

CANADA / JUDGMENT

Quest University Canada (Re)

2020 BCSC 1883

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1883 Quest University Canada (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Quest University Canada (Re),

2020 BCSC 1883

Date: 20201202

Docket: S200586

Registry: Vancouver

In the Matter of the COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

- and -

In the Matter of the SEA TO SKY UNIVERSITY ACT, S.B.C. 2002, c. 54

- and -

In the Matter of A PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST UNIVERSITY CANADA

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

(Sale Approval)

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Place and Date of Hearing:

Vancouver, B.C.

November 12-13, 16, 2020

Place and Date of Decision with Written Reasons to Follow:

Vancouver, B.C.

November 16, 2020

Place and Date of Written Reasons:

Vancouver, B.C.

December 2, 2020

INTRODUCTION

- [1] On November 3, 2020, the petitioner, Quest University Canada ("Quest"), applied for various orders in these Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36 ("CCAA") proceedings. Orders sought by Quest included approval of a sale transaction with Primacorp Ventures Inc. ("Primacorp") and orders necessary to facilitate that transaction, namely allowing Quest to implement a claims process and calling a meeting to consider its plan of arrangement.
- [2] On November 3, 2020, I granted the Claims Process Order and a Meeting Order to allow the creditors to consider Quest's plan of arrangement dated November 1, 2020 (the "Plan"). I also approved Quest's agreement to pay Primacorp a Break Up Fee and granted a charge to secure that amount: Quest University Canada (Re), 2020 BCSC 1845.
- [3] I adjourned Quest's application for a Transaction Approval and Vesting Order (TAVO) to approve the Primacorp transaction to these hearing dates to allow opposing parties to consider the matter further and prepare necessary materials.

- [4] Southern Star Developments Ltd. ("Southern Star") has since formalized its opposition to the granting of the TAVO. Indeed, its opposition has since increased in force because Quest and Primacorp have now changed the relief sought to approve the Primacopr transaction within the context of a "reverse vesting order" ("RVO"), as explained below. Southern Star also now applies for an order prohibiting Quest from disclaiming certain subleases, as is required in order for the Primacorp transaction to proceed.
- [5] In the meantime, other parties have joined in opposing the approval of the Primacorp transaction for a variety of reasons, including those advanced by Southern Star in relation to the RVO.
- [6] At the conclusion of this hearing, I granted the RVO and dismissed Southern Star's application, with written reasons to follow. These are my reasons for those orders.

BACKGROUND FACTS

- [7] This CCAA proceeding has been underway for almost ten months, after the granting of the Initial Order on January 16, 2020.
- [8] Since that time, the Court has extended the stay of proceedings a number of times, to allow Quest to undertake efforts to find a restructuring solution to its financial difficulties that would allow it to continue its educational endeavours. Many stakeholders have been actively involved in these proceedings, including secured creditors who, collectively, will be owed approximately \$30.7 million by the end of December 2020.
- [9] I have also approved interim financing to allow Quest to continue its operations while in this proceeding, with that debt now approaching \$11 million.
- [10] Quest's assets include lands in Squamish, BC, being Lot 1, on which the campus is located (the "Campus Lands"), as well as the surrounding 38 acres (the "Development Lands"). Lot 1 is encumbered by various charges, liens, interests, mortgages and assignments of rent, including a mortgage held by Capilano University ("CapU"). In addition, CapU holds various rights of first refusal, including a right of first refusal to purchase, a right of first refusal to lease and rights of first refusal to acquire the charges of Quest's major secured creditor, Vanchorverve Foundation ("VF") (collectively, the "ROFR").
- [11] Quest is also the registered owner of five real property lots (Lots A-E), four of which are the sites of its university residences (on Lots A-D) (collectively, the "Residences").
- [12] One of the significant flashpoints in this proceeding has been, and continues to be, in relation to the Residences that Quest leases from Southern Star. After the Residences became vacant in March 2020 following the onset of the COVID-19 pandemic, Quest attempted to defer payment of the substantial lease payments owed to Southern Star. On June 19, 2020, I denied that relief: *Quest University Canada (Re)*, 2020 BCSC 921 (the "Rent Deferral Reasons").

- [13] Quest's principal focus in these proceedings has been toward identifying a partner/investor to purchase its land assets and/or identifying an academic partner/investor that would permit Quest to continue as a post-secondary institution.
- [14] Since January 2020, Quest's Board of Governors and its Restructuring Committee have been working with a private educational consultant, Halladay Education Group Inc. to find a prospective academic partner. In addition, since March 2020, Quest has been working with Colliers Macaulay Nicolls Inc. to find prospective purchasers for Quest's real property assets.
- [15] There is no dispute that the sale and partner search process (SISP) has been extensive, as confirmed by the Monitor. Quest submits, and I accept that its management, the Restructuring Committee, and the Board analyzed all proposals based on a number of factors, including:
- a) Creditor recovery from the purchase price or other consideration under the proposal;
 - b) That the proposal would result in a completed transaction;
 - c) That the proposal offered allowed for Quest's long-term continuation as a post-secondary academic institution; and
 - d) That the proposal would lead to the continuation of a school on Quest's lands that aligned with Quest's current vision and academic quality.
- [16] The SISP resulted in a number of academic and real estate organizations approaching Quest to express interest in pursuing a transaction. Quest engaged with a number of potential purchasers or partners from Canada, the United States and other countries. Some parties executed Non-Disclosure Agreements (NDAs) and Quest received numerous Letters of Intent (LOIs) and other proposals.
- [17] On May 28, 2020, this Court granted an extension of the stay of proceedings. At that time, Quest stated that there was a realistic potential of a transaction with the party identified as the "Academic Partner". Unfortunately, that transaction did not proceed.
- [18] On August 7, 2020, this Court granted a further extension of the stay of proceedings to December 24, 2020 to allow Quest to continue seeking proposals towards a transaction by that deadline and to allow Quest to offer the fall term to its students. Quest was still in discussions with various interested parties at that time. By then, Quest had received LOIs, including one from Primacorp (identified as "Academic Partner #2) as of July 29, 2020.
- [19] Since August 7, 2020, Quest and Primacorp have worked extensively to negotiate the definitive documents toward completing a transaction. On September 16, 2020, Quest and Primacorp executed a Purchase and Sale Agreement (the "Primacorp PSA").
- [20] The Primacorp transaction, as originally presented, provided for:

- a) Sufficient funds to pay Quest's secured creditors' claims, including claims secured by the CCAA charges;
- b) Funding for a plan of arrangement to be voted on by Quest's unsecured creditors;
- c) Funds for these insolvency proceedings; and
- d) A working capital facility, and marketing and recruiting support to permit Quest to become self-sustaining as a post-secondary institution.

[21] The main and subsidiary agreements executed between Quest and Primacorp in September/October 2020 are complex. They were complete by October 28, 2020 and included, as defined in the Monitor's Fourth Report, the Primacorp PSA, the Campus Lease, an Operating Loan Agreement and an Operating Agreement. Significant terms included:

- a) Primacorp will purchase substantially all of Quest's lands and related assets, including the Campus Lands, the Development Lands, the residence Lands (Lots A-E; four of which involve Southern Star's subleases), chattels and vehicles;
- b) Primacorp will lease specific Campus Lands back to Quest under a long-term lease arrangement;
- c) Primacorp will provide marketing and recruiting expertise to support Quest as a university;
- d) The Purchase Price will satisfy all of Quest's secured lenders and any commissions on sales;
- e) Primacorp will fund sufficient monies to pay the lesser of the Unsecured Creditor Claims and \$1.35 million under Quest's Plan; and
- f) Primacorp will provide Quest with a \$20 million secured working capital facility to support its operations.

[22] The Primacorp transaction was subject to a number of significant conditions:

- a) Quest's disclaimer of the four Southern Star subleases of the Residences or an agreement with Southern Star. On October 23, 2020, Quest disclaimed those subleases;
- b) Court approval of the Primacorp transaction including approval of a Break Up Fee and Break Up Fee Charge to secure Primacorp's costs. On November 3, 2020, I approved the Break Up Fee and granted a charge to secure this amount;
- c) Creditor approval of Quest's Plan under the CCAA. On November 3, 2020, I granted the Meeting Order to allow Quest to present the Plan, after having completed a claims process under the Claims Process Order, also granted on that date; and
- d) Court approval of the Plan under the CCAA.

- [23] On November 3, 2020, when Quest sought the TAVO (which was adjourned), Quest asserted that the Primacorp transaction was beneficial in many respects. Quest argued that it maximized the value of Quest's assets, offered the greatest benefit to stakeholders, had a high likelihood of completing, provided a recovery for secured and unsecured creditors, and had the highest likelihood that Quest will continue to operate within its current academic model.
- [24] The Monitor concurred. In its Fourth Report dated November 2, 2020, the Monitor referred to the fact that there were only two viable proposals, with Primacorp's offer being the superior one. The Monitor's Supplemental and Confidential Report dated November 2, 2020 (the "Confidential Report") is also before the Court, although filed under seal. That Confidential Report referred to four other proposals received by Quest that were "not currently at a stage such that they are capable of being accepted by Quest".
- [25] Quest and Primacorp both see the closing of the Primacorp transaction as very time sensitive. Pursuant to agreements with the Interim Lender, Quest was required to enter into a transaction by October 30, 2020 with an anticipated closing of November 30, 2020. The Interim Lender has since agreed to amend that requirement to extend the necessary closing date to December 24, 2020 in accordance with the Primacorp transaction.
- [26] In addition to satisfying increasing pressure to repay its secured creditors, Quest seeks to exit these CCAA proceedings as soon as possible to allow it to recruit and plan for the upcoming 2021/22 academic year. Finally, there are other more financially driven and critical concerns. The Interim Lender has indicated that it will not fund its loan past December 2020. Without funding of some sort, Quest has no liquidity or financial ability after that time to continue operations.

ISSUES

- [27] The paramount issue for consideration is, of course, whether the Court should approve the Primacorp transaction under s. 36 of the CCAA. A number of subsidiary issues also emerged at this hearing, as a result of submissions from various stakeholders:
- a) Lot E: Southern Star objects to the TAVO (now RVO), as vesting off any interest it may have under an unregistered lease of Lot E;
 - b) ROFR: CapU objects to the sale to Primacorp, asserting that Quest is ignoring its rights under the ROFR that allows CapU to purchase/lease Quest's lands;
 - c) Other Offer: Landrex Ventures Inc. ("Landrex"), together with CapU, assert that they should be given further time to finalize their offer for Quest's assets;
 - d) Disclaimers: Southern Star, supported by its secured creditor, Bank of Montreal (BMO), applies for an order that the subleases of the Residences not be disclaimed by Quest; and

- e) RVO: Southern Star and another unsecured creditor, Dana Hospitality LP ("Dana"), object to the TAVO (now RVO), as being inappropriate and unfair in the circumstances and contrary to the spirit of the CCAA.
- [28] I will address the subsidiary issues in the first instance, before turning to an overall assessment of the Primacorp transaction and whether the Court should approve that transaction.

Lot E

- [29] As I described in the Rent Deferral Reasons (at para. 62), Quest, Southern Star and other parties are involved in a complex suite of agreements concerning the Residences that were built some time ago.
- [30] Quest is the limited partner in a limited partnership agreement with Southern Star, who is the General Partner (GP). They formed the Southern Star Developments Limited Partnership (the "LP") to build the Residences. Quest, as the owner of Lots A-D, leases those lands under Ground Leases to Southern Star (as the GP of the LP). The ground leases are at a nominal rate. In turn, Southern Star (the GP), as landlord, and Quest, as tenant, entered into Subleases for the Residences, once they were built.
- [31] The initial arrangements between Quest and Southern Star anticipated that a fifth student residence would be built on Lot E, the lot adjacent to Lot D.
- [32] In September 2017, as part of those arrangements, Quest and Southern Star executed certain Land Title documents (Form C Charges) attaching a Ground Lease and a Sublease with respect to Lot E. When the parties executed the Form C Charges, the Ground Lease was incomplete in many respects; it did not include any legal description because Lot E was created after the execution of the Form C Charges; and, it did not specify the applicable dates of the 99-year term. Finally, the Schedules to the Ground Lease included various documents between Quest, Southern Star and Southern Star's lender intended to be later executed once the Ground Lease, the Sublease and the mortgage were finalized and registered at the Land Title Office.
- [33] The parties delivered to Form C Charges to a law firm to be held in escrow pending the commencement of construction of the Lot E residence. Only recently, in response to this application, did a lawyer of the law firm complete the legal description for Lot E. Quest authorized this addition some time ago and I do not consider that matter as determinative of Southern Star's rights, if any, under the Lot E Ground Lease.

- [34] At present, Quest's title to Lot E remains clear of any registration relating to Southern Star's Ground Lease so there is no need for Quest to obtain a vesting order to remove it from the title. However, Quest and Primacorp seek an order that any claims that arise from the yet incomplete and unregistered Ground Lease on Lot E shall not attach to Quest's assets that are to be vested in Primacorp. They also seek an order permanently enjoining Southern Star from registering the Lot E Ground Lease against title to Lot E.
- [35] Southern Star objects to the RVO as vesting off any interest it may have in the unregistered Lot E Ground Lease, arguing:
- a) This Court has no jurisdiction to do so under the CCAA. Southern Star argues that this is simply a disguised disclaimer of the Ground Lease that the CCAA expressly prohibits. Disclaimers are allowed pursuant to s. 32 of the CCAA, however, limits are imposed by s. 32(9)(d) which provides that disclaimers can not be made:
- ... in respect of real property or of an immovable if the company is the lessor.
- b) If such jurisdiction exists under the CCAA, the relief sought is not fair and equitable in the circumstances.
- [36] I will begin by discussing the nature of any interest held by Southern Star in relation to the Lot E Ground Lease.
- [37] In my view, no "lease" per se is yet in existence and valid and enforceable between Quest and Southern Star. Although the parties executed the Form C Charges relating to the Lot E Ground Lease, Southern Star's principal, Michael Hutchison, acknowledges that they were not to be registered until construction had commenced. I conclude that the parties did not intend that the Ground Lease would be valid and effective between them until that time, in conjunction with the registration of the Sublease and the execution and registration of Southern Star's mortgage that would allow construction to begin.
- [38] Southern Star does not argue that it has acquired any legal or beneficial interest in Lot E. At its highest, I conclude that Southern Star's rights to Lot E are purely contractual; Quest agreed that it would grant the Lot E Ground Lease in the future and it would become effective upon certain conditions being satisfied - in essence, an agreement to agree. Those conditions included that Quest would decide to build a residence building on Lot E and that Southern Star would arrange financing to construct the building. In these circumstances, I readily conclude that this condition has not been satisfied and will never be satisfied by Quest given Quest's insolvency.
- [39] Further, even assuming that this is a "disguised" disclaimer, I conclude that Quest is not a "lessor" as that term is used in s. 32(9)(d) of the CCAA. Quest agreed that, if certain conditions were satisfied, it would become a "lessor" under the Ground Lease; however, that has not come to pass.

- [40] I conclude that I have the jurisdiction under s. 11 of the CCAA to grant the order sought by Quest to ensure that Southern Star does not assert any rights under the Lot E Ground Lease at a future date. In addition, I rely on s. 36(6) of the CCAA that allows the Court to exercise its jurisdiction to vest off "other restrictions".
- [41] The exercise of the Court's jurisdiction under s. 11 and 36 of the CCAA requires that the relief sought be "appropriate". This is in the sense that it accords with the statutory objectives of the CCAA, not only in terms of what the order will achieve, but the means by which it employs to that end: *Century Services Ltd. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70.
- [42] In this respect, the parties have advanced arguments as to equitable considerations in terms of whether such relief is appropriate in the circumstances, while taking into account the respective positions of the parties. While in the receivership context, Quest has referred to various authorities that discuss the balancing of interests in similar situations where leases (in these cases effective and enforceable) were vested off title: *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.) at paras. 19-23, citing *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154; *Romspen Investments Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648 at para. 66; *rev'd other grounds Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817 at para. 25.
- [43] Southern Star argues that the equities favour it, not Quest, in these circumstances.
- [44] Southern Star contends that neither Quest nor Primacorp have made any attempt to negotiate with it concerning its interest in Lot E. I would not accede to this argument. While the negotiations between Quest, Primacorp and Southern Star were not fruitful, it remains the case that Quest has made good faith efforts to address Southern Star's interests, although its ability in that respect were hampered by Primacorp's willingness to accommodate those interests.
- [45] Southern Star also argues that it will be prejudiced if its contractual right is vested off in that Quest and Primacorp are not offering compensation for the loss of that interest. Southern Star focusses on what it says is the "status quo", arguing that it has the "right" to build a residence on Lot E. However, any such "right" is illusory at best, since Quest has no present ability to occupy the Residences, let alone the financial capability to participate in the construction of a fifth one on Lot E. Nor is there any realistic prospect that Quest will be in a position to do so in the future.
- [46] Southern Star's argument in relation to Lot E is an attempt to gain leverage more than anything else. If Southern Star's argument succeeds and the relief sought is refused, Southern Star would be in the same position--facing a sale of Lot E and a likely order vesting off any rights or interests it may have. It is a condition of the Primacorp transaction that Lot E be transferred to it without any further involvement with Southern Star. Without an order rejecting Southern Star's claim in respect of the escrowed Ground Lease on Lot E, the likely result would be the end of these proceedings and the commencement of realization

proceedings by the Interim Lender and other secured creditors.

- [47] The Ground Lease is not effective and enforceable; the Ground Lease is not registered on title to Lot E. Given the circumstances, Quest has no ability to build a residence on Lot E and there is no reasonable prospect of that happening, given its insolvency and the need to dispose of its assets, including Lot E.
- [48] While I acknowledge the negative impact on Southern Star arising from this relief, that impact must be balanced in the context of Quest's restructuring efforts in this proceeding. Those efforts are intended to address not only Southern Star's interests, but also the myriad interests held by other stakeholders. The sale of Lot E to Primacorp will allow Quest to realize on its interest in Lot E to the benefit of the stakeholders as a whole.
- [49] I conclude that the relief sought by Quest in the RVO in relation to Lot E is appropriate and it is granted.

CapU ROFR

- [50] Lot 1 and Lots A-E are subject to various charges in favour of CapU.
- [51] In March 2019, Quest granted mortgage security in favour of CapU in connection with a loan made to Quest. As part of these agreements, in April 2019, Quest also granted the ROFR in favour of CapU. CapU registered the ROFR against these lands. Under the Primacorp transaction, Quest is required to obtain title to Lot 1 and Lots A-E without reference to the ROFR.
- [52] Pursuant to s. 9 of the Property Law Act, R.S.B.C. 1996, c. 377, a right of first refusal to land is an equitable interest in land.
- [53] CapU has referred to two non-CCAA cases that discuss ROFRs generally.
- [54] In *Adesa Auctions of Canada Corp. v. Southern Railway of B.C.*, 2001 BCSC 1421 at paras. 26-30, the Court found that the contractual terms were to be strictly enforced and that the rights under the ROFR could not be defeated or circumvented by an offer that included other lands not covered by the ROFR. To similar effect, *Alim Holdings Ltd. v. Tom Howe Holdings Ltd.*, 2016 BCCA 84 at para. 41 states, following *Adesa*, that a ROFR will be triggered by a package sale that includes the subject property, subject to contrary language in the ROFR.
- [55] It is common ground, however, that different considerations may also apply in the CCAA context. Having said that, there is little case authority on the ability of a court in CCAA proceedings to vest off a ROFR, whether triggered or not.
- [56] In "Rights of First Refusal and Options to Purchase in Insolvency Proceedings" (2019) 8 J.I.I.C. 103 (the "ROFR Article"), the authors Virginie Gauthier, David Sieradzki and Hugo Margoc extensively review the issue, including in relation to Options to Purchase (OTPs). At 106, the authors state:

... Section 11 of the CCAA grants courts the right to "make any order that it considers appropriate in the circumstances" except as limited by the CCAA. As such, the CCAA court is well equipped to approve the sale of an OTP- or ROFR-encumbered asset to a party other than the rights-holder and without having first complied with the restrictive covenants if the transaction is in the best interests of the creditors at large, provided that the interest of the OTP or ROFR-holders is taken into account. The court will consider, inter alia, the monitor's views on these issues before making any such approvals.

[57] At 118-119, the authors conclude that:

While jurisprudence on this matter is not conclusive, it appears that a CCAA court would likely only vest out a valid and unexpired OTP that runs with the land in exceptional circumstances such as in the context of a going-concern restructuring where obtaining the highest possible price for the encumbered asset is paramount to support the restructuring efforts of the debtor company, and where the OTP rights-holders are also creditors in the proceeding and could seek compensation for any loss incurred due to the removal of the OTP right.

...

In summary, common law CCAA courts may vest out valid or unexpired ROFRs and OPTs in a case where the equities favour such an order or on consent.

[58] Quest has referred to *Bear Hills Pork Producers Ltd. (Re)*, 2004 SKQB 213, additional reasons 2004 SKQB 216. In that CCAA proceeding, the debtors sought approval of a sale of bundled assets relating to a hog farm, in the face of a ROFR that applied to the land only. Justice Kyle referred to the overall security affecting the assets; the court also commented that a withdrawal of the lands from the sale would not allow the proposed sale to complete, leading possibly to a liquidation (at paras. 4-5).

[59] However, in *Bear Hills*, Kyle J. relied on authorities that have since been questioned in *Alim Holdings* (see paras. 38-41). Justice Kyle's conclusion at para. 10 that the ROFR was not triggered runs contrary to the court's conclusion in *Alim Holdings* at para. 41.

[60] I have no doubt that courts across Canada have vested off ROFRs in the context of assets sales approved in CCAA proceedings. For example, Quest refers to *Artic Glacier Income Fund (Re)*, [2012] M.J. No. 451 (Q.B.) where a ROFR was vested off title, although the circumstances under which that CCAA relief was granted is not clear.

[61] Similarly, in *Great Slave Helicopters Ltd. v. Gwichin Development Corp.* (November 23, 2018), CV-18-604434-00CL (Ont. S.C.J.), Justice Hainey's endorsement directed that a purchaser of aggregated assets in a CCAA proceeding provide certain information to the holder of the ROFR with respect to the purchase price allocation. The ROFR Article, which discusses the circumstances before the court in *Great Slave Helicopters* at 108-109, indicates that the issue of the exercise of the ROFR was ultimately resolved consensually.

[62] Fortunately, in this case, there is no dispute concerning the Court's jurisdiction to address CapU's rights arising under the ROFR. Both Quest and CapU agree that the Court has jurisdiction under the CCAA to vest off the ROFR, subject to a consideration of the equities as between the parties.

[63] For the following reasons, I conclude that a balancing of the equities favours vesting off CapU's ROFR to allow the Primacorp transaction to proceed:

- a) Since January 2020, Quest has been pursuing a going concern restructuring that will permit it to remain as a university and employer in the Squamish area. CapU has been involved in this proceeding from the outset and was well aware of the opportunity to participate in that pursuit;
- b) There is a significant issue as to whether the ROFR has even been triggered by delivery of the Primacorp PSA. The definition provided in the ROFR of "Bona Fide Offer to Purchase" means, in part, an offer that is:

(iii) only for the entirety of the Property [the lands] and all chattels thereto and no other property, rights or assets

[Emphasis added.]

The definition of "Purchased Assets" in the Primacorp PSA is broad and refers not only to lands and chattels, but a variety of other assets (for example, contracts, plans, permits, vehicles and intellectual property). This express language is what the court in Alim Holdings, at para. 41, described could indicate an intention that any such aggregated offer would not trigger the ROFR;

- c) The term of the ROFR expires in March 2024. The ROFR appears to contemplate that, even if CapU does not exercise the ROFR, the purchaser of the lands must still agree to grant CapU a ROFR on the same terms. Similarly, "change of control" provisions are potentially effective that would allow CapU to later acquire control of Quest in place of anyone else. This would frustrate Primacorp's expectation under the Primacorp PSA that it would have the right to nominate the board of governors for Quest after closing;

Primacorp does not agree to assume these restrictions. In addition, every other offer for Quest's assets required that the ROFR be vested off title to the lands. It is difficult to see that any purchaser would agree to take title to purchased assets with such significant restrictions. If the ROFR is effective, this would give rise to a severe "chilling effect" on the market, with potentially disastrous results for Quest's restructuring efforts;

- d) The 60-day period within which CapU is entitled to consider any "Bona Fide Offer to Purchase" is simply unworkable in these circumstances. This is not a matter of expediency, without regard to any rights held by CapU. Quest will have no funds to continue its operations past December 2020 and, if realizations by the secured creditors ensue, CapU's ROFR rights will be illusory at best;

- e) CapU complains that it received the redacted Primacorp PSA only recently, on October 29, 2020. CapU then requested an unredacted copy, which Quest agreed to do upon CapU executing an NDA. CapU refused to sign the NDA, stating that it would hamper its ability to participate in its own offer. Again, CapU has had months to formulate its own offer;
 - f) Quest asserts that CapU has no intention to or ability to make its own offer for all of Quest's assets in competition to the Primacorp transaction. CapU has not put forward any evidence at this hearing to confirm such intention or ability. Similarly, there is no evidence that CapU truly wishes to or is able to exercise any rights under the ROFR to purchase Quest's lands and chattels;
 - g) I consider that the evidence conclusively supports that CapU advances its arguments under the ROFR simply as a tactic to oppose the Primacorp transaction and delay the matter so that it and Landrex can seek to advance their own joint competing offer;
 - h) As I will discuss below, the terms of the joint Landrex/CapU proposal is only semi-formed at this point and Quest has indicated that some major terms are not acceptable. As such, it is highly questionable that this joint offer is, as CapU asserts, a "better, higher offer";
 - i) I conclude that Quest has given proper regard to and has not ignored CapU's rights under the ROFR in the context of these proceedings. CapU has had sufficient information even from the redacted Primacorp PSA to discern the substance of the Primacorp transaction in terms of advancing any competing offer or exercising the ROFR;
 - j) Given the above circumstances, including CapU's involvement in Quest's lengthy efforts to restructure, I cannot conclude that CapU will suffer significant prejudice if the ROFR is vested off. Quest has indicated that CapU will have the opportunity to file a proof of claim in respect of any loss alleged to arise because of the vesting off of the ROFR. Of course, the value of any such claim would be questionable unless CapU can establish that its rights were triggered by the Primacorp transaction and that it had the ability to complete under the ROFR; and
 - k) The Monitor supports the Primacorp sale, as maximizing the value of Quest's assets for the stakeholders and allowing a successful restructuring of Quest's business.
- [64] If CapU has rights under the ROFR, allowing CapU to assert those rights would delay the Primacorp sale and potentially negate it, all with potentially devastating effect on the broader stakeholder group. The Primacorp sale is the only sale that is before the Court that would result in a restructuring of Quest for the benefit of the stakeholders. Clearly, within that context, the rights of all affected stakeholders must be balanced in respect of any rights held by CapU.

- [65] In Bear Hills, similar considerations were before the court. The Saskatchewan Court of Queen's Bench approved a bundled sale of assets, without first requiring compliance with a ROFR. In part, the prospective purchaser would only consider purchasing the complete bundle of properties for an aggregate purchase price and did not allocate value on a property-by-property basis.
- [66] As I have sought to do here, the court in Bear Hills (at para. 9) was attuned to the overarching and remedial statutory purpose and objective of the CCAA to avoid the "social and economic losses resulting from liquidation of an insolvent company": Century Services at para. 70 and 9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10 at paras. 40-41. This objective is not to be achieved simply in the most expedient manner and without due regard to interests of stakeholders that are affected in that process. As the Court further stated in Century Services at para. 70, any restructuring is best achieved when "all stakeholders are treated as advantageously and fairly as the circumstances permit".
- [67] I am satisfied that it is appropriate, in the context of the Primacorp transaction, to vest off the ROFR held by CapU. In that regard, I have also considered the factors set out in s. 36(3) of the CCAA in terms of assessing any rights of CapU under the ROFR in that context.

Landrex / CapU Offer

- [68] Landrex, supported by CapU, opposes approval of the Primacorp transaction. Landrex argues that they should be given further time to present an offer for Quest's assets in competition with the Primacorp transaction.
- [69] As with CapU, Landrex has been fully engaged in discussions with Quest for some time now, having been alerted to the possibility of a transaction as long ago as fall 2019. Landrex's interest in Quest has always been in conjunction with securing an academic partner, namely, CapU.
- [70] In June 2020, Landrex and Quest entered into an agreement for a sale; however, the conditions lapsed.
- [71] On October 8, 2020, Landrex and Quest executed a further purchase and sale agreement (the "Landrex PSA") providing for a purchase price of \$51 million for most of Quest's assets (Lot 1 only and excluding Lots A-E: obviating any need for disclaimers of the Southern Star Subleases or vesting off any of Southern Star's rights under the Lot E Ground Lease). The closing date under the Landrex PSA is December 23, 2020.
- [72] By the start of this hearing, significant conditions precedent in respect of the Landrex PSA were still outstanding. Those included the financing condition in favour of Landrex and the mutual condition by which "another party" (CapU) was to have secured a sublease with Quest after Landrex had granted CapU a lease in the first instance.

- [73] Landrex suggests that Quest is contractually bound to honour the Landrex PSA by allowing it further time to remove the conditions precedent, citing the good faith organizing principle discussed in *Bhasin v. Hrynew*, 2014 SCC 71. Further, Landrex argues that Quest has a duty to take all reasonable steps to satisfy the conditions precedent: *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072.
- [74] Further discussions and negotiations continued between Landrex and Quest beyond October 8, 2020; however, matters under the Landrex PSA were not advanced.
- [75] By late October 2020, Quest was under significant pressure, if not a legal requirement from the Interim Lender, to conclude a transaction. At that time, only two potentially viable proposals were on the table, one being from Primacorp. As above, where the Monitor noted in its Confidential Report that other proposals were "not currently at a stage such that they are capable of being accepted by Quest", those "other proposals" included the Landrex PSA.
- [76] By the time the Landrex PSA was executed on October 8, 2020, Landrex was not aware that Quest had already signed the Primacorp PSA. However, I agree with Quest's counsel that Landrex had not secured any rights of exclusivity in terms of advancing its offer. The Landrex PSA provided:
- 20.2 Notwithstanding anything else contained herein, Landrex acknowledges and agrees that, following from date of the acceptance of this Offer by the Vendor until the date that the Vendor waives or declares satisfied the Vendor's Condition, the Vendor will be authorized to negotiate with or offer the Property for sale to any third party (including the entering into of any agreement by the Vendor with any third party). . . .
- [77] Under the Landrex PSA, Quest's Vendor's Condition was approval from its Board of Governors. Quest never obtained that approval because Quest's Board of Governors did not agree to certain deal terms under the Landrex PSA.
- [78] By October 29, 2020, Landrex would have been fully aware that its offer was not going to be advanced by Quest any further since, by then, Quest had chosen Primacorp.
- [79] On November 2, 2020, Landrex made a further offer for \$53.5 million. The only other significant change to their offer was to describe the requirement for a lease/sublease arrangement between Landrex, "another party" (intended to be CapU) and Quest as Landrex's condition precedent, not a mutual condition precedent. Quest did not accept this offer.
- [80] In any event, by that time, Landrex's financing condition was far from being satisfied. On November 9, 2020, TD Asset Management ("TD"), Landrex's lender, provided a letter simply stating that it was continuing to work with Landrex and CapU to provide that financing.
- [81] I acknowledge that, since the initial hearing date of November 3, 2020, Landrex has moved to finalize its offer but it has only done so to some extent.

- [82] On November 13, 2020, Landrex secured a letter from TD that referred to a term sheet being in place after a final financing structure was negotiated (no documents were disclosed). However, TD's commitment is clearly conditional upon CapU's board approving the lease between Landrex and CapU at a meeting that is not scheduled to take place until November 24, 2020. There is no evidence as to what those lease terms are and whether there is a reasonable likelihood that CapU's board will approve it. Further, this whole arrangement continues to hinge on a negotiated sublease between CapU and Quest, which is not in place.
- [83] On November 16, 2020, Landrex's counsel advised of yet further developments: (i) removal of its financing condition; (ii) an LOI with Southern Star by which it would take over the Residences but not require disclaimer of the Subleases; and, (iii) agreement with CapU to remove the ROFR.
- [84] Despite these developments, Quest advised that it was still not agreeable to the terms of the Landrex transaction. In addition, the Monitor continues to support approval of the Primacorp transaction, noting the uncertainty and potential delay of CapU obtaining ministerial approval to allow its participation in the Landrex transaction.
- [85] The s. 36(3) factors continue to provide a useful structure for consideration of the Landrex transaction, and these late breaking developments.
- [86] I am satisfied that Landrex was given a reasonable opportunity to participate in the SISP and that it has been aware of this opportunity for many months, even before it officially began. The fact that the cash consideration under the Landrex transaction exceeds that of Primacorp is deserving of consideration. However, other considerations arise, including that the Primacorp transaction involves significant other benefits to Quest in terms of its future operations, including the working capital facility of \$20 million.
- [87] Both Quest and the Monitor continue to be of the view that the Primacorp transaction is more beneficial to the creditors. I agree with this, particularly considering the continuing uncertainty and risk associated with the Landrex/CapU transaction that is yet to be resolved, leaving aside that Quest has unequivocally stated that it has no intention to pursue it. Even if the further negotiations required under the Landrex sale were advanced in an expeditious manner, it seems unlikely to be finalized by the end of the year. To the contrary, the Primacorp transaction has been finalized after weeks of complex negotiations and Quest and Primacorp are ready to close without further delay. I agree that time is of the essence at this stage of the proceedings, for the reasons already noted above.
- [88] In the overall circumstances here, I see no reason to delay, if not risk, the "bird in hand" transaction that arose through a reasonable sales process, in the hope that a more uncertain transaction may be finalized, such as with Landrex.

Southern Star Disclaimers

- [89] On October 23, 2020, and with the approval of the Monitor, Quest issued notices of disclaimer (the "Disclaimers") to Southern Star relating to the Subleases on Lots A-D by which Southern Star leases those lands and the Residences to Quest.
- [90] A condition precedent of the Primacorp transaction is that either Quest will disclaim the Subleases or Primacorp will have entered into an agreement with Southern Star to its satisfaction. The evidence discloses that negotiations did take place between the parties but they did not reach a mutually acceptable agreement.
- [91] Quest's rent payments to Southern Star under the Subleases for the Residences on Lots A-D total approximately \$236,218 per month.
- [92] Very recently, on November 15, 2020, before the conclusion of this hearing, Quest voluntarily withdrew the Disclaimers with respect to Lots A-B. Accordingly, failing an agreement between Primacorp and Southern Star, it remains a condition of the Primacorp transaction that Quest's Disclaimers of the Subleases in relation to Lots C-D be upheld.
- [93] The Ground Leases are registered against Lots A-D. BMO's security is registered against Southern Star's interest under the Ground Leases; in addition, Fivestone Capital Corp. ("Fivestone"), a company controlled by Mr. Hutchison, has registered security against the Grounds Leases. Quest does not seek any relief in respect of the Ground Leases; unlike Lot E, those documents are fully effective and enforceable and have been the basis upon which the parties have developed those properties.
- [94] What remains to be addressed is Southern Star's application pursuant to s. 32(2) of the CCAA, supported by BMO, for an order disallowing any disclaimer by Quest of the Subleases of the Residences on Lots C-D. Section 32(4) of the CCAA lists various non-exhaustive factors that the court is to consider in relation to disputes over disclaimers:

In deciding whether to make the order, the court is to consider, among other things,

- (a) whether the monitor approved the proposed disclaimer or resiliation;
 - (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
 - (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.
- [95] In *League Assets Corp. (Re)*, 2016 BCSC 2262, I discussed the significance of disclaimers in CCAA proceedings, both from the point of view of the counterparty and that of the entire stakeholder group:
- [49] These CCAA provisions are not inconsequential in the face of this type of proceedings. At this point, the matter is no longer between the debtor company and a counterparty. There are other stakeholders involved and the statutory provisions, and the provisions of court

orders such as the Initial Order, are meant to protect the stakeholder group as a whole, while also allowing a certain amount of flexibility for the debtor company. A disclaimer of a contract has consequences not only to the debtor company, but the estate generally. Such an action can substantially increase the debt being faced by the estate or divest the debtor of a substantial benefit that might be realized for the benefit of the creditors. It is in that context that the CCAA requires that certain procedures be followed by the debtor company, with the necessary oversight by the Court's officer, the Monitor, as to whether any disclaimer will be approved or not.

- [96] The factor under s. 32(4)(b) of the CCAA as to enhancing the prospects of a viable restructuring applies equally in respect of disclaimers in the context of a sales process by which the business is to continue as a going concern: *Timminco Ltd. (Re)*, 2012 ONSC 4471 at paras. 51-52 and *Aveos Fleet Performance Inc. (Re)*, 2012 QCCS 6796 at paras. 48-50. In addition, the disclaimer need not be proven as "essential", only "advantageous and beneficial": *Timminco* at para. 54.
- [97] Quest asserts that the Disclaimers are necessary to pursue and complete the Primacorp transaction, which it considers the best possible outcome for Quest and its stakeholders, including students, faculty, staff, secured and unsecured creditors, suppliers and vendors. In its letter dated October 28, 2020 to Southern Star, Quest also refers to its liquidity crisis and that amounts owing to its secured creditors became due some time ago.
- [98] In its Fourth Report dated November 2, 2020, the Monitor confirmed its approval of the Disclaimers, based on:
- 2.8.1 The residences are not currently being used by Quest (other than two units being used by staff members and some limited use by a film crew recently) given on-line learning format being employed as a result of COVID 19;
- 2.8.2 It is a term of the Primacorp Agreement that the subleases be disclaimed; and,
- 2.8.3 The Monitor noted that the two most promising alternative parties in discussions with Quest also required the Southern Star subleases to be disclaimed.
- [99] Southern Star advances a number of arguments in relation to the Disclaimers.
- [100] Firstly, it argues that the Disclaimers will not result in a viable compromise or arrangement. Southern Star argues that there is no indication that Quest and Primacorp do not wish to continue to have the Residences as part of the student experience for those attending Quest.

- [101] I agree that, in the Rent Deferral Reasons, many of my comments (at paras. 23-26, 90) were confirmatory of the importance of the Residences to Quest in respect of its future operations. However, that was then and this is now. The pandemic continues in full force and Quest is necessarily required to make decisions in the face of current circumstances. I agree that it is likely that Quest will seek to continue the student residence experience once the pandemic has receded, however, when that might happen is anyone's guess.
- [102] In the meantime, Quest, under the Primacorp transaction, must make decisions as to its financial capabilities going forward. Maintaining two empty Residences with accompanying rent payments is, on its face, not a reasonable business decision in the circumstances. It was Primacorp, an arms length purchaser, who has imposed this condition.
- [103] Further, the Monitor agrees with Quest that the Disclaimers are necessary to enhance the prospects of Quest making a viable compromise or arrangement in these proceedings. There is no reason to question the Monitor's view as it is apparent that the Monitor has considered all relevant matters.
- [104] I agree that the Disclaimers will enhance the prospects of Quest making a viable compromise or arrangement. The Monitor overwhelmingly agrees after a consideration of all the circumstances including those particularly faced by Southern Star as a result.
- [105] Secondly, Southern Star argues that Quest delivered the Disclaimers simply to secure a bargaining advantage for Quest and Primacorp toward a re-visitation of the rent deferral issue or to attempt to reduce the rent. I agree that there is some indication that Quest and Primacorp had that in mind; however, that is often the reality that arises after a debtor concludes that it is no longer viable to abide by those contractual commitments and that a disclaimer is appropriate. If it were possible to come to an amicable resolution with Southern Star in the context of the Primacorp transaction, I expect Quest would have done so.
- [106] Southern Star refers to the statements in *Allarco Entertainment Inc. (Re)*, 2009 ABQB 503 at para. 59, where Justice Veit considered whether certain contracts should be terminated. She was attuned to whether the termination was fair, appropriate and reasonable and whether it arose after good faith negotiations. In this case, there is no evidence to suggest that the parties did not approach the negotiations in good faith. Clearly, it is not my role on this application to assess the reasonableness of the respective positions of Quest, Primacorp and Southern Star in those negotiations. It does appear, however, that Quest and Primacorp have moved toward a middle ground by the withdrawal of the Disclaimers in relation to Lots A-B.
- [107] Thirdly, Southern Star places great emphasis on what it says will be the significant hardship it will suffer if the Disclaimers are upheld. Southern Star says that it has spent approximately \$41.7 million to construct the Residences.

- [108] The monthly mortgage payments to BMO and Fivestone are approximately \$220,000. The outstanding balance of the BMO loan facility is \$34.4 million. Mr. Hutchison indicates that, without payment of rent by Quest, Southern Star will not be able to make its mortgage payments to BMO. In that event, BMO will be in a position to foreclose on the Ground Leases. Mr. Hutchison has guaranteed the BMO debt, as has another of Mr. Hutchison's companies.
- [109] As noted by Quest, any financial consequences to Southern Star will largely depend on what mitigating measures are undertaken. Those could include a re-letting of the Residences or a sale of its interests under the Ground Leases. At present, with no clear indication as to how those matters might evolve, I am unable to conclude with certainty that any hardship suffered by Southern Star would be "significant".
- [110] Regardless of any hardship faced by Southern Star, the reality is that Quest has only one viable means by which to advance the restructuring at this time - the Primacorp transaction. Within the confines of that transaction, Primacorp sees no merit in maintaining the Subleases on these two Residences. Apparently, no other interested party expressed an interest in maintaining the Subleases besides Landrex. In light of Landrex's submissions at the conclusion of this hearing on November 16, 2020, I have considered that the Landrex/CapU transaction may have presented a more palatable resolution of the Subleases given the recent LOI between Landrex and Southern Star. However, I conclude that delaying the Primacorp sale, on the prospect that the Landrex/CapU transaction will come about, is not a viable option for the reasons discussed above.
- [111] I agree that this decision will visit hardship, even arguably significant hardship, upon Southern Star. However, it is difficult to see that preventing delivery of the Disclaimers would avoid that result in any event. If the Primacorp transaction does not proceed, there is no transaction and Quest has no financial means to continue past December 2020. The Interim Lender has indicated that it will not advance funds to Quest beyond that date, and specifically, that it has no interest in funding continued rent payments to Southern Star.
- [112] In that event, Southern Star will be in the same position post December 2020, with Quest unable to pay the rent for the Residences at that time: see *Target Canada Co. (Re)*, 2015 ONSC 1028 at paras. 27-28.
- [113] As the court noted in *Target Canada* at paras. 24-25, the court must give due consideration to the stakeholder group as a whole in assessing whether the Disclaimers are fair and reasonable: *Doman Industries Ltd. (Re)*, 2004 BCSC 733 at para. 33. The price of setting aside the Disclaimers is that the Primacorp transaction will not proceed and a receivership at the behest of the Interim Lender will likely follow. In my view, this is not in the best interests of that larger stakeholder group which, in my view, has primacy here even in the face of the hardship and prejudice caused to Southern Star.

- [114] I dismiss Southern Star's application for order that the Subleases of the Residences on Lots C-D not be disclaimed by Quest.

RVO

- [115] At the November 3, 2020 hearing, when Quest originally sought the TAVO, Quest was seeking to uphold the Disclaimers of the Subleases. At that time, Southern Star's evidence and submissions were to the effect that, if the Court upheld the Disclaimers, it would have a substantial unsecured claim against the estate. As indicated above, the amount of any claim that Southern Star might advance in the estate is far from clear, given possible mitigation, although there is potential for a significant claim.
- [116] This position did not come as a surprise to Quest; however, it appears that Quest did not appreciate the potential magnitude of Southern Star's claim. More importantly, Quest has not fully appreciated that a very unhappy claimant - Southern Star under the Disclaimers - was not likely to vote in favour of the Plan and that the value of its claim could swamp the class votes to prevent any approval by the creditors. Again, creditor approval of the Plan is a requirement of the Primacorp Transaction.
- [117] In early November 2020, known unsecured creditor's claims were estimated at approximately \$2.3 million. "Restructuring Claims" (which will include any claim of Southern Star under the Disclaimers) were yet unknown.
- [118] Initially, Primacorp agreed to fund Quest's Plan in the amount of the lesser of 50% of the claims or \$1.35 million. The Monitor now states that there is a "high probability" that Southern Star's claim will be large enough such that Southern Star will control the value of the votes at the creditors meeting. Other major unsecured creditor claims have also since emerged, being that of Dana (estimated \$1 million) and the Association for the Advancement of Scholarship (estimated \$5 million).
- [119] As the Monitor notes, any of these claims could effectively veto the Plan.
- [120] Quest and Primacorp were then facing a dilemma. They determined that, while they might succeed on the Disclaimer issue, they could not likely obtain approval of the Plan, a further requirement of the Primacorp PSA, if Southern Star carried through with its suggested negative vote. While Quest could raise arguments in relation to the value of any claim advanced by Southern Star, uncertain and lengthy litigation would likely result; even if Quest was successful, it would be too late to factor into this restructuring.
- [121] Quest, with Primacorp's approval, solved this dilemma by revising the TAVO to an RVO. In addition, the Primacorp PSA was amended to delete the conditions precedent requiring creditor and court approval of the Plan. Accordingly, the only condition precedent that remains before closing of the Primacorp transaction is the granting of the RVO.

[122] The Monitor supports this change as necessary in the circumstances in order to allow Quest to complete the Primacorp transaction. The Monitor supports the granting of the RVO.

[123] In its Fifth Report dated November 10, 2020, the Monitor describes the characteristics of the new structure and steps under the RVO, which involves Quest's subsidiary, Guardian Properties Ltd. ("Guardian"):

RVO Structure & Impact

2.6 The RVO provides for the following to occur in sequential order on the closing of the Primacorp Transaction:

2.6.1 A wholly owned subsidiary of Quest, Quest Guardian Properties Ltd. ("Guardian") shall be added as a Petitioner in these CCAA proceedings. Guardian was incorporated on January 25, 2018 and has never carried on any business and has never held any assets or liabilities;

2.6.2 All of Quest's right, title and interest in and to the Excluded Assets (as defined in the Primacorp PSA and the RVO) shall be transferred to and vested in Guardian;

2.6.3 All Contracts (other than Approved Contracts), Claims and Liabilities of Quest shall be transferred to Guardian and Quest shall be released from and in respect of all obligations in respect of such Contracts, Claims and Liabilities;

2.6.4 Primacorp will pay the Purchase Price to the Monitor to the extent of the Secured Charges and all the Secured Claims and the Secured Charges shall be extinguished and cancelled. The Purchase Price will stand in the place of the Purchased Assets;

2.6.5 All of Quest's right, title and interest in the Purchased Assets shall vest in Primacorp free and clear of any security interests, Claims and Liabilities; and,

2.6.6 Quest will cease to be a Petitioner in these CCAA proceedings leaving Guardian as the sole Petitioner.

2.7 The RVO contains release provisions similar to those contained in the Plan. Quest, its employees, legal advisors and other representatives, Quest's Governors and Officers, and the Monitor and its legal counsel shall be released from any and all demands and claims relating to, arising out of, or in connection with these CCAA Proceedings. The releases do not apply in the case of wilful misconduct or fraud.

2.8 As a result of the amendments to the Primacorp Transaction and the RVO, if the RVO is granted:

2.8.1 There will be no uncertainty as to whether the Primacorp Transaction can close and the condition precedent for the approval of the Plan is no longer applicable. As a result, there will be certainty for the go-forward operations of Quest, thereby creating security for the Quest students, faculty and staff leading into the critical enrolment period for the winter term;

2.8.2 Guardian will become responsible for the obligations under the Southern Star subleases should they not be disclaimed. As Guardian will not have the financial resources to meet those obligations, it is expected that Guardian would default on the Southern Star subleases in January 2021; and

2.8.3 The Plan, which will now compromise the debts of Guardian, will be funded through the Primacorp Transaction and therefore this aspect of the Primacorp Transaction and the Plan has not changed.

[124] As I will discuss below, the effect and substance of the RVO is to achieve what Quest has originally sought by way of a restructuring in these proceedings; namely, a sale of certain assets to Primacorp and, importantly, Quest continuing as a going concern as an academic institution, in partnership with Primacorp. The only aspect now missing is that, under the RVO, Quest will avoid having to obtain creditor or Court approval of the Plan.

[125] The intention is that the amounts that Primacorp was to fund under the Plan will now be transferred to Guardian to be distributed under Guardian's plan in relation to the Quest's liabilities that are to be transferred to Guardian. Effectively, Guardian will be funded just as it was originally intended that Quest's Plan was to have been funded to resolve those claims.

[126] Southern Star and Dana, as unsecured creditors of Quest, object to the granting of an RVO, contending that it effectively and unfairly negates their right to vote on Quest's Plan under s. 6 of the CCAA. They object to the transfer of their claims to Guardian. They say that, although they will have the ability to vote on Guardian's plan, it will effectively mean that they cannot vote to block Quest's restructuring to enable it to continue as a going concern within the context of the Primacorp transaction.

RVO Jurisdiction and Authorities

[127] There is no dispute between the parties that this Court has authority to grant the RVO under its general statutory jurisdiction found in s. 11 of the CCAA.

[128] Quest has referred me to a number of decisions across Canada where courts have exercised that jurisdiction to grant an RVO in the context of sale approvals considered under s. 36 of the CCAA. I will review those decisions in some detail below to highlight the relevant circumstances.

[129] In *Re T. Eaton Co.* 2000 CarswellOnt 4502, 26 C.C.P.B. 295, the Ontario court granted such an order under its CCAA proceedings. There are no written reasons discussing the circumstances in that case. The only brief reference to that structure is found in Claims Officer Houlden's decision in *Eaton's* that addressed an unrelated issue. The agreed statement of facts before the Claims Officer provided:

5. The CCAA Plan contemplated that all of the assets of Eaton's which were not being retained by Eaton's under the Sears Agreement would be transferred to a new corporation, Distributionco Inc. ("Distributionco"). These assets would then be liquidated by Richter & Partners Inc. ("Richter") in its capacity as court-appointed liquidator of the estate and effects of Distributionco. Richter would then distribute the assets of Distributionco to unsecured creditors and others in accordance with priorities set out in the CCAA Plan.
6. Under the CCAA Plan, unsecured creditor claims against Eaton's are converted into a right to participate in distributions in the liquidation of Distributionco based on the amount of the creditor's claim against Eaton's. Accordingly, a critical initial step in the liquidation of Distributionco is the determination of the validity and amount of claims asserted against Eaton's. For this purpose the CCAA Plan establishes a Claims Procedure for the resolution of such claims, of which the parties to this matter are aware.

[130] It is unclear as to the basis upon which the court approved this structure in Eaton's although, as Southern Star notes, it was a transaction approved within the context of a CCAA Plan.

[131] More recently, this structure was approved in *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00C (Ont. S.C.J. [Comm. List]). In those CCAA proceedings, an agreement was approved that "effectively" transferred current tax losses and intellectual property to a purchaser. Justice Wilton-Siegel's endorsement stated:

The Global Settlement contemplates implementation of a corporate reorganization by which the shares of Plasco will be transferred to an acquisition corporation owned by NSPG and CWP and the remaining assets of the applicants will be held by a new corporation, referred to as "New Plasco", which will assume all of the liabilities and obligations of Plasco. I am satisfied that the Court has authority under section 11 of the CCAA to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the CCAA insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise. For this purpose, I consider that the Global Settlement is analogous to such a plan in the context of these particular proceedings.

[132] Justice Gouin granted an RVO in the CCAA proceedings of Stornoway Diamond Corporation (October 7, 2019), Montreal 500-11-057094-191 (Q.C.S.C. [Comm. Div.]). There are no written reasons from the court; however, the motion materials disclose that, under the transaction, the purchasers acquired substantially all the debtor's assets by purchasing 100% of the shares of one debtor company (SDCI, which held the acquired assets). In consideration, the purchaser released certain liabilities owed by the debtors and agreed to assume others.

[133] In *Stornoway Diamond*, to ensure the purchaser acquired the assets free and clear of all encumbrances, the debtors incorporated a new subsidiary (Newco), added Newco as an applicant in the CCAA proceedings, and transferred all liabilities, obligations, and unacquired assets of SDCI to Newco. The debtor's motion referred to this transaction as the only viable alternative to preserve the going concern value of the debtor. The debtor noted

that the equity and "non-operational related unsecured claims" had no value. As in the RVO sought here, the court's order included familiar aspects found in sanction orders, including releases.

- [134] An RVO was also approved in the CCAA proceedings of Wayland Group Corp. (April 21, 2020), Toronto CV-19-00632079-00CL (Ont. S.C.J. [Comm. List]). Approval was sought in the context of preserving valuable cannabis licenses. Justice Hainey's brief endorsement indicates that the relief was unopposed. The court approved a sale of substantially all of the debtor's assets to the successful bidder under a share purchase agreement after a sales and investment solicitation process.
- [135] Other information before me regarding the Wayland Group transaction is found in the applicant's factum. The factum refers to both Plasco Energy and Stornoway Diamond, while also referring to ss. 11 and 36(3) of the CCAA as the jurisdictional basis for the relief. The applicants argued that transferring certain assets and liabilities of the debtors into a "newco" would ensure that the purchaser acquired the underlying assets of the target company free and clear of all claims and encumbrances and allow the business to continue as a going-concern. They asserted that this was the "only way" to complete the sale to realize the value in the assets; it was also argued that this transaction was in the best interests of stakeholders and did not prejudice major creditors. In Wayland Group, the transaction value was only sufficient to repay the interim lender and perhaps some amount for the first secured creditor.
- [136] The Ontario court again approved a similar RVO transaction in the CCAA proceedings of Comark Holdings Inc. (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. S.C.J. [Comm. List]). Justice Hainey granted the RVO while again indicating in a brief endorsement that the relief was unopposed. The share sale preserved the tax attributes of the debtor, which the purchaser viewed as critical for the success of the future business. The purchaser was a related party who was making a credit bid for the assets.
- [137] In Comark Holdings, the purchaser acquired all the issued and outstanding shares of the primary CCAA debtor and agreed to pay out all the secured debt and priority claims. The excluded assets, agreements, liabilities and encumbrances were transferred to another entity that became a debtor in the CCAA proceedings, with the result that the CCAA debtor held its assets free and clear of all claims and encumbrances and was then removed from the CCAA proceedings. The purchaser and the primary CCAA debtor then amalgamated. The new CCAA debtor (Newco) was authorized to make an assignment into bankruptcy. The monitor, along with the principal secured creditors, including the interim lender, supported the transactions. As in Plasco Energy, Stornoway Diamond and Wayland Group, the debtors in Comark Holdings argued that this was the "only option" to preserve the business, that the value in that business would be lost in a liquidation and that the transaction was in the best interests of the stakeholders generally.

[138] Justice Conway granted an RVO in the CCAA proceedings of Beleave Inc. (September 18, 2020), Toronto, CV-20-00642097-00CL (Ont. S.C.J. [Comm. List]). As in Wayland Group, the preservation of valuable cannabis licenses were at stake. The motion was supported by the monitor and unopposed. Justice Conway stated in her brief endorsement:

The Applicants seek approval of the transaction whereby . . . (the Purchaser) will acquire the operating business of the Applicants. The structure of the transaction is partly by share sale and partly by asset sale. The reason for the structure is to accommodate the licensing requirements of Health Canada. The order is structured as a reverse vesting order, in which excluded liabilities and assets will be transferred to "Residualco", which will then become one of the Applicants in the CCAA proceedings. Reverse vesting orders have been approved by the courts in other cases: see *Re Stornoway Diamond Corporation* . . . and *Re Wayland Group Corp.* . . .

The transaction is the culmination of a stalking horse sales process approved by the court. The motion is unopposed. The Monitor recommends and supports the transaction in its Fourth Report. In particular, the Monitor states that the proposed transaction is economically superior to the estimated liquidation value of the Beleave Group's assets and operations, will allow the Purchaser to maintain operations and use of the Cannabis licenses and will provide for continued employment for a majority of the existing employees. In my view, the transaction satisfies s. 36(3) of the CCAA and the Soundair test and should be approved.

[139] In Beleave, the RVO included releases of claims similar to that granted in other RVO decisions. These provisions were also consistent generally with sanction orders and are similar to the relief sought by Quest here.

[140] Even more recently, the Alberta court approved an RVO structure in the CCAA proceedings of JMB Crushing Systems Inc. (October 16, 2020), Calgary 2001-05482 (A.B.Q.B.). Justice Eidsvik approved the RVO structure as part of a sale approval. No written reasons of the court are available, however, the monitor's bench brief discloses the relevant facts.

[141] As in the above cases, the transaction addressed in JMB Crushing arose from a sale and investment solicitation process that yielded only one offer, with the RVO described as a critical component. The underlying intention was to preserve the value of the paid up capital and regulatory permits in the CCAA debtor.

[142] In JMB Crushing, the monitor relied on the orders granted in Plasco Energy, Stornoway Diamond, Wayland Group and Beleave, arguing that the RVO structure was justified in those circumstances:

24. In recent CCAA proceedings, where it was not practical to compromise amounts owed to creditors through a traditional plan of compromise and arrangement, but it was critical to the viability of a transaction to "cleanse" the debtor company, such that a prospective purchaser may: (i) utilize non-transferrable regulatory licenses (by way of amalgamation or the purchase of the shares of the debtor company); or, (ii) make use of tax attributes of the debtor company, such as [paid up capital], Courts have recently approved and utilized

reverse vesting orders to achieve such objectives.

25. The purpose of a reverse vesting order is to transfer and vest all of the assets and liabilities of a debtor company, which are not subject to a sale, to another company within the same CCAA proceedings. The cleansed debtor company is then able to: (i) be utilized by a purchaser as a go-forward vehicle, without any concern regarding creditors and obligations that may otherwise be "laying in the weeds"; and, (ii) allow the purchaser to make use of the debtor company's tax attributes and non-transferrable regulatory licenses. This approach is necessary in situations where the parties would otherwise be unable to preserve the value of significant assets that are subject to restraints on alienation and to provide a corresponding realizable benefit for creditors and stakeholders.

[143] In JMB Crushing, the monitor further justified the RVO structure in asserting that the debtor's secured creditors would suffer a shortfall even with such measures. The monitor stated that the unsecured creditors had no economic interest in the transaction and there was no reasonable prospect of any recovery to them. The debtor did not intend to undertake a claims process or present a plan to its unsecured creditors.

[144] By pure coincidence, another and perhaps more compelling authority came to the attention of the parties during this hearing.

[145] On November 11, 2020, the Québec Court of Appeal dismissed an application for leave to appeal the granting of an RVO by Gouin J. of the Québec Superior Court on October 15, 2020: Arrangement relatif à Nemaska Lithium inc., 2020 QCCS 3218; leave to appeal denied Arrangement relatif à Nemaska Lithium inc., 2020 QCCA 1488. The Court of Appeal's decision is in English; Gouin J.'s decision is in French and no English translation was available. As such, all references to Nemaska Lithium will be to the QCCA.

[146] All counsel agree that Gouin J.'s decision in Nemaska Lithium is the first time a Canadian court has granted an RVO in contested CCAA proceedings.

[147] In Nemaska Lithium (at para. 5), the court stated that the RVO allowed the purchaser to carry on the operations of the Nemaska Lithium entitles (mining in James Bay) by maintaining existing permits, licenses and authorizations. This goal was accomplished via a credit bid for the shares in Nemaska Lithium in return for assumption of the secured debt. At para. 22, the court refers to the intention of the "residual companies" to later present a plan of arrangement to the "remaining creditors", but the details are not disclosed.

[148] In denying leave to appeal in Nemaska Lithium, the court stated that an appeal would hinder the progress of the proceedings. More relevant to this application were the court's comments on the legitimacy of the position of the only objecting creditor, Cantore, and the court's rejection that it was appropriate to allow Cantore to exercise a veto in the restructuring:

- [38] As it turns out, the value of the Cantore provable claims (setting aside the later debate regarding his potential real rights) stands at \$8,160 million out of a total value of provable claims of \$200 million. Thus, Cantore's provable claims represent at this point in time 4% of the total value of unsecured creditors' claims as determined by the Monitor. Yet, Cantore is the only creditor having voiced an objection to the RVO approval. This begs the question: whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?
- [39] In these circumstances, I am simply not convinced that the arguments that are advanced by Cantore are anything but a "bargaining tool", while he pursues multidirectional attacks on the RVO with the same arguments that were dismissed in the first instance.
- [149] Similar to Cantore's position in the Nemaska Lithium restructuring, Southern Star and Dana's objections to the RVO are grounded in the assertion it will negate their effective veto on the Plan (and hence the Primacorp transaction) by which they seek to leverage further concessions. For obvious reasons, those concessions can only come about at a cost to other stakeholders, whose interests remain to be addressed.

Discussion

- [150] Quest, with the support of the Monitor, submits that the Primacorp transaction satisfies s. 36 of the CCAA and that the Court should grant the RVO pursuant to ss. 11 and 36 of the CCAA.
- [151] As with the structures approved in the above CCAA proceedings, the RVO has certain aspects that Southern Star says are objectionable. Those include primarily: (i) the addition of Guardian as a petitioner in the CCAA proceeding; (ii) the vesting of the Excluded Liabilities and Excluded Contracts in Guardian; (iii) Quest's exit from this CCAA proceeding; and (iv) the release of Quest in respect of the Excluded Liabilities and Excluded Contracts.
- [152] Essentially, unsecured claims against Quest and minor assets are transferred to Guardian and Quest continues as a going concern after having transferred the bulk of its assets to Primacorp free and clear of any encumbrances (save for certain Retained Liabilities). Quest no longer requires approval of the Plan by the creditors and the Court to complete the Primacorp transaction.
- [153] At para. 19, the QCCA in Nemaska Lithium referred to Gouin J.'s comment that s. 36 of the CCAA allows the court a broad discretion to consider and, if appropriate, grant relief that represents an innovative solution to any challenges in a proceeding. Justice Gouin considered that approving an RVO structure was such an innovative solution. Indeed, this is the history of CCAA jurisprudence under the court's broad statutory discretion and court approval of innovative solutions continues to this time.

- [154] That said, the ability of a CCAA court to be innovative and creative is not boundless; as always, the court must exercise its discretion with a view to the statutory objectives and purposes of the CCAA: *Century Services*.
- [155] I find further support for Quest's position in the recent comments of the Court in *Callidus*. The Court was there addressing a different issue - whether a CCAA judge has jurisdiction under s. 11 to bar a creditor from voting where the creditor is "acting for an improper purpose" - but the Court's comments on the exercise of jurisdiction under the CCAA ring true in relation to the RVO structure:
- [49] The discretionary authority conferred by the CCAA, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the CCAA, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).
- [50] The first two considerations of appropriateness and good faith are widely understood in the CCAA context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the CCAA, which provides:

Good faith

18.6(1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith -- powers of court

- (2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

(See also BIA, s. 4.2; Budget Implementation Act, 2019, No. 1, S.C. 2019, c. 29, ss. 133 and 140.)

...

- [65] There is no dispute that the CCAA is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, CCAA supervising judges are often called upon "to sanction measures for which there is no explicit authority in the CCAA" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: "courts [must] rely first on an interpretation of the provisions of the CCAA text before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation

of the provisions of the CCAA will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

...

[67] Courts have long recognized that s. 11 of the CCAA signals legislative endorsement of the "broad reading of CCAA authority developed by the jurisprudence" (Century Services, at para. 68). . . .

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the CCAA itself, and the requirement that the order made be "appropriate in the circumstances".

[68] Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no CCAA provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in Stelco, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the CCAA context (para. 36).

...

[70] . . . The exercise of this discretion must further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives -- that is, acting for an "improper purpose" -- the supervising judge has the discretion to bar that creditor from voting.

...

[75] We also observe that the recognition of this discretion under the CCAA advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also Century Services, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation If the CCAA is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.

("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))

In this vein, the supervising judge's oversight of the CCAA voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the CCAA necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

[76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the CCAA. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

[Underline emphasis added; italic emphasis in original.]

[156] Quest is not seeking to bar Southern Star or Dana from voting on the Plan. It is seeking approval of a structure that would result in Guardian submitting its own plan to the unsecured creditors, which would include Southern Star and Dana, at which time they are generally free to vote their "self-interest" subject to any relevant constraint (for example, if the court finds that they are voting for an improper purpose): *Callidus* at para. 24 and 56.

[157] There is no provision in the CCAA that prohibits an RVO structure. As is usually the case in CCAA matters, the court must ensure that any relief is "appropriate" in the circumstances and that all stakeholders are treated as fairly and reasonably "as the circumstances permit": *Century Services* at para. 70.

[158] As with the sales considered in most of the above RVO cases, including *Nemaska Lithium*, this is the only transaction that has emerged to resolve the financial affairs of Quest. No other options are before the stakeholders and the Court that would suggest another path forward. As was noted by Gouin J. in *Nemaska Lithium* (at para. 12), it is not up to the Court to dictate the terms and conditions that are included in an offer. Primacorp has presumably made the best offer that it is prepared to make in the circumstances - that is the offer the Court must consider.

[159] I agree with the Monitor that, without the RVO structure, the Primacorp transaction is in jeopardy. The only other likely path forward for Quest is receivership, liquidation and bankruptcy, a future that looms in early 2021 if the transaction is not approved.

[160] Many of the RVO cases cited above involve a sale of an ongoing business with a purchaser. The RVO structure was crafted to allow those businesses to continue through the debtor company, since it was that corporate vehicle who owned the valuable "assets" that could be not transferred.

[161] Akin to the tax losses, permits and licences that could not be transferred in those RVO cases, is Quest's ability to confer degrees under its statutory authority under s. 4(2) of the *Sea to Sky Act*, S.B.C. 2002, c. 54 (the "Sea to Sky Act"). Quest cannot sell its ability to grant degrees under s. 4(2) of the *Sea to Sky Act*. Nor can any purchaser acquire the right to grant degrees indirectly through a purchase of the shares in Quest. Pursuant to s. 2 of the *Sea to Sky Act*, Quest is a corporation "composed of the members of the board" and no shareholders exist. Pursuant to s. 1 of the *Sea to Sky Act*, the "board" means the board of

governors of the university.

[162] It is a critical requirement under the Primacorp transaction that Quest remain a viable entity to continue its operations and, in particular, continue to grant degrees. That is a significant component of the Primacorp transaction and the value that Primacorp is prepared to pay under the transaction reflects that component. In other words, the stakeholders are receiving a benefit from this transaction by which Primacorp ensures that Quest continues after exiting these CCAA proceedings.

[163] At para. 38, the court in Nemaska Lithium asked:

... whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?

[164] I acknowledge the negative consequences that arise particularly for Southern Star if the Primacorp transaction is approved, although there is significant uncertainty about the extent of any loss that may be suffered. Dana's unsecured claim has little, if any value, outside of the benefits of the Primacorp transaction.

[165] In that light, I would ask Southern Star and Dana a similar question to that of the QCCA--to what end is your veto if Quest's Plan is put presented for creditor approval?

[166] Both creditors potentially hold the sword of Damocles over the head of the significant broad stakeholder group who stand to benefit from the Primacorp transaction. Recently, Southern Star has secured further benefits by the withdrawal of two of the Disclaimers. Both objecting creditors have nothing to lose at this point in this dangerous game of chicken with Primacorp, with only the oversight of this Court to oversee this strategy. By any stretch, no one is blinking at this point, while significant other interests hang in the balance.

[167] The Monitor's comments in its Fifth Report as to the jeopardy to those other interests are apt:

2.15 The Monitor has considered the competing interests of Southern Star and the interests of Quest's other stakeholders. In the Monitor's view, the Primacorp Transaction should not be jeopardized by the lack of agreement between Southern Star and Primacorp. Southern Star can mitigate its financial hardship by entering into an agreement with Primacorp for use of some or all of the residences. By contrast, Quest's other stakeholders have no ability to mitigate their potential losses in the event that the Primacorp Transaction does not close. They are reliant on the completion of the Primacorp Transaction or face significant losses themselves should it not complete.

[168] In my view, in the vein of the Court's discussion in Callidus, these are unique and exceptional circumstances where the Court may grant the relief by allowing Quest to employ the RVO structure within the context of this sale transaction.

- [169] Southern Star and Dana seek to effectively block the only reasonable outcome here by insisting that they must approve of Quest's Plan in conjunction with the sale. However, creditor approval of a sale is not required under s. 36 of the CCAA.
- [170] The granting of the RVO in these circumstances is in accordance with the remedial purposes of the CCAA. To use the words of Dr. Sarra, quoted above in *Callidus*, I conclude that Southern Star and Dana are working actively against the goals of the CCAA by their opposition to the RVO.
- [171] I do not consider that an RVO structure would be generally employed or approved in a CCAA restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the CCAA.
- [172] Here, in these complex and unique circumstances, I conclude that it is appropriate to exercise my discretion to allow the RVO structure. Quest seeks this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. I have considered the balance between the competing interests at play. This transaction is unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group, a group that includes Southern Star and Dana.
- [173] The structure also allows Quest to continue its operations in partnership with Primacorp, a result that will avoid the devastating social and economic consequences that will be visited upon the stakeholders if this transaction is not approved. Ironically, the continuation of Quest's operations will also benefit Southern Star in the future through the continued payment of rent for two of the Residences. Other potential benefits may also arise if Southern Star and Quest are later able to come to terms once the pandemic has receded and students return to campus.

THE PRIMACORP TRANSACTION

- [174] Quest applies for the granting of the RVO in favour of Primacorp pursuant to s. 36(1) of the CCAA.
- [175] Section 36(1) of the CCAA allows the court to authorize the sale of a debtor company's assets out of the ordinary course of business. Section 36(3) of the CCAA lists the relevant non-exhaustive factors to be considered:
- (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.

[176] The well-known considerations identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at 6 (C.A.) are consistent with and overlap many of the s. 36(3) factors: see *Veris Gold Corp. (Re)*, 2015 BCSC 1204 at para. 25, referring to various authorities such as *Canwest Publishing Inc. (Re)*, 2010 ONSC 2870 at para. 13. Those considerations include: (i) whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which offers were obtained; and, (iv) whether there has been any unfairness in the sales process.

[177] More generally, in analyzing whether a transaction should be approved, taking into consideration the s. 36(3) and *Soundair* factors, a court is to consider the transaction as a whole and decide whether or not the sale is appropriate, fair and reasonable: *Veris Gold* at para. 23.

[178] I conclude that the s. 36(3) and *Soundair* factors all favour approving the Primacorp transaction and granting the RVO. Specifically:

- a) The process leading to the Primacorp transaction has been lengthy and exhaustive. The Monitor has overseen that entire process;
- b) Quest's Restructuring committee and its Board of Governors have sought and obtained professional advice throughout the CCAA process toward finding a suitable academic partner and/or a purchaser/developer for Quest's lands;
- c) No stakeholder objects to the proposition that the sales process was conducted in an appropriate, fair and reasonable manner;
- d) The Primacorp transaction will see the repayment of Quest's secured creditors, now totalling approximately \$42.2 million in what has been an increasingly pressurized environment to do so after long standing defaults;
- e) Since August 7, 2020, the Interim Lender and VF, Quest's major secured creditors, have been kept apprised of developments. They both support the Primacorp transaction. In addition, other secured creditors have been involved throughout these proceedings and support the transaction;

- f) There has been significant community and stakeholder involvement throughout the sales process;
- g) The Primacorp transaction will ensure that Quest continues as a going concern, by continuing operations as a post-secondary institution in Squamish. This will result in continuing benefits to the broad stakeholder group. This includes faculty, staff, students, secured and unsecured creditors, suppliers, landlords and the community generally;
- h) The broader stakeholder interests must be balanced against those who will be negatively affected by the transaction, such as Southern Star under the Disclaimers, although no viable offer has emerged that does not include the Disclaimers;
- i) Quest's Board of Governors have exercised their business judgment and determined that the Primacorp transaction is the best option to fulfil the goals of Quest's restructuring;
- j) The Primacorp transaction will fund a Plan for unsecured creditors;
- k) The Primacorp transaction provides Quest with significant benefits in terms of its future operations. These include the \$20 million working capital facility and Primacorp support for Quest's marketing, recruiting and operations to allow it to continue as a post-secondary institution into the future;
- l) No other or better offer or proposal has emerged that can be considered superior to the Primacorp transaction;
- m) The Monitor is satisfied that the consideration to be received from Primacorp is reasonable and fair, taking into account the market value of the assets and the other unique factors of these proceedings;
- n) The Monitor is of the view that this transaction will yield a greater benefit to the stakeholders than might be achieved in a liquidation or bankruptcy;
- o) Any delay of approval is likely to lead to ruinous consequences after December 2020, when Quest will be out of funds and the Interim Lender will be in a position to commence a receivership and liquidation of Quest's assets; and
- p) Simply, Quest has run out of time to find a restructuring solution and the Primacorp transaction presently stands as the only viable option to avoid the devastating social and economic consequences to its stakeholders if a liquidation results.

CONCLUSIONS

[179] I grant the RVO as sought by Quest, and as supported by the Monitor.

[180] The Primacorp transaction is the best option available that maximizes recovery for Quest's creditors and preserves Quest's university operations. Allowing Quest to continue as a university will benefit all stakeholders, including Quest's current and former employees, current and future students of Quest and the community generally. The RVO structure is an appropriate means to accomplish this result in these unique and exceptional circumstances.

"Fitzpatrick J."

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