Court File No.: CV-21-00662483-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CLEARBEACH RESOURCES INC. AND FORBES RESOURCES CORP.

Applicants

FACTUM OF THE APPLICANTS

(Returnable July 14, 2021)

July 9, 2021

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PART I: OVERVIEW

1. Clearbeach Resources Inc. ("**Clearbeach**") and Forbes Resources Corp. ("**Forbes**", and together with Clearbeach, the "**Applicants**"), are seeking relief pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), to implement the only viable transaction (the "**Transaction**") to have emerged in the course of a year-long insolvency process.

2. The proposed Transaction avoids the devastating impacts of Clearbeach's bankruptcy and ensures that Clearbeach can address the environmental and stewardship obligations associated with its oil and gas wells. To implement the Transaction, the Applicants seek an order (the "**Approval and Vesting Order**"), *inter alia*:

(a) approving the Transaction contemplated by the Share Purchase Agreement (the "**SPA**") between Clearbeach and Oil Patch Services Inc. (the "**Purchaser**" or "**OPS**"), and authorizing Clearbeach to execute and implement same;

(b) adding a corporation to be incorporated prior to the closing of the Transaction ("**ResidualCo**"), by and as a wholly-owned subsidiary of Forbes, as an Applicant to these CCAA proceedings (the "**CCAA Proceedings**");

(c) transferring and vesting all of Clearbeach's right, title and interest in and to the Excluded Assets (as defined in the SPA) in ResidualCo;

(d) releasing and discharging Clearbeach from and in respect of, and transferring and vesting all of the Excluded Contracts and Excluded Liabilities (each as defined in the SPA) in and to ResidualCo;

(e) cancelling and extinguishing all equity interests in Clearbeach existing prior to the Closing Date (as defined in the SPA) other than the issued and outstanding common shares thereof;

(f) authorizing and directing Clearbeach to issue the New Common Shares (as defined in the SPA), and vesting in the Purchaser all right, title and interest in and to the New Common Shares; and

(g) authorizing and directing MNP Ltd. ("**MNP**"), in its capacity as the Court-appointed monitor of the Applicants (in such capacity, the "**Monitor**"), to file an assignment in bankruptcy (the "**Assignment in Bankruptcy**") for and on behalf of ResidualCo and Forbes under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), the costs of which (the "**Bankruptcy Costs**") shall be paid by the Purchaser, on behalf of Clearbeach, to the Monitor pursuant to the SPA.

PART II: FACTS

3. The facts underlying this motion are set out in the affidavit of Jane Lowrie sworn June 21, 2021 and the Second Report of the Monitor dated July 9, 2021 (the "**Second Report**").[1]

A. Background to these Proceedings

4. The Applicants are privately-owned, affiliated companies in Ontario's oil and natural gas sector. Clearbeach currently owns approximately 400 oil, natural gas, disposal and injection wells in Southwestern Ontario. The oil and gas wells owned by Clearbeach are predominantly located on private farmland.[2]

5. In response to an application for the appointment of a receiver (the "**Receivership Proceedings**") brought and later abandoned by, PACE Savings & Credit Union Limited ("**Pace**"), Clearbeach and Forbes commenced proceedings (the "**Proposal Proceedings**") under Part III of the BIA by filing Notices of Intention to Make a Proposal on July 22, 2020 (the "**Filing Date**") and July

[1] Affidavit of Jane Lowrie sworn June 21, 2021 [Lowrie Affidavit], Motion Record of Clearbeach Resources Inc. and Forbes Resources Corp. dated June 21, 2021 at Tab 2 [Motion Record]; Second Report of MNP Ltd. dated July 9, 2021 [Second Report].

[2] Lowrie Affidavit, *ibid* at para 4, Motion Record at Tab 2.

23, 2020, respectively. Pace later abandoned the Receivership Proceedings in view of the limited realizable value of the Applicants' assets and Clearbeach's significant environmental obligations. The Applicants, certain related parties, and Pace later settled their dispute pursuant to a Court-approved settlement.[3]

6. On May 20, 2021, to prevent the deemed bankruptcies of each of Forbes and Clearbeach, provide the breathing space and flexibility necessary to canvass their restructuring options and implement the settlement reached with Pace, the Applicants sought and obtained from this Court:

(a) an order (as amended and restated, the "**Initial Order**") pursuant to the CCAA, among other things: authorizing the continuation under the CCAA of the Proposal Proceedings; appointing MNP as Monitor of the Applicants; granting a stay of proceedings; and granting the Administration Charge and Directors' Charge (each as defined in the Initial Order); and

(b) an order approving the terms of settlement set out in the Settlement Agreement among the Applicants, Pace, OPS, Jarvis Holdings Inc., Brookwood Resources Inc., 1782767 Ontario Inc., Peter Budd, Lagasco Inc. and Jane Lowrie (the "**Settlement Agreement**"), and sealing the unredacted Settlement Agreement.[4]

B. The SPA and the Proposed Transaction

7. Prior to entering into the Transaction with the Purchaser for which approval of the Court is being sought in this motion, the Applicants, in consultation with the Monitor, also discussed the viability and commercial reasonableness of other potential options, including developing and implementing a sale process to sell the assets and business operations of the Applicants. These discussions were, in significant part, informed by:

[3] *Ibid* at para 6, Motion Record at Tab 2.
[4] *Ibid* at para 7, Motion Record at Tab 2.

(a) the Applicants' financial circumstances and liquidity crisis;

(b) the need to ensure that Clearbeach's environmental and stewardship obligations are addressed and that the Oil and Gas Assets, the MNRF Licenses and the Liabilities (each as defined in the SPA) related thereto are retained by Clearbeach;

(c) the report prepared by a third-party service provider retained by the Monitor (the "**Sproule Report**") analyzing the potential value of Clearbeach's assets and concluding, among other things, that *Clearbeach's assets have no realizable value in light of Clearbeach's environmental obligations*;

(d) the cost of plugging Clearbeach's wells, estimated by the Ministry of Natural Resources and Forestry (the "**MNRF**") as being between $30,000-$1,000,000 per well, confirming that Clearbeach's assets have no realizable value in light of the very significant environmental obligations associated therewith;

(e) the first-lien secured debt held by the Purchaser, exceeding $7,500,000, which results in no realizable value being available for any other creditors until the Purchaser is paid in full; and

(f) an appreciation that the Applicants would require significant interim financing to fund any sale process, which, given the realizable value of the Applicants' assets, is extremely unlikely to be obtained on commercially reasonable terms, if at all.[5]

8. After consideration of the above factors, it was determined that the Transaction with the Purchaser represented the best, and indeed very likely the only viable, alternative.[6]

9. The Applicants, in consultation with the Monitor, have structured the Transaction as a share sale in order to preserve the MNRF Licenses, the Abandonment and Reclamation Obligations and the Oil

[5] *Ibid* at para 11, Motion Record at Tab 2.
[6] *Ibid* at para 12, Motion Record at Tab 2.

and Gas Assets and ensure that the stewardship and environmental obligations arising in connection therewith remain with Clearbeach (with OPS as Purchaser ultimately becoming the sole equity-holder of Clearbeach shares). These include, among other things: all of the Oil and Gas Assets; the Abandonment and Reclamation Obligations (as defined in the SPA); the MNRF Licenses related to the operation of its oil and gas wells issued under the Ontario *Oil, Gas and Salt Resources Act*, R.S.O. 1990, c. P. 12, as amended (the "**OGSRA**") by the MNRF; and all liabilities arising from or in connection with the MNRF Licenses or compliance with or the consequences of any non-compliance with, or violation or breach of the OGSRA or any orders issued pursuant to the OGSRA (the "**Inspector's Orders**").[7]

10. The Applicants are now seeking the Approval and Vesting Order, approving the SPA and the Transaction pursuant to which the Purchaser will subscribe for and purchase the New Common Shares, subject to the terms and conditions of the SPA. In accordance with the SPA, following the Consolidation and Cancellation (as defined in the SPA), the Purchaser will be the sole owner of 100% of the issued and outstanding shares of Clearbeach.[8]

C. The Excluded Liabilities

11. Pursuant to the SPA and the proposed Approval and Vesting Order, all Excluded Liabilities will be channeled to, assumed by and vested absolutely and exclusively in ResidualCo. The Excluded Liabilities include, among other things, all Encumbrances, Claims, Liabilities (each as defined in the SPA), obligations, undertakings, leases, agreements, debts, rights and entitlements of any kind or nature whatsoever of or against Clearbeach other than the Retained Liabilities, including:

(a) any contracts or historical arrangements constituting so-called "gross overriding royalty interests" (collectively, the "**GORRs**"), including without limitation the Gross Overriding Royalty Agreement dated November 16, 2018, between Clearbeach and

[7] *Ibid* at paras 12-14, Motion Record at Tab 2.
[8] *Ibid* at para 15, Motion Record at Tab 2.

Crich Holdings and Buildings Limited (the "**Crich GORR**");

(b) any liabilities arising under or in connection with the *Municipal Act, 2001*, S.O. 2001, c. 25 (the "**Municipal Act**") or the *Assessment Act*, R.S.O. 1990, c. A. 31 (the "**Assessment Act**") before the Filing Date in connection with one or more pipelines including without limitation, Taxes (as defined in the SPA) (collectively, the "**Principal Tax Claims**"); and

(c) all penalties, interest or additions which constitute Taxes arising before and after the Filing Date under or in connection with the Municipal Act or the Assessment Act, subject to any settlement, appeal, or rights of set-off (together with the Principal Tax Claims, the "**Municipal Tax Claims**").[9]

12. Each of the foregoing Excluded Liabilities are in the nature of monetary interests. The GORRs are contractual obligations provided to their respective holders as security for monetary obligations of Clearbeach. The "municipal taxes" (including the interest, penalties or additions thereon) coming within the ambit of Excluded Liabilities are in respect of neither real property nor buildings thereon. Rather, they arise in connection with certain machinery, pipelines and fixtures that are erected or placed upon, over or under the Landowners' real property or municipal property.[10]

D. Concluding the CCAA Proceedings and Authorizing ResidualCo's Assignment in Bankruptcy

13. To preserve stakeholder value and facilitate the efficient completion of their restructuring, the Applicants are also seeking to conclude the CCAA Proceedings, pursuant to the Approval and Vesting Order. Upon the Assignment in Bankruptcy, MNP will be released and discharged as Monitor and each of the Administration Charge and the Directors' Charge, which will have been paid (on behalf of Clearbeach) or assumed by the Purchaser, will be terminated.[11]

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[9] *Ibid* at para 24, Motion Record at Tab 2.
[10] *Ibid* at paras 25-26, Motion Record at Tab 2.
[11] *Ibid* at para 31, Motion Record at Tab 2.

14. Given that the Transaction will not provide proceeds to make any payments toward the claims of ResidualCo's creditors, the Applicants do not intend for ResidualCo to file a plan of compromise or arrangement or conduct a claims resolution process in the CCAA Proceedings. Accordingly, the proposed Approval and Vesting Order authorizes the Monitor on behalf of ResidualCo, to file an assignment in bankruptcy and MNP to act as the Trustee. As Forbes has no assets with which to satisfy the claims of any creditors ranking behind OPS' secured claim, the Approval and Vesting Order also authorizes the Monitor on behalf of Forbes, to file an assignment in bankruptcy and MNP to act as the Trustee. The proposed bankruptcy process will facilitate the orderly wind-up of ResidualCo's and Forbes' estates. Pursuant to the SPA, the Bankruptcy Costs associated with the Assignment in Bankruptcy will be paid by the Purchaser.[12]

E. Approving the Releases in Favour of the Released Parties and the Landowners

15. The proposed Approval and Vesting Order provides (i) the current directors, officers, employees, independent contractors that have provided legal or financial services to the Applicants, legal counsel and advisors of the Applicants, (ii) the ResidualCo D&Os, and (iii) the Monitor and its legal counsel (collectively, the "**Released Parties**") with the benefit of a release against the Released Claims (as defined in the Approval and Vesting Order).[13]

16. The Released Claims are subject to a number of exclusions. For instance, the Released Claims do not include any claim or liability arising out of any gross negligence or willful misconduct on the part of any of the Released Parties or any claim against the Applicants' current and former directors that is not permitted to be released pursuant to subsection 5.1(2) of the CCAA.[14] Additionally, nothing in the Approval and Vesting Order releases the Released Parties or any other person, from any responsibility or obligation, including any Encumbrance, that was, is or may be owed to or enforceable by the Province of Ontario or any Ministry or agency thereof (collectively, "**Ontario Governmental**

[12] *Ibid* at para 33, Motion Record at Tab 2.
[13] *Ibid* at para 36, Motion Record at Tab 2.
[14] *Ibid* at para 37, Motion Record at Tab 2.

Authorities"), that is not a "claim" as defined in subsection 2(1) of the CCAA, nor does it bar any steps or proceedings by any Ontario Governmental Authorities or any servant, agent or employee thereof in respect thereof.

17. The proposed Approval and Vesting Order also provides a release in favour of all persons upon whose real property the Oil and Gas Assets are situated (collectively, the "**Landowners**"). Specifically, the Landowners will be, and will be deemed to be, forever irrevocably released and discharged from any and all claims, liabilities (direct, indirect, absolute or contingent), or obligations with respect to any Taxes (including penalties and interest thereon) of, or that relate to, Clearbeach arising under the Municipal Act and/or the Assessment Act (provided that such release will not apply to Taxes in respect of the business and operations conducted by Clearbeach after the Effective Time (as defined in the Approval and Vesting Order)).[15]

18. The proposed release in favour of the Landowners recognizes their continued contribution to the Applicants' restructuring efforts and mitigates the claims that such Landowners may have against Clearbeach. As discussed above, some liabilities arising under or in connection with the Municipal Act or the Assessment Act, including certain Taxes form part of the Excluded Liabilities. If the Approval and Vesting Order is granted, the municipalities to which such Taxes are owed will be limited in their recourse to ResidualCo's estate and may, as a result, claim against the Landowners for any outstanding tax arrears. In turn, the Landowners may restrict or refuse to permit Clearbeach to continue its ordinary course operations or otherwise initiate claims against Clearbeach.[16]

PART III: ISSUES

19. The issues to be considered on this motion are whether this Court should:

(a) approve the SPA and the reverse vesting transactions contemplated by the Approval and

[15] *Ibid* at para 41, Motion Record at Tab 2.
[16] *Ibid* at para 42, Motion Record at Tab 2.

Vesting Order;

(b) vest the GORRs and the Municipal Tax Claims in and to ResidualCo pursuant to the Approval and Vesting Order;

(c) approve the Reorganization Transactions contemplated by the SPA;

(d) authorize the conclusion of the CCAA Proceedings and the discharge of the Monitor; and

(e) approve the releases in favour of the Released Parties and the Landowners.

PART IV: LAW AND ARGUMENT

A. The SPA and the Reverse Vesting Transactions Should be Approved

1. This Court has the Jurisdiction to Approve Reverse Vesting Transactions

20. The discretion inhering in sections 36 and 11 of the CCAA to approve a sale of a debtor company's assets outside of the ordinary course of business and make any order considered "appropriate in the circumstances" vests this Court with jurisdiction to approve reverse vesting transactions such as or akin to the proposed Transaction.[17]

21. This Court's authority under the CCAA must be exercised in furtherance of the CCAA's remedial objectives, having regard to whether: the order sought is appropriate in the circumstances; the debtor company is acting in good faith; and the debtor company is acting with due diligence.[18]

22. The CCAA's remedial objectives include "avoiding the social and economic losses resulting

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[17] *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 s 11, s 36 [CCAA]; *Quest University Canada (Re)*, 2020 BCSC 1883 at paras 150, 153-155 [*Quest*], Applicants' Book of Authorities at Tab 1 [BOA]; *Southern Star Developments Ltd v Quest University Canada*, 2020 BCCA 364 at paras 9, 11, 30, BOA at Tab 2; *Arrangement relatif à Nemaska Lithium inc*, 2020 QCCA 1488 at paras 1, 15, 19-20 [*Nemaska*], BOA at Tab 3; *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para 48 [*Callidus*], BOA at Tab 4;

[18] *Quest*, *ibid* at para 157, BOA at Tab 1; *Callidus*, *ibid*, BOA at Tab 4; *Ted Leroy Trucking [Century Services] Ltd, Re*, 2010 SCC 60 at paras 59, 70 [*Century Services*], BOA at Tab 5.

from the liquidation of an insolvent company."[19] In furtherance of this objective, courts have frequently approved reverse vesting transactions where, as here, the proposed transaction is the only viable transaction to have emerged in the restructuring and preserves the debtor's business operations and licenses, permits, tax losses or statutory privileges.[20]

23. When authorizing a sale of a debtor company's assets outside of the ordinary course of business free and clear of security, charges or other restrictions, subsection 36(3) of the CCAA requires courts to consider the following non-exhaustive factors:

(a) whether the process leading to the proposed sale was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale;

(c) whether the monitor filed a report stating that in its opinion the proposed sale would be more beneficial to creditors than a sale or disposition under a bankruptcy;

(d) the effects of the proposed sale on the creditors and other interested parties;

(e) the extent to which creditors were consulted; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into

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[19] *Century Services*, *ibid* at para 70, BOA at Tab 5; *Callidus*, *ibid* at para 41, BOA at Tab 4.

[20] *Quest*, *supra* note at paras 158-162, BOA at Tab 1; *Nemaska*, *supra* note 17, at paras 12-17, 20, BOA at Tab 3; *In the Matter of a Plan of Compromise or Arrangement of Comark Holdings Inc., Bootlegger Clothing Inc., CLEO Fashions Inc. and Ricki's Fashions Inc.* (July 13, 2020), Toronto, CV-20-00642013-00CL (Approval and Vesting and CCAA Termination Order) [*Comark*], BOA at Tab 6; *In the Matter of a Plan of Compromise or Arrangement of Wayland Group Corp., Maricann Inc. and Nanoleaf Technologies Inc.* (April 21, 2020), Toronto, CV-19-00632079-00CL (Approval and Vesting Order) [*Wayland*], BOA at Tab 7; *In the Matter of a Plan of Compromise or Arrangement of Beleave Inc., Beleave Kannabis Corp., Seven Oaks Inc., 9334416 Canada Inc. o/a Medi-Green and My-Grow, Beleave Kannabis Abbotsford Inc. and Beleave Kannabis Chilliwack Inc.* (September 18, 2020), Toronto, CV-20-00642097-00CL (Approval and Vesting Order) [*Beleave*], BOA at Tab 8; *In the Matter of a Plan of Compromise or Arrangement of FIGR Brands, Inc., FIGR Norfolk Inc. and Canada's Island Garden Inc.* (June 10, 2021), Toronto, CV-21-00655373-00CL (Approval and Vesting Order), BOA at Tab 9; *In the Matter of a Plan of Compromise or Arrangement of Green Relief Inc.* (November 9, 2020), Toronto, CV-20-00639217-00CL (Approval and Vesting Order) [*Green Relief Order*], BOA at Tab 10; *In the Matter of a Plan of Compromise or Arrangement of Bellatrix Exploration Ltd.* (June 22, 2021), Calgary, 1901-13767 (Approval and Vesting Order) [*Bellatrix*], BOA at Tab 11; *In the Matter of the Compromise or Arrangement of Redrock Camps Inc., Sockeye Enterprises Inc., Sweetwater Hospitality Inc. and Baldr Construction Management Inc.* (February 18, 2021), Calgary, 2001-06194 (Reverse Vesting Order), BOA at Tab 12.

account their market value.[21]

24. These factors are frequently considered concurrently with those articulated in *Royal Bank v Soundair* ("***Soundair***"):

(a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;

(b) the efficacy and integrity of the process by which offers have been obtained;

(c) whether the interests of all parties have been considered; and

(d) whether there has been unfairness in the working out of the process.[22]

25. The factors enumerated in subsection 36(3) of the CCAA and *Soundair* have been applied equally in reverse vesting transactions, including by this Court.[23] Here, these factors support the SPA's approval and the granting of the proposed Approval and Vesting Order, for the following reasons:

(a) ***The Process Leading to the Transaction was Reasonable*** – the SPA and the proposed Transaction are the culmination of extensive consideration of the restructuring options available to the Applicants. Due to the Applicants' financial circumstances, a public sale process was not feasible nor would it have produced a commercially reasonable alternative in light of Clearbeach's environmental obligations and the realizable value of the Applicants' assets.[24]

(b) ***The Monitor is Supportive of and was Consulted on the Transaction*** – the Monitor was consulted on the proposed SPA and the Transaction and has articulated the reasons for

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[21] CCAA, *supra* note 17 s 36(3); *Quest, supra* note 17 at para 175, BOA at Tab 1; *Green Relief Inc,* 2020 ONSC 6837 at para 5 [*Green Relief*], BOA at Tab 13.

[22] *Royal Bank v Soundair Corp*, [1991] 46 OAC 321 at para 16, BOA at Tab 14; *Green Relief*, *ibid* at para 6, BOA at Tab 13; *Quest, ibid* at para 176, BOA at Tab 1.

[23] *Green Relief*, *ibid*, BOA at Tab 13; *Quest, ibid*, BOA at Tab 1.

[24] Lorwie Affidavit, *supra* note 1 at paras 11-12, 29, 45, Motion Record at Tab 2; Second Report, *supra* note 1 at paras 41-42.

its support of same in the Second Report.[25]

(c) ***The Proposed Transaction is Superior to a Bankruptcy*** – importantly, the Monitor has expressed its view that the proposed Transaction represents the only commercially reasonable and viable transaction capable of ensuring a going-concern result.[26]

(d) ***The SPA and the Transaction are the Only Viable Option and are in the Best Interest of the Applicants and Their Creditors*** – the SPA and the Transaction are the only viable restructuring option to have emerged in the Applicants' year-long insolvency proceedings. The only other alternative in the circumstances is a bankruptcy. Given Clearbeach's environmental and stewardship obligations, a bankruptcy would have disastrous consequences for Clearbeach's stakeholders, including the Landowners and the MNRF.[27]

(e) ***The Consideration Received is Fair and Reasonable in the Circumstances*** – the consideration provided under the SPA is reasonable in the circumstances and commensurate with the Retained Liabilities and the value of Clearbeach's assets.[28]

2. The Additional Related Party Considerations are Satisfied

26. A sale of a debtor company's assets outside of the ordinary course of business to a related party is expressly contemplated by subsection 36(4) of the CCAA.[29] Where such a sale is proposed, subsection 36(4) of the CCAA provides that in addition to considering the factors in subsection 36(3), this Court must be satisfied that:

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

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[25] Lowrie Affidavit, *ibid* at para 11, Motion Record at Tab 2; Second Report, *ibid* at paras 41-42, 51.
[26] Lowrie Affidavit, *ibid* at para 29, Motion Record at Tab 2; Second Report, *ibid* at para 51.
[27] Lowrie Affidavit, *ibid* at paras 11-14, 29, 45, Motion Record at Tab 2; Second Report, *ibid* at paras 41-42, 51.
[28] Lowrie Affidavit, *ibid* at paras 11-12, 45, Motion Record at Tab 2; Second Report, *ibid* at para 51.
[29] CCAA, *supra* note 17 s 36(4).

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.[30]

27. The above criteria are satisfied here. The Applicants, in consultation with the Monitor, canvassed their restructuring alternatives in good faith and reasonably determined that the SPA presented the only viable alternative capable of assuring a going-concern result. Given Clearbeach's environmental liabilities and stewardship obligations, and the negative realizable value of the Applicants' assets after taking those liabilities and obligations into account, it is highly unlikely that a non-related party would have put forward a commercially reasonable proposal in a public sale process offering the Applicants superior consideration to that provided under the Transaction. Moreover, any sale of the Oil and Gas Assets, including the MNRF Licenses would have required the MNRF's consent and other regulatory approvals, which would have taken an extended period of time, created uncertainty and put the oil and gas well operations and the responsible stewardship thereof in jeopardy.[31]

B. The GORRs and the Municipal Tax Claims Should be Vested in and to ResidualCo

28. Included among the Excluded Contracts and Excluded Liabilities to be assumed by and vested in ResidualCo are the GORRs and the Municipal Tax Claims. As discussed immediately below, the proposed treatment of the GORRs and the Municipal Tax Claims is informed by the Supreme Court of Canada's decision in *Orphan Well Association v Grant Thornton Ltd.* ("***Redwater***"), and is appropriate in the circumstances.

1. The Treatment of the Excluded Contracts and Excluded Liabilities is Informed by *Redwater*

29. The proposed treatment of the Excluded Contracts and the Excluded Liabilities, including the GORRs and the Municipal Tax Claims, is informed by the nature of Clearbeach's environmental

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[30] *Ibid*.
[31] Lowrie Affidavit, *supra* note 1 at paras 11-14, 29, 45, Motion Record at Tab 2; Second Report, *supra* note 1 at paras 41-42, 51.

obligations under the OGSRA and any Inspector's Orders. In the event of Clearbeach's bankruptcy – the only other alternative in the circumstances – these obligations cannot be reduced to provable claims, are binding on Clearbeach's estate and would have to be satisfied from the sale of the Oil and Gas Assets prior to any distributions to Clearbeach's creditors, whether secured or unsecured.

30. The foundation of the BIA's comprehensive priority scheme for distribution of a bankrupt's assets among its creditors "is that of a 'claim provable in bankruptcy'".[32] In *Re AbitibiBowater Inc.* ("***Abitibi***"), the Supreme Court of Canada articulated the following three-part test to determine whether an environmental obligation imposed by a regulatory body will be a "provable claim" subject to the BIA's general priority scheme:

(a) there must be a debt, a liability or an obligation to a creditor;

(b) the debt, liability or obligation must be incurred before the debtor becomes bankrupt; and

(c) it must be possible to attach a monetary value to the debt, liability or obligation.[33]

31. The Supreme Court of Canada, in *Redwater*, clarified the application of the *Abitibi* factors in circumstances similar to the present case. In *Redwater*, the Alberta Energy Regulator issued orders– similar to the Inspector's Orders issued by the MNRF in this case – requiring a bankrupt, Redwater Energy Corporation, to suspend, abandon and reclaim uneconomic oil and gas wells that had been disclaimed by its trustee in bankruptcy pursuant to the BIA. The Supreme Court of Canada held that, notwithstanding the trustee's disclaimer, the abandonment orders were obligations of the bankrupt's estate and were not reduced to provable claims,[34] given that, among other things:

(a) The "creditor" step of the *Abitibi* factors is not invariably satisfied where a regulatory body exercises its enforcement powers against a debtor. Rather, where a regulatory body

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[32] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5, at para 33 [*Redwater*], BOA at Tab 15.
[33] *AbitibiBowater Inc, Re*, 2012 SCC 67 at para 26, BOA at Tab 16.
[34] *Redwater*, *supra* note 32 at paras 159-160, BOA at Tab 15.

has not performed the environmental work itself, is acting "in a *bona fide* regulatory capacity" in ordering "an entity to comply with its legal obligations in furtherance of the public good" and does not stand to benefit financially from same, the regulatory body will not constitute a creditor.[35]

(b) In determining whether a "non-monetary obligation of a bankrupt is too remote or too speculative to be included in the bankruptcy proceeding" as a provable claim, courts must apply the general rules applicable to future or contingent claims under the BIA.[36] That is, the claim cannot be too remote or too speculative – it must be sufficiently certain that the work ordered will be completed by the regulatory body such that it would assert a claim for reimbursement.[37] In the context of abandonment or reclamation orders, this degree of certainty will not be established where the regulatory body will not undertake the reclamation required by its orders itself, has not begun any such reclamation and would not be in a position to undertake any such remediation until long after the administration of the bankrupt's estate has been completed.[38]

32. There is no dispute that in seeking to enforce Clearbeach's environmental obligations, the MNRF is not acting as a creditor as contemplated under the *Abitibi* factors. The failure to satisfy the first *Abitibi* factor is dispositive – Clearbeach's obligations under any Inspector's Orders are not provable claims in bankruptcy and as a result, would need to be addressed in priority to the monetary claims of secured and unsecured creditors in a bankruptcy of Clearbeach.[39]

33. While the proposed Approval and Vesting Order will result in the release and extinguishment of certain claims that purport to be secured, including the GORRs and the Municipal Tax Claims, under the principles enunciated by the Supreme Court of Canada in *Redwater*, such claims could very plainly

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[35] *Ibid* at paras 122, 124, 128, 130-135, BOA at Tab 15.
[36] *Ibid* at paras 138-140, BOA at Tab 15.
[37] *Ibid* at paras 121, 140, BOA at Tab 15.
[38] *Ibid* at paras 145-153, BOA at Tab 15.
[39] *Ibid* at paras 137, 139, BOA at Tab 15.

not be met in the event of Clearbeach's bankruptcy. The Oil and Gas Assets cannot be sold on a piecemeal basis to satisfy secured claims against Clearbeach and its assets as a whole, would not yield any realizable value for creditors after taking into account Clearbeach's environmental obligations, as detailed in the Sproule Report and as made clear by the MNRF's estimated cost of plugging Clearbeach's wells. Unfortunately this is the stark reality facing Clearbeach and its creditors. Importantly, the proposed Transaction does not alter the priorities that would be faced in a bankruptcy. Rather, it seeks to mitigate the harm that would result from a bankruptcy, including by ensuring the ongoing operation of Clearbeach so that it can continue to address its environmental obligations, service its customers, provide partial payments to the municipalities in respect of municipal taxes currently owed and continue to pay municipal taxes in the future.

2. The GORRs are Contractual Rights Capable of Being Vested

34. The GORRs in this case are not true interests in land but rather contractual rights that can be vested in ResidualCo pursuant to section 36 of the CCAA.[40] The below analysis will focus on the Crich GORR, which is the only one of the GORRs to have been registered.

35. As the Supreme Court of Canada held in *Bank of Montreal v Dynex Petroleum Ltd.* ("***Dynex***"), in determining whether an overriding royalty interest is an interest in land, courts must consider whether:

> 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
>
> 2) the interest, out of which the royalty is carved, is itself an interest in land.[41]

36. While Clearbeach does not own any real property, save for the Clearville Property (as defined in the SPA), the Applicants accept that Clearbeach's working interest in the Landowners' real property

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[40] CCAA, *supra* note 17 s 36(6); *Walter Energy Canada Holdings Inc, Re* 2016 BCSC 1746 at paras 16, 48-72, 79-80 [*Walter Energy*], BOA at Tab 17.

[41] *Bank of Montreal v Dynex Petroleum Ltd,* 2002 SCC 7 at para 22, BOA at Tab 18; *Walter Energy, ibid* at para 49, BOA at Tab 17; *Accel Canada Holdings Limited (Re),* 2020 ABQB 182 at paras 13-14 (leave to appeal granted on other grounds) [*Accel*], BOA at Tab 19; *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc,* 2018 ONCA 253 at para 59 [*Third Eye*], BOA at Tab 20.

is an incorporeal hereditament that is itself, an interest in land. Accordingly, only the first part of the *Dynex* test is at issue.

37. The first stage of the *Dynex* test requires this Court determine the parties' intention in making the Crich GORR, from the agreement as a whole, along with the surrounding circumstances.[42] This engages the principles of contractual interpretation. As such, this Court must "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract".[43] While surrounding circumstances may be considered in interpreting an agreement, they "must never be allowed to overwhelm the words of that agreement".[44]

38. A plain reading of the Crich GORR evinces the intention of the parties to grant a contractual right to repayment of certain obligations owed to Crich Holdings and Buildings Limited, rather than a true interest in land. Specifically, the Crich GORR provides, in relevant part, that:

> Clearbeach and others have indebtedness and obligations owing to Crich pursuant to the memorandum of agreement dated September 25, 2018, as amended by the supplemental memorandum of agreement dated November 16, 2018 (collectively, the "**MOA**"), and all documents, agreements and instruments arising from or deliver pursuant to the MOA, which indebtedness and obligations are hereinafter collectively referred to as the "**Obligations**"; […]
>
> As security for the Obligations, Clearbeach has agreed to execute this Agreement in favour of Crich such that Crich has a security interest in the Off-Shore Royalty Lands (as hereinafter defined) and On-Shore Royalty Lands (as hereinafter defined) in accordance with the terms and premises of this Agreement; […]
>
> As general and continuing security for the Obligations, Clearbeach hereby grants unto Crich a gross overriding royalty equal to 10% of all petroleum substances produced, saved and marketed or allocated to or deemed to have been produced by Clearbeach from the Off-Shore Royalty Lands (the "**Off-Shore Royalty**"), until such time as Clearbeach has paid and satisfied, in full, the Obligations. […]
>
> As general and continuing security for the Obligations, Clearbeach hereby grants unto Crich a gross overriding royalty equal to 15% of all petroleum substances produced, saved and marketed or allocated to or deemed to have been produced by Clearbeach from the On-Shore Royalty Lands (the "**On-Shore Royalty**"), until such time as Clearbeach has paid and satisfied, in full,

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[42] *Third Eye, ibid* at para 63, BOA at Tab 20.

[43] *Third Eye Capital v B.E.S.T. Active 365 Fund*, 2020 ABCA 160 at para 15, BOA at Tab 21; *Creston Moly Corp v Sattva Capital Corp*, 2014 SCC 53 at para 47 [*Sattva Capital*], BOA at Tab 22; *Accel, supra* note 41 at paras 16-17, BOA at Tab 19.

[44] *Sattva Capital, ibid* at para 57, BOA at Tab 22; *Accel, ibid* at para 17, BOA at Tab 19.

the Obligations. […]

> All terms, covenants and conditions in this Agreement shall run with and are binding upon the Off-Shore Royalty Lands and On-Shore Royalty Lands and the overriding royalty is and shall be conclusively deemed to be an interest in the Off-Shore Royalty Lands and On-Shore Royalty Lands and all estates derived therefrom for the duration of this Agreement.[45] [Emphasis Added]

39. The substance of the Crich GORR is devoid of any language indicating an intention to "convey" or "transfer" an interest in land. Rather, read as a whole, the Crich GORR grants a right in the petroleum substances produced from land as security for monetary obligations until those monetary obligations have been satisfied. Thus, the Crich GORR is not a true interest in land based upon the principles enunciated by the Supreme Court of Canada in *Dynex*.

3. If This Court Determines the GORRs are Interests in Land They May Nonetheless be Vested in ResidualCo

40. Even if this Court were to determine that the GORRs are in fact, interests in land, it nonetheless retains a discretion to vest them in and to ResidualCo. As the Ontario Court of Appeal held in *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.* ("***Dianor***"), when determining whether an interest in land should be extinguished/vested, courts should consider:

(a) the nature of the interest in land – with fixed monetary interests that are "extinguished when the monetary obligation is fulfilled" being afforded lesser protection; and

(b) whether the interest holder has consented to the vesting out of their interest.[46]

41. Should the foregoing factors be inconclusive, courts may then consider the equities, having regard to, among other things:

(a) the prejudice, if any, to the third party interest holder;

(b) whether the third party interest holder may be adequately compensated for its interest

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[45] Lowrie Affidavit, *supra* note 1 at Exhibit "D", at 1, 3, 8, Motion Record at Tab 2.

[46] *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc*, 2019 ONCA 508 at para 109 [*Dianor*], BOA at Tab 23.

from the proceeds of the sale;

(c) whether, based on evidence of value, there is any equity in the property; and

(d) whether the parties are acting in good faith.[47]

42. Applied here, these factors strongly suggest that it is appropriate for this Court to exercise its direction to vest out the GORRs in and to ResidualCo. The Crich GORR is a fixed monetary interest extinguished upon fulfillment of the payment obligations for which it was granted and thus, does not give rise to an expectation that it will run with the land.[48] While the granting of the proposed Approval and Vesting Order will undoubtedly prejudice the holders of the GORRs, they would be equally prejudiced upon Clearbeach's bankruptcy – the only alternative – given the implications of *Redwater* and the negative equity in Clearbeach's assets. Thus, there is no additional prejudice beyond what there would be in the event of Clearbeach's bankruptcy.

43. In addition to the Crich GORR discussed above, the GORRs include certain historical arrangements in connection with companies acquired by Clearbeach. Clearbeach does not have copies of contracts with respect to such purported GORRs but notes that there are no registrations that would suggest such arrangements are true interests in land or were intended to create an interest in land.[49]

3. The Municipal Tax Claims Should be Vested in ResidualCo

44. The Municipal Tax Claims to be vested in ResidualCo consist of certain Taxes (including all interest and penalties thereon) arising under the Assessment Act and the Municipal Act in connection with pipelines and certain other assessable property, respectively.

45. Subsection 349(3) of the Municipal Act creates a priority lien on "land" in favour of a taxing municipality.[50] However, as Campbell J. held in *Credit Union Central of Ontario Ltd. v Fibratech*

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[47] *Ibid* at para 110, BOA at Tab 23.
[48] *Ibid* at para 105, BOA at Tab 23.
[49] *McDonald v Bode Estate*, 2018 BCCA 140 at para 45, BOA at Tab 24.
[50] *Municipal Act, 2001,* SO 2001, c. 25 s 349(3).

Manufacturing Inc., such lien is limited strictly to "land" as defined under the Municipal Act, being "'land' includes buildings".[51] As such, taxes arising under the Municipal Act do not benefit from a charge on chattels, equipment, machinery and other personal property used in the ordinary course of Clearbeach's business that are neither "land" nor "buildings". These claims, as against Clearbeach, are in the nature of unsecured monetary obligations and may be vested in and to ResidualCo.

46. Subsection 25(14) of the Assessment Act provides a priority lien in respect of "taxes payable by a pipe line company" on "all the lands of the company in the applicable municipality".[52] In contrast to the Municipal Act, the Assessment Act defines "land" as including:

> (a) land covered with water,
> (b) all trees and underwood growing upon land,
> (c) all mines, minerals, gas, oil, salt quarries and fossils in and under land,
> (d) all buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under or affixed to land,
> (e) all structures and fixtures erected or placed upon, in, over, under or affixed to a highway, lane or other public communication or water, but not the rolling stock of a transportation system […].[53]

47. In light of the foregoing, taxes payable on pipelines under the Assessment Act may constitute interests in land, engaging the *Dianor* analysis set out above. In the circumstances, the *Dianor* analysis supports the vesting of the Municipal Tax Claims in and to ResidualCo. Namely:

(a) the Municipal Tax Claims are, as characterized by the Ontario Court of Appeal in *Dianor*, "akin to a fixed monetary interest that is attached to real or personal property subject to the sale"[54] and as a result, do not garner a reasonable expectation that they will run with the land in all cases;

(b) the prejudice to the municipalities with the Municipal Tax Claims and their residents will be exacerbated if the Transaction fails and Clearbeach is assigned into bankruptcy –

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[51] *Ibid*, s 1(1) "Land"; *Credit Union Central of Ontario Ltd v Fibratech Manufacturing Inc* (2008), 176 ACWS (3d) 333 at paras 10-17, BOA at Tab 25;
[52] *Assessment Act*, RSO 1990 c. A. 31 s 25(14).
[53] *Ibid*, s 1(1) "land", "real property" and "real estate".
[54] *Dianor*, *supra* note 46 at para 105, BOA at Tab 23.

wherein, Clearbeach's environmental obligations will be paid in priority to any other creditor and there are expected to be no funds available to pay any past, present or future municipal taxes;

(c) as made clear by the MNRF's estimated cost of fulfilling Clearbeach's environmental obligations and the Sproule Report, there is no equity in Clearbeach's property, including the Retained Assets (as defined in the SPA); and

(d) importantly, as the only viable option that ensures a going-concern result, the Transaction will position Clearbeach to pay municipal taxes in respect of its business and operations in the future and also provides for the repayment of the principal amount of certain outstanding municipal taxes.[55]

C. The Reorganization Transactions Should be Approved

48. Read together, subsection 36(1) and section 11 of the CCAA authorize this Court to approve the Reorganization Transactions absent shareholder approval. Subsection 36(1) of the CCAA expressly authorizes this Court to approve sale transactions notwithstanding "any requirement for shareholder approval" while section 11 permits this Court to make "any order that it considers appropriate in the circumstances."[56]

49. Recognizing that it would be "unfair to the creditors and other stakeholders to permit the shareholders (whose interest has the lowest priority) to have any ability to block a reorganization", courts have dispensed with shareholder approval in CCAA restructurings.[57] This includes in cases of reverse vesting transactions.[58]

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[55] Lowrie Affidavit, *supra* note 1 at paras 11-12, 25, 27, 29, 45, Motion Record at Tab 2; Second Report, *supra* note 1 at paras 38-40, 47, 49, 51.
[56] CCAA, *supra* note 17 s 11, s 36(1).
[57] *Canadian Airlines Corp, Re*, 2000 ABQB 442 at paras 76, 79, BOA at Tab 26; *Angiotech Pharmaceuticals Inc, Re*, 2011 BCSC 450 at para 11, BOA at Tab 27.
[58] *Bellatrix*, *supra* note 20 at paras 4-9, BOA at Tab 11; *Beleave*, *supra* note 20 at para 5(d), BOA at Tab 8; *Wayland*, *supra* note 20 at para 4, BOA at Tab 7; *Green Relief Order*, *supra* note 20 at para 4, BOA at Tab 10.

50. In the circumstances, the Applicants submit that it is appropriate for this Court to exercise its discretion to approve the Reorganization Transactions absent shareholder approval. To do otherwise would be contrary to the treatment of equity claims under subsection 6(8) of the CCAA,[59] suggest that Clearbeach's shareholders have an economic interest and undermine the proposed Transaction to the detriment of all stakeholders.

D. The CCAA Proceedings Should be Terminated and the Monitor Should be Discharged

51. Section 11 of the CCAA vests this Court with broad discretion to make "any order that it considers appropriate in the circumstances."[60]

52. As previously noted, the exercise of this Court's discretion under section 11 of the CCAA must "further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence."[61] The remedial objectives of the CCAA include maximizing creditor recovery and providing a "timely, efficient and impartial resolution of a debtor's insolvency".[62]

53. In furtherance of the CCAA's remedial objectives, courts routinely grant orders – including in conjunction with the approval of reverse vesting transactions[63] – terminating a debtor company's CCAA proceedings, discharging the court-appointed monitor and authorizing the debtor's transition into bankruptcy.[64]

54. Having regard to the foregoing considerations, the Applicant submits that it is appropriate for this Court to conclude the CCAA Proceedings in the manner contemplated by Approval and Vesting

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[59] CCAA, *supra* note 17 s 6(8).
[60] *Ibid*, s 11.
[61] *Callidus*, *supra* note 17 at para 70, BOA at Tab 4.
[62] *Ibid*, at paras 40, 46, BOA at Tab 4.
[63] *Comark*, *supra* note 20 at paras 21-28, BOA at Tab 6.
[64] *In the Matter of a Plan of Compromise or Arrangement of Golf Town Canada Holdings Inc., Golf Town Canada Inc. and Golf Town GP II Inc.* (March 29, 2018), Toronto, CV-16-11527-00CL (CCAA Termination Order) [*Golf Town*], BOA at Tab 28; *In the Matter of a Plan of Compromise or Arrangement of DEL Equipment Inc.* (October 29, 2020), Toronto, CV-19-629552-00CL (CCAA Termination Order) [*Del Equipment*], BOA at Tab 29.

Order given that:

(a) ResidualCo and Forbes have no business operations;

(b) the Applicants have acted in good faith and with due diligence, including by complying with their obligations under the CCAA and under each of the orders issued in the CCAA Proceedings;

(c) the Applicants, in consultation with the Monitor, have determined that the proposed bankruptcy is the most efficient and cost-effective manner of formally winding-up ResidualCo and Forbes in the circumstances;

(d) all matters requiring resolution within the ambit of the CCAA will have been completed by the Assignment in Bankruptcy and no amounts are or will be owing in respect of Crown remittances or any pension plans under subsections 6(4) and 6(6) of the CCAA, respectively; and

(e) the Monitor supports the conclusion of the CCAA Proceedings on the terms set out in the proposed Approval and Vesting Order.[65]

E. The Releases in Favour of the Released Parties and the Landowners Should be Approved

55. The broad discretion provided to courts under section 11 of the CCAA to "make any order" considered appropriate in the circumstances, includes the authority to grant releases in favour of solvent third parties.[66] This authority has previously been exercised by courts when approving reverse vesting transactions and when terminating CCAA proceedings, in each case, absent a plan of compromise or arrangement.[67]

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[65] Lowrie Affidavit, *supra* note 1 at paras 31, 33-35, Motion Record at Tab 2; Second Report, *supra* note 1 at para 59.

[66] *ATB Financial v Metcalfe & Mansfield Alternative Investment II Corp*, 2008 ONCA 587 at paras 62-63, 69-71, 78 [*Metcalfe*], BOA at Tab 30; *Green Relief*, *supra* note 21 at paras 16-17, 23-26, BOA at Tab 13; *Entrec Corporation (Re)*, 2020 ABQB 751 at paras 3-7, 9, BOA at Tab 31.

[67] *Metcalfe*, *ibid*, BOA at Tab 30; *Green Relief*, *ibid*, BOA at Tab 13; *Entrec*, *ibid*, BOA at Tab 31; *Del Equipment*, *supra* note 64 at para 17, BOA at Tab 29; *Golf Town*, *supra* note 64 at para 14, BOA at Tab 28; *Comark*, *supra* note 20

56. When determining whether it is appropriate to grant such releases under section 11 of the CCAA, courts have drawn on the well-established factors for approving releases under plans of compromise or arrangement.[68] When modified to accommodate cases in which there is no plan of compromise or arrangement, these factors include whether:

(a) the claims to be released are rationally connected to the restructuring;

(b) the restructuring can succeed without the releases;

(c) the parties to be released contributed to the restructuring;

(d) the releases benefit the debtor as well as its creditors generally;

(e) the debtor's creditors have knowledge of the nature and effect of the releases; and

(f) the releases are fair, reasonable and not overly-broad.[69]

57. No one factor is determinative.[70]

58. Applied here, the factors considered by courts in approving releases in favour of third parties support approving the proposed releases given, among other things, that:

(a) the Released Parties and the Landowners have made, and continue to make, significant contributions to the CCAA Proceedings and the Applicant's restructuring efforts, including by ensuring the ongoing management, maintenance and stewardship of the Oil and Gas Assets and the lands on which they are situated in order to prevent an environmental disaster;

(b) the release of the Released Parties from the Released Claims was essential to the negotiation of the Transaction and is critical to preserving Clearbeach's limited resources

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at para 18, BOA at Tab 6; *Beleave*, *supra* note 20 at para 16, BOA at Tab 8; *Green Relief Order*, *supra* note 20 at para 24, BOA at Tab 10; *Bellatrix, supra* note 20 at para 16, BOA at Tab 11.

[68] *Green Relief*, *ibid* at para 27, BOA at Tab 13; *Entrec*, *ibid* at paras 7, 9, BOA at Tab 31. See also, *Metcalfe*, *ibid* at para 113, BOA at Tab 30.

[69] *Metcalfe, ibid,* BOA at Tab 30; *Green Relief*, *ibid*, BOA at Tab 13; *Entrec*, *ibid*, BOA at Tab 31.

[70] *Green Relief*, *ibid* at para 28, BOA at Tab 13.

and thus, the successful outcome of the CCAA Proceedings for Clearbeach;

(c) the proposed releases provide certainty and finality for the Released Parties and the Landowners, and protect the Applicants from potential contribution and indemnity costs that will erode value;

(d) by reducing the risk of further costs and delay in the CCAA Proceedings associated with potential contribution and indemnity claims, the proposed releases benefit the Applicants' creditors generally;

(e) the Released Claims are sufficiently narrow and not overly-broad – they do not include any claim or liability arising out of any gross negligence or willful misconduct on the part of the Released Parties or any claim against the Applicants' current directors that is not permitted to be released pursuant to subsection 5.1(2) of the CCAA, and include an appropriate carve-out in favour of Ontario Governmental Authorities; and

(f) absent the continued cooperation of the Landowners, Clearbeach will no longer be able to operate its business and attend to its environmental and stewardship obligations.[71]

PART V: RELIEF REQUESTED

59. For the foregoing reasons, the Applicants request that this Court issue the Approval and Vesting Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9TH DAY OF JULY 2021

Bennett Jones LLP

Bennett Jones LLP
Lawyers for the Applicants

[71] Lowrie Affidavit, *supra* note 1 at paras 36-43, Motion Record at Tab 2; Second Report, *supra* note 1 at paras 49-51; CCAA, *supra* note 17 s 5.1(2).

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. *AbitibiBowater Inc, Re*, 2012 SCC 67
2. *Accel Canada Holdings Limited (Re)*, 2020 ABQB 182
3. *Angiotech Pharmaceuticals Inc, Re*, 2011 BCSC 450
4. *Arrangement relatif à Nemaska Lithium inc,* 2020 QCCA 1488
5. *ATB Financial v Metcalfe & Mansfield Alternative Investment II Corp,* 2008 ONCA 587 at
6. *Bank of Montreal v Dynex Petroleum Ltd,* 2002 SCC 7
7. *Canadian Airlines Corp, Re*, 2000 ABQB 442
8. *Credit Union Central of Ontario Ltd v Fibratech Manufacturing Inc* (2008), 176 ACWS (3d)
9. *Creston Moly Corp v Sattva Capital Corp*, 2014 SCC 53
10. *Entrec Corporation (Re)*, 2020 ABQB 751
11. *Green Relief Inc,* 2020 ONSC 6837
12. *In the Matter of a Plan of Compromise or Arrangement of Beleave Inc., Beleave Kannabis Corp., Seven Oaks Inc., 9334416 Canada Inc. o/a Medi-Green and My-Grow, Beleave Kannabis Abbotsford Inc. and Beleave Kannabis Chilliwack Inc.* (September 18, 2020), Toronto, CV-20-00642097-00CL (Approval and Vesting Order)
13. *In the Matter of a Plan of Compromise or Arrangement of Bellatrix Exploration Ltd.* (June 22, 2021), Calgary, 1901-13767 (Approval and Vesting Order)
14. *In the Matter of a Plan of Compromise or Arrangement of Comark Holdings Inc., Bootlegger Clothing Inc., CLEO Fashions Inc. and Ricki's Fashions Inc.* (July 13, 2020), Toronto, CV-20-00642013-00CL (Approval and Vesting and CCAA Termination Order)
15. *In the Matter of a Plan of Compromise or Arrangement of DEL Equipment Inc.* (October 29, 2020), Toronto, CV-19-629552-00CL (CCAA Termination Order)
16. *In the Matter of a Plan of Compromise or Arrangement of FIGR Brands, Inc., FIGR Norfolk Inc. and Canada's Island Garden Inc.* (June 10, 2021), Toronto, CV-21-00655373-00CL (Approval and Vesting Order)
17. *In the Matter of a Plan of Compromise or Arrangement of Golf Town Canada Holdings Inc., Golf Town Canada Inc. and Golf Town GP II Inc.* (March 29, 2018), Toronto, CV-16-11527-00CL (CCAA Termination Order)
18. *In the Matter of a Plan of Compromise or Arrangement of Green Relief Inc.* (November 9, 2020), Toronto, CV-20-00639217-00CL (Approval and Vesting Order)
19. *In the Matter of the Compromise or Arrangement of Redrock Camps Inc., Sockeye Enterprises Inc., Sweetwater Hospitality Inc. and Baldr Construction Management Inc.* (February 18, 2021), Calgary, 2001-06194 (Reverse Vesting Order)
20. *In the Matter of a Plan of Compromise or Arrangement of Wayland Group Corp., Maricann Inc. and Nanoleaf Technologies Inc.* (April 21, 2020), Toronto, CV-19-00632079-00CL (Approval and Vesting Order)
21. *McDonald v Bode Estate*, 2018 BCCA 140
22. *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5
23. *Quest University Canada (Re)*, 2020 BCSC 1883
24. *Royal Bank v Soundair Corp*, [1991] 46 OAC 321
25. *Southern Star Developments Ltd v Quest University Canada*, 2020 BCCA 364

26. *Ted Leroy Trucking [Century Services] Ltd, Re*, 2010 SCC 60
27. *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc*, 2019 ONCA 508
28. *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc*, 2018 ONCA 253
29. *Third Eye Capital v B.E.S.T. Active 365 Fund*, 2020 ABCA 160
30. *Walter Energy Canada Holdings Inc, Re* 2016 BCSC 1746
31. *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10

SCHEDULE B – STATUTES RELIED ON

***Assessment Act*, RSO 1990, c. A. 31**

Section 1

Definitions

(1) In this Act, […]

"land", "real property" and "real estate" include,

(a) land covered with water,

(b) all trees and underwood growing upon land,

(c) all mines, minerals, gas, oil, salt quarries and fossils in and under land,

(d) all buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under or affixed to land,

(e) all structures and fixtures erected or placed upon, in, over, under or affixed to a highway, lane or other public communication or water, but not the rolling stock of a transportation system; ("biens-fonds", "biens immeubles", "biens immobiliers")

Section 25

Pipeline

(1) In this section,

"gas" means natural gas, manufactured gas or propane or any mixture of any of them; ("gaz")

"oil" means crude oil or liquid hydrocarbons or any product or by-product thereof; ("pétrole")

"pipe line" means a pipe line for the transportation or transmission of gas that is designated by the owner as a transmission pipe line and a pipe line for the transportation or transmission of oil, and includes,

(a) all valves, couplings, cathodic protection apparatus, protective coatings and casings,

(b) all haulage, labour, engineering and overheads in respect of such pipe line,

(c) any section, part or branch of any pipe line,

(d) any easement or right of way used by a pipe line company, and

(e) any franchise or franchise right,

but does not include a pipe line or lines situate wholly within an oil refinery, oil storage depot, oil bulk plant or oil pipe line terminal; ("pipeline")

"pipe line company" means every person, firm, partnership, association or corporation owning or operating a pipe line all or any part of which is situate in Ontario. ("compagnie de pipeline")

Notice

(2) On or before March 1 of every year or such other date as the Minister may prescribe, the pipe line company shall notify the assessment corporation of the age, length and diameter of all of its transmission pipe lines located on January 1 of that year in each municipality and in non-municipal territory. 2004, c. 31, Sched. 3, s. 8; 2006, c. 33, Sched. A, s. 16 (1).

Disputes

(3) All disputes as to whether or not a gas pipe line is a transmission pipe line shall, on the application of any interested party, be decided by the Ontario Energy Board and its decision is final.

Assessment of pipe line

(4) Despite any other provisions of this Act, a pipe line shall be assessed for taxation purposes in accordance with the regulations.

(5)-(7) Repealed: 1997, c. 5, s. 16 (1).

Pipe lines abandoned

(8) A pipe line that has been abandoned in any year ceases to be liable for assessment effective with the assessment next following the date of abandonment.

Reduction of assessment on pipe line

(9) Where a pipe line has been constructed and used for the transportation of oil or gas and ceases to be so used by reason of an order or regulation of an authority having jurisdiction in that behalf, other than the taxing authority, and an application to the proper authority for permission to abandon the pipe line has been refused, the assessment of the pipe line shall be reduced by 20 per cent so long as it is not used for the transportation of oil or gas.

Liability to taxation of pipe line on exempt property

(10) Where a pipe line is located on, in, under, along or across any highway or any lands, other than lands held in trust for a band or body of Indians, exempt from taxation under this or any special or general Act, the pipe line is nevertheless liable to assessment and taxation in accordance with this section.

Tax liability

(11) Despite the other provisions of this Act or any other special or general Act, a pipe line liable for assessment and taxation under this section is not liable for assessment and taxation in any other manner for municipal purposes, including local improvements, but all other land and buildings of the pipe line company liable for assessment and taxation under this or any other special or general Act continue to be so liable

Apportionment of assessment and taxation

(12) If a pipe line extends through two or more municipalities or through a municipality and non-municipal territory, the portion of the pipe line located in each respective municipality or in the non-municipal territory is liable to assessment and taxation in the respective municipality or non-municipal territory.

Same

(13) If a pipe line is located,

> (a) on a boundary between two municipalities or between a municipality and non-municipal territory;
>
> (b) so close to the boundary that it is on one side of the boundary in some places and on the other side of it in other places; or
>
> (c) on or in a road that lies between the municipalities or between the municipality and the non-municipal territory, and even if the road deviates so that in some places it is wholly or partly within either of them,

the pipe line shall be assessed in each municipality or in the municipality and the non-municipal territory, as the case may be, for one-half of the total amount assessable under this section in respect of the pipe line.

Real property assessment

(14) The assessment of a pipe line under this section shall be deemed to be real property assessment and the taxes payable by a pipe line company on the assessment of a pipe line under this section are a lien on all the lands of the company in the applicable municipality or in the non-municipal territory, as the case may be.

(15)-(18) Repealed: 1997, c. 5, s. 16 (3).

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

Section 5.1

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

Section 6

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a provincial pension plan as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty

in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

> (a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of
>
> > (i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and
> >
> > (ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and
>
> (b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

> (a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:
>
> > (i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,
> >
> > (ii) if the prescribed pension plan is regulated by an Act of Parliament,
> >
> > > (A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and
> > >
> > > (B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Section 11

General Power of Court

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Section 36

Restriction on disposition of business assets

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

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

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

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

***Municipal Act, 2001*, SO 2001, c. 25**

Section 1

Interpretation

(1) In this Act, […]

"land" includes buildings; ("bien-fonds")

Section 349

Recovery of taxes

(1) Taxes may be recovered with costs as a debt due to the municipality from the taxpayer originally assessed for them and from any subsequent owner of the assessed land or any part of it.

Interpretation

(2) Subsection (1) does not affect the taxpayer's or owner's recourse against any other person.

Taxes on escheated, etc. land

(2.1) For greater certainty, taxes that are levied or charges that are imposed under section 208 on the following land may not be recovered as a debt due to the municipality from the Crown:

1. Land that is vested in the Crown in right of Ontario because of an escheat or forfeiture as a result of the dissolution of a corporation.

2. Land that belongs to the Crown in right of Ontario as a result of the death of an individual who did not have any lawful heirs.

Special lien

(3) Taxes are a special lien on the land in priority to every claim, privilege, lien or encumbrance of every person except the Crown, and the lien and its priority are not lost or impaired by any neglect, omission or error of the municipality or its agents or through taking no action to register a tax arrears certificate.

Proof of debt

(4) In any action to recover taxes, the production of the relevant part of the tax roll purporting to be certified by the treasurer as a true copy is, in the absence of evidence to the contrary, proof of the debt.

Separate action

(5) The municipality may treat each year's taxes as a separate amount owing to the municipality and may bring separate actions for the purposes of recovering each amount.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CLEARBEACH RESOURCES INC. AND FORBES RESOURCES CORP.

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ONTARIO
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