IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Aquilini Development Limited Partnership v. Garibaldi at Squamish Limited Partnership,* 2024 BCSC 764

Date: 20240503
Docket: S236559
Registry: Vancouver

Between:

Aquilini Development Limited Partnership, Garibaldi Resort Management Company Ltd. and 1413994 B.C. Ltd.

Petitioners

And

Garibaldi at Squamish Limited Partnership and Garibaldi at Squamish Inc.

Respondents

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

In Chambers

Counsel for the Petitioners:	V.L. Tickle F. Finn
Counsel for the Respondents:	J.R. Sandrelli
Counsel for the Attendee, Ernst & Young Inc., in its capacity as court-appointed receiver and manager of Garibaldi at Squamish Limited Partnership and Garibaldi at Squamish Inc.:	W.E.J. Skelly J.R. Reid
Counsel for the Attendee, His Majesty the King in Right of the Province of British Columbia:	O. James R. Power A. Welch A. Glen

Counsel for the Attendee, the Squamish Nation:	L. Williams
Place and Dates of Hearing:	Vancouver, B.C. April 22-23, 2024
Place and Date of Judgment:	Vancouver, B.C. May 3, 2024

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Introduction and Background

[1] The petitioners, Aquilini Development Limited Partnership, Garibaldi Resort Management Company Ltd., and 1413994 B.C. Ltd., are secured creditors (debenture holders) of Garibaldi at Squamish Inc. (whom the parties refer to as "GAS") and Garibaldi at Squamish Limited Partnership ("Partnership"). GAS is a federally incorporated company founded in 2001 to develop a ski resort on Brohm Ridge, near Squamish, British Columbia ("Project"). GAS is the managing partner of the Partnership (and owns just under 90% of its units). Both are privately held entities with operations in Vancouver. When I refer to them collectively, it is as the "Garibaldi entities".

[2] In this insolvency proceeding, the petitioners seek to acquire ownership of the Garibaldi entities through an internal reorganization of GAS' share structure and the Partnership.

[3] The Project is intended to be a world-class, all-season resort, encompassing skiing, snowboarding, mountain biking, and other alpine activities, on Nch'Kay Mountain near Squamish, that would convert approximately 2,800 hectares of previously logged forest to recreational use. Construction of the Project is anticipated to occur in four phases over 30 years, with an expectation to create approximately 2,000 construction jobs, and once completed, for the resort to create approximately 4,000 long-term operational careers, providing guests and residents with access to 126 ski and snowboard runs accessed through a network of 21 ski lifts. The residential component of the Project includes 21,960 bed units spread out over 5,233 residential units representing hotel, condominium, townhouse, and detached dwellings.

[4] The Garibaldi entities' ability and GAS' right to develop the Project arises from an environmental assessment certificate ("EA Certificate") issued by the Province of British Columbia ("Province") to GAS on January 26, 2016, pursuant to the *Environmental Assessment Act*, S.B.C. 2018, c. 51 [*E.A. Act*]. The purpose of the EA Certificate is to ensure that the Project and ultimately, the resort, adequately

preserve and protect the surrounding environment. The Province entered into an interim agreement ("Interim Agreement") with GAS on March 29, 2021. The Interim Agreement granted, *inter alia*, GAS a license with the right of occupation.

[5] In order for construction to begin, GAS must, amongst other things, satisfy numerous (approximately 40) construction pre-conditions set out in the EA Certificate by no later than January 26, 2026 (the original deadline was extended by five years) and obtain approval of a master plan ("Master Plan") from the Province.

[6] The construction pre-conditions must be satisfied in order for the actual construction to begin at the Project. The work under these pre-conditions includes: (a) identifying primary and secondary water supplies to supply water at prescribed rates for at least three weeks in the event of an emergency; (b) robust conditions to evaluate and protect the Project area's aquatic environment, including consultation with the Squamish Nation, certain provincial agencies and local governments regarding aquatic effects and Brohm River management plans; and (c) development of specific plans concerning biodiversity, ecosystem, snowmaking reservoir and dam failure, archaeology, preservation of Squamish Nation cultural heritage and activity in the Project area, old growth management, waste management, employee housing, transportation, recreation sites and trails, access, culverts, and air quality.

[7] The Master Plan has been drafted and I am told, is substantially completed. It includes as a key component the incorporation of Squamish Nation tourism (such as cultural and educational centres that highlight the Squamish Nation culture, history, and traditions), ongoing consultation with the Squamish Nation with certain rights of first refusal, mentorship, internship, and training opportunities, along with an opportunity for Indigenous representation in the Sea-to-Sky Corridor of the Province.

[8] Construction has yet to get underway since the pre-conditions called for in the EA Certificate have yet to be satisfied. Only some work on the pre-conditions is underway. No actual work on the Project lands to satisfy those conditions has been done.

[9] The Garibaldi entities are now insolvent. They owe the petitioners over $80 million, and thus GAS lacks the financial means to satisfy the construction pre-conditions set out in the EA Certificate.

[10] A receivership order was issued pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 [*BIA*] on December 4, 2023, appointing Ernst & Young ("EY") as the receiver, over all of the assets, undertaking, and property of the Garibaldi entities.

[11] The Garibaldi entities do not own any physical assets and do not generate revenue. They have been dependant on third party funding since inception to support GAS' obligations to develop a draft Master Plan and to satisfy the construction pre-conditions in the EA Certificate. Their assets are the EA Certificate, the Interim Agreement, and some (unidentified) tax attributes (losses).

[12] EY reports that a lack of consensus amongst GAS' directors over the direction of the company and the future of the Project hindered its ability to raise funds necessary to support its ongoing operations, including funds required to satisfy the pre-conditions prescribed in the EA Certificate. EY also reports that eight of the construction pre-conditions, which are sequential in nature, are urgent and foundational to subsequent conditions since they inform the context of the remaining work to be done to satisfy the EA Certificate. EY reports they must be completed in the next 12 months and estimates the cost to complete the urgent construction pre-conditions is $5.5 million.

[13] In view of the urgency in which to complete the construction pre-conditions or face expiry and loss of the EA Certificate, EY undertook without delay following its appointment as receiver, and with court approval, what all parties agree was a robust sale and investment solicitation process ("SISP") to secure offers to sell those assets.

[14] As part of that process, EY obtained court approval for the petitioners' stalking horse bid ("Stalking Horse Bid") to purchase the Garibaldi entities for a price

of approximately $80.41 million, comprised of: (a) a credit bid of the indebtedness of the Garibaldi entities of just over $73.45 million plus interest to the petitioners; (b) funding for EY's borrowings; (c) a transaction to obtain the rights under the EA Certificate and the Interim Agreement, by either a traditional asset vesting order or a reverse vesting order (if necessary to retain the value of the EA Certificate and the Interim Agreement, and to a lesser extent, the tax attributes, in view of the risks and uncertainties said to be involved in obtaining governmental approval to a disposition through a transfer or assignment); (d) a $500,000 break fee; and (e) a requirement that any competing qualified bid must exceed the amount of the petitioners' bid including the break fee.

[15] EY also obtained an independent legal opinion confirming the validity of the petitioners' security.

[16] Despite what EY says were substantial expressions of interest from numerous parties (with nine executed confidentiality agreements allowing potential bidders access to the confidential data room), no other qualified bids were received.

[17] EY now seeks court approval of a purchase agreement in line with the Stalking Horse Bid by means of a reverse vesting order ("RVO"). I refer to both collectively as the "Transaction".

[18] The petitioners have committed to incur the costs to complete the construction pre-conditions, including $5.5 million in the next 12 months, if the Transaction is approved.

[19] The Squamish Nation, who has a 10% interest in the Partnership and was represented by counsel at the hearing, does not oppose the Transaction.

[20] The only party opposing the Transaction is the Province. In particular, the Province raises once more for consideration in this Court whether jurisdiction exists under the *BIA* to approve RVOs, and if it does, whether it is appropriate to do so in this case since, the Province contends, the RVO circumvents provincial legislation, abrogates their statutory decision-making powers, and is unnecessary.

[21] I say "once more" since the issue of jurisdiction to approve RVOs under the *BIA* has been considered and determined to exist in prior decisions of this Court: *PaySlate Inc. (Re)*, 2023 BCSC 608 [*PaySlate #1*] and 2023 BCSC 977 [*PaySlate #2*]; *Peakhill Capital Inc. v. Southview Gardens Limited Partnership*, 2023 BCSC 1476; *1351486 B.C. Ltd. v. Living Beachside Development Limited Partnership, Port Capital, et al.* (27 October 2023), Vancouver S229506 (B.C.S.C.) [*Port Capital*]; and *Royal Bank of Canada v. Canwest Aerospace Inc*., 2024 BCSC 585.

[22] Although the Province supports completion of the Project in view of the economic benefits to the Province (and others) and the fact that consultation with the Squamish Nation has already occurred, the Province argues, as one of its grounds opposing the Transaction, that there is no jurisdiction under the *BIA*, either generally or in the context of this case, to approve a transaction incorporating an RVO. The Province says that I am not bound to follow the prior decisions of this Court approving RVOs under the *BIA* because one or more of the exceptions to the application of horizontal *stare decisis* discussed 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, are engaged. The Province also maintains that EY has not satisfied the onus placed on it in the case authorities to establish that an RVO is necessary in this case and moreover that as a stakeholder, it is worse off under the RVO as opposed to a transaction involving a traditional asset vesting order ("AVO"): see, e.g., *Harte Gold Corp. (Re)*, 2022 ONSC 653, *Arrangement relatif à Blackrock Metals Inc*., 2022 QCCS 2828; *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354.

[23] Given my determination, set out below, it is not necessary for me to consider EY's alternative approach to jurisdiction grounded on the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

The Transaction

[24] The Transaction calls for an RVO, with excluded assets and liabilities to be vested into a separate entity the parties refer to as "Excluded Co". I am told that

there are no assets designated as excluded assets. On closing, Excluded Co will be assigned into bankruptcy. In the absence of any other qualified bidders, the purchase price of the transaction no longer includes payment of a break fee.

[25] To give effect to the Transaction, the Garibaldi entities will cancel all shares of GAS' existing shareholders and Partnership units and issue new shares and new units to the petitioners. Thus, there is no proposed transfer or assignment of the EA Certificate and the Interim Agreement.

[26] The result is a change of control.

[27] That said, it is important to note that certain principals of what is known as the Aquilini group, are not only principals of the petitioners, are also principals of three of GAS' four extant shareholders, Garibaldi Resorts (2002) Limited, Milborne Development Corporation, and Mountain Resort Developments Inc. (the other GAS shareholder is Garibaldi Alpen Resorts (1996) Ltd.).

[28] The amount of the credit bid has been amended from what was proposed in the Stalking Horse Bid. The credit bid is reduced by $20 million. That amount, owed by the Garibaldi entities (as interest) under their security to the petitioners, will be a retained liability. Also retained will be any potential liabilities arising under the *Environmental Management Act*, S.B.C. 2003, c. 53 [*Env. Mgmt. Act*]. All other liabilities will be vested into Excluded Co.

[29] Otherwise, the entities and their assets falling within the ambit of the RVO are to be released and forever discharged of all claims and encumbrances other than the retained liabilities, which as I have said, include any liability arising under the *Env. Mgmt. Act*.

Reverse Vesting Orders

[30] RVOs are a relatively recent method used in insolvency cases to avoid the purchaser assuming an insolvent debtor's unwanted assets and liabilities. Their use in insolvency proceedings is on the rise, extending beyond their original use in

restructurings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*], into cases brought under the receivership and proposal provisions of the *BIA.*

[31] Typically, an RVO contemplates the sale of the debtor through a transaction structured such that "unwanted" assets and liabilities are removed and vended to a residual company while the desired or "good assets" remain with the debtor acquired by the purchaser.

[32] RVOs circumvent the processes established by Parliament in insolvency legislation. They are not the norm and should only be granted in exceptional circumstances. RVOs have typically been granted where the debtor operates in a highly regulated environment where it is difficult to impossible to transfer licenses, permits, intellectual property, non-transferrable tax attributes, or other intangibles under a typical asset purchase agreement: see, e.g., *Blackrock Metals* at paras. 85–86; *Quest University Canada (Re)*, 2020 BCSC 1883 at paras. 161–162; *Harte Gold* at paras. 38, 48, and 70–71; Janis P. Sarra, "Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions", Canadian Legal Information Institute, 2022 CanLIIDocs 431 at 1-2.

[33] The factors to be considered are well described in the case authorities. In addition in to satisfying the court of the sufficiency of the sales process, the onus is on the proposed purchaser to establish necessity and that the result is at least as favourable as any other viable alternative, no other stakeholder is worse off than they would have been under any other viable structure, and the consideration paid reflects the importance and value of the licenses and permits (or other intangible assets) being preserved under the RVO structure: *Harte Gold* at para. 38; *Blackrock Metals* at paras. 99, 114–116; *Just Energy* at para. 33; *PaySlate #1* at para. 89; Sarra at 17, 19, 23, 27–30; *Peakhill* at paras. 31–48; *Canwest* at paras. 23–26.

EY Recommends Court Approval of the Transaction

[34] EY recommends the Transaction be approved for reasons it identified in its second report filed March 14, 2024 ("Second Report") and the first supplement to the second report filed April 10, 2024 ("First Supplement").

General Comments

[35] EY's general comments, taken from its Second Report, excerpted below, are not disputed:

> [from the Second Report]
>
> **The Receiver's Commentary on the Stalking Horse Agreement**
>
> General Comments
>
> 31. The Receiver is satisfied that a thorough marketing of the opportunity has been undertaken, including in respect of the undertakings of the Receiver in furtherance of the SISP as described above. Based on the foregoing, the Receiver is satisfied and recommends that the Stalking Horse Agreement be approved by this Honourable Court for the following reasons:
>
> a) the Stalking Horse Agreement is the only transaction resulting from the SISP;
>
> b) the Stalking Horse Agreement will ensure the continued business relationships between Garibaldi [entities] and the EAC [EA Certificate] consultants who are working to assist in the satisfaction of the EAC Conditions;
>
> c) the Stalking Horse Agreement ensures continued progress towards a new resort in southwestern British Columbia. It is expected that this progress will lead to continued and future sustained economic benefit in the region;
>
> d) the Receiver believes the Stalking Horse Agreement is the best outcome for stakeholders;
>
> e) the Receiver believes the Stalking Horse Agreement represents a greater recovery than would be available under a bankruptcy; and
>
> f) the Receiver believes that spending further time and resources marketing Garibaldi assets will not result in a transaction superior to the Stalking Horse Agreement.

Change in Amount of the Credit Bid

[36] EY supports the amendment to the amount of the credit bid and GAS' retention of $20 million as a retained liability. In its second report, EY explained the petitioners seek to amend the Transaction in this way based on advice from their

financial advisors. No party took issue to EY's advice that the change is "superficial in nature, does not prejudice any of the Garibaldi [entities'] stakeholders or potential bidders", and "does not impact on the efficacy of the SISP" (including the ability of any potential bidder to tender a bid that complies with the terms of the SISP), and is being done to avoid potential unintentional and adverse consequences to the petitioners as successful bidders.

The RVO

[37] EY recommends the RVO be approved. Two aspects of its advice to the Court are not challenged by the Province: the RVO produces an economic result at least as favourable as any other viable alternative and the consideration is appropriate. As mentioned at the outset of these reasons, the Province's objections are grounded on jurisdiction and what are known as the *Harte Gold* factors of necessity and whether any stakeholder is worse off under the RVO than they would be under any other viable structure.

[38] Before turning to my determination of the Province's objections, it is useful to set out EY's advice concerning jurisdiction and the two *Harte Gold* factors in issue.

[39] In terms of jurisdiction, EY (and the petitioners) submit that the issue of jurisdiction has been decided in prior decisions of this Court (cited in para. 21) and that I am bound to follow them based on the principle of horizontal *stare decisis*. Further, the RVO, it says, does not contravene provincial legislation.

[40] Turning to the two *Harte Gold* factors in issue, EY's advice concerning necessity, excerpted below, is predicated on urgency to satisfy the construction pre-conditions and the absence of any other viable alternative to preserve both the value of the Garibaldi entities as going concerns and the Project:

> [from the Second Report]
>
> 35. The Receiver considered the appropriateness of an RVO in the circumstances by evaluating the following factors:
>
> *a) Why is the RVO necessary in this case?*

> The RVO is necessary given the circumstances of the Debenture Holder's requirement to maintain the EAC, the Interim Agreement and the tax attributes that may not be assignable or conveyed under a typical asset sale.
>
> The RVO structure maintains the existing legal entities and ensures the preservation of the going concern nature of the Project, the EAC process and the Interim Agreement. The First Report describes the incredibly tight timeline to satisfy the preconstruction EAC conditions and the pivotal role the EAC plays in maintaining the Interim Agreement, Garibaldi only material asset. Any delay between now and the EAC deadline, being January 26, 2026, could have a material impact on the value of Garibaldi and the going concern nature of the Project. The First Report contains a gantt chart outlining the outstanding requirements that will need to be satisfied urgently and the required sequencing of the same to ensure those conditions are satisfied prior to the EAC Deadline. The Receiver notes that the near term estimated costs associated with satisfying these conditions far exceeds the amount available to it through Receiver borrowing within these proceedings. Accordingly maintaining the financial requirements of continuing to pursue the satisfaction [of] the EAC conditions for an extended period in receivership is not possible and in order for the Project to continue a transaction is necessary.

[from the First Supplement]

> 9. If Garibaldi is not able to keep the EAC in good standing, the Interim Agreement is at risk of being terminated and Garibaldi will not have any material assets or going concern enterprise value.
>
> 10. Given the unique nature of the Interim Agreement, its interdependence on the EAC, and the corresponding considerable expenses, and the tight timeline to satisfy the Pre-Construction Conditions, it is difficult to ascertain a value for the assets of Garibaldi. The Interim Agreement grants an intangible opportunity to build the Project, at the significant cost and risk of the Purchasers.

[Italic emphasis in original; underline emphasis added]

[41] EY considered whether an asset vesting order ("AVO") was possible as part of its necessity analysis:

[from the First Supplement]

> 33. In addition to considering alternative insolvency proceedings, the Receiver considered whether there was the potential to amend the Stalking Horse Agreement to allow for the assets of Garibaldi to transfer to the Purchaser by way of an assets vesting order ("**AVO**").

> 34. As mentioned previously, the Province has unilateral authority under the Interim Agreement to approve the assignment of the Interim Agreement. The Receiver does not think an AVO is a viable alternative to the Reverse Vesting Order without certainty from the Province that they would consent to the assignment of the Interim Agreement. It is unclear how long the Province would need to consult internally before approving the assignment of the Interim Agreement to the Purchasers. The Receiver and Purchasers were not willing to undertake the costs associated with drafting a new purchase and sale agreement and associated court material without knowing, with certainty, that the AVO could proceed without opposition or delay in obtaining consent on the assignment of the Interim Agreement from the Province.
>
> 35. Additionally, it is expected that any tax attributes within Garibaldi would be preserved through the Reverse Vesting Order would likely not be transferrable through an AVO.
>
> 36. Based on these factors and without the Province agreeing to expedite their consent to the assignment [of] the Interim Agreement and the EAC to the Purchasers, the Receiver does not believe an AVO is practical or reasonable in the circumstances.
>
> [Bold in original, underling emphasis added]

[42] On Friday before the hearing was to begin the following Monday, the Province informed EY in writing that if an application was made requesting an assignment or transfer of the EA Certificate and the Interim Agreement to the purchasers under an AVO, "the Chief Executive Assessment Officer (i.e., the statutory decision-maker) could make a transfer decision **within three weeks** of receiving a complete application for transfer" [bold in original, underline emphasis added]. According to the Province, a transaction by an AVO is a viable alternative to the RVO. However, the Province, who is aware of the relationship between the petitioners and three of GAS' four existing shareholders and to the Partnership, the looming timelines imposed under the EA Certificate, and urgent work to be done in the next twelve months to meet the deadline, has not indicated whether it will, would, or was likely to grant approval of a transfer when it responds. When the Province was pressed on the point during submissions, it became clear that the Province had not provided instructions to convey to the other parties and the Court of its position in that respect.

[43] As for whether there any viable alternatives to an RVO and whether any stakeholder is worse off, EY advises:

> [from the Second Report]
>
> 35. …
>
> *c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable structure?*
>
> No, the Receiver is not aware of any stakeholder who would be worse off under the RVO structure. The Receiver notes that there are no other alternative viable structures and absent the Stalking Horse Agreement, a liquidation or bankruptcy would be a likely scenario which, as mentioned above, would have a negative economic impact on the Project and the various stakeholders as compared to the Stalking Horse Agreement.
>
> [from the First Supplement]
>
> 17. The Receiver understands, based on conversation with the Province, that an assignment of the Interim Agreement to a third party purchaser would require consultation between several departments within the Province. The duration and resulting outcome of such a consultation process is unclear. Without certainty on the ability to assign the Interim Agreement, the Purchasers are not in a position to undertake any material costs associated with satisfying the EAC conditions.
>
> 18. The Province, through various ministries, is afforded consultation and approval rights within the EAC. There rights are maintained through the Stalking Horse Agreement and the Reverse Vesting Order sought by the Receiver. If the Reverse Vesting Order is approved by this Honourable Court there will be no impact to the Province's oversight of the EAC process.
>
> [Italic emphasis in original; underline emphasis added]

[44] EY's analysis also confirms that proceeding through bankruptcy or proposal proceedings under the *BIA* or under the *CCAA* would not provide any advantages and instead, would, at a minimum, cause significant delay, putting completion of the construction pre-conditions in considerable jeopardy, and also cause additional unwarranted expense. Bankruptcy proceedings would, EY said, "likely erode all of the enterprise value within Garibaldi [entities]": the First Supplement at para. 31.

[45] In its conclusion, EY advises that none of the alternatives it reviewed – an AVO transaction, a proposal or bankruptcy proceedings under the *BIA*, or

conversion to a *CCAA* proceeding – provide any additional benefit or better outcome and could put the Project at risk:

> [from the First Supplement]
>
> 37. In addition to the factors considered above, the Receiver notes none of the alternatives described above would provide any additional benefit or a better outcome to stakeholders. The recovery to stakeholders does not improve in any of the above alternatives. It is believed that the additional costs, uncertainty of outcome and potential delays associated [with] commencing or converting to a different proceeding is prejudicial to the Purchaser, who is the only creditor with a remaining economic interest in Garibaldi, and could put the Project at risk.
>
> [Emphasis added]

The Province Opposes the Transaction

Introductory Remarks

[46] The Province's opposition to the Transaction at the outset of the hearing was three-fold.

[47] First, there is no jurisdiction in the *BIA* to approve RVOs.

[48] Second, if there is, the RVO cannot be approved under the *BIA* in this case because it circumvents provincial legislation and its statutory decision-making powers, and, in any event, EY has not met its onus to satisfy the *Harte Gold* factors concerning necessity and the requirement that no other stakeholder is worse off.

[49] Third, the proposed release in the contemplated court order was overly broad as it would immunize the purchaser from its obligations as a "responsible person" under the *Env. Mgmt. Act* for any prior contravention of that statute. The Province's objection was resolved when the petitioners agreed to amend the release language.

Jurisdiction under the *BIA*

[50] The Province truncated its submissions somewhat concerning the absence of jurisdiction to order RVOs under any provision of the *BIA* after EY agreed that if it did, the Province could not be taken to have prejudiced what it described as its "no jurisdiction writ large" defence when its appeal of the order in *Peakhill*, approving an

RVO in a *BIA* receivership setting, is argued in the Court of Appeal on June 6, 2024. Nevertheless, the Province's submissions were, in the end, fulsome and referred to many authorities and points grounding its overarching defence since they were, it said, essential to and informed its position that there is no jurisdiction in the specific context of this case to approve the proposed RVO. For that reason, I have endeavoured to summarize the Province's position, which as I have mentioned, asks me to reach a different conclusion than other decisions of this Court on the basis that horizontal *stare decisis* is not engaged.

[51] The Province's overarching position that no jurisdiction exists under the *BIA* to grant RVOs relies on case authorities and commentary in certain articles discussing the difference between the rules-based nature of the *BIA* as opposed to the elastic provisions of the *CCAA:* see, e.g., *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60; *Canada v. Canada North Group Inc*., 2021 SCC 30; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd*., 2015 SCC 53; *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc*., 2006 SCC 35; *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508; *Yukon (Government of) v. Yukon Zinc Corporation*, 2021 YKCA 2; Professor Sarra's article; Aminollah Sabzervari, "A Hill Too Far: Reverse Vesting orders in BIA Receiverships" (26 February, 2024), online (CanLII Connects): <https://canliiconnects.org/en/commentaries/93579>; Eamonn Watson et al., "Anything You Can Do, I Can Do Better: Does the *CCAA* Provide Broader Discretionary Relief than the *BIA*?", 2022 Annual Review of Insolvency Law, 2022 CanLIIDocs 4309.

[52] In particular, the Province relies heavily on *dicta* from the Supreme Court of Canada (e.g., *Century Services* at para. 14) and appellate decisions discussing the different objectives of the receivership regime in the *BIA,* focusing on liquidation of a debtor's assets to maximize value to creditors, from the restructuring goals of the *CCAA*.

[53] The Province contends that neither s. 183(1)(c) nor s. 243(1) of the *BIA*, which it describes as general in nature, advanced as a jurisdictional basis in this and other cases where RVOs under the *BIA* are sought, are sufficient to ground jurisdiction in the rules-based regime of the *BIA* established by Parliament.

[54] Those sections provide:

> Courts vested with jurisdiction
>
> **(183)(1)** The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers: …
>
> > **(c)** in the Provinces of Nova Scotia and British Columbia, the Supreme Court; …
>
> …
>
> **Court may appoint receiver**
>
> **243 (1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > **(a)** take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the Insolvent person or bankrupt;
> >
> > **(b)** exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
> >
> > **(c)** take any other action that the court considers advisable.
>
> [Bold in original]

[55] The Province contrasts those provisions from s. 11 of the *CCAA*, excerpted below, which has been determined in numerous case authorities to ground jurisdiction to approve RVOs in restructuring proceedings brought under that statute:

> **General power of court**
>
> **11** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any

> other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
>
> [Emphasis in original]

[56] The Province's characterization of ss. 183 and 243 is aptly summarised in these extracts from its application response:

> 30. By its terms, s. 183 is general in nature. Indeed, it is difficult to conceive of a provision that could be more general. …
>
> 34. The *BIA*, unlike the *CCAA*, is prescriptive, detailed and intricate. It carefully weighs competing interests. Allowing an RVO in a *BIA* proceeding – which inherently offers less room for judicial flexibility, and wherein there is no broad grant of authority equivalent to *CCAA* s. 11 – risks upsetting the comprehensive *BIA* scheme chosen by Parliament.
>
> 35. Simply put, jurisdiction cannot arise under s. 183 because s. 183 does not provide jurisdiction to approve a proposal without a vote, to approve a proposal that has failed to meet the sufficient majority of votes (which results in a deemed assignment into bankruptcy), to approve a proposal that does not have the mandatory payment terms, or to impose a proposal that does not meet other requirements mandated by the *BIA*. Section 183 cannot be read as providing jurisdiction which would bypass and upset the *BIA* scheme chosen by Parliament.
>
> …
>
> 38. For the same reasons as set out above concerning s. 183, the non-descript language of s. 243 cannot provide jurisdiction to bypass the structure of the *BIA*.

[57] It is appropriate to observe at this juncture that concerns over bypassing processes put in place by Parliament are addressed through jurisprudence confirming the need to demonstrate exceptional circumstances exist and an evidence-based rationale to find that the *Harte Gold* factors are satisfied before approving an RVO.

[58] In contrast to the Province's characterization of the *BIA* as a rigid, formulaic, rules-based statute, an expansive interpretation of flexibility of those sections of the *BIA* to allow insolvency judges to react to circumstances as they arise to do what practicality demands and justice dictates in *BIA* proceedings, including receiverships, was remarked upon as far back as 1994 by the respected insolvency jurist, Justice Farley, in *Canada (Minister of Indian Affairs & Northern Development)*

v. Curragh Inc. (1994), 114 D.L.R. (4th) 176, 1994 CanLII 7468 (Ont. C.J. (Gen. Div.) [Commercial List]).

[59] In that case, Farley J. considered the scope of jurisdiction granted by Parliament in the language of what was then s. 47(2)(c) of the *BIA*, which authorized a court to direct an interim receiver to take such other action as the court considers advisable. His determination of the authority granted by that section is cited, with approval, in the following excerpt from the Ontario Court of Appeal's decision in *Third Eye Capital*:

> [51] Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor's business, and market and sell the debtor's property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205; Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.
>
> [52] Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver . . . to . . . take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:
>
> > It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.
>
> See also *Loewen Group Inc., Re* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.J. [Commercial List]).
>
> [53] Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim

> receiver to do not only what "justice dictates" but also what "practicality demands".
>
> [Emphasis added]

[60] The Ontario Court of Appeal took the same view (of s. 243) in *Third Eye Capital* of the flexibility granted to insolvency judges to authorize a receiver to enter into agreements to sell a debtor's property, recognizing the receivership regime must "be flexible and responsive to evolving commercial practice":

> [55] Parliament amended s. 47(2) through the *Insolvency Reform Act* 2005 and the *Insolvency Reform Act* 2007 which came into force on September 18, 2009. The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.
>
> …
>
> [57] When Parliament enacted s. 243, it was evident that courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates" and "practicality demands". As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.): "It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law". Thus, Parliament's deliberate choice to import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.
>
> …
>
> [85] In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an agreement to sell Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.
>
> [86] Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency — it facilitates the maximization of proceeds and realization of the debtor's assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus

> reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.
>
> [Emphasis added]

[61] The same point is made in the 2022 decision of the Supreme Court of Canada, *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, where, in the context of a *BIA* receivership proceeding, the Court was asked to decide whether a contractual agreement to arbitrate under a provincial statute should "give way to (what Justice Côté described at para. 1 as) the public interest in the orderly and efficient resolution of a court-ordered receivership under s. 243 of the" *BIA*:

> [148] Further, under s. 243(1)(c) of the *BIA*, a court may appoint a receiver to, among other things, "take any . . . action that the court considers advisable", if the court considers it "just or convenient to do so". This very expansive wording has been interpreted as giving judges the "broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise" in relation to court-ordered receiverships (*DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, 2021 ABCA 226, 459 D.L.R. (4th) 538, at para. 20; see also Houlden, Morawetz and Sarra, at § 12:18; *Dianor*, at paras. 57-58). Section 243(1)(c) thus permits a court to do not only what "justice dictates" but also what "practicality demands" (*Dianor*, at para. 57; *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.* (1994), 1994 CanLII 7468 (ON SC), 114 D.L.R. (4th) 176 (Ont. C.J. (Gen. Div.)), at p. 185).
>
> [Emphasis added]

See also paras. 9, 147.

[62] In the Watson article cited by the Province, the authors remarked that the Court's decision in *Petrowest* is "consistent with the trend reviewed in this article of encouraging Canadian courts to harmonize the two [*BIA* and *CCAA*] insolvency regimes."

[63] The Province nonetheless stands by its position on jurisdiction and maintains that the exceptions to horizontal *stare decisis* described in *Hansard Spruce Mills* and *Sullivan* are engaged. It contends that I am not bound by the prior decisions of this Court (*PaySlate #1*, *PaySlate #2*, *Peakhill*, *Port Capital*, and *Canwest*) determining that jurisdiction exists generally in the *BIA* to grant RVOs.

[64] The Province also says that there is no precedential value to decisions of the Ontario Superior Court of Justice approving RVOs (*Vert Infrastructure Ltd. (Re)* (8 June 2021), ONSC [Commercial List], Court file No. Toronto CV-20-00642256-00CL; and *2056706 Ontario Inc et al (Re)* (7 January 2021), ONSC [Commercial List], Court file No. Toronto CV-20-00638503-00CL) in the absence of reasons discussing jurisdiction and also since the orders were issued by consent.

[65] Leaving aside potential issues arising from the Ontario orders, the Province is in a difficult position concerning horizontal *stare decisis*.

[66] As Justice Gomery points out in *Canwest* at para. 17, there are narrow exceptions to the principle. A useful description of the principle and the exceptions is found in *Sullivan*:

> [6] …The right approach can be stated plainly. Superior courts at first instance may not be bound if the prior decision is distinguishable on its facts or if the court had no practical way of knowing that the earlier decision existed. Otherwise, the decision is binding and the judge may only depart from it if one or more of the exceptions helpfully explained in *Re Hansard Spruce Mills*, [citation omitted] apply.
>
> …
>
> [75] The principle of judicial comity — that judges treat fellow judges' decisions with courtesy and consideration — as well as the rule of law principles supporting *stare decisis* mean that prior decisions should be followed unless the *Spruce Mills* criteria are met. Correctly stated and applied, the *Spruce Mills* criteria strike the appropriate balance between the competing demands of certainty, correctness and the even-handed development of the law. Trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances:
>
> > 1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;
> >
> > 2. The earlier decision was reached per incuriam ("through carelessness" or "by inadvertence"); or
> >
> > 3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.
>
> [76] First, a judge need not follow a prior decision where the authority of the prior decision has been undermined by subsequent decisions. This may arise in a situation where a decision has been overruled by, or is necessarily inconsistent with, a decision by a higher court (see Rowe and Katz, at p. 18, citing Kerwin, at p. 542).

> [77] Second, a judge can depart from a decision where it was reached without considering a relevant statute or binding authority. In other words, the decision was made *per incuriam*, or by inadvertence, a circumstance generally understood to be "rare" (see, e.g., *The Owners, Strata Plan BCS 4006 v. Jameson House Ventures Ltd.*, 2017 BCSC 1988, 4 B.C.L.R. (6th) 370, at para. 132). The standard to find a decision *per incuriam* is well-known: the court failed to consider some authority such that, had it done so, it would have come to a different decision because the inadvertence is shown to have struck at the essence of the decision. It cannot merely be an instance in which an authority was not mentioned in the reasons; it must be shown that the missing authority affected the judgment (Rowe and Katz, at p. 19).
>
> [78] Third and finally, a judge may depart where the exigencies of the trial required an immediate decision without the opportunity to consult authority fully and thus the decision was not fully considered. An unconsidered judgment is not binding on other judges (Rowe and Katz, at p. 18, citing *Spruce Mills*, at p. 592).

[67] The Province points out that the RVO ultimately approved in *PaySlate #2* was in the context of the proposal provisions of the *BIA* which have different objectives (akin to restructuring under the *CCAA*) and that jurisdiction was uncontested.

[68] Even though jurisdiction was uncontested, it was considered in *PaySlate #1*: paras. 84–86.

[69] *Peakhill* was decided after *PaySlate #2*. Justice Loo determined he had jurisdiction to approve an RVO in a receivership proceeding. He considered the Province's argument that ss. 183(1) and 243 are insufficient to ground jurisdiction to approve an RVO in a *BIA* receivership proceeding. Justice Loo's reasons cite Professor Janis Sarra's article (at paras. 24, 45–48) which includes cautionary but not prohibitory language concerning the use of RVOs in *BIA* proceedings. Moreover, the Province advised me in submissions on this application that it put *T.C.T. Logistics* before Loo J. as part of its jurisdiction argument.

[70] *Port Capital,* also a *BIA* receivership proceeding, followed *Peakhill*. Justice Masuhara's reasons do not specifically address jurisdiction. His decision to approve the RVO following *Peakhill* rested on his determination that the exceptions to horizontal *stare decisis* argued by the Province were not engaged: paras. 9–11.

[71] The Province was not a party to *Canwest*, which was another receivership proceeding brought under the *BIA*. The Attorney General of Canada, who was a party, maintained its "principled objection" (described at para. 5 of the reasons) that the court has no power to order an RVO in a receivership proceeding but also acknowledged that the exceptions to horizontal *stare decisis* were not engaged. Justice Gomery considered the point in any event and determined he was bound by the decision in *Peakhill*:

> [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.

[72] On the instant application, the Province's horizontal *stare decisis* argument ultimately narrowed to this point: the decisions of this Court (it says I am not bound to follow) did not consider the Yukon Court of Appeal's 2021 discussion of the purposes and limits on a receiver's powers in *Yukon Zinc* (the Province says *Yukon Zinc* was not cited in argument in those cases).

[73] According to the Province, the reasons in *Yukon Zinc* provide a better discussion and analysis of the points the Province made in *Peakhill* and refers to more case authorities.

[74] EY points out that although the Province was not a party in *Canwest*, it was in *Peakhill* and *Port Capital* and had the opportunity to but did not cite *Yukon Zinc*.

[75] The Province conceded that it argued many of the points raised and some of the authorities discussed by Justice Tysoe (sitting as a justice of appeal of the Yukon Court of Appeal) in *Yukon Zinc* before Justice Loo in *Peakhill*. Moreover, what *Yukon Zinc* decided is that the court could not permit the receiver to extinguish substantive rights of third parties or "subvert provincially regulated property and civil rights" in the absence of clear statutory language: at paras. 43, 51, 120–122. That

determination is consistent with the *dicta* of the Supreme Court of Canada in *T.C.T. Logistics*, which was cited to Loo J. in *Peakhill.*

[76] The Province's position is, in essence, that *Peakhill*, *Port Capital*, and *Canwest*, and possibly the determination of jurisdiction in proposal provisions of the *BIA* in *PaySlate #1*, were wrongfully decided (I say possibly because the Province seemed to suggest that jurisdiction may exist under the proposal provisions of the *BIA* as their purpose was akin to the restructuring provisions of the *CCAA*). That position is for the Province to advance when the *Peakhill* appeal is argued before the Court of Appeal.

[77] For all of these reasons, I do not find that the exceptions to horizontal *stare decisis* are engaged.

Are there Impediments to Granting the RVO in this Case?

Jurisdiction

[78] The Province's position is that absent circumstances involving paramountcy, which all parties agree are not present on this application, ss. 183(1) and 243(1) are of such general application that they cannot be used to breach, circumvent, or otherwise work around provincial legislation.

[79] Relying on s. 72 of the *BIA* (excerpted below) and case authorities such as *T.C.T. Logistics*, *Lemare Lake Logging*, and *Yukon Zinc*, the Province contends that the Court has no jurisdiction to approve the RVO in this case:

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

[80] According to the Province, the RVO does a "work-around" of s. 33 of the *E.A. Act*, which includes its statutory decision-making powers and (undefined) rights for

consultation amongst various provincial government agencies, and s. 99(2) of the *Land Act*, R.S.B.C. 1996, c. 245 [*Land Act*].

[81] In my opinion, the point to be taken from the authorities cited by the parties is that while jurisdiction exists in *BIA* proceedings in appropriate circumstances to approve RVOs, it is not unbounded. Standing alone, ss. 183(1) and 243(1) do not afford a basis in receivership proceedings to circumvent provincial legislation or abrogate third party contractual rights.

[82] But that is not the result in this case.

[83] The RVO does not circumvent provincial legislation and statutory decision-making powers under the *E.A. Act*.

[84] Transfer applications by a holder of an environmental assessment certificate, such as the EA Certificate issued to GAS, to another person are addressed in s. 33 of the *E.A. Act*. The statute is silent to circumstances such as the instant case involving a change of control:

> **Transfer of certificate or exemption**
>
> **33** (1) On application by the holder of an environmental assessment certificate or exemption order, the chief executive assessment officer may transfer the certificate or order to another person on any conditions the chief executive assessment officer considers appropriate.
>
> (2) An application under subsection (1) must be made in accordance with the requirements of the chief executive assessment officer.
>
> (3) The chief executive assessment officer may make requirements for the purposes of this section that apply generally or with respect to a specific reviewable project.
>
> [Bold in original]

[85] However, the Province's June 2021 Transfer Policy and Procedures of the Chief Executive Assessment Officer does. It contemplates a change of control, contemplated by the Transaction and the RVO, as one of the identified circumstances in which a certificate holder is not required to engage in the transfer process:

> **3.1. No Transfer of EAC or Order Required**

> A request to transfer an EAC or Order is not required in the following cases:
>
> - If the Holder retains ownership of the EAC or Order and project assets. For example:
>   - Transfers in ownership of shares in a corporate Holder;
>   - Change of Holder legal name (e.g. rebranding); or,
>   - Amalgamation of a corporate Holder with another corporation.
> - If the EAC or Order or project assets are held in the name of a partnership (e.g. the Holder is simply identified as 123456 BC L.P.), a change in partners (either general partners or limited partners) does not require a transfer of the EAC.
>   - However, if the EAC or Order is held by one or more partners for the benefit of the partnership and the EAC is being transferred to a different partner or group of partners for the benefit of that partnership, the EAC or Order will need to be transferred.
>
> [Bold in original; underlining emphasis added]

[86] The *Land Act* is also silent regarding a change of control of the holder of an interest or right in land. Section 99(2) addresses situations where a person seeks to dispose or deal with an interest in land, which GAS is not seeking to do:

> A person may not dispose of or deal with an interest in Crown land held under a disposition, other than a Crown grant, unless
>
> (a) the disposition under which the interest is held expressly allows it, or
>
> (b) the minister approves in writing the disposition or dealing.

[87] The Province has also not established that the proposed RVO or any other aspect of the Transaction breach its contractual rights. The Interim Agreement is silent concerning change of control. While it prohibits assignments without its consent (not to be unreasonably withheld), it does not address an internal restructuring or change of control by GAS. There is a provision (s.10.01(e)) that permits the Province to exercise any or all of its remedies under s. 10.02 (e.g., to pursue remedies in law or in equity, suspend or terminate the license, or waive any default) if a receiver or receiver-manager is appointed to administer or carry on the business operations of GAS. However, there is no evidence to suggest, nor have I been told, that the Province has, intends to, or may elect to rely on that provision. Instead, as discussed above, the Province's objection to the RVO is grounded on its

position that there is no jurisdiction generally to approve RVOs under the *BIA* and its alternative position that in the context of this case, the RVO should not be approved because it abrogates its statutory decision-making powers.

[88] The Province has not established that the proposed RVO or any other aspect of the Transaction breach or circumvent any other inter-departmental consultation powers.

[89] In all, this is not a case where the RVO seeks to circumvent or work around provincial legislation, legislative intent, and statutory decision-making powers. To the contrary, the Province has specifically exempted from the transfer process the change of control mechanism called for in the Transaction.

[90] The Province has not established that the RVO aims to extinguish or adversely affect substantive rights of any third party. The present circumstances are distinguishable from the facts of the cases cited by the Province where the receivership jeopardized unionized employees' rights in *T.C.T Logistics* or infringed property rights of an equipment lessor in *Yukon Zinc*.

[91] Thus, s. 72 of the *BIA* is not engaged.

Harte Gold Factors

[92] The Province argues that EY has not satisfied its onus to establish the *Harte Gold* factor of necessity since it has not applied for approval from the chief executive assessment officer to transfer the EA Certificate to the petitioners. As I have found, that application is not required. The change of control mechanism contemplated by the Transaction is specifically excluded from the application process.

[93] Nonetheless, EY must still establish necessity on the evidence, which I find that it has.

[94] The RVO is essential to allow GAS to meet the timelines imposed by the Province in the EA Certificate and thereby preserve the going concern value of the Project for all stakeholders, the anticipated economic benefits for all stakeholders,

the goodwill established with and rights of the Squamish Nation, and tax attributes, in circumstances where the Province, aware of instant application since March 14, 2024, and knowing of the existing relationship between the petitioners and existing shareholders of GAS and the Partnership, and the urgent timeframe in which to complete the construction pre-conditions, has not advised, let alone indicated whether it would approve a transaction contemplated by a traditional AVO or that it would extend the deadlines in the EA Certificate (EY advises in its First Report that no further extensions will be granted). The Transaction represents the highest and best recovery for all of the Garibaldi entities' stakeholders.

[95] In contrast, a traditional AVO requires not only the reapproval from the Province, but also the preparation of a new application package, drafting and negotiation of a new purchase agreement, and filing of a new application to obtain the relevant order of the Court; all of which will result in additional delay and costs. Pursuing a transaction through the *CCAA* process would, given the urgency established by EY, similarly result in additional delay and in all probability, I find, doom satisfying the construction pre-conditions in the EA Certificate to failure. The Province's insistence on an unnecessary formal transfer application being made as part of an AVO transaction in these circumstances underscores the necessity of the RVO.

[96] EY has also established that no other stakeholder, including the Province, is worse off if the RVO is approved. Nothing in the Transaction avoids consultation obligations with the Squamish Nation. To the contrary, the EA Certificate retained by GAS provides for ongoing, broad oversight and consultation with the Squamish Nation throughout the Project to ensure its construction and the operation of the resort are carried out in a satisfactory manner. The petitioners are aware of those obligations contained in the EA Certificate and, EY advises, the petitioners are committed to satisfying them. The Province is the only stakeholder objecting to the Transaction despite its stated desire for the Project to complete. None of its statutory powers are adversely affected. There is no other viable alternative at this juncture to preserve the economic benefits to all stakeholders.

The Release

[97] The Province's fourth objection concerning a release of pre-transaction obligations under the *Env. Mgmt. Act*, which was the Province's only objection to the release of the Garibaldi entities' liabilities, was resolved during the course of the hearing when the purchasers agreed to amend the RVO, with the following language, to remain liable to any governmental authority:

> Notwithstanding the terms of this Order or the Purchase Agreement, any "Claims", "Encumbrances", or "Excluded Liabilities" which arise in favour of Governmental Authorities do not vest in Excluded Co and continue to rest with GAS and/or LP…

[98] With that amendment, I am satisfied the release is appropriate and meets these criteria identified in the case authorities: (a) whether the parties to be released from claims were necessary and essential to the restructuring of the debtor; (b) whether the claims to be released were rationally connected to the purpose of the plan and necessary for it; (c) whether the plan could succeed without the releases; (d) whether the parties being released were contributing to the plan; and (e) whether the release benefitted the debtors as well as the creditors generally: *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587 at paras. 61 and 70; *Blackrock Metals* at paras. 128–130; *Harte Gold* at paras. 78–86.

Conclusion

[99] In conclusion, jurisdiction exists under the *BIA* to approve the RVO. EY has met its onus to satisfy the *Harte Gold* factors. EY has demonstrated an evidence-based rationale to approve the RVO. Exceptional circumstances exist to warrant approval of the RVO. They arise from the urgency to complete the construction pre-conditions (in order to preserve value to the Garibaldi entities and their stakeholders, including the Province) coupled with the lack of any meaningful response from the Province that would allow for an expeditious AVO transaction.

[100] The Transaction proposed by EY is also commercially reasonable. EY has shown that the factors from the governing authority, *Royal Bank of Canada v. Soundair Corp*. (1991), 4 O.R. (3d) 1, 1991 CanLII 2727 (C.A.), to determine when

to approve a sale negotiated by a receiver are met: (a) whether the receiver 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 unfairness in the sales process: *Soundair Corp.* at paras. 16, 21-22. Looking at the Transaction as a whole, I am satisfied and find that EY has established that the proposed sale is appropriate, fair, and reasonable.

Disposition

[101] EY's application is allowed. The Transaction with the RVO is approved.

"Walker J."