IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Royal Bank of Canada v. Canwest Aerospace Inc.,* 2024 BCSC 585

Date: 20240410
Docket: S230764
Registry: Vancouver

Between:

Royal Bank of Canada

Plaintiff

And

Canwest Aerospace Inc., CanWest Global Airparts Inc., Thomas George Jackson

Defendants

In Chambers

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. April 2, 2024
Place and Date of Judgment:	Vancouver, B.C. April 10, 2024

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Overview

[1] This case involves a vigorously contested application for a reverse vesting order or RVO in a receivership proceeding. The RVO is supported by the principal secured creditor on the basis that it will minimize its expected losses. It is opposed on legal grounds by a creditor with nothing to gain if the order is refused.

[2] The debtors are Canwest Aerospace Inc. and Can West Global Airparts Inc. (collectively, "Canwest"). The principal secured creditor is the Royal Bank of Canada ("RBC"). His Majesty in right of Canada (“Canada”) is the party opposing the RVO.

[3] The RVO is proposed to give effect to a transaction under which a purchaser will acquire Canwest’s business for US$670,000. RBC is owed in excess of $4 million. Canada is a modest creditor, both in respect of statutory deemed trust claims totalling approximately $70,000, and in respect of unsecured claims for payroll source deductions and taxes totalling approximately $107,000. There will not be nearly enough money to satisfy all the secured claims, and the unsecured creditors will receive nothing. There is no prospect of an offer that would generate funds for the unsecured creditors.

[4] The purchaser is only willing to pay US$670,000 if the purchase is effected through an RVO. An RVO will enable the purchaser to acquire ownership of the two Canwest corporations, free and clear of their liabilities. The liabilities and the purchase price will be vested in another company, termed Residual Co., which will replace Canwest as the defendant in this proceeding. The advantage for the purchaser is that it will obtain through Canwest regulatory certifications and certain contracts that could not be transferred to the purchaser directly. Canwest’s secured creditors will retain their secured claims to the purchase price in Residual Co.’s hands, just as though the price had been paid to Canwest.

[5] Canada’s principled objection is that the court has no power to order an RVO in a receivership proceeding. The converse was decided in *Peakhill Capital Inc. v. Southview Gardens Limited Partnership*, 2023 BCSC 1476, at paras. 21 to 22.

Peakhill is under appeal. Absent appellate authority calling *Peakhill* into question, and at present there is none, I am bound to follow it and reject Canada's argument.

[6] Alternatively, Canada submits that an RVO is inappropriate. I disagree. An RVO is an unusual or extraordinary measure, not justifiable merely on the ground of convenience or benefit to the purchaser. On the uncommon facts of this case, I am satisfied that compelling and exceptional circumstances justify the order sought.

Background

[7] Until 2023, Canwest operated a business that provided specialized aircraft and helicopter maintenance, repair, and overhaul services, often to international customers. Its business was heavily regulated, requiring certifications issued by Canadian, U.S., and European authorities. It operated out of leased premises in British Columbia and its assets comprised, in the main, aviation certificates, accounts receivable, work in progress on contracts, and prepaid expenses, largely in relation to foreign contracts.

[8] In early 2023, faced with an application by RBC for the appointment of a receiver, Canwest sought and obtained an initial order under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. 36 [*CCAA*] in March 2023.

[9] While protected from its creditors under the *CCAA,* Canwest negotiated a sale of its undertaking to a purchaser, for US$1.7 million. The transaction involved a share sale that was functionally equivalent to the RVO transaction now proposed. It was approved by the creditors and the court. Unfortunately, the purchaser was unable to come up with the funds and the sale fell through. The purchaser forfeited a $225,000 deposit.

[10] Canwest abandoned its claim for relief under the *CCAA* and the court appointed a receiver on RBC's application in August 2023. The order was made pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 [*BIA*] and s. 39 of the *Law and Equity Act,* R.S.B.C. 1996, c. 253 [*LEA*].

[11] On September 29, 2023, the receiver negotiated a sale to another purchaser. McGregor, for US$800,000. This sale contemplated implementation by RVO. The sale fell through, and McGregor forfeited a non-refundable deposit of US$50,000.

[12] On December 27, 2023, the receiver negotiated a sale to a third purchaser, Axxeum, for a somewhat lower price. The sale required agreement on further matters by January 18, 2024, the parties were unable to reach agreement, and Axxeum forfeited a non-refundable deposit of US$15,000.

[13] Following further discussions with Axxeum, the receiver now seeks approval of a fourth proposed sale of Canwest's undertaking to 0854271 B.C. Ltd. and 2155537 Ontario Inc. The principals of the two numbered companies are Ms. Lundy, who was Canwest's chief financial officer, and Mr. Haroon, a businessman in the aerospace industry based in Toronto, who dealt with Canwest over the years. They have obtained a US$450,000 financing commitment from a lender for the transaction. The commitment requires that the transaction close by April 30, 2024. As already noted, the sale price is US$670,000 and the sale requires implementation by RVO.

Is the court authorized to grant an RVO in this receivership proceeding?

[14] *Peakhill* involved an application for an RVO in an action in which, like this one, the court had appointed a receiver pursuant to s. 243 of the *BIA* and s. 39 of the *LEA.* The RVO was sought to permit a sale of the debtor's undertaking in a manner that would avoid liability for $3.5 million of property transfer tax that would be payable on an asset sale. The Province, as the potential recipient of the tax, opposed the RVO. One of its arguments was that the court lacked jurisdiction to order an RVO. Justice Loo rejected the jurisdictional argument and granted the RVO. The Province has appealed and I am told that the appeal is to be heard in June.

[15] Justice Loo considered that jurisdiction to grant an RVO is found in s. 183(1)(c) of the *BIA.* It confers on this Court "such jurisdiction at law and in equity

as will enable [it] to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act".

[16] Justice Loo referred to *PaySlate Inc. (Re),* 2023 BCSC 608, at paras. 84 to 86, where Walker J. held that s. 183 of the *BIA* confers jurisdiction to grant an RVO in cases involving proposals under the *BIA* and receivership proceedings. *PaySlate* was a case in which the debtor company had given notice of its intention to make a proposal under the *BIA*. Justice Loo rejected the Province's jurisdictional argument succinctly. He stated:

> [22] In my view, the issue of whether this Court has jurisdiction to grant RVOs in proceedings under the BIA was raised squarely and decided in *PaySlate #1*. In my respectful view, the decision of Justice Walker was both correct and determinative of the issue.
>
> [23] The Province raises two arguments regarding jurisdiction.
>
> [24] First, it argues that the words of s. 183 of the BIA (or s. 243 which deals with receiverships) are insufficient to ground jurisdiction to grant an RVO.
>
> [25] In my view, this argument is met by *PaySlate #1*. As stated, Justice Walker has decided that the general words of s. 183 are sufficient to ground jurisdiction.
>
> [26] Second, the Province argues that even if s. 183 provides this Court with jurisdiction generally to grant an RVO, it does not do so in the context of this case. It says that that the BIA must be interpreted with regard to the *[Property Transfer Tax Act]*, and it cites s. 72(1) of the *BIA* which states:
>
> > 72 (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.
>
> [27 In my view, this submission is not one which relates to this Court's jurisdiction. Rather, it questions whether the granting of an RVO is appropriate in the particular circumstances of this case. The interplay between the RVO sought and the provisions of the *PTTA* will be addressed in detail below.

[17] *Peakhill* is binding upon me for what it decides according to the principle of horizontal *stare decisis*. There are narrow exceptions to horizontal *stare decisis* set out in *Hansard Spruce Mills (Re),* [1954] 4 D.L.R. 590, 1954 CanLII 253 (B.C.S.C.) and *R. v. Sullivan,* 2022 SCC 19 at paras. 6 and 73-79. Canada concedes and I

agree that none of these exceptions applies. The decision is not undermined by subsequent appellate authority. I have not been shown any authority binding on Justice Loo that he apparently overlooked. Justice Loo reserved judgment for three weeks before he rendered judgment, and his reasons are fully considered.

[18] Canada submits that *Peakhill* is distinguishable because the party opposing an RVO in that case was not an unsecured creditor. The Province was not owed money when the RVO was sought. Its interest was that it looked forward to becoming a creditor on the sale of the debtor's real property. The reasons for judgment characterize the Province as a stakeholder.

[19] Canada submits that the absence of an opposing creditor is critical to court's finding that it had jurisdiction because the granting of an RVO interferes with the provisions of the *BIA* that contemplate proposals to creditors. In the case of an RVO sought in the context of a proposal, the *BIA* allows the creditors to vote down the proposal. Canada argues that the RVO sought in this case circumvents protection for the creditors under the *BIA*. In its application response, it argues:

> There is no jurisdiction to impose an RVO outside of the statutory scheme for proposals. To permit otherwise would lead to an alternative proposal scheme created by insolvency practitioners rather than Parliament, one that is by its very nature attractive to secured creditors and other potential purchasers who seek to maximize their returns at the expense of the other creditors, particularly unsecured creditors. Parliament balanced the rights of all creditors in developing the proposal system as a regulated form of creditor democracy.
>
> [Emphasis added.]

[20] Canada acknowledges that the order sought does not adversely affect its pecuniary interest as a creditor. Insofar as it is a secured creditor, it can only benefit from the sale to be implemented by RVO, because there is no better sale in view. Insofar as it is an unsecured creditor, its interest is unaffected because the unsecured creditors are all indisputably out of the money. However, Canada says that its interest in voting on a proposal is adversely affected, because the RVO avoids a proposal. It is in this sense that the RVO would be made at Canada's expense.

[21] I disagree with Canada that the ruling in *Peakhill* that this Court has jurisdiction to grant an RVO in a receivership is limited to cases in which there are no unsecured creditors. The Province's status as a stakeholder rather than a creditor is not germane to Loo J.'s reasoning. Moreover, the possibility of a proposal in this case, as in many cases, is entirely theoretical. Proposals exist to facilitate a collective compromise of the claims of the unsecured creditors, and do not make sense where the secured debt far exceeds the value of the business as a going concern. The RVO sought in this case would not cause a meaningful injury to the rights, pecuniary or otherwise, of unsecured creditors.

[22] Canada's jurisdictional argument is really an argument that *Peakhill* is wrongly decided. That is an argument for the Court of Appeal. I am satisfied that *Peakhill* is not distinguishable and that I am bound by it to hold that the court has jurisdiction to grant an RVO in the circumstances of this case.

What must the court consider in deciding whether to grant an RVO?

[23] On an application for an RVO, the first question is whether the proposed sale, whatever its form, should be approved. The second question is whether the sale should be approved for implementation by an RVO. The second question is necessary because the authorities warn and the receiver accepts that an RVO is an unusual or extraordinary measure, not justified merely on the ground of convenience or benefit to the purchaser; *Harte Gold Corp.*, 2022 ONSC 653, at para. 38; *PaySlate at para. 87; Peakhill* at paras. 40 to 48.

[24] The first question is addressed by reference to the considerations enunciated in *Royal Bank v. Soundair Corp.,* [1991] OJ No. 1137 (C.A.) at paragraph 16, namely:

a) Whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently;

b) The interests of all parties;

c) The efficacy and integrity of the process by which offers were obtained; and

d) Whether there has been any interference in the sale process.

More generally, the court must consider the transaction as a whole and decide whether the sale is appropriate, fair, and reasonable; *Quest University Canada (Re),* 2020 BCSC 1883 at para. 176; *Veris Gold Corp (Re),* 2015 BCSC 1204 at paras. 23-25; *Kruger v. Wild Goose Vintners Inc.,* 2021 BCSC 1406 at paras. 26-30.

[25] The second question addresses the exceptional feature of a sale implemented by an RVO. RVOs require close scrutiny and must be justified by compelling and exceptional circumstances because of the risk to creditors and other stakeholders not before the court; Dr. Janis Sarra, *"Reverse Vesting Orders - Developing Principles and Guardrails to Inform Judicial Decisions",* 2022 CanLiiDocs 431, quoted in *PaySlate* at para. 89 and *Peakhill* at paras. 47 to 48.

[26] In *Peakhill*, at paras. 51 and 55, Justice Loo suggests that the absence of prejudice to creditors is crucial. In *Harte Gold,* at para. 38, Justice Penny proposes a series of questions to be addressed, including:

(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?

Is the proposed RVO justified in this case?

Apart from the question of implementation by RVO, is the proposed sale appropriate, fair and reasonable?

[27] Apart from the question of implementation by RVO, I find that the proposed sale is appropriate, fair and reasonable.

[28] There have been extensive efforts to market Canwest's undertaking since the initial *CCAA* order in March 2023. The failed sale under the *CCAA* followed on a court-sanctioned marketing process and was approved by the court. The receiver has made further extensive efforts to market Canwest since its appointment in August 2023. These efforts have given rise to three failed transactions, each featuring the payment of a non-refundable deposit.

[29] The marketing of the assets has been made difficult by the intangible nature of most of the assets, regulatory constraints, complexities introduced by Canwest's international customer base, and the specialized nature of its work, all serving to limit the universe of potential buyers. The receiver has conducted the marketing in good faith as an officer of the court. I am satisfied that it has acted efficaciously and with integrity, and has made sufficient efforts to obtain the best price. There has not been outside interference in the sale process.

[30] The interests of all parties are served by the proposed sale. RBC is the fulcrum creditor with the most to lose. It supports the sale. The sale will preserve Canwest's undertaking for the benefit of its former principal, Mr. Jackson, who will continue to be employed, and its contractual counterparties. There is no reasonable prospect of a better transaction. On any reasonable scenario, no one is worse off.

Is this one of those exceptional cases in which implementation of a sale by RVO is justified?

[31] I begin with the four questions proposed by Penny J. in *Harte Gold* as set out in paragraph [26] above.

[32] The RVO is necessary in this case because assets critical to the sale, namely, the aviation certificates and contracts with foreign counterparties, cannot be conveyed efficiently or in some cases at all in an asset sale. In its second report, the receiver states:

> First, the Aviation Certificates are critical to the Companies' ongoing operations, and the Purchaser has advised the Receiver that the same are critical to the Transaction. The Receiver has been advised by [Transport Canada Civil Aviation] that these certificates are not transferrable via a

> traditional asset sale and vesting order structure, and this appears to be confirmed by the offers received (which contemplate share transactions where the Aviation Certificates are to be included).
>
> …
>
> The reverse vesting order structure will allow the Companies to retain the Retained Contracts without seeking the approval of the counterparties to an assignment to a third-party purchaser. Any alternative transaction structure would require the Receiver and the Companies to either obtain consent to the assignment and/or to force the assignment by court order.
>
> The Purchaser has advised the Receiver that a prompt and efficient closing is critical to its offer, in particular because the Companies will be assuming material monetary penalties for further delays in deliveries under the Retained Contracts (in particular the agreements with the Bangladesh Ministry of Defence). The Purchaser has further advised the Receiver that, as a result of the foregoing, it is not willing to conclude a transaction to solely purchase the Companies' assets.

[33] The RVO structure produces an economic result at least as favourable as any other viable alternative. Indeed, no remotely viable alternative has been identified. A piecemeal liquidation of Canwest's physical assets would undoubtedly result in a markedly inferior result.

[34] No stakeholder is worse off under the RVO structure than they would have been under any other viable alternative. As already noted, the proposed transaction leaves Canwest's secured creditors collectively better off, the unsecured creditors no worse off, and stakeholders such as Mr. Jackson and contractual counterparties better off.

[35] Finally, the consideration being paid for Canwest's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure.

[36] Citing Dr. Sarra's article, Canada notes concerns that RVOs may provide for overly broad releases of directors and other parties, may be used to undercut environmental liabilities and obligations, may fail to provide sufficient value for unsecured creditors, and are often brought on unduly short notice. In its application response, Canada submits that:

> 27. The symptoms are present in this matter, including insufficient notice given to the impacted creditors, no value provided to the unsecured creditors, and excessively broad releases that resemble those in a settlement agreement rather than a contested order.

[37] I do not agree that Canada or any other creditor has suffered prejudice resulting from insufficient notice of this application. The application was filed and served on March 19, 2024 and heard on April 2. Technically, this was one day short of the eight business days' notice required under *Supreme Court Civil Rule* 8-1(8)(a), because the court registry was closed on March 29 and April 1 for Easter. At the commencement of the hearing, Canada sought an adjournment. It was the only opposing creditor. I refused an adjournment and allowed the application to proceed because I viewed the failure to give eight days' notice as technical in the circumstances, the application was fully briefed, and counsel were ready to proceed. I arranged for April 19 to be reserved for a continuation of the hearing, if it could not be completed in the time available, but this has proved unnecessary because all counsel were able to complete their submissions on April 2.

[38] While Canada is correct that no value is provided to unsecured creditors, as already noted, there is no realistic scenario under which there could be value for unsecured creditors. They are well out of the money.

[39] At the outset, there was apparent merit to Canada's submission that the proposed RVO included an excessively broad release, but the parties supporting the transaction, including the receiver and RBC, proffered a revised form of release during the hearing. The revised form of release encompasses only claims that might be brought by the Receiver and RBC. There can be no objection to the Receiver and RBC offering a release, however broad the terms, to facilitate a proposed sale.

[40] Canada submits that the RVO is inappropriate because it does not include terms requiring the payment of payroll debt that are required by s. 60 of the *BIA* in the context of an application to approve a proposal under Part III of the *BIA*. This submission follows from Canada's jurisdictional argument that "an RVO like the one sought in this hearing is simply an extreme and complicated proposal that seeks to

release a debtor's liability". Canada goes so far as to argue that "the use of the obfuscating term RVO instead of 'proposal without a vote' does not avoid the reality that a forced release of the debtor's liabilities is only provided for in the BIA under the proposal system".

[41] I do not accept the premise of Canada's argument that an RVO is, in substance, a species of proposal. An RVO is, as the name indicates, a kind of vesting order. It is inherent in vesting orders that liabilities attached to the property in question are released in order that the property may be conveyed to a third party, free and clear of encumbrances. The question is not whether the court can make such an order, it is whether the release of the liabilities in question is justified in the circumstances. The point is that an RVO is not a misnamed form of proposal subject to the exigencies of Part III of the *BIA.* It is something different.

[42] Canada further submits that the RVO conflicts with requirements under ss. 227(4) and (4.1) of the *Income Tax Act,* R.S.C. 1985, c. I-1 (5th Supp.) and ss. 222(1) and (3) of the *Excise Tax Act,* R.S.C. 1985, c. E-15 protecting unremitted payroll source deductions and GST owed by Canwest. These sections afford to the Crown what Canada describes as a super-priority in respect of funds that are deemed to be held in trust. The conflict is said to be that the RVO seeks to vest the liabilities in Residual Co. rather than leaving them in Canwest. In a footnote to its written argument, Canada adds that "the fact that the RVO proposes to also 'vest' the Purchase Price with the residual corporation does not remedy this conflict".

[43] I do not agree with this submission. If the RVO is not approved, there are no readily exigible assets for Canada to assert its super-priority against. If the RVO is approved, Canada will have a claim to the purchase price. To the extent that Canada is afforded a super-priority, it can assert that priority as against RBC and the receiver, which claims a priority for its charges. Reconciling those competing claims is a question for another day.

[44] The transaction effected by the RVO substitutes one asset – the purchase price – for other assets that are not readily exigible. The Crown's deemed trust

claim follows the assets into the purchase price, and follows the purchase price from Canwest into Residual Co. None of this does violence to the statutory intention that the Crown's claim be secured. Indeed, it facilitates realization of the Crown's claim.

[45] All in all, I agree with the receiver who states:

> In the Receiver's view the market has been canvassed and has spoken as to the value of the Retained Assets and – particularly in the absence of a viable alternative transaction – the Transaction is appropriate.

[46] I conclude that this case presents exceptional and compelling circumstances in which an RVO is necessary to realize a sale that is appropriate, fair and reasonable. There is no reasonable alternative to realize value for Canwest's creditors. No one is worse off.

Disposition

[47] For these reasons, I approve the RVO, incorporating a release in the form tendered during the hearing on April 2, 2024.

"Gomery J."