

2022 01G 0709
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF an application of Grant Thornton Limited, as Court-Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., Newspar and CFI Newspar Holdings Inc. (collectively, "**CFI**" or the "**Company**");

AND IN THE MATTER OF the *Companies Creditors Arrangement Act* R.S.C., 1985 c. C-36 as Amended (the "**CCAA**")

MEMORANDUM OF FACT AND LAW OF APPLICANT

SUMMARY OF CURRENT DOCUMENT

Court File Number(s):	2022 01G 0709
Date of Filing of Document:	May 29 2023
Name of Party Filing or Person:	Grant Thornton Limited, in its capacity as Court-Appointed Monitor (the " Applicant ") of the Company
Application to which Document being filed relates:	Interlocutory Application (Inter Partes) filed by the Applicant seeking, <i>inter alia</i> , approval of a Reverse Vesting Order
Statement of Purpose in filing:	Memorandum in support of the Application
Court Sub-File Number, if any	N/A

FACTS

1. As of February 21, 2022, Canada Fluorspar Inc., and Canada Fluorspar (NL) (hereinafter referred to as the "**Original Entities**") were insolvent and were unable to meet its debt obligations as they became due. As a result, PricewaterhouseCoopers Inc., in its capacity as court-appointed receiver and manager of Bridging Finance Inc., and Bridging Income Fund LP ("**PWC**") applied for an interim receivership order pursuant to s. 47(1) of the *Bankruptcy and Insolvency Act*, RSC 1985 c. B-3 (the "**BIA**") over substantially all the assets and undertaking of the Original Entities, which order was issued by this Honourable Court on the 21st day of February, 2022 (the "**Interim Receivership Order**"). Pursuant to the Interim Receivership Order, Grant Thornton Limited ("GTL") was appointed as Interim Receiver of all the assets and undertaking of the Original Entities, with the exception of those assets and undertakings that were carved out of the receivership (defined therein as the "**Excluded Property**").
2. On the 8th day of March 2022, GTL as Interim Receiver made an application to this Honourable Court declaring that Canada Fluorspar Inc., Canada Fluorspar (NL) Inc., and Newspar (hereinafter the "**New Entities**") were a company to which the CCAA applied and requesting protection under the CCAA. As a result of that application, the Court granted an initial CCAA Order on the 11th day of March 2022 (the "**Initial CCAA Order**") and the Court subsequently granted the ARIO on the 18th day of March 2022. In both orders, GTL was appointed and confirmed as CCAA Monitor
3. In the Initial CCAA Order, this Honourable Court authorized the Monitor, on behalf of the New Entities, to enter into a DIP Financing Agreement with the DIP Lenders referenced in the Initial CCAA Order (the "**DIP Lenders**").
4. Following the 18th day of March 2022, the Monitor conducted a SISP as contemplated in the order of this Honourable Court issued on the same day as the ARIO (the "**SISP Order**").
5. On the 31st day of May 2022, the Monitor made an application to this Honourable Court seeking an extension of the stay period until the 2nd day of September 2022 and amending the SISP procedures to extend the dates of the Phase 2 Bid Deadline and each date thereafter in order to correspond with the CCAA stay period (the "**Amended SISP Order**"). The extension was requested to allow the Monitor to arrange the completion of a National

Instruments 43-101 Technical Report with the expectation that it would assist in increasing the purchase price for the New Entities' assets. The court granted these amendments by Order dated the 10th day of June, 2022.

6. As outlined in the Monitor's Fifth Report, the Monitor received multiple bids on the New Entities' assets through the SISP process. The Monitor made a recommendation to the DIP Lenders as to its preferred choice with respect to the bids received. The DIP Lenders were in support of the Monitor's recommendation and the Monitor therefore notified the successful bidder (the "**Successful Bidder**") on August 18, 2022.
7. On the 30th day of August 2022, this Honourable Court issued the 2nd Amended ARIO extending the CCAA stay period until the 17th day of October 2022 and amended the SISP procedures in order to allow time to (i) complete the SISP; (ii) enter into a definitive agreement with the Successful Bidder; and (iii) obtain court approval.
8. As outlined in the Monitor's Fifth Report, the Monitor completed the SISP and awarded, with the consent and the agreement of the DIP Lenders, the sale of the New Entities' assets to the Successful Bidder.
9. As outlined in the Monitor's Sixth Report, the Monitor and the New Entities worked diligently to complete the definitive agreement. However, the Successful Bidder failed to top up the agreed upon deposit as required by the SISP, and therefore failed to complete a key deadline as outlined in the SISP. As a result of this material adverse change, the agreement with the Successful Bidder was then terminated. The Monitor filed with this Court a Material Adverse Change Report.
10. On the 12th day of October 2022 this court issued the 3rd Amended ARIO extending the CCAA stay period until the 26th day of February, 2023 to allow the senior secured creditors and the DIP Lenders time to determine next steps as it related to the New Entities' assets, including the possibility of another SISP or a different type of sale or liquidation process.
11. Following the 12th day of October 2022, the Monitor and the New Entities worked diligently to solicit bids from parties that previously submitted proposals during the SISP. As of January 26, 2023, the Monitor selected, and the DIP Lenders approved a new successful bidder (the "**Purchaser**").

12. On the 13th day of February 2023, the Monitor entered into a Letter of Intent with the Purchaser.
13. On the 21st day of February 2023, this court issued the 4th Amended ARIO extending the CCAA stay period until the 31st day of May 2023 to allow the Purchaser (i) to complete its due diligence (ii) enter into a Definitive Agreement; and (iii) obtain court approval.
14. On the 18th day of May, the court issued the 5th Amended ARIO extending the CCAA stay period until the 16th day of June, 2023 to allow the Purchaser (i) to complete the definitive agreement and (ii) obtain court approval and close the transaction. In addition, the court approved the addition of CFI Newspar Holdings Inc. to these proceedings (CFI Newspar Holdings Inc., the Original Entities and the New Entities hereinafter collectively referred to as "**CFI**" and /or the "**Company**").
15. The proposed Share Purchase Agreement with the Purchaser (the "**Share Purchase Agreement**") and the Transactions, as defined in the Share Purchase Agreement (the "**Transactions**") represent the culmination of approximately thirteen (13) months of extensive efforts on the part of the Monitor and the Company.
16. The SISP was a thorough and broad canvassing of the world-wide market of parties interested in the Company's business and assets. The SISP generated a significant amount of interest in the Company, which resulted in material improvements to the consideration provided under the Transactions for the benefit of the Company's stakeholders and senior secured creditors. The Parties who were engaged in the SISP ultimately became the parties the Monitor solicited after the agreement with the Successful Bidder was terminated.
17. Based on the Monitor's experience, the nature of the Company, the SISP, and the comparison of offers received, as set out in the Monitor's Third Confidential Report, the Monitor is of the view that the Share Purchase Agreement and the Transactions contain commercially reasonable terms and will maximize the available recovery for the Company, its stakeholders and senior secured creditors. Additional reasons and support are included in the Monitor's Third Confidential Report and the Monitor's Ninth Report.

REVERSE VESTING STRUCTURE

18. The Share Purchase Agreement contemplates a reverse vesting structure whereby:
 - (a) The Purchaser will purchase the existing interests of Canada Fluorspar Inc., and subscribe for and purchase new shares of Canada Fluorspar Inc., free and clear of all encumbrances, such that the Purchaser will become the sole shareholder of Canada Fluorspar Inc., and as such will acquire its shareholdings in Canada Fluorspar (NL) Inc., Newspar and CFI Newspar Holdings Inc.; and
 - (b) All Excluded Assets, Excluded Contracts and Excluded Liabilities (as defined in the Share Purchase Agreement) will be transferred and "vested out" to a corporation to be incorporated by the Monitor (the "**ResidualCo**") in advance of closing, in order to allow the Purchaser to acquire the Company's business and remaining assets on a "free and clear" basis.
19. The reverse vesting structure will avoid the need for the Company to transfer the permits, licenses, leases or amend the registrations associated with the Company's existing mineral claims, thereby reducing the costs and time associated with closing the Transactions, for the benefit of the Company's stakeholders and senior secured creditors. In addition, the reverse vesting structure will significantly reduce the time needed to restart the mine. Again, a financial benefit to stakeholders and senior secured creditors.
20. The mining industry is heavily regulated and as such it would be a cumbersome process to obtain an assignment of all the mining licenses and permits currently held by the Company. As a result of the complex regulatory environment in which mines operate, reverse vesting structures are commonly used in acquisitions of mines under the CCAA.
21. Further, in the current situation, the reverse vesting structure allows the Purchaser to preserve the Company's tax attributes that would otherwise be lost in an asset sale, and the Purchaser has expressed the importance of maintaining these attributes as part of the sale. The Cash Consideration is based on, in part, the preservation of those tax attributes.
22. A "reverse vesting" structure will not result in any material prejudice to the creditors of the Company, nor will it impair any of the creditors' rights that they would otherwise have under an asset sale transaction. There will be no funds available for the unsecured creditors through either type of transaction.

MONITOR'S POWER EXPANSION

23. As set out in the Clarke Affidavit, the Monitor's Ninth Report and the Monitor's Third Confidential Report, the Monitor is seeking enhanced powers in relation to the ResidualCo in order to enable the Monitor to take additional steps for completion of the Transactions and other steps related to the wind-down of these CCAA Proceedings.
24. No person, other than the Monitor, will be appointed to act as an officer or director of the ResidualCo, making it logical and cost-effective to enhance the Monitor's powers in order to enable the Monitor to take additional steps for completion of the Transactions and other steps related to the wind-down of these CCAA Proceedings.

RELEASE

25. The Monitor is also seeking a court ordered release (the "**Release**") in favour of:
- (a) the employees, legal counsel and advisors of the Company and of ResidualCo;
 - (b) the Monitor and its legal counsel, and their respective present and former directors, officers, partners, employees and advisors;
 - (c) the DIP Lenders, its counsel, and their respective present and former directors, officers, partners, employees and advisors; and
 - (d) the Purchaser, and its directors, officers, employees, legal counsel and advisors (collectively, the "**Released Parties**").
26. The Release covers any and all present and future claims against the Released Parties based upon any fact or matter of occurrence in respect of the Transactions or the Company, its assets, business or affairs or administration of the Company, except any claim for fraud or willful misconduct or any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.
27. The Released Parties have contributed to the successful outcome in these CCAA Proceedings.
28. The Release is being sought, with the support of the Company, the Monitor, the DIP Lenders and the Purchaser, in order to achieve certainty and finality for the Released Parties in the most efficient and appropriate manner given the current circumstances.

29. The Company is unaware of any statutory liabilities in respect of the Released Parties and to date, no stakeholder of the Company has made the Company or the Monitor aware that they intend to assert a claim against any of the Released Parties in respect of any claims covered by the Release.
30. As set out in the Clarke Affidavit, the Monitor's Ninth Report and the Monitor's Third Confidential Report, the Monitor believes that the Release is in the best interest of the Company in order to complete the Share Purchase Agreement and the Transactions.

EXTENSION OF THE STAY PERIOD

31. The Stay period will currently expire on the 16th day of June 2023.
32. The Applicant is requesting the Stay Period be extended until the 31st day of October, 2023.
33. The Stay Period will terminate in respect of the Company upon closing of the Transactions, however, the CCAA Proceedings and Stay Period will continue in respect of the ResidualCo following the completion of the Transactions.
34. Additional time is required to complete the Transactions contemplated under the Share Purchase Agreement and to seek court approval of the distribution of the sale proceeds resulting from the Transactions. The Applicant therefore seeks an extension of the Stay Period with respect to the ResidualCo. in order to provide the required stability during that time frame.
35. As set out in the cash flow projection, the Monitor expects that, with the funds to be advanced from the Share Purchase Agreement, it will have sufficient cash to fund its projected costs during the proposed stay extension period.
36. The Company and the Monitor have continued to act in good faith and with due diligence throughout these CCAA Proceedings.
37. The senior secured creditors and the DIP Lenders have consented to the extension of the stay of proceedings under section 11 of the CCAA.

SEALING ORDER

38. Finally, the Monitor requests that a Court Order be granted sealing the Monitor's Third Confidential Report and the Share Purchase Agreement and that it remain under seal until the Closing as outlined in the Share Purchase Agreement, to avoid any negative impact that could result from the dissemination of the information contained therein. The report contains commercially sensitive information pertaining to the SISP and the offers for purchase of the mine and other confidential information in respect of the new offers submitted to the Monitor after the material adverse change and the agreement with the Purchaser. Publication of the information contained in the Monitor's Third Confidential Report and Share Purchase Agreement would pose serious risk to the commercial interests of stakeholders and would irreparably harm the Monitor's efforts to maximize realizations from the Company's assets should the Transactions not close.

ISSUES:

39. The issues before this Court are as follows:
1. Whether the Share Purchase Agreement and the Transactions should be approved by way of a Reverse Vesting Order;
 2. Whether the requested release in favour of the Released Parties should be granted;
 3. Whether the requested extension of the stay of proceedings should be granted;
 4. Whether the Monitor should be granted enhanced powers with respect to ResidualCo; and
 5. Whether a sealing order should be granted with respect to the Monitor's [Third] Confidential Report and the Share Purchase Agreement.

LAW AND ARGUMENT

Whether the Share Purchase Agreement and the Transactions should be approved

40. The Applicant is requesting that the Share Purchase Agreement with the Purchaser and the Transactions contemplated therein, be approved by way of a Reverse Vesting Order ("RVO").
41. Section 11 of the CCAA provides the court with a broad discretion to make any orders it considers appropriate in the circumstances.

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.

Reference: CCAA s., 11 [TAB 1]

42. Section 36 of the CCAA sets out the applicable legal test for obtaining court approval of a sale outside the ordinary course of business during a CCAA proceeding. This legal test is also applicable in the context of a reverse vesting transaction. In particular, section 36 (3) outlines certain factors that the Court shall consider when deciding whether to approve a sale:

Factors to be considered

36 (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.

Reference: CCAA s., 36 (3) [TAB 2]

43. In *Harte Gold Corp (Re)*, 2022 ONSC 653, the Ontario Superior Court of Justice stated that the jurisdiction to grant an RVO is derived from section 11 of the CCAA and that the framework in section 36 (3) should apply to RVO transactions.

[37] I am, therefore, not sure I agree with the analysis which finds 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.

Reference: *Harte Gold Corp (Re)*, 2022 ONSC 653 at paragraph 37 [TAB 3]

44. In addition, the court provided a list of questions that the Monitor must be prepared to answer when requesting an RVO.

[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?

Reference: *Harte Gold Corp (Re)*, 2022 ONSC 653 at paragraph 38 [TAB 3]

45. The Applicant submits that this court has the discretion to approve the RVO under section 11 of the CCAA. Moreover, the Share Purchase Agreement and the Transactions satisfy the statutory criteria under section 36 (3) of the CCAA for approval of a sale, including a sale by way of an RVO:

- (a) **The solicitation process was reasonable:** The Share Purchase Agreement, and the Transactions contemplated therein, are the culmination of approximately thirteen (13) months of extensive solicitation efforts on the part of both the Monitor and the Company as part of the SISP, which process was approved by this Court pursuant to the SISP Order. As noted above, the Monitor canvassed the world-wide market of parties interested in the Company's business and assets. This allowed the Monitor to receive bids from a number of interested parties. The competitive process resulted in the final bid submitted by the Successful Bidder. Although the Successful Bidder was unable to complete the transaction as a result of a material adverse change, the Monitor continued to actively work to sell the assets of the Company including reaching out to those parties who had previously been interested during the SISP. As a result, the Monitor entered into a letter of intent with the Purchaser on February 13, 2022. Since that time, the Monitor, with the cooperation of the Company, has worked diligently to enter into a Share Purchase Agreement with the Purchaser.
- (b) **The Monitor approved the solicitation process:** GTL, as Monitor, was actively involved in the SISP. As the Company has no existing directors or officers, the Monitor, with the cooperation of the Company, sought court approval for the SISP and ran the SISP in compliance with the SISP Order. The Monitor continued to work with the interested parties from the SISP to solicit new bids when the transaction with the Successful Bidder failed as a result of the material adverse change.

- (c) **The Monitor filed reports:** The Monitor has filed its First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Reports with this Honourable Court. All reports have made reference to the progress of the SISP at various stages throughout the process. As outlined in the Monitor's Fifth Report and Ninth Report, filed with this Honourable Court, the Monitor believes that the sale and subscription of shares to a preferred bidder under the RVO would be more beneficial to the creditors than a sale of assets under a sale or disposition in bankruptcy. The Monitor supports the sale pursuant to the Share Purchase Agreement and is requesting the approval of this Honourable Court.
- (d) **Stakeholders were consulted during the sale process:** The Monitor has consistently and frequently consulted with the senior secured creditors of the Company, being the DIP Lenders, throughout the entire SISP process. The Monitor obtained the consent of the DIP Lenders prior to each change to the SISP, and to each milestone and prior to the approval of the Successful Bidder. The Monitor consulted with the DIP Lenders when the transaction with the Successful Bidder failed and the parties had to determine next steps. The Monitor sought approval from the DIP Lenders on the new offers and the successful bid from the Purchaser. The Monitor continues to consult the DIP Lenders in relation to the Share Purchase Agreement and the Transactions.
- (e) **The effect on creditors:** The Monitor has consulted with the DIP Lenders regarding the Share Purchase Agreement and the Cash Consideration (as defined in the Share Purchase Agreement). The DIP Lenders have agreed to the proposed sale. The Monitor submits that the unsecured creditors will remain unaffected regardless of the Transactions. Further, the Monitor submits that none of the creditors will be in a worse position if the RVO is granted.
- (f) **Consideration received for the assets:** The Cash Consideration payable pursuant to the Share Purchase Agreement is fair and reasonable as outlined in the Monitor's Ninth Report. The assets were extensively marketed as part of the SISP and the Purchaser was the highest bid received through the second round of bids. In addition, the sale to the Purchaser by way of the RVO will continue the operations of the Company as a going concern.

46. With respect to the questions outlined by the Superior Court of Justice in *Harte Gold Corp (Re)*, 2022 ONSC 653, the Applicant responds as follows:
- (a) **Necessity of the RVO:** The RVO is necessary in this instance as it will allow for the Purchaser to operate the Company as a going concern and use the Retained Assets of the Company, including the mineral leases and licences, without delay or additional costs to the Company.
 - (b) **Economic Result:** The economic result of the Transactions provides a better result than any other form of transaction under a bankruptcy, as it allows the Company to continue on as a going concern. In addition, the Transactions provide for the repayment of the DIP Financing as well as payment to the senior secured creditors.
 - (c) **Is any Stakeholder worse off:** No creditor is worse off as a result of the RVO. The unsecured creditors remain unaffected regardless of the sale process.
 - (d) **Consideration paid:** The consideration outlined in the Share Purchase Agreement for the sale and subscription of Canada Fluorspar Inc. shares is the highest price offered to the Monitor through the SISP and through the recanvassing of the SISP bidders. The SISP canvassed the worldwide market. The Monitor believes that the price received is fair and reasonable taking into account the assets, including the mineral leases and licences.
47. In *Quest University Canada (Re)*, 2020 BSCS 1883, the British Columbia Supreme Court extensively reviewed the case law related to a court's authority to grant a reverse vesting order under the CCAA. Following the review of the case law, it found that the CCAA provided sufficient authority to grant the reverse vesting order which was consistent "with the remedial purposes of the CCAA" and consistent with the Supreme Court of Canada's ruling on a CCAA court's jurisdiction in *Callidus*. The issue in each case is not whether the court has sufficient jurisdiction but whether the relief is "appropriate" in the circumstances and that stakeholders are treated as fairly and reasonably as the circumstances permit:

[155] I find further support for Quest's position in the recent comments of the Court in *Callidus*. The Court was there addressing a different issue – whether a CCAA judge has jurisdiction under s. 11 to bar a creditor from voting where the creditor is "acting for an improper purpose" – but the Court's comments on the exercise of jurisdiction under the CCAA ring true in relation to the RVO structure:

[49] The discretionary authority conferred by the CCAA, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the CCAA, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

Reference: *Quest University Canada (Re)*,
2020 BSCS 1883 at paragraph 155 [TAB 4]

48. The Applicant submits that the order is appropriate in these circumstances given the nature of the operation of the mine and structure of the current deal with the Purchaser. Granting the RVO will avoid additional costs and unnecessary delay to the Company, the stakeholders, the senior secured creditors and the Purchaser. The Monitor has acted in good faith and has exercised due diligence throughout the SISP process by (i) keeping all creditors informed, (ii) having numerous discussions with the senior secured creditors and DIP Lenders regarding phase 1 and phase 2 bidders, (iii) having numerous discussions with the senior secured creditors and DIP Lenders regarding the previous material adverse change and the recanvassing of the interested parties in the SISP; (iv) obtaining consent of the senior secured creditors and DIP Lenders prior to making any changes to the SISP and prior to choosing the Purchaser and (v) obtaining the highest price for the assets as a result of its marketing efforts under the SISP.
49. Appropriate use of an RVO was further discussed in *Quest University Canada (Re)*, 2020 BSCS 1883, wherein the court noted that RVOs are often used when the purchased assets include licenses that are either difficult to transfer to the purchaser and/or more valuable if maintained within the existing corporate entity:

[160] Many of the RVO cases cited above involve a sale of an ongoing business with a purchaser. The RVO structure was crafted to allow those businesses to continue through the debtor company, since it was that corporate vehicle who owned the valuable "assets" that could not be transferred.

Reference: *Quest University Canada (Re)*,
2020 BSCS 1883 at paragraph 160 [TAB 4]

50. In *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, the Ontario Superior Court approved a RVO and noted the difficulties in transferring permits and licenses through a traditional asset sale:

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.

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.

Reference: *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.* 2022 CarswellOnt 16700 at paras 33-34 [Tab 5]

51. In this case, the Share Purchase Agreement is structured as a reverse vesting transaction in order to maintain sixty four (64) material permits and licenses that are required for the Company's mining operations, including mineral licenses, mine lease rentals, surface lease rentals, crown land leases, water use licenses and operation permits, all of which are integral to the operation of the Company (collectively, the “**Permits and Licenses**”). A traditional asset sale transaction structure would require having to seek the consent to assignment from contract counterparties and a transfer of such Permits and Licenses by government departments resulting in inevitable delay and additional costs in completing the Transactions, to the detriment of the Company's stakeholders. Additionally, amendments to various mineral claim registrations would create additional costs associated with the Transactions.
52. In addition, the reverse vesting structure allows the Purchaser to preserve the Company's tax attributes that would otherwise be lost in an asset sale, and the Purchaser has expressed the importance of maintaining these attributes as part of the sale. The Cash Consideration is based on, in part, the preservation of those tax attributes.
53. The reverse vesting aspect of the Transactions will not prejudice or impair any rights of the Company's creditors as compared to an asset sale transaction, and certain elements of the Transactions were structured to preserve rights that creditors would otherwise have had in an asset sale transaction. Accordingly, the Applicant submits that approving the

Transactions as a reverse vesting transaction is appropriate in the circumstances and consistent with the underlying objectives of the CCAA.

Whether the requested Release in favour of the Released Parties should be granted

54. The proposed Release covers any and all present and future claims against the Released Parties except any claim for fraud or willful misconduct or any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.
55. Releases for the Monitor and other advisors to debtor companies are a common feature of CCAA plans. The absence of a CCAA plan, however, does not deprive the court of the jurisdiction to approve releases for these parties. Section 5.1(1) of the CCAA, for example, which deals with releases relating to directors, is drafted permissively. It does not limit the jurisdiction of the Court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances. Section 5.1(1) of the CCAA states as follows:

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Reference: CCAA s. 5.1(1) [TAB 6]

56. CCAA courts have, on multiple occasions, approved releases in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of, among other parties, directors, officers, monitors, counsel, employees, shareholders and advisors. In *Green Relief Inc. (Re)*, 2020 ONSC 6837, the Ontario Superior Court of Justice granted such a release and provided a non-exhaustive list of factors to be considered:

27 In *Lydian International Limited (Re)*, 2020 ONSC 4006 at paragraph 54, Morawetz J. (as he then was) summarized the factors relevant to the approval of releases in CCAA proceedings as including the following:

- (a) Whether the claims to be released are rationally connected to the purpose of the plan;
- (b) Whether the plan can succeed without the releases;
- (c) Whether the parties being released contributed to the plan;
- (d) Whether the releases benefit the debtors as well as the creditors generally;

(e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(f) Whether the releases are fair, reasonable and not overly-broad.

28 As in most discretionary exercises, it is not necessary for each of the factors to apply in order for the release to be granted: *Target Canada Co., Re*, endorsement of Morawetz J. (as he then was) at p. 14. Some factors may assume greater weight in one case than another.

Reference: *Green Relief Inc. (Re)*, 2020 ONSC 6837 at paragraphs 27-28 [TAB 7]

57. Several cases throughout Canada have granted similar releases relying on the factors outlined above. In *Harte Gold Corp (Re)*, the Ontario Superior Court of Justice stated as follows:

[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 the 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.

Reference: *Harte Gold Corp (Re)*, 2022 ONSC 653 at paragraph 78-80 [TAB 3]

58. Additionally, in the recent case of *Arrangement relatif à Blackrock Metals Inc*, 2022 QCCS 2828, the Quebec court considered contested releases in the context of an RVO:

128 It is now commonplace for third-party releases, in favor of parties to a restructuring, their professional advisors as well as their directors, officers and others, to be approved outside of a plan in the context of a transaction. In fact, similar releases have been approved by this Court in recent cases involving RVO transactions, including in *Nemaska Lithium*.

129 This being said, the courts should not grant releases blindly and systematically.

130 In *Harte Gold Corp.*, the Court approved releases in favor of various parties that included the purchaser and its directors and officers and considered the criteria ordinarily canvassed with respect to third-party releases provided for under a plan, as articulated in *Lydian International Limited (Re)* and elsewhere. They are the following:

- a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
- b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;
- c) Whether the plan could succeed without the releases;
- d) Whether the parties being released were contributing to the plan; and
- e) Whether the release benefitted the debtors as well as the creditors generally.

131 In the present file, IQ's and Orion's participation was obviously instrumental to the restructuring of BlackRock's business. Considering the SISP and the opportunity given to BlackRock's stakeholders to participate in the process, it is reasonable for IQ and Orion to now start with a clean slate and not to be under the threat of potential claims as they will be leading BlackRock's efforts with Project Volt. The release will provide more certainty and finality.

132 The release is thus reasonably connected and justified as part of the Proposed Transaction, and it is to the benefit of BlackRock and its stakeholders generally as it will allow BlackRock to emerge as a solvent entity and be in the best possible position to, hopefully, secure financing for Project Volt. They are also fair and reasonable in the present circumstances.

Reference: *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828 at paragraph 128-132 [TAB 8]

59. The Applicant submits that the Release sought is reasonable and appropriate in the circumstances and should be granted for the following reasons:

- (a) **Whether the claims to be released are rationally connected to the purpose of the restructuring:** The claims to be released are rationally connected to the Company's restructuring. The Release will have the effect of reducing claims against the Released Parties, which in turn will reduce indemnification claims by the Released Parties against the Administration Charge (as defined in the Initial Order). 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.

- (b) **Whether the releasees contributed to the restructuring:** The Released Parties made significant contributions to the Company's restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the Monitor, in consultation with the Company and its legal counsel, and the support and assistance from the DIP Lenders and its legal counsel, were instrumental to the conduct of the SISP and the continued operations of the Company during the CCAA Proceedings. With a proposed sale that will maintain the Company as a going concern and permit repayment of the DIP Financing and payment to the senior secured creditors, these CCAA Proceedings have had a successful outcome for the benefit of the Company's stakeholders. The Released Parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of the Release.
- (c) **Whether the Release is fair, reasonable and not overly broad:** The Release is fair and reasonable. The Monitor is unaware of any claims against the advisors related to their provision of services to the Company, or any claims against the Purchaser or DIP Lenders as it relates to its conduct with respect to the Company or these CCAA Proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow in the circumstances as 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.
- (d) **Whether the restructuring could succeed without the Release:** The Release is being sought, with the support of the Purchaser and the DIP Lenders, as it will bring certainty and finality for the Released Parties. Additionally, the Company and the Purchaser both believe that the Release is an essential component to the Transactions.
- (e) **Whether the Release benefits the Company as well as the creditors generally:** The Release benefits the Company as well as the Company's creditors and other stakeholders by reducing the potential for the Released Parties to seek indemnification from the Company, thus minimizing further claims against the Company.

- (f) **Creditors' knowledge of the nature and effect of the Release:** All creditors on the Service List were served with materials relating to this motion. The Monitor also provided notice to unsecured creditors and posting a copy of the materials on its website. The proposed Release was contained in the draft approval and reverse vesting order that was attached to the within Application, which provided stakeholders with ample notice and time to raise concerns with the Company or the Monitor.

60. For the reasons noted above, the Applicant submits that the Release should be granted.

Whether the requested extension of the stay of proceedings should be granted

61. The Stay Period will terminate in respect of the Company upon closing of the Transactions, however, the CCAA Proceedings and Stay Period will continue in respect of the ResidualCo following the completion of the Transactions.
62. The current stay period expires on the 16th day of June 2023. The Applicant is now requesting a stay with respect to the ResidualCo. until the 31st day of October, 2023.
63. Section 11.02(2) of the CCAA provides that a court has the discretion to grant a requested stay of proceedings on any terms that it may impose:

11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Reference: CCAA s., 11.02(2) [TAB 9]

64. Section 11.02 (3) of the CCAA outlines when a court should make an order to extend a stay:

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Reference: CCAA s., 11.02(3) [TAB 10]

65. The Applicant submits that the request is appropriate in these circumstances as it will allow for the necessary time needed to complete the Transactions contemplated by the Share Purchase Agreement as well as the time needed to obtain court approval for the distribution of funds.
66. In *Harte Gold Corp (Re)*, 2022 ONSC 653, the Ontario Supreme Court of Justice discussed the test for extending a stay of proceedings under s. 11.02 of the CCAA.

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.

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.

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.

For these reasons the stay is extended to March 29, 2022

Reference: *Harte Gold Corp (Re)*, 2022 ONSC 653 at paragraphs 87-90 [TAB 3]

67. As outlined above, the Applicant has been acting in good faith and with due diligence throughout this process but will require additional time to complete the Transactions contemplated by the Share Purchase Agreement and to attend to the distribution of funds.
68. No creditors will suffer prejudice as a result of the extension. In fact, the senior secured creditors and DIP Lenders have all consented to the extension. Finally, as outlined in the updated Cash Flow, the Monitor expects that, with the funds to be advanced from the

Share Purchase Agreement, it will have sufficient cash to fund its projected costs during the proposed stay extension period.

Whether the Monitor should be granted enhanced powers with respect to ResidualCo

69. The CCAA provides the Court with broad discretion in respect of the Monitor's functions in a particular CCAA proceeding.
70. Section 23(1) (k) of the CCAA provides that the Monitor can;
- (k) carry out any other functions in relation to the company that the court may direct.

Reference: CCAA s., 23 (1) (k) [TAB 11]

71. In addition, as noted above, section 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.
72. In *Harte Gold Corp (Re)*, 2022 ONSC 653, the Court granted the expansion of monitor powers in relation to an RVO involving newcos:

[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.

Reference: *Harte Gold Corp (Re)*, 2022 ONSC 653 at paragraphs 91-92 [TAB 3]

73. The Applicant submits that the present case is similar to *Harte Gold Corp (Re)*, in relation to the necessity for the expansion of monitor powers. The expanded powers are necessary in order for the Monitor to complete the Transactions with the Purchaser pursuant to the Share Purchase Agreement, including the necessity to vest out the Excluded Assets,

Excluded Contracts and Excluded Liabilities to ResidualCo. Moreover, no creditor will be prejudiced by the requested expansion of the Monitor's powers.

Whether a sealing order should be granted with respect to the Monitor's Third Confidential Report and the Share Purchase Agreement.

74. The Applicant requests a Court Order be granted sealing the Monitor's Third Confidential Report and the Share Purchase Agreement and that it remain under seal until the Closing as outlined in the Share Purchase Agreement, to avoid any negative impact that could result from dissemination of the information contained in the Monitor's Third Confidential Report and Share Purchase Agreement. The report and agreement contain commercially sensitive information pertaining to the valuation of the mine, bids, terms of the proposed sale and certain confidential information in respect of the offers submitted to the Applicant during both the SISP and the recanvassing of interested parties after the material adverse change. Publication of the information contained in the Monitor's Third Confidential Report and the Share Purchase Agreement would pose serious risks to the commercial interests of stakeholders and would irreparably harm the Applicant's efforts to maximize realizations should the sale not close.
75. This Honourable Court has recognized that sealing orders in respect of commercially sensitive information are appropriate in respect of information related to the sale or proposed sale of assets;

"I also granted an order sealing the Receiver's First Report until the transaction contemplated in the application is completed or upon further order of the Court. As a court of inherent jurisdiction, this Court has authority to seal part or all of a court record (Barnes, Re, 2016 NLTD(G) 106 (N.L. T.D.)). The receiver submits that this is an appropriate case for me to exercise my discretion in accordance with generally accepted insolvency practice to grant a sealing order over the Receiver's First Report and its appendices, until completion of the sale contemplated by this application.

.....

Because the proposed sale of the Subject Property has not been approved, the receiver is rightly concerned that the sensitive information contained in the Receiver's First Report could adversely affect the sale of these assets to another party."

Reference: *Sports Villas Resort, Inc. (Re)*
2020 CarswellNfld 188 at paras 7-9 (NLSC)
[Tab 12]

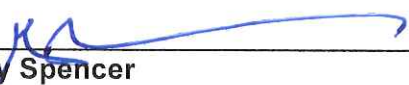
76. The Applicant submits that the rationale employed by this court in *Sports Villas Resort, Inc. (Re)*, is equally applicable to the present situation and that it is appropriate for the court to grant the requested Sealing Order.

Conclusion

77. The Applicant respectfully requests that this Honourable Court grant the Order attached to the within Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador, this 29th day of May, 2023.



Geoffrey Spencer
McInnes Cooper
Solicitors for the Applicant
Whose address for service is:
5th Floor, Baine Johnston Centre
10 Fort William Place
St. John's, NL A1C 5X4

TO: Supreme Court of Newfoundland & Labrador
General Division (In Bankruptcy)
P.O. Box 937
313 Duckworth Street
St. John's, NL A1C 5M3

AND TO: The Service List attached as Schedule "A" to the Application

List of Authorities:

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c-36, as amended, s. 11
2. *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c-36, as amended, s. 36 (3)
3. *Harte Gold Corp (Re)*, 2022 ONSC 653
4. *Quest University Canada (Re)*, 2020 BSCS 1883
5. *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.* 2022 CarswellOnt 16700
6. *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c-36, as amended, s. 5.1(1)
7. *Green Relief Inc. (Re)*, 2020 ONSC 6837
8. *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828
9. *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c-36, as amended, s. 11.02(2)
10. *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c-36, as amended, s. 11.02(3)
11. *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c-36, as amended, s. 23 (1) (k)
12. *Sports Villas Resort, Inc. (Re)* 2020 CarswellNfld 188

TAB 1

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II. — Jurisdiction of Courts (ss. 9-18.5)

Most Recently Cited in: Roman Catholic Episcopal Corporation of St. John's (Re) , 2022 NLSC 81, 2022 CarswellNfld 1551 (N.L. S.C., May 10, 2022)

R.S.C. 1985, c. C-36, s. 11

s 11. General power of court

Currency

11. General power of court

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

Amendment History

1992, c. 27, s. 90; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 124; 2005, c. 47, s. 128

Judicial Consideration (5)

Currency

Federal English Statutes reflect amendments current to March 2, 2022

Federal English Regulations Current to Gazette Vol. 156:5 (March 2, 2022)

TAB 2

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.

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

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.

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

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).

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.

2006, c. 47, s. 181; 2007, c. 35, s. 78; 2017, c. 25, s. 14; 2018, c. 27, s. 268.

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).

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.

2006, ch. 47, art. 181; 2007, ch. 35, art. 78; 2017, ch. 25, art. 14; 2018, ch. 27, art. 268.

TAB 3

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 Netnizaaggamig 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, Harte 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 pre-filing 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 contracts 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 employment 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 include 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 finds 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 pre-filing 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 Netnizaagamig 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 pre-filing 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 prefling 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

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.

would 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 pre-filing strategic process, the SISP and the continued operations of Harte Gold during the CCAA proceedings. With a proposed sale that will maintain Harte Gold as a going concern and permit most creditors to receive recovery in full, these CCAA proceedings have had what must be considered a "successful" outcome for the benefit of Harte Gold's stakeholders. The released parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of a release.

- [83] Whether the Release is fair, reasonable and not overly broad: The Release is fair and reasonable. Harte Gold is unaware of any outstanding director claims or liabilities against its directors and officers. Similarly, Harte Gold is unaware of any claims against the advisors related to their provision of services to Harte Gold or to the purchaser relating to Harte Gold or these CCAA proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow. Regulatory or environmental liabilities owed to any government authority have not been disclaimed and the language of the Release was specifically negotiated with the Ministry of Northern Development and Mines to preserve those identified obligations. Further, the Release carves out and preserves claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced and will allow Harte Gold and the released parties to move forward with the transaction and to conclude these CCAA proceedings.
- [84] Whether the restructuring could succeed without the Release: The Release is being sought, with the support of Silver Lake and the Appian parties (the most significant stakeholders in these CCAA proceedings) as it will enhance the certainty and finality of the transaction. Additionally, Harte Gold and the purchaser both take the position that the Release is an essential component to the transaction.
- [85] Whether the Release benefits Harte Gold as well as the creditors generally: The Release benefits Harte Gold and its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification, thus minimizing further claims against the Administration Charge and the Directors' Charge.
- [86] Creditors' knowledge of the nature and effect of the Release: All creditors on the service list were served with materials relating to this motion. Harte Gold also made additional efforts to serve all parties with excluded claims under the transaction. Additionally, the form of the Release was included in the draft approval and reverse vesting order that was included in the original Application Record in these CCAA proceedings. All of this provided stakeholders with ample notice and time to raise concerns with Harte Gold or the Monitor. No creditor (or any other stakeholder) has objected to the Release. A specific claims process for claims against the released parties in these circumstances would only result in additional costs and delay without any apparent corresponding benefit.

Extension of the Stay

- [87] The current stay period expires on January 31, 2022. Under s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.
- [88] Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the Silver Lake transaction, while at the same time preserving the status quo and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.

[89] No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. Harte Gold is acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Harte Gold's cash flow forecast, it is expected to have sufficient liquidity to continue its operations during the contemplated extension of the stay.

[90] For these reasons the stay is extended to March 29, 2022.

Expansion of Monitor's Powers

[91] The CCAA provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the CCAA provides that the Monitor can "carry out any other functions in relation to the [debtor] company that the court may direct". In addition, of course, s. 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.

[92] The order for the Monitor's expanded powers is intended to provide the Monitor with the power, effective upon the issuance of the approval and reverse vesting order, to administer the affairs of the newcos (which is necessary to complete the transaction), along with powers necessary to wind down these CCAA proceedings and to put the newcos into bankruptcy following the close of the transaction. No creditor is prejudiced by the expansion of the Monitor's powers to facilitate the transaction and the wind-down of the CCAA proceedings. On the contrary, the granting of such powers is necessary to achieve the benefits of the transaction to stakeholders which have been described above.

[93] I approve the grant of the requested powers to the Monitor.

Conclusion

[94] For all these reasons, the motion for an order approving the Silver Lake transaction, including the RVO structure, is granted. The additional requests for orders extending the stay and expanding the Monitor's powers are also granted.

Penny J.

Date: 2022-02-04

TAB 4

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Quest University Canada (Re)*,
2020 BCSC 1883

Date: 20201202
Docket: S200586
Registry: Vancouver

In the Matter of the **COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C.**
1985, c. C-36, as amended

- and -

In the Matter of the **SEA TO SKY UNIVERSITY ACT, S.B.C. 2002, c. 54**

- and -

In the Matter of A **PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST
UNIVERSITY CANADA**

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment (Sale Approval)

Counsel for the Petitioner:

J.R. Sandrelli
V. Cross

Counsel for the Monitor
PricewaterhouseCoopers Inc.:

V.L. Tickle

Counsel for Primacorp Ventures Inc.:

P. Rubin
G. Umbach

Counsel for RCM Capital Management Ltd.
and SESA-BC Holdings Ltd.:

K. Jackson
G. Nesbitt

Counsel for Southern Star Developments
Ltd.:

P. Reardon
K. Strong

Counsel for Vanchorverve Foundation:

C.D. Brousson

Counsel for Dana Hospitality LP:

D.V. Bateman

Counsel for Halladay Education Group:	D. Lawrenson
Counsel for Capilano University:	K. Mak
Counsel for Landrex Ventures Inc.:	J. D. West
Counsel for Quest University Faculty Union:	J. Sanders S. Rogers
Counsel for Bank of Montreal:	K. Davies
Counsel for Her Majesty The Queen In Right of Province of British Columbia and the Ministry of Advanced Education Skills and Training:	A. Welch
Counsel for 1114586 B.C. Ltd.:	K.E. Siddall
Counsel for Association for the Advancement of Scholarship:	L. Hiebert
Place and Date of Hearing:	Vancouver, B.C. November 12-13, 16, 2020
Place and Date of Decision with Written Reasons to Follow:	Vancouver, B.C. November 16, 2020
Place and Date of Written Reasons:	Vancouver, B.C. December 2, 2020

INTRODUCTION

[1] On November 3, 2020, the petitioner, Quest University Canada ("Quest"), applied for various orders in these *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 ("CCAA") proceedings. Orders sought by Quest included approval of a sale transaction with Primacorp Ventures Inc. ("Primacorp") and orders necessary to facilitate that transaction, namely allowing Quest to implement a claims process and calling a meeting to consider its plan of arrangement.

[2] On November 3, 2020, I granted the Claims Process Order and a Meeting Order to allow the creditors to consider Quest's plan of arrangement dated November 1, 2020 (the "Plan"). I also approved Quest's agreement to pay Primacorp a Break Up Fee and granted a charge to secure that amount: *Quest University Canada (Re)*, 2020 BCSC 1845.

[3] I adjourned Quest's application for a Transaction Approval and Vesting Order (TAVO) to approve the Primacorp transaction to these hearing dates to allow opposing parties to consider the matter further and prepare necessary materials.

[4] Southern Star Developments Ltd. ("Southern Star") has since formalized its opposition to the granting of the TAVO. Indeed, its opposition has since increased in force because Quest and Primacorp have now changed the relief sought to approve the Primacorp transaction within the context of a "reverse vesting order" ("RVO"), as explained below. Southern Star also now applies for an order prohibiting Quest from disclaiming certain subleases, as is required in order for the Primacorp transaction to proceed.

[5] In the meantime, other parties have joined in opposing the approval of the Primacorp transaction for a variety of reasons, including those advanced by Southern Star in relation to the RVO.

[6] At the conclusion of this hearing, I granted the RVO and dismissed Southern Star's application, with written reasons to follow. These are my reasons for those orders.

BACKGROUND FACTS

[7] This CCAA proceeding has been underway for almost ten months, after the granting of the Initial Order on January 16, 2020.

[8] Since that time, the Court has extended the stay of proceedings a number of times, to allow Quest to undertake efforts to find a restructuring solution to its financial difficulties that would allow it to continue its educational endeavours. Many stakeholders have been actively involved in these proceedings, including secured creditors who, collectively, will be owed approximately \$30.7 million by the end of December 2020.

[9] I have also approved interim financing to allow Quest to continue its operations while in this proceeding, with that debt now approaching \$11 million.

[10] Quest's assets include lands in Squamish, BC, being Lot 1, on which the campus is located (the "Campus Lands"), as well as the surrounding 38 acres (the "Development Lands".) Lot 1 is encumbered by various charges, liens, interests, mortgages and assignments of rent, including a mortgage held by Capilano University ("CapU"). In addition, CapU holds various rights of first refusal, including a right of first refusal to purchase, a right of first refusal to lease and rights of first refusal to acquire the charges of Quest's major secured creditor, Vanchorverve Foundation ("VF") (collectively, the "ROFR").

[11] Quest is also the registered owner of five real property lots (Lots A-E), four of which are the sites of its university residences (on Lots A-D) (collectively, the "Residences").

[12] One of the significant flashpoints in this proceeding has been, and continues to be, in relation to the Residences that Quest leases from Southern Star. After the Residences became vacant in March 2020 following the onset of the COVID-19 pandemic, Quest attempted to defer payment of the substantial lease payments owed to Southern Star. On June 19, 2020, I denied that relief: *Quest University Canada (Re)*, 2020 BCSC 921 (the "Rent Deferral Reasons").

[13] Quest's principal focus in these proceedings has been toward identifying a partner/investor to purchase its land assets and/or identifying an academic partner/investor that would permit Quest to continue as a post-secondary institution.

[14] Since January 2020, Quest's Board of Governors and its Restructuring Committee have been working with a private educational consultant, Halladay Education Group Inc. to find a prospective academic partner. In addition, since March 2020, Quest has been working with Colliers Macaulay Nicolls Inc. to find prospective purchasers for Quest's real property assets.

[15] There is no dispute that the sale and partner search process (SISP) has been extensive, as confirmed by the Monitor. Quest submits, and I accept that its management, the Restructuring Committee, and the Board analyzed all proposals based on a number of factors, including:

- a) Creditor recovery from the purchase price or other consideration under the proposal;
- b) That the proposal would result in a completed transaction;
- c) That the proposal offered allowed for Quest's long-term continuation as a post-secondary academic institution; and
- d) That the proposal would lead to the continuation of a school on Quest's lands that aligned with Quest's current vision and academic quality.

[16] The SISP resulted in a number of academic and real estate organizations approaching Quest to express interest in pursuing a transaction. Quest engaged with a number of potential purchasers or partners from Canada, the United States and other countries. Some parties executed Non-Disclosure Agreements (NDAs) and Quest received numerous Letters of Intent (LOIs) and other proposals.

[17] On May 28, 2020, this Court granted an extension of the stay of proceedings. At that time, Quest stated that there was a realistic potential of a transaction with the

party identified as the "Academic Partner". Unfortunately, that transaction did not proceed.

[18] On August 7, 2020, this Court granted a further extension of the stay of proceedings to December 24, 2020 to allow Quest to continue seeking proposals towards a transaction by that deadline and to allow Quest to offer the fall term to its students. Quest was still in discussions with various interested parties at that time. By then, Quest had received LOIs, including one from Primacorp (identified as "Academic Partner #2) as of July 29, 2020.

[19] Since August 7, 2020, Quest and Primacorp have worked extensively to negotiate the definitive documents toward completing a transaction. On September 16, 2020, Quest and Primacorp executed a Purchase and Sale Agreement (the "Primacorp PSA").

[20] The Primacorp transaction, as originally presented, provided for:

- a) Sufficient funds to pay Quest's secured creditors' claims, including claims secured by the CCAA charges;
- b) Funding for a plan of arrangement to be voted on by Quest's unsecured creditors;
- c) Funds for these insolvency proceedings; and
- d) A working capital facility, and marketing and recruiting support to permit Quest to become self-sustaining as a post-secondary institution.

[21] The main and subsidiary agreements executed between Quest and Primacorp in September/October 2020 are complex. They were complete by October 28, 2020 and included, as defined in the Monitor's Fourth Report, the Primacorp PSA, the Campus Lease, an Operating Loan Agreement and an Operating Agreement. Significant terms included:

- a) Primacorp will purchase substantially all of Quest's lands and related assets, including the Campus Lands, the Development Lands, the residence Lands (Lots A-E; four of which involve Southern Star's subleases), chattels and vehicles;
- b) Primacorp will lease specific Campus Lands back to Quest under a long-term lease arrangement;
- c) Primacorp will provide marketing and recruiting expertise to support Quest as a university;
- d) The Purchase Price will satisfy all of Quest's secured lenders and any commissions on sales;
- e) Primacorp will fund sufficient monies to pay the lesser of the Unsecured Creditor Claims and \$1.35 million under Quest's Plan; and
- f) Primacorp will provide Quest with a \$20 million secured working capital facility to support its operations.

[22] The Primacorp transaction was subject to a number of significant conditions:

- a) Quest's disclaimer of the four Southern Star subleases of the Residences or an agreement with Southern Star. On October 23, 2020, Quest disclaimed those subleases;
- b) Court approval of the Primacorp transaction including approval of a Break Up Fee and Break Up Fee Charge to secure Primacorp's costs. On November 3, 2020, I approved the Break Up Fee and granted a charge to secure this amount;
- c) Creditor approval of Quest's Plan under the CCAA. On November 3, 2020, I granted the Meeting Order to allow Quest to present the Plan, after having completed a claims process under the Claims Process Order, also granted on that date; and

d) Court approval of the Plan under the CCAA.

[23] On November 3, 2020, when Quest sought the TAVO (which was adjourned), Quest asserted that the Primacorp transaction was beneficial in many respects. Quest argued that it maximized the value of Quest's assets, offered the greatest benefit to stakeholders, had a high likelihood of completing, provided a recovery for secured and unsecured creditors, and had the highest likelihood that Quest will continue to operate within its current academic model.

[24] The Monitor concurred. In its Fourth Report dated November 2, 2020, the Monitor referred to the fact that there were only two viable proposals, with Primacorp's offer being the superior one. The Monitor's Supplemental and Confidential Report dated November 2, 2020 (the "Confidential Report") is also before the Court, although filed under seal. That Confidential Report referred to four other proposals received by Quest that were "not currently at a stage such that they are capable of being accepted by Quest".

[25] Quest and Primacorp both see the closing of the Primacorp transaction as very time sensitive. Pursuant to agreements with the Interim Lender, Quest was required to enter into a transaction by October 30, 2020 with an anticipated closing of November 30, 2020. The Interim Lender has since agreed to amend that requirement to extend the necessary closing date to December 24, 2020 in accordance with the Primacorp transaction.

[26] In addition to satisfying increasing pressure to repay its secured creditors, Quest seeks to exit these CCAA proceedings as soon as possible to allow it to recruit and plan for the upcoming 2021/22 academic year. Finally, there are other more financially driven and critical concerns. The Interim Lender has indicated that it will not fund its loan past December 2020. Without funding of some sort, Quest has no liquidity or financial ability after that time to continue operations.

ISSUES

[27] The paramount issue for consideration is, of course, whether the Court should approve the Primacorp transaction under s. 36 of the CCAA. A number of subsidiary issues also emerged at this hearing, as a result of submissions from various stakeholders:

- a) Lot E: Southern Star objects to the TAVO (now RVO), as vesting off any interest it may have under an unregistered lease of Lot E;
- b) ROFR: CapU objects to the sale to Primacorp, asserting that Quest is ignoring its rights under the ROFR that allows CapU to purchase/lease Quest's lands;
- c) Other Offer: Landrex Ventures Inc. ("Landrex"), together with CapU, assert that they should be given further time to finalize their offer for Quest's assets;
- d) Disclaimers: Southern Star, supported by its secured creditor, Bank of Montreal (BMO), applies for an order that the subleases of the Residences not be disclaimed by Quest; and
- e) RVO: Southern Star and another unsecured creditor, Dana Hospitality LP ("Dana"), object to the TAVO (now RVO), as being inappropriate and unfair in the circumstances and contrary to the spirit of the CCAA.

[28] I will address the subsidiary issues in the first instance, before turning to an overall assessment of the Primacorp transaction and whether the Court should approve that transaction.

Lot E

[29] As I described in the Rent Deferral Reasons (at para. 62), Quest, Southern Star and other parties are involved in a complex suite of agreements concerning the Residences that were built some time ago.

[30] Quest is the limited partner in a limited partnership agreement with Southern Star, who is the General Partner (GP). They formed the Southern Star Developments Limited Partnership (the "LP") to build the Residences. Quest, as the owner of Lots A-D, leases those lands under Ground Leases to Southern Star (as the GP of the LP). The ground leases are at a nominal rate. In turn, Southern Star (the GP), as landlord, and Quest, as tenant, entered into Subleases for the Residences, once they were built.

[31] The initial arrangements between Quest and Southern Star anticipated that a fifth student residence would be built on Lot E, the lot adjacent to Lot D.

[32] In September 2017, as part of those arrangements, Quest and Southern Star executed certain Land Title documents (Form C Charges) attaching a Ground Lease and a Sublease with respect to Lot E. When the parties executed the Form C Charges, the Ground Lease was incomplete in many respects; it did not include any legal description because Lot E was created after the execution of the Form C Charges; and, it did not specify the applicable dates of the 99-year term. Finally, the Schedules to the Ground Lease included various documents between Quest, Southern Star and Southern Star's lender intended to be later executed once the Ground Lease, the Sublease and the mortgage were finalized and registered at the Land Title Office.

[33] The parties delivered to Form C Charges to a law firm to be held in escrow pending the commencement of construction of the Lot E residence. Only recently, in response to this application, did a lawyer of the law firm complete the legal description for Lot E. Quest authorized this addition some time ago and I do not consider that matter as determinative of Southern Star's rights, if any, under the Lot E Ground Lease.

[34] At present, Quest's title to Lot E remains clear of any registration relating to Southern Star's Ground Lease so there is no need for Quest to obtain a vesting order to remove it from the title. However, Quest and Primacorp seek an order that any claims that arise from the yet incomplete and unregistered Ground Lease on

Lot E shall not attach to Quest's assets that are to be vested in Primacorp. They also seek an order permanently enjoining Southern Star from registering the Lot E Ground Lease against title to Lot E.

[35] Southern Star objects to the RVO as vesting off any interest it may have in the unregistered Lot E Ground Lease, arguing:

- a) This Court has no jurisdiction to do so under the CCAA. Southern Star argues that this is simply a disguised disclaimer of the Ground Lease that the CCAA expressly prohibits. Disclaimers are allowed pursuant to s. 32 of the CCAA, however, limits are imposed by s. 32(9)(d) which provides that disclaimers can not be made:

. . . in respect of real property or of an immovable if the company is the lessor.

- b) If such jurisdiction exists under the CCAA, the relief sought is not fair and equitable in the circumstances.

[36] I will begin by discussing the nature of any interest held by Southern Star in relation to the Lot E Ground Lease.

[37] In my view, no "lease" *per se* is yet in existence and valid and enforceable between Quest and Southern Star. Although the parties executed the Form C Charges relating to the Lot E Ground Lease, Southern Star's principal, Michael Hutchison, acknowledges that they were not to be registered until construction had commenced. I conclude that the parties did not intend that the Ground Lease would be valid and effective between them until that time, in conjunction with the registration of the Sublease and the execution and registration of Southern Star's mortgage that would allow construction to begin.

[38] Southern Star does not argue that it has acquired any legal or beneficial interest in Lot E. At its highest, I conclude that Southern Star's rights to Lot E are purely contractual; Quest agreed that it would grant the Lot E Ground Lease in the future and it would become effective upon certain conditions being satisfied – in

essence, an agreement to agree. Those conditions included that Quest would decide to build a residence building on Lot E and that Southern Star would arrange financing to construct the building. In these circumstances, I readily conclude that this condition has not been satisfied and will never be satisfied by Quest given Quest's insolvency.

[39] Further, even assuming that this is a "disguised" disclaimer, I conclude that Quest is not a "lessor" as that term is used in s. 32(9)(d) of the CCAA. Quest agreed that, if certain conditions were satisfied, it would become a "lessor" under the Ground Lease; however, that has not come to pass.

[40] I conclude that I have the jurisdiction under s. 11 of the CCAA to grant the order sought by Quest to ensure that Southern Star does not assert any rights under the Lot E Ground Lease at a future date. In addition, I rely on s. 36(6) of the CCAA that allows the Court to exercise its jurisdiction to vest off "other restrictions".

[41] The exercise of the Court's jurisdiction under s. 11 and 36 of the CCAA requires that the relief sought be "appropriate". This is in the sense that it accords with the statutory objectives of the CCAA, not only in terms of what the order will achieve, but the means by which it employs to that end: *Century Services Ltd. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70.

[42] In this respect, the parties have advanced arguments as to equitable considerations in terms of whether such relief is appropriate in the circumstances, while taking into account the respective positions of the parties. While in the receivership context, Quest has referred to various authorities that discuss the balancing of interests in similar situations where leases (in these cases effective and enforceable) were vested off title: *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.) at paras. 19-23, citing *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154; *Romspen Investments Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648 at para. 66; rev'd other grounds *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817 at para. 25.

[43] Southern Star argues that the equities favour it, not Quest, in these circumstances.

[44] Southern Star contends that neither Quest nor Primacorp have made any attempt to negotiate with it concerning its interest in Lot E. I would not accede to this argument. While the negotiations between Quest, Primacorp and Southern Star were not fruitful, it remains the case that Quest has made good faith efforts to address Southern Star's interests, although its ability in that respect were hampered by Primacorp's willingness to accommodate those interests.

[45] Southern Star also argues that it will be prejudiced if its contractual right is vested off in that Quest and Primacorp are not offering compensation for the loss of that interest. Southern Star focusses on what it says is the "*status quo*", arguing that it has the "right" to build a residence on Lot E. However, any such "right" is illusory at best, since Quest has no present ability to occupy the Residences, let alone the financial capability to participate in the construction of a fifth one on Lot E. Nor is there any realistic prospect that Quest will be in a position to do so in the future.

[46] Southern Star's argument in relation to Lot E is an attempt to gain leverage more than anything else. If Southern Star's argument succeeds and the relief sought is refused, Southern Star would be in the same position—facing a sale of Lot E and a likely order vesting off any rights or interests it may have. It is a condition of the Primacorp transaction that Lot E be transferred to it without any further involvement with Southern Star. Without an order rejecting Southern Star's claim in respect of the escrowed Ground Lease on Lot E, the likely result would be the end of these proceedings and the commencement of realization proceedings by the Interim Lender and other secured creditors.

[47] The Ground Lease is not effective and enforceable; the Ground Lease is not registered on title to Lot E. Given the circumstances, Quest has no ability to build a residence on Lot E and there is no reasonable prospect of that happening, given its insolvency and the need to dispose of its assets, including Lot E.

[48] While I acknowledge the negative impact on Southern Star arising from this relief, that impact must be balanced in the context of Quest's restructuring efforts in this proceeding. Those efforts are intended to address not only Southern Star's interests, but also the myriad interests held by other stakeholders. The sale of Lot E to Primacorp will allow Quest to realize on its interest in Lot E to the benefit of the stakeholders as a whole.

[49] I conclude that the relief sought by Quest in the RVO in relation to Lot E is appropriate and it is granted.

CapU ROFR

[50] Lot 1 and Lots A-E are subject to various charges in favour of CapU.

[51] In March 2019, Quest granted mortgage security in favour of CapU in connection with a loan made to Quest. As part of these agreements, in April 2019, Quest also granted the ROFR in favour of CapU. CapU registered the ROFR against these lands. Under the Primacorp transaction, Quest is required to obtain title to Lot 1 and Lots A-E without reference to the ROFR.

[52] Pursuant to s. 9 of the *Property Law Act*, R.S.B.C. 1996, c. 377, a right of first refusal to land is an equitable interest in land.

[53] CapU has referred to two non-CCAA cases that discuss ROFRs generally.

[54] In *Adesa Auctions of Canada Corp. v. Southern Railway of B.C.*, 2001 BCSC 1421 at paras. 26-30, the Court found that the contractual terms were to be strictly enforced and that the rights under the ROFR could not be defeated or circumvented by an offer that included other lands not covered by the ROFR. To similar effect, *Alim Holdings Ltd. v. Torn Howe Holdings Ltd.*, 2016 BCCA 84 at para. 41 states, following *Adesa*, that a ROFR will be triggered by a package sale that includes the subject property, subject to contrary language in the ROFR.

[55] It is common ground, however, that different considerations may also apply in the CCAA context. Having said that, there is little case authority on the ability of a court in CCAA proceedings to vest off a ROFR, whether triggered or not.

[56] In "Rights of First Refusal and Options to Purchase in Insolvency Proceedings" (2019) 8 J.I.L.C. 103 (the "ROFR Article"), the authors Virginie Gauthier, David Sieradzki and Hugo Margoc extensively review the issue, including in relation to Options to Purchase (OTPs). At 106, the authors state:

... Section 11 of the CCAA grants courts the right to "make any order that it considers appropriate in the circumstances" except as limited by the CCAA. As such, the CCAA court is well equipped to approve the sale of an OTP- or ROFR-encumbered asset to a party other than the rights-holder and without having first complied with the restrictive covenants if the transaction is in the best interests of the creditors at large, provided that the interest of the OTP or ROFR-holders is taken into account. The court will consider, *inter alia*, the monitor's views on these issues before making any such approvals.

[57] At 118-119, the authors conclude that:

While jurisprudence on this matter is not conclusive, it appears that a CCAA court would likely only vest out a valid and unexpired OTP that runs with the land in exceptional circumstances such as in the context of a going-concern restructuring where obtaining the highest possible price for the encumbered asset is paramount to support the restructuring efforts of the debtor company, and where the OTP rights-holders are also creditors in the proceeding and could seek compensation for any loss incurred due to the removal of the OTP right.

...

In summary, common law CCAA courts may vest out valid or unexpired ROFRs and OPTs in a case where the equities favour such an order or on consent.

[58] Quest has referred to *Bear Hills Pork Producers Ltd. (Re)*, 2004 SKQB 213, additional reasons 2004 SKQB 216. In that CCAA proceeding, the debtors sought approval of a sale of bundled assets relating to a hog farm, in the face of a ROFR that applied to the land only. Justice Kyle referred to the overall security affecting the assets; the court also commented that a withdrawal of the lands from the sale would not allow the proposed sale to complete, leading possibly to a liquidation (at paras. 4-5).

[59] However, in *Bear Hills*, Kyle J. relied on authorities that have since been questioned in *Alim Holdings* (see paras. 38-41). Justice Kyle's conclusion at para. 10 that the ROFR was not triggered runs contrary to the court's conclusion in *Alim Holdings* at para. 41.

[60] I have no doubt that courts across Canada have vested off ROFRs in the context of assets sales approved in CCAA proceedings. For example, Quest refers to *Artic Glacier Income Fund (Re)*, [2012] M.J. No. 451 (Q.B.) where a ROFR was vested off title, although the circumstances under which that CCAA relief was granted is not clear.

[61] Similarly, in *Great Slave Helicopters Ltd. v. Gwichin Development Corp.* (November 23, 2018), CV-18-604434-00CL (Ont. S.C.J.), Justice Hainey's endorsement directed that a purchaser of aggregated assets in a CCAA proceeding provide certain information to the holder of the ROFR with respect to the purchase price allocation. The ROFR Article, which discusses the circumstances before the court in *Great Slave Helicopters* at 108-109, indicates that the issue of the exercise of the ROFR was ultimately resolved consensually.

[62] Fortunately, in this case, there is no dispute concerning the Court's jurisdiction to address CapU's rights arising under the ROFR. Both Quest and CapU agree that the Court has jurisdiction under the CCAA to vest off the ROFR, subject to a consideration of the equities as between the parties.

[63] For the following reasons, I conclude that a balancing of the equities favours vesting off CapU's ROFR to allow the Primacorp transaction to proceed:

- a) Since January 2020, Quest has been pursuing a going concern restructuring that will permit it to remain as a university and employer in the Squamish area. CapU has been involved in this proceeding from the outset and was well aware of the opportunity to participate in that pursuit;

- b) There is a significant issue as to whether the ROFR has even been triggered by delivery of the Primacorp PSA. The definition provided in the ROFR of "Bona Fide Offer to Purchase" means, in part, an offer that is:

(iii) only for the entirety of the Property [the lands] and all chattels thereto and no other property, rights or assets

[Emphasis added.]

The definition of "Purchased Assets" in the Primacorp PSA is broad and refers not only to lands and chattels, but a variety of other assets (for example, contracts, plans, permits, vehicles and intellectual property). This express language is what the court in *Alim Holdings*, at para. 41, described could indicate an intention that any such aggregated offer would *not* trigger the ROFR;

- c) The term of the ROFR expires in March 2024. The ROFR appears to contemplate that, even if CapU does not exercise the ROFR, the purchaser of the lands must still agree to grant CapU a ROFR on the same terms. Similarly, "change of control" provisions are potentially effective that would allow CapU to later acquire control of Quest in place of anyone else. This would frustrate Primacorp's expectation under the Primacorp PSA that it would have the right to nominate the board of governors for Quest after closing;

Primacorp does not agree to assume these restrictions. In addition, every other offer for Quest's assets required that the ROFR be vested off title to the lands. It is difficult to see that any purchaser would agree to take title to purchased assets with such significant restrictions. If the ROFR is effective, this would give rise to a severe "chilling effect" on the market, with potentially disastrous results for Quest's restructuring efforts;

- d) The 60-day period within which CapU is entitled to consider any "Bona Fide Offer to Purchase" is simply unworkable in these circumstances. This is not a matter of expediency, without regard to any rights held by CapU. Quest will have no funds to continue its operations past December 2020 and, if realizations by the secured creditors ensue, CapU's ROFR rights will be illusory at best;
- e) CapU complains that it received the redacted Primacorp PSA only recently, on October 29, 2020. CapU then requested an unredacted copy, which Quest agreed to do upon CapU executing an NDA. CapU refused to sign the NDA, stating that it would hamper its ability to participate in its own offer. Again, CapU has had months to formulate its own offer;
- f) Quest asserts that CapU has no intention to or ability to make its own offer for all of Quest's assets in competition to the Primacorp transaction. CapU has not put forward any evidence at this hearing to confirm such intention or ability. Similarly, there is no evidence that CapU truly wishes to or is able to exercise any rights under the ROFR to purchase Quest's lands and chattels;
- g) I consider that the evidence conclusively supports that CapU advances its arguments under the ROFR simply as a tactic to oppose the Primacorp transaction and delay the matter so that it and Landrex can seek to advance their own joint competing offer;
- h) As I will discuss below, the terms of the joint Landrex/CapU proposal is only semi-formed at this point and Quest has indicated that some major terms are not acceptable. As such, it is highly questionable that this joint offer is, as CapU asserts, a "better, higher offer";
- i) I conclude that Quest has given proper regard to and has not ignored CapU's rights under the ROFR in the context of these proceedings.

CapU has had sufficient information even from the redacted Primacorp PSA to discern the substance of the Primacorp transaction in terms of advancing any competing offer or exercising the ROFR;

- j) Given the above circumstances, including CapU's involvement in Quest's lengthy efforts to restructure, I cannot conclude that CapU will suffer significant prejudice if the ROFR is vested off. Quest has indicated that CapU will have the opportunity to file a proof of claim in respect of any loss alleged to arise because of the vesting off of the ROFR. Of course, the value of any such claim would be questionable unless CapU can establish that its rights were triggered by the Primacorp transaction and that it had the ability to complete under the ROFR; and
- k) The Monitor supports the Primacorp sale, as maximizing the value of Quest's assets for the stakeholders and allowing a successful restructuring of Quest's business.

[64] If CapU has rights under the ROFR, allowing CapU to assert those rights would delay the Primacorp sale and potentially negate it, all with potentially devastating effect on the broader stakeholder group. The Primacorp sale is the only sale that is before the Court that would result in a restructuring of Quest for the benefit of the stakeholders. Clearly, within that context, the rights of all affected stakeholders must be balanced in respect of any rights held by CapU.

[65] In *Bear Hills*, similar considerations were before the court. The Saskatchewan Court of Queen's Bench approved a bundled sale of assets, without first requiring compliance with a ROFR. In part, the prospective purchaser would only consider purchasing the complete bundle of properties for an aggregate purchase price and did not allocate value on a property-by-property basis.

[66] As I have sought to do here, the court in *Bear Hills* (at para. 9) was attuned to the overarching and remedial statutory purpose and objective of the CCAA to avoid

the “social and economic losses resulting from liquidation of an insolvent company”: *Century Services* at para. 70 and 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 40-41. This objective is not to be achieved simply in the most expedient manner and without due regard to interests of stakeholders that are affected in that process. As the Court further stated in *Century Services* at para. 70, any restructuring is best achieved when “all stakeholders are treated as advantageously and fairly as the circumstances permit”.

[67] I am satisfied that it is appropriate, in the context of the Primacorp transaction, to vest off the ROFR held by CapU. In that regard, I have also considered the factors set out in s. 36(3) of the CCAA in terms of assessing any rights of CapU under the ROFR in that context.

Landrex / CapU Offer

[68] Landrex, supported by CapU, opposes approval of the Primacorp transaction. Landrex argues that they should be given further time to present an offer for Quest’s assets in competition with the Primacorp transaction.

[69] As with CapU, Landrex has been fully engaged in discussions with Quest for some time now, having been alerted to the possibility of a transaction as long ago as fall 2019. Landrex’s interest in Quest has always been in conjunction with securing an academic partner, namely, CapU.

[70] In June 2020, Landrex and Quest entered into an agreement for a sale; however, the conditions lapsed.

[71] On October 8, 2020, Landrex and Quest executed a further purchase and sale agreement (the “Landrex PSA”) providing for a purchase price of \$51 million for most of Quest’s assets (Lot 1 only and excluding Lots A-E: obviating any need for disclaimers of the Southern Star Subleases or vesting off any of Southern Star’s rights under the Lot E Ground Lease). The closing date under the Landrex PSA is December 23, 2020.

[72] By the start of this hearing, significant conditions precedent in respect of the Landrex PSA were still outstanding. Those included the financing condition in favour of Landrex and the mutual condition by which “another party” (CapU) was to have secured a sublease with Quest after Landrex had granted CapU a lease in the first instance.

[73] Landrex suggests that Quest is contractually bound to honour the Landrex PSA by allowing it further time to remove the conditions precedent, citing the good faith organizing principle discussed in *Bhasin v. Hrynew*, 2014 SCC 71. Further, Landrex argues that Quest has a duty to take all reasonable steps to satisfy the conditions precedent: *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072.

[74] Further discussions and negotiations continued between Landrex and Quest beyond October 8, 2020; however, matters under the Landrex PSA were not advanced.

[75] By late October 2020, Quest was under significant pressure, if not a legal requirement from the Interim Lender, to conclude a transaction. At that time, only two potentially viable proposals were on the table, one being from Primacorp. As above, where the Monitor noted in its Confidential Report that other proposals were “not currently at a stage such that they are capable of being accepted by Quest”, those “other proposals” included the Landrex PSA.

[76] By the time the Landrex PSA was executed on October 8, 2020, Landrex was not aware that Quest had already signed the Primacorp PSA. However, I agree with Quest’s counsel that Landrex had not secured any rights of exclusivity in terms of advancing its offer. The Landrex PSA provided:

20.2 Notwithstanding anything else contained herein, Landrex acknowledges and agrees that, following from date of the acceptance of this Offer by the Vendor until the date that the Vendor waives or declares satisfied the Vendor’s Condition, the Vendor will be authorized to negotiate with or offer the Property for sale to any third party (including the entering into of any agreement by the Vendor with any third party). . . .

[77] Under the Landrex PSA, Quest's Vendor's Condition was approval from its Board of Governors. Quest never obtained that approval because Quest's Board of Governors did not agree to certain deal terms under the Landrex PSA.

[78] By October 29, 2020, Landrex would have been fully aware that its offer was not going to be advanced by Quest any further since, by then, Quest had chosen Primacorp.

[79] On November 2, 2020, Landrex made a further offer for \$53.5 million. The only other significant change to their offer was to describe the requirement for a lease/sublease arrangement between Landrex, "another party" (intended to be CapU) and Quest as Landrex's condition precedent, not a mutual condition precedent. Quest did not accept this offer.

[80] In any event, by that time, Landrex's financing condition was far from being satisfied. On November 9, 2020, TD Asset Management ("TD"), Landrex's lender, provided a letter simply stating that it was continuing to work with Landrex and CapU to provide that financing.

[81] I acknowledge that, since the initial hearing date of November 3, 2020, Landrex has moved to finalize its offer but it has only done so to some extent.

[82] On November 13, 2020, Landrex secured a letter from TD that referred to a term sheet being in place after a final financing structure was negotiated (no documents were disclosed). However, TD's commitment is clearly conditional upon CapU's board approving the lease between Landrex and CapU at a meeting that is not scheduled to take place until November 24, 2020. There is no evidence as to what those lease terms are and whether there is a reasonable likelihood that CapU's board will approve it. Further, this whole arrangement continues to hinge on a negotiated sublease between CapU and Quest, which is not in place.

[83] On November 16, 2020, Landrex's counsel advised of yet further developments: (i) removal of its financing condition; (ii) an LOI with Southern Star by

which it would take over the Residences but not require disclaimer of the Subleases; and, (iii) agreement with CapU to remove the ROFR.

[84] Despite these developments, Quest advised that it was still not agreeable to the terms of the Landrex transaction. In addition, the Monitor continues to support approval of the Primacorp transaction, noting the uncertainty and potential delay of CapU obtaining ministerial approval to allow its participation in the Landrex transaction.

[85] The s. 36(3) factors continue to provide a useful structure for consideration of the Landrex transaction, and these late breaking developments.

[86] I am satisfied that Landrex was given a reasonable opportunity to participate in the SISP and that it has been aware of this opportunity for many months, even before it officially began. The fact that the cash consideration under the Landrex transaction exceeds that of Primacorp is deserving of consideration. However, other considerations arise, including that the Primacorp transaction involves significant other benefits to Quest in terms of its future operations, including the working capital facility of \$20 million.

[87] Both Quest and the Monitor continue to be of the view that the Primacorp transaction is more beneficial to the creditors. I agree with this, particularly considering the continuing uncertainty and risk associated with the Landrex/CapU transaction that is yet to be resolved, leaving aside that Quest has unequivocally stated that it has no intention to pursue it. Even if the further negotiations required under the Landrex sale were advanced in an expeditious manner, it seems unlikely to be finalized by the end of the year. To the contrary, the Primacorp transaction has been finalized after weeks of complex negotiations and Quest and Primacorp are ready to close without further delay. I agree that time is of the essence at this stage of the proceedings, for the reasons already noted above.

[88] In the overall circumstances here, I see no reason to delay, if not risk, the “bird in hand” transaction that arose through a reasonable sales process, in the hope that a more uncertain transaction may be finalized, such as with Landrex.

Southern Star Disclaimers

[89] On October 23, 2020, and with the approval of the Monitor, Quest issued notices of disclaimer (the “Disclaimers”) to Southern Star relating to the Subleases on Lots A-D by which Southern Star leases those lands and the Residences to Quest.

[90] A condition precedent of the Primacorp transaction is that either Quest will disclaim the Subleases or Primacorp will have entered into an agreement with Southern Star to its satisfaction. The evidence discloses that negotiations did take place between the parties but they did not reach a mutually acceptable agreement.

[91] Quest’s rent payments to Southern Star under the Subleases for the Residences on Lots A-D total approximately \$236,218 per month.

[92] Very recently, on November 15, 2020, before the conclusion of this hearing, Quest voluntarily withdrew the Disclaimers with respect to Lots A-B. Accordingly, failing an agreement between Primacorp and Southern Star, it remains a condition of the Primacorp transaction that Quest’s Disclaimers of the Subleases in relation to Lots C-D be upheld.

[93] The Ground Leases are registered against Lots A-D. BMO’s security is registered against Southern Star’s interest under the Ground Leases; in addition, Fivestone Capital Corp. (“Fivestone”), a company controlled by Mr. Hutchison, has registered security against the Grounds Leases. Quest does not seek any relief in respect of the Ground Leases; unlike Lot E, those documents are fully effective and enforceable and have been the basis upon which the parties have developed those properties.

[94] What remains to be addressed is Southern Star's application pursuant to s. 32(2) of the CCAA, supported by BMO, for an order disallowing any disclaimer by Quest of the Subleases of the Residences on Lots C-D. Section 32(4) of the CCAA lists various non-exhaustive factors that the court is to consider in relation to disputes over disclaimers:

In deciding whether to make the order, the court is to consider, among other things,

- (a) whether the monitor approved the proposed disclaimer or resiliation;
- (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
- (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[95] In *League Assets Corp. (Re)*, 2016 BCSC 2262, I discussed the significance of disclaimers in CCAA proceedings, both from the point of view of the counterparty and that of the entire stakeholder group:

[49] These CCAA provisions are not inconsequential in the face of this type of proceedings. At this point, the matter is no longer between the debtor company and a counterparty. There are other stakeholders involved and the statutory provisions, and the provisions of court orders such as the Initial Order, are meant to protect the stakeholder group as a whole, while also allowing a certain amount of flexibility for the debtor company. A disclaimer of a contract has consequences not only to the debtor company, but the estate generally. Such an action can substantially increase the debt being faced by the estate or divest the debtor of a substantial benefit that might be realized for the benefit of the creditors. It is in that context that the CCAA requires that certain procedures be followed by the debtor company, with the necessary oversight by the Court's officer, the Monitor, as to whether any disclaimer will be approved or not.

[96] The factor under s. 32(4)(b) of the CCAA as to enhancing the prospects of a viable restructuring applies equally in respect of disclaimers in the context of a sales process by which the business is to continue as a going concern: *Timminco Ltd. (Re)*, 2012 ONSC 4471 at paras. 51-52 and *Aveos Fleet Performance Inc. (Re)*, 2012 QCCS 6796 at paras. 48-50. In addition, the disclaimer need not be proven as "essential", only "advantageous and beneficial": *Timminco* at para. 54.

[97] Quest asserts that the Disclaimers are necessary to pursue and complete the Primacorp transaction, which it considers the best possible outcome for Quest and its stakeholders, including students, faculty, staff, secured and unsecured creditors, suppliers and vendors. In its letter dated October 28, 2020 to Southern Star, Quest also refers to its liquidity crisis and that amounts owing to its secured creditors became due some time ago.

[98] In its Fourth Report dated November 2, 2020, the Monitor confirmed its approval of the Disclaimers, based on:

- 2.8.1 The residences are not currently being used by Quest (other than two units being used by staff members and some limited use by a film crew recently) given on-line learning format being employed as a result of COVID 19;
- 2.8.2 It is a term of the Primacorp Agreement that the subleases be disclaimed; and,
- 2.8.3 The Monitor noted that the two most promising alternative parties in discussions with Quest also required the Southern Star subleases to be disclaimed.

[99] Southern Star advances a number of arguments in relation to the Disclaimers.

[100] Firstly, it argues that the Disclaimers will not result in a viable compromise or arrangement. Southern Star argues that there is no indication that Quest and Primacorp do not wish to continue to have the Residences as part of the student experience for those attending Quest.

[101] I agree that, in the Rent Deferral Reasons, many of my comments (at paras. 23-26, 90) were confirmatory of the importance of the Residences to Quest in respect of its future operations. However, that was then and this is now. The pandemic continues in full force and Quest is necessarily required to make decisions in the face of current circumstances. I agree that it is likely that Quest will seek to continue the student residence experience once the pandemic has receded, however, when that might happen is anyone's guess.

[102] In the meantime, Quest, under the Primacorp transaction, must make decisions as to its financial capabilities going forward. Maintaining two empty

Residences with accompanying rent payments is, on its face, not a reasonable business decision in the circumstances. It was Primacorp, an arms length purchaser, who has imposed this condition.

[103] Further, the Monitor agrees with Quest that the Disclaimers are necessary to enhance the prospects of Quest making a viable compromise or arrangement in these proceedings. There is no reason to question the Monitor's view as it is apparent that the Monitor has considered all relevant matters.

[104] I agree that the Disclaimers will enhance the prospects of Quest making a viable compromise or arrangement. The Monitor overwhelmingly agrees after a consideration of all the circumstances including those particularly faced by Southern Star as a result.

[105] Secondly, Southern Star argues that Quest delivered the Disclaimers simply to secure a bargaining advantage for Quest and Primacorp toward a re-visitation of the rent deferral issue or to attempt to reduce the rent. I agree that there is some indication that Quest and Primacorp had that in mind; however, that is often the reality that arises after a debtor concludes that it is no longer viable to abide by those contractual commitments and that a disclaimer is appropriate. If it were possible to come to an amicable resolution with Southern Star in the context of the Primacorp transaction, I expect Quest would have done so.

[106] Southern Star refers to the statements in *Allarco Entertainment Inc. (Re)*, 2009 ABQB 503 at para. 59, where Justice Veit considered whether certain contracts should be terminated. She was attuned to whether the termination was fair, appropriate and reasonable and whether it arose after good faith negotiations. In this case, there is no evidence to suggest that the parties did not approach the negotiations in good faith. Clearly, it is not my role on this application to assess the reasonableness of the respective positions of Quest, Primacorp and Southern Star in those negotiations. It does appear, however, that Quest and Primacorp have moved toward a middle ground by the withdrawal of the Disclaimers in relation to Lots A-B.

[107] Thirdly, Southern Star places great emphasis on what it says will be the significant hardship it will suffer if the Disclaimers are upheld. Southern Star says that it has spent approximately \$41.7 million to construct the Residences.

[108] The monthly mortgage payments to BMO and Fivestone are approximately \$220,000. The outstanding balance of the BMO loan facility is \$34.4 million.

Mr. Hutchison indicates that, without payment of rent by Quest, Southern Star will not be able to make its mortgage payments to BMO. In that event, BMO will be in a position to foreclose on the Ground Leases. Mr. Hutchison has guaranteed the BMO debt, as has another of Mr. Hutchison's companies.

[109] As noted by Quest, any financial consequences to Southern Star will largely depend on what mitigating measures are undertaken. Those could include a re-letting of the Residences or a sale of its interests under the Ground Leases. At present, with no clear indication as to how those matters might evolve, I am unable to conclude with certainty that any hardship suffered by Southern Star would be "significant".

[110] Regardless of any hardship faced by Southern Star, the reality is that Quest has only one viable means by which to advance the restructuring at this time – the Primacorp transaction. Within the confines of that transaction, Primacorp sees no merit in maintaining the Subleases on these two Residences. Apparently, no other interested party expressed an interest in maintaining the Subleases besides Landrex. In light of Landrex's submissions at the conclusion of this hearing on November 16, 2020, I have considered that the Landrex/CapU transaction may have presented a more palatable resolution of the Subleases given the recent LOI between Landrex and Southern Star. However, I conclude that delaying the Primacorp sale, on the prospect that the Landrex/CapU transaction will come about, is not a viable option for the reasons discussed above.

[111] I agree that this decision will visit hardship, even arguably significant hardship, upon Southern Star. However, it is difficult to see that preventing delivery of the Disclaimers would avoid that result in any event. If the Primacorp transaction

does not proceed, there is no transaction and Quest has no financial means to continue past December 2020. The Interim Lender has indicated that it will not advance funds to Quest beyond that date, and specifically, that it has no interest in funding continued rent payments to Southern Star.

[112] In that event, Southern Star will be in the same position post December 2020, with Quest unable to pay the rent for the Residences at that time: see *Target Canada Co. (Re)*, 2015 ONSC 1028 at paras. 27-28.

[113] As the court noted in *Target Canada* at paras. 24-25, the court must give due consideration to the stakeholder group as a whole in assessing whether the Disclaimers are fair and reasonable: *Doman Industries Ltd. (Re)*, 2004 BCSC 733 at para. 33. The price of setting aside the Disclaimers is that the Primacorp transaction will not proceed and a receivership at the behest of the Interim Lender will likely follow. In my view, this is not in the best interests of that larger stakeholder group which, in my view, has primacy here even in the face of the hardship and prejudice caused to Southern Star.

[114] I dismiss Southern Star's application for order that the Subleases of the Residences on Lots C-D not be disclaimed by Quest.

RVO

[115] At the November 3, 2020 hearing, when Quest originally sought the TAVO, Quest was seeking to uphold the Disclaimers of the Subleases. At that time, Southern Star's evidence and submissions were to the effect that, if the Court upheld the Disclaimers, it would have a substantial unsecured claim against the estate. As indicated above, the amount of any claim that Southern Star might advance in the estate is far from clear, given possible mitigation, although there is potential for a significant claim.

[116] This position did not come as a surprise to Quest; however, it appears that Quest did not appreciate the potential magnitude of Southern Star's claim. More importantly, Quest has not fully appreciated that a very unhappy claimant – Southern

Star under the Disclaimers – was not likely to vote in favour of the Plan and that the value of its claim could swamp the class votes to prevent any approval by the creditors. Again, creditor approval of the Plan is a requirement of the Primacorp Transaction.

[117] In early November 2020, known unsecured creditor's claims were estimated at approximately \$2.3 million. "Restructuring Claims" (which will include any claim of Southern Star under the Disclaimers) were yet unknown.

[118] Initially, Primacorp agreed to fund Quest's Plan in the amount of the lesser of 50% of the claims or \$1.35 million. The Monitor now states that there is a "high probability" that Southern Star's claim will be large enough such that Southern Star will control the value of the votes at the creditors meeting. Other major unsecured creditor claims have also since emerged, being that of Dana (estimated \$1 million) and the Association for the Advancement of Scholarship (estimated \$5 million).

[119] As the Monitor notes, any of these claims could effectively veto the Plan.

[120] Quest and Primacorp were then facing a dilemma. They determined that, while they might succeed on the Disclaimer issue, they could not likely obtain approval of the Plan, a further requirement of the Primacorp PSA, if Southern Star carried through with its suggested negative vote. While Quest could raise arguments in relation to the value of any claim advanced by Southern Star, uncertain and lengthy litigation would likely result; even if Quest was successful, it would be too late to factor into this restructuring.

[121] Quest, with Primacorp's approval, solved this dilemma by revising the TAVO to an RVO. In addition, the Primacorp PSA was amended to delete the conditions precedent requiring creditor and court approval of the Plan. Accordingly, the only condition precedent that remains before closing of the Primacorp transaction is the granting of the RVO.

[122] The Monitor supports this change as necessary in the circumstances in order to allow Quest to complete the Primacorp transaction. The Monitor supports the granting of the RVO.

[123] In its Fifth Report dated November 10, 2020, the Monitor describes the characteristics of the new structure and steps under the RVO, which involves Quest's subsidiary, Guardian Properties Ltd. ("Guardian"):

RVO Structure & Impact

- 2.6 The RVO provides for the following to occur in sequential order on the closing of the Primacorp Transaction:
 - 2.6.1 A wholly owned subsidiary of Quest, Quest Guardian Properties Ltd. ("Guardian") shall be added as a Petitioner in these CCAA proceedings. Guardian was incorporated on January 25, 2018 and has never carried on any business and has never held any assets or liabilities;
 - 2.6.2 All of Quest's right, title and interest in and to the Excluded Assets (as defined in the Primacorp PSA and the RVO) shall be transferred to and vested in Guardian;
 - 2.6.3 All Contracts (other than Approved Contracts), Claims and Liabilities of Quest shall be transferred to Guardian and Quest shall be released from and in respect of all obligations in respect of such Contracts, Claims and Liabilities;
 - 2.6.4 Primacorp will pay the Purchase Price to the Monitor to the extent of the Secured Charges and all the Secured Claims and the Secured Charges shall be extinguished and cancelled. The Purchase Price will stand in the place of the Purchased Assets;
 - 2.6.5 All of Quest's right, title and interest in the Purchased Assets shall vest in Primacorp free and clear of any security interests, Claims and Liabilities; and,
 - 2.6.6 Quest will cease to be a Petitioner in these CCAA proceedings leaving Guardian as the sole Petitioner.
- 2.7 The RVO contains release provisions similar to those contained in the Plan. Quest, its employees, legal advisors and other representatives, Quest's Governors and Officers, and the Monitor and its legal counsel shall be released from any and all demands and claims relating to, arising out of, or in connection with these CCAA Proceedings. The releases do not apply in the case of wilful misconduct or fraud.
- 2.8 As a result of the amendments to the Primacorp Transaction and the RVO, if the RVO is granted:
 - 2.8.1 There will be no uncertainty as to whether the Primacorp Transaction can close and the condition precedent for the

approval of the Plan is no longer applicable. As a result, there will be certainty for the go-forward operations of Quest, thereby creating security for the Quest students, faculty and staff leading into the critical enrolment period for the winter term;

- 2.8.2 Guardian will become responsible for the obligations under the Southern Star subleases should they not be disclaimed. As Guardian will not have the financial resources to meet those obligations, it is expected that Guardian would default on the Southern Star subleases in January 2021; and
- 2.8.3 The Plan, which will now compromise the debts of Guardian, will be funded through the Primacorp Transaction and therefore this aspect of the Primacorp Transaction and the Plan has not changed.

[124] As I will discuss below, the effect and substance of the RVO is to achieve what Quest has originally sought by way of a restructuring in these proceedings; namely, a sale of certain assets to Primacorp and, importantly, Quest continuing as a going concern as an academic institution, in partnership with Primacorp. The only aspect now missing is that, under the RVO, Quest will avoid having to obtain creditor or Court approval of the Plan.

[125] The intention is that the amounts that Primacorp was to fund under the Plan will now be transferred to Guardian to be distributed under Guardian's plan in relation to the Quest's liabilities that are to be transferred to Guardian. Effectively, Guardian will be funded just as it was originally intended that Quest's Plan was to have been funded to resolve those claims.

[126] Southern Star and Dana, as unsecured creditors of Quest, object to the granting of an RVO, contending that it effectively and unfairly negates their right to vote on Quest's Plan under s. 6 of the CCAA. They object to the transfer of their claims to Guardian. They say that, although they will have the ability to vote on Guardian's plan, it will effectively mean that they cannot vote to block Quest's restructuring to enable it to continue as a going concern within the context of the Primacorp transaction.

RVO Jurisdiction and Authorities

[127] There is no dispute between the parties that this Court has authority to grant the RVO under its general statutory jurisdiction found in s. 11 of the CCAA.

[128] Quest has referred me to a number of decisions across Canada where courts have exercised that jurisdiction to grant an RVO in the context of sale approvals considered under s. 36 of the CCAA. I will review those decisions in some detail below to highlight the relevant circumstances.

[129] In *Re T. Eaton Co.* 2000 CarswellOnt 4502, 26 C.C.P.B. 295, the Ontario court granted such an order under its CCAA proceedings. There are no written reasons discussing the circumstances in that case. The only brief reference to that structure is found in Claims Officer Houlden's decision in *Eaton's* that addressed an unrelated issue. The agreed statement of facts before the Claims Officer provided:

5. The CCAA Plan contemplated that all of the assets of Eaton's which were not being retained by Eaton's under the Sears Agreement would be transferred to a new corporation, Distributionco Inc. ("Distributionco"). These assets would then be liquidated by Richter & Partners Inc. ("Richter") in its capacity as court-appointed liquidator of the estate and effects of Distributionco. Richter would then distribute the assets of Distributionco to unsecured creditors and others in accordance with priorities set out in the CCAA Plan.
6. Under the CCAA Plan, unsecured creditor claims against Eaton's are converted into a right to participate in distributions in the liquidation of Distributionco based on the amount of the creditor's claim against Eaton's. Accordingly, a critical initial step in the liquidation of Distributionco is the determination of the validity and amount of claims asserted against Eaton's. For this purpose the CCAA Plan establishes a Claims Procedure for the resolution of such claims, of which the parties to this matter are aware.

[130] It is unclear as to the basis upon which the court approved this structure in *Eaton's* although, as Southern Star notes, it was a transaction approved within the context of a CCAA Plan.

[131] More recently, this structure was approved in *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00C (Ont. S.C.J. [Comm. List]). In those CCAA proceedings,

an agreement was approved that “effectively” transferred current tax losses and intellectual property to a purchaser. Justice Wilton-Siegel's endorsement stated:

The Global Settlement contemplates implementation of a corporate reorganization by which the shares of Plasco will be transferred to an acquisition corporation owned by NSPG and CWP and the remaining assets of the applicants will be held by a new corporation, referred to as “New Plasco”, which will assume all of the liabilities and obligations of Plasco. I am satisfied that 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. For this purpose, I consider that the Global Settlement is analogous to such a plan in the context of these particular proceedings. ...

[132] Justice Gouin granted an RVO in the CCAA proceedings of *Stornoway Diamond Corporation* (October 7, 2019), Montreal 500-11-057094-191 (Q.C.S.C. [Comm. Div.]). There are no written reasons from the court; however, the motion materials disclose that, under the transaction, the purchasers acquired substantially all the debtor's assets by purchasing 100% of the shares of one debtor company (SDCI, which held the acquired assets). In consideration, the purchaser released certain liabilities owed by the debtors and agreed to assume others.

[133] In *Stornoway Diamond*, to ensure the purchaser acquired the assets free and clear of all encumbrances, the debtors incorporated a new subsidiary (Newco), added Newco as an applicant in the CCAA proceedings, and transferred all liabilities, obligations, and unacquired assets of SDCI to Newco. The debtor's motion referred to this transaction as the only viable alternative to preserve the going concern value of the debtor. The debtor noted that the equity and “non-operational related unsecured claims” had no value. As in the RVO sought here, the court's order included familiar aspects found in sanction orders, including releases.

[134] An RVO was also approved in the CCAA proceedings of *Wayland Group Corp.* (April 21, 2020), Toronto CV-19-00632079-00CL (Ont. S.C.J. [Comm. List]). Approval was sought in the context of preserving valuable cannabis licenses. Justice Hainey's brief endorsement indicates that the relief was unopposed. The court

approved a sale of substantially all of the debtor's assets to the successful bidder under a share purchase agreement after a sales and investment solicitation process.

[135] Other information before me regarding the *Wayland Group* transaction is found in the applicant's factum. The factum refers to both *Plasco Energy* and *Stornoway Diamond*, while also referring to ss. 11 and 36(3) of the CCAA as the jurisdictional basis for the relief. The applicants argued that transferring certain assets and liabilities of the debtors into a "newco" would ensure that the purchaser acquired the underlying assets of the target company free and clear of all claims and encumbrances and allow the business to continue as a going-concern. They asserted that this was the "only way" to complete the sale to realize the value in the assets; it was also argued that this transaction was in the best interests of stakeholders and did not prejudice major creditors. In *Wayland Group*, the transaction value was only sufficient to repay the interim lender and perhaps some amount for the first secured creditor.

[136] The Ontario court again approved a similar RVO transaction in the CCAA proceedings of *Comark Holdings Inc.* (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. S.C.J. [Comm. List]). Justice Hainey granted the RVO while again indicating in a brief endorsement that the relief was unopposed. The share sale preserved the tax attributes of the debtor, which the purchaser viewed as critical for the success of the future business. The purchaser was a related party who was making a credit bid for the assets.

[137] In *Comark Holdings*, the purchaser acquired all the issued and outstanding shares of the primary CCAA debtor and agreed to pay out all the secured debt and priority claims. The excluded assets, agreements, liabilities and encumbrances were transferred to another entity that became a debtor in the CCAA proceedings, with the result that the CCAA debtor held its assets free and clear of all claims and encumbrances and was then removed from the CCAA proceedings. The purchaser and the primary CCAA debtor then amalgamated. The new CCAA debtor (Newco) was authorized to make an assignment into bankruptcy. The monitor, along with the

principal secured creditors, including the interim lender, supported the transactions. As in *Plasco Energy*, *Stornoway Diamond* and *Wayland Group*, the debtors in *Comark Holdings* argued that this was the “only option” to preserve the business, that the value in that business would be lost in a liquidation and that the transaction was in the best interests of the stakeholders generally.

[138] Justice Conway granted an RVO in the CCAA proceedings of *Beleave Inc.* (September 18, 2020), Toronto, CV-20-00642097-00CL (Ont. S.C.J. [Comm. List]). As in *Wayland Group*, the preservation of valuable cannabis licenses were at stake. The motion was supported by the monitor and unopposed. Justice Conway stated in her brief endorsement:

The Applicants seek approval of the transaction whereby . . . (the Purchaser) will acquire the operating business of the Applicants. The structure of the transaction is partly by share sale and partly by asset sale. The reason for the structure is to accommodate the licensing requirements of Health Canada. The order is structured as a reverse vesting order, in which excluded liabilities and assets will be transferred to “Residualco”, which will then become one of the Applicants in the CCAA proceedings. Reverse vesting orders have been approved by the courts in other cases: see *Re Stornoway Diamond Corporation* . . . and *Re Wayland Group Corp.* . . .

The transaction is the culmination of a stalking horse sales process approved by the court. The motion is unopposed. The Monitor recommends and supports the transaction in its Fourth Report. In particular, the Monitor states that the proposed transaction is economically superior to the estimated liquidation value of the Beleave Group’s assets and operations, will allow the Purchaser to maintain operations and use of the Cannabis licenses and will provide for continued employment for a majority of the existing employees. In my view, the transaction satisfies s. 36(3) of the CCAA and the *Soundair* test and should be approved.

[139] In *Beleave*, the RVO included releases of claims similar to that granted in other RVO decisions. These provisions were also consistent generally with sanction orders and are similar to the relief sought by Quest here.

[140] Even more recently, the Alberta court approved an RVO structure in the CCAA proceedings of *JMB Crushing Systems Inc.* (October 16, 2020), Calgary 2001-05482 (A.B.Q.B.). Justice Eidsvik approved the RVO structure as part of a sale approval. No written reasons of the court are available, however, the monitor’s bench brief discloses the relevant facts.

[141] As in the above cases, the transaction addressed in *JMB Crushing* arose from a sale and investment solicitation process that yielded only one offer, with the RVO described as a critical component. The underlying intention was to preserve the value of the paid up capital and regulatory permits in the CCAA debtor.

[142] In *JMB Crushing*, the monitor relied on the orders granted in *Plasco Energy*, *Stornoway Diamond*, *Wayland Group* and *Beleave*, arguing that the RVO structure was justified in those circumstances:

24. In recent CCAA proceedings, where it was not practical to compromise amounts owed to creditors through a traditional plan of compromise and arrangement, but it was critical to the viability of a transaction to "cleanse" the debtor company, such that a prospective purchaser may: (i) utilize non-transferrable regulatory licenses (by way of amalgamation or the purchase of the shares of the debtor company); or, (ii) make use of tax attributes of the debtor company, such as [paid up capital], Courts have recently approved and utilized reverse vesting orders to achieve such objectives.
25. The purpose of a reverse vesting order is to transfer and vest all of the assets and liabilities of a debtor company, which are not subject to a sale, to another company within the same CCAA proceedings. The cleansed debtor company is then able to: (i) be utilized by a purchaser as a go-forward vehicle, without any concern regarding creditors and obligations that may otherwise be "laying in the weeds"; and, (ii) allow the purchaser to make use of the debtor company's tax attributes and non-transferrable regulatory licenses. This approach is necessary in situations where the parties would otherwise be unable to preserve the value of significant assets that are subject to restraints on alienation and to provide a corresponding realizable benefit for creditors and stakeholders.

[143] In *JMB Crushing*, the monitor further justified the RVO structure in asserting that the debtor's secured creditors would suffer a shortfall even with such measures. The monitor stated that the unsecured creditors had no economic interest in the transaction and there was no reasonable prospect of any recovery to them. The debtor did not intend to undertake a claims process or present a plan to its unsecured creditors.

[144] By pure coincidence, another and perhaps more compelling authority came to the attention of the parties during this hearing.

[145] On November 11, 2020, the Québec Court of Appeal dismissed an application for leave to appeal the granting of an RVO by Gouin J. of the Québec Superior Court on October 15, 2020: *Arrangement relatif à Nemaska Lithium Inc.*, 2020 QCCS 3218; leave to appeal denied *Arrangement relatif à Nemaska Lithium Inc.*, 2020 QCCA 1488. The Court of Appeal's decision is in English; Gouin J.'s decision is in French and no English translation was available. As such, all references to *Nemaska Lithium* will be to the QCCA.

[146] All counsel agree that Gouin J.'s decision in *Nemaska Lithium* is the first time a Canadian court has granted an RVO in contested CCAA proceedings.

[147] In *Nemaska Lithium* (at para. 5), the court stated that the RVO allowed the purchaser to carry on the operations of the Nemaska Lithium entities (mining in James Bay) by maintaining existing permits, licenses and authorizations. This goal was accomplished via a credit bid for the shares in Nemaska Lithium in return for assumption of the secured debt. At para. 22, the court refers to the intention of the "residual companies" to later present a plan of arrangement to the "remaining creditors", but the details are not disclosed.

[148] In denying leave to appeal in *Nemaska Lithium*, the court stated that an appeal would hinder the progress of the proceedings. More relevant to this application were the court's comments on the legitimacy of the position of the only objecting creditor, Cantore, and the court's rejection that it was appropriate to allow Cantore to exercise a veto in the restructuring:

[38] As it turns out, the value of the Cantore provable claims (setting aside the later debate regarding his potential real rights) stands at \$8,160 million out of a total value of provable claims of \$200 million. Thus, Cantore's provable claims represent at this point in time 4% of the total value of unsecured creditors' claims as determined by the Monitor. Yet, Cantore is the only creditor having voiced an objection to the RVO approval. This begs the question: whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?

[39] In these circumstances, I am simply not convinced that the arguments that are advanced by Cantore are anything but a "bargaining tool", while he pursues multidirectional attacks on the RVO with the same arguments that were dismissed in the first instance.

[149] Similar to Cantore's position in the *Nemaska Lithium* restructuring, Southern Star and Dana's objections to the RVO are grounded in the assertion it will negate their effective veto on the Plan (and hence the Primacorp transaction) by which they seek to leverage further concessions. For obvious reasons, those concessions can only come about at a cost to other stakeholders, whose interests remain to be addressed.

Discussion

[150] Quest, with the support of the Monitor, submits that the Primacorp transaction satisfies s. 36 of the CCAA and that the Court should grant the RVO pursuant to ss. 11 and 36 of the CCAA.

[151] As with the structures approved in the above CCAA proceedings, the RVO has certain aspects that Southern Star says are objectionable. Those include primarily: (i) the addition of Guardian as a petitioner in the CCAA proceeding; (ii) the vesting of the Excluded Liabilities and Excluded Contracts in Guardian; (iii) Quest's exit from this CCAA proceeding; and (iv) the release of Quest in respect of the Excluded Liabilities and Excluded Contracts.

[152] Essentially, unsecured claims against Quest and minor assets are transferred to Guardian and Quest continues as a going concern after having transferred the bulk of its assets to Primacorp free and clear of any encumbrances (save for certain Retained Liabilities). Quest no longer requires approval of the Plan by the creditors and the Court to complete the Primacorp transaction.

[153] At para. 19, the QCCA in *Nemaska Lithium* referred to Gouin J.'s comment that s. 36 of the CCAA allows the court a broad discretion to consider and, if appropriate, grant relief that represents an innovative solution to any challenges in a proceeding. Justice Gouin considered that approving an RVO structure was such an innovative solution. Indeed, this is the history of CCAA jurisprudence under the court's broad statutory discretion and court approval of innovative solutions continues to this time.

[154] That said, the ability of a CCAA court to be innovative and creative is not boundless; as always, the court must exercise its discretion with a view to the statutory objectives and purposes of the CCAA: *Century Services*.

[155] I find further support for Quest's position in the recent comments of the Court in *Callidus*. The Court was there addressing a different issue – whether a CCAA judge has jurisdiction under s. 11 to bar a creditor from voting where the creditor is “acting for an improper purpose” – but the Court's comments on the exercise of jurisdiction under the CCAA ring true in relation to the RVO structure:

[49] The discretionary authority conferred by the CCAA, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the CCAA, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three “baseline considerations” (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

[50] The first two considerations of appropriateness and good faith are widely understood in the CCAA context. Appropriateness “is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA” (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the CCAA, which provides:

Good faith

18.6(1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

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

(See also *BIA*, s. 4.2; *Budget Implementation Act*, 2019, No. 1, S.C. 2019, c. 29, ss. 133 and 140.)

...

[65] There is no dispute that the CCAA is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, CCAA supervising judges are often called upon “to sanction measures for which there is no explicit authority in the CCAA” (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a “hierarchical” approach to determining whether jurisdiction exists to sanction

a proposed measure: "courts [must] rely first on an interpretation of the provisions of the CCAA text before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the CCAA will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

...

[67] Courts have long recognized that s. 11 of the CCAA signals legislative endorsement of the "broad reading of CCAA authority developed by the jurisprudence" (*Century Services*, at para. 68). . . .

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".

[68] 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 (para. 36).

...

[70] . . . The exercise of this discretion must further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

...

[75] We also observe that the recognition of this discretion under the CCAA advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation If the CCAA is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.

("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))

In this vein, the supervising judge's oversight of the CCAA voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the CCAA necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

[76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the CCAA. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

[Underline emphasis added; italic emphasis in original.]

[156] Quest is not seeking to bar Southern Star or Dana from voting on the Plan. It is seeking approval of a structure that would result in Guardian submitting its own plan to the unsecured creditors, which would include Southern Star and Dana, at which time they are generally free to vote their "self-interest" subject to any relevant constraint (for example, if the court finds that they are voting for an improper purpose): *Callidus* at para. 24 and 56.

[157] There is no provision in the CCAA that prohibits an RVO structure. As is usually the case in CCAA matters, the court must ensure that any relief is "appropriate" in the circumstances and that all stakeholders are treated as fairly and reasonably "as the circumstances permit": *Century Services* at para. 70.

[158] As with the sales considered in most of the above RVO cases, including *Nemaska Lithium*, this is the *only* transaction that has emerged to resolve the financial affairs of Quest. No other options are before the stakeholders and the Court that would suggest another path forward. As was noted by Gouin J. in *Nemaska Lithium* (at para. 12), it is not up to the Court to dictate the terms and conditions that are included in an offer. Primacorp has presumably made the best offer that it is prepared to make in the circumstances – that is the offer the Court must consider.

[159] I agree with the Monitor that, without the RVO structure, the Primacorp transaction is in jeopardy. The only other likely path forward for Quest is

receivership, liquidation and bankruptcy, a future that looms in early 2021 if the transaction is not approved.

[160] Many of the RVO cases cited above involve a sale of an ongoing business with a purchaser. The RVO structure was crafted to allow those businesses to continue through the debtor company, since it was that corporate vehicle who owned the valuable "assets" that could be not transferred.

[161] Akin to the tax losses, permits and licences that could not be transferred in those RVO cases, is Quest's ability to confer degrees under its statutory authority under s. 4(2) of the *Sea to Sky Act*, S.B.C. 2002, c. 54 (the "*Sea to Sky Act*"). Quest cannot sell its ability to grant degrees under s. 4(2) of the *Sea to Sky Act*. Nor can any purchaser acquire the right to grant degrees indirectly through a purchase of the shares in Quest. Pursuant to s. 2 of the *Sea to Sky Act*, Quest is a corporation "composed of the members of the board" and no shareholders exist. Pursuant to s. 1 of the *Sea to Sky Act*, the "board" means the board of governors of the university.

[162] It is a critical requirement under the Primacorp transaction that Quest remain a viable entity to continue its operations and, in particular, continue to grant degrees. That is a significant component of the Primacorp transaction and the value that Primacorp is prepared to pay under the transaction reflects that component. In other words, the stakeholders are receiving a benefit from this transaction by which Primacorp ensures that Quest continues after exiting these CCAA proceedings.

[163] At para. 38, the court in *Nemaska Lithium* asked:

... whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?

[164] I acknowledge the negative consequences that arise particularly for Southern Star if the Primacorp transaction is approved, although there is significant uncertainty about the extent of any loss that may be suffered. Dana's unsecured claim has little, if any value, outside of the benefits of the Primacorp transaction.

[165] In that light, I would ask Southern Star and Dana a similar question to that of the QCCA—to what end is your veto if Quest's Plan is put presented for creditor approval?

[166] Both creditors potentially hold the sword of Damocles over the head of the significant broad stakeholder group who stand to benefit from the Primacorp transaction. Recently, Southern Star has secured further benefits by the withdrawal of two of the Disclaimers. Both objecting creditors have nothing to lose at this point in this dangerous game of chicken with Primacorp, with only the oversight of this Court to oversee this strategy. By any stretch, no one is blinking at this point, while significant other interests hang in the balance.

[167] The Monitor's comments in its Fifth Report as to the jeopardy to those other interests are apt:

2.15 The Monitor has considered the competing interests of Southern Star and the interests of Quest's other stakeholders. In the Monitor's view, the Primacorp Transaction should not be jeopardized by the lack of agreement between Southern Star and Primacorp. Southern Star can mitigate its financial hardship by entering into an agreement with Primacorp for use of some or all of the residences. By contrast, Quest's other stakeholders have no ability to mitigate their potential losses in the event that the Primacorp Transaction does not close. They are reliant on the completion of the Primacorp Transaction or face significant losses themselves should it not complete.

[168] In my view, in the vein of the Court's discussion in *Callidus*, these are unique and exceptional circumstances where the Court may grant the relief by allowing Quest to employ the RVO structure within the context of this sale transaction.

[169] Southern Star and Dana seek to effectively block the only reasonable outcome here by insisting that they must approve of Quest's Plan in conjunction with the sale. However, creditor approval of a sale is not required under s. 36 of the CCAA.

[170] The granting of the RVO in these circumstances is in accordance with the remedial purposes of the CCAA. To use the words of Dr. Sarra, quoted above in

Callidus, I conclude that Southern Star and Dana are working actively against the goals of the CCAA by their opposition to the RVO.

[171] I do not consider that an RVO structure would be generally employed or approved in a CCAA restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the CCAA.

[172] Here, in these complex and unique circumstances, I conclude that it is appropriate to exercise my discretion to allow the RVO structure. Quest seeks this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. I have considered the balance between the competing interests at play. This transaction is unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group, a group that includes Southern Star and Dana.

[173] The structure also allows Quest to continue its operations in partnership with Primacorp, a result that will avoid the devastating social and economic consequences that will be visited upon the stakeholders if this transaction is not approved. Ironically, the continuation of Quest's operations will also benefit Southern Star in the future through the continued payment of rent for two of the Residences. Other potential benefits may also arise if Southern Star and Quest are later able to come to terms once the pandemic has receded and students return to campus.

THE PRIMACORP TRANSACTION

[174] Quest applies for the granting of the RVO in favour of Primacorp pursuant to s. 36(1) of the CCAA.

[175] Section 36(1) of the CCAA allows the court to authorize the sale of a debtor company's assets out of the ordinary course of business. Section 36(3) of the CCAA lists the relevant non-exhaustive factors to be considered:

- (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.

[176] The well-known considerations identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at 6 (C.A.) are consistent with and overlap many of the s. 36(3) factors: see *Veris Gold Corp. (Re)*, 2015 BCSC 1204 at para. 25, referring to various authorities such as *Canwest Publishing Inc. (Re)*, 2010 ONSC 2870 at para. 13. Those considerations include: (i) whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which offers were obtained; and, (iv) whether there has been any unfairness in the sales process.

[177] More generally, in analyzing whether a transaction should be approved, taking into consideration the s. 36(3) and *Soundair* factors, a court is to consider the transaction as a whole and decide whether or not the sale is appropriate, fair and reasonable: *Veris Gold* at para. 23.

[178] I conclude that the s. 36(3) and *Soundair* factors all favour approving the Primacorp transaction and granting the RVO. Specifically:

- a) The process leading to the Primacorp transaction has been lengthy and exhaustive. The Monitor has overseen that entire process;

- b) Quest 's Restructuring committee and its Board of Governors have sought and obtained professional advice throughout the CCAA process toward finding a suitable academic partner and/or a purchaser/developer for Quest's lands;
- c) No stakeholder objects to the proposition that the sales process was conducted in an appropriate, fair and reasonable manner;
- d) The Primacorp transaction will see the repayment of Quest's secured creditors, now totalling approximately \$42.2 million in what has been an increasingly pressurized environment to do so after long standing defaults;
- e) Since August 7, 2020, the Interim Lender and VF, Quest's major secured creditors, have been kept apprised of developments. They both support the Primacorp transaction. In addition, other secured creditors have been involved throughout these proceedings and support the transaction;
- f) There has been significant community and stakeholder involvement throughout the sales process;
- g) The Primacorp transaction will ensure that Quest continues as a going concern, by continuing operations as a post-secondary institution in Squamish. This will result in continuing benefits to the broad stakeholder group. This includes faculty, staff, students, secured and unsecured creditors, suppliers, landlords and the community generally;
- h) The broader stakeholder interests must be balanced against those who will be negatively affected by the transaction, such as Southern Star under the Disclaimers, although no viable offer has emerged that does not include the Disclaimers;

- i) Quest's Board of Governors have exercised their business judgment and determined that the Primacorp transaction is the best option to fulfil the goals of Quest's restructuring;
- j) The Primacorp transaction will fund a Plan for unsecured creditors;
- k) The Primacorp transaction provides Quest with significant benefits in terms of its future operations. These include the \$20 million working capital facility and Primacorp support for Quest's marketing, recruiting and operations to allow it to continue as a post-secondary institution into the future;
- l) No other or better offer or proposal has emerged that can be considered superior to the Primacorp transaction;
- m) The Monitor is satisfied that the consideration to be received from Primacorp is reasonable and fair, taking into account the market value of the assets and the other unique factors of these proceedings;
- n) The Monitor is of the view that this transaction will yield a greater benefit to the stakeholders than might be achieved in a liquidation or bankruptcy;
- o) Any delay of approval is likely to lead to ruinous consequences after December 2020, when Quest will be out of funds and the Interim Lender will be in a position to commence a receivership and liquidation of Quest's assets; and
- p) Simply, Quest has run out of time to find a restructuring solution and the Primacorp transaction presently stands as the *only* viable option to avoid the devastating social and economic consequences to its stakeholders if a liquidation results.

CONCLUSIONS

[179] I grant the RVO as sought by Quest, and as supported by the Monitor.

[180] The Primacorp transaction is the best option available that maximizes recovery for Quest's creditors and preserves Quest's university operations. Allowing Quest to continue as a university will benefit all stakeholders, including Quest's current and former employees, current and future students of Quest and the community generally. The RVO structure is an appropriate means to accomplish this result in these unique and exceptional circumstances.

"Fitzpatrick J."

TAB 5

2022 ONSC 6354
Ontario Superior Court of Justice

Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.

2022 CarswellOnt 16700, 2022 ONSC 6354

**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 JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. and JUST ENERGY (FINANCE) HUNGARY ZRT. (Applicants) and MORGAN STANLEY CAPITAL GROUP INC. (Respondents)

McEwen J.

Heard: November 2, 2022
Judgment: November 14, 2022
Docket: CV-21-00658423-00CL

Counsel: Jeremy Dacks, Marc Wasserman, for Just Energy Group
Tim Pinos, Ryan Jacobs, Alan Merskey, for LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC
David H. Botter, Sarah Link Schultz, for LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC
Heather L. Meredith, James D. Gage, for Agent and the Credit Facility Lenders
Howard A. Gorman, Ryan E. Manns, for Shell Energy North American (Canada) Inc. and Shell Energy North America (U.S.)
Danielle Glatt, for U.S. Counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in Donin et al. v. Just Energy Group Inc. et al. and Counsel to U.S. Counsel for Trevor Jordet, in his capacity as proposed class representative in Jordet v. Just Energy Solutions Inc.
David Rosenfeld, James Harnum, for Haidar Omarali in his capacity as Representative Plaintiff in Omarali v. Just Energy
Robert Kennedy, for BP Energy Company and certain of its affiliates
Jessica MacKinnon, for Macquarie Energy LLC and Macquarie Energy Canada Ltd.
Bevan Brooksbank, for Chubb Insurance Co. of Canada
Alexandra McCawley, for Counsel to Fortis BC Energy Inc.
Robert I. Thornton, Rebecca Kennedy, Rachel B. Nicholson, Puya Fesharaki, for FTI Consulting Canada Inc., as Monitor
John F. Higgins, for FTI Consulting Canada Inc., as Monitor
Ganesh Yadav, for himself
Mohammad Jaafari, for himself

Headnote

Bankruptcy and insolvency

Business associations

Table of Authorities

Cases considered by *McEwen J.*:

Arrangement relatif à Blackrock Metals Inc. (2022), 2022 QCCS 2828, 2022 CarswellQue 10503, 2 C.B.R. (7th) 214 (C.S. Que.)

Arrangement relatif à Blackrock Metals Inc. (2022), 2022 QCCA 1073, 2022 CarswellQue 11443 (C.A. Que.)

Canwest Global Communications Corp., Re (2010), 2010 ONSC 4209, 2010 CarswellOnt 5510, 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List])

Harte Gold Corp. (Re) (2022), 2022 ONSC 653, 2022 CarswellOnt 1698, 97 C.B.R. (6th) 202 (Ont. S.C.J. [Commercial List])

Quest University Canada (Re) (2020), 2020 BCSC 1883, 2020 CarswellBC 3091, 85 C.B.R. (6th) 41 (B.C. S.C.)

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.)

Sherman Estate v. Donovan (2021), 2021 SCC 25, 2021 CSC 25, 2021 CarswellOnt 8339, 2021 CarswellOnt 8340, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 458 D.L.R. (4th) 361, 72 C.R. (7th) 223 (S.C.C.)

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.)

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16
Generally

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally

s. 173

s. 176(1)(b)

s. 191(1) “reorganization”

s. 191(1) “reorganization” (c)

s. 191(2)

Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally

s. 11

s. 36

s. 36(3)

s. 36(4)

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1
Generally

McEwen J.:

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

2 The Just Energy Entities provided the court with two draft orders in furtherance of their position. The first is the RVO for the Transaction. The second is an order (the “Monitor’s Order”) giving FTI Consulting Canada Inc. (the “Monitor”) enhanced powers to implement the RVO and other related relief, including a stay extension, approval of the Monitor’s reports and fees and a sealing order.

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE ISSUES

24 There are two issues on this motion:

- whether the Transaction should be approved, including the RVO and related relief; and
- whether the Monitor should receive the enhanced powers requested in the Monitor’s Order with respect to the

implementation of the RVO and the related relief, including the stay extension, approval of the Monitor's reports and fees and a sealing order.

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

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

REVERSE VESTING ORDERS

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

- (a) the purchaser becomes the sole shareholder of the debtor company;
- (b) the debtor company retains its assets, including key contracts and permits; and
- (c) the liabilities not assumed by the purchaser are vested out and transferred, together with any excluded assets, into a newly incorporated entity or entities.¹

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

The Law relating to Reverse Vesting Orders

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

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

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

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

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

- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

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

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

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

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

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

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

The RVO should be granted

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

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

38 Currently the Just Energy Entities hold at least:

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

remaining nine only assignable with leave of the regulator.

- Five separate import and export orders issued by the Canadian Energy Regulator ("CER"), all of which are non-transferrable and non-assignable.
- Three separate registrations with the Alberta Electricity System Operator (the "AESO") in Alberta and with the Independent Electricity System Operator ("IESO") in Ontario, all of which are either non-transferrable or only assignable with leave.
- Six licenses in Nevada and New Jersey to allow them to market natural gas and/or electricity in the applicable states, all of which are non-transferrable.
- Twenty-five licenses in Connecticut, Delaware, Maine, Maryland, Ohio, Pennsylvania and Virginia to allow them to market natural gas and/or electricity in the applicable states, all of which may only be transferred with the prior authorization of the applicable regulator in each jurisdiction.
- Eighteen electricity and/or natural gas provider licenses or authorizations in California, Illinois, Massachusetts, Michigan, and New York, where no process for transferring the licenses or authorizations is prescribed in the applicable statutes.
- Five retail electricity provider certifications in Texas which may only be transferred with the authorization of the Public Utility Commission of Texas ("PUCT").
- Three separate export authorizations issued by the Department of Energy ("DOE") in the U.S., all of which may only be transferred with the prior authorization of the DOE's assistant secretary.
- Seven separate market-based authorizations issued by the Federal Energy Regulatory Commission ("FERC") in the U.S. which may only be transferred with the prior authorization of FERC.

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

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

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

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

43 I agree with the Just Energy Entities, who are supported by the Monitor. Given the above, the RVO sought is the only

way to achieve the preservation of the licenses, authorizations and certifications necessary for the ongoing business operations of the Just Energy Entities. This includes transferring the excluded assets into the two Residual Cos., one in Canada and one in the U.S. as is typically the case in reverse vesting orders.

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

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

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

The Transaction is fair and reasonable

The process leading to the proposed sale was reasonable

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

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

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

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

The Monitor has approved the process

51 As noted, the Monitor approved the process that lead to the Transaction. The Monitor concluded that the RVO is the only efficient means to ensure that all the licenses, authorizations and agreements remain in place. The Monitor is also of the view that any potential prejudice to the individual creditors is far outweighed by the overall benefit of the Transaction. Importantly, the Monitor also believes that the RVO represents the only viable alternative to implement the Transaction for the benefit of the Just Energy Entities' stakeholders.

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

52 The Monitor assisted the Just Energy Entities in preparing a liquidation analysis when the Just Energy Entities were pursuing approval of the Plan of Compromise and Arrangement. The analysis has been updated. The Monitor and the Just Energy Entities concluded, on the basis of the updated liquidation analysis, that not only would a liquidation produce no

recovery for unsecured creditors, but it would result in a shortfall to secured creditors. This, of course, would be less beneficial than closing the Transaction.

The creditors were consulted

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

The effect of the Transaction on creditors and other interested parties

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

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

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

- preserving the going-concern value of the business for the benefit of stakeholders;
- maintaining the Just Energy Entities' relationships with the majority of its commodity suppliers, vendors, trade creditors and other counter-parties;
- providing for the continued operation of the Just Energy Entities across Canada and the U.S.;
- continuing to supply uninterrupted energy to the Just Energies Entities approximately 950,000 customers;
- preserving the ongoing employment of most of the more than 1,000 employees of the Just Energy Entities;
- maintaining the aforementioned regulatory and licensing relationships across Canada and the U.S.;
- satisfying or assuming in full all secured claims and priority payables;
- preserving U.S. tax attributes and tax pools; and
- permitting the Just Energy Entities to exit these proceedings with a significantly deleveraged balance sheet and a U.S. \$250 million new credit facility bringing an end to the CCAA proceedings aside from the limited matters related to the Residual Cos.

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

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

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

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

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

Other considerations

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

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

Related relief

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

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

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

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

- It is appropriate that the RVO provides that all former employees of the Just Energy Entities be transferred to the Canadian Residual Cos. This will assist these former employees in relation to their entitlements under the Wage Earner Protection Program Act, S.C. 2005, c.47, s.1. Similar relief was granted in *Quest University (Re)*, which also involved a reverse vesting order.
- The releases sought are proportional in scope and consistent with releases granted in other similar CCAA proceedings. I have analyzed the factors set out by Penny J. in *Harte Gold Corp. (Re)*, at paras. 81-86. As in that case, the releases are rationally connected to the purposes of the restructuring; the releasees contributed to the restructuring; the releases are not overly broad; the releases will enhance the certainty and finality of the Transaction; the releases benefit the Just Energy Entities, its creditors and other stakeholders by reducing the potential for the released parties to seek

indemnification; and all creditors on the service list were made aware of the releases sought and the nature and effect of the release.

- The specific relief in the RVO concerning the ongoing litigation with the Electric Reliability Council of Texas Inc. ("ERCOT") is fair and reasonable. The wording was negotiated with ERCOT and preserves the Just Energy Entities' and ERCOT's rights in the ongoing litigation between them as set out para. 11.
- Similarly, the paragraphs of the RVO concerning the Omarali Class Action are fair and reasonable and have been negotiated with the Omarali Class Action solicitors and are not prejudicial to the insurers noted therein.
- All remaining ancillary relief is fair and reasonable. I have simply touched upon the most significant ancillary relief above.

THE MONITOR'S ORDER

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

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

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

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

72 Last, I agree that a sealing order should be issued with respect to confidential Exhibit "F" of Mr. Caiger's affidavit. Exhibit "F" is comprised of the four NOIs received by the Just Energy Entities. The NOIs contain confidential, commercially sensitive information regarding the identities of the four participants and their respective corporate, operational and financial information disclosed in support of the requirement of each NOI. Additionally, the NOIs contain confidential and commercially sensitive information regarding the scope and subject matter of each proposed bid. Dissemination of this information at this time, would pose a legitimate risk to the commercial interests of the SISP participants and the Just Energy Entities and their stakeholders should the Transaction fail to close. Thus, the public's interest in maintaining the confidentiality of this commercially sensitive information creates an important commercial interest. Accordingly, I am satisfied that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para.53, as recast in *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R.(4th) 361, at para. 38, has been met. The sealing order is being made on an interim basis pending further order of the court.

CLAIMS OF BP ENERGY COMPANY

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

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

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

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

THE OPPOSING STAKEHOLDERS

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

Ganesh Yadav

78 Mr. Yadav is a shareholder.

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

80 Essentially, he submits that the Just Energy Entities have significant liquidity, far in excess of the stalking-horse bid and the calculations performed by the Just Energy Entities and the Monitor. He primarily submits that the Just Energy Entities have significant future equity in its hedges, that energy prices are increasing and that the hedges are placed at very attractive prices. To support this argument, he relies upon the Just Energy Entities’ 2022 annual report describing the derivative instruments. Mr. Yadav stresses that there are significant cash flows and that the future value of the Just Energy Entities is very promising.

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

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

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

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

Mohammad Jaafari

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

86 Mr. Jaafari is a former Director and Representative Director of Just Energy Japan Kabushiki Kaisha (“JEJKK”), a former subsidiary of Just Energy. JEJKK operated the Just Energy Entities’ businesses in Japan.

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

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

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

90 Mr. Jaafari apparently has continued his litigation in Tokyo. As noted above, although there is no affidavit evidence, the documentation that he has filed with this court includes apparent endorsements by the Tokyo District Court which, if

accurate, accept that Mr. Jaafari was an employee of Just Energy.

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

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

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

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

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

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

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

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

CONCLUSION

99 For the reasons above, the RVO and the Monitor's Order should be approved. A reverse vesting order is permitted pursuant to the above provisions of the *CCAA*. Given the nature of the Just Energy Entities' business, the RVO structure is necessary and appropriate to preserve the going-concern value of the business. The Transaction is the only viable transaction that has emerged in the 19 months since the *CCAA* filing. It is currently the only option for a going-concern exit from the *CCAA* proceedings. The Transaction is the product of months of negotiations between the Just Energy Entities' key stakeholders as well as a robust court-approved SISF.

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

DISPOSITION

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

Footnotes

- ¹ Arrangement relatif à BlackRock Metals Inc., 2022 QCCS 2828, at para. 85, leave to appeal to QCCA refused, 2022 QCCA 1073.
- ² Mr. Jaafari continued to improperly send documents directly to me, after I signed the two orders, which I have not considered in preparing these reasons.

TAB 6

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part I — Compromises and Arrangements (ss. 4-8)

R.S.C. 1985, c. C-36, s. 5.1

s 5.1

Currency

5.1

5.1(1) Claims against directors — compromise

A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

5.1(2) Exception

A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

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

5.1(3) Powers of court

The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

5.1(4) Resignation or removal of directors

Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

Amendment History

1997, c. 12, s. 122

Currency

Federal English Statutes reflect amendments current to June 22, 2022

Federal English Regulations Current to Gazette Vol. 156:12 (June 8, 2022)

TAB 7

2020 ONSC 6837
Ontario Superior Court of Justice [Commercial List]

Re Green Relief Inc.

2020 CarswellOnt 19933, 2020 ONSC 6837, 331 A.C.W.S. (3d) 419, 88 C.B.R. (6th) 305

**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 GREEN RELIEF INC. (the "Applicant")

Koehnen J.

Heard: November 2-3, 2020
Judgment: November 9, 2020
Docket: CV-20-00639217-00CL

Counsel: C. Robert I. Thornton, Rebecca L. Kennedy, Mitchell Grossell, for Applicant
Peter Osborne, Christopher Yung, for Directors, Neilank Jha, Tony Battaglia, Brian Ranson, Christopher McNamara and Stephen Massel
Mark Abradjian, for Tony Battaglia in his capacity as shareholder and creditor
David Ward, for 2650064 Ontario Inc.
Alex Henderson, for Susan Basmaji
Gavin Finlayson, for Auxley Cannabis Group Inc. and Kolab Project Inc.
Anton Granic, for himself
Rory McGovern, for Steve LeBlanc
Alan Dick, Adrienne Boudreau, for Thomas Saunders
Steven Weisz, Amanda McInnis, for Lyn Mary Bravo
Brian Duxbury, for Warren Bravo
Robert Kennaley, Joshua W. Winter, for Henry Schilthuis and Mark Lloyd
Danny Nunes, for Monitor

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Applicant was company, that had filed for bankruptcy — Company sought order approving transaction for sale of its assets, under Companies' Creditors Arrangement Act (CCAA) — Stakeholders challenged release that approval was to grant in favour of releasees, as condition precedent for sale — Company applied for above-noted relief — Application granted — Whether release was condition precedent or not, was not barrier to court approval of release — Absence of relevant plan was similarly not barrier to release — Claim being released had little to no chance of success, so that deprivation of cause of action was not major issue — Released parties were necessary to restructuring — Claims released were rationally connected to purpose of plan — Releasees had contributed to efforts, so that company could apply for relief — Release benefitted debtor as well as creditors — Creditors had proper notice of release — All of these factors were in favour of approval of release and transaction — Application judge remained seized of all issues Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 36 (3).

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

Applicant was company, that had filed for bankruptcy — Company sought order approving transaction for sale of its assets, under Companies' Creditors Arrangement Act (CCAA) — Stakeholders challenged release that approval was to grant in favour of releasees, as condition precedent for sale — Company applied for above-noted relief — Application granted — Relief was

not extended to shareholder, who was not part of negotiation — It was not clear on evidence whether shareholder helped bring about transaction.

Table of Authorities

Cases considered by *Koehnen J.*:

Arrangement relatif à Nemaska Lithium inc. (2020), 2020 CarswellQue 10601, 2020 QCCS 3218 (Que. Bkcy.) — referred to

BlueStar Battery Systems International Corp., Re (2000), 2000 CarswellOnt 4837, [2001] G.S.T.C. 2, 10 B.L.R. (3d) 221, 25 C.B.R. (4th) 216 (Ont. S.C.J. [Commercial List]) — referred to

Lydian International Limited (Re) (2020), 2020 ONSC 4006, 2020 CarswellOnt 9768, 81 C.B.R. (6th) 218 (Ont. S.C.J. [Commercial List]) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to

Target Canada Co., Re (2016), 2016 ONSC 316, 2016 CarswellOnt 589, 32 C.B.R. (6th) 48 (Ont. S.C.J.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 5.1(1) [en. 1997, c. 12, s. 122] — referred to

s. 5.1(2) [en. 1997, c. 12, s. 122] — referred to

s. 11 — referred to

s. 36(3) — referred to

Koehnen J.:

1 The Applicant, Green Relief Inc., seeks an order approving a transaction for the sale of its assets in the course of a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). The sale transaction is generally not contested. Certain stakeholders do however, take issue with the release that the approval and vesting order purports to grant in favour of certain releasees as a condition precedent to the sale. For ease of reference, I refer to Green Relief alternatively by its name, as the Applicant or as the Company in these reasons.

2 For the reasons set out below, I:

a. Approve the sales transaction as Green Relief seeks, including the release. There is substantial difference of opinion on the proper interpretation of the release. It is not appropriate to interpret the release in a vacuum. It is preferable to do so on the basis of concrete circumstances which might present themselves if and when any claim is brought that implicates the release. I will however remain seized of the interpretation of the release. If any claim arises that calls for interpretation of the release, including an interpretation of any available insurance coverage, that issue must be brought before me for determination.

b. Temporarily lift the stay of proceedings until 12:01 a.m. November 27, 2020 to permit the filing of claims that might attract insurance coverage the that the release refers to.

c. Decline to extend the benefit of the release to Susan Basmaji.

I. The Sale Transaction

3 Green Relief seeks approval of the sale of certain assets to 2650064 Ontario Inc. (265 Co.) (the "Transaction"). As a result of the proposed transaction, 265 Co. will acquire new common shares of Green Relief in a sufficient quantity to reduce the holdings of existing shareholders to fractional shares which would be cancelled on the close of the transaction. On closing,

Residual Co. will be established and added as an applicant to the CCAA proceeding. In effect, all obligations and liabilities of Green Relief will be transferred to Residual Co.

4 265 Co. will pay \$5,000,000 for the common shares. Approximately \$1,500,000 of that is an operating loan with the balance being available for creditors. In addition, 265 Co. will pay Residual Co. up to \$7,000,000 as an earn out during the first two fiscal years following closing. The earn out is based on a payment of 25% of annual EBITDA above \$5,000,000.

5 Section 36(3) of the CCAA provides that, when deciding whether to authorize a sale of assets, the court should 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;
- (c) whether the Monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which creditors were consulted;
- (e) the effects of the proposed sale or distribution on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

6 These factors are consistent with the principles set out in *Royal Bank v. Soundair Corp.* 1991 CanLII 2727 (ON CA) at para. 16 for the approval of a sales transaction.

7 I am satisfied that the principles of *Soundair* and the factors set out in section 36 (3) of the CCAA have been met here.

8 The process leading to the Transaction was reasonable in the circumstances. While there was no formal sale and investor solicitation process, the transaction was the culmination of a seven-month long Notice of Intention and CCAA proceeding. The proceeding involved vigorously competing stakeholders and a competitive bidding process between interested purchasers. The competing stakeholder groups had ample opportunity to bring the business to the attention of potential purchasers. I am satisfied that there was ample information available and ample time for stakeholders to participate in the purchase process or bring the purchase to the attention of market players who may be interested in acquiring Green Relief. The Monitor approved the process and the Transaction. The Monitor notes that its liquidation analysis demonstrates that the Transaction is preferable to a bankruptcy. While creditors were not formally consulted on the process, they had ample information about it as a result of the ongoing CCAA proceeding. Creditors appeared at the various hearings. At times they made submissions in favour of an alternative bid, which submissions I gave effect to. The creditors who have made submissions before me on this motion approve of the Transaction and the release. No creditors ever objected to the process that was being followed. The Transaction makes funds available for creditors and is the best transaction available.

9 No one opposes the Transaction. Those who spoke in opposition on the motion did not oppose the Transaction but opposed only the release.

II. The Release

10 The release is opposed by the founders of Green Relief, Steven Leblanc, Warren Bravo and Lynn Bravo. They are supported on this motion by three other shareholders, Thomas Saunders, Henry Schilthuis and Mark Lloyd. For ease of reference, I will refer to those who oppose the release as the Objectors.

11 There is a long, bitter history of litigation and threats of litigation between the founders, the existing board and Green Relief's approximately 700 other shareholders.

12 The Objectors argue that I should reject the release because:

- (i) It was improper to include it as a condition precedent to the Transaction.
- (ii) I have no jurisdiction to approve the release.
- (iii) The release fails to meet the test set out in case law concerning releases.
- (iv) The release is too broad in scope.

(i) Release as a Condition Precedent

13 The Objectors note that the term sheet that preceded this motion and that I approved, did not contain any releases, let alone as a condition precedent to a transaction. Mr. Leblanc says he did not oppose the term sheet because it did not refer to releases. As negotiations towards a final agreement developed, the Company and the Monitor advised that Green Relief would be bringing a motion to approve releases. When the issue of a motion to approve releases arose, 265 Co. advised that it was agnostic about releases and that the releases were not theirs to give or ask for. The Objectors note that, instead of a motion to approve a release, Green Relief presented a transaction that contains a release as a condition precedent. The Objectors submit that the court should not be strong-armed in this fashion.

14 Both Green Relief and the Monitor did advise the court they would be bringing a motion to seek permission to include a release in the Transaction. It is certainly preferable for parties to live by representations they make to the court rather than represent one thing and do another. There is no evidence before me about how the release came to be a condition precedent in the transaction. 265 Co. made no representations in support of the release although it wants the Transaction to be approved. I infer from 265 Co.'s submissions that it does not care about the release and that the release was inserted at the insistence of others.

15 That certain parties have characterized the release as a condition precedent, is irrelevant to my analysis. Given that Green Relief and the Monitor represented to the court that they would be seeking the court's approval for any release, I will hold them to that representation. I do not feel in any way constrained to accept or reject the release simply because it has been included as a condition precedent. I consider myself free to approve the Transaction with or without the release.

(ii) Jurisdiction to Grant Release

16 The Objectors submit that I have no jurisdiction to grant the release because the wording of the CCAA does not permit it on the facts of this case.

17 The Objectors begin their analysis with section 5.1 (1) of the CCAA which provides:

5.1 (1) A **compromise or arrangement** made in respect of a debtor company **may include** in its terms provision for the **compromise of claims against directors** of the company **that arose before the commencement of proceedings under this Act** and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations (emphasis added).

18 The Objectors note that the section contains two qualifications. First it provides that a compromise or arrangement may include a release. Second, it limits the release to pre-filing claims

19 The Objectors note that the cases to which Green Relief points for the authority to grant a release address the release at the same time as the plan is being approved. Here, there is no plan to approve yet.

20 The Objectors submit that the distinction is significant because a plan is only approved after a claims process, negotiation for a plan, a meeting approving the plan and a two thirds majority vote in favour of the plan. Those steps are important in their view because they refine the claims against the company and ascertain the value of those claims.

21 Green Relief has not yet conducted a claims process or proposed a plan. Instead, the objective is to complete the Transaction, put \$3,500,000 into Residual Co. and conduct a claims process once Residual Co. has been funded.

22 Green Relief has not yet decided whether it will address litigation claims inside or outside the CCAA claims process.

23 While the presence of a plan is relevant to the approval of releases for the reasons the Objectors cite, I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release.

24 The primary advantage of approving a release on a plan approval is that it gives creditors better insight into the parameters of the plan they are being asked to approve. The interests of creditors are a prime consideration in any step of a CCAA proceeding. While the creditors have not approved a plan here, they have had the opportunity to make submissions throughout the process. They availed themselves of that opportunity. In large part I acceded to their requests as the primary beneficiaries of any plan. When certain creditors asked me to allow the Company to pursue a transaction other than one that 265 Co. was proposing at the time, I did so. When that possibility did not materialize, they spoke in favour of newer 265 Co. proposals and now speak in favour of Transaction and the proposed release. They favour the release because it maximizes the size of the estate available for distribution amongst creditors.

25 Returning the language of s. 5.1 (1), it is drafted permissively. It does not limit the overall jurisdiction of the court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.

26 At least one other court has approved a release in the absence of a plan and in the face of opposition to the release: *Re Nemaska Lithium Inc.*, 2020 QCCS 3218 where Gouin J. noted that the carveout provided by s. 5.1 (2) of the CCAA adequately protected the shareholders who opposed the release.

(iii) The Test for a Release

27 In *Lydian International Limited (Re)*, 2020 ONSC 4006 at paragraph 54, Morawetz J. (as he then was) summarized the factors relevant to the approval of releases in CCAA proceedings as including the following:

- (a) Whether the claims to be released are rationally connected to the purpose of the plan;
- (b) Whether the plan can succeed without the releases;
- (c) Whether the parties being released contributed to the plan;
- (d) Whether the releases benefit the debtors as well as the creditors generally;
- (e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and
- (f) Whether the releases are fair, reasonable and not overly-broad.

28 As in most discretionary exercises, it is not necessary for each of the factors to apply in order for the release to be granted: *Target Canada Co., Re*, endorsement of Morawetz J. (as he then was) at p. 14. Some factors may assume greater weight in one case than another.

29 In this case, I would add to these factors an additional factor, the quality of the claims the Objectors wish to maintain. While this may already be implicit in some of the considerations set out in *Lydian*, it warrants separate identification on the facts of the case before me.

30 The Objectors argue vigorously that this is not the stage to assess the strength of any potential action against proposed defendants or the size of damage claims available against them. I agree. At the same time, however, the court should not entirely ignore the nature of the proposed claim. If the court is being asked to release claims, it is helpful to know what is being released. The court's impression of the nature of the claim is a relevant factor to consider when determining whether releases should be granted. I do not think it would be advisable to lay down a precise definition of the quality of claim required to determine whether releases should or should not be granted nor would I described this as a threshold test to grant or deny the release. It is more of a directional or qualitative factor to consider in deciding whether to grant a release rather than a precise legal test.

The stronger a claim appears, the less likely a court may be to grant a release. The thinner and more speculative a claim, the more likely a court may be to grant a release.

The Quality of the Claims being Released

31 As noted earlier, the principal Objectors are the founders of Green Relief Steven Leblanc, Warren Bravo and Lynn Bravo. Relations between the founders on the one hand and the existing board and other shareholders are poisoned.

32 On the motion before me, shareholders spoke out against the founders and made submissions to the effect that the release should not preclude any claims by shareholders against the founders. Those shareholders see themselves as having been deprived of their entire investment, in some cases their life savings, because of alleged misrepresentations or improper transactions by the founders. None of those allegations are before me. I raise them only to set the highly litigious context in which the release arises. The release does not propose to release claims against the founders but only releases claims against current directors, Green Relief's legal counsel, the Monitor and its legal counsel.

33 This proceeding has been highly litigious from the outset, particularly in light of the relatively modest size of the estate at issue. It has been marred by litigation over who is a shareholder, who is or should be a director and who is a creditor.

34 This follows on a highly contentious corporate history involving struggles between shareholder groups, allegations of misrepresentation and allegations of fraud.

35 The Objectors' primary opposition to the release is based on their desire to bring an action against the current directors, the Company's legal advisors during the CCAA proceedings, the Monitor and its counsel for their conduct during the CCAA proceedings. The Objectors submit that the current Board, the Monitor and their legal counsel misled the court by suggesting that they had a transaction in the offing that would have injected \$20,000,000 into Green Relief. The Objectors say that the releasees did insufficient due diligence to determine whether the proposed purchaser in fact had \$20,000,000 available.

36 The Objectors submit that the Company has incurred needless professional fees because of the fruitless pursuit of the \$20,000,000 transaction and that Green Relief suffered a loss of chance in that it was deprived of the ability to pursue alternative transactions.

37 If anything, the proposed action demonstrates the need for a release. In the overall circumstances of the case, the threat of litigation against the current board, the Company's counsel, the Monitor and its counsel is unfounded and disproportionate. To demonstrate this requires some context and background.

38 At the outset of the proceeding, 265 Co. proposed to extend a \$5,000,000 operating loan to Green Relief. The loan provided no money for creditors. The board feared that accepting the loan would inevitably put Green Relief further into debt and ultimately end up with 265 Co. having ownership of Green Relief without having provided anything for other stakeholders. Mr. Leblanc supported the 265 Co. proposal and urged that I adopt it.

39 The board urged me to allow them to pursue a proposal from another investor, Mr. Vercouteren. The Vercouteren proposal would have injected \$20,000,000 into Green Relief. As it turns out, the Vercouteren proposal did not materialize. Initially the court was advised that the Vercouteren proposal was being delayed because of administrative holdups attributable to the Covid 19 pandemic. A few months later it was discovered that the delays were attributable to the fact that the Vercouteren proposal was contingent upon the completion of another transaction in Europe. The nature of that transaction, its status, closing date, likelihood of closing and reason for not closing to date were never revealed.

40 It is fair to say that when I discovered this, I expressed frustration to the Applicant for having failed to disclose the true status of the Vercouteren proposal from the outset. The Applicant assured me that they had done due diligence on Mr. Vercouteren and had been assured by his counsel, a reputable law firm, that he was a person of financial substance with the means to complete a transaction of the sort he had proposed.

41 With the benefit of hindsight one can debate whether the board acted perfectly, their conduct, however, ultimately led to the situation we find ourselves in now which is one that has 265 Co. offering more money to creditors and potentially other stakeholders than its initial proposal did. The proposal I am being asked to approve would see 265 Co. inject \$5,000,000 of which \$1,500,000 would be for operating purposes and \$3,500,000 would be for distribution to creditors. In addition, the 265 Co. proposal contains an earn out of up to an additional \$7,000,000 for distribution to creditors. While I agree that it does not offer \$20,000,000, the reality is that \$20,000,000 was not on the table.

42 Mr. McGovern, on behalf of Mr. Leblanc submits that the fact that the current offer of 265 Co. is superior to the prior offer does not end the analysis because the board and its advisors got that superior offer by engaging in questionable conduct. According to Mr. McGovern, this introduces moral hazard into the equation which is undesirable.

43 On that analysis, if anyone has been damaged by the alleged moral hazard, it is 265 Co. which has been led to improve its previous offers based on allegedly misleading information. However, 265 Co. does not complain. It wishes to close the Transaction.

44 Mr. Dick on behalf of Mr. Saunders and Mr. Kennaley on behalf of Messrs. Schilthuis and Lloyd submit that the Objectors should be able to pursue their loss of chance claim. They argue that there were no other bids for Green Relief because the size of the Vercouteren proposal inhibited others from bidding. While perhaps initially appealing as a basis to speculate about what other bids may have been available, I do not accept the submission for three reasons.

45 First, the Vercouteren proposal did not stop 265 Co. from making its \$5,000,000 operating loan proposal. It also did not stop 265 Co. from making a significantly more superior offer later subject to an exit right based on what its due diligence revealed. Anyone who was seriously interested in the business could have made an offer with a due diligence exit right. There is nothing unusual in that type of proposal

46 Second, the founders supported 265 Co.'s initial inferior proposal. Had they truly believed Green Relief was worth \$20,000,000, it is unlikely they would have done so. In addition, the founders were ideally placed to find other financial solutions preferable to the one on offer. They did not do so. Even when they learned that the current proposal was conditional on the release, the Objectors did not suggest that the company return to the drawing board to search for another transaction. The Objectors want me to approve the Transaction but with the release removed.

47 Third, no creditor objects to the Transaction. Any hope of a transaction that would offer more funds for creditors, let alone shareholders, than the Transaction does is illusory. At an earlier stage in this proceeding, Mr. Weisz stated that "Green Relief is hopelessly insolvent": see my endorsement of April 20, 2020 at para. 6. At the time, Green Relief was in default of leases, had tax arrears of over \$100,000 and was over five months in arrears on a mortgage in favour of Rescom. Hopelessly insolvent companies do not have enough money to pay off creditors, let alone provide value to shareholders. This particular hopelessly insolvent company is a cannabis business. The entire cannabis industry is undergoing a fundamental shakeup. There is no shortage of CCAA proceedings involving players in the cannabis industry. The harsh business reality is that creditors, let alone shareholders, will come out short in these restructurings. If anyone stands to gain from a superior offer, it is creditors. Yet no creditor, apart from Ms. Bravo who asserts that she is a creditor, wants to pursue a claim against anyone for their conduct of the CCAA proceeding.

48 In those circumstances, I am satisfied that whatever right of action is being removed by the release is so insubstantial that the court need not be concerned about depriving anyone of a cause of action that has even a remote chance of success. At best, it is a cause of action that is entirely without legal merit but which might have some economic value if a defendant were prepared to settle on the basis of the claim's nuisance value. Permitting unmeritorious claims to proceed so that the founders can try to extract a nuisance value settlement arising from steps that were approved by the court at each stage would amount to legally authorized extortion which I am not inclined to permit.

49 In the circumstances described above, the quality of the claims released would incline me to approve the release.

Application of the Lydian Factors

50 *Releasees necessary and essential:* The released parties here were necessary and essential to the restructuring. A CCAA proceeding quite obviously cannot proceed without a Monitor, Monitor's counsel or company counsel. Similarly, a restructuring cannot proceed without the other releasees like directors, officers and employees.

51 *Rational connection between claims released and the purpose of the plan:* The claims released are rationally connected to the purpose of the plan. The object of the release is to diminish indemnity claims by the releasees against Residual Co. and the pool of cash that is being created in its hands to satisfy creditor claims. Given that one purpose of a CCAA proceeding is to maximize creditor recovery, a release which helps do that is rationally connected to the purpose of the plan.

52 *Whether the plan can succeed without the releases* is unknown. The directors have made the releases a condition precedent to the plan. The court should not accept the release simply because it is said to be a condition precedent. In the circumstances of this case, the condition precedent strikes me as more of a strong-arm tactic that courts should resist. I feel myself at liberty to call the directors' bluff and approve the Transaction without the release.

53 Success of the plan without releases should, however, also be assessed with regard to factors other than potential strong-arming by incumbent directors. Here, the pool of assets immediately available for distribution of creditors is approximately \$3,500,000. As noted, the releasees may have a claim on those funds to satisfy any indemnity claims arising out of the litigation. Mr. McGovern's announced desire to sue the Monitor, its counsel, the directors and Green Relief's counsel for their conduct during the restructuring may give rise to indemnity claims of a size that would make a significant dent in the cash available for creditors. That diminution would make the plan significantly less successful and, depending on circumstances, could eliminate assets available for creditors.

54 *Did the releasees contribute to the plan:* While there is not yet a plan, the releasees have clearly contributed to get the Company to this stage. The Monitor, its counsel, the directors and Company counsel dedicated time and effort to the CCAA proceedings. Professional advisors contributed further by deferring billing and collection. Messrs. Jha and Battaglia contributed \$1,500,000 of their personal funds to provide DIP financing at relatively modest interest rates. Mr. Battaglia contributed \$220,000. Dr. Jha initially contributed \$500,000 and then increased his contribution to \$1,250,000 in June 2020.

55 *Does the release benefit the debtor as well as creditors:* The release benefits the debtor in that it helps facilitate a transaction that will make funds available to creditors. In the absence of the release, the funds available to creditors could be significantly diminished because of indemnity claims by the releasees. Those indemnity claims would include claims for advancement of defence costs. The advancement of defence costs would be claimed in relation to an action that questions the conduct of the releasees during a court supervised and court approved the process. As noted above, the nature of those claims is highly tenuous.

56 *Creditors knowledge of the nature and effect of the release:* All creditors on the service list were served with materials relating to this motion. Creditors were free to attend the hearing, several did. Those creditors who made submissions on the motion supported the release.

57 A consideration of the foregoing *Lydian* factors would also incline me to approve the release. If I balance the right to the Objectors to pursue the releasees for their conduct during the CCAA proceeding against the right of creditors to maximize recovery against the Green Relief estate, there is simply no contest. The creditors with proven claims have legitimate, verified demands against the corporate estate. The Objectors have tenuous claims based on objections to a court supervised process that would in effect amount to a collateral attack on court orders. In those circumstances I am satisfied that the release benefits the debtor and creditors generally.

Scope of the Releases

58 Although the scope of the releases is captured by the factor that Lydian describes as whether the releases are fair, reasonable and not overly broad, I consider the scope of the release here in a standalone section because of the prominence given to it during argument.

59 The release is found in paragraph 24 of the proposed order. Its material language provides:

...the current directors, officers, employees, independent contractors that have provided legal or financial services to the Applicant, legal counsel and advisors of the Applicant, and (ii) the Monitor and its legal counsel (collectively, the "Released Parties") shall be ... released ... from ...all ... claims ...of any nature or kind whatsoever ... based in whole or in part on any act or omission, ... taking place prior to the filing of the Monitor's Certificate and that relate in any manner whatsoever to the Applicant or any of its assets (current or historical), obligations, business or affairs or this CCAA Proceeding, ... provided that nothing in this paragraph shall ... release... any claim: (i) that is not permitted to be released pursuant to section 5.1(2) of the CCAA, (ii) against the former directors and officers of the Applicant for breach of trust arising from acts or omissions occurring before the date of the Initial Order, (iii) that may be made against any applicable insurance policy of the Applicant prior to the date of the Initial Order, or (iv) that may be made against the current directors and officers that would be covered by the Directors' Charge granted pursuant to the Initial Order.

60 While the release appears broad at first blush, a closer reading narrows its scope considerably. The parties being released are by and large parties who provided services to the company during the CCAA process. Given that the incremental steps in the CCAA process were approved by the court and were subject to submission by a wide variety of parties, the release is not, *prima facie*, unreasonable. In addition, while current directors are also released, the longest-serving of those are Messrs. Jha and Battaglia who became directors on March 7, 2019, approximately one year before the Notice of Intention was filed. The time period for which they are being released outside of the court proceedings is therefore relatively limited. On the motion, no one advanced any basis for a claim against them for pre-Notice of Intention conduct.

61 The release then goes on to carve out certain types of claims that are not being released even as against the limited population of releasees. The carveouts include claims not permitted to be released under section 5.1 (2) of the CCAA and claims that may be made against any applicable insurance policy.

62 Section 5.1 (2) of the CCAA prohibits releases for, among other things, "wrongful or oppressive conduct by directors." Just what that means was the subject of much argument on the motion.

63 On behalf of Green Relief, Mr. Thornton submitted that the carveout for "wrongful or oppressive conduct" is broad and would include negligence claims. In other words, in the Company's view, negligence claims are not being released. Mr. Thornton submitted that the language of section 5.1 (2) of the CCAA effectively releases the directors from statutory liabilities for which they may be liable because the corporation failed to do something even though that failure is not attributable to any wrongdoing by directors. By way of example, directors' statutory liability for unpaid wages would fall into this category and would be captured by the release.

64 In *BlueStar Battery Systems International Corp.*, Re2000 CanLII 22678 (ON SC) Farley J. said the following about the scope of section 5.1 (2) at para 14:

"However it seems to me that the directors of any corporation in difficulty and contemplating a CCAA plan would be unwise to engage in a game of hide and go seek since the language of s. 5.1 (2)(b) appears wide enough to encompass those situations where the directors stand idly by and do nothing to correct any misstatements or other wrongful or oppressive conduct of others in the corporation (either other directors acting *qua* directors, or officers or underlings). There was no evidence presented that the directors here had knowledge or ought to have had knowledge of such here. One may have the greatest of suspicion that they did or ought to have had such knowledge. This could have been crystallized if RevCan had put the directors on notice of the promises to pay GST. It would seem to me at first glance that the oppression claims cases which arise pursuant to corporate legislation such as the Canada Business Corporations Act and the Business Corporations

Act (Ontario) would be of assistance in defining "oppressive conduct". Similarly it would appear that "wrongful conduct" would be conduct which would be tortious (or akin thereto) as well as any conduct which was illegal."

65 This passage would appear to support Mr. Thornton's submission.

66 Mr. Osborne, on behalf of the current directors took a narrower view of the meaning of "wrongful or oppressive" conduct and described it as referring to "active but not "passive torts". In Mr. Osborne's submission, the release covers claims in respect of which the corporation can indemnify directors, including negligence, but does not include intentional conduct like fraud.

67 Given the difference of views, some counsel asked me to define specifically what was or was not excluded by section 5.1 (2) while others urged me not to define the scope of the section at this stage.

68 My inclination is to not to define the scope of the section or the release in a vacuum. Both the release and section 5.1 (2) are better interpreted in light of a specific claim in the context of the circumstances existing if and when any such claim arises.

69 In that regard I would urge a heavy dose of restraint on all parties. There has been no shortage of animosity and litigation between the parties. Temperatures have run high throughout. Before continuing any existing litigation or commencing new litigation, I would urge all parties to consider whether they are proceeding out of anger and frustration, however justified it may be, or are they proceeding on a rational economic basis because there is a cogent basis for a claim that will lead to recovery considerably in excess of the costs of litigating. This is a situation where suing "out of principle" warrants considerable restraint.

70 The release also carves out claims "that may be made against any applicable insurance policy of the Applicant prior to the date of the initial order." I was advised during the motion that the directors were unable to obtain insurance after the Notice of Intention was filed in March 2020 but that the company purchased tail coverage that extended coverage for past conduct of directors. The tail coverage expires on November 26, 2020. That still provides plaintiffs with a period of time to commence an action for which there might be insurance coverage and to which the release might therefore not apply. The tail coverage may for example, cover current and former directors for conduct that arose before the Notice of Intention was filed.

71 To permit such claims to be filed, I am temporarily lifting the stay of proceedings against officers and directors of Green Relief solely for the purpose of initiating claims that would potentially obtain the benefit of the carveouts under the release.

72 Given my preference for interpreting the release in light of actual circumstances rather than in a vacuum and given my temporary lift of the stay of proceedings against officers and directors, there is considerable benefit to the parties and considerable judicial efficiency in having the release interpreted by the same judicial officer who approved it and who had oversight of the CCAA proceedings. I will therefore remain seized of this issue and order that any issue about whether the release applies (including the issue of insurance coverage) will be determined by me.

73 To be clear, if any actions are commenced because of the temporary lift stay, the parties will still have to agree that such actions are carved out of the release by virtue of insurance coverage or I will have to determine that issue. The actions will not proceed and need not be defended until such agreement is reached or until I have determined whether the release applies.

Relief requested by Susan Basmaji

74 Susan Basmaji is a shareholder who asks that I extend the coverage of the release to her. Ms. Basmaji says she motivated a large number of other shareholders to cooperate with the Monitor and the Company to support the Transaction. She says that as a result of those efforts, Mr. Leblanc has commenced a defamation action against her.

75 I am not inclined to extend the release to Ms. Basmaji. The release was the product of negotiations between various stakeholders. It is not for the court to rewrite the release and bring other parties into the negotiation. I have extremely limited knowledge of the dispute between Mr. Leblanc and Ms. Basmaji and have no basis for concluding whether Ms. Basmaji was essential to the success of the Transaction as Lydian suggests nor do I have enough information about the defamation action to determine whether Ms. Basmaji should benefit from a release. That that said, it strikes me that the litigation between Mr. Leblanc and Ms. Basmaji a dispute to which the exhortation in paragraph 69 above is particularly relevant.

Disposition

76 For the reasons set out above, I

- a. approve the Transaction;
- b. approve the release;
- c. will remain seized of all issues concerning the interpretation of the release and the insurance coverage referred to in it;
- d. lift the stay of proceedings solely to permit actions to be brought up to and including November 26, 2020 in order to capture the benefit of insurance coverage referred to in the release;
- e. reimpose the stay of proceedings effective at 12:01 AM on November 27, 2020; and
- f. decline to extend the benefit of the release to Susan Basmaji.

Application granted.

TAB 8

2022 QCCS 2828
Cour supérieure du Québec

Arrangement relatif à Blackrock Metals Inc.

2022 CarswellQue 10503, 2022 QCCS 2828, EYB 2022-458285

**IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT UNDER THE
COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36 OF:
BLACKROCK METALS INC., BLACKROCK MINING INC., BRM METALS GP INC.
AND BLACKROCK METALS LP., DEBTORS, v. DELOITTE RESTRUCTURING
INC., MONITOR, and INVESTISSEMENT QUÉBEC AND OMF FUND II H
LTD., SECURED CREDITORS, and 13482332 CANADA INC., Shareholder
Bidder, and WINNER WORLD HOLDINGS LIMITED, 4470524 CANADA INC.,
GOLDEN SURPLUS TRADING AND PROSPERITY STEEL, INTERVENORS**

PAQUETTE Juge en chef

Heard: 30 may 2022 - 31 may 2022

Judgment: 8 july 2022

Docket: C.S. Qué. Montréal 500-11-060598-212

Counsel: *Me Jean Legault, Me Jonathan Warin, Me Ouassim Tadlaoui*, for the Debtors
Me Douglas Mitchell, Me Sophie Perron, for the Intervenors
Me Alain Riendeau, Me Brandon Farber, for the Monitor
Me Luc Morin, Me Guillaume Michaud, Me Noah Zucker, for the Secured Creditor, Investissement Québec
Me David Bish, Me Julie Himo, for the Secured Creditor, OMF Fund II H Ltd.
Me O'Neill Brendan, for the Special Committee of The Board Of Blackrock
Me Geneviève Cloutier, Me François Dandonneau, for The Grand Council Of The Crees And The Cree Nation Government
Me Gilles Robert, Me Kloé Sévigny, for The Canada Revenue Agency
Me Jean-Yves Simard, Laurent Crépeau, for the Shareholder Bidder

Table of Authorities

Cases considered by *Marie-Anne Paquette J.C.S.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513 (Ont. C.A.) — followed
ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 390 N.R. 393 (note), (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 257 O.A.C. 400 (note) (S.C.C.) — referred to
AbitibiBowater inc., Re (2010), 2010 QCCS 1742, 2010 CarswellQue 4082, 71 C.B.R. (5th) 220 (C.S. Que.) — followed
Arrangement relatif à Nemaska Lithium inc. (2020), 2020 CarswellQue 10601, 2020 QCCS 3218 (Que. Bkcty.) — followed
Arrangement relatif à Nemaska Lithium inc. (2020), 2020 QCCA 1488, 2020 CarswellQue 11925 (C.A. Que.) — referred to
Bank of Montreal v. Maitland Seafoods Ltd. (1983), 46 C.B.R. (N.S.) 75, 57 N.S.R. (2d) 20, 120 A.P.R. 20, 1983 CarswellNS 43 (N.S. T.D.) — considered
Bloom Lake General Partner Ltd., Re (2015), 2015 CarswellQue 6175, 2015 QCCS 3064 (Que. Bkcty.) — referred to
Boutiques San Francisco Inc., Re (2004), 2004 CarswellQue 753, [2004] R.J.Q. 965, 5 C.B.R. (5th) 197 (C.S. Que.) — followed

CCAA Plan of Arrangement - Clearbeach and Forbes (2021), 2021 ONSC 5564, 2021 CarswellOnt 12453, 94 C.B.R. (6th) 239 (Ont. S.C.J. [Commercial List]) — followed

Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303, 1981 CarswellNS 47 (N.S. C.A.) — followed

Canada v. Canada North Group Inc. (2021), 2021 SCC 30, 2021 CSC 30, 2021 CarswellAlta 1780, 2021 CarswellAlta 1781, 2021 D.T.C. 5080, (sub nom. *La Reine c. Canada North Group Inc.*) 2021 D.T.C. 5081, 91 C.B.R. (6th) 1, [2021] 5 C.T.C. 111, 28 Alta. L.R. (7th) 1, [2021] 10 W.W.R. 1, 460 D.L.R. (4th) 309, 19 B.L.R. (6th) 1 (S.C.C.) — followed

Harte Gold Corp. (Re) (2022), 2022 ONSC 653, 2022 CarswellOnt 1698, 97 C.B.R. (6th) 202 (Ont. S.C.J. [Commercial List]) — followed

Lydian International Limited (Re) (2020), 2020 ONSC 4006, 2020 CarswellOnt 9768, 81 C.B.R. (6th) 218 (Ont. S.C.J. [Commercial List]) — followed

Mecachrome Canada inc., Re (2009), 2009 CarswellQue 9963, 58 C.B.R. (5th) 49, 2009 QCCS 6355 (C.S. Que.) — considered

Peloton Pharmaceutiques inc., Re (2017), 2017 QCCS 1165, 2017 CarswellQue 2378 (Que. Bkcty.) — considered

Quest University Canada (Re) (2020), 2020 BCSC 1883, 2020 CarswellBC 3091, 85 C.B.R. (6th) 41 (B.C. S.C.) — followed

Raymor Industries inc., Re (2010), 2010 CarswellQue 2474, 66 C.B.R. (5th) 197, 2010 QCCA 578 (C.A. Que.) — considered

Re Green Relief Inc. (2020), 2020 ONSC 6837, 2020 CarswellOnt 19933, 88 C.B.R. (6th) 305 (Ont. S.C.J. [Commercial List]) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Southern Star Developments Ltd. v. Quest University Canada (2020), 2020 BCCA 364, 2020 CarswellBC 3252, 85 C.B.R. (6th) 96 (B.C. C.A.) — referred to

Stelco Inc., Re (2006), 2006 CarswellOnt 406, 17 C.B.R. (5th) 78, 14 B.L.R. (4th) 260 (Ont. S.C.J. [Commercial List]) — considered

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1, 2010 CSC 60 (S.C.C.) — followed

Victor Cantore v. Nemaska Lithium Inc. (Formerly Nemaska Lithium Inc., Nemaska Lithium Whabouchi Mine Inc., Nemaska Lithium Shawinigan Transformation Inc., Nemaska Lithium P/Ip Inc. and Nemaska Lithium Innovation Inc.), et al. (2021), 2021 CarswellQue 4589, 2021 CarswellQue 4590 (S.C.C.) — referred to

9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1 (S.C.C.) — followed

8640025 Canada Inc. (Re) (2021), 2021 BCSC 1826, 2021 CarswellBC 2888 (B.C. S.C.) — considered

8901341 Canada inc. c. Bloom Lake General Partner Ltd. (2015), 2015 QCCA 754, 2015 CarswellQue 3984 (C.A. Que.) — referred to

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 173 — considered

s. 173(1)(g) — considered

s. 191 — considered

s. 191(2) — considered
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

ss. 4-6 — referred to

s. 11 — considered

s. 36 — considered

s. 36(1) — considered

s. 36(2) — considered

s. 36(3) — considered

s. 36(3)(a) — considered

s. 36(3)(b) — considered

s. 36(3)(c) — considered

s. 36(3)(d) — considered

s. 36(3)(e) — considered

s. 36(3)(f) — considered

s. 36(6) — considered

PAQUETTE Juge en chef :

OVERVIEW

1 The debtors BlackRock Metals Inc., BlackRock Mining Inc., BlackRock Metals LP and BRM Metals GP Inc. (collectively: *BlackRock*) were established in 2008. They are developing a metals and materials manufacturing business with a mine in Chibougamau, and a metallurgical plant to be located at the Port of Saguenay (*Project Volt*).

2 The mine and plant to be built under Project Volt will eventually supply vanadium, high purity pig iron and titanium products, three specialty metals which are, according to BlackRock, central to the green materials transition in North America. BlackRock's business plan contemplates a forty-one year project life generating strong returns, with a small-scale mining operation.

3 As of now, BlackRock has been in the process of raising the necessary capital to start the construction and implementation of Project Volt, which is now being estimated to cost approximately US\$1.02 billion. Considering the early stage of its development, no revenues have ever been generated by the project.

4 BlackRock's only secured creditors are OMF Fund II H Ltd. (*Orion*) and Investissement Québec (*IQ*). On January 18, 2019, BlackRock signed a loan credit agreement with Orion and IQ to supply the necessary working capital required to continue Project Volt. This loan was due and payable on December 1, 2022 and, as of now, Orion and IQ's secured claim amounts to approximately \$100M, which constitutes the best part of BlackRock's pre-filing obligations. Orion and IQ also own, respectively, 18% and 12% of BlackRock's shares.

5 On December 22, BlackRock filed an Application for an Initial Order and other ancillary relief in the present *Companies' Creditors Arrangement Act (CCAA)*¹ restructuring proceedings.

6 On January 7, 2022, the Court issued a two-part order in view of the sale of the assets of BlackRock. Firstly, the Court established the parameters of a sale and investment solicitation process (*SISP*) for the sale of such assets.

7 Secondly, the Court approved the Agreement of Purchase and Sale signed by Orion and IQ as purchaser (*Stalking Horse Agreement*) and ordered that this agreement be considered as constituting the "Stalking Horse Bid" under the *SISP*. The agreed purchase price under the Stalking Horse Agreement is to be equal to the fair market value of BlackRock's secured debt towards Orion and IQ (approximately \$100M).

8 Pursuant to the January 7, 2022 orders, Phase 2 Bids under the *SISP* were to be submitted before May 11, 2022, as will be discussed below.

9 Two Applications are before the Court in relation to the above:

9.1. Amended Application by the Shareholder Bidder, 13482332 Canada Inc. (**Canada Inc.**) to extend the Phase 2 Bid Deadline (**Bid Extension Application**); and

9.2. BlackRock's Application to approve a vesting order (**RVO application**)

10 In the Bid Extension Application, Canada Inc. seeks to extend the deadlines provided for in the January 7, 2022 orders, with the view of continuing to canvass the market for financial partners that would allow it to submit a Phase 2 Bid after the Phase 2 Bid deadline.

11 In the RVO Application, BlackRock seeks an order approving the sale of its assets essentially along the terms of the IQ and Orion's Stalking Horse Agreement (*Proposed Transaction*).

12 On May 31, 2022, due to time constraints, the Court rejected the Bid Extension Application and granted the RVO Application, with reasons to follow. The reasons are found below.

1. PROCEDURAL BACKGROUND (COURT ORDERS)

13 On December 22, 2021, BlackRock filed an Application for an Initial Order and other ancillary relief.

14 On December 23, 2021, the Court issued a First Day Initial Order pursuant to the CCAA and, *inter alia*, appointed Deloitte Restructuring Inc. as the monitor (*Monitor*).

15 On January 7, 2022, the Court issued an *Amended and Restated Initial Order* and an *Order Approving a Sale and Investment Solicitation Process (SISP) and Approving a Stalking Horse Agreement of Purchase and Sale*.

16 The January 7, 2022 orders (*Initial Orders*) provided that BlackRock was authorized to borrow from Orion and IQ, as interim lenders, such amounts from time to time as BlackRock may consider necessary or desirable, up to a maximum principal amount of \$2M outstanding at any time, to fund the ongoing expenditures of BlackRock and to pay such other amounts as may be permitted (*Interim Facility*). The Court also authorized a corresponding Interim Charge, for a maximum amount of \$2.4M, in favor of IQ and Orion.

17 The Initial Orders also approved a *SISP* to be conducted in accordance with the approved procedures (*Bidding Procedures*);

17.1. authorized the Monitor and BlackRock to implement the *SISP*;

17.2. approved the Stalking Horse Agreement, solely for the purposes of:

(i) constituting the "stalking horse bid" under the SISP; and

(ii) approving the Expense Reimbursement (as defined in the Stalking Horse Agreement), and subject to further Order of this Court.

18 Pursuant to the Initial Orders and at the request of the Intervenor (shareholders), the Court extended the SISP by an additional 30 days beyond what was originally contemplated.

19 The Stay of proceedings was thereafter extended to June 30, 2022, in accordance with further requests made and in accordance with the debate arising from the two Motions identified above.

2. PHASES OF THE SISP

20 The objective of the SISP was to solicit interest either (i) in one or more sales or partial sales of all, substantially all, or certain portions of the BlackRock's business; and/or (ii) for an investment in a restructuring, recapitalization, refinancing or other form of reorganization of BlackRock or its business.

21 The Bidding Procedures provide that a party interested in participating in the SISP must sign and deliver to the Monitor a non-disclosure agreement (*NDA*) and upon doing so, is considered a "*Phase 1 Qualified Bidder*", following which the Monitor will provide to such party a confidential information memorandum (*CIM*) and access to the confidential virtual data room (*VDR*) set up by BlackRock and the Monitor.

22 The Bidding Procedures further provide that if a Phase 1 Qualified Bidder wishes to submit a bid, it must deliver to the Monitor a non-binding letter of intent (*LOI*) which must conform to certain specified requirements (*Phase 1 Qualified Bid*) no later than 5:00 p.m. on March 9, 2022 (*Phase 1 Bid Deadline*).

23 Following the Phase 1 Bid Deadline, BlackRock shall determine, in consultation with the Monitor, if an *LOI* qualifies as a "*Phase 1 Successful Bid*", in which case the bidder is thereafter deemed a "*Phase 2 Qualified Bidder*".

24 Phase 2 Qualified Bidders shall thereafter submit their Phase 2 Qualified Bid no later than 5:00 p.m. on May 11, 2022, or such other date or time as may be agreed by the Monitor in consultation with BlackRock and with the authorization of Orion and IQ as Stalking Horse Bidders, acting reasonably (*Phase 2 Bid Deadline*).

25 Also pursuant to the Bidding Procedures, the Stalking Horse Bidders are Phase 2 Qualified Bidders for all purposes under the SISP.

26 Therefore, Canada Inc. had until May 11, 2022, 5:00 p.m. (Eastern Standard Time) to submit its Phase 2 Qualified Bid (*Phase 2 Bid Deadline*).

3. TASKS PERFORMED BY THE MONITOR IN ACCORDANCE WITH THE SISP

27 Further to the Initial Orders, the Monitor undertook the following steps to conduct the solicitation process in accordance with the SISP:

- a. the Monitor contacted 415 potentially interested parties;
- b. 374 potentially interested parties received the Teaser according to email confirmations received by the Monitor;
- c. 232 potentially interested parties were contacted directly by the Monitor, in addition to the general distribution that occurred on January 10, 2022;
- d. 65 potentially interested parties participated in more serious discussions about the opportunity or confirmed that they were not interested;

e. 7 interested parties executed an NDA and were granted access to the VDR; and,

f. 1 interested party (Shareholder Bidder) submitted a non-binding Letter of Interest (LOI) prior to the Phase 1 Bid Deadline.²

4. CANADA INC.'S LOI

28 Canada Inc. was incorporated on March 8, 2022, as a special purpose vehicle to participate in the SISP and submit a bid.

29 Canada Inc.'s shares are owned by 3 individuals, Mr. Edward Yu, Mr. Solomon (Sam) Pillersdorf and Mr. Leslie A. Wittlin, who, directly or through corporate entities under their control, own approximately 50% of the outstanding shares of BlackRock. Mr. Yu, Mr. Pillersdorf and Mr. Wittlin also act as directors and officers of the company. Canada Inc.'s representatives submit that they have well established links into the mining industry and, based on same, have assembled a team of experienced advisory professionals in the field.

30 The Monitor did not receive any other LOI on or before the Phase 1 Bid Deadline. Therefore, Canada Inc.'s non-binding LOI³ of March 9, 2022 is the only Phase 1 Successful Bid.

31 In its LOI, Canada Inc. proposes a purchase price for BlackRock's shares that shall be either the sum of \$100M or such greater amount as would be required to exceed the minimum purchase price as defined in the Initial Order.

5. ORDERS SOUGHT AND CONCLUSIONS OF THE COURT

5.1 The Bid Extension Application

32 Canada Inc. argues that its tremendous efforts to submit a bid to the Monitor are on the verge of bearing fruit, albeit slightly past the Bid Deadline. Canada Inc. therefore begs the Court to extend the Phase 2 Bid Deadline (which expired on May 11, 2021) for an extra thirty days after the present judgment.

33 The Monitor, BlackRock and Orion and IQ object to such extension.

34 For the reasons below, the Court refused the extension sought.

5.2 The RVO Application

35 The only pending bid therefore is the one made by Orion and IQ, the Stalking Horse Bidders. With the support of BlackRock and of the Monitor, they beg the Court to approve the drafted agreement.⁴

36 The *Intervenors*, who own approximately 50% of the shares of BlackRock, object to the structure of the Proposed Transaction, as it would amount to an illegal appropriation of their shares, without their consent. They also object to the granting of a release to Orion and IQ, as contemplated under the Stalking Horse Agreement.

37 For the reasons below, the Court dismissed the *Intervenors'* objection and approved the transaction in accordance with the RVO.

ANALYSIS

6. BID EXTENSION APPLICATION

6.1 Facts relevant to the issue

38 As indicated above, Canada Inc.'s LOI⁵ is the only Phase 1 Successful Bid. Therefore, only IQ and Orion (Stalking Horse Bidders) and Canada Inc. (Shareholder Bidder) were permitted to proceed to Phase 2 of the SISP.

39 More particularly, on March 8-9, 2022, before the Phase 1 Bid Deadline, Canada Inc. was incorporated and delivered to the Monitor a non-binding LOI, which was confirmed as a Phase 1 Successful Bid. Canada Inc. therefore qualified for Phase 2 of the SISP.

40 To assist in making such a decision, BlackRock and the Monitor requested and received clarifications, particularly with respect to the ability of Canada Inc.'s representatives to fund its bid from their own assets or from third-party financing (*Clarification Letter*)⁶, which will be discussed below.⁷

41 At a later meeting, held on May 9, 2022, Canada Inc. informed the Monitor and BlackRock that despite having initiated, with the help of its own financial advisors, a solicitation process to identify financial partners that would support its bid, it would not be in position to file a qualified bid by the Phase 2 Deadline.

42 Canada Inc. therefore verbally requested that the Phase 2 Bid Deadline be extended for an additional 30 days in order to continue to canvass the market for financing.⁸

43 The Monitor consulted with BlackRock and requested the position of Orion and IQ, as Stalking Horse Bidders, in accordance with paragraph 21 of the approved Bidding Procedures. They expressed serious concerns but were agreeable to considering an extension of the Phase 2 Bid Deadline, subject to several conditions. These conditions included the financing (subordinate to the DIP and to the approximately \$100M of secured debt held by the Orion and IQ) of the costs resulting from the extra 30-day extension (estimated at \$500K) and the confirmation that no further extension would be sought in the future.⁹

44 Canada Inc. replied that it was prepared to advance a first tranche of \$200K of a DIP loan within one week of the acceptance date of their request for a SISP extension, and the balance of \$300K as needed. Canada Inc. contemplated that this proposed loan totaling \$500K was to be made on the same terms and conditions as the existing DIP loan of the Secured Lenders, and was to rank *pari passu* with them in all respects.

45 The Monitor estimated that it was unlikely that the extension sought would allow Canada Inc. to provide a proper bidding offer at the end of the extension. After further consultation with BlackRock and the Stalking Horse Bidders and with their support, the Monitor denied the extension and informed Canada Inc. accordingly on May 12, 2022.

46 On May 11, 2022, Canada Inc. filed the present Bid Extension Application.

6.2 Opposing arguments of the parties

47 Canada Inc. submits that its LOI conforms with the requirements of the Bidding Procedures in that, without limitation, it meets the "Minimum Purchase Price" requirement of providing at closing net cash proceeds that are not less than the aggregate of (a) the amount of cash payable under the Stalking Horse Agreement together with the amount of obligations being credit bid thereunder, (b) the amount of expense reimbursement payable to the Stalking Horse Bidders, plus (c) a minimum overbid amount of \$1M.

48 Canada Inc. also pleads that there is equity for the stakeholders of BlackRock, including the shareholders, based on their knowledge of the company and on recent pre-money valuations performed by third parties which ranged between USD\$175M and 350M. In order to assist in designing and financing its final bid, Canada Inc. has retained at its own costs the services of two consultants, FTI Capital Advisors Canada and BRG Securities US.

49 Canada Inc.'s consultants have contacted 156 investors to solicit interest in the opportunity. To date, seven remain highly interested in the opportunity and have executed NDAs and are continuing to perform due diligence on the asset. An additional three have expressed interest and are evaluating the opportunity internally before proceeding to execute an NDA. Investors that have executed NDAs have been added to the VDR and are actively analyzing and reviewing BlackRock's materials. The Consultants have prepared a report on the status of the financing process.¹⁰ For example, Canada Inc. submits a signed non-binding letter of interest signed on May 6, 2022, from a serious investment fund for a USD\$65M financing, conditional *inter*

alia on a 30-day-due diligence.¹¹ Canada Inc. further argues that the recent events in Ukraine have improved the outlook of Project Volt and increased the value of its strategic metals.

50 However, according to Canada Inc., based on the feedback provided to its consultants from investors and given the complexity of this transaction, the condensed timeframe of the SISP is a significant hurdle for investors to perform the necessary due diligence in order to provide a commitment to finance the its Phase 2 Qualified Bid. As such, the Consultants believe that additional time will have a material impact on the likelihood of raising the capital required.

51 Canada Inc. argues that although it has made significant progress, it needs more time to pursue these various opportunities and finalize the business and financial terms which will form part of the its Phase 2 Qualified Bid.

52 To that effect, Canada Inc. reminds the Court of its broad discretion under section 11 of the CCAA and points to case law¹² that suggests that the Court would be justified to refuse an asset sale in the presence of impropriety in the sales process.

53 The Monitor, BlackRock, Orion and IQ and BlackRock's First Nation Partners¹³ oppose to such extension of the Phase 2 Bid Deadline.

54 BlackRock, the Monitor and Orion and IQ argue that such extension would run contrary to the clear rules of the Bidding Procedures and would break the integrity of the SISP, to the prejudice of all potential bidders who made their decisions based on the rules known to all. Moreover, the extension sought would maintain uncertainty for BlackRock for an additional period, with no realistic chance of obtaining a better offer. Also, the extension would increase the costs and the amounts to be advanced by the Orion and IQ as interim lenders while Canada Inc. is not ready to pay for those expenses for the requested additional period.

6.3 Legal principles

55 The CCAA primarily seeks to refinance and restructure insolvent companies rather than liquidate them.¹⁴ When selling the assets of the company, one of the objectives is thus naturally to achieve the best possible price for the assets. This usually coincides with finding the best outcome for the company's creditors.

56 To achieve this goal, the court benefits from a wide discretionary power pursuant to section 11 of the CCAA:

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

[Emphasis added]

57 The three baseline requirements to meet for an order to be considered "appropriate in the circumstances" are appropriateness, good faith and due diligence.

58 In addition, the order sought must advance the policy and remedial objectives of the CCAA to qualify as "appropriate" within the meaning of section 11.¹⁵ The overarching remedial objectives pursued by the CCAA include:¹⁶

1. providing for timely, efficient and impartial resolution of a debtor's insolvency;
2. preserving and maximizing the value of a debtor's assets;
3. ensuring fair and equitable treatment of the claims against a debtor;
4. protecting the public interest; and

5. in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.

59 Hence, although the objective of any sale process is obviously to obtain the best possible price from prospective purchasers, monetary considerations cannot be the only relevant factor when the Court determines if it is appropriate to deviate from a process that has been duly followed by all parties involved.

60 On the contrary, it is well established that sale processes are important in CCAA proceedings and that modifying same *post facto* every time there is a chance of a better financial outcome could have a negative impact on all the parties involved. Therefore, Courts have often insisted on the importance of preserving the integrity of the sales process. As this court held in *Boutiques San Francisco Inc., Re*:

[20] Dans le cadre des plans d'arrangement qu'elle autorise, le but de la LACC est, entre autres, de favoriser un processus ordonné et encadré où les paramètres choisis doivent par conséquent avoir un sens. Dans le contexte de cette loi, tout comme par exemple dans celui de la *Loi sur la faillite et l'insolvabilité*, la recherche du meilleur prix possible pour les créanciers ne peut se faire en vase clos, en ignorant la protection nécessaire de l'intégrité et de la crédibilité du processus choisi pour atteindre cet objectif.¹⁷

61 The Bidding Procedures, which govern the SISP approved by this Court, are fundamentally important for assessing the Proposed Transaction as well as the arguments of the parties.¹⁸

6.4 Discussion

62 The Monitor also explains that efforts have already been made for some years before the beginning of the CCAA proceedings in order to further finance Project Volt. BlackRock, with the assistance of its financial advisors at the time, have conducted a global search since 2015, but, and despite considerable time and effort, have not been able to secure the required funding.

63 At the inception of the CCAA proceedings, the Court also modified the proposed Bidding Procedures to include a 30 day extension to the "Phase 1 Bid Deadline" based on a request from the Intervenor and their submission that such further time would suffice to ensure a fulsome and fair process. This extension has not led to the desired results.

64 The Monitor then conducted a thorough solicitation process as part of the Phase 1 of the SISP, as mentioned previously, which culminated in a single LOI submitted by Canada Inc.:

Based on the various discussions with prospective bidders during Phase 1 of the SISP, it was apparent to the Monitor that the BRM project, which had previously been promoted extensively in the market by BRM and its financial advisors for financing purposes, was already very well known by most of the strategic and industry leaders. This situation likely explains why many potentially interested parties declined the opportunity without signing an NDA and without performing due diligence of the VDR.¹⁹

65 The lack of interest of other bidders in taking part in the Debtor's restructuring has thus been apparent since the very first stages of the SISP process. According to the Monitor, potential players who were contacted either found the opportunity too risky, or not strategic or profitable enough, or did not believe in the feasibility of the technology involved. It remains unlikely that this situation will change in the near future.

66 Moreover, Canada Inc. was unable to secure financing of its own bid during the extended 60 days of Phase 1 of the SISP and waited all the way until that phase's deadline to execute an NDA and to enter into the process.

67 In determining that Canada Inc.'s non-binding LOI constituted a Phase 1 Successful Bid, the Monitor relied on Canada Inc.'s reassurance that it had both the ability and the means required to pay the offered purchase price and to raise or contribute

further capital resources to BlackRock's business to continue it as a going concern. The LOI went on to state that the net worth of the Bidder's representatives was, collectively, well above the said amount and that "[b]ased on their extensive experience and engagement in the industry", they were "well placed to obtain both direct and/or third party financing in an aggregate amount sufficient both to complete the Transaction and thereafter required to proceed with the Business and lead it to profitability as a going concern."²⁰

68 Canada Inc., in its Clarification Letter of March 14, 2022, refused to provide more details about its representatives' respective worth.²¹ Still, it is not in doubt that they have enough assets to finance its bid if needed.

69 However, Canada Inc. wrote that it was "unable to advise with certainty to what extent [its] three principals [. . .] may contribute to the capital required to fund the transaction contemplated by the non-binding LOI." This issue would "clarify as [its] funding plan finalizes through [its] on-going efforts already well underway." Canada Inc. confirmed that it would "have its financing, to the extent necessary and sufficient for the purpose of the binding LOI, on or before the Phase 2 bid deadline", but added that "some or all" of the funds "may come from external sources", which was subject to further due diligence that could only be performed during Phase 2 of the SISP.

70 These answers are evasive and, in retrospect, proved to include many loopholes. Still, the Clarification letter was considered and the Monitor nonetheless qualified Canada Inc. for Phase 2.

71 The Monitor understood that Canada Inc.'s primary focus during Phase 2 of the SISP was to secure financing, through equity or debt, in order to submit a binding offer prior to the Phase 2 Bid Deadline. Indeed, the due diligence performed during that Phase was limited. Only one meeting occurred, at the request of Canada Inc.'s consultants, with BlackRock and the Monitor, to review the assumptions supporting the financial model of BlackRock. Also, all the groups that were granted access spent a relatively short amount time on the VDR reviewing the information available for this kind of project.²²

72 At the time of the meeting on May 9, 2022, despite some cursory interest manifested by certain potential capital partners, and except for a non-binding LOI received from a third party for an amount (USD\$65M) significantly less than the one required to exceed the Stalking Horse Bid (\$100M), Canada Inc. received no other letter of intent or confirmation of interest in writing from a potential capital partner during the SISP.

73 Critically, Canada Inc. also revealed on May 9, 2022 that none of its representatives actually intended to participate in the financing of an eventual Phase 2 Qualified Bid, should there be such a bid.

74 The Monitor testified that had he known in due time that the shareholders had no intention to finance the bid using their own personal assets, Canada Inc. would likely not have qualified for Phase 2 of the SISP. This aspect of the LOI was described as a key consideration in the Monitor's decision at the time.

75 In addition, the failure by Canada Inc. to confirm that it would fund all of the Debtor's costs, including professional costs, during the extended 30-day period, indicates that it is not willing to put "skin in the game" as evidence of its *bona fide* intentions. It appears that Canada Inc. is unwilling to fund the costs of a further delay notwithstanding that any successful bid would necessarily have to cover those costs in order to exceed the value of the Stalking Horse Bid.

76 The above findings remain, in spite of the letter from VanadiumBank Inc., which Canada Inc. filed the day before the hearing.²³ This letter is presented as a new "financing proposal" in favor of Canada Inc. for up to \$125M in support of its bid.

77 Actually, it appears that VanadiumBank was incorporated only a few weeks before the hearing.²⁴ Notwithstanding its name, it is not a bank. Its offer to Canada Inc. is not to lend funds out of its own pocket, but rather to arrange a loan facility after seeking and obtaining the required financing from third parties in the market.

78 In other words, with VanadiumBank's proposal, Canada Inc. is nowhere closer to achieving its financial goals before the proposed extended Phase 2 Bid Deadline. The Court therefore gives no weight to VanadiumBank's letter.

79 It now seems clear that, as it was unable to meet the requirements of the Initial order, Canada Inc. instead decided to launch what could be described as a parallel SISP, which was nowhere authorized and which runs contrary to the letter and spirit of the SISP as ordered by the Court.

80 Although the Court recognizes Canada Inc. and its representatives' efforts in securing third party financing for their bid, and their belief in the potential of BlackRock's projects to attract new interest as the market evolves, it is time for the SISP to come to an end and for the CCAA proceedings to move forward.

81 It is advantageous to the stakeholders generally that BlackRock complete the restructuring process as soon as possible in order to, in particular, end the negative narrative surrounding the company, to limit any further uncertainty and risk and facilitate the completion of the financing necessary for Project Volt, if possible.

82 The SISP provided for a level playing field to all potential bidders. The rules were known to all parties and certain potential bidders might have decided not to participate in the SISP because of its duration (which is often the case in insolvency proceedings). Any modification of the rules after they are set and after all the players have made their choices accordingly should not be taken lightly. In the case at hand, there is no justification whatsoever to such a disruption of the fairness of the process. The overarching remedial objectives of the CCAA are better served by rejecting the Bid Extension Application.

7. RVO APPLICATION

83 The Court's refusal to further extend the Phase 2 Deadline leaves the Stalking Horse Bid from IQ and Orion as the only Phase 2 Qualified Bid. Pursuant to the RVO Application, the Court shall now turn to the question of whether it should approve the Proposed Transaction as per the terms of his bid and, in particular, BlackRock's restructuring through a reverse vesting order (*RVO*).

7.1 Legal Principles

84 In assessing the relevant criteria and determining whether the proposed transaction shall be approved, the Court is mindful not to modify the contractual terms that have been duly negotiated between the parties.²⁵ In this case, it takes the form of a RVO.

85 RVOs are a fairly new way to achieve the remedial objective of the CCAA: instead of selling the assets of a debtor, a series of transactions will result in i) the purchaser becoming the sole shareholder of a debtor and ii) the unwanted liabilities be vested out to a separate entity, thereby ensuring that the purchaser will not inherit the unwanted liabilities.²⁶

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.²⁷ In particular, CCAA courts have approved RVO structures in several complex mining transactions and have recognized that their benefits, which include maximizing recovery for creditors, importantly limiting delays and transaction costs, and facilitating the preservation of the insolvent business' going concern, justify the use of this innovative restructuring tool.

87 In addition to section 11, discussed above, section 36 of the CCAA has been interpreted as providing courts with the jurisdiction and the relevant criteria to issue an RVO:

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

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

(3) **[Factors to be considered]** In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[...]

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

[...] [Emphasis added]

88 This Court approved an RVO in the face of opposition by a creditor in *Arrangement relatif à Nemaska Lithium inc.*²⁸. It was held that section 36 should be interpreted broadly and in accordance with the policy and remedial objectives of the CCAA and the wide discretionary power vested to the supervising judge pursuant to section 11. The Court relied in part on the Supreme Court ruling in *9354-9186 Québec inc. v. Callidus Capital Corp.*²⁹ It added:

[52] La *LACC* donne donc au juge surveillant la flexibilité nécessaire pour rendre les ordonnances « indiquées » afin de faciliter la restructuration d'une compagnie insolvable.

[53] La nature des problèmes économiques contemporains commande que des solutions innovatrices soient envisagées et, si elles permettent que les objectifs fondamentaux de la *LACC* soient atteints, au bénéfice de tous, alors elles doivent être entérinées.

[...]

[71] Le Tribunal est d'avis que les termes « disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires » / « sell or otherwise dispose of assets outside the ordinary course of business » de l'article 36(1) *LACC* permettent un grand éventail d'actes et modes de disposition, incluant, en partie ou en totalité, par voie de « dévolution inversée », une solution innovatrice, à être analysée au cas par cas.

[72] L'article 36(1) *LACC* ne comporte aucune restriction à cet égard.

[73] Sortir des sentiers battus n'est pas contre-indiqué, au contraire, surtout lorsque cela permet de meilleurs résultats.

[74] D'ailleurs, dans l'Affaire *Callidus*, la Cour suprême mentionne ce qui suit quant au pouvoir discrétionnaire général du Tribunal prévu à l'article 11 *LACC* :

[...] le pouvoir conféré par l'art. 11 n'est limité que par les restrictions imposées par la *LACC* elle-même, ainsi que par l'exigence que l'ordonnance soit « indiquée » dans les circonstances.

[75] Dans la présente affaire, la solution d'une « dévolution inversée », efficace et rapide, n'affecte pas le résultat final pour les créanciers des Débitrices, au contraire, elle l'améliore.

[76] En effet, le maintien des permis, licences et autorisations existants et des contrats essentiels à l'exploitation des entreprises, et l'utilisation possible des divers attributs fiscaux disponibles, ont facilité l'obtention de concessions de la part des Offrants, et confirmées par le Contrôleur, ce qui devrait permettre qu'une distribution plus importante soit éventuellement effectuée au bénéfice des créanciers des Débitrices.

89 The Court of Appeal refused leave in that case, while noting that some issues raised by the appeal did "appear to qualify as being significant to the practice of insolvency":

[36] [...] This is particularly the case regarding the issue of the scope of authority of the CCAA supervising judge in the context of an order that is not strictly limited to the "sale or disposition of assets" provided for under section 36 (6) CCAA, which, according to the Applicants, results in an outcome that would normally form part of an arrangement subject to prior approval by the creditors. There is also an issue of principle raised regarding the granting of broad third party releases (that are not limited to the transaction itself), outside the confines of an arrangement and without determining their appropriateness and submitting same to the required vote of creditors.³⁰

90 In *Quest University Canada*, the Supreme Court of British Columbia cautioned that in the case of an RVO, "the ability of a CCAA court to be innovative and creative is not boundless; as always, the court must exercise its discretion with a view to the statutory objectives and purposes of the CCAA [...]." ³¹ On the other hand, the Court added that "[t]here is no provision in the CCAA that prohibits an RVO structure. As is usually the case in CCAA matters, the court must ensure that any relief is 'appropriate' in the circumstances and that all stakeholders are treated as fairly and reasonably 'as the circumstances permit' [...]." ³²

91 Similarly, the Ontario Superior Court of Justice relied on sections 11 and 36 of the CCAA to issue an RVO in *CCAA Plan of Arrangement - Clearbeach and Forbes*.³³

92 An RVO structure was approved most recently by the same court in *Harte Gold Corp. (Re)*.³⁴ Although the Court was unconvinced that such an order could rely entirely on section 36 of the CCAA, it concluded that its discretion under section 11 was clearly broad enough to encompass it. Furthermore, the criteria set out at paragraph 36(3) provide an analytical framework that could be applied *mutatis mutandis* to an RVO transaction:

[36] The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor 'selling or otherwise disposing of assets outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities.

[37] I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.³⁵

93 It is true that a Canadian appeal court has yet to rule definitively on the legality of an RVO under the CCAA. This being said, and although the contexts might differ, the Court sees no compelling reason why it should set aside its reasoning in *Nemaska Lithium*.

94 Even if this type of transaction was not contemplated by section 36 of the CCAA, section 11 could clearly step in as a basis for the Court's jurisdiction. The Supreme Court of Canada recently held that the other provisions of the CCAA, dealing with specific orders which the courts can issue, do not restrict the general language and power of section 11.³⁶

95 The Court agrees with the judge in *Harte Gold Corp* that paragraph 36(3), in any event, lays out a useful analytical framework for the issue at bar. These criteria, which are laid out above, should be applied in conjunction with the factors enumerated in *Royal Bank v. Soundair Corp.*:³⁷

95.1. whether sufficient efforts to get the best price have been made and whether the parties acted providently";

95.2. the efficacy and integrity of the process followed";

95.3. the interests of the parties"; and

95.4. whether any unfairness resulted from the process."³⁸

96 The Court also agrees that an RVO structure should remain the exception and not the rule, and should be approved only in the limited circumstances where it constitutes the appropriate remedy.

97 Some authorities indeed call for caution. For instance, Professor Janis Sarra recently stressed the importance for courts to provide detailed reasons when approving RVOs.³⁹ Among other things, Professor Sarra reminds us that this type of order deviates significantly from the usual CCAA framework, which is meant to provide all creditors with an opportunity to be heard in the process:

[...] [T]here must be exceptional circumstances for the court to be persuaded to bypass provisions of insolvency legislation aimed at giving both secured and unsecured creditors a meaningful voice/vote in the proceedings, as they are the residual claimants to the value of the debtor's assets during insolvency. [...]

[...]

The CCAA, particularly in its various amendments over the years, has sought to achieve an appropriate balance between various interests affected by a debtor company's insolvency. Part I sets out the framework of the statute, well-known to practitioners and Canadian courts. It allows for a compromise or arrangement to be proposed between a debtor company and its secured and unsecured creditors, a meeting of the creditors to vote on the plan, and, if a majority in number representing two-thirds in value of the creditors, or the class of creditors, present and voting either in person or by proxy at the meeting, agree to any plan of compromise or arrangement, the plan may be sanctioned by the court and, if so sanctioned, is binding. There are specific provisions addressing Crown claims, employees and pensioners, and treatment of equity claims, all designed to balance multiple interests in complex proceedings.

[...]

This statutory framework represents a careful balancing of interests and prejudice, and gives voice and vote to the creditors that are the residual claimants to the value of the debtor company. Many of the provisions are aimed at mitigating the imbalance in power that secured creditors have in insolvency proceedings, at least during the period of negotiations for a plan, with a view to maximizing the value of the assets, preserving going-concern value, and protection of employees and the public interest.

It makes sense, therefore, that in any application to bypass this carefully crafted statutory process, the court consider whether there are compelling and exceptional circumstances to justify this extraordinary remedy, even where the RVO is not specifically contested, as the court needs to be satisfied of the integrity of the system and the potential prejudice to creditors and other stakeholders that may not be appearing before it. Reasons are important for stakeholders to understand the benefits and prejudice that may accrue to any particular transaction.⁴⁰

98 As the Supreme Court of British Columbia held in *Quest University Canada*:

[171] I do not consider that an RVO structure would be generally employed or approved in a CCAA restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the CCAA.⁴¹

[Emphasis added]

99 In particular, the following comments made in *Harte Gold Corp* are enlightening:

[38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative?
and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[Emphasis added]

7.2 Discussion on criteria to approve an RVO

100 The Court will now apply the criteria set out in paragraph 36(3) of the CCAA to the RVO Application, keeping in mind the other relevant factors identified by the case law, and will analyze the appropriateness of the RVO structure in particular.

101 *The process leading to the proposed sale was reasonable in the circumstances (s. 36(3)(a) of the CCAA).* As detailed in the Fifth Report, BlackRock and the Monitor have conducted the SISF in accordance with the Bidding Procedures approved by this Court on January 7, 2022. The market has been adequately canvassed through a fulsome, fair and transparent process.

It should be reiterated that BlackRock had already deployed a global search for financing during the years leading up to the initiation of the CCAA Proceedings, to no avail.

102 In the present circumstances, the Court concludes that sufficient efforts have been made to get the best price for BlackRock's assets and that the parties acted providently. The record also shows the efficacy and integrity of the process followed.

103 *The Monitor approved of the process leading to the proposed sale and filed with the court a report stating that in their opinion the sale would be more beneficial to the creditors than a sale or disposition under a bankruptcy (s. 36(3)(a) and (b) of the CCAA).* The Monitor not only approved the SISP but also participated in the negotiation and development of the Bidding Procedures and had primary carriage of the process throughout. In the course of the SISP, the Monitor consulted with BlackRock.

104 The Fifth Report concludes that the SISP was properly conducted and that the Proposed Transaction is beneficial for all the stakeholders compared to a bankruptcy scenario. The Monitor "is of the view that creditors who will suffer a shortfall following the Purchase Agreement would not obtain any greater recovery in a sale in bankruptcy." "Furthermore, bankruptcy proceedings would: (i) [c]ause additional delays and uncertainty in the sale of [BlackRock]'s assets; (ii) [j]eopardize the going concern operations of [BlackRock]; and, (iii) [l]ikely result in employees to be unemployed."⁴²

105 *BlackRock's creditors were duly consulted (s. 36(3)(d) of the CCAA).* The secured creditors of BlackRock are Orion and IQ who are also the Stalking Horse Bidders. Obviously, they have been consulted extensively and they consent to the RVO Application.

106 Importantly, the Grand Council of the Crees (Eeyou Istchee) and the Cree Nation Government also expressed support for the Proposed Transaction, as outlined by their counsel in a letter sent to the Monitor on May 19, 2022:

Our clients consider that the approval of the Stalking Horse Agreement offers the most, and perhaps the only, viable prospect to bring the BlackRock Mining Project into successful commercial operation and hence to secure for the Cree Nation of Eeyou Istchee the critically important benefits of the BallyHusky Agreement.⁴³

107 The other creditors are unsecured creditors who have been duly advised of the Initial Application and Order, including the Bidding Procedures. They have decided not to participate in the SISP and nothing indicates that they would oppose to the RVO Application.

108 *The effects of the proposed sale or disposition on the creditors and other interested parties are beneficial overall (s. 36(3)(e) of the CCAA).* The Stalking Horse Bid is the best available alternative for BlackRock's creditors and other interested parties and should allow for BlackRock to emerge as a rehabilitated business in a stronger position to complete the Construction Financing and move forward with Project Volt. This outcome is advantageous to BlackRock and its stakeholders, including their creditors, employees, trading partners and First Nations partners.

109 It is true that the RVO will result in the claim of unsecured creditors being transferred to ResidualCo, an empty shell where all unassumed liabilities will be transferred. This transfer simply reflects the fact that the BlackRock's value, as tested in the market through the SISP and for many years prior to the current restructuring, is not high enough to generate value for these unsecured creditors.

110 As for the other stakeholders, they will benefit on the whole from the approval of the Proposed Transaction, as it will allow the Debtors' business to emerge in a position to move forward as a going concern. This will benefit the employees, trading partners and First Nations partners and it will have indirect socio-economic benefits in the province of Quebec.

111 *The consideration to be received for the assets is reasonable and fair, taking into account their market value (s. 36(3)(f) of the CCAA).* The consideration being paid by Orion and IQ, which is in excess of \$100M, is importantly linked to the preservation the Debtor's permits (crucial to the conduct of the contemplated mining activities), certain existing contracts and its tax attributes.

112 The reasonableness of the consideration is well established. Given the amount of the secured debt held by Orion and IQ, the consideration which they will pay exceeds i) what the market would be willing to pay to inherit intangible assets BlackRock has been able to build over time and ii) the capacity to raise on the market the financing required for Project Volt.

113 Nobody submitted a higher bid after extensive attempts to raise financing over many years.

114 *Exceptionally, the RVO structure is appropriate in the circumstances.* In his Fifth Report, the Monitor outlines the reasons why, in his opinion, the reverse vesting order structure that would be implemented would be "more appropriate and beneficial than a traditional vesting order structure and that the reverse vesting order structure is necessary, reasonable and justified in the circumstances".⁴⁴

(i) Numerous agreements, permits, licenses, authorizations, and related amendments are part of the assets that have to be transferred as per the Purchase Agreements. It could be more complex to transfer the benefits of these assets in a traditional vesting order structure since consents, approvals or authorizations may be required. A reverse vesting order structure minimizes risks, costs or delays of having these assets transferred;

(ii) The proposed reverse vesting order structure results in better economic results for some creditors of BRM who see their pre-filing claim being assumed and retained. Also, the reverse vesting order structure will avoid any delays or costs associated with the assignments of the assumed contracts;

(iii) The contracts or obligations of the creditors and the stakeholders that are considered Excluded Assets and Excluded Obligations according to Schedule B of the Purchase Agreement will not be in a worse position than they would have been with a more traditional vesting of assets to a third party;

(iv) Most assets of BRM are intangibles, such as agreements, permits, licenses, authorizations and related amendments, and their value depend on the capacity of the purchasers to complete the financing and achieve the project. These assets would have no or limited value if some of them were not being preserved. The reverse vesting order structure allows to avoid any potential risks around the transfer to the purchaser.

115 The Court agrees with the Monitor's conclusions. RVO structures have been found by courts to be appropriate in situations such as the present case, where a traditional sale of assets would lead to uncertainty regarding the transfer of numerous agreements, permits, authorizations and other regulatory approvals that are required for the continuation of a company's business.⁴⁵

116 Indeed, BlackRock operates in the highly regulated mining industry. Their business is almost entirely constituted of such intangible assets, which provide a head start of several years to the purchaser. Some of these assets cannot be assigned or are at least difficult to assign. Therefore, the capacity to restructure BlackRock depends heavily on the capacity to keep the existing legal entities in place while restructuring the share-capital of BlackRock. That is exactly what the RVO provides for.

117 If BlackRock was forced to proceed with a traditional asset sale, it could significantly increase the costs, generate uncertainties and reduce the value its assets, to the detriment of all parties involved.

118 Moreover, despite the Intervenor's firm belief, the SISP has unequivocally demonstrated that there is no realizable value in BlackRock's business or assets beyond the secured debt of IQ and Orion, such that there is no equity left for its unsecured creditors, let alone its shareholders.

119 The Court adds that Shareholders have little or no say in CCAA proceedings like the present one, where the debtor company is insolvent and its shares have lost all value. This goes to their legal interest in contesting an arrangement or transaction proposed by the company.⁴⁶

120 In any case, the shareholders and unsecured creditors of BlackRock are not in a worse position with an RVO than they would be under a traditional asset sale. Either way, they would have no economic interest because the purchase price paid would not generate any value for the unsecured creditors (and even less so for the shareholders).

121 This is consistent with the conclusions of the Ontario Superior Court of Justice in *Harte Gold Corp.*:

[59] Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.

[60] The evidence of Harte's financial problems and balance sheet insolvency, the unsuccessful prefilings strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.

[61] Under s. 186(1) of the OBCA, "reorganization" includes a court order made under the Bankruptcy and Insolvency Act or an order made under the Companies Creditors Arrangement Act approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.

[62] Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.

[...]

[64] [...] In circumstances like Harte Gold's, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders [...]. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances.⁴⁷

[Emphasis added]

122 In particular, paragraphs 61 and 62 of the above excerpt answer the Intervenor's argument about the jurisdiction of the Court to cancel their shares under *the Canada Business Corporations Act*⁴⁸ (CBCA). The same logic applies with sections 173 and 191 of that statute. The power to cancel and issue shares in the context of an RVO is captured by the possibility for a court order to "change the designation of all or any of [the corporation's] shares, and add, change or remove any rights, privileges, restrictions and conditions [...]" in respect of all or any of its shares, whether issued or unissued", pursuant to 191(2) and 173(1)(g) of the CBCA.

123 It should also be noted that the Intervenor's opposition to the RVO structure in particular appears to be new. Canada Inc.'s non-binding LOI had already conceded on March 9, 2022 that its proposed bid could itself "take the form of a reverse vesting order".⁴⁹ Ultimately, it seems that the Intervenor is not objecting to the use of an RVO *per se*, but only to the extinguishment of their equity interests, which would occur irrespective of the use of an RVO structure or of a traditional vesting order.

124 Therefore, the fact that the transaction is structured as an RVO only has benefits and does not prejudice any of the stakeholders. The Court finds that in the specific circumstances of the present case, the proposed RVO is an appropriate arrangement.

7.3 Discussion on the releases

125 The Proposed Transaction contemplates releases for various parties, including Orion and IQ, from all claims relating to, in particular, BlackRock, its restructuring or the Proposed Transaction.

126 While the Intervenor do not object to a release being granted to BlackRock directors or to the Monitor, they argue that Orion and IQ's actions constitute an abuse of both their rights as shareholders and of the CCAA process. Thus, the effect of the requested releases in favour of Orion and IQ would be to dismiss the Intervenor's potential claims without the benefit of hearing any evidence allowing for the determination of their potential liability.

127 For the reasons below, the Court holds that the releases in favor of Orion and IQ will form part of the Proposed Transaction.

128 It is now commonplace for third-party releases, in favor of parties to a restructuring, their professional advisors as well as their directors, officers and others, to be approved outside of a plan in the context of a transaction.⁵⁰ In fact, similar releases have been approved by this Court in recent cases involving RVO transactions, including in *Nemaska Lithium*.⁵¹

129 This being said, the courts should not grant releases blindly and systematically.

130 In *Harte Gold Corp.*, the Court approved releases in favor of various parties that included the purchaser and its directors and officers and considered the criteria ordinarily canvassed with respect to third-party releases provided for under a plan, as articulated in *Lydian International Limited (Re)*⁵² and elsewhere⁵³. They are the following:

- a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
- b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;
- c) Whether the plan could succeed without the releases;
- d) Whether the parties being released were contributing to the plan; and
- e) Whether the release benefitted the debtors as well as the creditors generally.⁵⁴

131 In the present file, IQ's and Orion's participation was obviously instrumental to the restructuring of BlackRock's business. Considering the SISP and the opportunity given to BlackRock's stakeholders to participate in the process, it is reasonable for IQ and Orion to now start with a clean slate and not to be under the threat of potential claims as they will be leading BlackRock's efforts with Project Volt. The release will provide more certainty and finality.

132 The release is thus reasonably connected and justified as part of the Proposed Transaction,⁵⁵ and it is to the benefit of BlackRock and its stakeholders generally as it will allow BlackRock to emerge as a solvent entity and be in the best possible position to, hopefully, secure financing for Project Volt. They are also fair and reasonable in the present circumstances.

133 The eventual claims for which Orion and IQ should not be released, according to the Intervenor, are based on allegations of abuse related solely to Orion's and IQ's Stalking Horse Bid and their conduct during the SISP.

134 The Court was sensitive to the shareholders' submissions initially and extended the SISP delays to ensure that the process was as fulsome and fair as possible. Still, and in spite of all the efforts made over the years, IQ and Orion remain the only entities who are ready to take over the development of BlackRock and to further invest in same.

135 In the process leading to the Bidding Procedures Order, to the refusal of the Bid Extension Application and to the approval of the Proposed Transaction (Reverse RVO), the Court was able to appreciate the context leading up to the final outcome ordered as per the present judgment and also found the Proposed Transaction, as proposed by Orion and IQ, to be fair and reasonable. The Court sees little to no room for a finding of abuse in the events leading to the CCAA proceedings, to the SISP or to the approved transaction.

136 To the contrary, there is no good reason to leave the door open to the Intervenor's potential claims against Orion and IQ, to BlackRock's detriment.

137 Therefore, the release provided for in the Proposed Transaction will be granted.

FOR THESE REASONS, THE COURT:

138 *DECIDES* in accordance with the attached orders.

Footnotes

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

2 Fifth Report, par. 27.

3 Exhibits A-2, R-3.

4 Exhibit R-2.

5 Exhibits A-2, R-3.

6 Exhibit R-5.

7 See par. [68] and following of the present judgment.

8 Exhibit R-6.

9 Exhibit R-7.

10 Exhibit A-3.

11 Exhibit A-4, filed under seal.

12 *Royal Bank v. Soundair Corp.* [1991 CarswellOnt 205 (Ont. C.A.)], 1991 CanLII 2727; *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1 (N.S. C.A.); *Bank of Montreal v. Maitland Seafoods Ltd.* (1983), 46 C.B.R. (N.S.) 75 (N.S. T.D.).

13 Exhibit R-11.

14 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), par. 14-15.

15 *Canada v. Canada North Group Inc.*, 2021 SCC 30 (S.C.C.), par. 21; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.), par. 48-51.

16 *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.), par. 40.

17 *Boutiques San Francisco Inc., Re* [2004 CarswellQue 753 (C.S. Que.)], 2004 CanLII 480, par. 20. See also *Bloom Lake General Partner Ltd., Re*, 2015 QCCS 3064 (Que. Bkcy.), par. 70 (leave to appeal dismissed, 2015 QCCA 754 (C.A. Que.)).

- 18 See *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218 (Que. Bkcty.), par. 14 (leave to appeal dismissed, 2020 QCCA 1488 (C.A. Que.); leave to appeal to SCC dismissed [2021 CarswellQue 4589 (S.C.C.)], 2021 CanLII 34999).
- 19 Fifth Report, par. 28.
- 20 Exhibit A-2.
- 21 Exhibit R-5, par. 3.
- 22 Fifth Report, par. 38-41.
- 23 Exhibit A-11.
- 24 Exhibit R-14.
- 25 *Mecachrome Canada inc., Re*, 2009 QCCS 6355 (C.S. Que.), par. 28.
- 26 Exhibit R-2.
- 27 See *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218 (Que. Bkcty.), par. 71-79 (leave to appeal dismissed, 2020 QCCA 1488 (C.A. Que.); leave to appeal to SCC dismissed, 2021 CanLII 34999); *Quest University Canada (Re)*, 2020 BCSC 1883 (B.C. S.C.), par. 151-172 (leave to appeal dismissed, 2020 BCCA 364 (B.C. C.A.)); *CCAA Plan of Arrangement - Clearbeach and Forbes*, 2021 ONSC 5564 (Ont. S.C.J. [Commercial List]), par. 24-26; *Harte Gold Corp. (Re)*, 2022 ONSC 653 (Ont. S.C.J. [Commercial List]), par. 36-39, 77.
- 28 2020 QCCS 3218 (Que. Bkcty.) (leave to appeal dismissed, 2020 QCCA 1488 (C.A. Que.); leave to appeal to SCC dismissed, 2021 CanLII 34999).
- 29 2020 CSC 10 (S.C.C.).
- 30 *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488 (C.A. Que.) (leave to appeal to SCC dismissed, 2021 CanLII 34999).
- 31 *Quest University Canada (Re)*, 2020 BCSC 1883 (B.C. S.C.), par. 154 (leave to appeal dismissed, 2020 BCCA 364 (B.C. C.A.)).
- 32 *Id.*, par. 157, citing *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), par. 14-15.
- 33 2021 ONSC 5564 (Ont. S.C.J. [Commercial List]), par. 24.
- 34 2022 ONSC 653 (Ont. S.C.J. [Commercial List]).
- 35 *Harte Gold Corp. (Re)*, 2022 ONSC 653 (Ont. S.C.J. [Commercial List]), par. 36-37.
- 36 *Canada v. Canada North Group Inc.*, 2021 SCC 30 (S.C.C.), par. 23. See also *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), par. 70.
- 37 1991 CanLII 2727; *AbitibiBowater inc., Re*, 2010 QCCS 1742 (C.S. Que.), par. 34-35.
- 38 See *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218 (Que. Bkcty.), par. 50 (leave to appeal dismissed, 2020 QCCA 1488 (C.A. Que.); leave to appeal to SCC dismissed, 2021 CanLII 34999); *CCAA Plan of Arrangement - Clearbeach and Forbes*, 2021 ONSC 5564 (Ont. S.C.J. [Commercial List]), par. 25.
- 39 Janis SARRA, "Reverse Vesting Orders - Developing Principles and Guardrails to Inform Judicial Decisions", 2022 CanLIIDocs 431.
- 40 *Id.*, p. 4, 26. See ss. 4-6 of the CCAA.
- 41 *Quest University Canada (Re)*, 2020 BCSC 1883 (B.C. S.C.), par. 171 (leave to appeal dismissed, 2020 BCCA 364 (B.C. C.A.)).

- 42 Fifth Report, par. 57-60.
- 43 Exhibit R-11.
- 44 Fifth Report, par. 65-66.
- 45 See *supra*, note 28.
- 46 *Peloton Pharmaceutiques inc., Re*, 2017 QCCS 1165 (Que. Bkcty.), par. 65-78; *Raymor Industries inc., Re*, 2010 QCCA 578 (C.A. Que.), par. 4-6; *Stelco Inc., Re* [2006 CarswellOnt 406 (Ont. S.C.J. [Commercial List])], 2006 CanLII 1773, par. 18.
- 47 *Harte Gold Corp. (Re)*, 2022 ONSC 653 (Ont. S.C.J. [Commercial List]), par. 59-64.
- 48 R.S.C. 1985, c. C-44.
- 49 Exhibit A-2.
- 50 See *Re Green Relief Inc.*, 2020 ONSC 6837 (Ont. S.C.J. [Commercial List]), par. 23-25; *8640025 Canada Inc. (Re)*, 2021 BCSC 1826 (B.C. S.C.), par. 43.
- 51 *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218 (Que. Bkcty.), par. 103-106 (leave to appeal dismissed, 2020 QCCA 1488 (C.A. Que.); leave to appeal to SCC dismissed, 2021 CanLII 34999).
- 52 2020 ONSC 4006 (Ont. S.C.J. [Commercial List]).
- 53 *Harte Gold Corp. (Re)*, 2022 ONSC 653 (Ont. S.C.J. [Commercial List]), par. 78-86. See also *Re Green Relief Inc.*, 2020 ONSC 6837 (Ont. S.C.J. [Commercial List]), par. 27-28.
- 54 *Lydian International Limited (Re)*, 2020 ONSC 4006 (Ont. S.C.J. [Commercial List]), par. 54. See also: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.);
- 55 See *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.), par. 70 (leave to appeal to SCC dismissed [2008 CarswellOnt 5432 (S.C.C.)], 2008 CanLII 46997).

TAB 9

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

Most Recently Cited in: *Harte Gold Corp. (Re)*, 2022 ONSC 653, 2022 CarswellOnt 1698 | (Ont. S.C.J. [Commercial List], Feb 4, 2022)

R.S.C. 1985, c. C-36, s. 11.02

S 11.02

Currency

11.02

11.02(1) Stays, etc. — initial application

A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02(2) Stays, etc. — other than initial application

A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02(3) Burden of proof on application

The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.02(4) Restriction

Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Amendment History

2005, c. 47, s. 128; 2019, c. 29, s. 137

Judicial Consideration (1)

Currency

Federal English Statutes reflect amendments current to February 15, 2022

Federal English Regulations Current to Gazette Vol. 156:3 (February 2, 2022)

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 10

Canada Federal Statutes Companies' Creditors Arrangement Act Part II — Jurisdiction of Courts (ss. 9-18.5)
--

Most Recently Cited in: Harte Gold Corp. (Re) , 2022 ONSC 653, 2022 CarswellOnt 1698 | (Ont. S.C.J. [Commercial List], Feb 4, 2022)

R.S.C. 1985, c. C-36, s. 11.02

S 11.02

Currency

11.02

11.02(1) Stays, etc. — initial application

A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02(2) Stays, etc. — other than initial application

A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02(3) Burden of proof on application

The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.02(4) Restriction

Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Amendment History

2005, c. 47, s. 128; 2019, c. 29, s. 137

Judicial Consideration (1)

Currency

Federal English Statutes reflect amendments current to February 15, 2022

Federal English Regulations Current to Gazette Vol. 156:3 (February 2, 2022)

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 11

Canada Federal Statutes

Companies' Creditors Arrangement Act

Part III — General (ss. 18.6-43) [Heading added 2005, c. 47, s. 131.]

Monitors [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 23

s 23.

Currency

23.

23(1) Duties and functions

The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than \$1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

(c) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

(d) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

(iii) at any other time that the court may order;

(iv) [Repealed 2007, c. 36, s. 72(2)]

- (d.1) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;
- (e) advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);
- (f) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;
- (f.1) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;
- (g) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;
- (h) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the *Bankruptcy and Insolvency Act*, so advise the court without delay after coming to that opinion;
- (i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;
- (j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and
- (k) carry out any other functions in relation to the company that the court may direct.

23(2) Monitor not liable

If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

Amendment History

2005, c. 47, s. 131; 2007, c. 36, s. 72

Currency

Federal English Statutes reflect amendments current to June 22, 2022

Federal English Regulations Current to Gazette Vol. 156:12 (June 8, 2022)

TAB 12



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION
In Bankruptcy and Insolvency**

Citation: *Sports Villas Resort, Inc. (Re)*, 2020 NLSC 109

Date: August 7, 2020

Docket: 201901G1157

IN THE MATTER OF the Receivership
of Sports Villas Resort, Inc. and Twin
Rivers Golf Inc.

AND IN THE MATTER OF the
Bankruptcy and Insolvency Act, R.S.C.
1985, c. B-3, as amended

BETWEEN:

**BUSINESS DEVELOPMENT BANK OF
CANADA**

APPLICANT

AND:

**SPORTS VILLAS RESORT, INC. and
TWIN RIVERS GOLF INC.**

RESPONDENTS

AND:

**83848 NEWFOUNDLAND AND
LABRADOR INCORPORATED**

FIRST INTERVENOR

AND:

**PROJECT MANAGEMENT AND
DESIGN LIMITED**

SECOND INTERVENOR

AND:

NWS HOLDINGS INC.

THIRD INTERVENOR

AND:

CLARKE INC. MASTER TRUST

FOURTH INTERVENOR

AND:

BASIL DOBBIN

FIFTH INTERVENOR

Before: Justice Robert P. Stack

Place of Hearing:

St. John's, Newfoundland and Labrador

Date of Hearing:

June 18, 2020

Summary:

The receiver's application for sale of the assets of the insolvent corporations was denied because the proposed sale included the interests of third parties in a condominium property. The receiver had not complied with the sale provisions of the *Condominium Act* and so could not convey the third party interests to the proposed purchaser.

Appearances:

Neil L. Jacobs, Q.C. and
Kimberley A. Walsh

Appearing on behalf of the Applicant

No Appearance

On behalf of the Respondents

Gregory K. Pittman, Q.C.

Appearing on behalf of the First Intervenor

Gregory M. Smith, Q.C.
and Shane R. Belbin

Appearing on behalf of the Second and
Fifth Intervenor

John J. Hogan, Q.C.

Appearing on behalf of the Third Intervenor

Timothy W. Hill, Q.C. Appearing on behalf of the Fourth Intervenor

Authorities Cited:

CASES CONSIDERED: *Barnes, Re*, 2016 NLTD(G) 106; *Penney v. Newfoundland and Labrador (Service NL)*, 2017 NLCA 25; *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (Ont. C.A.); *White Birch Paper Holding Co., Re*, 2010 QCCS 4915; *Denison Environmental Services v. Cantera Mining Ltd.* (2005), 11 C.B.R. (5th) 207, 139 A.C.W.S. (3d) 72 (Ont. Sup. Ct. J.), additional reasons at [2005] O.J. No. 2421, 140 A.C.W.S. (3d) 35 (Ont. Sup. Ct. J.); *Canadian Imperial Bank of Commerce (Re)*, 2018 NLSC 175; *2475813 Nova Scotia Ltd. v. Ali*, 2001 NSCA 12.

STATUTES CONSIDERED: *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3; *Condominium Act*, 2009, S.N.L. 2009, c. C-29.1; *Condominium Act*, R.S.N.S. 1989, c. 85.

REASONS FOR JUDGMENT

STACK, J.:

INTRODUCTION

[1] This matter deals with the proposed sale of the property of Sports Villas Resort, Inc. (“Sports Villas”) and Twin Rivers Golf Inc. (“Twin Rivers”), the respondents, in the entities commonly known as the Terra Nova Golf Resort and Terra Nova Estates located in Port Blandford, Newfoundland and Labrador, in connection with receivership proceedings pursuant to section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BLA*”). The property in question is referred to in the application as the Subject Property and I will describe it in more detail below.

[2] The respondents defaulted on certain secured obligations to Business Development Bank of Canada (“BDC”). On application by BDC, BDO Canada Limited was appointed receiver of the respondents pursuant to an order of this Court dated March 20, 2019. By order dated June 18, 2020, Grant Thornton Limited was substituted as the receiver.

[3] The first intervenor, 83848 Newfoundland and Labrador Incorporated, is the proposed purchaser of the Subject Property and will be referred to as the "Purchaser". Each of the second, third and fifth intervenors is an owner of a condominium unit in the TNCC Property, as described below. They will be referred to as "Project Management", "NWS", and "Dobbin", respectively. The fourth intervenor, Clarke Inc. Master Trust, holds mortgages on certain of the condominium units. I will refer to the fourth intervenor as the "Encumbrancer".

[4] The receiver seeks an order:

- (1) approving the first report of the court-appointed receiver (the "Receiver's First Report") and the receiver's activities as outlined therein;
- (2) approving the receiver's recommendation to sell the Subject Property (as defined by the receiver) to the Purchaser;
- (3) authorizing the receiver to complete the sale of the Subject Property to the Purchaser pursuant to its Invitation for Offers, with such minor amendments as the receiver may deem necessary or appropriate;
- (4) vesting the Subject Property in the Purchaser free and clear of all encumbrances pursuant to an approval and vesting order to be effective upon the receiver's filing of the receiver's certificate;
- (5) waiving the requirement of the receiver to obtain a release pursuant to section 61(1)(b) of the *Condominium Act, 2009*, S.N.L. 2009, c. C-29.1 (the "*Act*") from the Encumbrancer, and if not waived, provide direction to the receiver;

- (6) authorizing the receiver to execute conveyances to the Purchaser in respect of the condominium units owned by Sports Villas, Project Management, Dobbin, 68861 Newfoundland and Labrador Inc., ALJO Holdings Inc. and NWS, or alternatively, waiving the requirement pursuant to section 61(2) of the *Act* to have the conveyance executed by all the owners, or in the further alternative, provide direction to the receiver;
- (7) approving the receiver's Interim Statement of Receipts and Disbursements dated July 31, 2019; and
- (8) sealing the Receiver's First Report and all appendices thereto, such that the materials may be filed with the Court on a confidential basis until completion of the receivership of the respondents.

[5] The intervenors, other than the Purchaser, oppose their condominium units being included in the proposed sale.

Approval of the Receiver's First Report and the Receiver's Activities

[6] At the hearing, upon agreement by the parties, I approved the Receiver's First Report and the receiver's activities as described in it except as they relate to:

- (1) the proposed sale of the Subject Property; and
- (2) approval of the receiver's Interim Statement of Receipts and Disbursements which will be determined at a later date.

Sealing the Receiver's First Report

[7] I also granted an order sealing the Receiver's First Report until the transaction contemplated in the application is completed or upon further order of the Court. As a court of inherent jurisdiction, this Court has authority to seal part or all of a court record (*Barnes, Re*, 2016 NLTD(G) 106). The receiver submits that this is an appropriate case for me to exercise my discretion in accordance with generally accepted insolvency practice to grant a sealing order over the Receiver's First Report and its appendices, until completion of the sale contemplated by this application.

[8] The information contained in the Receiver's First Report describes in some detail the operations of the respondents, as well as the efforts undertaken by the receiver since being appointed privately by BDC. It also contains details of the respondents' financial circumstances, the financial circumstances of Terra Nova Resort Condominium Corporation ("TNCC"), details of bids, and asset appraisals.

[9] Because the proposed sale of the Subject Property has not been approved, the receiver is rightly concerned that the sensitive information contained in the Receiver's First Report could adversely affect the sale of these assets to another party.

[10] It is ordered that the Receiver's First Report be sealed until the proposed sale closes or further order of the Court.

ISSUE

[11] The remaining issues identified by the receiver all relate to the receiver's proposed sale of the Subject Property to the Purchaser. The sole issue to be decided, therefore, is whether that sale should be approved. In particular, can the receiver include in the proposed sale condominium units owned by Project Management, NWS, Dobbin and ALJO Holdings Inc., as well as the units over which the Encumbrancer holds a security interest?

MATERIAL FACTS

[12] BDC financed the respondents commencing on August 22, 2003. Details of this financing relationship and related security are set out in the receiver's originating application for the appointment of a receiver. The respondents were indebted to BDC jointly and severally for \$3,228,664 as of March 20, 2019.

The Subject Property

[13] For the purposes of the proposed sale, the receiver has defined the Subject Property as those assets that are collectively required to operate Terra Nova Golf Resort and Terra Nova Estates as follows:

- (1) Property of Sports Villas:
 - (a) the majority of the real property known as the Terra Nova Golf Resort, subject to a first charge of BDC;
 - (b) the real property known as the Eagle Creek golf course, subject to a first charge of BDC;
 - (c) the 38 unsold lots in an adjacent residential real estate development known as Terra Nova Estates, subject to a first charge of BDC; and
 - (d) 45 of the 54 condominium units in TNCC (25 of the 34 residential units and all of the 20 commercial units), subject to a first charge of BDC.

(2) Property of Twin Rivers:

- (a) the interest in the Parks Canada lease for the Twin Rivers golf course, subject to the consent of Parks Canada and a first charge of BDC; and
- (b) power carts and accessories, grass mowers and accessories, tractors and related attachments, and small tools, primarily leased from the Royal Bank of Canada and De Lage Landen Financial Services Canada Inc., or subject to a first charge of BDC.

(3) Properties owned by Third Parties:

- (a) Nine of the TNCC Property units as described below.

[14] The Subject Property is subject to certain security interests as set out in the application. To the extent that any are relevant for the purposes of this decision, they are identified later.

Proposed Sale of the Subject Property

[15] The receiver submits that this application is in furtherance of its powers set out in the receivership order to continue the commercial viability of the Subject Property and to achieve maximum value in accordance with its obligations under the receivership order and the *BIA*.

[16] The receiver states that its objective in conducting the sales process was to find a bidder who would operate the Terra Nova Golf Resort. This is because the receiver and its appraiser determined this approach most likely to: (a) maximize the

recovery to creditors in the estate; and (b) provide a future return to other stakeholders such as suppliers, employees, third party creditors, and other interested parties.

[17] The receiver advises that it took the following steps to market and sell the Subject Property:

- (1) retained competent and experienced property and golf course management, made appropriate repairs on the buildings as required to maintain the properties in a condition similar to that when appointed, or to improve the saleability of the assets, and entered into Operations Agreements with the Purchaser which require the Purchaser to continue to maintain the assets, pay all operating costs, and insure the assets;
- (2) offered for sale the property of the respondents, and the property comprising the TNCC, through an Invitation for Offers process as detailed in Section 6 of the Receiver's First Report;
- (3) secured an appraisal by Altus Group, dated April 22, 2019, in respect of the lands, excluding the golf courses, the Terra Nova Resort hotel, and the 38 residential lots, as detailed in Section 7.0 of the Receiver's First Report;
- (4) secured an appraisal by Castle Appraisal Limited, dated November 29, 2018, in respect of the equipment of the respondents as detailed in Section 7.1 of the Receiver's First Report;
- (5) entered into agreements with Royal Bank of Canada and De Lage Landen Financial Services Canada to include in the sale of the Subject Property the equipment of Twin Rivers over which they have a valid security interest;

- (6) obtained the consent of Parks Canada to the assignment of the lease to the Purchaser;
- (7) exercised the rights of Sports Villas to vote and/or consent to the sale of units at a meeting of TNCC, in accordance with the by-laws and declaration of TNCC;
- (8) negotiated the sale of the Subject Property to the Purchaser pursuant to the receiver's Invitation for Offers (the "Purchase Agreement") and the Operations Agreements with the Purchaser;
- (9) insured the Subject Property and negotiated continued services to the Subject Property with utility providers and the Town of Port Blandford for the continued operation of the Subject Property; and
- (10) met with interested parties such as condominium unit owners, other creditors, and pension claimants in respect of the respondents.

Terra Nova Condominium Corporation (TNCC)

[18] Sports Villas registered a declaration with a legal description in the Registry of Condominiums on July 22, 2011, thereby creating TNCC. As a result, TNCC is governed by the *Act*.

[19] Sports Villas is the declarant of TNCC. By section 2(1)(k) of the *Act*, "declarant" means:

... a person who owns the freehold estate in the land described in the description and who submits for registration under this *Act* a declaration and description that are registered under this *Act*, and includes a successor or assignee of that person,

but does not include a purchaser in good faith of a unit who pays fair market value or a successor or assignee of the purchaser.

[20] The legal description of the property comprising TNCC is attached to the declaration (the "TNCC Property"). The TNCC Property consists of the Terra Nova Park Lodge building and adjacent lands. The adjoining parking area is not included in the TNCC Property, title to it being held by Sports Villas. The description of the land associated with the TNCC Property suggests that there is a right-of-way or other easement over other lands of Sports Villas to permit access to it.

[21] For the purposes of this application, there are 54 units in the TNCC Property, 20 commercial units and 34 residential units. The percentage of the common elements referable to each unit is as listed in Schedule D of the declaration. The receiver advises that according to a search at the Registry of Deeds, none of the commercial units has been sold by Sports Villas. The following residential units (together with their corresponding percentage of the common elements) are currently owned as follows:

- (1) Unit 310 - Project Management – 2.47%
- (2) Unit 210 - Dobbin – 2.52%
- (3) Unit 109 - 68861 Newfoundland and Labrador Inc. – 1.27%
- (4) Unit 208 - 68861 Newfoundland and Labrador Inc. – 1.77%
- (5) Unit 209 - 68861 Newfoundland and Labrador Inc. – 1.27%
- (6) Unit 309 - 68861 Newfoundland and Labrador Inc. – 1.27%

(7) Unit 211 - 68861 Newfoundland and Labrador Inc. – 2.47%

(8) Unit 308 - ALJO Holdings Inc. – 1.77%

(9) Unit 311 - NWS – 2.45%

[22] ALJO Holdings Inc. played no role in the application.

[23] The Encumbrancer holds first ranking mortgages over the units owned by 68861 Newfoundland and Labrador Inc.

[24] The residential units conveyed by Sports Villas account for 17.26% of the common elements of the TNCC Property, resulting in Sports Villas, as declarant, retaining 82.74%.

THE LAW

[25] This case involves principles of statutory interpretation as they relate to the *Act*. It takes place at the intersection of bankruptcy and insolvency law and condominium law.

Statutory Interpretation

[26] As we have seen, the *Act* governs condominium developments in this jurisdiction. In this case, the principal point of departure between the receiver, the Purchaser, and the other intervenors is on how the *Act* should be interpreted as it relates to the proposed sale of the Subject Property, and particularly, the TNCC Property.

[27] In *Penney v. Newfoundland and Labrador (Service NL)*, 2017 NLCA 25, at paragraphs 17 to 20, White, J.A. reiterated the proper approach to statutory interpretation:

[17] In order to determine whether, in light of the application of the Regulations, the context of section 46 indicates "court" can, in this case, mean Court of Appeal, it is necessary to employ the principles of statutory interpretation. The approach to the interpretation of provincially enacted statutes is explained by Green J.A., as he then was, in *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124, leave to appeal to SCC refused, 29390 (March 20, 2003) at paras. 19 and 22:

19 The starting point for interpretation of any statute enacted by the legislature of this province is the legislature's own directive to the courts as found in s. 16 of the Interpretation Act:

Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation or provision according to its true meaning.

...

22 Instead of mandating some fictionalized search for a collective "legislative intention", s. 16 directs the court to consider every provision "remedial" and to interpret it so that it "best" ensures the attainment of its "objects" according to its "true" meaning. This requires a consideration, as an integral part of the interpretive exercise, of the problem or "mischief" to which the legislature directed its legislative act as a remedy and then the drawing of an inference, based on the language of the whole enactment and the court's general knowledge of the state of the pre-existing law and any information as to the broad social context in which the legislative act occurred, as to what, broadly speaking, the object or objects of the legislative act must have been. The end result is to arrive at a "true" meaning. That inevitably requires an examination of more than the bare words of the legislative enactment that is in issue, no matter how clear or unambiguous they may at first blush appear. The surrounding text, the interrelation of other related statutes, the social and legislative context in which the provision was enacted, and other extrinsic aids are all sources to be consulted in this exercise. Obviously, if the bare words of the relevant provision appear to be straightforward and seem on their face to admit of only one meaning, they may end up controlling the result, but even in such a case, it is not sufficient to stop the interpretive exercise at this "plain"

meaning; s. 16 requires that at the very least this plain meaning be given a "reality check" by being tested against other relevant sources of meaning to ensure that there is not some nuance or variation in the normal or apparent meaning that might indicate a different meaning in the particular context under consideration. "True" meaning is not plain meaning; it is a conclusion arrived at by reconciling all the appropriate indicators of meaning that the court is directed to consider.

[18] In Chapter 11 of the *Construction of Statutes* Sullivan explores what constitutes the "context" of a statutory provision. While the text indicates that context is a vague and malleable term, it includes the immediate context (the language of the particular section); the statute as a whole, including related regulations; the statute book and related legislation; the common law; international law; the external context; and extrinsic aids. Courts in this province have adopted Sullivan's definition of "context". For example, in *Wnek v Witless Bay (Town)*, 2003 CanLII 68653 (NL SC), 2003 NLSCD 17, 222 Nfld & P.E.I.R. 149 at para 21, Mercer J., as he then was, referenced several aspects of Sullivan's definition when dealing with a matter to which the URPA, 2000 applied.

...

[20] Further, in *Archean Resources* it is clearly stated that interpreting a statutory provision requires determining the objective of the act.

[28] At the hearing, no reference was made by counsel for any of the parties to any extrinsic sources, excerpts from *Hansard* for example, as to the objective of the legislature when it enacted or amended the *Act*. As a result, I am left with basing my interpretation of the *Act* on the principles in *Penney* by examining the *Act* itself.

Bankruptcy and Insolvency Law

[29] The applicable bankruptcy and insolvency provisions are set out in the *BIA*. Paragraph 3 of the receivership order, made under section 243(1) of the *BIA*, empowers the receiver to sell the property of the respondents as defined therein:

3. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without limiting the generality of the foregoing, the Receiver is hereby empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession and control of the Property and any proceeds or receipts arising from the Property but, while the Receiver is in possession of any of the Property, the Receiver must preserve and protect it;

...

(l) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part of parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(m) to sell, convey, transfer, lease, or assign the Property or any part or parts thereof out of the ordinary course of business

(i) without the approval of this Court in respect of any transaction not exceeding \$250,000, provided the aggregate consideration for all such transactions does not exceed \$500,000; and,

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under section 60 of the *Personal Property Security Act* shall not be required subject to the Receiver obtaining the consent of Parks Canada to lease the Twin Rivers Property....

[30] The receiver submits that the property referred to in the receivership order encompasses the Subject Property. It also says that in discharging its powers to sell the Subject Property, it is acting in accordance with its obligations under section 247 of the *BIA* to deal with the respondents' property in a commercially reasonable manner.

[31] The Ontario Court of Appeal in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (Ont. C.A.), enumerates the following factors to be considered by a court when considering the sale of assets in the course of a receivership:

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.), at pp. 92-94 [O.R.], of the duties

which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers are obtained.
4. It should consider whether there has been unfairness in the working out of the process.

[32] *Soundair* was followed in *White Birch Paper Holding Co., Re*, 2010 QCCS 4915, where, in a slightly different context, the Quebec Superior Court held at paragraph 49, that in deciding whether to grant authorization, the overarching consideration is whether the transaction is appropriate, fair, and reasonable.

[33] The Ontario Superior Court of Justice in *Denison Environmental Services v. Cantera Mining Ltd.* (2005), 11 C.B.R. (5th) 207, 139 A.C.W.S. (3d) 72 (Ont. Sup. Ct. J.), additional reasons at [2005] O.J. No. 2421, 140 A.C.W.S. (3d) 35 (Ont. Sup. Ct. J.), held that a receiver, as a court-appointed officer experienced in the insolvency field, is entitled considerable deference by the court relating to a sale of assets process and the adequacy of the receiver's efforts.

[34] This Court, citing *Soundair*, provided the following comments with respect to applications for approval and vesting in receivership proceedings at paragraphs 20 and 21 of *Canadian Imperial Bank of Commerce (Re)*, 2018 NLSC 175:

20 Based on the information and evidence provided, I am satisfied that the Receiver took the necessary and reasonable steps to obtain the best price for the assets. Where the Receiver has achieved its main obligation in obtaining as high a value for the assets as it reasonably could, the Court is entitled to find that the Receiver has acted properly and according to the directions given to it by the Court (*Regal Constellation Hotel Ltd., Re* (2004), 128 A.C.W.S. (3d) 646, 37 C.L.R. (3d) 207 (Ont. S.C.J. [Commercial List])

21 The Court's authority to confirm the actions of the Receiver is recognized in its entitlement to rely on the Receiver's expertise in arriving at its recommendations as it is assumed that the Receiver is acting properly unless it is clearly shown to be otherwise (*Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.)).

[35] It is through this bankruptcy and insolvency lens that I will view the receiver's application for approval of its sale process.

Condominium Law

[36] In order to understand the position of the receiver and the positions of the intervenors who oppose the sale of their interests in the TNCC Property, it is necessary to consider the legal nature of a condominium development. A useful primer is provided by Cromwell, J.A. at paragraphs 3 to 6 of 2475813 *Nova Scotia Ltd. v. Ali*, 2001 NSCA 12:

3 The term "condominium" refers to a system of ownership and administration of property with three main features. A portion of the property is divided into individually owned units, the balance of the property is owned in common by all the individual owners and a vehicle for managing the property, known as the condominium corporation, is established: see A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger Law of Real Property* (1985), Vol. II, s. 3801 and Alvin B. Rosenberg, *Condominium in Canada* (1969). The condominium may be seen, therefore, as a vehicle for holding land which combines the advantages of individual ownership with those of multi-unit development: Oosterhoff and Rayner at s. 3802. In a sense, the unit owners make up a democratic society in which each has many of the rights associated with sole ownership of real property, but in which, having regard to their co-ownership with the others, some of those rights are subordinated to the will of the majority: see Robert J. Owens et al. (eds), *Corpus Juris Secundum* (1996), *Estates* § 195, Vol. 31, p. 260.

4 As Oosterhoff and Rayner wisely observed, the success of a condominium depends in large measure on an equitable balance being struck between the independence of the individual owners and the interdependence of them all in a co-operative community. It follows, they note, that common features of all condominiums are the need for balance and the possibility of tension between individual and collective interests: at s. 3802.

5 From a more purely legal perspective, a modern condominium is created pursuant to detailed legislative provisions such as, in Nova Scotia, the *Condominium Act*, R.S.N.S. 1989, c. 85 (the "*Act*"). The condominium is, therefore, a creature of statute. But condominium legislation reflects the combination of several legal concepts and relies on, and to a degree incorporates by reference, principles drawn from several different areas of law. The law relating to individual ownership of real property is, of course, central because the owners of the individual units are, subject to certain limits, entitled to exclusive ownership and use of their units: see s. 27(2) of the *Act*. The law relating to joint ownership is significant because the owners are tenants in common with respect to the common elements: see s. 28(1). The law relating to easements and covenants is relevant because the unit owners have rights to compliance by the others with the provisions governing the condominium and certain easements are, by statute, appurtenant to each unit: see s. 30(2) and 29. The law relating to corporations is also of importance because the condominium is administered by the condominium corporation in which the unit holders are in a position analogous to shareholders: see, e.g., ss. 13 and ff and s. 25. While the *Condominium Act* enables and, to a degree, regulates the legal aspects of condominium ownership, it does so against a vast background of general legal principles which will frequently be relevant to the interpretation and application of the *Act*. As has been said, "[i]n its legal structure, the condominium first combines elements of several concepts ... and then seeks to delineate separate privileges and responsibilities on the one hand from common privileges and responsibilities on the other." *Corpus Juris Secundum*, *supra* at p. 260.

6 Not all condominium developments succeed or last indefinitely. The *Act* provides for termination and sale.

[37] Although *Ali* is a case from Nova Scotia, these general principles apply to condominium developments in this province as well. Where differences between the Nova Scotia *Condominium Act*, R.S.N.S. 1989, c. 85 (the "Nova Scotia Act") and the *Act* are important, I will address them later in this decision.

[38] Let us look now at some of the specific provisions of the *Act*.

[39] By section 16(2) of the *Act*, the unit owners are entitled to exclusive ownership of their respective units. By section 16(3), each unit owner is a tenant in common with the other unit owners of the title to the common elements. The percentage

ownership of the common elements is set out in Schedule D to the Declaration and conforms to the information provided by the receiver as set out above.

[40] By section 17(1) of the *Act*, the registration of the declaration created a corporation without share capital, the members of which are the owners of the units. The owners, therefore, each wear two hats – one as an owner of a unit (section 16) and the other as a member of the condominium corporation (section 17(1)).

[41] By section 18(1) of the *Act*, the objects of the corporation are to manage the property and assets of the condominium. That is, its role is that of a management corporation, managing the condominium property on the collective behalf of the unit owners. By section 27(1), a board of directors elected by vote of the unit owners manages the affairs of a condominium corporation itself.

[42] As can be seen from the foregoing, the object of the *Act* is to permit the creation of condominiums and to provide for their governance in accordance with the general principles set out in *Ali*. The language of the *Act*, read in its entire context and in its grammatical and ordinary sense harmoniously with the scheme and object of the *Act*, requires that the distinction be maintained between the roles of the unit owners and the role of the corporation. The unit owners own the condominium property and are members of the condominium corporation; the condominium corporation manages the property and assets of the condominium.

[43] The corporation is governed through votes by the members, primarily by voting for a board of directors which has direct authority over its day to day affairs. Issues related directly to the property interests of unit owners are decided by consent of the unit owners. It is important, therefore, not to conflate the two.

[44] For example, the allocation of one vote per unit holder as a member of the corporation (section 21(1) of the *Act*) has no application to a unit holder providing or withholding consent as an owner. That these functions are distinct is confirmed by section 21(4) of the *Act* which refers to “[p]owers of *voting* conferred by, or *consent* required to be given or document required to be *executed* under this *Act*”

(emphasis added). These same three actions are referred to in section 21(5). Sections 21(4) and (5) distinguish between the acts of voting and providing consent. Consequently, I find that the "one vote per unit" provision under section 21(1) applies only to the owners' powers of "voting" conferred by the *Act* and not to any "consent" of owners required to be given under the *Act*.

[45] Another example of the distinction between the requirement to obtain consent as opposed to an entitlement to vote is the consent required by an encumbrancer under section 61(1)(b) of the *Act*. An encumbrancer is not a member of the condominium corporation and plays no role in its governance; therefore, it is not given a vote on corporation issues.¹ I will discuss this provision in more detail later in this decision.

Approval and Authorization of the Proposed Sale of the Subject Property

[46] It is against this backdrop of the relationship among unit owners, as owners of the condominiums and as members of the corporation, that I will assess the receiver's application.

[47] As we have seen, paragraph 3 of the receivership order empowers the receiver to sell the property of the respondents. The receiver advises that the proposed sale of the Subject Property will require conveyances of:

- (1) the receiver's interest in the Subject Property, including 100% of the interests in TNCC Property;

¹ Unless it is a mortgagee in possession under section 2(1)(t)(i) of the *Act*.

- (2) the receiver's interest in the Twin Rivers Golf Course land lease with Parks Canada; and
- (3) the interests of Royal Bank of Canada and De Lage Landen Financial Services Canada in leased golf carts and maintenance equipment.

[48] No opposition is taken to the ability of the receiver to convey the property of Sports Villas and Twin Rivers or the property interests of third parties who have consented to the sale. Project Management, Dobbin, NWS and the Encumbrancer object to the attempt by the receiver to convey their property rights in the TNCC Property.

Section 61 of the *Act*

[49] The receiver claims that its authority to convey the TNCC Property, including the nine condominium units owned by third parties, comes from section 61 the *Act* which provides in relevant part:

61(1) Sale of the property or a part of the common elements may be authorized by the consent of

- (a) 80% of the owners of the common elements; and
- (b) the persons having registered claims against the property or the part of the common elements created after the acceptance for registration of the declaration and description.

[50] There are two ways that the property of a condominium can be sold. The first is by a unit holder to a purchaser.² A unit holder can do this in the ordinary course by way of a direct sale of the unit owned by them. The second method is by a sale

² Including the right of an encumbrancer to sell a condominium by virtue of title derived from the unit owner.

of the entirety of the condominium property instigated pursuant to section 61 of the *Act*, provided that the consents contemplated by sections 61(1)(a) and (b) are obtained.³

Dissenting unit owners – Section 61(1)(a)

[51] As to section 61(1)(a) of the *Act*, the receiver says that based upon the property interests of Sports Villas, it represents ownership of more than 80% of the common elements of TNCC. Consequently, it submits, it can force the sale of the TNCC Property pursuant to Section 61 notwithstanding the objections of the unit owners who appeared at the application.

[52] The dissenting unit owners argue that although Sports Villas owns more than 80% of the common elements, it is only one of the six owners of those units. Therefore, they say, it represents just 17% of the owners of the common elements and so cannot force a sale under section 61(1)(a) without the consent of a substantial number of the other unit owners. They submit that where consent of the owners is required, the *Act* distinguishes between the consents of a “percentage of the owners of the common elements” and the consents of the “owners of a percentage of the

³ It was suggested at the hearing that a sale of the condominium property can also be made by the condominium corporation (presumably acting through the board of directors) as provided for in section 18(3):

(3) A corporation may, with the consent of the owners of at least 66% of the common elements,

...

(c) mortgage or pledge its property or rights, including a future right to be paid money as a result of a levy made under this Act, in order to secure repayment of money borrowed by it or the payment or performance of obligations....

Reading the *Act* as a whole, I am of the view that the property referred to in section 18(3) of the *Act* is property that relates to the management functions of the condominium corporation. It does not refer to “the property” in the sense that that term is defined in section 2(1)(v). Property purchased pursuant to section 18(3), for example, a snow blower, becomes an asset of the condominium corporation; ownership of such assets is dealt with by section 24 of the *Act*:

24 The members of the corporation share the assets of the corporation in the same proportions as the proportions of their common interests in accordance with this Act, the declaration and the by-laws.

common elements". I agree that the use of different language in different sections of the *Act* gives rise to different interpretations.

[53] Examples of circumstances calling for the consent of owners of a percentage of the common elements include the following:

52(1) The corporation, by a **vote of members who own 80%, or a greater percentage that is specified in the declaration, of the common elements**, may make a substantial addition, alteration or improvement to or renovation of the common elements or may make a substantial change in the assets of the corporation.

...

62(2) Where there has been a determination that there has been substantial damage as provided in subsection (1) and **owners who own 80% of the common elements, or the greater percentage as specified in the declaration**, vote for repair within 60 days of the determination, the corporation shall repair.

...

66(1) Two or more corporations may amalgamate by registering a declaration and description where

(b) **the owners of at least 80% of the units** of each corporation vote in favour of approving the declaration and description.

[Emphases added.]

[54] In the circumstances referred to above, Sports Villas represents ownership of more than 80% of the common elements and so could, therefore, unilaterally effect a change contemplated by sections 52(1), 62(2) and 66(1).

[55] In contrast, the circumstances calling for a percentage of owners are more limited:

61 (1) Sale of the property or a part of the common elements may be authorized by the consent of

(a) 80% of the owners of the common element

...

63 (1) Withdrawal of the government of the property by this Act may be authorized by the consent of

(a) all the owners of the common elements;

[Emphasis added.]

[56] These latter provisions go to the very foundation of a unit holder's property interest in the condominium. I find that although the receiver's interest represents ownership of more than 80% of the common elements, it does not represent 80% of the owners of those common elements.

[57] The receiver argues that it does not matter how one interprets the phrase "80% of the owners of the common elements" in section 61(1)(a). It suggests that the same result is reached if the language used had been "the owners of 80% of the common elements" because Sports Villas could have avoided any confusion by holding each of its units in a separate corporation. This would have had the effect of making each individual corporation an owner with an interest in its unit and the appurtenant common elements, and at the same time giving each individual corporate owner one vote as a unit holder. Although Sports Villas could have arranged its ownership in such a way, it did not. The flaw in this argument, therefore, is that it does not reflect the facts before me. Furthermore, the legislature could have employed language in section 61 that would coincide with the receiver's position. It did not.

[58] It was also suggested by counsel for the receiver that it would be irrational to interpret section 61(1)(a) as requiring consent of 80% of the owners rather than the owners of 80% of the common elements. To understand the receiver's position, consider, for example, a declarant who has developed a fifty-unit condominium but has only sold one unit to a third party. That declarant may decide that the development would be better put to another use and seek to sell it. In such a case, each party, the declarant with 49 units, and the third party, with one unit, would each represent 50% of the owners. Consequently, the single third-party purchaser would

have a veto over the sale, which the receiver suggests would be unfair to the declarant who owns 98% of the units.

[59] The flaw in this argument is that the property rights of owners representing a minority of the ownership overall is recognized elsewhere in the *Act*. See section 63, for example, which applies to the removal of the property from operation of the *Act*. In such a case, *every* unit holder is given an express veto insofar as section 63(1) requires the consent of *all* of the owners of the common elements:

63 (1) Withdrawal of the government of the property by this Act may be authorized by the consent of

(a) **all the owners of the common elements; ...**

[Emphasis added.]

[60] Consequently, giving the owners of a minority of the common elements a veto over the fundamental ownership aspect of a condominium property is a value recognized in the *Act*.

The Giving of Consent versus the Exercise of a Right to Vote

[61] I wish to address one other position put forward on behalf of the receiver in respect of section 61 of the *Act*. It was submitted that on the principle of one vote per unit (section 21(1)), Sports Villas would have more than 80% of the votes.

[62] Section 61(1) refers to matters being determined by the consent of a percentage of the owners of the common elements. The requirement of consent where significant issues affecting property rights or fundamental expenditures affecting the property itself are contemplated can be contrasted with other circumstances where condominium business is conducted by a vote of the membership. For example, we saw above that the board of directors is elected by vote of the members pursuant to section 27 of the *Act*. Other examples include:

35 (1) The corporation may, **on a resolution of not less than 66% of its members**, make by-laws not inconsistent with this Act, the regulations or the declaration

...

(4) By-laws made under this section may be amended or revoked by the corporation **on a resolution of not less than 66% of its members** and subsection (3) shall apply to the amendment or revocation of the by-laws as it applies to the by-laws.

...

36 (2) The rules shall be reasonable and consistent with this Act, the declaration and the by-laws and **shall be approved by 66% of the members** of the corporation.

...

(4) The rules made under this section may be amended or revoked by the corporation on a resolution of **not less than 66% of its members**.

[Emphasis added.]

[63] The issues that are determined by a vote of the membership go to the governance of the condominium corporation and not to the property interests of owners.

[64] The receiver relies on *Ali* and submits that on a consent sought under section 61(1)(a) it should receive a number of "votes" equivalent to the number of units held by Sports Villas. The flaw in this reasoning is that the corresponding language of the Nova Scotia Act differs from section 61(1) of our *Act*. In Nova Scotia, to sell the condominium property a vote of the unit owners is contemplated as is consent by the encumbrancers. Section 40 of the Nova Scotia Act provides:

40 (1) Sale of the property or any part of the common elements may be authorized by

(a) a **vote** of owners who own eighty per cent of the common elements;
and

(b) the **consent** of the persons having registered claims against the property or the part of the common elements, as the case may be, created after the acceptance for registration of the declaration and description.

(Emphasis added)

[65] Our *Act* contemplates *consents* from a threshold percentage of the unit owners and consents from all of the encumbrancers. Voting is distinct from the giving of consent, as we saw above in reference to sections 21(4) and (5). The Nova Scotia Act contemplates *votes* by unit owners, and consents by encumbrancers. Furthermore, the Nova Scotia Act contemplates owners who own eighty per cent of the common elements; not eighty percent of the owners as is required by section 61(1)(a) of our *Act*. Consequently, the reasoning in *Ali* on this issue is of no assistance to the receiver.

Conclusion on the Application of Section 61(1)(a) of the Act

[66] Because the receivership order over the assets of Sports Villas does not capture the TNCC Property other than those units owned by Sports Villas itself, the receiver could not effect the sale of the entire TNCC Property without complying with section 61(1)(a) of the *Act*. The receiver has not obtained the necessary consents from 80% of the owners of condominium units. I find that the property of Project Management, Dobbin, and NWS should not have been bundled with the property of Sports Villas for the purposes of the sale. The receiver could have included its right, title and interest in the Sports Villas units in the tender package, but nothing more.

[67] The application for approval of the sale to the Purchaser is denied on this basis.

The Encumbrancer – Section 61(1)(b)

[68] The foregoing deals with the matter before me. Nevertheless, I wish to comment on another aspect of the receiver's application.

[69] Aside from the unit owners who do not consent to the sale, the receiver is also faced with the Encumbrancer refusing to consent. Section 61(1)(b) of the *Act* requires the consent of any encumbrancers to a sale of the TNCC Property. The Encumbrancer is a registered encumbrancer, holding mortgages over five of the units. Its position is, therefore, different from that of the dissenting unit owners.

[70] The receiver proposes to invoke section 21(5) of the *Act* to circumvent the refusal of consent by the Encumbrancer. In certain circumstances, section 21(5) provides that application can be made to the Court to have another person consent in respect of a unit:

(5) Where the court, upon application of the corporation or of an owner, is satisfied that there is no person capable or willing or reasonably available to exercise the power of voting, giving consent or executing a document, in respect of a unit, the court,

(a) in cases where unanimous vote or unanimous consent is required by this Act, the declaration or the by-laws, shall; and

(b) in another case, may

authorize another proper person to exercise the power of voting, to give the consent or to execute the document, in respect of the unit.

[71] The receiver acknowledges that it cannot comply with section 61(1)(b) of the *Act* unless the Court grants it the requested authority pursuant to section 21(5) to execute a deed of conveyance in respect of the units subject to the security interest of the Encumbrancer. The receiver submits that because the Encumbrancer will obtain no proceeds from the proposed sale as is set out in Schedule JJ to the Receiver's First Report, the Court should impose the sale upon it by invoking section

21(5). In essence, the receiver suggests that I should infer bad faith on the part of the Encumbrancer from its refusal to consent in such circumstances. Because of that bad faith, says the receiver, it would be appropriate for the Court to order that the receiver be authorized to consent to the sale and to execute any instruments otherwise required to be executed by the Encumbrancer.

[72] The Encumbrancer takes the position that it is entitled to the protection of section 61(1)(b) of the *Act* and that there is no provision for obtaining a waiver of its requisite consent. It argues that if the sale is approved and it receives no payment in respect of its security, the receiver will have succeeded in disposing of its security interest without compensation.

[73] It is not clear to me that section 21(5) of the *Act* would apply to an encumbrancer refusing to consent to a sale of a condominium property pursuant to section 61(1)(b). This is because, subject to limited and express exceptions, encumbrancers do not fall within the governance scheme of the *Act*. Section 21(5) is found under the heading "voting" with section 20 that addresses the quorum requirements for the transaction of the business of the corporation. Section 21, among other things, allocates one vote to each unit holder and prohibits voting by an encumbrancer unless it is a mortgagee in possession. The Encumbrancer is not a mortgagee in possession. Therefore section 21(5) would not apply to any consent required of the Encumbrancer as a stranger to the ownership of the units and the governance of the corporation.

[74] Even if section 21(5) of the *Act* does apply to the Encumbrancer, however, the receiver has not met the onus of establishing that the Encumbrancer is acting in bad faith by not consenting to the sale of the Subject Property. No authority was provided to me upon which I could come to such a conclusion. That the Encumbrancer has refused to consent to a transaction that will see it realize no return on its security interest is not sufficient, on its own, to establish unreasonableness.

Conclusion on the Application of Section 61(1)(b) of the Act

[75] The receiver has not obtained consent from the Encumbrancer as required by section 61(1)(b) of the *Act*. I am not prepared to invoke section 21(5) to obviate the need for such consent.

[76] The application for approval of the sale to the Purchaser would also be denied on this basis.

DISPOSITION

[77] The application by the receiver is granted in respect of sealing the First Receiver's Report and in approving the Receiver's First Report and activities as qualified above.

[78] Although Project Management and Dobbin raised other objections to the proposed sale, the failure by the receiver to obtain the requisite consents under section 61 of the *Act* is sufficient to dispose of the application. The application by the receiver for approval of the sale of the Subject Property to the Purchaser is dismissed.

[79] Because the request for approval of the sale was the main substantive matter considered on the application, the intervenors, other than the Purchaser, shall have their costs against the receiver in accordance with Column 3 of the Scale of Costs. The Purchaser shall bear its own costs.

ROBERT P. STACK
Justice