

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

1351486 B.C. LTD.

PETITIONER

AND

LIVING BEACHSIDE DEVELOPMENT LIMITED PARTNERSHIP,  
SUNNY BEACH MOTEL INC., PORT CAPITAL FARMS (BEACH)  
INC., PORTLIVING FARMS (3624 PARKVIEW) INVESTMENTS  
INC., PORTLIVING FARMS (3688 PARKVIEW) INVESTMENTS  
INC., PORTLIVING (3648 PARKVIEW) INVESTMENTS INC.  
PORT CAPITAL GROUP INC., PORTLIVING PROPERTIES INC.,  
MACARIO TEODORO REYES, PORT CAPITAL DEVELOPMENT  
(FARMS) INC., AND 1341550 B.C. LTD.

RESPONDENTS

**APPLICATION RESPONSE**

**Application Response of:** His Majesty the King in Right of the Province of British Columbia  
(the “**Province**”)

THIS IS A RESPONSE TO the notice of application of MNP Ltd., in its capacity as court-appointed receiver and manager (in such capacity, the “**Receiver**”) filed October 4, 2023.

**PART 1: ORDERS CONSENTED TO**

Nil.

**PART 2: ORDERS OPPOSED**

The Province opposes the order sought in paragraph 1 of Part 1 of the notice of application.

**PART 3: ORDERS ON WHICH NO POSITION IS TAKEN**

Nil.

**PART 4: FACTUAL BASIS**

1. The Province does not dispute the facts as set out in the Receiver’s notice of application.<sup>1</sup>

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<sup>1</sup> Except where otherwise indicated, all capitalized terms have the same meaning as defined in the Receiver’s notice of application

2. In this application, the Receiver seeks approval of a sale of the Properties by way of a share sale, enabled by an RVO structure.

3. Under the RVO structure:

- a) certain excluded assets and liabilities of 3624 Farms, 3688 Farms, and 3648 Farms (collectively the “**Nominees**”) shall be transferred by the Vendor into Sunny Beach;
- b) all of the issued and outstanding shares in the capital of each of the Nominees shall be transferred to the purchaser, 486 BC Ltd.;
- c) the Nominees are to be removed from the receivership proceedings and released from the purview of all orders of the court granted in respect of the receivership proceedings, save and except for the RVO; and
- d) the Receiver shall assign Sunny Beach and the Living Beachside LP into bankruptcy following the closing of the transaction.<sup>2</sup>

4. The rationale provided for an RVO is limited to the following:

The Receiver understands that the RVO structure is generally being proposed (rather than a ‘conventional’ approval and vesting order) to avoid payment of property transfer tax (“**PTT**”) payable to the Government of British Columbia pursuant to the *Property Transfer Act* (British Columbia). The estimated amount of PTT saved under an RVO structure is \$365,000.00.<sup>3</sup>

## **PART 5: LEGAL BASIS**

### ***An RVO is Extraordinary Relief***

5. An RVO is a type of transaction that has emerged in insolvency proceedings as an alternative to transferring assets from an insolvent company to a creditor. Instead of having assets conveyed from the debtor to the creditor, the debtor company’s shares are transferred to the creditor after unwanted assets and liabilities are removed from the debtor company and vended to a new “residual” company.<sup>4</sup>

6. The case authorities are clear that RVOs are only to be granted in extraordinary circumstances following close judicial scrutiny and only after the applicant, purchaser, and court’s

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<sup>2</sup> Receiver’s First Report to Court, dated September 20, 2023 at para. 30 [**Receiver’s Report**]

<sup>3</sup> Receiver’s Report at para. 31 (emphasis in original)

<sup>4</sup> *Peakhill Capital Inc. v. Southview Gardens Limited Partnership*, 2023 BCSC 1476 [**PeakHill Capital**] at para. 3; *PaySlate Inc. (Re)*, 2023 BCSC 608 [**PaySlate 1**] at para. 1

officer have established that the factors set out in the case authorities are satisfied.<sup>5</sup>

7. In assessing a potential RVO, the court should “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.”<sup>6</sup>

8. The onus rests with the applicant, purchaser, and court’s officer to provide the requisite evidence to demonstrate that the tests for issuing an RVO have been met.<sup>7</sup>

### ***Jurisdiction in the Context of a Receivership Unresolved***

9. As the Receiver acknowledges, “there is no specific jurisdiction in the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [**BIA**] or the *Law and Equity Act*, RSBC 1996, c 253 for the approval of a reverse vesting order in receivership proceedings.”

10. As a result, the jurisdiction to make such an order in receivership proceedings – as distinct from restructurings under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [**CCAA**] or *BIA* proposal provisions – remains unsettled.

11. Recently, in *Peakhill Capital*, Mr. Justice Loo considered for the first time the jurisdiction of this court to grant an RVO in receivership proceedings. The court considered the question of jurisdiction in that case to have been decided by *PaySlate 1* and purported to follow that decision on the point.

12. The court’s reliance on *PaySlate 1* was in error. *PaySlate1* involved a *BIA* proposal proceeding, such that the court’s authority to grant the RVO at issue in the case was grounded in s. 65.13 of the *BIA*. That provision does not apply in receivership proceedings.<sup>8</sup> It follows that *PaySlate 1* does not speak to the court’s jurisdiction to make a similar order in a receivership under s. 243 of the *BIA*. *Peakhill Capital* is under appeal.<sup>9</sup>

13. Whether the court has jurisdiction in a receivership to grant an RVO turns on the powers afforded the court under s. 243 of the *BIA*. Section 243 of the *BIA* addresses the power of a

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<sup>5</sup> *PaySlate 1* at paras. 87 and 144; subsequent reasons at 2023 BCSC 977 [**PaySlate 2**]

<sup>6</sup> *PaySlate 1* at para. 89, citing to Janis P. Sarra, “Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions”, Canadian Legal Information Institute, 2022 CanLIIDocs 431 [**Sarra Article**]

<sup>7</sup> *PaySlate 1* at para. 138

<sup>8</sup> See *PaySlate 2* at para. 19; section 65.13 of the *BIA* only applies to a “person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1)”

<sup>9</sup> *British Columbia v. Peakhill Capital Inc.*, 2023 BCCA 368. See para. 9 where the Court of Appeal commented, in an application to vary the automatic stay conferred in that appeal, that “[t]here is some merit to the appeal”, and that the question of jurisdiction to make the order “has not been looked at by appellate courts” and “is a new issue in bankruptcy practice.”

receiver appointed under the *BIA* and is the provision appellate courts have looked to in construing the jurisdiction of the court to make certain orders in receivership proceedings.<sup>10</sup>

14. Section 243 does not confer on the court the jurisdiction to grant an RVO. As the court observed in *Third Eye*, the jurisdiction under that section is not unbounded – it will confer the power to make orders that are incidental and ancillary to a receiver’s power to sell.<sup>11</sup>

15. The RVO sought in this case strays beyond what is incidental and ancillary to a receiver’s power to sell. Moreover, it is a power not provided to the Receiver under the Receivership Order in place in this proceeding.<sup>12</sup> None of the powers conferred on the Receiver to effect a sale empower the Receiver to take the added step of vending unwanted assets and liabilities to a residual company and subsequently bankrupting that company.

16. Further, even if s. 243 of the *BIA* could theoretically prescribe the jurisdiction to grant an RVO, it does not in the circumstances of this case, given the acknowledgment that the RVO is designed and intended to avoid the application of PTT under the *Property Transfer Tax Act*.<sup>13</sup>

17. Section 34.2 of the *PTTA* provides that any “person” who wilfully avoided or evaded or attempted to avoid or evade tax under the *PTTA* is (i) jointly and severally liable to pay the amount of that tax avoided or evaded and (ii) must pay a penalty equal to 100% of the amount of the tax avoided or evaded:

34.2 If the administrator determines that a person, for the purpose of evading or avoiding a tax liability of the person or of another person, has ...

(e) willfully, in any manner, avoided or evaded or attempted to avoid or evade

(i) compliance with this Act or the regulations, or

(ii) remittance or payment of taxes required by this Act or the regulations,

the person is jointly and severally liable for the amount of any tax avoided or evaded as a result and must pay to the administrator, in addition to that amount, a penalty in an amount equal to 100% of the amount of tax avoided or evaded.

18. The release provisions of the RVO appear designed to avoid the application of s. 34.2. The argument available to the purchaser would be that, by virtue of s. 11 of the RVO, the purchaser is released from any potential claim under s. 34.2. Other “persons” who could otherwise

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<sup>10</sup> *Third Eye Capital Corporation v. Resources Dianor Inc/Dianor Resources Inc.*, 2019 ONCA 508 [**Third Eye**]; *Yukon (Government of) v. Yukon Zinc*, 2021 YKCA 2 at para. 132 [**Yukon Zinc**]

<sup>11</sup> *Third Eye* at para. 82; *Yukon Zinc* at para. 132

<sup>12</sup> Bennett on Receivership, 4th ed. (Toronto: Carswell, 2021) at 408; see *Re Chimco Structures Ltd.* (1977), 5 B.C.L.R. 97; *New Skeena Forest Products Inc., Re v. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154

<sup>13</sup> *Property Transfer Tax Act*, RSBC 1996, c. 378 [**PTTA**]

be subject to the potential application of s. 34.2 could also attempt to rely on the release provisions.

19. In approving the transaction – designed to release the Nominees from the receivership without transferring title, and further to insulate the purchaser and others from PTT liability via the release provisions of the RVO – the Court would be condoning wilful tax avoidance which, in other circumstances, could potentially be caught by section 34.2.

20. As has been observed in other contexts, the discretion afforded the court under s. 243(1)(c) of the *BIA* is constrained by s. 72(1) of the *BIA*, the provision preserving substantive property rights that are not in conflict with the provisions of the *BIA*.<sup>14</sup> Where the court is being asked to authorize a transaction that's stated purpose is to avoid tax under the *PTTA*, potentially in contravention of section 34.2 – the case here – this court's jurisdiction to grant that relief under s. 243 of the *BIA* is circumscribed, absent explicit language permitting the tax avoidance.

21. (It is acknowledged that in *Peakhill Capital* this limit on the court's jurisdiction did not find favour with the court – however, as noted, that decision is under appeal.)

### ***Insufficient Basis for an RVO***

22. If this court does find it has the jurisdiction to grant an RVO in this proceeding, then there remains no basis to exercise that jurisdiction and approve an RVO.

23. The Province agrees with the Receiver that the factors set out in *Harte Gold Corp (Re)* are relevant in considering whether to grant an RVO.<sup>15</sup>

- 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 viable alternative?
- 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?

24. Also relevant is the language of associated releases and whether there is any *bona fide* motivation for the RVO.<sup>16</sup>

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<sup>14</sup> *Yukon Zinc* at paras. 110 to 131

<sup>15</sup> *Harte Gold Corp (Re)*, 2022 ONSC 653 [***Harte Gold***] at para. 38

<sup>16</sup> *PaySlate 1* at para. 99

25. Applying the above factors leads to the conclusion that the court should not approve an RVO in the circumstances of this case.

**(a) The RVO not necessary in this Receivership**

26. The RVO here is not “necessary” within the meaning set out in the authorities. There is no evidence before the court that the Properties will not be sold absent the RVO structure. Indeed, the sole reason given for employing an RVO structure, and proceeding with a share sale of the Nominees, is that it avoids payment of PTT.

27. This contrasts with decisions such as *Quest University Canada*, where the RVO transaction was the only potential option to resolve the financial affairs of the debtor.<sup>17</sup>

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.

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. [Emphasis in original.]

28. Here, the absence of an RVO does not place this transaction in jeopardy.

**(b) No favourable economic result produced by RVO structure**

29. Nor does the RVO structure produce a more favourable economic result than would otherwise arise if the Properties are conveyed under a traditional vesting order.

30. The RVO structure is being proposed to avoid paying \$365,000 in PTT that would otherwise be payable to the Government of British Columbia pursuant to the *PTTA*.

31. The sole reason given for employing the RVO is to avoid a tax obligation. The structure is not necessary to preserve going concern value for the benefit of affected creditors.

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<sup>17</sup> *Quest University Canada (Re)*, 2020 BCSC 1883 [*Quest University Canada*] at paras. 158-159, leave to appeal dismissed, 2020 BCCA 364

**(c) The Province is worse off**

32. The Province, as stakeholder, is worse off under the RVO structure, in that it is expected to forgo \$365,000 in PTT that would otherwise be payable under a conventional transaction.

**(d) The consideration paid by the purchaser does not reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure**

33. There are no licenses, permits or other intangible assets being preserved under the RVO structure.

34. Typically, where an RVO is granted it is to preserve an ongoing business by allowing the transfer of agreements, permits, licenses or authorizations. See e.g. *Harte Gold* at paras. 71-75 (para. 71 excerpted – other similar authorities footnoted):<sup>18</sup>

The principal objective and benefit of employing the RVO approach in this case is the preservation of Harte Gold's many permits and licences necessary to conduct operations at the Sugar Loaf Mine. Under a traditional asset sale and AVO structure, the purchaser would 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. [Emphasis added.]

35. Here, this typical motivating factor is entirely absent.

**Releases**

36. As indicated in *PaySlate 1*, the scope of the releases sought under an RVO must also be considered by the court on any application to approve an RVO. In considering whether to exercise the discretion to approve RVO release provisions, courts have considered the following factors (termed the "**Lydian Factors**"): <sup>19</sup>

- 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;

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<sup>18</sup> see also *Quest University Canada* at paras. 160-161

<sup>19</sup> *Payslate 1* at para. 143; see also *Harte Gold* at paras. 78-86

- 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.

37. Applying the *Lydian* Factors, the releases proposed under the RVO are not reasonable and appropriate in the circumstances:

- a) not necessary: it is not suggested that an RVO, and the associated releases sought under that structure, are required to sell the Properties;
- b) released claims not rationally connected to transaction: the releases are not rationally connected to achieving the overall transaction – by way of example, they extend to former employees who have outstanding claims which persist post-closing under section 11 of the proposed RVO;
- c) plan can succeed without release provisions: there is no evidence to suggest a sale could not proceed without the proposed releases; and
- d) benefit of the release provisions: the release provisions are for the sole benefit of the Purchaser – they provide a \$365,000 benefit to the purchaser, by insulating the purchaser and those associated with it from payment of PTT – at the expense of the Province. The release provisions have no other benefit for creditors.

38. The nature and effect of the releases included in the RVO is thus a factor weighing against the court exercising its discretion to grant the RVO structure sought.

#### **PART 6: MATERIAL TO BE RELIED ON**

- 1. The pleadings and proceedings filed herein.
- 2. Such further and other material as counsel may advise.

The Province estimates that this application will take 2.5 hours.

The Province has not filed in this proceeding a document that contains an address for service.

The Province's address for service in this proceeding is:

Dennis James Aitken LLP  
800 – 543 Granville Street  
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**Attention: Owen James/Ray Power**

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Dated: October 24, 2023

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Counsel for His Majesty the King in Right of  
the Province of British Columbia  
Owen James / Ray Power  
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THIS APPLICATION RESPONSE is prepared and delivered by Owen James and Ray Power of the firm Dennis James Aitken LLP, whose place of business and address for service is 800 – 543 Granville Street, Vancouver, British Columbia, V6C 1X8. Telephone: 604-659-9479. Email: [ojames@djacounsel.com](mailto:ojames@djacounsel.com) and [rpower@djacounsel.com](mailto:rpower@djacounsel.com)