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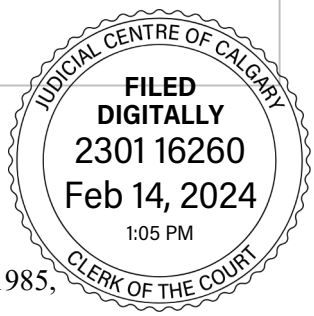

COURT FILE NUMBER	2301-16260
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PROCEEDING	IN THE MATTER OF *THE COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF FREE REIN RESOURCES LTD.
APPLICANT	INVICO DIVERSIFIED INCOME LIMITED PARTNERSHIP, by its general partner, INVICO DIVERSIFIED INCOME MANAGING GP INC.
RESPONDENT	FREE REIN RESOURCES LTD.
DOCUMENT	**AUTHORITIES TO THE BRIEF OF LAW OF INVICO DIVERSIFIED INCOME LIMITED PARTNERSHIP**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Fasken Martineau DuMoulin LLP** Barristers and Solicitors Suite 3400, 350 7 Avenue SW Calgary Alberta T2P 4K9 **Solicitor: Robyn Gurofsky / Anthony Mersich** Telephone: (403) 261 9469 / (587) 233 4124 Email: rgurofsky@fasken.com / amersich@fasken.com File Number 324505.00011

AUTHORITIES TO THE BRIEF OF LAW OF INVICO DIVERSIFIED INCOME LIMITED PARTNERSHIP
APPLICATION TO BE HEARD BY
THE HONOURABLE JUSTICE M. HOLLINS

February 23, 2024 at 2:00 p.m.

LIST OF AUTHORITIES

1. *Harte Gold Corp.* (Re), 2022 ONSC 653, 2022 CarswellOnt 1698;
2. *Royal Bank v. Soundair Corp*., 1991 CarswellOnt 205;
3. *Romspen Investment Corporation v. Tung Kee Investment...,* 2023 ONSC 5911,...;
4. *Just Energy Group Inc. et. al. v. Morgan Stanley Capital...*, 2022 ONSC 6354,...;
5. *Acerus Pharmaceuticals Corporation* (Re), 2023 ONSC 3314, 2023 CarswellOnt 8791;
6. *Rambler Metals and Mining Limited*, Re CCAA, 2023 NLSC 134, 2023 CarswellNfld 254;
7. *CannaPiece Group Inc v. Marzilli*, 2023 ONSC 3291, 2023 CarswellOnt 9600;
8. *Arrangement relatif à Blackrock Metals Inc*., 2022 QCCS 2828, 2022 CarswellQue 10503;
9. *Orphan Well Association v. Grant Thornton Ltd*., 2019 SCC 5, 2019 CSC 5, 2019...;
10. *Accel Canada Holdings Limited* (Re), 2020 ABQB 182, 2020 CarswellAlta 475;
11. *Third Eye Capital Corporation v. Ressources Dianor*..., 2019 ONCA 508, 2019...;
12. *Bank of Montreal v. Dynex Petroleum Ltd*., 2002 SCC 7 at para 22;
13. *Manitok Energy Inc* (Re), 2018 ABQB 488, 2018 CarswellAlta 1235;
14. *Bank of Montreal v. Dynex Petroleum Ltd.*, 1999 ABCA 363, 1999 CarswellAlta 1271'
15. *Third Eye Capital Corporation v. Ressources Dianor*..., 2018 ONCA 253, 2018...;
16. *Prairiesky Royalty Ltd v. Yangarra Resources Ltd*, 2023 ABKB 11, 2023 CarswellAlta 30;
17. *Vandergrift v. Coseka Resources Ltd*., 1989 CarswellAlta 76;
18. *Alberta Energy Regulator v. Lexin Resources Ltd*., 2018 ABQB 590, 2018 CarswellAlta...;
19. *Companies' Creditors Arrangement Act*, R.S.C. 1985;
20. *U.S. Steel Canada Inc*., Re, 2016 ONCA 662, 2016 CarswellOnt 14104;
21. *Bankruptcy and Insolvency Act*, R.S.C. 1985;
22. *Proposition de CL Métal inc*. 2017 QCCS 2931;
23. *Strait Line Contractors Ltd. (Receiver of) v. Rainbow Oilfield*..., 1991 CarswellAlta 47;
24. *Quest University Canada* (Re), 2020 BCSC 1883, 2020 CarswellBC 3091;
25. *Bear Hills Pork Producers Ltd*., Re, 2004 SKQB 213, 2004 CarswellSask 417;

26. In the Matter of the Bankruptcy of Goldenkey Oil Inc., Alberta Court of King's Bench Court File No. 25-2906009, Bench Brief of PricewaterhouseCoopers Inc. LIT in its capacity as Trustee in Bankruptcy of Goldenkey Oil Inc., filed January 23, 2024, and Sale Approval and Vesting Order granted by Bourque, J. on January 24, 2024;

27. *2123201 Ontario Inc v Israel Estate*, 2016 ONCA 409.

TAB 1

2022 ONSC 653
Ontario Superior Court of Justice [Commercial List]

Harte Gold Corp. (Re)

2022 CarswellOnt 1698, 2022 ONSC 653, 343 A.C.W.S. (3d) 284, 97 C.B.R. (6th) 202

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)

Penny J.

Heard: January 28, 2022
Judgment: February 4, 2022
Docket: CV-21-00673304-00CL

Counsel: Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais, for Applicant
Joseph Pasquariello, Chris Armstrong, Andrew Harmes, for Court appointed Monitor
Leanne M. Williams, for Board of Directors of the Applicant
Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji, for 1000025833 Ontario Inc.
Stuart Brotman, Daniel Richer, for BNP Paribas
Sean Collins, Walker W. MacLeod, Natasha Rambaran, for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited
David Bish, for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates
Orlando M. Rosa, Gordon P. Acton, for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)
Timothy Jones, for Attorney General of Ontario

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court

Company operated gold mine — Company encountered growing liquidity problem — Company developed plan to attract new capital through potential sale — No binding offers were received — Further sale and investment solicitation process led to two competing proposals from its primary secured creditors — One of creditors had winning bid and proposed purchase was structured as reverse vesting order — Company brought motion for orders approving creditor transaction, including reverse vesting order structure, extending stay and expanding monitor's powers — Motion granted — Section 11 of Companies Creditors Arrangement Act clearly provided court with jurisdiction to issue reverse vesting order, provided discretion available under s. 11 of Act was exercised in accordance with objects and purposes of Act — Reverse vesting order should continue to be regarded as unusual or extraordinary measure and approval of such structure should involve close scrutiny — Reverse vesting order sought in instant case was in creditors' and stakeholders' interests — Order was appropriate as it would provide for timely, efficient and impartial resolution of company's insolvency; preserve and maximize value of company's assets; ensure fair and equitable treatment of claims against company; protect public interest; and balance costs and benefits of company's restructuring or liquidation.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

Company operated gold mine — Company encountered growing liquidity problem — Company developed plan to attract new capital through potential sale — No binding offers were received — Further sale and investment solicitation process led to two competing proposals from its primary secured creditors — One of creditors had winning bid and proposed purchase was structured as reverse vesting order — Company brought motion for orders approving creditor transaction, including reverse vesting order structure, extending stay and expanding monitor's powers — Motion granted — Company was seeking to extend stay period to allow it to proceed with closing transaction, while at same time preserving status quo and preventing creditors and others from taking steps to try and better their positions — No creditors were expected to suffer material prejudice as result of extension of stay of proceedings.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Monitor

Company operated gold mine — Company encountered growing liquidity problem — Company developed plan to attract new capital through potential sale — No binding offers were received — Further sale and investment solicitation process led to two competing proposals from its primary secured creditors — One of creditors had winning bid and proposed purchase was structured as reverse vesting order — Company brought motion for orders approving creditor transaction, including reverse vesting order structure, extending stay and expanding monitor's powers — Motion granted — Order for monitor's expanded powers was intended to provide monitor with power to administer affairs of new companies, established to complete transaction, along with powers necessary to wind down proceedings and put new companies into bankruptcy following close of transaction.

MOTION by company for approval of sale of company's mining enterprise to strategic purchaser, including reverse vesting order structure of transaction, and for order extending stay and expanding monitor's powers.

***Penny J.*:**

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 Corp1991 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 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.

Motion granted.

Footnotes

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.

End of Document

TAB 2

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency
Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.
S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.
Held:
The appeal was dismissed.
Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.
The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.
The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the assets to them.
Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.
Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the "receiver") as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person.

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the Receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

6 Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

7 The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers, whether direct or indirect. They were Air Canada and Canadian Airlines International.

8 It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1990. On March 6, 1991, the receiver received an offer from Ontario Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

9 In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited ("922") for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the "922 offers."

10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-

guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer, which was acceptable, and the 922 offer, which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

> Its decision was made as a matter of business judgment *on the elements then available to it* . It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.

TAB 3

2023 ONSC 5911
Ontario Superior Court of Justice [Commercial List]

Romspen Investment Corporation v. Tung Kee Investment Canada Ltd. et al.

2023 CarswellOnt 16404, 2023 ONSC 5911

IN THE MATTER OF SECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, C.B-3, AS AMENDED, AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990 C. C.43, AS AMENDED

Romspen Investment Corporation (Applicant) AND Tung Kee Investment Canada Ltd. and Tung Kee Investment Limited Partnership (Respondents)

Peter J. Osborne J.

Heard: October 6, 2023
Judgment: October 19, 2023
Docket: CV-23-00703161-00CL

Counsel: Davis Preger, Lisa Corne, David Seifer, for Applicant
Maya Poliak, for Respondents
Roger Jaipargas, for Amber Mortgage Inv. Corp.
Vern DaRe, for 2149602 Ontario Inc., Frank Pa and Stephen Tung
Bota McNamara, Amandeep Sidhu, for Sow Capital Ontario Limited
Justin Chan, for DX Strategies
Ian Klaiman, for 2816513 Ontario Inc.
Ken Rosenberg, for Times Group
Chad Kopach, for Proposed Receiver - EY

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency; Property
Headnote
Bankruptcy and insolvency
Civil practice and procedure
Real property

***Peter J. Osborne J.*:**

The Receivership Application, the Two Sale Approval Motions and the Positions of the Parties

1 The Applicant, Romspen Investment Corporation ("Romspen"), seeks an order allowing the Application and appointing Ernst & Young Inc. as receiver and manager (the "Receiver") over the assets and property of the Respondents / Debtors Tung Kee Investment Canada Ltd. (TKIC") and Tung Kee Investment Limited Partnership ("TKIL") including the property at 3143 19th Ave., Markham, Ontario (the "Property").

2 The Property consists of three separate legally described parcels which collectively comprise an area of approximately 66.29 acres of developable vacant land. The Debtors had planned a mixed-use development including a film studio, offices, a hotel and retail, although that did not proceed.

3 Within the Application, Romspen moves for an order approving an agreement of purchase and sale between Romspen and Times 1010 Inc. ("Times") dated September 15, 2023, as amended (the "Times Transaction"), and authorizing the Receiver

83 Finally, the Respondents submit that they are really the only fulcrum stakeholders affected by the result here, since Romspen in first position, and maybe also Sow in fifth position, will be paid out in full. They therefore submit that there is no prejudice to any of the mortgagees, specifically including Romspen and Sow, to permit the Receiver time to market and sell the property.

84 I cannot accept that there is no prejudice to the mortgagees. The market is uncertain as evidenced by, among other things, the lack of a large number of offers generally and by the fact that the purchaser under the April, 2023 transaction who initially walked away, subsequently submitted an unconditional offer but only at 75% of its originally proposed purchase price.

85 I cannot accept the bald assertion by the Respondents that this case is distinguishable from the facts in *Elleway* , since the facts here clearly demonstrate that there will be no erosion of realization on security by the mortgagees caused by additional delay. There may very well be erosion of realization by further delay, with the professional costs and the very significant interest that continues to accrue on all of the mortgages.

86 In short, I am satisfied that it is in the best interests of the stakeholders that, as recommended by the Receiver, the Times Transaction, representing an unconditional commitment to purchase the Property in a very short period of time, be approved, and that another sales process is unlikely to yield a higher or otherwise better offer for the Property.

87 It follows that I decline to impose the term urged by the Respondents to the effect that this approval is without prejudice to their right to still attack the transaction as an improvident sale. I accept the submission of Romspen that such a condition or term is antithetical to the basis upon which the sale transaction is approved in the first place. The purchaser in the Times Transaction wants, and in my view is entitled to, a vesting order confirming that title is free and clear. The other stakeholders equally desire this, in order that purchasers are properly incentivized to offer maximum value and favourable terms.

88 Finally, I observe that 281, the proposed purchaser in the 281 Transaction, submitted a Responding Motion Record containing the affidavit of a senior officer of 281 and related entities, submitted a factum, and had counsel who appeared on the motion.

89 As a preliminary matter, I accept the general proposition urged by counsel for Times, that unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate. As stated by Farley, J. in Skyepharma PLC and Hyal Pharmaceutical Corporation, 1999 CarswellOnt 3641, [1999] O.J. No. 4300, [2000] B.P.I.R. 531, 12 C.B.R. (4th) 87, 92 A.C.W.S. (3d) 455, 96 O.T.C. 172 at para. 8:

> Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate. They have no legal or proprietary right as technically they are not affected by the order. They have no interest in the fundamental question of whether the court's approval is in the best interest of the parties directly involved. See *Crown Trust Co. v. Rosenberg* at pp. 114-119 and *British Columbia Development Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28 (B.C. S.C.) at pp. 30-31. The corollary of this is that no weight should be given to the support offered by a creditor *qua* creditor as to its offer to purchase the assets.

90 281 argues here that the prohibition expressed in *Skyepharma* does not apply here since 281 does not come to Court as an unsuccessful purchaser, but rather as a successful purchaser under a power of sale proceeding who is entitled at law to have its agreement approved.

91 In the circumstances, and without granting standing, I agreed to hear brief submissions from 281, and, in fairness, therefore from Times. I remain of the view that an unsuccessful bidder has no standing to challenge a sale approval motion in respect of that sale to another purchaser. In my view, the fact that in this case the sale agreement was entered into before the Receiver was appointed, does not change that analysis.

TAB 4

2022 ONSC 6354
Ontario Superior Court of Justice

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

2022 CarswellOnt 16700, 2022 ONSC 6354, 2022 A.C.W.S. 5355, 6 C.B.R. (7th) 386

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

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

McEwen J.

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

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

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Discretion of court

Applicants were group of energy companies, who were forced to file for protection under Companies' Creditors Arrangement Act — Applicants reached agreement for transaction — Applicants provided court with reverse vesting order and monitor's order in support of transaction — Applicants applied for approval of transaction — Application granted — Monitor's actions were necessary to implement required steps and provisions of vesting order — Stay extension was also necessary, so that needed steps could be undertaken — Monitor's fees were fair and reasonable — Reverse vesting order was necessary, so that necessary licenses and authorizations for ongoing business operations of applicants could be preserved — Relief was time-sensitive so that vesting order was to be granted immediately — Transaction was fair and reasonable, with proper process being followed — Transaction was more beneficial to creditors, than sale or disposition in bankruptcy would have been — Criteria for transaction had been met, including effort to obtain best price and interests of parties being considered.

APPLICATION by group of energy companies for approval of reverse vesting order and transaction in bankruptcy proceedings.

***McEwen J.*:**

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

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

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

BACKGROUND

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

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

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

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

8 On March 9, 2022, the Just Energy Entities obtained protection under the Companies' Creditors Arrangement Act,R.S.C. 1985, c.C–36 (the "*CCAA*") pursuant to anInitial Order under the *CCAA*.

9 The Just Energy Entities were forced to file for protection under the *CCAA* after an extreme winter storm in Texas. The February 2021 storm, together with Texas regulators' response to the storm, posed a significant liquidity challenge that

precipitated the filing. In or about the time of the filing, the Just Energy Entities held an aggregate book value of approximately CDN $1.069 billion, with an aggregate book value of liabilities around CDN $1.28 billion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE ISSUES

24 There are two issues on this motion:

- whether the Transaction should be approved, including the RVO and related relief; and
- whether the Monitor should receive the enhanced powers requested in the Monitor's Order with respect to the implementation of the RVO and the related relief, including the stay extension, approval of the Monitor's reports and fees and a sealing order.

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

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

REVERSE VESTING ORDERS

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

(a) the purchaser becomes the sole shareholder of the debtor company;

(b) the debtor company retains its assets, including key contracts and permits; and

(c) the liabilities not assumed by the purchaser are vested out and transferred, together with any excluded assets, into a newly incorporated entity or entities. [1]

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

The Law relating to Reverse Vesting Orders

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

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

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

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

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

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

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

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

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

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

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

The RVO should be granted

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

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

38 Currently the Just Energy Entities hold at least:

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

- Five separate import and export orders issued by the Canadian Energy Regulator ("CER"), all of which are non-transferrable and non-assignable.

- Three separate registrations with the Alberta Electricity System Operator (the "AESO") in Alberta and with the Independent Electricity System Operator ("IESO") in Ontario, all of which are either non-transferrable or only assignable with leave.

- Six licenses in Nevada and New Jersey to allow them to market natural gas and/or electricity in the applicable states, all of which are non-transferrable.

- Twenty-five licenses in Connecticut, Delaware, Maine, Maryland, Ohio, Pennsylvania and Virginia to allow them to market natural gas and/or electricity in the applicable states, all of which may only be transferred with the prior authorization of the applicable regulator in each jurisdiction.

- Eighteen electricity and/or natural gas provider licenses or authorizations in California, Illinois, Massachusetts, Michigan, and New York, where no process for transferring the licenses or authorizations is prescribed in the applicable statutes.

- Five retail electricity provider certifications in Texas which may only be transferred with the authorization of the Public Utility Commission of Texas ("PUCT").

- Three separate export authorizations issued by the Department of Energy ("DOE") in the U.S., all of which may only be transferred with the prior authorization of the DOE's assistant secretary.

- Seven separate market-based authorizations issued by the Federal Energy Regulatory Commission ("FERC") in the U.S. which may only be transferred with the prior authorization of FERC.

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

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

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

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

43 I agree with the Just Energy Entities, who are supported by the Monitor. Given the above, the RVO sought is the only way to achieve the preservation of the licenses, authorizations and certifications necessary for the ongoing business operations of the Just Energy Entities. This includes transferring the excluded assets into the two Residual Cos., one in Canada and one in the U.S. as is typically the case in reverse vesting orders.

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

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

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

The Transaction is fair and reasonable

The process leading to the proposed sale was reasonable

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

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

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

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

The Monitor has approved the process

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

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

52 The Monitor assisted the Just Energy Entities in preparing a liquidation analysis when the Just Energy Entities were pursuing approval of the Plan of Compromise and Arrangement. The analysis has been updated. The Monitor and the Just Energy Entities concluded, on the basis of the updated liquidation analysis, that not only would a liquidation produce no recovery for unsecured creditors, but it would result in a shortfall to secured creditors. This, of course, would be less beneficial than closing the Transaction.

The creditors were consulted

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

The effect of the Transaction on creditors and other interested parties

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

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

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

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

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

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

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

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

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

Other considerations

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

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

Related relief

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

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

66 Pursuant to ss. 173, 176(1)(b) and191(2) of the *CBCA* , courts have accepted that, under a *CCAA* proceeding, they can approve the cancellation of outstanding shares as part of a corporate reorganization that gives effect to a *CCAA* restructuring transaction and that the shareholders are not entitled to vote: see *Harte Gold Corp. (Re)*, at para. 62; *Black Rock Metals Inc.*, at para. 122; *Canwest*, at para. 34.

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

- It is appropriate that the RVO provides that all former employees of the Just Energy Entities be transferred to the Canadian Residual Cos. This will assist these former employees in relation to their entitlements under the Wage Earner Protection Program Act,S.C. 2005, c.47, s.1. Similar relief was granted in *Quest University (Re)*, which also involved a reverse vesting order.

TAB 5

2023 ONSC 3314
Ontario Superior Court of Justice

Acerus Pharmaceuticals Corporation (Re)

2023 CarswellOnt 8791, 2023 ONSC 3314, 2023 A.C.W.S. 3438

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ACERUS PHARMACEUTICALS CORPORATION, ACERUS BIOPHARMA INC., ACERUS LABS INC., AND ACERUS PHARMACEUTICALS USA, LLC

Penny J.

Heard: May 30, 2023
Judgment: June 2, 2023
Docket: CV-23-00693595-00CL

Counsel: Elizabeth Pillon, Lee Nicholson, Philip Yang, for Applicants
Stuart Brotman, Mitch Stephenson, for Monitor
Mervyn D. Abramowitz, for United States of America
Alex MacFarlane, Xiaodi Jin, for First Generation Capital Inc.
D.J. Miller, Alexander Soutter, for Jones Day
Kristina Bezprozvannykh, for Canada Life Assurance Company
Troels Keldmann — as principal of Keldmann Healthcare and Keldmann Innovation
Brian Gilderman — as principal of Precision Clinical Research, Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Headnote

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

Applicants were main company AP Corp. and its subsidiaries — Applicants were in specialized pharmaceutical business, focused on commercialization and development of prescription men's health products — Applicants sought protection under Companies' Creditors Arrangement Act (CCAA) — Applicants proposed transactions in form of Subscription Agreement, with consideration or purchase price in form of credit bid of all secured debt obligations owing to FGC — FGC was the majority shareholder of AP Corp., first in priority secured creditor of applicants and court approved DIP Lender — FGC was owed over $60 million in secured debt — Proposed transaction structure provided for available funding to remain with applicants and court officers, as necessary, to implement transactions, address ancillary post-closing steps, and emerge from CCAA proceedings — Transactions contemplated in Subscription Agreement were structured as "reverse vesting" (RVO) transaction — Applicants brought motion for approval of Subscription Agreement and proposed transactions and granting of release, ancillary releases and sealing order — Motion granted — Subscription Agreement was structured as ARVO transaction — Benefits of proposed transactions was satisfaction of all of applicants' secured liabilities by way of credit bid; assuming of various unsecured and contingent liabilities; and sufficient liquidity to provide for post-filing obligations incurred to date and those necessary to exit CCAA proceedings — Transactions did not disadvantage any stakeholder relative to any other viable transaction — Proposed transactions assured going concern result that would allow pharmaceutical products previously held by applicants to be pursued and brought to market, with potential for retention of employees — Consideration payable for purchased shares under Subscription Agreement was fair, reasonable, and reflected importance of assets being preserved under RVO structure — Execution of Subscription Agreement represented culmination of extensive solicitation efforts for investments beginning from

March 2022 and robust sales process conducted by applicants and monitor beginning from September 2022 — Release was reasonable and appropriate in circumstances and should be granted — Request for sealing order of bid information was granted.

MOTION for approval of Subscription Agreement and proposed transactions, and granting of release, ancillary releases and sealing order.

***Penny J.*:**

Overview

1 On May 30, 2023 I granted a sale approval and reverse vesting order, extended the stay and granted other ancillary relief, with reasons to follow. These are my reasons. The capitalized terms used in these reasons reflect the meanings attributed to those terms in the relevant documents submitted to the court on this motion.

Background

2 APC is an Ontario public company listed on the TSX and the OTCQB Exchange. APC operates out of its registered head office in Mississauga, Ontario. ABI and ALI are also OBCA corporations. APL was formed under the laws of the State of Delaware. There is a cross border component to these proceedings.

3 Each of the subsidiaries (ABI, ALI, and APL) are wholly owned by APC. The applicants comprise one corporate group which is operated and controlled by the management of APC at its head office in Mississauga, Ontario.

4 The applicants are in a specialized pharmaceutical business, focused on the commercialization and development of prescription men's health products. Their primary products are (a) Natesto, which is currently the sole source of revenue; and (b) Noctiva, which is currently not in distribution. There are also a number of secondary products.

5 The procedural history is uncontroversial. It is well laid out in the supporting material, the Monitor's Third Report and the applicants' factum. I will not repeat any of that here, other than to note that the proposed transactions are the result of both a prefiling strategic process and SISP, initialed by the applicants and overseen by E&Y, and a subsequent court approved SISP, also overseen by E&Y, which had been appointed Monitor by the initial order in these proceedings.

6 The proposed transactions which are before the Court are structured in the form of a Subscription Agreement, with the consideration or purchase price in the form of a credit bid of all secured debt obligations owing to First Generation Capital (FGC). FGC is the majority shareholder of APC. It is also the first in priority secured creditor of the applicants and the court approved DIP Lender. It is owed over $60 million in secured debt.

7 The proposed transaction structure provides for available funding to remain with the applicants and court officers, as necessary, to implement the transactions, address ancillary post-closing steps, and emerge from the CCAA proceedings. The transactions contemplated in the Subscription Agreement have been structured as a "reverse vesting" (or RVO) transaction. The transactions provide for a share transaction under which:

> (a) FGC will subscribe for and purchase new shares of APC, who will, in turn, cancel and terminate all of its existing shares so that FGC may become the sole shareholder of APC and ultimately, each of the subsidiaries of APC (including APL); and
>
> (b) all excluded contracts, excluded assets, and excluded liabilities with respect to the Companies (including APL) will be transferred and "vested out" to corporations (Residual Cos.) to be incorporated by APC in advance of the closing date, so as to allow FGC to indirectly acquire APC's business and assets on a "free and clear" basis.

Issues

8 The issues to be determined on this motion are whether this Court should:

> (a) approve the Subscription Agreement and proposed transactions in the form of an Approval and Reverse Vesting Order;

(b) grant the requested releases in favour of the applicants' directors, officers, employees and advisors, FAAN as CRO, the Monitor and its advisors and FGC and its directors, officers and advisors;

(c) grant ancillary relief in respect of the shares being cancelled and the articles of reorganization;

(d) grant the sealing order over the bid comparison chart in the Monitor's Third Report; and

(e) extend the stay period.

Analysis

Jurisdiction and Factors

9 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".

10 Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. While this motion is not for approval of a traditional asset sale, the s. 36(3) factors have been applied in an ARVO context. The factors 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.

11 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.

12 Use of the ARVO structure is 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 ARVO structure must be preceded by 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 the ARVO 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 address questions such as:

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

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

(c) Is any stakeholder worse off under the ARVO 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 ARVO structure?

The ARVO Structure is Necessary

13 The applicants operate in the pharmaceutical industry which is heavily regulated. In order for the applicants to carry on business, therefore, they are required to maintain various licenses. These licences are essential to the viability of the business. The insolvent circumstances of the applicants rules out a simple share purchase. In a traditional asset transaction, the purchaser would have to apply to transfer existing licences or apply for new ones. The purchaser in this case is not prepared to take the risk or invest the time and money to go through that process which is, by its very nature uncertain at best. There is no other comparable or viable transaction on offer.

14 The Subscription Agreement was structured as an ARVO transaction which is necessary to provide the following benefits:

(a) the applicants will maintain the multiple licenses that are required to maintain operations;

(b) the applicants have several in-progress trials and testing programs that are proceeding under and in the name of the applicants;

(c) the applicants hold various contracts with government entities; and

(d) the applicants have net operating losses in the approximate amount of $215 million.

15 The evidence is that it was not possible to structure the transaction in a different manner. The Monitor canvassed the possibility of structuring the transaction with FGC by way of a plan of arrangement. However, FGC was not willing to consider that approach.

More Favourable Economic Result

16 The benefits of the transactions include:

(a) based on the price payable under the Subscription Agreement, all of the applicants' secured liabilities will be satisfied by way of the credit bid (which, including advances under the DIP Facility, totals over $65 million), which would not otherwise be satisfied by any other potential alternative;

(b) various unsecured and contingent liabilities will be assumed, in comparison to the other potential alternatives which do not; and

(c) sufficient liquidity to provide for post-filing obligations incurred to date and those necessary to exit the CCAA proceedings, in comparison to the other potential alternatives which do not provide comparable funding.

17 The only other bid options available to the applicants were what is referred to in the material as Unsuccessful Bid 1 and Unsuccessful Bid 2. Neither of the unsuccessful bids was a better or even viable option because:

Unsuccessful Bid 1 offered nominal consideration for a minor asset owned by the applicants, where the consideration being offered was insufficient to cover even the expected professional fees related to closing that bid; and,

in respect of Unsuccessful Bid 2:

(i) the cash payment provided by Unsuccessful Bidder 2 was insufficient to repay the DIP Facility and amounts secured by charges in order to permit the applicants to exit the CCAA proceedings and the applicants are unable to generate liquidity from the excluded assets;

(ii) the vast majority of the offer value was driven by future sales, which are subject to a high degree of uncertainty and risk;

(iii) the Bid was only for a single product of the applicants and did not provide for a going-concern solution related to the remaining business of the applicants; and

(iv) the Bid does not assume any liabilities of the applicants nor provide for the potential employment of any existing employees.

The Transactions Do Not Disadvantage Any Stakeholder Relative to Any Other Viable Transaction

18 Under the proposed transactions, the applicants, some of the unsecured creditors and all of the existing shareholders will have no recovery. However, the evidence makes it clear that these stakeholders would not realize any recovery in any other available restructuring alternative either (i.e., under either of the unsuccessful bids or in a bankruptcy/liquidation).

19 The proposed transactions, by contrast, assure a going concern result. This will result in:

(a) an opportunity for each of the pharmaceutical products previously held by the applicants to be pursued and determine if they can be successfully brought to market at a future date;

(b) potential for several of the applicants' employees preserving their employment; and

(c) suppliers of goods and services having the opportunity to maintain their business relationship with the applicants on an ongoing basis in the future.

Is the Consideration Fair and Reasonable?

20 The consideration payable for the purchased shares under the Subscription Agreement is fair, reasonable, and reflects the importance of the assets being preserved under the RVO structure. The purchase price for the purchased shares will be satisfied through FGC's credit bid and the financing of post-filing obligations, which, as noted, together total in excess of $65 million. The fairness and reasonableness of the consideration is confirmed by the results of the pre-filing strategic process, the pre-filing SISP, and the court approved SISP (discussed in more detail below). The consideration allows for the satisfaction of all the applicants' secured liabilities and assumption of some unsecured liabilities. Further, the consideration provides the applicants with the ability to implement the transactions and exit the CCAA proceedings as a going-concern.

21 As noted earlier, the applicants' licenses and contracts with government entities may be difficult to transfer. Further, the applicants' tax attributes are also an important asset being preserved under the ARVO structure. The evidence is that the tax attributes were an important consideration for FGC in making its credit bid for all of the applicants' secured debt.

22 The market (and the evidence) has shown that there is no other bidder out there who is willing to pay more for these assets.

Section 36 CCAA Factors

The Process Leading Up to the Subscription Agreement and the Transactions

23 The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts for investments beginning from March 2022 and a robust sales process conducted by the applicants and E&Y beginning from September 2022. These efforts include:

(a) the applicants seeking refinancing or investment options;

(b) the pre-filing SISP which commenced in September 2022 and concluded in November 2022, with E&Y having canvassed its global network for prospective bidders;

(c) during the course of the CCAA the Monitor broadly canvassed the market under the SISP by approaching known potential bidders from prior processes and contacting 20 additional parties;

(d) the careful consideration of all the bids by the Special Committee, the applicants, the Monitor, the CRO, and their respective advisors and counsel of all available options; and

(e) negotiations between the Monitor, APC, and FGC in respect of the Subscription Agreement and the proposed transactions.

24 The SISP appears to have been well structured and, when combined with the pre-filing strategic processes, resulted in a broad canvassing of the market for potential purchasers of the applicants' business.

The Monitor Approved the Process Leading up to the Subscription Agreement and the Transactions

25 E&Y assisted with the pre-filing strategic initiative and the pre-filing SISP. The court approved SISP was developed in consultation with and supported by E&Y as Monitor. Further, the Monitor administered the SISP in accordance with its terms and the SISP order of this court. The Subscription Agreement is the product of the applicants' and the Monitor's continued efforts to solicit interest in the applicants' business and/or assets and is supported by the Monitor. It is the best alternative available.

More Beneficial to Creditors Than a Sale or Disposition Under a Bankruptcy

26 The Monitor has conducted an analysis of whether the completion of the proposed transactions contemplated by the Subscription Agreement would be more beneficial to the applicants' creditors and other stakeholders as compared to a sale or disposition of the business and assets of the applicants under a bankruptcy. The Monitor determined that:

(a) a potential bankruptcy could cause significant disruption in operations and delay the market launch of Noctiva, thus adversely impacting the value of the business. The uncertainty surrounding the timeline for transferring the patents and license to a purchaser during bankruptcy proceedings adds to the uncertainty and complexity. This, coupled with the bankruptcy procedure itself, could result in a substantial delay in closing any transaction;

(b) the RVO structure is a condition of closing the Subscription Agreement. The reverse vesting structure is unlikely to be available in a potential bankruptcy given the vesting of the assets in the trustee. Furthermore, even if FGC was willing to proceed based on an asset sale structure, instead of the RVO, the Monitor believes it is unlikely that the recovery could be enhanced by pursuing a sale transaction in a bankruptcy;

(c) accordingly, it is the Monitor's view that a sale or disposition of the business and assets of the applicants in a bankruptcy would most likely result in a lower recovery. In the Monitor's view, the market has been sufficiently canvassed and the FGC bid is the only viable bid in the circumstances. It is unlikely that there is any material value to the assets of the applicants in any transaction other than the FGC bid.

Stakeholders Were Consulted During the Sale Process

27 The applicants consulted with their largest secured creditor, FGC, throughout the pre-filing strategic process. FGC, and FGC in its capacity as the DIP Lender, was given the opportunity to submit a bid in respect of the applicants' business and assets,

which FGC did. This was through a court approved process on notice to all stakeholders. In addition, notice of this motion was given to a broad spectrum of the applicants' stakeholders as well.

28 In this context, I will address three specific situations which arose before and/or during the hearing of the motion.

Jones Day has an existing action against APL in the U.S. for outstanding professional fees owed by an APL predecessor. One of the issues raised by Jones Day in this CCAA proceeding involved a potential challenge to FGC's security beyond the amount advanced in December 2022 and pursuant to the DIP, in respect of the Applicants other than APC. The applicants, FGC and Jones Day were able to negotiate a specific carve-out of the Jones Day claim from the proposed releases and agreed that the following language would be approved by the court in this endorsement:

> For greater certainty, in providing the releases as outlined in paragraph 31 of the proposed Approval and Reverse Vesting Order, such relief shall not be used or raised by APL or any individual defendants in the course of the Jones Day Litigation, to limit or adversely affect the Jones Day Litigation as against APL or any individuals that have been named as defendants.
>
> This language is so approved.

29 Dr. Troels Keldmann attended the hearing. He is a principal of Keldmann Healthcare and Keldmann Innovation which sold certain product rights to a predecessor of APL in 2009. Part of the payment to Keldmann Innovation A/S was to be in the form of royalties under the Amended Product Development Agreement between Trimel Biopharma SRL, Keldmann Healthcare A/S and Keldmann Innovation A/S dated December 30, 2009. This agreement, however, is one of the Excluded Contracts being transferred to a ResidualCo under the terms of the Subscription Agreement. Dr. Keldmann was concerned that, although the Keldmann counterparties would lose the right to any future payments, should the product sold to APL be successfully developed at some future point, they would remain subject to a non-compete provision embedded in that agreement. The applicants immediately made it clear that they had no intention of relying on enforcement rights under this excluded contract and proposed that they would issue a formal disclaimer of rights under that contract. This appeared to satisfactorily address Dr. Keldmann's concern.

30 Mr. Brian Gilderman also attended the hearing. Mr. Gilderman is a principal of Precision Clinical Research, Inc., which is conducting clinical trials on an APL product. Mr. Gilderman expressed concern about a potential mis-match between his obligation to continue to perform contractual services under the court's CCAA order while being at risk of not being paid for those services. This situation was complicated by the existence of "hold back" provisions in the service agreement. There was insufficient evidence before the court to address this issue properly. The applicants and the Monitor undertook to pursue the matter with Mr. Gilderman. If a satisfactory understanding cannot be reached, the parties may return to court for further direction.

The Subscription Agreement and the Proposed Transactions Allow Various Stakeholders to Maintain their Rights

31 As noted earlier, the analysis of the applicants and the Monitor is that none of the applicants' creditors will be materially disadvantaged by the Subscription Agreement and the proposed transactions relative to any other viable alternative. In addition, the Subscription Agreement maintains many of the rights that creditors would otherwise have in an asset sale transaction. In the case of parties with existing contracts with the applicants, though no assignment of contracts (consensual or through an assignment order) is contemplated as part of the proposed transactions, the Subscription Agreement provides for all contracts, other than the Excluded Contracts, to remain with the applicants. The contracting parties, therefore, have the opportunity to continue supplying goods and services to the applicants post-CCAA proceedings if they choose to do so. While the Subscription Agreement does not require FGC to cure pre-filing arrears under the Retained Contracts, all contract counterparties have also been served with the applicants' motion record to provide them with notice that their contracts are either being retained or excluded as part of the proposed transactions.

32 While the Excluded Contracts, Assets and Liabilities will be vested out into Residual Cos in this structure, this outcome is no different from the result that would obtain if the proposed transactions had been carried out using a typical asset purchase structure. Nor will there be any inter-company transfer of assets and liabilities among the existing applicants prior to closing.

Therefore, the proposed transactions will not result in any material prejudice or impairment of any creditors' rights which might have been avoided in an asset purchase transaction.

Sufficient Effort has been Made to Obtain the Best Price and the Applicants have not Acted Improvidently

33 The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts for investment or sale opportunities beginning in March 2022 and a robust sales process conducted by the applicants and E&Y from September 2022, both privately and under a court approved SISP post-filing. There is no evidence, or suggestion, that the process was less than fair and robust. Nor is there any prospect that a "better deal" was somehow available but not pursued.

The Share Transactions

34 Consistent with ARVOs previously granted by this court, the proposed order in this case will terminate and cancel all options, securities and other rights held by any person that are convertible or exchangeable for any securities of APC. APC, previously publicly traded on the TSX, will be taken private as a result of the proposed transaction. The purchaser, FGC, currently holds approximately 89% of the issued and outstanding shares of APC. The other shareholders have been notified of the CCAA proceedings and the proposed transactions by way of various press releases and notices issued by the applicants and/or the Monitor.

35 The jurisdictional and legal basis for these orders has been canvassed extensively in prior decisions of this court so I will not repeat that analysis here: Harte Gold (Re), 2022 ONSC 653; Just Energy Group Inc. v. Morgan Stanley Capital Group Inc., 2022 ONSC 6354. In essence, equity claims must be subordinate to the claims of creditors. In no possible scenario, on the record before me, would there be any recovery for the shareholders of APC. The OBCA provides the relevant authority to order the restructuring of the shares and the articles as contemplated in the proposed Approval and Reverse Vesting Order.

The Releases

36 The Release covers any and all present and future claims against the Released Parties based upon any fact or matter of occurrence in respect of the transactions or the applicants, its assets, business or affairs or administration of the applicants, except any claim that is not permitted to be released under s. 5.1(2) of the CCAA. For avoidance of doubt, as noted above, the Releases will not release APL or the individuals named as defendants in the Jones Day litigation from liability in respect of that action.

37 A non-exhaustive list of relevant factors to consider in determining court approval of proposed releases was laid out by Chief Justice Morawetz in Lydian International Limited (Re),2020 ONSC 4006 at para. 54.

38 Considering those factors, I conclude the Release is reasonable and appropriate in the circumstances and that they should be granted for the following reasons:

(a) The claims released are rationally connected to the applicants' 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. 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 applicants' restructuring.

(b) The Released Parties made significant contributions to the applicants' restructuring, both prior to and throughout the CCAA proceedings. Among other things, the extensive efforts of the directors and management of the applicants were instrumental to the conduct of the pre-filing strategic process, the pre-filing SISP, the court-approved SISP and the continued operations of the applicants during the CCAA proceedings. The proposed transactions will maintain the applicants as a going concern; in this sense at least, the CCAA proceedings have had a successful outcome for the benefit of at least some of the applicants' stakeholders. This is an outcome which is, as discussed above, better than any other reasonably available alternative. The Released Parties have contributed time, energy and resources to achieve this outcome; they are deserving of the Release.

(c) The Release is fair and reasonable. The applicants, for example, are unaware of any statutory liabilities in respect of the Released Parties (particularly, the directors and officers of the applicants) and to date, no stakeholder of the applicants have made the applicants or the Monitor aware that they intend to assert a claim against any of the Released Parties in respect of any claims covered by the Release. Further, the Release is sufficiently narrow in circumstances as the Release carves out and preserve claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA, claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced to allow the applicants and the Released Parties to move forward with the Subscription Agreement and the transactions and work to conclude the CCAA proceedings.

(d) The Release will bring certainty and finality for the Released Parties. Additionally, the applicants, the Monitor, and FGC all believe that the Release is an essential component to the transactions.

(e) The Release benefits the applicants' creditors and other stakeholders by reducing the potential for the Released Parties to seek indemnification from the applicants, thus minimizing further claims against the applicants.

(f) Creditors had knowledge of the nature and effect of the Release. All creditors on the Service List were served with materials relating to this motion. The applicants also made additional efforts to serve all parties with excluded claims under the transactions. To date, no creditor has objected to the Release. At this point, and in these circumstances, requiring a specific claims process for claims against the Released Parties would only result in additional costs and delay without any apparent corresponding benefit.

Sealing Order

39 The applicants seek a limited sealing order regarding the results of the bids under the SISP. Preservation of the confidentiality of bid information is recognized as meeting the requirements of the test for sealing court documents in *Sherman Estate*. It is in the public interest that the ability of the applicants and the Monitor to maximize value be preserved until the transactions contemplated by the Subscription Agreement have closed. The request for a sealing order of the bid information is granted.

Extension of the Stay

40 The applicants need further time to close the proposed transactions and implement the remaining steps to bring these proceedings to their conclusion. As detailed in Updated Cash Flow Forecast at Appendix B to the Third Report of the Monitor, the applicants are expected to maintain liquidity to fund operations up to July 2, 2023. The stay is extended to June 30, 2023.

Monitor Support

41 I will say, in summary fashion to the extent not specifically mentioned in connection with the issues addressed above, that the Monitor has deep familiarity and experience with the applicants and their circumstances, dating back to March 2022. The Monitor has worked closely with the stakeholders, the CRO and other players. The Monitor, appointed by the court and answerable to the court, fully supports all the relief being sought by the applicants and has explained the basis for its support in detail in its Third Report.

Conclusion

42 For the forgoing reasons, the motion is granted. The Subscription Agreement and proposed transactions, including the ARVO, are approved. The sealing order regarding the bid summary is granted. The stay of proceedings is extended to June 30, 2023.

Motion granted.

End of Document

TAB 6

2023 NLSC 134
Newfoundland and Labrador Supreme Court

Rambler Metals and Mining Limited, Re CCAA

2023 CarswellNfld 254, 2023 NLSC 134, 2023 A.C.W.S. 4705, 9 C.B.R. (7th) 341

IN THE MATTER OF an application of Rambler Metals and Mining Canada Limited and 1948565 Ontario Inc.

AND IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. 36, as amended (CCAA)

Alexander MacDonald J.

Heard: September 11, 2023
Judgment: September 11, 2023
Docket: 202301G0841

Counsel: Joseph J. Thorne, for Applicants
Alex MacFarlane, Phil Clarke, Liam Murphy, Jason Kanji, for Monitor
Kathryn Esaw, Allison Philpott, for Purchaser, AuTECO Minerals Ltd.
Meghan King, for Elemental Royalties Corp.
Maeve Baird, Deanna Frappier, K.C., for CRA
Monique Sassi, Peter Fraser, for DIP Lenders
Sean Pittman, for Krinor Resources
Michael Collins, Sean Collins, for International Royalty Corporation / Royal Gold
Brendan O'Neill, for Rambler Group Directors & Officers

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Headnote

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

Metals and mining company (company) applied for creditor protection and other relief under Companies' Creditors Arrangement Act — Initial order, appointment of monitor, stay, and other orders were granted — Company brought motion for approval of reverse vesting order (RVO) to allow for sale of companies' shares, and other relief — Motion granted in part on these grounds — Successful process under Act typically resulted in plan of arrangement that creditors approved — Creditors did not need to approve sales of assets, such as RVO, outside ordinary course of business — RVO would allow preservation of company's multiple permits and licences it had to retain to operate mine — Process leading to proposed sale was reasonable in circumstances — RVO produced economic result at least as favourable as other viable alternative — Purchase price was fair and reasonable — Monitor supported use of RVO — RVO would allow, inter alia, efficient and impartial resolution of companies' insolvency, preserve and maximize assets, and would ensure fair treatment of claims and preserve employment — RVO was necessary to achieve clear benefits of purchase — It was appropriate to approve transaction and grant order releasing designated parties as released parties' efforts directly led to RVO and sale of enterprise.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant and length of stay

Metals and mining company (company) applied for creditor protection and other relief under Companies' Creditors Arrangement Act — Initial order, appointment of monitor, stay, and other orders were granted — Monitor brought motion for extension of stay, and other relief — Motion granted, in part, on these grounds — Stay extended until December 31, 2023 — Stay could be granted where circumstances made order appropriate and company had acted and was acting in good faith and due diligence — Extension of stay would allow company to proceed with closing of approved reverse vesting order (RVO) and resolve issues associated with RVO claims — Creditors would not suffer material prejudice because of extension of stay — Company's

cash flow forecast showed enough liquidity to allow monitor to deal with remaining tasks contemplated by RVO — Company continued to act in good faith and due diligence.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous
Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files

MOTION by company for approval of reverse vesting order, for extension of stay of execution, expansion of monitor's powers, approval of monitor's accounts, and sealing order.

***Alexander MacDonald J.*:**

INTRODUCTION

1 Rambler Metals and Mining Canada Limited (Rambler Canada), Rambler Metals and Mining PLC (Rambler UK), Rambler Mines Limited (Rambler Mines), and 1948565 Ontario Inc. (1948), applied for creditor protection and other relief under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (CCAA).

2 On February 27, 2023, I granted the Initial Order in favour of Rambler Canada and 1948 (Rambler Group) now filed in this Court. I appointed Grant Thornton Limited (GTL) to be the Monitor. I set the comeback hearing for March 6, 2023, and on that date, I granted an Amended and Restated Initial Order (ARIO) in which I provided for enhanced Monitor's powers. I approved the Sales and Investment Solicitation Process (SISP), and extended the stay until May 19, 2023.

3 On April 6, 2022, I granted an order pursuant to s. 5(5) of the Wage Earner Protection Program Act, S.C. 2005, c 47.

4 On May 16, 2023, I granted an amended ARIO and extended the stay until September 11, 2023. I also increased the maximum amount of the Debtor in Place financing (DIP) to US $8.3 million.

5 On June 29, 2023, I granted a vesting order in which I approved a settlement of a dispute between Rambler Canada and Transamine SA.

6 This is a motion by the Rambler Group for an approval of the sale of the shares of Rambler Group to the prospective purchaser and approval of:

(a) a Reverse Vesting Order (RVO) to allow for the sale of the Rambler Group's mining enterprise;

(b) an order extending the stay until December 31, 2023;

(c) an order expanding the Monitor's powers to include new entities to be created for the purposes of implementing the Rambler Group's proposed restructuring;

(d) an order releasing certain persons as I describe later in this decision (Releases);

(e) a claim identification order;

(f) an order passing accounts from February 20, 2023 through July 31, 2023, of the:

i. Monitor's fees and disbursements of $1,002,370; and

ii. Monitors Counsel (Borden Ladner Gervais LLP) fees and disbursements of $178,390.

(g) an order sealing the confidential supplement to the Monitor's Sixth Report.

7 The Rambler Group served the Monitor and all known creditors and shareholders with its application materials. Monitor's counsel provided notice to stakeholders previously registered for prior court applications. It also published its report accompanying this Application on GTL's website.

54 Justice Penny, (at para. 38) provides a list of questions I should consider. These are:

(a) Why is the RVO necessary?

(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 than they would have been under any other viable alternative?

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

55 Justice Fitzpatrick in *Quest University Canada (Re)* found that the *CCAA* provided sufficient authority to grant the RVO and was consistent with the remedial purposes of the *CCAA* (at para. 170).

56 In paragraph 155 she said, "I find further support for Quest's position in the recent comments of the Court in *Callidus*, [*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.)]. The Court was there addressing a different issue — whether a *CCAA* judge has jurisdiction under s. 11 to bar a creditor from voting where the creditor is 'acting for an improper purpose' — but the Court's comments on the exercise of jurisdiction under the *CCAA* ring true in relation to the RVO structure."

57 Justice Fitzpatrick quoted the Supreme Court of Canada in *Callidus* where it said, "The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*. ... Additionally, the court must keep in mind three 'baseline considerations' ... which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence" (*Quest* at para. 155; and *Callidus* at para. 49).

58 The Justice continued and said, "Many of the RVO cases cited above involve a sale of an ongoing business with a purchaser. The RVO structure was crafted to allow those businesses to continue through the debtor company, since it was that corporate vehicle who owned the valuable 'assets' that could be not be [*sic*] transferred" (at para. 160).

59 Justice McEwen in Just Energy Group Inc. v. Morgan Stanley Capital Group Inc. 2022 ONSC 6354, said "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 ... That said, reverse vesting orders have been deemed appropriate in a number of cases" (at para. 33).

60 Justice McEwen continued in paragraph 34 and said cases approved reverse vesting orders in circumstances where:

(a) the debtor operated in a highly regulated environment in which its existing permits, licences, or other rights were difficult or impossible to reassign to a purchaser;

(b) the debtor is a party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser; and

(c) maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.

61 I agree. I will consider the factors in section 36(3) of the CCAA, the principles articulated in these cases, the court's guidance in *Royal Bank v. Soundair Corp.*, (1991), 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (C.A.) for the approval of the sale of assets in an insolvency, and the additional factors referred to in paragraph 38 of *Harte*.

62 Thus when I combine these factors, I will consider as I did in my decision in Canada *Fluorspar (NL) Inc.*:

(a) is the RVO necessary?

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

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

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

(e) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(f) whether the Monitor approved the process leading to the proposed sale or disposition;

(g) does the Monitor say that the proposed sale would be more beneficial to the creditors than disposition under a bankruptcy?

(h) the extent to which the creditors were consulted;

(i) the effects of the proposed sale on the creditors and other interested parties;

(j) whether the price is reasonable and fair, taking into account their market value;

(k) whether sufficient effort has been made to obtain the best price, and whether the debtor has acted improvidently;

(l) the interests of all parties;

(m) the efficacy and integrity of the SISP; and

(n) whether there has been unfairness in operation of the SISP.

63 I need not consider all of these factors. Each need not support the issuing of the RVO. I use them to assist me in exercising the broad discretion I have under the *CCAA*.

Is the RVO necessary?

64 I find that the RVO is necessary. Rambler Group has dozens of permits and licences that it must retain if it is to operate the Mine. The Monitor says that:

(a) under an AVO most of these may be difficult to transfer. Even if it is possible to do so, the transfers will likely result in significant delays and costs;

(b) the permits, licences and leases are critical to the ability of the Purchaser to restart operations. The uncertainty around timing of acceptance would materially affect the restart operations and therefore the economics of the transaction;

(c) the tax attributes of a RVO are important to the Purchaser and support its valuation of Rambler Group. It can only preserve these tax attributes through a RVO (Monitor's Ninth Report at para. 49); and

(d) the RVO has significant benefits that are reasonable, justified and appropriate in the circumstances. Accordingly, it supports the transaction and the RVO.

Reasonableness of the Process Leading to the Proposed Sale

65 I find that the process leading to the proposed sale is reasonable in the circumstances. I find that the Monitor approved the process leading to the proposed sale or disposition.

66 The Monitor sought court approval of the SISP. Creditors received notice of these applications. The Court process allowed secured creditors the opportunity to provide input to the Court on these processes. The SISP is not innovative or unique. Many courts have approved similar sales processes.

Are stakeholders worse off under the RVO structure than they would have been under any other viable alternative? Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

67 I find that the RVO produces an economic result at least as favourable as any other viable alternative. The Monitor says, and I agree that:

(a) the additional cost to implement and approve the transaction would affect the Purchaser's proposed timelines to restart operations;

(b) the economic result of the transactions provides a better result than any other form of transaction under bankruptcy. It allows the Rambler Group to continue as a going concern. The transaction provides for repayment of DIP financing as well as some payment to the senior secured creditors;

(c) even under the RVO, secured creditors will realize a loss. Subject to the Monitor's further review and any Distribution Order, there are no funds available for unsecured creditors. Thus, the RVO does not disadvantage the unsecured as they would not receive any distribution in an AVO; and

(d) approval of a plan of arrangement based on an AVO is not an option. It would further reduce recovery to the secured creditors who were already suffering losses. It would unnecessarily add additional cost and risk to the sale as it would take time and money that the Monitor does not have.

68 I also find that:

(a) a bankruptcy would jeopardize the possibility of future operations. It could jeopardize the permits and licences necessary to maintain such operations. These risks could destroy the sale or reduce the purchase price;

(b) a bankruptcy sale would delay, and perhaps jeopardize, the sale. Before an AVO can be approved under a bankruptcy, Rambler Group must be bankrupt, a meeting of creditors must be held, inspectors must be appointed, and they must approve the sale;

(c) DIP lenders would need to advance additional money to finance ongoing operations during this time. There is no evidence they would be willing to do so. This process might fundamentally change the Rambler Group's value to the Purchaser; and

(d) every non-liquidation bid in the SISP assumes a RVO. There is no other more traditional AVO Proposal.

Consultation with Creditors

69 I discussed the efforts the Monitor took to inform creditors of this sale earlier in this decision. The Monitor did consult with CRA and other secured creditors. I have no evidence if it consulted with unsecured creditors.

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

70 The proposed transaction has the prospect of renewed employment for some of the Rambler Group employees. It has the prospect of providing ongoing business opportunities for suppliers of goods and services to the Mine.

71 The Monitor says that the RVO will provide an expedient and efficient transfer of Rambler Group's intangible assets to the Purchaser. This would support a timely restart of operations that will provide an opportunity for employees, stakeholders, and the unsecured creditors to engage with the new business. He says, and I agree that this will benefit the local community.

72 Thus, the evidence is that no creditor is in a worse position because of the use of a RVO than they would have been under an AVO (or, for that matter, under any plausible plan of compromise).

73 Furthermore, the transaction contemplates issuing new shares to the Purchaser. The RVO cancels the existing interests in the Rambler Group. Thus, the Rambler Group's current shareholders will receive no recovery of their investment.

Fairness of Consideration

74 Rambler Group's business and assets have been extensively marketed both prior to and during the *CCAA* proceedings. At the conclusion of the SISP, this bid is the most acceptable. As I described earlier, this transaction will provide a superior recovery for creditors than would a liquidation of the Companies' assets in bankruptcy.

75 Furthermore, the Monitor said that the purchase price is fair and reasonable taking into account the assets including the mineral leases and licences. Therefore, I find the price is fair and reasonable.

Other Considerations Re. Appropriateness of a RVO vs. AVO

76 The principal objective and benefit of employing the RVO in this case is the preservation of Rambler Group's many permits and licences necessary to conduct operations at the Mine.

77 Under an AVO, the purchaser would have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This process would necessarily involve risk, delay and cost. Furthermore, there is no way of knowing whether a new environmental indemnity is available from the GNL.

78 Thus, the RVO would achieve the timely and efficient preservation of the licences and permits necessary for the operations of the Mine.

79 Finally and importantly, the Monitor supports the use of the RVO.

80 For all these reasons, I find that the proposed RVO is necessary to achieve the clear benefits of the purchase and that it is appropriate to approve this transaction in the circumstances.

81 The RVO will:

(a) provide for timely, efficient and impartial resolution of the Companies' insolvency;

(b) preserve and maximize the value of the Companies' assets;

(c) ensure a fair and equitable treatment of the claims against the Companies;

(d) protect the public interest and preserve employment and third-party suppliers and service providers; and

(e) balance the costs and benefits of Rambler Group's restructuring or liquidation.

82 I now turn to whether I should extend the stay.

Should I approve an Order Extending the Stay until December 31, 2023?

83 I extend the stay until December 31, 2023.

84 The current stay period expires September 12, 2023. Under s. 11.02 of the CCAA, I may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the Rambler Group satisfies me that it has acted and *is* acting in good faith and with due diligence.

85 The Rambler Group seeks to extend the stay to October 31, 2023, to allow it to proceed with the closing of the transaction, and resolve the issues associated with the RVO claims I referred to earlier.

TAB 7

2023 ONSC 3291, 2023 CarswellOnt 9600

2023 ONSC 3291
Ontario Superior Court of Justice [Commercial List]

CannaPiece Group Inc v. Marzilli

2023 CarswellOnt 9600, 2023 ONSC 3291

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNAPIECE GROUP INC., CANNAPIECE CORP., CANADIAN CRAFT GROWERS CORP., 2666222 ONTARIO LTD., 2580385 ONTARIO INC. AND 2669673 ONTARIO INC.

Osborne J.

Heard: February 10, 2023
Judgment: February 10, 2023
Docket: CV-22-689631-00CL

Counsel: David S. Ward, Monica Faheim, Sam Massie, for Applicants
Clifton Prophet, Heather Fisher, for 2125028 Ontario Inc.
Rory McGovern, for Cardinal Advisory Services Ltd.
Lisa Corne, for Purchaser

Subject: Insolvency

Headnote

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

APPLICATION for approval and vesting order.

***Osborne J.*:**

1 The Applicants seek an approval and vesting order approving the amended and restated Share Purchase Agreement ("SPA"), authorizing and directing the Applicants to perform and complete the SPA, transferring to and vesting in a new entity those Excluded Assets, Contracts, and Liabilities, and vesting in the Purchaser ownership of the Purchased Shares.

2 The motion for approval of an earlier share purchase agreement was before me on January 31, 2023 and I decided to approve the transaction and the related vesting order for the reasons set out in my Endorsement of February 2, 2023. Defined terms in this Endorsement have the meaning given to them in my Endorsement of February 2, and/or the motion materials in respect of the January 30 motion, today's motion and the Second Report and Supplementary Report of the Monitor.

3 On January 30, the relief sought by the Applicants was opposed by one of the senior secured creditors, 212. The parties have in the interim period continued discussions and negotiations, resulting in an amended transaction which is reflected in the SPA for which approval is sought today.

4 Accordingly, none of the relief sought by the Applicants today is opposed, and it is supported and recommended by all parties who appeared in Court to make submissions today, including but not limited to Cardinal, 212, Marzilli and the Monitor. I observe that the Lawyer's Certificate of Service from counsel to the Monitor confirms that the Service List was served.

5 The Service List was also served with the motion materials in respect of the January 31 motion, at which time the only party in opposition was 212. As noted above, that opposition has now been withdrawn.

6 In the circumstances, I will not repeat all of the facts informing the background to and context for the motion before me today, as they are set out more fully in my Endorsement of February 2.

7 The SISP was conducted according to the order of Justice Penny made earlier in this proceeding, and overseen by the Monitor with the assistance of the Sales Agent, in consultation with the Applicants. Cardinal acted as a stalking horse bidder to provide a baseline in the process. Ultimately, the Marzilli Bid was the only Qualified Bid received notwithstanding that 83 parties were invited to participate in the process, 14 of which signed non-disclosure agreements.

8 The SPA before me today provides for the assumption by the Purchaser of the liabilities of the Applicants to both 212 and Marzilli, and those parties are the two senior secured creditors — each in first position: 212 as to the Equipment Collateral only and Marzilli as to, effectively, all other assets of the Applicants.

9 The primary benefit of the proposed transaction reflected in the Spa is the seamless continuity of business operations, which in turn ensures the structure of operations, importantly maintains the current cannabis licenses, and preserves economic activity including customer and supply arrangements. Importantly, the Purchaser is assuming approximately 95% of the 150 employees and the preservation of those jobs is important.

10 The key cannabis licences include the standard processing and sale licence in respect of cannabis for medical purposes as well as the license issued by the CRA under the excise duty framework. Those are critical to the continued operation of the business.

11 Fundamentally, the proposed transaction achieves the purpose of this CCAA proceeding. Indeed, it ensures that the business emerges in a form stronger than it was prior to filing, and in a manner that preserves enterprise value and employment for as many employees as is reasonably possible. The business will continue, post-closing, as a going concern.

12 The SISP process was robust, yet yielded only one Qualified Bid, reflective of the challenging circumstances in which the cannabis sector generally finds itself at present.

13 I am satisfied that the transaction reflected in the SPA represents the best outcome for all stakeholders in very challenging circumstances.

14 As is clear from my Endorsement of the February 2, the motion materials and as I have noted above, the relief is in the form of a reverse vesting order ("RVO"). Effectively, the Purchaser becomes the sole shareholder of the debtor company, which retains its assets including key contracts and licences, and those liabilities not assumed by the Purchaser are vested out and transferred, together with any excluded assets, into a newly incorporated entity referred to as Residualco.

15 This Court has jurisdiction to approve the transaction, including an RVO, as part of its general jurisdiction found in section 11 of the CCAA. (See Just Energy Group Inc. et al,2022 ONSC 6354 at para. 27 and *Harte Gold Corp. (Re)*, 2022 ONSC 653 (Ont. S.C.J. [Commercial List]) at paras. 31-32)

16 While, as those authorities noted above make clear, RVOs should not be the norm, they can be approved where the circumstances justify such a structure. As noted by Justice McEwen in *Just Energy*, the Court should be satisfied that the RVO was *prima facie* appropriate for use in the case at hand and that the factors set out in section 36 of the CCAA as informed by the Soundair Principles (Royal Bank of Canada v. Soundair Corp., [1991] 4 O.R. (3d) 1), are met.

17 Further, the factors set out by Justice Penny in *Harte Gold* provide a useful framework within which to determine whether an RVO should be approved.

18 Considering all of those factors, I am satisfied that the relief sought today should be granted for the reasons set out above, including but not limited to the fact that the relief is unopposed by an stakeholder, strongly supported by the two senior secured creditors and strongly recommended by the Monitor.

19 Simply put, there is no other reasonable alternative, and the relief sought provides for the continued operation of the business as a going concern and, critically, the continuation of the required cannabis licences. As observed by the Monitor, the transaction will be materially more beneficial to creditors and other stakeholders than would a bankruptcy. The section 36 factors, the *Soundair* Principles, and the factors applicable to proposed approval of an RVO, are all satisfied here.

20 For the same reasons, and as part of the approval of the transaction, I am also satisfied that the ancillary relief sought today should be granted. None of that ancillary relief is opposed, and all of it is supported by the senior secured creditors and strongly recommended by the Monitor

21 Adding Residualco as an Applicant, authorizing the Monitor to distribute the Deposit Repayment and granting the Monitor certain enhanced powers and extending the stay are all appropriate in the circumstances.

22 As part of the transaction, the Applicants seek third-party releases. I am satisfied that all of the parties in respect of which releases are sough were necessary to the restructuring of the Applicants; the claims to be released are rationally connected to the purpose of the restructuring and necessary for it; the restructuring could not succeed without the releases; the parties being released contributed to the restructuring; and the releases benefit the debtors as well as the creditors generally. (See Blackrock Metals Inc., 2022 QCCS 2828 at para. 128, Just Energy, at para. 67 and Green Relief Inc. (Re),2020 ONSC 6837 at para. 23-29).

23 In particular, I observe that Cardinal, which acted as the stalking horse bidder in the SISP, is proposed to be released. While it may not be appropriate in every case (or indeed in many cases) to approve a third-party release to a stalking horse bidder since, among other things, that party is typically compensated for the risk it undertook and the cost of its proposed offer by the terms of a stalking horse agreement, I am satisfied that in this particular case, the relief should be granted.

24 Cardinal acted as more than a stalking horse bidder, and indeed its provision of the interim financing permitted the Applicants to continue as a going concern, "keep the lights on", and thereby preserve the value of the business as a going concern which is the underpinning of the ability of the business to emerge as a going concern in the first place.

25 Moreover, Cardinal agreed to waive, as part of the negotiations leading to the amended SPA for which approval is sought today and which resulted in there being no opposition, its break fee and professional fees to which it otherwise would have been entitled pursuant to the terms of the stalking horse agreement. This was part of the matrix of consideration flowing between and among the various affected stakeholders resulting in the revised SPA and the consensus achieved today.

26 Finally, both senior secured creditors support the release, and the Monitor strongly recommends it, in large part for the reasons I have set out above. In the circumstances, I am satisfied that it is appropriate.

27 The Monitor's activities as reflected in the Second Report and Supplementary Report are appropriate, are unopposed and are approved.

28 The stay period is extended to including March 17, 2023 to give the Applicants sufficient time following the closing of the transaction reflected in the SPA to complete post-closing matters.

29 Both orders (approval and vesting order and ancillary order) to go in the form signed by me today. The orders are effective immediately and without the necessity of issuing and entering.

30 I am grateful to all of the parties and their counsel for their cooperation and compromise which has resulted in the unopposed motion for approval SPA today.

Application granted.

End of Document

TAB 8

2022 QCCS 2828
Quebec Superior Court

Arrangement relatif à Blackrock Metals Inc.

2022 CarswellQue 10503, 2022 QCCS 2828, 2022 A.C.W.S. 5339, 2 C.B.R. (7th) 214, EYB 2022-458285

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

Paquette C.J.Q.

Heard: May 30-31, 2022
Judgment: July 8, 2022 *
Docket: C.S. Montréal 500-11-060598-212

Proceedings: leave to appeal refused *Arrangement relatif à Blackrock Metals Inc.* (2022), EYB 2022-462867, 2022 QCCA 1073, 2022 CarswellQue 11443, Patrick Healy J.C.A. (C.A. Que.)

Counsel: Me Jean Legault, Me Jonathan Warin, Me Ouassim Tadlaoui, for Debtor
Me Jean-Yves Simard, Laurent Crépeau, for the Shareholder Bidder
Me Alain Riendeau, Me Brandon Farber, for the Monitor
Me Luc Morin, Me Guillaume Michaud, Me Noah Zucker, for the Secured Creditor, Investissement Québec
Me Doug Mitchell, for the Intervenor
Me David Bish, Me Julie Himo, for the Secured Creditor, OMF fund ii h ltd. (orion)
Me Brendan O'Neill, for the Special Committee of The Board Of Blackrock
Me Geneviève Cloutier, Me François Dandonneau, for The Grand Council Of The Crees And The Cree Nation Government
Me Gilles Robert, Me Kloé Sévigny, for The Canada Revenue Agency

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous Debtors were developing metals and materials manufacturing business — Debtors' project was still at early stage of its development and had yet to generate revenues — Debtors sought protection under Companies' Creditors Arrangement Act (CCAA) and initial order was granted — Parameters of sale and investment solicitation process for sale of debtors' assets were established — Debtors and their creditors entered into agreement of purchase and sale of debtors' assets — Shareholder bidder brought motion seeking to extend bid deadline under solicitation process — Debtors brought motion seeking approval of sale of their assets under agreement of purchase and sale — Bidder's motion dismissed; debtors' motion granted — CCAA primarily seeks to refinance and restructure insolvent companies rather than liquidate them — When selling debtor's assets, one objective is thus to achieve best possible price for assets — Here, evidence showed that bidder was still in process of seeking financial support for its bid — Debtors, creditors and appointed monitor objected to bidder's extension application — Hence, overarching remedial objectives of CCAA were better served by rejecting extension application — Refusal to extend solicitation process deadline left creditors as only qualified bidders — Exceptionally, reverse vesting order structure proposed by creditors was appropriate in present case — Therefore, agreement of purchase and sale should be approved as part of reverse vesting order.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Approbation par le tribunal — Divers

Débitrices étaient en plein développement d'une entreprise de métaux et de matériaux — Projet des débitrices en était encore aux premières étapes de son développement et n'avait pas encore généré de revenus — Débitrices se sont placées sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) et une ordonnance initiale a été accordée — Paramètres du processus de sollicitation en vue de la vente et du financement des biens des débitrices ont été établis — Débitrices et leurs créanciers ont conclu une entente en vue de la vente des biens des débitrices — Actionnaire soumissionnaire a déposé une requête visant à obtenir le prolongement du délai du processus de sollicitation — Débitrices ont déposé une requête visant à obtenir l'approbation de la vente de leurs biens en vertu de l'entente de vente — Requête du soumissionnaire rejetée; requête des débitrices accordée — LACC vise principalement à assurer le refinancement et la restructuration des compagnies insolvables plutôt que leur liquidation — Au moment de procéder à la vente des biens d'un débiteur, un des objectifs est, ainsi, de rechercher le meilleur prix possible pour les biens — En l'espèce, la preuve indiquait que le soumissionnaire était toujours à la recherche de soutien financier pour les besoins de sa soumission — Débitrices, les créanciers et le contrôleur s'opposaient à la demande de prolongation du soumissionnaire — Ainsi, les objectifs principaux de la LACC visant à mettre en oeuvre une mesure correctrice étaient mieux servis par le rejet de la demande de prolongation — Refus de prolonger le délai du processus de sollicitation signifiait que les créanciers étaient les seuls soumissionnaires qualifiés — De manière exceptionnelle, la structure fondée sur une ordonnance de dévolution inversée proposée par les créanciers s'avérait appropriée dans le présent dossier — Par conséquent, l'entente portant sur la vente des biens devrait être approuvée dans le cadre d'une ordonnance de dévolution inversée.

MOTION by bidder seeking more time to file its submission; MOTION by debtors seeking approval of agreement entered into with their creditors for sale of their assets.

Paquette C.J.Q. [1] **:**

OVERVIEW

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

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

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

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

5 On December 22, BlackRock filed an Application for an Initial Order and other ancillary relief in the present *Companies' Creditors Arrangement Act (CCAA)* [2] restructuring proceedings.

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

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

94 Even if this type of transaction was not contemplated by section 36 of the CCAA, section 11 could clearly step in as a basis for the Court's jurisdiction. The Supreme Court of Canada recently held that the other provisions of the CCAA, dealing with specific orders which the courts can issue, do not restrict the general language and power of section 11. [37]

95 The Court agrees with the judge in *Harte Gold Corp* that paragraph 36(3), in any event, lays out a useful analytical framework for the issue at bar. These criteria, which are laid out above, should be applied in conjunction with the factors enumerated in *Royal Bank v. Soundair Corp.*: [38]

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

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

95.3. the interests of the parties"; and

95.4. whether any unfairness resulted from the process." [39]

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

97 Some authorities indeed call for caution. For instance, Professor Janis Sarra recently stressed the importance for courts to provide detailed reasons when approving RVOs. [40] Among other things, Professor Sarra reminds us that this type of order deviates significantly from the usual CCAA framework, which is meant to provide all creditors with an opportunity to be heard in the process:

> [. . .] [T]here must be exceptional circumstances for the court to be persuaded to bypass provisions of insolvency legislation aimed at giving both secured and unsecured creditors a meaningful voice/vote in the proceedings, as they are the residual claimants to the value of the debtor's assets during insolvency. [. . .]
>
> [. . .]
>
> The CCAA, particularly in its various amendments over the years, has sought to achieve an appropriate balance between various interests affected by a debtor company's insolvency. Part I sets out the framework of the statute, well-known to practitioners and Canadian courts. It allows for a compromise or arrangement to be proposed between a debtor company and its secured and unsecured creditors, a meeting of the creditors to vote on the plan, and, if a majority in number representing two-thirds in value of the creditors, or the class of creditors, present and voting either in person or by proxy at the meeting, agree to any plan of compromise or arrangement, the plan may be sanctioned by the court and, if so sanctioned, is binding. There are specific provisions addressing Crown claims, employees and pensioners, and treatment of equity claims, all designed to balance multiple interests in complex proceedings.
>
> [. . .]
>
> This statutory framework represents a careful balancing of interests and prejudice, and gives voice and vote to the creditors that are the residual claimants to the value of the debtor company. Many of the provisions are aimed at mitigating the imbalance in power that secured creditors have in insolvency proceedings, at least during the period of negotiations for a plan, with a view to maximizing the value of the assets, preserving going-concern value, and protection of employees and the public interest.

> It makes sense, therefore, that in any application to bypass this carefully crafted statutory process, the court consider whether there are compelling and exceptional circumstances to justify this extraordinary remedy, even where the RVO is not specifically contested, as the court needs to be satisfied of the integrity of the system and the potential prejudice to creditors and other stakeholders that may not be appearing before it. Reasons are important for stakeholders to understand the benefits and prejudice that may accrue to any particular transaction. [41]

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

> [171] I do not consider that an RVO structure would be generally employed or approved in a CCAA restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the CCAA. [42]
>
> [Emphasis added]

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

> [38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:
>
> > (a) Why is the RVO necessary in this case?
> >
> > (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
> >
> > (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and
> >
> > (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?
>
> [Emphasis added]

7.2 Discussion on criteria to approve an RVO

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

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

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

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

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

104 The Fifth Report concludes that the SISP was properly conducted and that the Proposed Transaction is beneficial for all the stakeholders compared to a bankruptcy scenario. The Monitor "is of the view that creditors who will suffer a shortfall following the Purchase Agreement would not obtain any greater recovery in a sale in bankruptcy." "Furthermore, bankruptcy proceedings would: (i) [c]ause additional delays and uncertainty in the sale of [BlackRock]'s assets; (ii) [j]eopardize the going concern operations of [BlackRock]; and, (iii) [l]ikely result in employees to be unemployed." [43]

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

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

> Our clients consider that the approval of the Stalking Horse Agreement offers the most, and perhaps the only, viable prospect to bring the BlackRock Mining Project into successful commercial operation and hence to secure for the Cree Nation of Eeyou Istchee the critically important benefits of the BallyHusky Agreement. [44]

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

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

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

110 As for the other stakeholders, they will benefit on the whole from the approval of the Proposed Transaction, as it will allow the Debtors' business to emerge in a position to move forward as a going concern. This will benefit the employees, trading partners and First Nations partners and it will have indirect socio-economic benefits in the province of Quebec.

111 *The consideration to be received for the assets is reasonable and fair, taking into account their market value (s. 36(3)(f) of the CCAA).* The consideration being paid by Orion and IQ, which is in excess of $100M, is importantly linked to the preservation the Debtor's permits (crucial to the conduct of the contemplated mining activities), certain existing contracts and its tax attributes.

TAB 9

Most Negative Treatment: Distinguished
Most Recent Distinguished: Abbey Resources Corp. v. Saskatchewan Assessment Management Agency | 2021 SKQB 100, 2021 CarswellSask 230, 332 A.C.W.S. (3d) 623 | (Sask. Q.B., Apr 7, 2021)

2019 SCC 5, 2019 CSC 5
Supreme Court of Canada

Orphan Well Association v. Grant Thornton Ltd.

2019 CarswellAlta 141, 2019 CarswellAlta 142, 2019 SCC 5, 2019 CSC 5, [2019] 1 S.C.R. 150, [2019] 1 R.C.S. 150, [2019] 3 W.W.R. 1, [2019] A.W.L.D. 879, [2019] A.W.L.D. 880, [2019] A.W.L.D. 881, [2019] A.W.L.D. 941, [2019] A.W.L.D. 942, [2019] S.C.J. No. 5, 22 C.E.L.R. (4th) 121, 301 A.C.W.S. (3d) 183, 430 D.L.R. (4th) 1, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, 9 P.P.S.A.C. (4th) 293

Orphan Well Association and Alberta Energy Regulator (Appellants) and Grant Thornton Limited and ATB Financial (formerly known as AlbertaTreasury Branches) (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Ecojustice Canada Society, Canadian Association of Petroleum Producers, Greenpeace Canada, Action Surface Rights Association, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown JJ.

Heard: February 15, 2018
Judgment: January 31, 2019
Docket: 37627

Proceedings: reversing *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171, 2017 CarswellAlta 695, 2017 ABCA 124, Frans Slatter J.A., Frederica Schutz J.A., Sheilah Martin J.A. (Alta. C.A.); affirming *Grant Thornton Ltd. v. Alberta Energy Regulator* (2016), 33 Alta. L.R. (6th) 221, 37 C.B.R. (6th) 88, [2016] 11 W.W.R. 716, 2016 CarswellAlta 994, 2016 ABQB 278, Neil Wittmann C.J.Q.B. (Alta. Q.B.)

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Christine Laing, Shaun Fluker, for Intervener, Action Surface Rights Association
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Howard A. Gorman, Q.C., D. Aaron Stephenson, for Intervener, Canadian Bankers' Association

Subject: Civil Practice and Procedure; Environmental; Estates and Trusts; Insolvency; Natural Resources
Headnote
Bankruptcy and insolvency --- Priorities of claims — Unsecured claims — Priority with respect to secured creditors

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — "Disclaimer" did not empower trustee to simply walk away from "disclaimed" assets when bankrupt estate had been ordered to remedy any environmental condition or damage — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — End-of-life obligations binding on G Ltd. were not claims provable in R Corp. bankruptcy, so they did not conflict with general priority scheme in BIA Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 14.06.

Bankruptcy and insolvency --- Administration of estate — Trustees — Miscellaneous

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — Bankruptcy is not licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy.

Bankruptcy and insolvency --- Administration of estate — Trustee's possession of assets — Miscellaneous

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — Bankruptcy is not licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy — End-of-life obligations binding on G Ltd. were not claims provable in R Corp. bankruptcy, so they did not conflict with general priority scheme in BIA.

Natural resources --- Oil and gas — Constitutional issues — Miscellaneous

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd.

as "licensee" under Oil and Gas Conservation Act (OGCA) and Pipeline Act (PA) was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy by inclusion of trustees in definition of "licensee" in OGCA and PA — Under either branch of paramountcy analysis, Alberta legislation authorizing Regulator's use of its disputed powers would be inoperative to extent that use of those powers during bankruptcy altered or reordered priorities established by BIA — In test set out in 2012 Supreme Court case, court clearly stated that not all environmental obligations enforced by regulator would be claims provable in bankruptcy — On proper understanding of "creditor" step, it was clear that Regulator acted in public interest and for public good and that it was not creditor of R Corp.

Natural resources --- Oil and gas — Statutory regulation — General principles

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act (OGCA) and Pipeline Act (PA) was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy by inclusion of trustees in definition of "licensee" in OGCA and PA — In test set out in 2012 Supreme Court case, court clearly stated that not all environmental obligations enforced by regulator would be claims provable in bankruptcy — On proper understanding of "creditor" step, it was clear that Regulator acted in public interest and for public good and that it was not creditor of R Corp.

Faillite et insolvabilité --- Priorité des créances — Réclamations non garanties — Priorité par rapport aux créanciers garantis

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — « Renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI.

Faillite et insolvabilité --- Administration de l'actif — Syndics — Divers

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a

accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — « Renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite.

Faillite et insolvabilité --- Administration de l'actif — Possession de l'actif par le syndic — Divers

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite — Obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI.

Ressources naturelles --- Pétrole et gaz — Questions d'ordre constitutionnel — Divers

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite par l'ajout des syndics à la définition légale de « titulaire de permis » dans l'OGCA et la PA — Dans l'un ou l'autre volet de l'analyse relative à la prépondérance, la loi albertaine autorisant l'organisme de réglementation à exercer ses pouvoirs contestés sera inopérante, dans la mesure où l'exercice de ces pouvoirs pendant la faillite modifie ou réarrange les priorités établies par la LFI — Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes

des réclamations prouvables en matière de faillite — D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp.
Ressources naturelles --- Pétrole et gaz — Réglementation statutaire — Principes généraux
Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite par l'ajout des syndics à la définition légale de « titulaire de permis » dans l'OGCA et la PA — Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite — D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp.
In order to exploit oil and gas resources in Alberta, a company needs a property interest in the oil or gas, surface rights and a licence issued by the Alberta Energy Regulator. The Regulator administers the licensing scheme and enforces the abandonment and reclamation obligations of the licensees. The Regulator has delegated to the Orphan Wells Association (OWA) the authority to abandon and reclaim "orphans". On application by a creditor, G Ltd. was appointed receiver for R Corp. G Ltd. informed the Regulator that it was taking possession and control only of R Corp.'s 17 most productive wells, three associated facilities and 12 associated pipelines, and that it was not taking possession or control of any of R Corp.'s other licensed assets. The Regulator issued an order under the Oil and Gas Conservation Act (OGCA) and the Pipeline Act (PA) requiring R Corp. to suspend and abandon the renounced assets. The Regulator and the OWA filed an application for a declaration that G Ltd.'s renunciation of the renounced assets was void, an order requiring G Ltd. to comply with the abandonment orders and an order requiring G Ltd. to fulfill the statutory obligations as licensee in relation to the abandonment, reclamation and remediation of all of R Corp.'s licensed properties. G Ltd. brought a cross-application seeking approval to pursue a sales process excluding the renounced assets. A bankruptcy order was issued for R Corp. and G Ltd. was appointed as trustee. G Ltd. sent another letter to the Regulator invoking s. 14.06(4)(a)(ii) of the Bankruptcy and Insolvency Act (BIA) in relation to the renounced assets.
The chambers judge found an operational conflict between s. 14.06 of the BIA and the definition of "licensee" in the OGCA and the PA, and approved the proposed sale procedure. Appeals by the Regulator and the OWA were dismissed. The majority of the court stated that the constitutional issues in the appeals were complementary to the primary issue, which was the interpretation of the BIA. Section 14.06 of the BIA did not exempt environmental claims from the general bankruptcy regime, other than the super priority in s. 14.06(7). Section 14.06(4) of the BIA did not limit the power of the trustee to renounce properties to those circumstances where it might be exposed to personal liability. In terms of constitutional analysis, the majority concluded that the role of G Ltd. as a "licensee" under the OGCA and the PA was in operational conflict with the provisions of the BIA that exempted trustees from personal liability, allowed them to disclaim assets and established the priority of environmental claims. The dissenting judge would have allowed the appeal on the basis that there was no conflict between Alberta's environmental legislation and the BIA. The dissenting judge was of the view that s. 14.06 of the BIA did not operate to relieve G Ltd. of R Corp.'s obligations with respect to its licensed assets and that the Regulator was not asserting any provable claims, so the priority scheme in the BIA was not upended. The Regulator and the OWA appealed.
Held: The appeal was allowed.
Per Wagner C.J.C. (Abella, Karakatsanis, Gascon, Brown JJ. concurring): There is no conflict between Alberta's regulatory regime and the BIA requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although G

Ltd. remained fully protected from personal liability by federal law, it could not walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4) of the BIA. Section 14.06(4) of the BIA was clear and unambiguous when read on its own. There was no basis on which to read the words "the trustee is not personally liable" in s. 14.06(4) of the BIA as encompassing the liability of the bankrupt estate. "Disclaimer" did not empower a trustee to simply walk away from the "disclaimed" assets when the bankrupt estate had been ordered to remedy any environmental condition or damage. The operational conflicts between the BIA and the Alberta legislation alleged by G Ltd. arose from its status as a "licensee" under the OGCA and the PA. In light of the proper interpretation of s. 14.06(4) of the BIA, no operational conflict was caused by the fact that, under Alberta law, G Ltd. as "licensee" remained responsible for abandoning the renounced assets utilizing the remaining assets of the estate. The burden was on G Ltd. to establish the specific purposes of ss. 14.06(2) and 14.06(4) of the BIA if it wished to demonstrate a conflict. Based on the plain wording of the sections and the Hansard evidence, it was evident that the purpose of these provisions was to protect trustees from personal liability in respect of environmental matters affecting the estates they were administering. This purpose was not frustrated by the inclusion of trustees in the definition of "licensee" in the OGCA and the PA.

Under either branch of the paramountcy analysis, the Alberta legislation authorizing the Regulator's use of its disputed powers would be inoperative to the extent that the use of those powers during bankruptcy altered or reordered the priorities established by the BIA. Only claims provable in bankruptcy must be asserted within the single proceeding. Other claims are not stayed upon bankruptcy and continue to be binding on the estate. In the test set out in a 2012 Supreme Court case, the court clearly stated that not all environmental obligations enforced by a regulator would be claims provable in bankruptcy. On a proper understanding of the "creditor" step, it was clear that the Regulator acted in the public interest and for the public good and that it was not a creditor of R Corp. No fairness concerns were raised by disregarding the Regulator's concession. The end-of-life obligations binding on G Ltd. were not claims provable in the R Corp. bankruptcy, so they did not conflict with the general priority scheme in the BIA. Requiring R Corp. to pay for abandonment before distributing value to creditors did not disrupt the priority scheme of the BIA. In crafting the priority scheme set out in the BIA, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation. Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy.

Per Côté J. (dissenting) (Moldaver J. concurring): The appeal should be dismissed. Two aspects of Alberta's regulatory regime conflict with the BIA. First, Alberta's statutes regulating the oil and gas industry define the term "licensee" as including receivers and trustees in bankruptcy. The effect of this definition was that insolvency professionals were subject to the same obligations and liabilities as R Corp. itself, including the obligation to comply with the abandonment orders and the risk of personal liability for failing to do so. G Ltd. validly disclaimed the non-producing assets and the result was that it was no longer subject to the environmental liabilities associated with those assets. Because Alberta's statutory regime did not recognize these disclaimers as lawful, there was an unavoidable operational conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should be held inoperable to the extent that it did not recognize the legal effect of G Ltd.'s disclaimers. Section 14.06 of the BIA, when read as a whole, indicated that s. 14.06(4) did more than merely protect trustees from personal liability. Parliament did not make the disclaimer power in s. 14.06(4) of the BIA conditional on the availability of the Crown's super priority. There was an operational conflict to the extent that Alberta's statutory regime held receivers and trustees liable as "licensees" in relation to disclaimed assets.

Second, the Regulator has required that G Ltd. satisfy R Corp.'s environmental liabilities ahead of the estate's other debts, which contravened the BIA's priority scheme. Because the abandonment orders were "claims provable in bankruptcy" under the three-part test outlined in the 2012 Supreme Court of Canada case, the Regulator could not assert those claims outside of the bankruptcy process. To do so would frustrate an essential purpose of the BIA of distributing the estate's value in accordance with the statutory priority scheme. Nor could the Regulator achieve the same result indirectly by imposing conditions on the sale of R Corp.'s valuable assets. The province's licensing scheme effectively operated as a debt collection mechanism in relation to a bankrupt company. It should be held inoperative as applied to R Corp. under the second prong of the paramountcy test, frustration of purpose. G Ltd. and the creditor had satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law under both branches of the paramountcy test. The Court should continue to apply the "creditor" prong of the test as it was clearly articulated in the 2012 Supreme Court of Canada decision. Under that standard, the Regulator plainly acted as a creditor with respect to the R Corp. estate. It was sufficiently certain that either the Regulator or the OWA would ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement.

Pour exploiter des ressources pétrolières et gazières en Alberta, une société a besoin d'un intérêt de propriété sur le pétrole ou le gaz, des droits de surface et d'un permis délivré par un organisme de réglementation, l'Alberta Energy Regulator. Cet organisme administre le régime de délivrance de permis et s'assure du respect des engagements d'abandon et de remise en état des titulaires de permis. L'organisme a délégué une association de puits orphelins, l'Orphan Wells Association, le pouvoir d'abandonner et de remettre en état les « orphelins ». À la demande d'un créancier, G Ltd. a été nommé séquestre de R Corp. G Ltd. a informé l'organisme de réglementation qu'il prenait possession et contrôle seulement des 17 puits les plus productifs de R Corp., ainsi que de trois installations et de 12 pipelines connexes, et qu'il ne prenait pas possession ou contrôle de tous les autres éléments d'actif de R Corp. visés par des permis. L'organisme de réglementation a rendu une ordonnance en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) enjoignant à R Corp. de suspendre l'exploitation des biens faisant l'objet de la renonciation et de les abandonner. L'organisme de réglementation et l'association ont déposé une demande en vue d'obtenir un jugement déclaratoire portant que l'abandon par G Ltd. des biens faisant l'objet de la renonciation était nul, une ordonnance obligeant G Ltd. à se conformer aux ordonnances d'abandon, de même qu'une ordonnance enjoignant à G Ltd. de remplir les obligations légales en tant que titulaire de permis concernant l'abandon, la remise en état et la décontamination de tous les biens de R Corp. visés par des permis. G Ltd. a présenté une demande reconventionnelle visant à obtenir l'autorisation de poursuivre un processus de vente excluant les biens faisant l'objet de la renonciation. Une ordonnance de faillite a été rendue à l'égard de R Corp., et G Ltd. a été nommé syndic. G Ltd. a envoyé une autre lettre à l'organisme de réglementation dans laquelle il invoquait l'art. 14.06(4)a)(ii) de la Loi sur la faillite et l'insolvabilité (LFI) à l'égard des biens faisant l'objet de la renonciation.

Le juge siégeant en son cabinet a conclu à un conflit d'application entre l'art. 14.06 de la LFI et la définition de « titulaire de permis » que l'on trouve dans l'OGCA et la PA et a approuvé la procédure de vente proposée. Les appels interjetés par l'organisme de réglementation et l'association ont été rejetés. Les juges majoritaires de la cour ont déclaré que les questions constitutionnelles soulevées dans les appels étaient complémentaires à la question principale, soit l'interprétation de la LFI. L'article 14.06 de la LFI n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7). L'article 14.06(4) de la LFI n'a pas limité le pouvoir du syndic de renoncer aux biens dans des circonstances où il pourrait s'exposer à une responsabilité personnelle. Sur le plan de l'analyse constitutionnelle, les juges majoritaires ont conclu que le rôle de G Ltd. en tant que « titulaire de permis » au sens de l'OGCA et de la PA était en conflit d'application avec les dispositions de la LFI qui dégageaient les syndics de toute responsabilité personnelle, qui leur permettaient de renoncer à des biens et qui établissaient la priorité des réclamations environnementales. La juge dissidente aurait accueilli l'appel au motif qu'il n'y avait aucun conflit entre la législation albertaine sur l'environnement et la LFI. La juge dissidente était d'avis que l'art. 14.06 de la LFI n'a pas eu pour effet de libérer G Ltd. des obligations de R Corp. à l'égard de ses biens visés par des permis et que l'organisme de réglementation ne faisait valoir aucune réclamation prouvable, de sorte que le régime de priorité de la LFI n'était pas renversé. L'organisme de réglementation et l'association ont formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C. (Abella, Karakatsanis, Gascon, Brown, JJ., souscrivant à son opinion) : Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite. Bien que G Ltd. demeurait entièrement dégagé de toute responsabilité personnelle par le droit fédéral, il ne peut se soustraire aux engagements environnementaux qui lient l'actif du failli en invoquant l'art. 14.06(4) de la LFI. À la simple lecture de ses termes, l'art. 14.06(4) était clair et sans équivoque. Il n'y avait aucune raison de considérer que les mots « le syndic est [. . .] dégagé de toute responsabilité personnelle » figurant à l'art. 14.06(4) de la LFI visaient la responsabilité de l'actif du failli. La « renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement. Les conflits d'application entre la LFI et la législation albertaine allégués par G Ltd. résultaient de sa qualité de « titulaire de permis » au sens de l'OGCA et de la PA. Vu l'interprétation qu'il convenait de donner à l'art. 14.06(4) de la LFI, aucun conflit d'application n'était imputable au fait que, suivant le droit albertain, G Ltd. demeurait, en qualité de « titulaire de permis », tenu d'abandonner les biens faisant l'objet de la renonciation et d'utiliser les autres éléments de l'actif. Il incombait à G Ltd. d'établir les objectifs précis des art. 14.06(2) et (4) s'il souhaitait démontrer qu'il y avait conflit. Compte tenu du libellé clair des art. 14.06(2) et (4) et des débats parlementaires, l'objectif de ces dispositions était manifestement de dégager les syndics de toute responsabilité personnelle à l'égard de questions environnementales touchant l'actif qu'ils administrent. Cet objectif n'a pas été entravé par l'ajout des syndics à la définition de « titulaire de permis » dans l'OGCA et la PA.

Dans l'un ou l'autre volet de l'analyse relative à la prépondérance, la loi albertaine autorisant l'organisme de réglementation à exercer ses pouvoirs contestés sera inopérante, dans la mesure où l'exercice de ces pouvoirs pendant la faillite modifie ou réarrange les priorités établies par la LFI. On doit faire valoir uniquement les réclamations prouvables en matière de faillite dans le cadre de la procédure unique. Les réclamations non prouvables ne sont pas suspendues à la faillite et elles lient toujours l'actif. Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite. D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp. Aucune préoccupation n'a été soulevée en matière d'équité en ne tenant pas compte de la concession faite par l'organisme de réglementation. Les obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI. Obliger R Corp. à payer l'abandon avant de répartir la valeur entre les créanciers ne perturbait pas le régime de priorité établi dans la LFI. Au moment d'élaborer ce régime, le Parlement voulait permettre aux organismes de réglementation d'imposer une charge prioritaire sur le bien réel du failli touché par un fait ou dommage lié à l'environnement en vue de financer la décontamination. La faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite.

Côté, J. (dissidente) (Moldaver, J., souscrivant à son opinion) : Le pourvoi devrait être rejeté. Deux aspects du régime de réglementation albertain entraient en conflit avec la LFI. D'abord, les lois albertaines qui règlementent l'industrie pétrolière et gazière précisent que le terme « titulaire de permis » vise les séquestres et syndics de faillite. Cette définition avait pour effet d'assujettir les professionnels de l'insolvabilité aux mêmes obligations et responsabilités que R Corp. elle-même, notamment l'obligation de se conformer aux ordonnances d'abandon et le risque d'engager sa responsabilité personnelle pour ne pas l'avoir fait. G Ltd. ayant valablement renoncé aux biens inexploités, il n'était donc plus assujetti aux engagements environnementaux liés à ces biens. Étant donné que le régime législatif albertain ne reconnaissait pas la légalité de ces renonciations, il y avait un conflit d'application inévitable entre la loi fédérale et la loi provinciale. La loi albertaine régissant l'industrie pétrolière et gazière devrait donc être déclarée inopérante dans la mesure où elle ne reconnaissait pas l'effet juridique des renonciations de G Ltd. Lu dans son ensemble, l'art. 14.06 indiquait que l'art. 14.06(4) ne se bornait pas à dégager les syndics de toute responsabilité personnelle. Le Parlement n'a pas rendu le pouvoir de renonciation prévu à l'art. 14.06(4) conditionnel à la possibilité pour la Couronne de se prévaloir de sa superpriorité. Il y avait un conflit d'application dans la mesure où le régime législatif albertain tenait les séquestres et les syndics responsables en tant que « titulaires de permis » relativement aux biens faisant l'objet d'une renonciation.

Ensuite, l'organisme de réglementation a exigé que G Ltd. acquitte les engagements environnementaux de R Corp. avant les autres dettes de l'actif, ce qui contrevenait au régime de priorité établi par la LFI. Comme les ordonnances d'abandon sont des « réclamations prouvables en matière de faillite » selon le test à trois volets énoncé par la Cour suprême du Canada dans une décision rendue en 2012, l'organisme de réglementation ne pouvait faire valoir ces réclamations en dehors du processus de faillite. Agir ainsi entraverait la réalisation d'un objet essentiel de la LFI : le partage de la valeur de l'actif conformément au régime de priorités établi par la loi. L'organisme de réglementation ne pouvait pas non plus atteindre indirectement le même résultat en imposant des conditions à la vente des biens de valeur de R Corp. Le régime provincial de délivrance de permis servait en fait de mécanisme de recouvrement de créances à l'endroit d'une société en faillite. Il devrait être déclaré inopérant en ce qui concernait R Corp., suivant le second volet du critère de la prépondérance, l'entrave à la réalisation d'un objet fédéral. G Ltd. et le créancier se sont acquittés de leur fardeau de démontrer qu'il existait une incompatibilité véritable entre la loi fédérale et la loi provinciale selon les deux volets du test de la prépondérance. La Cour devrait continuer d'appliquer l'analyse relative au « créancier » telle qu'elle a été clairement formulée dans la décision rendue en 2012 par la Cour suprême du Canada. Suivant ce critère, l'organisme de réglementation a clairement agi comme créancier relativement à l'actif de R Corp. Il était suffisamment certain que l'organisme de réglementation ou l'association effectuerait ultimement les travaux d'abandon et de remise en état et ferait valoir une réclamation pécuniaire afin d'obtenir un remboursement.

APPEAL from judgment reported at *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.), dismissing appeal from judgment dismissing application for declaration that trustee-in-bankruptcy's disclaimer of licensed wells was void and granting cross-application for approval of sales process that excluded renounced wells.

POURVOI formé à l'encontre d'une décision publiée à *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.), ayant rejeté un appel interjeté à l'encontre d'un jugement ayant rejeté une demande visant à faire déclarer que la renonciation du syndic de faillite à des puits autorisés était nulle et ayant accueilli une demande reconventionnelle visant à obtenir l'approbation d'un processus de vente qui excluait les puits ayant fait l'objet d'une renonciation.

Wagner C.J.C. **(Abella, Karakatsanis, Gascon, Brown JJ. concurring):**

I. Introduction

1 The oil and gas industry is a lucrative and important component of Alberta's and Canada's economy. The industry also carries with it certain unavoidable environmental costs and consequences. To address them, Alberta has established a comprehensive cradle-to-grave licensing regime that is binding on companies active in the industry. A company will not be granted the licences that it needs to extract, process or transport oil and gas in Alberta unless it assumes end-of-life responsibilities for plugging and capping oil wells to prevent leaks, dismantling surface structures and restoring the surface to its previous condition. These obligations are known as "reclamation" and "abandonment" (Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12 (“EPEA”), s. 1(ddd), and Oil and Gas Conservation Act, R.S.A. 2000, c. O-6 (“OGCA”), s. 1(1)(a)).

2 The question in this appeal is what happens to these obligations when a company is bankrupt and a trustee in bankruptcy is charged with distributing its assets among various creditors according to the rules in the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (“BIA”). Redwater Energy Corporation ("Redwater") is the bankrupt company at the centre of this appeal. Its principal assets are 127 oil and gas assets — wells, pipelines and facilities — and their corresponding licences. A few of Redwater's licensed wells are still producing and profitable. The majority of the wells are spent and burdened with abandonment and reclamation liabilities that exceed their value.

3 The Alberta Energy Regulator ("Regulator") and the Orphan Well Association ("OWA") are the appellants in this Court. (For simplicity, I will refer to the Regulator when discussing the appellants' position, unless otherwise noted.) The Regulator administers Alberta's licensing regime and enforces the abandonment and reclamation obligations of licensees. The Regulator has delegated to the OWA, an independent non-profit entity, the authority to abandon and reclaim "orphans", which are oil and gas assets and their sites left behind in an improperly abandoned or unreclaimed state by defunct companies at the close of their insolvency proceedings. The Regulator says that, one way or another, the remaining value of the Redwater estate must be applied to meet the abandonment and reclamation obligations associated with its licensed assets.

4 Redwater's trustee in bankruptcy, Grant Thornton Limited ("GTL"), and Redwater's primary secured creditor, Alberta Treasury Branches ("ATB"), oppose the appeal. (For simplicity, I will refer to GTL when discussing the respondents' position, unless otherwise noted.) GTL argues that, since it has disclaimed Redwater's unproductive oil and gas assets, s. 14.06(4) of the BIA empowers it to walk away from those assets and the environmental liabilities associated with them and to deal solely with Redwater's producing oil and gas assets. Alternatively, GTL argues that, under the priority scheme in the *BIA*, the claims of Redwater's secured creditors must be satisfied ahead of Redwater's environmental liabilities. Relying on the doctrine of paramountcy, GTL says that Alberta's environmental legislation regulating the oil and gas industry is constitutionally inoperative to the extent that it authorizes the Regulator to interfere with this arrangement.

5 The chambers judge (2016 ABQB 278, 37 C.B.R. (6th) 88 (Alta. Q.B.)) and a majority of the Court of Appeal (2017 ABCA 124, 47 C.B.R. (6th) 171 (Alta. C.A.)) agreed with GTL. The Regulator's proposed use of its statutory powers to enforce Redwater's compliance with abandonment and reclamation obligations during bankruptcy was held to conflict with the *BIA* in two ways: (1) it imposed on GTL the obligations of a licensee in relation to the Redwater assets disclaimed by GTL, contrary to s. 14.06(4) of the BIA; and (2) it upended the priority scheme for the distribution of a bankrupt's assets established by the *BIA* by requiring that the "provable claims" of the Regulator, an unsecured creditor, be paid ahead of the claims of Redwater's secured creditors.

160 Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. The Abandonment Orders and the LMR requirements are based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the *BIA* is built. As noted in *Moloney* , the *BIA* is clear that "[t]he ownership of certain assets and the existence of particular liabilities depend upon provincial law" (para. 40). End-of-life obligations are imposed by valid provincial laws which define the contours of the bankrupt estate available for distribution.

161 Finally, as noted earlier, the *BIA*'s general purpose of facilitating financial rehabilitation is not relevant for a corporation such as Redwater. Corporations with insufficient assets to satisfy their creditors will never be discharged from bankruptcy because they cannot satisfy all their creditors' claims in full (BIA, s. 169(4)). Thus, no conflict with this purpose is caused by the conclusion that the end-of-life obligations binding Redwater are not provable claims.

IV. Conclusion

162 There is no conflict between Alberta's regulatory regime and the *BIA* requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although GTL remains fully protected from personal liability by federal law, it cannot walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4). On a proper application of the *Abitibi* test, the Redwater estate must comply with ongoing environmental obligations that are not claims provable in bankruptcy.

163 Accordingly, the appeal is allowed. In *Alberta Energy Regulator v. Grant Thornton Limited*, 2017 ABCA 278, 57 Alta. L.R. (6th) 37 (Alta. C.A.), Wakeling J.A. declined to stay the precedential effect of the Court of Appeal's decision. As he noted, the interests of the Regulator itself were already protected. Pursuant to earlier orders of the Alberta courts, GTL had already sold or renounced all of Redwater's assets, and the sale proceeds were being held in trust. Accordingly, the Regulator's request for an order that the proceeds from the sale of Redwater's assets be used to address Redwater's end-of-life obligations is granted. Additionally, the chambers judge's declarations in paras. 3 and 5-16 of his order are set aside.

164 As the successful party in the appeal, the Regulator would normally be entitled to its costs. However, the Regulator specifically did not seek costs. Accordingly, there will be no order made as to costs.

***Côté J.* (dissenting) (Moldaver J. concurring):**

I. Introduction

165 Redwater Energy Corporation ("Redwater") is a bankrupt oil and gas company. Its estate principally consists of two types of properties or assets: valuable, producing oil wells and facilities that are still capable of generating revenue; and value-negative, non-producing assets, including depleted wells that are subject to onerous environmental liabilities. Redwater's receiver and trustee in bankruptcy, Grant Thornton Limited ("GTL"), purports to have disclaimed ownership of the non-producing assets. It did so in order to sell the valuable, producing wells separately — unencumbered by the liabilities attached to the disclaimed properties — and to distribute the proceeds of that sale to the estate's creditors.

166 However, Alberta law does not recognize GTL's disclaimers as enforceable. Shortly after GTL's appointment as receiver, the Alberta Energy Regulator ("AER") issued "Abandonment Orders" for the disclaimed assets, directing Redwater and its working interest participants to carry out environmental work on those properties. Specifically, the AER sought to have GTL "abandon" the non-producing properties, which meant to render the wells environmentally safe according to the AER's directives. It later notified GTL that it would refuse to approve any sale of Redwater's valuable assets unless GTL did one of three things: sell the disclaimed properties in a single package with the producing wells and facilities; complete the abandonment and reclamation work itself; or post security to cover the environmental liabilities associated with the disclaimed properties.

TAB 10

Most Negative Treatment: Leave to appeal allowed
Most Recent Leave to appeal allowed: Third Eye Capital v. B.E.S.T. Active 365 Fund | 2020 ABCA 160, 2020 CarswellAlta 750, [2020] A.W.L.D. 1754, [2020] A.W.L.D. 1798, 318 A.C.W.S. (3d) 180, [2020] A.W.L.D. 1807, [2020] A.W.L.D. 1819, [2020] A.W.L.D. 1893, 78 C.B.R. (6th) 241 | (Alta. C.A., Apr 27, 2020)

2020 ABQB 182
Alberta Court of Queen's Bench

Accel Canada Holdings Limited (Re)

2020 CarswellAlta 475, 2020 ABQB 182, [2020] A.W.L.D. 1659, [2020] A.W.L.D. 1710, [2020] A.W.L.D. 1741, 11 P.P.S.A.C. (4th) 329, 12 Alta. L.R. (7th) 161, 13 R.P.R. (6th) 24, 317 A.C.W.S. (3d) 695, 78 C.B.R. (6th) 207

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

In the Matter of Accel Canada Holdings Limited and Accel Energy Canada Limited

K.M. Horner J.

Heard: February 20-21, March 6, 2020
Judgment: March 6, 2020
Written reasons: March 11, 2020
Docket: Calgary 1901-16581

Proceedings: leave to appeal allowed *Third Eye Capital v. B.E.S.T. Active 365 Fund* (2020), 2020 ABCA 160, 2020 CarswellAlta 750, Elizabeth Hughes J.A. (Alta. C.A.)

Counsel: William Roberts, Jonathan Selnes, Kyle Gardiner, for Accel Canada Holdings Limited and Accel Energy Canada Limited
Alexis Teasdale, Kevin Zych, for Third Eye Capital Corporation
David Legeyt, for ARC Resources Ltd.
Jeffrey Oliver, Danielle Marechal, for B.E.S.T. Active 365 Funds LP, B.E.S.T. Total Return Fund Inc. and Tier One Capital Limited Partnership

Subject: Contracts; Corporate and Commercial; Insolvency; Natural Resources; Property
Headnote
Real property --- Interests in real property — Miscellaneous
ARC Ltd. sold certain assets to H Ltd. with H Ltd. not paying entire purchase price but granting ARC Ltd. gross overriding royalties (GOR) agreement with royalty payments by H Ltd. triggered by certain events — H Ltd. financed portion of purchase agreement that ARC Ltd. received with monies from T Corp. and loan was secured by way of first ranking security — T Corp. was largest secured lender of H Ltd. and made significant loans to ARC Ltd. beginning in 2017, and loans were predominantly used by H Ltd. to pursue acquisitions — In 2018 and 2019, T Capital entered into royalty purchase agreements and GOR agreements with H Ltd. and E Ltd. (both parts of A Ltd.) — If stated amount was not paid by respective A Ltd. entity by set date, then T Capital GORs were payable by respective A Ltd. entity until payout had been paid pursuant to royalty payments due under GOR agreements — Monitor applied for and was granted Order Approving Sale and Investment Solicitation Process over all or nearly all of assets of A Ltd. in December 2019 — Monitor and A Ltd. brought applications to accelerate determination of issues to assist potential purchasers and/or investors with certainty surrounding nature of assets offered for sale and jurisdiction to vest off interests — Applications granted — It was determined that T Corp. GOR's were security interests and not interests in land — Certain aspects of provisions weighed toward ARC Ltd. GOR creating interest in land, such as provisions that referred to creation of an interest in land and provide ARC Ltd. with right to take in kind petroleum substances comprising GOR — However, other

factors indicated intention of parties to create security interest and overall aim and essence of transaction supported creation of security interest — In fact, T Corp. acknowledged intention of parties to create security interest by also making conflicting argument that GORs were registerable security interests capable of achieving priority over T Capital's interests.

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Dealings with security after bankruptcy — Miscellaneous

ARC Ltd. sold certain assets to H Ltd. with H Ltd. not paying entire purchase price but granting ARC Ltd. gross overriding royalties (GOR) agreement with royalty payments by H Ltd. triggered by certain events — H Ltd. financed portion of purchase agreement that ARC Ltd. received with monies from T Corp. and loan was secured by way of first ranking security — T Corp. was largest secured lender of H Ltd. and made significant loans to ARC Ltd. beginning in 2017, and loans were predominantly used by H Ltd. to pursue acquisitions — In 2018 and 2019, T Capital entered into royalty purchase agreements and GOR agreements with H Ltd. and E Ltd. (both parts of ARC Ltd.) — If stated amount was not paid by respective A Ltd. entity by set date, then T Capital GORs were payable by respective A Ltd. entity until payout had been paid pursuant to royalty payments due under GOR agreements — Monitor applied for and was granted Order Approving Sale and Investment Solicitation Process over all or nearly all of assets of A Ltd. in December 2019 — Monitor and A Ltd. brought applications to accelerate determination of issues to assist potential purchasers and/or investors with certainty surrounding nature of assets offered for sale and jurisdiction to vest off interests — Applications granted — It was determined that priority was governed by date of registration for security interests at issue — Accordingly, it was found that T Capital held first in time registration in assets with respect to A Ltd. GOR pursuant to both Personal Property Security Act, in accordance with Law of Property Act, and under Mines and Minerals Act (MMA) with respect to Crown mineral leases — T Capital registered security interests in H Ltd. present, after-acquired personal property and land charges in respect of its real property in PPR in June 2017 — T Capital also registered security interests with Alberta Energy in accordance with MMA and A Ltd. did not register its security interest with Alberta Energy.

Natural resources --- Mines and minerals — Ownership and acquisition of mineral rights — Mining lease — Miscellaneous

ARC Ltd. sold certain assets to H Ltd. with H Ltd. not paying entire purchase price but granting ARC Ltd. gross overriding royalties (GOR) agreement with royalty payments by H Ltd. triggered by certain events — H Ltd. financed portion of purchase agreement that ARC Ltd. received with monies from T Corp. and loan was secured by way of first ranking security — T Corp. was largest secured lender of H Ltd. and made significant loans to ARC Ltd. beginning in 2017, and loans were predominantly used by H Ltd. to pursue acquisitions — In 2018 and 2019 T Capital entered into royalty purchase agreements and GOR agreements with H Ltd. and E Ltd. (both parts of ARC Ltd.) — If stated amount was not paid by respective A Ltd. entity by set date, then T Capital GORs were payable by respective A Ltd. entity until payout had been paid pursuant to royalty payments due under GOR agreements — Monitor applied for and was granted Order Approving Sale and Investment Solicitation Process over all or nearly all of assets of A Ltd. in December 2019 — Monitor and A Ltd. brought applications to accelerate determination of issues to assist potential purchasers and/or investors with certainty surrounding nature of assets offered for sale and jurisdiction to vest off interests — Applications granted — Statutory registration schemes, as established in LPA with regard to freehold leases and MMA with regard to Crown mineral leases, applied to determine which interests were first in time as between T Corp. and T Capital GORs — Therefore, priority with respect to T Corp. and T Capital interests is also governed by date of registration for security interests at issue — Crown mineral leases have priority based on date of registration under MMA, and any remaining leases have priority based on registration under Personal Property Registry.

APPLICATIONS for determination and if appropriate declarations regarding several issues.

K.M. Horner J. **(orally):**

1 On March 6, 2020 I delivered an Oral Decision in these Applications and noted that written Reasons would follow. These are those Reasons.

2 In these proceedings the Applicants, Accel Canada Holdings Limited and Accel Energy Canada Limited (collectively Accel and separately Holdings and Energy) applied on November 22, 2019 to this court for an Order in proceedings they had commenced under Part III of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] to continue under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*] which was granted. On November 27, 2019 that Order was amended

and restated with the Stay granted therein extended to January 31, 2020 and then on January 21, 2020, further extended to March 13, 2020.

3 There are currently before this court Applications of four different stakeholders in these Arrangement proceedings, informally referred to as the Gross Overriding Royalty Applications. They involve applications for determination and if appropriate Declarations with respect to the following issues:

1. Whether the Gross Overriding Royalties ("GOR") held by ARC Resources Ltd ("ARC") and B.E.S.T. Active 365 Fund LP, B.E.S.T. Total Return Fund Inc. and Tier One Capital Limited Partnership (collectively "BEST"):

a) Are interests in land or contractual security for payment;

b) Can be vested off title pursuant to a Sale Approval/Vesting Order;

c) Can be redeemed for a specific sum; and

d) Have priority over other security interests held by other stakeholders.

Background

4 Pursuant to an Asset Purchase and Sale Agreement dated May 10, 2018 (the "APA") ARC as vendor sold certain assets (the "Redwater Assets") to Holdings as purchaser. The purchase price ("PP") in the APA was $154M. Holdings did not pay the whole of the PP but rather Holdings granted to ARC a GOR under a Gross Overriding Royalty Agreement ("ARC GOR"), with royalty payments by Holdings to ARC triggered by certain events to occur in the future, namely payment by Holdings to ARC of the remaining PP of $40M (the "DPP") on or before January 1, 2020 or July 1, 2020.

5 Holdings financed that portion of the PP that ARC did receive on closing with monies borrowed from Third Eye Capital Corporation ("TEC"). The loan by TEC was secured by way of a first ranking security interest in all of Holdings' property, including those assets purchased from ARC and in particular the assets underlying the ARC GOR.

6 TEC (which includes itself and as agent for others) is the largest secured lender of Holdings and is currently owed over $300M. TEC has made significant loans to Accel beginning in June 2017. The loans were predominantly used by Holdings to pursue acquisitions including the Redwater Assets under the APA. In return, Holdings granted to TEC a variety of security agreements including credit agreements and fixed and floating charge debentures over all present and after acquired property, security interests in all of its present and after acquired personal property and fixed charges over certain lands, leases and/or agreements.

7 TEC made numerous registrations of its security beginning in 2017, as will be discussed further in the consideration of the priorities issues. As at September, 2019 it also held first ranking security on Energy, which security is itself the subject of a further validity court challenge, but which may have $12.5M outstanding to TEC.

8 The APA contains a clause whereby ARC acknowledged the first ranking security of TEC in the underlying ARC GOR assets. All three parties, namely Holdings, TEC and ARC also entered into an Acknowledgement Agreement ("Acknowledgement") that was supposed to record this understanding, but the effect of which is itself a component of this dispute.

9 On August 29, 2018 and October 12, 2018, BEST entered into Royalty Purchase Agreements ("RPA") and GOR Agreements with Energy and Holdings respectively. These are referred to as GOR#1 and GOR#2 (collectively the "BEST GORs"). The purchase price for GOR#1 was $3M and for GOR#2 was $5M. Both sets of agreements were structured in an identical manner. Should either Energy or Holdings repurchase the Royalty by a set date for a stated amount, November 1, 2018 and $3.5M for GOR#1 or December 1, 2018 and $6M for GOR#2, the GOR would terminate. The stated amounts were not paid by either Holdings or Energy on the set dates contracted for.

10 If the stated amount was not paid by the respective Accel entity by the set date, then the BEST GORs were payable by the respective Accel entity until an Aggregate Proceeds Amount ("Payout") had been paid pursuant to the royalty payments due under the GOR Agreements. In the case of GOR#1, the Payout was the greater of $4M or an amount equal to $3M and interest at a rate of 59.4% per annum calculated and compounded monthly. In the case of GOR#2, the Payout was the greater of $6M or an amount equal to $5M and interest at a rate of 59.4% per annum calculated and compounded monthly. The term of each BEST GOR continues until the date that BEST has received sufficient royalty payments to reach Payout.

11 The Monitor applied for and was granted an Order Approving Sale and Investment Solicitation Process ("SISP") over all or nearly all of the Assets of Accel on December 13, 2019. Phase one of the SISP has ended. The Monitor and Accel have therefore requested that this court accelerate its determination of the issues in these Applications in order to assist it and the potential purchasers and/or investors with certainty surrounding the nature of the assets offered for sale and this court's jurisdiction to vest off interests.

12 I will address each issue in turn and will deal with additional facts as they are relevant to the discussion and determination.

1. Interest in land or contract for payment

13 The current leading decision in this area in Canada remains the Supreme Court decision in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7 (S.C.C.). That decision has more recently been the subject of application in similar circumstances to these by the Court of Appeal in Ontario in *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2018 ONCA 253 (Ont. C.A.) [*Dianor 2018*]. The *Dianor 2018* decision was itself the subject of discussion and application by this court in *Manitok Energy Inc (Re)*, 2018 ABQB 488 (Alta. Q.B.).

14 These cases make it clear and the parties agree the test for determining whether a royalty is an interest in land is whether:

1. the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and

2. the interest, out of which the royalty is carved, is itself an interest in land.

15 These facts do not engage part 2 of the test. All parties are agreed that Accel's interests underlying the royalties in issue are themselves interests in land.

16 Part 1 of the test, however, requires that the court determine the parties' intention in making the contracts that are outlined above. Our court of Appeal in *Bank of Montreal v. Dynex Petroleum Ltd.*, 1999 ABCA 363 (S.C.C.) at para 73, aff'd 2002 SCC 7 (S.C.C.), quoted with approval in *Dianor 2018* at para 63, set out the approach of a court in determining the parties' intention in these circumstances which is to "examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words."

17 When interpreting an agreement, a court must read the contract "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.) at para 47. Nonetheless, while surrounding circumstances are important considerations, they must not overwhelm the words of the contract or effectively create a new agreement contrary to the wording of the agreement itself: *Sattva* at para 57.

18 It is important to consider the surrounding circumstances, also referred to as the "factual matrix", of an agreement because "words alone do not have an immutable or absolute meaning": *Sattva* at para 47. Therefore, courts must consider the surrounding circumstances regardless of whether or not a contract is ambiguous; failing to consider the surrounding circumstances when interpreting a contract is a reversible error: *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157 (Alta. C.A.) at paras 57, 58, leave to appeal to SCC refused 37712 (5 April 2018) [2018 CarswellAlta 666 (S.C.C.)].

19 The parole evidence rule, which prevents the admission of outside evidence that alters the words of a contract, does not apply when considering the surrounding circumstances as to the intent of parties to an agreement. The primary concern of the parole evidence rule is to ensure certainty and finality in contractual arrangements by precluding evidence beyond the contract itself; however, because evidence of surrounding circumstances must necessarily be within the knowledge of both parties at or before the time of agreement, those concerns of improperly varying or contradicting the agreement do not apply: *Sattva* at para 59.

20 The evidence that can be relied upon to determine the "surrounding circumstances" varies from case to case: *Sattva* at para 58. Evidence of surrounding circumstances should only consist of objective evidence about the background facts at the time of the contract execution. The evidence must have been, or reasonably ought to have been, within the knowledge of both parties at the time of or prior to the contract execution: *Sattva* at para 58.

21 Determining what constitutes surrounding circumstances is a question of fact: *IFP Technologies* at para 83. Surrounding circumstances are relevant background facts that are likely not controversial to the parties and are capable of affecting how a reasonable person would understand the language of the document: *Alberta Union of Provincial Employees v. Alberta Health Services*, 2020 ABCA 4 (Alta. C.A.) at para 25 [*AUPE*]. Relevant background facts include those that speak to:

1) the genesis, aim or purpose of the contract;

2) the nature of the relationship created by the contract; and

3) the nature or custom of the market or industry in which the contract was executed: *IFP Technologies* at para 83.

22 The type of evidence that can be used is broad, and can include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man": *Sattva* at para 58, citing Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 W.L.R. 896 (U.K. H.L.) at 913.

23 In a commercial contract, the Court should know the commercial purpose of the contract, which assumes knowledge of the genesis of the transaction and the background, context, and market in which the parties are operating: *AUPE* at para 24. Contractual interpretation is "an exercise in determining what the parties objectively intended having regard to the entire written text, relevant contextual background and commercial context": *IFP Technologies* at para 89.

24 In *IFP Technologies*, the Court considered an antecedent agreement and written evidence of negotiations proceeding the agreement: at paras 84, 85. As further discussed below, negotiations preceding a contractual agreement are often not permissible evidence of surrounding circumstances. However, where written evidence of negotiations can provide a relatively objective indication of relevant background facts, such as the genesis and aim of the contract, it may be permissible: *IFP Technologies* at para 85.

25 Overall, the evidence that can be used to show the surrounding circumstances of an agreement is largely left to the Court's discretion, considering the circumstances of the case. The key requirements are that the evidence speaks to objective intentions relating to the background of the agreement that was known to all parties at the time of agreement.

26 Conversely, evidence that is not objective or known to the parties at the time of the agreement is not permissible evidence of surrounding circumstances. Therefore, evidence of subjective intentions is always inadmissible: *AUPE* at para 27; *Sattva* at para 58.

27 Evidence of pre-contract negotiations, including prior drafts, is generally inadmissible as subjective evidence about what the parties intended: *AUPE* at para 27. However, the issue of whether all pre-contract negotiations are admissible is unclear. The Alberta Court of Appeal stated in *AUPE* at para 32 that *Sattva* should not be interpreted broadly so as to define surrounding circumstances to include all pre-contract negotiations as long as they do not include subjective intentions. The Court of Appeal determined that where evidence of pre-contract negotiations overlaps with evidence of surrounding circumstances,

it may provide an objective interpretive aid where not speaking to subjective intentions and as long as it doesn't overwhelm the meaning of the written contract:*AUPE* at para 3; *IFP Technologies* at paras 85 — 87.

28 Post-contract conduct is not admissible in regard to determining the intentions of the parties. The only instance where evidence of post-contract conduct is admissible is where it is permitted as an exception to the parole evidence rule because of an ambiguity in the contract. A contract is only ambiguous where the words can be reasonably interpreted to have more than one meaning: *IFP Technologies* at para 87; *AUPE* at para 44.

29 In summary, the central feature of evidence that is not proper to consider as an aspect of the surrounding circumstances is that which only proves the subjective intentions of the parties. Clear examples of evidence based on subjective intentions include a bald statement by one party as to their interpretation of the agreement or pre-contract negotiations that speak only to the subjective intent of a party and/or overwhelm the resulting written agreement. Post-contract conduct is also inadmissible for the purpose of proving the surrounding circumstances at the time of the agreement.

30 In the context of the present proceedings, any evidence in the affidavits that speaks to the circumstances leading to the agreements at issue is admissible. If the Court is satisfied that the information was known to both parties at the time of the agreements and is evidence of an objective intent, rather than mere statements about an individual's subjective beliefs, then that evidence can be considered. Considering the interrelated nature of some of the entities in this proceeding and the commercial reality of these types of agreements, evidence of interrelated occurrences and negotiations may be relevant as long as all the parties to the specific agreements were aware of it.

31 This court's review of the permissible surrounding circumstances then will be directed at determining the genesis, aim and purpose of the contract, the nature of the relationship created by the contract and the custom of the market in which the contract was executed.

32 As our Court of Appeal put it so succinctly in *AUPE* at para 30; "Obviously there would be no dispute if there was consensus on the intent, so the lack of consensus does not assist in interpretation."

33 With these principles in mind, I then turn to a consideration of the wording of the ARC GOR and the BEST GORs together with the circumstances surrounding each transaction.

34 Accel has filed an Application asking this court to find that the interests granted in each case are not interests in land but rather security for payment or performance and, as such, are contracts that do not run with the land.

35 TEC similarly submits that the respective GORs are personal in nature and not interests in land.

36 Each of the GOR holders, ARC and BEST, urge the court to find that the parties used clear language in the appropriate respective contracts to vest interests in land.

37 What is really at stake now that the grantor or debtor, Holdings and Energy, have entered insolvency proceedings is priority concerns with all stakeholders taking positions most advantageous to their interests and, in particular, in sharing in any sale proceeds that may be realized by the SISP. It is from this perspective that the court reviews the evidence and arguments put forward.

ARC GOR

38 ARC makes several arguments in favour of this court determining that its GOR is an interest in land. They are, in summary:

1. ARC was the owner of the Redwater Assets prior to the transfer to Holdings and, as owner, reserved the GOR share out of the of the Redwater Assets that were transferred, such that ARC remains both the owner of the assets subject to the ARC GOR and the payee under the ARC GOR;

2. The APA and the ARC GOR manifest by their language a clear intention of the parties that ARC be the owner of the ARC GOR at the conclusion of the transaction; and

3. The parties intended the ARC GOR to be an interest in land as evidenced by the wording of the APA and the ARC GOR.

39 TEC and Accel submit that the ARC GOR, when read in conjunction with the APA and the Acknowledgment, clearly contemplate that the GOR is itself a security interest, albeit one that is a charge on land within the definition of same provided by the *Law of Property Act*, RSA 2000, c L-7 [*LPA*]. Section 64(1) of the *LPA* defines a charge on land as "an interest, whether arising immediately or in the future, in real property given by a corporation, that secures payment or the performance of an obligation.

40 Although the APA and ARC GOR do not in the language of either couch the grant as a security interest, TEC and Accel submit that when the entirety of the documents and the transaction is viewed as a whole it is clear that the ARC GOR is security for the payment of the DPP. It is the mechanism used by ARC to secure its right to payment under the APA.

41 When considering the intention of the APA and ARC GOR, I find that the agreements are capable of more than one meaning. On one hand, the ARC GOR could be interpreted as creating an interest in land, considering the potential for a royalty interest in perpetuity and plain wording of the provision stating that the ARC GOR creates an interest in land. On the other hand, the APA envisions the GOR as a mechanism of ensuring payment and could be read to establish a contractual agreement to pay secured by a royalty interest. Accordingly, I am permitted to consider some evidence of post-contract conduct in order to address that ambiguity.

42 I will begin by considering the words of the ARC GOR and the APA, and then address the surrounding circumstances.

43 Several components of the APA are particularly relevant to determining the intention of the parties in creating the ARC GOR. The Deferred Purchase Price Amount ("DPP") of $40M outlined in the ARC APA is to bear interest at the rate of 6% per annum calculated daily. The DPP and combined interest are the Deferred Obligations ("DO"). Pursuant to para 2.4 of the APA, the DO is due and payable by Holdings on January 2, 2020 (the "Maturity Date").

44 As per para 2.8(c) of the APA, Holdings was also to make monthly payments of interest to ARC following closing. As per para 2.8(g) of the APA, Holdings agreed to provide a GOR to ARC which would be triggered only if the DO were not paid by January 2,2020 and would only bind the Petroleum and Natural Gas Rights as defined in the APA from and after that date.

45 As per para 2.8(g)(i) of the APA, the DO that remain outstanding after January 2,2020 comprise the Unpaid Amount ("UP"). If the UP is paid after January 2, 2020 but before July 2, 2020 the GOR will terminate as per para 2.8(g)(iii).

46 If the DO are not paid on January 2, 2020 and the GOR is triggered and enforceable, then six months after that date (July 2020) ARC must calculate the GOR Elimination Amount ("GEA") as per para 2.8(g)(v) and Schedule "S" of the APA and then give notice to Holdings of the GEA (para 1.1(cccc) "Payout Amount"; para 2.8(g)(v)(A) and Schedule "S").

47 The GEA is calculated by taking the UP and deducting any payments received by ARC under the GOR as per para 2.8(g)(v)(A) and Schedule S. If Holdings pays the GEA within ten business days of receiving Notice of the GEA, the GOR terminates. If the GEA is not paid within the ten days period then the GOR is to continue in perpetuity as per para 2.8(g)(v)(B) of the APA. As per para 2.8(g)(vi) of the APA, ARC agreed to grant Holdings a Right of First Refusal in respect of a disposition by ARC of the ARC GOR.

48 The ARC GOR was executed on the closing of the sale of the Redwater Assets under the APA dated August 15, 2018. Holdings has made no payments to ARC either of interest, the DO or the UP.

49 The provisions that ARC submits support its position are:

1. The ARC GOR is to exist in perpetuity if Holdings does not pay the GEA within the time contracted for (yet to occur);

2. Para 2.2 of the ARC GOR Agreement uses the following language that makes it clear the parties intended the ARC GOR to be an interest in land:

> " . . . Shall constitute, and is to be construed as, an interest in land .....All terms, covenants, provisions and conditions of this Agreement shall run with and be binding upon the Royalty Lands and Title Documents, and the estates affected thereby for the duration of this Agreement.";

3. Para 2.3(c) of the GOR appoints Holdings as the agent and trustee of ARC with respect to proceeds;

4. Para 2.3(g)(i — iii) provide that ARC's prior written consent is to be obtained by Holdings prior to Holdings entering into a pooling unitization or other combination. Further para 3.1 provides that Holdings may not convert a well covered by the ARC GOR to another type of well. Para 3.4(c) requires Holdings to obtain ARC's consent to the surrender of title documents for the abandonment of a well covered by the ARC GOR;

5. Para 2.5(a) and para 4 provides ARC, upon the default of Holdings, with the right to take in kind its GOR, which ARC submits illustrates a strong badge of ownership as it means ARC may exert the right to take possession of its property;

6. Para 6.2 restricts Holdings from proceeding with certain types of transactions without ARC's consent; and

7. None of the language in the APA or the ARC GOR creates or talks of a security interest, charge or mortgage.

50 Certain aspects of these provisions weigh toward the ARC GOR creating an interest in land, such as provisions that: refer to the creation of an interest in land; provide ARC with a right to take in kind the Petroleum Substances comprising the GOR, including upon default of payment by Accel; create the potential for an interest in perpetuity; and prevent Accel from proceeding with certain transactions that would affect the ARC GOR, such as particular assignments of interest.

51 However, other aspects of the APA and ARC GOR point toward the ARC GOR being a security interest, including that the ARC GOR: predominantly ensures payment of the PP under the APA, plus interest; terminates upon full payment of the DO; does not exist in perpetuity unless Accel fails to meet its payment obligations, in which case only then additional funds would be paid to ARC by virtue of a continuing royalty interest; and is provided to ARC in exchange for payment of the APA's DO, and not in exchange for consideration from ARC beyond permitting Accel more time to meet its payment obligations.

52 Accel points out that various cases in Alberta that have held that a significant feature of a security interest as opposed to an absolute transfer of an interest in land is whether the debtor or grantor retains a right of redemption: *Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc.*, [1996] 1 S.C.R. 963 (S.C.C.), *Sharma v. 643454 Alberta Ltd.*, 2006 ABQB 119 (Alta. Q.B.) and *Equitable Trust Co. v. Lougheed Block Inc.*, 2014 ABCA 427 (Alta. C.A.), rev'd on other grounds 2016 SCC 19 (S.C.C.).

53 As Accel points out, the APA provides that the ARC GOR can be redeemed prior to January 2, 2020 as well as at any time after that to the expiration of the Notice of the GEA.

54 Additionally, evidence of the surrounding circumstances at the time of the agreements also indicates that the ARC GOR was intended to be a security interest and not an interest in land.

55 ARC was aware at all times that TEC was providing the financing to Holdings for the acquisition of the Redwater Assets in the APA. At the request of Holdings' counsel and 2 days prior to the closing of the scheduled APA the parties, TEC, ARC and Holdings entered into the Acknowledgment dated August 15, 2018.

56 While it suffers from some ambiguous wording, reading the Acknowledgment in conjunction with correspondence between counsel during the drafting of and the drafts of the document themselves as well as considering the surrounding circumstances and giving the document commercial sense, it is clear that it subordinates the priority of whatever security interests ARC has that secure the payment by Holdings of the DPP and interest accruing due thereunder to the payment by Holdings to TEC of whatever security interests TEC has.

57 It makes no commercial sense in the circumstances that were present when the APA and the TEC financing were negotiated that a lender in TEC's position would agree to subordinate its security to ARC for the DPP, as ARC would have the court read the Acknowledgement.

58 Further, the second paragraph of the Acknowledgment, again given the circumstances surrounding the drafting and execution of it, make it clear that the subordination of ARC's security interests include the ARC GOR and that Holdings would not grant to ARC any "other" security interest as security for the DPP and accruing interest.

59 The Acknowledgement therefore provides that the ARC GOR is subordinated to the TEC security interests. Priorities between the stakeholders to these Applications will be dealt with later in these reasons.

60 After the APA, ARC GOR, and Acknowledgement were entered into, ARC continued to treat the ARC GOR as a security interest obtained to secure payment for the Redwater Assets under the APA.

61 On May 6, 2019 ARC registered a security agreement and a land charge at the Personal Property Registry ("PPR") which identified ARC as the secured party, Holdings as the Debtor and the collateral as all the Debtor's right, title, estate and interest in the Petroleum Substances produced from the Royalty Lands as defined in the Royalty Agreement dated August 15, 2018 between the Debtor and the Secured Party.

62 ARC also prepared and released public disclosure documents following the closing of the APA, in which the sale of the Redwater Assets was described as a disposition with the ARC GOR as security for the deferred portion of the PP.

63 The evidence as a whole speaks to the objective intention of the parties that the ARC GOR provide a security interest for payment of the DO to ARC by Accel. Considering all of the evidence and submissions this Court is of the view that the ARC GOR is not an interest in land but rather is a security interest that does not run with the land.

64 ARC applies in the alternative for this court to lift the Stay, currently set to expire March 13, 2020, and allow it to enforce the ARC GOR by invoking the take in kind provisions.

65 TEC submits and this court agrees that the DPP, the UP and the GEA were all future debts to which Holdings was subject to on the initial filing date in October 2019 under both the *CCAA* and the *BIA*.

66 In considering an application for the lifting of a Stay under the CCAA, the court is to consider the balance of convenience, the relative prejudice to the parties, the merits of the proposed action, the prejudice to the applicant of the continuation of the Stay and whether lifting the Stay is in the interests of justice.

67 Beginning in at least March 2019, Accel began experiencing what would become sustained liquidity issues culminating in each entity filing a Notice of Intention to Make a Proposal under the *BIA* on October 21, 2019, resulting in a Stay of stakeholder's rights for a 10-day period, later extended.

68 To allow ARC to proceed with its intended enforcement actions would have the effect of reversing the purpose of the Acknowledgement by allowing ARC to receive payments when Holdings' obligations to TEC are stayed.

69 More importantly, the interests of justice are not served by allowing one of the stake holders to enforce its security interest and not the others. Lifting the stay would have the effect of draining finances from Holdings at a time when the status quo is the priority while it attempts to proceed with an orderly distribution of its assets. It would in effect prefer ARC over all the other Holdings stakeholders without equitable reason.

70 ARC provides no evidence of prejudice other than the same prejudice that all stakeholders with security interests have and will suffer.

71 The application to lift the Stay by ARC is accordingly denied.

72 In the further alternative, ARC claims that para 2.3(c) of the GOR creates an express trust in its favour and asks this court to direct that Holdings or the Monitor hold the proceeds attributable to the Redwater lands that underlie its ARC GOR in trust for it.

73 While para 2.3(c)(i) uses trust language, the ARC GOR as a whole must be reviewed to determine if the parties intended to great a true trust relationship.

74 TEC submits that when the ARC GOR is considered on all of its terms it establishes a debtor-creditor relationship rather than a trustee-beneficiary relationship. TEC points to three indicia to support its interpretation:

1. The ARC GOR supports payments of interest to ARC;

2. The ARC GOR is silent on co-mingling of proceeds attributable to the ARC GOR with Holdings' own funds; and

3. The GOR does not restrict Holdings' use of the those proceeds between the periodic payments due to ARC.

75 Again, in examining the true nature of the ARC GOR in light of the provisions of the APA and the surrounding circumstances present at the time of the execution of the agreements, it is clear that the ARC GOR is a security interest which secures the payment by Holdings to ARC of the DPP and does not give rise to a trustee beneficiary relationship.

76 The application to hold the proceeds in trust is accordingly denied.

BEST GORs

77 BEST relies predominantly on the language of the respective RPAs and BEST GORs to establish that Energy and Holdings granted to it interests in land and not security interests.

78 As has already been reviewed in these reasons, the language used in the agreement is but one factor that the court considers in determining the intention of the parties to it.

79 In August 2018, Accel sought short-term financing from BEST in order to bridge their capital requirements and to close a loan agreement with J.P. Morgan. Pursuant to a term sheet formalized on August 29, 2018, the parties entered into the RPA, whereby BEST agreed to purchase GOR#1 on Energy's lands for a purchase price of $3M, although Energy could repurchase GOR#1 at any time before November 1, 2018 for a purchase price of $3.5M. If GOR#1 was not repurchased by Energy before Nov 1, 2018, then GOR#1 was to remain effective until it expired. The Expiration Date is defined as the earlier of (i) the demand for payment by BEST, (ii) BEST receiving the greater of $4M OR the sum of $3M and an amount equal to interest of 59.4% per annum calculated and compounded monthly (the Aggregate Proceeds) and (iii) December 31, 2018.

80 Payments under the RPA and GOR#1 were to commence November 1, 2018 if the repurchase option for $3.5M had not been exercised by Energy before that date.

81 Pursuant to GOR#1, the payments to be made by Energy were to be that portion of the production equal to the Aggregate Proceeds amount and were to continue until the Aggregate Proceeds was paid. In other words, $3M plus interest at the rate of 59.4% until paid.

82 BEST was entitled to demand payment at any time for any reason. The term of GOR#1 was until BEST received payment of the Aggregate Proceeds in full. If Energy defaulted in payment, then BEST was entitled to be reimbursed all out-of-pocket expenses incurred to enforce its rights under the RPA and GOR#1, which included professional fees of a certain stated kind.

83 As security for the term sheet, Energy was to provide BEST with GOR#1.

84 On October 12, 2018, BEST entered into a further RPA and GOR#2 whereby BEST purchased GOR#2 for $5M from Holdings. BEST was advised that the purpose of the advance was to complete an acquisition of strategic value. The terms of the RPA and GOR#2 are identical in all material respects to the RPA and GOR#1 entered into between the parties in August, 2018.

85 No monies have been paid by Energy or Holdings to BEST under either transaction.

86 As previously stated, in considering the BEST GORs, the real question is whether the transactions granted to BEST an interest in land or a contractual right to a portion of the Petroleum Substances recovered from the land by way of security for the payment to it of a stated amount.

87 BEST submits that in addition to the clear grant of land language, a take in kind provision in each GOR signifies an interest in land. BEST also indicates other factors that support the creation of an interest in land, including that the BEST GORs provide a right to payment to BEST that is tied to production of the substances; create an interest capable of lasting for the duration of Accel's estate; and prevent Accel from an assignment without BEST's consent, for example.

88 However, other factors indicate the intention of the parties to create a security interest. The overall aim and essence of the transaction support the creation of a security interest. In fact, BEST acknowledges the intention of the parties to create a security interest by also making the conflicting argument that the BEST GORs are registerable security interests capable of achieving priority over TECs interests.

89 Further, the BEST GORs create limited, revisionary interests that terminate upon repayment of the Aggregate Proceeds. While Accel requires BEST's permission to assign its interests and obligations under the BEST GORs, Accel is entitled to pool or unitize the lands without express consent of BEST and is not generally limited in its decisions with respect to the substances, including its use of the substances as required for its operations. Finally, no further consideration was provided by BEST to attain an interest in the land beyond the funds provided to Accel which the BEST GORs function to provide repayment for from Accel. There is no further nexus between BEST and Accel's interest in the land.

90 With respect to BEST's submissions, it is clear that when both sets of agreements and the surrounding circumstances of each transaction are considered, the agreements document a short-term financing agreement secured by a time-limited and extinguishable GOR. This conclusion is supported by the extremely high rate of interest, the demand nature of the repayment terms, and the repurchase amounts being the loan amounts rather than a calculation of the real value of the royalty, which would be tied to the underlying reserves of the land it is granted over.

91 The BEST GORs are therefore determined to be security interests and not interests in land.

92 BEST also applies to lift the Stay to allow it to take in kind sufficient Petroleum Substances under the GOR to repay the loan amounts. For similar reasons given with respect to the ARC application of the same nature, that Application fails and is dismissed.

2. Vesting Off the ARC and BEST Interests/Redemption

93 As this court has determined that all three GORs before the court are not interests in land, but rather are security interests, there is no issue that the court can vest off the interests represented by the respective registrations. See *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 (Ont. C.A.).

94 Given that each set of agreements provides for payout calculations it should be a simple matter to determine what those amounts are when these proceedings have reached a point where funds are ready for distribution among the stakeholders.

95 The priorities of the various stake holders before this court on these applications based on those registrations will be dealt with below.

3. Priorities

96 TEC, ARC, and BEST each registered multiple security interests related to their respective interests against Energy and Holdings, including security interests related to the TEC Financing Agreements with Accel as well as the ARC GOR and BEST

GORs. The TEC Financing Agreements provided funding to ACCEL for the purchase of various petroleum and natural gas assets, including the Redwater Assets.

97 TEC first registered security interests at the Personal Property Registry (PPR) on June 29, 2017, against Holdings in relation to the TEC Financing Agreements. TEC made other related registrations in the PPR against Holdings on October 31, 2017, June 27, 2018, August 15, 2018, and November 12, 2018. TEC registered each of those interests as both a land charge and as a security interest against all present and after acquired personal property of Holdings. TEC also registered interests in the PPR against Energy on September 20, 2019, including an interest against all present and after acquired property of ACCEL Energy and a land charge, which relates to a subsequent application in these proceedings.

98 TEC registered security notices at Alberta Energy against Holdings on January 24, 2019, in relation to the financing of Accel's purchase of the Redwater Assets.

99 BEST registered security interests through the PPR on October 18, 2018 as a land charge and a security interest against all of Holdings' right, title, estate and interest in the petroleum substances produced from the lands defined in the GOR#2 Agreement.

100 BEST also registered a security notice against Holdings on November 15, 2018, at Alberta Energy with respect to multiple Crown mineral leases. BEST subsequently registered another security notice at Alberta Energy on January 9, 2019, against Energy.

101 ARC registered a land charge and security agreement against Holdings' right, title, estate and interest in the Petroleum Substances produced from the royalty lands in the PPR on May 6, 2019. ARC also registered caveats against title to Holding's freehold oil and gas leases.

102 In summary, TEC and BEST both hold multiple first in time registrations at Alberta Energy regarding Holdings' Crown mineral leases, while TEC has first in time registrations at the PPR against Holdings for land charges relative to both ARC and BEST.

103 There are two key statutory regimes governing the security interests at issue in this circumstance: the *LPA* and the *Mines and Minerals Act*, RSA 2000, c M-17 [*MMA*].

104 The *LPA* section 64(2) governs priority for registration through the PPR of charges on land and any right to payment arising in connection with an interest in land.

105 Section 64(1)(b) of the *LPA* defines "charge on land" as "an interest, whether arising immediately or in the future, in real property given by a corporation, that secures payment or performance of an obligation". Real property is defined in section 64(1)(c) of the *LPA* to mean land, an interest in land, and a right to payment arising in connection with an interest in land but not a right to payment evidenced by a security or an instrument to which the *Personal Property Security Act*, RSA 2000, c P-7 [*PPSA*] applies. The *PPSA* does not apply to the creation of an interest in a right to payment that arises in connection with an interest in land: *PPSA* s 4(g).

106 Under the *LPA*, priority of successive charges on land affecting the same interest are determined under section 64(2) as follows:

> **(2)** Subject to subsections (8) and (12), except in the case of fraud, priority among successive charges on land affecting the same interest shall be determined as follows:
>
> (a) priority between registered charges on land shall be determined by the order of registration without regard to the order of creation of the charges or execution of the agreements providing for the charges;
>
> (b) a registered charge on land has priority over an unregistered charge on land;

(c) priority between unregistered charges on land shall be determined by the order of execution of the agreements providing for the charges.

107 Registering under the *LPA* means, for the purposes of section 64, "registered by means of a financing statement in the Personal Property Registry in accordance with *the Personal Property Security Act* and the regulations made under that *Act*.": *LPA*, s 64(1)(d).

108 Since 64(2) of the *LPA* is subject to subsections 10 and 12, it is necessary to consider those provisions as well. Subsection (12) relates to interests registered between 1990 and 1992, which is not relevant in this case.

109 Subsection (8) states that:

(8) This section is subject in all respects to the *Land Titles Act* and the *Mines and Minerals Act*, and the priority of any interest registered or filed under either Act shall be determined pursuant to that Act.

110 Therefore, *LPA* registrations are subject to registrations undertaken pursuant to the *MMA*. The MMA permits secured parties to register a security notice in relation to security interests in a lease of Crown minerals: *MMA*, ss 2(a), 95. Section 95(4) establishes priorities under the *MMA* such that:

(4) A security interest in respect of which a security notice is registered has priority

(a) over any other security interest acquired before the registration of that security notice unless a security notice in respect of that other security interest is registered before the registration of the first mentioned security notice, ... and

(b) (d) over any interest, right or charge acquired after the registration of that security notice.

111 "Registered" in section 95 is defined as "registered under Division 2 of Part 6, in relation to a security notice or any other document registrable under that Division": *MMA* s 1(1)(ii). Registration under the *MMA* occurs through the registry operated by Alberta Energy.

112 Under section 94(1) of the *MMA*, the following definitions apply to the registration of a Crown mineral lease:

(e) "security interest" means an interest in or charge on collateral if the interest or charge secures

(i) the payment of an indebtedness arising from an existing or future loan or advance, . . .

and

(a)"collateral" means

(i) the interest of the lessee or of any of the lessees in an agreement, or

(ii) an interest in an agreement derived directly or indirectly from the lessee or any of the lessees of the agreement or from a former lessee or any of the former lessees of the agreement;

113 In summary, the *LPA* and the *MMA* govern registration of security interests in land or payment arising in land. The *LPA* provides for a registration-based priority system through the PPR, while the *MMA* provides a registration-based priority system through the Alberta Energy registry system for security interests relating to Crown mineral leases. PPR registrations in accordance with the *LPA* are subject to registrations that relate to Crown mineral leases under the *MMA*.

ARC GOR

114 ARC argues that the ARC GOR is an interest in land, and that there is no registration system or statutory requirement for royalty holdings to register interests in land or interests against crown oil and gas leases.

115 As previously discussed, the ARC GOR created a security interest, which is connected with the land making up the Redwater Assets. That security interest falls within the definition of "charge on land" within the meaning of the *LPA*, and also affects certain Crown mineral leases that fall within the meaning of the *MMA*. As such, it is governed by the statutory registration schemes under the *LPA* and *MMA*.

116 TEC submits that it has first priority security interests based on registration under the *LPA* with respect to the Redwater Assets that are subject to the ARC GOR. Further, TEC submits that it also has priority over the land through its registration in accordance with the *MMA*.

117 TEC registered security interests in Holdings present and after-acquired personal property and land charges in respect of its real property in the PPR on June 29, 2017. ARC did not register its security interest and land charge in the same property until May 6, 2019. TEC also registered security interests with Alberta Energy in accordance with the *MMA*. ARC did not register its security interest with Alberta Energy.

118 TEC and Accel also argue that TEC's security interest ranks above the ARC GOR by virtue of the Acknowledgement. Conversely, ARC argues that that the Acknowledgement subordinates TEC's interest behind ARC's right to payment for the GOR.

119 As previously discussed, applying the necessary principles of interpretation to the Acknowledgement indicates that the parties intended it to be interpreted as a full subordination of the ARC GOR, except for payments made in the ordinary course, which are currently stayed by the Orders in these proceedings.

120 Therefore, priority is governed by date of registration for the security interests at issue. Accordingly, I find that TEC holds first in time registration in the Redwater Assets with respect to the ARC GOR pursuant to both the *PPSA*, in accordance with the *LPA*, and under the *MMA* with respect to the Crown mineral leases.

BEST GORs

121 TEC and BEST are largely in agreement as to the state of registration regarding the Crown mineral leases related to the BEST GORs, but they disagree as to the effect of those registrations.

122 BEST says that it holds first in time registrations with Alberta Energy against 88% of the Crown Mineral Leases subject to GOR#1 Agreement, and 43.6% of the Crown Mineral Leases subject to GOR#2.

123 However, TEC submits that it has prior security interests over all of Accel's personal real property in the PPR, despite not having total first in time registrations under both the *LPA* and the *MMA* as compared to the BEST security interests. TEC therefore argues that BEST knew, or ought to have known, about TEC's security interests in the mineral leases, as registered first in time in the PPR prior to the BEST GORs, and that BEST's security interests should therefore be subordinated to TEC's security interests on the basis of that knowledge.

124 Specifically, TEC argues that the *MMA* has a gap in its priority scheme that is not present in other property registries in Alberta. TEC says that the *MMA* is silent as to the effect of actual or constructive knowledge of a pre-existing interest on a secured party's right to rely on the priority rules set out in the *MMA* or as to the principles of the common law or equity.

125 By way of contrast, TEC notes that the priorities in section 64(2) of the *LPA* are only effective "except in the case of fraud", and that section 64(9) further elaborates that:

> **(9)** For the purposes of subsection (2) and the *Land Titles Act*, a person does not act fraudulently merely because the person acts with knowledge of a charge on land, regardless of whether it has been registered under this section or not. [emphasis added]

126 Similarly, the *PPSA* states that a "person does not act in bad faith merely because the person acts with knowledge of the interest of some other person": *PPSA* s 66(2). Further, the *PPSA* section 66(3) states that the "principles of common law, equity and the law merchant, except insofar as they are inconsistent with the express provisions of this Act, supplement this Act and continue to apply".

127 TEC suggests that the Court must look to the common law to address the legislative gap, being the *MMA*'s failure to explicitly address knowledge. TEC claims that BEST was, or should have been, aware of its pre-existing security interests in the property and therefore should be subject to its interest despite the fact that TEC did not register its entire interest under the *MMA* prior to BEST. To that end, TEC relies on pre-PPSA case law to support the premise that actual knowledge of a prior unregistered interest can defeat a subsequent claim to title.

128 BEST disagrees that there is a legislative gap. BEST submits that the *MMA* establishes a priority system based on registration, and that knowledge is not mentioned because knowledge is not relevant.

129 As the Supreme Court of Canada stated in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (S.C.C.) at para 51, a court must determine and apply the intention of the legislation "without crossing the line between judicial interpretation and legislative drafting". A court's role in filling in legislative gaps is described in Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law Inc, 2016) at 301 as follows:

> . . . the courts have a jurisdiction to cure drafter's errors. However, gaps in the legislative scheme are attributed to the legislature. Gaps may be the result of a considered decision or the result of an oversight or mistake, but in either case the court normally claims that it has no jurisdiction to cure the problem. The technique required to remedy it, namely, reading in, is generally perceived as going beyond interpretation and impinging on the legislative role.

130 It is for the legislature to address the statutory scheme for registration, not for this Court. The *MMA* establishes a clear priority ranking scheme in section 95(4), based on registration with Alberta Energy. If the Legislature was concerned with knowledge in creating a registration scheme under the *MMA*, it would have said so. Accordingly, I find that the *MMA* priority system is based solely upon registration as specified in section 95(4), without regard to knowledge.

131 TEC and Accel also both argue that the principle of *nemo dat quod non habet* (*nemo dat*) should apply. *Nemo dat* is the principle that, as between legal interests in property, the first party to take a legal interest in a property takes priority: *Innovation Credit Union v. Bank of Montreal*, 2010 SCC 47 (S.C.C.) at para 51 [*Innovation*]. TEC suggests that Accel could not grant priority interests to BEST because it was prohibited from doing so under the Credit Agreement with Accel, which requires Accel to gain consent from TEC before incurring, among other things, new debts or liens against the land. TEC says that for this reason, Accel did not have the authority to grant a subsequent security interest to BEST.

132 BEST argues that *nemo dat* doesn't apply to the *LTA* or the *MMA*.

133 The Supreme Court's discussion of *nemo dat* in *Innovation* is indicative of the type of circumstances where the *nemo dat* principle may apply in relation to security interests. Those circumstances are distinguishable from the present circumstances. In Innovation, the Supreme Court of Canada applied the principle of *nemo dat* when considering two competing security interests. The competing interests were between an unperfected security interest subject to the *PPSA* and a subsequently acquired *Bank Act* security interest. *Nemo dat* was necessarily invoked in Innovation because the *Bank Act* gave priority over security interests acquired after the *Bank Act* security interest, without addressing whether or not a prior unperfected interest took priority. The Court noted that because the *Bank Act* establishes that a *Bank Act* security interest is subject to prior acquired interests, the Bank can receive no greater interest in the property than the debtor has, similar to the principle of *nemo dat*: *Innovation* at para 51. The Bank in *Innovation* asked the Court to adopt a rule that would give priority based on registration rather than relying on principles of *nemo dat*, and the Court recognized that it would be open to Parliament, rather than the Court, to do so: at paras 52, 53.

134 The circumstances in *Innovation* are distinguishable from the present circumstances, where the statutory schemes of the *LPA* and *MMA* both establish priority schemes based on registration. Here, the Legislature has created priority schemes under

the *MMA* and the *LPA*, and therefore the principles of *nemo dat* are not applicable as to determining priority between security interests in the same property.

135 Registration systems provide commercial certainty. The registration schemes in the *LPA* and *MMA* establish priority for security interests based on registration. It is neither necessary nor would it provide certainty to commercial parties to create additional obligations beyond those contemplated within the statutory regimes, such as by limiting that priority system based on knowledge or preventing a party from providing funding in exchange for a security interest based on *nemo dat*.

136 Accordingly, the statutory registration schemes, as established in the *LPA* with regard to the freehold leases and the *MMA* with regard to the Crown mineral leases, apply to determine which interests are first in time as between TEC and the BEST GORs. Therefore, priority with respect to the BEST and TEC interests is also governed by date of registration for the security interests at issue. The Crown mineral leases have priority based on date of registration under the *MMA*, and any remaining leases have priority based on registration under the *PPR*.

137 Should the parties wish to address costs of these applications, their respective right to do is reserved.

Applications granted.

TAB 11

2019 ONCA 508
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2019 CarswellOnt 9683, 2019 ONCA 508, [2019] O.J. No. 3211, 11 P.P.S.A.C. (4th) 11,
306 A.C.W.S. (3d) 235, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 70 C.B.R. (6th) 181

Third Eye Capital Corporation (Applicant / Respondent) and Ressources Dianor Inc. /Dianor Resources Inc. (Respondent / Respondent) and 2350614 Ontario Inc. (Interested Party / Appellant)

S.E. Pepall, P. Lauwers, Grant Huscroft JJ.A.

Heard: September 17, 2018
Judgment: June 19, 2019
Docket: CA C62925

Proceedings: affirming *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 41 C.B.R. (6th) 320, 2016 CarswellOnt 15947, 2016 ONSC 6086, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Third Eye Capital Corp. v. Ressources Dianor Inc. / Dianor Resources Inc.* (2016), 2016 CarswellOnt 18827, 2016 ONSC 7112, 42 C.B.R. (6th) 269, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Peter L. Roy, Sean Grayson, for Appellant, 2350614 Ontario Inc.
Shara Roy, Nilou Nezhat, for Respondent, Third Eye Capital Corporation
Stuart Brotman, Dylan Chochla, for Receiver of Respondent, Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.
Nicholas Kluge, for Monitor of Essar Steel Algoma Inc., Ernst & Young Inc.
Steven J. Weisz, for Intervener, Insolvency Institute of Canada

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Natural Resources; Property

Headnote

Natural resources --- Mines and minerals — Remedies — Vesting orders

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title; however, it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days

after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — TE was successful — Motion judge approved sale to TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 was unsuccessful in its cross-motion claiming payment for debt owing under Repair and Storage Liens Act — 235 appealed — In holding that royalty rights created no interest in law, vesting order was granted whereby receiver sold mining rights to third-party purchaser, free and clear of royalty rights — Vesting order was not stayed pending appeal and was executed — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing 235's appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title, but it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Appeal period in Bankruptcy and Insolvency General Rules (BIGR) governed appeal — Under R. 31 of BIGR, 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" — 235 had known for considerable time there could be no sale to TE in absence of extinguishment of GORs and royalty rights; this was condition of sale that was approved by motion judge — 235 was stated to be unopposed to

sale but opposed sale condition requiring extinguishment — Jurisdiction to grant approval of sale emanated from BIA and so did vesting component — It would have made little sense to split two elements of order in circumstances — Essence of order was anchored in BIGR — Accordingly, appeal period was 10 days as prescribed by R. 31 of BIGR and ran from date of motion judge's decision, and 235's appeal was out of time.
Personal property security --- Statutory liens — Miscellaneous

APPEAL by numbered company from judgment reported at *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 2016 ONSC 6086, 2016 CarswellOnt 15947, 41 C.B.R. (6th) 320 (Ont. S.C.J. [Commercial List]), respecting whether third party interest in land in nature of Gross Overriding Royalty could be extinguished by vesting order granted in receivership proceeding and governance of appeal.

***S.E. 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 (Ont. C.A.) ("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 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-

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 *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), 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.J.), 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 Ltd. v. 984 Bay Street Inc.*, [2005] O.J. No. 3707 (Ont. S.C.J.), 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 (Ont. 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 Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.).

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 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 Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 (Ont. S.C.J. [Commercial List]) 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.J. [Commercial List]), 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 (S.C.C.), 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.

TAB 12

Supreme Court of Canada

27766

Cour suprême du Canada

02 028 003

BANK OF MONTREAL

- v. -

ENCHANT RESOURCES LTD. and D. S WILLNESS
(Alta.)(27766)

CORAM:

The Rt. Hon. Beverley McLachlin, P.C.
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Iacobucci
The Hon. Mr. Justice Major
The Hon. Mr. Justice Bastarache
The Hon. Mr. Justice Binnie
The Hon. Mr. Justice LeBel

Appeal heard and judgment rendered:
November 9, 2001

Reasons delivered:
January 24, 2002

Reasons for judgment by:
The Hon. Mr. Justice Major

Concurred in by:
The Rt. Hon. Beverley McLachlin, P.C.
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Iacobucci
The Hon. Mr. Justice Bastarache
The Hon. Mr. Justice Binnie
The Hon. Mr. Justice LeBel

BANQUE DE MONTRÉAL

- c. -

ENCHANT RESOURCES LTD. et D. S. WILLNESS
(Alta.)(27766)

CORAM:

La très honorable Beverley McLachlin, c.p.
L'honorable juge Gonthier
L'honorable juge Iacobucci
L'honorable juge Major
L'honorable juge Bastarache
L'honorable juge Binnie
L'honorable juge LeBel

Appel entendu et jugement rendu:
le 9 novembre 2001

Motifs déposés:
le 24 janvier 2002

Motifs de jugement:
L'honorable juge Major

Souscrivent à l'avis de l'honorable juge Major:
La très honorable Beverley McLachlin, c.p.
L'honorable juge Gonthier
L'honorable juge Iacobucci
L'honorable juge Bastarache
L'honorable juge Binnie
L'honorable juge LeBel

Counsel at hearing:

For the appellant:
Richard B. Jones

For the respondents:
James C. Crawford, Q.C.
Frank R. Dearlove
Scott H. D. Bower

Avocats à l'audience:

Pour l'appelante:
Richard B. Jones

Pour les intimés:
James C. Crawford, c.r.
Frank R. Dearlove
Scott H. D. Bower

Citations	Références
Alta. C.A.: (1999), 74 Alta. L.R. (3d) 219, 255 A.R. 116, 182 D.L.R. (4th) 640, 2 B.L.R. (3d) 58, 15 C.B.R. (4th) 5, 15 P.P.S.A.C. (2d) 175, [2000] 2 W.W.R. 693, [1999] A.J. No. 1463 (QL), 1999 ABCA 363.	C.A. Alb.: (1999), 74 Alta. L.R. (3d) 219, 255 A.R. 116, 182 D.L.R. (4th) 640, 2 B.L.R. (3d) 58, 15 C.B.R. (4th) 5, 15 P.P.S.A.C. (2d) 175, [2000] 2 W.W.R. 693, [1999] A.J. No. 1463 (QL), 1999 ABCA 363.
Q.B.: (1995), 39 Alta. L.R. (3d) 66, [1996] 6 W.W.R. 461, [1995] A.J. No. 1279 (QL).	B.R.: (1995), 39 Alta. L.R. (3d) 66, [1996] 6 W.W.R. 461, [1995] A.J. No. 1279 (QL).

CITATION

Before publication in the S.C.R., this judgment should be cited using the neutral citation: *Bank of Montreal v. Dynex Resources Ltd.*, 2002 SCC 7. Once the judgment is published in the S.C.R., the neutral citation should be used as a parallel citation: *Bank of Montreal v. Dynex Resources Ltd.*, [2002] 1 S.C.R. xxx, 2002 SCC 7.

RÉFÉRENCE

Avant sa publication dans le R.C.S., ce jugement devrait être cité en utilisant la référence neutre: *Banque de Montréal c. Dynex Resources Ltd.*, 2002 CSC 7. Une fois le jugement publié au R.C.S., la référence neutre sera utilisée à titre de référence parallèle: *Banque de Montréal c. Dynex Resources Ltd.*, [2002] 1 R.C.S. xxx, 2002 CSC 7.

bank of montreal *v.* dynex resources ltd.

Bank of Montreal *Appellant*

v.

Enchant Resources Ltd. and
D. S. Willness *Respondents*

Indexed as: Bank of Montreal *v.* Dynex Petroleum Ltd.

Neutral citation: 2002 SCC 7

File No.: 27766

Hearing and judgment: 2001: November 9.

Reasons delivered: 2002: January 24.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, and LeBel JJ.

on appeal from the court of appeal for alberta

Commercial law – Oil and gas industry – Overriding royalties – Whether overriding royalties arising from working interest capable of being interest in land.

The appellant Bank was a secured creditor of D, a corporation in liquidation. The trustee in bankruptcy wanted to sell all the oil and gas properties of

D. One issue of concern was whether any such sale would be subject to overriding royalties arising out of the working interest held by D. Also, the respondents held overriding royalties and claimed priority over the Bank, as to the assets of D, because their interests, as protected by caveats filed in a land registration office, preceded the Bank's loans to D and its predecessors. The caveats claimed an interest in D's working interest as a result of services performed for D and/or its predecessors. The chambers judge granted the Bank's application for a preliminary determination finding that an overriding royalty interest cannot be an interest in land. The Court of Appeal set aside that decision, holding that overriding royalty interests can, subject to the intention of the parties, be interests in land.

Held: The appeal should be dismissed.

The common law prohibition against the creation of an interest in land from an incorporeal hereditament is inapplicable to the oil and gas industry given its practices and the support found in the law. A royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest or a *profit à prendre* if that is the intention of the parties.

Cases Cited

By Major J.

Referred to: *Berkheiser v. Berkheiser*, [1957] S.C.R. 387; *Saskatchewan Minerals v. Keyes*, [1972] S.C.R. 703; *Scurry-Rainbow Oil Ltd. v. Galloway Estate* (1993), 138 A.R. 321, aff'd (1994), 157 A.R. 65; *Canco Oil and Gas Ltd. v. Saskatchewan* (1991), 89 Sask. R. 37; *St. Lawrence Petroleum Ltd. v. Bailey Selburn*

Oil & Gas Ltd., [1963] S.C.R. 482; *Vanguard Petroleums Ltd. v. Vermont Oil & Gas Ltd.*, [1977] 2 W.W.R. 66; *Isaac v. Cook* (1982), 44 C.B.R. 39; *Guaranty Trust Co. v. Hetherington* (1987), 50 Alta. L.R. (2d) 193, aff'd in part [1989] 5 W.W.R. 340; *Vandergrift v. Coseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17; *Nova Scotia Business Capital Corp. v. Coxheath Gold Holdings Ltd.* (1993), 128 N.S.R. (2d) 118; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, 2000 SCC 34.

Authors Cited

Davies, G. J. "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232.

Dukelow, Daphne A., and Betsy Nuse. *The Dictionary of Canadian Law*, 2nd ed. Scarborough, Ont.: Carswell, 1995, "corporeal hereditament", "incorporeal hereditament".

Ellis, W. H. "Property Status of Royalties in Canadian Oil and Gas Law" (1984), 22 *Alta. L. Rev.* 1.

Newman, J. Forbes. "Can a Gross Overriding Royalty Be an Interest in Land", in Insight Educational Services, *Oil & Gas Agreements Update*. Mississauga, Ont.: Insight Press, 1989.

APPEAL from a judgment of the Alberta Court of Appeal (1999), 74 Alta. L.R. (3d) 219, 255 A.R. 116, 182 D.L.R. (4th) 640, 2 B.L.R. (3d) 58, 15 C.B.R. (4th) 5, 15 P.P.S.A.C. (2d) 175, [2000] 2 W.W.R. 693, [1999] A.J. No. 1463 (QL), 1999 ABCA 363, reversing a judgment of the Court of Queen's Bench (1995), 39 Alta. L.R. (3d) 66, [1996] 6 W.W.R. 461, [1995] A.J. No. 1279 (QL). Appeal dismissed.

Richard B. Jones, for the appellant.

James C. Crawford, Q.C., *Frank R. Dearlove* and *Scott H. D. Bower* , for the respondents.

Solicitors for the appellant: Jones, Rogers, Toronto.

Solicitors for the respondent: McDonald Crawford; Bennett Jones, Calgary.

SUPREME COURT OF CANADA

BANK OF MONTREAL

v.

ENCHANT RESOURCES LTD. and D. S. WILLNESS

CORAM: The Chief Justice and Gonthier, Iacobucci, Major, Bastarache, Binnie and LeBel JJ.

MAJOR J. –

I. Introduction

1 This appeal arises from an application made by the appellant Bank of Montreal before the chambers judge in the Alberta Court of Queen's Bench for a determination that, as a matter of law, an overriding royalty is incapable of being an interest in land. The application was opposed by several defendants including the respondents in this Court, Enchant Resources Ltd. ("Enchant") and D. S. Willness ("Willness"), each holders of overriding royalties who claim their interests to be interests in land. The learned chambers judge allowed the Bank's application which the Alberta Court of Appeal reversed, holding that an overriding royalty is capable of being an interest in land. This appeal to the Supreme Court of Canada was dismissed with reasons to follow.

II. Facts

2 The material filed and submissions of counsel indicated that royalty 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.

3 The appellant Bank of Montreal was a secured creditor of Dynex Petroleum Ltd. ("Dynex"), a corporation in liquidation. The trustee in bankruptcy wanted to sell all the oil and gas properties of Dynex. One issue was whether any such sale would be subject to overriding royalties arising out of the working interest held by Dynex. Also, there were several competing claims against the appellant, which by the time of this appeal had narrowed to the overriding royalties of the respondents Enchant and Willness, who claimed a preference by way of a caveat filed in the South Alberta Land Registration District, claiming an interest in Dynex's working interest as a result of services performed for Dynex and/or its predecessors. The respondents claimed their royalty rights comprised interests in land and claimed priority over the appellant because their interests, as protected by caveats, preceded the appellant's loans to Dynex and its predecessors. The appellant submitted that at common law an interest

in land could not arise from an incorporeal hereditament and therefore the respondents' overriding royalties (which arose from a working interest, an incorporeal hereditament) did not rank higher in priority than the appellant's security interest.

4 This case pits this ancient common law rule against a common practice in the oil and gas industry. The Court is asked to resolve the apparent conflict.

III. Judicial History

5 The appellant applied to the Court of Queens Bench of Alberta ((1995), 39 Alta. L.R. (3d) 66) for a preliminary determination that the overriding royalty interests do not constitute interests in land. The learned chambers judge, Rooke J. in allowing the application held at para. 3 that:

> ... as a matter of law, a lessee of an oil and gas lease (which is a profit à prendre), which is in itself an interest in land, obtained from a lessor (whether the Crown or freehold), cannot in law pass on an interest in land to a third party.

He also concluded that if an interest in land could issue from a *profit à prendre*, which he held that it could not, the matter could not be determined summarily as evidence would be necessary to examine the language of the instruments and the intentions of the parties.

6 After a review of policy considerations, industry practice and Canadian and United States case law, the Alberta Court of Appeal ((1999), 74 Alta. L.R. (3d) 219) concluded that overriding royalty interests can constitute interests in land if intended

by the parties. For substantially the same reasons as the Court of Appeal, I conclude that overriding royalty interests can be interests in land.

IV. Issue

7 Can an overriding royalty issued from a working interest (an incorporeal hereditament) be an interest in land?

V. Analysis

8 At common law, an interest in land could issue from a corporeal hereditament but not from an incorporeal hereditament. 'Corporeal hereditament' is defined by *The Dictionary of Canadian Law* (2nd ed., 1995) as:

> 1. A material object in contrast to a right. It may include land, buildings, minerals, trees or fixtures....
>
> 2. Land.

'Incorporeal hereditament' is defined as:

> 1. "[A right] . . . in land, which [includes] such things as rent charges, annuities, easements, profits à prendre, and so on."...
>
> 2. Property which is not tangible but can be inherited.

9 In *Berkheiser v. Berkheiser*, [1957] S.C.R. 387, at p. 392, Rand J. held that an oil and gas lease, the interest from which an overriding royalty is created, can be a *profit à prendre*, an interest in land. A *profit à prendre* is an incorporeal hereditament. The appellant has submitted that at common law, an interest in land could not issue

from an incorporeal hereditament and therefore overriding royalties cannot be interests in land.

10 Canadian case law suggests otherwise. In *Saskatchewan Minerals v. Keyes*, [1972] S.C.R. 703, the majority declined to decide whether an overriding royalty could be an interest in land. However, Laskin J. in dissent specifically addressed that issue. He did not find the distinction between corporeal and incorporeal hereditaments to be useful in this context and discussed the difficulty of conforming new commercial concepts to anachronistic categories at p. 722:

> The language of "corporeal" and "incorporeal" does not point up the distinction between the legal interest and its subject-matter. On this distinction, all legal interests are "incorporeal", and it is only the unconfronted force of a long history that makes it necessary in this case to examine certain institutions of property in the common law provinces through an antiquated system of classification and an antiquated terminology. The association of rents and royalties has run through the cases (as in *Re Dawson and Bell, supra*, the *Berkheiser* case, *supra*, and cf. *Attorney-General of Ontario v. Mercer*, at p.777) but without the necessity hitherto in this Court to test them against the common law classifications of interests in land or to determine whether those classifications are broad enough to embrace a royalty in gross.

11 Laskin J. referred to *Berkheiser*, *supra*, where Rand J. held that a royalty was analogous to rent. While that case involved a lessor's royalty, Laskin J. found that although theoretically the holder of a lessor's royalty holds an interest in reversion, whereas the holder of an overriding royalty does not, since in essence the two interests are identical, there should be no distinction between the two royalty interests in their treatment as interests in land. The effect of Laskin J.'s reasons was to render inapplicable, at least insofar as overriding royalties, the common law rule against creating interests in land out of incorporeal interests.

12 Laskin J. concluded that the overriding royalty was an interest in land, analogous to a rent-charge. It is significant that he did not find all overriding royalty interests to be interests in land. He held that the intentions of the parties judged by the language creating the royalty would determine whether the parties intended to create an interest in land or to create contractual rights only.

13 In *Scurry-Rainbow Oil Ltd. v. Galloway Estate* (1993), 138 A.R. 321 (Q.B.), aff'd (1994), 157 A.R. 65 (C.A.), and in *Canco Oil and Gas Ltd. v. Saskatchewan* (1991), 89 Sask. R. 37 (Q.B.), Hunt J. and Matheson J. respectively relied upon the dissent in *Keyes*, *supra*, to find that lessor royalties can be interests in land depending on the intentions of the parties and the language used to create the interest. The Court of Appeal in *Scurry-Rainbow* did not base its decision on this issue.

14 The appellant referred to cases that held royalty interests not to be interests in land. (See *St. Lawrence Petroleum Ltd. v. Bailey Selburn Oil & Gas Ltd.*, [1963] S.C.R. 482; *Vanguard Petroleums Ltd. v. Vermont Oil & Gas Ltd.*, [1977] 2 W.W.R. 66 (Alta. S.C.T.D.); *Isaac v. Cook* (1982), 44 C.B.R. 39 (N.W.T.S.C.); *Guaranty Trust Co. v. Hetherington* (1987), 50 Alta. L.R. (2d) 193 (Q.B.), aff'd in part [1989] 5 W.W.R. 340 (Alta. C.A.); *Vandergrift v. Coseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17 (Q.B.); *Nova Scotia Business Capital Corp. v. Coxheath Gold Holdings Ltd.* (1993), 128 N.S.R. (2d) 118 (S.C.).) Although each of these cases held that the royalty therein is not an interest in land, they do not support the proposition that a royalty cannot be an interest in land. In each case the court found that the language used by the parties in creating the interest did not evidence the intention to create an interest in land.

15 That royalties can be interests in land finds support in W. H. Ellis' "Property Status of Royalties in Canadian Oil and Gas Law" (1984), 22 *Alta. L. Rev.* 1 at p. 10:

> Royalties, as used in the oil and gas industry, make sense only if they are property interests in unproduced minerals. Owners of mineral rights should be able to create them as such if they make clear their intent to do so.

16 In *Oil and Gas Agreements Update* (1989), J. F. Newman in his article "Can a Gross Overriding Royalty Be an Interest in Land?"concludes that most parties to an overriding royalty interest intend for such interest to be an interest in land. Evidence of this is the common practice of registering caveats in the Land Titles Office of Alberta seeking to protect that interest.

17 The oil and gas industry, which developed largely in the second half of the 20th century and continues to evolve, is governed by a combination of statute and common law. The application of common law concepts to a new or developing industry is useful as it provides the participants in the industry and the courts some framework for the legal structure of the industry. It should come as no surprise that some common law concepts, developed in different social, industrial and legal contexts, are inapplicable in the unique context of the industry and its practices.

18 The appellant could not offer any convincing policy reasons for maintaining the common law prohibition on the creation of an interest in land from an incorporeal hereditament other than fidelity to common law principles. Given the custom in the oil and gas industry and the support found in case law, it is proper and

reasonable that the law should acknowledge that an overriding royalty interest can, subject to the intention of the parties, be an interest in land.

19 The Alberta Court of Appeal offered compelling insight into the evolution of the law at para. 52:

> The principles inherent in the above argument need not be applied to prevent an overriding royalty from being an interest in land for a number of reasons. First, royalties and ORRs need not be classified into a traditional common law property category unsuited to the realities of the oil and gas industry and need not be subject to the arcane strictures of traditional categories. Second, some authorities suggest it is possible to have an incorporeal interest (an overriding royalty) created from an incorporeal interest. Third, even if it is not possible, the rule need not be blindly adhered to because, as stated by Mr. Justice Holmes in "The Path of the Law" (1897) 10 Harv. L. Rev. 457 at p. 469, it is "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV," and, "still more revolting if the grounds upon which it was laid down have vanished long since, and the rule persists from blind imitation of the past."

20 In *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, 2000 SCC 34, at para. 42, Bastarache J. outlined when changes to the rules of common law are necessary:

> (1) to keep the common law in step with the evolution of society,
>
> (2) to clarify a legal principle, or
>
> (3) to resolve an inconsistency.

In addition, the change should be incremental, and its consequences must be capable of assessment.

21 In this appeal, to clarify the status of overriding royalties, the prohibition of the creation of an interest in land from an incorporeal hereditament is inapplicable. A royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest or a *profit à prendre*, if that is the intention of the parties.

22 Virtue J. in *Vandergrift, supra*, at p. 26 succinctly stated:

> ... it appears reasonably clear that under Canadian law a "royalty interest" or an "overriding royalty interest" can be an interest in land if:
>
> 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
>
> 2) the interest, out of which the royalty is carved, is itself an interest in land.

VI. Conclusion

23 The appeal is dismissed with costs to the respondents.

16p

TAB 13

2018 ABQB 488
Alberta Court of Queen's Bench

Manitok Energy Inc (Re)

2018 CarswellAlta 1235, 2018 ABQB 488, [2018] A.W.L.D. 2770,
293 A.C.W.S. (3d) 858, 62 C.B.R. (6th) 109, 71 Alta. L.R. (6th) 357

In the Matter of the Bankruptcy and Insolvency of Manitok Energy Inc.

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

In the Matter of the Notice of Intention to Make a Proposal of Raimount Energy Corp.

In the Matter of the Notice of Intention to Make a Proposal of Corinthian Oil Corp.

Freehold Royalties Partnership (Applicant) and Alvarez & Marsal Canada Inc., in its capacity as Receiver and Manager of Manitok Energy Inc., Raimount Energy Corp. and Corinthian Oil Corp. (Respondents)

K.M. Horner J.

Heard: May 4, 2018
Judgment: June 22, 2018
Docket: Calgary B201-332583, B201-332610, B201-335351

Counsel: Ryan Zahara, Chris Nyberg, for Applicant
Howard Gorman, D. Aaron Stephenson, for Receiver
David M. Price, for Stream Asset Financial Manitok LP
Sean F. Collins, for National Bank of Canada

Subject: Contracts; Insolvency; Natural Resources

Headnote

Natural resources --- Oil and gas — Exploration and operating agreements — Royalty agreement — Interpretation

In June 2015, applicant entered acquisition and royalty agreements with debtor pursuant to which it paid $25 million for "producing royalty" from certain oil and gas properties — Applicant, debtor and bank subsequently entered agreement in which bank confirmed it did not have security interest in royalty — Debtor paid royalty in cash until end of August 2017 when it gave notice applicant should take royalty in kind — Applicant did so until receiver was appointed in February 2018 — Applicant brought application for declaration royalty was interest in land, was its property and that it was entitled to take royalty in kind retroactive to March 2018 — Application was opposed by receiver and by beneficial owner of certain facilities related to lands impacted by royalty — Application granted — While royalty was in respect of specific quantity of production per day, not of share of minerals in situ or of production from specific area of land, acquisition and royalty agreements both referred to royalty as interest in land — That was clearly intention of applicant and debtor — Absence of right of entry and limitations on assignment did not defeat intention — There was no reason royalty should be precluded from attaching to all subject lands.

APPLICATION for declaration "producing royalty" was interest in land.

***K.M. Horner J.*:**

1 This is an Application by Freehold Royalties Partnership ("Freehold") for an order declaring, among other things, that:

(a) the Producing Royalty is an interest in land and is the property of Freehold; and

25 The Acquisition Agreement and Royalty Agreement are sufficiently clear to show that Manitok and Freehold intended to create an interest in land, satisfying the first part of the test set out in *Dynex*. The Receiver and Stream Financial disagree with respect to the second element of that test. The Receiver says Manitok holds an interest in the Royalty Lands in the form of a *profit a prendre*, and therefore concedes that the interest out of which the royalty is carved is an interest in land. Stream Financial argues that the Producing Royalty is not carved out of an interest in land because it is granted in crude oil and condensate that have already been produced, and are therefore severed from the land. They are, in Stream Financial's submission, personal and not real property. This misconceives the second part of the test in *Dynex*, which is intended to ensure that the party granting the interest in land is able to do so because it holds an interest in land. Moreover and in any event, a full answer to this proposition has been provided by the Alberta Court of Appeal in *Dynex* and by the Ontario Court of Appeal in *Dianor*. I agree with the Receiver, and with Freehold, that this part of the test has been met.

Conclusion

26 Freehold's application for a declaration is granted. The Producing Royalty is an interest in land and is the property of Freehold. It follows that Freehold properly exercised a right to take the Producing Royalty in kind effective August 30, 2017.

27 I agree with the Receiver that as court officer it will act in accordance with this decision and no mandatory direction to it to do so is required.

28 I further agree that this is not a case where an award of costs or enhanced costs is warranted. There is no basis to deviate from the established practice in insolvency cases of having the parties bear their own costs.

Application granted.

TAB 14

Most Negative Treatment: Leave to appeal allowed
Most Recent Leave to appeal allowed: Bank of Montreal v. Dynex Petroleum Ltd. | 2000 CarswellAlta 1151, 2000 CarswellAlta 1152, 262 N.R. 400 (note), 277 A.R. 400 (note), 242 W.A.C. 400 (note) | (S.C.C., Sep 21, 2000)

1999 ABCA 363
Alberta Court of Appeal

Bank of Montreal v. Dynex Petroleum Ltd.

1999 CarswellAlta 1271, 1999 ABCA 363, [1999] A.J. No. 1463, [2000] 2 W.W.R. 693, [2000] A.W.L.D. 151, 15 C.B.R. (4th) 5, 15 P.P.S.A.C. (2d) 179, 182 D.L.R. (4th) 640, 220 W.A.C. 116, 255 A.R. 116, 2 B.L.R. (3d) 58, 2 B.L.R. (3d) 59, 74 Alta. L.R. (3d) 219, 93 A.C.W.S. (3d) 950

Bank of Montreal, Respondent (Plaintiff) and Enchant Resources Ltd., and D.S. Willness, Appellants (Defendants) and Dynex Petroleum Ltd., Alberta Energy Company Ltd., Ardmore Investments Ltd., Transcanada Pipelines Ltd., Amoco Canada Petroleum Ltd., Atcor Ltd., Crestar Energy Inc., Dana Distributors Ltd., Vimyview Ltd., Col-Syb Holdings Ltd., Hexam Holdings Ltd., Davids Investments Ltd., Edward W. Hadway, Estate of Harry Veiner, Victor Sopkiw, Nancy Oil & Gas Ltd., Staniloff Oil & Gas Ltd., Cory Oils Ltd., Doran Investments Ltd., Encor Energy Corporation Inc., Epic Resources Ltd., Kirriemuir Resources Ltd., Meridian Oil Inc., North Canadian Oils Limited, Odessa Natural Corporation, Precambrian Shield Resources Limited, Star Oil and Gas Ltd., Suncor Inc., Earl Gordon, Antelope Land Serves Ltd., Brannigan Resources Canada (1992) Ltd., Jim Bruce Consultants, Saskatchewan Oil and Gas Corporation, Sask Oil Resources Inc., Landsea Oil & Gas Ltd., Intensity Resources Ltd., Deane Enterprises Ltd., Shell Canada Resources Ltd., Channel Lake Petroleum Ltd., and Enron Oil Canada Ltd., Defendants not Party to the Appeal

Bank of Montreal, Appellant (Plaintiff) and Meridian Oil Inc., Odessa Natural Corporation, Enchant Resources Ltd., and D.S. Willness, (Respondents) Defendants and Dynex Petroleum Ltd., Alberta Energy Company Ltd., Ardmore Investments Ltd., Transcanada Pipelines Ltd., Amoco Canada Petroleum Ltd., Atcor Ltd., Crestar Energy Inc., Dana Distributors Ltd., Vimyview Ltd., Col-Syb Holdings Ltd., Hexam Holdings Ltd., Davids Investments Ltd., Edward W. Hadway, Estate of Harry Veiner, Victor Sopkiw, Nancy Oil & Gas Ltd., Staniloff Oil & Gas Ltd., Cory Oils Ltd., Doran Investments Ltd., Encor Energy Corporation Inc., Epic Resources Ltd., Kirriemuir Resources Ltd., North Canadian Oils Limited, Precambrian Shield Resources Limited, Star Oil and Gas Ltd., Suncor Inc., Earl Gordon, Antelope Land Services Ltd., Brannigan Resources Canada (1992) Ltd., Jim Bruce Consultants, Saskatchewan Oil and Gas Corporation, Sask Oil Resources Inc., Landsea Oil & Gas Ltd., Intensity Resources Ltd., Deane Enterprises Ltd., Shell Canada Resources Ltd., Enron Oil Canada Ltd. and Channel Lake Petroleum Ltd., Defendants

Bank of Montreal, Appellant (Plaintiff) and Meridian Oil Inc., Odessa Natural Corporation, Enchant Resources Ltd., and D.S. Willness, (Respondents) Defendants and Dynex Petroleum Ltd., Alberta Energy Company Ltd., Ardmore Investments Ltd., Transcanada Pipelines Ltd., Amoco Canada Petroleum Ltd., Atcor Ltd., Crestar Energy Inc., Dana Distributors Ltd., Vimyview Ltd., Col-Syb Holdings Ltd., Hexam Holdings Ltd., Davids Investments Ltd., Edward W. Hadway, Estate of Harry Veiner, Victor Sopkiw, Nancy Oil & Gas Ltd., Staniloff Oil & Gas Ltd., Cory Oils Ltd., Doran Investments Ltd., Encor Energy Corporation Inc., Epic Resources Ltd., Kirriemuir Resources Ltd., North Canadian Oils Limited, Precambrian Shield Resources Limited, Star Oil and Gas Ltd., Suncor Inc., Earl Gordon, Antelope Land Services Ltd., Brannigan Resources Canada (1992) Ltd., Jim Bruce Consultants, Saskatchewan Oil and Gas Corporation, Sask Oil Resources Inc., Landsea Oil & Gas Ltd., Intensity Resources Ltd., Deane Enterprises Ltd., Shell Canada Resources Ltd., Enron Oil Canada Ltd. and Channel Lake Petroleum Ltd., Defendants (Not Parties to this Appeal)

Foisy, Berger, Sulatycky JJ.A.

Heard: November 30, December 1 and 2, 1998
Judgment: December 17, 1999
Docket: Calgary Appeal 96-16526, 96-16536, 97-17211

Proceedings: reversing (1995), 35 Alta. L.R. (3d) 66 (Alta. Q.B.); reversing (1997), 50 Alta. L.R. (3d) 44 (Alta. Q.B.)

Counsel: *G.S. Griffiths, Q.C.* and *R.B. Jones*, for Bank of Montreal.
J.C. Crawford, Q.C., for Enchant Resources Ltd. and D.S. Willness.
R.C. Dixon, for Ernst & Young Inc., Trustee in Bankruptcy of Dynex Petroleum Ltd.

Subject: Natural Resources; Property; Corporate and Commercial; Insolvency

Headnote

Oil and gas --- Exploration and operating agreements — Royalty agreement — General

Defendant D Ltd. granted overriding royalty and net profit interests to other defendants with respect to D Ltd's oil and gas leases, and granted debenture to bank, employing gas leases as security — On bankruptcy of D. Ltd., bank sought declaration that it had priority over parties holding overriding royalties and net profits interests — Chambers judge found ORRs were choses in action and not real property interest, that they were subject to personal property security legislation, that they were unsecured and thus subject to trustee's taking — ORRs holders appealed — Appeal allowed — Parties can create overriding royalties that constitute interests in land if they manifest their intention to do so.

Personal property security --- Scope of legislation — Miscellaneous transactions

Defendant D Ltd. granted overriding royalty and net profit interests to other defendants with respect to D Ltd's oil and gas leases, and granted debenture to bank, employing gas leases as security — On bankruptcy of D. Ltd., bank sought declaration that it had priority over parties holding overriding royalties and net profits interests — Chambers judge found ORRs were choses in action and not real property interest, that they were subject to personal property security legislation, and that they were unsecured and thus subject to trustee's taking — ORRs holders appealed — Appeal allowed — Parties can create overriding royalties that constitute interests in land if they manifest their intention to do so.

Oil and gas --- Oil and gas lease — Miscellaneous issues

Defendant D Ltd. granted overriding royalty and net profit interests to other defendants with respect to D Ltd's oil and gas leases, and granted debenture to bank, employing gas leases as security — On bankruptcy of D. Ltd., bank sought declaration that it had priority over parties holding overriding royalties and net profits interests — Chambers judge found ORRs were choses in action and not real property interest, that they were subject to personal property security legislation, that they were unsecured and thus subject to trustee's taking — ORRs holders appealed — Appeal allowed — Parties can create overriding royalties that constitute interests in land if they manifest their intention to do so.

The defendant D Ltd. and its predecessor companies granted overriding royalty and net profit interests ("ORRs") respecting D Ltd.'s oil and gas leases to other defendants. Later, D Ltd. gave a debenture to the plaintiff bank, employing the leases as security. All of the documentation supporting the debenture stated that the ORR interests were permitted encumbrance. D Ltd. later defaulted on the bank loan. Shortly thereafter, D Ltd. was petitioned into bankruptcy. The bank brought an action against the bankrupt and the ORRs, seeking a declaration that the bank's claim ranked in priority to those of the ORRs in the context of the bankruptcy. All the parties requested a determination of the priorities between the bank and the ORRs after the bankruptcy. The chambers judge found that the ORRs were choses in action and did not constitute interests in land. As a matter of law, he found that a lessee of an oil and gas lease obtained from a lessor could not pass an interest in land to a third party. Based on this conclusion that ORRs were not interests in land, the chambers judge went on to make determinations respecting priority of the bank's debenture vis-à-vis the ORRs, and the effect of bankruptcy on such priority determinations.

The ORRs holders appealed.

Held: The appeal was allowed.

Parties can create overriding royalties that constitute interests in land if they manifest their intention to do so. Some indicia of whether or not a creation of an interest in land is intended may be the fact that the underlying interest is an interest in land, the intention of the parties as evidenced by the language of the grant and surrounding circumstances, and that the interest is capable

of lasting for the duration of the underlying estate. Other indicia of intention can be found in the wording of the overriding royalty clause creating a reservation of an interest in the petroleum substances by the farmor in the working interest to be earned by the farmee, the farmee as agent of the farmor for the farmor's share of petroleum production, and remedies against the interest of the farmee through a lien.
Having found that ORRs may be interests in land depending on the agreement between parties, a final determination of the matter required a finding of fact. Therefore, issues respecting priority of bank's debenture security interests vis-à-vis ORRs, and the effect of bankruptcy on such priority determinations were to be determined at trial along with the issue of whether the ORRs were, in fact, interests in land.

APPEAL by overriding royalties and net profit interest holders from judgments reported at (1995), 39 Alta. L.R. (3d) 66, [1996] 6 W.W.R. 461, 11 P.P.S.A.C. (2d) 291 (Alta. Q.B.) and 50 Alta. L.R. (3d) 44, [1997] 6 W.W.R. 104, 31 B.L.R. (2d) 44, 46 C.B.R. (3d) 36, 145 D.L.R. (4th) 499, 202 A.R. 331, 12 P.P.S.A.C. (2d) 183 (Alta. Q.B.), finding that their interests were subject to personal property security legislation and subordinate to interests of trustee in bankruptcy.

***Per curiam*:**

Introduction

1 This appeal involves the competing interests of a bank as a debenture holder and parties holding overriding royalties and net profits interests from a petroleum and natural gas company now in bankruptcy.

2 These matters initially came before the chambers judge pursuant to two notices of motion seeking summary judgment on the issue of priorities between the bank and the overriding royalty holders, and a preliminary determination of a point of law prior to trial that the overriding royalties do not constitute interests in land binding upon any successor in title to the petroleum and natural gas properties. After those motions were determined, leave was granted to determine the effect of the bankruptcy upon the earlier order.

3 Appeals from each of the three applications before the chambers judge were heard.

Issues

4 The issues argued in this appeal were:

> 1. Can net profits and overriding royalty interests constitute interests in land.
>
> 2. If they are not interests in land, are the debenture security interests and similar interests granted to the bank subordinated to the overriding royalty interests.
>
> 3. If the bank's interests are subordinated to the overriding royalty interests, does the bankruptcy affect the subordination of the bank's security interest to the overriding royalty interests and does the bank continue to be obliged to hold in trust proceeds received prior to the sale of the oil and gas properties.

Summary of Conclusions

5 We conclude that overriding royalties or net profits interests can constitute an interest in land. Whether the interests in this appeal are interests in land depends upon the intentions of the parties. We do not make a determination on the second and third issues since their outcome depends upon the determination of the first.

Facts

6 On May 27, 1993, Ernst & Young Inc. ("the Trustee") was appointed trustee in bankruptcy of Dynex Petroleum Ltd., previously M-P Petroleum Ltd. ("Dynex") pursuant to the petition of the Bank of Montreal ("the Bank"). The Trustee wanted to sell all the petroleum and natural gas properties of Dynex. One issue was whether those properties must be sold subject

27 However, Dynex's assets sold by the Trustee to Channel Lake were unencumbered by the interests of the ORRs as they were mere unsecured claims and therefore, Channel Lake Petroleum Ltd. acquired the Dynex properties free of the ORRs.

Analysis

Issue 1. Can net profits and overriding royalty interests, as a matter of law, constitute interests in land?

28 We are of the view that overriding royalties can be interests in land. There are practical reasons why ORRs should be treated as interests in land and where an agreement expresses the appropriate intentions, parties can grant or reserve interests in land.

General Observations

29 By way of general observation, we adopt those set out by Hunt J. (as she then was) in *Scurry-Rainbow Oil Ltd. v. Galloway Estate*, [1993] 4 W.W.R. 454 (Alta. Q.B.); appeal dismissed(1994), [1995] 1 W.W.R. 316 (Alta. C.A.); leave to appeal denied,(1995), 26 Alta. L.R. (3d) 1 (note) (S.C.C.), at pp. 464-5. Her first observation was a caution regarding reliance on American authorities:

> First, since the development of the oil and gas industry in Alberta and other parts of western Canada, Canadian courts have been called upon to make many decisions relating to the industry's activities. Due to the early dearth of jurisprudence and the fact that many industry practices in Canada were modelled upon those in the United States, Canadian courts have at times relied upon American decisions. Although such decisions can be of assistance, in my view they must be used cautiously because of the fact that different American jurisdictions have adopted varied approaches to basic concepts of oil and gas law, approaches that at times are in distinct contrast to those of Canadian courts....

Her second observation was a caution regarding rigid reliance on English common law:

> Second, in trying to come to grips with some of the novel legal problems created by the industry's presence in our country, Canadian courts have often drawn upon English common law concepts, especially those of real property law. That this should be the case is hardly surprising, given our legal traditions. Moreover, these traditional concepts have often proven helpful in sorting out complex problems. On the other hand, too rigid a reliance on common law principles that have developed in vastly different circumstances can lead to results that are out of touch with the realities of the industry and that deviate from the sorts of solutions needed by the affected parties....

Her third observation was the need to interpret documents within their context:

> A third and related point is that judicial resolutions of industry-related problems have typically occurred long after the fact, for example, long after a contract was entered into. Thus, the courts may have interpreted the language of a document two or three decades after it was drafted. These judicial views are often argued to be binding in the interpretation of other agreements entered into long before the jurisprudence was in existence, and of course, long before the parties could possible have known how the courts might construe the language they have chosen.... While these authorities should not be disregarded simply because they were later in time and thus could not have been in the contemplation of the drafters of the Agreements before me, the discrepancy in time is a factor to be weighed in considering the persuasiveness of such authorities in the context of the issues raised here.

Royalties and Overriding Royalties

30 A lessor's a royalty is a share of the product or the proceeds reserved to the owner for permitting another to use the property and also a right to receive, either in kind or its equivalent in money, a stipulated fraction of the oil and gas produced and saved from the property covered by the lease, free of all costs of development and production: E. Kuntz, *A Treatise on the Law of Oil and Gas* (Cincinnati, Ohio: Anderson, 1991) Vol. 1, s. 15.1.

31 An overriding royalty or a gross overriding royalty is an unencumbered share or fractional interest in the gross production granted to a third party in exchange for performing duties (*e.g.* drilling). Commonly, it is reserved in an assignment, part assignment or sublease of an oil and gas lease, often carved out or reserved by lessees who have a working interest created by a lease: G.J. Davies, in "The Legal Characterization of Overriding Royalties in Canadian Oil and Gas Law" (1972) 10 Alta. L. Rev. 232 at p. 233.

Net Profit Agreements

32 A net profits interest includes, at least, the right to receive a portion of the proceeds from the sale of petroleum and natural gas. Whether it is an interest in land was determined by Martland J. in *St. Lawrence Petroleum v. Bailey Selburn Oil & Gas Ltd.*, [1963] S.C.R. 482 (S.C.C.), by ascertaining the intention of the parties pursuant to two farmout agreements. He looked at both the wording and the context of the agreements in issues. They assigned "such an undivided interest in the petroleum and natural gas and related hydrocarbons... as well" after production was obtained and sold. In the opinion of Martland J. opinion, the interest was only an equitable interest because the interest was held in trust for the purposes of the agreement and the beneficiaries would receive the money equivalent of their share of the proceeds of production. He could not find that the parties contemplated or agreed to convey an interest in the lands capable of assignment or registration. He agreed with the trial judge at p. 490, "Had it been intended to convey such an interest it would have been a very simple thing to do in plain and unmistakable words."

33 Martland J. left open the possibility that a net profits agreement can convey an interest in land where the parties intended to convey such an interest. Here, unlike *St. Lawrence Petroleum v. Bailey Selburn Oil & Gas Ltd.*, the agreement stated that the interest was an interest in land. But in each particular case, the interest conveyed is to be found by interpreting the agreement as a whole and within its context. A net profits interest; in many cases, can function in much the same manner as a royalty or other non-working interests where the interest is a right to a share of production as opposed to a right to a certain amount of money out of a certain described portion of production. The analysis which follows discusses royalties and overriding royalties, but where the intention of the parties to the net profits agreement was to create an interest analogous to that of a royalty or overriding royalty, we are of the opinion that the result should be the same.

The Function of Royalties

34 A partial list of the ways in which royalties are used was set out by W. H. Ellis, "Property Status of Royalties in Canadian Oil and Gas Law" (1984) 22 Alta. L. Rev. 1 at pp. 2-3. They include financing the costs of drilling and spreading the risks of exploration. For the buyer, it is a chance to invest in areas where he or she may not own enough interest to consider drilling. For the seller, it is a way to realize immediately on part of the investment against the chance the hole will be dry and keep part of the investment on the chance that an oil or gas well will be drilled. This results in further economic benefits by stabilizing the volatile industry and raising money for exploration. Additionally, overriding royalties are used to compensate employees whose efforts determine the success of a project.

35 Ellis described two further characteristics important to understanding the function of royalties in the oil and gas industry. Oil and gas ventures require huge amounts of capital but only a small fraction are successful. The oil and gas investor is betting that the many losses will be made up by the small fraction of successes. Therefore, the industry needs first, the incentive to induce such high risk investments by offering the hope of a share of production from successful ventures. Second, good investment decisions in the oil and gas industry depend on good geological information. Geological information is information about specific land.

36 Royalties fit these characteristic needs because they are investments in a particular piece of property, not in a particular operator or company. There are other means for investing in the owner or operator. The investment return on a royalty results from the success of the property regardless of who owns or is working the property. These unique functions and characteristics apply equally to overriding royalties as well as royalties. The fact that overriding royalties are not granted from the whole of the mineral interest but from the working interest does not change their role in oil and gas production.

Assumptions that Royalties are Interest in Land

37 American authorities, Williams and Meyers, *Oil and Gas Law* (New York: Matthew Bender, looseleaf) assert that royalties are interests in land and that almost all courts in the United States treat them as such. As noted also by this Court in *Scurry-Rainbow, supra* at pp. 321-2, while it would be erroneous to rely too heavily on U.S. decisions, the American cases are persuasive when not in conflict with authoritative Canadian decisions.

38 In oral argument, counsel for the appellants asserted that despite the uncertainty in the common law and the absence of any statutory authority, overriding royalty holders are treated as having an interest in land when they are pursued for the costs of abandoned wells. (The abandonment costs procedure was described in *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1989), 75 Alta. L.R. (2d) 185 (Alta. Q.B.); (1991), 81 D.L.R. (4th) 280 (Alta. C.A.); leave to appeal refused (1992), 86 D.L.R. (4th) 567n (S.C.C.).)

39 Edward Evans, Forbes Newman and Keith Smith, in an article titled, "Overriding Royalties and Subleases as Interests in Land" *Papers Presented at the Mid-Winter Meeting of the Alberta Branch, Canadian Bar Association* (Calgary, 1988) pp. 406-457, analysed the overriding royalty provisions in the proposed model farm-out agreement prepared by a joint committee of the Canadian Bar Association Natural Resources Section and the Canadian Association of Petroleum Landmen. The authors, after reviewing case law, concluded at p. 424 that "an overriding royalty, properly drafted, can be an interest in land." They also made it clear that the oil and gas industry has traditionally assumed that overriding royalties were interests in land. As was done for some of the overriding royalties in this case, they have been registered as caveats with land titles offices on the assumption that they were interests in land.

40 Indeed, many transactions over many years have been predicated on this assumption. This is not a fact which should be taken lightly. This conclusion echoes the remarks of Ellis, in "Property Status of Royalties in Canadian Oil and Gas Law," *supra* at p. 10:

> Royalties, as used in the oil and gas industry, make sense only if they are property interests in unproduced minerals. Owners of mineral rights should be able to create them as such if they make clear their intent to do so.

41 Davies, *supra* at pp. 235-6, stated that the usual overriding royalty interest is limited to endure as long as the lease upon which it is raised and that in turn, is usually for a fixed term and thereafter for the producing life of the land. The overriding royalty is treated as analogous to a determinable fee interest, assuming that the overriding royalty is an interest in land.

42 Academic and professional literature, such as that cited above, support the view that overriding royalties should be classified as an interest in land primarily on the basis of expediency.

43 Eugene Kuntz, in a discussion paper entitled "Classifying Non-Operating Interests in Oil and Gas," (Calgary: Canadian Institute of Resources Law, 1988), argued that the law should provide a framework within which unnecessary risks for those who invest or participate in oil and gas operations are removed. The oil and gas industry has created new devices to meet the high risks of the enterprise. Included among the new devices are non-operating interests which are used to make the sharing of the benefits of mineral ownership definite and certain, minimize taxes, make clear delegation of operating rights and make proper allocation of the risks and rewards of an operation without invoking many objectionable features associated with creating a conventional business association. Non-operating interests include royalty interests, overriding royalty interests, production payments, net profit interests and carried interests.

44 He pointed out that it is of great importance to the party acquiring a non-operating interest that such an interest be classified as a property interest and not a mere contractual right in order to guard against the consequences of possible financial difficulties of the granting party and to protect the interests against the rights of third persons generally.

45 There are other practical arguments that can be marshalled to support overriding royalties as interests in land. First, certainty and stability are desirable qualities and the industry expects or assumes that overriding royalties can be interests in land. It should be noted, however, that for some time this assumption has been known to be somewhat tenuous — the body of literature on royalties as interests in land attests to this fact. Second, one consequence of the ruling below, that overriding

TAB 15

2018 ONCA 253
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2018 CarswellOnt 3694, 2018 ONCA 253, [2018] O.J. No. 1381, 141 O.R. (3d) 192, 290 A.C.W.S. (3d) 20, 420 D.L.R. (4th) 657, 57 C.B.R. (6th) 171, 8 P.P.S.A.C. (4th) 181

Application under section 243 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, and section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43.

Third Eye Capital Corporation (Applicant / Respondent) and Ressources Dianor Inc./Dianor Resources Inc. (Respondent / Respondent)

P. Lauwers, S.E. Pepall, Grant Huscroft JJ.A.

Heard: May 23, 2017
Judgment: March 15, 2018
Docket: CA C62925 (M47498)

Proceedings: affirming in part *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 41 C.B.R. (6th) 320, 2016 CarswellOnt 15947, 2016 ONSC 6086, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Third Eye Capital Corp. v. Ressources Dianor Inc. / Dianor Resources Inc.* (2016), 2016 CarswellOnt 18827, 2016 ONSC 7112, 42 C.B.R. (6th) 269, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Daniel J. Matson, Roderick W. Johansen, for Appellant, 2350614 Ontario Inc.
Shara N. Roy, for Respondent, Third Eye Capital Corporation
Dylan Chochla, for Receiver of Dianor Resources Inc., Richter Advisory Group Inc.
Delna Contractor, for Monitor of Essar Steel Algoma Inc., Ernst & Young Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Insolvency; Natural Resources; Property

Headnote

Natural resources --- Mines and minerals — Remedies — Vesting orders

At request of insolvent company's lender (Third Eye), court-appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 Co. had acquired royalty rights — Notices of agreements granting GOR's were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GOR's be terminated or reduced — Motion judge approved sale to successful bidder Third Eye and granted vesting order purporting to extinguish GOR's — Motion judge rejected 235 Co.'s argument that claims would continue to be subject to GORs after their transfer to Third Eye holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to Third Eye on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights were found to be fair and receiver paid this amount to 235 Co., which were held in trust — 235 Co. appealed — Third Eye brought motion for order quashing 235 Co.'s appeal as moot since 235 Co. did not seek stay of vesting order which operated to extinguish GOR's when it was registered on title — It was premature to quash appeal —

235 Co.'s GORs constituted interest in land but further submissions were requested on whether motion judge had jurisdiction to grant vesting order free and clear of 235 Co.'s GOR's in sale to Third Eye and whether 235 Co. was entitled to remedy.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

At request of insolvent company's lender (Third Eye), court-appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 Co. had acquired royalty rights — Notices of agreements granting GOR's were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GOR's be terminated or reduced — Third eye was successful — Motion judge approved sale to Third Eye and granted vesting order purporting to extinguish GORs — Motion judge rejected 235 Co.'s argument that claims would continue to be subject to GORs after their transfer to Third Eye holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to Third Eye on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights were found to be fair and receiver paid this amount to 235 Co., which were held in trust — 235 Co was unsuccessful in its cross-motion claiming payment for debt owing under Repair and Storage Liens Act — 235 Co. appealed — In holding that royalty rights created no interest in law, vesting order was granted whereby receiver sold mining rights to third-party purchaser, free and clear of royalty rights — Vesting order was not stayed pending appeal and was executed — Court declined to determine that appeal was moot since vesting order had been executed — Further submissions were requested on whether Superior Court had jurisdiction to grant vesting order free and clear of royalty rights and whether or not appeal was moot.

Personal property security --- Statutory liens — Miscellaneous

At request of insolvent company's lender (Third Eye), court-appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 Co. had acquired royalty rights — Notices of agreements granting GOR's were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GOR's be terminated or reduced — Motion judge approved sale to successful bidder Third Eye and granted vesting order purporting to extinguish GOR's — 235 Co. brought cross-motion for relief including paying under Repair and Storage Liens Act (Act) on basis that another company transferred surface rights to 235 Co. and since then, insolvent stored its assets on 235 Co.'s surface rights — Cross-motion was dismissed as insolvent was never lawfully displaced of its ownership of surface rights — There was no evidence of understanding that 235 Co. would be paid for alleged storage — Building structures and vehicles were on property because they were used to exploit insolvent's mining rights, drill cores were there because they were obtained in that exploitation: they were never given to 235 Co. for storage — Even if 235 Co. had storage lien, it would have no right to be paid what it claimed — Under s. 4(1) of Act, storer is entitled only to fair value of storage and not some rental value for land — 235 Co. appealed — Appeal dismissed — 235 Co., as purported owner of surface rights was not entitled to storer's lien respecting insolvent's surface works — Appeal was dismissed for same reasons concluded by motion judge.

Natural resources --- Mines and minerals — Ownership and acquisition of mineral rights — Mining lease — Rents and royalties — Miscellaneous

At request of insolvent company's lender (Third Eye), court-appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 Co. had acquired royalty rights — Notices of agreements granting GOR's were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GOR's be terminated or reduced — Motion judge approved sale to successful bidder Third Eye and granted vesting order purporting to extinguish GOR's — Motion judge rejected 235 Co.'s argument that claims would continue to be subject to GORs after their transfer to Third Eye holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to Third Eye on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights were found to be fair and receiver paid this amount to 235 Co., which were held in trust — 235 Co. appealed — Third Eye brought motion for order quashing 235 Co.'s appeal as moot since 235 Co. did not seek stay of vesting order which operated to extinguish GOR's when it was registered on title — It was premature to quash appeal —

235 Co.'s GORs constituted interest in land but further submissions were requested on whether motion judge had jurisdiction to grant vesting order free and clear of 235 Co.'s GOR's in sale to Third Eye and whether 235 Co. was entitled to remedy.

APPEAL by numbered company from judgment reported at *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 2016 ONSC 6086, 2016 CarswellOnt 15947, 41 C.B.R. (6th) 320 (Ont. S.C.J. [Commercial List]), dismissing its cross-motion for lien and granting applicant's motion for vesting order; MOTION by applicant company for order quashing numbered company's appeal.

***P. Lauwers J.A.*:**

A. THE CONTEXT OF THE APPEAL

1 Dianor Resources Inc. was insolvent. At the request of the respondent, Third Eye Capital Corporation as a lender, the court appointed a receiver under s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), and s. 101 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43 ("*CJA*"), over the assets, undertakings, and property of the debtor, Dianor [1] .

2 Dianor's main asset was a group of mining claims. The claims with which this appeal is concerned were subject to, among other things, a "Gross Overriding Royalty" ("GOR") in favour of a company from which the appellant, 2350614 Ontario Inc. ("235Co"), had acquired the royalty rights. Notices of the agreements granting the GORs were registered on title to the surface rights and the mining rights.

3 The supervising judge made an order approving a bid process for the sale of Dianor's mining claims. It generated two bids, both containing a condition that the GORs be terminated or significantly reduced. Third Eye was the successful bidder.

4 At the request of the receiver, the motion judge approved the sale of the mining claims to Third Eye and granted a vesting order that purported to extinguish the GORs. 235 did not oppose the sale but asked that the property vested in Third Eye be subject to the GORs.

5 The motion judge rejected the appellant's argument that the claims would continue to be subject to the GORs after their transfer to Third Eye. He held, at para. 30: "that the GORs do not run with the land or grant the holder of the GORs an interest in the lands over which Dianor holds the mineral rights." The motion judge also held, at para. 38, that ss. 11(2), 100, and 101 of the *CJA*, gave him "the jurisdiction to grant a vesting order of the assets to be sold to Third Eye on such terms as are just" including the authority to dispense with the royalty rights. He found the expert's valuation of the royalty rights to be fair and added, at para. 39:

> In my view, it is appropriate and just that a vesting order in the usual terms be granted to Third Eye on the condition that $250,000 be paid to 235Co. or whatever entity Mr. Leadbetter directs the payment to be made. That is higher than the mid-point of the range of values determined by Dr. Roscoe.

6 The receiver paid this amount to 235Co. The funds are being held in trust pending the outcome of this appeal.

7 235Co also brought a cross-motion claiming payment for a debt owing under the *Repair and Storage Liens Act*, R.S.O. 1990, c. R.25. The motion judge dismissed the cross-motion.

8 In this appeal, 235Co seeks to set aside the order of the motion judge and to obtain an order that 235Co's GORs constitute a interests in land, along with consequential relief. Third Eye moved for an order quashing 235Co's Notice of Appeal on the basis that the appeal is moot because 235Co did not seek a stay of the vesting order, which operated to extinguish the GORs when it was registered on title. Furthermore, the variation 235Co seeks to the vesting order is unavailable as the subject transaction was predicated on the elimination of the GORs.

9 For the reasons that follow, it would be premature to quash the appeal. I would hold that 235Co's GORs constitute an interest in land, but I would require additional submissions on whether the motion judge had jurisdiction to vest out 235Co's

57 The motion judge also referred, at para. 24, to the decision of the Court of Appeal of Quebec in *Anglo Pacific Group PLC c. Ernst & Young Inc.*, 2013 QCCA 1323, [2013] R.J.Q. 1264 (C.A. Que.).

(4) The Principles Applied

58 In this section of the reasons, I apply the *Dynex* test and then consider the errors made by the motion judge in his reasoning. It is important to note that the legal documents on which the appellant relies were prepared after *Dynex*.

(a) The Dynex test

59 I repeat for convenience the test prescribed in *Dynex*, at para. 22, for determining whether a royalty right is an interest in land:

> 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
>
> 2) the interest, out of which the royalty is carved, is itself an interest in land.

60 Dianor's interests in the claims were working interests or *profits à prendre*, which the common law unquestionably recognizes as interests in land. The GORs were carved out of Dianor's interests. The second element in the *Dynex* test is plainly met in this case.

61 In my view, the first element is also met. The Crown Land Agreement and the Patented Land Agreement expressly state that the parties intend the GOR to create an interest in and to run with the land. To repeat for convenience, s. 4.1 of each of the Agreements states:

> 4.1. It is the intent of the parties hereto that the GOR shall constitute a covenant and an interest in land running with the Property and the Mining Claims and all successions thereof or leases or other tenures which may replace them, whether created privately or through governmental action, and including, without limitation, any leasehold interest.

62 Apart from the plain language of the Agreements, in considering the surrounding context, the original GOR-holder took steps to register its royalty rights: notices of the GORs were registered on title to the patented lands under s. 71 of the *LTA* and on the unpatented mining claims under the *Mining Act*.

63 I agree with the Court of Appeal of Alberta in *Dynex*, at para. 73, that the court must "examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances". Doing so in this instance makes plain their mutual intention to constitute the GORs as interests in land. It is express in the Agreements (based on the general principles of contractual interpretation), and the royalty rights-holder took care to register the interests on title.

64 I observe that the same result was reached with less supporting evidence in *Blue Note Mining Inc. v. Merlin Group Securities Ltd.*, 2008 NBQB 310, 337 N.B.R. (2d) 116 (N.B. Q.B.), aff'd 2009 NBCA 17, 342 N.B.R. (2d) 151 (N.B. C.A.). One issue was whether a net profit interest constituted a continuing interest in land that bound the purchaser. The motion judge determined that the agreement creating the interest did not contain the typical words "found in a conveyance of an interest in land": at para. 34. The only relevant words were "grant" and "in the mine". However, the motion judge held (and the Court of Appeal affirmed) that this was sufficient to grant an interest in land.

65 The contractual terms are not necessarily determinative of whether an interest in land was intended; the language does not require magic words to demonstrate the parties' intention. However, these words were present in the Agreements. In my view, the appellant's GORs constitute interests in land that run with the land and are capable of binding the claims in the hands of a purchaser.

(b) The motion judge's errors

66 The motion judge made three legal errors in his analysis. The first error was that he did not examine the parties' intentions from the royalty agreements as a whole, along with the surrounding circumstances; this was the burden of the previous section of these reasons.

67 The motion judge's second error was in holding that in order to qualify as an interest in land, the royalty agreements had to give the appellant the right "to enter the property to explore and extract diamonds or other minerals": at para. 26. The third error is in holding that: "The interest, out of which the royalty is carved, is not [an] interest in land" because it is expressed in the Agreements as only a right "to share in revenues produced from diamonds or other minerals extracted from the lands." The latter two errors come from a misapprehension of the *Dynex* test. I will address them in turn.

(i) Dynex does not require a royalty rights-holder to have the right to enter the property to explore and extract resources in order to qualify as an interest in land

68 In my view, a serious misapprehension has arisen in the application of *Dynex* in some cases, including some of those relied on by the motion judge.

69 In *Dynex*, Major J. used some precise language from the trial decision of Virtue J. in *Vandergrift v. Coseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17 (Alta. Q.B.), at p. 26, to specify the test as to when a royalty interest can be an interest in land. However, the Supreme Court did not adopt the reasoning in *Vandergrift*. There is good reason for this, because *Vandergrift* is inconsistent with *Dynex* in a critical way.

70 In *Vandergrift*, the court did not conclude that the royalty right ran with the land but instead concluded that it was a purely contractual right, taking precisely the approach to the analysis that both the Court of Appeal of Alberta and the Supreme Court expressly disavowed in *Dynex*. Justice Virtue stated, at p. 28:

> One of the incidents of an interest in land one would expect to find in a royalty agreement intended to create an interest in land would be the right to the royalty holder to enter upon the lands to explore for and extract the minerals. A mere entitlement to an overriding royalty, without more, does not, in my view, carry with it the right to explore for oil and gas.

71 The purpose of the Supreme Court and the Court of Appeal of Alberta in *Dynex* was to step away from the requirement that a royalty right had to have the incidents of a working interest or a *profit à prendre* in order to constitute an interest in land, so that royalty rights could play their useful role in financing the industry and spreading risk.

72 Moreover, royalty rights-holders have no interest in working the land, nor do holders of the working interest or the *profit à prendre* want their operations to be subject to the working rights of a royalty rights-holder. This is precisely why the Alberta Court noted, at para. 43, that the royalty right was to be "non-operating", adding: "Non-operating interests include royalty interests, overriding royalty interests, production payments, net profit interests and carried interests."

73 I agree with Professor Bankes, who observed, at p. 23 of his article: "I do not think that the Court should be taken to have endorsed either the particular approach taken by Justice Virtue or the actual result that he arrived at in that case." This built on his earlier comment criticizing *Vandergrift*, at p. 18, on the basis that it "seems to want to turn the royalty owner's passive interest into a working interest."

74 I turn now to the motion judge's second error respecting the application of *Dynex*.

(ii) The language in which the calculation of the royalty right is expressed does not affect its characterization as an interest in land

75 As noted, the motion judge held, at para. 26, that: "The interest, out of which the royalty is carved, is not [an] interest in land" because it is expressed in the Agreements as only a right "to share in revenues produced from diamonds or other minerals extracted from the lands." This takes the mistaken approach of the court in *Vandergrift*, which was rejected in *Dynex*.

TAB 16

2023 ABKB 11
Alberta Court of King's Bench

Prairiesky Royalty Ltd v. Yangarra Resources Ltd

2023 CarswellAlta 30, 2023 ABKB 11, [2023] A.W.L.D. 1142, 16 P.P.S.A.C. (4th) 17, 2023 A.C.W.S. 115, 59 Alta. L.R. (7th) 386

Prairiesky Royalty Ltd. (Plaintiff) and Yangarra Resources Ltd. (Defendant)

M.H. Bourque J.

Heard: March 28-31, April 1, June 17, 2022
Judgment: January 6, 2023
Docket: Calgary 1701-08362

Counsel: Laura M. Poppel, Emma Morgan, for PrairieSky Royalty Ltd.
Warren Foley, Ram Sankaran, for Yangarra Resources Ltd.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Natural Resources; Property; Public

Headnote

Natural resources --- Oil and gas — Exploration and operating agreements — Royalty agreement — Miscellaneous

Plaintiff was successor to original grantee's interest in royalty agreement under which 8 per cent overriding royalty was granted in respect of oil and gas recovered under Crown petroleum and natural gas lease — Purchaser acquired Crown lease — Plaintiff brought action for declaration that purchaser was bound by eight per cent royalty, and monetary judgment against purchaser for outstanding royalty payments plus interest — Action allowed — Royalty and purchaser's interest in Crown lease were both legal interests — Plaintiff's eight per cent royalty was first in time and therefore, had priority over purchaser's subsequent legal interest in Crown lease — Royalty was binding on purchaser — Where royalty agreement expressly states that royalty in question constitutes interest in land, is to be construed as interest in land, or runs with lands subject to royalty or underlying interest in land, such language creates strong, but rebuttable presumption that royalty is interest in land — Interest in Land Clause in agreement that creates royalty capable of lasting for duration of underlying interest in land may be sufficient to satisfy relevant test — Crown Lease out of which royalty was carved was working interest or profit à prendre and, therefore, interest in land capable of satisfying applicable test — Carving gross overriding royalty out of mineral lease does not offend nemo dat principle, nor does that principle elevate gross overriding royalty to working interest on par with underlying leasehold interest — Whether parties intended eight per cent royalty to constitute interest in land, predecessors intended for it to constitute interest in land that ran with and bound lands subject to Crown lease — As there were no public registries where predecessors in title could have registered notice of royalty against Crown lands, priority to be determined by rules of priority of competing interests at common law and in equity — Even if royalty were merely equitable interest contingent on future production at time royalty agreement was executed, it would have crystallized as legal interest as soon as petroleum substances were produced — As current lessee, purchaser held rights and interests provided under Crown lease, despite nominal purchase price under agreement not being paid — If royalties were extinguishable upon underlying interest changing hands without subsequent acquiror's knowledge of royalty, there would be no point in labelling them interests in land — Defence of bona fide purchaser for value did not apply Mines and Minerals Act [Repealed], R.S.A. 1980, c. M-15, s 91(1)(b).

ACTION by plaintiff for declaration regarding royalties.

***M.H. Bourque J.*:**

I. Introduction

1 The overarching question before me is whether the successor in interest to a Crown petroleum and natural gas lease is bound by an overriding royalty that was originally granted by a predecessor lessee as consideration for the funding for the acquisition of the lease.

2 The Plaintiff, PrairieSky Royalty Ltd. ("PrairieSky"), is the successor to the original grantee's interest in an April 1, 2011 Royalty Agreement (the "2011 Royalty Agreement") under which an 8% overriding royalty (the "8% Royalty") was granted in respect of oil and gas recovered under Crown Petroleum and Natural Gas Lease No. 0579030039 (the "Crown Lease"). The 8% Royalty grantor's undivided interest in the underlying Crown Lease was transferred to Relentless Resources Ltd. ("Relentless") in 2013. The Defendant, Yangarra Resources Ltd. ("Yangarra"), acquired Relentless' interest in the Crown Lease in 2016.

3 PrairieSky seeks a declaration that Yangarra is bound by the 8% Royalty and monetary judgement against Yangarra for outstanding royalty payments plus interest. In its defence, Yangarra asserts that the 8% Royalty is not an interest in land that could run with the lands subject to the Crown Lease and, therefore, could not encumber subsequent lessees. In the alternative, if the 8% Royalty *does* constitute an interest in land, Yangarra asserts it is a *bona fide* purchaser for value without notice ("BFPV") under the law of equity and, therefore, should not be bound by the 8% Royalty.

4 This is a case where the Torrens system of land registration and transfers is not determinative of the priority of the competing interests. Certificates of title are generally not issued for Crown-owned lands. Further, caveats and other encumbrances that can otherwise be registered to provide notice to potential purchasers of an overriding royalty on freehold minerals cannot be registered against Crown-owned minerals pursuant to s 202(a) of the Land Titles Act, RSA 2000, c L-4 (the "*LTA*"). Therefore, to determine whether the defence of BFPV applies here, the Court must determine the nature of the parties' interests — legal or equitable — and apply the common law rules of priority to PrairieSky's prior interest in the form of the 8% Royalty and Yangarra's subsequent interest in the Crown Lease.

5 For the reasons that follow, I find that the 8% Royalty arising from the 2011 Royalty constitutes an interest in land. I have also found that each of the 8% Royalty and Yangarra's interest in the Crown Lease are legal interests. Given that it was first in time, the 8% Royalty has priority over Yangarra's interest in the Crown Lease.

II. Issues

6 To determine whether Yangarra is bound by the 8% Royalty, the following issues must be resolved:

Issue 1: Does the 8% Royalty arising from the 2011 Royalty Agreement constitute an interest in land?

Issue 2: If the 8% Royalty is an interest in land, does it have priority over Yangarra's interest in the Crown Lease? To determine this issue, the following sub-issues must individually be determined:

(i) Are the parties' interests legal or equitable?

(ii) As two legal interests, does PrairieSky's 8% Royalty have priority over Yangarra's interest in the Crown Lease?

Issue 3: What remedy, if any, is appropriate?

III. Background Facts

7 The Crown Lease conferring "the exclusive right to explore for, work, win and recover petroleum and natural gas within and under" the Southwest $^{1}/_{4}$ Section 7, Township 41, Range 5, West of the Fifth Meridian in Alberta (the "Royalty Lands") was initially granted to Westhill Resources Limited ("Westhill") and O'Sullivan Resources Ltd. ("O'Sullivan") in 1979. Upon obtaining the Crown Lease, Westhill and O'Sullivan entered into a royalty agreement (the "1979 Royalty Agreement") with Success Oil Ltd. ("Success"), under which a 2% gross overriding royalty was granted in respect of petroleum substances produced, saved, and sold after the date thereof from the Royalty Lands (the "2% GOR"). While the status of the 2% GOR in

party. This further evidences an intention to create an interest in land that runs with the underlying estate in land (*Dynex ABCA* at para 84).

97 The Surrender clause (clause 9.1) and definition of "Title Documents" referenced thereunder stipulate that the grantor may only surrender the Crown Lease in accordance with "accepted industry practice" and must first offer to convey its interest in the Crown Lease to the royalty holder before surrendering. By extension, the grantor cannot allow the 8% Royalty to extinguish by surrendering or otherwise allowing the underlying Crown Lease to expire by failing to meet the continuation obligations required under the applicable regulations except in accordance with sound industry practices.

98 Initially granted in 1979, the Crown Lease had been continued indefinitely beyond the primary and intermediate terms by the time Home Quarter became lessee. Therefore, when the 2011 Royalty Agreement was executed, the Crown Lease or portions thereof would only expire and revert to the Crown if the lessee could no longer demonstrate that the subject geologic zones were productive or potentially productive, and that they were not being drilled at the time of expiry (Petroleum and Natural Gas Tenure Regulation, Alta Reg 263/1997 ss 15-18). The Surrender clause therefore implies that the 8% Royalty is capable of lasting for the duration of the productive life of the reservoirs subject to the Crown Lease.

99 Finally, the Area of Mutual Interest clause (clause 8.1) stipulates that, if the Royalty Lands subject to the Crown Lease revert back to the Crown by expiry or surrender but are reacquired by the grantor within two years, the 8% Royalty shall apply to those lands reacquired by the grantor. Considering the Term and Surrender clauses alongside the Area of Mutual Interest clause, I find the 8% Royalty was an investment in the success of "a particular piece of property" (*Dynex ABCA* at para 36), as opposed to an extinguishable mechanism for the repayment of a debt. This further reinforces the parties' intention that the 8% Royalty constitute an interest in land.

(5) The "Taking in Kind" clause

100 Clause 2.2 of the 2011 Royalty Agreement articulates the royalty holder's "right to take in kind or separately dispose of, at its own expense, its [8% Royalty] share of the Petroleum Substances." This Court has previously held that right of royalty holders to take their royalty in kind reflects a right of personal ownership that is indicative of an interest in land (Bank of Montreal v Dynex Petroleum Ltd, 2003 ABQB 243 at para 40; *James H Meek Trust v San Juan Resources Inc*, 2003 ABQB 1053; *Accel* at para 50). Yangarra submits that, while provisions allowing for royalty holders to "take in kind" the substances extracted from the land may weigh toward a GOR being characterized as an interest in land, they do not, in and of themselves, create an interest in land. I agree.

101 With regards to the important role that royalties play in attracting capital for upstream oil and gas ventures, for example, certain investors may lack the operational capacity to physically take possession of and market oil, gas, or condensate, rendering a "take in kind" provision in a royalty agreement potentially irrelevant to them. The parties' intention to establish an interest in land therefore should not be dependent on the royalty holder's ability to take the royalty payment in kind. Nor should emphasis be placed on take-in-kind provisions as indicia of interests in land to the extent they demonstrate the royalty holder's measure of control over the interest. Such a control-oriented approach incorrectly seeks "to turn the royalty owner's passive [non-operating] interest into a working interest" (*Dianor* at para 73, quoting Nigel D Bankes, "Private Royalty Issues: A Canadian Viewpoint" (2003) Private Oil & Gas Royalties, Paper No. 8, Rocky Mountain Mineral Law Foundation at 195).

102 Moreover, a take-in-kind provision could be equally applicable as a contractual right to take the produced substances in kind as security for the payment of a debt, which would not reflect an interest in land. Absent additional context as to how take-in-kind provisions evidence the intention that the subject GOR constitute an interest in land, I find that the mere presence of such clauses does not illuminate the parties' intention. Accordingly, I find the Taking in Kind clause of the 2011 Royalty Agreement neutral with respect to whether the parties intended the 8% Royalty to constitute an interest in land.

(6) The "Pooling" and "Unitization" clauses

103 Clause 4.1 of the 2011 Royalty Agreement (the "Pooling Clause") stipulates that the grantor has the discretion to "pool all or a part of the Royalty Lands with any other lands for the purposes of creating a Spacing Unit if such pooling becomes

TAB 17

Most Negative Treatment: Not followed
Most Recent Not followed: Prairiesky Royalty Ltd v. Yangarra Resources Ltd | 2023 ABKB 11, 2023 CarswellAlta 30 | (Alta. K.B., Jan 6, 2023)

1989 CarswellAlta 76
Alberta Court of Queen's Bench,

Vandergrift v. Coseka Resources Ltd.

1989 CarswellAlta 76, [1989] A.W.L.D. 528, 15 A.C.W.S. (3d) 36, 67 Alta. L.R. (2d) 17, 95 A.R. 372

VANDERGRIFT et al v. COSEKA RESOURCES LIMITED et al.

Virtue J.

Judgment: March 30, 1989
Docket: Calgary No. 8201 33548

Counsel: *W.H. Kennedy*, for plaintiffs.
E.L. Bunnell, Q.C., for defendants except Telstar Resources Ltd.
B.K. O'Ferrall, for third party Dome Petroleum Ltd.
T.M. Hughes, for fourth party Wudel.
L.C. Fontaine, for fourth party Chevron Standard Ltd.

Subject: Natural Resources; Civil Practice and Procedure
Headnote
Oil and Gas --- Exploration and operating agreements — Royalty agreement — General
Oil and Gas --- Statutory regulation — Provincial boards — General
Energy and natural resources — Oil and gas — Oil and gas interests — Nature of legal interest — Company having right under farmout agreement to earn interest in petroleum and natural gas lease in land upon drilling gas well on land — Company assigning itself and others gross overriding royalty in all petroleum substances recovered from land — Company completing earning well and receiving leasehold interest — Assignees of royalty interest claiming royalty on interest in land — Language of royalty agreement not showing intention of parties to create interest in land but conveying contractual right to share in petroleum substances after recovered from land — Interest out of which royalty carved not itself an interest in land as company not having earned lease at time royalty agreement executed — Court dismissing assignees action.
Energy and natural resources — Oil and gas — Government regulation — Production — Unitization — Company earning petroleum and natural gas lease under farmout agreement — Company having gross overriding royalty on actual production from land — Company transferring lease to owners of petroleum and natural gas lease on adjacent land — Owners obtaining gas block order for both lands to avoid off-target penalty — Assignees of royalty interest seeking calculation of royalty based on pooled production from all wells in gas block — Gas block order not creating unitization of petroleum and natural gas area — Neither order nor legislation governing gas blocks requiring compulsory allocation of percentage of total amount of gas produced in unit to individual parcels of land or substituting previous contracts based on actual production with allocated percentage of production from entire unit — Court not amending existing arrangement between working interest owners and royalty holders in absence of clear contractual provisions or legislative authority — Court dismissing assignees' action.
Energy and natural resources — Oil and gas — Exploration and operations — Royalty agreements — Company having right under farmout agreement to earn interest in petroleum and natural gas lease in land upon drilling gas well on land — Company assigning itself and others gross overriding royalty in all petroleum substances recovered from land — Company completing earning well and receiving leasehold interest — Assignees of royalty interest claiming royalty on interest in land — Language of royalty agreement not showing intention of parties to create interest in land but conveying contractual right to share in petroleum

substances after recovered from land — Interest out of which royalty carved not itself an interest in land as company not having earned lease at time royalty agreement executed — Court dismissing assignees' action.

Energy and natural resources — Oil and gas — Exploration and operations — Royalty agreements — Company earning petroleum and natural gas lease under farmout agreement — Company having gross overriding royalty on actual production from land — Company transferring lease to owners of petroleum and natural gas lease on adjacent land — Owners obtaining gas block order for both lands to avoid off-target penalty — Assignees of royalty interest seeking calculation of royalty based on pooled production from all wells in gas block — Gas block order not creating unitization of petroleum and natural gas area — Neither order nor legislation governing gas blocks requiring compulsory allocation of percentage of total amount of gas produced in unit to individual parcels of land or substituting previous contracts based on actual production with allocated percentage of production from entire unit — Court not amending existing arrangement between working interest owners and royalty holders in absence of clear contractual provisions or legislative authority — Court dismissing assignees' action.

Under a farmout agreement, S. Ltd. was entitled to acquire a 60 per cent working interest in 94.4 per cent of a petroleum and natural gas lease on seven sections of land known as the Suffolk lands by drilling a gas well on the lands. S. Ltd. granted itself and two others equal shares in the farmout agreement. S. Ltd. obtained a Crown Reserve and Natural Gas Licence for the lands and entered into a royalty agreement under which it assigned to itself and the other two grantees under the farmout agreement a 3 per cent gross overriding royalty in all petroleum substances recovered from the lands. The agreement provided that S. Ltd. was not required to conduct exploratory operations or to drill a well on the land. By a series of assignments, the 3 per cent royalty came to be held by the plaintiffs. Two years after execution of the royalty agreement, S. Ltd. completed the earning well under the farmout agreement and received a natural gas lease for the 60 per cent interest in the Suffolk lands. S. Ltd. sold the 60 per cent interest to the defendant working interest owners who also held the lease on the adjacent eight sections of land known as the TransAlta lands. The defendant C. Ltd. was retained as the field operator for both the Suffolk and TransAlta lands and five producing gas wells were drilled on the TransAlta lands. The defendants then entered into an agreement to pool their respective interests and a percentage of the pooled costs and revenues of the Suffolk and TransAlta lands were allocated to each working interest owner. Not being working owners, the plaintiffs were not parties to this agreement and continued to receive a 3 per cent royalty "applicable to production from the Suffolk lease". Two years after the earning well drilled by S. Ltd. on the Suffolk lands went into production, the Oil and Gas Conservation Board announced its intention to impose a retroactive off-target penalty for overproduction that would have resulted in the well being shut-in for two years. To avoid this penalty, C. Ltd. obtained from the board a gas block order for the Suffolk and TransAlta lands. Thereafter there was no change in the way C. Ltd. allocated production to the six wells in the gas block and the plaintiffs' royalty continued to be calculated solely upon 3 per cent of the actual production from the Suffolk well. Claiming that their royalty was an interest in land and that the gas block order had resulted in a statutory or defacto unitization of the lands in the gas block, the plaintiffs commenced this action for, inter alia, a declaration that their royalty should be calculated and paid as a percentage of the pooled production from all the wells in the gas block.

Held:

Action dismissed.

A royalty interest or an overriding royalty interest can be an interest in land if the parties use language sufficiently precise to show that intent rather than the intent to create a contractual right to a portion of the oil and gas recovered from the land, and if the interest out of which the royalty is carved is, itself, an interest in land. In each case where it is claimed a royalty agreement creates an interest in land, the court must examine the specific wording of the agreement to determine the intention of the parties. In this case the choice of language used was completely in the hands of the recipients of the royalty interest as for all practical purposes the recipients and the grantor were one and the same. The references in the agreement to a royalty in petroleum substances "found in" or "recovered from" the land as opposed petroleum substances "within, upon or under" the land conveyed a contractual right to the payment of a share of the petroleum after it had been removed, rather than an interest in land. Further, had the agreement been intended to create an interest in land one would expect it to include the right of the royalty holder to enter the land to explore and extract minerals. Since a mere entitlement to an overriding royalty without more does not carry with it a right to explore for oil and gas, the plaintiffs could neither extract the oil and gas themselves nor require S. Ltd. as grantor to drill for them. Also, as the plaintiffs sought to impose obligations on the defendants who were not party to the royalty agreement and did not participate in its drafting, it was reasonable to require that the language used show clearly the parties' intent for the royalty to be an interest in land.

When S. Ltd. granted the royalty, it had the right to earn an interest in land by drilling a well, but had not yet earned that interest and did not do so until two years after execution of the royalty agreement. The natural gas licence did not create an interest in land in S. Ltd. as a bare licence to drill and produce in the hands of one who neither owns nor leases the land or minerals is not an interest in land. Accordingly, when S. Ltd. granted the royalty, it did not own an interest in land and therefore could not convey an interest in the land to the plaintiffs.

The two most critical elements required for the unitization of a petroleum and natural gas area are the compulsory allocation of a percentage of the total amount of gas produced in the whole unit to individual parcels or tracts of land, and a provision that previous contracts are deemed to have been amended by substituting for actual production the allocated percentage of the production from the entire unit. The primary effect of the gas block order was to relieve against the necessity of imposing an off-target penalty in the Suffolk well and the order did not change the way in which the wells in the gas block could be produced but in fact conferred a substantial benefit on the plaintiffs by avoiding any payment of the penalty. Nothing in the order itself or the provisions of the Oil and Gas Conservation Act or the regulations required a percentage of the total production from the gas block to be allocated to each parcel of land in the block. Nor was there a formula setting out the basis on which such allocation could be made. In the absence of such provisions in the order or in the governing legislation, the conclusion to be drawn was that the issuance of the gas block order did not effect a compulsory unitization of the block. Further, without clear contractual provision or legislative authority, the court will not amend existing arrangements between working interest owners and royalty holders. The plaintiffs' rights were governed by the royalty agreement and their royalty remained payable on the production of the Suffolk lands alone.

Action for declaration that gross overriding royalty be calculated and paid as a percentage of the pooled production of all wells in a gas block.

***Virtue J.*:**

Introduction, issues, and relief sought

1 The plaintiffs are entitled to an overriding royalty in the gas and oil substances recovered from seven sections of leasehold land in the Coleman field (the "Suffolk lands") on which there is one producing gas well. The lease on the Suffolk lands is held by the defendants (the working interest owners) who also hold the lease on the adjacent eight sections of land (the "TransAlta lands") on which there are five producing gas wells. Coseka Resources Ltd. operates the wells on all the lands in the gas block for the leaseholders. The Energy Resources Conservation Board of Alberta issued an order establishing the Suffolk lands and the TransAlta lands as a gas block. The gas block order was in effect from 29th June 1978 until November 1987, when it was rescinded.

2 There are two main issues to be dealt with:

3 1. Have the defendants wrongfully taken gas, underlying the Suffolk lands, without payment to the plaintiffs for their royalty?

4 2. Did the issuance of the gas block order entitle the plaintiffs to be paid their royalty based upon the pooled production from all the wells in the gas block, rather than on the one well on the Suffolk lands?

5 The plaintiffs seek a declaration that their royalty should be calculated on the basis of the total production from the gas block during the time the gas block order was in effect, and, in addition, specific performance of the royalty agreement on the basis of such a declaration; and an accounting for all royalties said to be due to the plaintiffs, with interest.

6 The trial, by agreement of the parties, was split into two parts: the first, to determine the issues arising between the plaintiffs and the defendants, and the second, if required, to deal with the issues arising between the defendants and the third and fourth parties.

The facts

> Suffolk shall deliver and furnish to The Royalty Owners on or before the last day of each calendar month a complete statement or statements with respect to the *quantity and kind of the petroleum substances produced and saved* during the preceding calendar month *from the lands* ...
>
> **6. Performance Of License By Suffolk**
>
> Suffolk shall pay all rentals, royalties, taxes and charges payable under the License and as to *production from the lands*, and shall keep the License in good standing until surrender thereof as herein provided, but *nothing herein shall be construed as requiring Suffolk to conduct exploratory operations or to drill a well or wells on the lands* ...
>
> **15. Miscellaneous Provisions**
>
> (a) All terms and conditions of this Agreement shall run with and be binding upon the lands. [emphasis added]

40 In reading the agreement one is struck by the fact that the first reference to the nature of the interest to be conveyed used the expression "royalty on all petroleum substances recovered from the lands", not petroleum within, upon and under the lands, but, those substances "recovered" from the lands. The next reference, in para. 2, is to a royalty on "petroleum substances found". Again, the reference is not to petroleum substances within, upon or under the lands, but to substances "found" within, upon or under the lands. The other references in agreement are to royalty in terms of "a share of production", "petroleum substances sold", "petroleum substances produced". Taken as a whole, I am of the view that the agreement conveys a contractual right to the payment of a royalty on petroleum substances produced from the lands, that is, a share of the petroleum after it has been removed, rather than on interest in land.

41 In *Vanguard Petroleums v. Vermont*, Moore J., after reviewing the decision of Allen J.A. in *Emerald Resources Ltd. v. Sterling Oil Properties Mgmt. Ltd.* (1969), 3 D.L.R. (3d) 630 (Alta. C.A.), affirmed 15 D.L.R. (3d) 256 (S.C.C.), stated that the Court of Appeal in that case (p. 71):

> ... was of the clear opinion that, where the royalty relates to a share after the petroleum had been removed from the land, this is not an interest in land but is to be treated as personalty.

With respect, I share the same view.

42 One of the incidents of an interest in land one would expect to find in a royalty agreement intended to create an interest in land would be the right to the royalty holder to enter upon the lands to explore for and extract the minerals. A mere entitlement to an overriding royalty, without more, does not, in my view, carry with it the right to explore for oil and gas. In this case the royalty agreement specifically provides that "nothing herein shall be construed as requiring Suffolk to conduct exploratory operations or to drill a well on the lands". Thus the royalty holders could not themselves extract the oil and gas, nor could they require the grantor to drill a well for that purpose. In addition, I regard it as significant that the parties who drafted the royalty agreement now seek to use the agreement to impose obligations on the defendants who were not parties to the agreement and had no part in the drafting of it. Where that is the case, it is not unreasonable, in my view, to require that the language used show clearly that the parties intended the royalty to be an interest in land.

43 On reviewing the whole of the agreement and the circumstances in which it was made, I am persuaded that the royalty agreement in this case did not create an interest in land, but gave a contractual right to a payment calculated on production.

2. Was the grantors interest, out of which the royalty was carved, an interest in land?

44 In *Telstar Resources Ltd. v. Coseka Resources Ltd.* (1980), 12 Alta. L.R. (2d) 187 at 191, 24 A.R. 562 (C.A.), Morrow J.A. describes an overriding royalty as " 'a percentage carved out of the lessee's working interest' " or a " 'charge on that working interest' ". If the interest, out of which the royalty is carved, is not itself an interest in land, then the royalty cannot be an interest in land.

45 When the royalty agreement was entered into, the grantor, Suffolk, had an interest in the farmout agreement from Imperial, and it had a natural gas licence from the Crown. At that time, Suffolk, which granted the royalty, did not have a lease, and it would not acquire a lease until it earned it by drilling a well. The farmout agreement stated that "if Suffolk drills the well to the contract depth", as required by the agreement, *then* Imperial would "convey to the Farmee an undivided sixty (60%) per cent of the Farmors' interest in the lands and the leases ... effective as of and from the release date of the rig used to drill the well to contract depth". The agreement went on to provide in para. 7(c):

> It is specifically understood by Farmee that if Farmee fails to complete ... the well ... Farmee has no interest whatsoever in the lands.

46 The effect of this was that Suffolk, at the time it granted the royalty, had the right to earn an interest in land by drilling a well, but it had not yet earned it. Suffolk did not acquire the lease until 13th August 1973, that is, more than two years after the royalty agreement was executed.

47 Insofar as the natural gas licence is concerned it did not create an interest in land in the grantor, Suffolk. The Natural Gas Licence Regula tions, 1962, Alta. Reg. 297/62, describe the rights which accompany a natural gas licence:

> 14. A licence conveys the right to drill a well or wells for natural gas that is the property of the Crown ... and the right to produce the same ...

48 In my view, a bare licence to drill and produce, in the hands of one who neither owns nor leases the lands or minerals, is not an interest in land.

49 The result is that when Suffolk granted the royalty it did not own an interest in land and could not, therefore, "carve out" or convey an interest in land to the plaintiffs.

50 Neither of the two conditions for the creation of an interest in land has been met: The language of the royalty agreement is not sufficiently precise to show an intention to create such an intent, and the grantor did not itself have an interest in land.

Did the gas block order alter or change the terms of the plaintiffs' royalty agreement?

51 Counsel for the plaintiffs submits that the issuance of the block order "pooled" the production from the Suffolk and TransAlta lands, and thereafter, natural gas should be treated as having come from the pool rather than from an individual well. The result, he says, is that the plaintiffs' royalties must be calculated not on the actual production from the Suffolk lands, as provided in the royalty agreement, but on a percentage of the pooled production from the entire block. In effect, he says that the block order constituted a compulsory unitization of the lands in the block.

52 The two most critical elements required for the unitization of a petroleum and natural gas area are:

53 1) The compulsory allocation of a percentage of the total amount of gas produced in the whole unit to individual parcels, or "tracts", of lands; and

54 2) A provision that previous contracts are deemed to have been amended by substituting for actual production the allocated percentage of the production from the entire unit. The issuance of the gas block order, in this case, did not achieve either of those requirements.

55 The operative part of the gas block order reads as follows:

> 1. The area outlined on the attachment to this order marked Appendix A to this order is a gas block, and shall be known as North Coleman Gas Block No. 1.

TAB 18

2018 ABQB 590
Alberta Court of Queen's Bench

Alberta Energy Regulator v. Lexin Resources Ltd.

2018 CarswellAlta 1905, 2018 ABQB 590, [2018] A.W.L.D. 3664, 296 A.C.W.S. (3d) 238, 63 C.B.R. (6th) 220

Alberta Energy Regulator (Applicant) and Lexin Resources Ltd., 1051393 B.C. Ltd., 0989 Resource Partnership, LR Processing Ltd., and LR Processing Partnership (Respondents)

B.E. Romaine J.

Judgment: August 8, 2018
Docket: Calgary 1701-03460

Counsel: Robin Gurofksy, Jessica L. Cameron, for Receiver, Grant Thorton
David Girard, for MD of Foothills Ranchland
Douglas A. McGillivray, Q.C., David LeGeyt, David A. de Groot, for MFC Energy Finance Inc.
Keely R. Cameron, for Alberta Energy Regulator
Chris D. Simard, for Exxon Mobil Energy Canada
Gregory C. Plester, Megan Van Huizen, for Municipal District of Willow Creek No. 26 and Vulcan County
Mary Buttery, for Energy Leasing Partners Ltd.
Richard Billington, Q.C., for Young Energy Services Inc.
Karen Fellows, for MNP Ltd.

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy and insolvency --- Proving claim — Provable debts — Partnership or firm debts

Partnership and partner L Ltd. were two of several debtors in group of debtors — Partnership held assets of L Ltd., whose debt had been extinguished through restructuring using financing arranged through subsidiary of partner M Ltd. — Payments made by L Ltd. to subsidiary, which became owner of L Ltd., were by way of return of share capital — No loan agreement or other debt obligation had ever been put in place between subsidiary and L Ltd. or between subsidiary and partnership — Second subsidiary of M Ltd. incorporated M Inc. for purpose of loaning partnership $37,570,500, being amount notionally received by M Inc. for its shares from second subsidiary — Loan was distributed to partners, with amount received by L Ltd. being transferred to first subsidiary, which repaid initial financing and paid remainder to second subsidiary — Receiver was appointed over group of debtors, and second subsidiary advanced secured claim against partnership — Receiver brought application for advice and direction respecting characterization of funds indirectly advanced by second subsidiary to partnership — Application granted — Creditor's advance was more properly characterized as equity rather than debt, with result that second subsidiary's secured claim was subordinated to claims of all other creditors by operation of s. 140.1 of Bankruptcy and Insolvency Act — While there was formal documentation, there was no fixed maturity date, no schedule for repayment, and no obligation to pay interest until default — Expectation that advance would be repaid by partnership from cash flow was not objectively reasonable, and lack of interest implied equity disguised as debt.

APPLICATION by receiver for advice and direction respecting characterization of funds indirectly advanced to partnership by one of partner's subsidiaries.

***B.E. Romaine J.*:**

I. Introduction

1 This is an application by the Receiver of Lexin Resources Ltd, 1051393 BC Ltd, 0989 Resource Partnership, LR Processing Ltd and LR Processing Partnership (the Lexin Group) seeking advice and direction respecting the characterization of funds indirectly advanced by MFC Energy Finance Inc to the 0989 partnership, a member of the Lexin Group, on June 30, 2015. The original amount of the advance was $37,570,500 (the Finance Advance). Finance advances a secured claim in the receivership against 0989 in the amount of $15,058,116.08, which it alleges is the remaining amount of the Finance Advance.

2 For the reasons set out in this decision, I find that the Finance Advance is more properly characterized as equity rather than debt. In the alternative, I find that the Finance Advance should be postponed to the claims of other creditors pursuant to section 137 of *the Bankruptcy and Insolvency Act*, RSC 1985, C. B-3, as it is not a proper transaction.

II. Facts

3 The relevant facts are as follows:

4 MFC Bancorp Ltd (Bancorp) is a merchant banking company that invests in distressed businesses. In 2012, a subsidiary of Bancorp acquired the shares of Lexin Resources Inc, and in effect assumed or paid down Lexin's existing debt. At the time it did so, another of Bancorp's subsidiaries, MFC Energy Holding Austria Gmbh (MFC Austria) entered into two loan facility agreements with Austrian banks.

5 Debt under these facilities was incurred in order to aid in the restructuring of Lexin, and used by the subsidiary to acquire a TD bank loan facility that had been used by Lexin's predecessor. The subsidiary and Lexin were then amalgamated, thus extinguishing Lexin's debt.

6 While Finance submits that the intention was that the facility loans would be repaid from Lexin's cash flow, no loan agreement or other debt obligation has ever been put in place between MFC Austria and Lexin. Any payments by Lexin to MFC Austria have been made by way of a return of share capital.

7 In 2013, Lexin's assets were transferred to the 0989 partnership, in which Lexin and Bancorp are partners. Again, there is no loan agreement between MFC Austria and 0989. The outstanding balance of the Finance Advance was reduced from time to time, and Finance now submits that the current balance is $15,058,116.08.

8 In June, 2015, approximately $10.2 million in payments under the Austrian facilities became due.

9 At this point in time, Bancorp held 100% of the shares of M Financial Corp (M Financial) and MFC Austria, which was wholly-owned by Bancorp, owned all the shares of Lexin. Lexin and Bancorp were partners of 0989, Lexin as to 66 2/3% and Bancorp as to 33.68%.

10 Finance was incorporated on June 26, 2015 as a wholly-owned subsidiary of M Financial. Thus, each of Finance, M Financial, MFC Austria and Lexin were wholly — owned subsidiaries of Bancorp.

11 Michael Smith was a director of Bancorp, M Financial, Finance, MFC Austria and Lexin and a member of the management committee of 0989.

12 The following transactions all occurred on the same day, June 30, 2015:

(a) the directors of Finance resolved to issue 37,570,500 shares in Finance to M Financial for consideration of $37,570,500 and to grant a loan to 0989 in the same amount. Mr. Smith and Samuel Morrow, a director of Finance, MFC Austria and Bancorp, signed the directors' resolution. At the time, Finance had no other business or assets;

(b) 0989 received a wire transfer of $37,570,500 directly from M Financial;

13 Finance and 0989 entered into a demand loan agreement dated June 30, 2015 which states that Finance was providing a loan to 0989 in the amount of $37,570,500. As security for the loan, 0989 and Lexin executed a general security agreement

31 Those comments were made in context of a contest between competing creditors, and not an application by a receiver for advice and directions with respect to its findings on the validity of a claim. The Receiver has made its objections to the claim clear: the transaction bears the characteristics of a claim in equity and not in debt. Thus, the normal rule that the creditor bears the onus of establishing otherwise should apply. In any event, even if the burden shifts to the Receiver, the Receiver has met the burden in this case.

2. Analysis

32 The issue of: *supra* particular claim is to be treated as debt or equity is a matter of statutory interpretation: *supra* at para 152.

33 An "equity claim" is defined in the *BIA* as a claim that is in respect of an equity interest, including a claim for a return of capital or a contribution in respect of such a claim. An "equity interest" is defined as a share in the corporation, or another right to acquire a share in the corporation, other than one that is derived from a convertible debt. As noted by Wilton-Seigel, J. in *U.S. Steel*, this type of situation can be distinguished from the situation in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558 (S.C.C.), where the transaction was arm's length.

34 In *U.S. Steel*, the Court held at para 155-156 that the definition of "equity claim" can extend to a contribution to capital by a sole shareholder unaccompanied by a further issuance of shares. Further, the reference to "a return of capital" need not be limited to a claim in respect of express contribution to capital, and a transaction can be a contribution of capital in substance even if it is expressed otherwise.

35 Both the Receiver and Finance rely on the decision of U.S. Steel, as the Court in that case considered the specific circumstances of the characterization of the claim, such as this one, involving wholly-owned subsidiaries engaged in non-arm's length transaction.

36 As noted at para 154 of *U.S. Steel*:

> In the circumstances of a sole shareholder, there is no practical difference..... between a shareholding of a single share and a shareholding of multiple shares. Accordingly, for the purposes of the definition of an "equity claim", there should be no difference between a payment to a debtor company on account of the issuance of new shares and a payment to a debtor company by way of a contribution to capital in respect of the existing shares.

37 Thus, as was the case in *U.S. Steel*, the determination of whether Finance's claim is to be treated as debt or equity must address, not just the expressed intentions of the parties as reflected in the transaction documentation but also the manner in which the transaction was implemented and the economic reality of the surrounding circumstances. The form of the documentation is merely the "point of departure": *supra* at para 149.

38 The issue in situations where the parties are not arm's length is not what the parties say they intended regarding the substance of the transaction but the "underlying substantive reality of the transaction": *supra* para 167. As actually implemented, is the substance of the transaction different from what was expressed in the transaction documentation?

39 It is not as simple as submitted by Finance. The approach to characterization is not merely a narrow "rubber-stamping" of the form of transaction chosen by the sole shareholder: *supra* para 168.

40 While the characterization of the claim must be analyzed at the date of advance, subsequent behavior, rather than subsequent stated intention, may be relevant if it illuminates the intentions of the parties at the date of advance although it cannot on its own justify a re-characterization of such advance: *U.S. Steel* at para 195; *Canada Deposit Insurance* at para 52. The determination is not based on inequitable behaviour, but on the underlying substantive reality of the transaction.

41 *U.S. Steel* sets out a helpful two-part test in to be followed in situations involving parent-subsidiary relationships at paras 186-190:

(a) subjectively, did the alleged lender actually expect to be repaid the principle amount of the loan with interest out of the cashflows of the alleged borrower; and

(b) objectively, was the expectation reasonable under the circumstances?

42 The Court in *U.S. Steel* referred to various factors used by American courts to aid in determining appropriate characterization, including the following:

(a) the names given to the instruments, if any, evidencing the indebtedness;

(b) the presence or absence of a fixed maturity date and schedule of payments. The American cases suggest that the absence of a fixed maturity date and a fixed obligation to repay is an indication that the advances were capital contributions and not loans;

(c) the presence or absence of a fixed rate of interest and interest payments. Again, it is suggested that the absence of a fixed rate of interest and interest payments is a strong indication that the advances were capital contributions rather than loans;

(d) the source of repayments. If the expectation of repayment depends solely on the success of the borrower's business, the cases suggest that the transaction has the appearance of a capital contribution;

(e) the adequacy or inadequacy of capitalization. Thin or inadequate capitalization is strong evidence that the advances are capital contributions rather than loans;

(f) the identity of interest between the creditor and the shareholder. If shareholders make advances in proportion to their respective stock ownership, an equity contribution is indicated;

(g) the security, if any, for advances;

(h) the corporation's ability to obtain financing from outside lending institutions. When there is no evidence of other outside financing, some cases indicate that the fact no reasonable creditor would have acted in the same manner is strong evidence that the advances were capital contributions rather than loans;

(i) the extent to which the advances were subordinated to the claims of outside creditors;

(j) the extent to which the advances were used to acquire capital assets. The use of the advance to meet the daily operating needs for the corporation, rather than to purchase capital assets, is arguably indicative of bona fide indebtedness; and

(k) the presence or absence of a sinking fund to provide repayments.

43 However, these and other factors are no more than an aid in determining substantive reality and should not be used in a "score-card" manner: *supra* para 181.

44 However, the Receiver submits that these factors overwhelmingly point to the Finance Advance being in reality equity and not debt, particular factors b), c), e), f) and j).

45 While there is formal documentation in this case, it does not include a schedule for repayment and there is no obligation to pay interest until default. Since it is characterized as a demand loan, there is no fixed maturity date. Thus, it would be possible, and in fact has been the case, that no demand for repayment has been made. Although there is evidence indicating the commencement of enforcement proceedings by various creditors, and thus default, Finance has issued no formal notice of default and no interest is alleged to be payable.

46 Payments made under the Finance Advance were sporadic and the first payment made was in the form of an actual transfer of assets to Finance and its subsidiaries. Two variable cash repayments were made in 2016.

TAB 19

Canada Federal Statutes
Companies' Creditors Arrangement Act
Interpretation

R.S.C. 1985, c. C-36, s. 2

s 2.

Currency

2.
2(1)Definitions
In this Act,

"aircraft objects" [Repealed 2012, c. 31, s. 419.]

"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a company; *("agent négociateur")*

"bond" includes a debenture, debenture stock or other evidences of indebtedness; *("obligation")*

"cash-flow statement", in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; *("état de l'évolution de l'encaisse")*

"claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; *("réclamation")*

"collective agreement", in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; *("convention collective")*

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; *("compagnie")*

"court" means

(a) in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,

(a.1) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench, and

(c.1) in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice;

("tribunal")

"debtor company" means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of thecompany have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

("compagnie débitrice")

"director" means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever named called; *("administrateur")*

"eligible financial contract" means an agreement of a prescribed kind; *("contrat financier admissible")*

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

("réclamation relative à des capitaux propres")

"equity interest" means

(a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

("intérêt relatif à des capitaux propres")

"financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account;

("garantie financière")

"income trust" means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act;

("fiducie de revenu")

"initial application" means the first application made under this Act in respect of a company; *("demande initiale")*

"monitor", in respect of a company, means the person appointed under section 11.7 to monitor the business and financial affairs of the company; *("contrôleur")*

"net termination value" means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; *("valeurs nettes dues à la date de résiliation")*

"prescribed" means prescribed by regulation; *("Version anglaise seulement")*

"secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; *("créancier garanti")*

"shareholder" includes a member of a company — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; *("actionnaire")*

"Superintendent of Bankruptcy" means the Superintendent of Bankruptcy appointed under subsection 5(1) of the *Bankruptcy and Insolvency Act*; *("surintendant des faillites")*

"Superintendent of Financial Institutions" means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; *("surintendant des institutions financières")*

"title transfer credit support agreement" means an agreement under which a debtor company has provided title to property for the purpose of securing the payment or performance of an obligation of the debtor company in respect of an eligible financial contract; *("accord de transfert de titres pour obtention de crédit")*

"unsecured creditor" means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issue under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. *("creancier chirographaire")*

2(2)Meaning of "related" and "dealing at arm's length"
For the purpose of this Act, section 4 of the *Bankruptcy and Insolvency Act* applies for the purpose of determining whether a person is related to or dealing at arm's length with a debtor company.

Amendment History

R.S.C. 1985, c. 27 (2nd Supp.), s. 10 (Sched., item 3); 1990, c. 17, s. 4; 1992, c. 27, s. 90(1)(f); 1993, c. 28, s. 78 (Sched. III, item 20) [Repealed 1999, c. 3, s. 12 (Sched., item 4).]; 1993, c. 34, s. 52; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 120; 1998, c. 30, s. 14(c); 1999, c. 3, s. 22; 1999, c. 28, s. 154; 2001, c. 9, s. 575; 2002, c. 7, s. 133; 2004, c. 25, s. 193; 2005, c. 3, s. 15; 2005, c. 47, s. 124 [Amended 2007, c. 36, s. 105.]; 2007, c. 29, s. 104; 2007, c. 36, ss. 61(1), (2), (4); 2012, c. 31, s. 419; 2015, c. 3, s. 37; 2018, c. 10, s. 89

Currency

Federal English Statutes reflect amendments current to November 22, 2023
Federal English Regulations Current to Gazette Vol. 157:21 (October 11, 2023)

End of Document

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

R.S.C. 1985, c. C-36, s. 6

s 6.

Currency

6.

6(1)Compromises to be sanctioned by court

If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

6(2)Court may order amendment

If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

6(3)Restriction — certain Crown claims

Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

6(4)Restriction — default of remittance to Crown

If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

6(5)Restriction — employees, etc.

The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

6(6)Restriction — pension plan

If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(A.1) an amount equal to the sum of all special payments, determined in accordance with section 9 of the *Pension Benefits Standards Regulations, 1985*, that were required to be paid by the employer to the fund referred to in sections 81.5 and 81.6 of the *Bankruptcy and Insolvency Act* to liquidate an unfunded liability or a solvency deficiency,

(A.2) any amount required to liquidate any other unfunded liability or solvency deficiency of the fund as determined on the day on which proceedings commence under this Act,

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(A.1) an amount equal to the sum of all special payments, determined in accordance with section 9 of the *Pension Benefits Standards Regulations, 1985*, that would have been required to be paid by the employer to the fund referred to in sections 81.5 and 81.6 of the *Bankruptcy and Insolvency Act* to liquidate an unfunded liability or a solvency deficiency if the prescribed plan were regulated by an Act of Parliament,

(A.2) any amount required to liquidate any other unfunded liability or solvency deficiency of the fund as determined on the day on which proceedings commence under this Act,

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament;

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

6(7)Non-application of subsection (6)

Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

6(8)Payment — equity claims

No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Amendment History

1992, c. 27, s. 90(1)(f); 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 123; 2004, c. 25, s. 194; 2005, c. 47, s. 126 [Amended 2007, c. 36, s. 106.]; 2009, c. 33, s. 27; 2012, c. 16, s. 82; 2023, c. 6, s. 5

Currency

Federal English Statutes reflect amendments current to November 22, 2023
Federal English Regulations Current to Gazette Vol. 157:21 (October 11, 2023)

End of Document

TAB 20

2016 ONCA 662
Ontario Court of Appeal

U.S. Steel Canada Inc., Re

2016 CarswellOnt 14104, 2016 ONCA 662, [2016] O.J. No. 4688, 270 A.C.W.S. (3d) 471, 39 C.B.R. (6th) 173, 402 D.L.R. (4th) 450, 61 B.L.R. (5th) 1

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

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect to U.S. Steel Canada Inc.

George R. Strathy C.J.O., P. Lauwers, M.L. Benotto JJ.A.

Heard: March 17, 2016
Judgment: September 9, 2016
Docket: CA C61331

Counsel: Gordon Capern, Kristian Borg-Olivier, Denise Cooney for Appellant, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union
Andrew Hatnay, Barbara Walancik for SSPO and non-union retirees and active employees of U.S. Steel Canada Inc.
Tamryn Jacobson for Her Majesty the Queen in Right of Ontario and Superintendent of Financial Services (Ontario)
Michael E. Barrack, Jeff Galway, John Mather for Respondent, United States Steel Corporation
Sharon Kour for U.S. Steel Canada Inc.

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court Company was in Companies' Creditors Arrangement Act (CCAA) protection — Former employees of company claimed its American parent company ran company into insolvency to further its own interests — Former employees sought to have CCAA judge apply American legal doctrine of "equitable subordination" to subordinate parent company's claims to former employee's claims — CCAA judge held that he had no jurisdiction to apply doctrine of equitable subordination — Union appealed — Appeal dismissed — Nowhere in words of CCAA was there authority, express or implied, to apply doctrine of equitable subordination, nor did it fall within scheme of statute, which focused on implementation of plan of arrangement or compromise — Words "may make any order it considers appropriate in circumstances" in s. 11 of CCAA must be read as "may in furtherance of purposes of act make any order it considers appropriate in circumstances" — There was no support for concept that phrase "any order" in s. 11 provided at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors — Section 6(8) of CCAA effectively subordinates "equity claims", as defined, to claims of all other creditors — "Equitable subordination" is form of equitable relief to subordinate claim of creditor who has engaged in inequitable conduct, such claim was not "equity claim" as defined — There was no "gap" in legislative scheme to be filled by equitable subordination through exercise of discretion, common law, court's inherent jurisdiction or by equitable principles Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 11; Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 6.

APPEAL by union of judgment finding that court had no jurisdiction to apply American doctrine of equitable subordination.

***George R. Strathy C.J.O.*:**

1 U.S. Steel Canada Inc. ("USSC") is in *CCAA* [1] protection. Its former employees claim that its American parent, United States Steel Corporation ("USS"), ran the company into insolvency to further its own interests. An issue arose in the court below as to whether the *CCAA* judge could apply an American legal doctrine called "equitable subordination" to subordinate USS's claims to the appellant's claims.

2 The *CCAA* judge held he had no jurisdiction to do so. For reasons different than the ones he gave, I agree, and would dismiss the appeal.

FACTUAL BACKGROUND

3 USS is one of the largest steel producers in North America. In 2007, it acquired Stelco, which was in *CCAA* protection at the time, and changed its name to USSC.

4 Seven years later, on September 16, 2014, USSC was again granted *CCAA* protection by order of the Superior Court of Justice (Commercial List).

5 The *CCAA* judge made a Claims Process Order on November 13, 2014, establishing a procedure for filing, reviewing and resolving creditors' claims against USSC.

6 The order set out a separate procedure for resolving claims of approximately $2.2 billion by USS against USSC. Most of the claims arose from USS's acquisition and reorganization of Stelco and from advances of working capital. Those claims were to be determined by the court, rather than by the Monitor.

7 USS filed its proofs of claims. The Monitor recommended they be approved and USS moved for court approval of the claims.

8 Notices of Objection were filed by four parties: (a) the Province of Ontario and the Superintendent of Financial Services in his capacity as administrator of the Pension Benefits Guarantee Fund; (b) the United Steelworkers, Locals 8782 and 1005; (c) Representative Counsel to the Non-USW Active Salaried Employees and Non-USW Salaried Retirees; and (d) Robert Milbourne, a former president of Stelco, and his wife, Sharon Milbourne, both of whom are beneficiaries of a pension agreement with USSC.

9 These objections overlapped to some extent. The *CCAA* judge had to develop a procedure to address the objections. He had to decide whether they should be dealt with within the *CCAA* process, outside it, or not at all.

10 The Province made two allegations. The first was that loans by USS to USSC should be characterized as shareholders' equity, because of the circumstances in which they were made. They should therefore be subordinated to all other claims pursuant to s. 6(8) of the CCAA [2] (the "Debt/Equity Objection"). Second, the Province argued that the security for the loans should be invalidated pursuant to provincial and federal fraudulent assignment and fraudulent preference legislation (the "Security Objection"). USS disputed both allegations, but was content to have the issues determined under the Claims Process Order.

11 The Union made objections similar to the Province's, but it added a third based on oppression and breach of fiduciary duty arising out of USS's conduct in relation to the Canadian plants, pensioners, pension plan members and beneficiaries (the "Conduct Objections").

12 The *CCAA* judge described the Conduct Objections as allegations that USS caused USSC to underperform, thereby requiring it to incur significant debt and to be unable to meet its pension obligations. The Union sought, among other things, an order subordinating the USS claims in whole or in part to its claims.

13 The Milbournes' objections were based on USS's alleged conduct and relied primarily on the doctrine of equitable subordination. They asked that the USS claims be dismissed entirely or subordinated to the claims of the other unsecured creditors.

14 The *CCAA* judge scheduled a motion to establish a litigation plan for USS's motion for approval of its claims against USSC. The parties agreed that the Security Objection and the Debt/Equity Objection could be determined pursuant to the Claims Process Order and within the *CCAA* proceedings. [3]

80 What is apparent from the many creative orders that have been made, before and since the 2009 amendments, is that such orders are made squarely in furtherance of the legislature's objectives. In *Century Services*, at para. 59, the Supreme Court observed that "[j]udicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes", to avoid the devastating social and economic effects of bankruptcy while an attempt is made to organize the affairs of the debtor under court supervision.

81 The words "may ... make any order it considers appropriate in the circumstances" in s. 11 must, in my view, be read as "may ... *in furtherance of the purposes of this act*, make any order it considers appropriate in the circumstances."

82 There is no support for the concept that the phrase "any order" in s. 11 provides an at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors. The orders reflected in the case law have addressed the business at hand: the compromise or arrangement.

83 I turn to the second limit on the court's jurisdiction under s. 11, the "restrictions set out in this Act". The first question is whether such restrictions must be express or can be implied.

84 It bears noting that there are numerous express restrictions on the court's jurisdiction contained within the *CCAA* itself. Some are contained in Part II (Jurisdiction of Courts) and some are actually preceded by the heading "Restriction". In *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 426, 81 B.C.L.R. (5th) 102 (B.C. C.A.), at para. 34, the British Columbia Court of Appeal observed that "where other provisions of the statute are intended to restrict the powers under ss. 11 and 11.02 of the statute, they do so in unequivocal terms."

85 The *CCAA* judge found that there were "restrictions set out" in the *CCAA* that prevented the court from applying equitable subordination, namely the definition of "equity claim" in s. 2(1) and the provisions of s. 36.1. Essentially, he found that Parliament could have introduced equitable subordination into the *CCAA* when it amended the legislation in 2009, but declined to do so. "The court must respect that policy decision", he said at para. 53. The respondent supports this interpretation.

86 I agree with the appellant that "equity claim" is not a restriction at all, but a definition. Together with s. 6(8), it codifies what was essentially the law before the 2009 amendments. The purpose of this involvement in the priority of claims is to remove shareholders from the process of arriving at a compromise or arrangement, absent permission of the court. It has nothing to do with any wrongdoing by the person with the equity interest. The only "restriction", if any, would be the lack of flexibility to reverse this statutory subordination, as Pepall J. pointed out in *Nelson Financial Group Ltd., Re*, 2010 ONSC 6229, 75 B.L.R. (4th) 302 (Ont. S.C.J. [Commercial List]), at para. 34. However, this has to do only with subordination flowing from the characterization of a claim and not equitable subordination.

87 I also agree that the plain meaning of the words "subject to the restrictions *set out* in this Act" refers to express restrictions, of which there are a number.

(b) Subsection 6(8): Subordination of "equity claims"

88 In the court below, and in the appellant's submissions in this court, there was a blurring of the distinction between the separate concepts of "equity claim" and the doctrine of "equitable subordination". The *CCAA* judge's reasons referred at times to the "subordination claims" of the Union and the Milbournes as including the equitable subordination claims and the claims for oppression and breach of fiduciary duty.

89 As explained earlier, s. 6(8) of the CCAA effectively subordinates "equity claims", as defined, to the claims of all other creditors. No compromise or arrangement can be approved unless it provides for other claims to be paid, in full, before equity claims are paid.

90 With the exception of environmental claims, ss. 6(8) and 22.1 are the only provisions of the *CCAA* to deal expressly with priorities between creditors. [7] There is a clear rationale for these provisions. In E. Patrick Shea, *BIA, CCAA & WEPPA: A Guide to the New Bankruptcy & Insolvency Regime* (Markham: LexisNexis Group, 2009), at p. 89, the author explains that

"[t]he intention of these amendments is to remove the shareholder/creditor from the reorganization process, unless the court orders that they have a seat at the table."

91 "Equitable subordination", on the other hand, refers to the doctrine at issue here: a form of equitable relief to subordinate the claim of a creditor who has engaged in inequitable conduct. Such a claim is not an "equity claim", as defined. If it were, it would be subordinated without the need for intervention by the court.

92 Pepall J. dealt with these different principles and distinguished them clearly in *I. Waxman & Sons Ltd.*, a Commercial List decision that predated the 2009 amendments. There, a trustee in bankruptcy brought a motion for advice and directions as to whether a judgment creditor's claim should be allowed. Other creditors argued that his claim was rooted in equity and was not a debt claim. In the alternative, they argued that even if it was a debt claim, it should be subordinated to their claims pursuant to the doctrine of equitable subordination.

93 Pepall J. addressed the argument that the judgment creditor's claim was an equity claim under the heading "Characterization" (paras. 18-26), because the issue was whether his claim was properly characterized as one of equity or debt, with the attendant priority consequences. Next she considered whether, even though she had found that the claim was a debt claim, it should be subordinated pursuant to the doctrine of equitable subordination (paras. 27-35). She noted, at para. 27, that "[a]s its name suggests, the basis for development of the doctrine is the equitable jurisdiction of the court". She held that even if it applied in Canada, which was not established, there was no evidence on which to apply it in that case.

94 By contrast, the *CCAA* judge in this case disposed of these issues under one heading, "The Authority of the Court to Adjudicate Claims for Debt Re-Characterization and for Equitable Subordination", at paras. 38-53. He found, at para. 51, that the absence of any provision in the *CCAA* that would permit the application of equitable subordination was indicative of an intention to exclude the operation of the doctrine.

95 The *CCAA* judge appears to have treated equitable subordination as akin to equity claims as defined in s. 2(1), the subordination of equity claims in s. 6(8) and the remedies under s. 36.1. He found that because equitable subordination is not mentioned in the context of these remedies, Parliament must have intended to exclude it.

96 The distinction between these terms undermines the argument that equitable subordination does not exist because it was not included as part of the definition of (or together with the subordination of) equity claims. Equity claims are subordinated in order to keep shareholders away from the table while the claims of other creditors are being sorted out. Even prior to being explicitly subordinated by statute in 2009, they generally ranked lower than general creditors: *Sino-Forest Corp., Re*, 2012 ONCA 816, 114 O.R. (3d) 304 (Ont. C.A.), at para. 30. The purpose of the 2009 amendments appears to have been to confirm and clarify the law: see The Report of the 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, November 2003), at p. 158-59.

(c) Section 36.1: Preferences and Assignments

97 Section 36.1, which was part of the 2009 amendments, incorporates by reference provisions of the *BIA* permitting the court to invalidate prior fraudulent preferences or fraudulent assignments.

> 36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

98 The respondent argues that the inclusion of these express provisions implies that no other form of equitable remedy was contemplated. Its argument is that, had Parliament wished to invalidate or subordinate claims of creditors who had engaged in inequitable conduct in relation to other creditors, it could have expressly included that remedy.

TAB 21

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 65.13

s 65.13

Currency

65.13

65.13(1)Restriction on disposition of assets

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.

65.13(2)Individuals

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.

65.13(3)Notice to secured creditors

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.

65.13(4)Factors to be considered

In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the 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.

65.13(5)Additional factors — related persons

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.

65.13(6)Related persons
For the purpose of subsection (5), a person who is related to the insolvent person includes

(a) a director or officer of the insolvent person;

(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

(c) a person who is related to a person described in paragraph (a) or (b).

65.13(7)Assets may be disposed of free and clear
The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person 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.

65.13(8)Restriction — employers
The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

65.13(9)Restriction — intellectual property
If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Amendment History
2005, c. 47, s. 44; 2007, c. 36, s. 27; 2018, c. 27, s. 266

Currency
Federal English Statutes reflect amendments current to November 22, 2023
Federal English Regulations Current to Gazette Vol. 157:21 (October 11, 2023)

End of Document

TAB 22

COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE QUÉBEC

N° : 200-11-023049-169

DATE : 31 janvier 2017

SOUS LA PRÉSIDENCE DE L'HONORABLE CARL LACHANCE, J.C.S.

DANS L'AFFAIRE DE LA PROPOSITION DE :

C.L. MÉTAL INC.
Débitrice
et

YVON JACQUES
Requérant
c.

C.L. MÉTAL INC.

et

9827960 CANADA INC.
Intimées
et

ROY, MÉTIVIER, ROBERGE INC., ès qualité de syndic de la proposition de C.L. Métal inc.

et

JEAN-FRANÇOIS LARUE, notaire

et

OFFICIER DE LA PUBLICITÉ ET DES DROITS DE LA CIRCONSCRIPTION FONCIÈRE DE LÉVIS
Mis en cause

JUGEMENT SUR DEMANDE EN DÉCLARATION DE NULLITÉ ET EN ANNULATION D'UNE VENTE D'IMMEUBLE

INTRODUCTION

[1] Monsieur Yvon Jacques, ci-après appelé le requérant, demande l'annulation de la vente de l'immeuble de C.L. Métal inc., ci-après appelée la débitrice sur lequel il détient une hypothèque de premier rang.

[2] Il s'agit d'un immeuble situé sur le chemin des Iles à Lévis, endroit où la débitrice exploitait une entreprise de récupération de métal.

[3] La vente attaquée intervient le 15 juillet 2016 devant le notaire Jean François Larue au prix de 300 000 $ payé par l'acheteur 9827960 Canada inc., ci-après appelée l'intimée.

[4] Les administrateurs de 9827960 sont Messieurs Jocelyn Faucher et Hubert Labonté.

[5] Selon le requérant, il s'agit d'une vente illégale et nulle en vertu des termes de l'article 65.13 de la Loi sur la faillite et l'insolvabilité[1], ci-après appelée LFI, se lisant comme suit :

> **65.13 (1)** Il est interdit à la personne insolvable à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

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[1] L.R.C., 1985 ch. B-3

[91] Le 17 mai 2016, il rencontre le président de la débitrice et lui demande le montant de la créance du requérant et se fait répondre 95 000 $ à 100 000 $.

[92] Ayant des doutes sur le montant réel de la créance, il inscrit une dette de 200 000 $ à l'offre d'achat et mentionne à Monsieur Eric Lemieux « *si c'est 100 000 $ la dette il va te rester de l'argent* ».

[93] Il témoigne avoir investi environ 81 000 $ dans le commerce de la débitrice.

[94] Contre-interrogé, il mentionne évaluer la créance du requérant à la hauteur de 200 000 $ à 220 000 $ en mai 2015.

[95] Il admet le refus du requérant d'une somme de 100 000 $ pour acheter 50% de sa créance.

[96] Il ne nie pas avoir utilisé sans frais à l'été 2015 les équipements de la débitrice pour opérer son commerce.

[97] Il affirme avoir fait arpenter le terrain de la débitrice à l'été 2015 pour découvrir que l'emplacement des bornes réduisait la dimension de l'immeuble.

[98] Il a toujours su que le terrain était contaminé.

[99] Il a négocié avec l'Agence du Revenu du Québec et a réglé pour 50 000 $ la valeur de leur garantie sur l'immeuble de la débitrice.

ANALYSE ET MOTIFS DE LA DÉCISION

La vente de l'immeuble de la débitrice sans avoir obtenu l'autorisation judiciaire prévue à l'article 65.13 de la LFI est-elle valide?

[100] Le requérant nous soumet que cette vente est nulle. L'interdiction de vendre débute au jour du dépôt de l'avis d'intention et prend fin seulement au moment de l'extinction du concordat par l'exécution complète de celui-ci.

[101] L'intimée plaide qu'à compter de la date de l'homologation de la proposition, soit en l'espèce le 4 juillet 2016, la débitrice peut disposer de ses biens comme elle l'entend et sans aucune autorisation judiciaire. Le syndic n'a pas la saisine de l'immeuble.

[102] À notre avis, avant l'émission du certificat d'exécution de la proposition par le syndic, il faut assurément une autorisation judiciaire pour vendre un élément d'actif d'un débiteur ayant déposé une proposition concordataire même homologuée.

[103] Le concordat n'étant pas éteint, la vente du 15 juillet 2016 se trouve frappée de nullité et la demande du requérant, une personne intéressée, bien fondée. Nous nous expliquons.

[104] Présentement la débitrice bénéficie toujours de la protection de la LFI vis-à-vis les mesures d'exécution ou saisies de ses créanciers. Cette situation démontre que les effets de cette loi subsistent actuellement.

[105] En outre, si la proposition n'est pas exécutée en raison du refus du requérant de verser la somme de 25 000 $, la débitrice se retrouvera en faillite et les créanciers ordinaires ne toucheront rien si nous reconnaissons la vente du 15 juillet comme valide.

[106] À notre opinion, l'immeuble demeure un enjeu en lien avec la gestion du syndic considérant entre autres que sa vente à un prix raisonnable, comme le souhaite le requérant, permettra entre autres d'honorer la proposition et de payer les honoraires du syndic.

[107] Le processus visant à libérer la débitrice de ses dettes, à protéger ses intérêts et ceux des créanciers se déroule toujours comme le démontre par exemple l'assemblée récente où l'inspecteur désigné par les créanciers autorise le report de l'exécution de la proposition concordataire en raison de la présente demande et du fait que le requérant refuse de verser la somme de 25 000 $ qui devait provenir du produit de la vente de l'immeuble envisagée par le requérant à un prix supérieur à 300 000 $.

[108] Malgré les prétentions de l'avocat de l'intimée, il n'existe aucun indice dans la LFI nous permettant d'écarter l'application de l'article 65.13.

[109] Cet article énonce clairement une interdiction de vendre un élément d'actif à partir du dépôt d'une proposition, à moins d'une autorisation préalable du tribunal, celui-ci devant prendre en compte les critères du paragraphe 4.

[110] Si le législateur avait voulu mettre fin à l'interdiction de vendre un actif hors du cours normal des affaires à une autre étape du déroulement de la proposition comme par exemple après le vote l'acceptant ou après son homologation, il l'aurait prévu expressément dans la LFI.

[111] Par exemple, le législateur précise à l'article 66 (1.3) que le droit d'interroger le débiteur cesse à la date de l'homologation de la proposition en ces termes :

> Pour l'application du paragraphe (1), l'interrogatoire prévu au paragraphe 161(1) a lieu lorsque la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) se présente devant le séquestre officiel, avant l'approbation par le tribunal ou sa mise en faillite.

Proposal from CL Métal inc., 2017 QCCS 2931 (CanLII)

Date:	2017-01-31
File number:	200-11-023049-169
Reference:	Proposal from CL Métal inc., 2017 QCCS 2931 (CanLII), < https://canlii.ca/t/h4nqw >, consulted on 2024-02-12

Proposal from CL Metal Inc. **2017 QCCS 2931**

JL-3595

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF QUEBEC

No.: 200-11-023049-169

DATE: January 31, 2017

UNDER THE PRESIDENCY OF THE HONOURABLE CARL LACHANCE, JCS

IN THE MATTER OF THE PROPOSAL OF:

CL METAL INC.
Debtor
and

YVON JACQUES
Applicant
vs.

CL METAL INC.

and

9827960 CANADA INC.
Respondents
and

ROY, MÉTIVIER, ROBERGE INC. , in his capacity as trustee of th
e
proposal from CL Metal Inc.

and

JEAN-FRANÇOIS LARUE , notary

and

ADVERTISING AND RIGHTS OFFICER
LÉVIS LAND DISTRICT
Implicated

JUDGMENT ON REQUEST FOR DECLARATION OF NULLITY AND IN CANCELLATION OF A SALE OF A BUILDING

INTRODUCTION

[1] Mr. Yvon Jacques, hereinafter called the applicant, requests the cancellation of the sale of the building of CL Métal inc., hereinafter called the debtor on which he holds a first rank mortgage.

[2] This is a building located on Chemin des Iles in Lévis, where the debtor operated a metal recovery business.

[3] The impugned sale took place on July 15, 2016 before the notary Jean François Larue at the price of $300,000 paid by the buyer 9827960 Canada inc., hereinafter called the respondent.

[4] The administrators of 9827960 are Messrs. Jocelyn Faucher and Hubert Labonté.

[5] According to the applicant, this is an illegal and void sale under the terms of section 65.13 of the Bankruptcy and Insolvency Act [1] , hereinafter called BIA, reading as follows:

> **65.13 (1***)* An insolvent person in respect of whom a notice of intention under section 50.4 or a proposal under subsection 62(1) has been filed is prohibited from disposing of, including by sale, assets outside the ordinary course of its business without the authorization of the court. The court may grant authorization without it being necessary to obtain the consent of the shareholders, despite any requirement to this effect, in particular under a rule of federal or provincial law.

encroachment on the city's land.

[[88] At the end of October 2015, after two extensions of his letter of intent to buy the business, he left the premises.

[[89] In the spring of 2016, after the sale of the equipment, he again became interested in buying the debtor's property after a May 14 meeting with the applicant. He doesn't say a word about it.

[[90] At that time, he still believed the property was worth $400,000 to $500,000.

[[91] On May 17, 2016, he met with the debtor's president and asked him the amount of the applicant's debt and was told $95,000 to $100,000.

[[92] Having doubts about the real amount of the debt, he entered a debt of $200,000 in the offer to purchase and mentioned to Mr. Eric Lemieux " if it's $100,000 the debt, you're going to have money left ."

[[93] He testified that he had invested approximately $81,000 in the debtor's business.

[[94] Under cross-examination, he stated that he had assessed the applicant's debt at $200,000 to $220,000 in May 2015.

[95] He admitted that the applicant had refused $100,000 to purchase 50% of his claim.

[[96] He does not deny that in the summer of 2015 he used the debtor's equipment free of charge to operate his business.

[[97] He stated that he had the debtor's property surveyed in the summer of 2015 to discover that the location of the bollards reduced the size of the building.

[98] He always knew the land was contaminated.

[99] He negotiated with the Agence du Revenu du Québec and settled the value of their security on the debtor's property for $50,000.

ANALYSIS AND REASONS FOR THE DECISION

Is the sale of the debtor's immovable property without judicial authorization under section 65.13 of the BIA valid?

[[100] The applicants submit that this sale is void. The prohibition on sale begins on the day on which the notice of intention is filed and ends only when the composition is extinguished by its full execution.

[[101] The respondent argues that as of the date of approval of the proposal, in this case July 4, 2016, the debtor can dispose of her property as she sees fit and without any judicial authorization. The property manager does not have the right to seize the property.

[[102] In our opinion, before the trustee issues the certificate of execution of the proposal, judicial authorization is certainly required to sell an asset of a debtor who has filed a proposal, even if it is homologated.

[[103] As the arrangement has not been extinguished, the sale of 15 July 2016 is null and void and the claim of the applicant, an interested party, is well founded. Let us explain.

[[104] Currently, the debtor still benefits from the protection of the BIA from enforcement or seizure actions by its creditors. This situation shows that the effects of this law are still in place today.

[[105] In addition, if the proposal is not executed because of the applicant's refusal to pay the $25,000, the debtor will become bankrupt and ordinary creditors will receive nothing if we recognize the July 15 sale as valid.

[[106] In our opinion, the building remains an issue related to the management of the trustee, considering, among other things, that its sale at a reasonable price, as the applicant wishes, will make it possible, among other things, to honor the proposal and pay the trustee's fees.

[[107] The process of discharging the debtor from her debts, protecting her interests and those of the creditors is still proceeding, as demonstrated, for example, by the recent meeting where the

TAB 23

Most Negative Treatment: Distinguished
Most Recent Distinguished: Carter Oil & Gas Ltd. (Trustee of) v. 400133 B.C. Ltd. | 1998 ABCA 372, 1998 CarswellAlta 1013, 228 A.R. 1, 188 W.A.C. 1, 64 Alta. L.R. (3d) 269, [1999] 4 W.W.R. 523, 83 A.C.W.S. (3d) 723 | (Alta. C.A., Nov 6, 1998)

1991 CarswellAlta 47
Alberta Court of Appeal

Strait Line Contractors Ltd. (Receiver of) v. Rainbow Oilfield Maintenance Ltd.

1991 CarswellAlta 47, [1991] 4 W.W.R. 376, [1991] A.W.L.D. 301, 115 A.R. 326, 25 A.C.W.S. (3d) 1065, 79 Alta. L.R. (2d) 169

STRAIT LINE CONTRACTORS LTD. (Receiver and Manager, ARTHUR ANDERSEN INC.), GYORI and GYORI v. RAINBOW OILFIELD MAINTENANCE LTD.

Bracco, Stratton and Côté JJ.A.

Judgment: March 12, 1991
Docket: Calgary Doc. 11499

Counsel: *F. Kathol*, for appellant Rainbow Oilfield Maintenance Ltd.
J.R. McKee, for respondents.

Subject: Corporate and Commercial

Headnote

Corporations --- Borrowing — Bonds and debentures

Corporations — Prohibited transactions — Alberta Business Corporations Act s. 42(2)(c) allowing corporation to financially assist holding company if corporation wholly owned subsidiary of holding company — Court setting criteria for application of s. 42(2)(c) exception — Court reviewing circumstances to determine true nature of ownership claimed — At effective time "holding" corporation's ownership being subject to 35 per cent interest acquired by lender — Transaction not falling within exception — Prohibition rendering debenture and seizure thereunder invalid.

Corporations — Debentures and bonds — Validity and enforceability — Corporation giving floating charge debenture, secured by own assets, to implement purchaser's obligation to vendors of shares — Transaction being funded, in effect, by lender — Lender receiving 35 per cent interest in corporation under agreement entered into before closing of share transaction — Debenture being invalid under s. 42 of Business Corporations Act — Court setting aside order for removal and sale of assets seized under debenture. .

As part of the purchase price for the shares of two companies, the vendors were to receive a second charge debenture secured by the companies' assets. The purchaser arranged for institutional funding, the lender to receive 35 per cent of each of the acquired companies. On closing, the companies approved the transfer of all the shares to the purchaser and the subsequent transfer of 35 per cent of the shares to the lender. One of the newly appointed directors signed the debenture to the vendors. The acquired companies paid part of the money secured by the debenture and then defaulted. The vendors seized the companies' chattels and sought an order for removal and sale. The master's order granting leave was confirmed by a chambers judge. R. Ltd., one of the acquired companies, appealed, claiming that the debenture was unenforceable as it was not an exception from the Business Corporations Act s. 42(1)(*c*) prohibition against a corporation providing assistance for the purchase of its own shares.

Held:

Appeal allowed; debenture invalid; orders vacated.

The financial assistance that the acquired companies gave was clearly "in connection with" the purchase of its shares and was prohibited by s. 42 unless the transaction fell within an exception. The only relevant exception was found in s. 42(2)(*c*). To determine if that exception applies to a transaction, the court must consider whether a relationship of 100 per cent ownership

existed at the time the financial commitment was given, and whether the ownership was one of substance. The entire scheme must be reviewed to determine the true nature of the ownership.
The transactions in this case did not come within the exception. The purchaser's ownership of the acquired companies existed, if at all, only for a short period and more importantly, was subject, at closing, to the lender's 35 per cent equitable interest. That fact alone precluded the application of s. 42(2)(*c*). Since the exception did not apply, the debenture constituting that assistance was invalid.

Appeal from dismissal of appeal from order for removal and sale of assets seized pursuant to debenture.

The judgment of the court was delivered by *Stratton J.A.*:

1 This is an appeal from a Queen's Bench order, in chambers, dismissing an appeal from a master's order of June 27, 1989 which, inter alia, gave leave to the respondents ("the Gyoris") to remove and sell certain goods of the appellant ("Rainbow") which were seized pursuant to the terms of a debenture dated April 25, 1986 ("the debenture") and granted by Rainbow to the Gyoris.

2 Rainbow's attack on the validity of the debenture raises the issue which is of primary importance in these proceedings, namely, whether, on a correct interpretation of s. 42(2)(*c*) of the Business Corporations Act, S.A. 1981, c. B-15 ("the Act"), the debenture is an exception from the prohibition in s. 42(1)(*c*) of that Act.

3 The record before us does not disclose "Reasons" for the decision of either the master or Queen's Bench judge.

4 Section 42(1) and (2) of the Act reads as follows:

> 42(1) Except as permitted under subsection (2), a corporation shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise
>
> (*a*) to a shareholder or director of the corporation or of an affiliated corporation,
>
> (*b*) to an associate of a shareholder or director of the corporation or of an affiliated corporation, or
>
> (*c*) to any person for the purpose of or in connection with a purchase of a share issued or to be issued by the corporation or an affiliated corporation,
>
> if there are reasonable grounds for believing that
>
> (*d*) the corporation is, or after giving the financial assistance would be, unable to pay its liabilities as they become due, or
>
> (*e*) the realizable value of the corporation's assets, excluding the amount of any financial assistance in the form of a loan or in the form of assets pledged or encumbered to secure a guarantee, after giving the financial assistance, would be less than the aggregate of the corporation's liabilities and stated capital of all classes.
>
> (2) A corporation may give financial assistance by means of a loan, guarantee or otherwise
>
> (*a*) to any person in the ordinary course of business if the lending of money is part of the ordinary business of the corporation,
>
> (*b*) to any person on account of expenditures incurred or to be incurred on behalf of the corporation,
>
> (*c*) to a holding body corporate if the corporation is a wholly owned subsidiary of the holding body corporate,
>
> (*d*) to a subsidiary body corporate of the corporation, or

(*e*) to employees of the corporation or any of its affiliates

(i) to enable or assist them to purchase or erect living accommodation for their own occupation, or

(ii) in accordance with a plan for the purchase of shares of the corporation or any of its affiliates to be held by a trustee.

5 No issue was raised with respect to paras. (*d*) and (*e*) and accordingly we have proceeded on the understanding that one or both of the situations set out in those paragraphs apply here to the effect that, unless the financial assistance here in question comes within an exception stated in subs. (2), the prohibition in subs. (1) must apply. The only subs. (2) exception raised before us is set out in subs. (2)(*c*).

The facts

6 The Gyoris were owners of 100 per cent of the issued shares of Rainbow and Strait Line Oilfield Maintenance Ltd. ("Strait Line"). Strait Line was an applicant in the original action but is not a party to this appeal. The Gyoris and Brital Industries Ltd. ("Brital") entered into a share purchase and sale agreement, effective January 31, 1986 ("share purchase agreement") for the sale to Brital of 100 per cent of the issued shares of Rainbow and Strait Line for $850,000 payable by $430,000 in cash and $420,000 payable as follows:

... by way of Second Charge Debenture with the following terms:

(i) Interest rate: No interest for 30 months from Closing Date, thereafter 10%;

(ii) Term: Five (5) years;

(iii) Security: All equipment owned by the Acquired Companies;

(iv) Payment Schedule: March 15, 1987 — $84,000.00 and $42,000.00 payable every six months thereafter until the full amount of principal and interest is paid in full. Purchaser can prepay without bonus or penalty.

7 The share purchase agreement was amended by increasing the total purchase price of the shares but the amendment is not material to this appeal. The "closing date" for the amended agreement was April 25, 1986.

8 Brital also entered into an agreement dated April 18, 1986 and entitled "Funding Agreement" with Zurich Holding Ltd. ("Zurich"). The preamble to that agreement is as follows:

WHEREAS:

A. Brital has identified a certain pipeline construction business located in Rimbey, Alberta that it would like to purchase;

B. Zurich has agreed to provide funds to accomplish this purchase, on the conditions contained herein:

9 Notwithstanding that preamble it is clear that the primary purpose of the funding agreement was to finance Brital's purchase from the Gyoris of their shares in Rainbow and Strait Line. The following is a condensation of certain relevant parts of the funding agreement:

10 1. $500,000 to be advanced by Zurich to Brital, $430,000 of which is "to be used" to pay to the Gyoris the cash required from Brital for payment to the Gyoris on the closing date.

11 2. Zurich to be entitled to 35 per cent of the issued shares of each of Rainbow and Strait Line.

12 3. Zurich to receive 50 per cent of the net profits of Rainbow and Strait Line until it receives $750,000 from net profits.

13 4. Although Rainbow and Strait Line were not parties to this funding agreement, cl. 6.01 of it read as follows:

> The Acquired Companies will provide, as security for the repayment of the Seven Hundred Fifty Thousand Dollars ($750,000.00) pursuant to the net profits interest as fixed and floating charge debenture which will rank behind the current Royal Bank debenture and the debenture to be granted to the Vendors pursuant to the Purchase and Sale Agreement.

14 On the closing date of the share purchase agreement (April 25, 1986) the director and shareholders of Rainbow approved of the transfer of 100 per cent of its shares from the Gyoris to Brital and the transfer of 35 per cent of shares of Rainbow to Zurich was formally implemented. In addition the Gyoris resigned as directors of Rainbow and new directors were appointed. One of these new directors also signed, for Rainbow, as of the same date, the second charge debenture in favour of the Gyoris as agreed by them and Brital in the share purchase agreement.

15 Subsequently, Rainbow and Strait Line paid approximately one half of the moneys secured by the last mentioned debenture and then defaulted. On December 3, 1988 the Gyoris effected seizure of the chattels of Rainbow and Strait Line in reliance on that debenture and subsequently sought an order for removal and sale of the chattels seized. Rainbow contends that the debenture is unenforceable under s. 42 of the Act.

16 A summary of what occurred as a result of the foregoing is that upon the sale of its own shares, Rainbow gave a floating charge debenture, secured by its own assets, to implement an obligation, entered into by the purchaser of those shares to the vendor of those shares, all of which was funded to a considerable extent by a financial institution which, by virtue of an agreement entered into well before the closing of the share transaction, would receive in consideration of that funding, inter alia, a 35 per cent interest in Rainbow.

17 Clearly Rainbow gave financial assistance to Brital "in connection with" the purchase of its shares, within the wording of s. 42(1)(*c*). Thus the prohibition in s. 42 would be breached unless the transaction can be brought within an exception to that prohibition. It is common ground that the only relevant exception is under s. 42(2)(*c*), and the Gyoris maintain that, at the relevant time, the company which was being assisted by Rainbow, namely, Brital, was the "holding body corporate" of Rainbow and that Rainbow was then a wholly owned subsidiary of Brital.

18 It is clear that if the transaction does not fit within an exception and is therefore a breach of the prohibition of s. 42, on the authority of *Central & Eastern Trust Co. v. Irving Oil Ltd.*, [1980] 2 S.C.R. 29, 10 B.L.R. 42, 12 R.P.R. 67, 110 D.L.R. (3d) 257, 39 N.S.R. (2d) 541, 31 N.R. 593, the subject debenture is invalid and cannot be enforced. Counsel for the Gyoris did not contend otherwise.

19 The Gyoris' contention that the exception applies is based essentially on three submissions. Firstly, their counsel argued that the chambers judge made a finding of fact that we should not disturb, namely that at the time in question Rainbow was a wholly owned subsidiary of Brital. We must reject that argument. As noted above, we do not have the benefit of reasons from either of the earlier judgments now under appeal. We take it, however, that counsel's argument stems from the first paragraph of the learned master's order which reads as follows:

> IT IS HEREBY ORDERED THAT:
>
> At the time of the execution by Rainbow of the Debenture in favour of the Respondents dated the 25th day of April, 1986, Rainbow was a wholly owned subsidiary of Brital Industries Ltd. who was the holding body corporate of Rainbow within the meaning of Section 42(2)(*c*) of the *Business Corporations Act*, S.A. 1981 c. B-15.

20 I take that paragraph to be a statement of law as it is obviously based on an interpretation of s. 42 with which, with the greatest respect, I must disagree for the reasons hereafter set out.

21 Secondly, the Gyoris point out, quite correctly, that there is no evidence as to the order of the business conducted on the afternoon of the closing date. Thus, it is contended in the Gyoris' factum, that:

> ... in the light of the time which passed from the date of execution to the time of the Respondents' challenge to the validity of this Debenture and the fact that payments were made for two years, the legal maxim *omnia praesumuntur rite et solemiter esse acta* should be applied. This stands for the proposition that all acts are presumed to have been done correctly and according to law in the absence of evidence to the contrary.

22 The authority for this maxim provided by counsel is R.H. Kersley's Broom's Legal Maxims, 10th ed. (1939), p. 640. The bare statement above quoted overlooks the limitation to that maxim as expressed in the footnote added by the learned author:

> Per Pollock, C.B., in *Gibson v. Doeg*, 2 H. & N. 615, at p. 623; and in *Price v. Worwood*, 4 Id. 512, at p. 514, where he observed, "The law will presume a state of things to continue which is lawful in every respect; but, if the continuance is unlawful, it cannot be presumed."

23 There is a second limitation to the application of that maxim that is also relevant on the present facts; that second limitation involves a consideration of who is entitled to rely on it. Both these points are well stated in the judgment of Viscount Simonds in *Morris v. Kanssen*, [1946] A.C. 459 at 475, [1946] 1 All E.R. 586 (H.L.), from which I quote:

> One of the fundamental maxims of the law is the maxim "omnia praesumuntur rite esse acta." It has many applications. In the law of agency it is illustrated by the doctrine of ostensible authority. In the law relating to corporations its application is very similar. The wheels of business will not go smoothly round unless it may be assumed that that is in order which appears to be in order. But the maxim has its proper limits. An ostensible agent cannot bind his principal to that which the principal cannot lawfully do. The directors or acting directors or other officers of a company cannot bind it to a transaction which is ultra vires. Nor is this the only limit to its application. It is a rule designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he claims. This is clearly shown by the fact that the rule cannot be invoked if the condition is no longer satisfied, that is, if he who would invoke it is put upon his inquiry. He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done.

24 Although I have considerable concern that the Gyoris cannot rely on the above maxim for the second reason, I need not decide that point. It is enough that the illegality of the subject transactions, which I find to exist in this case, is sufficient to prevent the Gyoris' reliance on the maxim.

25 Counsel for the Gyoris raised another legal maxim in defence of the subject transaction. He argued that it would be improper to grant Rainbow the relief requested because "it would offend the legal maxim *frustara legis auxilium quoerit qui in legem committit*, namely a man shall not take advantage of his own wrong to gain a favourable interpretation of the law."

26 Again the authority given was Broom's Legal Maxims, p. 191. I could not find any authoritative decision put forward by the learned author which could reasonably compare with the facts here. Indeed, in my view, it would be unjust to prevent a corporation or a duly authorized representative of a corporation, acting in the interests of its creditors or innocent shareholders, from seeking protection against an illegal transaction forced upon that corporation by its directors and officers. Aside entirely from that consideration, I see this transaction as having been authored by the Gyoris and Brital and thus I do not accept that we have here the situation of Rainbow taking advantage of its wrong to gain an advantage.

27 Both counsel referred us to the decision of the British Columbia Court of Appeal in *Noren Invt. Ltd. v. Brownie's Franchises Ltd.* (1987), 13 B.C.L.R. (2d) 73, 36 B.L.R. 85, 37 D.L.R. (4th) 1. There the court considered a section of the Companies Act of British Columbia (s. 125) comparable on all material points to our s. 42. In *Noren* the transactions under review were decided upon at some time before the closing date of those transactions. On the closing date, the 100 per cent ownership condition was met and the financial assistance in question took the form of royalties payable over a five-year period. It was suggested in argument that the critical time to look at for the wholly owned relationship was when the "scheme" involving the financial assistance was conceived. That argument was rejected by Lambert J.A., writing for the court, in the following words (p. 4):

> During the closing on February 28, 1980, Brownie's became a wholly-owned subsidiary of First Food Corporation, its holding company. It was a wholly-owned subsidiary when the royalty agreement was executed and became a legal commitment, binding on Brownie's. It was a wholly-owned subsidiary throughout the period when the financial assistance was given. The fact that it was not a wholly-owned subsidiary when the whole purchase scheme was initially conceived cannot be relevant to the application of s-s. 125(1) or (5).

Later in his judgment, Lambert J.A. added the following (p. 5):

> The number of shares owned when the transaction is first conceived is, in my opinion, irrelevant. *The relevant times are when the transaction becomes a binding legal commitment and when the financial assistance is actually given*. [the emphasis is mine]

28 In *Noren* the court found that the exemption applied. It must be immediately noted that there, unlike the present case, the relationship of 100 per cent ownership continued from the date the legal commitment to assist was given for the entire period during which that assistance persisted.

29 To the extent that the *Noren* decision concludes that two of the factors to be considered in determining whether the exemption applies are, firstly, the ownership situation as it existed at the time the legal commitment to assist is given and, secondly, whether that 100 per cent ownership persisted during the period of giving that assistance, I am in complete agreement. However, I would respectfully disagree to the extent that the decision may be interpreted to mean that if, at any time during the period of assistance, the 100 per cent ownership relationship should end, that would have the effect of leaving the subject transactions open for a successful attack on the basis that the exemption would then be inapplicable.

30 Such a result would lead inevitably to continuous uncertainty and indeed potentially unfair interference in the planning and conduct of sound business practices. This result is particularly evident when one considers, for example, a case involving financial assistance given by way of a mortgage or debenture calling for a long term payout. The company and its shareholders would be severely restricted in its activities pending the completion of the pay back. This type of restriction would surely not be within the intent of the legislature.

31 In my view, the test as to whether the exception applies to the subject transactions must relate to the various circumstances surrounding the transaction. These would certainly include, as in *Noren*, a consideration of whether the relationships of 100 per cent ownership as allowed in the exemption existed at the time the legal commitment to give financial assistance was given. Another and major consideration must be whether the ownership forming the basis for the exemption claimed is one of substance. By that I intend to accommodate a consideration of both the true nature of the ownership and the perceived permanency of it as gathered from a review of the entire scheme.

32 In the light of those considerations, I have concluded that the transactions presently under consideration do not come within the exemption. First the ownership by Brital of Rainbow was, at its highest level, transitory in that it existed (if at all) for a short period of time as dictated by a closing agenda for the share purchase agreement. But of even greater significance is the fact that, as of the closing date, the shares of Rainbow and Strait Line were subject to an earlier commitment by Brital of 35 per cent of those shares to Zurich, the funding institution. Thus, at best, Brital's ownership of Rainbow and Strait Line was subject to a 35 per cent equitable interest of Zurich, a fact which of itself would preclude the applicability of the exempting section.

33 For the foregoing reasons, I conclude that the exception presented by s. 42(2)(*c*) of the Act does not apply to the financial assistance given by Rainbow to Brital and therefore the debenture constituting that assistance is invalid and the above mentioned orders must be vacated.

34 The appellant is entitled to its costs in this appeal and in the courts below.

Appeal allowed.

End of Document

TAB 24

2020 BCSC 1883
British Columbia Supreme Court

Quest University Canada (Re)

2020 CarswellBC 3091, 2020 BCSC 1883, 326 A.C.W.S. (3d) 192, 85 C.B.R. (6th) 41

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 (Petitioner)

Fitzpatrick J.

Heard: November 12-13, 16, 2020
Judgment: November 16, 2020
Written reasons: December 2, 2020
Docket: Vancouver S200586

Proceedings: leave to appeal refused *Southern Star Developments Ltd. v. Quest University Canada* (2020), 2020 CarswellBC 3252, 2020 BCCA 364, Harris J.A., In Chambers (B.C. C.A.)

Counsel: J.R. Sandrelli, V. Cross, for Petitioner
V.L. Tickle, for Monitor PricewaterhouseCoopers Inc.
P. Rubin, G. Umbach, for Primacorp Ventures Inc.
K. Jackson, G. Nesbitt, for RCM Capital Management Ltd. and SESA-BC Holdings Ltd.
P. Reardon, K. Strong, for Southern Star Developments Ltd.
C.D. Brousson, for Vanchorverve Foundation
D.V. Bateman, for Dana Hospitality LP
D. Lawrenson, for Halladay Education Group
K. Mak, for Capilano University
J. D. West, for Landrex Ventures Inc.
J. Sanders, S. Rogers, for Quest University Faculty Union
K. Davies, for Bank of Montreal
A. Welch, for Her Majesty The Queen In Right of Province of British Columbia and the Ministry of Advanced Education Skills and Training
K.E. Siddall, for 1114586 B.C. Ltd.
L. Hiebert, for Association for the Advancement of Scholarship

Subject: Insolvency; Public

Headnote

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

Parties were involved in proceedings under Companies' Creditors Arrangement Act — Arrangement plan was approved, while approval of transaction and vesting order was adjourned — Creditor SS Ltd. formalized opposition to vesting order and brought application for order prohibiting debtor disclaiming certain subleases of university residences, which was required for transaction to proceed — Application dismissed; transaction approved — Certain lot on property of debtor was not subject to extant lease, and certain related charges were not intended to be registered until construction began — Jurisdiction existed under s. 11 of Act to approve transaction and to grant order sought by debtor to ensure that SS Ltd. did not assert any rights under lot lease, and authority existed under s. 36(6) of Act that allowed Court to exercise its jurisdiction to vest off other restrictions —

2020 BCSC 1883, 2020 CarswellBC 3091, 326 A.C.W.S. (3d) 192, 85 C.B.R. (6th) 41

Balance of equities regarding creditor C university's charges including mortgage security on certain lots favoured vesting off C university's right of first refusal to allow transaction to proceed — Creditor L Inc. was not entitled to further time to present offer for debtor's assets in competition with transaction — L Inc. had been fully engaged in discussions for some length of time and was given opportunity to participate in sale and partner search process — L had executed purchase and sale agreement when debtor had already signed purchase and sale agreement as part of transaction, but L had not secured rights of exclusivity — Transaction involved significant other benefits to debtor than L Inc.'s offer in terms of debtor's future operations, and was better for shareholders — Any hardship to SS Inc. from disclaiming leases was not shown to be significant, as there was no clear indication how mitigation matters might resolve — Revisions to transaction by parties deleted conditions precedent requiring creditor and court approval of plan, so that only condition precedent that remained before closing was granting of transaction's reverse vesting order — Effect of transaction was to achieve what debtor originally sought by way of restructuring, namely, sale of certain assets to buyer and continuation as going concern as academic institution, in partnership with buyer — Transaction at issue was only transaction that had emerged to resolve financial affairs of debtor and no other options were available — SS Ltd. and other creditors were working actively against goals of Act by their opposition to transaction.

APPLICATION by creditor for order preventing disclamation of leases in proceedings under *Companies' Creditors Arrangement Act*.

***Fitzpatrick J.*:**

INTRODUCTION

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

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

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

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

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

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

BACKGROUND FACTS

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

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

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

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

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

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

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

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

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

a) Creditor recovery from the purchase price or other consideration under the proposal;

b) That the proposal would result in a completed transaction;

c) That the proposal offered allowed for Quest's long-term continuation as a post-secondary academic institution; and

d) That the proposal would lead to the continuation of a school on Quest's lands that aligned with Quest's current vision and academic quality.

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

17 On May 28, 2020, this Court granted an extension of the stay of proceedings. At that time, Quest stated that there was a realistic potential of a transaction with the party identified as the "Academic Partner". Unfortunately, that transaction did not proceed.

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

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

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

a) Sufficient funds to pay Quest's secured creditors' claims, including claims secured by the *CCAA* charges;

b) Funding for a plan of arrangement to be voted on by Quest's unsecured creditors;

c) Funds for these insolvency proceedings; and

d) A working capital facility, and marketing and recruiting support to permit Quest to become self-sustaining as a post-secondary institution.

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

a) Primacorp will purchase substantially all of Quest's lands and related assets, including the Campus Lands, the Development Lands, the residence Lands (Lots A-E; four of which involve Southern Star's subleases), chattels and vehicles;

b) Primacorp will lease specific Campus Lands back to Quest under a long-term lease arrangement;

c) Primacorp will provide marketing and recruiting expertise to support Quest as a university;

d) The Purchase Price will satisfy all of Quest's secured lenders and any commissions on sales;

e) Primacorp will fund sufficient monies to pay the lesser of the Unsecured Creditor Claims and $1.35 million under Quest's Plan; and

f) Primacorp will provide Quest with a $20 million secured working capital facility to support its operations.

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

a) Quest's disclaimer of the four Southern Star subleases of the Residences or an agreement with Southern Star. On October 23, 2020, Quest disclaimed those subleases;

b) Court approval of the Primacorp transaction including approval of a Break Up Fee and Break Up Fee Charge to secure Primacorp's costs. On November 3, 2020, I approved the Break Up Fee and granted a charge to secure this amount;

c) Creditor approval of Quest's Plan under the *CCAA*. On November 3, 2020, I granted the Meeting Order to allow Quest to present the Plan, after having completed a claims process under the Claims Process Order, also granted on that date; and

d) Court approval of the Plan under the *CCAA*.

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

24 The Monitor concurred. In its Fourth Report dated November 2, 2020, the Monitor referred to the fact that there were only two viable proposals, with Primacorp's offer being the superior one. The Monitor's Supplemental and Confidential Report dated November 2, 2020 (the "Confidential Report") is also before the Court, although filed under seal. That Confidential

Report referred to four other proposals received by Quest that were "not currently at a stage such that they are capable of being accepted by Quest".

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

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

ISSUES

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

a) *Lot E*: Southern Star objects to the TAVO (now RVO), as vesting off any interest it may have under an unregistered lease of Lot E;

b) *ROFR*: CapU objects to the sale to Primacorp, asserting that Quest is ignoring its rights under the ROFR that allows CapU to purchase/lease Quest's lands;

c) *Other Offer*: Landrex Ventures Inc. ("Landrex"), together with CapU, assert that they should be given further time to finalize their offer for Quest's assets;

d) *Disclaimers*: Southern Star, supported by its secured creditor, Bank of Montreal (BMO), applies for an order that the subleases of the Residences not be disclaimed by Quest; and

e) *RVO*: Southern Star and another unsecured creditor, Dana Hospitality LP ("Dana"), object to the TAVO (now RVO), as being inappropriate and unfair in the circumstances and contrary to the spirit of the *CCAA*.

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

Lot E

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

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

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

32 In September 2017, as part of those arrangements, Quest and Southern Star executed certain Land Title documents (Form C Charges) attaching a Ground Lease and a Sublease with respect to Lot E. When the parties executed the Form C Charges, the Ground Lease was incomplete in many respects; it did not include any legal description because Lot E was created after the execution of the Form C Charges; and, it did not specify the applicable dates of the 99-year term. Finally, the Schedules

to the Ground Lease included various documents between Quest, Southern Star and Southern Star's lender intended to be later executed once the Ground Lease, the Sublease and the mortgage were finalized and registered at the Land Title Office.

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

34 At present, Quest's title to Lot E remains clear of any registration relating to Southern Star's Ground Lease so there is no need for Quest to obtain a vesting order to remove it from the title. However, Quest and Primacorp seek an order that any claims that arise from the yet incomplete and unregistered Ground Lease on Lot E shall not attach to Quest's assets that are to be vested in Primacorp. They also seek an order permanently enjoining Southern Star from registering the Lot E Ground Lease against title to Lot E.

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

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

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

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

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

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

38 Southern Star does not argue that it has acquired any legal or beneficial interest in Lot E. At its highest, I conclude that Southern Star's rights to Lot E are purely contractual; Quest agreed that it would grant the Lot E Ground Lease in the future and it would become effective upon certain conditions being satisfied — in essence, an agreement to agree. Those conditions included that Quest would decide to build a residence building on Lot E and that Southern Star would arrange financing to construct the building. In these circumstances, I readily conclude that this condition has not been satisfied and will never be satisfied by Quest given Quest's insolvency.

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

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

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

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

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

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

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

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

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

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

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

CapU ROFR

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

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

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

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

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

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

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

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

57 At 118-119, the authors conclude that:

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

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

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

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

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

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

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

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

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

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

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

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

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

d) The 60-day period within which CapU is entitled to consider any "Bona Fide Offer to Purchase" is simply unworkable in these circumstances. This is not a matter of expediency, without regard to any rights held by CapU. Quest will have no funds to continue its operations past December 2020 and, if realizations by the secured creditors ensue, CapU's ROFR rights will be illusory at best;

e) CapU complains that it received the redacted Primacorp PSA only recently, on October 29, 2020. CapU then requested an unredacted copy, which Quest agreed to do upon CapU executing an NDA. CapU refused to sign the NDA, stating that it would hamper its ability to participate in its own offer. Again, CapU has had months to formulate its own offer;

f) Quest asserts that CapU has no intention to or ability to make its own offer for all of Quest's assets in competition to the Primacorp transaction. CapU has not put forward any evidence at this hearing to confirm such intention or ability. Similarly, there is no evidence that CapU truly wishes to or is able to exercise any rights under the ROFR to purchase Quest's lands and chattels;

g) I consider that the evidence conclusively supports that CapU advances its arguments under the ROFR simply as a tactic to oppose the Primacorp transaction and delay the matter so that it and Landrex can seek to advance their own joint competing offer;

h) As I will discuss below, the terms of the joint Landrex/CapU proposal is only semi-formed at this point and Quest has indicated that some major terms are not acceptable. As such, it is highly questionable that this joint offer is, as CapU asserts, a "better, higher offer";

i) I conclude that Quest has given proper regard to and has not ignored CapU's rights under the ROFR in the context of these proceedings. CapU has had sufficient information even from the redacted Primacorp PSA to discern the substance of the Primacorp transaction in terms of advancing any competing offer or exercising the ROFR;

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

k) The Monitor supports the Primacorp sale, as maximizing the value of Quest's assets for the stakeholders and allowing a successful restructuring of Quest's business.

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

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

66 As I have sought to do here, the court in *Bear Hills* (at para. 9) was attuned to the overarching and remedial statutory purpose and objective of the *CCAA* to avoid the "social and economic losses resulting from liquidation of an insolvent company": *Century Services* at para. 70 and *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.) at paras. 40-41. This objective is not to be achieved simply in the most expedient manner and without due regard to interests of stakeholders that are affected in that process. As the Court further stated in *Century Services* at para. 70, any restructuring is best achieved when "all stakeholders are treated as advantageously and fairly as the circumstances permit".

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

Landrex / CapU Offer

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

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

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

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

TAB 25

2004 SKQB 213
Saskatchewan Court of Queen's Bench

Bear Hills Pork Producers Ltd., Re

2004 CarswellSask 417, 2004 SKQB 213, [2004] S.J. No. 393, 132 A.C.W.S. (3d) 212, 2 C.B.R. (5th) 70

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF a proposed plan of arrangement for the creditors of Bear Hills Pork Producers Ltd., Manitou Hog Enterprises Ltd., Horizon Pork Producers Ltd., Carrot River Valley Pork Producers Ltd., Carlton Trail Pork No. 1 Ltd., Elm Springs Multipliers Ltd., East Diefenbaker Pork Producers Ltd., and Heartland Pork Management Services Ltd.

BEAR HILLS PORK PRODUCERS LTD., MANITOU HOG ENTERPRISES LTD., HORIZON PORK PRODUCERS LTD., CARROT RIVER VALLEY PORK PRODUCERS LTD., CARLTON TRAIL PORK NO. 1 LTD., ELM SPRINGS MULTIPLIERS LTD., EAST DIEFENBAKER PORK PRODUCERS LTD., and HEARTLAND PORK MANAGEMENT SERVICES LTD. (APPLICANTS) and BANK OF MONTREAL, SASKATCHEWAN WHEAT POOL (RESPONDENTS)

Kyle J.

Judgment: May 14, 2004 *
Docket: Regina Q.B.G. 713/04

Proceedings: additional reasons at (2004), 2004 SKQB 216, 2004 CarswellSask 418 (Sask. Q.B.)

Counsel: Rick M. Van Beselaere for Applicants
Victor Dietz for KPMG (the Monitor)
N. Chris MacLeod for Gregory Rupcich
Kirby H. Burningham (by telephone) for Garry Meier, Glen Meier, Carmen Drury
Gordon Berscheid (by telephone) for Canada Customs & Revenue Agency
Gordon Wyant (by telephone) for Bank of Montreal
M. Kim Anderson (by telephone) for Stomp Pork Farm Ltd.

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Insolvent companies were subject of order under Companies' Creditors Arrangement Act — S Ltd. offered to purchase entire package of lands owned severally by insolvent companies — Only purchase of all units of land for total price was contemplated and withdrawal of any property from package would result in withdrawal of offer, leading possibly to liquidation — Lands were affected by number of rights of first refusal held by third parties — Lands as whole were also subject to blanket mortgage security for large loans — Insolvent companies brought application for declaration that rights of first refusal were not triggered by proposed sale of lands of insolvent companies — Application granted — Where sale of large number of assets is contemplated there is effectively no offer for holder of right of first refusal to accept or refuse — Unless rights of first refusal were found to have no application to sale there would be no offer to purchase — Proposed sale was not motivated by desire to avoid rights of first refusal but by desire of secured creditors to cut their losses and realize upon their security — Welfare of business and avoidance of economic dislocation which liquidation would bring were valid considerations under Act — Security of 160 jobs would be assured by sale.

APPLICATION by insolvent companies for declaration that rights of first refusal were not triggered by proposed sale of lands of insolvent companies.

***Kyle J.*:**

1 The applicants are subject to an order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 which was originally to expire on May 12, 2004, but is now extended at the request of all parties, to June 30, 2004.

2 The applicants have come forth with a proposed sale of all of the assets of the applicant corporations to Stomp Pork Farm Ltd. and Sterling Pork Farm Ltd. upon terms set forth in an offer, the final provisions of which remain under negotiation.

3 There are a number of rights of first refusal in respect of the lands which were acquired by the applicants when their businesses were begun. In general, they affect the sale of the land that was conveyed, typically by the farmer upon whose formerly held land the hog barn was or was to be established. In some cases they are limited to what would be a winding up of the hog business, other cases are not so limited.

4 The lands affected by the rights of first refusal are at present, subject to security for loans in large amounts which are not segregated property by property and which, registered as mortgages and *Bank Act* security, would render the exercise of a right of first refusal difficult if not economically impossible without the full cooperation of the lender.

5 The proposed sale is one of an entire package of lands owned severally by eight applicants and, while individual allocations of the purchase price can be made to a given property for bookkeeping purposes, only the sale of all units for a total price is contemplated and the withdrawal of any property from the package will, I am assured, result in the withdrawal of the offer, leading possibly to a liquidation of the assets with the attendant costs, job losses, etc. which this sale seeks to avoid.

6 In *Budget Car Rentals Toronto Ltd. v. Petro-Canada Inc.* (1989), 60 D.L.R. (4th) 751 (Ont. C.A.), it was held by the Ontario Court of Appeal that a right of first refusal required that a *bona fide* offer for the property in question be made. Where, in that case as here, a sale of a large number of assets was contemplated there was effectively no offer for the holder of the right of first refusal to accept or to refuse.

7 In *Southland Canada Inc. v. Zarcan Equities Ltd.*, 1999 ABQB 831, 254 A.R. 59 (Alta. Q.B.), it was held following *Budget* that the offer to purchase a larger block of which the portion affected by the right of first refusal was a smaller portion, did not trigger the right of first refusal. The Alberta Queen's Bench noted that in *Budget* "the court determined that an offer to purchase a package of property which included the ROFR property did not trigger the ROFR."

8 If a sale of an individual hog farm were contemplated, free of the blanket mortgage security, these rights of first refusal would presumably arise depending upon their terms. No such sale is contemplated and unless the right of first refusal is found to have no application to the contemplated sale, no sale will take place; no offer of purchase that is, which the holder can have the right to accept or refuse, will exist.

9 It is clear from judicial pronouncements that a right of first refusal cannot be avoided by simply stacking together a few properties and claiming an exemption on this ground. Such is not the case here. The proposed sale is of course, motivated by the desire of the secured creditors to cut their ongoing losses and to realize upon their security as best they can. From the point of the view of the Court, operating under the *Companies' Creditors Arrangement Act*, the welfare of the business carried on by the companies and the avoidance of the economic dislocation which a liquidation or winding up would involve, are valid considerations. I am advised that the security of 160 jobs will be assured by the sale.

10 I am requested to grant an order declaring that the rights of first refusal are not triggered by the presently contemplated transaction and I have concluded for the reasons alluded to above that such an order should issue, as part of the order confirming the sale.

11 As the determination of this issue was an obstacle to the determination of other issues, I assume that the applicants will wish to present a further draft of the order reflecting this and certain other aspects of the proposed sale.

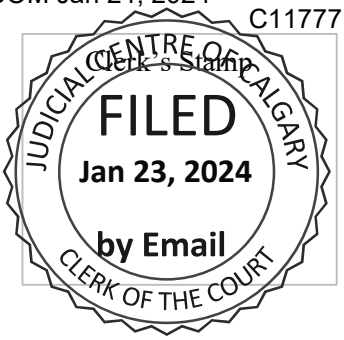
Application granted.

Footnotes

* Additional reasons at *Bear Hills Pork Producers Ltd., Re* (2004), 2004 SKQB 216, 2004 CarswellSask 418, 2 C.B.R. (5th) 73 (Sask. Q.B.)

TAB 26

COM Jan 24, 2024 NB C11777



COURT FILE NUMBER	25-2906009 / B201906009
COURT	COURT OF KING'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
PROCEEDING	IN THE MATTER OF THE BANKRUPTCY OF GOLDENKEY OIL INC.
DOCUMENT	**AUTHORITIES TO THE BRIEF OF LAW AND ARGUMENT OF PRICEWATERHOUSECOOPERS INC. LIT in its capacity as TRUSTEE IN BANKRUPTCY OF GOLDENKEY OIL INC.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Fasken Martineau DuMoulin LLP** Barristers and Solicitors Suite 3400, 350 7 Avenue SW Calgary Alberta T2P 3N9 Attention: Robyn Gurofsky / Anthony Mersich Phone: 403 261-9469 / 587-233-4124 Email: rgurofsky@fasken.com / amersich@fasken.com

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BENCH BRIEF OF PRICEWATERHOUSECOOPERS INC. LIT in its capacity as TRUSTEE IN BANKRUPTCY OF GOLDENKEY OIL INC.

APPLICATION TO BE HEARD BY THE HONOURABLE JUSTICE M.H. BOURQUE

January 24, 2024 at 10:00 a.m.

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INTRODUCTION

1. This Bench Brief is submitted by PricewaterhouseCoopers Inc. LIT in its capacity as bankruptcy trustee (the "**Trustee**") of the estate of Goldenkey Oil Inc. ("**Goldenkey**") in support of its application returnable January 24, 2024 (the "**Application**"), seeking, among other relief,
   (a) an order approving and authorizing the sale of property of Goldenkey's estate pursuant to an Asset Purchase and Sale Agreement ("**PSA**") between Brotherin Energy Ltd. (the "**Purchaser**") and the Trustee; and
   (b) vesting the assets purchased pursuant to the PSA (the "**Purchased Assets**") free and clear of all liens and encumbrances in the Purchaser, save and except permitted encumbrances.
2. The material facts are summarized in the First Report of the Trustee, dated November 20, 2023 (the "**First Report**"), the Second Report of the Trustee, dated January 15, 2024 (the "**Second Report**"), and the Supplement to the Trustee's Second Report, dated January 18, 2024 (the "**Supplemental Second Report**").
3. In short, Goldenkey has agreements with four joint venture partners (the "**JV Agreements**"), who collectively hold interests in 21 of Goldenkey's 24 wells. Those JV Agreements provide that the respective joint venture partner is entitled to a share of profits generated from the wells.[1]
4. On January 18, 2024, an investor in one of the joint venture partners, ROC Pacific Oil and Gas Inc. ("**ROC**") expressed concern to the Trustee regarding the discontinuance of the JV Agreements following the completion of the transaction contemplated by the PSA.[2] That investor also expressed concerns regarding the application of a provision within the JV Agreement between Goldenkey and ROC providing for a right of first refusal ("**ROFR**") for the purchase of an oil and gas well subject to that JV Agreement, which well is also a Purchased Asset pursuant to the PSA.
5. Notwithstanding these concerns, it is the Trustee's opinion that the transaction contemplated by the PSA is fair and reasonable and would be beneficial to Goldenkey's stakeholders.[3] Furthermore, the Trustee has provided its recommendation regarding the allocation of the proceeds from the transaction under the PSA between Goldenkey and those joint venture partners, including ROC, with a right to a share of proceeds from the sale.[4]

LAW AND ARGUMENT

(a) The Court Has Inherent Jurisdiction to Vest Assets Free and Clear of Liens and Encumbrances

6. The *Bankruptcy and Insolvency Act* ("***BIA***") provides the Court of King's Bench with jurisdiction

[1] Second Report at paras 5.1-5.3.
[2] Supplemental Second Report at para 3.2.
[3] Second Report at para 3.4.
[4] Second Report at paras 5.1-5.14.

at law and in equity as will enable it to exercise jurisdiction in bankruptcy and other proceedings authorized by the Act.[5]

7. Although the *BIA* is silent on the topic of the court's authority to grant sales approval and vesting orders specifically within the bankruptcy context, it is the Trustee's submission that this authority is founded within the inherent jurisdiction of the court.

8. Jurisprudence demonstrates that the Court in Bankruptcy and Insolvency may exercise its inherent jurisdiction to authorize and sanction acts required to be done by a Trustee for the proper administration and protection of a bankrupt estate, even in the absence of a specific provision conferring such jurisdiction within the statute.[6]

9. In *Century Services Inc v Canada (Attorney General)*, the Supreme Court of Canada emphasized the harmonious interpretation of Canada's insolvency statutes and aspects common to those various statutory schemes.[7] The granting of sales approval and vesting orders is well-recognized within other areas of Canada's bankruptcy and insolvency statutes, such as in the context of receiverships, proceedings under the *Companies' Creditors Arrangement Act* ("***CCAA***"), and proposal proceedings.

10. In addition, Canadian courts have previously recognized the importance of vesting orders in the bankruptcy and insolvency context. In *Third Eye Capital Corporation v Resources Dianor Inc/Dianor Resources Inc*, the Ontario Court of Appeal extensively canvassed the relevant literature regarding such orders in the insolvency context.[8] The Court ultimately concluded that this literature demonstrates "that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders" which act to transfer assets free and clear to a purchaser, while preserving the priority of claims in respect to the sale proceeds.[9]

11. At issue in *Third Eye* was whether the Court possessed jurisdiction under the *BIA* to grant a sales approval and vesting order in the receivership context. Although it identified the fact that the *BIA* did not provide express authority to receivers to liquidate or sell property, the Court concluded that "such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples".[10] Thus, the Court held that "implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis."[11] This jurisdiction extends to orders acting to vest out third-party rights and interests, subject to a consideration of the strength of the interest, any prior agreement or consent between the parties, and in the case of ambiguity, a

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[5] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 at s. 183(1)(d) [**TAB 1**].
[6] *Wiggins, Re*, 2003 CarswellOnt 3514 (Sup. Ct. Just.) at para 7 [**TAB 2**].
[7] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at paras 24, 78 [**TAB 3**].
[8] *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc*, 2019 ONCA 508 at paras 25-28 [**TAB 4**].
[9] *Third Eye* at para 28 [**TAB 4**].
[10] *Third Eye* at para 74 [**TAB 4**].
[11] *Third Eye* at para 76 [**TAB 4**].

balancing of the relevant equities.[12]

12. The decision in *Third Eye* has been applied by Courts outside of the receivership context, such as in *Accel Canada Holdings Limited (Re)*, which involved proceedings begun under Part III of the *BIA* and later continued under the *CCAA*. There, the Court analyzed whether certain Gross Overriding Royalty Agreements could be vested off title pursuant to a sale approval and vesting order.[13] Following a determination that the agreements did not constitute interests in land but rather security interests, the Court stated that "there is no issue that the court can vest off the interests represented by the respective registrations."[14]

13. Furthermore, such orders are explicitly contemplated by the *BIA* in other contexts. Under that Act, in the circumstance of an insolvent person in respect of whom a notice of intention or proposal is filed under the statute:

> 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 insolvent person 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.[15]

14. Finally, within the bankruptcy context, courts in Alberta have previously issued such orders vesting purchased assets free and clear of any and all liens and encumbrances.[16]

15. Therefore, applying the direction of the Supreme Court in *Century Services*, the Trustee submits that through its inherent jurisdiction, this court possesses the authority to grant the sales approval and vesting order and vest the purchased assets free and clear of all liens and encumbrances in the Purchaser. Although the *BIA* does not explicitly provide such authority, the significance and ubiquity of such orders within the insolvency field and the presence of authority to grant such orders in multiple other aspects of Canada's insolvency statutes indicate that the court possesses inherent jurisdiction to grant the order requested by the Trustee. This conclusion is harmonious with the other aspects of Canadian insolvency statutes, and promotes the fulfilment of the substantive objectives of the *BIA*.

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[12] *Third Eye* at paras 109-110 [**TAB 4**].
[13] *Accel Canada Holdings Limited (Re)*, 2020 ABQB 182 at para 3 [**TAB 5**].
[14] *Accel* at para 93 [**TAB 5**].
[15] *BIA* at s. 65.13(7) [**TAB 1**].
[16] Approval and Vesting Order of the Registrar in Bankruptcy L.R. Birkett, pronounced July 11, 2019, *In the Matter of the Bankruptcy of BW Rig Supply Inc*, Alberta Court of Queen's Bench Action No. 24-2473449 at para 2 [**TAB 6**]; Sale Approval and Vesting Order of the Honourable Justice R.A. Graesser, pronounced September 29, 2021, *In the Matter of the Bankruptcy and Insolvency of Direct Oil & Gas Inc*, Alberta Court of Queen's Bench Action No. 25-2624152 at para 3 [**TAB 7**].

(b) The Balance of Equities Favours the Vesting Off of the ROFR Provision Within the JV Agreement

16. The Trustee further submits that the ROFR provision within the JV Agreement between ROC and Goldenkey is not a bar to the vesting order sought by the Trustee on this application.

17. Within the bankruptcy and insolvency context, courts have repeatedly granted orders vesting off ROFR provisions in the context of asset sales. The decisions in *Quest University Canada (Re)*[17] and *Bear Hills Pork Producers Ltd, Re*[18] are illustrative.

18. *Quest University* concerned an application for various orders by Quest University Canada under the *CCAA*, including an order for the approval of a sales transaction with Primacorp Ventures Inc. for substantially all of Quest's lands and related assets.[19] The sale was opposed by Capilano University, who held ROFRs in respect of specific lands subject to the Primacorp transaction.[20]

19. In determining whether to grant the sales approval and vesting order sought by Quest, the Court undertook a balancing of the equities. Fitzpatrick J. ultimately concluded that the equities weighed in favour of vesting off the ROFR, based in part upon the following considerations:

    (a) Quest's restructuring efforts had been pursued for several months, and Capilano University was aware of those efforts and had the opportunity to participate in them;

    (b) it was a precondition of Primacorp's purchase of Quest's assets on an *en bloc* basis that Quest obtain title to the individual lands in question without reference to the ROFR, and an assertion of rights under the ROFR would delay and potentially negate the sale;

    (c) enforcement of the rights within the ROFR would "give rise to a severe 'chilling effect'", both preventing the sale to Primacorp and disincentivizing future purchasers; and

    (d) the Primacorp sale was the only sale before the Court which would result in a beneficial restructuring of Quest for its stakeholders.[21]

20. Similarly, in *Bear Hills*, the Court approved a proposed sale of all the assets of the applicant corporations despite a number of ROFRs in respect of certain lands of the applicants.[22] Only the sale of all the lands on an *en bloc* basis was contemplated, and the withdrawal of any individual property would prevent the sale, resulting in the potential liquidation of the assets.[23] Ultimately, the Court held that the welfare of the business carried on by the applicant corporations, and the avoidance of detrimental economic impacts resulting from liquidation, were valid considerations in approving the sale.[24]

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[17] *Quest University Canada (Re)*, 2020 BCSC 1883 [**TAB 8**].
[18] *Bear Hills Pork Producers Ltd, Re*, 2004 SKQB 213 [**TAB 9**].
[19] *Quest* at paras 20-22 [**TAB 8**].
[20] *Quest* at paras 50-51 [**TAB 8**].
[21] *Quest* at paras 51, 63-64 [**TAB 8**].
[22] *Bear Hills* at paras 1-3 [**TAB 9**].
[23] *Bear Hills* at para 5 [**TAB 9**].
[24] *Bear Hills* at para 9 [**TAB 9**].

21. In the present circumstances, a consideration of the test established in *Third Eye*, set out at para 11 above, indicates that the ROFR should be vested off.

22. The first factor to be assessed is the nature and strength of the interest to be extinguished. In *Third Eye*, the Court noted that when assessing whether to vest off an interest in land, interests more akin to a fee simple, such as ownership interests in ascertainable features of the property, are less likely to be extinguishable. In contrast, a fixed monetary interest attached to real or personal property is more amenable to extinguishment.[25]

23. The Trustee acknowledges that the ROFR at issue constitutes an interest in land. While such rights initially constitute mere contractual rights, they subsequently crystallize into interests in land following an offer to purchase.[26] Nevertheless, the nature of the interest is far closer to the fixed monetary interest identified by the Court in *Third Eye*, as opposed to an ownership interest such as a fee simple, indicating that it may be vested off.

24. The second factor considers whether the interest holder has consented to the vesting out of their interest, either during the insolvency process or beforehand.[27] No such consent has been given – in contrast, ROC has advised the trustee of its opposition to any vesting out.

25. Under the *Third Eye* test, when a consideration of the first two factors is ambiguous or inconclusive, the equities must be assessed.[28] Here, a balancing of the equities clearly favours the vesting off of the ROFR contained in the JV Agreement between ROC and Goldenkey. The relevant considerations are:

    (a) ROC will be allocated a portion of the proceeds from the transaction equivalent to its interest under the JV Agreement between itself and Goldenkey, as calculated by the Trustee;[29]

    (b) the Alberta Energy Regulator ("**AER**") has indicated to the Trustee that they wish to see an *en bloc* sale of assets;

    (c) the Purchaser's offer is an aggregated offer to purchase multiple Goldenkey wells, and ROC's ROFR only relates to one of the wells. The situation is analogous to *Quest University* and *Bear Hills* where each of the Courts favoured an aggregated offer over a single ROFR provision;

    (d) it is the Trustee's view that the PSA constitutes the only available opportunity to sell the assets on an *en bloc* basis, and should the contemplated transaction not close due to a lack of court approval and authorization, the Trustee will lack funds to commence further sales processes, which in any event are unlikely to result in a more beneficial arrangement for

[25] *Third Eye* at paras 103-105.
[26] *2123201 Ontario Inc v Israel Estate*, 2016 ONCA 409 at para 23 [**TAB 10**].
[27] *Third Eye* at para 106.
[28] *Third Eye* at para 110.
[29] Second Report at paras 5.1-5.14.

Goldenkey's stakeholders;[30]

(e) the Trustee further advises that if the transaction does not close, it will seek discharge as trustee in bankruptcy of Goldenkey, likely resulting in the transfer of care and custody of Goldenkey's assets to the AER, and subsequently to the Orphan Well Association, preventing any recoveries by Goldenkey's stakeholders;[31]

(f) the Trustee conducted the SISP as a public process, and ROC was aware that Goldenkey was undergoing bankruptcy proceedings, yet never previously approached the Trustee with an offer to purchase the well; and

(g) it is not open to the Trustee to sell the well to ROC due to ROC's lack of licensee eligibility with the AER. Per AER Directive 067, a person, including a corporation, must hold a Business Associate Code in order to apply to the AER for a license or approval for wells, facilities, or pipelines under the relevant legislation.[32] A list of parties holding Business Associate Codes, published on the webpage of the AER, does not include ROC.[33] In addition, as of January 22, 2024, ROC was not a registered corporation within Alberta.[34]

CONCLUSION

26. For the reasons set out above, the Trustee requests that this Honourable Court exercise its inherent jurisdiction and grant the relief sought in the Application, including approval and authorization of the PSA and the vesting of the purchased assets free and clear of all liens and encumbrances, save and except permitted encumbrances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23rd DAY OF JANUARY, 2024.

Robyn Gurofsky / Anthony Mersich
Counsel to PricewaterhouseCoopers Inc. LIT in its capacity as bankruptcy trustee of the estate of Goldenkey Oil Inc.

[30] Supplemental Second Report at para 3.2.
[31] Supplemental Second Report at para 3.3.
[32] Exhibit "D" to the Affidavit of Kim Picard, sworn on January 22, 2024 ("**Kim Picard Affidavit**").
[33] Exhibit "B" to Kim Picard Affidavit.
[34] Exhibit "A" to Kim Picard Affidavit.

LIST OF AUTHORITIES

STATUTES

1 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ss. 65.13(7), 183(1)(d).

CASE LAW AND ORDERS

2 *Wiggins, Re*, 2003 CarswellOnt 3514 (Sup. Ct. Just.).

3 *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60.

4 *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc*, 2019 ONCA 508.

5 *Accel Canada Holdings Limited (Re)*, 2020 ABQB 182.

6 Approval and Vesting Order of the Registrar in Bankruptcy L.R. Birkett, pronounced July 11, 2019, *In the Matter of the Bankruptcy of BW Rig Supply Inc*, Alberta Court of Queen's Bench Action No. 24-2473449.

7 Sale Approval and Vesting Order of the Honourable Justice R.A. Graesser, pronounced September 29, 2021, *In the Matter of the Bankruptcy and Insolvency of Direct Oil & Gas Inc*, Alberta Court of Queen's Bench Action No. 25-2624152.

8 *Quest University Canada (Re)*, 2020 BCSC 1883.

9 *Bear Hills Pork Producers Ltd, Re*, 2004 SKQB 213.

10 *2123201 Ontario Inc v Israel Estate*, 2016 ONCA 409.

COURT FILE & BANKRUPTCY ESTATE NUMBER	25-2906009 / B201906009
COURT	COURT OF KING'S BENCH OF ALBERTA, IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE BANKRUPTCY OF GOLDENKEY OIL INC.
APPLICANT	PRICEWATERHOUSECOOPERS INC., LIT, IN ITS CAPACITY AS TRUSTEE IN BANKRUPTCY OF GOLDENKEY OIL INC.
DOCUMENT	**APPROVAL AND VESTING ORDER (Sale by Trustee)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Fasken Martineau DuMoulin LLP Barristers and Solicitors 3400 First Canadian Centre 350 – 7th Avenue SW Calgary, Alberta T2P 3N9 Lawyer: Robyn Gurofsky / Anthony Mersich Phone Number: 403.261.9469 / 587.233.4124 File Number: 277219.00017

Clerk's Stamp

pp

BANKRUPTCY AND INSOLVENCY
FILED
by Email
Jan 25, 2024
Calgary
FAILLITE ET INSOLVABILITÉ

DATE ON WHICH ORDER WAS PRONOUNCED: January 24, 2024

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER: The Honourable Justice M.H. Bourque

UPON THE APPLICATION by PricewaterhouseCoopers Inc. LIT in its capacity as the bankruptcy trustee (the "**Trustee**") of Goldenkey Oil Inc. (the "**Debtor**") for an order approving the sale transaction (the "**Transaction**") contemplated by an agreement of purchase and sale between the Trustee and Brotherin Energy Ltd. (the "**Purchaser**") dated January 8, 2024 (the "**Sale Agreement**") and appended at Appendix "B" to the Second Report of the Trustee dated January

15, 2024 (the "**Report**"), and vesting in the Purchaser (or its nominee) the Trustee's right, title and interest in and to the assets described in the Sale Agreement (the "**Purchased Assets**");

AND UPON HAVING READ the Application, the Report, the Supplement to the Report, dated January 19, 2024, and the Affidavit of Service of Shaaista Murji, sworn January 24, 2024, together with the Bench Brief and Supplemental Bench Brief filed on behalf of the Trustee;

AND UPON HEARING the submissions of counsel for the Trustee, the Purchaser, and such other counsel in attendance at the hearing of this Application;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. Service of notice of this application and supporting materials is hereby declared to be good and sufficient and this application is properly returnable today.

APPROVAL OF TRANSACTION

2. The Transaction is hereby approved and execution of the Sale Agreement by the Trustee is hereby authorized and approved, with such minor amendments as the Trustee may deem necessary or desirable. The Trustee is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for completion of the Transaction and conveyance of the Purchased Assets to the Purchaser (or its nominee).

CANPAR LEASE

3. The Petroleum and Natural Gas Lease between Canpar Holdings Ltd. ("**Canpar**") as lessor and the Debtor as lessee, dated June 1, 2013 in respect of all petroleum and natural gas mineral rights in the Viking formation within, upon or under the lands described as East Half (E/2) of Section Eight (8), in Township Forty (T40), Range Four (R4), West of the Fifth Meridian (W5M), and included at Appendix "C" of the Report is valid and binding on Canpar in accordance with the terms thereof.

VESTING OF PROPERTY

4. Subject only to approval by the Alberta Energy Regulator ("**Energy Regulator**") of transfer of any applicable licenses, permits and approvals pursuant to section 24 of the *Oil and Gas Conservation Act* (Alberta) and section 18 of the *Pipeline Act* (Alberta), upon delivery of the Trustee's certificate to the Purchaser (or its nominee) substantially in the form set out in **Schedule "A"** hereto (the "**Trustee's Closing Certificate**"), all of the Trustee's right, title and interest in and to the Purchased Assets listed in **Schedule "B"** hereto shall vest absolutely in the name of the Purchaser (or its nominee), free and clear of and from any and all caveats, security interests, hypothecs, pledges, mortgages, liens, trusts or deemed trusts, reservations of ownership, royalties, options, rights of pre-emption, privileges, interests, assignments, actions, judgements, executions, levies, taxes, writs of enforcement, charges, or other claims, whether contractual, statutory, financial, monetary or otherwise, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, "**Claims**") including, without limiting the generality of the foregoing:

   (a) any charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Alberta) or any other personal property registry system;

   (b) the joint venture agreements entered into by Goldenkey and each of Baytech Energy Investment Inc., ROC Pacific Oil and Gas Inc., Principal Investment Inc. and Tri-Holding Energy Inc. (the "**JV Agreements**");

   (c) any liens or claims of lien under the *Builders' Lien Act* (Alberta); and

   (d) those Claims listed in **Schedule "C"** hereto (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, caveats, interests, easements, and restrictive covenants listed in **Schedule "D"** (collectively, "**Permitted Encumbrances**")),

   and for greater certainty, this Court orders that all Claims including Encumbrances other than Permitted Encumbrances, affecting or relating to the Purchased Assets are hereby expunged, discharged and terminated as against the Purchased Assets.

5. Upon delivery of the Trustee's Closing Certificate, and upon filing of a certified copy of this Order, together with any applicable registration fees, all governmental authorities

including those referred to below in this paragraph (collectively, "**Governmental Authorities**") are hereby authorized, requested and directed to accept delivery of such Trustee's Closing Certificate and certified copy of this Order as though they were originals and to register such transfers, interest authorizations, discharges and discharge statements of conveyance as may be required to convey to the Purchaser or its nominee clear title to the Purchased Assets subject only to Permitted Encumbrances. Without limiting the foregoing:

(a) The Registrar of Land Titles ("**Land Titles Registrar**") shall and is hereby authorized, requested and directed to forthwith transfer all land titles instruments standing in the name of the Debtor, to the Purchaser (or its nominee) free and clear of all Claims including Encumbrances but excluding Permitted Encumbrances.

(b) Alberta Energy ("**Energy Ministry**") shall and is hereby authorized, requested and directed to forthwith:

(i) cancel and discharge those Claims including builders' liens, security notices, assignments under section 426 (formerly section 177) of the *Bank Act* (Canada) and other Encumbrances (but excluding Permitted Encumbrances) registered (whether before or after the date of this Order) against the estate or interest of the Debtor or the Trustee in and to any of the Purchased Assets located in the Province of Alberta; and

(ii) transfer all Crown leases listed in **Schedule "E"** to this Order standing in the name of the Debtor, to the Purchaser (or its nominee) free and clear of all Claims including Encumbrances but excluding Permitted Encumbrances;

(c) the Registrar of the Alberta Personal Property Registry (the "**PPR Registrar**") shall and is hereby directed to forthwith cancel and discharge any registrations at the Alberta Personal Property Registry (whether made before or after the date of this Order) claiming security interests (other than Permitted Encumbrances) in the estate or interest of the Debtor in any of the Purchased Assets which are of a kind prescribed by applicable regulations as serial-numbered goods.

6. In order to effect the transfers and discharges described above, this Court directs each of the Governmental Authorities to take such steps as are necessary to give effect to the terms of this Order and the Sale Agreement. Presentment of this Order and the Trustee's Closing Certificate shall be the sole and sufficient authority for the Governmental Authorities to make and register transfers of title or interest and cancel and discharge registrations against any of the Purchased Assets of any Claims including Encumbrances but excluding Permitted Encumbrances.

7. No authorization, approval or other action by and no notice to or filing with any Governmental Authority or regulatory body exercising jurisdiction over the Purchased Assets is required for the due execution, delivery and performance by the Trustee of the Sale Agreement, other than any required approvals by the Energy Regulator referenced in paragraph 4 above.

8. Upon delivery of the Trustee's Closing Certificate together with a certified copy of this Order, this Order shall be immediately registered by the Land Titles Registrar notwithstanding the requirements of section 191(1) of the *Land Titles Act*, RSA 2000, c. L-7 and notwithstanding that the appeal period in respect of this Order has not elapsed. The Land Titles Registrar is hereby directed to accept all Affidavits of Corporate Signing Authority submitted by the Trustee in its capacity as Trustee of the Debtor and not in its personal capacity.

9. For the purposes of determining the nature and priority of Claims, net proceeds from sale of the Purchased Assets (to be held in a non-interest bearing trust account by the Trustee) shall stand in the place and stead of the Purchased Assets from and after delivery of the Trustee's Closing Certificate and all Claims including Encumbrances (but excluding Permitted Encumbrances) shall not attach to, encumber or otherwise form a charge, security interest, lien, or other Claim against the Purchased Assets and may be asserted against the net proceeds from sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

10. Except as expressly provided for in the Sale Agreement or by section 5 of the Alberta *Employment Standards Code*, the Purchaser (or its nominee) shall not, by completion of the Transaction, have liability of any kind whatsoever in respect of any Claims against the Debtor.

11. Upon completion of the Transaction, the Debtor and all persons who claim by, through or under the Debtor in respect of the Purchased Assets, and all persons or entities having any Claims of any kind whatsoever in respect of the Purchased Assets, save and except for persons entitled to the benefit of the Permitted Encumbrances, shall stand absolutely and forever barred, estopped and foreclosed from and permanently enjoined from pursuing, asserting or claiming any and all right, title, estate, interest, royalty, rental, equity of redemption or other Claim whatsoever in respect of or to the Purchased Assets, and to the extent that any such persons or entities remain in the possession or control of any of the Purchased Assets, or any artifacts, certificates, instruments or other indicia of title representing or evidencing any right, title, estate, or interest in and to the Purchased Assets, they shall forthwith deliver possession thereof to the Purchaser (or its nominee).

12. The Purchaser (or its nominee) shall be entitled to enter into and upon, hold and enjoy the Purchased Assets for its own use and benefit without any interference of or by the Debtor, or any person claiming by, through or against the Debtor.

13. Immediately upon closing of the Transaction, holders of Permitted Encumbrances shall have no claim whatsoever against the Trustee or the Debtor's estate.

14. The Trustee is directed to file with the Court a copy of the Trustee's Closing Certificate forthwith after delivery thereof to the Purchaser (or its nominee).

MISCELLANEOUS MATTERS

15. Notwithstanding:

    (a) the pendency of these proceedings and any declaration of insolvency made herein;

    (b) the pendency of any applications for a bankruptcy order now or hereafter issued pursuant to the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, as amended (the "**BIA**"), in respect of the Debtor, and any bankruptcy order issued pursuant to any such applications;

(c) any assignment in bankruptcy made in respect of the Debtor; and

(d) the provisions of any federal or provincial statute:

the vesting of the Purchased Assets in the Purchaser (or its nominee) pursuant to this Order shall be binding on and shall not be void or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a transfer at undervalue, settlement, fraudulent preference, assignment, fraudulent conveyance, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

16. The Trustee, the Purchaser (or its nominee) and any other interested party, shall be at liberty to apply for further advice, assistance and direction as may be necessary in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing the Transaction.

17. This Honourable Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any of its provinces or territories or in any foreign jurisdiction, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order and to assist the Trustee and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such order and to provide such assistance to the Trustee, as an officer of the Court, as may be necessary or desirable to give effect to this Order or to assist the Trustee and its agents in carrying out the terms of this Order.

18. Service of this Order shall be deemed good and sufficient by:

(a) Serving the same on:

(i) the persons listed on the service list created in these proceedings;

(ii) any other person served with notice of the application for this Order;

(iii) any other parties attending or represented at the application for this Order;

(iv) the Purchaser or the Purchaser's solicitors; and

(b) Posting a copy of this Order on the Trustee's website at: https://www.pwc.com/ca/en/services/insolvency-assignments/goldenkey.html

and service on any other person is hereby dispensed with.

19. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

Justice of the Court of King's Bench of Alberta

TAB 27

2016 ONCA 409
Ontario Court of Appeal

2123201 Ontario Inc. v. Israel Estate

2016 CarswellOnt 8308, 2016 ONCA 409, 130 O.R. (3d) 641, 130 O.R. (3d) 652,
266 A.C.W.S. (3d) 1003, 349 O.A.C. 200, 401 D.L.R. (4th) 501, 70 R.P.R. (5th) 169

2123201 Ontario Inc., Applicant (Appellant) and The Estate of Harold Israel by his Estate Trustee, Ken Israel, Respondent (Respondent)

John Laskin, G. Pardu, L.B. Roberts JJ.A.

Heard: November 27, 2015
Judgment: May 27, 2016
Docket: CA C60033

Proceedings: reversing *2123201 Ontario Inc. v. Israel Estate* (2015), 2015 ONSC 538, 2015 CarswellOnt 940, P.J. Flynn J. (Ont. S.C.J.); additional reasons at *2123201 Ontario Inc. v. Israel Estate* (2015), 2015 ONSC 2035, 2015 CarswellOnt 4230, P.J. Flynn J. (Ont. S.C.J.)

Counsel: Randell K. Thomson, for Appellant
Steven W. Pettipiere, for Respondent

Subject: Civil Practice and Procedure; Contracts; Property

Headnote

Real property --- Sale of land — Option contracts — Exercise of option — Miscellaneous

Equitable interest — In 1931, HI conveyed land to purchasers who bought land to obtain gravel — Parties entered agreement giving HI "first option to purchase" land for $1 once gravel removed but giving purchasers discretion to determine when all gravel removed — Appellant, current owner of land, continued to extract gravel — HI's estate registered two notices of claim against land, demanding it be conveyed to it for $1 — Current owner brought application for order declaring agreement void — Application turned on whether first option to purchase created interest in land or only personal contractual right — Application judge dismissed application — Current owner appealed — Appeal allowed — Option to purchase gives option holder right but not obligation to purchase land — Option holder has equitable interest in land, contingent on holder's election to exercise option — It is specifically enforceable at time option is granted but must be exercised within perpetuity period which is "not later than twenty-one years after some life in being at the creation of the interest" — Perpetuity period ended in 1952, 21 years after agreement was signed, or 2001, 21 years after HI died — Right of first refusal is commitment by owner of land to give holder of right first chance to buy should owner decide to sell — Owner has unfettered discretion whether and when to sell — Right of first refusal is personal right and does not create immediate interest in land — When owner of land receives offer to purchase that it is prepared to accept, right of first refusal is converted into option to purchase, at which point holder of right has interest in land that can be specifically enforced — Although current owner may remove gravel at any pace it chooses, discretion to decide when it has been removed must be exercised reasonably — Parties intended to give HI interest in land at time agreement was made — Even in absence of control, HI still had equitable interest in land — Purpose of agreement, context in which it was made, its terms, and conduct of parties under it, demonstrated intention to give HI option to repurchase land, which gave rise to immediate, equitable interest in land — Interest was contingent on exercise of option to purchase — Since option was not exercised, interest did not vest within perpetuity period and option became void.

Real property --- Sale of land — Option contracts — Exercise of option — Right of first refusal

In 1931, HI conveyed land to purchasers who bought land to obtain gravel — Parties entered agreement giving HI "first option to purchase" land for $1 once gravel removed but giving purchasers discretion to determine when all gravel removed — Appellant, current owner of land, continued to extract gravel — HI's estate registered two notices of claim against land, demanding it be

conveyed to it for $1 — Current owner brought application for order declaring agreement void — Application judge dismissed application — Application judge held that agreement was not really option agreement — Application judge found that agreement was something akin to right of first refusal, which did not create any interest in land and that therefore, Rule against Perpetuities did not apply — Current owner appealed — Appeal allowed — Option to purchase gives option holder right but not obligation to purchase land — Option holder has equitable interest in land, contingent on holder's election to exercise option — It is specifically enforceable at time option is granted but must be exercised within perpetuity period which is "not later than twenty-one years after some life in being at the creation of the interest" — Right of first refusal is commitment by owner of land to give holder of right first chance to buy should owner decide to sell — Owner has unfettered discretion whether and when to sell — Right of first refusal is personal right and does not create immediate interest in land — When owner of land receives offer to purchase that it is prepared to accept, right of first refusal is converted into option to purchase, at which point holder of right has interest in land that can be specifically enforced — In present case, purpose of agreement, context in which it was made, its terms, and conduct of parties under it, demonstrated intention to give HI option to repurchase land, which gave rise to immediate, equitable interest in land — However, since option was not exercised, interest did not vest within perpetuity period and option became void.

APPEAL from judgment reported at *2123201 Ontario Inc. v. Israel Estate* (2015), 2015 ONSC 538, 2015 CarswellOnt 940 (Ont. S.C.J.), dismissing application for order declaring option agreement void and unenforceable.

***John Laskin J.A.*:**

A. Introduction

1 A sells land to B. At the same time, A and B enter into an agreement that A can repurchase the land if a condition under B's control is met. Does the agreement give A an interest in the land, or only a personal contractual right? This appeal turns on the answer to that question.

2 In 1931, Harold Israel conveyed land he owned in Waterloo County to two individuals, D.M. Bowman and Seranus Martin. The land contained a gravel pit, and the purchasers bought the land to obtain the gravel, sand, and stone on it (collectively "the gravel"). Contemporaneously with the conveyance, the parties signed an Agreement giving Israel the "first option to purchase" the land for $1 once the gravel has been removed from it. But the Agreement gave Bowman and Martin the "discretion" and "authority" to state when all the gravel had been removed.

3 The appellant, 2123201 Ontario Inc., is the current owner of the land and continues to extract gravel from it. Harold Israel died in 1980, and his rights under the Agreement have passed to his Estate, the respondent in this appeal. The Estate has registered two notices of claim against the land and in May 2009 demanded that the land be conveyed to it for $1.

4 2123201 then brought an application for an order declaring the Agreement void and deleting it from title. The resolution of the application turned on how to characterize Israel's "first option to purchase" under the Agreement.

5 2123201 contended that the Agreement was an option agreement, which gave Israel an immediate, equitable interest in the land. Because his interest in the land had not vested, the Agreement was void and unenforceable under the rule against perpetuities.

6 The Estate contended that the Agreement gave Israel a right of first refusal, which was not an interest in land, but was merely a personal right. As the Agreement did not give Israel an interest in land, the rule against perpetuities did not apply and the Estate may still enforce Israel's "first option to purchase" under the Agreement.

7 The application judge dismissed 2123201's application. He held that the Agreement was not an option agreement that created an interest in land. It was, instead, "something akin to a right of first refusal — which does not create any interest in land".

8 On appeal, each party renews the position it took before the application judge. For the reasons that follow, I would allow the appeal.

> rule applies only to contingent interests and, to that extent, it has been said by many commentators that the rule should be really characterized as a rule against remoteness of vesting.

21 In the present case, the perpetuity period ended in 1952 (21 years after the Agreement was signed) or 2001 (21 years after Harold Israel died). It is unnecessary to decide which date is appropriate. If the Agreement is an option to purchase, which creates an interest in land, that interest still has not vested; therefore even if 2001 is the appropriate date, the option to purchase is void. [1]

(b) Rights of First Refusal

22 A right of first refusal is a commitment by the owner of land to give the holder of the right the first chance to buy the land should the owner decide to sell. Typically, where a land owner is prepared to accept an offer to purchase from a third party, the holder of the right of first refusal will be given an opportunity to match the offer; or, when an owner of land decides to sell and fixes the sale price, the holder of the right of first refusal will be given the first chance to buy at the fixed price. In these typical right of first refusal scenarios, the owner has an unfettered discretion whether to sell and when to sell.

23 Importantly, the right of first refusal is a personal right. It does not create an immediate interest in land: *Canadian Long Island Petroleums*, at p. 735. Thus, it is not immediately enforceable by an action for specific performance. If, however, an owner of land receives an offer to purchase that it is prepared to accept, then the right of first refusal is converted into an option to purchase. At that point, the holder of the right of first refusal has an interest in the land, which can be specifically enforced: *Harris*, at para. 12.

(c) Summary

24 As the discussion above shows, the jurisprudence establishes that options to purchase create immediate interests in land; rights of first refusal do not. Options to purchase are specifically enforceable; rights of first refusal are not. And options to purchase are subject to the rule against perpetuities; rights of first refusal are not. Finally, according to *Canadian Long Island Petroleums*, options to purchase give the option holder control over the decision to effect a conveyance. Rights of first refusal give the land owner control over the decision to convey. But, as I will discuss, other case law shows that in some circumstances control over the exercise of the option is not determinative.

(4) Analysis

25 The "first option to purchase" the land given to Harold Israel under the 1931 Agreement does not fit precisely into either the definition of an option to purchase or the definition of a right of first refusal established in the jurisprudence.

26 It is not precisely a simple option to purchase or repurchase as defined in *Canadian Long Island Petroleums* because the event triggering the ability to exercise the option — the removal of all the gravel from the land — is not within the control of the holder of the option, now Israel's Estate. Thus the Estate cannot immediately exercise its option. Its ability to do so depends on 2123201's determination that the gravel has been removed. [2]

27 And Israel's "first option to purchase" the land is not precisely a simple right of first refusal. No third party is involved, and more importantly, 2123201 does not have an unfettered discretion to decide if and when it will sell the land. It must offer to sell the land to the Estate when all the gravel is removed. Although 2123201 may remove the gravel at any pace it chooses and has the discretion to decide when all of it has been removed, that discretion is not open-ended. It must be exercised reasonably.

28 That a discretion given to a contracting party must be exercised reasonably is clear from the authorities. For example, in *Nareerux Import Co. v. Canadian Imperial Bank of Commerce*, 2009 ONCA 764, 97 O.R. (3d) 481 (Ont. C.A.), at para. 71, Blair J.A. wrote:

> Contracts in which performance is dependent upon the exercise of discretion on the part of one of the parties are contracts that are particularly characterized by the implied duty of good faith performance. In such circumstances, the discretion must be exercised reasonably and in good faith. [Citations omitted.]

