

CANADA / JUDGMENT

PaySlate Inc. (Re)

2023 BCSC 608

COURT

Supreme Court of British Columbia

DECIDED

14 April 2023

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2023 BCSC 608 PaySlate Inc. (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

PaySlate Inc. (Re),

2023 BCSC 608

Date: 20230414

Docket: B220504

Estate No.: 11-2891281

Registry: Vancouver

In Bankruptcy and Insolvency

In the Matter of the Notice of Intention

to Make a Proposal of PaySlate Inc.

Corrected Judgment: The text of these Reasons for Judgment

has been corrected at paras. 1, 11 and 86 on April 18, 2023.

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

March 10, 22, 27, 28 and 31, 2023

Place and Date of Judgment:

Vancouver, B.C.

April 14, 2023

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Introduction

- [1] Reverse vesting orders ("RVOs") are a relatively new method used in insolvency cases to avoid the purchaser assuming the insolvent debtor's unwanted assets and liabilities. Typically, an RVO contemplates the sale of the debtor company's shares through a transaction structured so that "unwanted" assets and liabilities (including in this case, certain unsecured creditor claims) are removed and vended to a residual company while the "good assets" remain with the debtor. RVOs are not the norm. They have been used in appropriate circumstances to preserve non-transferrable assets such as licenses, permits, intellectual property, and non-transferrable tax attributes: see, e.g., *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828 at paras. 85-86, leave to appeal ref'd 2022 QCCA 1073; *Quest University Canada (Re)*, 2020 BCSC 1883; *Harte Gold Corp. (Re)*, 2022 ONSC 653; Janis Sarra, "Reverse Vesting Orders - Developing Principles and Guardrails to Inform Judicial Decisions", 2022 CanLIIDocs 431 at 1-2.
- [2] In this case, the debtor seeking approval of an RVO is PaySlate Inc. ("PaySlate") in the context of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA], having filed a notice of intention ("NOI") to make a proposal to creditors pursuant to s. 50.4 on December 5, 2022.

- [3] On March 7, 2023, PaySlate filed its notice of application seeking approval of a bid from its debtor-in-possession ("DIP") lender, Ayrshire Real Estate Management Inc. ("Ayrshire"), to purchase its shares through an RVO ("the RVO") with an outside closing date of March 31, 2023. PaySlate was intent on securing court approval on a fast-track basis and scheduled the hearing of its application for March 10, 2023.
- [4] Despite some initial concerns, PaySlate's proposal trustee advised, in its fourth report dated March 8, 2023, that it approved of the proposed transaction.
- [5] When PaySlate, Ayrshire, and PaySlate's proposal trustee appeared in court on March 10, 2023, one of PaySlate's critical suppliers (and an unsecured creditor), Paysafe Merchant Services Inc. ("Paysafe"), who provides payment processing services to PaySlate, sought an adjournment. Paysafe objected to the granting of the RVO on account of insufficient notice and what it said were its initial substantive concerns regarding the propriety of the RVO.
- [6] Based on what I heard from Paysafe, I decided to adjourn the hearing for a brief period to allow Paysafe to consider its position. When the parties returned to court, Paysafe continued to object to the transaction, on both substantive and procedural grounds. The hearing took longer than the initial half-day scheduled, and even after it finished, and two days before the proposed completion date, PaySlate and Ayrshire submitted an amended version of the RVO attempting to ameliorate one of Paysafe's objections concerning lack of service. That led to a further, brief hearing. In view of the impending proposed completion date, on March 30, 2023, I advised the parties of my decision to dismiss the application with reasons to follow. These are my reasons.

PaySlate

- [7] PaySlate describes itself as a technology company, providing an online rental payment processing service for its customers who are primarily property owners and property managers. It is in financial distress. It has been operating at a loss since it began operations in April 2013.
- [8] PaySlate earns revenue from software usage fees, tenant and condominium transaction fees, lease payments, and third-party partner service revenues. By way of example, its service allows for payments to be made by tenants and condominium owners either online or through mobile applications or by telephone.
- [9] PaySlate's director and principal is Mr. Adam Rosenfeld.
- [10] PaySlate operates virtually in Canada, and the United States through its wholly owned subsidiary, RentMoola Payment Solutions LLC ("RentMoola US"), whom it manages. PaySlate also owns a non-operating subsidiary in the United Kingdom called RentMoola Payment Solutions Limited.

- [11] PaySlate is federally incorporated and extra-provincially registered in British Columbia and Alberta. PaySlate does not have any physical premises. Its employees operate entirely on a remote basis. Most of its employees are located in British Columbia. Its American-based employees are employed by PaySlate and not RentMoola US.
- [12] According to PaySlate, its assets consist of its customer service agreements, intellectual property, its employees, what the parties refer to as "tax attributes" consisting of tax credits, and scientific research and experimental development tax credits ("SR&ED credits"). In his evidence, Mr. Rosenfeld deposed the value of the SR&ED credits to be approximately \$341,000 for 2021, and a similar amount for 2022, after payment of fees to a third party for preparation of the required tax filings (subject to review by the CRA). The Proposal Trustee's first report estimates SR&ED credits to be approximately \$716,000. As I discuss below, no specific information concerning the potential value of its tax attributes was provided until the late stages of the hearing, and only following Paysafe's continued objections concerning the insufficiency of valuation evidence.
- [13] PaySlate's creditors are comprised of secured creditors, government creditors, and unsecured creditors.
- [14] Its pre-filing secured creditors are:
- (a) Novel Growth Partners Fund I LP ("Novel"), per a revenue financing agreement dated December 4, 2020; Novel is owed approximately US \$416,000 plus interest and costs;
 - (b) a group of noteholders, including Ayrshire ("Noteholders"), per a convertible note purchase agreement dated June 10, 2022; the principal amount owing is approximately \$2.6 million; and
 - (c) Ayrshire, per a SR&ED facility agreement dated November 25, 2022; the principal amount owing is \$300,000.
- [15] Ayrshire is PaySlate's DIP lender. Mr. Rosenfeld is also a director of Ayrshire and acts as its managing director. He is the key principal of both PaySlate and Ayrshire involved in the proposed transaction.
- [16] PaySlate's government creditors are Canada Revenue Agency ("CRA"), owed approximately \$13,375 for unremitted goods and services tax and excise tax, and British Columbia, owed approximately \$33,689 for provincial sales and education and health tax.
- [17] PaySlate's unsecured creditors fall into three categories in these approximate amounts:
- (a) \$96,000 owed to its chief executive officer and former vice president of finance for cash bonuses related to its 2021 fiscal year;
 - (b) \$60,000 and US \$25,000 owed to its Canadian and American employees, respectively; and
 - (c) \$1,230,000 to various suppliers and service providers.

- [18] Its other actual and contingent obligations include (in approximate numbers): (a) interest-free promissory notes issued to its former chief executive and chief operating officers in the principal amount of \$275,000, maturing in 2027 and 2028; (b) debt prepayment agreements of \$375,000; (c) a claim filed in this Court by the RFA Bank of Canada for alleged breaches of a sub-lease of office premises (no dollar amount disclosed); and of importance to the instant application, (d) a claim made by Paysafe for damages of approximately \$2.2 million (on account of fraudulent merchant accounts) Paysafe says are owed to it per PaySlate's indemnification obligations in its contract with Paysafe.

Financial Difficulties

- [19] According to Mr. Rosenfeld, PaySlate has incurred consolidated operating losses of approximately \$39.4 million since it began operations in April 2013 (\$33.8 million incurred by PaySlate and \$5.6 million by RentMoola US). RentMoola US, he deposed, owes PaySlate approximately US \$4.2 million in intercompany loans and recovery is doubtful.
- [20] In his affidavit evidence, Mr. Rosenfeld explained the primary reason for PaySlate's operating losses is its inability to generate sufficient revenue or gross margins from revenue to cover its operating expenses. Its main operating expenses are salaries and wages and third-party consulting expenses and software subscription expenses required for its ongoing development of its online rent collection platform.
- [21] In the spring of 2022, PaySlate introduced a convertible note offering in an attempt to raise \$4 million in capital. According to Mr. Rosenfeld, it raised far less, just over \$2 million along with \$600,000 from notes issued for services in kind or employee bonus supplements. In June 2022, PaySlate began what he described as ongoing "right-sizing and cost-reduction strategies" which included reducing the size of its workforce from 70 to 19 individuals. In November 2022, PaySlate obtained \$300,000 from Ayrshire through the SR&ED facility agreement.
- [22] Ultimately, Ayrshire and another investor advised PaySlate they would not contribute any further funds without a path towards restructuring or selling the business. As a consequence, PaySlate filed the NOI on December 5, 2022. It named Grant Thornton Limited as the proposal trustee ("Proposal Trustee"). PaySlate also proposed a court-approved sale and investment solicitation process ("SISP") to be conducted by the Proposal Trustee in order to identify a purchaser or an investor to allow it to then present a proposal to its creditors. PaySlate's proposed SISP called for marketing efforts to begin on December 5, 2022, with offers to be presented by February 3, 2023.
- [23] In the interim, Ayrshire agreed to advance interim DIP financing to cover PaySlate's operating expenses.

- [24] On December 9, 2022, Justice Fitzpatrick approved both the SISP and Ayrshire's DIP financing facility up to a maximum amount of \$1.2 million with interest at 15%, along with an administrative charge of \$250,000 to cover professional fees (including those of the Proposal Trustee). An extension of the stay for the time for filing PaySlate's proposal per Part III, Division I of the BIA to February 17, 2023, was also granted (further extensions have been granted over time, to April 24, 2023).
- [25] In January 2023, PaySlate became concerned that many, if not most, of its remaining employees would leave without some assurance that salaries would be paid (along with bonuses contingent on the outcome of the SISP). It sought court approval of a key employee retention program ("KERP") charge, which it grounded on its assertion that retention of its remaining workforce was not only vital to a successful outcome of the SISP but was also crucial to sustain its business as a going concern.
- [26] Accepting the integrity of its evidence and submissions in this respect, and also in light of support from the Proposal Trustee, on January 23, 2023, I approved a charge in the amount of \$604,000 covering all 19 remaining members of PaySlate's workforce, over the vehement objection of Paysafe, who argued that it was excessive and out of line with KERPs ordered in other cases.
- [27] As will be seen from the discussion below, on the instant application, Paysafe argues that the evidence and submissions relied on by PaySlate on the KERP application belie the credibility of PaySlate's assertion that the RVO is necessary to maintain its business as a going concern.
- [28] I also approved PaySlate's request in January 2023 to increase the DIP financing facility from \$1.2 million to \$1.45 million. On March 10, 2023, I granted PaySlate's request (unopposed by Paysafe) to increase the DIP financing facility from \$1.45 million to \$1.95 million.

The SISP Failed

- [29] The Proposal Trustee advises that the SISP was structured to allow for an asset purchase or a transaction involving a restructuring of PaySlate's debt, share, or capital structure together with an asset bid. In consultation with PaySlate, the Proposal Trustee conducted a robust sales and marketing process. It: (a) prepared a list of parties who may have a potential interest in and the financial means to make a bid; (b) prepared and sent an initial offering summary or teaser letter to 88 potential bidders; (c) created a virtual data room containing confidential information, including some of PaySlate's tax filings; (d) prepared a draft confidentiality and non-disclosure agreement; and (e) placed ads concerning the SISP in the Financial Post and Vancouver Sun on December 16, 2022. In all, twenty-three potential bidders signed the requisite documents to view the data room. Draft potential share purchase and asset purchase agreements were provided to potential bidders. The Proposal Trustee answered questions from potential bidders and coordinated 11 virtual meetings.

- [30] Initially set to close on February 3, 2023, the SISP deadline was extended to February 10 at the request of a potential bidder who expressed serious interest in submitting a bid but said it needed more time to carry out its due diligence. However, by the expiry of the new bid deadline, only one bid was submitted. It was from Ayrshire and certain Noteholders in the form of: (a) a credit bid covering 50% of the DIP loan in the amount of \$700,000 and convertible notes including accrued interest and fees of \$2,791,370.17; (b) cash consideration to pay the administration charge and KERP charge of \$258,545, cure costs for services from persons it viewed as critical suppliers, and bankruptcy costs; and (c) assumption of certain assumed liabilities including 50% of the DIP loan, the SR&ED obligations, post-closing liabilities, contracts with counterparties it deems to be critical suppliers, and debt obligations to Novel to be compromised in the amount of \$557,000 (that part of the bid was later altered to offer a partial compromise and conversion of debt to equity).
- [31] Although the Proposal Trustee was optimistic at that time that the proposed transaction would proceed, Ayrshire ultimately withdrew its bid when Novel refused to accept the conversion of debt-to-equity proposal. Ayrshire says that as a result, its credit bid was no longer feasible as it contemplated the crediting of debt subordinate to Novel's position. Ayrshire withdrew its bid and forfeited its deposit of \$26,794 (reflecting a percentage of the cash portion of the proposed purchase price as opposed to the total consideration).

The RVO

- [32] Ayrshire submitted a new bid, this time in its capacity as the DIP lender, proposing a share purchase transaction through an RVO. A subscription agreement ("Subscription Agreement") dated March 3, 2023 was executed by Ayrshire and PaySlate. The RVO contains provisions mirroring the language in the Subscription Agreement as well as specific language approving that agreement as commercially reasonable.
- [33] Key features of the proposed transaction provided for in the RVO are discussed below.

Consideration

- [34] Ayrshire proposes consideration that is comprised of part cash (of an anticipated maximum of \$198,000), part credit bid of Ayrshire's DIP, and an assumption of certain pre-filing liabilities.

Retained Contracts

[35] Central to the transaction are orders mandating retention of some 176 pre-filing contracts with customers and suppliers (whom Ayrshire deems critical suppliers), who are also unsecured creditors, without recourse to certain termination rights, with accompanying releases, waivers, and bars to claims other than unpaid pre-filing services. Those contracts are called "Retained Contracts" in the Subscription Agreement and the RVO, and are included within the definition of "Assumed Liabilities".

[36] All outstanding amounts owed for pre-filing services are to be paid as "cure costs" out of a trust to be established and called a "Creditor Trust". Cure costs are defined as monetary defaults in respect of the Retained Contracts as at the time of closing:

"Cure Costs" means all monetary defaults in relation to the Retained Contracts as at the date of Closing, other than those arising by reason only of PaySlate's insolvency, the commencement of the NOI proceedings by PaySlate or PaySlate's failure to perform a non-monetary obligation.

[Bold in original]

[37] However, other terms of the RVO would bar or disclaim certain contractual rights and claims counterparties to Retained Contracts may have. As well, the RVO contains broad form waiver and release provisions that cover any pre-filing claims, other than cure costs, those counterparties may have against PaySlate and other persons (such as its directors and officers).

[38] For example, the RVO, which incorporates terms of the Subscription Agreement through reference, would bar counterparties to the Retained Contracts from relying on certain termination rights, such as termination for change of control or PaySlate's insolvency.

[39] Paragraph 12 of the RVO provides:

12. Except to the extent expressly contemplated by the Subscription Agreement, all Contracts (excluding the Excluded Contracts) to which PaySlate is a party upon delivery of the Proposal Trustee's Certificate will be and remain in full force and effect upon and following delivery of the Proposal Trustee's Certificate and no individual, firm, corporation, governmental body or agency, or any other entity (all of the foregoing, collectively being "Persons" and each being a "Person") who is a party to any such arrangement may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including right of set-off, dilution or other remedy) or make any demand under or in respect of any such arrangement and no automatic termination will have any validity or effect, by reason of:
 - (a) any event that occurred on or prior to the delivery of the Proposal Trustee's Certificate and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of PaySlate);

- (b) the insolvency of PaySlate or the fact that PaySlate sought or obtained relief under the BIA;
- (c) any compromises, releases, discharges, cancellations, transactions, arrangements, reorganizations or other steps taken or effected pursuant to the Subscription Agreement, the Transactions or the provisions of this Order, or any other Order of the Court in these proceedings; or
- (d) any change of control of PaySlate arising from the implementation of the Subscription Agreement, the Transactions or the provisions of this Order.

[Bold in original]

[40] Although outstanding amounts claimed by, for example, counterparties to Retained Contracts for unpaid pre-filing services are to be paid as cure costs from the Creditor Trust, the RVO preserves to PaySlate all of its rights of contest, as seen from this term of the RVO:

13. For greater certainty the description of any Claim as an Assumed Liability is without prejudice to PaySlate's right to dispute the existence, validity or quantum of any such Assumed Liability, and (c) nothing in this Order or the Subscription Agreement shall affect or waive PaySlate's rights and defences, both legal and equitable, with respect to any Assumed Liability, including, but not limited to, all rights with respect to entitlements to set-offs or recoupments against such Assumed Liability.

[41] Waiver and discharge provisions applicable to all "Persons", which (per para. 12 in the RVO, excerpted above, includes counterparties to Retained Contracts), are also included:

14. From and after the Effective Time, all Persons shall be deemed to have waived any and all defaults of PaySlate then existing or previously committed by PaySlate, or caused by PaySlate, directly or indirectly, or non-compliance with any covenant, warranty, representation, undertaking, positive or negative pledge, term, provision, condition or obligation, expressed or implied, in any Contract, existing between such Person and PaySlate arising directly or indirectly from the filing by PaySlate under the BIA and the implementation of the Transaction, including without limitation any of the matters or events listed in paragraph 12 hereof, and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under a Contract shall be deemed to have been rescinded and of no further force or effect, provided that nothing herein shall be deemed to excuse PaySlate or the Purchaser from performing its obligations under the Subscription Agreement or be a waiver of defaults by PaySlate under the Subscription Agreement and the related documents.

[42] Once the Proposal Trustee files the Certificate, PaySlate is deemed, per para. 5 of the RVO excerpted below, to have satisfied or assumed the Assumed Liabilities in accordance with the terms of the Subscription Agreement, which in the case of the Retained Contracts, is payment of any money owed for services out of the Creditor Trust (para. 5 also contains release and discharge provisions in respect of the Assumed Liabilities):

5. Upon the delivery of the Proposal Trustee's certificate (the "Proposal Trustee's Certificate") to the Purchaser (the "Effective Time"), substantially in the form attached as Schedule "B" hereto, the following shall occur and shall be deemed to have occurred at the Effective Time, all in accordance with the Closing Sequence set out in the Subscription Agreement and the steps contemplated thereunder:
- (h) PaySlate shall have paid, assumed or otherwise satisfied the Assumed Liabilities, in accordance with the terms of the Subscription Agreement, and upon payment or assumption thereof, other than as set out in the Subscription Agreement, the Assumed Liabilities shall be and are hereby forever released, expunged and discharged as against the Retained Assets, PaySlate, and the Subscribed Shares;

[Bold in original]

- [43] Thus, counterparties to Retained Contracts are required to carry on providing services to PaySlate, with restricted termination rights as well as loss of any right to claim for any other claims they may have against PaySlate's beyond cure costs (which, as pointed out above, may be contested by PaySlate). Those counterparties are required to carry on in circumstances where they risk not being fully paid for post-closing services by a debtor who has incurred significant operating losses since its inception and who also retains all of its rights to contest pre-filing cure cost claims.
- [44] Using Paysafe as an example, except for the 60-day termination on-notice provision in its contract with PaySlate, it would lose its right to rely on its other contractual rights of termination (e.g., on account of PaySlate's insolvency) and lose its right to advance its claim for recovery of what it says are damages, calculated to be approximately \$2.2 million, against PaySlate under the indemnity provisions of their contract.
- [45] In respect of that claim, Paysafe threatened legal action to recover those losses and to terminate its contractual relationship with PaySlate if it is not paid. The claim remains outstanding, and the Proposal Trustee advises it is not in a position to evaluate the claim (it advises that the claim must be adjudicated in court).
- [46] In the midst of this proceeding, PaySlate offered financial assurances to Paysafe in order to avoid termination of what it characterizes as Paysafe's critical services for its business as a going concern. The parties reached an agreement on February 9, 2023 that calls for PaySlate to pay \$100,000 to Paysafe, comprised of an immediate partial payment of \$25,000 (which was paid on February 13, 2023) with a further \$75,000 to be paid on closing of the SISP, so long as Paysafe did not terminate its services prior to payment being made. I was advised their agreement also called for PaySlate to provide a guarantee of \$100,000 for post-filing claims. However, Paysafe's extant claim under the indemnity provisions was not compromised in that agreement. During the hearing of this application, PaySlate and Ayrshire confirmed that even though the SISP has failed, they will honour the agreement with Paysafe if court approval of its current bid is granted. The language of the release and waiver provisions in the Subscription Agreement and RVO, they said, would be modified to

the extent necessary to exclude that agreement from their ambit.

- [47] Nonetheless, if the RVO is approved, Paysafe would lose its right to pursue its indemnity claim, something it is not prepared to give up particularly in light of the loss of its contractual termination rights, the preservation to PaySlate of all of its rights to defend pre-filing monetary claims for cure costs, an unsecured guarantee, and what it says is inadequate valuation evidence and evidence necessary to show that creditors are no worse off under the RVO than they would be under any other viable alternative.

Other Assumed Obligations

- [48] Ayrshire will also assume all liabilities in respect of employees (except for terminated employees, for whom it will pay \$2,000 per terminated employee), including KERP payments (approximately \$258,545), tax obligations owed to the CRA and British Columbia, and PaySlate's SR&ED obligations (and corresponding benefits due to Ayrshire).

Creditor Trust

- [49] PaySlate's other unsecured pre-filing liabilities, such as all pre-filing contracts with unsecured creditors (called "Excluded Contracts" in the Subscription Agreement and the RVO), professional fees, and cure costs would be channelled, assumed by, and vested into the Creditor Trust to be administered by the Proposal Trustee acting in its capacity as its sole trustee. PaySlate and the Proposal Trustee propose the Creditor Trust instead of an incorporated company because of what they say will be the vastly reduced costs of setting up a trust as opposed to a new corporate entity, and the near impossibility to find someone willing to act as a director with attendant potential liabilities in the circumstances.
- [50] It is anticipated that the cash consideration to be paid by Ayrshire - said to be no more than approximately \$198,000 - would be sufficient to pay professional fees and cure costs to counterparties to Retained Contracts, but nothing more. All other excluded liabilities, including Excluded Contracts, would be unpaid.
- [51] Moreover, all excluded claims, including Excluded Contracts, are released as against PaySlate:
5. Upon the delivery of the Proposal Trustee's certificate
 - (e) all of PaySlate's right title and interest in and to the Excluded Liabilities, but specifically excluding the Assumed Liabilities, shall be channeled to, assumed by and vest absolutely and exclusively in the Creditor Trust for the purpose of allowing the Creditor Trustee to continue to administer the Excluded Liabilities in accordance with the Trust Settlement such that the Excluded Liabilities shall become the obligations of the Creditor Trust which shall be deemed to be a party to the contracts and agreements giving rise thereto and which shall stand in place and stead of PaySlate in respect of any such liability or obligation, and shall no longer be obligations of PaySlate, and PaySlate shall be and are hereby forever released

and discharged from such Excluded Liabilities and all related Claims (excluding, for greater certainty, the Assumed Liabilities);

Ayrshire Becomes the Sole Shareholder of PaySlate

[52] The RVO contains terms that see Ayrshire becoming the sole shareholder of PaySlate free and clear of any claims or liabilities. PaySlate's articles of incorporation would be amended to provide for its issued common shares to be redeemed at the nominal price of \$0.00001 per share, and then, along with all other subscription rights, conversion rights, options, plans, and instruments created or granted in connection with PaySlate's share capital, would be terminated and cancelled.

Claims Bar

[53] Claims bar language prohibits any person from commencing or continuing with a proceeding directly or derivatively against PaySlate, concerning, inter alia, any claims waived, released, expunged, or discharged by the terms of the RVO:

15. From and after the Effective Time, any and all Persons shall be and hereby forever barred, estopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, whether directly or derivatively or otherwise, and including without limitation taken or proceeded with or that may be commenced, taken or proceeded with against PaySlate or the Retained Assets relating in any way to or in respect of any Excluded Assets, Excluded Contracts or Excluded Liabilities and any other claims, obligations and other matters which are waived, released, expunged or discharged pursuant to this Order.

[Emphasis added]

Broad Form Release to Persons Associated with PaySlate

[54] A broad form release is provided for the protection of individuals associated with PaySlate, such as its past and present directors, officers, employees, legal counsel, the Proposal Trustee, and Ayrshire.

[55] Except for anything specifically preserved in the Subscription Agreement, the release encompasses any and all present, future claims, liabilities, indebtedness, actions, causes of action and suits related to the proceedings before the Court and the administration and management of PaySlate prior to these proceedings. The release language is not limited to the specific matters and claims in issue in this insolvency proceeding:

19. Effective upon the delivery of the Proposal Trustee's Certificate, (i) the present and former directors, officers, employees, legal counsel and advisors of PaySlate (ii) the Proposal Trustee and its legal counsel, and their respective present and former directors, officers, partners, employees and advisors, and (iii) the Purchaser, its directors, officers, employees, legal counsel and advisors shall be deemed to be forever irrevocably released and

discharged from any and all present and future claims whatsoever (including, but without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or in equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, offer, investment proposal, dealing, or other fact... or to any other entity and are extinguished, provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim for fraud or wilful misconduct or any claim that is not permitted to be released pursuant to section 50(14) of the BIA.

- [56] To the extent that they are not covered by the release, the RVO limits recovery of claims against directors and officers to proceeds available from any applicable insurance policy.

Termination of this Proceeding

- [57] This NOI proceeding will be terminated and PaySlate will be released from it when the Proposal Trustee issues and files with the court the Certificate confirming that Ayrshire has satisfied the subscription price set out in the Subscription Agreement and the conditions in that agreement have been satisfied.

Lack of Service

- [58] One of the many concerns raised by Paysafe regarding the propriety of the RVO and transaction concerns service. Paysafe correctly points out that there is no court approved service list despite the continued reference to one in PaySlate's application materials. Moreover, the service list, Paysafe points out, does not include unsecured creditors.
- [59] PaySlate's position throughout has been that service on unsecured creditors would be unduly burdensome and would negatively affect what they characterize as their business relationship management.
- [60] Paysafe submits that given the extraordinary circumstances of an RVO, the service requirements found under s. 58 of the BIA concerning proposals, set out below, should be complied with:

Application for court approval

58 On acceptance of a proposal by the creditors, the trustee shall

- (a) within five days after the acceptance, apply to the court for an appointment for a hearing of the application for the court's approval of the proposal;

- (b) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor who has proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;
 - (c) forward a copy of the report referred to in paragraph (d) to the official receiver at least ten days before the date of the hearing; and
 - (d) at least two days before the date of the hearing, file with the court, in the prescribed form, a report on the proposal.
- [61] Paysafe also points to Rule 3 of the Bankruptcy and Insolvency General Rules, C.R.C., c. 368, which states that "in cases not provided for in the statute or its Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules." Thus, if the RVO in this case is not a proposal, which is the position taken by PaySlate, then Paysafe submits that Rule 8-1(7) and Rule 8-1(8) of the Supreme Court Civil Rules [Rules], which requires that the applicant must serve a notice of application and related documents "on each party of record and on every other person, other than a party, who may be affected by the orders sought", applies.
- [62] In response submissions adopted by PaySlate, Ayrshire contended that in this case, where unsecured creditors are out of the money, there is no requirement to serve the entire body of unsecured creditors where it is demonstrated there is no value to them. Ayrshire submits that as there is no such requirement in a vesting order circumstance, there should be no requirement in the context of an RVO. That, of course, presumes that PaySlate has established there is, in fact, no value to the unsecured creditors, a finding (as discussed in the next section) I am unable to make.
- [63] During the late stages of the hearing, following Paysafe's continued objections concerning lack of service, I was advised that PaySlate had just served its application materials on most of the counterparties to Excluded Contracts, including counterparties outside Canada, by email. In many instances, it was to their generic customer service or information email addresses or website portals (no order was sought or made approving service in that manner).
- [64] However, PaySlate did not attempt to serve or provide notice to counterparties to the Retained Contracts with its notice of application. It continues to say that it would be onerous to do so in the circumstances and would negatively affect its business relationship management. No evidence concerning any negative impact on its business management was provided.
- [65] PaySlate's characterization of the circumstances does not take into account what I have pointed out above: the terms of the RVO require counterparties to the Retained Contracts, in particular those whom PaySlate views to be critical suppliers, to carry on providing services (with restrictions on their contractual termination rights accompanied by waiver, release,

and claims bar language) with the risk of non-payment given that PaySlate has operated with significant losses since its inception, where PaySlate preserves to itself all defences to cure costs claims.

- [66] There is no evidence from which I can determine if their contracts have provisions allowing them to terminate for change of control or insolvency or for other reasons that I am being asked to override in the RVO. Yet, I am being asked to approve a transaction that requires them to carry on providing goods and services to PaySlate relying on whatever other termination provisions may be contained in their contracts.
- [67] Nor is there is any evidence from which I can determine whether any of the counterparties to the Retained Contracts other than Paysafe have or may have contingent claims that would be caught by those provisions.
- [68] I am also being asked to make those orders in the absence of service, let alone evidence of notice, to those counterparties in circumstances unlike Harte Gold. In that case, absence of extensive discussions with creditors was not seen to be a material deficiency since virtually all creditors, including unsecured creditors, would be paid: Harte Gold at para. 52. Similarly, in *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354, Justice McEwen was satisfied that extensive consultation had taken place with all creditors, including the unsecured creditors (in his reasons, McEwen J. pointed out, at para. 53, "There is no suggesting in the record that any creditors were ignored or overlooked").
- [69] On March 29, 2023, after the hearing had concluded, and while my decision was under reserve, I received a letter from counsel for PaySlate addressing some of the concerns surrounding service. PaySlate and Ayrshire, in consultation with the Proposal Trustee, with a proposed amendment to the RVO. The amendment added a paragraph to the RVO that would allow counterparties to the Retained Contracts to object to the retention of their contract by serving notice on the Proposal Trustee within 30 days of service of the RVO:

Notwithstanding the terms of this Order, any counter-party to a Retained Contract may object to the retention of their contract by providing written notice to the Proposal Trustee at Mark.Arzadon@ca.gt.com, within thirty (30) days of service of this Order, and shall include the bases of the counter-party's objections. The Proposal Trustee in consultation with the Purchaser will attempt to resolve such objections with the objecting counter-party, and if not resolved shall bring the matter back before the Court for determination.

[70] Paysafe objects to the amendment on these grounds:

- (a) the amendment paragraph is inconsistent with PaySlate's earlier statement that providing notice was unduly burdensome;
- (b) a significant number of Retained Contracts are with parties outside of the jurisdiction of the court;

- (c) this Court does not have the jurisdiction to impose the relief provided for in the proposed paragraph on counterparties located outside of Canada; and
 - (d) in the absence of any service on affected non-Canadian counterparties, it is not appropriate for the RVO to request that foreign courts take steps that may be "necessary or desirable" to give effect to the RVO.
- [71] The proposed amendment to the RVO is not an answer to avoid service. It forces counterparties to Retained Contracts to engage with the Proposal Trustee to lodge and pursue their objection in an undefined process in circumstances where their rights have been abrogated by court order. The amendment also raises the potential for increased expense through the objection process.
- [72] Paysafe also points out that the RVO attempts to bar the ability of counterparties located in jurisdictions outside of this province to rely on legal defences prescribed by law in their home jurisdictions.
- [73] I was advised that some counterparties to the Retained Contracts are based in Hong Kong, the Netherlands, Israel, the United Kingdom, Switzerland, and the United States. The provision in the RVO asking for aid and recognition from any court or tribunal in Canada or the United States to give effect to the RVO in the absence of service is, in my opinion, problematic.
- [74] Issuing the RVO which bypasses providing service to a substantial group of counterparties to Retained Contracts also lacks procedural fairness.
- [75] I agree with Paysafe's submissions that PaySlate's reason for not serving these counterparties is inconsistent with the amendment that PaySlate is proposing. If it is not "unduly burdensome" for PaySlate to provide service after the order is granted, why is it that it cannot provide service prior to this hearing, particularly when it has made efforts to serve counterparties to the Excluded Contracts.
- [76] PaySlate's reason that providing service would negatively affect PaySlate's business relationship management is also inconsistent. If service would negatively affect PaySlate's business relationship management with the group of counterparties to Retained Contracts, what is the difference between providing it before the hearing and after the hearing?
- [77] Even assuming PaySlate can establish there is no value to pay out unsecured creditors, service should have been effected on the counterparties to the Retained Contracts given the proposed waiver, release, and bar provisions and restrictions on their contractual rights.

When an RVO may be Ordered

Introductory Comments

- [78] As mentioned at the outset, RVOs typically contemplate a purchase of shares in a debtor company wherein the "unwanted" assets, liabilities, and creditor claims are removed and vended to a residual company while the "good assets" remain with the debtor.
- [79] In *Harte Gold*, Justice Penny described the purpose of an RVO in the context of the sale of Harte's mining enterprise to a strategic purchaser:
- [22] The purchase transaction for which approval is being sought in this case does not provide for a sale of assets but, rather, provides for a "reverse vesting order" under which the purchaser will become the sole shareholder of Harte Gold and certain excluded assets, excluded contracts and excluded liabilities will be vested out to new companies incorporated for that purpose.
- [80] RVOs are often thought to be appropriate in situations where the debtor's licenses cannot be vested on an asset sale. By way of example, in *Blackrock Metals*, Chief Justice Paquette made this observation in the context of a case involving the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [CCAA]:
- [86] Albeit new, RVOs have been confirmed by the courts as an appropriate way for a debtor to sell its business when the circumstances justify such structure. In particular, CCAA courts have approved RVO structures in several complex mining transactions and have recognized that their benefits, which include maximizing recovery for creditors, importantly limiting delays and transaction costs, and facilitating the preservation of the insolvent business' going concern, justify the use of this innovative restructuring tool.

Jurisdiction

- [81] In *Harte Gold*, Penny J. described the jurisdictional basis to make the order in a CCAA context, at paras. 18-39, to be grounded in the court's discretionary power in s. 11 of the CCAA to further the objectives of the CCAA and other insolvency legislation in Canada, as discussed and approved of in other case authorities.
- [82] It is clear from the reasons of Justice Fitzpatrick in *Quest*, leave to appeal denied, *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364, a CCAA case, and the case authorities reviewed in her decision at paras. 127-149, that this Court has authority to grant an RVO under its general statutory authority found in s. 11 of the CCAA.
- [83] In this province, appellate approval of RVOs is gleaned from the reasons in *Southern Star*, where the Court of Appeal said that an RVO granted by Fitzpatrick J. reflected "precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising CCAA proceedings":

- [30] In arriving at her conclusion, Fitzpatrick J. considered and applied the principles recently set out by the Supreme Court of Canada in *Callidus*, which affirm the broad and flexible discretion of judges under the CCAA to make orders that are appropriate in the circumstances. She was also alive to the limits of her discretion; namely, that any order must conform to the objectives and purposes of the CCAA: at para. 154. She carefully evaluated each factor under s. 32(4) in making her determination that the Disclaimers were appropriate. With respect to the lease for Lot E, she found that no lease was in effect between Quest and Southern Star, so the prohibition in s. 32(9)(d) was inapplicable: at paras. 37-40. Finally, she recognized that this case presented unique and complex circumstances which made it appropriate to grant the RVO: at paras. 168, 172. While jurisprudential authority for making such an order in a contested proceeding is limited, it is notable that leave to appeal was refused in the one case in which it has been done, and under similar factual circumstances: *Nemaska*, *supra*.
- [31] Fitzpatrick J. acknowledged the negative impact to Southern Star arising from the relief she granted, though she questioned the extent of that damage; she gave some credence to the suggestion, as Quest argues in this application, that Southern Star's arguments were made strategically with a view to gaining leverage, while significant other interests hung in the balance: at paras. 46, 164-66. Whether that was so did not, however, drive her conclusions. Ultimately, she accepted that Southern Star would suffer harm but balanced that impact with the "myriad interests held by other stakeholders" and chose the best option for everyone involved, including Southern Star: at paras. 48, 111, 164.
- [32] The judge's order reflects precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising CCAA proceedings, and which forms the basis for the considerable deference their decisions are afforded on review. Respectfully, in my opinion, if a division of this Court were to set aside the order it would be acting contrary to the instruction of the Supreme Court of Canada in *Callidus* that appellate courts should defer to the exercise of discretion by supervising judges in these kinds of proceedings.
- [84] Although many of the case authorities discussing the circumstances in which RVOs may be issued are in the context of the CCAA, RVOs are available tools in other insolvency cases as well. Similar considerations apply in the context of the BIA.
- [85] In the BIA, s. 183 confers jurisdiction in accordance with legal and equitable principles to give effect to its purpose: *Re Olympia & York Developments Ltd.*, [1997] O.J. No. 591 at paras. 7, 10 (Gen. Div., in Bankruptcy); *Re Residential Warranty Company of Canada Inc.* (Bankrupt), 2006 ABQB 236 at para. 26. Those purposes include those applying to proposals such as s. 65.13(4).
- [86] In addition to *Blackrock Metals*, *Harte Gold*, and *Quest*, there are other case authorities finding jurisdiction to order RVOs, including a notice of intention to make a proposal under the BIA (case name is underlined), and receivership proceedings, such as: *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00 (Ont. S.C.J. [Comm. List]); *Stornoway Diamond*

Corporation (October 7, 2019), Montreal 500-11-057094-191 (Q.C.S.C. [Comm. Div.]); Wayland Group Corp. (April 21, 2020), Toronto CV-19-00632079-00CL (Ont. S.C.J. [Comm. List]); Comark Holdings Inc. (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. S.C.J. [Comm. List]); Beleave Inc. (September 18, 2020), Toronto, CV-20-642097 (Ont. S.C.J. [Comm. List]); JMB Crushing Systems Inc. (October 16, 2020), Calgary 2001-05482 (A.B.K.B.); Arrangement relatif à Nemaska Lithium Inc., 2020 QCCS 3218, leave to appeal refused, 2020 QCCA 1488; In the Matter of a Plan of Compromise or Arrangement of Clearbeach Resources Inc. and Forbes Resources Corp., 2021 ONSC 5564; In the Matter of the Notice of Intention to Make a Proposal of Junction Craft Brewing Inc. (November 8 and December 20, 2021, Toronto, CV-31-2774500 (Ont. S.C.J. [Comm. List]; Port Capital Development (EV) Inc. (Re), 2022 BCSC 1464, leave to appeal ref'd 1296371 B.C. Ltd. v. Domain Mortgage Corp., 2022 BCCA 331; In the Matter of CannaPiece Group Inc., 2023 ONSC 841; In the Matter of CannaPiece Group Inc. (February 10, 2023), Toronto CV-22-689631-00CL (Ont. S.C.J. [Comm. List]); Credit Suisse AG, Cayman Islands Branch v. Southern Pacific Resource Corp. et. al. (May 13, 2022), Calgary 1501-05908 (A.B.K.B.).

Extraordinary Circumstances Must Exist

[87] RVOs are not the norm and should only be granted in extraordinary circumstances.

[88] In *Just Energy*, a CCAA case involving Just Energy's highly regulated business as a retail energy provider with assets including licenses, authorizations, and permits across multiple jurisdictions in Canada and the United States, McEwen J. noted that RVOs have been approved in specific circumstances:

[33] Reverse vesting orders are relatively new structures. I agree that reverse vesting orders should not be the "norm" and that a court should carefully consider whether a reverse vesting order is warranted in the circumstances: see *Harte Gold Corp. (Re)*, at para. 38; *Black Rock Metals Inc.*, at para. 99. That said, reverse vesting orders have been deemed appropriate in a number of cases: see *Quest University (Re)*, at para. 168, *Harte Gold Corp. (Re)*, at para. 77 and *Black Rock Metals Inc.*, at para. 114.

[34] The aforementioned cases approved reverse vesting orders in circumstances where:

- The debtor operated in a highly-regulated environment in which its existing permits, licenses or other rights were difficult or impossible to reassign to a purchaser.
- The debtor is a party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser.
- Where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.

[Emphasis added]

[89] In an article written by highly respected insolvency author and educator, Professor Janis Sarra, cited with approval by Paquette C.J.S.Q. in *Blackrock Metals* and Penny J. in *Harte Gold*, Professor Sarra wrote that RVOs require special scrutiny by the courts, even where uncontested, since they deviate from statutory framework intended to provide all creditors with an opportunity to be heard in the process:

[T]here must be exceptional circumstances for the court to be persuaded to bypass provisions of insolvency legislation aimed at giving both the secured and unsecured creditors a meaningful voice/vote in the proceedings, as they are the residual claimants to the value of the debtor's assets during insolvency.

This statutory framework represents a careful balancing of interests and prejudice, and gives voice and vote to the creditors that are the residual claimants to the value of the debtor company. Many of the provisions are aimed at mitigating the imbalance in power that secured creditors have in insolvency proceedings, at least during the period of negotiations for a plan, with a view to maximizing the value of the assets, preserving going-concern value, and protection of employees and the public interest.

It makes sense, therefore, that in any application to bypass this carefully crafted statutory process, the court consider whether there are compelling and exceptional circumstances to justify this extraordinary remedy, even where the RVO is not specifically contested, as the court needs to be satisfied of the integrity of the system and the potential prejudice to creditors and other stakeholders that may not be appearing before it. Reasons are important for stakeholders to understand the benefits and prejudice that may accrue to any particular transaction.

[Emphasis added]

[90] Those comments are echoed in the approach taken in the case authorities.

[91] For example, in *Harte Gold*, a CCAA case involving the sale of the debtor's mining enterprise (including its 12 materials permits and licenses allowing it to maintain its mining operations, 24 active work permits and licenses allowing it to perform exploration work, forestry licenses, mineral claims, and fire permits), Penny J. cautioned against the use of an RVO structure in an insolvency situation as the "norm" or something that is "routine or ordinary course". Close judicial scrutiny of the proposed transaction is required. RVOs, he wrote in comments apposite to this case as they include the BIA in his discussion, should continue to be regarded as an "unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser":

[38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this

restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA.

[Emphasis added]

[92] In Blackrock Metals, another CCAA case involving a distressed mining and metals manufacturing business, Paquette C.J.Q.S. approved, following a failed SISP, a proposed RVO that contemplated a share sale to allow licenses, permits, and authorizations to remain with the debtor while the claims of unsecured creditors are transferred to a shell company. Of critical importance was the monitor's advice that numerous agreements, permits, and licenses are vital assets that must be retained to facilitate the debtor's restructuring, and would avoid any need for consents required under a traditional vesting order:

[114] In his Fifth Report, the Monitor outlines the reasons why, in his opinion, the reverse vesting order structure that would be implemented would be "more appropriate and beneficial than a traditional vesting order structure and that the reverse vesting order structure is necessary, reasonable and justified in the circumstances":

(iv) Most assets of BRM are intangibles, such as agreements, permits, licenses, authorizations and related amendments, and their value depend on the capacity of the purchasers to complete the financing and achieve the project. These assets would have no or limited value if some of them were not being preserved. The reverse vesting order structure allows to avoid any potential risks around the transfer to the purchaser.

[115] The Court agrees with the Monitor's conclusions. RVO structures have been found by courts to be appropriate in situations such as the present case, where a traditional sale of assets would lead to uncertainty regarding the transfer of numerous agreements, permits, authorizations and other regulatory approvals that are required for the continuation of the company's business.

[116] Indeed, BlackRock operates in the highly regulated mining industry. Their business is almost entirely constituted of such intangible assets, which provide a head start of several years to the purchaser. Some of these assets cannot be assigned or are at least difficult to assign. Therefore, the capacity to restructure BlackRock depends heavily on the capacity to keep the existing legal entities in place while restructuring the share-capital of BlackRock. That Is exactly what the RVO provides for.

[Emphasis added]

[93] Nonetheless, and similar to Penny J., Paquette C.J.Q.S. cautioned that RVOs must be carefully scrutinized. Citing Professor Sarra's remarks, Paquette C.J.Q.S. wrote, at paras. 95-97, that, "Some authorities indeed call for caution. Professor Sarra recently stressed the importance for courts to provide detailed reasons when approving RVOs. Among other things, Professor Sarra reminds us that this type of order deviates significantly from the usual CCAA framework, which is meant to provide all creditors with an opportunity to be heard."

[94] Likewise, in a BIA context, an RVO avoids the statutory processes mandated by Parliament.

[95] In addition to those discussed above, I would also add these remarks from Professor Sarra's article as important considerations when considering whether RVOs should be approved.

[96] First, creditors should have the opportunity to have a voice in the workout strategy:

[at 27-28]

The guardrail should be what creditors are entitled to under all avenues to resolve the insolvency, including liquidation, unless the creditors agree otherwise to compromises for their benefit, and the framework should not be bypassed absent compelling circumstances. In analogous circumstances, courts have consistently held that the fact a secured creditor states it will not support a plan under any circumstances is no reason not to grant relief pursuant to the CCAA. The entire structure of the statute is to allow the claimants to the residual value of the assets a 'voice' in the workout strategy, and the value of claims under the voting procedure draws parties to the negotiation table. It raises the question of whether the court has authority to override a veto position, which is quite different than urging parties back to the bargaining table.

[Emphasis added]

[97] Second, since the purchaser obtains all of the forward-value of the debtor's activities, RVOs remove the opportunity for negotiations that may lead to compromise and greater value for a broader group of creditors:

[at 17]

As many CCAA proceedings in the past have illustrated, negotiations and a creditor vote can lead to innovative and fairer outcomes in which parties compromise rights today for future upside value.⁷⁰ Negotiations can lead to higher value being paid for the licenses and the shedding of liabilities; or the debtor can negotiate deferral or compromise of claims until such time as the debtor is once again a viable entity.

Absent negotiations, the purchaser gets all the forward-value of the debtors' activities and the creditors whose claims are transferred to newco receive nothing of that forward-value for the value of their pre-filing claims. Yet the participation of creditors can enhance asset value in some cases. A presumption that the delay and costs of a vote are not worth it does not address the risk of opportunistic behaviour by debtors/secured creditors if they can bypass a vote.

[at 19]

[After citing *McEwan Enterprises Inc.*, 2021 ONSC 8423] Second, the reality is that when a court rules against commercial parties that claim they will not agree to any changes or compromises, they ultimately do bargain further and come to an agreement with creditors. The current practice of endorsing RVO without consideration of the policy and statutory framework of the CCAA undermines the ability of all creditors to bargain.

[Emphasis added]

[98] Next, and of particular importance for this case, an evidence-based rationale should explain why an RVO is at least equivalent to outcomes under the statutory mechanisms:

[at 29-30]

At the very least, some sort of written endorsement should issue in each case, and that endorsement should address the key questions that the court has asked of the monitor and debtor. This procedural process is important to safeguard the transparency, accountability, and integrity of the system. The following are some initial suggestions as to questions the courts should be asking:

- Has the monitor in its report offered an evidence-based rationale as to why the proposed transaction is at least equivalent to respecting the rights and remedies of creditors under a plan of arrangement?

[Emphasis added]

[99] Lastly, and also important to this case, careful consideration should be given to proposed releases where creditors have no opportunity to vote (and to that I would add, in the instant circumstances where counterparties to Retained Contracts have not been served with the application):

[at 23]

Also of concern are the broad releases in respect of potential liability claims being granted against directors, officers, insolvency professionals, and third-parties, without the reasoning that usually underpins such broad releases, including contributions to the value of the assets that remain to satisfy creditors' claims. Prior to RVO, the courts had established clear tests for endorsing broad liability releases, which both protect the integrity of the insolvency system and encourage parties to negotiate in the shadow of liability risk. The tests have included: whether the claims to be released are rationally connected to the purpose of the plan; whether the plan can succeed without the releases; whether the parties being released contributed to the plan; whether the releases benefit the debtors as well as the creditors generally; whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and whether the releases are fair, reasonable, and not overly-broad.

While willful misconduct and fraud liability are often excluded from the release, in a number of the RVO cases, releases are being granted in respect of a broad range of statutory claims without discussion of potential prejudice from such releases or reference to the developed jurisprudence. As one commentary observes, courts have granted broad releases in RVO transactions, thereby achieving third-party releases without creditors being asked to vote on this issue, undermining one of the key criteria for approval that the courts have used.

[Emphasis added]

Factors to be Considered

[100] What other factors should be considered on an application to approve an RVO other than those discussed above?

[101] In *Quest*, Fitzpatrick J. was clear that RVOs should not be employed or approved in a CCAA restructuring "simply to rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests", nor should it be used to expedite the debtor's desired result without regard to the remedial objectives of the CCAA": para. 171. The analysis should consider whether the relief is appropriate in the circumstances and whether the stakeholders are treated fairly and reasonably as the circumstances permit.

[102] After considering the balance between competing interests and the good faith of the debtor *Quest* who acted with due diligence to promote the best outcome for all stakeholders, Fitzpatrick J. determined, in the absence of any other offers, that the proposed RVO in that case was the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group that includes *Southern Star* and *Dana* [who opposed the RVO]": para. 172.

[103] In *Harte Gold*, Penny J. said at para. 23, factors to consider when an RVO is sought in a CCAA context include those set out in s. 36(3) of the CCAA, excerpted below:

- (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.

[104] Justice Penny also said the s. 36(3) CCAA criteria correspond to the principles set out in *Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No. 1137, 1991 CanLII 2727 (C.A.) for the approval of asset sales in an insolvency context. He did not confine his remarks to CCAA cases:

[21] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp.*, 1991 CanLII 2727(ONCA) for the approval of the sale of assets in an insolvency scenario:

- (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers have been obtained; and
- (d) whether there has been unfairness in the working out of the process:

see *Target Canada Co. (Re)*, 2015 ONSC 1487, at paras. 14-17.

[Emphasis added]

[105] In *Blackrock Metals*, Paquette C.J.Q.S. also referred to the s. 36(3) CCAA factors as well as the additional factors discussed by Penny J. in *Harte Gold* when scrutinizing a proposed RVO: at paras. 100-124.

[106] Likewise, in *Nemaska*, Justice Gouin also said approval should be considered with the s. 36 criteria in mind, subject to determining, whether sufficient efforts to get the best price have been made and whether the parties acted providently, the efficacy and integrity of the process followed, the interests of the parties, and whether any unfairness resulted from the process: see, e.g., paras. 3-8, 46, 49-54, 57.

[107] In the context of the BIA, the following questions were outlined by Penny J. in *Harte Gold* as those that should be answered by the debtor, proposed purchaser, and the court's officer:

[38] The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

- (a) Why is the RVO necessary in this case?
- (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
- (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[108] In my opinion, those same factors considered in the CCAA context apply to the RVO proposed in the context of PaySlate's NOI proceeding.

[109] With this discussion in mind, I turn now to consider whether, apart from the service issue, PaySlate has established that the RVO is appropriate in this case.

Determination

Position of PaySlate and Ayrshire

[110] I will begin this section by setting out PaySlate's position, supported by Ayrshire, that it has established the necessary prerequisites for the RVO.

[111] PaySlate says that its primary assets are its intellectual property, tax attributes, and value as a going concern (encompassing its Retained Contracts with its critical suppliers and customers). The proposed transaction, PaySlate and Ayrshire maintain, is structured as an RVO in order to enable PaySlate to continue its business operations under new ownership with minimal disruption and to avoid losing PaySlate's tax attributes, which they submit, are otherwise non-transferable. PaySlate's tax attributes, they say, are an important factor supporting the RVO. There are no licenses or permits as in other cases where RVOs have been granted.

[112] According to PaySlate and Ayrshire, the proposed transaction is the only viable option available to PaySlate and provides the greatest recovery available and greatest certainty to PaySlate's emergence from these proceedings as a going concern.

[113] They submit that since PaySlate has limited liquidity, its financial position does not allow it to meet its obligations to conduct a further SISP or use an alternative process to find an alternative transaction that could lead to a proposal. They submit that PaySlate has provided appropriate evidence of value to support the consideration offered by Ayrshire and to demonstrate there is nothing available for unsecured creditors in any other scenario.

Support from the Proposal Trustee

[114] Although the Proposal Trustee expressed some initial concerns, it is ultimately supportive of the relief sought by PaySlate. The Proposal Trustee submits that the transaction is structured pursuant to the RVO so that Ayrshire can assume and maintain the business as a going concern, ensure the continued ability to PaySlate to file claims for SR&ED credits, and preserve certain tax attributes that Ayrshire has indicated "may" hold value.

[115] That said, the Proposal Trustee agrees with Paysafe that the RVO is not the only means by which PaySlate's tax attributes and SR&ED credits may be acquired. The Proposal Trustee confirms that they may be acquired by a purchaser in a typical share acquisition and in that sense, on their own, they do not satisfy the necessity test. However, the Proposal Trustee says that the Ayrshire's bid, which is the only one available, meets the necessity test as it will allow PaySlate to continue as a going concern providing continued employment for certain employees. The Proposal Trustee also says that Ayrshire's bid provides greater recovery to PaySlate's stakeholders than could be obtained in a liquidation or bankruptcy.

Analysis

[116] For reasons set out below, I have determined that PaySlate has not established that the RVO should be approved.

Necessity

[117] Paysafe appropriately questions whether the proposed transaction is truly meant to facilitate the business as a going concern.

[118] Paysafe argues that the purpose of the RVO is not, as PaySlate says, to preserve the business as a going concern, and is, instead, an attempt by Ayrshire to obtain PaySlate's tax attributes well below market value without having to comply with the processes set out in the BIA (for example, the voting requirements for a proposal set out in s. 54(2)(d) of the BIA, stating that a proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors, other than equity claimants, vote for acceptance by a majority in number and two thirds in value of the unsecured creditors of each class present).

[119] Paysafe asserts that PaySlate's statement that the RVO is necessary to preserve its business as a going concern is belied by the incongruity between its proposed termination of over half of its remaining 19 workforce (and possibly more) and the position it took and the evidence it adduced on the KERP application.

[120] On the KERP application, which was opposed by Paysafe, PaySlate argued, based on evidence it adduced from Mr. Rosenfeld and its chief financial officer, Gary Bentham, that it had no hard assets. Its assets and value as a going concern were its employees; retention of its then remaining 19 employees was critical.

[121] For example, Mr. Rosenfeld deposed in his affidavit no. 2, sworn January 10, 2023:

KERP and KERP Charge

A. Management and Employees

12. PaySlate does not have physical premises and its employees operate entirely on a remote basis. As set out in detail in the First Affidavit, the majority of PaySlate's employees are resident in British Columbia, Canada.

13. Shortly prior to the commencement of the BIA Proceedings, and as part of PaySlate's cost-reduction strategies, PaySlate had terminated certain employment contracts. As such, as at the time of filing of its Notice of Intention to Make a Proposal, PaySlate employed, and now continues to employ, a minimum number of employees necessary to continue business operations (and ideally, would have a larger complement of employees).
14. Since the execution of the First Affidavit on December 6, 2022, one employee has resigned from PaySlate. As of the date of this Affidavit, PaySlate has 19 employees. This does not include the Chief Financial Officer, Gary Bentham, who provides his services through an independent contractor arrangement.
15. PaySlate has identified certain key employees (the "Key Employees") whose continued involvement is necessary to maintain ongoing operations and business stability. Furthermore, the retention of the Key Employees is critical to the value of PaySlate's business as a going concern.

B. The KERP Terms and Conditions

Development of the KERP

16. As set out in further detail below, the Key Employees are a critical component of PaySlate's value and ability to operate as a going concern. Accordingly, PaySlate has been considering how it can best retain and incentivize those employees and whether the Key Employees could be retained without a formal KERP. Based on discussions with management and in consultation with the Proposal Trustee, PaySlate determined that a KERP was required to retain and incentivize the Key Employees (for the reasons described further below).
19. The KERP includes only Key Employees where management has determined that their continued employment and participation is integral to the operation of PaySlate's business, the preservation of value, and the successful completion of the SISP and any potential restructuring transaction.
20. PaySlate reduced its employee headcount shortly before filing the NOI in order to reduce its operating expenses. As a result, PaySlate is operating on a very lean basis, and ideally would have a larger complement of employees. However, since PaySlate is already operating with minimal staffing, it is particularly important that it retain the Key Employees.
21. Each of the Key Employees has institutional knowledge and expertise in their respective roles, and cannot be easily replaced given PaySlate's current financial condition.

[Bold and italics in original; underlining added]

- [122] Some of Mr. Bentham's evidence was admitted under seal given its confidential nature regarding key employees. His evidence that was not sealed was as equally pointed as Mr. Rosenfeld's: PaySlate's remaining employees were critical to its ability to operate as a going concern as well as to promote a successful SISP; any further reduction in staff would

further diminish Paysafe's ability to deliver product to its customers on a timely basis. In his first affidavit sworn January 19, 2023, he also remarked on the essential role each employee brings to the company's ability to carry on business:

8. PaySlate's employees include individuals with highly specialized technical knowledge regarding PaySlate's product offering and intellectual property, and their roles include maintaining the technology platform, security, onboarding customers, and supporting existing customers. There is no overlap in responsibilities and each employee brings their specific skills and knowledge to the ongoing operations of PaySlate. Without those skills and knowledge, the ability for PaySlate to sustain operations and support a successful sale and/or restructuring of PaySlate will materially diminish.
13. Based on my interaction with the employees and on my discussions with Mr. Brissot [a member of management] if the KERP is not approved, it is my view that employees will immediately be leaving PaySlate and PaySlate's ability to maintain operations through the SISP process will severely diminish and PaySlate may in fact not be able to sustain operations as a going concern. PaySlate's value to all stakeholders lies in its ability to remain operating as a going concern. The significant reduction in the workforce has also impacted the remaining employees because it has increased their workload. The demands on employees have further increased during these proceedings since several have also been asked to assist with gathering information for the sale process and will be asked to participate in meetings with bidders.
15. In particular, as set out in the Affidavit #1 of Adam Rosenfeld, PaySlate's value is primarily as a going concern, and its revenue potential is based on (a) increased tenant adoption of the platform; (b) tenant screening, credit reporting, and rental insurance services; (c) renegotiation of legacy contract terms; and (d) signing new landlords and property managers. Realizing that potential requires PaySlate's employees, and the expertise and history of the participants in the KERP are integral to the going concern value and realizing on PaySlate's potential.

[Emphasis and square bracket insertion added]

[123] The Proposal Trustee supported Paysafe's request for the KERP and provided this advice in its second report (mistakenly dated January 11, 2022, as opposed to 2023):

Development of the KERP

28. Management has advised the Proposal Trustee that PaySlate is currently operating with the minimum number of staff necessary to ensure continued business operations. The Proposal Trustee understands, based on discussions with management, that if there are any more departures from the Company, its operations and the SISP could be at risk.

The Proposal Trustee's Opinion

35. The Proposal Trustee is supportive of the proposed KERP Charge for the following reasons:

- (a) The Company downsized its headcount shortly before the Filing Date to reduce operating expenses and is currently operating on a very lean basis. The number of Key Employees identified is proportionately reasonable to the size and nature of the business.

[Emphasis added]

[124] In these circumstances, I find myself unable to accept at face value PaySlate's contention that the RVO is intended to preserve the company as a viable going concern. Nor am I able to make that finding. That said, without more, I cannot go so far as to make the finding suggested by Paysafe - that the RVO is a disguised attempt by Ayrshire to obtain a valuable tax asset for improvident consideration while avoiding the statutory requirements imposed by Parliament. While I recognize that it is not uncommon for a purchaser of a distressed debtor to reorganize the debtor's affairs, and reduce the size of its workforce, I do find the inconsistency (pointed out by Paysafe) between PaySlate's present approach to the proposed reduction of at least half of its remaining workforce and its approach on the KERP application raises significant concerns about the reliability of submissions and evidence from PaySlate and Ayrshire regarding the purpose of the RVO.

Evidence of Value

[125] In this section, I address the insufficient nature of the valuation evidence provided by PaySlate and Ayrshire in the context of factors concerning no other viable alternative, whether any other stakeholder is worse off, and the appropriateness of the consideration paid.

[126] For most of the hearing, evidence of value of PaySlate's assets came from two sources: Ayrshire's view that PaySlate's tax attributes "may hold" value and from what was described as the "market has spoken" through the failed SISP.

[127] For the tax attributes, Ayrshire's position is contained in the Proposal Trustee's Fourth Report dated March 8, 2023, that they "may hold" value:

35. Although the Proposal Trustee has expressed some concerns, as noted above, the Proposal Trustee is supportive of the relief sought by the Company. In particular:

- (a) The Proposal Trustee understands that the transaction is structured pursuant to a reverse vesting order so that the proposed purchaser can assume the business as a going concern, ensure the continued ability of the Company to file claims for SR&ED credits and preserve certain tax attributes which the proposed purchaser has indicated may hold value;

[Emphasis added]

[128] Paysafe cautions that the advice comes from the proposed purchaser, i.e., Ayrshire, whose managing director and principal, Mr. Rosenfeld, is the director of and commands the same role with PaySlate.

[129] With that in mind, Paysafe brought to my attention written advice it received from the Proposal Trustee on March 13, 2023, five days after it issued its Fourth Report, answering an inquiry from Paysafe (both are excerpted below) that the value of the tax attributes may be in the range of \$27 million:

[From Paysafe's law firm]

March 7, 2023

On another issue, Robyn, could you please confirm with your client and RM , what the value of the non-transferrable tax attributes to which reference is made in paragraph 44 e) of the Motion?

March 13, 2023

Robyn, please see below. Can you provide me with this information?

[From counsel for the Proposal Trustee]

Bernard, we understand it is approximately \$27 million.

[Emphasis added; email descriptions in brackets added]

[130] The information in this email was, understandably, brought to my attention as a matter of significant concern. It also grounded, in part, Paysafe's challenge of the valuation of the tax attributes proffered by PaySlate on the application, which was essentially Ayrshire's view of value as reported in the Proposal Trustee's Fourth Report noted above.

[131] After this correspondence was admitted into evidence (by consent), the Proposal Trustee delivered a supplemental report dated March 24, 2023 with additional information concerning value, suggesting a range of \$750,000 to \$1.5 million:

24. Based on the Proposal Trustee's past experience, and in consultation with tax experts within its office, the market will typically pay approximately \$0.03 to \$0.06 per \$1.00 of available tax attributes in similar transactions. The range is largely dependant on the type of attribute available. For example, resources pools which may be held by oil and gas companies, typically carry greater value than non-capital losses as there is more certainty associated with their utility on a carry forward basis. In this case, PaySlate does not operate in that sphere and does not have any resource pools. Further, there is significant uncertainty associated with the value of non-capital losses as there are many variables that affect their use. For example:

(a) A company must generate profitability of \$25 million on a go forward basis in order to use the tax losses (within a 20-year period when the non-capital losses expire);

- (b) Tax losses cannot be sold to a third party, but if there is a change of control in a company, the company's business must be continuing; and
 - (c) To the extent there is any debt forgiveness in a company, the amount of that forgiveness reduces the amount of losses available for potential use (in this case, the tax losses of approximately \$27 million may be reduced by debt forgiveness and conversion of debt to equity in the aggregate of approximately \$5.5 million).
25. The realizable value of the tax attributes is never the face amount of the non-capital losses. Given the significant uncertainty surrounding the utility of the losses, the market is limited and deeply discounted.
26. Applying the range of value to the amount understood to be available in non-capital losses (even without the grind for debt forgiveness), the Proposal Trustee can attribute a value of \$750,000 to \$1,500,000 for the tax attributes (based on \$0.03 to \$0.06 per dollar of \$27 million). The Proposal Trustee notes that this is well below the value associated with the proposed Transaction, which includes:
- (a) The assumption of the DIP Loan of approximately \$1.95 million;
 - (b) The assumption of the SRED Loan of approximately \$300,000;
 - (c) The conversion of the Novel debt (approximately US \$416,000 as at December 2020) to equity;
 - (d) The conversion of the Noteholder debt (approximately \$2.6 million as at December 2020) to equity;
 - (e) The assumption of tax obligations to the Canada Revenue Agency and BC Ministry of Finance, which the Proposal Trustee understands are being paid as they could be set off against any SRED claim;
 - (f) The payment of arrears under Retained Contracts for services provided thereunder; and
 - (g) The payment of any amounts owing under the Administration Charge and in relation to Terminated Employee Claims.

[Emphasis added]

[132] Paysafe takes issue with the late provision of this information as it did not give it an opportunity for fair consideration, and further, that it was not, and should have been qualified as expert evidence. Paysafe also questions this valuation advice, reminding me that Novel and the CRA, who initially opposed the RVO, must see sufficient value in the proposed transaction sufficient to satisfy their claims since, in Novel's case, it agreed to convert secured debt to equity and for the CRA, to accept a post-closing indemnity.

[133] Paysafe correctly points out that in respect of any proposal that PaySlate proffered, ss. 65.13(1), (4), and (5) of the BIA require me to consider, in addition to other factors emphasized in s. 65.13(4)(d) and (e) in the excerpt below, whether (per s. 65.13(4)(f)) the consideration provided for the assets "is reasonable and fair, taking into account their market value":

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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

- (4) 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 trustee approved the process leading to the proposed sale or disposition;
 - (c) whether the trustee 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.

Additional factors -- related persons

- (5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that
 - (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
 - (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

[Bold in original; underlining emphasis added]

- [134] Although those provisions do not specifically require a valuation opinion or liquidation analysis, either or both have been provided in other cases in appropriate circumstances.
- [135] I disagree with PaySlate's contention that it is inappropriate to consider s. 65.13(4) in my analysis as it assumes there is a party willing to tender and fund a proposal in this case. I agree with Paysafe that that is in effect what is being sought on this application. Even if it is not construed as a proposal, the s. 65.13(4) factors are appropriate to the analysis in this case as they align with those discussed in the case authorities dealing with RVOs.
- [136] Paysafe argues that both expert evidence of valuation along with a valuation and liquidation analysis should have been provided in this case in view of the extraordinary nature of an RVO, the stringent burden placed on an applicant seeking an RVO and the Proposal Trustee, and in particular, in view of the concerns it raised regarding the \$27 million value for the tax attributes contained in the Proposal Trustee's March 13 email.
- [137] I agree, to this extent.
- [138] While not every case involving an RVO may require expert valuation opinions, at a minimum, fulsome evidence concerning the value of PaySlate's assets, including its tax attributes, should have been provided well before the hearing began. The information in the Proposal Trustee's supplemental report should not have had to be drawn out on account of Paysafe's objections during the hearing. I agree with Paysafe that the case authorities are clear that the onus rests with the applicant, purchaser, and court's officer to provide the requisite evidence to demonstrate that the tests for issuing an RVO have been met.
- [139] While I do not accept Paysafe's contention that expert valuation evidence tendered in accordance with the Rules is necessary in this case, I agree with Paysafe that the unidentified sources for much of the valuation information and advice are problematic. I also do not know the qualifications and expertise of the author of the Proposal Trustee's reports (their resume is not in evidence) nor that of the tax experts spoken to (let alone their identity). Nor is the nature, extent, and scope of the research grounding their analysis provided.
- [140] I also agree with Paysafe that value in this case is not necessarily measured solely by what a third party might pay for the tax attributes (it points out there is no evidence concerning the specific information available in the data room to potential bidders concerning valuation including the tax attributes and SR&ED credits). In the specific circumstances of Ayrshire's stated purpose of its bid (i.e., to maintain it as a going concern), the value of the tax attributes is to PaySlate's business as a going concern. The value of those attributes based on a forward-looking cash flow analysis would be useful (in other cases, the court's officers have provided a comparative analysis, including a cash flow analysis to show the potential value of tax attributes). It would also address factors such as appropriateness of consideration and the extent of value to all stakeholders under the proposed transaction as

opposed to bankruptcy).

[141] As Professor Sarra aptly points out, there must be an evidence-based rationale for value in the proposed transaction. In addition, given the heightened obligations on the court's officer, discussed in *Blackrock Metals* and in *Harte Gold*, analysis should have been provided in this case contrasting the impact of bankruptcy on all stakeholders to the RVO.

[142] Thus, in all, I am not satisfied that sufficient evidence of value has been provided. Without it, I am unable to determine the appropriateness of the consideration proposed to be paid under the RVO, whether there are other viable alternatives, and whether other stakeholders are no worse off.

Release, Bars, and Restrictions on Contractual Rights

[143] In all of these circumstances, and in the absence of service on counterparties to Retained Contracts whose rights are affected and given insufficient evidence concerning value, I cannot accept that PaySlate and Ayrshire have demonstrated that the waiver, bar, release provisions as well as those restricting contractual rights of counterparties to Retained Contracts are fair and reasonable, as they must in accordance with the principles outlined in *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54; see also; *Blackrock Metals* at paras. 128-130; *Harte Gold* at paras. 78-86.

Disposition

[144] The case authorities are clear that RVOs are only to be granted in extraordinary circumstances following close judicial scrutiny and only after the applicant, purchaser, and court's officer have established that the factors set out in the case authorities are satisfied. In addition to significant issues arising from lack of service, they have not met that burden on the evidence available. I have no choice but to dismiss the application.

"Walker J."

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