

CANADA / JUDGMENT

Good Natured Products Inc. (Re)

2024 BCSC 2126

COURT

Supreme Court of British Columbia

DECIDED

22 November 2024

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2024 BCSC 2126 Good Natured Products Inc. (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Good Natured Products Inc. (Re),

2024 BCSC 2126

Date: 20241122

Docket: S244212

Registry: Vancouver

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985,

c. C-36

- and -

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57, as amended

- and -

In the Matter of Good Natured Products Inc.

and those entities listed in Schedule "A" [to the Petition]

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

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Place and Date of Hearings:

Vancouver, B.C.

October 28 and 31, 2024

Place and Date of Decisions with Written Reasons to Follow:

Vancouver, B.C.

October 28 and 31, 2024

Place and Date of Written Reasons:

Vancouver, B.C.

November 22, 2024

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INTRODUCTION

- [1] These applications required this Court to again consider the appropriateness of approving a sale of the petitioners/debtors' assets in these insolvency proceedings through the structure of a reverse vesting order ("RVO").
- [2] Fairness is a cornerstone principle of insolvency proceedings. Most often, fairness is considered in relation to the treatment of those stakeholders who are directly affected by the proceedings at the time it begins.
- [3] These applications concerned fairness to not only those pre-filing stakeholders, but also fairness in relation to a stakeholder who became involved in these proceedings after the filing. This was a stakeholder - a sales agent - who was engaged to assist the debtors and their pre-filing stakeholders in achieving a successful restructuring.

[4] In the end, this was a tale of two sale agreements - one which I considered was unfair and that I declined to approve on October 28, 2024 - and the second, which was an amended agreement to address that unfairness and that I approved on October 31, 2024.

[5] Both decisions were made on the days on which the applications were heard, with written reasons to follow. These are those reasons.

BACKGROUND

[6] The petitioners are a group of companies who are in the business of developing and manufacturing plant-based products in Canada and the U.S. The first named petitioner - good natured Products Inc. - is a BC public company that directly or indirectly owns various subsidiaries in the corporate group. I will refer to the group of companies collectively as "GDNP".

[7] GDNP has various manufacturing facilities in Ontario, Illinois and Texas.

[8] GDNP has a number of secured creditors. Wells Fargo Capital Finance Corporate Canada ("Wells Fargo") provided operating credit. Other secured creditors include Royal Bank of Canada ("RBC"), the Toronto-Dominion Bank ("TD"), and Export Development Canada ("EDC"), some of whom have mortgages registered against GDNP's owned real property.

[9] As of March 2024, GDNP's liabilities were approximately \$85.7 million.

[10] The declining economic reality in North America over the last few years - including higher interest rates, supply chain difficulties and declining sales - had significantly and negatively affected GDNP's finances. Efforts in 2023 to find a solution, as I will describe below, were unsuccessful.

[11] In spring 2024, GDNP was facing a significant liquidity crisis, with limited options. By any measure, it was insolvent, with looming payments required to be made and little or no cash to do so.

[12] On June 28, 2024, GDNP was granted creditor protection under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [CCAA]. In the usual fashion, the initial order provided for an administration charge and a directors charge.

[13] Thereafter, GDNP made immediate efforts to commence a Chapter 15 proceeding in Illinois under the U.S. Bankruptcy Code to recognize and enforce the CCAA initial order in that jurisdiction. By late July 2024, that recognition had been obtained and the U.S. Bankruptcy Court had granted relief in favour of GDNP.

PRE- SALES PROCESS

- [14] Prior to the CCAA filing, GDNP had made efforts to solve its financial difficulties. In July 2023, GDNP retained an investment bank and financial services company to explore strategic alternatives, including investment or sale of the company or its various business units. Despite some interest, GDNP did not receive any formal offers.
- [15] Nevertheless, in late June 2024, after the filing, GDNP indicated that it intended to move quickly to implement a sales process of the assets, if possible.
- [16] On July 8, 2024, I heard the comeback hearing and granted the amended and restated order ("ARIO"). By that time, GDNP had made significant progress in formulating a consensual path forward, including implementing a renewed sale and investment solicitation process ("SISP"), with the support of interim financing to be provided by Wells Fargo.
- [17] On July 11, 2024, I granted two orders.
- [18] Firstly, I granted the "SISP Order", which approved a SISP and also appointed Capital West Partners ("Cap West") as sales agent to implement and carry out the SISP.
- [19] The terms of the SISP are not unusual. However, given the issues that arose on these applications, and for context, it is worth setting out the statement as to the purpose of the SISP:
7. The purpose of the SISP is to solicit interest in one or more or any combination of (1) a restructuring, recapitalization or other form or reorganization of the business and affairs of one or more of the Petitioners as a going concern, or (2) a sale of all, substantially all or one of more components of the Petitioners' assets (the "Property") and/or business operations of the Petitioners (the "Business") as a going concern or otherwise.
- [20] Secondly, I granted the "DIP Order". In the DIP Order, I approved the Wells Fargo interim financing facility to a maximum of \$15.1 million. This financing was necessary to allow GDNP to continue its restructuring efforts in these proceedings, including under the SISP.
- [21] The DIP Order also addressed the involvement of Cap West and specifically, approved the terms of Cap West's engagement letter, including how Cap West was to be remunerated. Cap West's remuneration was two-fold:
- a) a \$75,000 per month "Work Fee"; and
- b) a "Transaction Success Fee", equal to 3% of the "Enterprise Value" implied under a "Transaction", with a minimum amount of \$1.25 million. "Transaction" was defined by reference back to the purpose of the SISP, reproduced above.
- [22] Two other provisions in Cap West's engagement letter in relation to the Transaction Success Fee are relevant to these applications, including the definition of "Enterprise Value":

The Transaction Success Fee will be paid in full at the closing of the Transaction, and [GDNP] hereby assigns to Capital West an amount equal to the Transaction Success Fee from the proceeds to which [GDNP] is otherwise entitled from the counterparty under the Transaction. [GDNP] covenants to cause the Transaction Success Fee to be presented as a "closing document" on the closing agenda relating to the Transaction, and acknowledges that receipt by Capital West of payment of the Transaction Success Fee will be a condition precedent to the closing of the Transaction. [GDNP] and Capital West will provide letters of direction with respect to the payment of the Transaction Success Fee in connection with the closing of the Transaction.

For purposes of this agreement, "Enterprise Value" is defined as the sum of the fair market value of the cash, securities, and other amounts paid or payable to [GDNP] or its shareholders including, for avoidance of doubt, any amounts held in escrow.

[Emphasis added.]

[23] As a result of the above orders and a later order, as of October 2024, the CCAA charges were ranked in the following order as against GDNP's "Property" as defined in the ARIQ (essentially, all of the business assets and undertakings, including all proceeds thereof) in priority to the existing secured charges:

- a) First - the Administration Charge (\$250,000) and the Cap West Work Fee Charge (\$75,000);
- b) Second - the DIP Lender's Charge (max. \$15.1 million);
- c) Third - the Director's charge (max. \$400,000); and
- d) Fourth - the KERP Charge (max. \$116,000).

[24] Not surprisingly, given GDNP's insolvency, Cap West also sought and obtained certain protections in the DIP Order in respect of the remuneration (specifically, the Transaction Success Fee) that it expected to be paid under the terms of its engagement. The DIP Order provided:

[Cap West], in its capacity as "Sales Agent" shall be entitled to the benefit of and is hereby granted a charge (the "Cap West Work Fee Charge") on the Property (other than any owned real property owned by one or more of the Petitioners located in the United States) in the amount of \$75,000 for its work fees charged pursuant to the [Cap West]'s engagement letter dated July 11, 2024 (the "Cap West Engagement Letter").

The Sales Agent shall be entitled to the benefit of and is hereby granted a charge (the "Cap West Success Fee Charge") on the any proceeds derived from the sale of [GDNP]'s Property as a result of a sale resulting from the SISP, ranking in priority to all other claims and charges in the amount of \$1,250,000 for its success fees charged pursuant to the Cap West Engagement Letter.

[Emphasis added.]

[25] As such, this Court endorsed protections in favour of Cap West that ensured that it had a first ranking charge against "proceeds" derived from GDNP's assets and undertakings (the "Property") as was anticipated to be achieved under the SISP, to pay any Transaction Success Fee (min. \$1.25 million).

THE SISP

[26] On July 18, 2024, Cap West commenced the SISP.

[27] During Phase 1, Cap West contacted 165 parties, 49 of which executed a confidentiality agreement and were invited into the data room. Both Cap West and GDNP later responded to due diligence requests and questions from those potential bidders.

[28] By August 22, 2024, binding letters of Intent were due; seven bids were received, and four bidders were invited into Phase II. As at the final bid deadline of September 17, 2024, Cap West received one definitive bid and, later, an additional bid was submitted.

[29] Upon receipt of the two final qualified bids, through discussions between GDNP, the Monitor, Cap West, Wells Fargo and the other secured lenders, a bid was selected. On September 30, 2024, that bidder, HUK 149 Limited, (the "Purchaser") was notified and the parties set about preparing the necessary documentation.

[30] The Monitor states that the other final qualified bid did not provide for full payment of GDNP's outstanding secured debt and, if accepted, would require the secured creditors to take significant losses on their secured positions. That bid was not supported by those secured creditors.

[31] Numerous courts across Canada, including BC, refer to well-known factors to consider in assessing the efficacy and result of a sales process, as set out in *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1, 1991 CanLII 2727 (ON CA) at 6:

1. ... whether the debtor made sufficient effort to get the best price and has not acted improvidently;
2. ... the interests of all parties;
3. ... the efficacy and integrity of the process by which offers are obtained;
4. ... whether there has been unfairness in the working out of the process.

[32] No party or stakeholder takes issue with the efficacy of the sales process. No one disputes that GDNP, with the assistance of Cap West, made sufficient efforts to achieve a transaction that could be completed for the benefit of the overall stakeholder group.

[33] I agree with the Monitor that the SISP was carried out in accordance with its terms and specifically, that Cap West fulfilled its duties under the SISP. As particularly relevant here, Cap West expended extensive efforts to ensure that GDNP's business and assets were widely marketed and it achieved a successful result.

- [34] Not unexpectedly, Cap West anticipated that it would receive its Transaction Success Fee, based on 3% of the Enterprise Value of the transaction proposed by the Purchaser. The Monitor estimated that the value of the transaction would be in excess of \$53 million. The Purchaser, aided by GDNP, had other ideas.

THE SALE TRANSACTION

- [35] On October 23, 2024, GDNP entered into a Subscription Agreement with the Purchaser. It is the structure of this agreement - a sale via the granting of a RVO - that led to an issue arising in relation to Cap West. For consistency, I will refer to this agreement as the "Transaction".

The Transaction Terms

- [36] The overall terms of the Transaction are complex, but they include what today are fairly standard in terms of any RVO, with the Purchaser obtaining the shares of certain members of the corporate group, who would only have what are commonly referred to as Retained Assets and Retained Liabilities. In addition, a new entity - "ResidualCo" - will be created for the remaining assets and liabilities.
- [37] At a very high level, the Transaction's defined "Purchase Price" included: retention of all debt owing Wells Fargo, RBC, TD, EDC and another lender (est. \$44 million); a credit facility provided by the Purchaser (\$7 million); and, the value of other Retained Liabilities to be satisfied by the Purchaser by performing or discharging them as they become due (est. \$2.3 million). Those other Retained Liabilities included amounts owing to the professionals, priority payments to employees, and a lien holdback claim.
- [38] In addition, the Purchaser would pay and satisfy a charge (the KERP Charge) of \$116,000 that was earlier approved in order to retain certain key employees.
- [39] I agree with the Monitor's conclusions that the Transaction represents the highest and best offer resulting from the SISP. The Transaction would sell the business as a going concern, to the benefit of many stakeholder groups including employees, suppliers and customers.
- [40] For obvious reasons, most of the stakeholders who appeared at this hearing - including the secured creditors and the lien holder - supported the Transaction. This was because the Purchaser structured the terms of the RVO to assume all of the secured debt and pay or satisfy all of the CCAA charges (and secure the lien), save for one.
- [41] The one CCAA charge that was not to be fully satisfied was the Cap West Success Fee Charge. The treatment of Cap West on closing, chosen by the Purchaser, was to fashion the Transaction and the RVO so that the only cash payment to be made on closing was \$315,000 (defined as the "Closing Payment"). This amount represented a payment of \$300,000 plus tax, which was to be paid from the Purchaser's credit facility, which the Monitor was then allowed to pay to Cap West to "satisfy" the Cap West Success Fee.

- [42] This "Closing Payment" was but a small fraction of what Cap West was arguably due on closing - namely, 3% of the "Enterprise Value" of \$53.3 million, or approximately \$1.6 million.
- [43] Both Cap West and the Monitor opposed the approval of the Transaction for that reason. The Monitor's position was set out in its Fifth Report dated October 25, 2024.

Cap West

- [44] The central issue addressed at the October 28, 2024 hearing was the fairness of the Transaction, not just for the stakeholder group as a whole, but for Cap West specifically.
- [45] In advance of the hearing, the Purchaser's counsel made substantial efforts to convince the Monitor to withdraw its opposition and support approval of the Transaction. The Monitor was not swayed.
- [46] At the hearing, both GDNP and the Purchaser advanced many arguments in support of the treatment of Cap West. No other stakeholder repeated these arguments or took a position in respect of Cap West; they simply supported the Transaction.
- [47] In my view, GDNP and the Purchaser's arguments were unsupportable and without merit.
- [48] Their main argument related to the meaning of "proceeds" of the Transaction. The Cap West Success Fee Charge was against "proceeds derived from a sale" under the SISP, per the DIP Order. That term - "proceeds" - was also used in the engagement letter and it is a term found within the meaning of "Property" in the ARIO.
- [49] The Purchaser argues that the "Enterprise Value" was clearly set at \$315,000 as the amount it is willing to pay to acquire the shares under the RVO. In essence, GDNP and the Purchaser argue that one should ignore the substantial amount of debt being assumed (or, to be more accurate, left behind in GDNP) as being part of the "proceeds" of the Transaction. The Purchaser asserts that it "takes no responsibility for these debts". GDNP argues that the Cap West Success Fee Charge attaches to nothing since the Retained Liabilities are left in GDNP under the RVO and continue in its prior form, not producing any "proceeds".
- [50] In my view, this is an extremely flawed argument.
- [51] A sale will typically involve some sort of financing, whether newly arranged or assumed. If I buy a widget for \$100, and finance \$80 (or assume \$80 of existing debt), that does not mean that the proceeds of the sale payable to the vendor is only \$20 - it is \$100. The Purchaser's argument rests on the fact that the structure of the RVO results in a transfer to it of shares and not the underlying assets; however, inherently, the Purchaser is assuming responsibility for the \$44 million of secured debt in that GDNP, to be owned by the Purchaser, will pay down those debts in the ordinary course of business, just as it would if it had otherwise financed the purchase price (and in doing so, increase its equity).

- [52] In addition, GDNP and the Purchaser ignore the many other cash payments or assumption of liabilities that are part of the Purchase Price - having a value of some \$9.3 million, which are being used to pay almost all of the CCAA charges. The Purchaser no doubt knew that a failure to satisfy these priority obligations (like Monitor and legal fees) was a non-starter. If the Purchaser was able to free up some of its \$7 million financing to pay these amounts, why not also the Cap West Success Fee?
- [53] Both GDNP and the Purchaser also argue that Cap West failed to secure for itself any protections that may have changed this result. This argument also lacks any merit.
- [54] In my view, the interpretation of the engagement letter is beyond doubt, based on the wording itself and the surrounding circumstances in which it was made. Cap West was hired to find a buyer for GDNP's business. The references in the engagement letter to both "proceeds" and "Enterprise Value", together with reference to the broad purpose of the SISP, support a broad interpretation of those terms.
- [55] I find support for my conclusions in *McCain Produce v. PEI Lending Agency*, 2010 PECA 4, a decision that also required a consideration of the meaning of "proceeds" found in a contract. At paras. 28-31, the court considered the dictionary meaning of the term and then stated:
- [32] When the plain meaning of the word is applied, the word "proceeds" appears to mean something which has been derived as a result of converting an article or item into something else. It is something which can be identifiable, traceable or linked to the original item.
- [56] In short, the Transaction comes within the meaning of "proceeds" as that term is used in the engagement letter and as was intended by GDNP and Cap West. The RVO structure does not negate the fact that the value of GDNP's assets is being effectively transferred to the Purchaser as "proceeds" of the Transaction, which arose as a result of the SISP and Cap West's efforts.
- [57] The context or surrounding circumstances are also important. In July 2024, when Cap West was engaged, no one knew what the outcome of the SISP would be. For obvious reasons, Cap West's task under the SISP was to seek out any available restructuring option for the stakeholders - whether it be a direct sale or "other form of reorganization of the business and affairs of [GDNP] as a going concern".
- [58] One option sought was obviously a direct sale of GDNP's assets to a purchaser. If that had occurred, the purchase price would have been distributed in accordance with the priorities set out in the various CCAA court orders. There is no question that the result may have been a shortfall to those stakeholders at the end the line (i.e. some of the secured creditors) through the vesting process: *DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, 2021 ABCA 226 at para. 30. This was an option available to GDNP under the qualified bid that was not accepted.

- [59] However, in the event of such a direct sale, there would also have been no question in respect of the payment of the Transaction Success Fee to Cap West.
- [60] Ironically, the engagement letter stated that Cap West would provide advice to GDNP on the appropriate form and structure of the Transaction. I can only presume that Cap West supported the RVO structure, since it would benefit the overall stakeholder group and was the best outcome, before they knew how the Purchaser intended to use that structure to defeat its claim to the success fee.
- [61] I fail to see how the mechanism of the RVO, chosen by the Purchaser - which is akin to a sale in a different form - cannot be said to such a "reorganization" of GDNP's business and affairs, as set out in the SISP. As the stakeholders and professionals involved in this proceeding well know, RVOs have become somewhat ubiquitous as a solution in insolvency proceedings in Canada in place of an ordinary sale of assets. In July 2024, when Cap West was engaged, that option would have been well understood by everyone as a possible solution for GDNP's financial difficulties.
- [62] It is egregious for the Purchaser to now suggest that Cap West did not properly seek to protect its right to compensation in this proceeding. The Purchaser in essence disingenuously argues that Cap West did not anticipate that the Purchaser would seek an advantage through the RVO structure, so as to disenfranchise Cap West from what would otherwise have been its negotiated compensation.
- [63] As I stated above, Cap West did seek and obtain both approval of its fee structure and also a court ordered charge or protection to secure payment of its compensation. Court orders are not interpreted in a vacuum: *Sutherland v. Reeves*, 2014 BCCA 222 at para. 31. In *Yu v. Jordan*, 2012 BCCA 367, the Court emphasized that it is the Court - not the Purchaser - who determines the meaning of its orders:
- [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.
- [64] Again, the language used in the DIP Order was broad and referred to the charge attaching to "any proceeds derived from the sale of [GDNP]'s Property". In addition, the circumstances under which Cap West obtained its protections in the DIP Order included those already outlined above. The overall intention of the parties - which this Court accepted - was to protect Cap West for its agreed upon compensation from whatever solution might arise from the SISP that would be acceptable to the creditors and the Court.

- [65] In other words, the DIP Order provides for the very protections that Cap West asserts here. No other meaning arises.
- [66] Two of the Purchaser's other arguments were of even less merit.
- [67] Firstly, the Purchaser complained about the amount of Cap West's success fee. However, this was a fee agreed upon back in July 2024 by GDNP, and which was approved by the Court after no stakeholder objected. It does not now lie in the mouth of the Purchaser, who had no part in it, to ex post facto complain about the amount of the fee. Even now, the Monitor confirms that Cap West did what it was engaged to do, and Cap West produced a successful result.
- [68] Secondly, the Purchaser cheekily suggested that Cap West was better off with the reduced amount versus not receiving anything in a liquidation. However, the SISP was a success and no liquidation necessarily looms, particularly given another qualified bid was made for an asset purchase transaction.
- [69] I began these reasons emphasizing that fairness is a cornerstone principle in insolvency proceedings. In respect of any sale under the CCAA, one factor under s. 36(3)(e) is the effect of the sale or disposition on the creditors and other interested parties. Cap West is an interested party. Although s. 36(3) of the CCAA is not directly engaged in respect of the RVO, this same factor is a relevant consideration under s. 11 of the CCAA in considering whether the RVO transaction is appropriate.
- [70] Courts across Canada regularly consider many factors in terms of whether the RVO structure is appropriate in the circumstances. The most often cited factors are found in *Harte Gold Corp (Re)*, 2022 ONSC 653. One factor is whether any stakeholder is worse off under the RVO structure than they would have been under any other viable alternative, a factor that similarly requires a consideration of the effect of the RVO on the stakeholders: *Harte Gold* at para. 38.
- [71] In *British Columbia v. Peakhill Capital Inc.*, 2024 BCCA 246 [*Peakhill Capital*], the court discussed RVOs and stated that, in considering that structure, the Court must weigh and consider varying stakeholder interests within the statutory framework and objectives:
- [32] 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.
- [72] By far, the most compelling argument advanced by GDNP and the Purchaser was that the benefits of the Transaction for all of the other stakeholders far outweighed any prejudice to Cap West. This argument was made in what was described by GDNP's counsel as exigent circumstances, where a failure to approve the Transaction would mean GDNP running out of cash by the end of the week, consistent with the cash flow statement. At the hearing, Wells Fargo's counsel confirmed that his client had not agreed to any extension of the interim financing past October 31, 2024. The stay of proceedings expired October 31, 2024.

- [73] This balancing argument gave me some pause. A refusal to approve the Transaction invited some risk in terms of how the matter would proceed, if at all. The interests of the other stakeholders seemingly hung in that balance with the possibility of a receivership and/or liquidation.
- [74] However, upon reflection, I did not see that the prejudice and unfairness to Cap West could be ignored. The Purchaser's approach, through its carefully crafted Subscription Agreement, was to single out Cap West as the sole stakeholder to suffer a loss in its position. I agree with the Monitor that, in doing so, the Purchaser was attempting to "circumvent" the Cap West Success Fee Charge, by using what would otherwise be the fee payable to Cap West to buy peace with the secured creditors.
- [75] GDNP sought and obtained the assistance of Cap West to find a solution. The stakeholders agreed to that arrangement. There was no guarantee that a viable solution would be found, in which case Cap West would not have earned any success fee. The results of the SISP were of course positive and the stakeholders now stand to reap the benefits. In that scenario, Cap West had undoubtedly earned the success fee.
- [76] In my view, it would be morally and commercially repugnant for those stakeholders to now disregard the means by which that successful solution was found and the price that they agreed to pay for that effort. In addition, in my view, it would offend the conscience of the Court - if not constitute an error of law - to endorse such an ex post facto balancing approach that would void protections granted by this Court and would result in such unfairness.
- [77] I find it difficult to accept that this Court would now send a message to persons who might otherwise become engaged in insolvency proceedings that they may lose protections granted by the Court because of a later rebalancing of relative prejudice to the stakeholders based on hindsight considerations. Such a message would no doubt be a chilling one and would likely hinder participation of such persons in future proceedings to the detriment of those stakeholders.
- [78] At the end of the day on October 28, 2024, I advised the parties that I was declining to exercise my discretion to approve the Transaction under my jurisdiction under s. 11 of the CCAA.

THE REVISED SALE TRANSACTION

- [79] The stakeholders and the Purchaser returned to the drawing board.
- [80] On October 28, 2024, GDNP filed a new application to approve an amended Transaction. The only two changes were to extend the closing date and increase the "Closing Payment" to be paid to Cap West for the Transaction Success Fee from \$300,000, plus tax, to \$850,000, plus tax (the "Revised Transaction").

- [81] With that amendment, Cap West supported the Revised Transaction. In addition, the Monitor withdrew its objection, as confirmed in its Supplemental Report dated October 30, 2024. In light of what was obviously a negotiated solution between GDNP, the Purchaser and Cap West, with the support of the other stakeholders, no further fairness issues arose in that respect.
- [82] What remained to be considered were the Harte Gold factors in terms of whether the RVO structure was appropriate. I agree that all of those factors support that conclusion, as follows.
- [83] Why is the RVO necessary? The RVO is a required condition to the Revised Transaction. The next best offer that arose from the SISP would result in lower net sale proceeds and lack the support of the secured lenders.
- [84] The RVO allows the Retained Assets and Retained Liabilities to stay with the Purchaser and avoid a lengthy and expensive process whereby the Purchaser would be required to amend or assign numerous contracts, licenses and permits in the many jurisdictions in Canada and the U.S. where GDNP operates. As the Monitor notes, delays in the consummation of the Revised Transaction would result in further reduction to the Purchase Price and those delays would take place with GDNP having considerable constrained liquidity.
- [85] In addition, the RVO preserves certain tax attributes that GDNP has accumulated that would otherwise be lost in a traditional sale and vesting order transaction. GDNP's non-capital losses are approximately \$51 million.
- [86] Does the RVO produce an economic result at least as favourable as any other viable alternative? I agree that the RVO structure produces an economic result at least as favorable as other transaction structures. The RVO allows the assumption of the secured debt owed to the secured lenders. The SISP allowed other parties to tender an offer that could have been structured as a RVO or as a traditional asset sale and vesting order transaction, yet no similar transaction was proposed.
- [87] Is any stakeholder worse off under the RVO structure than they would have been under another viable structure? With the resolution of the Cap West issue, I accept that all stakeholders substantially benefit from the RVO structure and are not better off under another structure. In fact, under the other qualified bid, some of the secured creditors would suffer a shortfall.
- [88] This structure similarly allows GDNP's business to be sold as a going concern, with the attendant benefits for employees, suppliers and customers, and which provides for assumption of certain payables under contracts.

- [89] Does the consideration being paid for GDNP's business reflect the importance and value of the intangible assets being preserved under the RVO structure? As the RVO is a required condition to the Revised Transaction, the Monitor considers the consideration being paid does reflect the importance and value of the assets and business operations (including goodwill, customer relations and trademarks) being preserved under the RVO structure. I agree.
- [90] In all of the circumstances, I am satisfied that the Revised Transaction is reasonable and appropriate. As stated in Peakhill Capital, the RVO best fulfills the purposes and objects of the statutory scheme under the CCAA in providing a going concern result which is in the best interests of the overall stakeholder group and which will hopefully lead to a more financially stable business for everyone's benefit.

RELEASES

- [91] The final matter for consideration is the appropriateness of the releases sought by GDNP.
- [92] GDNP is seeking, under the RVO, release of:
- a) the current and former directors, officers, employees, consultants, legal counsel and advisors of GDNP;
 - b) the current directors, officers, employees, consultants, legal counsel and advisors to ResidualCo; and
 - c) the Monitor and its legal counsel and their respective current and former directors, officers, partners, employees, consultants and advisors (collectively, the "Released Parties"), for any and all present and future claims against the Released Parties based upon any fact, matter or occurrence in respect of the Subscription Agreement, the Revised Transaction, GDNP or their business, operations, assets, property or affairs, or the administration of GDNP, the CCAA proceedings and/or the Chapter 15 Proceedings, except
 - i. any claim for fraud or willful misconduct;
 - ii. any claim against ResidualCo in respect of the Excluded Liabilities transferred pursuant to the closing; or
 - iii. any claim that is not permitted to be released pursuant to s. 5.1(2) of the CCAA.
- [93] Further, in the RVO, GDNP seeks exculpations of the Released Parties for the purposes of recognition in the Chapter 15 proceedings (the "Exculpations"). This relief is said to be narrower than the releases sought from this Court, as the scope of the Exculpations will be in compliance with the requirements of the U.S. Bankruptcy Code, as recently discussed by the U.S. Supreme Court decision in *Harrington v. Purdue Pharma LP*, 603 US ____ (2024).

- [94] The releases under the RVO and the Exculpations under the Chapter 15 proceedings are sought in part to satisfy the release of the Directors' Charge of \$400,000 granted by Court under the ARIO. The Monitor advised that it understands that the directors and officers have agreed to the release of the Directors' Charge on this basis.
- [95] Initially, GDNP also sought a release and an Exculpation in favour of the Purchaser in respect of the Subscription Agreement and the Revised Transaction. When questioned as to the reasons to support that relief, the Purchaser withdrew its request for any releases or Exculpation both in this Court and in the Chapter 15 proceedings.
- [96] The considerations relevant to the granting of releases have been articulated and applied in many Canadian decisions, including *NextPoint Financial Inc. (Re)*, 2023 BCSC 2378 at para. 25, citing *Harte Gold* at paras. 78-86; *Blackrock Metals Inc. (Re)*, 2022 QCCS 2828 at paras. 125-132; and *Just Energy Group Inc. v. Morgan Stanley Capital Group Inc.*, 2022 ONSC 6354 at para. 67. They include:
- 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.
- [97] I agree that the proposed releases and Exculpations are reasonable and appropriate in the circumstances. The releases and the Exculpations are rationally connected to the restructuring and essential to its success. The granting of the RVO (including the releases and the Exculpations) is a condition to the closing and implementation of the Revised Transaction.
- [98] In addition, the Released Parties have made significant contributions to the development and implementation of GDNP's exit from these CCAA proceedings. I accept GDNP's evidence and submissions that its directors and officers have been, and remain, critical to these CCAA proceedings, including the negotiation and execution of the Subscription Agreement, and the consummation of the Revised Transaction. In addition, the directors and officers of ResidualCo will be necessary to facilitate the orderly wind-down of these CCAA proceedings. Finally, the Monitor has reviewed the requested releases and Exculpations in respect of these parties and agrees that they are appropriate and reasonable in the circumstances.
- [99] I also accept that the Monitor and its professional advisors have diligently overseen these CCAA proceedings and are entitled to this relief in its role as the Court's officers.

STAY OF PROCEEDINGS

[100] I also granted an extension of the stay of proceedings to November 12, 2024, which GDNP sought in order to complete the Revised Transaction and seek foreign recognition in the U.S. (scheduled for November 8, 2024). That further time will allow these steps to be completed and is possible because Wells Fargo has agreed to further extend its interim financing to that date. The financing will allow a relatively small further draw to cover GDNP's operating shortfalls and professional costs, in accordance with the updated cash flow statement.

[101] I am satisfied that GDNP is acting in good faith and with due diligence and that this short extension to November 12, 2024 is appropriate for that purpose, as s. 11 of the CCAA requires.

"Fitzpatrick J."

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