

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)**

B E T W E E N:

SMARTPAY INC.

Applicant

- and -

CUREXE INC.

Respondent

**IN THE MATTER OF PART XVIII OF THE *CANADA BUSINESS CORPORATIONS
ACT, RSC 1985, C C-44***

**FACTUM
(Liquidation under s. 214 of the CBCA)**

PART I—THE APPLICATION

1. This is an Application by SmartPay Inc. (“**SmartPay**”), the sole shareholder of Curexe Inc. (“**Curexe**”), pursuant to Part XVIII of the *Canada Business Corporations Act* (the “**CBCA**”) for an Order liquidating Curexe and appointing MNP Ltd. (“**MNP**”) as the liquidator of Curexe.

2. Curexe has consented to the Application and MNP has consented to be the liquidator of Curexe.

PART II—FACTS, LAW AND ARGUMENT

3. The relevant facts are set out in the Affidavit of Johnathan Holland sworn 27 October 2020 (the “**Holland Affidavit**”).

4. **Technical Requirement of the CBCA Satisfied.** The Application satisfies the technical requirements of the CBCA:

- (a) Curexe is a CBCA company; [**Holland Affidavit, para 3 and Exhibit B**]
- (b) Curexe is not an insolvent person within the meaning of the *Bankruptcy and Insolvency Act* (the “BIA”); and [**CBCA, ss. 208(1) and 217, and BIA, s. 2. See also Holland Affidavit, para 6 and 8**]
- (c) SmartPay has filed an Affidavit stating the reasons why Curexe should be liquidated. [**CBCA, s. 216(1). See Holland Affidavit**]

5. **Liquidation is “Just and Equitable”.** The objective of the liquidation of a company is to protect asset value (and thus the interests of creditors) and maximize the return to shareholders. [**See *Cavendish Investing Ltd. (Re)*, [1996 CanLII 10449](#) (AB QB), para 25**] There is no dispute that the liquidation of Curexe satisfies those objectives. The ability of to protect the asset value of Curexe is dependent on the release of the funds being held in the Luminus Accounts and the distribution of those funds to Curexe’s clients and SmartPay.

6. This is not a “standard” application under s. 214 of the CBCA. Applications under s. 214 typically involve a dispute between shareholders and an Application by one of the shareholders to liquidate the company. [**See, for example, *Animal House Investments Inc. v. Lisgar Development Ltd.*, [2007 CanLII 82794](#) (ON SC)**] The basis for the Court-ordered liquidation of Curexe is not a dispute between shareholders that has frustrated the objectives of the company, but the fact that Curexe is, while solvent, no longer able to carry on the business that it was intended to carry on when it was incorporated. [**Holland Affidavit, paras 5, 15, 16 and 17**]

7. Liquidation is the “end of life” procedure applicable to (solvent) companies incorporated under the CBCA and a Court-ordered liquidation is appropriate where a company is no longer able to conduct the business for which it was incorporated [**See, for example, *Hanemaayer v. Freure*, [1999 CanLII 14942](#) (ON SC), para 158**]. This basis for liquidating a company was described in *Dominion Steel Corp Ltd. (Re)*:

The Court may, by reading the memorandum or statute and considering the circumstances under which the company came into being, ascertain what the primary paramount or main object of the company was to be, and if that object has failed, it may treat the substratum of the company as gone and regard it as impossible for the company to carry on the real business for which it was formed, and accordingly make a winding-up order. [Dominion Steel Corp. Ltd. (Re), [1927 CanLII 376](#) (NS CA)]

8. There is no dispute that, as a result of the Luminus Accounts being frozen, Curexe is no longer able to carry on the business for which it was incorporated. [Holland Affidavit, paras 15, 16 and 17] Curexe was established as a single-purpose entity and bank accounts are fundamental to the operation of its business [Holland Affidavit, paras 5 and 9] The freezing of the Luminus Accounts has made it impossible, from a practical perspective, for Curexe to carry on its business and service its clients. [Holland Affidavit, paras 9 and 16] While Curexe has considered establishing a new bank relationship, doing so would not address the ability of Curexe to fulfill its obligations to its 21 clients in terms of paying over the funds in the Luminus Accounts and the freezing of the Luminus Accounts has had a negative impact on Curexe's reputation in the marketplace that makes this option not viable. [Holland Affidavit, para 17]

9. All other things being equal, SmartPay could initiate a voluntary liquidation of Curexe. [See CBCA, s. 211(3)] However, the freezing of the Luminus Accounts results in it being more appropriate that the liquidation of Curexe take place under the supervision of the Court if for no other reason than to secure the release of the funds in the Luminus Accounts so that they can be distributed to Curexe's clients and SmartPay.

10. **Jurisdiction.** In connection with the liquidation of a CBCA company, the Court has broad jurisdiction to make any order that it sees fit. [CBCA, s. 217]

11. **Liquidator's Charge.** The Liquidation Order provides the Liquidator with a priority charge over all of Curexe's property, including the funds in the Luminus Accounts. The Court has jurisdiction to subject the funds in the Luminus Accounts to the charge in favour of the Liquidator. Where an officer of the court has been appointed to preserve and realize assets for the benefit of all interested parties, the officer of the court will be given priority over the interested persons for charges and expenses properly incurred by the officer of the court. [See *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975)*, [1975 CanLII 681](#) (ON CA)]

and Ontario Securities Commission v. Consortium Construction Inc., [1992 CanLII 7734](#) (ON CA)] The services to be provided by the Liquidator are essential for funds to be released to Curexe's clients and is of substantial benefit to Curxes's clients. In the absence of a liquidation, each of Curexe's clients would have to take proceeding against Luminus to secure the release of the funds payable to them by Curexe.

12. **Claims Procedure.** The Court has jurisdiction to determine the validity of any claims against Curexe. [CBCA, s. 217(e)] There is no express claims procedure in the CBCA and it is common practice for the Court to establish a procedure for claims to be proven in a liquidation or receivership. Rather than create a bespoke claims procedure, the Liquidation Order adopts the claims procedure in the BIA. This essentially parallels the liquidation provisions of the *Business Corporations Act* (Ontario), which adopt the claims procedure in the *Assignments and Preferences Act* for the purpose of determining claims in the liquidation of an OBCA company. [See OBCA, s. 228]

PART III—ORDER REQUESTED

13. The Applicant requests an Order substantially in the form attached to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of October 2020.

E Patrick Shea

E. Patrick Shea
GOWLING WLG (CANADA) LLP
Lawyers for the Applicant

Schedule A

Animal House Investments Inc. v. Lisgar Development Ltd., [2007 CanLII 82794](#) (ON SC)

Hanemaayer v. Freure, [1999 CanLII 14942](#) (ON SC)

Dominion Steel Corp. Ltd. (Re), [1927 CanLII 376](#) (NS CA)

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), [1975 CanLII 681](#) (ON CA)

Ontario Securities Commission v. Consortium Construction Inc., [1992 CanLII 7734](#) (ON CA)

Schedule B

Canada Business Corporations Act, RSC 1985, c C-44

208 (1) This Part, other than sections 209 and 212, does not apply to a corporation that is an insolvent person or a bankrupt as those terms are defined in section 2 of the Bankruptcy and Insolvency Act.

211 (3) A corporation may liquidate and dissolve by special resolution of the shareholders or, where the corporation has issued more than one class of shares, by special resolutions of the holders of each class whether or not they are otherwise entitled to vote.

(8) The Director or any interested person may, at any time during the liquidation of a corporation, apply to a court for an order that the liquidation be continued under the supervision of the court as provided in this Part, and on such application the court may so order and make any further order it thinks fit.

214 (1) A court may order the liquidation and dissolution of a corporation or any of its affiliated corporations on the application of a shareholder,

- (a) if the court is satisfied that in respect of a corporation or any of its affiliates
 - (i) any act or omission of the corporation or any of its affiliates effects a result,
 - (ii) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
 - (iii) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer; or

- (b) if the court is satisfied that
 - (i) a unanimous shareholder agreement entitles a complaining shareholder to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred, or
 - (ii) it is just and equitable that the corporation should be liquidated and dissolved.

216 (1) An application to a court under subsection 214(1) shall state the reasons, verified by an affidavit of the applicant, why the corporation should be liquidated and dissolved.

(3) On an application under subsection 214(1), the court may order the directors and officers of the corporation to furnish the court with all material information known to or reasonably ascertainable by them, including

- (a) financial statements of the corporation;
- (b) the name and address of each shareholder of the corporation; and
- (c) the name and address of each known creditor or claimant, including any creditor or claimant with unliquidated, future or contingent claims, and any person with whom the corporation has a contract.

(5) Publication and service of an order under this section shall be effected by the corporation or by such other person and in such manner as the court may order.

217 In connection with the dissolution or the liquidation and dissolution of a corporation, the court may, if it is satisfied that the corporation is able to pay or adequately provide for the discharge of all its obligations, make any order it thinks fit including, without limiting the generality of the foregoing,

- (a) an order to liquidate;
- (b) an order appointing a liquidator, with or without security, fixing the liquidator's remuneration and replacing a liquidator;
- (c) an order appointing inspectors or referees, specifying their powers, fixing their remuneration and replacing inspectors or referees;
- (d) an order determining the notice to be given to any interested person, or dispensing with notice to any person;
- (e) an order determining the validity of any claims made against the corporation;
- (f) an order, at any stage of the proceedings, restraining the directors and officers from
 - (i) exercising any of their powers, or
 - (ii) collecting or receiving any debt or other property of the corporation, and from paying out or transferring any property of the corporation, except as permitted by the court;
- (g) an order determining and enforcing the duty or liability of any present or former director, officer or shareholder
 - (i) to the corporation, or
 - (ii) for an obligation of the corporation;

- (h) an order approving the payment, satisfaction or compromise of claims against the corporation and the retention of assets for such purpose, and determining the adequacy of provisions for the payment or discharge of obligations of the corporation, whether liquidated, unliquidated, future or contingent;
- (i) an order disposing of or destroying the documents and records of the corporation;
- (j) on the application of a creditor, the inspectors or the liquidator, an order giving directions on any matter arising in the liquidation;
- (k) after notice has been given to all interested parties, an order relieving a liquidator from any omission or default on such terms as the court thinks fit and confirming any act of the liquidator;
- (l) subject to section 223, an order approving any proposed interim or final distribution to shareholders in money or in property;
- (m) an order disposing of any property belonging to creditors or shareholders who cannot be found;
- (n) on the application of any director, officer, security holder, creditor or the liquidator,
 - (i) an order staying the liquidation on such terms and conditions as the court thinks fit,
 - (ii) an order continuing or discontinuing the liquidation proceedings, or
 - (iii) an order to the liquidator to restore to the corporation all its remaining property; and
- (o) after the liquidator has rendered a final account to the court, an order dissolving the corporation.

218 The liquidation of a corporation commences when a court makes an order therefor.

- 219 (1) If a court makes an order for liquidation of a corporation,
- (a) the corporation continues in existence but shall cease to carry on business, except the business that is, in the opinion of the liquidator, required for an orderly liquidation; and
 - (b) the powers of the directors and shareholders cease and vest in the liquidator, except as specifically authorized by the court.
- (2) The liquidator may delegate any powers vested in the liquidator by paragraph (1)(b) to the directors or shareholders.

220 (1) When making an order for the liquidation of a corporation or at any time thereafter, the court may appoint any person, including a director, an officer or a shareholder of the corporation or any other body corporate, as liquidator of the corporation.

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

2 In this Act,

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

124 (1) Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.

(2) A claim shall be proved by delivering to the trustee a proof of claim in the prescribed form.

(3) The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge.

(4) The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counter-claim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated.

135 (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

(2) The trustee may disallow, in whole or in part,

- (a) any claim;
- (b) any right to a priority under the applicable order of priority set out in this Act; or
- (c) any security.

(3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

(4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

149 (1) The trustee may, after the first meeting of the creditors, send a notice, in the prescribed manner, to every person with a claim of which the trustee has notice or knowledge but whose claim has not been proved. The notice must inform the person that, if that person does not prove the claim within a period of 30 days after the sending of the notice, the trustee will proceed to declare a dividend or final dividend without regard to that person's claim.

Business Corporations Act, RSO 1990, c B.16

228 For the purpose of proving claims, sections 23, 24 and 25 of the *Assignments and Preferences Act* apply with necessary modifications, except that where the word "judge" is used therein, the word "court" as used in this Act shall be substituted.

Assignments and Preferences Act, RSO 1990, c A.33

25 (1) All persons claiming to be entitled to rank on the estate shall furnish to the assignee particulars of their claim proved by affidavit and such vouchers as the nature of the case admits.

(2) Where a person claiming to be entitled to rank on the estate does not, within a reasonable time after receiving notice of the assignment and of the name and address of the assignee, furnish to the assignee satisfactory proofs of claim as provided by this and the preceding sections, the judge upon summary application by the assignee or by any other person interested in the estate, of which application at least three days notice shall be given to the claimant, may order that unless the claim is proved to the satisfaction of the judge within a time

to be limited by the order, the claimant shall be deemed to be no longer a creditor of the estate and is wholly barred of any right to share in the proceeds thereof.

(3) If the claim is not so proved within the time so limited or within such further time as the judge by subsequent order allows, it is wholly barred and the assignee is at liberty to distribute the proceeds of the estate as if no such claim existed, but without prejudice to the liability of the assignor therefor.

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(PROCEEDING COMMENCED AT TORONTO)

FACTUM

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
1 First Canadian Place
100 King Street West, Suite 1600
Toronto, ON M5X 1G5

E. Patrick Shea (LSUC No. 39655K)
Tel: (416) 369-7399 / Fax: (416) 862-7661
Email: patrick.shea@gowlingwlg.com

Lawyers for the Applicant