

**CITATION:** CCAA Plan of Arrangement - Clearbeach and Forbes, 2021 ONSC 5564  
**COURT FILE NO.:** CV-21-00662483  
**DATE:** 20210816

**SUPERIOR COURT OF JUSTICE - ONTARIO (COMMERCIAL LIST)**

**RE:** RE: IN THE MATTER OF THE COMPANIES' CREDITORS  
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

**AND:**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT  
OF CLEARBEACH RESOURCES INC. AND FORBES RESOURCES CORP.

**BEFORE:** C. Gilmore, J.

**COUNSEL:** Richard Swan, Raj Sahni and Joshua Foster, for the Applicants Clearbeach and  
Forbes

Graham Phoenix, for the Monitor, MNP Ltd.

Ananthan Sinnadurai, for the Province of Ontario

Paula Boutis, for Norfolk County

David Taylor, for the Municipality of Chatham-Kent

Steven Gibson, for Elgin County

Stuart R. Mackay, for Eugenie Gaiswinkler

**HEARD:** July 14, 2021

**ENDORSEMENT**

**OVERVIEW**

[1] This endorsement relates to a motion by the Applicants heard on July 14, 2021 with additional written submissions received from counsel from Norfolk County and Chatham-Kent on July 30 and a written response from the Applicants on August 5, 2021.

[2] The Applicants seek to restructure by way of a reverse vesting order ("the RVO"). The restructuring is not opposed by CRA, the Monitor or the Ministry of Natural Resources and

Forestry ("MNRF"). The RVO is opposed by certain municipalities including Elgin County and certain of its included municipalities ("Elgin"), Norfolk County ("Norfolk") and the municipality of Chatham-Kent ("Chatham") (together "the municipalities"). The opposition relates to outstanding municipal taxes owed by the Applicant to the municipalities as the RVO would extinguish most of the outstanding tax liabilities.

[3] For the reasons set out below, I approve the RVO transaction and include with this endorsement a signed copy of the Order sought by the Applicants.

### **FACTUAL BACKGROUND**

[4] The Applicants are privately-owned affiliated companies in Ontario's oil and gas sector. Clearbeach owns 400 oil and gas wells in Southwestern Ontario, most of which are located on private farmland. MNRF issued orders requiring Clearbeach to plug 41 inactive wells by June 30, 2021. Five wells have been plugged to date. The estimated cost to plug the remaining 36 wells is \$433,000.

[5] Due to poor financial performance caused by challenging commodity prices and significant environmental obligations, Clearbeach has been unable to pay royalties to landowners, municipal taxes or service its debt to Pace. Pace subsequently took enforcement steps which precipitated Proposal Proceedings.

[6] Clearbeach and Forbes commenced Proposal Proceedings under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, in July 2020.

[7] In May 2021, to prevent the bankruptcies of Clearbeach and Forbes and to provide some flexibility to consider restructuring options, a CCAA Initial Order was obtained authorizing the continuation of CCAA proceedings and appointing a Monitor.

[8] Prior to the CCAA proceedings, the Monitor commissioned the Sproule Report to assess the potential value of the wells. Each well has an abandonment and reclamation obligation related to the costs to plug the well and reclaim the land at the end of the well's useful life. Historically, Clearbeach's abandonment and reclamation cost was \$40,000 per well. With 400 wells, this cost could exceed \$16M. This obligation gives rise to a priority interest in all of Clearbeach's assets.

[9] The Sproule Report estimated an actual cost of abandonment and reclamation of \$9M along with a negative after-tax cash flow of \$3.6 to \$4M. According to the Report, these costs exceed the gas and oil resources estimated to be available from the remaining active wells.

[10] In consultation with the Monitor, the Applicants seek approval of an RVO which is structured as a share sale in order to preserve the MNRF licenses and to ensure that the stewardship and environmental obligations in connection with the Clearbeach wells remain with Clearbeach. The Applicants seek approval of an RVO which would see the Purchaser purchase new common shares under the SPA and become the sole owner of 100% of the outstanding shares of Clearbeach.

[11] Pursuant to the terms of the RVO, all Excluded Liabilities will vest in ResidualCo. The Excluded Liabilities include royalty interests and municipal taxes. The municipalities oppose the

RVO on the grounds that lost tax arrears will significantly impact vulnerable taxpayers and affect services and infrastructure.

## **THE POSITIONS OF THE PARTIES**

### ***The Applicants***

[12] The Applicants submit that the RVO is the only viable transaction to emerge after a year-long insolvency process. It would avoid a devastating bankruptcy for Clearbeach while ensuring that Clearbeach can address its environmental and stewardship obligations associated with its oil and gas wells.

[13] In order to implement the transaction the Applicants seek an approval and vesting order (the RVO). The structure of the RVO involves six steps:

- a. a share purchase agreement ("the SPA") between Clearbeach and the Purchaser ("Oil Patch Services" or "OPS") authorizing Clearbeach to implement the transaction;
- b. adding a corporation ("ResidualCo"), to be incorporated prior to the closing of the transaction as a wholly-owned subsidiary of Forbes, as an Applicant in this CCAA proceeding;
- c. transferring and vesting Clearbeach's title to the Excluded Assets (as defined in the SPA) in ResidualCo;
- d. cancelling and extinguishing all equity interests in Clearbeach existing prior to the Closing Date other than the issued and outstanding common shares;
- e. authorizing Clearbeach to issue new common shares and vesting title to those shares in the Purchaser;
- f. authorizing the Monitor to file an assignment in bankruptcy for ResidualCo and Forbes with MNP acting as Trustee.

[14] The Applicants submit that the RVO should be approved because it meets the criteria in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.), for the following reasons:

- a. The process leading to the transaction was reasonable as the proposed transaction was the culmination of a year long process of consideration of various restructuring options. A public sale was not an option given that Clearbeach has no realizable assets.
- b. Any sale process would require interim financing which is unlikely to be obtained given that Clearbeach has no assets.
- c. The Monitor was consulted in relation to the transaction and is supportive of it.
- d. MNRF was consulted in relation to the transaction and is supportive of it.

- e. The Transaction is the only viable option and is in the best interest of the Applicants and their creditors. A bankruptcy would have disastrous consequences for all stakeholders including the landowners and MNRF.
- f. The consideration is fair and reasonable and commensurate with the value of Clearbeach's assets.
- g. The process is expressly contemplated in s. 36(4) of the CCAA.

[15] The terms of the SPA include assumption of all Excluded Liabilities by ResidualCo. Excluded Liabilities include Gross Overriding Loyalty Interests ("GORRs") and outstanding municipal taxes, interest and penalties.

[16] The proposed RVO includes a release in favour of landowners upon whose property the oil and gas assets are situated with respect to any outstanding municipal tax liabilities in relation to those assets.

### ***Norfolk***

[17] Norfolk opposes the plan put forward by the Applicants and supports the submissions of both Elgin and Chatham. It is owed \$678,493.25 in property taxes by Clearbeach. The SPA would result in that liability being rolled into ResidualCo which would then declare bankruptcy. The tax debt would then be eliminated. The release proposed by the Applicants would prevent Norfolk from collecting any tax arrears from any landowners who have leases with Clearbeach.

[18] Norfolk objects to the proposed plan on the grounds that it represents an unreasonable loss of revenue. Norfolk is left without a remedy to collect the tax arrears as the municipality cannot collect on the taxes owed in relation to the pipeline or from the landowners.

[19] Norfolk further objects to the plan on the basis that it is fundamentally unfair. Further, there is great concern about future environmental liabilities in relation to the wells. MNRF has made it clear that it does not have any financial responsibility for those liabilities. The alleged primary benefit of the proposed plan is in meeting environmental obligations that would otherwise fall on landowners, and potentially others. Norfolk submits that it is being asked to forgo arrears of taxes to fund liabilities which should be the responsibility of the Province, the landowners or both.

### ***Chatham***

[20] Chatham's share of arrears to be assumed by ResidualCo total \$212,352.96 plus interest. Chatham is concerned about further arrears of \$1,039,277.26 owed by Lagasco Inc., a related company to Clearbeach.

[21] Chatham submits that there has been a complete lack of consultation by the Applicants with the municipalities. This is contrary to the principles set out in *Soundair*. Chatham also expresses concerns similar to those of Norfolk with respect to the releases proposed to be granted to landowners as well as the uneven balance of the elimination of tax arrears in relation to the alleged benefit of compliance with outstanding MNRF orders.

[22] Chatham is concerned that the restructured version of Clearbeach will be controlled by the same individuals who controlled the original entity but with "hand-picked" assets and liabilities including the extinguishment of all municipal tax debt. This makes the proposed plan patently unfair.

[23] The ownership of three of the municipality's tax rolls is also in question. Chatham is dissatisfied with the explanations given by the Applicant and submits that it is unclear that those tax rolls are associated with Clearbeach. That is, Clearbeach is using the RVO to expunge tax debt from related entities as well as from Clearbeach.

### **ANALYSIS AND RULING**

[24] It is clear that this Court has the jurisdiction to approve the RVO pursuant to sections 36 and 11 of the CCAA. In order to properly exercise this jurisdiction, the Court must consider both the factors set out in s. 36(3) of the CCAA and the *Soundair* principles. The factors in s. 36(3) are as follows:

- (a) whether the process leading to the proposed sale was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale;
- (c) whether the monitor filed a report stating that in its opinion the proposed sale would be more beneficial to creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which creditors were consulted;
- (e) the effects of the proposed sale 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.

[25] The relevant principles enumerated in *Soundair* are set out below:

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

[26] The abovementioned principles have been applied in cases involving RVOs. In the *Green Relief* case, 2020 ONSC 6837, the Court approved an RVO in which the shares of Green Relief were acquired by ResidualCo, which assumed all of Green Relief's assets and liabilities.

[27] Turning to the specific factors to be considered under the CCAA and *Soundair*, I make the following findings:

- a. The Process leading to the transaction was reasonable. Multiple restructuring options have been considered by the Applicants over the last many months. I am aware of this, having case managed this matter for more than a year. A public sale was never a viable option given that Clearbeach has no realizable assets and given its environmental obligations.
- b. The Monitor supports the transaction as set out in its Second Report. Specifically, the Monitor's position is that a sale to a non-related purchaser is unlikely to provide a transaction more favourable than the RVO. Further, a sales process would require funding. It is unlikely that such funding could be obtained given Clearbeach's abandonment and reclamation obligations and its stewardship and environmental obligations to MNRF. Further, the Monitor views the RVO as superior to a bankruptcy and the only commercially viable alternative.
- c. MNRF supports the transaction. While MNRF did not provide any written materials for this hearing, counsel for MNRF made brief submissions pointing out that Clearbeach's abandonment and reclamation obligations would be in priority to any arrears of municipal taxes and far exceed the amount of those taxes. MNRF did not support a bankruptcy.
- d. Bankruptcy is not a viable option given Clearbeach's stewardship obligations and the fact that it has no assets. The RVO provides a going-concern result and the ability to satisfy Clearbeach's ongoing environmental and stewardship obligations by personnel who have experience in doing so, in consultation with MNRF. A potential piecemeal sale of the oil and gas assets to new operators with less experience would create uncertainty and delay. Abandonment of the wells could result in environmental damage which would potentially be borne by the landowners or MNRF.
- e. The consideration received is fair and reasonable. There is \$7.5M owed to Pace on a secured basis. The assets of Clearbeach would need to generate \$11.1M more than the value estimated in the Sproule Report for there to be funds available for creditors ranking behind Pace.
- f. The third-party releases are needed to protect landowners from being held responsible for municipal taxes and penalties related to land used in Clearbeach's operations. They also protect Clearbeach from claims by landowners in relation to municipal taxes and penalties included in the Excluded Liabilities. The releases benefit the creditors and the debtors and are fair and reasonable.
- g. Clearbeach's obligations under various Ministry Inspector's Orders are not provable in bankruptcy and need to be addressed in priority to any secured and unsecured creditors. Therefore, the RVO seeks to mitigate the harm that would result from a bankruptcy including ensuring the ongoing operation of Clearbeach so that it can meet its environmental obligations and pay future municipal taxes.

- h. The granting of the RVO will prejudice any holders of Gross Overriding Royalty Agreements (GORRs). However, those GORR holders would be equally prejudiced in the event of a bankruptcy.
- i. The prejudice to municipalities with Municipal Tax Claims will be increased in the event of Clearbeach's bankruptcy. If a bankruptcy occurs, Clearbeach must pay its environmental obligations with no funds available for past or future municipal taxes. As was made clear in the Sproule Report, Clearbeach has no equity in any of its property nor in the Retained Assets defined in the SPA.
- j. The municipalities submitted that the consultation with them regarding the transaction was deficient. Creditor consultation is only one of the factors to be considered by the Court in the approval of the proposed RVO in accordance with the *Soundair* principles and s. 36(3) of the CCAA. There was extensive consultation with MNRF in order to address Clearbeach's environmental and stewardship obligations. Failure to engage MNRF and the senior creditor, Pace, would have led to a bankruptcy.
- k. The municipalities also submit that they are disproportionately affected by the treatment of the Excluded Liabilities. However, if the RVO fails there will be no funds with which to pay future taxes. I adopt the reasoning of Patillo, J. in *Grafton-Fraser v. Cadillac*, 2017 ONSC 2496 at paras. 23 and 24 as set out below:

I am in agreement with Grafton's submission that, in the context of the sale of a company's business under the CCAA, there is no requirement that creditors be treated equally. That is not to say that their interests are to be ignored. Rather, the effects of the proposed sale on the creditors are one of the factors that must be considered. But they are considered in the larger context of the proposed sale and weighted against the other above noted factors, including the interests of the debtor and the stakeholders generally.

The above principle was applied in *Re Nelson Education Ltd.*, 2015 ONSC 5557, 29 C.B.R. (6th) 140 (Ont. S.C.J.) where Newbould J., in approving a sale of substantially all of Nelson's assets pursuant to a credit bid pursuant to the CCAA, noted at para. 39 that while there were some excluded liabilities and a small amount owing to former employees that would not be paid, the monitor indicated there was no reasonable prospect of any alternative solution that would provide recovery for those creditors.

- l. The municipalities are concerned that the Excluded Liabilities include tax liabilities that do not belong to Clearbeach. While much of this confusion was cleared following the written submissions of the municipalities, the SPA provides that the Excluded Liabilities include municipal taxes owed by Clearbeach. If there are tax roll numbers related to other entities, they would not form part of the Excluded Liabilities.
- m. The municipalities also submitted that Clearbeach has overestimated its environmental obligations and relies on those obligations as a reason to include arrears of municipal taxes in its list of Excluded Liabilities. However, the municipalities did not provide any

independent evidence of the environmental obligations. The Sproule Report (commissioned by the Monitor) estimates those obligations at \$9.4M. MNRF estimates them to be in range of \$12M.

- n. This Court has authority under the CCAA to grant reorganizations without shareholder approval in order to ensure that shareholders (who have the lowest priority) cannot block the proposed reorganization. I agree that it is appropriate for the Court to exercise its discretion to do so in this case.

[28] Given all of the above, I find that the Transaction meets the requirements under both the CCAA and *Soundair*. Further, it is fair, reasonable and no other commercially reasonable transaction could be obtained from an arm's length party. I have therefore signed the draft Order provided by the Applicants which is attached.

A handwritten signature in black ink, appearing to read "C. Gilmore J.", is enclosed within a rectangular box with a dashed top border. The signature is written in a cursive style.

---

C. Gilmore J.

**Date:** August 16, 2021