

SUPERIOR COURT OF JUSTICE – ONTARIO

(Commercial List)

RE: 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 12463873 Canada Inc., Applicant

BEFORE: Koehnen J.

COUNSEL: *Danny Nunes*, for the Monitor of 12463873 Canada Inc

Rebecca Kennedy, for 12463873 Canada Inc.

David Ward and Manav Singhla, for Green Relief Inc., 2650064 Ontario Inc. and AOCO Ventures Inc.

Maria Vujnovic and Myra Sivaloganathan, for the Department of Justice

HEARD: August 13, 2021

ENDORSEMENT

Introduction

[1] This is a motion brought by the Monitor of 12463873 Canada Inc. for declaratory relief about entitlement to HST refunds with a value of approximately \$456,429.42.

[2] The issue arises in connection with a company known as Green Relief Inc. which obtained protection under the *Companies' Creditors Arrangement Act*,¹ (the "CCAA") in early 2020. On November 9, 2020 I issued an Approval and Vesting Order which

¹ *Companies Creditors Arrangement Act Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA")

approved a Share Purchase Agreement (the “SPA”) between Green Relief and AOCO Ventures Inc. The effect of the SPA was to make AOCO the new, sole shareholder of Green Relief. That transaction closed on November 20, 2020.

- [3] At the risk of oversimplifying things, the overall goal of the transaction was to have Green Relief’s assets remain with Green Relief while all of its liabilities were vested with 12463873 Canada Inc. (“ResidualCo”).
- [4] On the closing of the transaction, Green Relief exited CCAA protection, the former Monitor of Green Relief became the Monitor of ResidualCo, and ResidualCo became subject to CCAA protection. ResidualCo and the Monitor were then to continue to administer the claims process that addresses claims that were formerly made against Green Relief and are now being made against ResidualCo by virtue of the Approval and Vesting Order and the transfer of Green Relief’s liabilities to ResidualCo.
- [5] After the closing, Green Relief was renamed Galaxie Brands. For ease of reference, I will refer to the Corporation as Green Relief when addressing pre-closing issues and as Galaxie when addressing post closing issues.
- [6] The issue before me arises because Canada Revenue Agency (“CRA”) has now paid ResidualCo an HST refund of \$407,736.61 on account of HST payments that arose before November 20, 2020. Galaxie takes the position that the HST refund was an asset of Green Relief which was intended to remain with Green Relief/Galaxie under the SPA. ResidualCo takes the position that the proper interpretation of the SPA entitles it to retain the HST refund.
- [7] In addition, CRA has paid an HST refund to Galaxie on account of the fourth quarter of 2020. Approximately one half of that quarter applies to a time before the SPA became effective and one half applies to a time after it became effective. ResidualCo submits that it is entitled to \$48,692.81 of the fourth quarter HST refund because that amount is referable to transactions that arose on or before the closing date of November 20, 2020. As with the larger refund, Galaxie takes the position that it is entitled to the refund because it was an asset that belonged to Green Relief on or before November 20, 2020.
- [8] In my view, a proper reading of the SPA entitles ResidualCo to the total HST refunds it claims of \$456,429.42. The language of the contract alone, the language interpreted in light of the factual matrix and the conduct of the parties are all consistent with ResidualCo being entitled to the HST refunds.

Analysis

- [9] Galaxie’s position relies almost exclusively on one section of the SPA, section 4.1 which states:

On the Closing Date, the Company² shall retain all of the assets owned by it on the date of this Agreement and any assets acquired by it up to and including Closing, including its Assumed Contracts, Permits and Licences and Books and Records (the “Retained Assets”), save and except for inventory sold in the ordinary course of Business in the Interim Period, cash in the bank accounts of the Company, the Excluded Assets and Excluded Contracts, which the Company shall transfer to ResidualCo on or before the Closing Time or shall be vested in ResidualCo pursuant to the Approval and Vesting Order.

- [10] Galaxie then views HST refunds as completely separate and apart from HST liabilities and argues that the HST refunds belong to it because they are assets that were not included on the schedule of Excluded Assets and therefore remained with Green Relief/Galaxie.
- [11] ResidualCo and its Monitor urge me to look at the contract as a whole and to interpret it in light of the surrounding circumstances. Galaxie says this is simply a case where the Monitor asks the Court to “rectify a belatedly recognized error of judgement” by the Applicant, and to use the Court’s power “as a substitute for due diligence at the time a document is signed.” To accede to ResidualCo’s approach would, Galaxie submits, undermine the confidence of the commercial world in written contracts.
- [12] I find ResidualCo’s approach more consistent with the proper approach to contractual interpretation.
- [13] The modern starting point of contractual interpretation in Canada is the Supreme Court of Canada’s decision in *Sattva Capital Corp. v. Creston Moly Corp.*³ where the court stated at paragraph 46:

...the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine ‘the intent of the parties and the scope of their understanding’ To do so, a decision-maker 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. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention

² Green Relief (now Galaxie)

³ *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 (CanLII) at para. 46

can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning⁴

- [14] Two points emerge from this. First, that the contract must be read as a whole, and not interpreted by simply looking at a single clause in isolation. Second, it must be read in a manner consistent with the surrounding circumstances known to the parties.
- [15] Galaxie’s approach focuses solely on section 4.1 of the SPA and ignores the surrounding circumstances in which the contract was made. In addition, it does not engage with the circumstances in which the contract was made but speaks of its and AOCO’s subjective intention and understanding when entering into the contract. Evidence of subjective intention and understandings is not admissible. Courts should consider only objective evidence of the background facts at the time of the SPA’s execution. This has been interpreted by the courts to mean “knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting” and includes “anything which would have affected the way in which the language of the document would have been understood by a reasonable man”.⁵
- [16] In my view, a reading of the contract as a whole and a reading of the contract in the context in which it was made are more consistent with a finding that allows ResidualCo to retain HST refunds that arise on account of transactions entered into before November 20, 2020.

(a) Language of the Contract

- [17] Section 6.6 of the SPA is entitled tax matters. It provides as follows:

Tax Matters

The Company shall pay any and all Post-Filing Taxes owed or owing or accrued due by the Company prior to the Closing Time (the “**Post-Filing Tax Obligations**”).

All Taxes owed or owing or accrued due by the Company prior to the Filing Date (the “**Pre-Filing Tax Obligations**”) shall be transferred to and vest in ResidualCo. For greater certainty, any audits or reassessments with respect to any Taxes that relate to a time period occurring, or facts arising, prior to the Filing Date shall be a Pre-Filing Tax Obligation, regardless upon which such audit was

⁴ *Sattva*, at para. 47.

⁵ *Sattva*, at para. 58.

commenced or completed, and any and all such obligations with respect to such audits or reassessments shall be transferred to and vest in ResidualCo.

Prior to Closing, the Company shall provide evidence in form and substance satisfactory to the Purchaser that all such Post-Filing Tax Obligations have been paid in full. To the extent that any Post-Filing Tax Obligations remain outstanding at Closing, the Company shall provide an irrevocable direction to the Purchaser (the “**Tax Direction**”) authorizing and directing the Purchaser to pay a portion of the Cash Purchase Price to the relevant Tax authorities to satisfy such outstanding amounts. For certainty, the Post-Filing Tax Obligations include, but are not limited to, any and all withholding taxes, property taxes and excise taxes.

- [18] The effect of section 6 is to make Green Relief responsible for tax liabilities up until closing and to transfer that liability to ResidualCo on closing. It is common practice for CRA and businesses to offset HST liabilities against HST refunds and pay or refund a net amount. This typically arises because in each quarter, a business files an HST return in which it lists all of the HST it has charged customers and all the HST it has paid to suppliers. The HST it has paid is credited against the HST collected. Typically, the business pays the net amount owing for HST which is the amount by which the HST collected exceeds the HST paid for the reporting period at issue. If the amount of HST collected is less than the amount of HST paid, it results in a refund. In that context, the tax liability referred to in section 6.6 should be interpreted as the net liability when referring to HST.
- [19] The CRA in fact took a netting approach with Green Relief before November 20, 2020. By way of example, in July 2020, Green Relief asked CRA to pay HST refunds for the first two quarters of 2020 as soon as possible. In response, on July 21, 2020, CRA advised that it would hold the refunds to set off against Green Relief’s pre CCAA HST liability which would not be finalized until CRA completed its HST audit of Green Relief. On September 3, 2020, CRA advised that it had completed its HST audit and determined that the Green Relief’s pre CCAA HST Liability was \$814,239.78. This far exceeded the HST refund of approximately \$400,000 as a result of which no refund was paid at that time.
- [20] In this context it is somewhat artificial to separate HST refunds from HST liabilities as Galaxie urges. In my view it is more appropriate to view the refunds and liabilities as a whole, set them off against each other, and characterize the net result of the two as either a refund or a liability.
- [21] Other provisions of the SPA support this approach.
- [22] As Ms. Kennedy, on behalf of ResidualCo noted, Section 1.7 of the SPA provides that a list of specifically enumerated exhibits and schedules attached to the SPA are incorporated into and form part of the agreement. Included amongst those is schedule F,

the Draft Approval and Vesting Order. Paragraph 18 of the order sets out a number of specific powers that the Monitor of ResidualCo has in addition to any powers accorded to the monitor under the initial filing order. Paragraph 18 (g) allows the monitor to:

Claim or cause ResidualCo to claim any and all insurance refunds or tax refunds, including refunds of harmonized sales taxes, to which ResidualCo is entitled.

- [23] ResidualCo submits that the only HST refunds in respect of which ResidualCo had any possible entitlement are the ones at issue on this motion. At the time the SPA and the Approval and Vesting Order were entered into, both parties knew that Green Relief had an HST liability of approximately \$800,000 and entitlement to a refund of approximately \$400,000. From the perspective of Galaxie paragraph 18 (g) of the Approval and Vesting Order is a boilerplate provision that does not determine the issue before me. While paragraph 18 (g) is directionally helpful, it is not determinative. To some extent it begs the question. It entitles the Monitor to claim HST refunds to which ResidualCo is entitled. It does not speak to whether ResidualCo is entitled to HST refunds that arose in respect of the period before closing. Although ResidualCo was not expected to conduct business and therefore would not be expected to receive any material HST refunds, it would be expected to pay some HST on account of expenses such as legal fees or Monitor's fees, as a result of which it could be entitled to some sort of HST refund going forward. It therefore remains to be determined whether ResidualCo is entitled to the refunds at issue here.
- [24] To delve further into that issue, I turn to the factual matrix in which the SPA and the Approval and Vesting Order arose.

(b) Factual Matrix

- [25] The factual matrix surrounding the HST liability and the negotiation of the SPA strengthen me in my view that the HST refund belongs to ResidualCo.
- [26] During the initial stages of the CCAA proceeding, Green Relief showed the HST refunds in its cash flow projections. The Monitor's analyses of Green Relief's cash flow projections were also based on receipt of the HST refunds.
- [27] As noted above, in July 2020, Green Relief asked CRA to pay out the Q1 and Q2 HST refunds that were being held by CRA as soon as possible. In response, on July 21, 2020, CRA advised that it would hold the Q1 and Q2 refunds to set off against Green Relief's Pre-Filing HST Liability which would not be finalized until CRA completed its HST audit of Green Relief. At that point, the factual matrix supports a netting of HST refunds and liabilities.

[28] On September 3, 2020, CRA advised that it had completed its HST audit and determined that the Green Relief's Pre-Filing HST Liability was \$814,239.78. This was disclosed to AOCO in October 2020 in the course of its due diligence leading to its acquisition of Green Relief.

[29] As of the closing date, CRA had set off the HST refunds owed to Green Relief against the its HST liabilities so that Green Relief owed a net HST balance of \$492,098.26 to CRA. This was shown on Green Relief's online HST account with CRA.

[30] In January 2021 Galaxie was required to file its first HST return after AOCO had acquired control of Green relief. It appears that Galaxie was concerned that any HST payment it made would be used to diminish the outstanding net HST liability of the old Green Relief, now ResidualCo. To address this issue, Galaxie wrote to the CRA on January 18, 2021, saying:

Upon closing there was a balance owing of \$492,098.26 for HST. We wish to file our HST return on January 31, 2021 for the period November 21, 2020 to December 31, 2020 and do not wish to do this under the existing business number while there is an existing debit balance. We have contacted several agents through the CRA HST telephone line to discuss either removing the debit balance or assigning a new CRA business account for the business. Because the corporation continues to exist post the RVO process we were unsure if a new business number would be the appropriate

solution. Neither of the CRA agents that we discussed the HST debit balance with were able to provide a solution. We speculate that the RVO process is so new they were unfamiliar with possible solutions. I would appreciate any guidance on how to move forward. We are unsure how to file our upcoming HST return without any clarity.

[31] Galaxie attached to its email a screenshot of the CRA's HST account for Green Relief which showed the amount owing as \$492,098.26 and not as \$814,239.78 as determined by the audit. The amount owing was lower than the audited amount because CRA had applied the refund to the audited amount.

[32] It is important to note here that Galaxie did not object to CRA reducing the gross amount of the HST that the old Green Relief (now ResidualCo) owed by applying the refund against it. Nor did Galaxie claim any entitlement to HST refunds for the period preceding November 21, 2020. It simply wanted to ensure that any HST refunds arising after November 20 would not be set off against any tax liability on account of obligations that arose before November 20.

- [33] Galaxie filed the HST return and, as it had feared, saw that its HST refund for the fourth quarter of 2020 had in fact been applied to the outstanding HST liability of Green Relief/ResidualCo. In response, Galaxie wrote to CRA on February 3, 2021 stating:

Thank you for your all assistance on this to date. We did file our Q4 2020 HST return as discussed and attached hereto.

This return showed a refund owing of almost \$110,000.00.

Unfortunately this refund was applied to the HST balance owing pre RVO closing. We are investing almost \$5,000,000.00 in capital equipment and building improvements over the next 4 months. This is in addition to the 20 new staff that are being hired from the local area. We are very anxious to collect the HST input tax credits on these expenditures as we developed our operating budgets based on quarterly refunds of these credits. We kindly ask that you reallocate this refund to our company post RVO. We have already established direct deposit for the HST account. Please let me know if there are any steps we need to take in order to fulfill our request. Thank you.

- [34] What is of particular interest in this email is that Galaxie states that it has developed its operating budgets based on the expectation of HST refunds calculated on expenditures it made after November 20, 2020. Nowhere does Galaxie express the view that its operating budgets were in any way based on an expectation of HST refunds for the period preceding November 21, 2020.

- [35] CRA responded the same day stating that:

The refund for the period ending December 31, 2020 is being held until we receive confirmation from the Monitor that it can be forwarded to the purchasing company as the transaction date lies within the period. We will disburse the refund once confirmation is received.

- [36] Galaxie sent a further response, still on February 3 stating:

Per the motion record attached (and also available on the PwC website at: [https://www.pwc.com/ca/en/services/insolvency/assignments/green relief inc/court orders.html](https://www.pwc.com/ca/en/services/insolvency/assignments/green%20relief%20inc/court%20orders.html)) the court approved

the RVO and share purchase agreement of Green Relief Inc. On page 75 of the attached court approved motion record, paragraph 4.1 states:

On the Closing Date, the Company shall retain all of the assets owned by it on the date of this Agreement and any assets acquired by it up to and including Closing, including its Assumed Contracts, Permits and Licences and Books and Records (the Retained Assets), save and except for inventory sold in the ordinary course of Business in the Interim Period, cash in the bank accounts of the Company, the Excluded Assets and Excluded Contracts, which the Company shall transfer to ResidualCo on or before the Closing Time or shall be vested in ResidualCo pursuant to the Approval and Vesting Order.

It is our interpretation that the HST refund, if any, for the period from October 1, 2020 to the closing date of November 20, 2020 would be considered an accounts receivable and hence an acquired asset as defined in the court approved Share Purchase Agreement and Reverse Vesting Order. I understand your desire to seek the blessing of PwC before you release the refund to Green Relief Inc. however it is likely in their best interest to take no action at all. I hope you can reconsider your position based on the attached information.

- [37] Again, AOCO did not claim any entitlement to HST refunds arising before the fourth quarter of 2020 but was merely asserting a right to the full refund for the fourth quarter which straddles the period before and after AOCO acquired Green Relief.
- [38] On February 9, 2021 CRA wrote to Galaxie indicating that the Monitor did not object to CRA sending the fourth quarter refund to Galaxie and that CRA would do so within two weeks.
- [39] In response to that email, Galaxie wrote CRA on February 10 and now claimed, for the first time, that it was also entitled to the HST refunds for the period preceding the fourth quarter of 2020.
- [40] CRA then appeared to change its past position on netting liabilities and refunds with respect to ResidualCo and, on February 11, 2021, advised the Monitor that it would pay ResidualCo an HST refund of \$460,740, plus accrued interest for the period of April 9 to September 30, 2020.
- [41] It appears that the amount CRA ultimately paid to ResidualCo was \$407,736.61. Having received the refund payment, ResidualCo remained liable for the gross amount of HST owing for transactions arising before November 21, 2020.

- [42] The foregoing are the objective circumstances in which to interpret the SPA. In my view, they indicate that the SPA and the Approval and Vesting Order were negotiated in a commercial context in which CRA and businesses offset HST liabilities and refunds against each other in such a way as to properly interpret the concept of an HST liability in the SPA as one that is net of any refunds. There was evidence before the parties that demonstrated CRA's intention to do so in this case. Galaxie's own correspondence with CRA proceeded on that assumption. It is a common sense business assumption. It makes little sense to divorce HST liabilities and HST refunds from each other when they appear to have been treated by all parties as a single net concept.

Q4 HST

- [43] As noted above, the fourth quarter of 2020 straddles both the pre-closing and post closing time periods. Galaxie filed an HST return and obtained HST credits for the entire fourth quarter.
- [44] For the same reasons as set out above, in my view, that is not appropriate. Galaxie is entitled to refunds arising out of HST payments that it made after November 20, 2020. Refunds arising with respect to HST payments made on or before November 20, 2020 belong to ResidualCo.
- [45] It might be said that this is inappropriate because the Monitor appears to have agreed to having the CRA pay the full fourth quarter refund to Galaxie and should not be permitted to resile from that position. I do not, however, think that would be the proper approach. The Monitor's position when permitting CRA to pay the entire fourth quarter refund to Galaxie was a position taken in a context where Galaxie was not claiming refunds owing for the period before November 21, 2020. Given that Galaxie had changed its position to demand more than it had previously done, the Monitor should also be entitled to rely on its full legal position. In that sense, the communications with CRA about how much should be paid to whom were akin to settlement discussions which should not bind the parties when asserting their legal rights.
- [46] I understand from the Monitor's factum that the amount that Galaxie should repay ResidualCo on account of the fourth quarter 2020 HST refunds is \$48,692.81. There were, however, no submissions on this point during oral argument. In the event the parties differ on the amount, I may be spoken to.

Costs and Disposition

- [47] Any party seeking costs of this motion may make written submissions by September 14, 2021. Responding submissions should follow by September 22, 2021 with reply due by September 28.

[48] For the reasons set above, I find that Residual Co. is entitled to retain any HST refunds it received from CRA on account of transactions that occurred before November 20, 2020 and that Galaxie shall pay to Residual Co. the HST refund of \$48,692.81 that it received on account of transactions that occurred between October 1, 2020 and November 20, 2020.

A handwritten signature in blue ink, appearing to be 'J. Koehnen', written over a horizontal line.

Koehnen J.

Date: 2021-09-03