

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
PLANT-BASED INVESTMENT CORP.

Applicant

**FACTUM OF THE MONITOR
(Re: Approval of Share Purchase Agreement)
(Returnable August 17, 2023)**

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TO: **THE SERVICE LIST**

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MONITOR'S FACTUM

PART I - INTRODUCTION

1. On May 1, 2023, the Applicant obtained protection under the *Companies Creditors' Arrangement Act*, RSC 1985, c. C-36, as amended (the "**CCAA**") pursuant to an Initial Order granted by the Ontario Superior Court of Justice (Commercial List) (the "**Court**").
2. This motion, for approval of the purchase and sale of shares of the debtor investment corporation structured by way of a reverse vesting order ("**RVO**") will maximize recovery available to creditors. The transaction for which approval is sought represents the best outcome available to stakeholders in difficult circumstances.
3. This factum is filed by msi Spergel Inc. ("**Spergel**" or the "**Monitor**") in accordance with the terms of the Sale and Investment Solicitation Process (the "**SISP**") approved by this Court on June 8, 2023, in support of the motion for:
 - (a) an Order (the "**SPA Order**"), substantially in the form attached at **Tab "3"** of the Monitor's motion record approving the share purchase agreement dated July 25, 2023 (the "**2272663 Ontario Inc. SPA**") entered into between Plant-Based Investment Corp. ("**PBIC**" or the "**Company**") as vendor and 2272663 Ontario Inc. as purchaser (the "**Purchaser**") and granting related relief, including relief in the nature of reverse vesting provisions;

- (b) an Order (the “**CCAA Termination Order**”), substantially in the form attached at **Tab “4”** of the Monitor’s motion record, among other things:
- (i) extending the stay of proceedings up to and including September 30, 2023 (the “**Extended Stay Period**”);
 - (ii) approving of the conduct and fees of the Monitor and its counsel, Gowling WLG (Canada) LLP (“**Gowling WLG**”); and,
 - (iii) terminating these CCAA proceedings upon the issuance of the Monitor’s Certificate.
4. The transaction contemplated by the 227 Ontario Inc. SPA is structured as an RVO whereby all of the liabilities of PBIC other than the Assumed Liabilities shall be transferred to and vested in a newly incorporated corporation, 15262976 Canada Inc. (“**ResidualCo**”).
5. The RVO structure is necessary to preserve PBIC’s status as an investment corporation and the material tax attributes of the corporation, which cannot be transferred in the ordinary course or through a traditional vesting order.
6. The Reorganization Transaction provides the best outcome for the Applicant’s creditors in the circumstances. Among other things, it represents the best value to stakeholders, as it provides more value than all other Qualified Bids and is superior to any realizations that could be achieved in bankruptcy.

PART II - SUMMARY OF FACTS

7. The facts supporting this motion are set out in the Third Report of the Monitor, dated August 8, 2023 (the “**Third Report**”).¹ Capitalized terms used herein and not defined shall have the meanings ascribed to them in the Third Report.

A. Background

8. PBIC is a public corporation incorporated under the *Canada Business Corporations Act* (the “**CBCA**”) listed on the Canadian Securities Exchange under the symbol “PBIC”.²

9. PBIC is an investment corporation that invests in public and private companies that derive a portion of their revenues, earnings or intellectual property-based value from products, equipment, services and/or technologies related to plant-based industries, including the cannabis plant family and its various compounds, the fungi industry (including medicinal, functional and psychedelics), super-foods and/or organic ingredients industries in addition to investing in specialty retail locations, functional medicine and wellness-based clinics and treatment centers (the “**Plant-Based Industry**”).³

10. PBIC sought protection under the CCAA on account of financial pressures arising as a result of: (i) the Ontario Securities Commission issuing a “failure to file” cease trade order (“**CTO**”) against PBIC on or around March 6, 2023, which

¹ Third Report of the Monitor, dated August 8, 2023 (“**Third Report**”), Motion Record of the Monitor dated August 8, 2023 (“**MR**”), Tab 2.

² Third Report at para 16, MR, Tab 2.

³ Third Report at para 17, MR, Tab 2.

resulted in a prohibition on PBIC raising equity investment;⁴ and (ii) a secular downturn in the market for the Plant-Based Industry.⁵

B. Initial Order

11. On May 1, 2023, Madam Justice Conway granted an Initial Order, among other things, appointing Spergel as Monitor, granting customary stays of proceedings until May 11, 2023 and granting initial charges for professional fees (the **Administrative Charge**) and for amounts advanced for interim financing (the **DIP Lender's Charge**).
12. On May 11, 2023, Justice Conway granted an amended and restated initial order (the **ARIO**), which among other things:
 - (a) granted an increase in the Administrative Charge not to exceed \$250,000 and an increase in the DIP loan not to exceed \$500,000; and
 - (b) granted an extension of the Stay of Proceedings to June 9, 2023.
13. On June 8, 2023, Justice Conway granted two orders:
 - (a) a further amended and restated initial order (the **Further ARIO**):
 - (i) increasing the DIP Lender's Charge to an amount not to exceed \$1,000,000; and

⁴ Third Report at para 21, MR, Tab 2.

⁵ Third Report at para 20, MR, Tab 2.

- (ii) extending the Stay of Proceedings to August 25, 2023; and
- (b) a sale approval and investment solicitation order (the “**SISP Order**”) approving the Sales and Investment Solicitation Process (the “**SISP**”) developed by PBIC with the assistance of the Monitor and providing related relief.

C. The SISP

- 14. The Monitor, in conjunction with the Applicants, conducted the SISP in accordance with the SISP Order. The Third Report provides a detailed overview of the steps the Monitor took to identify, market, and provide an opportunity for interested parties.
- 15. The Monitor published notice of the SISP in a national edition of the Globe and Mail and The Insolvency Insider.⁶
- 16. The Monitor, with the assistance of the Applicant, developed a list of potential bidders to whom the Notice, a Teaser Letter and a Non-Disclosure Agreement (“**NDA**”) were sent by email. The Monitor also responded directly to expressions of interest arising through the media or word of mouth.⁷

⁶ Third Report at paras 26-27, MR, Tab 2.

⁷ Third Report at para 29, MR, Tab 2.

17. 54 individuals received a copy of the Teaser Letter and NDA. From these, 14 individuals executed and submitted NDAs and 8 parties accessed the Data Room.⁸
18. At the bid deadline, the Monitor had received bids from 4 parties, including from the successful bidder.⁹
19. The Monitor reviewed each Qualified Bid.

D. The Successful Bid and SPA

20. On or about July 25, 2023, 2272663 Ontario Inc. submitted the 227 Ontario Inc. SPA to PBIC, subject to the Court's approval.¹⁰ The 227 Ontario Inc. SPA was determined to be the Successful Bid in the SISP. The 227 Ontario Inc. SPA sets out the proposed transaction before this Honourable Court for approval (the "**Reorganization Transaction**").
21. The Reorganization Transaction contemplates the following:¹¹
 - (a) Excluded Liabilities: All of the liabilities of the Company other than the Assumed Liabilities (the "**Liabilities**") shall be transferred to and vested in ResidualCo;
 - (b) Share Issuance: The Company shall issue, assign, and transfer via private placement New Common Shares to the Purchaser in a number to be

⁸ Third Report at para 30, MR, Tab 2.

⁹ Third Report at para 31, MR, Tab 2.

¹⁰ Third Report at para 32, MR, Tab 2, Appendix L.

¹¹ Third Report at para 33, MR, Tab 2.

determined by the Purchaser acting reasonably and in consultation with PBIC and the Monitor, having regard to the intended effect of the Reorganization Transaction, free and clear of encumbrances, in exchange for payment of the Purchase Price;

- (c) Share Consolidation: The Company's Articles shall be amended to, amongst other things: (i) consolidate the New Common Shares and the Existing Shares on the basis of a consolidation ratio as defined in the 227 Ontario Inc SPA; and ii) provide for such additional changes to the rights and conditions attached to the New Common Shares and Existing Shares as may be requested by the Purchaser in its sole and unfettered discretion;
- (d) Share Cancellation: Any fractional New Common Shares and Existing Shares held by any holder of such shares shall immediately following the consolidation of such shares be cancelled without any liability, payment, or other compensation in respect thereof, and Articles shall be altered as necessary to achieve such cancellation, with the effect that the New Common Shares will be the only shares remaining after the Consolidation and Cancellation and will represent 100% of the issued and outstanding common shares of the Company and be solely owned and controlled by the Purchaser (the "**Post-Consolidation Shares**"); and,
- (e) Equity Interests Extinguished: Any and all Equity Interests (for greater certainty, not including Post-Consolidation Shares) that remain issued and

outstanding immediately following the Consolidation and Cancellation shall be cancelled and extinguished without any liability, payment or other compensation in respect thereof and all Equity Interests shall be fully, finally and irrevocably and forever compromised, released, discharged, cancelled and barred without any liability, payment or other compensation in respect thereof.

22. In addition to seeking approval of the 227 Ontario Inc. SPA and the Reorganization Transaction through the Approval and Vesting Order, the Monitor is also seeking the approval of other relief critical to the completion of the Reorganization Transaction and the orderly and efficient conclusion of these CCAA Proceedings, including, among other things:¹²

- (i) adding ResidualCo as an Applicant;
- (ii) vesting all of the Excluded Assets, Excluded Contracts, and Excluded Liabilities in ResidualCo, and discharging all Encumbrances (other than the Permitted Encumbrances) against the Retained Assets;
- (iii) granting the Releases more particularly described below; and
- (iv) granting certain enhanced powers to the Monitor in respect of ResidualCo.

¹² Third Report at para 31, MR, Tab 3.

23. The Reorganization Transaction represents a superior outcome for the estate as the most competitive bid and a superior option to a liquidation.¹³

E. Monitor's Activities, Professional Fees and CCAA Termination

24. Since the Second Report, the Monitor has, among other things:¹⁴
- (a) communicated with the Company, Company's Counsel and the Monitor's counsel on various matters in connection with these CCAA proceedings; and
 - (b) worked with the Company on the implementation of the SISP.
25. The Monitor will continue to carry out the implementation of the SISP until the termination of these CCAA Proceedings. The proposed CCAA Termination Order provides that these CCAA Proceedings will be terminated and that Spergel will be discharged as Monitor upon the filing of the proposed Monitor's Certificate certifying:
- (a) that all outstanding matters involving the Monitor to be attended to have been completed (including, without limitation, the completion of the Reorganization Transaction); and
 - (b) that other residual and/or administrative matters in connection with Spergel's appointment as the Monitor including, without limitation, filing

¹³ Third Report at para 39, MR, Tab 2.

¹⁴ Third Report at para 52, MR, Tab 2.

statutory reporting with the Office of the Superintendent of Bankruptcy, have been completed.¹⁵

26. The Monitor notes that under the terms of the Approval and Vesting Order the Monitor will also be empowered to cause the bankruptcy of ResidualCo.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

A. The SPA and Transaction Should Be Approved

The Reverse Vesting Order is Appropriate

27. A reverse vesting order generally involves a series of steps, whereby:
- (a) the purchaser becomes the sole shareholder of the debtor company;
 - (b) the debtor company retains its assets, including key contracts and licenses; and
 - (c) the liabilities not assumed by the purchaser are vested out and transferred, together with any excluded assets, into a newly incorporated entity (which are referred to in the RVO as “**ResidualCo.**”).¹⁶
28. Claims against ResidualCo can then be addressed through a distribution order, a bankruptcy or other similar process.

¹⁵ Third Report at para 54, MR, Tab 2.

¹⁶ *Re Just Energy Group Inc.*, et al., [2022 ONSC 6354](#) [“**Just Energy**”] at para 27.

29. The Purchase Price stands in place of the assets and is available to satisfy creditor claims, in whole or in part, in accordance with their pre-existing priority.¹⁷
30. The jurisdiction to approve a transaction through a reverse vesting order is found in section 11 of the CCAA, which gives this Court broad powers to make Orders that it sees fit, subject to the restrictions set out in the statute. Justice McEwen recently confirmed that:¹⁸

...[t]here is no provision in the CCAA that prohibits a reverse vesting order structure.

(...)

it is settled law that courts have jurisdiction to approve a transaction involving a reverse vesting order. Moreover, courts agree that the factors set out in s. 36(3) of the CCAA should also be considered on a motion to approve a sale, including one involving a reverse vesting order. [Emphasis added.]

31. The Court of Appeal for Ontario has noted that a vesting order “effects the transfer of purchased assets to a purchaser on a *free and clear basis*, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction”.¹⁹ Absent vesting orders, the insolvency system “could not function in its present state”.²⁰

¹⁷ *Re Just Energy Group Inc.*, et al., [2022 ONSC 6354](#) at para 27.

¹⁸ *Re Just Energy Group Inc.*, et al., [2022 ONSC 6354](#) at para 29.

¹⁹ *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) at para 25.

²⁰ *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) at para 27.

32. This is true because a “purchaser cannot be expected to pay the fair and reasonable purchase price but at the same time leave it open for the assets purchased to be later attacked and, perhaps, taken back”.²¹
33. The use of RVOs has recently become more prominent. While this Court has cautioned that RVOs should not be the “norm” in restructurings, and should not be used merely because of convenience, they can be an appropriate way for a debtor to sell its business as a going concern where the circumstances justify such a structure.²²
34. In the recent CCAA proceedings of *Just Energy Group Inc. et. al.*, Justice McEwen followed a two-step analysis when considering whether to approve a sale transaction that was structured as a RVO:²³
- (a) First, whether the RVO was *prima facie* appropriate for use in the case at hand; and
 - (b) Second, whether the CCAA s. 36/*Soundair* factors supported the sale transaction generally.
35. In *Re Harte Gold*, Justice Penny provided detailed guidance on the circumstances in which an RVO can be appropriate. In December 2021, Ontario gold mining developer Harte Gold Corp. (“**Harte Gold**”) commenced proceedings under the CCAA. From the outset, the debtor’s plan was to achieve a going-

²¹ *Re Canadian Red Cross Society/Société canadienne de la Croix-Rouge*, [1998] OJ No. 3306 at para 42.

²² *Re Harte Gold Corp.*, 2022 ONSC 653 at paras 31-32.

²³ *Re Just Energy Group Inc., et al.*, 2022 ONSC 6354 at para 27.

concern sale of its business, with the pre-filing secured lender serving as the stalking horse bidder in a sale process that culminated with the stalking horse bid being declared the winning bid.²⁴

36. In *Re Harte Gold*, the stalking horse bid was structured as a share subscription agreement with an RVO. The result was the purchaser became the sole shareholder of Harte Gold's business, which was divested of certain assets, contracts and liabilities that were assigned to a residual corporation. The RVO structure was argued to be necessary instead of a traditional asset sale approach in order to maintain Harte Gold's multitude of contracts, licences and mining-related claims.²⁵
37. In considering whether to approve the RVO, Justice Penny articulated four non-exhaustive factors to provide guidance on the circumstances when an RVO can be appropriate:²⁶
- (a) why the RVO is necessary;
 - (b) whether the structure produces an economic result at least as favourable as any other viable alternative;
 - (c) whether any stakeholder is worse off under the RVO structure than under a viable alternative; and

²⁴ *Re Harte Gold Corp.*, [2022 ONSC 653](#) at paras 9-14.

²⁵ *Re Harte Gold Corp.*, [2022 ONSC 653](#) at paras 14-15.

²⁶ *Re Harte Gold Corp.*, [2022 ONSC 653](#) at para 38.

- (d) whether the consideration provided by the acquirer reflects the importance and value of the assets being preserved under the RVO structure.
38. Justice Penny found that those questions had been favourably addressed and that the sale was otherwise appropriate in the circumstances.²⁷ He therefore granted the RVO.
39. This case fits within the pattern of circumstances where an RVO is appropriate:
- (a) the reverse vesting structure will preserve PBIC's corporate status as an investment corporation and its material tax attributes, which cannot be transferred in the ordinary course or through a traditional vesting order;²⁸
 - (b) no stakeholder is worse off under the RVO structure;²⁹
 - (c) there is no competing plan of compromise or arrangement, or other restructuring transaction; and
 - (d) the Purchase Price was generated through a broadly supported and court-approved SISP implemented by the Monitor, and represents the highest possible consideration that a potential bidder was willing to pay.
40. Since the Reorganization Transaction constitutes a "proposal" pursuant to section 191 of the *Canada Business Corporations Act*, RSC 1985, c. C-44 (the "**CBCA**"), s. 191(4) of the CBCA provides that PBIC's articles may be amended

²⁷ *Re Harte Gold Corp.*, [2022 ONSC 653](#) at paras 77 and 94.

²⁸ Third Report at para 22, MR, Tab 2.

²⁹ Third Report at para 39, MR, Tab 2.

by an order of this Court to effect any change change that might lawfully be made by an amendment under s. 191 and the Reorganization transaction requires no further approval.³⁰

The Section 36 Factors Support the Transaction Generally

41. Section 36 of the CCAA provides that a debtor “may not sell or otherwise dispose of assets outside of the ordinary course of business unless authorized to do so by the court.”³¹ In considering whether to approve a sale, a court should consider, among other things:³²

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the monitor approved of the process leading up to the proposed sale;
 - (c) whether the monitor filed a report stating that the sale or disposition would be more beneficial to creditors than a sale or disposition in a bankruptcy;
 - (d) the extent to which creditors were consulted;
 - (e) the effects of the proposed sale on creditors and other interested parties;
- and

³⁰ *Re Harte Gold Corp.*, [2022 ONSC 653](#) at paras 60, 62, 63. In *Harte Gold*, Justice Penny confirmed that s. 191(4) provides the jurisdiction for the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser. [CBCA, s 191](#).

³¹ [CCAA, s. 36\(1\)](#).

³² [CCAA, s. 36\(3\)](#).

- (f) whether the consideration to be received is reasonable and fair, taking into account their market value.
42. In *Harte Gold*, Justice Penny held that the s. 36(3) criteria largely correspond to the common law factors applied to the consideration of an asset sale in insolvency articulated in *Royal Bank of Canada v Soundair Corp.*³³ In *Just Energy*, Justice McEwen held that where a s. 36(3) analysis supports a proposed transaction, *Soundair* is likely satisfied as well.³⁴
43. The Monitor submits that the 227 Ontario Inc. SPA and the Reorganization Transaction satisfy the test set out in s. 36(3) of the CCAA and *Soundair*, and ought to be approved for the following reasons:
- (a) The process leading to the Reorganization Transaction was reasonable.
The Reorganization Transaction results from the SISP, which involved the Monitor contacting 54 potential buyers; broad, public notice of the opportunity; the execution of NDA's by 14 potential bidders; and data room due diligence by 8 potential bidders – all with a view to yielding the highest and best purchase price.
- (b) The Monitor approved of the process leading up to the proposed sale. The Monitor was involved in the design and implementation of the SISP and

³³ *Royal Bank of Canada v Soundair Corp.*, [1991] O.J. No. 1137, 4 OR (3d) 1.

³⁴ *Re Just Energy Group Inc.*, et al., 2022 ONSC 6354 at paras 32 and 62.

oversaw the marketing of the opportunity and due diligence of the business.³⁵

- (c) The Transaction is the best available option for the Applicants. The Monitor believes that the Reorganization Transaction will be more beneficial to creditors than a bankruptcy.³⁶ The Reorganization Transaction is also capable of implementation in a timely manner, which will minimize professional fees and maximize creditor recoveries.³⁷
- (d) All creditors have been put on notice of this motion and have been included on the Service List throughout these CCAA Proceedings. There is no suggestion in the record that any creditors, including the CRA, were ignored or overlooked.
- (e) The Purchase Price is fair and reasonable. The Successful Bid was evaluated by the Monitor and determined to be SISP-compliant and a Qualified Bid. It is superior to all other Qualified Bids.³⁸

44. In light of the foregoing, the *Soundair* factors are also met: there was a sufficient effort to obtain the best price, the debtor has not acted improvidently, the interests of the parties have been properly considered, the process has been carried out with efficacy and integrity, and there is no unfairness in the circumstances.

³⁵ Third Report at para 30, MR, Tab 2.

³⁶ Third Report at paras 38-39, MR, Tab 2.

³⁷ Third Report at paras 51, MR, Tab 2.

³⁸ Third Report at paras 36, MR, Tab 2.

The Related Relief Should Be Granted

45. In addition to seeking approval of the 227 Ontario Inc. SPA and the Reorganization Transaction, the Monitor is also seeking the approval of other relief critical to the completion of the Reorganization Transaction and the orderly and efficient conclusion of these CCAA Proceedings, including, among other things:

- (a) adding ResidualCo as an Applicant;
- (b) vesting the liabilities of PBIC other than the Assumed Liabilities in ResidualCo;
- (c) granting the Releases;
- (d) granting certain enhanced powers to the Monitor in respect of ResidualCo; and
- (e) extending the Stay Period.

ResidualCo Should Be Added as an Applicant

46. In order to consummate the Reorganization Transaction, ResidualCo must become an Applicant in these CCAA Proceedings. Doing so will allow the Purchaser to acquire all issued and outstanding shares of PBIC, free and clear of

all Claims and Encumbrances, while allowing the Claims of the Applicants' stakeholders to continue against ResidualCo.³⁹

47. ResidualCo is a corporation that has been incorporated under the federal laws of Canada. Immediately after the Excluded Assets and Excluded Liabilities are transferred to ResidualCo, ResidualCo will be balance sheet insolvent and the claims against ResidualCo will be in excess of the statutory threshold of \$5 million.

Liabilities Should be Vested in ResidualCo

48. The Monitor is seeking an order vesting all liabilities of PBIC in ResidualCo, including liabilities arising from claims which might otherwise have a legal priority.⁴⁰ This includes the Administrative Charge in accordance with its first ranking priority status and any liabilities relating to a potential deemed statutory trust in favour of CRA. In contrast, the DIP Lender's Charge remains a liability of PBIC and is effectively being assumed as part of the Reorganization Transaction.
49. The court-ordered Charges represent all of the value comprising the Purchase Price provided for in the 227 Ontario Inc. SPA, which in turn is the highest and best bid received in the SISP by a considerable margin. These charges are entitled to priority at law over all claims, including statutory priority claims, following the making of the Initial Order on notice to all creditors.⁴¹

³⁹ Third Report, Appendix L, MR, Tab 2.

⁴⁰ Approval and Vesting Order, para 17, MR, Tab 3.

⁴¹ *Canada v Canada North Group Inc.*, [2021 SCC 30](#) at paras 169-176.

50. No stakeholder will be prejudiced by the Reorganization Transaction or the RVO in this case because the amounts secured by the Administrative Charge and the DIP Lender's Charge are the maximum value that could be obtained for PBIC and its property and there can be no amounts available to any creditor subordinate to these charges (which is all creditors) in any circumstances.
51. Additionally, any investments that have springing rights as a result of these CCAA Proceedings are properly vested.
52. As part of the Approval and Vesting Order, the Monitor is seeking an order that, following the termination of the CCAA, all contracts to which the Vendor is a party will not be automatically terminated by reason of a change of control of the Vendor.⁴² This provisions specifically addresses one of the bids received during the SISP, which was for the purchase of an asset whereby the bidder was engaged in a joint venture with PBIC. This provision is appropriate as it ensures the continuation of such contractual relationship.

The Releases Should be Granted

53. The Approval and Vesting Order contains typical Releases in favour of (a) the current directors, officers, employees, independent contractors, legal counsel and advisors of PBIC; and (b) the Monitor and its legal counsel (collectively, the

⁴² Approval and Vesting Order, para 12(d), MR, Tab 3.

“Released Parties”). Nothing in the Approval and Vesting Order releases any claim against the Released Parties pursuant to section 5.1(2) of the CCAA.⁴³

54. Third party releases have been granted in both CCAA plans and RVO transactions. As the Quebec Court recently noted in *Blackrock Metals*, “it has now become commonplace for third-party releases, in favour of parties to a restructuring, their professional advisors, as well as their directors, officers and others, to be approved outside of a plan of arrangement in the context of a transaction.”⁴⁴ There are numerous examples where such releases have been granted in RVO transactions.⁴⁵
55. The CCAA expressly contemplates that claims against the directors and officers of a debtor company can be compromised and released in a plan, subject to certain exceptions.⁴⁶ The same should apply where a CCAA restructuring does not involve a plan, as this Court has noted: “I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release.”⁴⁷
56. The Courts have approved releases in favour of third parties in the absence of a plan of compromise or arrangement, both on consent and in contested matters.⁴⁸

⁴³ Third Report at para 47, MR, Tab 2.

⁴⁴ *Blackrock Metals Inc.*, [2022 QCCS 2828](#) [“*Blackrock Metals*”] at para. 128, citing *Green Relief Inc. (Re)*, [2020 ONSC 6837](#) [“*Green Relief*”] at paras 23-25; *Re 8640025 Canada Inc.*, [2021 BCSC 1826](#) at para 43.

⁴⁵ For example: *Just Energy* at para 67; *Harte Gold* at paras 78-86; *Re Clearbeach and Forbes*, [2021 ONSC 5564](#) at para 27(f); *Green Relief*, paras 23 and 27-29.

⁴⁶ [CCAA, s. 5.](#)

⁴⁷ [Green Relief at para 23.](#)

⁴⁸ See, for example, [Green Relief](#), and CCAA Termination Order in the Matter of *Golf Town Canada Holdings Inc. et al*, dated March 29, 2018, Toronto, [Court File No. CV-16-11527-00CL](#) (ONSC).

Third party releases have also been granted in reverse vesting order transactions.⁴⁹

57. The same test for granting third party releases in a CCAA plan applies to a release in an RVO. The Court must ask: (a) whether the parties to be released were necessary to the restructuring of the debtor; (b) whether the claims to be released are rationally connected to the purpose of the restructuring and necessary for it; (c) whether the restructuring could succeed without the releases; (d) whether the parties being released contributed to the restructuring; and (e) whether the releases benefit the debtors as well as the creditors generally.⁵⁰ It is not necessary for each of these factors to apply in order for the proposed release to be granted.⁵¹

58. In this case, the proposed Releases should be granted for the following reasons:

(a) The Released Parties have made material contributions to this restructuring. Since the initiation of these CCAA Proceedings, the Released Parties have worked diligently towards, or otherwise facilitated, the restructuring of PBIC. Such efforts resulted in a successful SISF and the 227 Ontario Inc. SPA;

⁴⁹ See, for example, Approval and Vesting Order, in the Matter of *Wayland Group Corp. et al*, dated April 21, 2020, Toronto, [Court File No. CV-19-00632079-00CL](#) (ONSC).

⁵⁰ *Blackrock Metals*, citing *Harte Gold*, at paras 78-86 and the test established in *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.*, [2008 ONCA 587](#). See also [Green Relief at para 27](#), citing *Re Lydian International Limited*, [2020 ONSC 4006](#) at para 54.

⁵¹ [Green Relief at para 28](#).

- (b) The Releases will benefit the Applicants by protecting the Applicants and ResidualCo against potential contribution and indemnity claims thus minimizing potential claims against them;
- (c) The requested Releases are necessary to bring finality to these CCAA Proceedings, facilitate the release of the Court-ordered charges, and to protect the Released Parties from Released Claims, which capture all claims arising prior to the filing of the Monitor's Certificate and relating to acts or liabilities (a) undertaken or completed pursuant to the terms of [the Approval and Vesting Order], (b) arising in connection with or relating to the SPA or the completion of the Transaction, (c) arising in connection with or relating to the within these CCAA proceedings, or (d) related to the management, operations or administration of the Applicants⁵².
- (d) Nothing in the Approval and Vesting Order releases any claim against the Released Parties pursuant to section 5.1(2) of the CCAA, being claims by litigants alleging misrepresentations made by directors to creditors or wrongful or oppressive conduct by directors.
- (e) The Releases were disclosed in the Monitor's motion materials served on the service list in advance of this motion, including counsel for CanadaBis Capital Inc., which has asserted a claim for oppression against PBIC

⁵² Draft Approval and Vesting Order, paragraph 18, MR, Tab 3.

directors and officers. This claim against directors and officers would not be subject to the Releases.

The Monitor's Powers Should be Expanded

59. The Monitor is seeking an order expanding the powers of the Monitor to, among other things, take all steps necessary to wind down, dissolve and/or bankrupt ResidualCo. This relief is intended to facilitate the RVO structure.⁵³

60. Similar relief has been granted in other RVO cases.⁵⁴

61. The Monitor has the experience necessary to oversee ResidualCo and it is appropriate to expand the powers of the Monitor in order to complete this CCAA proceeding. Further, to bring about an orderly conclusion to this matter and in view of the insolvency of ResidualCo, it is appropriate, just and convenient to empower the Monitor to cause ResidualCo to become bankrupt.

The Stay Period Should be Extended

62. The current stay of proceedings expires on August 25, 2023.⁵⁵ The Monitor seeks an extension of the stay of proceedings until September 30, 2023 to allow time to complete the necessary steps to close the Transaction and conclude the CCAA proceeding.

⁵³ Draft Approval and Vesting Order, paragraph 20, MR, Tab 3.

⁵⁴ *Just Energy*, [2022 ONSC 6354](#) at paras 2, 24 and 101; *Harte Gold*, [2022 ONSC 653](#) at paras 91-93.

⁵⁵ Third Report at para 11, MR, Tab 2.

63. The Applicants have acted with due diligence and in good faith in furtherance of these CCAA proceedings.⁵⁶ No creditors will be materially prejudiced by the proposed extension of the Stay Period.

The Proposed CCAA Termination Order Should be Approved

64. The Monitor is seeking a CCAA Termination Order to permit the conclusion of these CCAA Proceedings.

65. The CCAA Termination Order is appropriate and necessary in the circumstances to facilitate the efficient conclusion of these CCAA Proceedings.

PART IV - ORDER REQUESTED

66. For the reasons set out above, the Monitor requests that this Honourable Court grant:

- (a) the Approval and Vesting Order approving the Transaction in substantially the same form as found at Tab 3 of the Motion Record; and
- (b) the CCAA Termination Order in substantially the same form as found at Tab 4 of the Motion Record.

⁵⁶ Third Report at para 12, MR, Tab 2.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of August, 2023.



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SCHEDULE "A"

LIST OF AUTHORITIES

67. *Re Just Energy Group Inc.*, et al., 2022 ONSC 6354
68. *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508
69. *Re Canadian Red Cross Society/Société canadienne de la Croix-Rouge*, [1998] OJ No. 3306
70. *Re Harte Gold Corp.*, 2022 ONSC 653
71. *Royal Bank of Canada v Soundair Corp.*, [1991] O.J. No. 1137, 4 OR (3d) 1
72. *Canada v Canada North Group Inc.*, 2021 SCC 30
73. *Blackrock Metals Inc.*, 2022 QCCS 2828
74. *Green Relief Inc. (Re)*, 2020 ONSC 6837
75. *Re 8640025 Canada Inc.*, 2021 BCSC 1826
76. *Re Clearbeach and Forbes*, 2021 ONSC 5564
77. *Golf Town Canada Holdings Inc. et al*, dated March 29, 2018, Toronto, Court File No. CV-16-11527-00CL
78. *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587
79. *Re Lydian International Limited* , 2020 ONSC 4006

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Companies' Creditors Arrangement Act, RSC 1985, c C-36

Restriction on disposition of business assets

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

...

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

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

Canada Business Corporations Act, RSC 1985, c C-44

Definition of reorganization

191 (1) In this section, reorganization means a court order made under

- (a) section 241;
- (b) the Bankruptcy and Insolvency Act approving a proposal; or
- (c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

...

Articles of reorganization

(4) After an order referred to in subsection (1) has been made, articles of reorganization in the form that the Director fixes shall be sent to the Director together with the documents required by sections 19 and 113, if applicable.

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

Court File No. CV-23-00698826-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF PLANT-BASED INVESTMENT CORP.

Applicant

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE MONITOR
(Re: Approval of Share Purchase Agreement)
(Returnable on August 17, 2023)

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