COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia v. Peakhill Capital Inc.,* 2024 BCCA 246

Date: 20240702
Docket: CA49320

Between:

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

Appellant
(Respondent)

And

Peakhill Capital Inc.

Respondent
(Petitioner)

And

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

Respondents
(Respondents)

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Voith
The Honourable Justice Winteringham

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

Counsel for the Appellant:	O.J. James R. L. Power B.A. Gulka-Tiechko
Counsel for the Respondent, Cenyard Pacific Developments Inc.:	J.D. Schultz E.T.T.Y. Newbery
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Place and Date of Hearing:	Vancouver, British Columbia June 3, 2024

Place and Date of Judgment: Vancouver, British Columbia
July 2, 2024

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Mr. Justice Voith
The Honourable Justice Winteringham

Summary:

This case concerns an order under the Bankruptcy and Insolvency Act [BIA] approving a transaction, known as a reverse vesting order ("RVO"), designed to avoid provincial property transfer tax for the benefit of creditors. The appellant Province submits that the judge erred: by grounding jurisdiction for the RVO in the BIA; by contravening s. 72(1) of the BIA in granting an order that abrogates the Property Transfer Tax Act [PTTA]; and in exercising his discretion to grant the RVO.

Held: Appeal dismissed. Section 243 of the BIA confers jurisdiction to grant an RVO in a receivership; the appellants did not satisfy the Court that the transaction at issue undermines the PTTA; and finally, the judge reasoned that the RVO furthered the purpose and object of the BIA, namely by maximizing return for creditors while balancing other risks. He did not err in exercising his discretion.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[1] The appellant, the Province, appeals from an order pronounced in a receivership under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], approving what is referred to as a reverse vesting order ("RVO").

[2] Reduced to its essentials, this RVO approved a transaction whereby the shares of the insolvent debtor were sold to a purchaser. As part of the transaction, the unwanted assets and liabilities of the debtor were stripped out of the company and transferred to another corporate entity (the residual company), leaving only the valuable real property as an asset of the company. The sale of the shares therefore transferred the beneficial interest in the property to the purchaser of the company without transferring title to the underlying real estate asset. By avoiding the transfer of title, the transaction did not attract property transfer tax ("PTT") under the *Property Transfer Tax Act*, R.S.B.C. 1996, c. 378 [*PTTA*], thereby enhancing, for the benefit of creditors, the value of the estate for distribution to them. If tax were payable, the amount available for distribution to the creditors would have been reduced by the tax owing.

[3] The use of RVOs appears to be a relatively recent innovation in insolvency proceedings. They have been used principally, it seems, in restructuring the affairs

of insolvent companies under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*], (see, e.g., *Harte Gold Corp. (Re)*, 2022 ONSC 653) or the proposal provisions of the *BIA* (see, e.g., *PaySlate Inc. (Re)*, 2023 BCSC 608 [*PaySlate #1*]). We are told that this case is the first opportunity for an appellate court to consider whether a court in a receivership proceeding has the jurisdiction to authorize an RVO rather than an approval and vesting order ("AVO") involving the transfer of title from the insolvent debtor to a purchaser. It seems that, if such a jurisdiction exists, the parties invite the Court to identify the criteria governing the exercise of discretion to make such an order.

[4] For completeness, the order under appeal also approved an AVO, as an alternative transaction in the event the RVO was improperly approved, for the sale and transfer of the underlying asset, at a reduced price to account for PTT that would then be owing.

Reasons for Judgment

[5] The judge began by outlining the transaction and the rationale for it. He noted, at para. 14, that "(i)t is uncontested that the purpose for structuring the Transaction in this way, as opposed to through a conventional AVO, was to avoid paying PTT of approximately $3.5 million."

[6] The judge first considered whether he had jurisdiction to make the order sought. The application grounded jurisdiction in s. 243 of the *BIA* and s. 39 of the *Law and Equity Act,* R.S.B.C. 1996, c. 253 [*LEA*]. The judge followed a decision of Justice Walker in *PaySlate #1* that had found jurisdiction to grant an RVO in the courts' general jurisdiction under s. 183(1)(c) of the *BIA*. That section grants the Supreme Court of British Columbia "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 …".

[7] The judge considered that Justice Walker's decision was a complete answer to the challenge to jurisdiction mounted by the Province. In passing, I comment that I am not persuaded that that was necessarily so, if only because Justice Walker's

decision did not deal with an RVO in the context of a receivership, but dealt rather with a proposal under the *BIA*. The judge in the present case did not go on to decide whether s. 243 also provided the necessary jurisdiction.

[8] The judge then turned to a second argument, rooted in the implications of s. 72(1) of the *BIA*, which limits the jurisdiction of the court such that the *BIA* cannot "be deemed to abrogate or supersede" provincial laws of general application that relate to property and civil rights.

[9] The judge concluded that this argument did not properly relate to jurisdiction, but went to whether an RVO was appropriate on the particular facts of the case. On that question, the judge identified the issue as being whether an RVO may be granted solely for the purpose of achieving a tax benefit.

[10] The judge turned to examine cases in which RVOs had been authorized for the tax benefits they provide. I do not think it necessary to summarize the judge's analysis of those cases. It is sufficient to observe that the judge recognized that typically RVOs had been used to preserve going concerns or to deal with situations where, for example, licences were not readily transferrable. Moreover, these cases typically involved restructuring, not liquidation. Furthermore, he identified a common theme in the cases: that RVOs should be sanctioned only where they furthered the remedial objects of the legislation under which authorization was sought, and that they were not regarded as routine, the norm, but rather were "exceptional" or "extraordinary". The judge commented:

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

[11] The judge then turned his mind to the details of the proposed transaction. He considered that the proposed RVO provided approximately $3.5 million more to the secured creditors than an AVO; that the three secured creditors were owed more

than the recovery available under either an RVO or an AVO; and, that the unsecured creditors or residual claimants were "out of the money". He reasoned:

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

In his view, the analysis needed to be viewed in the context of the purpose and objectives of insolvency law, including maximizing recovery for creditors.

[12] The judge then considered the interplay between the granting of an RVO and the application of the *PTTA*. First, he reiterated that courts have granted RVOs which have conferred tax benefits on the parties in an insolvency proceeding, blessing the objective of avoiding a tax liability, albeit in circumstances where that was not the only objective. Second, the judge said that "the Province's arguments on this issue appear to be based on the premise that the transfer of property by means of the sale of the corporate property owner's shares constitutes unlawful tax avoidance": at para. 62. The judge rejected that proposition, noting that outside of the insolvency context, share transactions premised on PTT avoidance are not captured by the *PTTA*. On this point, the judge concluded:

> [66] … This is not a case in which the title will be transferred but the parties will be permitted nonetheless to evade or avoid the tax. The entire point of the RVO is to create an alternative arrangement in which there is no transfer of the property, as can readily be done without attracting tax when property is owned by a solvent company.

[13] The judge did not accept the Province's argument that statutory jurisdiction to grant an RVO is negated by mechanisms in the *PTTA* by which the Administrator can assess PTT and penalties when a transaction is designed to avoid the tax. He accepted that the Province already has, by means of regulation (albeit not exercised), the authority to impose PTT on the transfer of property through the purchase of the shares of a nominee company.

[14] Finally, the judge summarized his conclusion:

> [77] In my view, these factors lead to the conclusion that an RVO ought to be granted in this matter:
>
> a) While an RVO is not necessary to avoid foreclosure or bankruptcy, it is necessary to allow the parties to structure their affairs so as to preserve $3.5 million in value for the creditors and to maximize the return for creditors.
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> b) In my view, the RVO structure produces an economic result at least as favourable as any other viable alternative. It clearly creates more value for the creditors. To the extent that the Province is a stakeholder in the analysis, the overall economic result is at least as favourable overall, in the sense that the Province "loses" exactly the amount that the creditors gain.
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> c) As to whether any stakeholder is worse off under the RVO structure, the Province is undoubtedly worse off. However, for the reasons set out above, it is my view that the Province's argument that it is entitled to the PTT because would be unlawful for the creditors to avoid the tax in these circumstances is belied by the regime currently in place in the non-insolvency context. As stated above, it has not been suggested that any creditor or any other stakeholder is worse off.
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> d) Finally, the question of whether the consideration paid for the assets reflect the importance and value of the assets being preserved under the RVO structure may be answered in the affirmative. In the event that an RVO is granted, the saved funds go to the creditors.

[15] In authorizing the RVO, the judge decided that the order should include releases of third-party claims, even though the releases would potentially prevent the Province from collecting PTT. In his view: "As the purpose of the RVO is to maximize the creditors' recovery by avoiding [PTT], it would be inconsistent with that purpose to permit the Province to collect the tax from the proposed releasees": at para. 81.

The Province's Position on Appeal

[16] The Province contends that a court supervising a receivership intended to liquidate an insolvent debtor's assets for the benefit of its creditors lacks the jurisdiction to approve an RVO. It says that neither s. 183 nor s. 243 of the *BIA* confer that authority on the court. The Province says that s. 183 provides a more limited jurisdiction to approve a transaction such as an RVO than is found in, for

example, s. 11 of the *CCAA*. Had Parliament intended to confer on a court such a broad authority to approve such a transaction, it would have amended s. 183 of the *BIA* at the same time as the broad scope of a court's authority was clarified by the amendments to s. 11 of the *CCAA*.

[17] According to the Province, the broad scope of authority conferred by s. 11 of the *CCAA* is consistent with the purposes and objects of restructuring and plans of arrangement under that Act, which focus on attempting to continue insolvent companies as going concerns. By contrast, the receivership provisions in the *BIA* are concerned with the liquidation of assets in accordance with the priorities of creditors and interested third parties. The court's authority in receiverships under the *BIA*, it argues, is rule bound and does not engage a broad discretionary grant of authority outside what is necessary to sell assets as part of an orderly liquidation of them.

[18] In the Province's submission, if the jurisdiction to authorize an RVO in a receivership exists at all, it must be found in the part of the *BIA* that concerns receiverships. More specifically, it says the jurisdiction must be found in s. 243 which gives a court power to appoint a receiver to take possession and control of the insolvent company's assets. Section 243 further allows the court to "take any other action that the court considers advisable" — language that has been held to authorize the court to direct a sale of the assets, and to take actions incidental or ancillary to that sale. The Province, however, says that s. 243 should not be read broadly to confer the jurisdiction required to authorize an RVO. It says that an RVO goes beyond anything that can properly be seen as incidental or ancillary to a sale.

[19] If this Court is inclined to find the jurisdiction for an RVO in the *BIA*, the Province offers an alternative argument against transactions designed specifically to limit tax exposure. It says that an order authorizing such an RVO, if accompanied by releases of any third-party claims arising from the transaction, immunizes the transaction from a possible review or reassessment by the Administrator designated by the *PTTA*. In short, it usurps the authority of the Administrator to potentially

inquire into and determine whether the transaction is a tax avoidance transaction for the purposes of the *PTTA*. By so doing, it violates the limitation on jurisdiction found in s. 72(1) of the *BIA*, which prevents a court abrogating any other law or statute governing property and civil rights.

Analysis

[20] It is convenient to set out the relevant statutory provisions that provide the framework in which the RVO was granted. Section 183(1)(c) of the *BIA* provides:

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

Section 243 of the *BIA* provides:

> 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:
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> (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;
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> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
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> (c) take any other action that the court considers advisable. [Emphasis added.]

And finally, s. 72(1) of the *BIA* 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.

Did the court err in finding jurisdiction to grant the RVO?

[21] It is important to begin by recognizing that the purpose and object of a receivership authorized by the *BIA* is to facilitate and enhance the preservation and realization of the assets of an insolvent debtor for the benefit of the creditors in accordance with their priority rankings: *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at para. 73 [*Third Eye*], quoting *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (S.C.), 1995 CanLII 7059. This necessarily involves the receiver being endowed with the power to liquidate assets, and being charged with a principal responsibility to ensure the liquidation of the assets results in a maximum return to the creditors: *Third Eye* at para. 73, quoting *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340 at para. 77. It is, perhaps, surprising that there is no *express* power in the *BIA* authorizing a receiver to liquidate and sell assets. Although, those powers are incontrovertibly conferred on a court-appointed receiver, inherent in their role and standardly contained in the order appointing them, in order to give effect to the purpose and object of the insolvency regime contained in the *BIA*: *Third Eye* at para. 74.

[22] There is, it appears to me, no question that the general jurisdiction found in s. 243(1)(c) to "take any other action that the court considers advisable" encompasses the jurisdiction to authorize the sale of a debtor's assets confirmed by the mechanism of a vesting order. If authority is needed to confirm that proposition, it can be found in cases such as *Third Eye* (at para. 87) and *Yukon (Government of) v. Yukon Zinc Corporation*, 2021 YKCA 2. In that case, the Yukon Court of Appeal, *per* Justice Tysoe, observed:

> [132] … The Ontario Court of Appeal held that s. 243(1) does give jurisdiction to grant such orders on the bases that vesting orders are incidental and ancillary to a receiver's power to sell and that the interests of efficiency dictate the ability for vesting orders to be granted in national receiverships rather than requiring them in each province in which assets are being sold. The Court did, however, note that the exercise of the jurisdiction is not unbounded: *Third Eye* at para. 82. [Emphasis added.]

[23] The Province relies heavily on the observation that the jurisdiction to grant vesting orders is not unbounded. That is hardly a surprising proposition. Orders granted pursuant to a statutory regime will only be legitimate to the extent that they are consistent with, and further the purposes and objects of, the statute. The question here is simply whether an RVO furthers the purpose and objects of the insolvency regime insofar as a receiver is liquidating assets to maximize the recovery of the creditors, subject to the priorities among them and the rights of third parties.

[24] It follows, in my view, that there is a clear jurisdiction to authorize an RVO found in s. 243, provided that the vesting order in question is incidental and ancillary to the receiver's power to liquidate the assets by sale. The shares of the insolvent company are assets within the receivership. The receiver has taken possession and control of them. They are capable of being sold or liquidated just as underlying assets held by the company can be sold or liquidated. Just as the company's underlying assets can be prepared for the sale in a manner intended to maximize their fair market value (as in an AVO), so too can arrangements be made to enhance the value of the shares by transferring the liabilities that serve to depress the value of those shares to another entity. I can see no reason to conclude that an RVO is not incidental or ancillary to a receiver's power to sell. An RVO advances the same goals as an AVO — albeit by employing a different transaction structure. The Province was not able to explain why the RVO at issue here was not incidental or ancillary to powers of the court and receiver under s. 243. This Court was provided only with a bald assertion, without any underlying rationale, as to why the RVO was not an exercise of incidental or ancillary powers.

[25] Accordingly, given that the jurisdiction to authorize an RVO is found in s. 243, it is not necessary to opine on whether that jurisdiction is also found in s. 183 (which appears in the part of the *BIA* concerned with the general jurisdiction of courts pursuant to the statute). As noted above, s. 243 deals with the powers of a receiver, and in that sense is a more specific source of the jurisdiction. I appreciate that the judge concluded the jurisdiction was found in s. 183. That may very well be correct.

But, as I understand it, the application was brought pursuant to s. 243 of the *BIA* and s. 39 of the *LEA*. It suffices to say that s. 243 of the *BIA* provides a jurisdictional foundation for the order. It is also unnecessary to decide whether the jurisdiction to authorize an RVO is also found in the *LEA*, although I am aware of cases which have found jurisdiction under the equivalent of the *LEA*.

Did the court err in granting an order inconsistent with s. 72(1) of the BIA?

[26] I turn now to the question whether the judge erred in granting an RVO for what is said to be the sole purpose of avoiding the payment of PTT that would be incurred under the *PTTA* if title to the real estate asset were transferred. Here, the Province does not suggest that the transaction as structured attracts PTT. It also accepts that the form of the transaction approved by the RVO is one commonly used outside the insolvency context to ensure that PTT is not payable. The Province does not explicitly contend that structuring a transaction in this way is illegitimate, abusive, or in any other way an improper means of avoiding the payment of taxes otherwise owing. These circumstances figured prominently in the judge's consideration of how to exercise his discretion. It is convenient to reproduce what the judge had to say:

> [62] Second, the Province's arguments on this issue appear to be based on the premise that the transfer of property by means of the sale of the corporate property owner's shares constitutes unlawful tax avoidance. However, it seems clear that, at least outside of the insolvency context, this proposition is not correct.
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> [63] … [I]t is common for purchasers to acquire land in British Columbia by acquiring the shares of a nominee to avoid paying PTT.
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> [64] In a non-insolvency context, the parties would have been permitted to carry out the transfer of the property by means of the transfer of shares of the nominee company. Indeed, it seems evident that similarly situated parties in a non-insolvency context would have done so.
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> [65] Therefore, this is a tax liability which is readily avoided in a non-insolvency context. The Province has not been able to satisfactorily explain why, given that premise, the proposed RVO transaction is unlawful or would attract the *PTTA*'s general anti-avoidance tax rules.
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> [66] In the Province's submission quoted above, it refers to "specific provisions of the *PTTA*…which provide for…the payment of PTT *when title is transferred*". It is important to emphasize that if an RVO is granted in this case, title to the Real Property will not be transferred. This is not a case in which the title will be transferred but the parties will be permitted nonetheless

> to evade or avoid the tax. The entire point of the RVO is to create an alternative arrangement in which there is no transfer of the property, as can readily be done without attracting tax when property is owned by a solvent company. [Italics emphasis in original; underline emphasis added.]

[27] As noted, the Province does not challenge these conclusions. Indeed, in resisting an application to introduce new evidence, the Province explicitly accepts the fact that transactions of this kind are routine outside the insolvency context, and went so far as to submit that the factual findings in paras. 63–65 were not contested. The Province has not provided any evidentiary basis that would permit the Court to conclude that the Province regards such transactions as improper tax avoidance, or a form of tax evasion, or that the powers of the Administrator have been used to invoke the *PTTA*'s general anti-avoidance tax rules.

[28] Before us, the Province's argument devolved to an academic and theoretical argument about a potential conflict between the authority of the Administrator to review transactions in order to decide whether they should be assessed under the so-called Recapture Provisions of the *PTTA*. Section 2.001(3) of the *PTTA* enables the Administrator to deny any resultant tax benefit where the transaction is not undertaken for a *bona fide* purpose other than obtaining tax avoidance. For the purposes of s. 2.001, an "avoidance transaction" is comprised of:

- a transaction (which notably is defined so as to include an arrangement);
- resulting directly or indirectly in a tax benefit (which is defined broadly as a reduction, avoidance or deferral of tax payable under the *PTTA*); and,
- where that transaction is not one that may reasonably be considered to have been undertaken or arranged primarily for a *bona fide* purpose other than for the purpose of obtaining the tax benefit.

[29] The Province contends that the Recapture Provisions demonstrate a statutory intention that the *PTTA*'s Administrator has the exclusive jurisdiction to review the RVO at first instance and decide whether to assess under the Recapture Provisions. It says the effect of the RVO was to insulate the parties from the potential application

of the Recapture Provisions and usurp the role of the Administrator. Any jurisdiction afforded by the *BIA* was necessarily circumscribed in this case by the Recapture Provisions by operation of s. 72(1) of the *BIA*. The Province maintains that by granting the RVO in the face of the Recapture Provisions, the chambers judge exceeded his jurisdiction by trenching provincial jurisdiction.

[30] Respectfully, I think there is no force in these submissions. I can see no error in the judge's conclusion that structuring a transaction to avoid the transfer of title and thereby PTT is a legitimate commercial practice outside the insolvency context. It is a perfectly proper form of transaction structured so as to avoid attracting PTT. In other words, there is no basis for the suggestion that the Recapture Provisions might apply to them. I can see no reason why that which is legitimate and proper outside the insolvency context should be viewed differently within it.

[31] In any event, I can find no air of reality to the suggestion that the Recapture Provisions could apply to this transaction. The Province fastens on to the suggestion that the sole purpose of the transaction is to avoid PTT, but that is not entirely accurate. As the judge found, the purpose of the transaction was to maximize recovery for the creditors and it did so by avoiding PTT. The goal of maximizing recovery for creditors is a *bona fide* purpose intended to further the objectives of the *BIA*. Avoiding PTT was simply the means by which that benefit was conferred. To use the language of the provisions, the RVO is a transaction that may reasonably be considered to have been undertaken or arranged primarily for a *bona fide* purpose other than for the purpose of obtaining the tax benefit. Accordingly, I see no conflict, on these facts, between the RVO and the jurisdiction of the Administrator.

Did the judge err in exercising his discretion?

[32] Finally, I can discern no other errors in the way the judge exercised his discretion. The judge noted the various reasons why it is important to give very careful consideration to whether to pronounce an RVO. He identified the importance of respecting third-party rights, concerns about avoiding creditors' rights to vote on plans, and other factors. In my view, the comment that RVOs are exceptional or

extraordinary orders simply reflects the fact that, in any given situation, the rights of all persons engaged in an insolvency must be carefully weighed to decide whether an RVO best fulfills the purposes and objects of the statutory scheme. The judge turned his mind to those considerations and determined that, in all of the circumstances of this case, an RVO should be pronounced. There is no basis to interfere with his decision.

Disposition

[33] I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Voith"

I agree:

"The Honourable Justice Winteringham"