, as the successful bidder, was not shy about arguing the unfairness inherent in a process that imposed a number of conditions and deadlines on bidders, all of which it met in order to make a firm financial commitment in the midst of a difficult and uncertain market, only to be forced to unilaterally leave its offer on the table while a competing offer is further developed.

[29] Certainly, there is more than ample jurisprudence for considering the integrity of the process itself in this analysis; ***Re Grant Forest Products Inc*** 2010 ONSC 1846 at paras.28-33. In ***Royal Bank v Soundair Corp***, 1991 Carswell Ont 205 at para. 22, the Ontario Court of Appeal adopted the caution of the Nova Scotia Court of Appeal in ***Cameron v Bank of Nova Scotia***, (1981) 38 CBR (NS) 1 at p.11:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

[30] The application to approve the sale in a *CCAA* proceeding is not a "rubber stamp" exercise. The Court must retain and execute its mandate to balance the interests of stakeholders affected by any offer, even one arriving late. However, an important factor in that exercise may be protecting the predictability of the process, for these participants and possibly for others in future proceedings. While buyers, including Spartan, know that their purchase is subject to court approval, any arbitrary exercise of that discretion may well discourage similar transactions necessary to promote the purposes of this legislation.

[31] While there was no imminent threat of Spartan withdrawing its offer, the Asset Purchase Agreement approved and executed by Bellatrix' Board of Directors has a June 30, 2020 closing date. No one wants to see that date jeopardized and it already appears that there are a number of pre-closing issues that will need to be addressed in short order to preserve this sale.

[32] And practically speaking, while Bellatrix does have access to interim financing, whatever additional costs and losses are incurred over the next few weeks would come directly from the residue of the purchase price going to the first lien noteholders because that financing is a priority charge. They are the ones financing the adjournment and they object to doing so.

[33] I am balancing the ongoing costs, not just in Bellatrix' operations but in the continued involvement in this litigation of these many parties, their executives, lawyers and the third-party advisors, as well as the risk, small but serious in consequence, of losing the one Binding Bid made against the chance for EIG/KKR to finalize a proposal in a matter of weeks that has not crystallized in months and still seems somewhat fluid and uncertain.

[34] As difficult as the decision is, in my view, the sales process must continue as scheduled. The adjournment request is denied.

Approval of the Asset Purchase Agreement

[35] Apart from dismissing the application by EIG/KKR for an adjournment, this Court must still review the Spartan Bid against the statutory and common law criteria for approval. EIG/KKR and the remaining second lien noteholders opposed the sale to Spartan because it provides no recovery to them or any subsequent creditors. Although some parties reserved their rights to argue about the form of Order and their inclusion or exclusion on the anticipated s.11.3 application, no other parties opposed the Spartan Bid.

[36] Although the *CCAA* itself contains no description of its objectives, a number of purposes of this legislation have been identified in case law. For our purposes, the most germane include the goal of permitting a company to stay in business and thereby avoid the social and economic costs of liquidation and the goal of giving the company the chance of finding an arrangement acceptable to its creditors or which, at least, seeks to balance the interests of the company's stakeholders.

[37] Section 36(3) of the *CCAA* sets out a non-exhaustive list of factors to consider on an application to approve a sale. The related criteria from the common law are included in this list where relevant.

A. Whether the Sales Process was Reasonable

[38] There was no real complaint at this application about the form of the SISP approved by this Court in October, 2019. As is often the case, much of the work necessary to proffer the

assets for sale had been done prior to the court order. BMO was appointed as the Sale Advisor to assist Bellatrix in soliciting and developing potential bids. The process was to be overseen by the Monitor, as appointed in the Initial Order.

[39] The first phase, as mentioned, was just over one month. The deadline for binding bids in Phase II was not included in the SISP or in the SISP Order but was to be set by Bellatrix with the Monitor's consent.

[40] The process as envisioned was reasonable. It was also designed to be efficient; ***Soundair*** at para.16. Bellatrix set the deadline for binding bids at January 13, 2020 and then extended that deadline to February 7, 2020. There was no suggestion that this information was not communicated in a proper and timely way. The period of time between October 9, 2019 and February 7, 2020 was short enough to protect the value of the company assets for sale and long enough to provide Bellatrix with a good look at the market prospects, as discussed *infra*.

[41] Not only was there no dispute about the reasonability of the SISP before me, there had been no dispute about the final form of the SISP before the issuing Justice on October 9, 2019. As is often the case, the parties had negotiated their own concessions which were represented in that Order. Indeed, even EIG/KKR made the point that they had negotiated certain concessions in the form of the SISP before it was approved by the Court.

[42] I will also address the implementation of the sales process at this juncture, although I realize that is often done separately from a review of the mechanics of the process itself. The relevant cases make it clear, and it is completely intuitive, that the process must not only be designed to be fair but must be fairly implemented.

[43] EIG/KKR complained of a number of developments they felt were unfair; that they provided the necessary interim financing in order to protect their interests and then were "cut out" of the final bidding, that the First Lien Lenders opted to finance the Spartan Bid even though EIG/KKR had approached them first) and that EIG/KKR had made it known throughout the sales process that they might wish to put in a credit bid if whatever offer(s) came out of the SISP did not provide for recovery for the second lien noteholders.

[44] While it is true that EIG/KKR did provide the interim financing without which Bellatrix would not have had the opportunity to look for a purchaser under the protection of the *CCAA*, it is equally true that EIG/KKR's *quid pro quo* for doing so are the fees and interest payments they will receive in a priority position. It should not be treated as consideration for a strategic advantage to a credit bidder, at least not beyond what was negotiated in the SISP.

[45] The First Lien Lenders chose to back the Spartan Bid, even though that offer meant that the first lien debt advanced by that syndicate would not be paid out to those noteholders in full. It did so knowing that EIG/KKR was working on an alternative that would, if successful, see a more full recovery. It is safe to infer that the certainty of the Spartan Bid outweighed the possibility of increased recovery under a much less certain scenario.

[46] The Bellatrix Affidavit filed for this application also indicated that the Monitor had been notified at some prior point in time that Spartan might received confidential information that it ought not to have had. The Monitor investigated and determined that this had not affected the process or provided any advantage to Spartan as a bidder. Given what little information I had about this information and its source, combined with the fact that it was not much pursued in

argument, I am similarly convinced that it evidences no impropriety that has affected the sales process or the result.

B. Whether the Monitor approved of the SISP

[47] The Monitor supported the Court's approval of the SISP at the October 9, 2019 application.

C. Whether the Monitor Supports the Proposed Sale

[48] The Monitor supports the proposed sale of the Bellatrix assets to Spartan for the reasons set out in its Sixth Report. Those reasons included the experience of BMO as the Sale Advisor, the interest expressed in the Bellatrix assets from industry participants, the time taken to market the assets and its own experience in overseeing sales processes similar to this one. The Monitor's opinion was that the process was fair and open. While the Monitor, among others, engaged in ongoing discussions with EIG/KKR, those discussions did not culminate in a binding bid from EIG/KKR or any credit bidder.

[49] Because the Monitor is assumed to be independent and experienced, the Court is entitled to rely on the opinion of the Monitor, albeit not blindly. As quoted in ***Soundair*** at paragraph 21:

> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role of the Receiver both in the perception of receiver and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers; ***Crown Trust Co v Rosenberg*** (1986), 60 OR (2d) 87 at p.112

[50] In my view, the Monitor has discharged its duties to this point and its recommendation that the Spartan Asset Purchase Agreement be approved is entitled to due consideration.

D. The Extent to which the Company's Creditors were Consulted

[51] The Monitor's Report and the Affidavit of Mark Caiger of BMO outline the consultations undertaken with the various groups of creditors. EIG/KKR argued that they were not properly consulted because they were not provided with a copy of the final Spartan Asset Purchase Agreement, either as proposed or as signed. They say this was in contravention of Clause 7 of the SISP, which entitled them to receive further, detailed information about a competing third-party bid "in a form satisfactory to Bellatrix and the Monitor, more detailed information in respect of any such Binding Bid, including copies of the Binding Bid and any definitive agreement(s) in connection therewith" (Clause 7, SISP).

[52] However, a careful reading of that paragraph shows that the Monitor and BMO expressly retained the ability to vet information given to any credit bidder. While no particularly satisfactory explanation was provided to me as to why that document was not provided to EIG/KKR, I cannot conclude that EIG/KKR suffered any disadvantage as a result.

[53] In ***Soundair***, the unsuccessful bidder complained it was not given needed information, specifically an offering memorandum. However, the Court found the bidder was not prejudiced by that decision of the Receiver, rather its offer was rejected because it contained a condition

unacceptable to the Receiver; ***Soundair*** at paras.50-57. Similarly, the provision of the Spartan Asset Purchase Agreement itself was not necessary for EIG/KKR to get the financing in place that it was missing.

[54] The most important thing for EIG/KKR to know as creditors and potential competing bidders was the information given to them on March 10, 2020; that the only offer left was one that would be insufficient to pay anything beyond a portion of the first lien noteholders. Their real complaint is that the SISP afforded them no set period of time in which to finalize their bid and that Bellatrix, the Monitor and BMO should have put Spartan on ice to afford EIG/KKR an adequate and mutually-communicated/accepted period of time in which to finalize their competing bid.

[55] While I understand why EIG/KKR would be unhappy about the way things unfolded, I cannot conclude that the process was unfair to them. The SISP, which they negotiated with Bellatrix and others, did not provide that cushion of time – it only said that credit bids could be submitted after third party bids. The SISP further reserved to BMO and the Monitor the "sole discretion" to decide whether the financing arrangements for any credit bid were satisfactory.

[56] When the Bellatrix Board of Directors considered the Spartan offer on April 20, 2020, it opted to lock Spartan in by signing the Asset Purchase Agreement. EIG/KKR was not in a position at that time to give the Board any other viable options, nor had that changed appreciably by the time of this application.

[57] Service of Bellatrix' application and supporting Affidavit was effected on April 27, 2020 although the date for the hearing was not set or communicated until April 30, 2020. There was almost two weeks between service of the application and the return date of the motion. EIG/KKR certainly moved quickly within that time to put together their own Affidavit and to provide written confirmation of CIBC's interest. However, it was not the timing of the motion that was problematic, it was the failure of EIG/KKR to advance a firm competing offer before that; if not after March 10, 2020 then after April 23, 2020 when they learned more specifics of the Spartan transaction from the public announcement.

E. The Effects of the Proposed Sale on Creditors and Other Stakeholders

[58] While this Court is to consider the effect of the proposed sale on all stakeholders, the primary stakeholders are obviously the company's creditors. They have financed the company to their detriment and now hold compromised security for those debts. They have only the process itself to assist them.

[59] The Spartan Bid will see the first lien noteholders paid a portion of their outstanding debt but not all. The second and third lien noteholders will receive nothing. While some of the earlier non-binding bids would have been sufficient to pay the first lien debt in full plus some of the second lien debt, making the second lien noteholders the fulcrum creditors, that shifted over time to the point where the only certain offer on the table no longer covered the first lien noteholders. As I understand the Monitor's argument, that meant that the first lien noteholders became the fulcrum creditors and thus their preferences took on more importance.

[60] Assuming that I am understanding the meaning of the term correctly, I accept the Monitor's submissions. That does not absolve the Monitor nor the Bellatrix Board from consideration of other creditors, nor was that suggested; ***Soundair*** at para.21. Rather, it was

argued that the Bellatrix Board, with assistance from BMO and the Monitor, did consider the effect on these stakeholders before accepting the Spartan Bid.

[61] The Spartan Asset Purchase Agreement obligates Spartan to assume the obligations and liabilities, except relating to excluded assets. This will include environmental liabilities, as well as employment, regulatory and contractual obligations. The parties represented at the approval hearing included various contracting parties and regulators, all of whom supported the Spartan Bid. While they cannot be assumed to be overly concerned about which of Bellatrix' creditors receive payment, it is important to remember that these other stakeholders do represent the beneficiaries of a sale of the company as a going concern. From an overarching economic view, keeping contracts intact and people employed is a significant and positive factor.

[62] It is axiomatic that considering someone's interests is not the same thing as satisfying those interests. I accept the submissions of Bellatrix, the Monitor, BMO and the other parties supporting the Spartan bid that the interests of all parties and particularly the creditors were considered. The weighing of these competing interests and the ultimate decision by the Board to accept the Spartan bid are discussed below.

F. Is the Sale Price Fair and Reasonable?

[63] For EIG/KKR, the price on the proposed sale does not seem fair or reasonable because it believes that, given more time, it could present an offer to purchase the Bellatrix assets for much more that Spartan has offered. As I said in my brief oral decision, if the Westbrick offer had included committed financing, was unconditional and irrevocable and for a much higher price, that may have changed the assessment of the Spartan bid. Where a substantially higher bid turns up at the approval stage, it may indicate that all reasonable attempts to get the best offer were not made; ***Soundair*** at para. 28 quoting from ***Re Beauty Counsellors of Canada Ltd***., (1986), 58 CBR (NS) 237 (Ont. SC).

[64] However, the Westbrick offer cannot be said to be truly comparable to the Spartan Bid because of its outstanding conditions. The Bellatrix Board of Directors, the first lien noteholders and all the independent advisors to the company recommended a lower but certain offer over a higher but uncertain offer. The Board of Directors, who have statutory and common law fiduciary obligations to act in the best interests of the company as a whole, considered their options and chose this proposal. In fact, they committed to the sale in order to make sure that the one Binding Bid they did have did not disappear before this application could be heard and decided. The exercise of their business judgment deserves a measure of deference.

[65] The directors were assisted, as was Bellatrix and as is this Court, by an independent Monitor and an independent Sale Advisor, both of whom were working to find an arrangement that would benefit the entire economic community, with focus on the creditors. Bellatrix received six conditional non-binding offers during Phase II but no binding bids, plus two additional non-binding bids after February 6, 2020. Bellatrix, BMO and the Monitor then continued to work with all these bidders and with EIG/KKR to try and convert non-binding bids into binding bids.

[66] I am satisfied that the sufficient efforts were made to find the best possible price. While it will satisfy only a small portion of the company's entire debt, it is still the only unconditional offer in play, notwithstanding the time anticipated by the SISP plus the additional time since

Phase II officially expired in February. As so succinctly put in ***Re Nortel Networks Corp***, 2009 CarswellOnt 4467 (Ont SCJ) at para.49, there is no better viable alternative.

Conclusion

[67] The fact that the only offeror willing to make an unconditional, fully financed commitment will still result in a shortfall is not evidence that the process was flawed or unfair, that stakeholders were ignored or that the price is not reasonable. Rather, the fact that a court-approved and competently-managed sales process narrowed to only one viable offer when conditions had to be removed is reflective of the challenges in our economic markets and in this industry in particular.

[68] It is understandable, even if not ideal, that the Bellatrix directors ultimately concluded that accepting the Spartan offer was in the best interests of the company and its stakeholders collectively. The fact that that decision is now supported by virtually all affected parties is also important.

[69] I am satisfied that Bellatrix has met the tests, both statutory and common law, for approving the Spartan Asset Purchase Agreement.

Sealing Orders

[70] Bellatrix applied to seal confidential portions of and supplements to the Monitors' reports. EIG/KKR applied to seal the Affidavit of Eric Long. No parties opposed any of this relief. As the Spartan Asset Purchase Agreement has yet to close and having reviewed the information sought to be sealed, I am satisfied that the tests for doing so have been satisfied; ***Sierra Club of Canada v Canada (Minister of Finance)***, 2002 SCC 41 at para.53

[71] The sealing orders requested are granted. Counsel are requested to include in the form of Order time limits for the expiration thereof.

Heard on the 7th day of May, 2020.
Dated at the City of Calgary, Alberta this 21st day of May, 2020.

M.H. Hollins
J.C.Q.B.A.

Appearances:

Robert J. Chadwick, Caroline Descours and Andrew Harmes
for Bellatrix Exploration Ltd.

Sean F. Collins
for Winslow Resources Inc.

Tom Cumming, Caireen Hanert, Warren Foley and Ram Sankaran
for Yangarra Resources Ltd

Kelly Bourassa, James Reid and Peter Bychawski
for the First Lien Lenders

Michael Hanlon, Adam Maerov and Kourtney Rylands
for U.S. Bank National Association, in its capacities as
Second Lien Notes Trustee and Third Lien Notes Trustee

Ed Halt
Conflict counsel for the First Lien Lenders

Josef G. A. Kruger and Robyn Gurofsky
for the Monitor

Maria Lavelle
for the Alberta Energy Regulator

Howard A. Gorman, Q.C. and Gunnar Benediktsson
for BP Canada Energy Group ULC

Guy Martel & Danny Vu
for EIG/KKR

Michael Shakra, Kevin J. Zych, Chris Simmard, Kristopher Hanc
for the Ad Hoc Committee of Second Lien and Third Lien Noteholders

Christa Nicholson and Andrew MacGregor
for TAQA NorthLtd

Colin Feasby
for Bank of Montreal

Jordan Milne and Lori Williams
Department of Justice Canada
for the Indian Oil and Gas Canada (IOGC)

Jeffrey Poole and Ian Carruthers
for the O'Chiese First Nation

Alexis Teasdale and Karen Dawson

for the Bull Moose Capital Ltd.

Randal Van de Mossalaer and Emily Paplawski
for Keyera Patrnership

Brad Angove
for Nelson Brothers Oilfield Services 1997 Ltd
and Gen7 Environmental Solutions Ltd.

Joseph Reynaud and Leland Corbett
for Stream Asset Financial Lumos LP,
by its General Partner Stream Asset Financial Lumos Corp

Kelsey Meyer
for SCCP Ferrier Facility LP

Louis Belzil
for Jo-Anne Reynolds

Shane King
for Bidell Gas Compression

Marian Baldwin Fuerst
for Delaware Trust Company

Mikkel Arnston
for Thomas Group Inc.

Jennie Buchanan and Frankie Deni
for Mark Stephen

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Court File No. CL-25-00753537-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE	)	MONDAY, THE 27TH DAY
JUSTICE W.D. BLACK	)	OF OCTOBER, 2025
	)	

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO B+H ARCHITECTS CORP.
(the "**Applicant**")

SALE AND INVESTMENT SOLICITATION PROCESS ORDER

THIS MOTION, made by the Applicant pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, for an order, among other things: (a) approving the Stalking Horse Agreement (as defined below) which will act as the stalking horse bid in the SISP (as defined below) (the "**Stalking Horse Bid**"), (b) approving the SISP (as defined below), and (c) granting certain related relief, was heard this day by judicial videoconference.

ON READING the Notice of Motion of the Applicant, the affidavit of Patrick Fejér sworn October 16, 2025 and the exhibits thereto (the "**First Fejér Affidavit**"), the affidavit of Patrick Fejér sworn October 20, 2025 and the exhibits thereto (the "**Second Fejér Affidavit**"), the First Report of KSV Restructuring Inc., in its capacity as monitor of the Applicant (the "**Monitor**") dated 22, 2025 (the "**First Report**"), and on hearing the submissions of counsel for the Applicant, the Monitor and those other parties that were present as listed on the Participant Information Form, no other party appearing although duly served as appears from the Lawyer's Certificate of Service of Saneea Tanvir dated October 21, 2025.

SERVICE AND DEFINITIONS

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

2. **THIS COURT ORDERS** that any capitalized term used and not defined herein shall have the meaning ascribed thereto in the First Fejér Affidavit, the Second Fejér Affidavit and the Amended and Restated Initial Order dated October 27, 2025 (as it may be amended from time to time, the "**Initial Order**"), as applicable.

STALKING HORSE AGREEMENT

3. **THIS COURT ORDERS** that the execution, delivery, entry into, compliance with, and performance by the Applicant of the Investment Agreement dated October 16, 2025 (the "**Stalking Horse Agreement**") between the Applicant and Surbana Jurong Holdings (Canada) Ltd. (the "**Stalking Horse Bidder**"), substantially in the form attached as Exhibit "D" to the Second Fejér Affidavit is hereby ratified, authorized and approved, *nunc pro tunc*, with such minor amendments as the Applicant, with the consent of the Monitor, and the Stalking Horse Bidder may agree to in writing, and the bid made by the Stalking Horse Bidder pursuant to the Stalking Horse Agreement is hereby approved to act as the stalking horse bid under, and in accordance with, the SISP (as defined below), provided that nothing herein approves the sale or vesting of any Property to the Stalking Horse Bidder. The approval of any sale and vesting of any Property to the Stalking Horse Bidder shall be considered by this Court on a subsequent motion if the Stalking Horse Agreement is the Successful Bid pursuant to the SISP.

APPROVAL OF STALKING HORSE SALE PROCESS

4. **THIS COURT ORDERS** that the stalking horse sale process guidelines attached as Schedule "A" hereto (the "**SISP**") (subject to such amendments as may be agreed to by the Monitor and the Applicant, in consultation with the Stalking Horse Bidder, in accordance with the SISP) be and is hereby approved and the Applicant and the Monitor are hereby authorized and directed to implement the SISP pursuant to its terms and the terms of this Order. The Applicant and the

Monitor are hereby authorized and directed to take any and all actions as may be necessary or desirable to implement and carry out the SISP in accordance with its terms and this Order.

5. **THIS COURT ORDERS** that each of the Applicant and the Monitor and their respective affiliates, partners, directors, employees, agents, advisors, representatives and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any person in connection with or as a result of the SISP, except to the extent of such losses, claims, damages or liabilities arising or resulting from the gross negligence or wilful misconduct of the Applicant or the Monitor, as applicable, in performing their obligations under the SISP, as determined by a final order of this Court that is not subject to appeal or other review and all rights to seek any such appeal or other review shall have expired.

6. **THIS COURT ORDERS** that, pursuant to section 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS), the Applicant and the Monitor are authorized and permitted to send, or cause or permit to be sent, commercial electronic messages to an electronic address of prospective bidders or offerors and to their advisors, but only to the extent required to provide information with respect to the SISP in these proceedings.

7. **THIS COURT ORDERS** that notwithstanding anything contained in this Order or in the SISP, the Monitor shall not take Possession of the Property or be deemed to take Possession of the Property, including pursuant to any provision of the Environmental Legislation.

8. **THIS COURT ORDERS** that in supervising the SISP, the Monitor shall have all the benefits and protections granted to it under the CCAA, the Initial Order and any other Order of this Court in these proceedings.

PROTECTION OF PERSONAL INFORMATION

9. **THIS COURT ORDERS** that the Applicant is authorized and permitted to transfer to the Monitor personal information of identifiable individuals ("**Personal Information**") in the Applicant's custody and control solely for the purposes of assisting with and conducting the SISP, as applicable, and only to the extent necessary for such purposes, and the Monitor is hereby authorized to make use of such Personal Information solely for the purposes as if it were an Applicant.

10. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (Canada) and any similar legislation in any other applicable jurisdictions, the Applicant and the Monitor and each of their respective advisors are hereby authorized and permitted to disclose and transfer to prospective SISP participants (each, a "**Potential Bidder**") and their advisors Personal Information, including, without limitation, information in the custody or control of the Applicant relating to the operation of the businesses being sold pursuant to the SISP, records pertaining to the Applicant's past and current employees and information on specific customers, but only to the extent desirable or required to negotiate or attempt to complete a transaction under the SISP (each a "**Transaction**"). Each Potential Bidder to whom any Personal Information is disclosed shall maintain and protect the privacy of such Personal Information and limit the use of such Personal Information to its evaluation of a Transaction, and if it does not complete a Transaction, shall return all such information to the Applicant or the Monitor, or in the alternative destroy all such information and provide confirmation of its destruction if required by the Applicant or the Monitor. Any successful bidder(s) shall maintain and protect the privacy of such information and, upon closing of the Transaction, shall be entitled to use the personal information provided to it that is related to the Business and/or the Property acquired pursuant to the SISP in a manner that is in all material respects identical to the prior use of such information by the Applicant, and shall return all other personal information to the Applicant or the Monitor, or ensure that all other personal information is destroyed and provide confirmation of its destruction if requested by the Monitor or the Applicant.

GENERAL

11. **THIS COURT ORDERS** that, subject to the terms of the Stalking Horse Agreement, the Applicant, with the Stalking Horse Bidder's consent, may from time to time apply to this Court to amend, vary or supplement this Order.

12. **THIS COURT ORDERS** that the Monitor may from time to time apply to this Court to amend, vary or supplement this Order.

13. **THIS COURT ORDERS** that the Applicant or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their respective powers and duties hereunder and under the SISP.

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

15. **THIS COURT ORDERS** that each of the Applicant and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings in any jurisdiction outside Canada, including, without limitation to apply for recognition and enforcement of this Order in the United States.

16. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern/Daylight Time on the date of this Order without the need for entry and/or filing.

Schedule "A"

Stalking Horse Sale Process

Introduction

On October 17, 2025, B+H Architects Corp. (the "**Applicant**") commenced proceedings (the "**CCAA Proceedings**") under the *Companies' Creditors Arrangement Act* (the "**CCAA**") pursuant to an initial order (as amended or amended and restated from time to time, the "**Initial Order**") from the Ontario Superior Court of Justice, Commercial List (Toronto) (the "**Court**"). Pursuant to the Initial Order, the Court appointed KSV Restructuring Inc. as monitor of the Applicant (in such capacity, the "**Monitor**").

The Applicant and Surbana Jurong Holdings (Canada) Ltd. (the "**Stalking Horse Bidder**") have entered into an Investment Agreement dated October 16, 2025 (the "**Stalking Horse Agreement**" or when referring to the bid, the "**Stalking Horse Bid**"), pursuant to which the Stalking Horse Bidder would acquire substantially all of the assets and business operations of the Applicant, and act as a stalking horse bidder in a court-supervised sale and investment solicitation process (the "**SISP**") within the CCAA Proceedings.

Pursuant to an Order dated October 27, 2025 (the "**SISP Approval Order**"), the Court approved the SISP and the Stalking Horse Agreement as the Stalking Horse Bid in the SISP. The purpose of this SISP is to seek Sale Proposals (as defined herein) and Investment Proposals (as defined herein) from Qualified Bidders (as defined herein) and to implement one or a combination of them in respect of the Property (as defined herein) and the Business (as defined herein) of the Applicant.

The SISP describes, among other things: (a) the Property and Business available for sale; (b) the manner in which prospective bidders may gain access to or continue to have access to due diligence materials concerning the Property and the Business; (c) the manner in which bidders become Phase 1 Qualified Bidders, Phase 2 Qualified Bidders and Successful Bidders (each as defined herein), and bids become Qualified Bids, Back-Up Bids and/or Successful Bids (each as defined herein); (d) the process for the evaluation of bids received; (e) the process for the ultimate selection of a Successful Bid; and (f) the process for obtaining such approvals (including the approval of the Court) as may be necessary or appropriate in respect of a Successful Bid.

Defined Terms

1. Capitalized terms used and not otherwise defined herein have the meanings given to them in **Appendix "A"**.

2. All references to "$" or dollars herein are to Canadian dollars unless otherwise indicated.

Supervision of the SISP

3. The Monitor will supervise, in all respects, the SISP and any attendant sales or investments. The Monitor and the Applicant, in consultation with the Stalking Horse Bidder, shall have the right to adopt such other rules for the SISP that in their reasonable business judgment will better promote the goals of the SISP. In the event that there is disagreement or clarification required as to the interpretation or application of this SISP or the responsibilities of the Monitor or the Applicant hereunder, the Court will have jurisdiction to hear such matters and provide advice and directions, upon application by the Monitor or the Applicant. For the avoidance of doubt, with respect to the Monitor's role in regards to the SISP, the terms of the Initial Order concerning the Monitor's rights, duties and protections in the CCAA Proceedings shall govern.

Opportunity

4. The SISP is intended to solicit interest in and opportunities for a sale of or investment in all or part of the Property and Business of the Applicant (the "**Opportunity**"). One or more bids for a sale of, or an investment in, all or a portion of the Business or the Property relating to the Applicant's Business will be considered, either alone or in combination as a Final Qualified Bid or a Successful Bid.

5. A bid may, at the option of the Qualified Bidder, involve, among other things, one or more of the following: a restructuring, recapitalization or other form of reorganization of the business and affairs of the Applicant as a going concern; or a sale of the Property or any part thereof as contemplated herein to the Qualified Bidder.

As-is Basis

6. Except to the extent otherwise set forth in a definitive sale or investment agreement with a successful bidder, any sale of the Property or investment in the Business will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Applicant, the Monitor or any of their respective agents, advisors, representatives or estates, and, in the event of a sale, all of the right, title and interest of the Applicant in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests (collectively, the "**Claims and Interests**") pursuant to such Court orders as may be desirable, except to the extent otherwise set forth in the definitive sale or investment agreement executed with a Successful Bidder.

Timeline

7. The following table sets out the key milestones under the SISP (collectively, the "**Milestones**"):

Milestone	**Deadline**
Teaser Letter and NDA sent to Known Potential Bidders	Commencing by October 21, 2025
Phase 1 Bid Deadline	November 17, 2025 at 5:00 p.m. (prevailing Eastern Time)
Phase 2 Bid Deadline	December 5, 2025 at 5:00 p.m. (prevailing Eastern Time)
Selection of Successful Bid(s) and Back-Up Bidder(s) or designation of Auction	December 8, 2025 at 5:00 p.m. (prevailing Eastern Time)
Auction Date (if designated)	December 10, 2025
Approval of Successful Bid(s)	December 17, 2025 at 5:00 p.m. (prevailing Eastern Time)
Closing – Successful Bid(s)	December 19, 2025 at 5:00 p.m. (prevailing Eastern Time)
Outside Date – Closing	December 31, 2025

The dates set out in the SISP may be extended by the Monitor, in consultation with the Applicant and the Stalking Horse Bidder, or by further order of the Court.

Any extensions or amendments to the Milestones will be communicated to all Known Potential Bidders or Phase 2 Potential Bidders, as applicable, in writing and such extensions or amendments shall be posted on the website the Monitor maintains in respect of this CCAA proceeding at https://www.ksvadvisory.com/experience/case/BHA (the "**Monitor's Website**").

Solicitation of Interest and Publication Notice

8. As soon as reasonably practicable:

(a) the Applicant and the Monitor will prepare a list of potential bidders, including (i) parties that have approached the Applicant or the Monitor indicating an interest in bidding for the sale of or investment in the Business and/or Property, (ii) local and international strategic and financial parties who the Applicant and the Monitor believe may be interested in purchasing all or part of the Business and Property or investing in the Applicant pursuant to the SISP; and (iii) any other parties reasonably suggested by a stakeholder as a potential bidder who may be interested in the Opportunity (collectively, "**Known Potential Bidders**");

(b) the Applicant will issue a press release, in form acceptable to the Monitor, setting out the information regarding the Opportunity and the key terms of the SISP including the timelines and such other relevant information which the Applicant and the Monitor considers appropriate for dissemination in Canada and major financial centres in the United States; and

(c) the Monitor, in consultation with the Applicant, will distribute: (i) a process summary (the "**Teaser Letter**") describing the Opportunity and inviting recipients of the Teaser Letter to express their interest pursuant to the SISP; and (ii) an NDA.

9. The Monitor will send the Teaser Letter and NDA to all Known Potential Bidders by end of day October 21, 2025 and to any other party who requests a copy of the Teaser Letter and NDA or who is identified to the Applicant or the Monitor as a potential bidder as soon as reasonably practicable after such request or identification, as applicable.

10. Notwithstanding anything else contained herein, unless the Monitor is satisfied that the fairness of the SISP is not impacted, a Related Person shall not be entitled to be a Phase 1 Qualified Bidder or a Phase 2 Qualified Bidder or submit or participate in a Sale Proposal or Investment Proposal unless such Related Person made a declaration to the Monitor in writing of their intention to participate in a Sale Proposal or Investment Proposal by 5:00 p.m. (prevailing Eastern Time) on October 31, 2025. The Monitor shall, in its discretion, design and implement additional procedures for the SISP to limit the sharing of information with such Related Person so as to ensure and preserve the fairness of the SISP. For greater certainty, this paragraph shall not apply to the Stalking Horse Bidder or the Stalking Horse Agreement.

PHASE 1: NON-BINDING LOIs

Qualified Bidders

11. Any party who wishes to participate in the SISP (a "**Potential Bidder**") must provide to the Monitor an NDA executed by it and a letter setting forth the identity of the Potential Bidder, the contact information for such Potential Bidder, full disclosure of the direct and indirect principals of the Potential Bidder and information regarding the Potential Bidder's financial ability to complete a transaction. If a Potential Bidder has previously delivered an NDA and letter of this nature to the Applicant and the NDA remains in effect, the Potential Bidder is not required to deliver a new NDA or letter to the Monitor unless otherwise requested by the Applicant or the Monitor.

12. A Potential Bidder (who has delivered the executed NDA and letter as set out above) will be deemed a "**Phase 1 Qualified Bidder**" if the Applicant and the Monitor in their reasonable business judgment determines such person is likely, based on the availability of financing, experience and other considerations, to be able to consummate a sale or investment pursuant to the SISP.

13. At any time during Phase 1 of the SISP, the Applicant and the Monitor may, in their reasonable business judgment, eliminate a Phase 1 Qualified Bidder from the SISP, in which case such bidder will be eliminated from the SISP and will no longer be a "Phase 1 Qualified Bidder" for the purposes of the SISP.

14. The Monitor, with the assistance of the Applicant, will provide access to an electronic data room of due diligence information (the "**Data Room**"). The Monitor, the Applicant and their respective affiliates, partners, directors, employees, agents, advisors, representatives and controlling persons make no representation or warranty as to the information contained in the Data Room or otherwise made available pursuant to the SISP or otherwise, except to the extent expressly contemplated in any definitive sale or investment agreement with a successful bidder ultimately executed and delivered by the Applicant.

15. The Applicant, in consultation with the Monitor, reserves the right to limit any Phase 1 Qualified Bidder's access to any confidential information (including any information in the data room) and to customers and suppliers of the Applicant, where, in the Applicant's opinion after consultation with the Monitor, such access could negatively impact the SISP, the ability to maintain the confidentiality of the confidential information, the Business or the Property.

16. Potential Bidders must rely solely on their own independent review, investigation and/or inspection of all information and of the Property and Business in connection with their participation in the SISP and any transaction they enter into with the Applicant.

Non-Binding Letters of Intent from Qualified Bidders

17. A Phase 1 Qualified Bidder that wishes to pursue the Opportunity further must deliver a non-binding letter of interest (an "**LOI**") to the Monitor at the addresses specified in Schedule "1" hereto (including by email transmission), so as to be received by them not later than 5:00 PM (Eastern Time) on or before November 17, 2025 (the "**Phase 1 Bid Deadline**").

18. Subject to paragraph 19, an LOI so submitted will be considered a qualified LOI (a "**Qualified LOI**") only if:

    (a) it is received by the Monitor on or before the Phase 1 Bid Deadline from a Phase 1 Qualified Bidder;

    (b) it: (i) identifies the Phase 1 Qualified Bidder and representatives thereof who are authorized to appear and act on behalf of the Phase 1 Qualified Bidder for all purposes regarding the transaction; and (ii) fully discloses the identity of each entity or person that will be sponsoring, participating in or benefitting from the transaction contemplated by the LOI;

    (c) the LOI expressly states that the LOI does not entitle the Phase 1 Qualified Bidder to any break-up fee, termination fee, expense reimbursement, or similar type of payment or reimbursement;

    (d) it contains an indication of whether the Phase 1 Qualified Bidder is proposing:

        (i) to acquire all, substantially all or a portion of the Property (a "**Sale Proposal**"), or

        (ii) a recapitalization, arrangement or other form of investment in or reorganization of the Business (an "**Investment Proposal**");

    (e) in the case of a Sale Proposal, it identifies or contains the following:

        (i) the purchase price or price range in Canadian dollars and a description of any non-cash consideration, including details of any liabilities to be assumed by the Phase 1 Qualified Bidder and key assumptions supporting the valuation;

(ii) a description of the Property that is expected to be subject to the transaction and any of the Property expected to be excluded;

(iii) a description of the Phase 1 Qualified Bidder's proposed treatment of material agreements and employees (for example, anticipated employment offers):

(iv) a specific indication of the financial capability of the Phase 1 Qualified Bidder and the expected structure and financing of the transaction (including, but not limited to, the sources of financing to fund the acquisition, preliminary evidence of the availability of such financing or such other form of financial disclosure and credit-quality support or enhancement that will allow the Applicant and the Monitor and each of their respective advisors to make a reasonable business or professional judgment as to the Phase 1 Qualified Bidder's financial or other capabilities to consummate the transaction and to perform all obligations to be assumed in such transaction; and the steps necessary and associated timing to obtain financing and any related contingencies, as applicable);

(v) a description of the conditions and approvals required for the Phase 1 Qualified Bidder to be in a position to submit a final and binding offer, including any anticipated corporate, securityholder or other internal approvals and any anticipated impediments for obtaining such approvals;

(vi) an outline of any additional due diligence required to be conducted in order to submit a Bid;

(vii) a description of all conditions to closing that the Phase 1 Qualified Bidder expects to include in its Bid, including without limitation any regulatory approvals and any form of agreement required from a government body, stakeholder or other third party ("**Third Party Agreement"**) and an outline of the principal terms thereof; and

(viii) any other terms or conditions of the Sale Proposal that the Phase 1 Qualified Bidder believes are material to the transaction;

(f) in the case of an Investment Proposal, it identifies the following:

(i) a description of how the Phase 1 Qualified Bidder proposes to structure the proposed investment, restructuring, recapitalization, refinancing or reorganization, and a description of any non-cash consideration;

(ii) the aggregate amount of the equity and/or debt investment to be made in the Business in Canadian dollars, including the cash and non-cash component thereof and any contemplated adjustment to the investment;

(iii) key assumptions supporting the Phase 1 Qualified Bidders' valuation;

(iv) a description of the Phase 1 Qualified Bidder's proposed treatment of any liabilities, material contracts and employees;

(v) the underlying assumptions regarding the pro forma capital structure (including the form and amount of anticipated equity and/or debt levels, debt service fees, interest or dividend rates, amortization, voting rights or other protective provisions (as applicable), redemption, prepayment or repayment attributes and any other material attributes of the investment);

(vi) a specific indication of the sources of capital for the Phase 1 Qualified Bidder and the structure and financing of the transaction (including, but not limited to, the sources of capital to fund the investment, preliminary evidence of the availability of such capital or such other form of financial disclosure and credit-quality support or enhancement that will allow the Applicant and the Monitor and each of their respective advisors to make a reasonable business or professional judgment as to the Phase 1 Qualified Bidder's financial or other capabilities to consummate the transaction, steps necessary and associated timing to obtain such capital and any related contingencies, as applicable, and a sources and uses analysis);

(vii) a description of the conditions and approvals required for the Phase 1 Qualified Bidder to be in a position to submit a final and binding offer, including any anticipated corporate, securityholder or other internal approvals and any anticipated impediments for obtaining such approvals;

(viii) an outline of any additional due diligence required to be conducted in order to submit a final and binding offer;

(ix) a description of all conditions to closing that the Phase 1 Qualified Bidder expects to include in its final and binding offer, including without limitation any regulatory approvals and any Third Party Agreement required and an outline of the principal terms thereof; and

(x) any other terms or conditions of the Investment Proposal which the Phase 1 Qualified Bidder believes are material to the transaction;

(g) in the case of either a Sale Proposal or an Investment Proposal, it demonstrates compliance with the ownership and other requirements of the *Architects Act*, RSO 1990, c. A.26;

(h) in the case of either a Sale Proposal or an Investment Proposal, it contains such other information as reasonably requested by the Applicant or the Monitor.

19. The Applicant and the Monitor may waive compliance with any one or more of the requirements specified above and deem such non-compliant bids to be a Qualified LOI. For the avoidance of doubt, the completion of any Sale Proposal or Investment Proposal shall be subject to the approval of the Court and the requirement of approval of the Court may not be waived.

Assessment of Phase 1 Bids

20. Following the Phase 1 Bid Deadline, the Applicant and the Monitor will assess the LOIs obtained by the Phase 1 Bid Deadline to determine whether they are Qualified LOIs that meet the criteria set out in paragraph 18 above and, to the extent required, they may request

clarification of the terms of such LOI. In respect of each Qualified LOI, the Applicant and the Monitor will consider (the "**LOI Assessment Criteria**"):

(a) whether the Phase 1 Qualified Bidder that has submitted a Qualified LOI (each, an "**LOI Bidder**"): (i) has a *bona fide* interest in completing a Sale Proposal or Investment Proposal (as the case may be); (ii) has provided satisfactory evidence of its financial capability (based on availability of financing, experience and other considerations) to consummate such a transaction based on the financial information provided; and (iii) has provided satisfactory evidence of its capability to consummate the transaction considering the ownership and other requirements of the *Architects Act*, RSO 1990, c. A.26; and

(b) whether the LOI Bidder is likely to be considered a Phase 2 Qualified Bidder (defined below).

21. If one or more Qualified LOIs are received then:

(a) if at least one such Qualified LOI alone or together with other Qualified LOIs are, in the opinion of the Applicant and the Monitor, superior to or competitive with the Stalking Horse Bid based on the LOI Assessment Criteria and Assessment Criteria (as defined below) or if it is otherwise appropriate to do so in their reasonable business judgment, then the Applicant and the Monitor may select such Qualified LOI or Qualified LOIs to continue to Phase 2, with each such bidder deemed to be a "**Phase 2 Qualified Bidder**", provided that (i) the Applicant and the Monitor may, in their reasonable business judgment, limit the number of Phase 2 Qualified Bidders (and thereby eliminate some bidders from the process) taking into account any material adverse impact on the operations and performance of the Applicant; and (ii) the Stalking Horse Bidder shall automatically be considered as a Phase 2 Qualified Bidder; or

(b) if no Qualified LOIs alone or together with other Qualified LOIs are, in the opinion of both the Applicant and the Monitor, superior to or competitive with the Stalking Horse Bid based on the LOI Assessment Criteria and Assessment Criteria, and no bidder other than the Stalking Horse Bidder is deemed to be a Phase 2 Qualified Bidder, then the Applicant and the Monitor may deem the Stalking Horse Bid to be the Successful Bid and apply to the Court for approval of the Stalking Horse Bid (in which case, for greater certainty, the SISP shall not proceed to Phase 2 nor shall an Auction be held in respect of the Property or the Business).

22. The Applicant and the Monitor shall notify the Stalking Horse Bidder and any Phase 2 Qualified Bidders of the Applicant's intention to conduct Phase 2 by no later than November 24, 2025.

PHASE 2: FORMAL OFFERS AND SELECTION OF SUCCESSFUL BIDDER

Due Diligence

23. The Applicant and the Monitor shall in their reasonable business judgment and subject to competitive and other business considerations, continue to afford each Phase 2 Qualified Bidder such access to due diligence materials and information relating to the Property and Business as they deem appropriate. Due diligence access may include management

presentations, access to an electronic data room, and other matters which a Phase 2 Qualified Bidder may reasonably request and as to which the Applicant and the Monitor, in their reasonable business judgment, may agree. The Monitor will designate a representative to coordinate all reasonable requests for additional information and due diligence access from Phase 2 Qualified Bidders and the manner in which such requests must be communicated. None of the Applicant or the Monitor will be obligated to furnish any information relating to the Property or Business to any person other than to Phase 2 Qualified Bidders. Further and for the avoidance of doubt, selected due diligence materials may be withheld from certain Phase 2 Qualified Bidders if the Applicant and the Monitor determine such information to represent proprietary or sensitive competitive information.

Formal Binding Offers

24. A Phase 2 Qualified Bidder that wishes to make a formal offer to purchase or make an investment in the Applicant or the Property and Business shall submit a final and binding offer (a "**Bid**") to the Monitor at the addresses specified in Schedule "1" hereto (including by email transmission), so as to be received by them not later than 5:00 PM (Eastern Time) on or before December 5, 2025 (the "**Phase 2 Bid Deadline**").

25. Subject to paragraph 27, a Bid so submitted will be considered a Qualified Bid (as defined below) only if it complies with all of the following requirements (the "**Qualified Bid Requirements**"):

    (a) the Bid shall comply with all of the requirements set forth in respect of Phase 1 Qualified LOIs;

    (b) in the case of an Investment Proposal, the Bid shall be accompanied by a redline to the Stalking Horse Agreement;

    (c) the Bid (either individually or in combination with other bids that make up one Bid) is an offer to purchase or make an investment in some or all of the Property or Business and is consistent with any necessary terms and conditions communicated to Phase 2 Qualified Bidders;

    (d) the Bid includes a letter stating that the Phase 2 Qualified Bidder's offer is irrevocable until the selection of the Successful Bidder (as defined below), provided that if such Phase 2 Qualified Bidder is selected as the Successful Bidder, its offer shall remain irrevocable until the closing of the transaction with the Successful Bidder;

    (e) the Bid includes duly authorized and executed transaction agreements, including the purchase price, investment amount and any other key economic terms expressed in Canadian dollars (the "**Purchase Price**"), together with all exhibits and schedules thereto, all applicable ancillary agreements with all exhibits and schedules thereto (or term sheets that describe the material terms and provisions of such agreements), and proposed order to approve the sale by the Court, together with blacklines to any model documents provided by the Applicant and uploaded onto the Data Room;

    (f) the Bid alone or together with other Bids must have a proposed Purchase Price (i) equal to or greater than that contained in the Stalking Horse Bid plus $100,000, (ii)

must include cash consideration, payable in an amount sufficient to fully satisfy all outstanding amounts secured by each of the Court-ordered charges granted in the CCAA Proceedings as of the date of closing (such amount, the "**Charge Payout Amount**") (to the extent such amount is not duplicative of the Purchase Price contained in the Stalking Horse Bid), and (iii) cash to administer the wind-up of the Applicant in the amount of $100,000 (plus HST);

(g) the Bid includes written evidence of a firm, irrevocable commitment for financing or other evidence of ability to consummate the proposed transaction, that will allow the Applicant and the Monitor to make a determination as to the Phase 2 Qualified Bidder's financial and other capabilities to consummate the proposed transaction;

(h) the Bid is not conditioned on: (i) the outcome of unperformed due diligence by the Phase 2 Qualified Bidder, apart from, to the extent applicable, the disclosure of due diligence materials that represent proprietary or sensitive competitive information which was withheld in Phase 2 from the Phase 2 Qualified Bidder; and/or (ii) obtaining financing;

(i) the Bid fully discloses the identity of each entity that will be entering into the transaction or the financing (including through the issuance of debt in connection with such Bid), or that is participating or benefiting from such Bid, and such disclosure shall include, without limitation: (i) in the case of a Phase 2 Qualified Bidder formed for the purposes of entering into the proposed transaction, the identity of each of the actual or proposed direct or indirect equity holders of such Phase 2 Qualified Bidder and the terms and participation percentage of such equity holder's interest in such Bid; and (ii) the identity of each entity that has or will receive a benefit from such Bid from or through the Phase 2 Qualified Bidder or any of its equity holders and the terms of such benefit;

(j) the Bid includes a commitment by the Phase 2 Qualified Bidder to provide a deposit in the amount of not less than 10% of the Purchase Price (the "**Deposit**") upon the Phase 2 Qualified Bidder being selected as the Successful Bidder or the Back-Up Bidder, which shall be promptly paid to the Monitor in trust following, and in any event, no later than two (2) days after, such selection, and shall be held by the Monitor in accordance with paragraph 41 of this SISP;

(k) the Bid includes acknowledgements and representations of the Phase 2 Qualified Bidder that: (i) the transaction is on an "as is, where is" basis; (ii) it has had an opportunity to conduct any and all due diligence regarding the Property, Business and the Applicant prior to making its offer (apart from, to the extent applicable, the disclosure of due diligence materials that represent proprietary or sensitive competitive information which were withheld in Phase 2 from the Phase 2 Qualified Bidder); (iii) it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Property in making its Bid; (iv) it did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Business, Property, or the Applicant or the completeness of any information provided in connection therewith, except as expressly stated in the definitive transaction agreement(s) signed by the Applicant;

(l) the Bid includes evidence, in form and substance reasonably satisfactory to the Applicant and to the Monitor, of authorization and approval from the Phase 2 Qualified Bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the transaction agreement(s) submitted by the Phase 2 Qualified Bidder;

(m) the Bid contains other information required by the Applicant or the Monitor including, without limitation, such additional information as may be required in the event that an auction of certain Property is to be conducted; and

(n) the Bid is received by the Phase 2 Bid Deadline.

26. Following the Phase 2 Bid Deadline, the Applicant and the Monitor will assess the Bids received. The Applicant and the Monitor will designate any Bids that comply with the foregoing Qualified Bid Requirements to be "**Qualified Bids**".

27. Only Phase 2 Qualified Bidders whose Bids have been designated as Qualified Bids are eligible to become the Successful Bidder(s). The Stalking Horse Bid shall automatically be considered as a Qualified Bid for the purposes of this SISP and the Auction notwithstanding that it does not meet any one or more of the requirements set out in paragraph 25 (including, for greater certainty, the requirement to provide a Deposit).

28. The Applicant and the Monitor may waive strict compliance with any one or more of the requirements specified above (other than the requirement set out in paragraph 24(f), which requirement may only be waived with the consent of the Stalking Horse Purchaser, acting reasonably) and deem such non-compliant Bids to be a Qualified Bid.

29. The Applicant and the Monitor may aggregate separate Bids from unaffiliated Phase 2 Qualified Bidders to create one "Qualified Bid" if in their reasonable business judgment it may be possible to do so.

Selection of Successful Bid

30. A Qualified Bid will be valued based upon several factors, including, without limitation, items such as the following (together with the Qualified Bid Requirements, the "**Assessment Criteria**"):

(a) the Purchase Price and the net value provided by such bid;

(b) the composition of the consideration proposed to be used to satisfy the Purchase Price (it being understood that cash is a superior form of consideration and that credit bid consideration shall be considered equivalent to cash for these purposes);

(c) whether the Phase 2 Qualified Bidder has a *bona fide* interest in completing a Sale Proposal or Investment Proposal (as the case may be);

(d) whether the Phase 2 Qualified Bidder has provided satisfactory evidence of its financial capability (based on availability of financing, experience and other considerations) to consummate a Sale Proposal or Investment Proposal (as the case may be) based on the financial information provided;

(e) whether the Phase 2 Qualified Bidder has provided satisfactory evidence of its capability to consummate the transaction considering the ownership and other requirements of the *Architects Act*, RSO 1990, c. A.26;

(f) the claims likely to be created by such bid in relation to other bids;

(g) the identity, circumstances and ability of the Phase 2 Qualified Bidder to successfully complete such transactions;

(h) the proposed transaction documents;

(i) the effects of the bid on the stakeholders of the Applicant;

(j) the ability of the purchaser to complete the transaction on or before the Outside Date;

(k) any other factors affecting the speed, certainty and value of the transaction (including any conditions, regulatory approvals or third party contractual arrangements required to close the transactions);

(l) the assets included or excluded from the bid;

(m) any related restructuring costs; and

(n) the likelihood and timing of consummating such transactions,

each as determined by the Applicant and the Monitor.

31. The Applicant, in consultation with the Monitor, will review and evaluate each Qualified Bid, provided that each Qualified Bid may be negotiated between the Applicant, in consultation with the Monitor, and the applicable Phase 2 Qualified Bidder, and may be amended, modified or varied to improve such Phase 2 Qualified Bid as a result of such negotiations.

32. To the extent that no Qualified Bids (other than the Stalking Horse Bid) are received by the Phase 2 Bid Deadline, then, no later than 5:00 p.m. (prevailing Eastern Time) on December 8, 2025, the Stalking Horse Bid will be identified as the highest or otherwise best bid (the "**Successful Bid**" and the Phase 2 Qualified Bidder making such Successful Bid, the "**Successful Bidder**") for the Property and Business contemplated in the Stalking Horse Bid and the SISP shall not proceed to an Auction.

33. In the event there is one or more Qualified Bid, in addition to the Stalking Horse Bid, then, no later than 5:00 p.m. (prevailing Eastern Time) on December 8, 2025, the Applicant and the Monitor will, based on the Assessment Criteria, either determine the Stalking Horse Bid is the Successful Bid in respect of the relevant assets or determine that the Successful Bid in respect of such assets will be identified through an Auction or such other process as recommended by the Monitor and may be agreed to by the Applicant and the Stalking Horse Bidder.

34. If the Stalking Horse Bid is selected as the Successful Bid without designating an Auction, then the Applicant and Monitor may accept one or more Qualified Bids conditional upon

the failure of the transaction(s) contemplated by the Successful Bid(s) to close and subject to approval by the Court (the "**Back-up Bid**" and the Phase 2 Qualified Bidder making such Back-up Bid, the "**Back-Up Bidder**").

35. If the Applicant and Monitor designate an Auction, then:

(a) any such Auction will be conducted in accordance with procedures to be determined by the Applicant and the Monitor, acting reasonably, and notified to the applicable Qualified Bidders no less than 24 hours prior to the commencement of the Auction;

(b) any such Auction will commence at a time to be designated by the Applicant and the Monitor, no later than 12:00 p.m. (prevailing Eastern Time) on December 10, 2025, or such other date or time as may be determined by the Applicant and the Monitor, acting reasonably, and such Auction may, in the discretion of the Applicant and the Monitor, be held virtually via videoconference, teleconference or such other reasonable means as the Applicant and Monitor deems appropriate; and

(c) the Applicant and Monitor may accept one or more Qualified Bids as a Successful Bid(s) and one or more Qualified Bids as a Back-Up Bid(s) no later than 5:00 p.m. (prevailing Eastern Time) on December 10, 2025. The Stalking Horse Bid shall not be required to serve as a Back-Up Bid. The determination of any Successful Bid or Back-Up Bid by the Applicant and the Monitor shall be subject to approval by the Court.

36. The Successful Bid(s) must close no later than the Outside Date. If any Back-Up Bid is identified in accordance with this SISP, then such Back-Up Bid shall remain open until the date (the "**Back-Up Bid Outside Date**") on which the transaction contemplated by the respective Successful Bid is consummated or such earlier date as the Applicant and Monitor determine. If the transactions contemplated by a Successful Bid have not closed by the Outside Date or a Successful Bid is terminated for any reason prior to the Outside Date, then the Applicant and Monitor may elect to proceed with completing the transactions contemplated by a Back-Up Bid and will promptly seek to close the transaction contemplated by such Back-Up Bid. In such event, the applicable Back-Up Bid will be deemed to be a Successful Bid.

37. The Applicant shall have no obligation to enter into a Successful Bid (provided that nothing herein affects the Applicant's obligations under the Stalking Horse Agreement), and it reserves the right, after consultation with the Monitor, to reject any or all Phase 2 Qualified Bids (save and except for the Stalking Horse Bid). If no other Phase 2 Qualified Bidder is chosen as the Successful Bid, the Stalking Horse Bid shall be the Successful Bid.

Approval of Successful Bid

38. The Applicant will bring one or more motions before the Court (each such motion, an "**Approval Motion**") for one or more orders:

(a) approving the Successful Bid(s) and authorizing the taking of such steps and actions and completing such transactions as are set out therein or required thereby (and

such order shall also approve the Back-Up Bid(s), if any, should the applicable Successful Bid(s) not close for any reason); and

(b) granting a vesting order and/or reverse vesting order to the extent that such relief is contemplated by the applicable Successful Bid(s) to vest title to any purchased assets in the name of the Successful Bidder(s) and/or vesting unwanted liabilities out of the Applicant (collectively, the "**Approval Order(s)**").

39. The Approval Motion(s) will be held on date(s) to be scheduled by the Applicant and confirmed by the Court. The Applicant, in consultation with the Monitor and the Stalking Horse Bidder, may adjourn or reschedule any Approval Motion without further notice, by an announcement of the adjourned or rescheduled date at the applicable Approval Motion or in a notice to the service list of the CCAA Proceedings prior to the applicable Approval Motion.

40. All Qualified Bids (other than the Successful Bid(s) but including the Back-Up Bid(s)) will be deemed rejected on and as of the date of the closing of the final Successful Bid, with no further or continuing obligation of the Applicant to any unsuccessful Qualified Bidders.

41. Any Deposit(s) shall be held by the Monitor in an interest bearing account. A Deposit paid by a Successful Bidder shall be dealt with in accordance with the definitive documents for the transactions contemplated by the applicable Successful Bid. Deposits, and any interest thereon, paid by Phase 2 Qualified Bidders not selected as either a Successful Bidder or a Back-Up Bidder shall be returned to such Phase 2 Qualified Bidders within three (3) business days of Court approval of the Successful Bid(s). In the case of Back-Up Bid(s), the Deposit and any interest earned thereon shall be retained by the Monitor until the Back-Up Bid Outside Date and returned to the Back-Up Bidder within three (3) business days thereafter or, if a Back-Up Bid becomes a Successful Bid, shall be dealt with in accordance with the definitive documents for the transaction contemplated by the Back-Up Bid.

Confidentiality, Stakeholder/Bidder Communication and Access to Information

42. All discussions regarding an LOI, Bid, Sale Proposal or Investment Proposal must be directed through the Monitor. Under no circumstances should the management of the Applicant or any stakeholder of the Applicant be contacted directly without the prior consent of the Monitor. Any such unauthorized contact or communication could result in exclusion of the interested party from the SISP process.

43. Participants and prospective participants in the SISP shall not be permitted to receive any information that is not made generally available to all participants relating to the number or identity of Potential Bidders, Phase 1 Qualified Bidders, Phase 2 Qualified Bidders, Phase 2 Qualified Bids, the details of any bids submitted or the details of any confidential discussions or correspondence between the Applicant, the Monitor, and such other bidders or Potential Bidders in connection with the SISP, except to the extent the Applicant, with the approval of the Monitor and consent of the applicable participants, are seeking to combine separate bids from Phase 1 Qualified Bidders or Phase 2 Qualified Bidders.

44. The Monitor may consult with the legal and financial advisers to parties with a material interest in the CCAA proceedings regarding the status of the SISP to the extent considered appropriate (subject to taking into account, among other things, whether any particular party is a Potential Bidder, Phase 1 Qualified Bidder, Phase 2 Qualified Bidder or other

participant or prospective participant in the SISP or involved in a bid), provided that any such party has entered into confidentiality arrangements satisfactory to the Monitor.

Supervision of the SISP

45. The Monitor will participate in the conduct of the SISP in the manner set out in this SISP Process Outline and the Initial Order and is entitled to receive all information in relation to the SISP.

46. This SISP does not, and will not be interpreted to create any contractual or other legal relationship between the Applicant and any Phase 1 Qualified Bidder, any Phase 2 Qualified Bidder or any other party, other than as specifically set forth in a definitive agreement that may be signed with the Applicant.

47. The Applicant and the Monitor and their respective counsel shall not have any liability whatsoever to any person or entity, including without limitation any potential bidder, Phase 1 Qualified Bidder, Phase 2 Qualified Bidder, Back-Up Bidder, Successful Bidder or any other creditor or stakeholder, as a result of implementation or otherwise in connection with this SISP, except to the extent that any such liabilities result from the gross negligence or wilful misconduct of the Applicant or the Monitor, as applicable, as determined by a final order of the Court. Further, no person or entity, including without limitation any potential bidder, Phase 1 Qualified Bidder, Phase 2 Qualified Bidder, Back-Up Bidder, Successful Bidder or any other creditor or stakeholder shall have any claim against the Applicant or the Monitor or their respective affiliates, partners, directors, employees, agents, advisors, representatives and controlling persons in respect of the SISP for any reason whatsoever, except to the extent that such claim is the result of gross negligence or wilful misconduct by the Applicant or the Monitor, as applicable, as determined by a final order of the Court that is not subject to appeal or other review and all rights to seek any such appeal or other review shall have expired.

48. Participants in the SISP are responsible for all costs, expenses and liabilities incurred by them in connection with the submission of any LOI, Phase 2 bid, due diligence activities, and any further negotiations or other actions whether or not they lead to the consummation of a transaction.

49. The Applicant and the Monitor shall have the right to modify the SISP, in consultation with the Stalking Horse Bidder, if, in their reasonable business judgment, such modification will enhance the process or better achieve the objectives of the SISP; provided that the Service List in this CCAA Proceeding shall be advised of any substantive modification to the procedures set forth herein.

50. All bidders shall be deemed to have consented to the jurisdiction of the Court in connection with any disputes relating to the SISP, including the qualification of bids, the construction and enforcement of the SISP, and closing, as applicable.

APPENDIX A

DEFINED TERMS

(a) "**Applicant**" is defined in the introduction hereto.

(b) "**Approval Motion**" is defined in paragraph 38.

(c) "**Approval Order**" is defined in paragraph 38.

(d) "**Back-Up Bid**" is defined in paragraph 34.

(e) "**Back-Up Bidder**" is defined in paragraph 34.

(f) "**Back-Up Bid Outside Date**" is defined in paragraph 36.

(g) "**Bid**" is defined in paragraph 24.

(h) "**Business**" means the business of the Applicant.

(i) "**Business Day**" means a day (other than Saturday or Sunday) on which banks are generally open for business in Toronto, Ontario.

(j) "**CCAA**" is defined in the introduction hereto.

(k) "**Charge Payout Amount**" is defined in paragraph 25(f).

(l) "**Claims and Interests**" is defined in paragraph 6.

(m) "**Court**" is defined in the introduction hereto.

(n) "**Data Room**" is defined in paragraph 14.

(o) "**Deposit**" is defined in paragraph 25(j).

(p) "**Initial Order**" is defined in the introductions hereto.

(q) "**Investment Proposal**" is defined in paragraph 18(d)(ii).

(r) "**Known Potential Bidders**" is defined in paragraph 8(a).

(s) "**LOI**" is defined in paragraph 17.

(t) "**LOI Assessment Criteria**" is defined in paragraph 20.

(u) "**LOI Bidder**" is defined in paragraph 20(a).

(v) "**Milestones**" is defined in paragraph 7.

(w) "**Monitor**" is defined in the introduction hereto.

(x) "**Monitor's Website**" is defined in paragraph 7.

(y) "**NDA**" means a non-disclosure agreement in form and substance satisfactory to the Monitor and the Applicant, which will inure to the benefit of any purchaser of the Property or any investor in the Business or the Applicant.

(z) "**Opportunity**" is defined in paragraph 4.

(aa) "**Outside Date**" means December 31, 2025, or such later date as may be agreed to by the Applicant and the Monitor.

(bb) "**Phase 1 Bid Deadline**" is defined in paragraph 17.

(cc) "**Phase 1 Qualified Bidder**" is defined in paragraph 12.

(dd) "**Phase 2 Bid Deadline**" is defined in paragraph 24.

(ee) "**Phase 2 Qualified Bidder**" is defined in paragraph 21(a).

(ff) "**Potential Bidder**" is defined in paragraph 11.

(gg) "**Property**" means all of property, assets and undertakings of the Applicant.

(hh) "**Purchase Price**" is defined in paragraph 25(e).

(ii) "**Qualified Bids**" is defined in paragraph 26.

(jj) "**Qualified LOI**" is defined in paragraph 18.

(kk) "**Related Person**" means any person within the meaning of "related person" in the *Bankruptcy and Insolvency Act* (Canada).

(ll) "**Sale Proposal**" is defined in paragraph 18(d)(i).

(mm) "**Stalking Horse Agreement**" is defined in the introduction hereto.

(nn) "**Stalking Horse Bid**" is defined in the introduction hereto.

(oo) "**Stalking Horse Bidder**" is defined in the introduction hereto.

(pp) "**Successful Bid**" is defined in paragraph 32.

(qq) "**Successful Bidder**" is defined in paragraph 32.

(rr) "**Teaser Letter**" is defined in paragraph 8(c).

(ss) "**Third Party Agreement**" is defined in paragraph 18(e)(vii).

APPENDIX B

Address for Submitting LOI / Phase 2 Bid

Monitor:

KSV Restructuring Inc.
220 Bay St. Suite 1300
Toronto, ON M5J 2W4

Email: ttrifunovic@ksvadvisory.com

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO B+H ARCHITECTS CORP.

Court File No. CL-25-00753537-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding Commenced at Toronto

SALE AND INVESTMENT SOLICITATION PROCESS ORDER

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