NO. VLC-S-S- S229506
VANCOUVER REGISTRY

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.

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CITATION: *Harte Gold Corp. (Re)*, 2022 ONSC 653
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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.

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Orlando M. Rosa and Gordon P. Acton for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)

Timothy Jones for the Attorney General of Ontario

HEARD: January 28, 2022

ENDORSEMENT

[1] This is a motion by Harte Gold for an approval and reverse vesting order involving the sale of Harte Gold's mining enterprise to a strategic purchaser (that is, an entity in the gold

mining business) and for an order extending the stay and expanding the Monitor's powers to include new entities to be created for the purposes of implementing Harte Gold's proposed restructuring. There was no opposition to the relief sought. All those who appeared at the hearing supported approval of the transaction.

[2] Following the conclusion of oral submissions on Friday, January 28, 2022, I issued the orders sought with written reasons to follow. These are the reasons.

Background

[3] Harte Gold is a public company incorporated under the *Business Corporations Act* (Ontario). Prior to January 17, 2022, its shares publicly traded on the Toronto Stock Exchange, Frankfurt Stock Exchange and over-the-counter. Harte Gold operates a gold mine located in northern Ontario within the Sault Ste. Marie Mining Division and approximately 30 km north of the town of White River. This mine, referred to as the Sugar Loaf Mine, produces gold bullion. Harte Gold has a total of 260 employees on payroll, as well as 19 employees retained through various agencies. Harte Gold's payroll obligations are current.

[4] Of some importance to the form of transaction proposed in this case, involving an approval and reverse vesting order (RVO), is the fact that Harte Gold has 12 material permits and licenses that are required to maintain its mining operations, 24 active work permits and licenses that allow the performance of exploration work on various parts of the Sugar Loaf property and many other forest resource licenses, fire permits and the like, all necessary in one way or another to Harte Gold's continued operations. Harte Gold also has 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The transfer of these permits and licenses etc. would involve a complex transfer or new application process of indeterminate risk, delay and cost.

[5] It is also important to note that Harte Gold is party to an Impact Benefits Agreement dated April 2018 between Harte Gold and Netmizaaggamig Nishnaabeg First Nation.

[6] Harte Gold has two primary secured creditors. They are: a numbered company (833) owned by Silver Lake Resources Limited (an Australian gold mine company). 833 is a very recent assignee of significant secured debt from BNPP; and, AHG Jersey Limited (AHG is part of the Appian group). Appian entities are also counterparties to a number of offtake agreements under which Harte Gold sells gold in exchange for prices determined by a pricing formula tied to the London bullion market. Orion is, similarly, a counterparty to additional offtake agreements. BNPP, following the assignment of its secured debt, has retained additional obligations in respect of certain hedging arrangements provided to Harte Gold. Harte Gold also has a number of trade and other unsecured creditors who are owed an estimated $7.5 million for pre-filing obligations and further amounts for services rendered post-filing.

[7] At the time of its initial application to the court, Harte Gold's assets were valued at $163.8 million. Its liabilities were valued at $166.1 million. On a balance sheet basis, therefore, Heart Gold was insolvent.

[8] Since about 2019, Harte Gold has been pursuing a number of measures to address a growing liquidity problem, a problem only exacerbated by the Covid-19 pandemic. Despite these efforts, in 2020 Harte Gold was obliged to seek agreement from its prime lender, BNPP, to defer debt payments and to seek a forbearance from enforcement of BNPP's security. In May 2021, Harte Gold initiated a strategic review of options to achieve the desired liquidity and to fund the acquisition of new capital. Harte Gold appointed a strategic committee of its board and, shortly thereafter, a special committee of independent directors. The special committee retained FTI as financial advisor (FTI was subsequently appointed Monitor by this Court) and developed a plan to attract new capital through a potential sale.

[9] This prefiling strategic process involved approaching over 250 potential buyers. 31 of these entities executed confidentiality agreements; 28 of those conducted due diligence through Harte Gold's virtual data room. Harte Gold received four nonbinding expressions of interest but, by the bid deadline in September 2021, no binding offers had been received.

[10] In the aftermath of this unsuccessful process, Silver Lake through 833 acquired BNPP's debt and advanced a proposal to acquire Harte Gold's operations by way of a credit bid and to provide interim financing in connection with any proceedings under the CCAA. An initial order under the CCAA issued from this Court on December 7, 2021.

[11] In the midst of this process, Harte Gold received a competing proposal to make a credit bid from Harte Gold's second secured creditor, Appian. As a result of these developments, Harte Gold resolved to conduct a further (albeit brief, given the extensive process that had just been completed) sale and investment solicitation process, this time with a stalking horse bid. Further competing proposals took place between Silver Lake and Appian over who would be the stalking horse bidder. As a result of this process, the stalking horse bid of Silver Lake was significantly improved. Appian was then content to let Silver Lake's credit bid form the basis of the SISP. I approved this process in an order dated December 20, 2021.

[12] The Monitor provided a new solicitation notice to a total of 48 known and previously unknown potential bidders (other than Silver Lake and Appian). None of the potentially interested parties signed a confidentiality agreement or requested access to the data room.

[13] Only one competing bid was received – a further credit bid from Appian with improved conditions over those proposed by Silver Lake. Ultimately, all parties agreed that the responding commitment from Silver Lake which was at least as favourable to stakeholders as the Appian bid would be, in effect, the prevailing and winning bid.

[14] This took the form of a Second Amended and Restated Subscription Agreement (SARSA) with 833, the actual purchaser. The improved terms were: (a) the assumption by the purchaser of Harte Gold's office lease at 161 Bay Street in Toronto; (b)(i) the proviso that

the $10 million cap on payment of cure costs and pre-filing trade creditors does not apply to the assumption of post-filing trade creditor obligations; and (ii) all amounts owing by Harte Gold to any of the Appian parties are subject to a settlement agreement between 833 Ontario, Silver Lake and Appian and excluded from the prefiling cure costs; and, (c) the undertaking to pay an additional cash deposit of US$1,693,658.72, equivalent to approximately 5% of the Appian indebtedness.

[15] In broad brush terms, the Silver Lake/833 purchase is structured as a reverse vesting order. The transaction will involve:

- the cancellation of all Harte Gold shares and the issue of new shares to the purchaser
- payment by the purchaser of all secured debt
- payment by the purchaser of virtually all prefiling trade amounts (estimated at $7.5 million but with a $10 million cap) and postfiling trade amounts
- certain excluded contracts and liabilities being assigned to newly formed companies which will, ultimately, be put into bankruptcy. The excluded contacts and liabilities include a number of agreements involving ongoing or future services in respect of which there is little if any money currently owed. They also include a number of contracts with Appian entities and Orion, both of which support approval of the transaction The emplyment contracts of four terminated executives will, however, be excluded liabilities, which will nullify the value of any termination claims. Notably, excluded liabilities does not include regulatory or environmental liabilities to any government authority
- retaining on the payroll all but four employees (the four members of the executive team whose employment contracts will be terminated), and
- releases, including of Harte Gold and its directors and officers, the Monitor and its legal counsel and Silver Lake and its directors and officers.

There is no provision for any break fee. Nor is there a request for any form of sealing order.

[16] I should add that the value of what the purchaser is paying for Harte Gold's business, including the secured debt, the pre and postfiling trade amounts, interim financing and the like, totals well over $160 million.

Issues

[17] There are three principal issues:

(1) Whether the proposed transaction should be approved, including the reverse vesting order transaction structure and the form of the proposed release;

(2) Whether the stay should be extended; and,

(3) Whether the Monitor's mandate should be extended to included additional companies (newcos) being incorporated for the purposes of executing the proposed transaction.

Analysis

[18] Section 11 of the CCAA confers jurisdiction on the Court in the broadest of terms: "the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances".

[19] Section 36(1) of the CCAA provides:

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

[20] Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. These include:

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

[21] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp,* 1991 CanLII 2727 (ONCA) for the approval of the sale of assets in an insolvency scenario:

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

see *Target Canada Co. (Re),* 2015 ONSC 1487, at paras. 14-17.

[22] The purchase transaction for which approval is being sought in this case does not provide for a sale of assets but, rather, provides for a "reverse vesting order" under which the purchaser will become the sole shareholder of Harte Gold and certain excluded assets, excluded contracts and excluded liabilities will be vested out to new companies incorporated for that purpose.

[23] In determining whether the transaction should be approved and the RVO granted, it is appropriate to consider:

(a) the statutory basis for a reverse vesting order and whether a reverse vesting order is appropriate in the circumstances; and,

(b) the factors outlined in s. 36(3) of the CCAA, making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction.

The Statutory Basis (Jurisdiction) for a Reverse Vesting Order

[24] The first reverse vesting sale transaction appears to have been approved by this Court in *Plasco Energy (Re),* (July 17, 2015), CV-15-10869-00CL in the handwritten endorsement of Justice Wilton-Siegel. The use of the reverse vesting order structure was not in dispute (indeed, in most of the cases, reported and otherwise, there has been no dispute). Wilton-Siegel J. found "the Court has authority under section 11 of the CCAA to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the CCAA insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise."

[25] A few dozen of these orders have been made since that time, mostly in a context where there was no opposition and no obvious or identified unfairness arising from the use of the RVO structure. The frequency of applications based on court approval of an RVO structure has increased significantly in the past few years.

[26] More recently, two reverse vesting orders have been approved in contested cases and been considered by appellate courts in Canada. I cite these two cases in particular because, being opposed and appealed, there tends to be a more in-depth analysis of the issues than is usually the case in the context of unopposed orders.

[27] In *Arrangement relatif à Nemaska Lithium Inc, 2020 QCCS 3218* at paras. 52 and 71 (leave to appeal to QCCA refused, *Arrangement relatif à Nemaska Lithium Inc,* 2020 QCCA 1488; leave to appeal to SCC refused, *Arrangement relatif à Nemaska Lithium Inc,* 2021 CarswellQue 4589), Justice Gouin of the Quebec Superior Court approved a reverse vesting transaction in the face of opposition by a creditor. Following a nine day hearing, Gouin J. reviewed the context of the transaction in detail and carefully analyzed the purpose and efficiency of the RVO in maintaining the going concern operations of the debtor companies. He also found that the approval of the RVO should be considered under s. 36 CCAA, subject to determining, for example:

- Whether sufficient efforts to get the best price have been made and whether the parties acted providently
- The efficacy and integrity of the process followed
- The interests of the parties, and
- Whether any unfairness resulted from the process.

Gouin J. considered that these criteria had been met and found the issuance of the RVO to be a valid exercise of his discretion, concluding that it would serve to maximize creditor recoveries while maintaining the debtor companies as a going concern and allowing an efficient transfer of the necessary permits, licences and authorizations to the purchaser.

[28] In denying leave to appeal, the Quebec Court of Appeal noted that the CCAA judge found that "the terms 'sell or otherwise dispose of assets outside the ordinary course of business' under subsection 36(1) of the CCAA should be broadly interpreted to allow a CCAA judge to grant innovative solutions such as RVOs on a case by case basis, in accordance with the wide discretionary powers afforded the supervising judge pursuant to section 11 CCAA, as recognized by the Supreme Court in *Callidus*": *Nemaska* QCCA at para 19.

[29] Similarly, in *Quest University Canada (Re)*, 2020 BCSC 1883, Justice Fitzpatrick of the British Columbia Supreme Court extensively reviewed the caselaw related to a CCAA court's authority to grant a reverse vesting order. Fitzpatrick J. found that the CCAA provided sufficient authority to grant the reverse vesting order being sought, which was consistent "with the remedial purposes of the CCAA" and consistent with the Supreme Court of Canada's ruling on CCAA jurisdiction in *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10. She found, therefore, that the issue in each case is not whether the court has sufficient jurisdiction but whether the relief is "appropriate" in the circumstances and stakeholders are treated as fairly and reasonably as the circumstances permit.

[30] In *Quest*, the debtor was in the process of putting forward a plan of compromise under the CCAA. It encountered resistance from an unsecured creditor whose vote could potentially have prevented the necessary creditor approval of the plan. The debtor revised its approach, deleting all conditions precedent requiring creditor and court approval and proceeded with a motion for the approval of an RVO to achieve what it was really after; that is, a sale of certain assets to a new owner with Quest continuing as a going concern academic institution.

[31] Fitzpatrick J. relied on *Callidus* to the effect that:

- Courts have long recognized that s. 11 of the CCAA signals legislative endorsement of the "broad reading of CCAA authority developed by the jurisprudence". On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only

by restrictions set out in the CCAA itself, and the requirement that the order made be "appropriate in the circumstances"

- the CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company"

- Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no CCAA provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the CCAA context

- The exercise of the discretion under s. 11 must further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence

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

[32] The SCC in *Callidus* made an important point in the context of the limits of broad discretion; all discretion has limits and its exercise under s. 11 must accord with the objectives of the CCAA and other insolvency legislation in Canada. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. Further, the discretion under s. 11 must also be exercised in furtherance of three baseline considerations: (a) that the order sought is appropriate in the circumstances, and (b) that the applicant has been acting in good faith and (c) with due diligence.

[33] Ultimately, Fitzpatrick J. held that, in the complex and unique circumstances of that case, it was appropriate to exercise her discretion to allow the RVO structure. Quest sought this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. She considered the balance between the competing interests at play and concluded that the proposed transaction was unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group.

[34] The British Columbia Court of Appeal refused leave to appeal, concluding that the appeal was not "meritorious", also noting that reverse vesting orders had been granted in other contested proceedings, namely *Nemaska*. The BCCA also stated that the reverse vesting order granted by Fitzpatrick J. "reflect[ed] precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising CCAA proceedings": *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364.

[35] It is worthy of note that, in both *Nemaska* and *Quest*, the *bona fides* of the objectors were front and centre in the judicial analysis and, in both cases, the motivations and objectives of the objectors were found suspect and inadequate.

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

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

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

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

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

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

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

[39] With this in mind, I will turn to the enumerated s. 36(3) factors. To the extent there are RVO specific issues of concern apart from those enumerated in s. 36(3), I will also address those in the following section of my analysis.

The Section 36 Factors in the RVO Context

Reasonableness of the Process Leading to the Proposed Sale

[40] Between the pre-filing strategic review process and the court approved SISP, the business and assets of Harte Gold have been extensively marketed on a global basis. While the SISP was subject to variation from the format contemplated in my earlier order, the ability of the applicant, in conjunction with the Monitor, to vary the process was already established in that order. I find, in any event, that the adjustments made were appropriate in the circumstances, given there were no new bidders and the only offers came from the two competing secured creditors who had already been extensively involved in the process and whose status, interests and objectives were well known to the applicant and the Monitor.

[41] Prior to its appointment as Monitor, FTI was intimately involved at all stages of the strategic review process, including the implementation of the pre-filing marketing process and the negotiation of the original proposed subscription agreement that was executed prior to the commencement of the CCAA proceedings and subsequently replaced by the stalking horse bid and the SARSA.

[42] Following the commencement of the CCAA proceedings, the Monitor was involved in the negotiations that resulted in the execution of the stalking horse bid and the SARSA. In addition, the Monitor has overseen the implementation of the SISP and is satisfied that it was carried out in accordance with the SISP procedures, including the Monitor's consent to the amendment of the SISP procedures to cancel the auction as unnecessary and accept the SARSA as the best option available.

[43] The Monitor's opinion is that the process was reasonable, leading to the best outcome reasonably available in the circumstances.

[44] I am satisfied that the sales process was reasonable. The transaction now before the Court was the culmination of approximately seven months of extensive solicitation efforts on the part of both Harte Gold and FTI as part of the prefiling strategic process and the SISP.

[45] Harte Gold and FTI broadly canvassed the market by contacting 241 parties regarding their potential interest in acquiring Harte Gold's business and assets. This process ultimately culminated in initial competing bids from Silver Lake and Appian and, subsequently, additional competing bids from both entities as part of the SISP. The competitive tension in this process resulted in material improvements for stakeholders on both occasions.

Comparison with Sale in Bankruptcy

[46] The Monitor has considered whether the completion of the transaction contemplated by the SARSA would be more beneficial to creditors of the applicant and stakeholders generally than a sale or disposition of the business and assets of Harte Gold under a bankruptcy. The Monitor is unambiguously of the view that the SARSA transaction is the vastly more beneficial option.

[47] The SISP has shown that the SARSA represents the highest and best offer available for Harte Gold's business and assets. The Monitor is satisfied that the approval and completion of the transactions contemplated by the SARSA are in the best interests of the creditors of Harte Gold and its stakeholders generally.

[48] In addition to anything else, a bankruptcy would jeopardize ongoing operations and the permits and licences necessary to maintain such operations. A sale in bankruptcy would delay and, again, jeopardize the approval and closing of the proposed transaction as it would be necessary to first assign Harte Gold into bankruptcy or obtain a bankruptcy order, convene a meeting of creditors, appoint inspectors and obtain the approval of the inspectors for the transaction prior to seeking a more traditional AVO or an RVO. Additional costs would also be incurred in undertaking those steps. Silver Lake would have to continue to advance additional funds to finance ongoing operations during this extended period. There is no indication it would be willing to do so. In any event, requiring such a process would fundamentally change the value proposition the purchaser has relied upon and is willing to accept.

[49] Taking all this into account, a sale or disposition of the business and assets of the applicant in a bankruptcy would almost certainly result in a lower recovery for stakeholders and would not be more beneficial than closing the RVO transaction in the CCAA proceedings.

Consultation with Creditors

[50] Harte Gold's major creditors are Silver Lake, the Appian parties and BNPP. BNPP still has potential claims of approximately $28 million in respect of its hedge agreements. Silver Lake has claims of approximately $95 million in respect of the DIP facility and the first lien credit facilities it acquired from BNPP. The Appian parties have claims of approximately US$34 million in respect of amounts owing under the Appian facility and additional potential claims in respect of obligations under royalty and offtake agreements.

[51] BNPP was consulted throughout the strategic review process and has executed a support agreement with the purchaser. In addition, as previously described, the purchaser and the Appian Parties have been extensively involved in the SISP.

[52] While there is no evidence of consultations with unsecured creditors, I do not regard that as a material deficiency given that virtually all creditors, secured and unsecured alike, are going to be paid in full under the terms of the SARSA.

[53] The Monitor is of the view that the degree of creditor consultation has been appropriate in the circumstances. The Monitor does not consider that any material change in the outcome of efforts to sell the business and assets of the Applicant would have resulted from additional creditor consultation.

[54] I find, on the evidence, that the Monitor's assessment of this factor is well supported and correct.

The Effect of the Proposed Sale on Creditors and Other Interested Parties

[55] The proposed transaction affords the following benefits to the creditors and to stakeholders generally:

(a) the retention and payment in full of the claims of almost all creditors of Harte Gold;

(b) continued employment for all except four of the Harte Gold's employees;

(c) ongoing business opportunities for suppliers of goods and services to the Sugar Loaf Mine; and

(d) the continuation of the benefits of the existing Impact Benefits Agreement with Netmizaaggamig Nishnaabeg First Nation.

[56] The Monitor's opinion is that the effect of the proposed transaction is overwhelming positive for the vast majority of Harte Gold's creditors and other stakeholders apart (as discussed below) from the shareholders who have no reasonable economic interest at this point.

[57] Unlike *Quest*, this is not a case in which the RVO is being used to thwart creditor opposition. Indeed, the evidence is that almost all creditors, secured and unsecured, will be paid in full. To the extent there might be concerns that an RVO structure could be used to thwart creditor democracy and voting rights, those concerns are not present here. This is not a traditional "compromise" situation. It is hard to see how anything would change under a creditor class vote scenario because almost all of the creditors are being paid in full.

[58] The evidence is that there is no creditor being placed in a worse position, because of the use of an RVO transaction structure, than they would have been in under a more traditional asset sale and AVO structure (or, for that matter, under any plausible plan of compromise).

[59] Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.

[60] The evidence of Harte's financial problems and balance sheet insolvency, the unsuccessful prefiling strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.

[61] Under s. 186(1) of the OBCA, "reorganization" includes a court order made under the *Bankruptcy and Insolvency Act* or an order made under the *Companies Creditors Arrangement Act* approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.

[62] Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.

[63] Section 36(1) of the CCAA contemplates that despite any requirement for shareholder approval, the court may authorize a sale or disposition out of the ordinary course even if shareholder approval is not obtained. While, again, s. 36(1) is concerned with asset sales, the underlying logic of this provision applies to an assessment of cancellation of shares as well. In this case, there is no prospect of shareholder recovery on any realistic scenario.

[64] Equity claims are subject to special treatment under the CCAA. Section 6(8) prohibits court approval of a plan of compromise if any equity is to be paid before payment in full of all claims that are not equity claims. Section 22(1) provides that equity claimants are prohibited from voting on a plan unless the court orders otherwise. In short, shareholders have no economic interest in an insolvent enterprise: *Sino-Forest Corporation (Re)*, 2012 ONSC 4377, paras. 23-29. In circumstances like Harte Gold's, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders: *Stelco Inc. (Re),* 2006 CanLII 4500 at para. 11. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances.

[65] Taking all this into account, I find that the effect of the transaction on creditors and stakeholders is overwhelmingly positive and the best outcome reasonably available in the circumstances.

Fairness of Consideration

[66] Harte Gold's business and assets have been extensively marketed both prior to and during the CCAA proceedings. At the conclusion of the SISP, two bids were available, which were equivalent in all material respects and represented the highest and best offers received. As described earlier, all parties concurred that the Silver Lake-sponsored SARSA should be determined to be the successful bid. As also described above, the closing of the SARSA transaction will provide a vastly superior recovery for creditors than would a liquidation of Harte Gold's assets in bankruptcy. Based on the market, therefore, the consideration must be considered fair and reasonable.[1]

[67] A further concern with an RVO transaction structure such as this one could be whether, in effect, a purchaser making a credit bid might be getting something (i.e., the licences and permits) for nothing (i.e., the licences and permits were not subject to the creditor's security). It is possible that in a bankruptcy, for example, the licences and permits might have no value. The evidence here is that the purchaser is paying more than Harte Gold would be worth in a bankruptcy. The evidence is also that the purchaser is paying considerably more than just the value of the secured debt. This includes cure costs for third party trade creditors and DIP financing to keep the Mine operational – both payments being made to bring about the acquisition of the Mine as a going concern.

[68] It is true that no attempt has been made to put an independent value on the transfer of the licences and permits. However, any strategic buyer (Silver Lake is a strategic buyer and acquired the BNPP debt for this purpose) would need the licences and permits. The results of the prefiling strategic process and the SISP constitutes evidence that no one else among the universe of potential purchasers of an operating gold mine in Northern Ontario was willing to pay more than Silver Lake was willing to pay. In the circumstances, I do not think it could be seriously suggested that Silver Lake is getting "something" for "nothing".

[69] The Monitor is satisfied that the consideration is fair in the circumstances. I agree with the Monitor's assessment for the reasons outlined above.

Other Considerations Re Appropriateness of RVO vs. AVO

[70] As noted, Harte Gold has twelve material permits and licenses that are required to maintain its mining operations, as well as twenty-four active work permits and licenses that allow the performance of exploration work and many other forest resource licences and fire permits.

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

[1] The total value of the consideration is, perhaps coincidentally, also roughly equivalent to the value of Harte Gold's assets as shown in its audited financial statements in the last full year prior to the commencement of these proceedings.

have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This is a process that would necessarily involve risk, delay, and cost. The RVO sought in this case achieves the timely and efficient preservation of the necessary licences and permits necessary for the operations of the Mine.

[72] It is no secret that time is not on the side of a debtor company faced with Harte Gold's financial challenges. It is also relevant that the purchaser has agreed to provide DIP financing up to $10.8 million and substantial cure costs of pre and post filing trade obligations. This is all financing required to be able to continue operations as a going concern at the Mine post closing and to fund the CCAA process.

[73] The position of the purchaser is, not unreasonably, that it will not both continue to fund ongoing operations and the CCAA process and undertake a process of application to relevant government agencies for transfers of the Harte Gold licenses and permits (or, if necessary, for new ones) with all of the risks and uncertainties of possible adverse outcomes and indeterminant delays and costs associated with such a process. The RVO structure will enable the transaction to be completed efficiently and expeditiously, without exposure to these material risks, delays and costs.

[74] The Monitor supports the use of the RVO transaction structure. The Monitor has also pointed out that the applicant holds some 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The reverse vesting structure avoids the need to amend the various registrations to reflect a new owner, which would add more cost and delay if the proposed purchase transaction was to proceed through a traditional asset purchase and vesting order.

[75] In addition, Harte Gold has a significant number of contracts that will be retained under the SARSA. Again, the RVO transaction structure will avoid potentially significant delays and costs associated with having to seek consent to assignment from contract counter-parties or, if consents could not be obtained, orders assigning such contracts under s. 11.3 of the CCAA. The Monitor has also pointed out that under the SARSA and the RVO, the purchaser will be required to pay applicable cure costs in respect of the retained contracts which has been structured in substantially the same manner as contemplated by s. 11.3(4) of the CCAA if a contract was assigned by court order.

[76] For all these reasons, I accept that the proposed RVO transaction structure is necessary to achieve the clear benefits of the Silver Lake purchase and that it is appropriate to approve this transaction in the circumstances.

Conclusion on RVO/Section 36 Issues

[77] In all the circumstances, I find that the RVO sought in the circumstances of this case is in the interests of the creditors and stakeholders in general. I consider the RVO to be appropriate in the circumstances. The RVO will: provide for timely, efficient and impartial resolution of Harte Gold's insolvency; preserve and maximize the value of Harte Gold's

assets; ensure a fair and equitable treatment of the claims against Harte Gold; protect the public interest (in the sense of preserving employment for well over 250 employees as well as numerous third party suppliers and service providers and maintaining Harte Gold's commitments to the First Nations peoples of the area); and, balances the costs and benefits of Harte Gold's restructuring or liquidation.

Release

[78] Harte Gold seeks a Release which includes the present and former directors and officers of Harte Gold and the newcos, the Monitor and its legal counsel, and the purchaser and its directors, and officers. The proposed Release covers all present and future claims against the released parties based upon any fact, matter of occurrence in respect of the SARSA transactions or Harte Gold and its assets, business or affairs, except any claim for fraud or willful misconduct or any claim that is not permitted to be released under s. 5.1(2) of the CCAA.

[79] CCAA courts have frequently approved releases, both in the context of a plan and in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of the parties, directors, officers, monitors, counsel, employees, shareholders and advisors.

[80] I find that the requested Release is reasonable and appropriate in the circumstances. I base my decision on an assessment of following factors taken from *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54. As is often the case in the exercise of discretionary powers, it is not necessary for each of the factors to apply for the release to be approved.

[81] Whether the claims to be released are rationally connected to the purpose of the restructuring: The claims released are rationally connected to Harte Gold's restructuring. The Release will have the effect of diminishing claims against the released parties, which in turn will diminish indemnification claims by the released parties against the Administration Charge and the Directors' Charge. The result is a larger pool of cash available to satisfy creditor claims. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Company's restructuring.

[82] Whether the releasees contributed to the restructuring: The released parties made significant contributions to Harte Gold's restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of Harte Gold were instrumental in the conduct of the prefiling strategic process, the SISP and the continued operations of Harte Gold during the CCAA proceedings. With a proposed sale that will maintain Harte Gold as a going concern and permit most creditors to receive recovery in full, these CCAA proceedings have had what must be considered a "successful" outcome for the benefit of Harte Gold's stakeholders. The released parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of a release.

[83] Whether the Release is fair, reasonable and not overly broad: The Release is fair and reasonable. Harte Gold is unaware of any outstanding director claims or liabilities against its directors and officers. Similarly, Harte Gold is unaware of any claims against the advisors related to their provision of services to Harte Gold or to the purchaser relating to Harte Gold or these CCAA proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow. Regulatory or environmental liabilities owed to any government authority have not been disclaimed and the language of the Release was specifically negotiated with the Ministry of Northern Development and Mines to preserve those identified obligations. Further, the Release carves out and preserves claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced and will allow Harte Gold and the released parties to move forward with the transaction and to conclude these CCAA proceedings.

[84] Whether the restructuring could succeed without the Release: The Release is being sought, with the support of Silver Lake and the Appian parties (the most significant stakeholders in these CCAA proceedings) as it will enhance the certainty and finality of the transaction. Additionally, Harte Gold and the purchaser both take the position that the Release is an essential component to the transaction.

[85] Whether the Release benefits Harte Gold as well as the creditors generally: The Release benefits Harte Gold and its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification, thus minimizing further claims against the Administration Charge and the Directors' Charge.

[86] Creditors' knowledge of the nature and effect of the Release: All creditors on the service list were served with materials relating to this motion. Harte Gold also made additional efforts to serve all parties with excluded claims under the transaction. Additionally, the form of the Release was included in the draft approval and reverse vesting order that was included in the original Application Record in these CCAA proceedings. All of this provided stakeholders with ample notice and time to raise concerns with Harte Gold or the Monitor. No creditor (or any other stakeholder) has objected to the Release. A specific claims process for claims against the released parties in these circumstances would only result in additional costs and delay without any apparent corresponding benefit.

Extension of the Stay

[87] The current stay period expires on January 31, 2022. Under s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.

[88] Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the Silver Lake transaction, while at the same time preserving the status quo and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.

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

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

Expansion of Monitor's Powers

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

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

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

Conclusion

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

Penny J.

Date: 2022-02-04

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***New Skeena Forest Products Inc., Re v. Don Hull & Sons Contracting Ltd.,*** 2005 BCCA 154

Date: 20050318
Docket: CA032519; CA032539; CA032528

Docket: CA032519

Between:

In the Matter of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36

And

In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended

And

**In the Matter of New Skeena Forest Products Inc.
Orenda Forest Products Ltd., Orenda Logging Ltd., and
9753 Acquisition Corporation
Kitwanga Lumber Co. Ltd.**

Respondents
(Petitioners)

And

**Don Hull & Sons Contracting Ltd., and
K'Shian Logging & Construction Ltd.**

Appellants
(Respondents)

- and -

Docket: CA032539

Between:

**In the Matter of the Bankruptcies of
New Skeena Forest Products Inc., Orenda Forest Products Ltd.,
Orenda Logging Ltd. and 9753 Acquisition Corporation**

Respondents
(Petitioners)

And

Don Hull & Sons Contracting Ltd. and K'Shian Logging & Construction Ltd.

Appellants
(Respondents)

- and -

Docket: CA032528

Between:

In the Matter of the Bankruptcies of New Skeena Forest Products Inc., Orenda Forest Products Ltd., Orenda Logging Ltd., and 9753 Acquisition Corporation

Respondents
(Petitioners)

And

Main Logging Ltd.

Appellant
(Respondent)

Before: The Honourable Madam Justice Southin
The Honourable Mr. Justice Braidwood
The Honourable Mr. Justice Oppal

P. Voth, Q.C. and M.S. Oulton	Counsel for the Appellants Don Hull & Sons Contracting Ltd. and K'Shian Logging & Construction Ltd.
R.A. Millar	Counsel for the Respondents Ernest & Young Inc.
F.M. Kirchner	Counsel for the Respondents Coast T'simshian Resources
S.B. Jackson	Counsel for the Appellant Main Logging
R. Leong	Counsel for the Attorney General of Canada

D.J. Hatter	Counsel for H.M.T.Q. in Right of British Columbia
S.R. Ross	Counsel for the Intervenor Truck Loggers Association
Place and Date of Hearing:	Vancouver, British Columbia February 17, 2005
Place and Date of Judgment:	Vancouver, British Columbia March 18, 2005

Written Reasons by:
The Honourable Mr. Justice Braidwood

Concurred in by:
The Honourable Mr. Justice Oppal

Reasons Concurring in Dismissing the Appeal:
The Honourable Madam Justice Southin (Page 17, Paragraph 35)

Reasons for Judgment of the Honourable Mr. Justice Braidwood:

[1] This is an appeal from an order of Brenner C.J.S.C. in which he vested all assets of New Skeena Forest Products Inc. ("New Skeena") in the court-appointed receiver of New Skeena, Ernst & Young (the "Receiver"), free and clear of the interests of all creditors and contractors.

[2] There are two main issues in this case. First, there is a question of the relationship between the replaceable contract scheme under the ***Forest Act***, R.S.B.C. 1996, c. 157, which is intended to give financial security to contractors in the forest industry, and bankruptcy proceedings. Specifically, the appeal concerns the rights of the appellant forestry contractors to continue their harvesting contracts on Tree Farm Licence 1 ("TFL-1") after a sale by the Receiver of the TFL. Second, there is an issue of the power of the Receiver to disclaim contracts like the contracts held by the contractor appellants.

FACTS

[3] The continuing saga of Skeena Forest Products is well known in this province, and indeed in these courts. The respondent New Skeena, the newest corporate incarnation of Skeena Cellulose Inc., after several reorganization attempts filed for bankruptcy in August 2004. Subsequently, a court appointed the Receiver in September 2004 and the Receiver thereafter commenced liquidating New Skeena's assets. The appellants, Don Hull & Sons Contracting Ltd. and K'Shian Logging and Construction Ltd., had contracts with New Skeena under which they harvested trees from TFL-1. TFL-1 is a forest licence granted by the Province to New Skeena under

which New Skeena has the exclusive harvesting rights over certain lands around Terrace. The TFL is a significant asset of the company.

[4] In November 2004, the Receiver entered into an asset purchase agreement for TFL-1 with the respondent Coast Tsimshian Resources Limited Partnership ("Coast Tsimshian"). The agreement is contingent on Coast Tsimshian taking TFL-1 free and clear of any obligations to the appellants under the replaceable contracts. In the court below, Chief Justice Brenner found the Coast Tsimshian offer for TFL-1 "highly favourable". Indeed, none of the other offers made to the Receiver came close to the Coast Tsimshian offer. The other offers also required cancellation of the appellants' replaceable contracts.

[5] The replaceable forest licence scheme is set out in the ***Forest Act*** and ***Timber Harvesting Contract and Subcontract Regulation***, B.C. Reg. 22/1996 [***Timber Harvesting Regulation***]. Chief Justice Brenner described the replaceable forest licence scheme at paragraph 13 of his reasons for judgment. According to his Lordship:

> The essential policy behind this regime is that it imposes an obligation on holders of replaceable licences such as TFL-1 to harvest a proportion of the timber from the licence through contractors that have entered into these replaceable contracts. The replaceable contract is, in essence, a contract that will continue so long as the contractor's performance under the contract is satisfactory. Provided that continues to be the case, the contractor is entitled to receive replacement contracts from the licence holder under substantially similar terms for as long as the licence subsists.

[6] On 2 June 2004, the Province amended the ***Timber Harvesting Regulation*** to remove the requirement that future contracts under a replaceable licence must

also be replaceable. However, the amendment also grandfathered any replaceable contracts, such as the appellants', in existence on the date of the amendments. In addition, the amendments added s. 12(4) to the regulation. Section 12(4) reads:

> If a replaceable contract has been terminated by a licence holder for default by the contractor, that licence holder must enter into one or more replaceable contracts with other contractors, which contractors must in aggregate specify an amount of work equal to or greater than the amount of work specified in the terminated contract.

The appellants attached much significance to this addition to the regulation both in this Court and in the court below.

TRIAL JUDGMENT

[7] In his reasons for judgment, Chief Justice Brenner noted that a court-appointed liquidator is entitled to disclaim executory contracts, and persons who have contracted with the bankrupt thereafter have a claim in the bankruptcy for damages. He observed that the court-appointed receiver must have regard to equitable considerations when deciding whether to disclaim a contract, and a court considering an application to transfer assets to a receiver must also weigh equitable considerations when deciding whether to transfer assets to a receiver free of contractual obligations. His Lordship then reviewed the equitable considerations supporting the respective positions of the contractors and the Receiver. The appellants appear to take no issue with his weighing of the equities.

[8] Regarding the effect of the June 2004 regulatory amendments, Chief Justice Brenner considered the key question was whether the regulatory amendment

conferred a statutory right or a right greater than a simple contractual right for the benefit of the appellants. In his view, the amendments did not, with one proviso. Under s. 12(4) of the ***Timber Harvesting Regulation***, there is a new statutory right in the event of termination because of default. However, as contractor default was not in issue in the case before him, his Lordship was not of the view that the regulation created an *in rem* or proprietary right that attached to the tree farm licence itself or would run with the tree farm licence in the event of a bankruptcy.

ANALYSIS

[9] The appellants argue in this Court that Chief Justice Brenner erred first in finding the ***Forest Act*** and the ***Timber Harvesting Regulation*** did not give rise to an ongoing statutory duty on the part of New Skeena to enter into replaceable contracts unless the contractor is terminated for cause; and, second, in finding that the ***Timber Harvesting Regulation*** did not create an *in rem* or proprietary right that attaches to the tree farm licence and runs with the licence in bankruptcy.

[10] In the appellants' submission, forest contractors have a crystallized statutory right because under the legislation licencees must use replaceable contracts for at least 50 per cent of their harvesting, must re-issue replaceable contracts on their termination or expiry, and must ensure replaceable contracts are offered on substantially the same terms and conditions as a contract they replace. According to the appellants, the addition of s. 12(4) to the regulation further clarifies that the obligation to enter into a replacement contract is not personal to the licence holder, but rather integral to the licence itself.

[11] On the other hand, both respondents say an earlier decision of this Court involving Skeena and other logging contractors with replaceable contract rights, ***Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*** (2003), 13 B.C.L.R. (4th) 236, 2003 BCCA 344, is binding on this Court. In ***Clear Creek***, which involved the issue of Skeena's ability to terminate replaceable contracts during a reorganization under the ***Companies Creditor Arrangement Act***, Madam Justice Newbury concluded that the elimination of the contractors' replaceable contract rights did not amount to overriding the licence-holder's statutory obligation to replace the contracts, and that accordingly, in approving an arrangement in which the debtor corporation terminated a replaceable logging contract, a court did not override provincial legislation. (The appellants, of course, argued vigorously that ***Clear Creek*** could be distinguished for several reasons, notably because it concerned a reorganization rather than a bankruptcy.)

[12] The respondents also argue that nothing in the 2004 amendments elevated the rights enjoyed by the appellants from the contractual rights described by Madam Justice Newbury to statutory rights claimed by the appellants.

[13] The intervenor Truck Loggers Association submits that allowing the termination of replaceable contract rights during a bankruptcy will reduce the number of replaceable contracts in the province, and thus undermine an important protection against financial uncertainty for logging contractors. It argues that the 2004 amendments were intended to maintain a province-wide pool of replaceable contracts except where they are cancelled pursuant to specific provisions of the

legislation, and that even if this Court does not find the appellants' replaceable contracts must be assumed by the purchaser, the new licence holder for TFL-1 should be obligated to replace the appellants' contracts with other new replaceable contracts.

[14] After considering the parties' submissions on the issue of the nature of the contractors' replaceable contract rights, I agree in substance with Chief Justice Brenner's reasons. I see no error in principle in what he has said on the matter. In addition, I find these comments of Mr. Justice Thackray, who was then a judge of the Supreme Court, in the context of an earlier reorganization by New Skeena, persuasive:

> I do not accept that allowing the petitioner to terminate renewable contracts is a striking down of provincial legislation. I mentioned several times to Mr. Ross that I could and do go so far as to find that there is legislat[ive] involvement in replaceable contracts under the *Forest Act*. However, I cannot accede to the position taken by Mr. Ross that these contracts attain some classification that makes them almost statutory contracts and thereby subject to some different rule of the law than general commercial contracts....

(See ***In the Matter of the Companies' Creditors Arrangement Act*** *and* ***In the Matter of Repap British Columbia Inc. et al.*** (11 June 1997), Vancouver Registry A970588 (B.C.S.C.), at para. 7). In my view, there is nothing in the recent amendments that changes this basic proposition.

[15] However, the Intervenor raises another question, which is the power of the Receiver to disclaim contracts like those at issue in this case. It submits that as there is no statutory power for trustees to disclaim contracts, there is no such power in the

Receiver. The Intervenor relies on a decision of Donald J., as he then was, in ***Re Erin Features #1 Ltd.*** (1993), 15 C.B.R. (3d) 66 (B.C.S.C.) [***Erin Features***]. In ***Erin Features***, Donald J. "[a]ssumed without deciding that a trustee in bankruptcy generally possesses a power to disclaim" (at para. 3). However, he observed that a trustee's power to disclaim is only "weakly supported" by *dicta* in Canadian authorities (at para. 4) and that the issue was "fraught with difficulty" (at para. 6).

[16] However, Ernst & Young in this case is not a trustee, but rather a court-appointed receiver, and the situation is somewhat different in such a case. In a recent decision of the Alberta Court of Queen's Bench ***Bank of Montreal v. Scaffold Connection Corp.***, 2002 ABQB 706, Wachowich C.J.Q.B., in considering whether to grant a declaration to a receiver-manager that certain seating equipment would vest in the receiver free and clear of claims by a secured creditor, observed at para. 11:

> The law is clear to the effect that in a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor: *Re Bayhold Financial v. Clarkson* (1991), 10 C.B.R. (3d) 159 (N.S.C.A.), Bennett on Receivership, 2d ed. (Toronto: Carswell, 1999) at 169, 341.

[17] Frank Bennett in his text, *Bennett on Receiverships*, 2d ed (Toronto: Carswell, 1999) at 341 writes:

> In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor.... However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract than terminating it or that the receiver breached the duty by dissipating

> the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court. The debtor remains liable for any damages as a result of the breach.

[18] I also observe that in ***Erin Features***, Donald J. did not appear to take issue with the assertion of the applicant trustee in that case that "a receiver... can confidently be said [to] possess the right to disclaim an executory contract" (at para. 6).

[19] In another leading case, ***Bayhold Financial Corp. v. Clarkson*** (1991), 108 N.S.R. (2d) 198, 10 C.B.R. (3d) 159 (N.S.C.A.), the Nova Scotia Court of Appeal considered the content of the order appointing the receiver determinative of the receiver's powers, and rejected the proposition that a court cannot approve the repudiation of contracts entered into by a debtor prior to the receiver's appointment.

[20] The powers of the Receiver in this case are set out in the appointment order of 20 September 2004, in which Brenner C.J.S.C. included in clause 14, *inter alia*:

> The Receiver be and it is hereby authorized and empowered, if in its opinion it is necessary or desirable for the purpose of receiving, preserving, protecting or *realizing upon the Assets* or any part or parts thereof, to do all or any of the following acts and things with respect to the assets, forthwith and from time to time, until further or other order of this Court:
>
> * * *
>
> (c) *apply for any vesting Order* or Orders which may be necessary or desirable in the opinion of the Receiver in Order *to convey the Assets or any part or parts thereof to a purchaser or purchasers thereof free and clear of any security, liens or encumbrances* affecting the Assets....
>
> [Emphasis added.]

In my view, this clause is the end of the matter. The court's order contemplates a power in the Receiver to apply to court for a vesting order to convey the assets to a purchaser free and clear of the interests of other parties. That is what happened in this case, and no serious challenge was mounted to the equitable considerations Chief Justice Brenner took into account when deciding whether to grant the vesting order. It is conceivable there may be an issue regarding whether the replaceable contracts fall within the bounds of clause 14(c), but as no argument was advanced on this ground, I do not think it necessary to address the issue.

[21] Although it is not necessary for me to decide for the purposes of this case, in light of the Intervenor's submissions on the confusion in the law regarding the power of trustees to disclaim contracts, and with a view to clarifying the matter, I make these observations.

[22] There is no provision in the ***Bankruptcy & Insolvency Act***, R.S.C. 1985, c. B-3 that gives a trustee power to disclaim contracts. The ***Act*** only addresses those powers that may be exercised with permission of inspectors. Thus, under s. 30(1)(k) of the ***Bankruptcy & Insolvency Act*** the trustee may disclaim a "lease of, or other temporary interest in, any property of the bankrupt".

[23] The power to disclaim contracts has been included in statutes in other common-law jurisdictions. Notably, s. 23 of the English ***Bankruptcy Act, 1869*** (32 & 33 Vict.), c. 71 first gave trustees the power to disclaim contracts of the bankrupt. The modern English statute, ***Insolvency Act 1986*** (U.K.), 1986, c. 45, s. 315 confers the same right upon a trustee. Similarly, in both Australia (***Bankruptcy Act***

1966**,** (Cth.), s. 133) and the United States (11 U.S.C. § 365) there is a statutory power for trustees to disclaim contracts.

[24] However, the power of trustees to disclaim contracts has its roots in the English law where there was a common-law power in assignees (who took control of debtor property prior to use of trusteeships in bankruptcy) to disclaim contracts. There is a weight of authority supporting the existence of such a power prior to the enactment of the ***1869 Act***.

[25] In his 1922 text, Lewis Duncan, in *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922) at 304-5, cites several venerable English cases for the proposition that:

> There is no section in the Canadian *Act* corresponding with section 54 of the English *Act* [earlier s. 23] which gives the trustee the right to disclaim onerous contracts or property. The law under *The* [Canadian] *Bankruptcy Act* will be the same as the law in England before the Act of 1869 was passed, with the exception that section 44 of the *Bankruptcy Act* gives a right of proof against the estate of the debtor with respect to contracts entered into before the date of the receiving order or authorized assignment. The law under the *Bankruptcy Act* would seem to be that a trustee may at his option perform the contract into which the bankrupt has entered or he may abandon it.

[26] In ***In re Sneezum ex parte Davis*** (1876), 3 Ch. D. 463 (C.A.) at 472, James L.J. said that at common law, prior to the passing of the ***1869 Act***, assignees in bankruptcy had the option of deciding whether or not to carry on with performance of an executory contract.

[27] To similar effect, in ***Gibson v. Carruthers*** (1841), 8 M. & W. 321 at 326-27, a case in which the assignees wished to assume a contract under which the defendant, who had contracted with the bankrupt, had agreed to deliver 2000 quarters of linseed to a charter ship, Gurney B. said:

> ...it is clear that assignees of a bankrupt are entitled to the benefit of all contracts entered into by the bankrupt and which are in fieri at the time of the bankruptcy. They may elect to adopt or reject such contracts, according as they are likely to be beneficial or onerous to the estate.

[28] In Canada, the Ontario Supreme Court Appellate Division in ***Re Thomson Knitting Company***, [1925] 2 D.L.R. 1007 (Ont. S.C. (A.D.) recognized such a power; see also ***Denison v. Smith*** (1878), 43 U.C.R. 503 (Q.B.); ***Stead Lumber Co. v. Lewis*** (1958), 37 C.B.R. 24, 13 D.L.R. (2d) 34 at 43 (Nfld. S.C.); ***Re Salok Hotel Co.*** (1967), 11 C.B.R. (N.S.) 95, 66 D.L.R. (2d) 5 at 8 (Man. Q.B.).

[29] In more recent times, L.W. Houlden & G.B. Morowetz in their text *Bankruptcy and Insolvency Law of Canada*, 3d ed, looseleaf (Toronto: Thomson Carswell, 2004) at F§45.2 state quite unequivocally that a trustee may disclaim a contract entered into by the bankrupt. Similarly, in a case comment on ***Potato Distributors Inc. v. Eastern Trust Co.*** (1955), 35 C.B.R. 161 at 166 (P.E.I. C.A.), L.W. Houlden writes:

> It is well established law that a trustee may elect to carry on with a contract entered into prior to bankruptcy, provided he pays up arrears and is ready to perform the contract. The trustee could also, if he saw fit, elect not to go on with the contract in which event the vendor would have the right to prove a claim for damages.

[30] I observe that several Canadian commentators have recently opined that in the absence of an express statutory power, trustees in Canada may not disclaim executory contracts, specifically licences: see Piero Ianuzzi, “Bankruptcy and the Trustee’s Power to Disclaim Intellectual Property and Technology Licencing Agreements: Preventing the Chilling Effect of Licensor Bankruptcy in Canada” (2001) 18 C.I.P.R. 367; Gabor F.S. Takach and Ellen Hayes, “Case Comment,” ***Re Erin Features #1 Ltd.*** (1993) 15 C.B.R. (3d) 66 (B.C.S.C.).; Mario J. Forte and Amanda C. Chester, “Licences and the Effects of Bankruptcy and Insolvency Law on the Licensee” (2001) 13 Comm. Insol. R. 25. However, the position taken by the authors of these articles departs from the traditional understanding of the law in this area.

[31] In view of the position in the English authorities pre-dating the English Act of 1869, there is a common-law power in trustees to disclaim executory contracts. This power has been relied on for many years by trustees, and in the absence of a clear statutory provision overriding the common law, in my view trustees should have this power to assist them fulfill the duties of their office.

[32] I observe that recently, in its 2002 *Report on the Operation of the Administration of the* Bankruptcy and Insolvency Act and the *Companies’ Creditors Arrangements Act,* Industry Canada’s Marketplace Framework Policy Branch considered the extent to which insolvency law should intervene in private contracts to ensure fair distribution or maximize value during an insolvency. The Report notes there is not universal support for the enactment of a detailed statutory

provision like the American one. In a 2001 report on business insolvency law reform, the Insolvency Institute of Canada and the Canadian Association of Insolvency & Restructuring Professionals proposed the enactment of more detailed rules for both powers of trustees to disclaim executory contracts (*http://www.insolvency.ca/papers/2001ReportScheduleA.html*). Ultimately, it may therefore be preferable for the legislature to move to include a power in the statute, but until that time, in my view, trustees enjoy the power protected by the common law.

[33] In the result, the order of 20 September 2004 grants the Receiver the power here exercised and I see no reason in principle that would cause me to alter that result.

DISPOSITION

[34] Accordingly, I would dismiss the appeal and order costs payable to the Receiver by the appellants.

"The Honourable Mr. Justice Braidwood"

I Agree:

"The Honourable Mr. Justice Oppal"

Reasons for Judgment of the Honourable Madam Justice Southin:

[35] I have had the privilege of reading in draft the reasons for judgment of my colleague, Braidwood J.A., concurred in by my colleague, Oppal J.A.

[36] While I am uneasy, without the opportunity for further study, as to his conclusions on both issues, further study would require time. Being alive both to the importance to the parties of a decision being pronounced promptly and to the lack of practical value either to the parties or to the law of a dissent, if that is where I arrived after further study, I do not dissent from his conclusion that the appeal should stand dismissed.

"The Honourable Madam Justice Southin"

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *PaySlate Inc. (Re),*
2023 BCSC 608

Date: 20230414
Docket: B220504
Estate No.: 11-2891281
Registry: Vancouver

In Bankruptcy and Insolvency

In the Matter of the Notice of Intention to Make a Proposal of PaySlate Inc.

Corrected Judgment: The text of these Reasons for Judgment has been corrected at paras. 1, 11 and 86 on April 18, 2023.

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for PaySlate Inc.:	T. Bennett L. Beatch, Articled Student
Counsel for Paysafe Merchant Services Inc.:	P. Bychawski C.I. Hildebrand
Counsel for the Proposal Trustee, Grant Thornton Limited:	R. Gurofsky G.P. Nesbitt
Counsel for Ayrshire Real Estate Management Inc.:	S. Collins E. Wilson
Place and Dates of Hearing:	Vancouver, B.C. March 10, 22, 27, 28 and 31, 2023
Place and Date of Judgment:	Vancouver, B.C. April 14, 2023

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Introduction

[1] Reverse vesting orders ("RVOs") are a relatively new method used in insolvency cases to avoid the purchaser assuming the insolvent debtor's unwanted assets and liabilities. Typically, an RVO contemplates the sale of the debtor company's shares through a transaction structured so that "unwanted" assets and liabilities (including in this case, certain unsecured creditor claims) are removed and vended to a residual company while the "good assets" remain with the debtor. RVOs are not the norm. They have been used in appropriate circumstances to preserve non-transferrable assets such as licenses, permits, intellectual property, and non-transferrable tax attributes: see, e.g., *Arrangement relatif à Blackrock Metals Inc*., 2022 QCCS 2828 at paras. 85-86, leave to appeal ref'd 2022 QCCA 1073; *Quest University Canada (Re)*, 2020 BCSC 1883; *Harte Gold Corp. (Re)*, 2022 ONSC 653; Janis Sarra, "Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions", 2022 CanLIIDocs 431 at 1-2.

[2] In this case, the debtor seeking approval of an RVO is PaySlate Inc. ("PaySlate") in the context of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 [*BIA*], having filed a notice of intention ("NOI") to make a proposal to creditors pursuant to s. 50.4 on December 5, 2022.

[3] On March 7, 2023, PaySlate filed its notice of application seeking approval of a bid from its debtor-in-possession ("DIP") lender, Ayrshire Real Estate Management Inc. ("Ayrshire"), to purchase its shares through an RVO ("the RVO") with an outside closing date of March 31, 2023. PaySlate was intent on securing court approval on a fast-track basis and scheduled the hearing of its application for March 10, 2023.

[4] Despite some initial concerns, PaySlate's proposal trustee advised, in its fourth report dated March 8, 2023, that it approved of the proposed transaction.

[5] When PaySlate, Ayrshire, and PaySlate's proposal trustee appeared in court on March 10, 2023, one of PaySlate's critical suppliers (and an unsecured creditor), Paysafe Merchant Services Inc. ("Paysafe"), who provides payment processing services to PaySlate, sought an adjournment. Paysafe objected to the granting of

the RVO on account of insufficient notice and what it said were its initial substantive concerns regarding the propriety of the RVO.

[6] Based on what I heard from Paysafe, I decided to adjourn the hearing for a brief period to allow Paysafe to consider its position. When the parties returned to court, Paysafe continued to object to the transaction, on both substantive and procedural grounds. The hearing took longer than the initial half-day scheduled, and even after it finished, and two days before the proposed completion date, PaySlate and Ayrshire submitted an amended version of the RVO attempting to ameliorate one of Paysafe's objections concerning lack of service. That led to a further, brief hearing. In view of the impending proposed completion date, on March 30, 2023, I advised the parties of my decision to dismiss the application with reasons to follow. These are my reasons.

PaySlate

[7] PaySlate describes itself as a technology company, providing an online rental payment processing service for its customers who are primarily property owners and property managers. It is in financial distress. It has been operating at a loss since it began operations in April 2013.

[8] PaySlate earns revenue from software usage fees, tenant and condominium transaction fees, lease payments, and third-party partner service revenues. By way of example, its service allows for payments to be made by tenants and condominium owners either online or through mobile applications or by telephone.

[9] PaySlate's director and principal is Mr. Adam Rosenfeld.

[10] PaySlate operates virtually in Canada, and the United States through its wholly owned subsidiary, RentMoola Payment Solutions LLC ("RentMoola US"), whom it manages. PaySlate also owns a non-operating subsidiary in the United Kingdom called RentMoola Payment Solutions Limited.

[11] PaySlate is federally incorporated and extra-provincially registered in British Columbia and Alberta. PaySlate does not have any physical premises. Its employees operate entirely on a remote basis. Most of its employees are located in British Columbia. Its American-based employees are employed by PaySlate and not RentMoola US.

[12] According to PaySlate, its assets consist of its customer service agreements, intellectual property, its employees, what the parties refer to as "tax attributes" consisting of tax credits, and scientific research and experimental development tax credits ("SR&ED credits"). In his evidence, Mr. Rosenfeld deposed the value of the SR&ED credits to be approximately $341,000 for 2021, and a similar amount for 2022, after payment of fees to a third party for preparation of the required tax filings (subject to review by the CRA). The Proposal Trustee's first report estimates SR&ED credits to be approximately $716,000. As I discuss below, no specific information concerning the potential value of its tax attributes was provided until the late stages of the hearing, and only following Paysafe's continued objections concerning the insufficiency of valuation evidence.

[13] PaySlate's creditors are comprised of secured creditors, government creditors, and unsecured creditors.

[14] Its pre-filing secured creditors are:

(a) Novel Growth Partners Fund I LP ("Novel"), per a revenue financing agreement dated December 4, 2020; Novel is owed approximately US $416,000 plus interest and costs;

(b) a group of noteholders, including Ayrshire ("Noteholders"), per a convertible note purchase agreement dated June 10, 2022; the principal amount owing is approximately $2.6 million; and

(c) Ayrshire, per a SR&ED facility agreement dated November 25, 2022; the principal amount owing is $300,000.

[15] Ayrshire is PaySlate's DIP lender. Mr. Rosenfeld is also a director of Ayrshire and acts as its managing director. He is the key principal of both PaySlate and Ayrshire involved in the proposed transaction.

[16] PaySlate's government creditors are Canada Revenue Agency ("CRA"), owed approximately $13,375 for unremitted goods and services tax and excise tax, and British Columbia, owed approximately $33,689 for provincial sales and education and health tax.

[17] PaySlate's unsecured creditors fall into three categories in these approximate amounts:

(a) $96,000 owed to its chief executive officer and former vice president of finance for cash bonuses related to its 2021 fiscal year;

(b) $60,000 and US $25,000 owed to its Canadian and American employees, respectively; and

(c) $1,230,000 to various suppliers and service providers.

[18] Its other actual and contingent obligations include (in approximate numbers): (a) interest-free promissory notes issued to its former chief executive and chief operating officers in the principal amount of $275,000, maturing in 2027 and 2028; (b) debt prepayment agreements of $375,000; (c) a claim filed in this Court by the RFA Bank of Canada for alleged breaches of a sub-lease of office premises (no dollar amount disclosed); and of importance to the instant application, (d) a claim made by Paysafe for damages of approximately $2.2 million (on account of fraudulent merchant accounts) Paysafe says are owed to it per PaySlate's indemnification obligations in its contract with Paysafe.

Financial Difficulties

[19] According to Mr. Rosenfeld, PaySlate has incurred consolidated operating losses of approximately $39.4 million since it began operations in April 2013 ($33.8 million incurred by PaySlate and $5.6 million by RentMoola US).

RentMoola US, he deposed, owes PaySlate approximately US $4.2 million in intercompany loans and recovery is doubtful.

[20] In his affidavit evidence, Mr. Rosenfeld explained the primary reason for PaySlate's operating losses is its inability to generate sufficient revenue or gross margins from revenue to cover its operating expenses. Its main operating expenses are salaries and wages and third-party consulting expenses and software subscription expenses required for its ongoing development of its online rent collection platform.

[21] In the spring of 2022, PaySlate introduced a convertible note offering in an attempt to raise $4 million in capital. According to Mr. Rosenfeld, it raised far less, just over $2 million along with $600,000 from notes issued for services in kind or employee bonus supplements. In June 2022, PaySlate began what he described as ongoing "right-sizing and cost-reduction strategies" which included reducing the size of its workforce from 70 to 19 individuals. In November 2022, PaySlate obtained $300,000 from Ayrshire through the SR&ED facility agreement.

[22] Ultimately, Ayrshire and another investor advised PaySlate they would not contribute any further funds without a path towards restructuring or selling the business. As a consequence, PaySlate filed the NOI on December 5, 2022. It named Grant Thornton Limited as the proposal trustee ("Proposal Trustee"). PaySlate also proposed a court-approved sale and investment solicitation process ("SISP") to be conducted by the Proposal Trustee in order to identify a purchaser or an investor to allow it to then present a proposal to its creditors. PaySlate's proposed SISP called for marketing efforts to begin on December 5, 2022, with offers to be presented by February 3, 2023.

[23] In the interim, Ayrshire agreed to advance interim DIP financing to cover PaySlate's operating expenses.

[24] On December 9, 2022, Justice Fitzpatrick approved both the SISP and Ayrshire's DIP financing facility up to a maximum amount of $1.2 million with interest

at 15%, along with an administrative charge of $250,000 to cover professional fees (including those of the Proposal Trustee). An extension of the stay for the time for filing PaySlate's proposal per Part III, Division I of the *BIA* to February 17, 2023, was also granted (further extensions have been granted over time, to April 24, 2023).

[25] In January 2023, PaySlate became concerned that many, if not most, of its remaining employees would leave without some assurance that salaries would be paid (along with bonuses contingent on the outcome of the SISP). It sought court approval of a key employee retention program ("KERP") charge, which it grounded on its assertion that retention of its remaining workforce was not only vital to a successful outcome of the SISP but was also crucial to sustain its business as a going concern.

[26] Accepting the integrity of its evidence and submissions in this respect, and also in light of support from the Proposal Trustee, on January 23, 2023, I approved a charge in the amount of $604,000 covering all 19 remaining members of PaySlate's workforce, over the vehement objection of Paysafe, who argued that it was excessive and out of line with KERPs ordered in other cases.

[27] As will be seen from the discussion below, on the instant application, Paysafe argues that the evidence and submissions relied on by PaySlate on the KERP application belie the credibility of PaySlate's assertion that the RVO is necessary to maintain its business as a going concern.

[28] I also approved PaySlate's request in January 2023 to increase the DIP financing facility from $1.2 million to $1.45 million. On March 10, 2023, I granted PaySlate's request (unopposed by Paysafe) to increase the DIP financing facility from $1.45 million to $1.95 million.

The SISP Failed

[29] The Proposal Trustee advises that the SISP was structured to allow for an asset purchase or a transaction involving a restructuring of PaySlate's debt, share, or capital structure together with an asset bid. In consultation with PaySlate, the

Proposal Trustee conducted a robust sales and marketing process. It: (a) prepared a list of parties who may have a potential interest in and the financial means to make a bid; (b) prepared and sent an initial offering summary or teaser letter to 88 potential bidders; (c) created a virtual data room containing confidential information, including some of PaySlate's tax filings; (d) prepared a draft confidentiality and non-disclosure agreement; and (e) placed ads concerning the SISP in the Financial Post and Vancouver Sun on December 16, 2022. In all, twenty-three potential bidders signed the requisite documents to view the data room. Draft potential share purchase and asset purchase agreements were provided to potential bidders. The Proposal Trustee answered questions from potential bidders and coordinated 11 virtual meetings.

[30] Initially set to close on February 3, 2023, the SISP deadline was extended to February 10 at the request of a potential bidder who expressed serious interest in submitting a bid but said it needed more time to carry out its due diligence. However, by the expiry of the new bid deadline, only one bid was submitted. It was from Ayrshire and certain Noteholders in the form of: (a) a credit bid covering 50% of the DIP loan in the amount of $700,000 and convertible notes including accrued interest and fees of $2,791,370.17; (b) cash consideration to pay the administration charge and KERP charge of $258,545, cure costs for services from persons it viewed as critical suppliers, and bankruptcy costs; and (c) assumption of certain assumed liabilities including 50% of the DIP loan, the SR&ED obligations, post-closing liabilities, contracts with counterparties it deems to be critical suppliers, and debt obligations to Novel to be compromised in the amount of $557,000 (that part of the bid was later altered to offer a partial compromise and conversion of debt to equity).

[31] Although the Proposal Trustee was optimistic at that time that the proposed transaction would proceed, Ayrshire ultimately withdrew its bid when Novel refused to accept the conversion of debt-to-equity proposal. Ayrshire says that as a result, its credit bid was no longer feasible as it contemplated the crediting of debt subordinate to Novel's position. Ayrshire withdrew its bid and forfeited its deposit of $26,794

(reflecting a percentage of the cash portion of the proposed purchase price as opposed to the total consideration).

The RVO

[32] Ayrshire submitted a new bid, this time in its capacity as the DIP lender, proposing a share purchase transaction through an RVO. A subscription agreement ("Subscription Agreement") dated March 3, 2023 was executed by Ayrshire and PaySlate. The RVO contains provisions mirroring the language in the Subscription Agreement as well as specific language approving that agreement as commercially reasonable.

[33] Key features of the proposed transaction provided for in the RVO are discussed below.

Consideration

[34] Ayrshire proposes consideration that is comprised of part cash (of an anticipated maximum of $198,000), part credit bid of Ayrshire's DIP, and an assumption of certain pre-filing liabilities.

Retained Contracts

[35] Central to the transaction are orders mandating retention of some 176 pre-filing contracts with customers and suppliers (whom Ayrshire deems critical suppliers), who are also unsecured creditors, without recourse to certain termination rights, with accompanying releases, waivers, and bars to claims other than unpaid pre-filing services. Those contracts are called "Retained Contracts" in the Subscription Agreement and the RVO, and are included within the definition of "Assumed Liabilities".

[36] All outstanding amounts owed for pre-filing services are to be paid as "cure costs" out of a trust to be established and called a "Creditor Trust". Cure costs are defined as monetary defaults in respect of the Retained Contracts as at the time of closing:

> "**Cure Costs**" means all monetary defaults in relation to the Retained Contracts as at the date of Closing, other than those arising by reason only of PaySlate's insolvency, the commencement of the NOI proceedings by PaySlate or PaySlate's failure to perform a non-monetary obligation.
>
> [Bold in original]

[37] However, other terms of the RVO would bar or disclaim certain contractual rights and claims counterparties to Retained Contracts may have. As well, the RVO contains broad form waiver and release provisions that cover any pre-filing claims, other than cure costs, those counterparties may have against PaySlate and other persons (such as its directors and officers).

[38] For example, the RVO, which incorporates terms of the Subscription Agreement through reference, would bar counterparties to the Retained Contracts from relying on certain termination rights, such as termination for change of control or PaySlate's insolvency.

[39] Paragraph 12 of the RVO provides:

> 12. Except to the extent expressly contemplated by the Subscription Agreement, all Contracts (excluding the Excluded Contracts) to which PaySlate is a party upon delivery of the Proposal Trustee's Certificate will be and remain in full force and effect upon and following delivery of the Proposal Trustee's Certificate and no individual, firm, corporation, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") who is a party to any such arrangement may accelerate, terminate, rescind, refuse to perform or other wise repudiate its obligations thereunder, or enforce or exercise any right (including right of set-off, dilution or other remedy) or make any demand under or in respect of any such arrangement and no automatic termination will have any validity or effect, by reason of:
>
> (a) any event that occurred on or prior to the delivery of the Proposal Trustee's Certificate and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of PaySlate);
>
> (b) the insolvency of PaySlate or the fact that PaySlate sought or obtained relief under the BIA;
>
> (c) any compromises, releases, discharges, cancellations, transactions, arrangements, reorganizations or other steps taken or effected pursuant to the Subscription Agreement, the Transactions or the provisions of this Order, or any other Order of the Court in these proceedings; or

> (d) any change of control of PaySlate arising from the implementation of the Subscription Agreement, the Transactions or the provisions of this Order.
>
> [Bold in original]

[40] Although outstanding amounts claimed by, for example, counterparties to Retained Contracts for unpaid pre-filing services are to be paid as cure costs from the Creditor Trust, the RVO preserves to PaySlate all of its rights of contest, as seen from this term of the RVO:

> 13. For greater certainty the description of any Claim as an Assumed Liability is without prejudice to PaySlate's right to dispute the existence, validity or quantum of any such Assumed Liability, and (c) nothing in this Order or the Subscription Agreement shall affect or waive PaySlate's rights and defences, both legal and equitable, with respect to any Assumed Liability, including, but not limited to, all rights with respect to entitlements to set-offs or recoupments against such Assumed Liability.

[41] Waiver and discharge provisions applicable to all "Persons", which (per para. 12 in the RVO, excerpted above, includes counterparties to Retained Contracts), are also included:

> 14. From and after the Effective Time, all Persons shall be deemed to have waived any and all defaults of PaySlate then existing or previously committed by PaySlate, or caused by PaySlate, directly or indirectly, or non-compliance with any covenant, warranty, representation, undertaking, positive or negative pledge, term, provision, condition or obligation, expressed or implied, in any Contract, existing between such Person and PaySlate arising directly or indirectly from the filing by PaySlate under the BIA and the implementation of the Transaction, including without limitation any of the matters or events listed in paragraph 12 hereof, and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connecting therewith under a Contract shall be deemed to have been rescinded and of no further force or effect, provided that nothing herein shall be deemed to excuse PaySlate or the Purchaser from performing its obligations under the Subscription Agreement or be a waiver of defaults by PaySlate under the Subscription Agreement and the related documents.

[42] Once the Proposal Trustee files the Certificate, PaySlate is deemed, per para. 5 of the RVO excerpted below, to have satisfied or assumed the Assumed Liabilities in accordance with the terms of the Subscription Agreement, which in the case of the Retained Contracts, is payment of any money owed for services out of

the Creditor Trust (para. 5 also contains release and discharge provisions in respect of the Assumed Liabilities):

> 5. Upon the delivery of the Proposal Trustee's certificate (the "**Proposal Trustee's Certificate**") to the Purchaser (the "**Effective Time**"), substantially in the form attached as Schedule "**B**" hereto, the following shall occur and shall be deemed to have occurred at the Effective Time, all in accordance with the Closing Sequence set out in the Subscription Agreement and the steps contemplated thereunder: …
>
> > (h) PaySlate shall have paid, assumed or otherwise satisfied the Assumed Liabilities, in accordance with the terms of the Subscription Agreement, and upon payment or assumption thereof, other than as set out in the Subscription Agreement, the Assumed Liabilities shall be and are hereby forever released, expunged and discharged as against the Retained Assets, PaySlate, and the Subscribed Shares;
>
> [Bold in original]

[43] Thus, counterparties to Retained Contracts are required to carry on providing services to PaySlate, with restricted termination rights as well as loss of any right to claim for any other claims they may have against PaySlate's beyond cure costs (which, as pointed out above, may be contested by PaySlate). Those counterparties are required to carry on in circumstances where they risk not being fully paid for post-closing services by a debtor who has incurred significant operating losses since its inception and who also retains all of its rights to contest pre-filing cure cost claims.

[44] Using Paysafe as an example, except for the 60-day termination on-notice provision in its contract with PaySlate, it would lose its right to rely on its other contractual rights of termination (e.g., on account of PaySlate's insolvency) and lose its right to advance its claim for recovery of what it says are damages, calculated to be approximately $2.2 million, against PaySlate under the indemnity provisions of their contract.

[45] In respect of that claim, Paysafe threatened legal action to recover those losses and to terminate its contractual relationship with PaySlate if it is not paid. The claim remains outstanding, and the Proposal Trustee advises it is not in a position to evaluate the claim (it advises that the claim must be adjudicated in court).

[46] In the midst of this proceeding, PaySlate offered financial assurances to Paysafe in order to avoid termination of what it characterizes as Paysafe's critical services for its business as a going concern. The parties reached an agreement on February 9, 2023 that calls for PaySlate to pay $100,000 to Paysafe, comprised of an immediate partial payment of $25,000 (which was paid on February 13, 2023) with a further $75,000 to be paid on closing of the SISP, so long as Paysafe did not terminate its services prior to payment being made. I was advised their agreement also called for PaySlate to provide a guarantee of $100,000 for post-filing claims. However, Paysafe's extant claim under the indemnity provisions was not compromised in that agreement. During the hearing of this application, PaySlate and Ayrshire confirmed that even though the SISP has failed, they will honour the agreement with Paysafe if court approval of its current bid is granted. The language of the release and waiver provisions in the Subscription Agreement and RVO, they said, would be modified to the extent necessary to exclude that agreement from their ambit.

[47] Nonetheless, if the RVO is approved, Paysafe would lose its right to pursue its indemnity claim, something it is not prepared to give up particularly in light of the loss of its contractual termination rights, the preservation to PaySlate of all of its rights to defend pre-filing monetary claims for cure costs, an unsecured guarantee, and what it says is inadequate valuation evidence and evidence necessary to show that creditors are no worse off under the RVO than they would be under any other viable alternative.

Other Assumed Obligations

[48] Ayrshire will also assume all liabilities in respect of employees (except for terminated employees, for whom it will pay $2,000 per terminated employee), including KERP payments (approximately $258,545), tax obligations owed to the CRA and British Columbia, and PaySlate's SR&ED obligations (and corresponding benefits due to Ayrshire).

Creditor Trust

[49] PaySlate's other unsecured pre-filing liabilities, such as all pre-filing contracts with unsecured creditors (called "Excluded Contracts" in the Subscription Agreement and the RVO), professional fees, and cure costs would be channelled, assumed by, and vested into the Creditor Trust to be administered by the Proposal Trustee acting in its capacity as its sole trustee. PaySlate and the Proposal Trustee propose the Creditor Trust instead of an incorporated company because of what they say will be the vastly reduced costs of setting up a trust as opposed to a new corporate entity, and the near impossibility to find someone willing to act as a director with attendant potential liabilities in the circumstances.

[50] It is anticipated that the cash consideration to be paid by Ayrshire – said to be no more than approximately $198,000 – would be sufficient to pay professional fees and cure costs to counterparties to Retained Contracts, but nothing more. All other excluded liabilities, including Excluded Contracts, would be unpaid.

[51] Moreover, all excluded claims, including Excluded Contracts, are released as against PaySlate:

> 5. Upon the delivery of the Proposal Trustee's certificate…
>
> (e) all of PaySlate's right title and interest in and to the Excluded Liabilities, but specifically excluding the Assumed Liabilities, shall be channeled to, assumed by and vest absolutely and exclusively in the Creditor Trust for the purpose of allowing the Creditor Trustee to continue to administer the Excluded Liabilities in accordance with the Trust Settlement…such that the Excluded Liabilities shall become the obligations of the Creditor Trust which shall be deemed to be a party to the contracts and agreements giving rise thereto and which shall stand in place and stead of PaySlate in respect of any such liability or obligation, and shall no longer be obligations of PaySlate, and PaySlate shall be and are hereby forever released and discharged from such Excluded Liabilities and all related Claims (excluding, for greater certainty, the Assumed Liabilities);

Ayrshire Becomes the Sole Shareholder of PaySlate

[52] The RVO contains terms that see Ayrshire becoming the sole shareholder of PaySlate free and clear of any claims or liabilities. PaySlate's articles of

incorporation would be amended to provide for its issued common shares to be redeemed at the nominal price of $0.00001 per share, and then, along with all other subscription rights, conversion rights, options, plans, and instruments created or granted in connection with PaySlate's share capital, would be terminated and cancelled.

Claims Bar

[53] Claims bar language prohibits any person from commencing or continuing with a proceeding directly or derivatively against PaySlate, concerning, *inter alia*, any claims waived, released, expunged, or discharged by the terms of the RVO:

> 15. From and after the Effective Time, any and all Persons shall be and hereby forever barred, estopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, whether directly or derivatively or otherwise, and including without limitation…taken or proceeded with or that may be commenced, taken or proceeded with against PaySlate or the Retained Assets relating in any way to or in respect of any Excluded Assets, Excluded Contracts or Excluded Liabilities and any other claims, obligations and other matters with are waived, released, expunged or discharged pursuant to this Order.
>
> [Emphasis added]

Broad Form Release to Persons Associated with PaySlate

[54] A broad form release is provided for the protection of individuals associated with PaySlate, such as its past and present directors, officers, employees, legal counsel, the Proposal Trustee, and Ayrshire.

[55] Except for anything specifically preserved in the Subscription Agreement, the release encompasses any and all present, future claims, liabilities, indebtedness, actions, causes of action and suits related to the proceedings before the Court and the administration and management of PaySlate prior to these proceedings. The release language is not limited to the specific matters and claims in issue in this insolvency proceeding:

> 19. Effective upon the delivery of the Proposal Trustee's Certificate, (i) the present and former directors, officers, employees, legal counsel and advisors of PaySlate (ii) the Proposal Trustee and its legal counsel, and their respective present and former directors, officers, partners, employees and

> advisors, and (iii) the Purchaser, its directors, officers, employees, legal counsel and advisors…shall be deemed to be forever irrevocably released and discharged from any and all present and future claims whatsoever (including, but without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or in equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, offer, investment proposal, dealing, or other fact... or to any other entity and are extinguished, provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim for fraud or wilful misconduct or any claim that is not permitted to be released pursuant to section 50(14) of the BIA.

[56] To the extent that they are not covered by the release, the RVO limits recovery of claims against directors and officers to proceeds available from any applicable insurance policy.

Termination of this Proceeding

[57] This NOI proceeding will be terminated and PaySlate will be released from it when the Proposal Trustee issues and files with the court the Certificate confirming that Ayrshire has satisfied the subscription price set out in the Subscription Agreement and the conditions in that agreement have been satisfied.

Lack of Service

[58] One of the many concerns raised by Paysafe regarding the propriety of the RVO and transaction concerns service. Paysafe correctly points out that there is no court approved service list despite the continued reference to one in PaySlate's application materials. Moreover, the service list, Paysafe points out, does not include unsecured creditors.

[59] PaySlate's position throughout has been that service on unsecured creditors would be unduly burdensome and would negatively affect what they characterize as their business relationship management.

[60] Paysafe submits that given the extraordinary circumstances of an RVO, the service requirements found under s. 58 of the *BIA* concerning proposals, set out below, should be complied with:

> **Application for court approval**
>
> **58** On acceptance of a proposal by the creditors, the trustee shall
>
> **(a)** within five days after the acceptance, apply to the court for an appointment for a hearing of the application for the court's approval of the proposal;
>
> **(b)** send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor who has proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;
>
> **(c)** forward a copy of the report referred to in paragraph (d) to the official receiver at least ten days before the date of the hearing; and
>
> **(d)** at least two days before the date of the hearing, file with the court, in the prescribed form, a report on the proposal.

[61] Paysafe also points to Rule 3 of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368, which states that "in cases not provided for in the statute or its Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules." Thus, if the RVO in this case is not a proposal, which is the position taken by PaySlate, then Paysafe submits that Rule 8-1(7) and Rule 8-1(8) of the *Supreme Court Civil Rules* [*Rules*], which requires that the applicant must serve a notice of application and related documents "on each party of record and on every other person, other than a party, who may be affected by the orders sought", applies.

[62] In response submissions adopted by PaySlate, Ayrshire contended that in this case, where unsecured creditors are out of the money, there is no requirement to serve the entire body of unsecured creditors where it is demonstrated there is no value to them. Ayrshire submits that as there is no such requirement in a vesting order circumstance, there should be no requirement in the context of an RVO. That, of course, presumes that PaySlate has established there is, in fact, no value to the

unsecured creditors, a finding (as discussed in the next section) I am unable to make.

[63] During the late stages of the hearing, following Paysafe's continued objections concerning lack of service, I was advised that PaySlate had just served its application materials on most of the counterparties to Excluded Contracts, including counterparties outside Canada, by email. In many instances, it was to their generic customer service or information email addresses or website portals (no order was sought or made approving service in that manner).

[64] However, PaySlate did not attempt to serve or provide notice to counterparties to the Retained Contracts with its notice of application. It continues to say that it would be onerous to do so in the circumstances and would negatively affect its business relationship management. No evidence concerning any negative impact on its business management was provided.

[65] PaySlate's characterization of the circumstances does not take into account what I have pointed out above: the terms of the RVO require counterparties to the Retained Contracts, in particular those whom PaySlate views to be critical suppliers, to carry on providing services (with restrictions on their contractual termination rights accompanied by waiver, release, and claims bar language) with the risk of non-payment given that PaySlate has operated with significant losses since its inception, where PaySlate preserves to itself all defences to cure costs claims.

[66] There is no evidence from which I can determine if their contracts have provisions allowing them to terminate for change of control or insolvency or for other reasons that I am being asked to override in the RVO. Yet, I am being asked to approve a transaction that requires them to carry on providing goods and services to PaySlate relying on whatever other termination provisions may be contained in their contracts.

[67] Nor is there is any evidence from which I can determine whether any of the counterparties to the Retained Contracts other than Paysafe have or may have contingent claims that would be caught by those provisions.

[68] I am also being asked to make those orders in the absence of service, let alone evidence of notice, to those counterparties in circumstances unlike *Harte Gold*. In that case, absence of extensive discussions with creditors was not seen to be a material deficiency since virtually all creditors, including unsecured creditors, would be paid: *Harte Gold* at para. 52. Similarly, in *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354, Justice McEwen was satisfied that extensive consultation had taken place with all creditors, including the unsecured creditors (in his reasons, McEwen J. pointed out, at para. 53, “There is no suggesting in the record that any creditors were ignored or overlooked”).

[69] On March 29, 2023, after the hearing had concluded, and while my decision was under reserve, I received a letter from counsel for PaySlate addressing some of the concerns surrounding service. PaySlate and Ayrshire, in consultation with the Proposal Trustee, with a proposed amendment to the RVO. The amendment added a paragraph to the RVO that would allow counterparties to the Retained Contracts to object to the retention of their contract by serving notice on the Proposal Trustee within 30 days of service of the RVO:

> Notwithstanding the terms of this Order, any counter-party to a Retained Contract may object to the retention of their contract by providing written notice to the Proposal Trustee at Mark.Arzadon@ca.gt.com, within thirty (30) days of service of this Order, and shall include the bases of the counter-party’s objections. The Proposal Trustee in consultation with the Purchaser will attempt to resolve such objections with the objecting counter-party, and if not resolved shall bring the matter back before the Court for determination.

[70] Paysafe objects to the amendment on these grounds:

(a) the amendment paragraph is inconsistent with PaySlate’s earlier statement that providing notice was unduly burdensome;

(b) a significant number of Retained Contracts are with parties outside of the jurisdiction of the court;

(c) this Court does not have the jurisdiction to impose the relief provided for in the proposed paragraph on counterparties located outside of Canada; and

(d) in the absence of any service on affected non-Canadian counterparties, it is not appropriate for the RVO to request that foreign courts take steps that may be "necessary or desirable" to give effect to the RVO.

[71] The proposed amendment to the RVO is not an answer to avoid service. It forces counterparties to Retained Contracts to engage with the Proposal Trustee to lodge and pursue their objection in an undefined process in circumstances where their rights have been abrogated by court order. The amendment also raises the potential for increased expense through the objection process.

[72] Paysafe also points out that the RVO attempts to bar the ability of counterparties located in jurisdictions outside of this province to rely on legal defences prescribed by law in their home jurisdictions.

[73] I was advised that some counterparties to the Retained Contracts are based in Hong Kong, the Netherlands, Israel, the United Kingdom, Switzerland, and the United States. The provision in the RVO asking for aid and recognition from any court or tribunal in Canada or the United States to give effect to the RVO in the absence of service is, in my opinion, problematic.

[74] Issuing the RVO which bypasses providing service to a substantial group of counterparties to Retained Contracts also lacks procedural fairness.

[75] I agree with Paysafe's submissions that PaySlate's reason for not serving these counterparties is inconsistent with the amendment that PaySlate is proposing. If it is not "unduly burdensome" for PaySlate to provide service after the order is granted, why is it that it cannot provide service prior to this hearing, particularly when it has made efforts to serve counterparties to the Excluded Contracts.

[76] PaySlate's reason that providing service would negatively affect PaySlate's business relationship management is also inconsistent. If service would negatively affect PaySlate's business relationship management with the group of counterparties to Retained Contracts, what is the difference between providing it before the hearing and after the hearing?

[77] Even assuming PaySlate can establish there is no value to pay out unsecured creditors, service should have been effected on the counterparties to the Retained Contracts given the proposed waiver, release, and bar provisions and restrictions on their contractual rights.

When an RVO may be Ordered

Introductory Comments

[78] As mentioned at the outset, RVOs typically contemplate a purchase of shares in a debtor company wherein the "unwanted" assets, liabilities, and creditor claims are removed and vended to a residual company while the "good assets" remain with the debtor.

[79] In *Harte Gold*, Justice Penny described the purpose of an RVO in the context of the sale of Harte's mining enterprise to a strategic purchaser:

> [22] The purchase transaction for which approval is being sought in this case does not provide for a sale of assets but, rather, provides for a "reverse vesting order" under which the purchaser will become the sole shareholder of Harte Gold and certain excluded assets, excluded contracts and excluded liabilities will be vested out to new companies incorporated for that purpose.

[80] RVOs are often thought to be appropriate in situations where the debtor's licenses cannot be vested on an asset sale. By way of example, in *Blackrock Metals*, Chief Justice Paquette made this observation in the context of a case involving the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*]:

> [86] Albeit new, RVOs have been confirmed by the courts as an appropriate way for a debtor to sell its business when the circumstances justify such structure. In particular, CCAA courts have approved RVO structures in several complex mining transactions and have recognized that their benefits, which include maximizing recovery for creditors, importantly

> limiting delays and transaction costs, and facilitating the preservation of the insolvent business' going concern, justify the use of this innovative restructuring tool.

Jurisdiction

[81] In *Harte Gold*, Penny J. described the jurisdictional basis to make the order in a *CCAA* context, at paras. 18-39, to be grounded in the court's discretionary power in s. 11 of the *CCAA* to further the objectives of the *CCCA* and other insolvency legislation in Canada, as discussed and approved of in other case authorities.

[82] It is clear from the reasons of Justice Fitzpatrick in *Quest*, leave to appeal denied, *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364, a *CCAA* case, and the case authorities reviewed in her decision at paras. 127-149, that this Court has authority to grant an RVO under its general statutory authority found in s. 11 of the *CCAA*.

[83] In this province, appellate approval of RVOs is gleaned from the reasons in *Southern Star*, where the Court of Appeal said that an RVO granted by Fitzpatrick J. reflected "precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising *CCAA* proceedings":

> [30] In arriving at her conclusion, Fitzpatrick J. considered and applied the principles recently set out by the Supreme Court of Canada in *Callidus,* which affirm the broad and flexible discretion of judges under the *CCAA* to make orders that are appropriate in the circumstances. She was also alive to the limits of her discretion; namely, that any order must conform to the objectives and purposes of the *CCAA*: at para. 154. She carefully evaluated each factor under s. 32(4) in making her determination that the Disclaimers were appropriate. With respect to the lease for Lot E, she found that no lease was in effect between Quest and Southern Star, so the prohibition in s. 32(9)(d) was inapplicable: at paras. 37–40. Finally, she recognized that this case presented unique and complex circumstances which made it appropriate to grant the RVO: at paras. 168, 172. While jurisprudential authority for making such an order in a contested proceeding is limited, it is notable that leave to appeal was refused in the one case in which it has been done, and under similar factual circumstances: *Nemaska*, *supra*.
>
> [31] Fitzpatrick J. acknowledged the negative impact to Southern Star arising from the relief she granted, though she questioned the extent of that damage; she gave some credence to the suggestion, as Quest argues in this application, that Southern Star's arguments were made strategically with a view to gaining leverage, while significant other interests hung in the balance:

> at paras. 46, 164–66. Whether that was so did not, however, drive her conclusions. Ultimately, she accepted that Southern Star would suffer harm but balanced that impact with the "myriad interests held by other stakeholders" and chose the best option for everyone involved, including Southern Star: at paras. 48, 111, 164.
>
> [32] The judge's order reflects precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising *CCAA* proceedings, and which forms the basis for the considerable deference their decisions are afforded on review. Respectfully, in my opinion, if a division of this Court were to set aside the order it would be acting contrary to the instruction of the Supreme Court of Canada in *Callidus* that appellate courts should defer to the exercise of discretion by supervising judges in these kinds of proceedings.

[84] Although many of the case authorities discussing the circumstances in which RVOs may be issued are in the context of the *CCAA*, RVOs are available tools in other insolvency cases as well. Similar considerations apply in the context of the *BIA*.

[85] In the *BIA*, s. 183 confers jurisdiction in accordance with legal and equitable principles to give effect to its purpose: *Re Olympia & York Developments Ltd.*, [1997] O.J. No. 591 at paras. 7, 10 (Gen. Div., in Bankruptcy); *Re Residential Warranty Company of Canada Inc. (Bankrupt)*, 2006 ABQB 236 at para. 26. Those purposes include those applying to proposals such as s. 65.13(4).

[86] In addition to *Blackrock Metals*, *Harte Gold,* and *Quest*, there are other case authorities finding jurisdiction to order RVOs, including a notice of intention to make a proposal under the *BIA* (case name is underlined), and receivership proceedings, such as: *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00 (Ont. S.C.J. [Comm. List]); *Stornoway Diamond Corporation* (October 7, 2019), Montreal 500-11-057094-191 (Q.C.S.C. [Comm. Div.]); *Wayland Group Corp.* (April 21, 2020), Toronto CV-19-00632079-00CL (Ont. S.C.J. [Comm. List]); *Comark Holdings Inc.* (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. S.C.J. [Comm. List]); *Beleave Inc.* (September 18, 2020), Toronto, CV-20-642097 (Ont. S.C.J. [Comm. List]); *JMB Crushing Systems Inc.* (October 16, 2020), Calgary 2001-05482 (A.B.K.B.); *Arrangement relatif à Nemaska Lithium Inc*., 2020 QCCS 3218, leave to appeal refused, 2020 QCCA 1488; *In the Matter of a Plan of Compromise or Arrangement*

of Clearbeach Resources Inc. and Forbes Resources Corp., 2021 ONSC 5564*; In the Matter of the Notice of Intention to Make a Proposal of Junction Craft Brewing Inc.* (November 8 and December 20, 2021, Toronto, CV-31-2774500 (Ont. S.C.J. [Comm. List]; *Port Capital Development (EV) Inc. (Re)*, 2022 BCSC 1464, leave to appeal ref'd *1296371 B.C. Ltd. v. Domain Mortgage Corp.*, 2022 BCCA 331; *In the Matter of CannaPiece Group Inc.*, 2023 ONSC 841; *In the Matter of CannaPiece Group Inc.* (February 10, 2023), Toronto CV-22-689631-00CL (Ont. S.C.J. [Comm. List]); *Credit Suisse AG, Cayman Islands Branch v. Southern Pacific Resource Corp. et. al.* (May 13, 2022), Calgary 1501-05908 (A.B.K.B.).

Extraordinary Circumstances Must Exist

[87] RVOs are not the norm and should only be granted in extraordinary circumstances.

[88] In *Just Energy*, a *CCAA* case involving Just Energy's highly regulated business as a retail energy provider with assets including licenses, authorizations, and permits across multiple jurisdictions in Canada and the United States, McEwen J. noted that RVOs have been approved in specific circumstances:

> [33] Reverse vesting orders are relatively new structures. I agree that reverse vesting orders should not be the "norm" and that a court should carefully consider whether a reverse vesting order is warranted in the circumstances: see *Harte Gold Corp. (Re)* , at para. 38; *Black Rock Metals Inc.*, at para. 99. That said, reverse vesting orders have been deemed appropriate in a number of cases: see *Quest University (Re)* , at para. 168, *Harte Gold Corp. (Re)* , at para. 77 and *Black Rock Metals Inc.*, at para. 114.
>
> [34] The aforementioned cases approved reverse vesting orders in circumstances where:
>
> - The debtor operated in a highly-regulated environment in which its existing permits, licenses or other rights were difficult or impossible to reassign to a purchaser.
> - The debtor is a party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser.
> - Where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.
>
> [Emphasis added]

[89] In an article written by highly respected insolvency author and educator, Professor Janis Sarra, cited with approval by Paquette C.J.S.Q. in *Blackrock Metals* and Penny J. in *Harte Gold*, Professor Sarra wrote that RVOs require special scrutiny by the courts, even where uncontested, since they deviate from statutory framework intended to provide all creditors with an opportunity to be heard in the process:

> [T]here must be exceptional circumstances for the court to be persuaded to bypass provisions of insolvency legislation aimed at giving both the secured and unsecured creditors a meaningful voice/vote in the proceedings, as the are the residual claimants to the value of the debtor's assets during insolvency. …
>
> This statutory framework represents a careful balancing of interests and prejudice, and gives voice and vote to the creditors that are the residual claimants to the value of the debtor company. Many of the provisions are aimed at mitigating the imbalance in power that secured creditors have in insolvency proceedings, at least during the period of negotiations for a plan, with a view to maximizing the value of the assets, preserving going-concern value, and protection of employees and the public interest.
>
> It makes sense, therefore, that in any application to bypass this carefully crafted statutory process, the court consider whether there are compelling and exceptional circumstances to justify this extraordinary remedy, even where the RVO is not specifically contested, as the court needs to be satisfied of the integrity of the system and the potential prejudice to creditors and other stakeholders that may not be appearing before it. Reasons are important for stakeholders to understand the benefits and prejudice that may accrue to any particular transaction.
>
> [Emphasis added]

[90] Those comments are echoed in the approach taken in the case authorities.

[91] For example, in *Harte Gold*, a *CCAA* case involving the sale of the debtor's mining enterprise (including its 12 materials permits and licenses allowing it to maintain its mining operations, 24 active work permits and licenses allowing it to perform exploration work, forestry licenses, mineral claims, and fire permits), Penny J. cautioned against the use of an RVO structure in an insolvency situation as the "norm" or something that is "routine or ordinary course". Close judicial scrutiny of the proposed transaction is required. RVOs, he wrote in comments apposite to this case as they include the *BIA* in his discussion, should continue to be regarded as an

"unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser":

> [38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. …
>
> [Emphasis added]

[92] In *Blackrock Metals*, another *CCAA* case involving a distressed mining and metals manufacturing business, Paquette C.J.Q.S. approved, following a failed SISP, a proposed RVO that contemplated a share sale to allow licenses, permits, and authorizations to remain with the debtor while the claims of unsecured creditors are transferred to a shell company. Of critical importance was the monitor's advice that numerous agreements, permits, and licenses are vital assets that must be retained to facilitate the debtor's restructuring, and would avoid any need for consents required under a traditional vesting order:

> [114] … In his Fifth Report, the Monitor outlines the reasons why, in his opinion, the reverse vesting order structure that would be implemented would be "more appropriate and beneficial than a traditional vesting order structure and that the reverse vesting order structure is necessary, reasonable and justified in the circumstances":
>
> …
>
> > (iv) Most assets of BRM are intangibles, such as agreements, permits, licenses, authorizations and related amendments, and their value depend on the capacity of the purchasers to complete the financing and achieve the project. These assets would have no or limited value if some of them were not being preserved. The reverse vesting order structure allows to avoid any potential risks around the transfer to the purchaser.

> [115] The Court agrees with the Monitor's conclusions. RVO structures have been found by courts to be appropriate in situations such as the present case, where a traditional sale of assets would lead to uncertainty regarding the transfer of numerous agreements, permits, authorizations and other regulatory approvals that are required for the continuation of the company's business.
>
> [116] Indeed, BlackRock operates in the highly regulated mining industry. Their business is almost entirely constituted of such intangible assets, which provide a head start of several years to the purchaser. Some of these assets cannot be assigned or are at least difficult to assign. Therefore, the capacity to restructure BlackRock depends heavily on the capacity to keep the existing legal entities in place while restructuring the share-capital of BlackRock. That Is exactly what the RVO provides for.
>
> [Emphasis added]

[93] Nonetheless, and similar to Penny J., Paquette C.J.Q.S. cautioned that RVOs must be carefully scrutinized. Citing Professor Sarra's remarks, Paquette C.J.Q.S. wrote, at paras. 95-97, that, "Some authorities indeed call for caution. Professor Sarra recently stressed the importance for courts to provide detailed reasons when approving RVOs. Among other things, Professor Sarra reminds us that this type of order deviates significantly from the usual *CCAA* framework, which is meant to provide all creditors with an opportunity to be heard."

[94] Likewise, in a *BIA* context, an RVO avoids the statutory processes mandated by Parliament.

[95] In addition to those discussed above, I would also add these remarks from Professor Sarra's article as important considerations when considering whether RVOs should be approved.

[96] First, creditors should have the opportunity to have a voice in the workout strategy:

> [at 27-28]
>
> The guardrail should be what creditors are entitled to under all avenues to resolve the insolvency, including liquidation, unless the creditors agree otherwise to compromises for their benefit, and the framework should not be bypassed absent compelling circumstances. In analogous circumstances, courts have consistently held that the fact a secured creditor states it will not support a plan under any circumstances is no reason not to grant relief pursuant to the *CCAA*. <u>The entire structure of the statute is to allow the</u>

> claimants to the residual value of the assets a 'voice' in the workout strategy, and the value of claims under the voting procedure draws parties to the negotiation table. It raises the question of whether the court has authority to override a veto position, which is quite different than urging parties back to the bargaining table.
>
> [Emphasis added]

[97] Second, since the purchaser obtains all of the forward-value of the debtor's activities, RVOs remove the opportunity for negotiations that may lead to compromise and greater value for a broader group of creditors:

> [at 17]
>
> As many *CCAA* proceedings in the past have illustrated, negotiations and a creditor vote can lead to innovative and fairer outcomes in which parties compromise rights today for future upside value.70 Negotiations can lead to higher value being paid for the licenses and the shedding of liabilities; or the debtor can negotiate deferral or compromise of claims until such time as the debtor is once again a viable entity.
>
> Absent negotiations, the purchaser gets all the forward-value of the debtors' activities and the creditors whose claims are transferred to newco receive nothing of that forward-value for the value of their pre-filing claims. Yet the participation of creditors can enhance asset value in some cases. A presumption that the delay and costs of a vote are not worth it does not address the risk of opportunistic behaviour by debtors/secured creditors if they can bypass a vote.
>
> [at 19]
>
> … [After citing *McEwan Enterprises Inc*., 2021 ONSC 8423] Second, the reality is that when a court rules against commercial parties that claim they will not agree to any changes or compromises, they ultimately do bargain further and come to an agreement with creditors. The current practice of endorsing RVO without consideration of the policy and statutory framework of the *CCAA* undermines the ability of all creditors to bargain.
>
> [Emphasis added]

[98] Next, and of particular importance for this case, an evidence-based rationale should explain why an RVO is at least equivalent to outcomes under the statutory mechanisms:

> [at 29-30]
>
> At the very least, some sort of written endorsement should issue in each case, and that endorsement should address the key questions that the court has asked of the monitor and debtor. This procedural process is important to safeguard the transparency, accountability, and integrity of the system. The

> following are some initial suggestions as to questions the courts should be asking: …
>
> - Has the monitor in its report offered an evidence-based rationale as to why the proposed transaction is at least equivalent to respecting the rights and remedies of creditors under a plan of arrangement?
>
> …
>
> [Emphasis added]

[99] Lastly, and also important to this case, careful consideration should be given to proposed releases where creditors have no opportunity to vote (and to that I would add, in the instant circumstances where counterparties to Retained Contracts have not been served with the application):

> [at 23]
>
> Also of concern are the broad releases in respect of potential liability claims being granted against directors, officers, insolvency professionals, and third-parties, without the reasoning that usually underpins such broad releases, including contributions to the value of the assets that remain to satisfy creditors' claims. Prior to RVO, the courts had established clear tests for endorsing broad liability releases, which both protect the integrity of the insolvency system and encourage parties to negotiate in the shadow of liability risk. The tests have included: whether the claims to be released are rationally connected to the purpose of the plan; whether the plan can succeed without the releases; whether the parties being released contributed to the plan; whether the releases benefit the debtors as well as the creditors generally; whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and whether the releases are fair, reasonable, and not overly-broad.
>
> While willful misconduct and fraud liability are often excluded from the release, in a number of the RVO cases, releases are being granted in respect of a broad range of statutory claims without discussion of potential prejudice from such releases or reference to the developed jurisprudence. As one commentary observes, courts have granted broad releases in RVO transactions, thereby achieving third-party releases without creditors being asked to vote on this issue, undermining one of the key criteria for approval that the courts have used.
>
> [Emphasis added]

Factors to be Considered

[100] What other factors should be considered on an application to approve an RVO other than those discussed above?

[101] In *Quest*, Fitzpatrick J. was clear that RVOs should not be employed or approved in a *CCAA* restructuring "simply to rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests", nor should it be used to expedite the debtor's desired result without regard to the remedial objectives of the *CCAA*": para. 171. The analysis should consider whether the relief is appropriate in the circumstances and whether the stakeholders are treated fairly and reasonably as the circumstances permit.

[102] After considering the balance between competing interests and the good faith of the debtor Quest who acted with due diligence to promote the best outcome for all stakeholders, Fitzpatrick J. determined, in the absence of any other offers, that the proposed RVO in that case was the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group that includes Southern Star and Dana [who opposed the RVO]": para. 172.

[103] In *Harte Gold*, Penny J. said at para. 23, factors to consider when an RVO is sought in a *CCAA* context include those set out in s. 36(3) of the *CCAA*, excerpted below:

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

[104] Justice Penny also said the s. 36(3) *CCAA* criteria correspond to the principles set out in *Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No. 1137, 1991 CanLII 2727 (C.A.) for the approval of asset sales in an insolvency context. He did not confine his remarks to *CCAA* cases:

> [21] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp*, 1991 CanLII 2727(ONCA) for the approval of the sale of assets in an insolvency scenario:
>
> (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which offers have been obtained; and
>
> (d) whether there has been unfairness in the working out of the process:
>
> see *Target Canada Co. (Re)*, 2015 ONSC 1487, at paras. 14-17.
>
> [Emphasis added]

[105] In *Blackrock Metals*, Paquette C.J.Q.S. also referred to the s. 36(3) *CCAA* factors as well as the additional factors discussed by Penny J. in *Harte Gold* when scrutinizing a proposed RVO: at paras. 100-124.

[106] Likewise, in *Nemaska*, Justice Gouin also said approval should be considered with the s. 36 criteria in mind, subject to determining, whether sufficient efforts to get the best price have been made and whether the parties acted providently, the efficacy and integrity of the process followed, the interests of the parties, and whether any unfairness resulted from the process: see, e.g., paras. 3-8, 46, 49-54, 57.

[107] In the context of the *BIA*, the following questions were outlined by Penny J. in *Harte Gold* as those that should be answered by the debtor, proposed purchaser, and the court's officer:

> [38] … The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:
>
> (a) Why is the RVO necessary in this case?
>
> (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
>
> (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and
>
> (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[108] In my opinion, those same factors considered in the *CCAA* context apply to the RVO proposed in the context of PaySlate's NOI proceeding.

[109] With this discussion in mind, I turn now to consider whether, apart from the service issue, PaySlate has established that the RVO is appropriate in this case.

Determination

Position of PaySlate and Ayrshire

[110] I will begin this section by setting out PaySlate's position, supported by Ayrshire, that it has established the necessary prerequisites for the RVO.

[111] PaySlate says that its primary assets are its intellectual property, tax attributes, and value as a going concern (encompassing its Retained Contracts with its critical suppliers and customers). The proposed transaction, PaySlate and Ayrshire maintain, is structured as an RVO in order to enable PaySlate to continue its business operations under new ownership with minimal disruption and to avoid losing PaySlate's tax attributes, which they submit, are otherwise non-transferable. PaySlate's tax attributes, they say, are an important factor supporting the RVO. There are no licenses or permits as in other cases where RVOs have been granted.

[112] According to PaySlate and Ayrshire, the proposed transaction is the only viable option available to PaySlate and provides the greatest recovery available and greatest certainty to PaySlate's emergence from these proceedings as a going concern.

[113] They submit that since PaySlate has limited liquidity, its financial position does not allow it to meet its obligations to conduct a further SISP or use an alternative process to find an alternative transaction that could lead to a proposal. They submit that PaySlate has provided appropriate evidence of value to support the consideration offered by Ayrshire and to demonstrate there is nothing available for unsecured creditors in any other scenario.

Support from the Proposal Trustee

[114] Although the Proposal Trustee expressed some initial concerns, it is ultimately supportive of the relief sought by PaySlate. The Proposal Trustee submits that the transaction is structured pursuant to the RVO so that Ayrshire can assume and maintain the business as a going concern, ensure the continued ability to PaySlate to file claims for SR&ED credits, and preserve certain tax attributes that Ayrshire has indicated "may" hold value.

[115] That said, the Proposal Trustee agrees with Paysafe that the RVO is not the only means by which PaySlate's tax attributes and SR&ED credits may be acquired. The Proposal Trustee confirms that they may be acquired by a purchaser in a typical share acquisition and in that sense, on their own, they do not satisfy the necessity test. However, the Proposal Trustee says that the Ayrshire's bid, which is the only one available, meets the necessity test as it will allow PaySlate to continue as a going concern providing continued employment for certain employees. The Proposal Trustee also says that Ayrshire's bid provides greater recovery to PaySlate's stakeholders than could be obtained in a liquidation or bankruptcy.

Analysis

[116] For reasons set out below, I have determined that PaySlate has not established that the RVO should be approved.

Necessity

[117] Paysafe appropriately questions whether the proposed transaction is truly meant to facilitate the business as a going concern.

[118] Paysafe argues that the purpose of the RVO is not, as PaySlate says, to preserve the business as a going concern, and is, instead, an attempt by Ayrshire to obtain PaySlate's tax attributes well below market value without having to comply with the processes set out in the *BIA* (for example, the voting requirements for a proposal set out in s. 54(2)(d) of the *BIA*, stating that a proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors, other than

equity claimants, vote for acceptance by a majority in number and two thirds in value of the unsecured creditors of each class present).

[119] Paysafe asserts that PaySlate's statement that the RVO is necessary to preserve its business as a going concern is belied by the incongruity between its proposed termination of over half of its remaining 19 workforce (and possibly more) and the position it took and the evidence it adduced on the KERP application.

[120] On the KERP application, which was opposed by Paysafe, PaySlate argued, based on evidence it adduced from Mr. Rosenfeld and its chief financial officer, Gary Bentham, that it had no hard assets. Its assets and value as a going concern were its employees; retention of its then remaining 19 employees was critical.

[121] For example, Mr. Rosenfeld deposed in his affidavit no. 2, sworn January 10, 2023:

> **KERP and KERP Charge**
>
> **A. Management and Employees**
>
> 12. PaySlate does not have physical premises and its employees operate entirely on a remote basis. As set out in detail in the First Affidavit, the majority of PaySlate's employees are resident in British Columbia, Canada.
>
> 13. Shortly prior to the commencement of the BIA Proceedings, and as part of PaySlate's cost-reduction strategies, PaySlate had terminated certain employment contracts. As such, as at the time of filing of its Notice of Intention to Make a Proposal, PaySlate employed, and now continues to employ, a minimum number of employees necessary to continue business operations (and ideally, would have a larger complement of employees).
>
> 14. Since the execution of the First Affidavit on December 6, 2022, one employee has resigned from PaySlate. As of the date of this Affidavit, PaySlate has 19 employees. This does not include the Chief Financial Officer, Gary Bentham, who provides his services through an independent contractor arrangement.
>
> 15. PaySlate has identified certain key employees (the "**Key Employees**") whose continued involvement is necessary to maintain ongoing operations and business stability. Furthermore, the retention of the Key Employees is critical to the value of PaySlate's business as a going concern.
>
> **B. The KERP Terms and Conditions**

> *Development of the KERP*
>
> 16. As set out in further detail below, the Key Employees are a critical component of PaySlate's value and ability to operate as a going concern. Accordingly, PaySlate has been considering how it can best retain and incentivize those employees and whether the Key Employees could be retained without a formal KERP. Based on discussions with management and in consultation with the Proposal Trustee, PaySlate determined that a KERP was required to retain and incentivize the Key Employees (for the reasons described further below).
>
> …
>
> 19. The KERP includes only Key Employees where management has determined that their continued employment and participation is integral to the operation of PaySlate's business, the preservation of value, and the successful completion of the SISP and any potential restructuring transaction.
>
> 20. PaySlate reduced its employee headcount shortly before filing the NOI in order to reduce its operating expenses. As a result, PaySlate is operating on a very lean basis, and ideally would have a larger complement of employees. However, since PaySlate is already operating with minimal staffing, it is particularly important that it retain the Key Employees.
>
> 21. Each of the Key Employees has institutional knowledge and expertise in their respective roles, and cannot be easily replaced given PaySlate's current financial condition. …
>
> [Bold and italics in original; underlining added]

[122] Some of Mr. Bentham's evidence was admitted under seal given its confidential nature regarding key employees. His evidence that was not sealed was as equally pointed as Mr. Rosenfeld's: PaySlate's remaining employees were critical to its ability to operate as a going concern as well as to promote a successful SISP; any further reduction in staff would further diminish Paysafe's ability to deliver product to its customers on a timely basis. In his first affidavit sworn January 19, 2023, he also remarked on the essential role each employee brings to the company's ability to carry on business:

> 8. PaySlate's employees include individuals with highly specialized technical knowledge regarding PaySlate's product offering and intellectual property, and their roles include maintaining the technology platform, security, onboarding customers, and supporting existing customers. There is no overlap in responsibilities and each employee brings their specific skills and knowledge to the ongoing operations of PaySlate. Without those skills and knowledge, the ability for PaySlate to sustain operations and support a successful sale and/or restructuring of PaySlate will materially diminish.
>
> …

> 13. Based on my interaction with the employees and on my discussions with Mr. Brissot [a member of management] if the KERP is not approved, it is my view that employees will immediately being to leave PaySlate and PaySlate's ability to maintain operations through the SISP process will severely diminish and PaySlate may in fact not be able to sustain operations as a going concern. PaySlate's value to all stakeholders lies in its ability to remain operating as a going concern. The significant reduction in the workforce has also impacted the remaining employees because it has increased their workload. The demands on employees have further increased during these proceedings since several have also been asked to assist with gathering information for the sale process and will be asked to participate in meetings with bidders.
>
> …
>
> 15. In particular, as set out in the Affidavit #1 of Adam Rosenfeld, PaySlate's value is primarily as a going concern, and its revenue potential is based on (a) increased tenant adoption of the platform; (b) tenant screening, credit reporting, and rental insurance services; (c) renegotiation of legacy contract terms; and (d) signing new landlords and property managers. Realizing that potential requires PaySlate's employees, and the expertise and history of the participants in the KERP are integral to the going concern value and realizing on PaySlate's potential.
>
> [Emphasis and square bracket insertion added]

[123] The Proposal Trustee supported Paysafe's request for the KERP and provided this advice in its second report (mistakenly dated January 11, 2022, as opposed to 2023):

> *Development of the KERP*
>
> …
>
> 28. Management has advised the Proposal Trustee that PaySlate is currently operating with the minimum number of staff necessary to ensure continued business operations. The Proposal Trustee understands, based on discussions with management, that if there are any more departures from the Company, its operations and the SISP could be at risk.
>
> …
>
> *The Proposal Trustee's Opinion*
>
> 35. The Proposal Trustee is supportive of the proposed KERP Charge for the following reasons:
>
> > (a) The Company downsized its headcount shortly before the Filing Date to reduce operating expenses and is currently operating on a very lean basis. The number of Key Employees identified is proportionately reasonable to the size and nature of the business. …
>
> [Emphasis added]

[124] In these circumstances, I find myself unable to accept at face value PaySlate's contention that the RVO is intended to preserve the company as a viable going concern. Nor am I able to make that finding. That said, without more, I cannot go so far as to make the finding suggested by Paysafe – that the RVO is a disguised attempt by Ayrshire to obtain a valuable tax asset for improvident consideration while avoiding the statutory requirements imposed by Parliament. While I recognize that it is not uncommon for a purchaser of a distressed debtor to reorganize the debtor's affairs, and reduce the size of its workforce, I do find the inconsistency (pointed out by Paysafe) between PaySlate's present approach to the proposed reduction of at least half of its remaining workforce and its approach on the KERP application raises significant concerns about the reliability of submissions and evidence from PaySlate and Ayrshire regarding the purpose of the RVO.

Evidence of Value

[125] In this section, I address the insufficient nature of the valuation evidence provided by PaySlate and Ayrshire in the context of factors concerning no other viable alternative, whether any other stakeholder is worse off, and the appropriateness of the consideration paid.

[126] For most of the hearing, evidence of value of PaySlate's assets came from two sources: Ayrshire's view that PaySlate's tax attributes "may hold" value and from what was described as the "market has spoken" through the failed SISP.

[127] For the tax attributes, Ayrshire's position is contained in the Proposal Trustee's Fourth Report dated March 8, 2023, that they "may hold" value:

> 35. Although the Proposal Trustee has expressed some concerns, as noted above, the Proposal Trustee is supportive of the relief sought by the Company. In particular:
>
> (a) The Proposal Trustee understands that the transaction is structured pursuant to a reverse vesting order so that the proposed purchaser can assume the business as a going concern, ensure the continued ability of the Company to file claims for SR&ED credits and preserve certain tax attributes which the proposed purchaser has indicated may hold value; …
>
> [Emphasis added]

[128] Paysafe cautions that the advice comes from the proposed purchaser, i.e., Ayrshire, whose managing director and principal, Mr. Rosenfeld, is the director of and commands the same role with PaySlate.

[129] With that in mind, Paysafe brought to my attention written advice it received from the Proposal Trustee on March 13, 2023, five days after it issued its Fourth Report, answering an inquiry from Paysafe (both are excerpted below) that the value of the tax attributes may be in the range of $27 million:

> [From Paysafe's law firm]
>
> March 7, 2023
>
> On another issue, Robyn, could you please confirm with your client and RM , what the value of the non-transferrable tax attributes to which reference is made in paragraph 44 e) of the Motion?
>
> March 13, 2023
>
> Robyn, please see below. Can you provide me with this information?
>
> [From counsel for the Proposal Trustee]
>
> Bernard, we understand it is approximately $27 million.
>
> [Emphasis added; email descriptions in brackets added]

[130] The information in this email was, understandably, bought to my attention as a matter of significant concern. It also grounded, in part, Paysafe's challenge of the valuation of the tax attributes proffered by PaySlate on the application, which was essentially Ayrshire's view of value as reported in the Proposal Trustee's Fourth Report noted above.

[131] After this correspondence was admitted into evidence (by consent), the Proposal Trustee delivered a supplemental report dated March 24, 2023 with additional information concerning value, suggesting a range of $750,000 to $1.5 million:

> 24. Based on the Proposal Trustee's past experience, and in consultation with tax experts within its office, the market will typically pay approximately $0.03 to $0.06 per $1.00 of available tax attributes in similar transactions. The range is largely dependant on the type of attribute available. For example, resources pools which may be held

by oil and gas companies, typically carry greater value than non-capital losses as there is more certainty associated with their utility on a carry forward basis. In this case, PaySlate does not operate in that sphere and does not have any resource pools. Further, there is significant uncertainty associated with the value of non-capital losses as there are many variables that affect their use. For example:

(a) A company must generate profitability of $25 million on a go forward basis in order to use the tax losses (within a 20-year period when the non-capital losses expire);

(b) Tax losses cannot be sold to a third party, but if there is a change of control in a company, the company's business must be continuing; and

(c) To the extent there is any debt forgiveness in a company, the amount of that forgiveness reduces the amount of losses available for potential use (in this case, the tax losses of approximately $27 million may be reduced by debt forgiveness and conversion of debt to equity in the aggregate of approximately $5.5 million).

25. The realizable value of the tax attributes is never the face amount of the non-capital losses. Given the significant uncertainty surrounding the utility of the losses, the market is limited and deeply discounted.

26. Applying the range of value to the amount understood to be available in non-capital losses (even without the grind for debt forgiveness), the Proposal Trustee can attribute a value of $750,000 to $1,500,000 for the tax attributes (based on $0.03 to $0.06 per dollar of $27 million). The Proposal Trustee notes that this is well below the value associated with the proposed Transaction, which includes:

(a) The assumption of the DIP Loan of approximately $1.95 million;

(b) The assumption of the SRED Loan of approximately $300,000;

(c) The conversion of the Novel debt (approximately US $416,000 as at December 2020) to equity;

(d) The conversion of the Noteholder debt (approximately $2.6 million as at December 2020) to equity;

(e) The assumption of tax obligations to the Canada Revenue Agency and BC Ministry of Finance, which the Proposal Trustee understands are being paid as they could be set off against any SRED claim;

(f) The payment of arrears under Retained Contracts for services provided thereunder; and

(g) The payment of any amounts owing under the Administration Charge and in relation to Terminated Employee Claims.

[Emphasis added]

[132] Paysafe takes issue with the late provision of this information as it did not give it an opportunity for fair consideration, and further, that it was not, and should have been qualified as expert evidence. Paysafe also questions this valuation advice, reminding me that Novel and the CRA, who initially opposed the RVO, must see sufficient value in the proposed transaction sufficient to satisfy their claims since, in Novel's case, it agreed to convert secured debt to equity and for the CRA, to accept a post-closing indemnity.

[133] Paysafe correctly points out that in respect of any proposal that PaySlate proffered, ss. 65.13(1), (4), and (5) of the *BIA* require me to consider, in addition to other factors emphasized in s. 65.13(4)(d) and (e) in the excerpt below, whether (per s. 65.13(4)(f)) the consideration provided for the assets "is reasonable and fair, taking into account their market value":

> **Restriction on disposition of assets**
>
> **65.13 (1)** An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> …
>
> **Factors to be considered**
>
> **(4)** In deciding whether to grant the authorization, the court is to consider, among other things,
>
> **(a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> **(b)** whether the trustee approved the process leading to the proposed sale or disposition;
>
> **(c)** whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> **(d)** the extent to which the creditors were consulted;
>
> **(e)** the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> **(f)** whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
>
> **Additional factors — related persons**

> **(5)** If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that
>
> **(a)** good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
>
> **(b)** the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.
>
> [Bold in original; underlining emphasis added]

[134] Although those provisions do not specifically require a valuation opinion or liquidation analysis, either or both have been provided in other cases in appropriate circumstances.

[135] I disagree with PaySlate's contention that it is inappropriate to consider s. 65.13(4) in my analysis as it assumes there is a party willing to tender and fund a proposal in this case. I agree with Paysafe that that is in effect what is being sought on this application. Even if it is not construed as a proposal, the s. 65.13(4) factors are appropriate to the analysis in this case as they align with those discussed in the case authorities dealing with RVOs.

[136] Paysafe argues that both expert evidence of valuation along with a valuation and liquidation analysis should have been provided in this case in view of the extraordinary nature of an RVO, the stringent burden placed on an applicant seeking an RVO and the Proposal Trustee, and in particular, in view of the concerns it raised regarding the $27 million value for the tax attributes contained in the Proposal Trustee's March 13 email.

[137] I agree, to this extent.

[138] While not every case involving an RVO may require expert valuation opinions, at a minimum, fulsome evidence concerning the value of PaySlate's assets, including its tax attributes, should have been provided well before the hearing began. The information in the Proposal Trustee's supplemental report should not have had to be drawn out on account of Paysafe's objections during the hearing. I agree with Paysafe that the case authorities are clear that the onus rests with the

applicant, purchaser, and court's officer to provide the requisite evidence to demonstrate that the tests for issuing an RVO have been met.

[139] While I do not accept Paysafe's contention that expert valuation evidence tendered in accordance with the *Rules* is necessary in this case, I agree with Paysafe that the unidentified sources for much of the valuation information and advice are problematic. I also do not know the qualifications and expertise of the author of the Proposal Trustee's reports (their resume is not in evidence) nor that of the tax experts spoken to (let alone their identity). Nor is the nature, extent, and scope of the research grounding their analysis provided.

[140] I also agree with Paysafe that value in this case is not necessarily measured solely by what a third party might pay for the tax attributes (it points out there is no evidence concerning the specific information available in the data room to potential bidders concerning valuation including the tax attributes and SR&ED credits). In the specific circumstances of Ayrshire's stated purpose of its bid (i.e., to maintain it as a going concern), the value of the tax attributes is to PaySlate's business as a going concern. The value of those attributes based on a forward-looking cash flow analysis would be useful (in other cases, the court's officers have provided a comparative analysis, including a cash flow analysis to show the potential value of tax attributes). It would also address factors such as appropriateness of consideration and the extent of value to all stakeholders under the proposed transaction as opposed to bankruptcy).

[141] As Professor Sarra aptly points out, there must be an evidence-based rationale for value in the proposed transaction. In addition, given the heightened obligations on the court's officer, discussed in *Blackrock Metals* and in *Harte Gold*, analysis should have been provided in this case contrasting the impact of bankruptcy on all stakeholders to the RVO.

[142] Thus, in all, I am not satisfied that sufficient evidence of value has been provided. Without it, I am unable to determine the appropriateness of the

consideration proposed to be paid under the RVO, whether there are other viable alternatives, and whether other stakeholders are no worse off.

Release, Bars, and Restrictions on Contractual Rights

[143] In all of these circumstances, and in the absence of service on counterparties to Retained Contracts whose rights are affected and given insufficient evidence concerning value, I cannot accept that PaySlate and Ayrshire have demonstrated that the waiver, bar, release provisions as well as those restricting contractual rights of counterparties to Retained Contracts are fair and reasonable, as they must in accordance with the principles outlined in *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54; see also; *Blackrock Metals* at paras. 128-130; *Harte Gold* at paras. 78-86.

Disposition

[144] The case authorities are clear that RVOs are only to be granted in extraordinary circumstances following close judicial scrutiny and only after the applicant, purchaser, and court's officer have established that the factors set out in the case authorities are satisfied. In addition to significant issues arising from lack of service, they have not met that burden on the evidence available. I have no choice but to dismiss the application.

"Walker J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *PaySlate Inc. (Re),*
2023 BCSC 977

Date: 20230510
Docket: B220504
Estate No.: 11-2891281
Registry: Vancouver

In Bankruptcy and Insolvency

In the Matter of the Notice of Intention to Make a Proposal of PaySlate Inc.

Before: The Honourable Mr. Justice Walker

Oral Reasons for Judgment

In Chambers

Counsel for PaySlate Inc.:	M. Lemmens J. Pepper L. Beatch, Articled Student T. Haggstrom, Articled Student
Counsel for Paysafe Merchant Services Inc.:	P. Bychawski C. Hildebrand
Counsel for the Proposal Trustee, Grant Thornton Limited:	R. Gurofsky J. Cameron
Counsel for Ayrshire Real Estate Management Inc. and 1410512 B.C. Ltd.:	S. Collins E. Wilson
Place and Dates of Hearing:	Vancouver, B.C. April 24, 27 and May 10, 2023
Place and Date of Judgment:	Vancouver, B.C. May 10, 2023

THE COURT:

Introduction

[1] Let me start by saying I have no hesitation in approving the new proposed reverse vesting order ("RVO") as modified in oral submissions today and supported by Grant Thornton Limited, the proposal trustee ("Proposal Trustee"). The terms will be reflected in an affidavit to be prepared and filed by counsel, Ms. Pepper, on behalf of PaySlate Inc. ("PaySlate").

[2] Even though the approval application is now unopposed, it is important, as Professor Sarra reminds us, to provide reasons, even brief ones, explaining why the proposed transaction passes judicial scrutiny: Janis Sarra, "Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions", 2022 CanLIIDocs 431 at 1-2.

[3] The parties have now addressed all of the concerns I expressed in my reasons for judgment indexed as 2023 BCSC 608 ("Prior Reasons") about the RVO previously proposed and have satisfied the tests established in *Harte Gold Corp. (Re)*, 2022 ONSC 653, and *Arrangement relatif à Blackrock Metals*, 2022 QCCS 2828, leave to appeal ref'd 2022 QCCA 1073.

PaySlate has met the tests set out in *Harte Gold* and *Blackrock*

[4] PaySlate's value is unquestionably tied to its business as a going concern and its tax attributes and Scientific Research and Experimental Development ("SR&ED") credits.

[5] There is now an appropriate evidence-based rationale provided by the debtor with fulsome and most helpful information and analysis of value provided by the Proposal Trustee in its sixth and seventh reports. It establishes that the proposed consideration is appropriate or, as required by the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], "reasonable and fair" in relation to the value of the business being acquired through the proposed RVO.

[6] The administration and professional charges, cure costs, KERP charge, employee termination payments of $2,000 each, per the *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s. 1, and the debtor-in-possession ("DIP") financing will all be satisfied.

[7] The proposed RVO offer follows upon a well-structured, highly robust, and comprehensive marketing program (Sale and Investment Solicitation Process or "SISP") and follow-up efforts after the SISP failed (all conducted by the Proposal Trustee); the latter attracted offers demonstrating that the value in the company does not extend beyond its DIP financing.

[8] The parties have established that the proposed RVO offers better value to stakeholders than the asset vesting order ("AVO") offered as an alternative transaction in the event I did not approve the RVO, by approximately $357,000.

[9] The RVO also offers better value than the two other offers (received from Party A and Party B as discussed in the Proposal Trustee's sixth and seventh reports), both of which attract risk and completion delays.

[10] Stakeholders are not worse off if the proposed RVO is approved. In fact, not only does the RVO offer better value, as I have just said, some stakeholders are better off than under any other proposed transaction offered.

[11] Necessity has also been established. Not only does the share acquisition contemplated by the RVO preserve PaySlate's tax attributes and SR&ED credits, from additional evidence adduced by PaySlate and discussed by the Proposal Trustee, it is clear that the RVO is also necessary to preserve PaySlate's cyber security and cyber insurance policies.

[12] A vesting order, including the AVO proposed in the alternative, would require the new purchaser to secure that coverage which affords integral protection to PaySlate's business. The evidence establishes that such coverage may not be readily obtainable, if at all, and even if it is, operational delays for PaySlate would

result while coverage is being sought and placed. Customers may leave to other service providers.

[13] The proposed releases are now significantly restricted (more so than typically seen in other AVO transactions) and are, in any event, rationally connected to the proposed transaction and are in favour of those persons and entities who have been integrally involved in supporting the RVO and the alternate AVO transaction. Further, parties to retained contracts are not being asked to release pre-filing claims.

[14] Service has been properly effected on all requisite stakeholders, including parties to retained contracts, and all key stakeholders have been consulted.

[15] The rights of parties to retained contracts are not being abrogated other than they are not permitted to terminate on account of PaySlate's insolvency.

[16] The RVO and the related subscription agreement which contains that singular prohibition of termination rights, i.e., in respect of insolvency, are not opposed, and the RVO is now supported by the only party who previously opposed it, Paysafe Merchant Services Inc. (“Paysafe”). This is not a case where the RVO is a disguised attempt to rid PaySlate of a recalcitrant creditor.

[17] Paysafe and PaySlate have reached an agreement, where Paysafe, who is a critical supplier, will continue to provide services for 30 days beyond closing of the transaction, at which time the contract between the parties will terminate. In return, Paysafe’s indemnity claim of just over $2.21 million will be accepted and, in turn, comprised by the receipt of equity for approximately 4.8% of PaySlate's common shares, representing an approximate value of $350,000.

[18] However, the agreement between Paysafe and PaySlate does not involve a reordering of priorities and does not reduce the amounts that would otherwise be available to other creditors. I agree with the Proposal Trustee that the settlement with Paysafe represents a positive outcome for PaySlate and its stakeholders, as it allows PaySlate to pursue a transaction before the looming expiry of this “NOI” proceeding and avoids further court proceedings and their attendant drain on the

company's cash and a distraction to the company's intention to pursue a successful restructuring.

[19] I am satisfied that the parties have met the criteria set out in s. 65.13(4) and (5) of the *BIA*, as:

a) sustained good faith, comprehensive and robust efforts have been made to solicit offers from non-related parties;

b) the RVO offers a far better outcome than bankruptcy; and

c) no other viable alternative providing the same value to stakeholders exists.

[20] There is no funding available to conduct a further SISP, and even if there were, I am satisfied that all efforts have been undertaken by the Proposal Trustee after the failed SISP to obtain further and better offers from those expressing an interest in pursuing an acquisition.

Conclusion

[21] Before concluding, I wish to thank counsel and the parties for engaging in what I understand to have been further substantive negotiations following the release of the Prior Reasons to achieve this positive outcome for PaySlate and its stakeholders.

[22] I also wish to thank counsel for their most helpful, focused oral and written submissions and the Proposal Trustee, in particular, for providing me with the information, evidence, and analysis necessary when a reverse vesting order is sought.

[23] Anyone wishing to read a useful example of the type of information, evidence, and analysis required to pass judicial scrutiny to obtain a reverse vesting order should read the Proposal Trustee's sixth and seventh reports and the further

evidence adduced through Mr. Bentham's affidavit and the affidavits of service after the Prior Reasons were issued.

[24] In summary, I have approved the RVO as amended in submissions today that will be reflected in an exhibit attached to an affidavit to be sworn by Ms. Pepper. I also approve the order sought that is declaring service to be valid and effected and also approve the increase in the DIP amount.

[25] Is there anything arising?

[DISCUSSION RE: EXTENSION OF STAY]

[26] THE COURT: I am prepared to extend it to the end of the week if the parties agree to that. I will extend the extension of the stay to midnight, May 19, 2023.

“Walker J.”

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Peakhill Capital Inc. v. Southview Gardens Limited Partnership,* 2023 BCSC 1476

Date: 20230825
Docket: S-231065
Registry: Vancouver

Between:

Peakhill Capital Inc.

Petitioner

And

Southview Gardens Limited Partnership, Southview Gardens BT Ltd., Southview Gardens Properties Ltd., Zhen Yu Zhong, Junchao Mo, Coromandel Properties (2016) Ltd., Baystone Properties (2016) Ltd., and Coromandel Holdings Ltd.

Respondents

Before: The Honourable Justice K. Loo

Reasons for Judgment

Counsel for the Petitioner:	E. Laskin
Counsel for the Receiver, KSV Restructuring Inc.:	V. Tickle
Counsel for Cenyard Pacific Developments Inc.:	J. Schultz E. Newbery
Counsel for His Majesty the King in right of the Province of British Columbia:	O. James R. Power
Counsel for Cenyard Southview Gardens Ltd.:	A. Teasdale
Place and Date of Hearing:	Vancouver, B.C. August 4, 2023

Place and Date of Judgment: Vancouver, B.C.
August 25, 2023

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Overview

[1] On this application in an ongoing receivership proceeding, this Court has been asked to approve a sale transaction (the "Transaction") in respect of lands legally described as Lot 14, District Lot 334, Plan 13993, PID 007-982-160, municipally known as 3240 East 58th Avenue, Vancouver, British Columbia, and the buildings thereon (the "Real Property") to Cenyard Southview Gardens Ltd. (the "Purchaser").

[2] The sole issue before the Court is whether the Transaction may be carried out by means of a Reverse Vesting Order ("RVO") or whether it must proceed by way of a standard Approval and Vesting Order (“AVO").

[3] An RVO is a type of transaction which is typically used 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.

[4] RVOs were described by Justice Walker as follows in *PaySlate Inc. (Re)*, 2023 BCSC 608 [*PaySlate #1*]:

> [1] Reverse vesting orders ("RVOs") are a relatively new method used in insolvency cases to avoid the purchaser assuming the insolvent debtor's unwanted assets and liabilities. Typically, an RVO contemplates the sale of the debtor company's shares through a transaction structured so that "unwanted" assets and liabilities (including in this case, certain unsecured creditor claims) are removed and vended to a residual company while the "good assets" remain with the debtor.

[5] In this case, an AVO would transfer legal title to the Real Property directly to the Purchaser from the company under receivership. That conveyance would trigger an obligation to pay property transfer tax (“PTT”) pursuant to the *Property Transfer Tax Act*, R.S.B.C. 1996, c. 378 [*PTTA*] estimated to be approximately $3.5 million.

[6] By contrast, if an RVO is employed, the shares of the debtor company which owns legal title to the Real Property, Southview Gardens BT Ltd., would be

conveyed to the Purchaser. In those circumstances, the Real Property would not be directly transferred and no PTT would be payable.

[7] Cenyard Pacific Developments Inc. ("Cenyard") is a major secured creditor of the respondents, which holds a second priority mortgage on the Real Property.

[8] The Transaction provides that if the PTT is payable, the purchase price will be reduced by the amount of the PTT. If PTT is payable, it is Cenyard who will suffer the shortfall, subject to any other security rights that it may have.

[9] Both Cenyard and the Purchaser (the “Applicants”) seek to have the Transaction completed by way of an RVO, thus avoiding the PTT obligation.

[10] The Province of British Columbia (the "Province") opposes the Transaction by way of RVO, but does not oppose the Transaction by way of an AVO.

Background

[11] Pursuant to an application made by Peakhill Capital Inc., this Court made an order on February 16, 2023 appointing KSV Restructuring Inc. (the “Receiver”) as the receiver of all of the assets, undertakings and business of various companies related to the Real Property, together with the Real Property itself.

[12] On March 23, 2023, this Court made an Order approving a sales process for the Real Property.

[13] The sales process was overseen by CBRE Limited who was retained and authorized by the Receiver to market the Real Property. Five offers were received, and the Purchaser submitted the highest offer.

[14] The Purchaser’s offer contemplated completion of the Transaction in part by way of an RVO. It is uncontested that the purpose for structuring the Transaction in this way, as opposed to through a conventional AVO, was to avoid paying PTT of approximately $3.5 million.

[15] On June 29, 2023, in its second report, the Receiver expressed some reservations about the Transaction proceeding by way of RVO on the basis that the Transaction did not include attributes that have been relied upon in the past by the courts in granting RVOs. In early July 2023, the Province expressed its opposition to the RVO.

[16] Consequently, the hearing of this application was set, and pending the contested hearing, the parties decided to seek approval of the AVO. I am advised by counsel for the Purchaser that this was done to achieve some commercial certainty.

[17] On July 13, 2023, this Court approved the Transaction by way of AVO, subject to: (i) the Court granting the RVO; and (ii) the closing of the Transaction being on or before September 12, 2023.

Issues

[18] In determining this application, there are two issues. In the circumstances of this case:

(a) does the Court have jurisdiction to grant an RVO; and

(b) if so, is it appropriate for the Court to grant an RVO?

Jurisdiction

[19] The receivership order in this case was sought pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*] and s. 39 of the *Law and Equity Act,* R.S.B.C. 1996, c. 253 [*LEA*].

[20] In *PaySlate #1*, Justice Walker found that an RVO may be granted under this Court's general jurisdiction under s. 183(1)(c) of the *BIA* which provides:

> 183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers …
>
> (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

[21] In *PaySlate #1*, Justice Walker held:

> [84] Although many of the case authorities discussing the circumstances in which RVOs may be issued are in the context of the *CCAA*, RVOs are available tools in other insolvency cases as well. Similar considerations apply in the context of the *BIA*.
>
> [85] In the *BIA*, s. 183 confers jurisdiction in accordance with legal and equitable principles to give effect to its purpose: *Re Olympia & York Developments Ltd.*, [1997] O.J. No. 591 at paras. 7, 10 (Gen. Div., in Bankruptcy); *Re Residential Warranty Company of Canada Inc. (Bankrupt)*, 2006 ABQB 236 at para. 26. Those purposes include those applying to proposals such as s. 65.13(4).
>
> [86] In addition to *Blackrock Metals*, *Harte Gold,* and *Quest*, there are other case authorities finding jurisdiction to order RVOs, including a notice of intention to make a proposal under the *BIA* (case name is underlined), and receivership proceedings, such as: *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00 (Ont. S.C.J. [Comm. List]); *Stornoway Diamond Corporation* (October 7, 2019), Montreal 500-11-057094-191 (Q.C.S.C. [Comm. Div.]); *Wayland Group Corp.* (April 21, 2020), Toronto CV-19-00632079-00CL (Ont. S.C.J. [Comm. List]); *Comark Holdings Inc.* (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. S.C.J. [Comm. List]); *Beleave Inc.* (September 18, 2020), Toronto, CV-20-642097 (Ont. S.C.J. [Comm. List]); *JMB Crushing Systems Inc.* (October 16, 2020), Calgary 2001-05482 (A.B.K.B.); *Arrangement relatif à Nemaska Lithium Inc*., 2020 QCCS 3218, leave to appeal refused, 2020 QCCA 1488; *In the Matter of a Plan of Compromise or Arrangement of Clearbeach Resources Inc. and Forbes Resources Corp.*, 2021 ONSC 5564*; In the Matter of the Notice of Intention to Make a Proposal of Junction Craft Brewing Inc*. (November 8 and December 20, 2021, Toronto, CV-31-2774500 (Ont. S.C.J. [Comm. List]; *Port Capital Development (EV) Inc. (Re)*, 2022 BCSC 1464, leave to appeal ref'd *1296371 B.C. Ltd. v. Domain Mortgage Corp.*, 2022 BCCA 331; *In the Matter of CannaPiece Group Inc.*, 2023 ONSC 841; *In the Matter of CannaPiece Group Inc.* (February 10, 2023), Toronto CV-22-689631-00CL (Ont. S.C.J. [Comm. List]); *Credit Suisse AG, Cayman Islands Branch v. Southern Pacific Resource Corp. et. al.* (May 13, 2022), Calgary 1501-05908 (A.B.K.B.).

[22] In my view, the issue of whether this Court has jurisdiction to grant RVOs in proceedings under the *BIA* was raised squarely and decided in *PaySlate #1*. In my respectful view, the decision of Justice Walker was both correct and determinative of the issue.

[23] The Province raises two arguments regarding jurisdiction.

[24] First, it argues that the words of s. 183 of the *BIA* (or s. 243 which deals with receiverships) are insufficient to ground jurisdiction to grant an RVO.

[25] In my view, this argument is met by *PaySlate #1*. As stated, Justice Walker has decided that the general words of s. 183 *are* sufficient to ground jurisdiction.

[26] Second, the Province argues that even if s. 183 provides this Court with jurisdiction generally to grant an RVO, it does not do so in the context of this case. It says that that the *BIA* must be interpreted with regard to the *PTTA*, and it cites s. 72(1) of the *BIA* which states:

> 72 (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

[27] In my view, this submission is not one which relates to this Court's jurisdiction. Rather, it questions whether the granting of an RVO is appropriate in the particular circumstances of this case. The interplay between the RVO sought and the provisions of the *PTTA* will be addressed in detail below.

[28] As stated above, the Applicants also argue that this Court has jurisdiction to grant an RVO under s. 39 of the *LEA*. Given my conclusion that it has jurisdiction under the *BIA*, it is not necessary for me to decide whether the *LEA* provides an additional basis for this Court's jurisdiction to grant an RVO and I decline to do so.

Appropriateness

[29] This case, insofar as I am aware, is unique in the sense that there is no reported decision of a Canadian court in a contested proceeding that has addressed whether an RVO may be granted *solely* for the purpose of achieving a tax benefit.

[30] In order to determine this issue, I will review the principles regarding the granting of RVOs, I will address the Province's argument that an RVO in this case would abrogate or supersede the provisions of the *PTTA*, and I will address the Province's argument that an RVO ought not to be granted in the face of reservations expressed by the Receiver about the Transaction proceeding by way of RVO.

Analysis of the Authorities Regarding RVOs

[31] The Applicants argue that the case law supports the issuance of an RVO to support tax-related objectives. There are a number of cases in which tax benefits have been cited as reasons for granting an RVO.

[32] In *Port Capital Development (EV) Inc. (Re)*, 2022 BCSC 1464 *[Port Capital]*, Justice Fitzpatrick held:

> [58] Finally, I am satisfied that approval of the Solterra Offer in the form of an RVO is appropriate, just as it was in relation to the Solterra Backup Offer. In the *BCSC Sale Reasons*, I set out the reasons why such a structure would be beneficial, albeit in relation to Landa's offer:
>
> > [20] Landa Offer #1 was in the form of an asset purchase, although the parties allowed for the possibility of completion pursuant to a Reverse Vesting Order ("RVO"). That scenario was seen as beneficial in order to allow the existing Petitioners to continue under Landa's ownership and control while preserving existing contractual rights, such as the building permit (but not the pre-sale contracts). The RVO structure also avoided payment of substantial property transfer tax.
>
> [emphasis added]

[33] Further, in *Quest University Canada (Re)*, 2020 BCSC 1883 *[Quest]*, leave to appeal ref'd at 2020 BCCA 364, Justice Fitzpatrick cited two other cases in which courts found it appropriate to grant RVOs for tax planning purposes:

a) At para. 131, she cited *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00C (Ont. S.C.J. [Comm. List]), in which an RVO was approved to implement an agreement "that 'effectively' transferred current tax losses and intellectual property to a purchaser"; and

b) At para. 136, she cited *Comark Holdings Inc*. (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. S.C.J. [Comm. List]), wherein Justice Hainey granted the RVO involving a share sale that "preserved the tax attributes of the debtor, which the purchaser viewed as critical for the success of the future business".

[34] Moreover, in *PaySlate Inc. (Re)*, 2023 BCSC 977 [*PaySlate #2*], Justice Walker held:

> [11] Necessity has also been established. Not only does the share acquisition contemplated by the RVO preserve PaySlate's tax attributes and SR&ED credits, from additional evidence adduced by PaySlate and discussed by the Proposal Trustee, it is clear that the RVO is also necessary to preserve PaySlate's cyber security and cyber insurance policies.
>
> [emphasis added]

[35] And in *Just Energy Group Inc. v. Morgan Stanley Capital Group Inc.*, 2022 ONSC 6354 at para. 34 [*Just Energy*], the court held that one of the circumstances in which RVOs have been approved is where "maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction".

[36] The Province argues that, in those cases, the preservation of tax attributes or the saving of tax were not the only benefits arising from the RVOs which were granted. Further, it submits that an RVO is usually granted to preserve a going concern which would otherwise be lost.

[37] For example, in *Port Capital*, while the RVO structure did allow the parties to avoid property transfer tax, it also allowed the business to continue as a going concern and to preserve existing contractual rights such as a building permit.

[38] Similarly, in *PaySlate* #2, an RVO was granted to preserve the debtor's existing tax attributes, but it also preserved scientific research and experimental development tax credits, as well as cyber security and cyber insurance policies which would otherwise not be transferable.

[39] There is no doubt that a common use of RVOs is to preserve a going concern or to maintain licenses and permits which cannot be transferred easily: see *PaySlate #1* at para. 1, and *Harte Gold Corp. (Re)*, 2022 ONSC 653 *[Harte Gold]* at para. 71.

[40] It is also clear that the jurisprudence is replete with cautionary words regarding the granting of RVOs.

[41] In *PaySlate #1* at para. 87, Justice Walker held that "RVOs are not the norm and should only be granted in extraordinary circumstances".

[42] Similarly, in *Harte Gold* at para. 38, Justice Penny stated as follows:

> … 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.

[43] In *Quest*, Justice Fitzpatrick held at para. 171:

> A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the *CCAA*.

[44] And in *Just Energy* at para 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…

[45] There is no doubt that careful consideration is required when an RVO is sought. It is important to observe, however, that much of the reluctance expressed by courts about granting RVOs has arisen because RVOs may be used to circumvent processes in insolvency proceedings which entitle creditors to vote on plans, or may otherwise prejudice creditors.

[46] In *PaySlate #1,* Justice Walker cited an article of Professor Janis Sarra for the proposition that "RVOs require special scrutiny by the courts, even where uncontested, since they deviate from [the] statutory framework intended to provide all creditors with an opportunity to be heard in the process".

[47] In Dr. Sarra's article, "Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions", 2022 CanLIIDocs 431 (the "Sarra Article"), she stated:

> [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…
>
> 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.

[48] And further:

> Weighed against these benefits is the concern that the RVO approach bypasses key components of the statutory framework that balances multiple creditor rights and interests, including the ability of creditors to vote on a plan. While one benefit of an RVO is often described as cost savings if a plan vote is avoided, the cases reveal that RVO can be complex and costly to structure and implement. There is also a question of whether companies will be able to shed substantial environmental remediation and reclamation obligations under this new structure, leaving few assets to satisfy the obligations.

[49] In this case, there are three secured creditors who are collectively owed more than $83 million: Peakhill, Cenyard, and a group of entities referred to as "Woodbourne". The purchase price for the Real Property—which is the debtors' principal asset—is $72 million if the Transaction proceeds by way of RVO, and approximately $3.5 million less if it does not.

[50] According to the Receiver's first report, the unsecured creditors are owed approximately $124,000. It is clear that as residual claimants to the value of the debtors' assets, they are "out of the money".

[51] There is no suggestion in this case that the rights of creditors are being compromised or that their interests would be prejudiced by the granting of an RVO. There is no suggestion that any significant liabilities or obligations other than the PTT will be avoided. It appears that the only party by whom any prejudice will be allegedly suffered is the taxing authority. In the particular circumstances of this case, the reasons for caution typically considered when an RVO is contemplated do not weigh heavily.

[52] The Province suggested that the avoidance of PPT in this case is akin to the avoidance of environmental and reclamation obligations referred to in the Sarra Article. However, in my view, the potential tax liabilities are different in kind. The avoidance of environmental obligations brings into play a significant public interest. The Province's interest in collecting PTT will be addressed below in the discussion regarding the interplay between the granting of an RVO and the *PTTA.*

[53] Relatedly, the Province also advanced what might be characterized as a "floodgates argument". I understand its submission to be that if an RVO is granted in this case, there will be an excess of RVO applications.

[54] In response, the Applicants observed that an RVO to avoid PPT may only be applied for when the property at issue is already held in the name of a company whose shares can be conveyed.

[55] In any event, although it may well be true that the granting of an RVO in this context will cause them to be sought more often, I have been advised of no reason why this would be undesirable from a policy perspective or from the perspective of any stakeholder, other than the taxing authority, at least in the absence of prejudice to other stakeholders such as creditors.

[56] As stated at the beginning of this section, the issue in this case is somewhat uncharted territory. On one hand, it does not appear that a Canadian court has ordered an RVO in a contested proceeding when tax savings were the only benefit. On the other hand, in the circumstances of this case, and subject to the Province's arguments addressed below regarding the interplay between the *BIA* and the *PTTA*, there does not seem to be any specific reason not to employ an RVO to preserve value for the creditors.

[57] All of these issues must be viewed in the context of the objectives of insolvency law, one of which is to maximize recovery for creditors. In this regard, Chief Justice Paquette held as follows in *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828 at para. 86, leave to appeal ref'd 2022 QCCA 1073, leave to appeal to SCC ref'd, 40401 (4 May 2023):

> Albeit new, RVOs have been confirmed by the courts as an appropriate way for a debtor to sell its business when the circumstances justify such structure. In particular, CCAA courts have approved RVO structures in several complex mining transactions and have recognized that their benefits, which include maximizing recovery for creditors, importantly limiting delays and transaction costs, and facilitating the preservation of the insolvent business' going concern, justify the use of this innovative restructuring tool.

The Interplay between the Granting of an RVO and the *PTTA*

[58] The foregoing analysis leads to the critical issue on this application: whether it would be contrary to the *PTTA* to grant an RVO which would have the effect of saving the creditors approximately $3.5 million in PTT.

[59] The Province argues that "to exercise jurisdiction and approve the RVO would be to bless the objective of avoiding a tax liability". Further, it argues:

> 77. Any statutory jurisdiction which could otherwise be found in the BIA or the LEA is negated in light of the specific provisions of the PTTA, which provide for (i) the payment of PTT when title is transferred (absent an applicable exemption), and (ii) mechanisms whereby the Province can assess PTT (and penalties) when a transaction or series of transactions are designed to avoid the payment of PTT.

[60] In my view, with respect, the Province's arguments on this issue are unpersuasive, for at least two reasons.

[61] First, I reiterate that in numerous cases, some of which are cited above, courts have granted RVOs which have conferred tax benefits on the parties in an insolvency proceeding. Those courts have already "blessed the objective of avoiding a tax liability", albeit in circumstances wherein the tax objective was not the only one. In all of these cases, it appears clear that the taxing authority became entitled to less tax than otherwise, either because tax credits or tax losses were preserved, or because taxes otherwise payable were avoided.

[62] Second, the Province's arguments on this issue appear to be based on the premise that the transfer of property by means of the sale of the corporate property owner's shares constitutes unlawful tax avoidance. However, it seems clear that, at least outside of the insolvency context, this proposition is not correct.

[63] To the extent that evidence on this point is required, the Applicants cite the Receiver's second report and an affidavit from an experienced corporate realtor for the proposition that it is common for a seller and purchaser to enter into a share purchase agreement for the sale of shares in a company whereby all of the issued and outstanding shares of the company are transferred by the seller to the purchaser so that the purchaser can own the seller company's real property. In particular, it is common for purchasers to acquire land in British Columbia by acquiring the shares of a nominee to avoid paying PTT.

[64] In a non-insolvency context, the parties would have been permitted to carry out the transfer of the property by means of the transfer of shares of the nominee company. Indeed, it seems evident that similarly situated parties in a non-insolvency context would have done so.

[65] Therefore, this is a tax liability which is readily avoided in a non-insolvency context. The Province has not been able to satisfactorily explain why, given that

premise, the proposed RVO transaction is unlawful or would attract the *PTTA*'s general anti-avoidance tax rules.

[66] In the Province's submission quoted above, it refers to "specific provisions of the PTTA…which provide for…the payment of PTT *when title is transferred*". It is important to emphasize that if an RVO is granted in this case, title to the Real Property will not be transferred. This is not a case in which the title will be transferred but the parties will be permitted nonetheless to evade or avoid the tax. The entire point of the RVO is to create an alternative arrangement in which there is no transfer of the property, as can readily be done without attracting tax when property is owned by a solvent company.

[67] In further support of its position on this issue, and in answer to the Province's argument that this Court's statutory jurisdiction to grant an RVO is negated by mechanisms in the *PTTA* by which the Province can assess PTT and penalties when a transaction is designed to avoid the payment of PTT, the Applicants point out that the Province has the ability to impose PTT on the transfer of property through the purchase of the shares of a nominee company by means of regulation and it has not done so.

[68] In particular, s. 2(3) and (4) of the *PTTA* contemplate that the Province has the power to tax the transfer of beneficial interests in land:

> (3) The Lieutenant Governor in Council may prescribe that a transaction that consists of a purported transfer, by a prescribed method of a prescribed interest in land, is taxable under this Act, whether or not that interest is registrable under the Land Title Act.
>
> (4) A regulation under subsection (3) may prescribe
>
> (a) when the liability for the tax arises and when the tax is payable, and
>
> (b) the method by which
>
> (i) returns must be filed, and
>
> (ii) the tax may be remitted and collected.

[69] At present, there are no regulations under the *PTTA* that would deem a sale of shares of a nominee holding real property to be a taxable transaction.

The Lack of a Positive Recommendation from the Receiver

[70] The Province argues that the application ought to be dismissed because of the Receiver's decision not to recommend the Transaction by way of RVO.

[71] There is no doubt that the recommendations of a court-appointed officer ought generally to weigh heavily in the deliberations of this Court. However, the Receiver did not recommend against the RVO. It simply declined to recommend it and it did not take a position on this application.

[72] Further, the reservations that it expressed were legal ones. In particular, it took the view that the facts of this case did not have many of the features found in other cases in which RVOs were ordered. In my view, these observations were generally correct and reflected the uncharted nature of this application.

[73] In my view, a receiver's recommendation is most valuable to the court when it reflects factual or other matters of which the receiver would have unique knowledge. In this case, while the Receiver's views on the application of the current jurisprudence are helpful, they do not weigh as heavily as they would in other circumstances.

[74] This is not a case in which the Receiver has opined on something that it is uniquely qualified to know. It has expressed reservations about whether the tests in the legal authorities have been met, which is a matter for this Court to determine.

[75] In my view, the fact that the Receiver declined to recommend approval of the Transaction by way of RVO does not preclude this Court from granting an RVO in the circumstances of this case.

The *Harte Gold* Factors

[76] In *Harte Gold* at para. 38, Justice Penny set out what are commonly referred to in the insolvency bar as the "*Harte Gold* factors" which are to be considered in determining whether an RVO is appropriate. As I have concluded that this Court is not precluded from granting an RVO by the present jurisprudence, the interplay

between an RVO and the *PTTA*, or the Receiver's decision not to recommend the RVO, I will turn to a consideration of those factors and their application to this case:

> 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?

[77] In my view, these factors lead to the conclusion that an RVO ought to be granted in this matter:

a) While an RVO is not necessary to avoid foreclosure or bankruptcy, it is necessary to allow the parties to structure their affairs so as to preserve $3.5 million in value for the creditors and to maximize the return for creditors.

b) In my view, the RVO structure produces an economic result at least as favourable as any other viable alternative. It clearly creates more value for the creditors. To the extent that the Province is a stakeholder in the analysis, the overall economic result is at least as favourable overall, in the sense that the Province "loses" exactly the amount that the creditors gain.

c) As to whether any stakeholder is worse off under the RVO structure, the Province is undoubtedly worse off. However, for the reasons set out above, it is my view that the Province's argument that it is entitled to the PTT because would be unlawful for the creditors to avoid the tax in these circumstances is belied by the regime currently in place in the non-

insolvency context. As stated above, it has not been suggested that any creditor or any other stakeholder is worse off.

d) Finally, the question of whether the consideration paid for the assets reflect the importance and value of the assets being preserved under the RVO structure may be answered in the affirmative. In the event that an RVO is granted, the saved funds go to the creditors.

[78] In the circumstances of this case, and particularly in the absence of any suggestion that an RVO in this case would prejudice the rights of creditors, I find that the RVO sought ought to be granted, on the basis that the RVO will preserve and maximize the value of the assets available to creditors.

Releases

[79] In considering whether to exercise the discretion to approve RVO release provisions, courts have considered the following factors set out in *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54:

> 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.

[80] The submissions of the parties regarding the release provisions in this case were very limited. The primary objection voiced by the Province was that the releases "serve to potentially inhibit the Province from collecting PPT".

[81] As I have determined that the granting of an RVO is appropriate so as to allow the creditors to save the amount of the PTT, the fact that the releases would also have this effect does not weigh heavily in the analysis. As the purpose of the RVO is to maximize the creditors' recovery by avoiding PPT, it would be inconsistent

with that purpose to permit the Province to collect the tax from the proposed releasees.

[82] In my view, the releases in this case are necessary to the Transaction if it is to be carried out by way of RVO, and they are rationally connected to it.

Conclusion

[83] For the reasons stated, the relief sought at paragraph 1(b) of the Receiver's Notice of Application filed June 30, 2023—which includes an approval and reverse vesting order, substantially in the form attached to the Notice of Application as Schedule "C" thereto—is granted.

"Loo J."

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia v. Peakhill Capital Inc.,* 2023 BCCA 368

Date: 20230925
Docket: CA49320

Between:

His Majesty the King in Right of the Province of British Columbia

Appellant
(Respondent)

And

Peakhill Capital Inc.

Respondent
(Petitioner)

And

KSV Restructuring Inc., Cenyard Pacific Developments Inc., and Cenyard Southview Gardens Ltd.

Respondents
(Respondents)

Before: The Honourable Madam Justice Saunders
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated August 25, 2023 (*Peakhill Capital Inc. v. Southview Gardens Limited Partnership*, 2023 BCSC 1476, Vancouver Docket S231065).

Oral Reasons for Judgment

Counsel for the Appellant:	O.J. James
Counsel for the Respondent, Cenyard Southview Gardens Ltd.:	W.L. Roberts A.T. Paczkowski
Counsel for the Respondent, Cenyard Pacific Developments Inc.:	J.D. Schultz E. Newbery
Counsel for the Respondent, KSV Restructuring Inc.:	V.L. Tickle

Counsel for the Respondent, Peakhill Capital Inc.:	E. Laskin
Place and Date of Hearing:	Vancouver, British Columbia September 25, 2023
Place and Date of Judgment:	Vancouver, British Columbia September 25, 2023

Summary:

The order appealed approved a reverse vesting order for a sale of real property in bankruptcy and insolvency proceedings: 2023 BCSC 1476. Such a transaction would result in no property transfer tax becoming payable to the Province of British Columbia. The Province appealed the order, triggering an automatic stay of proceedings under s. 195 of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3. The application is to lift the stay of proceedings to allow the transaction to complete, on terms that fully protect the Province in the event it succeeds in challenging the reverse vesting order. Held: On consent, application granted.

[1] **SAUNDERS J.A.**: The applicant, Cenyard Southview Gardens Ltd., applies for an order lifting a stay of proceedings that was triggered by s. 195 of the *Bankruptcy and Insolvency Act,* R.S.C., 1985, c. B-3.

[2] The creditor protection proceedings were commenced under the *Companies' Creditors Arrangement Act,* R.S.C., 1985, c. C-36, by Coromandel Properties (2016) Ltd. KSV Restructuring Inc. is the receiver of Coromandel's assets pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, and it has, in particular, the purpose of conducting the court-supervised sale of land that is the subject of disagreement between the parties.

[3] The appeal arises from a reverse vesting order granted by Mr. Justice Loo on August 25, 2023, approving a sale transaction in respect of lands in the city of Vancouver, British Columbia. The Province of British Columbia took the position before Mr. Justice Loo that the reverse vesting order should not be granted and that the property should be transferred the way we are usually accustomed to property transferring, attracting property transfer tax. The result of this transaction going by reverse vesting order is that no property transfer tax is payable.

[4] The Province is the appellant and is appealing the order approving the sale. The appeal triggered s. 195 of the *Bankruptcy and Insolvency Act* which automatically stays all the proceedings under a judgment until the appeal is disposed of.

[5] The issues on appeal are likely to be a jurisdictional point as to whether a reverse vesting order can be made under the *Bankruptcy and Insolvency Act* and,

also, the implications of the transaction on payment of property transfer tax that would be payable were the property to be disposed of through the alterative of a normal vesting order.

[6] The sale transaction is scheduled to close on September 29, 2023, and the appeal cannot be heard before that date. In fact, some confidence is required earlier than that date in order to free up the financing for the closing on September 29. This is the reason we are hearing this on short notice today.

[7] Cenyard applies for an order lifting the statutory stay so that the sale transaction can complete on time and the application has been prepared so as to acknowledge that the funds should be secured in an appropriate way so that the Province is not prejudiced.

[8] The application is conceptually a stay of the statutory stay. The test to consider for lifting the stay of proceedings here is the same three-part test that this court usually applies to stays under *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311:

a) there is some merit to the appeal in the sense that there is a serious question to be determined;

b) the party seeking the stay will suffer irreparable harm if the stay is not granted; and

c) the balance of convenience favours a stay.

[9] I certainly recognize that there is a serious question here to be determined, it is of importance to the parties and it is of importance to the practice. There is some merit to the appeal – I understand that the large issue of jurisdiction has not been looked at by appellate courts and so this is a new issue in bankruptcy practice. And one cannot say that the applicant has not met that first test.

[10] There will be irreparable harm if the stay is not lifted – the transaction is highly unlikely to proceed, the offers that were made other than this offer were quite inferior

to this one so there will be financial losses to the parties, and other matters will fall out from the collapse of the transaction – including a loss of deposit. Third, the balance of convenience clearly favours lifting the stay with the terms proposed.

[11] The parties have worked together to prepare an order that they either consent to, or do not oppose. I think, as I hear it today, they are consenting to at least some of the terms, if not all of the terms. I am certainly satisfied that the order applied for should issue and I will read it into the record.

[12] The transaction is referred to as the "Primary Transaction" and I will order that the stay imposed by operation of s. 195 of the *Bankruptcy and Insolvency Act* of the order of Mr. Justice Loo pronounced on August 25, 2023 granting a reverse vesting order in the action below is lifted on these terms:

1. Upon closing of the Primary Transaction, the Applicant, or its assignee Cenyard Investments Ltd. (the "Assignee"), will pay $3,342,100 (the "Disputed Amount") into trust with its solicitors, Lawson Lundell LLP, and the Disputed Amount will be held in trust by Lawson Lundell LLP on the terms set out in paragraph (2) below, unless otherwise agreed to in writing by the Applicant, or the Assignee and the Appellant, or pursuant to a further order of this Court;

2. If the appeal is allowed, the Disputed Amount will be paid to the Appellant upon the expiry of the applicable appeal period. If the Appeal is dismissed, the Disputed Amount will be repaid to the Applicant or the Assignee upon the expiry of the applicable appeal period. If a further appeal, or an application for leave to appeal from the Court of Appeal's decision is filed, the Disputed Amount shall remain in trust with Lawson Lundell LLP, pending determination of the further appeal or application for leave to appeal, as the case may be;

3. By consent, no party to this appeal, including the Assignee, may assert the appeal is moot as a result of the closing of the Primary Transaction

referred to in the reverse vesting order, or assert that the appeal ought not to be allowed as a result of this order; and

4. By consent, if the Primary Transaction referred to in the reverse vesting order closes, the remedies on appeal will be limited to remedies related to the Disputed Amount and costs of the appeal, and the Primary Transaction will stand and will not be reversed.

[13] Costs of this application will be in the cause.

[Discussion with counsel re: clarifying order and dispensing with signatures]

[14] Because this order is by consent, I ask that counsel sign the order.

"The Honourable Madam Justice Saunders"

Court of Appeal for British Columbia
Chimo Structures Ltd. (Re)
Date: 1977-02-11

A. Sweezey, for appellants.

G. K. MacIntosh, for respondent receiver-manager.

(Vancouver CA761129)

[1] 11th February 1977. MCFARLANE J.A. (orally):—I recognize that there are five appellants before the court today, but when I use the word appellants for the purpose of the judgment I am about to deliver I am referring to the three corporate appellants who executed a joint debenture of their undertakings and assets in favour of the Toronto-Dominion Bank in December 1975.

[2] In May 1976 the bank as debenture holder appointed one Sigurdson as the receiver and manager under the powers contained in the debenture for that purpose.

[3] On 11th June 1976 the debenture holder applied by way of originating notice of motion under The Companies Act, 1973 (B.C.), c. 18, for the appointment of Mr. Sigurdson as a receiver-manager by the court, and on that date an order was made by a local judge of the Supreme Court appointing Mr. Sigurdson compendiously with the power to take possession of the property and assets of the appellants and to carry on or concur in carrying on the business of those companies, and to sell or concur in selling any or all of such property and assets in the ordinary course of business. The order also reserved liberty to apply for further directions.

[4] It is conceded by the appellants here today that they are not in a position to go behind that order, or to attack it, because the time for appealing from it has long since expired.

[5] In December 1976 the receiver-manager applied, again by way of originating notice of motion under The Companies Act, for an order authorizing the sale of the assets of the appellants, and Macdonald J. by his order dated 20th December 1976 [23 C.B.R. (N.S.) 250] ordered that the receiver-manager [p. 254]:

> "… [is] authorized to offer for sale the lease fleet and current assets and to enter into an agreement for their sale, which agreement shall be subject to the subsequent approval of the court."

[6] The appellants appeal from that order and the first ground of appeal is that such an order for sale is not authorized by The Companies Act to be made in a proceeding of this

kind. It is clear that the debenture holder has proceeded by way of originating notices under The Companies Act and has not taken a debenture holder's action for the enforcement of the terms of the debenture itself in the ordinary way.

[7] Asked for the authority under The Companies Act for the making of such an order counsel for the receiver-manager says that he relies for the appointment on ss. 107 and 224 of The Companies Act of 1973.

[8] In assessing that submission we have considered the provisions of ss. 106 to 121, inclusive. Asked for the authority under The Companies Act for making of an order for sale, such as the order now under appeal, counsel relied first on s. 113 of The Companies Act, and, second, in the alternative, on the inherent jurisdiction of a superior court to supervise the actions of its officer, which this receiver unquestionably is.

[9] In my opinion, ss. 106 to 121 of The Companies Act were not intended to and do not substitute a summary procedure under the Act for enforcement of the debenture for the well-established procedures which we all know of as a debenture holder's action.

[10] In my view, s. 107 of the Act merely deals with what persons may be appointed as receiver-managers in the two situations, first, under an Instrument such as a debenture, and, second, by the court.

[11] Section 113, so far as relevant here, reads:

> "113. A receiver or receiver-manager may apply to the Court …
>
> "(*b*) for directions on any matter arising in connection with the performance of his duties,
>
> "and, upon such application, the Court may give directions, declare the rights of persons before the Court, and make any further order it considers necessary."

[12] That section, in my view, presupposes the proper appointment of a receiver or receiver-manager, and deals with his right to apply to the court either to be relieved from his fiduciary relationship, or for directions, and I again quote: "on any matter arising in connection with the performance of his duties,"

[13] The duties of this receiver-manager, whether validly or invalidity given under the order of 11th June, were clearly duties related to the preservation of all the assets of the debtor companies, and selling and disposing of those assets only in the ordinary course of business.

[14] In. my opinion, the section does not, in the circumstances of this case, authorize the making of an order for sale of the appellant companies' property and assets under the summary procedure which has been taken.

[15] It is my view that the appeal must be allowed and the order-under appeal set aside.

"BRANCA J.A.: I agree.
"MCINTYRE J.A.: I agree.
"MCFARLANE J.A.: The appeal is allowed accordingly.
"MR. SWEEZEY: May there be an order for costs here and below?
"MCFARLANE J.A.: Costs follow the event."

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Southern Star Developments Ltd. v. Quest University Canada,* 2020 BCCA 364

Date: 20201217
Docket: CA47138

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

In the Matter of the *Sea to Sky University Act*, S.B.C. 2002, c. 54

In the Matter of A Plan of Compromise and Arrangement of Quest University Canada

Between:

Southern Star Developments Ltd.

Appellant

And

Quest University Canada

Respondent (Petitioner)

Before: The Honourable Mr. Justice Harris (In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated November 16, 2020 (*Quest University (Re)*, 2020 BCSC 1883, Vancouver Docket S-200586).

Counsel for the Appellant (via teleconference):	P.J. Reardon K. Strong
Counsel for the Respondent (via teleconference):	J.R. Sandrelli T.R.M. Jeffries V.L. Cross
Counsel for Primacorp Ventures Inc. (via teleconference):	G.W. Umbach P.L Rubin

Counsel for PricewaterhouseCoopers Inc., in its capacity as Monitor of Quest University Canada (via teleconference):	V.L. Tickle
Counsel for RCM Capital Management Ltd. and SESA-BC Holdings Ltd. (via teleconference):	K.M. Jackson
Counsel for Vanchorverve Foundation (via teleconference):	C.D. Brousson
Counsel for 1114586 B.C. Ltd. (via teleconference):	K.E. Siddall
Place and Date of Hearing:	Vancouver, British Columbia December 7, 2020
Place and Date of Judgment with Written Reasons to Follow:	Vancouver, British Columbia December 7, 2020
Place and date of Written Reasons:	Vancouver, British Columbia December 17, 2020

Summary:

Application for leave to appeal an order approving a transaction in CCAA proceedings. Held: Application dismissed, reasons following. Given the high degree of deference shown to discretionary decisions by supervising judges in CCAA proceedings, and the finding that this transaction is the only viable transaction with the potential to protect the interests of stakeholders, the interests of justice do not justify granting leave, even if the appeal raises some issues that would be of interest to the practice.

Reasons for Judgment of the Honourable Mr. Justice Harris:

[1] The appellant, Southern Star Developments Ltd. ("Southern Star"), seeks leave to appeal the order below pursuant to s. 13 of the *Companies' Creditors Arrangement Act,* R.S.C., 1985, c. C-36 [*CCAA*], and that the order be stayed pending the outcome of that appeal.

[2] At the conclusion of the argument, I dismissed the applications for leave and a stay with reasons to follow. These are those reasons.

Background

[3] Quest University ("Quest") is a not-for-profit post-secondary educational institution operating in Squamish, B.C. On 16 January 2020, Quest obtained creditor protection under the *CCAA* to enable it to restructure its debts. Quest subsequently sought approval under the *CCAA* for a transaction with Primacorp Ventures Inc. ("Primacorp") as a restructuring solution.

[4] On 16 November 2020, Justice Fitzpatrick, the supervisory judge for the *CCAA* proceedings, approved the transaction with written reasons to follow which were dated 2 December 2020: *Quest University Canada (Re)*, 2020 BCSC 1883 (Chambers). She found that the transaction with Primacorp was "the *only* viable option to avoid the devastating social and economic consequences to [Quest's] stakeholders if a liquidation results": at para. 178(p). She also found the Primacorp transaction to be the best option available to maximize recovery for Quest's creditors and preserve Quest's university operations: at para. 180.

[5] Southern Star, one of Quest's stakeholders, objected to the transaction. The Primacorp proposal required Quest to disclaim certain subleases it had executed in favour of Southern Star, as they were not economical for Quest (the "Subleases"): paras. 91–93, 97–98. The Subleases concern campus residence buildings located on four lots of land ("Lots A–D") that have been sitting largely vacant as a result of the COVID-19 pandemic. Quest and Southern Star had executed an unregistered lease of a fifth lot, "Lot E", in 2017. When the parties executed the documents, the Ground Lease contained a number of incomplete or blank terms, including a legal description, lease term and information about Southern Star's lender: at para. 32. Southern Star objected to the judge vesting off any interest it had in the unregistered Lot E Ground Lease: at para. 35, arguing that the judge did not have the jurisdiction to do so because of s. 32(9)(d) of the *CCAA*.

[6] Fitzpatrick J. concluded the parties did not intend for the Ground Lease to become effective between them until certain conditions were satisfied; namely, that Quest would decide to build a residence building on Lot E and Southern Star would arrange financing to construct the building. At that point, the Ground Lease would come into effect, in conjunction with the registration of a Sublease and the execution and registration of Southern Star's mortgage. Those conditions were never satisfied, and the supervisory judge concluded that no valid and enforceable lease yet existed between the parties in respect of Lot E: at paras. 36–39. Accordingly, Lot E could be vested off to Primacorp because to do so did not conflict with any prohibition in the *CCAA*.

[7] Southern Star also applied to the court, pursuant to s. 32(2) of the *CCAA*, for an order disallowing any disclaimer by Quest of the Subleases for two of the lots (Lots C–D). In evaluating this application, the chambers judge had regard to s. 32(4) of the *CCAA* which provides:

> Factors to be considered
>
> (4) 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.

[8] Fitzpatrick J. dismissed Southern Star's application. The Disclaimer of the Subleases had been approved by the court-appointed Monitor for the *CCAA* proceedings: at para. 98. She agreed with the Monitor that the Disclaimers would enhance the prospects of Quest making a viable compromise or arrangement: at para. 104. She found that "[m]aintaining two empty Residences with accompanying rent payments is, on its face, not a reasonable business decision in the circumstances", as evidenced by Primacorp's requirement that the Subleases be disclaimed: at para. 102. She also noted that Quest and Primacorp had already made efforts to find a middle ground by withdrawing disclaimers which had initially been filed in relation to the two other lots (Lots A–B): at para. 106. She finally stated that any hardship imposed on Southern Star would be no less if she disapproved the Disclaimers, as Quest would have no funds to pay rent under the Subleases if the sale did not go through: at paras. 111–12.

[9] Fitzpatrick J. also granted a reverse vesting order ("RVO") approving the sale to Primacorp. That form of order was also supported by the Monitor: at para. 122. She found that she had jurisdiction to grant the order under ss. 11 and 36 of the *CCAA.* Section 11 provides:

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

Section 36(6) provides:

> 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.

[10] This type of order was sought especially in light of Southern Star's dissent, as it enabled the transaction to close without creditors' approval, but in a way that preserved overall economic recovery for creditors. The size of Southern Star's claim relative to other creditors created the possibility that Southern Star could effectively veto the restructuring plan if approval was required: at para. 116.

[11] While there is no specific jurisdiction in the *CCAA* to grant RVOs, Fitzpatrick J. canvassed a number of cases in which courts had relied on ss. 11 and 36 to do so: paras. 127–49. While an RVO had only been ordered once previously in a contested proceeding (*Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488), it had been approved in a number of other proceedings which were not contested. She also relied on case law referring to the broad discretionary authority conferred on courts by the *CCAA*, by which courts are able to be innovative and creative when called upon to approve solutions for which there is no explicit authority in the *CCAA*, as long as they do so in light of its objectives: at paras. 153–55.

[12] The transaction between Quest and Primacorp must close by 24 December 2020, or Primacorp has the right to walk away and Quest loses its funding. Conditions precedent of the transaction are the Disclaimer of the Subleases with Southern Star and the RVO.

Positions of the Parties

Appellant (Applicant)

[13] The appellant's grounds of appeal are:

> 1. The chambers judge erred in law in finding she had the jurisdiction under the *CCAA* to approve the transaction which included the transfer of lands legally described as PID 030-469-074, Lot E District Lot 512 Group 1 New Westminster District Plan EPP77026 ("Lot E") free and clear of the leasehold interest of the appellant in Lot E.

> 2. The chambers judge erred in principle in approving the disclaimer of two subleases between the appellant and Quest University Canada ("Quest") pursuant to s. 32 of the *CCAA*.
>
> 3. The chambers judge erred in principle in approving a reverse vesting order specifically designed to deprive the appellant of its right under sections 4 and 6 of the *CCAA* to participate in a plan of arrangement process that effected a fair and equitable compromise of its claims.

[14] Southern Star argues that leave to appeal should be granted. It contends that the interpretation of the disclaimer provisions in the *CCAA* and the approval of an RVO in a contested proceeding is of significance to the practice, especially given lack of appellate authority on this point. It argues that the appeal is important to the action and the parties, as Southern Star's claim and potential loss is substantial. Southern Star also suggests that the appeal would not unduly hinder the restructuring proceedings as it proposes to have the appeal heard on an expedited basis and because the judge's order below permitted Quest and Primacorp to extend their closing date to 31 January 2020.

[15] While acknowledging the deference conferred on supervisory judges in *CCAA* proceedings, Southern Star nonetheless maintains that all three of its grounds of appeal are meritorious. It argues that the judge engaged in improper balancing under s. 32(4) by approving the Disclaimers. It also contends that granting the RVO was not within the judge's discretion under the *CCAA*, as it was "a last minute reverse vesting order expressly targeted at one creditor" and was in any case not necessary under the circumstances. Finally, it contends that the sale of Lot E is expressly prohibited by s. 32(9)(d) of the *CCAA*, which does not permit disclaimers to be issued in the case of "a lease of real property or of an immovable if the company is the lessor."

[16] The Lot E ground of appeal featured prominently in Southern Star's oral submissions. Southern Star argues that the judge below fundamentally misinterpreted the parties' intention as to when the Ground Lease for Lot E would become effective between them. Specifically, it suggests that the blank terms in the lease documents for Lot E were present in all the leases between the parties at the time of their execution, and that the leases contemplated those terms being filled out

at the time of registration, which was flexible under the agreements. However, the leases became effective the moment they were executed. Accordingly, the judge's approval of the sale of Lot E was barred by s. 32(9)(d) of the *CCAA* by virtue of the Ground Lease between Quest and Southern Star attaching to that property.

[17] With respect to the stay, Southern Star argues that the appeal is meritorious, that it would suffer irreparable harm if a stay was not granted because its appeal would be rendered moot by the closing transaction, and that the balance of convenience favours granting the stay. In terms of the latter, Southern Star suggests that the harm to Quest of granting a stay is minimal, again because Quest can extend its closing date with Primacorp, and because the appeal will be sought on an expedited basis. By comparison, Southern Star suggests it will suffer irreparable harm because its claim will far exceed the pool of available funds allocated to unsecured creditors. It argues that this transaction has been approved unfairly at its expense.

Respondent

[18] Quest argues that leave to appeal should not be granted and that the RVO and Disclaimers should not be stayed. Quest acknowledges that jurisprudence on RVOs might be of interest to the practice, but contends that this factor is outweighed by the catastrophic effects leave would have on the progress of the *CCAA* proceedings. It further argues that the points on appeal are only of significance to Southern Star, personally, for strategic purposes; namely, to levy a negotiation with Primacorp for rent related to the residence buildings. Quest maintains that Southern Star will be better off financially with the transaction than without it in a liquidation scenario.

[19] Quest also contends that the appeal is frivolous, as the court's broad and flexible authority to make a range of orders in *CCAA* proceedings has recently been confirmed by the Supreme Court in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 53–54. Quest points out that, in this case, the judge had been overseeing the *CCAA* proceedings for over ten months. Quest says that the

judge's decisions are well within her discretion and expertise—including vesting off the Lot E lease, approving the disclaimers, and approving the RVO—and are entitled to deference. Finally, Quest argues that it is not in the interests of justice to grant leave to appeal given the devastating impacts that doing so would have on Quest's attempt to restructure, and because Southern Star is only seeking leave to appeal for strategic purposes related to ongoing negotiations with Primacorp.

[20] Quest also argues that the relevant factors do not support staying the RVO and Disclaimers. Southern Star cannot succeed in its appeal. Furthermore, Southern Star will not suffer irreparable harm if the orders are not stayed. Notably, Southern Star will be worse off without the transaction than if it closes, as Quest will be able to continue paying rent on two of the Subleases after the deal closes. By contrast, if a stay is granted, Quest will be unable to survive and/or to offer a Winter 2021 semester to students, faculty and staff. All of Quest's stakeholders, including Southern Star, will be prejudiced if a stay is granted and the deal does not close. The balance of convenience does not favour granting a stay.

Law & Analysis

Legal Framework

[21] Leave to appeal is required by the *CCAA* and can be sought from this Court:

> Leave to appeal
>
> 13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.
>
> Court of appeal
>
> 14 (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

[22] The criteria for leave to appeal were stated by Saunders J.A. in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 (Chambers), at para. 10:

> [10] The criteria for leave to appeal are well known. As stated *in Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.) they include:
>
> (1) whether the point on appeal is of significance to the practice;
>
> (2) whether the point raised is of significance to the action itself;
>
> (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> (4) whether the appeal will unduly hinder the progress of the action.
>
> See also *Chavez v. Sundance Cruises Corp.* (1993), 77 B.C.L.R. (2d) 328 (C.A.).

[23] Even where the four criteria have been met, leave may still be denied where granting it would not be in the interests of justice: *Movassaghi v. Aghtai*, 2010 BCCA 175 at para. 27 (Smith J.A. in Chambers).

[24] Where the order under consideration is discretionary, leave to appeal will generally only be granted where the order is clearly wrong, where a serious injustice would occur if leave were refused, or where discretion was exercised on a wrong principle: see e.g., *Strata Plan LMS 2019 v. Green*, 2001 BCCA 286 (Chambers). A high degree of deference is owed to the discretionary decisions of judges supervising *CCAA* proceedings as they are "steeped in the intricacies of the *CCAA* proceedings they oversee": *Callidus* at para. 54. In *Callidus*, at para. 54, the Supreme Court quoted with approval the words of Justice Tysoe in *Edgewater Casino Inc., (Re)*, 2009 BCCA 40 at para. 20:

> ... one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. ... *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[25] Accordingly, leave in *CCAA* proceedings is only granted sparingly: *Edgewater* at paras. 12–14.

Application

[26] I dismissed the application for leave to appeal for the following reasons.

[27] Southern Star accepts that with one exception the judge had the jurisdiction to reach the conclusions she did. In substance, the complaint is about the manner in which the judge exercised her discretion. I will deal shortly with the issue of Lot E and the suggestion that the alleged error in relation to that issue entailed that the judge could not approve the transaction.

[28] I accept, for the purpose of this application, that the nature of the order sought to be appealed, at least so far as approval of the RVO is concerned, is unusual in *CCAA* proceedings and is of significance to the practice and to the parties. Additionally, in the recent words of the Alberta Court of Appeal, the disclaimer of contracts under the *CCAA* "is a significant issue in insolvency practice generally" and can significantly impact *CCAA* proceedings: *Bellatrix Exploration Ltd. v. BP Canada Energy Group ULC*, 2020 ABCA 178 at paras. 21–24.

[29] However, I am not persuaded the appeal is meritorious. I consider the prospects that a division of this Court would interfere with the judge's exercise of discretion to be remote. This is especially so in light of the judge's assessment, grounded in months of experience of managing the proceedings, that the consequences of not approving the transaction would be catastrophic. The grounds of appeal advanced by Southern Star raise essentially the same arguments which were dismissed by Fitzpatrick J., with one exception as to the argument for Lot E, which I will address below. I do not think she erred in principle, as alleged by the applicant. I agree with Quest that the orders she made were well within her broad discretion and considerable expertise as a supervisory judge of ten months in the matter, who was alive to the intricacies of the commercial realities confronting the parties.

[30] In arriving at her conclusion, Fitzpatrick J. considered and applied the principles recently set out by the Supreme Court of Canada in *Callidus,* which affirm the broad and flexible discretion of judges under the *CCAA* to make orders that are appropriate in the circumstances. She was also alive to the limits of her discretion; namely, that any order must conform to the objectives and purposes of the *CCAA*: at para. 154. She carefully evaluated each factor under s. 32(4) in making her determination that the Disclaimers were appropriate. With respect to the lease for Lot E, she found that no lease was in effect between Quest and Southern Star, so the prohibition in s. 32(9)(d) was inapplicable: at paras. 37–40. Finally, she recognized that this case presented unique and complex circumstances which made it appropriate to grant the RVO: at paras. 168, 172. While jurisprudential authority for making such an order in a contested proceeding is limited, it is notable that leave to appeal was refused in the one case in which it has been done, and under similar factual circumstances: *Nemaska*, *supra*.

[31] Fitzpatrick J. acknowledged the negative impact to Southern Star arising from the relief she granted, though she questioned the extent of that damage; she gave some credence to the suggestion, as Quest argues in this application, that Southern Star's arguments were made strategically with a view to gaining leverage, while significant other interests hung in the balance: at paras. 46, 164–66. Whether that was so did not, however, drive her conclusions. Ultimately, she accepted that Southern Star would suffer harm but balanced that impact with the "myriad interests held by other stakeholders" and chose the best option for everyone involved, including Southern Star: at paras. 48, 111, 164.

[32] The judge's order reflects precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising *CCAA* proceedings, and which forms the basis for the considerable deference their decisions are afforded on review. Respectfully, in my opinion, if a division of this Court were to set aside the order it would be acting contrary to the instruction of the Supreme Court of Canada in *Callidus* that appellate courts should defer to the exercise of discretion by supervising judges in these kinds of proceedings.

[33] Southern Star argued in oral submissions that Fitzpatrick J.'s interpretation of the Lot E Ground Lease was not an exercise of her discretion as a supervisory judge, but rather was a legal error. She wrongly concluded that the parties had only agreed to agree, and not entered into a binding lease agreement that meant that Quest was a lessor for the purposes of s. 32(9)(d) of the *CCAA.* As I understood the argument, the judge had misapprehended the facts in reaching her conclusion. I will not rehearse the details of those alleged misapprehensions here. I do not accept Southern Star's argument, however, that the judge's interpretation of the Ground Lease turned on the existence of blank terms in a document and the impact of certain other documents; rather, I think that she made an assessment of the parties' objective intentions with respect to when the lease would be valid and effective between them. She concluded that would occur when Quest decided to construct a building on Lot E and Southern Star arranged for financing to facilitate that construction. This, it appears to me, was a conclusion open to her on the evidence.

[34] It is well settled now that, as a general rule, a judge's conclusions about matters of contractual interpretation are reviewed on a highly deferential standard. As I see the matter, a division of this Court would have to be persuaded that the judge made palpable and overriding errors in her conclusion. I am not persuaded that Southern Star has advanced anything more at its highest than an arguable, but hardly a strong case, that the judge erred as alleged. The likelihood that, even if this issue stood alone, a division of this Court would interfere with the judge's conclusion, is remote, in my opinion.

[35] Southern Star argues that if the judge erred on the Lot E issue, she could not have approved the transaction. Even if I accepted that the merits threshold had been met by the Lot E issue, and that the appeal raises issues that are, in an abstract sense, of interest to the parties, I would not have granted leave to appeal. These factors are overwhelmed by other elements of the test such as the fourth factor of the test for leave. This factor has traditionally been considered the most important factor in the test for leave to appeal, and that is true of the case at bar: see *Hockin v. Bank of British Columbia* (1989), 37 B.C.L.R. (2d) 139 at para. 20 (Wallace J.A. in

C.A. Chambers). In this case, granting leave to appeal would unduly hinder the progress of the action, with catastrophic effects. As the supervisory judge recognized, time is of the essence in this proceeding: para. 87. The Primacorp transaction, which she viewed to be the only viable option to save Quest and all those interested in it, would collapse if the transaction was not approved.

[36] In my opinion, granting leave would most probably have equally disastrous consequences for the myriad stakeholders affected by Quest's financial circumstances. There is no realistic prospect, in my view, that this Court could reasonably be expected to hear and decide this appeal on a timeframe that would preserve the transaction if the appeal were to be dismissed, as it surely would be given its merits. The fundamental and overarching question ultimately is whether it is in the interests of justice to grant leave. In my opinion, it would defeat the interests of justice and frustrate the purposes of the *CCAA* to grant leave. It is for these reasons, I dismissed the application. As a result, the application for a stay was also dismissed.

[37] I am grateful to counsel for their submissions.

"The Honourable Mr. Justice Harris"

COURT OF APPEAL FOR ONTARIO

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

Pepall, Lauwers and Huscroft JJ.A.

BETWEEN

Third Eye Capital Corporation

Applicant
(Respondent)

and

Ressources Dianor Inc. /Dianor Resources Inc.

Respondent
(Respondent)

and

2350614 Ontario Inc.

Interested Party
(Appellant)

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

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

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

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

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

Heard: September 17, 2018

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

Pepall J.A.:

Introduction

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

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

Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Proceedings Before This Court

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

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

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

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

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

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

(1) Positions of Parties

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

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

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

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

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

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

(2) Analysis

(a) Significance of Vesting Orders

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

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

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

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

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

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

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

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

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

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

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

(b) Potential Roots of Jurisdiction

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

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

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

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

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

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

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

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

(d) Section 100 of the CJA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) Section 243 of the BIA

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

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

The Wording and Purpose of s. 243

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

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

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

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

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

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

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

The History of s. 243

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) Review of the Case Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) The Applicable Appeal Period

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The Receiver's Conduct

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

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

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

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

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

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

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

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

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

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

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

(3) Remedy is not Merited

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Disposition

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

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

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

Released: “SEP” JUN 19, 2019

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

COURT OF APPEAL OF YUKON

Citation: *Yukon (Government of) v. Yukon Zinc Corporation*, 2021 YKCA 2

Date: 20210305
Dockets: 20-YU865; 20-YU866; 20-YU867; 20-YU868

Docket: 20-YU865

Between:

Government of Yukon, as represented by the Minister of the Department of Energy, Mines and Resources

Appellant
(Petitioner)

And

Yukon Zinc Corporation

Respondent
(Respondent)

And

Welichem Research General Partnership

Respondent

- and -

Dockets: 20-YU866; 20-YU867; 20-YU868

Between:

Government of Yukon, as represented by the Minister of the Department of Energy, Mines and Resources

Respondent
(Petitioner)

And

Yukon Zinc Corporation

Respondent
(Respondent)

And

Welichem Research General Partnership

Appellant

Corrected Judgment: The text of the judgment was corrected at paragraph 144 on May 10, 2021.

Before: The Honourable Mr. Justice Tysoe
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Lyons

On appeal from: Orders of the Supreme Court of Yukon, dated May 26, 2020 (*Yukon (Government of) v. Yukon Zinc Corporation*, 2020 YKSC 15; 2020 YKSC 16; and 2020 YKSC 17, Whitehorse Docket 19-A0067).

Counsel for the Government of Yukon, as represented by the Minister of the Department of Energy, Mines and Resources (via videoconference):	J.T. Porter L.A. Henderson
Counsel for Welichem Research General Partnership (via videoconference):	H.L. Williams M. Sassi F.D. Finn
Counsel for the Receiver, PricewaterhouseCoopers Inc. (via videoconference):	J.R. Sandrelli T.R.M. Jeffries E.T.T.Y. Newbery
Place and Date of Hearing:	Vancouver, British Columbia November 17 and 18, 2020
Place and Date of Judgment:	Vancouver, British Columbia March 5, 2021

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Lyons

Summary:

These appeals relate to four orders arising from a proceeding in which the Government of Yukon (the "Government") petitioned Yukon Zinc Corporation (the "Debtor") into receivership. The Government appeals the order that it does not have a provable claim in bankruptcy with respect to the costs of remedying environmental damage. Welichem Research General Partnership, the Debtor's primary secured creditor and the lessor of certain mining equipment, has three appeals. First, it appeals the provision in the order granting the Government security over the Debtor's mineral claims. Second, it appeals the order dismissing its application for an order that a notice given by the receiver to disclaim the equipment lease was a nullity. Third, it appeals the order that certain of the leased items are subject to the receiver's charge and challenges the approval of the receiver's solicitation plan.

Held: Appeals allowed in part. The Government does not have a provable claim or contingent provable claim in bankruptcy. Mineral claims are an interest in real property, not real property, and thus the judge erred in including the mineral claims in the Government's charge over the Debtor's real property. The equipment lease was disclaimed in its entirety, and the receiver's purported appropriation of certain leased items is of no force or effect. As the leased items belong to Welichem, not the Debtor, the judge erred in extending the receiver's charge over the leased items. It is appropriate for the receiver to consider a bidder's ability to obtain regulatory approvals in assessing their bids, and the judge did not err in approving the solicitation plan.

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Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] These appeals relate to four orders dated May 26, 2020, in a proceeding in which the Government of Yukon (the "Government") had successfully petitioned the court to appoint PricewaterhouseCoopers Inc. as the receiver (the "Receiver") of all of the assets, undertakings and property of Yukon Zinc Corporation (the "Debtor").

[2] The Government appeals the order made pursuant to its application that it does not have a provable claim in the bankruptcy of the Debtor until it incurs costs related to remedying the environmental damage affecting the Debtor's real property. In particular, the Government appeals the holdings that it does not have a provable claim in respect of the Debtor's obligation to post security pursuant to the *Quartz Mining Act*, S.Y. 2003, c. 14 [*Mining Act*], and that it does not have a contingent claim in respect of remediation costs.

[3] Welichem Research General Partnership ("Welichem") has three appeals. First, it appeals the provision in the order made pursuant to the Government's application that the security given to the Government for remediation costs by s. 14.06(7) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], on the real property of the Debtor includes the Debtor's mineral claims.

[4] Second, Welichem appeals the dismissal of its application for orders that a notice to lessor to disclaim or resiliate equipment lease given by the Receiver was a nullity and that the Receiver had affirmed the equipment lease.

[5] Third, Welichem appeals two aspects of an order made on application by the Receiver. The first aspect was an order making certain assets, referred to as the "Essential Master Lease Items", subject to the secured charge given to the Receiver for its fees, disbursements and borrowings. The second aspect was an order approving a sale and investment solicitation plan developed by the Receiver (the "Solicitation Plan").

Background

[6] The Debtor was incorporated in British Columbia and registered to carry on business in the Yukon Territory. Its principal asset is a zinc-silver-lead mine known as the Wolverine Mine located in the Yukon Territory (the "Mine"). It holds 2,945 quartz mineral claims, a quartz mining license issued under the *Mining Act* and a water licence issued under the *Waters Act*, S.Y. 2003, c. 19.

[7] Under s. 139 of the *Mining Act*, the Minister of the Department of Energy, Mines and Resources (the "Minister") may require a licensee to furnish security for adverse environmental effects from the licensee's activities. When its license was issued, the Debtor was required to furnish security in the amount of $1,780,000, and the amount of required security was subsequently increased from time to time (the "Reclamation Security").

[8] The Debtor performed exploration and developmental activities between 2008 and 2011, and the Mine commenced commercial production in March 2012. The estimated life of the Mine was nine years, but it only operated for approximately three years before it was put into care and maintenance in January 2015 when the Debtor encountered financial difficulties as a result of a downturn in metal prices.

[9] In March 2015, the Debtor made a filing in the Supreme Court of British Columbia pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*]. It successfully reorganized its financial obligations pursuant to the *CCAA* in October 2015 with funds provided by its sole shareholder. As part of the *CCAA* reorganization, the Minister was provided with the shortfall of slightly less than $3 million in the amount of the Reclamation Security, bringing it to a total of $10,588,966. The Debtor had been charged with two counts under the *Mining Act* for its failure to furnish the full amount of the Reclamation Security, and it was fined $5,000 in respect of each count in November 2015.

[10] The Debtor's shareholder did not provide it with the further funds required to operate the Mine, which remained in care and maintenance. The Debtor employed only four persons at the Mine to provide monitoring and maintenance services. Attempts to sell the Mine were not successful.

[11] In 2017, the underground portion of the Mine flooded, and contaminated water was diverted to the tailings storage facility. No water treatment was available, and the situation created a risk of untreated water being released into the environment.

[12] The Government became more involved in the Mine as a result of the flooding, and it inspected the Mine on a more frequent basis. The Government revised the Mine's reclamation and closure plan, and recalculated the amount of the Reclamation Security it required. In May 2018, the Debtor was notified that it was required to provide Reclamation Security in the amount of $35,548,650, an increase of approximately $25 million. None of this increased amount has been provided by the Debtor (the "Unfurnished Reclamation Security").

[13] In May, July and August of 2018, the Debtor received loans from Welichem in the amounts of $1,000,000, $1,000,000 and $6,550,000 on the security of general security agreements covering all of its assets. In September 2018, the Debtor used $5,060,000 of the loan proceeds (plus $27,000 for interest) to exercise a purchase option under a lease with Maynbridge Capital Inc. pursuant to which Maynbridge had leased to the Debtor the equipment used in the Mine. The Debtor then sold all of this equipment for the same amount to Welichem which, in turn, leased the equipment back to the Debtor under a master lease agreement (the "Master Lease") with payments of $110,688 a month.

[14] As a result of the deteriorating environmental conditions at the Mine, the Government began using the Reclamation Security to deal with the influx of contaminated water in the tailings storage facility. As of July 15, 2019, $635,758.14 of the Reclamation Security had been used by the Government.

[15] In July 2019, the Government commenced a petition proceeding for the appointment of a receiver of the Debtor's property. On July 31, 2019, the day before the scheduled hearing of the Government's petition, the Debtor filed a notice of intention to make a proposal in British Columbia under s. 50.4(1) of the *BIA*, with Alvarez & Marsal Canada Inc. named as the proposal trustee. The filing of the notice created an automatic stay of proceedings in respect of the Debtor pursuant to s. 69(1) of the *BIA*. In reasons for judgment dated August 7, 2019, and indexed as 2019 YKSC 39, the chambers judge held that the Supreme Court of Yukon had jurisdiction to lift the stay of proceedings, and she did lift it to allow the hearing of the Government's petition to proceed.

[16] The Government's petition was heard on September 13, 2019, and the chambers judge appointed the Receiver as receiver of all of the assets, undertakings and property of the Debtor. Paragraph 3 of the order appointing the Receiver (the "Receivership Order") set out the powers given to the Receiver, which included the following:

> (c) to manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;
>
> * * *
>
> (i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtor;
>
> * * *
>
> (p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if considered necessary or appropriate by the Receiver, in the name of the Debtor;
>
> * * *
>
> (s) to the extent authorized and approved by Yukon, to carry out care and maintenance activities with respect to the Mine and to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations; and
>
> (t) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations,
>
> …

[17] The Receivership Order also created charges as security for the Receiver's fees and disbursements, and borrowings by the Receiver up to the principal amount of $3,000,000 plus interest (the "Receiver's Charges"). The Receiver's Charges were fixed and specific charges against the assets, properties and undertakings of the Debtor ranking in priority subordinate to all valid security interests, trusts, liens, charges and encumbrances. The Receiver has borrowed funds from the Government, which has utilized the Reclamation Security for that purpose. As of January 15, 2020, the Government had expended or loaned the aggregate of $5,582,411 from the Reclamation Security, leaving a balance of $5,006,555.

[18] No proposal was filed within the time period stipulated in the *BIA* and, pursuant to s. 50.4(8) of the *BIA*, the Debtor was deemed to have made an assignment into bankruptcy. On October 11, 2019, the Supreme Court of British Columbia granted an order substituting PricewaterhouseCoopers Inc. as the trustee in bankruptcy in place of Alvarez & Marsal Canada Inc.

[19] Upon being appointed, the Receiver assumed responsibility for the care and maintenance of the Mine and rectified the majority of the initial deficiencies in the care and maintenance program. It worked with contractors engaged by the Government to deal with water treatment at the tailings storage facility, and it engaged a contractor to carry out environmental monitoring.

[20] The Receiver also made an assessment of the Debtor's assets, including the items leased to it under the Master Lease. The Receiver identified 79 of these items as being required for the essential care and maintenance at the Mine (the "Essential Lease Items"), including heavy equipment, motor vehicles, power generators, fuel storage, staff accommodation and pipes and pumps required for water treatment. The Debtor's equipment had not been properly maintained since 2015, and the Receiver took steps to bring essential heavy equipment up to minimum operating standards. As of December 31, 2019, the Receiver had expended approximately $200,000 for these repairs.

[21] The Receiver met with Welichem to discuss the short-term rental of the Essential Lease Items. As detailed in its second report to the court, the Receiver advised Welichem that: (a) the monthly lease payments of $110,688 were not appropriate because many of the leased items were unusable or in poor condition; (b) the insurance required by the Master Lease, estimated to be approximately $150,000 was similarly inappropriate; and (c) the obligation under the Master Lease for the lessee to pay for the transport of the leased items to any location at Welichem's discretion at the end of the lease represented a significant cost that was contrary to the best interests of stakeholders.

[22] As a result of these concerns and the inability to negotiate a new rental arrangement with Welichem, the Receiver sent a notice to Welichem on or about November 8, 2019. The notice was entitled "Notice to Lessor to Disclaim or Resiliate Equipment Lease" (the "Disclaimer Notice"). The main operative paragraph of the Disclaimer Notice reads as follows:

> 4. Pursuant to the Receivership Order, the Receiver hereby gives you notice of its intention to disclaim or resiliate the following agreement:
>
> Master Lease Agreement (the "**Master Lease Agreement**"), dated September 3, 2018, between Welichem Research General Partnership (as lessor) and YZC (as lessee)
>
> **except, however that the lessee's right to use the equipment and other items described in Schedule "A" to this Notice of Disclaimer shall survive the disclaimer of the Master Lease Agreement.**
>
> **For greater clarity, all obligations of YZC pursuant to the Master Lease are hereby exclaimed except, however, that the Receiver shall retain the right to use the equipment and other items described in Schedule "A" for the monthly rent of $13,500 (plus applicable taxes), as the only compensation to be required from the Receiver to you for the use of such equipment and other items.**
>
> [Emphasis in original.]

The Receiver explained in its second report to the court that it arrived at the figure of $13,500 as being a reasonable rental rate by computing a pro-rated amount of the monthly rental rate under the Master Lease according to the number and value of the Essential Lease Items in comparison to the number and value of all of the items leased under the Master Lease.

[23] The Receiver developed the Solicitation Plan for approval by the court. It was proposed in the Solicitation Plan that the Receiver would evaluate purchase bids on the basis of a number of factors, including several factors in relation to the bidder's environmental expertise and ability to obtain regulatory approval.

The Applications

[24] The Government, Welichem and the Receiver each brought applications that were heard at the same time by the chambers judge.

[25] The Government's application was for the following declarations:

a) the Government has a provable claim in the bankruptcy of the Debtor in the amount of $35,548,650 for the costs of remedying the environmental damage affecting the Debtor's real property; and

b) the Government's claim is secured in the manner described in s. 14.06(7) of the *BIA*.

[26] Welichem's application was for an order that (a) the Disclaimer Notice was a nullity, and (b) the Receiver affirmed the Master Lease and was required to pay the full lease payments to Welichem from the date of the Receiver's appointment.

[27] The Receiver's application was for:

a) an order elevating the priority of the Receiver's Charges so that they would rank in priority to all security interests, trusts, liens, charges and encumbrances, but still subordinate to the charges set out in ss. 14.06(7), 81.4(4) and 81.6(2) of the *BIA*;

b) an order approving the Solicitation Plan; and

c) directions from the court regarding whether the items covered by the Master Lease could be included in the property being offered for sale and, if so, whether those items were subject to the security of the Government pursuant to s. 14.06(7) of the *BIA*.

Reasons of the Chambers Judge

(a) Government Application Reasons (Appeal Nos. 20-YU865 and 20-YU867)

[28] In reasons for judgment indexed as 2020 YKSC 15 (the "Government Application Reasons"), the chambers judge first considered whether the Government had a provable claim in bankruptcy as a result of the failure of the Debtor to provide the Unfurnished Reclamation Security. She first tentatively concluded that the obligation to provide the Unfurnished Reclamation Security was not a provable claim because it was secondary in nature and it was not an obligation recoverable by legal process.

[29] The judge then considered whether this tentative conclusion was affected by the reasoning of the Supreme Court of Canada in *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67 [*Abitibi*], which involved a determination of whether future remediation costs were a provable claim under the *CCAA* on the basis of being a contingent claim. The judge held that *Abitibi* did not affect her conclusion because the third prong of the test set out in *Abitibi* (i.e., it must be possible to attach a monetary value to the obligation) had not been met. It was her view that it was not sufficiently certain that the Government would be performing remediation work as a result of the potential of a sale of the Mine.

[30] The judge did not specifically address the Government's alternate argument that it had a provable contingent claim for remediation costs (as opposed to a provable claim for the Unfurnished Reclamation Security). She did, however, implicitly reject the argument with her conclusion that the third prong of the *Abitibi* test had not been satisfied.

[31] The judge then turned to a consideration of the security provided for environmental remediation costs by s. 14.06(7) of the *BIA*. She concluded that s. 14.06(7) applied once the Government had incurred remediation costs and that the claim for remediation costs was not an unsecured claim as had been asserted by the Debtor's sole shareholder.

[32] Finally, the judge considered the issue of whether the term “real property” used in s. 14.06(7) included mineral claims such that the Government’s security under that section would extend to mineral claims. Following three earlier decisions of the Supreme Court of Yukon, she held that the mineral claims constituted real property subject to the security in favour of the Government.

(b) <u>Disclaimer Reasons (Appeal No. 20-YU866)</u>

[33] In her reasons for judgment, which are indexed as 2020 YKSC 16 (the “Disclaimer Reasons”), the chambers judge began her analysis by reviewing the law generally in relation to a receiver’s ability to disclaim contracts and the duties of receivers. She accepted that there was no legal authority allowing a receiver to partially disclaim a contract.

[34] The judge reviewed the Receivership Order, and rejected Welichem’s argument that clause (c) of paragraph 3 (which set out the powers of the Receiver) supported the view that the Receiver had only a binary choice to either disclaim or affirm the Master Lease. She was of the view that this ignored the powers contained in clauses (i), (p), (s) and (t) of paragraph 3. She concluded that the Receiver’s general powers under the Receivership Order to protect and preserve the Property (as defined in the Receivership Order) gave the Receiver the power to use the Essential Lease Items.

[35] The judge turned to a consideration of statutory powers and, in particular, s. 243(1) of the *BIA*. She concluded that the phrase “take any other action that the court considers advisable” in clause (c) of that section provided authority to allow the Receiver to use the Essential Lease Items for the purposes of the care and maintenance of the Mine and environmental remediation. She further stated that this conclusion also flowed from the wording of s. 26 of the *Judicature Act*, R.S.Y. 2002, c. 128, which empowers the court to appoint a receiver “on any terms and conditions the Court thinks just”.

[36] The judge then considered whether the Receiver acted in compliance with its duties. She expressed the view that the Receiver had not acted arbitrarily and had acted in a commercially responsible manner in exercising its duty to maximize value for all of the stakeholders. In the same section of the Disclaimer Reasons, the judge quoted the following passage from Frank Bennett, *Bennett on Receiverships*, 3rd ed. (Toronto: Carswell, 2011) at 436:

> In the proper case, the receiver may move before the court for an order to break **or vary** an onerous or material contract including a lease of premises or an equipment lease where the payments are significant. … [T]he receiver must act reasonably and exercise good business sense.
>
> [Emphasis added in the Disclaimer Reasons.]

The judge stated her view that this passage provided general support for the Receiver's appropriate exercise of authority under s. 243(1) to use the Essential Lease Items.

[37] Finally, the judge held that the Receiver had not affirmed the Master Lease because it would be absurd for the Receiver to be required to pay the full amount of the $110,000 monthly lease payment for the use of only 79 of the 572 leased items after having spent over $200,000 in repairs on those 79 items.

(c) <u>Receiver Application Reasons (Appeal 20-YU868)</u>

[38] In her reasons indexed as 2020 YKSC 17 (the "Receiver Application Reasons"), the judge dealt with two of the three matters requested in the notice of application; namely, the elevation of the priority of the Receiver's Charges and the approval of the Solicitation Plan.

[39] The judge dealt first with the aspect of the application to elevate the priority of the Receiver's Charges. She made reference to s. 243(6) of the *BIA*, which authorizes the court to create a charge for a receiver's fees and disbursements. She then reviewed *Robert F. Kowal Investments Ltd. et al. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84 (C.A.) [*Kowal*], the leading authority on the issue of elevating a receiver's charge in priority to secured creditors. *Kowal* created three exceptions to

the general rule that the costs and expenses of a receiver do not have priority over existing security interests.

[40] The judge relied on the second *Kowal* exception (i.e., the receiver was appointed to preserve and realize the assets for the benefit of all interested parties) to elevate the Receiver's Charges on the Debtor's property in priority over Welichem and other secured creditors. She also relied on the second *Kowal* exception to elevate the Receiver's Charges on the Essential Lease Items in priority to Welichem. The judge added that, if she were incorrect, she would have held that the third *Kowal* exception (i.e., necessary preservation and improvement) applied to the extent that the Receiver would be entitled to a priority charge for the amounts it spent on the Essential Lease Items for repairs and monthly lease payments.

[41] Welichem did not oppose the general proposal of the Receiver to solicit investment or buyers for the Mine but objected to the factors set out in the Solicitation Plan for consideration in the assessment of any bids received by the Receiver. Welichem complained that the factors imported the regulatory process into the Solicitation Plan.

[42] The judge approved the Solicitation Plan without changing any of the factors for evaluating bids. She did not consider that the Government would have inappropriate influence in the solicitation process, and she was of the view that the Receiver was acting responsibly in consulting the Government.

[43] In the Receiver Application Reasons, the judge did not deal with the issue of whether the Receiver's Charges should attach to the balance of the items covered by the Master Lease (the "Non-Essential Lease Items") or with the Receiver's request for directions with respect to the issue of whether the Non-Essential Lease Items could be included in the property being offered for sale. She referred to a request for further written submissions, which she elaborated upon in her reasons for judgment indexed as 2020 YKSC 18 dealing with an application by the Receiver for an increase in its borrowing charge from $3 million to $7.5 million (which was granted). The issues on which she requested further submissions were: (a) whether

the true lease/financing lease dichotomy has relevance to the consideration of whether the items covered by the Master Lease could be considered the property of the Debtor; and (b) whether the items covered by the Master Lease are fixtures.

(d) Supplementary Reasons for Judgment

[44] The judge issued two sets of supplementary reasons for judgment after she received the written submissions she had requested. The orders flowing from these reasons are not the subject matter of these appeals, but one of the sets of reasons does touch on one of the issues under appeal. In addition, the reasons complete the backdrop of these appeals.

[45] The first set of supplementary reasons, indexed as 2020 YKSC 25, dealt with the issue of whether the items covered by the Master Lease could be included in the property being offered for sale. The judge first held that the issue of whether the Master Lease could be properly characterized as a financing lease was not relevant to this issue because the Receiver did not have the ability to avail itself of the remedy contained in s. 57(2)(a) of the *Personal Property Security Act*, R.S.Y. 2002, c. 169, of disposing of collateral by public sale.

[46] The judge then turned to the issue of whether the items covered by the Master Lease could be included in the property being offered for sale on the basis that they are fixtures and could be treated as part of the Debtor's property. She concluded that there was an argument the items were constructive fixtures even if they were not affixed to the land but that she required further evidence in order to decide the issue.

[47] The judge's second set of supplementary reasons, indexed at 2020 YKSC 26, dealt with the issue of whether the Receiver's borrowing charge should be elevated over Welichem on the Non-Essential Lease Items after consideration of the further submissions regarding financing leases and fixtures.

[48] At para. 6 of the second set of supplementary reasons, the judge stated that she did not specifically address in the Receiver Application Reasons how the property of the Debtor included the Essential Lease Items under s. 243(6) of the *BIA* in view of the fact that the Master Lease contained a reservation of title in Welichem. She then stated that s. 243(1) of the *BIA* (and s. 26 of the *Judicature Act*), as she had explained them in the Disclaimer Reasons, allowed the court to make the Essential Lease Items subject to the priority charges of the Receiver.

[49] The judge concluded that none of the *Kowal* exceptions applied to the Non-Essential Lease Items. Next, she reiterated her view that, without more evidence, she was unable to find that the Master Lease items were fixtures. Finally, she ruled that, as she had found in her first set of supplementary reasons that the remedies set out in the *Personal Property Security Act* do not help the Receiver, the true lease/financing lease characterization had no relevance to the issue before her. As a result, unless additional evidence established that the Non-Essential Lease Items were fixtures, the Receiver's borrowing charge could not be elevated in priority over them.

Discussion

(a) Government's Application (Appeal No. 20-YU865)

[50] I will deal with the declarations sought by the Government under this heading, and I will address the issue of whether the Government's security under s. 14.06(7) of the *BIA* charges the mineral claims under the next main heading because it is the subject matter of Appeal No. 20-YU867 (Mineral Claims).

[51] Before analyzing the grounds of appeal, I wish to make an observation with respect to the Government's application for a declaration that it has a provable claim in bankruptcy. I have reservations as to whether the Supreme Court of Yukon had the jurisdiction to make such a declaration. Section 124 of the *BIA* makes provision for the filing of proofs of claims in bankruptcy matters with the trustee in bankruptcy. Section 135(1) provides that the trustee in bankruptcy is to examine proofs of claim and s. 135(1.1) specifically provides that the trustee in bankruptcy must determine

whether a contingent claim or an unliquidated claim is a provable claim and, if it is, the trustee is tasked with the responsibility of valuing it. If the party filing the proof of claim is dissatisfied with the trustee's determination, it has 30 days to appeal to the court. In the present case, that court would presumably be the British Columbia Supreme Court.

[52] This is not a situation like existed in *Abitibi*, where the proceedings were under the *CCAA*. The *CCAA* authorizes the court to make any order it considers appropriate in the circumstances (s. 11), including making orders as to whether a person has a "claim" as that term is defined in s. 2 of the *CCAA*.

[53] When this point was raised at the hearing of the appeal, counsel advised that they agreed to have the status of the Government's claim determined in the receivership action as a matter of convenience. As no submissions were made as to the jurisdiction of the Supreme Court of Yukon, this Court will not make any determination on the issue. I mention the point so that these reasons for judgment will not be regarded as a considered precedent on the jurisdiction of a court which appoints a receiver to determine whether claims are provable in bankruptcy when there is a bankruptcy over which another court has jurisdiction.

i) Obligation to Provide Unfurnished Reclamation Security

[54] The judge's first ruling was that the obligation of the Debtor to provide the Unfurnished Reclamation Security was not a claim provable in bankruptcy. The Government says the judge erred in making this ruling on the basis that the requirement to provide the Unfurnished Reclamation Security was a secondary obligation and was not recoverable by legal process. The Government also says the judge erred in finding that the obligation to provide the Unfurnished Reclamation Security was not a contingent claim, a ground that the Government repeats with respect to the costs it may incur to remediate the environmental damage.

[55] Section 2 of the *BIA* defines the terms “claim provable in bankruptcy”, “provable claim” and “claim provable” to include “any claim or liability provable in proceedings under this Act by a creditor”. Section 121 of the *BIA* supplements the definition and also deals with contingent claims:

> **Claims provable**
>
> **121 (1)** All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt’s discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> **Contingent and unliquidated claims**
>
> **(2)** The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

Section 135(1.1), to which I referred above, provides that the trustee in bankruptcy must determine whether contingent or unliquidated claims are provable claims and must value them if they are provable claims.

[56] In finding that the obligation to provide the Unfurnished Reclamation Security was not a provable claim because it was secondary in nature, the judge relied on the decision of *JICO Holdings Inc. v. Lynco Construction Ltd.*, 2016 SKCA 126 [*JICO*]. In that case, a judge had dismissed JICO’s application for a bankruptcy order against Lynco on the basis that JICO was not owed a debt of more than $1,000 as required by s. 43(1)(a) of the *BIA*. One of the matters relied upon by JICO as establishing a debt was that it was a contingent beneficiary in respect of an order for security for costs made against Lynco in favour of a credit union in an unrelated action.

[57] The Saskatchewan Court of Appeal held that the order for security for costs did not constitute a debt for two reasons. First, it did not yet constitute a debt owing to anyone. Second, the security for costs order merely created a contingent liability that, if crystalized, would become owing to the credit union, not JICO.

[58] I do not find *JICO* to be particularly helpful in determining that an obligation to post security is not a claim provable in bankruptcy because it was a secondary obligation. The decision is clearly distinguishable on at least two bases. However, the case is useful in its finding that the obligation to post security for costs is not a debt.

[59] In discussing the present issue, the chambers judge focused on the word "obligation". I believe this is because, in making its submissions, the Government relied upon the test set out in *Abitibi* for determining whether there is a claim for the purposes of the *CCAA*:

> [26] These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation.
>
> [Emphasis in original.]

This passage refers to "a debt, a liability or an obligation". The Government submits the obligation to provide the Unfurnished Reclamation Security is an "obligation" and it matters not that it may be considered to be a "secondary obligation".

[60] However, one must be cautious in relying upon *Abitibi* in this regard. The definition of "claim" in the *CCAA* is slightly different than the definition of "claim provable in bankruptcy" in the *BIA*. In s. 2 of the *CCAA*, "claim" is defined as any "indebtedness, liability or obligation" that would be a claim provable in bankruptcy under the *BIA*. In contrast, the definition of "claim provable in bankruptcy" in s. 2 of the *BIA* refers to any "claim or liability" provable by a "creditor". Section 121(1) of the *BIA* provides that all "debts and liabilities" by reason of "any obligation" incurred before the date of bankruptcy are deemed to be claims provable under the *BIA*.

[61] I do not know why the wording is slightly different in the two statutes. What is important for this appeal, however, is that it is not sufficient for there to simply have been an "obligation" on the bankrupt in order to establish a claim provable in bankruptcy. What is required is a debt or liability to a creditor by reason of an

obligation incurred before the date of bankruptcy. Hence, it cannot be an obligation of any kind. It must be an obligation creating a debt or liability.

[62] As held in *JICO*, a requirement to post security certainly does not create a debt. The question becomes whether it creates a liability. In other words, is it something for which a court would have found the Debtor to be liable prior to the date of bankruptcy? This question leads to a discussion of the second basis on which the chambers judge found that the failure to provide the Unfurnished Reclamation Security did not give rise to a claim provable in bankruptcy.

[63] The jurisprudence in Canada is clear that a claim provable in bankruptcy must be one recoverable or enforced by legal process. The leading authority in this regard is *Farm Credit Corp. v. Holowach (Trustee of)* (1988), 51 D.L.R. (4th) 501 (Alta. C.A.), leave to appeal ref'd (1989), [1988] S.C.C.A. No. 291 [*Holowach*], a case in which a mortgagee filed a proof of claim in the bankruptcy of the mortgagor for the amount of the deficiency in the mortgage debt following the sale of the mortgaged property. The trustee in bankruptcy disallowed the claim on the basis that s. 41 of the *Law of Property Act*, R.S.A. 1980, c. L-8, prohibited proceedings on the covenant to pay.

[64] In agreeing with the trustee, the Alberta Court of Appeal said the following after acknowledging that s. 41 did not extinguish the debt (at 258–259):

> In our view a provable claim must be one recoverable by legal process. In *Ref. Re Debt Adjustment Act, 1937*, [1943] A.C. 356, [1943] 1 W.W.R. 378, 24 C.B.R. 129, [1943] 1 All E.R. 240, [1943] 2 D.L.R. 1 [Alta.], the Privy Council said (at p. 11):
>
> > In England it has always been held that, subject to the statutory exceptions as to debts payable at some certain future time, the petitioning creditor's debt and the debts provable must be debts recoverable by legal process. For example a debt barred by the *Statute of Limitations* is not a debt on which a bankruptcy petition can be presented, nor is it one provable in bankruptcy … The *Dominion Act* is very similar to the English *Bankruptcy Acts* so far as those matters are concerned and there appears to be no reason for thinking that a similar principle would not be applied in Canada to the words "debt due."

> The same reasoning was applied in *Re Kolodychuk* (1978), 6 B.C.L.R. 238, 27 C.B.R. (N.S.) 307 (S.C.), to hold a chattel mortgagee disentitled to a deficiency claim because of "seize or sue" limitations. Other examples are *Re Solmon* (1974), 19 C.B.R. (N.S.) 165 (Ont. S.C.) (Statute of Frauds); *Re Hamer (Hamar); Ex parte McGuinty & Co.* (1921), 2 C.B.R. 137, 63 D.L.R. 241 (Sask. K.B.) (Statute of Limitations); and *Re Morton; Ex parte Morton Bartling & Co.*, 15 Sask. L.R. 460, [1922] 2 W.W.R. 811, 3 C.B.R. 114, 66 D.L.R. 378 (K.B.) (Statute of Limitations). We agree with the conclusions that a provable claim must be recoverable.

Holowach has been accepted as the leading authority on this point in *Luscar Ltd. v. Smokey River Coal Limited*, 1999 ABCA 179 at para. 37, and *Asian Concepts Franchising Corporation (Re)*, 2018 BCSC 1022 at para. 115.

[65] *Holowach* dealt with a debt, and it was held that the debt must be recoverable by legal process in order to be a claim provable in bankruptcy. In *Central Capital Corp. (Re)* (1996), 132 D.L.R. (4th) 223 (Ont. C.A.) [*Central Capital*], the Ontario Court of Appeal applied the same principle to an obligation giving rise to a liability. In that case, a company reorganizing under the *CCAA* had issued retractable shares to the appellants, who asserted that they had a claim for the purposes of the reorganization. The appellants had given a notice of retraction to the company, which declined to redeem the shares on the basis that s. 36 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, prohibited the redemption of shares by a company that was believed to be insolvent. The appellants deposited their shares for redemption. Justice Weiler, for the majority, relied on *Holowach* to hold that the appellants did not have a claim provable in bankruptcy because the company's promise to redeem the shares was not enforceable.

[66] Although neither *Holowach* nor *Central Capital* are binding on this Court, they are persuasive authorities, and I see no principled reason to decline to follow them. Applying the principle of *Holowach* and *Central Capital* to the present circumstances, it is my view that the Government does not have a claim provable in bankruptcy as a result of the failure of the Debtor to provide the Unfurnished Reclamation Security because it is not a requirement that the Government could have enforced by legal action.

[67] The Minister is entitled to require reclamation security from an applicant for a license or a licensee pursuant to s. 139 of the *Mining Act*. However, the *Mining Act* contains no provisions by which a licensee's obligation to provide reclamation security can be enforced by legal action. The closest the *Mining Act* comes is to provide for prosecution for contravention of a condition of a license (s. 150(3)), and the Government did prosecute the Debtor on two occasions. Section 147(2) provides that, if the amount of the reclamation security is inadequate to pay for the reclamation costs incurred by the Government, the shortfall is recoverable as a debt by the Government. But the *Mining Act* does not provide that the Government can recover as a debt any required reclamation security that has not been furnished or that the Government can otherwise invoke legal process to enforce the obligation to provide required reclamation security.

[68] Accordingly, the Government does not have a provable claim of a liability because the obligation of the Debtor to provide the Unfurnished Reclamation Security is not enforceable by legal action. I agree with the conclusion of the chambers judge that the Government does not have a claim provable in bankruptcy in respect of the Unfurnished Reclamation Security.

[69] The judge also analyzed the obligation to post the Unfurnished Reclamation Security in terms of the *Abitibi* test. In my opinion, the *Abitibi* test does not apply to such an obligation because it is not a contingent obligation, which is what *Abitibi* was addressing. The obligation to provide the Unfurnished Reclamation Security arose as soon as the Minister required additional security, and it was not contingent on the happening of any other event. I will leave a consideration of *Abitibi* to the next issue, which is whether the Government had a claim provable in bankruptcy as a result of a contingent claim for costs of remediating the environment damage caused by the Mine.

ii) Contingent Claim for Remediation Costs

[70] In *Abitibi*, unlike the present case, the Government of Newfoundland and Labrador took the position that it did not have a provable claim in bankruptcy. The

reason is that it did not want its rights under environmental protection orders issued by it to be affected by the claims procedure order made in connection with Abitibi's proposed reorganization. In its decision, the Supreme Court of Canada held that the Government of Newfoundland and Labrador did have a claim for the purposes of the *CCAA*. The Government urged the chambers judge to reach a similar conclusion in this case.

[71] As in *Abitibi*, there are no issues in the present case with respect to the first two prongs of the three-part test established by the Supreme Court of Canada. By virtue of s. 147(2) of the *Mining Act*, any remediation costs expended by the Government are recoverable as a debt, with the result that the Government qualifies as a creditor under the first prong. The second prong is satisfied because some, if not all, of the environmental damage occurred prior to the Debtor's bankruptcy.

[72] The third prong is that it must be possible to attach a monetary value to the debt or liability. Justice Deschamps, for the majority, said the following about this prong:

> [36] The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (*Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process.

[73] The chambers judge held that it was not sufficiently certain that the Government would incur the remediation costs for the following reasons:

> [124] The $35,548,650 security amount comprises the estimated future costs for the entire remediation and final closure plan for the Mine. While it is clear that the debtor cannot do or pay for the necessary work, there remains uncertainty as to what will be done, when and by whom. For example, if the Mine were sold, it is safe to assume that not all of the closure plan would need to be implemented at that time (e.g. closing down road access, decommissioning all the buildings, removing equipment and infrastructure). Answers to these questions depend on whether or not there is a sale; whether there is an assumption by a new purchaser of the licence condition to provide security in whole or in part; whether or not all or part of the

> reclamation and closure work will be done; what those costs will be; when the amount of existing security will be spent. These are all questions of fact.

Although the judge made these comments in the context of deciding whether the obligation to provide the Unfurnished Reclamation Security was a provable claim, they apply equally to the issue of whether the Government had a provable claim in respect of the contingency that it would incur remediation costs (which the judge did not explicitly rule upon, although she did refer to it as an alternate argument at para. 67 of the Government Application Reasons).

[74] On appeal, the Government says the judge misapplied the third prong of the *Abitibi* test. It submits the judge relied solely on the speculative nature of the claim, and this was a legal error because all contingent claims by their nature are speculative. The Government argues that it is sufficiently certain that the Government will be using its own funds to remediate the environmental damage.

[75] In my opinion, the judge's conclusion was a finding on a question of mixed fact and law. As set out in *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36, such questions lie along a spectrum between fact and law. Where the issue is closer to the factual end of the spectrum and no error of law is extricable, the standard of review by an appellate court is one of palpable and overriding error.

[76] It is my view that the judge did not simply rely on the fact that the claim was speculative to conclude that it was not sufficiently certain that the Government would incur remediation costs. She considered all of the evidence, including the prospect of a sale of the Mine, in reaching her conclusion. The Government has not established that the judge made a palpable error, and her conclusion is owed deference by this Court. I would not disturb the judge's finding on this point, with the result that the judge did not err in finding that the Government's contingent claim for remediation costs was not a claim provable in bankruptcy.

iii) Secured Claim under Section 14.06(7) of the BIA

[77] Section 14.06(7) of the *BIA* reads as follows:

> **Priority of claims**
>
> **(7)** Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security
>
> **(a)** is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and
>
> **(b)** ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

As noted by Deschamps J. at paras. 32 and 33 of *Abitibi*, s. 11.8(8) of the *CCAA* (which corresponds to s. 14.06(7)) represents a balance between the public's interest in enforcing environmental regulations and the interests of third-party creditors in being treated equitably. The security does not extend to all of the debtor's assets but is limited to the contaminated real property and related contiguous real property.

[78] The Government says the chambers judge correctly stated the law when she said the following at para. 132 of the Government Application Reasons:

> [132] In this case, Yukon is continuing to spend money on care and maintenance and environmental remediation at the Mine. There is every reason, once those costs are incurred, or it is sufficiently certain that they will incur such costs, for Yukon to exercise its super-priority charge against the real property.
>
> [Emphasis added by the Government.]

But, says the Government, the judge fell into error when she concluded in para. 136 that "s. 14.06(7) of the *BIA* does apply once Yukon has incurred costs" without noting that the "sufficiently certain" test applies to s. 14.06(7).

[79] In my view, there are two answers to this submission. The first is that in para. 132 the chambers judge conflated the *Abitibi* test for contingent environmental claims and the priority charge created by s. 14.06(7) for environmental remediation

costs. *Abitibi* was concerned with the question of whether the government had a claim under the *CCAA* for the purpose of the claims procedure order made in the *CCAA* proceeding. *Abitibi* did not deal with s. 14.06(7) and did not import the "sufficiently certain" test into s. 14.06(7).

[80] A claim under s. 14.06(7) does not need to be a claim provable in bankruptcy. Parliament has defined the terms "claims provable in bankruptcy", "provable claim" and "claim provable" in s. 2 of the *BIA*, but has not defined the word "claim" as used in s. 14.06(7). The distinction is made clear by s. 14.06(8) of the *BIA*, which provides that the charge created by s. 14.06(7) applies to costs for remedying an environmental condition or environmental damage that arose or occurred after the date of bankruptcy. This is in contrast to a claim provable in bankruptcy, which must relate to a debt or liability in existence before the date of bankruptcy. As Deschamps J. commented at para. 28 of *Abitibi* when contrasting the time requirements of s. 121(1) of the *BIA* and s. 11.8(9) of the *CCAA* (the provision corresponding to s. 14.06(8) of the *BIA*), s. 11.8(9) provides for "more temporal flexibility for environmental claims" (than for claims provable in bankruptcy).

[81] The second answer to the Government's submission is that on the plain reading of s. 14.06(7) the charge is created for costs that have been incurred for environmental remediation, not for anticipated future costs or contingent costs. The natural meaning of the words "Any claim … for costs of remedying" is a claim for actual remediation costs. If Parliament had intended to create a charge for costs that may be incurred in the future, one would have expected it to have used explicit language in that regard.

[82] In holding that s. 14.06(7) did not create a charge for anticipated future costs or contingent costs, the chambers judge relied upon the following passage from the majority's decision in *Orphan Well Association v. Grant Thornton Limited*, 2017 ABCA 124:

> [55] For example, s. 14.06(7) grants a security interest to a government that remediates property. That section does not create any generalized priority or super priority for existing or contingent environmental liabilities; it only comes into play where a government has actually remediated specific contaminated property. While that section operates through the use of a limited and focused super priority, it is based on the restitutionary principle that a party that discharges the obligation of another is entitled to be compensated for its efforts by the original obligee and its successors in title. It simply recognizes a type of subrogated claim, and is not a part of any broader "statutory compromise". If a government ends up having to incur the expense of remediating property, the previous defaulting owner or its secured creditor cannot insist on getting back the restored land without refunding those costs to the government. For example, if a government remediates a site (say an industrial site, or an open pit mine) resulting in a parcel of land with some value (say a clean industrial site, or perhaps only pasture or parkland) the government has a security interest in that site. If the defaulting owner wants to get that parcel back, it has to pay the remediation costs.

While that decision did not directly involve s. 14.06(7) and was overturned by the Supreme Court of Canada on other grounds (*Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 [*Orphan Well* SCC]), I agree with the chambers judge that it correctly summarizes the meaning of s. 14.06(7) and, in particular, that the charge arises when a government incurs costs to remediate an environmental condition or damage.

[83] In her concluding remarks in the Government Application Reasons, the judge said the following:

> [165] [The Government] has a provable claim in the bankruptcy of [the Debtor] once it incurs costs, beyond the existing security it holds, of remedying the environmental damage affecting the real property of [the Debtor]. That claim is secured by security on the real property of [the Debtor] affected by the damage and property contiguous with it, related to the environmental damage, and is enforceable in the same way as any other security on real property.

These two sentences were incorporated as orders and declarations in the first two paragraphs of the order entered pursuant to the Government Application Reasons.

[84] With respect, it is my view that, in making these remarks, the judge again conflated the concept of a contingent claim giving rise to a provable claim in bankruptcy and the concept of the priority charge created by s. 14.06(7). As she held that the Government's contingent claim did not meet the *Abitibi* test, the judge

should have dismissed the Government's application for a declaration that it had a provable claim in the bankruptcy of the Debtor. As I have discussed, a provable claim must be based on a debt or liability that came into existence prior to the date of bankruptcy. The judge did hold, at para. 136 of the Government Application Reasons, that s. 14.06(7) applies once the Government incurs costs of remediation, and that is the declaration that should have been included in the entered order. The judge did not give reasons for her comment about the Government exhausting the security it held (i.e., the Reclamation Security) and, as she made the comment in the context of her incorrect finding that the Government had a provable claim, her comment should not have been reflected in the entered order.

iv) Disposition

[85] I would allow Appeal No. 20-YU865 to the limited extent of correcting the entered order by deleting the first two paragraphs of it and replacing them with the following:

1. Yukon's application for a declaration that it has a claim provable in the bankruptcy of Yukon Zinc Corporation ("YZC") is dismissed.

2. A claim by Yukon for costs of remedying any environmental condition or environmental damage affecting real property of YZC will be secured on the real property of YZC affected by the environmental condition or environmental damage and on any other real property of YZC that is contiguous with that real property and that is related to the activity that caused the environmental condition or environmental damage.

I would not allow the appeal as it relates to any of the Government's grounds of appeal.

(b) Mineral Claims (Appeal No. 20-YU867)

[86] This appeal is also from the order entered pursuant to the Government Application Reasons. Welichem appeals the aspect of the order that, for the

purposes of the Government's security pursuant to s. 14.06(7) of the *BIA*, the Debtor's real property includes the mineral claims it holds.

[87] Under the *Mining Act*, every person who locates a mineral claim is required to record it with the mining recorder (s. 41(1)). The holder of a mineral claim is entitled to all minerals lying within the boundaries of the claim (and downward into the earth) (s. 50). Section 52 provides as follows:

> **Chattel interest for one year**
>
> **52** The interest of the holder of a mineral claim shall, prior to the issue of a lease, be deemed to be a chattel interest, equivalent to a lease of the minerals in or under the land for one year, and thence from year to year, subject to the performance and observance of all the terms and conditions of this Part.

Under s. 74, the holder of a mineral claim is entitled to a lease of the claim if the holder obtains a certificate of improvements under s. 70 that it has done work on the claim of at least $500.

[88] Under s. 56, the holder of a mineral claim is entitled to it for a period of one year and thence from year to year if the holder has done work on the claim of at least $100 per year unless the Minister has granted relief in respect of the annual representation work (s. 57) or the holder has paid $100 in respect of each claim to the mining recorder (s. 59). A mining claim expires at the end of the year in which the required work or payment is not done or made (s. 60). The holder pays annual royalties to the Government based on the value of the output of the mine (s. 102).

[89] In the Government Application Reasons, the chambers judge accepted that, as a result of the wording of s. 52, mineral claims under the *Mining Act* are chattels real, with the result that they are an interest in land: see *Rock Resources Inc. v. British Columbia*, 2003 BCCA 324, leave to appeal ref'd (2004), [2003] S.C.C.A. No. 375. She stated that the real question was whether the words "real property" in s. 14.06(7) includes an interest in land.

[90] The judge articulated the modern rule of statutory interpretation; i.e., the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21. The judge found the clear intention of Parliament in enacting s. 14.06(7) was to ensure that remediation costs would not become a burden to the taxpayer. She reasoned that, as mineral claims have value, they need to be included as part of the security under s. 14.06(7). She found her conclusion to be supported by the decisions of *Yukon Territory (Commissioner) v. Bedard*, [1987] Y.J. No. 48 (S.C.) [*Bedard*]; *Yukon v. B.Y.G. Natural Resources Inc.*, 2017 YKSC 2 [*B.Y.G.*]; and *Yukon (Government of) v. United Keno Hill Mines Limited*, 2004 YKSC 59 [*Keno Hill*].

[91] In my view, the judge made two errors in her analysis. First, in finding the intention of Parliament, she overlooked the comments of Deschamps J. at paras. 32 and 33 of *Abitibi*, to which I referred above. At para. 32, Deschamps J. found that, in enacting the corresponding section in the *CCAA* (s. 11.8(8)), Parliament struck a balance between the public's interest in enforcing environmental regulations and the interest of third-party creditors in being treated equally. At para. 33, she observed that, if Parliament had intended that the debtor would always satisfy all remediation costs, it would have created the security over all of the debtor's assets (and not just real property). Hence, it was incorrect for the judge to conclude that the intention of Parliament was to ensure that remediation costs would not become a burden to the taxpayer.

[92] Second, the judge did not consider the wording of the *BIA* to determine whether Parliament intended to distinguish between real property and interests in real property (although, in fairness to the judge, it is not clear that the following wording from the *BIA* was brought to her attention). The words "real property" are not defined in the *BIA*, but the word "property" is defined in s. 2 as follows:

> ***property*** means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;
>
> [Emphasis added.]

The use of the words "as well as" (rather than words to the effect of "including") indicates that the words "real property" are not intended to include an interest in real property.

[93] A similar distinction is made in s. 74(3) of the *BIA*:

> **Caveat may be filed**
>
> **(3)** If a bankrupt owns any real property or immovable or holds any charge registered in a land registry office or has or is believed to have any interest, estate or right in any of them, … a caveat or caution may be filed with the official in charge of the land registry by the trustee, …
>
> [Emphasis added.]

It is clear that the words "real property" in s. 74(3) do not include an interest in real property because, if they did, it would not have been necessary to add the reference to any interest in real property.

[94] Perhaps most importantly, s. 14.06(4), which deals with non-liability of a trustee in bankruptcy for environmental remediation costs in certain circumstances, uses the phrase "any interest in any real property". The phrase "any interest in any real property" is also used in s. 14.06(6) in stating that environmental remediation costs are not to rank as costs of administration if the trustee had abandoned or renounced any interest in any real property. It is evident that, in enacting s. 14.06(7) at the same time, Parliament was aware of the distinction between "real property" and "an interest in real property", and did not intend that the security created by s. 14.06(7) would extend to an interest in real property such as mineral claims.

[95] The Government submits that clause (b) of s. 14.06(7) supports its interpretation that s. 14.06(7) does create security against interests in land. For ease of reference, I set out clause (b) again:

> **(b)** ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

Clause (b) is referring to the security created for environmental remediation costs, and the Government argues that the use of the word "property" in clause (b) includes interests in real property because they are included in the definition of "property" in s. 2 of the *BIA*. With respect, clause (b) is dealing with the priority of the security that is created earlier in the section and is simply referring back to the property over which the security is created (i.e., real property or immovables). Clause (b) does not expand the type of property over which the security is created.

[96] None of the decisions upon which the chambers judge relied to support her decision involved an interpretation of the *BIA*, and they are all distinguishable. The question in *Bedard* was whether mineral claims were personal property which could be sold by the sheriff in executing upon a judgment. The Court held the mineral claims were not personal property because, under the predecessor to s. 52 of the *Mining Act*, they were an interest in land.

[97] The chambers judge found support in *B.Y.G.* and *Keno Hill* because mineral claims were included in the charges of the receiver over the debtor's real property. However, the receiver was appointed over all of the assets and property of the debtor in each case, and this included their mineral claims. Each case involved an application to approve a marketing plan, and there was no discussion of whether a mineral claim constituted real property.

[98] I conclude for these reasons that the words "real property" in s. 14.06(7) do not include an interest in land such as a mineral claim. I would allow Appeal No. 20-YU867, and I would vary the entered order by deleting paragraph 5 of it and replacing it with the following:

> 5. Yukon's security under s. 14.06(7) of the BIA does not extend to YZC's mineral claims.

(c) <u>Disclaimer of Master Lease (Appeal No. 20-YU866)</u>

[99] In the emails between counsel following the giving of the Disclaimer Notice, counsel began referring to it as a "partial disclaimer". In its notice of application, Welichem defined the Disclaimer Notice as the "Partial Disclaimer". In the Disclaimer Reasons, the judge framed the first issue to be whether "the Receiver has the authority to use the Essential Items to carry out its duties (i.e. partially disclaim the Master Lease)".

[100] The judge did not analyze the Disclaimer Notice. Other than addressing Welichem's argument that clause (c) of paragraph 3 of the Receivership Order only gave the Receiver the binary choice to either cease to perform a contract (i.e., disclaim it), or to affirm it, the judge did not express her conclusions in terms of the Master Lease being partially disclaimed. In para. 69 of the Disclaimer Reasons, after discussing s. 243(1) of the *BIA* and a number of decisions, the judge found that there is authority under s. 243(1)(c) for "the Court to allow the Receiver to use the Essential Items". At para. 78, she stated her view that the passage from page 436 of *Bennett on Receiverships* quoted above was "general support for the Receiver's appropriate exercise of authority under s. 243(1) of the BIA … to use the Essential Items".

[101] In the concluding paragraph of the Disclaimer Reasons, the judge summarized her conclusion:

> [84] I find that the use by the Receiver of the Essential Items is a disclaimer of the Master Lease and a permissible variation for the reason that its terms are onerous and not commercially reasonable in the circumstances. The Receiver properly exercised its authority under s. 243(1) of the *BIA* and/or s. 26 of the *Judicature Act* to do so.

[102] I make these observations to illustrate that, despite the terminology used by counsel, the judge did not make her decision on the basis of a partial disclaimer of the Master Lease but, rather, she made it on the basis that the Receiver was entitled to use the Essential Lease Items. In my opinion, the judge was correct to characterize it in this fashion because the Disclaimer Notice did not constitute a partial disclaimer of the Master Lease. Rather, it constituted a disclaimer of the

Master Lease in its entirety but was coupled with an appropriation by the Receiver of the right to use the Essential Lease Items without complying with any of the terms of the Master Lease at a monthly rent unilaterally determined by the Receiver.

[103] The first four lines of paragraph 4 of the Disclaimer Notice is typical language to disclaim a contract in its entirety. Following the fourth line is an exception stating that the lessee's right to use the Essential Lease Items was to survive the disclaimer of the Master Lease and that all obligations of the Debtor pursuant to the Master Lease were disclaimed except for this right to use the Essential Lease Items.

[104] This was not a situation where the Receiver was agreeing to abide by the terms of the Master Lease as they related to the Essential Lease Items. As explained in its second report to the court, the Receiver decided to issue the Disclaimer Notice for several reasons, including the reasons that it did not want to pay the insurance required by the Master Lease and that it did not want to be obliged to return the leased items to a location of Welichem's choosing. The effect of the Disclaimer Notice was to disclaim all obligations under the Master Lease but to assert a right to use the Essential Lease Items.

[105] As a result, it is not necessary to discuss partial disclaimers of contracts by receivers. There was no authority before the chambers judge as to whether a receiver could or could not partially disclaim a contract. Welichem had relied on the decision of *Re Lord and Fullerton's Contract* (1895), [1896] 1 Ch. 228 (C.A.), where it was held that an executor under a will was not entitled to disclaim property located in one country while not disclaiming property located in other countries, but the judge found that it had no applicability. However, there is now some authority on the point.

[106] In a decision released after the hearing of this appeal, the British Columbia Court of Appeal had occasion to consider whether a receiver could disclaim the provision of a contract requiring disputes to be resolved by arbitration and could sue in court to recover monies allegedly owing under the contract. In *Petrowest Corporation v. Peace River Hydro Partners*, 2020 BCCA 339, the Court relied on the doctrine of separability to hold that the arbitration clause was an independent

agreement which could be separately disclaimed. In the course of his reasons for judgment, Justice Grauer said the following:

> [46] As we have seen, and as the *New Skeena* [*New Skeena Forest Products Inc., Re v. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154] case confirmed, the receiver is entitled to disclaim the debtor's executory contractual obligations. The respondents assert that nothing more is necessary to permit the receiver to avoid the effect of the arbitration clauses. The appellant submits, however, and I accept, that this concept does not form a basis for allowing the receiver freedom to pick and choose among the terms of a contract the receiver seeks to enforce. The question is whether arbitration clauses can be treated differently in the particular circumstances we are considering.
>
> [Emphasis added.]

[107] I also wish to comment on the reliance by the chambers judge on the passage from *Bennett on Receiverships* (in which the author discussed a receiver applying to court to "break or vary an onerous or material contract") and her comment in para. 84 of the Disclaimer Reasons (quoted above) about a "permissible variation". First, the Disclaimer Notice did not constitute a variation of the Master Lease – it was a complete disclaimer of it. Hence, the passage from *Bennett on Receiverships* was not relevant. Second, the text does not state that a receiver is entitled to unilaterally vary existing contracts, and no authority for such a proposition is cited in the text. The statement was made in a section of the text dealing with the advisability of receivers obtaining court approval for the disclaimer of contracts, and it may be that the statement was intended to deal with the situation of a receiver obtaining court approval of an amendment to an existing contract that the receiver has negotiated with the other party to the contract.

[108] Welichem framed its grounds of appeal in terms of the Disclaimer Notice being a partial disclaimer of the Master Lease. At the hearing of the appeal, when it was raised that the proper characterization of the Disclaimer Notice was a full disclaimer coupled with an appropriation by the Receiver of the Essential Lease Items for its use, Welichem responded that the analysis in its factum also applied to such a characterization of the Disclaimer Notice.

[109] Welichem's grounds of appeal, as reframed to reflect the proper characterization of the Disclaimer Notice, are as follows:

(a) the judge erred in interpreting s. 243(1)(c) of the *BIA* and s. 26 of the *Judicature Act* so broadly as to authorize the Receiver to use the Essential Lease Items;

(b) the judge erred in interpreting the Receivership Order so broadly as to authorize the Receiver to use the Essential Lease Items; and

(c) the judge erred in finding that the Receiver did not affirm the Master Lease.

It could be argued that the second ground is a threshold issue because the judge relied on the Receivership Order as permitting the Receiver to use the Essential Lease Items, and she did not make a specific order authorizing the use of the Essential Lease Items (in contrast to the following appeal which does involve a specific order under s. 243(6) of the *BIA*). However, I agree with Welichem that it is more appropriate to deal with the issues in the same order as they were set out in its factum.

[110] Section 243 reads as follows:

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

The other relevant provision of the *BIA* is s. 72(1):

> **Application of other substantive law**
>
> **72 (1)** The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

[111] The wording of clauses (a), (b) and (c) of s. 243(1) correspond to the wording of clauses (a), (b) and (c) of s. 47(2) of the *BIA* when it was first enacted in 1992 (S.C. 1992, c. 27, s. 16). At the time, s. 47(1) was added to the statute to provide for the appointment of an interim receiver as a companion provision to another new section, s. 244(1), which required a secured creditor to give advance notice to an insolvent person before enforcing its security against substantially all of the person's inventory, accounts receivable or other property. Section 47(1) empowered the court to appoint an interim receiver when such a notice was about to be sent or had been sent. Similar to clause (c) of s. 243(1), clause (c) of s. 47(2) empowered the court to direct the interim receiver to "take such other action as the court considers advisable".

[112] In its current form, s. 243(1) was enacted by s. 58(1) of *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36. Its enactment introduced a receivership regime in Canada that was national in scope. Interestingly, clause (c) of s. 47(2), as it had been enacted in 1992, was removed, first by s. 30(2) of S.C. 2005, c. 47 (not proclaimed) and then by s. 14(2) of S.C. 2007, c. 36.

[113] I mention this history because s. 47(2)(c), as initially enacted, has been considered by a number of cases, two of which were relied upon by the chambers judge and two of which are relied upon by Welichem on appeal. In my view, the most important of these cases for the purposes of this appeal is *GMAC Commercial*

Credit Corporation – Canada v. T.C.T. Logistics Inc., 2006 SCC 35 [*T.C.T. Logistics*].

[114] In *T.C.T. Logistics*, an interim receiver was appointed under s. 47(1). The order appointing the interim receiver provided that it was not a successor employer within the meaning of the *Labour Relations Act*, *1995*, S.O. 1995, c. 1. The union applied under s. 215 of the *BIA* for leave to continue with an application before the Labour Relations Board for a declaration that the interim receiver and the company which purchased the assets from it were successor employers. The judge amended the order to somewhat limit the scope of the provision, but denied the request for leave.

[115] The Supreme Court of Canada held that the bankruptcy court did not have jurisdiction to decide whether the interim receiver was a successor employer and that leave should have been granted to the union under s. 215 to continue with its application before the Labour Relations Board. After quoting s. 47(2) of the *BIA*, Justice Abella, for the majority, said the following:

> [45] These statutory parameters, though sufficiently flexible to authorize a wide range of conduct dealing with the taking, management, and eventual disposition of the debtor's property, are not open-ended. The powers given to the bankruptcy court under s. 47(2) are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes.

[116] After quoting s. 72(1) of the *BIA*, Abella J. commented that the effect of s. 72(1) was "not intended to extinguish legally protected rights unless those rights are in conflict with the [*BIA*]". She explained further:

> [51] If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all employment rights if the bankruptcy court thinks it "advisable" under s. 47(2)(*c*). Explicit language would be required before such a sweeping power could be attached to s. 47 in the face of the preservation of provincially created civil rights in s. 72.

T.C.T. Logistics was followed in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 [*Lemare Lake*], in which it was held that s. 72(1) prevented the appointment of a receiver under s. 243 of the *BIA* when provincial legislation required a notice period and a mediation process before enforcement proceedings could be commenced with respect to farm land.

[117] *T.C.T. Logistics* was also followed in one of the cases that the chambers judge did discuss, *Railside Developments Ltd. (Re)*, 2010 NSSC 13 [*Railside*]. In that case, a receiver was appointed over a building complex which was subject to a number of builder's liens. The receiver wanted to register the complex as condominiums but the *Condominium Act*, R.S.N.S. 1989, c. 85 required encumbrancers to consent to the registration.

[118] In *Railside*, Justice Moir dismissed the application of the receiver under s. 243(1)(c) to dispense with the consent of the encumbrancers in registering the complex as condominiums. He noted that s. 243 was a remedial right provided only for secured creditors and that the reasoning in *T.C.T. Logistics* on the scope of s. 47(2)(c) applied to s. 243(1)(c): *Railside* at paras. 80, 88. He held that the general provision for a receiver's powers under s. 243 was not a basis for finding a conflict between the *Condominium Act* and s. 243 for the purposes of s. 72(1) of the *BIA* and, hence, an order under s. 243 could not override the *Condominium Act*: *Railside* at para. 89.

[119] The chambers judge in the present case declined to follow *Railside*. She noted that the goal in each case was for the receiver to maximize the value of the assets for all creditors. However, she held that *Railside* did not apply because the actions of the Receiver in this case were not an incursion on the property and civil rights of Welichem because the Receiver was paying Welichem for the use of the Essential Lease Items and had paid over $200,000 to bring the Essential Lease Items up to operational standards.

[120] In my opinion, the reasoning of *T.C.T. Logistics* and *Railside* applies to the present case, and the chambers judge erred in failing to follow it. It is trite property law that one person cannot expropriate or appropriate for their own use the property of another person unless authorized by statute (such as, for instance, the *Expropriation Act*, R.S.Y. 2002, c. 81). Under s. 243, a receiver is appointed to take possession of property of an insolvent person or a bankrupt, and it does not, explicitly or implicitly, confer authority on the court to permit the receiver to make unilateral decisions to use the property of third parties.

[121] The right of a third party to possess its own property is not in conflict with the *BIA* and, hence, it is protected under s. 72(1). Explicit language would be required in the *BIA* to interfere with this right.

[122] With respect, the judge erred in concluding that the Receiver's actions were not an incursion on Welichem's property rights. The owner of property has the right to decide whether it wants to sell, lease or let another party use the property. No other party has the right to force the owner to let them buy, lease or use the property, even if the other party is prepared to pay what it considers to be fair value and even if it is considered to be "advisable" in the circumstances.

[123] On appeal, the Receiver seeks to distinguish *T.C.T. Logistics*, *Lemare Lake* and *Railside* on the basis that they all involved provincial statutes. However, that is not a basis to make the reasoning of those decisions inapplicable because s. 72(1) protects "the substantive provisions of any other law or statute relating to property and civil rights" that is not in conflict with the provisions of the *BIA* (emphasis added). The reasoning of those decisions applies as equally to common law property rights as it does to statutory rights.

[124] In deciding that s. 243(1)(c) did allow the court to authorize a receiver to use the assets of a third party without their consent, the chambers judge decided to follow the decision of *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. C.J. (Gen. Div.)) [*Curragh*], as interpreted in the recent decision of *Third Eye Capital Corporation v. Resources*

Dianor Inc./Dianor Ressources Inc., 2019 ONCA 508 [*Third Eye*]. On appeal, the Receiver argues that *Third Eye* is the governing authority.

[125] In *Curragh*, an interim receiver applied for an order that it be authorized to advertise for parties to file claims against a mine in Faro, Yukon, and that, if a claim was not made by a specified date, the claim would be barred. The issue was whether the court had the jurisdiction to make such an order pursuant to s. 47(3) of the *BIA*.

[126] *Curragh* was decided in the early days of s. 47(2)(c) and the relatively early days of the resuscitation of the use of the *CCAA*. In the early 1990s, prior to substantial amendments to it, the *CCAA* was considered to be a "bare-bones" statute and the court struggled to make it an effective mechanism to achieve successful reorganizations of financially distressed companies. Judges resorted to the use of the court's inherent jurisdiction to find authority to make orders. Over time, it was recognized that judges had stretched the bounds of the doctrine of inherent jurisdiction and that the use by judges of inherent jurisdiction was a misnomer for the exercise of statutory discretion (see Georgina R. Jackson & Janis Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*, (Toronto: Thomson Carswell, 2008) at 41).

[127] In deciding in *Curragh* that the court did have the jurisdiction to make the requested order, Justice Farley relied on the doctrine of inherent jurisdiction. After referring to several authorities, including my comments on inherent jurisdiction in *Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257 at 268 (S.C.), Farley J. reasoned as follows:

> [16] While the BIA is generally a very fleshed out piece of legislation when one compares it to the CCAA, it should be observed that s. 47(2)(*c*): "The court may direct an interim receiver ... to ... (*c*) take such other action as the court considers advisable" is not in itself a detailed code. It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the

> services of an interim receiver to do not only what "justice dictates" but also what "practicality demands."

[128] In *Third Eye*, the Ontario Court of Appeal observed that, after the enactment of s. 47(2), it became common for interim receivers to market and sell the debtor's property. The Court then discussed *Curragh*, quoting part of the above passage, and commented that, in view of the article by Justice Jackson and Professor Sarra, the reference by Farley J. to inherent jurisdiction might more appropriately be characterized as statutory jurisdiction.

[129] *Curragh* is distinguishable from this case on the basis that it dealt with the procedural matter of a claims process. It is frequently necessary in insolvency proceedings (albeit not usually in interim receiverships) to have a claims process that includes a deadline for the submission of claims.

[130] In the instant case, the chambers judge, having reviewed *Third Eye*, made it clear that she was not relying on the court's inherent jurisdiction (para. 79 of the Disclaimer Reasons). However, she did follow *Curragh* in holding that the circumstances of the case allowed the Court to enlist the Receiver "to do what justice dictates and practicality demands": Disclaimer Reasons at para. 65.

[131] The difficulty with the judge's holding is that it is apparent she considered the Court to be unfettered in doing what it considers to be dictated by justice and demanded by practicality. This is contrary to para. 51 of *T.C.T. Logistics* (quoted above). The discretion afforded by s. 243(1)(c) is constrained by s. 72(1), which preserves substantive property rights that are not in conflict with the provisions of the *BIA*.

[132] I turn now to *Third Eye*. At issue in the appeal was whether the court had the jurisdiction under s. 243(1) to grant vesting orders in receiverships and, if so, whether it was appropriate to grant an order vesting off a gross overriding royalty attached to mineral claims of the debtor that the receiver had arranged to sell. The Ontario Court of Appeal held that s. 243(1) does give jurisdiction to grant such orders on the bases that vesting orders are incidental and ancillary to a receiver's

power to sell and that the interests of efficiency dictate the ability for vesting orders to be granted in national receiverships rather than requiring them in each province in which assets are being sold. The Court did, however, note that the exercise of the jurisdiction is not unbounded: *Third Eye* at para. 82.

[133] In deciding when it is appropriate to exercise the jurisdiction to grant a vesting order, the Court made a distinction between a fee simple interest in land (i.e., an ownership interest), which should not be extinguished by a vesting order, and an interest in land that is more akin to a fixed monetary interest, which could be extinguished. In reviewing the case authorities, the Court noted the decision of *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.J.), in which the judge refused to authorize the sale of the debtor's property free of an undertaking given by the debtor that it would hold two lots in trust for third parties.

[134] In *Third Eye*, the Court held that it was not appropriate to exercise the jurisdiction under s. 243(1) to vest off the gross overriding royalties because they created an interest in the gross product extracted from the land and was not akin to a fixed monetary sum. The Court reached this conclusion despite the fact that the vesting order granted by the motions judge provided for payment to the holders of the gross overriding royalties of amounts that were agreed to represent their fair market value.

[135] I disagree with the Receiver's position that *Third Eye* is a governing authority that supports the holding of the chambers judge in this case. *Third Eye* dealt with a type of order that is commonly necessary in receiverships, and the Court held it was a necessary incident to a receiver's power to sell. It is not common in receiverships for receivers to take control of a third party's assets without their consent. Indeed, the conclusion reached by the Court that it was not appropriate to exercise the vesting order jurisdiction to extinguish ownership interests supports the position of Welichem that s. 243(1) does not give the court the jurisdiction to interfere with ownership rights of third parties.

[136] The chambers judge stated that her analysis of s. 243(1) of the *BIA* applied equally to the interpretation of s. 26 of the *Judicature Act*. Although no case authorities were cited to her, the judge stated that the same principles would apply if s. 26 was relied upon.

[137] Section 26(1) of the *Judicature Act* reads as follows:

> **Interlocutory mandamus or injunction**
>
> **26**(1) A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and that order may be made either unconditionally or on any terms and conditions the Court thinks just.

[138] I do not agree with the chambers judge that s. 26(1) is as equally broad as s. 243(1). Even if it were as broad, s. 26(1) is not sufficient to give the court jurisdiction to authorize a receiver to use the property of a third party without their consent. The comments of Abella J. at paras. 45 and 47 of *T.C.T. Logistics* apply to a provision like s. 26(1). The authority in s. 26(1) is not open-ended, and while it authorizes the appointment of a receiver over the property of a party, it does not, explicitly or implicitly, confer authority on the court to make unilateral determinations about the rights of third parties whose properties are not the properties over which the receiver has been appointed. Explicit language would be required to give the court the authority to interfere with the property rights of third parties.

[139] Welichem's second ground of appeal is that the judge erred in interpreting the Receivership Order so broadly as to authorize the Receiver to use the Essential Lease Items. As I mentioned above, this ground of appeal could be regarded as a threshold issue. To illustrate this point, this ground is now academic because, to the extent that the Receivership Order could be interpreted so broadly, it would have been made without jurisdiction for the above reasons dealing with the interpretation of s. 243(1)(c) of the *BIA* and s. 26 of the *Judicature Act*. However, I will express my view that the Receivership Order should not have been interpreted so broadly because it is not the normal function of orders appointing receivers to deal with the property rights of third parties. In my opinion, express language would have been

required to enable the Receivership Order to be interpreted so as to enable the Receiver to use the Essential Lease Items.

[140] Welichem's third ground of appeal is finding that the Receiver did not affirm the Master Lease. The chambers judge held there was no affirmation on the basis that it would be absurd for the Receiver to be liable for all of the obligations under the Master Lease for using only 79 of the 572 total number of the items covered by the Master Lease. While I do not agree that this is a legal reason for finding there was no affirmation, I agree with the result. As I have explained above, the proper characterization of the Disclaimer Notice is a full disclaimer of the Master Lease, coupled with an appropriation by the Receiver of the Essential Lease Items for its use. Welichem does not point to any evidence of affirmation before the Disclaimer Notice was given and does not argue that the Master Lease could not have been disclaimed because it had already been affirmed. The Receiver fully disclaimed the Master Lease, and none of its actions thereafter amounted to a withdrawal of the disclaimer and affirmation of the Master Lease.

[141] I have two final comments on this appeal. In her reasons for judgment indexed as 2020 YKSC 18, dealing with the Receiver's application to increase its borrowing charge, the chambers judge requested further submissions on whether the items covered by the Master Lease could be considered to be property of the Debtor or had become fixtures. The judge dealt to some extent with these further submissions in the second set of supplementary reasons I summarized above, but it appears that she has not made a final decision on the fixtures issue and it is unclear whether she has made a definitive decision on the financing lease issue.

[142] My first comment is that nothing I have said in these reasons should be interpreted as affecting these issues because my reasoning has been based on the premise that all of the items covered by the Master Lease are the property of Welichem.

[143] My second comment is that the judge was understandably sympathetic with the position in which the Receiver found itself and the Receiver's efforts to attempt to

maximize the recovery on the realization of the Debtor's assets. Despite whatever sympathy one may have for the Receiver's position, it is subject to general laws regarding property. To borrow the words of Chief Justice Wagner, for the majority, in *Orphan Well* SCC at para. 160, receivership "is not a license to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws" during receivership.

[144] For these reasons, I would allow Appeal No. 20-YU866 to the extent of setting aside the order dismissing Welichem's application and granting Welichem's application in part by declaring that the purported appropriation by the Receiver in the Disclaimer Notice of the right to use the Essential Lease Items is of no force or effect. I would not allow Appeal No. 20-YU866 as it relates to the aspects of Welichem's application for orders that the Receiver has affirmed the Master Lease and that the Receiver pay Welichem all amounts owing under the Master Lease since the date of the Receiver's appointment.

(d) Receiver's Application (Appeal No. 20-YU868)

[145] Welichem appeals two aspects of the order made in respect of the Receiver's application. First, it appeals the order that the Receiver's Charges were to be against the Essential Lease Items in priority to the interest of Welichem. Second, it appeals the order approving the Solicitation Plan.

[146] Welichem does not appeal the aspect of the order that the Receiver's Charges were to charge the Debtor's property in priority to Welichem and other secured creditors.

i) Receiver's Charges

[147] Welichem says that the chambers judge erred in relying upon s. 243(1) of the *BIA* and s. 26(1) of the *Judicature Act* to subject its property to the Receiver's Charges and, in the alternative, that the judge erred in applying the *Kowal* exceptions to its property.

[148] In the Receiver Application Reasons, the judge relied on s. 243(6) of the *BIA* and *Kowal* in elevating the Receiver's Charges against the Debtor's property in priority to the security held by the Debtor's secured creditors. Section 243(6) contains specific authority for the court to give a charge, ranking ahead of secured creditors, over the property of the insolvent person or bankrupt in respect of whom the receiver was appointed. The judge did not discuss the statutory or case authority she relied upon to make the ownership interest in the Essential Lease Items subject to the Receiver's Charges. She simply applied the *Kowal* exceptions to the Essential Lease Items.

[149] The judge did address the point in her second set of supplementary reasons (indexed as 2020 YKSC 26), in which she said the following:

> [6] I did not address specifically how the property of the debtor, YZC, includes the Essential Items in the Master Lease, under s. 243(6) of the *BIA*. The Master Lease agreement provides that the "Equipment is and will at all times be [Welichem's] property …
>
> [7] The necessary ongoing use of the Essential Items by the Receiver to carry out the urgent environmental remediation and required care and maintenance, combined with the discretion afforded to the Court by the wording in s. 243(1) of the *BIA* (and s. 26 of the *Judicature Act*, R.S.Y. 2002, c. 128), explained in the [Disclaimer Reasons], allows for these Essential Items to be subject to the priority charge of the Receiver.

After making reference to *Curragh*, the judge stated the *Kowal* exceptions, combined with the discretion in s. 243, provided authority for the elevation of the priority of the Receiver's borrowing charge over the Essential Lease Items.

[150] As discussed in Appeal No. 20-YU866 (Disclaimer of Master Lease), the judge erred in her conclusion that s. 243(1) of the *BIA* and s. 26 of the *Judicature Act* gave the court jurisdiction to authorize the Receiver to use the Essential Lease Items, which are the property of Welichem, without Welichem's consent. The same reasoning applies in this appeal. Explicit language in the legislation would be required to give the court authority to interfere with the property rights of third parties, including the authority to give a receiver a charge for its fees and disbursements over the property of a third party without their consent. Such explicit language is contained in s. 243(6) to give such a charge priority over secured

creditors but it is limited to a charge over the property of the insolvent person or bankrupt in respect of whom the receiver was appointed.

[151] It is unnecessary to consider *Kowal* other than to note that *Kowal* dealt with giving a receiver's charges and expenses priority over secured creditors in relation to the debtor's property and that it did not deal with giving a receiver a charge against the property of third parties.

[152] For the reasons given in Appeal No. 20-YU866 (Disclaimer of Master Lease), I conclude that the judge erred in ordering that Welichem's ownership interest in the Essential Lease Items was subject to the Receiver's Charges. Similar to the comment I made in that appeal, my conclusion is based on the premise that the Essential Lease Items are the property of Welichem, and nothing I have said should be interpreted as affecting the fixtures and financing lease issues to the extent they remain outstanding.

ii) Solicitation Plan

[153] It was proposed that the Receiver would evaluate purchase bids received pursuant to the Solicitation Plan on the basis of numerous factors. Those factors included the following:

> (g) Bidder's financial strength, technical and environmental expertise and relevant experience to carry out work required to maintain regulatory compliance at the Wolverine Mine after closing of the proposed transaction;
>
> (h) Bidder's historical environmental safety record, operational experience with undertakings of similar nature and/or scale and record of successful restart of mines out of care and maintenance;
>
> (i) Strength of a bidder's proposal for posting required Reclamation Security as required by the DEMR and any other security required by any other applicable regulator;
>
> (j) Qualified Bidder's willingness and demonstrated ability to obtain and maintain any necessary regulatory approval in connection with ownership and operation or care and maintenance of the Wolverine Mine, including from but not limited to the Water Board and the DEMR;

[154] Citing *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178 at para. 32, Welichem says a receiver's obligation is to obtain the highest possible sale price for the assets. It asserts that the chambers judge erred when she stated, at para. 68 of the Receiver Application Reasons, that commercial efficacy requires an assessment of the bidder's ability to implement regulatory requirements and that obtaining the optimal price could not be separated from a consideration of the bidder's ability to comply with regulatory requirements.

[155] A receiver's obligation to obtain the highest possible sale price does not mean that it is required to accept the offer containing the highest price. A receiver is entitled to take into account the ability of the bidder to close the transaction (one of the factors listed in the Solicitation Plan for assessing bids was the bidder's probability of closing the transaction). It is not in the interests of stakeholders for the receiver to waste time, and possibly lose the interest of other bidders, in attempting to close a sale to the highest bidder if there are questions about the feasibility of the bidder satisfying conditions in its offer or arranging the funds necessary to complete the purchase.

[156] Under the *Mining Act*, no person may engage in production without a license (s. 135(1)). The Minister is not required to approve the assignment of a license unless he or she is satisfied that the assignment would not be likely to result in a contravention of the license (s. 143(2)). The Minister is entitled to require a prospective assignee to provide reclamation security (s. 139(1)) and, in assessing the risk of significant adverse environmental effect for that purpose, the Minister is entitled to consider the past performance of the prospective assignee (s. 139(2)).

[157] No bidder for the purchase of the Debtor's assets will be able to complete the transaction unless the Minister approves the assignment of the Debtor's license and the bidder is able to provide the required reclamation security. As a result, the factors that the Receiver proposes to consider are relevant to the ability of the bidder to complete the purchase of the assets. In my view, it is not inappropriate for the Receiver to take them into account in assessing bids.

[158] I am not persuaded that the judge erred in approving the Solicitation Plan as proposed by the Receiver.

iii) Disposition

[159] I would allow Appeal No. 20-YU868, in part, by deleting paragraph 4 of the order entered pursuant to the Receiver Application Reasons. I would not allow the appeal as it relates to the approval of the Solicitation Plan.

Conclusion

[160] I would allow each of Appeal Nos. 20-YU865, 20-YU866 and 20-YU868, in part, as set out in these reasons. I would allow Appeal No. 20-YU867.

[161] The parties agreed at the hearing of the appeals that it would not be appropriate for costs to be awarded in Appeal Nos. 20-YU865, 20-YU867 and 20-YU868. In contrast, Welichem and the Receiver were agreed that it would be appropriate for costs to be awarded in Appeal No. 20-YU866. As Welichem has been substantially successful in Appeal No. 20-YU866, I would award party and party costs of the appeal to Welichem.

"The Honourable Mr. Justice Tysoe"

I AGREE:

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Mr. Justice Lyons"

PART III

Proposals (continued)

DIVISION I

General Scheme for Proposals (continued)

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall 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

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

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

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

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

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

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

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

Additional factors — related persons

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

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

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

Application of other substantive law

72 (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

Operation of provincial law re documents executed under Act

(2) No bankruptcy order, assignment or other document made or executed under the authority of this Act shall, except as otherwise provided in this Act, be within the operation of any legislative enactment in force at any time in any province relating to deeds, mortgages, hypothecs, judgments, bills of sale, chattel mortgages, property or registration of documents affecting title to or liens or charges on real or personal property or immovables or movables.

R.S., 1985, c. B-3, s. 72 1997, c. 12, s. 68(F) 2004, c. 25, s. 45

PART VII

Courts and Procedure

Jurisdiction of Courts

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed, 2001, c. 4, s. 33]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

(e) in the Province of Prince Edward Island, the Supreme Court of the Province;

(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;

(g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

PART XI

Secured Creditors and Receivers

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of *receiver* — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition ***receiver*** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

This Act is current to March 29, 2023

See the Tables of Legislative Changes for this Act's legislative history, including any changes not in force.

PROPERTY TRANSFER TAX ACT

[RSBC 1996] CHAPTER 378

Contents

Definitions and interpretation

1 (1) In this Act:

"administrator" means the person that the minister designates as the administrator for the purposes of this Act;

"agreement for sale" means a contract for the sale of an interest in land under which the purchaser agrees to pay the purchase price over a period of time, in the manner stated in the contract, and on payment of which the vendor is obliged to transfer the interest in land to the purchaser;

"assessment" includes reassessment;

"child" includes a person who is the stepchild of a parent;

"designate" means a person in a class designated under section 13.1 (1);

"electronic return" means a return in electronic format, the form of which is established by the administrator;

"execution copy", in relation to an electronic return, means a legible paper copy of the electronic return, containing every material provision and particular contained in the original, that is prepared for the purposes of certification under section 13.1 (3);

"fair market value" means

(a) for a transaction referred to in paragraph (a) (i) of the definition of "taxable transaction", the amount that would have been paid for the fee simple interest in the land had it been sold at the date of registration of the taxable transaction in the open market by a willing seller to a willing purchaser free of any trust and unencumbered by

(i) a mortgage, debenture, trust deed, hypothecation agreement or any other financial instrument, other than a prescribed instrument, that secures the payment of money or the performance of an obligation,

(ii) a right to purchase under an agreement for sale,

(iii) a judgment for the payment of money,

(iv) the rights of a lien holder under the *Builders Lien Act*, or

(v) any other prescribed charge,

(b) for a transaction referred to in paragraph (a) (ii) of the definition of "taxable transaction", the fair market value of the life estate, determined in the prescribed manner,

(c) for a transaction referred to in paragraph (a) (iii) or (c) of the definition of "taxable transaction", the fair market value, determined in the prescribed manner, of the lease agreement or of its extension, as the case may be,

(d) for a transaction referred to in paragraphs (a) (iv) and (b) of the definition of "taxable transaction", the fair market value of the fee simple interest in the land that is the subject of the agreement for sale referred to in those paragraphs, free of any trust, determined in accordance with paragraph (a) of this definition,

(e) for a transaction referred to in paragraph (d) of the definition of "taxable transaction", the fair market value of the interest that is being transferred by the transaction, determined in the prescribed manner,

(f) for a transaction referred to in paragraph (e) of the definition of "taxable transaction", the fair market value of the lease agreement, determined in the manner referred to in paragraph (c), but as though the transaction were a lease agreement having a term consisting of the total period referred to in paragraph (e) of the definition of "taxable transaction", or

(g) for a transaction referred to in paragraph (f) of the definition of "taxable transaction", the fair market value of the interest to which the application under section 191 of the *Land Title Act* relates, as determined in accordance with the provision of this definition that corresponds to the nature of the interest involved;

"industrial improvement" means an industrial improvement as defined in section 20 (1) of the *Assessment Act*;

"land title office" means a land title office as defined in the *Land Title Act*;

"lease agreement" means

(a) an agreement by which a leasehold estate is granted or assigned, or

(b) an agreement by which an option to renew or extend the term of a lease is granted,

and includes a lease modification agreement;

"lease modification agreement" means an agreement between a lessor and a lessee that extends the term of the lease;

"ministry" means the ministry of the minister responsible for the administration of this Act;

"ministry person" means a person who is employed in, or retained under a contract to perform services for, the ministry;

"parcel" means a parcel as defined in the *Land Title Act* that has not been subdivided into smaller parcels and that

(a) bears a parcel identifier, or

(b) under land title office practice, is to be assigned a parcel identifier on registration under the *Land Title Act* of a transfer of the parcel;

"parcel identifier" means a permanent parcel identifier assigned under section 58 of the *Land Title Act*;

"parent" includes a spouse of a parent of the child;

"permanent resident of Canada" means a permanent resident as defined in the *Immigration and Refugee Protection Act* (Canada);

"personal information" means personal information as defined in Schedule 1 of the *Freedom of Information and Protection of Privacy Act*;

"related individual" means

(a) a person's spouse, child, grandchild, greatgrandchild, parent, grandparent or greatgrandparent,

(b) the spouse of a person's child, grandchild or greatgrandchild, or

(c) the child, parent, grandparent or greatgrandparent of a person's spouse;

"related person" means a person who is

(a) a related individual, or

(b) a related person within the meaning of section 251 of the *Income Tax Act* (Canada);

"return" means a return in the form provided by the minister;

"settlor", in relation to land held in trust, means the person who

(a) contributed the land to the trust estate, or

(b) contributed to the trust estate the assets used to acquire the land,

whether or not that person is the creator of the trust;

"spouse" means a person who

(a) is married to another person, or

(b) is living with another person in a marriage-like relationship, and has been living in that relationship for a continuous period of at least 2 years;

"tax" means the tax imposed by this Act and the regulations and includes all interest and penalties imposed or that may be imposed under this Act;

"taxable transaction" means a transaction

(a) purporting to transfer or grant, by any method including a disposition, an order of a court, including an order absolute of foreclosure, or by the operation of any enactment or law,

(i) an estate in fee simple referred to in section 23 (2) of the *Land Title Act*,

(ii) a life estate in land,

(iii) a right to occupy land under a lease agreement, or

(iv) a right to

(A) occupy land, or

(B) require the transfer of an estate in fee simple referred to in section 23 (2) of the *Land Title Act*,

under an agreement for sale,

(b) purporting to transfer a right referred to in paragraph (a) (iv), if an agreement for sale is cancelled or determined in any manner, including

(i) a court order cancelling or otherwise determining the agreement, or

(ii) a quit claim releasing the interest of the purchaser under the agreement,

(c) extending the term of a lease agreement by a lease modification agreement,

(d) prescribed under section 2 (3),

(e) between a lessor and a lessee of land such that, following the transaction, that lessee and any other person, if any, having the right to occupy the land under a lease agreement, will have the right to

occupy the land for a period that exceeds 30 years in total, or

(f) that consists of an application under section 191 of the *Land Title Act* in respect of an amalgamation referred to in section 191 (4) of that Act,

and includes

(g) 2 or more lease agreements or options to lease if

(i) those transactions are in respect of the same land,

(ii) the applications for registration of the transactions are made at a land title office within 6 months of each other,

(iii) each of the transactions provides either a term during which a person is given a right to occupy the land or, in the case of an option to lease, a right to enter into a lease agreement under which a person will be given a right to occupy the land for a term specified in the option to lease, and

(iv) the terms referred to in subparagraph (iii), other than terms provided by a time share plan within the meaning of the *Real Estate Development Marketing Act*, a sublease or an assignment, exceed 30 years in total;

"taxpayer" means a person liable for payment of tax under this Act;

"transferee" means a person to whom land is transferred under a taxable transaction, and, for the purposes of section 3 (7), includes a person to whom an option to lease referred to in paragraph (g) (iii) of the definition of "taxable transaction" gives a right to enter into a lease agreement under which is given a right to occupy land for a term that is not the same as or included within a term provided by any other of the transactions that comprise the taxable transaction referred to in section 3 (7);

"transferor" means a person who transfers land to a transferee under a taxable transaction;

"true copy" means

(a) in relation to a paper document, an exact copy of the document, and

(b) in relation to an electronic return,

(i) an exact copy of the electronic return, or

(ii) a legible paper copy of the electronic return containing every material provision and particular contained in the original.

(2) For the purpose of determining the term of the lease,

(a) the term of the lease includes the cumulative total of all options or rights to renew the lease, and

(b) if the lease is a time share plan under the *Real Estate Development Marketing Act*, the term of the lease must be determined by adding together the number of calendar years during which the transferee may, for any part of a year, occupy the land.

(3) For the purpose of calculating tax payable under this Act, a person registered in the land title office as the owner of land, other than a person registered only as the owner of a charge, is deemed to be the legal and beneficial owner of a fee simple interest in the land, even if the person holds the land in trust.

Fair market value of land with industrial improvements

1.1 (1) For the purposes of a transaction referred to in paragraph (a) (i), (iii) or (iv) of the definition of "taxable transaction",

(a) if

(i) the transferor is the government, or

(ii) the transfer is between associated corporations within the meaning of section 256 of the *Income Tax Act* (Canada), and

(b) the land being transferred includes an industrial improvement,

the fair market value of the land with industrial improvements is deemed to be, at the election of the transferee,

(c) the value of

(i) the land without industrial improvements as determined under section 19 of the *Assessment Act*, and

(ii) the industrial improvements as determined under section 20 of the *Assessment Act*, or

(d) the value resulting from an appraisal of the land with industrial improvements prepared, at the expense of the transferee, by an appraiser referred to in subsection (2).

(2) For the purposes of subsection (1) (d), any of the following persons may do an appraisal:

(a) a person designated Accredited Appraiser Canadian Institute by the Appraisal Institute of Canada;

(b) a person qualified as an appraiser by the Real Estate Institute of British Columbia.

(3) The appraisal referred to in subsection (1) (d) must value the land with industrial improvements on the basis of the following principles:

(a) the value is to be the value of the unencumbered fee simple interest as at the date of the application to register the taxable transaction;

(b) the valuation must be in conformity with the Uniform Standards of Professional Appraisal Practice and the Canadian Supplement;

(c) the valuation must be the most probable price which the land with industrial improvements would bring in a competitive and open market under all conditions requisite to a fair sale;

(d) the valuation must represent the normal consideration for the land with industrial improvements if sold without special or creative financing or sales concessions granted by anyone associated with the sale;

(e) the valuation must be in accordance with the following assumptions:

(i) the buyer and seller are each acting prudently and knowledgeably;

(ii) the buyer and seller are both motivated to transact;

(iii) a reasonable time is allowed for exposure of the land in the open market;

(iv) there is more than one willing purchaser;

(v) properties or supplies which produce input materials for a facility located on the land continue to supply inputs for their natural life span.

(4) Subsection (1) does not apply to a transaction referred to in paragraph (a) (iii) of the definition of "taxable transaction" if the unexpired term of the lease agreement, including all options to renew, is 30 years or less.

Fair market value of property subject to certain interests

1.2 (1) In this section:

"interest of the previous holder" means the interest of the previous holder referred to in the definition of "previous holder";

"new holder" means the person who, through a taxable transaction, acquires an interest in land

(a) as beneficiary, if the interest is held in trust, or

(b) as transferee, if paragraph (a) does not apply;

"previous holder" means a person who, immediately before the registration of a taxable transaction, held an interest

(a) as beneficiary, if the interest was held in trust, or

(b) as legal and beneficial owner, if paragraph (a) does not apply,

in the same land to which the taxable transaction relates.

(2) Subject to section 1.1 and subsection (3) of this section, this section applies in relation to a taxable transaction if

(a) the previous holder and the new holder are the same person or are related persons, and

(b) the interest of the previous holder was not registered in the land title office or, when that interest was registered, tax under this Act was not payable.

(3) This section does not apply if the interest of the previous holder

(a) was registered before March 23, 1987, or

(b) was a registered interest in the estate in fee simple as a joint tenant or a tenant in common.

(4) For the purposes of determining the fair market value of an estate in fee simple in relation to a taxable transaction to which this section applies, the fair market value is deemed to be the fair market value of the estate in fee simple determined in accordance with paragraph (a) of the definition of "fair market value", but as if the fee simple were not subject to the interest of the previous holder.

Fair market value if improvement on more than one parcel

1.3 (1) If

(a) the same improvement is located on more than one parcel,

(b) each parcel on which the improvement is located is the subject matter of a taxable transaction,

(c) the transferee under each taxable transaction referred to in paragraph (b) is

(i) the same person,

(ii) a related individual to the other transferees, or

(iii) an associated corporation to the other transferees, within the meaning of section 256 of the *Income Tax Act* (Canada), and

(d) all the applications for registration of the taxable transactions referred to in paragraph (b) are filed at a land title office within 6 months of the date of the first application for registration,

all the taxable transactions are deemed to be a single taxable transaction and the transferees referred to in paragraph (c) are jointly and severally liable to pay the total tax.

(2) The filing date of the application for all the taxable transactions that are deemed to be a single transaction under subsection (1) is deemed to be the date that the first application for registration is filed in the land title office.

(3) Subsection (1) applies only for the purpose of determining the fair market value of the parcels of land described in subsection (1).

Proposed strata lots — determination of fair market value

1.4 (1) In this section:

"owner developer" means an owner developer as defined in the *Strata Property Act*;

"proposed strata lot" means a strata lot

(a) proposed by an owner developer to be included as part of a strata plan under the *Strata Property Act* when the strata plan is deposited in the land title office, and

(b) that is the subject of a written instrument executed

(i) after the owner developer proposed the strata lot's inclusion as part of the strata plan, and

(ii) before the deposit of the strata plan in the land title office

under which a person became entitled to a transfer of the strata lot in a form registrable under the *Land Title Act*,

but does not include a bare land strata lot as defined in the *Strata Property Act*;

"written instrument" means

(a) a written agreement or another written instrument, or

(b) a written assignment of a written agreement or of another written instrument.

(2) Despite the definition of "fair market value" in section 1 (1), for a transfer of a proposed strata lot for consideration in a taxable transaction, described in paragraph (a) (i) of the definition in section 1 (1) of "taxable

transaction", in which the parties dealt with each other at arm's length in the open market, the fair market value for the purposes of this Act is the total amount of that consideration.

(3) Despite the definition of "fair market value" in section 1 (1), for a transfer of a proposed strata lot in a taxable transaction, described in paragraph (a) (i) of the definition in section 1 (1) of "taxable transaction", in which the parties did not deal with each other at arm's length in the open market, the fair market value for the purposes of this Act is the amount the administrator determines would have been the total amount of the consideration in the taxable transaction if the transferor and the transferee had dealt with each other at arm's length in the open market.

(4) For a transfer of a proposed strata lot in a taxable transaction that

(a) is not a taxable transaction to which subsection (2) or (3) applies, and

(b) is a taxable transaction for which the fair market value, under a provision

(i) of this Act other than this section, or

(ii) of the regulations

is determined partly by reference to a fee simple component valued according to paragraph (a) of the definition of "fair market value",

the fair market value in the taxable transaction for the purposes of this Act is the amount the administrator determines by

(c) applying the provision described in paragraph (b) of this subsection without reference to that fee simple component, and,

(d) in doing so, substituting for that fee simple component the amount the administrator determines would have been the total amount of consideration in the taxable transaction if it were a transaction to which subsection (3) applied.

(5) For the purposes of a determination under this section of the fair market value of a proposed strata lot, the transferee of the strata lot, if required to do so by the administrator, must provide the administrator with

(a) a copy of the written instrument that pertains to the transfer, and

(b) any relevant

(i) other records, and

(ii) other information

that the administrator requests for the purpose of assisting in the determination.

(6) On being satisfied that a person was the transferee under a transfer of a proposed strata lot for which the person applied for registration in the land title office on or after January 1, 2001 and that the person paid tax in an amount

(a) calculated based on the fair market value of the strata lot as at the date of the application, and

(b) in excess of the tax for the strata lot that would have been payable if the tax had been calculated in accordance with whichever of subsection (2), (3) or (4) would have been applicable,

the administrator must pay the transferee out of the consolidated revenue fund a refund equal to the difference between the tax paid and the amount of tax for the strata lot that would have been payable if it had been calculated in accordance with whichever of subsection (2), (3) or (4) would have been applicable.

General tax imposed

2 (1) Subject to subsection (2), on application for registration of a taxable transaction at a land title office, the transferee must

(a) pay tax to the government in accordance with section 3 or 38, and

(b) file a return, in the prescribed manner, whether or not the taxable transaction is exempt under this Act.

(1.1) In the case of an application for registration submitted under Part 10.1 of the *Land Title Act*,

(a) tax required to be paid under subsection (1) (a) must be paid by electronic means at the time and in the manner established by the administrator, and

(b) the return required to be filed under subsection (1) (b) must be an electronic return that is filed by electronic means in the manner established by the administrator.

(2) If the Crown or a municipality registers a taxable transaction at the land title office on behalf of a transferee, the transferee must pay tax in accordance with section 2.02 and section 3 or 38 at the prescribed time and to the person designated in the regulations as the collector of the tax for the purposes of this subsection.

(3) The Lieutenant Governor in Council may prescribe that a transaction that consists of a purported transfer, by a prescribed method of a prescribed interest in land, is taxable under this Act, whether or not that interest is registrable under the *Land Title Act*.

(4) A regulation under subsection (3) may prescribe

(a) when the liability for the tax arises and when the tax is payable, and

(b) the method by which

(i) returns must be filed, and

(ii) the tax may be remitted and collected.

(5) A transferee who, although entitled to apply, does not apply to register a taxable transaction at a land title office, must, within a prescribed period, file a return under this section and pay tax under this section and section 2.02 to the person designated in the regulations as the collector of the tax for the purposes of this subsection.

(6) If a transferee is not entitled to register a taxable transaction only because of an agreement between the transferor and transferee that the transaction is not to be registered, the transferee is, for purposes of subsection (5) and section 14 (3) and (4), entitled to register the transaction.

(7) Tax is not payable under subsection (5) if no period to file the return and pay the tax has been prescribed.

(8) A registrar may, without a hearing, refuse to accept an application for registration of a taxable transaction if the registrar has reasonable grounds to believe that

(a) the tax under subsection (1) or section 2.02 (3) has not been paid or the return required by subsection (1) of this section is incomplete or has not been filed, and

(b) in the case of an application for registration referred to in subsection (1.1), any of the requirements of that subsection has not been fulfilled.

Additional tax imposed — anti-avoidance rule

2.001 (1) In this section:

"avoidance transaction" means a transaction

(a) that, but for this section, would result, directly or indirectly, in a tax benefit, or

(b) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit,

but does not include a transaction that may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than for the purpose of obtaining a tax benefit;

"tax benefit" means a reduction, avoidance or deferral of tax payable under this Act;

"transaction" includes an arrangement or event.

(2) For the purposes of this section, a series of transactions is deemed to include any related transactions completed in contemplation of the series.

(3) If a transaction is an avoidance transaction, the administrator may determine the tax consequences to a transferee or transferor in a manner that is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.

(4) The tax consequences to any person, after the application of this section, must be determined only through an assessment under section 18.

Definitions in relation to additional tax imposed

2.01 In this section and sections 2.02 and 2.03:

"controlled", in relation to the control of a corporation, means controlled, directly or indirectly in any manner whatever, within the meaning of section 256 of the *Income Tax Act* (Canada);

"foreign corporation" means a corporation that is one of the following:

(a) a corporation that is not incorporated in Canada;

(b) unless the shares of the corporation are listed on a Canadian stock exchange, a corporation that is incorporated in Canada and is controlled by one or more of the following:

(i) a foreign national;

(ii) a corporation that is not incorporated in Canada;

(iii) a corporation that would, if each share of the corporation's capital stock that is owned by a foreign national or by a corporation described in paragraph (a) of this definition were owned by a particular person, be controlled by the particular person;

"foreign entity" means a foreign national or a foreign corporation;

"foreign national" means an individual who is a foreign national as defined in section 2 (1) of the *Immigration and Refugee Protection Act* (Canada);

"residential property" means any of the following:

(a) land or improvements, or both, as defined in section 1 (1) of the *Assessment Act*, that are described as class 1 property in section 1 of the Prescribed Classes of Property Regulation, B.C. Reg. 438/81, but does not include prescribed land or improvements;

(b) an area of land, not including improvements, that

(i) is not larger than 0.5 ha in area, and

(ii) is classified as a farm under the *Assessment Act* only because the land is used for

(A) an owner's dwelling as defined in section 23 (0.1) of the *Assessment Act*, or

(B) a farmer's dwelling as defined in section 1 (1) of the Classification of Land as a Farm Regulation, B.C. Reg. 411/95;

"specified area" means any of the following:

(a) the Metro Vancouver Regional District, other than both of the following:

(i) subject to paragraph (b), the treaty lands of the Tsawwassen First Nation;

(ii) a prescribed area within the Metro Vancouver Regional District;

(b) the treaty lands of the Tsawwassen First Nation, if those treaty lands are prescribed for the purposes of this definition;

(c) a prescribed area that is not within the Metro Vancouver Regional District;

"taxable trustee", in relation to a taxable transaction, means a trustee of a trust in respect of which

(a) any trustee is a foreign entity, or

(b) no trustee is a foreign entity but, immediately after the registration of the taxable transaction, a beneficiary of the trust who is a foreign entity holds a beneficial interest in the residential property to which that taxable transaction relates;

"trust" does not include the following:

(a) a mutual fund trust within the meaning of section 132 (6) of the *Income Tax Act* (Canada);

(b) a real estate investment trust as defined in section 122.1 (1) of the *Income Tax Act* (Canada);

(c) a SIFT trust as defined in section 122.1 (1) of the *Income Tax Act* (Canada).

Additional tax imposed

2.02 (1) The tax imposed under this section in respect of a taxable transaction is in addition to the tax imposed under section 2 (1) in respect of the taxable transaction.

(2) Subsection (3) applies to a taxable transaction if

(a) the subject matter of the taxable transaction includes residential property located, in whole or in part, within a specified area, and

(b) any transferee is a foreign entity or taxable trustee, or both.

(3) On application at a land title office for registration of a taxable transaction to which this subsection applies, the transferee must

(a) pay tax to the government, in accordance with subsection (4), by the means, at the time and in the manner required by the administrator,

(b) include with the return filed under section 2 (1) (b) the information and records required by the administrator, and

(c) unless the administrator specifies otherwise, file the form established by the administrator, by the means, at the time and in the manner required by the administrator, whether or not the taxable transaction is exempt under this Act.

(4) The tax payable under subsection (3) by the transferee is,

(a) unless paragraph (b) of this subsection applies, 15% of the taxable amount, or

(b) if a rate of tax is prescribed for the purposes of this subsection, the amount determined by multiplying the prescribed rate by the taxable amount.

(5) For the purposes of subsection (4) and subject to section 2.03, the taxable amount in respect of a taxable transaction is as follows:

(a) in the case of a taxable transaction in respect of which each transferee is a foreign entity or taxable trustee, or both, the taxable transaction's fair market value;

(b) in any other case, the total of all amounts, each of which is one of the following:

(i) in the case of a transferee who is a foreign entity and is not a taxable trustee, the transferee's proportionate share of the taxable transaction's fair market value;

(ii) in the case of a transferee who is a taxable trustee, the transferee's proportionate share of the taxable transaction's fair market value.

(6) For the purposes of calculating the taxable amount under subsection (5) (b) in respect of a taxable transaction whose subject matter includes residential property located, in whole or in part, in a specified area,

(a) if, immediately after the registration of the taxable transaction, a foreign entity holds an interest in the residential property as a taxable trustee and in a capacity other than as a taxable trustee, the foreign entity is deemed to be

(i) a transferee under subsection (5) (b) (i) in respect of the interest held in the capacity other than as a taxable trustee, and

(ii) a separate transferee under subsection (5) (b) (ii) in respect of the interest held as a taxable trustee, and

(b) if there is more than one taxable trustee of a trust, including any taxable trustee who is deemed under paragraph (a) (ii) to be a separate transferee, all of the trustees of the trust are deemed to be a single transferee.

(7) For certainty, each transferee under a taxable transaction referred to in subsection (3) is jointly and severally liable to pay the total amount of tax owing under that subsection in respect of that taxable transaction.

Additional tax imposed — calculation of tax if transaction includes non-residential property

2.03 If the subject matter of a taxable transaction to which section 2.02 (3) applies includes land that is not residential property, the taxable amount for the purposes of section 2.02 (4) is the taxable amount calculated as follows:

$$\text{VTA} \times \text{VRP}$$

VFS

where

VTA is the amount that, but for this section, would be the taxable amount under section 2.02 (5) in respect of the taxable transaction;

VFS is the value of the fee simple interest in the land that is the subject matter of the taxable transaction, determined

(a) as though that land were being transferred in a taxable transaction referred to in paragraph (a) (i) of the definition of "taxable transaction" in section 1 (1), and

(b) in accordance with paragraph (a) of the definition of "fair market value" in section 1 (1);

VRP is, subject to the regulations, the value of the residential property included in the subject matter of the taxable transaction, determined

(a) as though that residential property were being transferred in a taxable transaction referred to in paragraph (a) (i) of the definition of "taxable transaction" in section 1 (1), and

(b) in accordance with paragraph (a) of the definition of "fair market value" in section 1 (1).

Renumbered

2.04 [Renumbered as 2.001 by 2018-4-56.]

Nisga'a exemption

2.1 (1) In this section, **"Taxation Agreement"** has the same meaning as in section 6.1 of the *Nisga'a Final Agreement Act*.

(2) Despite sections 2 and 2.02, a person is not subject to tax under this Act if and to the extent that the Taxation Agreement provides that the person is not subject to tax under this Act.

Treaty first nation exemption

2.2 (1) [Repealed 2011-11-64.]

(2) Despite sections 2 and 2.02, a person is not subject to tax under this Act if, and to the extent and for the period that, a tax treatment agreement provides that the person is not subject to tax under this Act.

General rate of tax

3 (1) The tax payable under section 2 in respect of a taxable transaction is the sum of the following:

(a) 1% of the taxable transaction's fair market value that does not exceed $200 000;

(b) 2% of that fair market value that exceeds $200 000 but does not exceed $2 000 000;

(c) 3% of that fair market value that exceeds $2 000 000;

(d) if section 3.01 applies in respect of the taxable transaction, the amount determined under subsection (4) of that section.

(1.1) Subsections (2) to (7) do not apply to tax under section 2.02 (3).

(2) If a transferee

(a) applies for registration of a taxable transaction at a land title office, and

(b) within 6 months after the application referred to in paragraph (a) applies for registration of one or more additional taxable transactions respecting the same land,

the rate of tax owing on the taxable transaction referred to in paragraph (b) is to be calculated based on the cumulative total of the fair market value of the taxable transactions referred to in paragraphs (a) and (b) as if all the taxable transactions referred to in paragraphs (a) and (b) were a single taxable transaction.

(3) If

(a) a transferee applies for registration of a taxable transaction at a land title office, and

(b) one or more related individuals of the person referred to in paragraph (a) apply, as transferees, at the same time as or within 6 months after the application referred to in paragraph (a), for registration of one or more taxable transactions respecting the same land for which the transferor is not the person referred to in paragraph (a),

the tax owing on the taxable transactions referred to in paragraphs (a) and (b), in total, is to be calculated based on the total fair market value of the taxable transactions referred to in paragraphs (a) and (b) as if all those taxable transactions were a single taxable transaction, and the transferees referred to in paragraphs (a) and (b) are jointly and severally liable to pay that total tax.

(3.1) In subsections (3.2) to (3.5), words and expressions used have the same meaning as in section 14 (3) (j) and (p.3) and (4) (k) and (k.1).

(3.2) If the exemption set out in section 14 (3) (j) is not available to a transferee only because the condition set out in section 14 (3) (j) (ii) is not fulfilled, the tax payable by the transferee must be calculated as if all of the taxable transactions in relation to a transfer of all of, or a registered ownership interest in, one or more of the smaller parcels created under the subdivision were a single taxable transaction with a fair market value calculated

(a) firstly, by determining the difference between the following 2 percentages by subtracting from the percentage under subparagraph (i) the percentage under subparagraph (ii):

(i) the transferee's proportionate share, expressed as a percentage, of the fair market value of the smaller parcels, calculated using the fair market values as they were immediately after the subdivision;

(ii) the transferee's proportionate share, expressed as a percentage, of the fair market value of the original parcel referred to in section 14 (3) (j) (i), calculated using the fair market value as it was immediately before the subdivision, and

(b) secondly, by multiplying the total fair market value of all of the smaller parcels, calculated at the time of the application to register the transfer to the transferee, by the difference determined under paragraph (a), to obtain the fair market value that is subject to tax.

(3.21) If the exemption set out in paragraph (p.3) of section 14 (3) is not available to a transferee only because the condition set out in that paragraph is not fulfilled, the tax payable by the transferee must be calculated as if all of the taxable transactions in relation to the amendment of the strata plan were a single taxable transaction with a fair market value calculated

(a) firstly, by determining the difference between the following 2 percentages by subtracting from the percentage under subparagraph (i) the percentage under subparagraph (ii):

(i) the transferee's proportionate share, expressed as a percentage, of the fair market value of all the parcels involved in the amendment, calculated using the fair market values as they were immediately after the amendment;

(ii) the transferee's proportionate share, expressed as a percentage, of the fair market value of all the parcels involved in the amendment, calculated using the fair market values as they were immediately before the amendment, and

(b) secondly, by multiplying the total fair market value of all of the parcels involved in the amendment, calculated at the time of the application to register the transfer to the transferee, by the difference determined under paragraph (a), to obtain the fair market value that is subject to tax.

(3.3) If the exemption set out in section 14 (4) (k) is not available to the trustee only because the trustee

(a) transfers all of, or a registered ownership interest in, one or more of the parcels created under the subdivision to one or more transferees, in this subsection called the "third parties", none of whom was a registered owner of one or more of the original parcels immediately before their transfer to the trustee, or

(b) retains all of, or a registered ownership interest in, one or more of the parcels created under the subdivision,

the tax payable by the trustee must be calculated as if the transfer of the original parcels were a single taxable transaction with a fair market value calculated

(c) firstly, by determining the third parties' proportionate share, expressed as a percentage, of the fair market value of the parcels created under the subdivision, calculated using the fair market values as they were immediately after the subdivision,

(d) secondly, by determining the proportionate share retained by the trustee, expressed as a percentage, of the fair market value of the parcels created under the subdivision, calculated using

the fair market values as they were immediately after the subdivision,

(e) thirdly, by determining the sum of the percentages determined under paragraphs (c) and (d), and

(f) fourthly, by multiplying the total fair market value of the original parcels, calculated using the fair market values as they were immediately before the subdivision, by the percentage determined under paragraph (e), to obtain the fair market value that is subject to tax.

(3.4) If the exemption set out in section 14 (4) (k.1) is not available to an original owner only because the condition set out in section 14 (4) (k.1) (ii) is not fulfilled, the tax payable by the original owner as transferee must be calculated as if all of the taxable transactions in relation to a transfer of all of, or a registered ownership interest in, one or more of the parcels were a single taxable transaction with a fair market value calculated

(a) firstly, by determining the difference between the following 2 percentages by subtracting from the percentage under subparagraph (i) the percentage under subparagraph (ii):

(i) the original owner's proportionate share, as transferee, expressed as a percentage, of the fair market value of all of the parcels created under the subdivision, calculated using the fair market values as they were immediately after the subdivision;

(ii) the original owner's proportionate share, expressed as a percentage, of the fair market value of the original parcels referred to in section 14 (4) (k.1) (ii), calculated using the fair market values as they were immediately before the subdivision, and

(b) secondly, by multiplying the total fair market value of all of the parcels created under the subdivision, calculated at the time of the application to register the transfer to the original owner, by the difference determined under paragraph (a), to obtain the fair market value that is subject to tax.

(3.5) Subsections (3.2) to (3.4) do not operate to impose a tax that is greater than the tax that would be payable under this Act without those subsections.

(4) If

(a) a transferee that is a corporation (in this subsection and subsection (5) called the "corporate transferee") applies for registration of a taxable transaction at a land title office, and

(b) one or more corporations associated with the corporate transferee apply, as transferees, at the same time as or within 6 months after the application referred to in paragraph (a), for registration of one or more taxable transactions respecting the same land for which the transferor is not the corporate transferee,

the tax owing on the taxable transactions referred to in paragraphs (a) and (b), in total, is to be calculated based on the total fair market value of the taxable transactions referred to in paragraphs (a) and (b) as if all those taxable transactions were a single taxable transaction, and the transferees referred to in paragraphs (a) and (b) are jointly and severally liable to pay that total tax.

(5) For the purposes of subsection (4), a corporation is associated with a corporate transferee if the corporation and the corporate transferee are associated, within the meaning of section 256 of the *Income Tax Act* (Canada), on the date that the corporation applies to register a taxable transaction respecting the land referred to in subsection (4) of this section.

(6) The tax owing on a taxable transaction referred to in paragraph (g) of the definition of "taxable transaction" is to be calculated as if

(a) the taxable transaction were a single lease transaction referred to in paragraph (e) of the definition of "taxable transaction", and

(b) the term of the lease transaction were the total of the terms referred to in paragraph (g) (iii) of that definition.

(7) Each transferee under the taxable transaction referred to in subsection (6) is jointly and severally liable to pay the tax owing on that taxable transaction.

Tax on residential property value exceeding $3 million

3.01 (1) In this section:

"residential property" means "residential property" as defined in section 2.01 except that, in applying that definition for the purposes of this section, paragraph (a) of the definition is to be read as if the words "but does not include prescribed land or improvements" were excluded;

"residential property value", in relation to a residential property, means the value of the residential property as described or determined under subsection (3).

(2) This section applies in respect of a taxable transaction referred to in section 3 (1) if

(a) the subject matter of the taxable transaction includes residential property, and

(b) the residential property value exceeds $3 000 000.

(3) For the purposes of this section, the value of a residential property is,

(a) if the subject matter of the taxable transaction includes only residential property, the taxable transaction's fair market value, or

(b) if the subject matter of the taxable transaction includes land that is not residential property, the value calculated as follows:

$$\frac{VTT}{VFS} \times VRP$$

where

VTT is the taxable transaction's fair market value;

VFS is the value of the fee simple interest in the land that is the subject matter of the taxable transaction, determined

(a) as though that land were being transferred in a taxable transaction referred to in paragraph (a) (i) of the definition of "taxable transaction" in section 1 (1), and

(b) in accordance with paragraph (a) of the definition of "fair market value" in section 1 (1);

VRP is, in respect of the residential property included in the subject matter of the taxable transaction and subject to the regulations, the amount determined

(a) as though that residential property were being transferred in a taxable transaction referred to in paragraph (a) (i) of the definition of "taxable transaction" in section 1 (1), and

(b) in accordance with paragraph (a) of the definition of "fair market value" in section 1 (1).

(4) If this section applies in respect of a taxable transaction, the amount payable under section 3 (1) (d) is 2% of the amount by which the residential property value exceeds $3 000 000.

Tax payable on registration of correcting transaction

3.1 (1) In this section:

"correcting transaction" means a taxable transaction that is a transfer made for the purpose of transferring land that was intended to be transferred to the transferee when the original transaction was registered;

"original transaction" means a taxable transaction in which land was transferred to a transferee and

(a) the land was transferred in error, or

(b) an error was made in the description or survey under which title to the land was registered.

(2) Despite sections 2.02 (3) and 3 (1), the tax payable under this Act for a correcting transaction is the tax payable calculated in accordance with this Act and the regulations, as they read on the date of registration of the original transaction and as if the fair market value of the correcting transaction were determined at that date.

(3) On the registration of a correcting transaction, the amount of tax paid under this Act by a transferee in respect of the original transaction is deemed to be tax

(a) paid by the transferee in respect of the correcting transaction, and

(b) paid on the date the correcting transaction is registered.

Definitions in relation to first time home buyers' program

4 (1) In this section and in sections 4.1 to 12:

"eligible transaction" means, for the purposes of determining the eligibility of a first time home buyer for an exemption or refund under sections 5 to 12, a taxable transaction not referred to in paragraph (f) or (g) of the definition of "taxable transaction", for which an application for registration is made at a land title office after March 23, 1994;

"first time home buyer" means an individual who,

(a) on the registration date, is

(i) a Canadian citizen, or

(ii) a permanent resident of Canada,

(b) either

(i) continuously maintained the individual's principal residence in British Columbia throughout a period of not less than one year immediately before the registration date, or

(ii) was subject to tax under section 2 (1) (a) of the *Income Tax Act* (British Columbia) and has filed a return under section 29 (1) of that Act in at least 2 of the 6 taxation years immediately preceding the registration date,

(c) has not previously held a registered interest in land, whether in British Columbia or elsewhere, that constituted the individual's principal residence, and

(d) has not previously obtained a first time home buyers' exemption or refund;

"Habitat for Humanity" means a corporation designated by regulation of the minister;

"principal residence" means the usual place where an individual makes his or her home;

"property" means a parcel of land and the improvements, if any, in respect of which an application is made for

(a) an exemption under section 5 or 6, or

(b) a refund under section 7;

"qualifying property" means a property the fair market value of which does not, on the registration date, exceed the sum of the qualifying value of that property and $25 000;

"qualifying value", in relation to a property, means $500 000;

"registration date" means, in respect of an eligible transaction, the date on which the application for registration of the eligible transaction is made at a land title office;

"residential improvement", in respect of a property, means

(a) an improvement that is permanently affixed to the property and is intended to be a dwelling, or

(b) if only part of an improvement that is permanently affixed to the property is intended to be a dwelling, that part of the improvement that is intended to be a dwelling.

(2) For the purposes of the definition of "property", if the same residential improvement is located on more than one parcel, the parcels are deemed to be one parcel.

Fair market value — property transferred by Habitat for Humanity

4.1 For the purposes of sections 5, 6 and 8, the fair market value of the fee simple interest in property transferred by Habitat for Humanity to a transferee in an eligible transaction is deemed to be the lesser of

(a) the fair market value, as determined in accordance with paragraph (a) of the definition of "fair market value" in section 1 (1), and

(b) the principal amount secured by the first ranking of the mortgages that

(i) secure financing applied to a transfer effected by an eligible transaction, and

(ii) are between the transferee and Habitat for Humanity.

First time home buyers' exemption

5 (1) Subject to subsection (1.1) and sections 6 to 11, a transferee who applies for registration, at a land title office, of an eligible transaction in respect of a qualifying property is exempt from the obligation to pay tax under

section 2 (1) (a) on that transaction if

(a) the transferee is a first time home buyer, and

(b) the transferee applies for an exemption under this section or section 6 by tendering with the application for registration an application for exemption.

(c) [Repealed 2008-10-90.]

(1.1) If the fair market value of a qualifying property exceeds the qualifying value of the property, the exemption under subsection (1) is the amount calculated as follows:

$$PTT \times \frac{QV + 25\,000 - FMV}{25\,000}$$

where

FMV is the fair market value of the qualifying property,

PTT is the amount of tax that would be payable on the taxable transaction under section 2 (1) (a) but for the exemption under subsection (1), and

QV is the qualifying value of the qualifying property.

(2) An application for exemption under subsection (1) must be in the form required by the minister and must

(a) include a declaration, in the form required by the minister, by which the transferee declares that the transferee is a first time home buyer,

(b) disclose that the property to which the eligible transaction relates is a qualifying property, and

(c) include a consent, in the form required by the minister, by which the transferee consents to the administrator conducting inquiries respecting the transferee that the administrator considers necessary to confirm the qualifications of the transferee for the exemption.

First time home buyers' partial exemption

6 (1) Subject to subsection (3), if a qualifying property that is the subject matter of an eligible transaction is larger than 0.5 ha in area, a transferee who qualifies for an exemption under section 5 is exempt from the obligation to pay tax under section 2 (1) (a) on that transaction

(a) in respect of that portion of the fair market value of the property that is applicable to the residential improvement in which the transferee establishes a qualifying residence within the meaning of section 8 (2) on the property, and

(b) in respect of that portion of the fair market value of the property, not including improvements, that is equivalent to the ratio of 0.5 ha to the total area of the property.

(2) Subject to subsection (3), if a qualifying property not referred to in subsection (1) is the subject matter of an eligible transaction and has improvements on it that are in addition to the residential improvement in which the transferee establishes a qualifying residence within the meaning of section 8 (2), a transferee who qualifies for an exemption under section 5 is exempt from the obligation to pay tax under section 2 (1) (a) on that transaction

(a) in respect of that portion of the fair market value of the property that is applicable to that residential improvement, and

(b) in respect of the fair market value of the property, not including improvements.

(3) If the fair market value of a qualifying property exceeds the qualifying value of the property, the exemption under subsection (1) or (2) is the amount calculated as follows:

$$E \times \frac{(QV + 25\,000 - FMV)}{25\,000}$$

where

E is the amount of the applicable exemption under subsection (1) or (2),

FMV is the fair market value of the qualifying property, and

QV is the qualifying value of the qualifying property.

First time home buyers' refund

7 (1) A transferee who is entitled to an exemption under section 5 or 6 in respect of an eligible transaction who fails to apply for that exemption on the registration date may, within 18 months after that date, apply to the administrator for a refund of the tax paid on the registration of the transaction by the transferee.

(1.1) If a transferee is not entitled on the registration date to an exemption under section 5 or 6 in respect of an eligible transaction because the transferee does not meet a requirement under paragraph (a) of the definition of "first time home buyer" on that date, the transferee may apply to the administrator for a refund of the tax paid on the registration of the transaction by the transferee if

(a) the transferee meets a requirement under paragraph (a) of that definition on or before the first anniversary of the registration date, and

(b) the application for the refund is made within 18 months after the registration date.

(2) On receiving an application under subsection (1), the administrator must,

(a) on being satisfied that the transferee would have qualified for an exemption under section 5 or 6 on the registration date, pay out of the consolidated revenue fund a refund of that portion of the amount of tax paid by the transferee that is equivalent to the amount of the exemption to which the transferee would have been entitled had the application for the exemption been made on the registration date, or

(b) if not satisfied that the transferee would have qualified for an exemption under section 5 or 6 on the registration date, refuse the application and provide written notice to the transferee of that refusal under subsection (3).

(2.1) On receiving an application under subsection (1.1), the administrator

(a) if satisfied that the transferee

(i) would have qualified for an exemption under section 5 or 6 on the registration date but for the transferee's failure to meet a requirement under paragraph (a) of the definition of "first time home buyer" on that date, and

(ii) met a requirement under paragraph (a) of that definition on or before the first anniversary of the registration date,

must pay out of the consolidated revenue fund a refund of the portion of the amount of tax paid by the transferee that would have been exempted under section 5 or 6 had the requirement been met on the registration date, and

(b) if not satisfied that the transferee met a requirement under paragraph (a) of the definition of "first time home buyer" on or before the first anniversary of the registration date, must refuse the application and provide the transferee with written notice under subsection (3) of the refusal.

(3) If an application for a refund under subsection (1) or (1.1) is refused, the administrator must send a letter to the applicant stating the reason for the refusal, and the letter is deemed to be a notice of assessment for the purposes of allowing the applicant to give a notice of objection under section 19.

First time home buyers' program — obligations of transferee

8 (1) A transferee who has applied for an exemption under section 5 or 6 or a refund under section 7 must establish a qualifying residence on the property within the meaning of subsection (2) of this section.

(2) For the purposes of subsection (1), a transferee establishes a qualifying residence on a property if, on the registration date,

(a) the property contains a residential improvement that the transferee inhabits as the transferee's principal residence

(i) beginning on a date that is not more than 92 days after the registration date, and

(ii) continuing to a date that is not earlier than the first anniversary of the registration date, or

(b) the property does not contain a residential improvement but, before the first anniversary of the registration date, there is established on the property a residential improvement

(i) that the transferee inhabits as the transferee's principal residence

(A) beginning at the time it is completed, and

(B) continuing to a date that is not earlier than the first anniversary of the registration date, and

(ii) if the total costs incurred to establish the improvement, when added to the fair market value of the property at the registration date, do not exceed the sum of the qualifying value of the property and $25 000.

(3) and (4) [Repealed 2008-10-91.]

First time home buyers' program — unqualified transferee

9 (1) Subject to section 10, a transferee who has obtained an exemption under section 5 or 6 or a refund under section 7 is liable under subsection (2) of this section if and from the time that the transferee

(a) fails or ceases to qualify for an exemption under section 5 (1) (a),

(b) fails or refuses to comply with section 5 (1) (b) or (2), or

(c) subject to subsection (1.1), fails, refuses or ceases to comply with the obligations under section 8.

(1.1) If a transferee does not meet the obligations under section 8 only because the transferee, before the first anniversary of the registration date, fails to establish a qualifying residence as required under section 8 (2) (a) (ii) or (2) (b) (i) (B) as applicable, the transferee is liable under subsection (2.1) of this section from the date of the failure to establish a qualifying residence.

(2) A transferee referred to in subsection (1) must pay to the administrator tax in the same amount that the transferee would have been obliged to pay under section 2 (1) (a) had the transferee not received the exemption or refund.

(2.1) A transferee referred to in subsection (1.1) must pay to the administrator tax in the amount calculated in accordance with whichever of the following applies:

(a) if the period between the registration date and the date from which the transferee is liable under subsection (1.1) is greater than or equal to 360 days, the transferee is liable for the amount that would apply under subsection (2) reduced by 100%;

(b) if the period between the registration date and the date from which the transferee is liable under subsection (1.1) is less than 360 days, the transferee is liable for the amount that would apply under subsection (2) multiplied by

$$1 - (n/365)$$

where

n is the number of days between the registration date and the date from which the transferee is liable under subsection (1.1).

(3) A transferee not referred to in subsection (1) who has obtained an exemption under section 5 or 6 or a refund under section 7 for an amount greater than the amount to which the transferee is entitled under this Act must pay to the administrator as a tax liability the amount by which the exemption or refund received exceeded the exemption or refund to which the transferee was entitled.

(4) [Repealed 2008-10-92.]

First time home buyers' exemption or refund retained

10 Section 9 (1) to (2.1) does not apply to a transferee who has obtained an exemption under section 5 or 6 or a refund under section 7 if the transferee does not comply with section 8 (2) (a) or (b) only because

(a) the transferee dies before the first anniversary date of the registration date, or

(b) the property is transferred by the transferee pursuant to a written separation agreement or a court order under the *Family Law Act*.

Lien for amount of exemption, refund or credit

11 (1) In order to secure the amount of the tax liability that a transferee is or may be obliged to pay to the administrator under section 9 or 12.12 (8), the administrator may register against the property in the appropriate land title office a lien form claiming a lien conferred by this section in the same manner that a charge is registered under the *Land Title Act*.

(2) On registration of a lien form against the property under subsection (1), a lien for the amount of the tax liability referred to in that subsection is created on the property.

(3) The lien created under this section expires on the first anniversary date of the registration date unless the administrator, before the expiration of the lien,

(a) discharges the lien, in which event the lien ceases to exist on the effective date of the discharge, or

(b) registers a renewal of lien in the appropriate land title office in the same manner that a charge is registered under the *Land Title Act*.

(4) A lien created on the property under subsection (2) or renewed under subsection (3) (b) has priority over all other claims of every person except any claims secured by liens, charges or encumbrances registered against the property before the date on which the lien form referred to in subsection (1) was registered to create the lien.

(5) If the administrator registers a lien form in respect of a tax liability under subsection (1) or a renewal of lien under subsection (3) (b) and it is subsequently determined that the amount referred to in the lien form or renewal of lien is different than the amount of the tax liability to which the transferee is or may be obliged to pay to the administrator under section 9 or 12.12 (8), the administrator may correct the amount by

(a) registering a new lien form or renewal of lien in the revised amount, and

(b) discharging the original lien form or renewal of lien,

but for the purposes of subsection (4) the new registration under paragraph (a) is deemed to have been effected at the same time that the lien form that created the lien was registered under subsection (2).

False declaration

12 If the administrator determines that a transferee who applies for an exemption under section 5 or 6 or a refund under section 7 or makes an application under section 12.12

(a) is not qualified under section 5 to receive an exemption from tax under section 2 (1) (a) or to obtain a refund under section 7, and

(b) provided a declaration under section 5 (2) or an application under section 7 or 12.12 that is false or misleading in respect of the matters referred to in paragraph (c) or (d) of the definition of "first time home buyer" in section 4 (1),

the transferee must pay to the administrator, in addition to the amount of tax that the transferee is obliged to pay the administrator under section 2 (1) (a), 9 or 12.12 (8), as applicable, a penalty in an amount equal to the amount of the exemption, refund or credit claimed in the application.

Definitions in relation to new housing program

12.01 (1) In this section and in sections 12.02 to 12.08:

"eligible transaction", for the purposes of determining the eligibility of a qualifying individual for an exemption or refund under sections 12.02 to 12.08, means a taxable transaction not referred to in paragraph (f) or (g) of the definition of "taxable transaction" in section 1 (1), for which an application for registration is made at a land title office after February 16, 2016;

"principal residence" means the usual place where an individual makes his or her home;

"property" means a parcel of land and the improvements in respect of which an application is made for

(a) an exemption under section 12.02 or 12.03, or

(b) a refund under section 12.04 or 12.06;

"qualifying individual" means an individual who is a Canadian citizen or a permanent resident of Canada;

"qualifying property" means a property the fair market value of which does not, on the registration date, exceed the sum of the qualifying value of that property and $50 000;

"qualifying value", in respect of a property, means $750 000;

"registration date", in respect of an eligible transaction, means the date on which the application for registration of the eligible transaction is made at a land title office;

"residential improvement", in respect of a property, means

(a) an improvement that is permanently affixed to the property and is intended to be a dwelling, or

(b) if only part of an improvement that is permanently affixed to the property is intended to be a dwelling, that part of the improvement that is intended to be a dwelling.

(2) For the purposes of the definition of "property", if the same residential improvement is located on more than one parcel, the parcels are deemed to be one parcel.

New housing exemption

12.02 (1) Subject to subsection (2) and sections 12.03 to 12.08, a transferee who applies for registration, at a land title office, of an eligible transaction in respect of a qualifying property that, on the registration date, contains a residential improvement is exempt from the obligation to pay tax under section 2 (1) (a) on the eligible transaction if

(a) the transferee is a qualifying individual on the registration date,

(b) the eligible transaction is in respect of either of the following:

(i) a qualifying property in respect of which the residential improvement

(A) was constructed or placed on the property, and

(B) on the registration date, has not been used as a dwelling since the construction of the residential improvement began or since the residential improvement was placed on the property, as the case may be;

(ii) a qualifying property that resulted from a subdivision of a parcel and in respect of which the residential improvement

(A) was developed from the division of an improvement that was on the parcel that was subdivided, and

(B) on the registration date, has not been used as a dwelling since the subdivision of the parcel,

(c) the qualifying property does not, on the registration date, contain a residential improvement other than a residential improvement that falls within the description in paragraph (b) (i) or (ii),

(d) the application is the first application for registration in respect of the qualifying property,

(i) in the case of a qualifying property described in paragraph (b) (i), since the residential improvement was completed or since the residential improvement was placed on the property, as the case may be, or

(ii) in the case of a qualifying property described in paragraph (b) (ii), since the subdivision of the parcel, and

(e) the transferee applies for an exemption under this section or section 12.03 by tendering with the application for registration an application for exemption.

(2) If the fair market value of a qualifying property exceeds the qualifying value of the property, the exemption under subsection (1) is the amount calculated as follows:

$$\text{PTT} \times \left(\frac{\text{QV} + 50\,000 - \text{FMV}}{50\,000} \right)$$

where

FMV is the fair market value of the qualifying property,

PTT is the amount of tax that would be payable on the taxable transaction under section 2 (1) (a) but for the exemption under subsection (1) of this section, and

QV is the qualifying value of the qualifying property.

(3) An application for exemption under subsection (1) must be in the form required by the minister and must

(a) disclose that the property to which the eligible transaction relates is a qualifying property, and

(b) include a consent, in the form required by the minister, by which the transferee consents to the administrator conducting inquiries respecting the transferee that the administrator considers necessary to confirm the qualifications of the transferee for the exemption.

New housing partial exemption

12.03 (1) Subject to subsection (3), if a qualifying property that is the subject matter of an eligible transaction is larger than 0.5 ha in area, a transferee who qualifies for an exemption under section 12.02 is exempt from the obligation to pay tax under section 2 (1) (a) on that transaction

(a) in respect of that portion of the fair market value of the property that is applicable to the residential improvement inhabited as the transferee's principal residence as required by section 12.05, and

(b) in respect of that portion of the fair market value of the property, not including improvements, that is equivalent to the ratio of 0.5 ha to the total area of the property.

(2) Subject to subsection (3), if a qualifying property not referred to in subsection (1) is the subject matter of an eligible transaction and has improvements on it that are in addition to the residential improvement inhabited as the transferee's principal residence as required by section 12.05, a transferee who qualifies for an exemption under section 12.02 is exempt from the obligation to pay tax under section 2 (1) (a) on that transaction

(a) in respect of that portion of the fair market value of the property that is applicable to that residential improvement, and

(b) in respect of the fair market value of the property, not including improvements.

(3) If the fair market value of a qualifying property exceeds the qualifying value of the property, the exemption under subsection (1) or (2) is the amount calculated as follows:

$$E \times \left(\frac{QV + 50\,000 - FMV}{50\,000} \right)$$

where

E is the amount of the applicable exemption under subsection (1) or (2),

FMV is the fair market value of the qualifying property, and

QV is the qualifying value of the qualifying property.

New housing refund if property contains residential improvement on registration date

12.04 (1) A transferee who is entitled to an exemption under section 12.02 or 12.03 in respect of an eligible transaction and who fails to apply for that exemption on the registration date may, within 18 months after that date, apply to the administrator for a refund of the tax paid on the registration of the transaction by the transferee.

(2) A transferee who is not entitled on the registration date to an exemption under section 12.02 or 12.03 in respect of an eligible transaction because the transferee is not a qualifying individual on that date may apply to the administrator for a refund of the tax paid on the registration of the transaction by the transferee if

(a) the transferee becomes a qualifying individual on or before the first anniversary of the registration date, and

(b) the application for the refund is made within 18 months after the registration date.

(3) On receiving an application under subsection (1), the administrator,

(a) if satisfied that the transferee would have qualified for an exemption under section 12.02 or 12.03 on the registration date, must pay out of the consolidated revenue fund a refund of the portion of the amount of tax paid by the transferee that is equivalent to the amount of the exemption to which the

transferee would have been entitled had the application for the exemption been made on the registration date, or

(b) if not satisfied that the transferee would have qualified for an exemption under section 12.02 or 12.03 on the registration date, must refuse the application and provide the transferee with written notice under subsection (5) of the refusal.

(4) On receiving an application under subsection (2), the administrator,

(a) if satisfied that the transferee

(i) would have qualified for an exemption under section 12.02 or 12.03 on the registration date but for the transferee's failure to be a qualifying individual on that date, and

(ii) became a qualifying individual on or before the first anniversary of the registration date,

must pay out of the consolidated revenue fund a refund of the portion of the amount of tax paid by the transferee that would have been exempted under section 12.02 or 12.03 had the transferee been a qualifying individual on the registration date, and

(b) if not satisfied that the requirements for the refund set out in paragraph (a) (i) and (ii) have been met, must refuse the application and provide the transferee with written notice under subsection (5) of the refusal.

(5) If an application for a refund under subsection (1) or (2) is refused, the administrator must send a letter to the applicant stating the reason for the refusal, and the letter is deemed to be a notice of assessment for the purposes of allowing the applicant to give a notice of objection under section 19.

New housing program — obligation of transferee if property contains residential improvement on registration date

12.05 A transferee who has applied for an exemption under section 12.02 or 12.03 or a refund under section 12.04 must,

(a) beginning on a date that is not more than 92 days after the registration date, and

(b) continuing to a date that is not earlier than the first anniversary of the registration date,

inhabit as the transferee's principal residence a residential improvement that the property contained on the registration date.

New housing refund if property does not contain residential improvement on registration date

12.06 (1) A transferee to whom is transferred, under an eligible transaction, a qualifying property that does not, on the registration date, contain a residential improvement may apply to the administrator for a refund of the tax paid on the registration of the transaction by the transferee if

(a) the transferee is a qualifying individual on the registration date or becomes a qualifying individual on or before the first anniversary of the registration date,

(b) before the first anniversary of the registration date, the transferee establishes a residential improvement on the property

(i) that the transferee inhabits, as the transferee's principal residence,

(A) beginning at the time the residential improvement is completed, and

(B) subject to subsection (2) of this section, continuing to a date that is not earlier than the first anniversary of the registration date, and

(ii) in respect of which the total costs incurred to establish the residential improvement, when added to the fair market value of the property at the registration date, do not exceed the sum of the qualifying value of the property and $50 000, and

(c) the application for the refund is made on a date that is

(i) after the first anniversary of the registration date, and

(ii) on or before the date that is 18 months after the registration date.

(2) The requirement set out in subsection (1) (b) (i) (B) is deemed to have been met in respect of a property if the transferee fails to meet that requirement only because, before the first anniversary of the registration date,

(a) the transferee dies, or

(b) the property is transferred by the transferee pursuant to a written separation agreement or a court order under the *Family Law Act*.

(3) On receiving an application under subsection (1), the administrator,

(a) if satisfied that

(i) the property was, on the registration date, a qualifying property that did not contain a residential improvement, and

(ii) the requirements for the refund set out in subsection (1) (a), (b) and (c) have been met,

must pay out of the consolidated revenue fund a refund of the portion of the amount of tax paid by the transferee that is equivalent to the amount of the exemption to which the transferee would have been entitled under section 12.02 or 12.03, as applicable, if there were no requirement in section 12.02 (1) that the property contain a residential improvement described in section 12.02 (1) (b) (i) or (ii), or

(b) if not satisfied that the requirements for the refund set out in paragraph (a) (i) and (ii) have been met, must refuse the application and provide the transferee with written notice under subsection (4) of the refusal.

(4) If an application for a refund under subsection (1) is refused, the administrator must send a letter to the applicant stating the reason for the refusal, and the letter is deemed to be a notice of assessment for the purposes of allowing the applicant to give a notice of objection under section 19.

New housing program — unqualified transferee

12.07 (1) Subject to section 12.08, a transferee who has obtained an exemption under section 12.02 or 12.03 or a refund under section 12.04 is liable under subsection (3) of this section if and from the time that the transferee,

(a) in the case of a transferee who obtained an exemption under section 12.02 or 12.03 or a refund under section 12.04 (3) (a), is not a qualifying individual on the registration date,

(b) in the case of a transferee who obtained a refund under section 12.04 (4) (a), does not become a qualifying individual on or before the first anniversary of the registration date,

(c) in the case of a transferee who obtained an exemption under section 12.02 or 12.03, fails or refuses to comply with section 12.02 (1) (e) or (3), or

(d) subject to subsection (2), fails to inhabit the residential improvement referred to in section 12.05 as the transferee's principal residence as required by that section.

(2) If subsection (1) (d) applies only because the transferee, before the first anniversary of the registration date, fails to comply with section 12.05 (b), the transferee is liable under subsection (4) of this section from the date the transferee ceases to inhabit the property as the transferee's principal residence.

(3) A transferee referred to in subsection (1) must pay to the administrator tax in the same amount that the transferee would have been obliged to pay under section 2 (1) (a) had the transferee not received the exemption or refund.

(4) A transferee referred to in subsection (2) must pay to the administrator tax in the amount calculated in accordance with whichever of the following applies:

(a) if the period between the registration date and the date from which the transferee is liable under subsection (2) is greater than or equal to 360 days, the transferee is liable for the amount that would apply under subsection (3) reduced by 100%;

(b) if the period between the registration date and the date from which the transferee is liable under subsection (2) is less than 360 days, the transferee is liable for the amount that would apply under subsection (3) multiplied by

$$1 - (n/365)$$

where

n is the number of days between the registration date and the date from which the transferee is liable under subsection (2).

(5) A transferee not referred to in subsection (1) who has obtained an exemption under section 12.02 or 12.03 or a refund under section 12.04 or 12.06 for an amount greater than the amount to which the transferee is entitled under this Act must pay to the administrator as a tax liability the amount by which the exemption or refund received exceeded the exemption or refund to which the transferee was entitled.

New housing exemption or refund retained

12.08 Section 12.07 (1) to (4) does not apply to a transferee who has obtained an exemption under section 12.02 or 12.03 or a refund under section 12.04 if the transferee does not comply with section 12.05 only because, before the first anniversary of the registration date,

(a) the transferee dies, or

(b) the property is transferred by the transferee pursuant to a written separation agreement or a court order under the *Family Law Act*.

Definitions for sections 12.09 to 12.12

12.09 In this section and in sections 12.10 to 12.12:

"first time home buyers' credit" means a credit referred to in section 12.12 (1) (b);

"first time home buyers' exemption or refund" means an exemption under section 5 or 6 or a refund under section 7;

"new housing credit" means a credit referred to in section 12.11 (1) (b);

"new housing exemption or refund" means an exemption under section 12.02 or 12.03 or a refund under section 12.04 or 12.06.

Transferee must not apply for both first time home buyers' exemption or refund and new housing exemption or refund

12.10 Despite sections 4 to 12.08, a transferee is not entitled to and must not apply for both a first time home buyers' exemption or refund and a new housing exemption or refund in respect of the same taxable transaction.

Application to cancel first time home buyers' application and obtain new housing credit

12.11 (1) A transferee who has applied for a first time home buyers' exemption or refund in respect of a taxable transaction may, whether or not the transferee has received the exemption or refund, apply to the administrator

(a) to cancel the transferee's application for the first time home buyers' exemption or refund, and

(b) to obtain a credit under this section in respect of the tax payable under this Act on the registration of the taxable transaction by the transferee.

(2) An application under subsection (1) may only be made within 18 months after the registration date of the taxable transaction.

(3) On receiving an application under subsection (1), the administrator,

(a) if satisfied that the transferee would have qualified for a new housing exemption or refund in respect of the taxable transaction had the transferee applied for the exemption or refund in accordance with section 12.02, 12.03, 12.04 or 12.06, as applicable, must grant the application under subsection (1) of this section and must

(i) cancel the transferee's application for the first time home buyers' exemption or refund, and

(ii) provide to the transferee a new housing credit in the amount provided for in subsection (4) of this section, or

(b) if not satisfied that the transferee would have qualified for a new housing exemption or refund had the transferee applied for the exemption or refund in accordance with section 12.02, 12.03, 12.04 or 12.06, as applicable, must refuse to grant the application and provide the transferee with written notice under subsection (8) of this section of the refusal.

(4) The amount of the new housing credit to which a transferee is entitled under subsection (3) (a) (ii) in respect of a taxable transaction is equal to the amount of the new housing exemption or refund to which the transferee would have been entitled in respect of the taxable transaction had the transferee applied for the exemption or refund in accordance with section 12.02, 12.03, 12.04 or 12.06, as applicable.

(5) In the case of a transferee who is entitled to a new housing credit for a taxable transaction and who has received a first time home buyers' exemption or refund in respect of the tax payable on the registration of the taxable transaction, the following applies:

(a) the transferee is deemed to have received, instead of a first time home buyers' exemption or refund, a new housing credit in an amount equal to the amount received;

(b) if the amount, under subsection (4), of the new housing credit exceeds the amount received, the administrator must pay out of the consolidated revenue fund to the transferee a refund of the tax paid by the transferee in respect of the taxable transaction equal to the difference between those amounts;

(c) if the amount, under subsection (4), of the new housing credit is less than the amount received, the transferee, from and after the date the transferee makes the application under subsection (1), is liable to pay to the administrator, as tax under this Act in respect of the taxable transaction, the amount of the difference between those amounts;

(d) if the amount, under subsection (4), of the new housing credit is equal to the amount received, no amount is payable by or to the administrator or the transferee.

(6) In the case of a transferee who is entitled to a new housing credit for a taxable transaction and who has not received a first time home buyers' exemption or refund in respect of the tax payable on the registration of the taxable transaction, the administrator must pay out of the consolidated revenue fund to the transferee a refund of the tax paid by the transferee in respect of the taxable transaction equal to the amount, under subsection (4), of the new housing credit.

(7) If the administrator makes a determination under section 12 in respect of an application for a first time home buyers' exemption or refund before or after the cancellation of that application under subsection (3) (a) (i) of this section, the transferee must, despite the cancellation of that application, pay to the administrator the penalty owing under section 12 in respect of the application.

(8) If an application under subsection (1) is refused, the administrator must send a letter to the applicant stating the reason for the refusal, and the letter is deemed to be a notice of assessment for the purposes of allowing the applicant to give a notice of objection under section 19.

(9) A transferee who obtains a new housing credit under this section in an amount greater than the amount to which the transferee is entitled must pay to the administrator as a tax liability the amount by which the credit received exceeds the credit to which the transferee was entitled.

Application to cancel new housing application and obtain first time home buyers' credit

12.12 (1) A transferee who has applied for a new housing exemption or refund in respect of a taxable transaction may, whether or not the transferee has received the exemption or refund, apply to the administrator

(a) to cancel the transferee's application for the new housing exemption or refund, and

(b) to obtain a credit under this section in respect of the tax payable under this Act on the registration of the taxable transaction by the transferee.

(2) An application under subsection (1) may only be made within 18 months after the registration date of the taxable transaction.

(3) On receiving an application under subsection (1), the administrator,

(a) if satisfied that the transferee would have qualified for a first time home buyers' exemption or refund in respect of the taxable transaction had the transferee applied for the exemption or refund in accordance with section 5, 6 or 7, as applicable, must grant the application under subsection (1) of this section and must

(i) cancel the transferee's application for the new housing exemption or refund, and

(ii) provide to the transferee a first time home buyers' credit in the amount provided for in subsection (4) of this section, or

(b) if not satisfied that the transferee would have qualified for a first time home buyers' exemption or refund had the transferee applied for the exemption or refund in accordance with section 5, 6 or 7, as applicable, must refuse to grant the application and provide the transferee with written notice under subsection (7) of this section of the refusal.

(4) The amount of the first time home buyers' credit to which a transferee is entitled under subsection (3) (a) (ii) in respect of a taxable transaction is equal to the amount of the first time home buyers' exemption or refund to which the transferee would have been entitled in respect of the taxable transaction had the transferee applied for the exemption or refund in accordance with section 5, 6 or 7, as applicable.

(5) In the case of a transferee who is entitled to a first time home buyers' credit for a taxable transaction and who has received a new housing exemption or refund in respect of the tax payable on the registration of the taxable transaction, the following applies:

(a) the transferee is deemed to have received, instead of a new housing exemption or refund, a first time home buyers' credit in an amount equal to the amount received;

(b) if the amount, under subsection (4), of the first time home buyers' credit exceeds the amount received, the administrator must pay out of the consolidated revenue fund to the transferee a refund of the tax paid by the transferee in respect of the taxable transaction equal to the difference between those amounts;

(c) if the amount, under subsection (4), of the first time home buyers' credit is less than the amount received, the transferee, from and after the date the transferee makes the application under subsection (1), is liable to pay to the administrator, as tax under this Act in respect of the taxable transaction, the amount of the difference between those amounts;

(d) if the amount, under subsection (4), of the first time home buyers' credit is equal to the amount received, no amount is payable by or to the administrator or the transferee.

(6) In the case of a transferee who is entitled to a first time home buyers' credit for a taxable transaction and who has not received a new housing exemption or refund in respect of the tax payable on the registration of the taxable transaction, the administrator must pay out of the consolidated revenue fund to the transferee a refund of the tax paid by the transferee in respect of the taxable transaction equal to the amount, under subsection (4), of the first time home buyers' credit.

(7) If an application under subsection (1) is refused, the administrator must send a letter to the applicant stating the reason for the refusal, and the letter is deemed to be a notice of assessment for the purposes of allowing the applicant to give a notice of objection under section 19.

(8) A transferee who obtains a first time home buyers' credit under this section in an amount greater than the amount to which the transferee is entitled must pay to the administrator as a tax liability the amount by which the credit received exceeds the credit to which the transferee was entitled.

Additional information to be included in return

12.13 (1) In this section, **"bare trustee"** means a trustee of a trust who can reasonably be considered to act as agent for all the beneficiaries under the trust with respect to all dealings with all of the trust's property.

(2) In addition to any other required information, a return that must be filed under section 2 in respect of a taxable transaction must include the information required under this section.

(3) If the transferee is an individual,

(a) the return must state the date of birth of the transferee, and whether or not the transferee is a Canadian citizen or permanent resident of Canada,

(b) in the case of a transferee who is a Canadian citizen or permanent resident of Canada, the return must state the social insurance number of the transferee, and

(c) in the case of a transferee who is not a Canadian citizen or permanent resident of Canada, the return must state whether or not the transferee is a citizen of a foreign country or state and, if so, must

state the date of birth and, as applicable, social insurance number or individual tax number of the transferee, and must identify the foreign country or state.

(4) If the transferee is a corporation,

(a) the return must state

(i) the total number of directors of the transferee,

(ii) the number of those directors who are Canadian citizens or permanent residents of Canada, and

(iii) the date of birth and social insurance number for each director who is a Canadian citizen or permanent resident of Canada,

(b) in relation to each director of the transferee who is not a Canadian citizen or permanent resident of Canada,

(i) the return must state the name, contact information, date of birth and, as applicable, social insurance number or individual tax number of the director, and

(ii) the return must state whether or not the director is a citizen of a foreign country or state and, if so, must identify the foreign country or state, and

(c) the return must state the business corporation number of the transferee.

(5) If the transferee is, as a bare trustee of a trust, acquiring the land to which the taxable transaction relates, the return must include, in addition to the information required under subsection (3) or (4), as applicable, the following information in relation to each settlor and each beneficiary of the trust:

(a) in the case of a settlor or beneficiary who is an individual,

(i) in the case of a settlor or beneficiary who is a Canadian citizen or permanent resident of Canada, the return must state the name, contact information, date of birth and social insurance number of the settlor or beneficiary, and

(ii) in the case of a settlor or beneficiary who is not a Canadian citizen or permanent resident of Canada, the return must state whether or not the settlor or beneficiary is a citizen of a foreign country or state and, if so, must state the date of birth and, as applicable, social insurance number or individual tax number of the settlor or beneficiary and must identify the foreign country or state;

(b) in the case of a settlor or beneficiary that is a corporation,

(i) the return must state the name, contact information, date of birth and social insurance number of each director of the settlor or beneficiary who is a Canadian citizen or permanent resident of Canada, and

(ii) in the case of a director who is not a Canadian citizen or permanent resident of Canada, the return must state whether or not the director is a citizen of a foreign country or state and, if so, must state the date of birth and, as applicable, social insurance number or individual tax number of the director and must identify the foreign country or state.

(6) The return must state the name, contact information and tax residency status under the *Income Tax Act* (Canada) of the transferor.

Ministerial regulation-making power

12.14 The minister may, by regulation, require additional information to be provided under section 12.13 on returns that must be filed under section 2.

Certifying return and additional tax form

13 The return required by section 2 (1) (b) and the form required by section 2.02 (3) (c) must be certified,

(a) if no exemption is claimed, by the transferee or a person with actual authority to certify the return or form on behalf of the transferee,

(b) if an exemption is claimed and the transferee is an individual, by a transferee or by an agent of the transferee who has personal knowledge of the matters certified, or

(c) if an exemption is claimed and the transferee is a corporation, by a person who has personal knowledge of the matters certified and actual authority to certify the return or form on behalf of the transferee.

Electronic returns

13.1 (1) The administrator may designate classes of persons as authorized to certify electronic returns under this section.

(2) Before an electronic return is filed under section 2 (1.1) (b), the electronic return must be

(a) signed electronically by the transferee in accordance with the policies established by the administrator, or

(b) certified under this section by a designate.

(3) An electronic return is certified under this section by a designate if the electronic return

(a) includes a statement that the electronic return is certified under this section by the designate, and

(b) is signed electronically by the designate in accordance with the policies established by the administrator.

(4) The electronic signature by a designate of an electronic return described in subsection (3) is a certification by the designate that

(a) an execution copy of the electronic return has been certified in accordance with section 13, and

(b) the execution copy referred to in paragraph (a), or a true copy of that execution copy, is in the possession of the designate.

(5) If an electronic return that is signed electronically by the transferee is filed under section 2 (1.1) (b), the transferee must

(a) retain a true copy of the electronic return for a period established by the administrator, and

(b) produce the true copy for inspection if requested by the administrator during that period.

(6) If an electronic return that is certified under this section by a designate is filed under section 2 (1.1) (b), the transferee and the persons, if any, that are specified in the policies established by the administrator must

(a) retain the execution copy referred to in subsection (4) (a) of this section, or a true copy of that execution copy, for the period established by the administrator, and

(b) produce that execution copy or true copy for inspection if requested by the administrator during that period.

Evidence of electronic returns

13.2 (1) A copy of an electronic return that is

(a) obtained from the records of the administrator, and

(b) certified by the administrator to be a true copy of the electronic return

is conclusive evidence of the electronic return and is admissible in court as if it were the original.

(2) A certification of the administrator under subsection (1) is conclusive evidence that the copy was made by the administrator in the usual and ordinary course of business using procedures and techniques that

(a) are capable of recording all significant details of the original electronic return, and

(b) do not permit additions to or deletions or changes from the original electronic return.

Exemptions

14 (1) In this section:

"family farm" means farm land that

(a) is used, owned and farmed by one individual or by family members,

(b) is used, owned and farmed by a family farm corporation,

(c) for the purpose of an exemption claimed under subsection (3) (c.1) or (c.2), was, immediately before the deceased's death, owned by the deceased and used and farmed by one or more of the following:

(i) the deceased;

(ii) family members of the deceased;

(iii) a family farm corporation that, at the time of the deceased's death, was comprised of shareholders, each of whom was one of the following:

(A) a related individual of the deceased;

(B) a sibling of the deceased;

(C) a spouse of a sibling of the deceased, or

(d) for the purpose of an exemption claimed under subsection (3) (d.1) or (d.2) or subsection (4) (p.22) (ii) (B), was used, owned and farmed by the settlor or the deceased;

"family farm corporation" means a corporation of which

(a) the principal activity is farming farm land, and

(b) no shareholder is a corporation;

"family member" means an individual who is a Canadian citizen or a permanent resident of Canada and who is

(a) a related individual,

(b) a person's sibling, cousin, niece, nephew, aunt or uncle,

(c) the spouse of a person's sibling, cousin, niece, nephew, aunt or uncle, or

(d) the sibling, cousin, niece, nephew, aunt or uncle of a person's spouse;

"farm land" means land classified under the *Assessment Act* as farm land;

"principal residence" means a parcel of land

(a) on which the person in relation to whose residency the exemption under this section is claimed usually resided and used as his or her home,

(b) on which there are improvements that are designed to accommodate and that are used only to accommodate 3 or fewer families,

(c) on which all the improvements are classified under section 19 of the *Assessment Act* as property used for residential purposes, and

(d) that is not larger than 0.5 ha in area;

"recreational residence" means an interest in a parcel of land if the parcel is one

(a) on which, before the transfer,

(i) an individual transferor resided on a seasonal basis for recreational purposes, or

(ii) if an exemption is claimed under subsection (3) (c) or (d) or subsection (4) (p.21) (iii) (B), the settlor or the deceased usually resided on a seasonal basis for recreational purposes,

(b) that has been classified as residential land under the *Assessment Act*,

(c) that is not larger than 5 ha in area, and

(d) that has a fair market value, determined under paragraph (a) of the definition of "fair market value", of no more than $275 000;

"related individual" means a related individual who is a Canadian citizen or a permanent resident of Canada;

"sibling" means a sibling who is a Canadian citizen or a permanent resident of Canada;

"spouse" means a spouse who is a Canadian citizen or a permanent resident of Canada.

(1.1) For the purposes of the definition of "principal residence", if the same dwelling is located on more than one parcel, the parcels are deemed to be one parcel.

(2) For the purposes of this section, a person is considered to have only one principal residence at a time.

(2.1) Despite subsections (3) and (4), a transferee is not exempt from the payment of tax under section 2.02 (3) in respect of a taxable transaction that is a transfer described in subsection (3) (m) or (4) (q) or (u) of this section.

(3) If a taxable transaction entitles the transferee, on compliance with the *Land Title Act*, to registration in a land title office, that transferee is exempt from the payment of tax if the taxable transaction is a transfer within any of the following descriptions:

(a) a transfer from a transferor who is not a trustee referred to in paragraph (c) or (d), to a transferee who is

(i) a related individual, a sibling or a spouse of a sibling, if the land transferred is a family farm, or

(ii) a related individual, if the land transferred is a recreational residence;

(b) a transfer from a transferor who is not a trustee referred to in paragraph (c), (d) or (e), to a transferee who is a related individual, if the land transferred has been the principal residence of either the transferor for a continuous period of at least 6 months immediately before the date of transfer or of the transferee for that period;

(c) a transfer from a transferor who is a trustee of a deceased's estate or of a trust established under a deceased's will and who is registered in that capacity under the *Land Title Act* as the trustee of the land transferred to a transferee, if

(i) the transferee is a beneficiary of the estate or trust,

(ii) the transferee beneficiary was a related individual of the deceased at the time of the deceased's death, and

(iii) immediately before the deceased's death, the land transferred

(A) was the deceased's recreational residence or principal residence, or

(B) had been the transferee's principal residence for a continuous period of at least 6 months;

(c.1) a transfer from a transferor who is a trustee of a deceased's estate or of a trust established under a deceased's will and who is registered in that capacity under the *Land Title Act* as the trustee of the land transferred to a transferee, if

(i) the transferee is a family farm corporation,

(ii) at the time of the deceased's death, the relationship between the deceased and each other person, if any, who is a shareholder of the family farm corporation was one of the following:

(A) the shareholder was a related individual of the deceased,

(B) the shareholder was a sibling of the deceased, or

(C) the shareholder is a spouse of a sibling of the deceased, and

(iii) immediately before the deceased's death, the land transferred was the deceased's family farm;

(c.2) a transfer from a transferor who is a trustee of a deceased's estate or of a trust established under a deceased's will and who is registered in that capacity under the *Land Title Act* as the trustee of the land transferred to a transferee, if

(i) the transferee is a beneficiary of the estate or trust,

(ii) at the time of the deceased's death, the relationship between the deceased and the transferee beneficiary was one of the following:

(A) the transferee was a related individual of the deceased,

(B) the transferee was a sibling of the deceased, or

(C) the transferee was a spouse of a sibling of the deceased, and

(iii) immediately before the deceased's death, the land transferred was the deceased's family farm;

(d) a transfer from a transferor who is a trustee of a trust that is settled during the lifetime of the settlor and who is registered in that capacity under the *Land Title Act* as the trustee of the land transferred, if

(i) the transferee is a beneficiary of the trust,

(ii) the transferee beneficiary is a related individual of the settlor of the trust, and

(iii) the land transferred is a recreational residence or was the principal residence of either the settlor for a continuous period of at least 6 months immediately before the date of transfer or of the transferee beneficiary for that period;

(d.1) a transfer from a transferor who is a trustee of a trust that is settled during the lifetime of the settlor and who is registered in that capacity under the *Land Title Act* as the trustee of the land transferred, if

(i) the transferee is a family farm corporation,

(ii) at the time of the land transfer, the relationship between the settlor of the trust and each other person, if any, who is a shareholder of the family farm corporation is one of the following:

(A) the shareholder is a related individual of the settlor,

(B) the shareholder is a sibling of the settlor, or

(C) the shareholder is a spouse of a sibling of the settlor, and

(iii) the land transferred is the settlor's family farm;

(d.2) a transfer from a transferor who is a trustee of a trust that is settled during the lifetime of the settlor and who is registered in that capacity under the *Land Title Act* as the trustee of the land transferred, if

(i) the transferee is a beneficiary of the trust,

(ii) the relationship between the settlor of the trust and the transferee beneficiary is one of the following:

(A) the transferee is a related individual of the settlor,

(B) the transferee is a sibling of the settlor, or

(C) the transferee is a spouse of a sibling of the settlor, and

(iii) the land transferred is a family farm;

(e) a transfer from a transferor who is a trustee of a trust that is settled during the lifetime of the settlor and the transferor is registered in that capacity under the *Land Title Act* as the trustee of the land transferred, if

(i) the transferee is a beneficiary of the trust,

(ii) the transferee beneficiary is a related individual of the settlor of the trust,

(iii) the land transferred was the principal residence of the settlor, and

(iv) between August 18, 1990 and the date of the transfer, the transferor as trustee of the trust was continuously registered as the trustee of the then current principal residence of the settlor and, for the purposes of this paragraph, continuity is deemed not to have been broken if the transferor was not so registered for a period of one month or less but is deemed to have been broken if the transferor was not so registered for a period greater than one month,

(f) a transfer from a transferor to a transferee, if

(i) the transferee is a family farm corporation,

(ii) each of the shareholders of the family farm corporation is

(A) the transferor,

(B) a related individual of the transferor,

(C) a sibling of the transferor, or

(D) a spouse of a sibling of the transferor, and

(iii) the land transferred is a family farm;

(g) a transfer from a transferor that is a family farm corporation to a transferee, if the land transferred is a family farm and

(i) the transferee is the sole shareholder of the family farm corporation, or

(ii) the relationship between the transferee and each other person who is a shareholder of the family farm corporation is one of the following:

(A) the transferee is a related individual of that shareholder,

(B) the transferee is a sibling of that shareholder,

(C) the transferee is a sibling of a spouse of that shareholder, or

(D) the transferee is the spouse of a sibling of that shareholder;

(h) a transfer from a transferor to a transferee who is a spouse or former spouse of the transferor and the transfer is made pursuant to a written separation agreement or a court order under the *Family Law Act*;

(i) a transfer that changes a joint tenancy to a tenancy in common, if

(i) the persons owning the interest in the land are the same before and after the transfer, and

(ii) each person owning an interest in the land after the transfer has an interest in the land equal to that owned by the other owners;

(j) a transfer if

(i) a parcel, in this subsection called the "original parcel", is subdivided into smaller parcels and the transferee of all of, or a registered ownership interest in, one or more of those smaller parcels was one of the registered owners of the original parcel immediately before its subdivision, and

(ii) the transferee's proportionate share of the fair market value of those smaller parcels, calculated using the fair market values as they were immediately after the subdivision, does not exceed the transferee's proportionate share of the fair market value of the original parcel, calculated using the fair market value as it was immediately before the subdivision;

(k) a transfer by which land reverts, escheats or is forfeited to the Crown or by which land that has reverted, escheated or been forfeited to the Crown is returned;

(l) a transfer made in accordance with a registered agreement for sale, if the transferee is

(i) the purchaser under the agreement and the tax in respect of the agreement has been paid, or

(ii) the assignee of the purchaser under the agreement and the tax in respect of the assignment has been paid;

(m) a transfer by operation of law to the survivor of a joint tenancy of the land consequent on the death of a joint tenant of the land;

(n) a transfer to the trustee in bankruptcy of land forming part of the estate of a bankrupt;

(o) a transfer from the trustee in bankruptcy to the bankrupt of land forming part of the estate of the bankrupt, other than a transfer to the bankrupt of land described in paragraph (p), if

(i) no consideration for the transfer is paid by or on behalf of the transferee, and

(ii) a declaration to that effect is made by the transferee and the transferor in the return filed under section 2;

(p) a transfer from the trustee in bankruptcy to the bankrupt or the spouse or former spouse of the bankrupt of land forming part of the estate of the bankrupt, if the land transferred was the principal residence of the bankrupt immediately before the date of the bankruptcy;

(p.1) a transfer to a liquidator appointed under section 277 or 284 of the *Strata Property Act* of land referred to in section 277 (3) (c) (i) or (ii) of that Act;

(p.2) a transfer under section 275 of the *Strata Property Act* of land that was shown on a strata plan cancelled under that section;

(p.3) a transfer to facilitate an amendment to a strata plan under

(i) the provisions of Division 1 of Part 15 of the *Strata Property Act*, or

(ii) the provisions of Division 1 of Part 15 of the *Strata Property Act* in combination with either or both of section 80 or 253 of that Act,

if the transferee's proportionate share of the fair market value of all the parcels that are involved in the amendment, calculated using the fair market values as they were immediately after the amendment, does not exceed the transferee's proportionate share of the fair market value of all the parcels that are involved in the amendment, calculated using the fair market values as they were immediately before the amendment;

(q) a transfer to a person in his or her capacity as personal representative, if the land transferred is part of the deceased's estate;

(r) a transfer of a life estate, if the transferee of that life estate transferred the fee simple estate in the same land to the transferor of the life estate in a concurrent transaction;

(r.1) a transfer of a life estate, if

(i) immediately before the transfer of the life estate, a mortgage is registered as a charge on the same land in respect of which that life estate is transferred to the transferee of that life estate,

(ii) the transferee of the life estate was the tenant for life under a registered life estate in the same land but the registration of that life estate was cancelled immediately before the registration of the charge referred to in subparagraph (i), and

(iii) the transfer of the life estate and the transfer of the registered life estate referred to in subparagraph (ii) involve a transfer by the same transferor of a life estate in the same land, on the same conditions and to the same transferee;

(s) a transfer to a regional district, municipality, an improvement district, the Okanagan Basin Water Board, the Islands Trust, a board of school trustees as defined in the *School Act*, a francophone education authority as defined in the *School Act*, a water users' community as defined in section 1 (1) of the *Water Users' Communities Act*, a regional hospital district, a library board as defined in the *Library Act*, a greater board as defined in the *Community Charter*, or any board incorporated by letters patent that provides services similar to those provided by a greater board;

(t) a transfer to the government in accordance with a bylaw under section 27 *[exchange or other disposal of park land]* of the *Community Charter* or section 281 *[exchange of park land: application of Community Charter]* of the *Local Government Act*;

(t.1) a transfer to the government from a municipality for the purposes of exchanging land necessary for improving, widening, straightening, relocating or diverting a highway;

(u) [Repealed 2014-1-13.]

(v) a transfer if the government is the transferor, and the transaction has been designated by the minister as exempt from payment of tax under this Act.

(4) If a taxable transaction entitles the transferee, on compliance with the *Land Title Act*, to registration in a land title office, that transferee is exempt from the payment of tax if the taxable transaction is a transfer within any of the following descriptions:

(a) a transfer to a board as defined by section 1 of the *Health Authorities Act* for the purposes of that Act;

(b) a transfer to a "registered charity" as defined by section 248 (1) of the *Income Tax Act* (Canada), if the land being transferred will be used for a charitable purpose;

(c) a transfer to a "designated educational institution" as defined in paragraph (a) of the definition of "designated educational institution" in section 118.6 (1) of the *Income Tax Act* (Canada) where the land being transferred will be used for an educational purpose;

(d) a transfer to a corporation established under the *University Foundations Act* or to the corporation established under the *Trinity Western University Foundation Act*;

(e) and (f) [Repealed 2002-25-65.]

(g) a transfer to the corporation established under the *Library Foundation of British Columbia Act*;

(h) a transfer to the corporation established under the *Cultural Foundation of British Columbia Act*;

(i) a transfer to an educational institution that receives grants under the *Independent School Act*, if the land being transferred will be used for an educational purpose;

(j) a transfer to the corporation or the committee established under the *First Peoples' Heritage, Language and Culture Act*;

(k) a transfer of 2 or more adjacent parcels, in this subsection called the "original parcels", from their registered owners, in this subsection called the "original owners", to a person who is registered under the transfer as a trustee under the *Land Title Act*, if

(i) the transfer is to facilitate the subdivision of the original parcels, and

(ii) after the registration under the *Land Title Act* of the plan of subdivision, the trustee transfers all of the parcels created under the subdivision to the original owners or to any one or more of them;

(k.1) a transfer of all of, or a registered ownership interest in, one or more of the parcels created under a subdivision described in paragraph (k), if

(i) the transfer is from the trustee referred to in paragraph (k) to any of the original owners, and

(ii) that original owner's proportionate share of the fair market value of the parcels created under the subdivision, calculated using the fair market values as they were immediately after the subdivision, does not exceed that original owner's proportionate share of the fair market value of the original parcels, calculated using the fair market values as they were immediately before the subdivision;

(l) a transfer of the vendor's interests under an agreement for sale, if the transferee is not the purchaser under the agreement for sale;

(m) a transfer to a mortgagee, if the mortgagee was the immediately preceding registered owner of the land;

(n) a transfer referred to in paragraph (b) of the definition of "taxable transaction", if the transferee was the original vendor under the agreement for sale;

(o) a transfer of a lease agreement, except a lease modification agreement, with a term of 30 years or less remaining as at the date of registration of that lease agreement;

(p) a transfer from a settlor to the Public Guardian and Trustee or a trustee that is a trust company or credit union authorized under the *Financial Institutions Act* to carry on trust business by a business authorization under that Act, if

(i) the settlor is a natural person,

(ii) the settlor was the registered owner of the fee simple interest in the land immediately before the transfer to the trustee,

(iii) the administration of the trust estate is for the sole benefit of the settlor, and

(iv) on the termination of the trust the land reverts to the settlor or to the executor or administrator of the settlor's estate;

(p.1) a transfer from a trustee of a trust referred to in paragraph (p) to the settlor of the land being transferred;

(p.2) a transfer to the Public Guardian and Trustee, if

(i) the land transferred is to be held in trust by the Public Guardian and Trustee for the sole benefit of a minor,

(ii) the minor is a related individual of

(A) the transferor, or

(B) the person whose estate is the transferor, and

(iii) the land transferred was

(A) the principal residence of the transferor,

(B) the principal residence of the person whose estate is the transferor, or

(C) the principal residence of the minor;

(p.21) a transfer to the Public Guardian and Trustee, if

(i) the land transferred is to be held in trust by the Public Guardian and Trustee for the sole benefit of a minor,

(ii) the minor is a related individual of

(A) the transferor, or

(B) the person whose estate is the transferor, and

(iii) the land transferred was

(A) a recreational residence of the transferor, or

(B) the recreational residence of the person whose estate is the transferor;

(p.22) a transfer to the Public Guardian and Trustee, if

(i) the land transferred is to be held in trust by the Public Guardian and Trustee for the sole benefit of a minor,

(ii) the minor is a related individual, or a sibling or a spouse of a sibling, of

(A) the transferor, or

(B) the person whose estate is the transferor, and

(iii) the land transferred was a family farm;

(p.3) a transfer from the Public Guardian and Trustee, if

(i) the land transferred was held in trust by the Public Guardian and Trustee for the sole benefit of a minor, and

(ii) the transferee is the beneficiary;

(q) a transfer from a transferor to a transferee, each of whom is registered under the *Land Title Act* as a trustee of the land, if

(i) the change in trustee is for reasons that do not relate, directly or indirectly, to a change in beneficiaries or in a class of beneficiaries or to a change in the terms of the trust, and

(ii) the transferor and the transferee make a declaration to that effect in the return filed under section 2;

(r) a transfer from the Director, the *Veterans' Land Act* (Canada), to a veteran or the spouse or surviving spouse of a veteran;

(s) a transfer to the Crown in right of Canada or to a corporation listed in Schedule 1 of the *Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act* (Canada);

(t) a transfer for the purpose of reconveying land

(i) that was transferred in error, or

(ii) in respect of which an error was made in the description or survey under which title to the land was registered;

(u) a transfer referred to in paragraph (f) of the definition of "taxable transaction", if

(i) the amalgamation was effected under Division 3 of Part 9 of the *Business Corporations Act*, under sections 181 to 186 of the *Canada Business Corporations Act* (Canada) or under similar provisions of an enactment of Canada or of a province, and

(ii) the continuing corporation files a certificate of amalgamation with the administrator, at the request of the administrator and within the time period specified by the administrator;

(v) a transfer consisting of a lease, sublease or right to occupy premises, if it is coupled with a concurrent transfer of an estate in fee simple to the same land or a right to purchase with respect to the same land and

(i) the lessee, sublessee or occupant, as the case may be, and the transferee of the fee simple estate are the same person, and

(ii) tax was paid on the transfer of the fee simple estate or the right to purchase;

(w) a transfer referred to in paragraph (f) of the definition of "taxable transaction", if

(i) the amalgamation was effected under Division 1 of Part 7 of the *Societies Act*, and

(ii) the amalgamated society files a certificate of amalgamation with the administrator, at the request of the administrator and within the time period specified by the administrator.

(5) For the purposes of an exemption under subsection (3) (c) or (d) or subsection (4) (p.21), no more than one recreational residence may be claimed in respect of the deceased's estate or, as the case may be, the trust referred to in subsection (3) (d).

Partial exemption for certain residential transfers

15 (1) In this section:

"adjusted value" means the fair market value of a taxable transaction or the residential property value, as applicable, minus the following:

(a) the fair market value of the interest in the residential improvements transferred;

(b) if the parcel involved in the taxable transaction is

(i) 0.5 ha in area or less, the fair market value of the land transferred, not including improvements, or

(ii) more than 0.5 ha in area, the fair market value of the land transferred, not including improvements, multiplied by the ratio of 0.5 ha to the total area of the parcel;

"eligible transferee" means a transferee who does not qualify under section 14 (3) (b), (c), (d), (e) or (p) or (4) (p.2) for an exemption in relation to a principal residence only because of one or both of the following reasons:

(a) there are non-residential improvements on the parcel involved in the taxable transaction;

(b) the parcel involved in the taxable transaction is larger than 0.5 ha in area;

"non-residential improvements" means improvements that are not classified under section 19 of the *Assessment Act* as property used for residential purposes;

"residential improvements" means improvements that are classified under section 19 of the *Assessment Act* as property used for residential purposes;

"residential property value" means residential property value as determined under section 3.01 (3).

(2) An eligible transferee is exempt from the obligation to pay tax in accordance with section 3 (1) in an amount equal to the transferee's proportionate share of the fair market value of the taxable transaction multiplied by the following:

(a) for the purposes of section 3 (1) (a) to (c), the amount that is the tax that would otherwise have been payable on the fair market value of the taxable transaction minus the tax that would be payable if the fair market value of the taxable transaction was equal to the adjusted value;

(b) for the purposes of section 3 (1) (d), if applicable, the amount that is the tax that would otherwise have been payable on the residential property value minus the tax that would be payable if the residential property value was equal to the adjusted value.

(3) For the purposes of this section, the fair market value of the following must be determined in the prescribed manner:

(a) the interest in the residential improvements transferred;

(b) the land transferred, not including improvements.

Exemption for land subject to conservation covenant

16 (1) In this section, **"conservation covenant"** means a covenant in favour of the Crown that

(a) is registered under subsection (2), and

(b) includes

(i) one or more provisions described in section 219 (4) (b) of the *Land Title Act*,

(ii) provisions that the covenant will not be amended or discharged without the approval of the Lieutenant Governor in Council, and

(iii) any other provision prescribed by regulation for inclusion.

(2) If the Lieutenant Governor in Council approves, a covenant referred to in subsection (1) may be registered against the title to land in the same manner as a covenant under section 219 (1) of the *Land Title Act* and, when registered, it is deemed to be a covenant under that section.

(3) A taxable transaction is exempt from the payment of tax under section 2 to the extent provided in subsection (4) if, at the time of registration of the taxable transaction, a conservation covenant is registered against the title to the land to which the taxable transaction relates.

(4) A taxable transaction to which subsection (3) applies is exempt to the extent of the fair market value, determined in the prescribed manner, of the interest being transferred that is subject to the conservation covenant.

(5) The administrator may, by certificate, postpone for up to 6 months the time at which tax would otherwise be payable, if satisfied that a conservation covenant is intended to be registered within that time against the title to the land to which the taxable transaction relates.

(6) If, within one year after a taxable transaction is registered, a conservation covenant is registered against the title to the land to which the taxable transaction relates, the transferee may apply to the administrator within that one year period for a refund under subsection (7).

(7) After receiving an application under subsection (6) and on being satisfied that the taxable transaction would have been exempt under subsection (3) from tax had the conservation covenant been registered at the time of the taxable transaction, the administrator must

(a) pay out of the consolidated revenue fund a refund of the tax paid equivalent to the amount of exemption to which the transferee would have been entitled had the conservation covenant been registered at the time of the taxable transaction, or

(b) send a letter to the transferee stating the reasons for the refusal, and the letter is deemed to be a notice of assessment for the purposes of allowing the transferee to give a notice of objection under section 19.

(8) If a conservation covenant is discharged after the taxable transaction has been exempt from taxation because of this section or after the transferee has received a refund under this section, the person registered in the land title office at the time of discharge as owner of the fee simple interest in the land against which the covenant was registered must, at the time of discharge,

(a) file a return referred to in section 2 (1), and

(b) pay to the government, as tax payable under section 2, an amount equal to the tax that would be payable at that time were the title to the land being transferred to that person as transferee in a taxable transaction referred to in paragraph (a) (i) of the definition of "taxable transaction".

(9) A registrar may, without a hearing, refuse to accept an application for discharge of a conservation covenant if there are reasonable grounds to believe

(a) that the Lieutenant Governor in Council has not approved the discharge,

(b) that the return required by subsection (8) has not been filed, or

(c) that the tax imposed by subsection (8) has not been paid.

Investigation

17 The administrator may investigate whether

(a) a return or other record required to be made, provided or kept under this Act is accurate,

(a.1) information required to be provided under this Act is accurate,

(b) the tax has been paid as required by this Act and the regulations, and

(c) a provision of this Act or the regulations has been contravened.

Assessment

18 (1) The administrator may, on information available to the administrator, make a determination of fair market value or tax owing.

(2) If the administrator determines that the correct amount of tax has not been paid, the administrator must make an assessment and mail a notice of assessment to the transferee.

(3) The notice of assessment must state

(a) the determination of the fair market value made by the administrator,

(b) the total amount of tax payable,

(c) the amount of tax paid,

(d) the balance owing or overpaid, and

(e) the date of the notice of assessment.

(3.1) In respect of an assessment made in relation to section 2.001, a reference to "transferee" must be read as including a transferor.

(4) The transferee assessed must pay to the administrator the amount of tax owing as set out in the notice of assessment within 30 days after the date shown on the notice of assessment.

(5) Except as provided in this Act, the administrator must issue the notice of assessment within 6 years after

(a) the date that the transaction was registered in the land title office, or

(b) the expiry of the prescribed period under section 2 (5),

as the case may be.

(5.1) [Repealed 2018-4-63.]

(6) If any of the following exemptions, refunds or credits has been applied for, the notice of assessment must be issued within 6 years after the application for registration of the taxable transaction to which the application under paragraph (a), (b) or (c) relates:

(a) an exemption applied for under section 5, 6, 12.02 or 12.03;

(b) a refund applied for under section 7, 12.04 or 12.06;

(c) a credit applied for as part of an application made under section 12.11 or 12.12.

(6.1) If an exemption has been applied for under section 14 (3) (j), the notice of assessment must be issued within 6 years after the date of the first transfer after the subdivision.

(6.11) If an exemption has been applied for under section 14 (3) (p.3), the notice of assessment must be issued within 6 years after the date of the last of the transfers to facilitate the amendment of the strata plan.

(6.2) If an exemption has been applied for under section 14 (4) (k) or (k.1), the notice of assessment must be issued within 6 years after the date of the last of the transfers to the trustee to facilitate the subdivision.

(6.3) A transferee may file with the administrator a waiver for a transaction, in the form and containing the information required by the administrator, and in accordance with subsection (6.4) or (6.8).

(6.4) A transferee must file a waiver under subsection (6.3) before the date for issuing a notice of assessment set out in subsection (5), (6), (6.1), (6.11) or (6.2) that applies, in the circumstances, to the transferee.

(6.5) If a waiver for a transaction has been filed under subsection (6.3), the administrator may issue a notice of assessment for the transaction at any time during the period that the waiver is in effect.

(6.6) A waiver filed under subsection (6.3) or (6.8) continues in effect until 6 months after the date the transferee files a notice revoking the waiver in accordance with subsection (6.7).

(6.7) A transferee may file with the administrator a notice revoking a waiver, in the form and containing the information required by the administrator.

(6.8) Despite subsection (6.4), a transferee may file with the administrator a new waiver for a transaction during the period of 6 months following the date the transferee filed with the administrator a notice revoking the prior waiver for the transaction.

(7) Subject to being varied or vacated on objection or by reassessment, an assessment is valid and binding despite any error, defect, omission or error in procedure.

(8) The amount of tax assessed is payable whether or not an objection to the assessment is made.

(9) Interest on the amount of tax owing to the government is payable and must be calculated, starting on the 30th day after the date shown on the notice of assessment, at the rate prescribed under section 20 (1) of the *Financial Administration Act* calculated in the manner prescribed in the regulations.

Objection to minister

19 (1) A person who objects to an assessment made under section 18 must give a notice of objection to the minister within 90 days after the date shown on the notice of assessment.

(2) A person who objects to any of the following must give a notice of objection to the minister within 90 days after the date shown on the notice of assessment:

(a) a refusal by the administrator to grant an exemption under section 5, 6, 12.02 or 12.03;

(b) a refusal by the administrator to pay a refund under section 7, 12.04 or 12.06;

(c) a refusal by the administrator to grant an application under section 12.11 or 12.12;

(d) the imposition of a penalty under section 12.

(3) The notice of objection must contain the reasons for the objection and must state all relevant facts, including an estimate of the fair market value if the person objecting considers that estimate to be relevant to the objection.

(4) On receipt of the notice of objection and of the relevant information from the office of the administrator, the minister must decide the amount of the penalty or tax owing or the refund payable, as the case may be.

(5) The minister must deliver to the person who objected to the assessment made under section 18 a notice of the minister's decision under subsection (4) of this section and, if the minister's decision is to vary the assessment, the administrator must deliver a notice of assessment reflecting the variation to the person who objected.

(6) The time limit for giving a notice of objection under subsection (1) may be extended by the minister if

(a) an application for extension is made in respect of that notice before the expiry of the time allowed under subsection (1) for giving the notice, and

(b) the application contains the reason for the extension and specifies the period of time applied for.

(7) The minister may, in writing, delegate any of the minister's powers or duties under this section.

(8) A delegation under subsection (7) may be to a named person or to a class of persons.

Notice of objection

19.1 (1) The date on which a notice of objection is given to the minister under section 19 (1) or (2) is the date it is received by the minister.

(2) A notice of objection is conclusively deemed to have been given to the minister if it is received at a location and by a method specified by the minister.

Assessment of related individual and associated corporation transactions

20 (1) If

(a) tax imposed on taxable transactions in accordance with section 3 (3) or (4) has been paid, and

(b) the administrator is satisfied that a taxable transaction referred to in section 3 (3) (b) or (4) (b) was made for purposes unrelated to the imposition of taxes under this Act,

the administrator may, on application, make an assessment of the tax imposed on the taxable transactions referred to in section 3 (3) or (4), as the case may be, in accordance with subsection (3).

(2) An application under subsection (1) must be made within 6 months after the date that the transaction referred to in subsection (1) (b) was registered in the land title office.

(3) On an assessment under subsection (1),

(a) the tax payable in respect of the taxable transaction referred to in subsection (1) (b) must be calculated in accordance with section 3 (1) based on the fair market value of the interest transferred by that taxable transaction, and

(b) the tax payable in respect of the other taxable transaction or transactions in respect of which the tax referred to in subsection (1) (a) was paid must be calculated without reference to the taxable transaction referred to in subsection (1) (b).

(4) If the tax payable on assessment under subsection (1) is less than the amount actually paid, the administrator must, in accordance with the *Financial Administration Act*, refund out of the consolidated revenue fund, jointly to the transferees liable under section 3 (3) or (4), as the case may be, for the tax paid, the overpaid tax including any interest relating to the amount overpaid calculated in the manner prescribed in the regulations.

(5) If the administrator refuses an application for an assessment under subsection (1), the administrator must send a letter to the applicant stating the reasons for the refusal, and the letter may be treated as a notice of assessment for the purposes of allowing the applicant to give a notice of objection under section 19.

Appeal to court

21 (1) A decision of the minister under section 19 may be appealed to the Supreme Court by way of a petition proceeding.

(2) The Supreme Court Civil Rules relating to petition proceedings apply to appeals under this section, but Rule 18-3 of those rules does not apply.

(3) A petition must be filed in the court registry within 90 days after the date on the minister's notice under section 19 (5) of the minister's decision.

(4) Within 14 days after the filing of the petition under subsection (3), it must be served on the Crown in accordance with section 8 of the *Crown Proceeding Act* and the Crown must be designated "Her Majesty the Queen in right of the Province of British Columbia".

(4.1) An appeal under this section is a new hearing that is not limited to the evidence and issues that were before the minister.

(5) The court may dismiss the appeal, allow the appeal, vary the decision from which the appeal is made or refer the decision back to the administrator for reconsideration.

(6) [Repealed 2021-18-56.]

Arbitration for fair market value determination

22 (1) Within the time set out in section 21 (3), a person who receives a minister's notice under section 19 (5) of a minister's decision may, instead of appealing the decision under section 21, serve on the minister a notice of arbitration in which the person

(a) requires that a determination of fair market value be made by arbitration in accordance with the regulations, and

(b) acknowledges

(i) that an issue other than a determination of fair market value may not be determined by arbitration, and

(ii) that, by serving the notice of arbitration, the person loses the right under section 21 to appeal the minister's decision to the Supreme Court.

(2) Subject to section 22.2, a person who serves a notice of arbitration under subsection (1) loses the right under section 21 to appeal the minister's decision to the Supreme Court.

Jurisdiction of arbitrator

22.1 The jurisdiction of an arbitrator under section 22 is limited to determinations of fair market value.

Matters not suitable for arbitration

22.2 (1) If, after the minister receives a notice of arbitration under section 22 (1), the minister determines that a person requires the determination of an issue other than the determination of fair market value, the minister must advise the person

(a) that the issue may not be determined by arbitration, and

(b) that the person may

(i) cancel the notice of arbitration and appeal the minister's decision to the Supreme Court within 90 days after the date on the minister's notice under section 19 (5) of the minister's decision, in accordance with section 21, or

(ii) continue to require an arbitration for the sole purpose of a determination of fair market value.

(2) The minister may, in writing, delegate the minister's powers and duties under this section.

(3) A delegation under subsection (2) may be to a named person or to a class of persons.

Arbitrator must refer decision back to administrator

22.3 An arbitrator under section 22 who makes a determination of fair market value must refer the decision of the minister under section 19 back to the administrator for reconsideration.

Transition — arbitration

22.4 (1) Section 22 applies in relation to a decision of the minister if the date on the minister's notice under section 19 (5) of the minister's decision is on or after April 20, 2021.

(2) Section 22, as it read immediately before the date on which this section comes into force, applies in relation to a decision of the minister if the date on the minister's notice under section 19 (5) of the minister's decision is before April 20, 2021.

(3) The Lieutenant Governor in Council may repeal this section by regulation.

Refunds

23 (1) If a person has paid tax under this Act pursuant to a notice of assessment issued under section 18 (3) and, as a result of

(a) a decision of the minister under section 19 (4),

(b) an order of the court under section 21 (5), or

(c) a decision by an arbitrator under section 22,

the tax payable is less than the amount actually paid, the administrator must, in accordance with the *Financial Administration Act*, refund out of the consolidated revenue fund the overpaid tax including any interest relating to the amount overpaid calculated in the manner prescribed in the regulations.

(2) If, after a person has paid tax under section 2 (1) or 2.02 (3),

(a) the person withdraws the application for registration, or

(b) the application for registration is rejected,

the administrator must, in accordance with the *Financial Administration Act*, refund out of the consolidated revenue fund the overpaid tax including any interest relating to the amount overpaid calculated in the manner prescribed in the regulations.

(3) If a person is deemed to have paid tax under section 3.1 (3) in respect of a correcting transaction and the tax payable on that transaction is less than the amount deemed to have been paid, the administrator must, in accordance with the *Financial Administration Act*, refund out of the consolidated revenue fund the overpaid tax including any interest relating to the amount overpaid calculated in the manner prescribed in the regulations.

Refund of tax paid

23.1 (1) If the administrator is satisfied that an amount has been paid as tax under this Act in circumstances where there was no legal obligation to pay the amount as tax, the administrator must refund, out of the consolidated revenue fund, that amount to the person entitled to it.

(2) To claim a refund under subsection (1), a person must

(a) submit to the administrator a written application signed by the person who paid the amount claimed, and

(b) provide sufficient evidence to satisfy the administrator that the person who paid the amount is entitled to the refund.

(3) For the purposes of subsection (2) (a), if the person who paid the amount claimed is a corporation, the application must be signed by a member of the board of directors or an authorized employee of the corporation.

(4) Despite section 16 of the *Financial Administration Act*,

(a) a refund of less than $10 must not be made under subsection (1) of this section, and

(b) a refund under subsection (1) of this section must not be made on a claim for a refund made more than 6 years after the date on which the amount claimed was paid.

(5) Despite the *Limitation Act*, an action for a refund under subsection (1) of this section must not be brought more than 6 years after the date on which the amount claimed was paid.

Refund payable under regulations

23.2 The administrator must pay out of the consolidated revenue fund a tax refund payable under the regulations.

Notice to taxpayer before taking proceedings

24 (1) Before taking proceedings under this Act or otherwise for the recovery of taxes, the administrator must give notice to the taxpayer of the intention to enforce payment.

(2) Failure to give notice under subsection (1) does not affect the validity of proceedings taken for the recovery of taxes or money to be collected as taxes under this Act.

Recovery of taxes due or collected by court action

25 The amount of taxes that are due and payable under this Act may be recovered by action in any court as a debt due to the government.

Summary proceedings without action

26 (1) If a person defaults in the payment of taxes that are due and payable under this Act, the administrator may issue a certificate stating the amount due, the amount remaining unpaid, including interest, and the name of the person by whom it is payable, and may file the certificate with a district registrar of the Supreme Court and when filed the certificate has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the court for the recovery of a debt for the amount stated in the certificate against the person named in it.

(2) Even though a person has given a notice of objection under section 19 or appealed to the Supreme Court under section 21 or applied for arbitration under section 22, the person must pay the amount of tax owing as set out in the notice of assessment prepared by the administrator under section 18 or 19 (5), and the administrator may exercise the administrator's powers to collect the amount owing if the person fails to pay the amount as provided by this Act.

Attachment

27 (1) If the administrator has knowledge or suspects that a person is or is about to become indebted or liable to make a payment to a taxpayer, the administrator may demand that the person pay the money otherwise payable to the taxpayer in whole or in part to the government on account of the taxpayer's liability under this Act.

(2) Without limiting subsection (1), if the administrator has knowledge or suspects that a person is about to

(a) advance money to a taxpayer,

(b) make a payment on behalf of a taxpayer, or

(c) make a payment in respect of a negotiable instrument issued by a taxpayer,

the administrator may demand that the person pay to the administrator on account of the taxpayer's liability under this Act money that would otherwise be advanced or paid.

(2.1) A demand under this section may be served by

(a) personal service,

(b) registered mail, or

(c) electronic mail or fax.

(3) If under this section the administrator demands that a person pay to the government on account of a taxpayer's liability under this Act money otherwise payable by that person to the taxpayer as interest, rent, remuneration, dividend, annuity or other periodic payment, the demand

(a) applies to all of those payments to be made by the person to the taxpayer until the liability under this Act is satisfied, and

(b) operates to require payments to the government out of each payment of the amount stipulated by the administrator in the demand.

(4) Money or a beneficial interest in money in a savings institution

(a) on deposit to the credit of a taxpayer at the time a demand is served, or

(b) deposited to the credit of a taxpayer after a demand is served

is money for which the savings institution is indebted to the taxpayer within the meaning of this section, but money on deposit or deposited to the credit of a taxpayer as described in paragraph (a) or (b) does not include money on deposit with, or deposited to the credit of, a taxpayer in the taxpayer's capacity as a trustee.

(5) A demand under this section continues in effect until

(a) the demand is satisfied, or

(b) 90 days after the demand is served,

whichever is earlier.

(6) Despite subsection (5), if a demand is made in respect of a periodic payment referred to in subsection (3), the demand continues in effect until it is satisfied unless no periodic payment is made or is liable to be made within 90 days after the demand is served, in which case the demand ceases to have effect on the expiration of that period.

(6.1) Money demanded from a person by the administrator under this section becomes payable

(a) as soon as the person is served with the demand, if the person is indebted or liable to make a payment to the taxpayer at the time the demand is served, or

(b) as soon as the person becomes indebted or liable to make a payment to the taxpayer, in any other case.

(7) A person who fails to comply with a demand under this section is liable to pay to the government an amount equal to the amount that the person was required by the demand to pay.

(8) The receipt of the administrator for money paid under this section is a good and sufficient discharge of the original liability to the extent of the payment.

(9) Money paid by any person to the government in compliance with a demand under this section is conclusively deemed to have been paid by that person to the taxpayer.

(10) If a person carries on business under a name or style other than the person's own name, the demand under this section may be addressed to the name or style under which that person carries on business and, in the case of personal service, the demand is deemed to have been validly served if it was left with an adult person employed at the place of business of the addressee.

(11) If persons carry on business in partnership, the demand under this section may be addressed to the partnership name and, in the case of personal service, the demand is deemed to have been validly served if it was served on one of the partners or left with an adult person employed by the partnership at the place of business of the partnership.

Lien on land for taxes

28 (1) All tax, costs and other amounts imposed under this Act are, on registration by the administrator in the proper land title office of a lien form claiming a lien and charge conferred by this subsection, a lien and charge on land the lien is filed against that is owned by the person liable to pay the tax, costs and other amounts, and the lien and charge has priority over charges, encumbrances or claims registered or attaching to the land after the registration of the lien.

(2) The administrator may apply under the *Land Title Act* to register the lien form in the same manner as a charge is registered.

(3) The lien form is sufficient for registration if it is in the prescribed form and signed by the administrator.

(4) Sections 89 and 90 of the *Court Order Enforcement Act* apply as if

(a) the judgment debtor was the taxpayer,

(b) the judgment creditor was the administrator,

(c) the judgment was the lien, and

(d) the certificate of judgment was the lien form.

Limitation period

29 (1) In this section, **"proceeding"** means

(a) an action for the recovery of taxes under section 25,

(b) the filing of a certificate under section 26,

(c) the making of a demand under section 27, and

(d) the registration of a lien under section 28.

(2) A proceeding may be commenced at any time within 7 years after the date on which liability arose for payment of the taxes claimed in the proceeding.

(3) Despite subsection (2), a proceeding that relates to a contravention of this Act or the regulations and that involves wilful default or fraud may be commenced at any time.

Exercise of powers for recovery of taxes or collections

30 (1) The powers conferred by this Act for the recovery of tax or money collected as tax, may be exercised separately, or concurrently or cumulatively.

(2) The liability of a person for the payment of tax under this Act is not affected by the fact that a fine has been imposed on or paid by the person in respect of a contravention of this Act.

Enforcement

31 (1) A person authorized by the administrator for any purpose related to the administration or enforcement of this Act may

(a) during normal office hours enter into a place where a business is carried on or where anything is done in connection with a business or where business records are or should be kept and inspect the records that relate or may relate to tax that is or may be payable under this Act,

(b) examine land described in a transfer or any land an examination of which may, in the person's opinion, assist in determining

(i) the accuracy of

(A) a return or other record required to be made, provided or kept under this Act, or

(B) information that is or should be in, or provided with, a return or record referred to in clause (A),

(ii) whether or not tax is payable under this Act, or

(iii) the amount of tax, if any, payable under this Act, and

(c) by registered letter, or by demand served personally, require from any person any information about the person or any other person or any thing including, for greater certainty, any or all information contained in a multiple listing service database or similar database, within a reasonable time specified by the authorized person, if it is reasonable to make the demand in order to determine liability or possible liability of any person to tax under this Act.

(2) If a record has been inspected or produced under this section, the person by whom it is inspected or to whom it is produced may make or cause to be made one or more copies.

(3) A document certified by the administrator or a person authorized by the administrator to be a copy made under this section is evidence of the nature and content of the original.

(4) A person must not obstruct a person doing anything that he or she is authorized by this section to do.

Confidentiality

32 Subject to sections 32.1 and 32.2, a ministry person who collects information or a record under this Act must not use the information or record or disclose the information or record to another person except as follows:

(a) for the purposes of administering or enforcing this Act, another taxation Act, the *Home Owner Grant Act*, the *Land Tax Deferment Act* or the *Real Estate Development Marketing Act*;

(b) in court proceedings related to this Act or an Act referred to in paragraph (a);

(c) under an agreement that

(i) is between the government and another government,

(ii) relates to the administration or enforcement of tax enactments, and

(iii) provides for the disclosure of information and records to and the exchange of similar information and records with that other government;

(c.1) to an official or employee of the ministry for the purposes of the formulation or evaluation of fiscal policy;

(d) for the purpose of the compilation of statistical information by the government or the government of Canada;

(e) to the British Columbia Assessment Authority.

Information obtained under certain Acts

32.1 (1) Subject to subsection (2), a ministry person who collects personal information as a result of a disclosure under section 13.1 (2) or (3) of the *Home Owner Grant Act* or section 13.1 of the *Land Tax Deferment Act* must not use the personal information or disclose the personal information to another person except as follows:

(a) for the purposes of administering or enforcing this Act;

(b) for the purposes of administering or enforcing any of the following Acts:

(i) the *Home Owner Grant Act*;

(i.1) the *Income Tax Act*;

(ii) the *Land Tax Deferment Act*;

(iii) the *Taxation (Rural Area) Act*;

(iv) the *Speculation and Vacancy Tax Act*;

(c) in court proceedings related to this Act or an Act referred to in paragraph (b) of this subsection;

(d) to an official or employee of the ministry for the purposes of the formulation or evaluation of fiscal policy.

(2) Subsection (1) (a) or (b) does not permit a disclosure to an employee of, or a person who is retained under a contract to perform services for, a municipality or a government agent office.

Information obtained under a taxation Act

32.2 If a ministry person collects information or a record under this Act as a result of a disclosure under another taxation Act, other than the *Income Tax Act*, the *Speculation and Vacancy Tax Act* or the *Taxation (Rural Area) Act*, the ministry person must not use the information or record or disclose the information or record to another person for the purposes of administering or enforcing the *Home Owner Grant Act* or the *Land Tax Deferment Act*.

Access to records

33 (1) The British Columbia Assessment Authority and a land title office must provide assistance and access to their records to the administrator free of charge.

(2) Each of the following must provide assistance and access to their records to the administrator free of charge for the purpose of assisting the administrator in determining the past and present principal residences of an individual who applies for an exemption under section 5, 6, 12.02, 12.03 or 14 or a refund under section 7, 12.04 or 12.06 or makes an application under section 12.11 or 12.12:

(a) the British Columbia Hydro and Power Authority;

(b) the Insurance Corporation of British Columbia and the ministry of the minister responsible for the administration of section 3 or 25 of the *Motor Vehicle Act*, in respect of registration and licensing of motor vehicles and licensing and certification of drivers of motor vehicles.

Offences

34 (1) A person who fails to pay the tax imposed by this Act and the regulations commits an offence.

(2) [Repealed 2018-4-65.]

(3) If a corporation commits an offence under this section, every director, officer, employee or agent of the corporation who authorized, permitted or acquiesced in the offence also commits the offence.

(4) A corporation convicted of an offence under subsection (1) is liable to a fine equal to a minimum of

(a) the amount of tax not paid or remitted, with interest, plus

(b) an amount not exceeding

(i) $200 000, in the case of an offence in relation to the tax imposed under section 2.02, or

(ii) $50 000, in any other case.

(5) An individual convicted of an offence under subsection (1) or (3) is liable to

(a) a fine equal to

(i) the minimum of the amount of tax not paid or remitted, with interest, plus

(ii) an amount not exceeding

(A) $100 000, in the case of an offence in relation to the tax imposed under section 2.02, or

(B) $25 000, in any other case,

(b) imprisonment for not more than 2 years, or

(c) both fine and imprisonment.

(6) Section 5 of the *Offence Act* does not apply to this Act or to the regulations.

(7) In a prosecution under this section, the certificate signed by the minister or the authorized person stating the amount of tax and interest is evidence of the amount of tax and interest referred to in subsection (4) (a) or (5) (a) (i).

(8) An information or complaint in respect of an offence under this Act may be for one or more than one offence, and no information, complaint, warrant, conviction or other proceeding in a prosecution under this Act is objectionable or insufficient only because it relates to 2 or more offences.

(9) An action taken under this section does not suspend or affect any remedy for the recovery of any tax or amount payable under this Act.

(10) Fines collected under this Act must be paid to the minister on behalf of the government.

Offences in relation to electronic returns

34.1 (1) A person commits an offence if the person wilfully makes a false certification under section 13.1 (3).

(2) A person commits an offence if the person

(a) signs an electronic return using an electronic signature of another person, or

(b) permits an electronic signature of the person to be used by another person to sign an electronic return.

Administrative penalties

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

(a) made, or participated in, assented to or acquiesced in the making of, a false or deceptive statement in a return or record required to be made or provided under this Act, or in information required to be provided under this Act,

(b) destroyed, altered, mutilated, hidden or otherwise disposed of a return or record of a transferor or transferee,

(c) made, or participated in, assented to or acquiesced in the making of, a false or deceptive entry in a record or return of a transferor or transferee,

(d) omitted, or assented to or acquiesced in the omission of, a material particular in a record or return of a transferor or transferee, or

(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.

Limitation

35 (1) Subject to subsection (2), an information or complaint in respect of an offence against this Act must be laid or made within one year of the time when the matter of the information or complaint arose.

(2) An information or complaint in respect of an offence in relation to the tax imposed under section 2.02 must be laid or made within 6 years after the date that the matter of the information or complaint arose.

Administrator's certificate

36 For the purpose of any proceeding taken under this Act, a certificate signed by the administrator is evidence of the facts necessary to establish compliance with this Act and the regulations by the minister and the administrator.

Power to make regulations

37 (1) The Lieutenant Governor in Council may make regulations considered necessary or advisable for the purpose of carrying out this Act according to its intent and for supplying any deficiency in it.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:

(a) respecting any matter for which regulations are contemplated under this Act;

(b) exempting a person or class of person, a transferee or class of transferee, a taxable transaction or class of taxable transaction from tax under section 2 (1) (a) or from the requirement to file a return under section 2 (1) (b) and prescribing any conditions of exemption;

(c) providing for the collection of tax;

(d) providing for the refund of tax and prescribing the terms and conditions under which that refund may be made;

(e) providing for the refund by the administrator of fees paid under the *Land Title Act*, except fees established by the Board of Directors under that Act, in respect of a taxable transaction;

(f) providing for the method of calculating and ascertaining fair market value for the purposes of the definition of "fair market value";

(f.1) providing for the method of determining the value of residential property for the purposes of the description of "VRP" in section 3.01 (3) (b);

(g) providing for the method of calculating and ascertaining fair market value for the purposes of section 15;

(h) providing for the method of calculating and ascertaining fair market value for the purposes of section 16;

(i) providing for the payment of interest on any refund or rebate of tax authorized by this Act or the regulations, or on any money due to the government under this Act;

(j) defining, for the purposes of this Act, any expression used but not defined in the Act;

(k) respecting a return or form or class of return or form and the records required to accompany a return or form;

(l) respecting the form and manner of records to be kept by transferors, transferees or persons to whom the tax is paid;

(m) providing that a regulation made under the authority of this Act is effective before its enactment;

(n) prescribing persons to whom the tax is payable;

(o) respecting arbitrations or classes of arbitrations and discretionary powers related to them, adopting all or part of the *Arbitration Act* or restricting or prohibiting judicial review of or appeals from an arbitration;

(p) respecting appeals from arbitrations or classes of arbitrations to court, entitlement to appeal, grounds for appeal, powers of the court on an appeal and procedure on an appeal;

(q) prescribing provisions to be included in a conservation covenant under section 16, which may vary for different conservation covenants and different classes of conservation covenants;

(r) respecting the payment of tax under section 2 (4);

(s) respecting the payment of tax under section 2 (5);

(t) respecting declarations;

(u) and (u.1) [Repealed 2018-37-34.]

(v) and (v.1) [Repealed 2018-37-34.]

(w) prescribing the information that must be included in electronic returns;

(w.1) prescribing the manner in which electronic returns are to be completed;

(x) [Repealed 2018-37-34.]

(y) exempting or authorizing the administrator to exempt any person from any of the provisions of this Act or the regulations respecting the filing of electronic returns.

(2.1) Without limiting subsections (1) and (2), the Lieutenant Governor in Council may make regulations as follows:

(a) for the purposes of paragraph (a) of the definition of "residential property" in section 2.01, prescribing land or improvements, or both, as land or improvements that are not residential property;

(b) for the purposes of paragraph (a) (ii) of the definition of "specified area" in section 2.01, excluding an area within the Metro Vancouver Regional District from being a specified area within the meaning of that definition;

(c) for the purposes of paragraph (b) of the definition of "specified area" in section 2.01, prescribing the treaty lands of the Tsawwassen First Nation as being a specified area within the meaning of that definition;

(d) for the purposes of paragraph (c) of the definition of "specified area" in section 2.01, prescribing an area that is not within the Metro Vancouver Regional District as being a specified area within the meaning of that definition;

(e) for the purposes of section 2.02 (4), prescribing a rate of tax that is not less than 10% and not greater than 20%;

(f) subject to conditions that may be specified in the regulation, exempting any of the following from tax under section 2.02 (3) (a) or from the requirement to provide information or records under section 2.02 (3) (b) or to file a form under section 2.02 (3) (c):

(i) a person or class of persons;

(ii) a transferee or class of transferees;

(iii) a taxable transaction or class of taxable transactions;

(g) in respect of tax under section 2.02 (3) (a) or in respect of the requirement to file a return under section 2 (1) (b), to provide information or records under section 2.02 (3) (b) or to file a form under section 2.02 (3) (c), and subject to conditions that may be specified in the regulation,

(i) deeming a foreign national or foreign corporation to be a person who is not a foreign national or foreign corporation, and

(ii) deeming persons within a class of foreign nationals or a class of foreign corporations to be persons who are not foreign nationals or foreign corporations;

(h) for the purposes of the description of "VRP" in section 2.03, providing for the method of determining the value of residential property.

(3) Regulations that may be made under this Act may be made retroactive to March 20, 1987 or a later date that the Lieutenant Governor in Council may determine and a regulation made retroactive is deemed to come into force on the date specified in the regulation.

(4) Subsection (3) does not apply to a regulation

(a) under section 2 (3),

(b) prescribing a period under section 2 (5), or

(c) under subsection (2.1) (c), (d), (e) or (h) of this section.

Regulations by the minister

37.1 The minister, for the purposes of the definition of "Habitat for Humanity" in section 4 (1), may make regulations designating a corporation that is operating in British Columbia.

Transition — tax imposed

38 Despite section 3, the tax payable under section 2 must be at the rate of 0.1% of the fair market value of the interest to be transferred under the taxable transaction if the taxable transaction is a transfer

(a) under a written interim agreement or option to purchase, made before March 20, 1987, whether or not the interim agreement or option was subject to conditions that were not satisfied before that date, if

(i) the application to register the transfer is made before December 31, 1987, and

(ii) a true copy of the interim agreement or option to purchase accompanies the return filed under section 2,

(b) under an executed taxable transaction in writing made before March 20, 1987, if

(i) the application to register the transfer is made before December 31, 1987, and

(ii) a true copy of the transfer documents accompanies the return filed under section 2,

(c) from a transferor who is a personal representative to a transferee who is a beneficiary of an estate of a deceased if the deceased died before March 23, 1987 and the transfer is tendered for registration before December 31, 1988,

(d) under an agreement for sale tendered for registration before March 23, 1987, if the purchaser under the agreement is the transferee of the transfer tendered for registration,

(e) to a transferee who has a leasehold estate with any term of years in land that was tendered for registration at the land title office before March 23, 1987 and the estate being transferred to the transferee is the fee simple in the same land,

(f) under a court order made before March 23, 1987,

(g) under an order absolute of foreclosure, if the order nisi of foreclosure was made before March 23, 1987, or

(h) under an option to purchase contained in a lease agreement in respect of Crown land if the lease agreement was entered into before November, 1987 and the Minister of Forests and Lands received written notice before January, 1989 of the transferee's intention to exercise the option.

BENNETT on RECEIVERSHIPS

Fourth Edition

2021

by

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(b) Court-appointed Receiver

With respect to court-appointed receivers, the initial order usually provides that the receiver has the power to sell the debtor's inventory in the ordinary course of business. The court has the discretion to grant the receiver the power of sale even though the security instrument contains the power. The court confirms the receiver's right to sell the debtor's inventory in the ordinary course of the debtor's business.[74] If the security instrument does not contain a power of sale clause, the court has the discretion under the original jurisdiction to grant the receiver the power of sale.

Depending on the provision in the initial order, the security holder may be required to apply to the court for any proposed sale of the debtor's business or capital assets. Court approval provides protection to the receiver, gives the purchaser valid title to the assets, and assures the creditors that the sale process is fair and reasonable. The receiver should have no authority to sell the debtor's assets out of the ordinary course of business until the security holder obtains judgment against the debtor or unless the debt is not in dispute, or there are special circumstances that warrant a sale before judgment such as where the assets are perishable or are wasting, or are declining speedily in value, or where there is clearly no equity for the debtor.[75] If special circumstances exist, the receiver should apply to the court on an urgent basis. Obtaining judgment before a sale rarely occurs.

If the security instrument contains a power of sale clause, the security holder need not apply for a court-appointed receiver, but the security holder can appoint a private receiver who then applies to the court for an order vesting title in the purchaser. The security holder must be able to justify to the court the reasons for a power of sale.[76]

In most cases, the court-appointed receiver enters into an agreement of purchase and sale with a purchaser subject to court approval following a tender offering or following private negotiations. Where the sale is subject to the court approval, the court is not bound by any contract entered into by the receiver.[77] The court looks at the broader picture to see if the contract is for the benefit of the creditors as a whole.[78] In fact, it is possible that the debtor may be able to redeem even after the receiver accepts a tender.[79]

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[74] See model template receivership order in the Appendix.

[75] *First Pacific Credit Union v. Grimwood Sports Inc.* (1984), 59 B.C.L.R. 145, 16 D.L.R. (4th) 181, 56 C.B.R. (N.S.) 7 (B.C.C.A.); *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010), 67 C.B.R. (5th) 97, 2010 BCSC 477 , 2010 CarswellBC 855 (B.C. S.C. [In Chambers]); *Southwest Marine v. Bank of British Columbia* (1985), 65 B.C.L.R. 328, 1985 CarswellBC 249 (B.C. C.A.); *Royal Bank of Canada v. Caruso* (1985), 63 B.C.L.R. 125, 1985 CarswellBC 137 (B.C. S.C.).

[76] *Toronto-Dominion Bank v. E. Goldberger Holdings Ltd.* (1993), 12 O.R. (3d) 739, 1993 CarswellOnt 599 (Ont. Gen. Div.). Subsequently, the bank applied and obtained an order permitting it to sell the debtor's property under the contractual power of sale. Absent bad faith or fraud, a court should not enjoin a mortgagee from exercising a power of sale: *Toronto-Dominion Bank v. E. Goldberger Holdings Ltd.* (1993), 14 O.R. (3d) 819, 1993 CarswellOnt 1060 (Ont. Gen. Div.).

Where the initial order is silent as to the sale of assets out of the ordinary course of business, the security holder must re-apply to the court for this type of power. If the order does not contain the authority to sell, the receiver will not be able to negotiate a sale even if such an agreement were made subject to court approval.[80] On the motion to sell the debtor's assets, or independently, the debtor can request a time period within which to redeem or refinance especially where the assets are real property and have a value sufficient to pay the creditors.[81]

In the case of real property, the court generally protects the debtor's equity of redemption for a period of time before it authorizes a sale.[82] The debtor may be able to obtaining a restraining order against the receiver to sell the property. The court has the discretion whether to grant an extension of time to the debtor to redeem. The test is that there must be a reasonable prospect of payment and that the value of the property is more than sufficient to protect the security holder.[83]

The debtor can, of course, appeal the order directing the sale, claiming that its defences go to the root of the action and that the assets should not be sold prematurely. In provinces where there is no stay of proceedings from an appeal from an order approving the sale of assets, the debtor or other interested party must apply for an injunction or stay of proceedings at the same time, as otherwise the sale will proceed long before the hearing in the appellate court. On the injunction hearing, the test regarding a stay of proceedings is the same as in any injunction proceeding, namely that the applicant must establish a *prima facie* or serious triable issue, that the applicant will suffer irreparable harm if the stay is not granted, and that the balance of convenience favours a stay of proceedings.[84]

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80 See *G. Slocombe & Associates Inc. v. Gold River Lodges Ltd.* (2001), 2 P.P.S.A.C. (3d) 324, 24 C.B.R. (4th) 32 at para. 7, 2001 CarswellBC 461 (B.C. S.C.) where the court questioned the need for court approval.

81 *Amalgamated Dairies Ltd. v. Prince Edward Island Development Agency* (1991), 90 Nfld. & P.E.I.R. 292, 5 C.B.R. (3d) 122, 1991 CarswellPEI 13 (P.E.I. T.D.).

82 *Maldon Petroleums Inc. v. Federal Business Development Bank* (1985), 63 N.B.R. (2d) 88, 164 A.P.R. 88, 1985 CarswellNB 175 (N.B. C.A.). But see *G. Slocombe & Associates Inc. v. Gold River Lodges Ltd.* (2001), 2 P.P.S.A.C. (3d) 324, 24 C.B.R. (4th) 32, 2001 CarswellBC 461 (B.C. S.C.) where the court concluded that once the receiver accepts an offer, the debtor's right to redeem terminates.

83 *Royal Bank v. Harrison Airways Ltd. et al.* (1978), 26 C.B.R. (N.S.) 190, 1978 CarswellBC 274 (B.C. S.C.).

84 *IMOR Capital Corp. v. Bullet Enterprises Ltd.*, 2012 BCSC 899, 92 C.B.R. (5th) 227 (B.C. S.C. [In Chambers]) where the court postponed the sale of real property for 6 months to give the debtor an opportunity to redeem.

Toronto Dominion Bank v. Agriboreallis (1988), 68 C.B.R. (N.S.) 313, 1988 CarswellNWT 3 (N.W.T. S.C.). In this case, the court granted six months to the debtor to redeem.

IMOR Capital Corp. v. Bullet Enterprises Ltd., 2014 BCSC 2540 (B.C. S.C.)

RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.); *Merchants & Traders Assurance Company v. Paragon Capital Corporation* (2002), 2002 ABCA 72 , 2002 CarswellAlta 345 (Alta. C.A.).

If the debtor does not have a meritorious defence, the security holder should obtain summary judgment first and then give the debtor an opportunity to redeem before the assets are sold.[85] However, if the debtor puts up a good defence, the receiver should not be able to sell the debtor's assets until there is a full hearing.

In *Re Chimo Structures Ltd.*,[86] the court concluded that the receiver did not have the capacity under the initial order to enter into an agreement of purchase and sale. The order did not provide authority to the receiver to sell the assets. The purchaser previously requested the return of the deposit and, when the receiver refused, the parties concluded a compromise agreement where part of the deposit was to be returned. When the Court of Appeal ruled against the receiver, the purchaser applied for a return of the full deposit on the basis that the receiver had no legal right to sell the assets, let alone enter into a settlement. In *Toronto-Dominion Bank v. Fortin et al. (No. 2)*,[87] the court held that, as a result of the receiver's incapacity to sell, the subsequent compromise agreement was voidable in equity. In ordering the return of the full deposit, the court stated that a court-appointed receiver, like a trustee in bankruptcy, has a higher onus than an ordinary person to return moneys obtained under a mistake of law.

If the initial receivership order does not give the receiver the right to sell the debtor's assets, the receiver has no authority to sell. However, if the receiver applies to the court for an order giving it the right to sell, the court may grant approval of an agreement of purchase and sale *nunc pro tunc* on notice to all creditors.[88]

See also *Bank of Montreal v. Trump Hydraulics Ltd.* (1970), 63 C.P.R. 42, 1970 CarswellOnt 843 (Ont. H.C.) where the debtor obtained an injunction restraining the receiver from selling certain assets pending trial.

See also *York (Regional Municipality) v. Thornhill Green Co-Operative Homes Inc.* (2008), 46 C.B.R. (5th) 237 (Ont. S.C.J. [Commercial List]) where the court dismissed the Co-operative's motion for an injunction.

85 From the security holder's point of view, such appeal proceedings offer the debtor an extended redemption period and therefore prejudice the security holder and others if there is delay and no equity. Further, where the accounts are in dispute, the court cannot set the redemption date until they are settled: see *Royal Bank v. Astor Hotel Ltd.* (1986), 70 B.C.L.R. 77, 62 C.B.R. (N.S.) 241, 1986 CarswellBC 485 (B.C. C.A.) dismissing an application for leave to appeal an order directing a sale; leave to appeal granted on fresh evidence (1986), 62 C.B.R. (N.S.) 249, 1986 CarswellBC 486 (B.C. C.A.); appeal dismissed (1986), 62 C.B.R. (N.S.) 257 (B.C. C.A.).

86 *Re Chimo Structures Ltd.* (1977), 5 B.C.L.R. 97, 26 C.B.R. (N.S.) 104, 1977 CarswellBC 252 (B.C. C.A.).

87 *Toronto-Dominion Bank v. Fortin et al. (No. 2)*, [1978] 5 W.W.R. 302, 88 D.L.R. (3d) 232, 27 C.B.R. (N.S.) 232 (B.C. S.C.).

88 *B.C. Dev. Corp. v. SpunCast Indust. Ltd. et al.* (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28, 1977 CarswellBC 250 (B.C. S.C.).

Receiver's Recommendation

Where the receiver has the authority to sell, it is not always clear when the receiver may exercise that authority. For example, the court will not approve a sale by a receiver where the parties in the action are litigating over the subject matter of the sale.[89] The court ultimately has the discretion to approve the receiver's sale after hearing the evidence in support. The receiver must demonstrate the reasons why the court ought to approve the sale. Accordingly, the receiver must show the methods and mechanics of procuring the offer including, as the circumstances may warrant, any appraisals, the exposure in the market place, the nature and amounts of secured debt against the property, including prior encumbrances, as well as show the effect on all interested persons.[90] On such applications, the receiver has a duty to make candid and full disclosure and recommend that the court approve the sale. The receiver should disclose not only facts favourable to its application, but also facts that are unfavourable to it.[91] The court usually accepts that a court-appointed receiver has acted properly unless there is strong evidence to the contrary.[92] The court-appointed receiver must be fair and balanced in its report to the court and to stakeholders. The report should not contain argument and rationalization to support its recommendation. The report should be within the bounds of reasonableness, neutral and not biased.[93] If so, the court will approve the sale:[94]

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89 *C.I.B.C. v. J & J Lumber Ltd.* (1985), 58 C.B.R. (N.S.) 151, 1985 CarswellAlta 330 (Alta. Q.B.) where the debtor successfully argued that the bank had agreed to release a warehouse property if it received payment from the debtor's other assets. Nor will the court approve a sale of assets where the closing has been delayed for six years pending intervening litigation which devalued the assets: *Bank of Montreal v. On-Stream Natural Gas Ltd. Partnership* (1995), 30 C.B.R. (3d) 285, 1995 CarswellBC 75 (B.C. S.C.). See also *Bank of Montreal v. Transo Hydraulics Ltd.* (1970), 63 C.P.R. 42, 1970 CarswellOnt 843 (Ont. H.C.) where the court restrained the receiver from selling the assets until trial.

90 In *Re Anvil Range Mining Corp.* (1998), 7 C.B.R. (4th) 51, 1998 CarswellOnt 5319 (Ont. Gen. Div. [Commercial List]), while the receiver recommended the sale of mining equipment supported by almost all the creditors, the court adjourned the hearing to permit one creditor to conduct further analysis at its own expense. The court in supervising a receivership must watch out for the social consequences of the receivership having regard to the fact that the debtor generated about 20 percent of the economy in the area.

91 *Canadian Imperial Bank of Commerce v. Morrison* (1985), 69 N.S.R. (2d) 335, 57 C.B.R. (N.S.) 319 (headnote only), 1985 CarswellNS 41 (N.S. T.D.), appeal allowed on other grounds (1986), 75 N.S.R. (2d) 406, 33 D.L.R. (4th) 132, 1986 CarswellNS 140 (N.S. C.A.).

See also *4202643 Canada Inc. v. 8186980 Canada Inc.* (2006), 10 P.P.S.A.C. (3d) 187, 28 C.B.R. (5th) 49, 2006 CarswellAlta 968 (Alta. Q.B.) where the court approved the receiver's sale after the receiver widely advertised the debtor's assets but had received a letter from one of the secured parties raising a number of issues unrelated to the sale price.

92 *Fernande v. Francis* (2008), 45 C.B.R. (5th) 228, 2008 CarswellOnt 3082 (Ont. S.C.J.) relating to *Re Bakemakes International Inc.*, [2003] O.J. No. 3181 at paras. 18 and 19, 2003 CarswellOnt 3075 (Ont. S.C.J.), appeal dismissed [2004] O.J. No. 2463, 2004 CarswellOnt 2339 (Ont. C.A.).

93 *Canwell Ventures LLC v. Ambercore Software Inc.*, 2011 ONSC 1138, 2011 CarswellOnt 1969, 74 C.B.R. (5th) 298 (Ont. S.C.J. [Commercial List]) where the receiver's material was completely inadequate, and in particular, there was no valuation of the assets for a court to consider whether the sale was in the best interests of the stakeholders.

CanLII

Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions

2022 CanLIIDocs 431

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Introduction*

Reverse vesting orders (RVO) are a relatively new tool being used by insolvency practitioners in *Companies' Creditors Arrangement Act* (*CCAA*) and other insolvency proceedings.[1] RVO usually involve the sale of an insolvent debtor company's shares to a purchaser in a transaction where unwanted assets and liabilities are excluded in the purchase transaction and are transferred, assigned and vested in a newly-incorporated company ('newco') as part of a pre-closing reorganization, allowing the debtor company to shed liabilities and retain the most valuable assets.

The result of an RVO is to expunge the existing corporate structure of the debtor company of anything the purchaser does not want. The newco is added to the insolvency proceeding and continues in that process while the debtor company exits the insolvency proceeding with broad liability releases; then the newco is liquidated or placed in bankruptcy to be liquidated. The transaction takes place outside of a negotiated and court-approved plan of arrangement or compromise.[2]

The benefits of such transactions accrue primarily to senior secured lenders and the purchaser, which may or may not be related parties. The purchaser acquires the existing debtor without many of the liabilities, ostensibly to allow the business to continue operating under new owners. This strategy can preserve non-transferable licenses, permits, intellectual property, and/or tax attributes such as tax losses, all of which provide value only if exercised by the debtor. The rationale is that the process can be efficient, particularly for debtor companies operating in a highly regulated environment, and going-concern value can be preserved. In several cannabis insolvencies, there have not been any secured creditors and the value has gone to creditors generally, often the founding owners that funded the start-up.

Weighed against these benefits is the concern that the RVO approach bypasses key components of the statutory framework that balances multiple creditor rights and interests, including the ability of creditors to vote on a plan. While one benefit of an RVO is often described as cost-savings if a plan vote is avoided, the cases reveal that RVO can be complex and costly to structure and implement. There is also a question of whether companies will be able to shed substantial environmental remediation and

reclamation obligations under this new structure, leaving few assets to satisfy the obligations. In some instances, the RVO offers secured creditors a new "race to the assets" that the statutory stay provisions were originally designed to slow down to give a meaningful opportunity to negotiate with all creditors.[3]

To date, most of the RVO transactions have been approved by the courts without reasons, either because they have been uncontested, or where they have been contested, the focus has been on the court's statutory authority. Many judgments have relied on other judicial endorsements of RVO, with little or no discussion of the court's authority. In part, the absence of judicial reasons regarding RVO may be a function of the increasingly complex financial reasons for insolvencies and increasing pressures on the court to sanction strategies that speedily resolve the financial distress. It reflects a larger trend of parties placing voluminous material before the court without it giving adequate time to fully understand the transaction. Endorsements without any reasoning leave stakeholders, regulators, and other courts with uncertainty on the criteria that the courts are applying in departing from the general framework of the statute. In some cases, a going-concern business is the objective, but without some of the guardrail protections that the plan of arrangement process offers.

While there has been commentary on the positive features of such transactions,[4] there is a lacuna in the commentary on the prejudice that may be experienced by various creditors and other stakeholders given the nature of these transactions. A recent *Financial Post* article quotes Canadian insolvency practitioners as saying that there will be a significant diminution of *CCAA* plans of arrangement and that RVO will become the predominant transactional path to effectuate a restructuring in a distressed context.[5] In the space of two years, RVO have gone from being approved only in 'exceptional' circumstances,[6] to a push for being the norm. The building pressure to be the norm is troubling insofar as the RVO approach effectively uses the *CCAA* process, but bypasses the framework set out in the statute.

Why are RVO so popular? The *Financial Post* article notes that practitioners are selling RVO to potential clients on the basis that, among other factors, creditor votes are not required; the "purchaser does not have to offer employment to employees; nor do purchasers have to take on pensions and benefits plans; licenses and permit[s], even those purporting to be non-transferable can remain in place"; and execution risks are minimized.[7]

This brief paper highlights some issues for consideration as the courts move forward in their deliberation of RVO. It starts from the premise that the court has authority to approve an RVO pursuant to sections 11 and 36 of the *CCAA* and the court's general authority under the statute. However, it suggests that there 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. Just as the provisions limiting initial stay periods under the *CCAA* are aimed at improving the participation of all stakeholders and encouraging parties to act in good faith,[8] the courts should ensure that their court-appointed officers are establishing guardrails that protect stakeholders and the integrity of the insolvency regime.

The Court's Authority to Approve an RVO

The Supreme Court of Canada (SCC) has consistently held that the remedial objectives of Canadian insolvency laws are to provide timely, efficient, and impartial resolution of a debtor's insolvency, preserve and maximize the value of a debtor's assets, ensure fair and equitable treatment of the claims against a debtor, protect the public interest, and balance the costs and benefits of restructuring or liquidating the

debtor company, where possible avoiding the social and economic losses resulting from liquidation of an insolvent company by facilitating the reorganization and survival of the business as a going concern.[9] Considerable deference is typically given by appellate courts to the *CCAA* supervising judge, given the broad statutory authority of the *CCAA* and the extensive knowledge of the proceeding acquired by the judge.

Section 11 sets out the general authority of the court in *CCAA* proceedings. Specifically, 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."[10] This broad statutory authority allows the court to make determinations where there are gaps in the express provisions; however, the authority is qualified in that it must always be exercised within the framework of the statute, having careful regard to the objectives of the *CCAA.*[11]

The other source of authority for RVO that courts have relied on is s. 36 of the *CCAA,* which allows for the sale or disposition of assets outside the ordinary course of business if specified criteria are met. In exercising its authority pursuant to s. 36 to approve a sale, the court must be satisfied that notice has been given "to the secured creditors who are likely to be affected by the proposed sale or disposition."[12] The court is to consider, among other factors: "(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."[13]

These factors involve the court weighing the evidence, including valuations of different options for dealing with the insolvency, and balancing the interests of diverse stakeholders. The language is quite specific in s. 36(1) that 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."[14] Certainly s. 36 has evolved since its enactment to encompass 'liquidating *CCAA*', but is it clear that an RVO of liabilities is included, and if it is, are the same considerations adequate?

Leaving aside this question, the combination of these statutory provisions and the caselaw suggest that there is a basis for approval of an RVO pursuant to the broad statutory authority of the court. The SCC has held that the exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs.[15] The important question is what factors the court should consider in approving an RVO, particularly in circumstances where the RVO approach does not form part of a plan of arrangement pursuant to the statute. A relevant issue is whether the RVO is being used to deliberately evade the plan process, including voting procedures, and have the proponents of the RVO justified evasion of these requirements?

The RVO resembles features of bank resolution proceedings adopted in Canada and internationally.[16] The rationale in bank resolution proceedings for overriding creditor voting rights, embedded in the statutory resolution framework, is that the protection of the financial system is a paramount consideration, including protection of deposit-holders' savings and policyholders' life annuities. Given the systemic risks of financial institution failure, extraordinary remedies for resolution are authorized over a very tight time frame, without a creditor vote, but with a resolution authority granted broad statutory powers.[17] None of

these bank resolution proceeding features are present in the corporate insolvencies involving RVO. They do not involve protection of the financial system. In contrast to a bank resolution proceeding, the RVO transaction does not need to occur over a weekend or in a few days to prevent collapse of the financial system. There is no risk of a run on the financial system from a corporate insolvency. Given these distinctions, what principles should inform the court's decision to approve a transaction?

The Genesis and Development of the RVO

It merits considering the first *CCAA* case that used an RVO outside of a plan of arrangement,[18] because it was approved on an exceptional basis. In that case, the court was persuaded that it had all the features of a plan of arrangement.[19] Plasco Energy was a 2015 *CCAA* proceeding before the Ontario Superior Court of Justice, in which the Court approved a sale transaction of certain equipment, a global settlement with commercial entities, and a settlement with government entities. Collectively, the settlements were aimed at selling the principal assets of the applicants, facilitating an orderly liquidation, and satisfying the debtor companies' decommissioning and environmental remediation obligations.

The Court's approval in Plasco Energy is a five-page handwritten decision by Justice Wilton-Siegel, who held that the court had jurisdiction to approve the sale transaction, applying the criteria in s. 36 of the *CCAA* and the *Royal Bank v Soundair Corp* tests,[20] and approving the settlement agreements pursuant to s. 11 of the *CCAA*.[21] Of note are the following findings of the court:

- There was an extensive sales process that failed to produce any bids for the business and there was no evidence of any unfairness in the sales process.
- There was extensive consultation with both secured and unsecured creditors and other stakeholders likely to be affected by the transaction; and the secured creditors and 95% of the unsecured creditors supported the transaction.
- The court's authority to approve settlement agreements pursuant to s. 11 must further the purposes of the CCAA, which, in this case, entailed an orderly wind-up of the business and a maximization of recoveries for its creditors and other stakeholders".
- "The test for approval requires demonstration that: (1) the settlement is fair and reasonable; (2) the settlement will be beneficial to the debtor and its stakeholders generally; and (3) that the settlement is consistent with the purpose and spirit of the *CCAA*."
- A key feature was that it allowed for the decommissioning of a facility in a cost-effective way that satisfied the fairness and reasonableness requirements consistent with the purpose of the *CCAA.*
- The settlement was analogous to a *CCAA* plan "in the context of these particular proceedings".[22]

In the past two years, RVO have been approved for debtors in at least 20 cases outside of a plan of arrangement and sidestepping creditor voting, including a debtor developing lithium deposits,[23] to preserve cannabis licenses,[24] proposal proceedings,[25] construction projects,[26] and companies in the entertainment,[27] retail,[28] energy,[29] grain,[30] and mining sectors.[31] Terms being used include 'newco', 'residualco', and 'excludedco' to refer to the separation of the debtor as an entity from its liaiblities under new corporate structures that are added to the insolvency proceeding, with the original debtor exiting without its prefiling liabilities and obligations.

Often the proceedings involve complex arrangements in respect of leases,[32] relief due to the COVID 19 pandemic,[33] disclaimer of supply and other contracts,[34] and vesting off of contractual rights in a sale process.[35] In some cases, the transaction is altered from a proposed plan process late in the proceeding to proposing an RVO transaction, at the point that the court is presented with untenable alternatives. More recently, use of RVO has expanded to receivership.[36] Another court noted from the records that the transaction value in that case was only sufficient to repay the interim lender and perhaps some amount for the first secured creditor.[37] One RVO transaction was approved on the basis that it was unopposed and supported by the monitor, the transaction satisfied s. 36(3) of the *CCAA* and the *Royal Bank v Soundair Corp* tests, and the court was advised that the proposed transaction was economically superior to an estimated liquidation value.[38] Another case dismissed objections to RVO where the objecting creditor failed to establish it did not receive notice, without analyzing considerations that court should apply in approving RVO.[39] Some cases have involved what the court perceived as inappropriate behaviour of an objecting party, viewing their objection to the RVO as a bargaining tool.[40]

Of concern is that there may be an unwarranted presumption in the RVO jurisprudence that such objections are tactical only, made by 'out of the money' creditors. Creditors are able to legitimately represent their interests within the framework of the statute.

In uncontested cases, other than the first decision, there is almost no discussion of the court's jurisdiction or the principles it has applied in approving the RVO, other than to acknowledge that it has been approved in other proceedings.[41] This situation is exacerbated by some parties arguing great time pressure for the transaction to be approved, contending it is the only viable alternative to preserve the going-concern value of the debtor. However, the evidence establishing this urgency is not cited in the court's reasoning. The 2019 amendments on the scope of first day orders and interim financing were intended to push back on the artificial urgency created by some debtors except in truly urgent cases; the same standard should be applied to consideration of RVO.

In the United Kingdom, the courts have pushed back on proponents claiming that the insolvency scheme/plan needs to be rushed through due to extreme urgency or because it is the only viable option. For example, Mr Justice Richard Snowden in *Re Noble Group Ltd* observed:

> It is important that the Court is not taken for granted and its willingness to assist must not be abused. That means that the Judge hearing a scheme case needs to be given adequate time for pre-reading and for the hearing, including time to consider what decision to make and to prepare a judgment. The parties involved in restructuring discussions must understand that they cannot run things down to the wire for their own benefit and without due regard for the proper process of the Court. Negotiations must be finalised in good time. The position should not be reached in which the Court is presented with a metaphorical "gun to the head" and the Judge is in effect told that if he does not comply with the company's application immediately, he will be responsible for the collapse of the company because other creditors (and in this case the SIC) will be unwilling to extend their deadlines."[42]

The majority of the decisions approving RVO do not offer any reasoning why the statutory provisions of proposing a plan and conducting a creditor vote could not be complied with by the applicant.[43] There are usually no reasons in the court's endorsement of whether creditors are prejudiced by the RVO, for example, assessment of whether the liquidation value under the *BIA* is higher than realization under the RVO, given that the *BIA* sets out a clear hierarchy of claims and requires the trustee to maximize value of the estate for the benefit of creditors.

To date, there have been four contested RVO proceedings. These cases have been described in detail elsewhere,[44] but a few points of note are raised here for discussion.

In approving the RVO in *Nemaska Lithium*, the *CCAA* judge conducted nine days of hearing on the proposed transaction, having the parties explain the rationale for each step of the complex corporate and commercial transaction.[45] The transaction arose out of an approved sale and investment solicitation process (SISP) that involved 18 months of canvassing the market, and resulted in only one remaining offer.[46] The Court cited extensively from the SCC in *Callidus* regarding the role of the *CCAA* judge and the objectives of the *CCAA,* including, to resolve the insolvency of a debtor in a timely, efficient and impartial manner; preserve and maximize the value of assets; ensure fair and equitable treatment of claims; protect the public interest; and balance the costs and benefits of restructuring or winding up a company, the Court noting that the *CCAA* generally prioritizes avoiding social and economic losses resulting from the liquidation of an insolvent company.[47] In applying the s. 36 criteria, the Court held that the structure of the *CCAA* allows it to balance these remedial objectives on a case-by-case basis.[48] The Court concluded that the debtors had acted in good faith and with the required diligence, and held that « La refuser serait catastrophique! » (to not approve it would be catastrophic).[49]

The Court in *Nemaska Lithium* found that the RVO structure was efficient; would not require the reissuance or transfer of the debtors' mining lease, mining claims or environmental permits, allowing the business to be developed on an expedited timeline; substantially all of the current employees would be retained; and the rights of the Cree parties pursuant to an agreement would not be affected.[50] Only one creditor voiced objection to the RVO; however, the court offers no reasoning on why a positive vote on a plan under the statutory framework could not be achieved. If bypassing plans is to be allowed, the proponents need to lead evidence to justify the need for such an exceptional remedy and an impartial assessment should be reported by the monitor to the court.

The Québec Court of Appeal denied two applications for leave to appeal the decision of the *CCAA* judge in *Nemaska Lithium*, with further leave denied by the SCC.[51] The Court of Appeal held that the RVO allows the purchaser to continue to carry on operations in a highly regulated environment by maintaining existing permits, licences, essential contracts and fiscal attributes, and leave would hinder the progress of the proceedings. The Court held that the "proposed RVO provides for the acquisition by the impleaded parties of the shares of Nemaska entities free and clear of the claims of creditors which are transferred along with unwanted assets to a newly incorporated non-operating company, as part of a pre-closing reorganization",[52] noting that the "*CCAA* judge also insisted on the fact that the expungement of real rights was contemplated by s. 36(6) and was a necessary condition to the implementation of a solution, and served to prevent a veto on the part of the holders of those real rights."[53] The appellate court affirmed the judge's approval of the RVO, finding that it was essentially a credit bid whereby the shares of the Nemaska entities are acquired in return for the assumption of the secured debt.[54]

With great respect, s. 36 discusses asset sales outside the ordinary course of business and there is nothing in the statutory language that refers to vesting liaiblities. The Court of Appeal could have taken the opportunity to consider the implications of this interpretation of s. 36, and to set some guardrail protections for creditors. Moreover, s. 36(6) expressly states that where the court authorizes a sale free of any security or charge, it "shall order" that other assets of the company or the proceeds of the sale be subject to a security, charge or other restriction in favour of the affected creditor. There has been no

judicial consideration of what that provision means in the context of an RVO, and arguably, it does not mean leaving the charge over assets that have little or no value as the assets of value have been moved out of reach of creditors.

In *Quest University*, an RVO was approved in a *CCAA* proceeding of a financially distressed university in order to preserve a license to operate and grant post-secondary degrees.[55] The *CCAA* judge noted that the ability of a judge to be innovative is not boundless, and the court must exercise its authority in furtherance of the *CCAA*'s remedial objectives.[56] The Court must keep in mind three baseline considerations: the applicant bears the burden of demonstrating that the order sought is appropriate in the circumstances, advancing the policy objectives underlying the *CCAA,* and that the applicant has been acting in good faith and with due diligence.[57] The exercise of discretion by the *CCAA* court should advance basic fairness, and "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," and the substantive aspect of fairness is based on the assumption that all involved parties face real economic risks and the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute."[58] The Court in *Quest University* held: "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."[59] The British Columbia Court of Appeal (BCCA) declined to grant leave to appeal the RVO decision in *Quest University*, finding that granting leave would likely doom the transaction and harm Quest's stakeholders.[60]

In both of the above judgments, one point is of note. The Court in *Nemaska Lithium* held that its role is not to tell the offerors which terms and conditions must form part of the transaction,[61] and the Court in *Quest University* held that "it is not up to the Court to dictate the terms and conditions that are included in an offer".[62] Yet the SCC has made clear in the context of directors' statutory duties that the court "should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made."[63]

In *Clearbeach and Forbes,* the Ontario Superior Court of Justice approved an RVO without a plan vote. This approval was granted notwithstanding the objection of several municipalities to which the debtor owed municipal taxes that the RVO would extinguish. These creditors argued that the "lost tax arrears will significantly impact vulnerable taxpayers and affect services and infrastructure".[64] The debtor also owed an estimated $9 million in mine abandonment and reclamation costs. The RVO was aimed at preserving Ministry of Natural Resources' licenses and ensuring that stewardship and environmental obligations in connection with abandonment stayed with the debtor company.[65] The Court's decision applies the s. 36 *CCAA* requirements and *Royal Bank v Soundair* tests.[66] The Court noted that "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",[67] and acknowledged that the RVO will prejudice holders of gross overriding royalty agreements and the municipalities, but found that prejudice would also occur in bankruptcy, as the debtor would have to pay its environmental obligations in priority in bankruptcy.[68] In response to the municipalities' complaint of deficient consultation with them regarding the RVO transaction, the Court noted that the federal government was consulted and that "Creditor consultation is only one of the factors to be considered by the Court in the

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approval of the proposed RVO in accordance with the *Soundair* principles and s. 36(3) of the *CCAA*."[69] There are no written reasons given by the court as to why plan negotiations and a vote needed to be by-passed.

As many *CCAA* proceedings in the past have illustrated, negotiations and a creditor vote can lead to innovative and fairer outcomes in which parties compromise rights today for future upside value.[70] Negotiations can lead to higher value being paid for the licenses and the shedding of liaiblities; or the debtor can negotiate deferral or compromise of claims until such time as the debtor is once again a viable entity.

Absent negotiations, the purchaser gets all the forward-value of the debtors' activities and the creditors whose claims are transferred to newco receive nothing of that forward-value for the value of their pre-filing claims. Yet the participation of creditors can enhance asset value in some cases. A presumption that the delay and costs of a vote are not worth it does not address the risk of opportunistic behaviour by debtors/secured creditors if they can bypass a vote.

A recent example of the Ontario Superior Court of Justice declining to approve a sale transaction under the *CCAA* (not an RVO) illustrates the importance of the court being satisfied that parties are acting in compliance with the statute and importance of creditor negotiations. Chief Justice Morawetz held that the court has the jurisdiction to approve the sale of the assets of a debtor company in the *CCAA* proceeding in the absence of a plan where such sale is in the best interests of stakeholders generally and where the sale as a going concern is consistent with the purposes of the *CCAA*.[71] However, the Court declined to approve the transaction because the sale was to related parties, and the parties had not met the s. 36(4) criteria, specifically, that good faith efforts were made to sell or otherwise dispose of the assets to parties not related to the company, and the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.[72] No efforts were made to sell to unrelated parties.[73] The monitor had not objected to the statutory violation.

Chief Justice Morawetz held that the consideration referenced in the proposed transaction was not superior to the receivership/bankruptcy alternative and the s. 36(4) requirements had not been satisfied.[74] Chief Justice Morawetz rejected the argument of the debtor MEI and owner Mr McEwan that it was not practicable to consider a sale to a third party, given that McEwan as 'celebrity chef' was key and McEwan "was not interested in continuing this type of a business operation under ownership of an unrelated purchaser"; the Court finding the explanation fell short of establishing that good faith efforts were made to sell the assets to unrelated persons.[75] There was no evidence provided by MEI or the monitor that would allow the court to conclude that the consideration to be received was superior to the consideration to be received under any other offer made in accordance with a sale process.[76] The ruling resulted in the parties going back into negotiations and ultimately resolving creditor objections and terminating the *CCAA* proceedings.[77]

The judgment highlights two points. First, the court's obligation to satisfy itself that the statutory provisions are being complied with, even where its court-appointed officer has failed to alert the court to a violation. Second, the reality is that when a court rules against commercial parties that claim they will not agree to any changes or compromises, they ultimately do bargain further and come to an agreement with creditors. The current practice of endorsing RVO without consideration of the policy and statutory framework of the *CCAA* undermines the ability of all creditors to bargain.

In *Re Port Capital Development (EV) Inc*, the British Columbia Supreme Court approved a sale transaction as an RVO; and while the case was contested, no one challenged the authority to approve an RVO structure and the Court did not consider the matter, except to cite its previous decision in *Quest* that it will garner significant benefits to stakeholders.[78] After a prolonged and contested dual-track SISP, the Court approved the RVO transaction,[79] noting the court must exercise its discretion with a view to the remedial purposes of the *CCAA*, and the requirements of appropriateness in advancing the *CCAA*'s policy objectives, good faith, and due diligence.[80] The BCCA granted leave to appeal this decision to a panel of five judges to consider the question of how to treat competing offers under the *CCAA*.[81] On the merits, the Court of Appeal allowed the appeal and held that "it would be impractical to remit this matter at this late stage to the Supreme Court for reconsideration."[82] The Court of Appeal did not discuss criteria or authority in respect of RVO, although it did endorse the idea that there can be arrangements that are not subject to approval by creditors, the court reasoning that interim financing and liquidations in a number of cases have not required a plan vote.

Some RVO transactions are being driven by secured creditors whose interests are not fully covered by their security and can involve the purchaser paying for value inherent in licenses and permits to assist in paying out secured claims. This approach is a reasonable business decision, but the court should be satisfied that the valuation of these assets is not satisfying only secured claims without considering whether value could be maximized for other creditors under a plan of arrangement, a proposal or *BIA* bankruptcy proceeding, processes that require the debtor and the insolvency professional to satisfy creditors and the court that it has maximized the value of the assets for the general benefit of creditors. The court should also be satisfied that the transaction is not leaving the value of the assets in the debtor to satisfy the unsecured portion of secured claims and transferring other unsecured claims into newco and out of reach of realizing on the value those assets to meet their claims.

The policy implications are that RVO may be covertly introducing cramdown by another name into the Canadian insolvency regime, obtaining *de facto* approval of a transaction, with the RVO approach dispensing with any need to incentivize out-of-the-money creditors to support the proposed transaction. In this respect, it undermines creditor democracy and can deprive certain unsecured creditors of their proportionate share of accretive value of the debtor's assets.