Court File No. CV-21-00656040-00CL

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 LAURENTIAN UNIVERSITY OF SUDBURY

Applicant

FACTUM OF THE APPLICANT
(Vesting Order)

January 20, 2023

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PART I - OVERVIEW

1. This factum is filed in support of a motion brought by Laurentian University of Sudbury (the "**University**"), for an order (the "**Vesting Order**") vesting all of the University's right, title and interest in and to the real property identified as Part 1 on Plan 53R-21719 (the "**Subject Property**"), being a portion of the real property legally described as PCL 34100 SEC SES AS IN LT264521; PT BROKEN LT 1 CON 1 MCKIM LOCATION 145, PT 1 SR1028; GREATER SUDBURY (the "**University Property**"), in favour of James Crispo and Dominique Ansell (collectively, the "**Neighbours**") on an "as-is, where-is" basis (the "**Vesting Order**").

2. The Vesting Order, if granted, will resolve a long-standing dispute in respect of a litigation action issued by the University in 2018 (the "**Action**"), years prior to the commencement of this proceeding (the "**CCAA Proceeding**") under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**").

3. The Vesting Order that is sought will satisfy a condition in favour of the University under the Settlement Agreement (defined below).

4. His Majesty the King in right of Ontario as represented by the Minister of Colleges and Universities ("**MCU**") has confirmed its support of the Settlement Agreement, thereby satisfying a further condition in favour of the University under the Settlement Agreement.

5. Parties who may be affected by the relief sought have been served with the University's Motion Record dated January 11, 2023 (the "**Motion Record**"). As of the date of this Factum, no party has indicated an intention to oppose the relief sought by the University.

6. The proposed Vesting Order also directs the Land Registrar to discharge, delete and expunge from title to the Subject Property certain instruments that are listed on Schedule "C" to the Vesting Order, all of which were registered on title to the University Property in connection with the University's CCAA proceeding (the "**CCAA Instruments**").

PART II - FACTS

Background

7. The University owns the University Property, including the Subject Property, which is identified as Part 1 on Plan 53R-21719.[1]

8. The Neighbours own real property that abuts the University Property (the "**Abutting Property**").[2]

9. Certain structures erected or installed by the prior owners of the Abutting Property or their predecessors in title encroach upon the University Property (the "**Encroachments**").[3]

10. Starting in or around autumn 2016, the University and the Neighbours began discussing a potential resolution to the issue of the Encroachments.[4]

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[1] Affidavit of Pierre Fontaine sworn January 11, 2023 (the "**Fontaine Affidavit**") at para 4, Motion Record of the University dated January 11, 2023 (the "**Motion Record**"), Tab 2.

[2] Fontaine Affidavit at para 5, Motion Record, Tab 2.

[3] Fontaine Affidavit at para 6, Motion Record, Tab 2.

[4] Fontaine Affidavit at para 7, Motion Record, Tab 2.

11. Since at least mid-2018, the Neighbours have also engaged in a publicity campaign concerning the Encroachments and other matters relating to the University and its affairs, including through their website "laurentian.org" (the "**Publicity Campaign**").[5]

12. The Publicity Campaign has also been the subject of extensive discussions between the University and the Neighbours, including through the parties' respective counsel.[6]

13. The initial discussions between the University and the Neighbours did not resolve the issues of the Encroachments, the Action or the Publicity Campaign.[7]

The Action

14. On October 24, 2018, the University commenced the Action, which sought, among other relief:

(a) a declaration that the Neighbours have no title to, and no right or interest in, the University Property;

(b) a declaration that the Encroachments are an ongoing trespass on the University Property;

(c) an order providing for the removal of the Encroachments; and

(d) damages.[8]

[5] Fontaine Affidavit at para 8, Motion Record, Tab 2.
[6] Fontaine Affidavit at para 9, Motion Record, Tab 2.
[7] Fontaine Affidavit at para 10, Motion Record, Tab 2.
[8] Fontaine Affidavit at paras 11-12, Motion Record, Tab 2.

15. Prior to serving the statement of claim, on February 19, 2019, the University attended mediation with the Neighbours in an attempt to resolve the issue of the Encroachments, but the mediation did not resolve the issue.[9]

16. Thereafter, pleadings were exchanged and one pleadings motion was resolved.[10]

17. The Action has not progressed past the pleadings stage—no documentary discovery has been exchanged and no examinations for discovery have taken place.[11]

The CCAA Proceeding

18. On February 1, 2021 the University commenced the CCAA Proceeding and, by initial order granted February 1, 2021 (as amended and restated on February 11, 2021, the "**Initial Order**"), Ernst & Young Inc. was appointed by the Court as the monitor of the University (in such capacity, the "**Monitor**").[12]

19. On January 27, 2022, this Court made an order (the "**DIP Approval Order**") approving and empowering the University to obtain and borrow under a debtor-in-possession credit facility (the "**DIP Facility**") from MCU, in replacement of the original DIP lender who was repaid in full.[13]

20. MCU subsequently became the University's post-emergence secured lender (the "**Exit Lender**") under an Exit Loan Agreement dated October 21, 2022 (the "**Exit Loan**

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[9] Fontaine Affidavit at para 13, Motion Record, Tab 2.
[10] Fontaine Affidavit at paras 14-18, Motion Record, Tab 2.
[11] Fontaine Affidavit at para 19, Motion Record, Tab 2.
[12] Fontaine Affidavit at para 20, Motion Record, Tab 2.
[13] Fontaine Affidavit at paras 20, 48, Motion Record, Tab 2.

Agreement"), effective as of implementation of the Plan of Compromise and Arrangement (the "**Plan**) which occurred on November 28, 2022, with all amounts owing pursuant to the DIP Facility being repaid in full at that time.[14]

21. Section 11.1(f) of the Exit Loan Agreement requires that the University obtain the consent of the Exit Lender prior to selling, transferring or disposing of its assets or property.

22. Pursuant to paragraph 20 of the Plan Sanction Order dated October 5, 2022, all Orders issued within the CCAA Proceeding, other than the Initial Order, remain in full force and effect following implementation of the Plan, and the CCAA Proceeding remains ongoing until all distributions to creditors under the Plan have been completed. All provisions of the Initial Order, save and except as it relates to protections in favour of the Monitor, terminated upon implementation of the Plan on November 28, 2022.[15]

The Settlement Agreement

23. On July 11, 2022, an Offer to Settle was made by the University and accepted by the Neighbours resulting in a settlement agreement being reached (the "**Settlement Agreement**"). The Settlement Agreement is subject to the satisfaction of certain conditions in favour of the University, as described therein. The University and the Neighbours have agreed that the Settlement Agreement and the without prejudice information therein cannot be relied upon by either the University or the Neighbours, in the event that the settlement is not completed.[16]

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[14] Fontaine Affidavit at para 21, Motion Record, Tab 2.
[15] Fontaine Affidavit at para 22, Motion Record, Tab 2.
[16] Fontaine Affidavit at para 25, Motion Record, Tab 2.

24. The Settlement Agreement provides that the University will seek a Vesting Order within this proceeding to transfer and vest its interest in the Subject Property in the Neighbours, on an "as-is, where-is" basis. In exchange, the Neighbours will pay to the University $20,000 (the "**Payment**"), the Action will be dismissed on a with-prejudice and without-costs basis on consent of both parties, and all issues relating to the Encroachments and the Publicity Campaign will be resolved. The Payment has been made in trust to the University's lawyers Fasken.[17]

25. The Settlement remains conditional upon, among other things, issuance of the Vesting Order, which condition is in favour of the University.[18]

Registration Discharges

26. The proposed Vesting Order directs the Land Registrar to discharge, delete and expunge from title the CCAA Instruments. The CCAA Instruments are all registered on title in connection with the CCAA Proceeding.[19]

27. The University served its Motion Record on the Service List including all parties associated with the CCAA instruments and who are affected by the relief sought in the Vesting Order.[20]

PART III - ISSUES

[17] Fontaine Affidavit at paras 26-27, Motion Record, Tab 2.

[18] Fontaine Affidavit at paras 28-29, Motion Record, Tab 2.

[19] Fontaine Affidavit at para 45, Motion Record, Tab 2.

[20] Fontaine Affidavit at para 46, Motion Record, Tab 2; Affidavit of Service of Derek Harland sworn January 12, 2023.

28. The sole issue to be determined by this Court is whether the Vesting Order should be granted.

PART IV - LAW & ARGUMENT

This Court has Jurisdiction to Grant the Vesting Order

29. This Court is empowered to grant a vesting order by section 100 of the *Courts of Justice Act*, RSO 1990, c C.43 (the "**CJA**"):[21]

> **100** A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

30. Ontario courts have suggested that section 100 of the CJA does not provide a freestanding right to property simply because the court considers the result equitable and that, in order to grant a vesting order, the court's jurisdiction must have some other root.[22]

31. In the present situation, various sources in addition to section 100 of the CJA provide this Court further jurisdiction to grant the Vesting Order. First, as described above, the purpose of the Settlement Agreement, including the Vesting Order contemplated thereby, is to resolve the issue of the Encroachments. Section 37(1) of the *Conveyancing and Law of Property Act*, RSO 1990, c C.34 (the "**CLPA**") provides that this Court may require that land upon which lasting improvements have been made be retained by the person who made the improvements in exchange for just compensation for the land:

> **37** (1) Where a person makes lasting improvements on land under the belief that it is the person's own, the person or the person's assigns are entitled to a lien upon it

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[21] *Courts of Justice Act*, RSO 1990, c C.43, s 100; *Third Eye Capital Corporation v Dianor Resources Inc*, 2019 ONCA 508 [*Third Eye Capital*] at para 33.

[22] *Third Eye Capital, ibid* at para 39.

> to the extent of the amount by which its value is enhanced by the improvements, or are entitled or may be required to retain the land if the Superior Court of Justice is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court directs.[23]

32. Section 37(1) of the CLPA is the main ground raised by the Neighbours in their defence of the Action. Section 37(1) of the CLPA empowers the Court to: (i) require the Neighbours to retain the Subject University and to pay the University just compensation for it, and (ii) grant a vesting order effecting the transfer of the Subject Property from the University to the Neighbours pursuant to section 100 of the CJA. Through the compromise that resulted in the Settlement Agreement, the University and the Neighbours have effectively consented to such relief.

33. Second, the transaction contemplated by the Settlement Agreement is essentially a sale or disposition of real property, which this Court has the jurisdiction to authorize pursuant to section 36(1) of the CCAA:

> **36** (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.[24]

34. The CCAA Proceeding remains in place following implementation of the Plan of Arrangement. In considering whether to authorize the sale or disposition of an asset by a debtor subject to the CCAA, certain factors are considered by the Court as set out in section 36. In the case of the disposition of a redundant or non-material asset, the initial order made in a CCAA proceeding typically contains standard language taken from the model initial order used by this

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[23] *Conveyancing and Law of Property Act*, RSO 1990, c C.34, s 37(1).

[24] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 36.

Court authorizing the debtor to dispose of redundant or non-material assets at its discretion, subject only to the requirements imposed by the CCAA.

35. In this case, the Initial Order (while all of its terms were in effect) authorized the University to dispose of assets valued at less than $50,000 outside the ordinary course of business, provided that the aggregate value of all such transactions does not exceed $250,000. The transaction contemplated by the Settlement Agreement concerns a disposition of the Subject Property - a small portion of land without road access located immediately behind the Abutting Property - for $20,000. The parties request the Vesting Order to complete the transaction efficiently.

36. Third, within the CCAA proceeding, this Court is empowered by section 11 of the CCAA to make any order that it considers appropriate in the circumstances, provided that appropriate notice is given and subject to any restrictions contained in the CCAA:

> **11** 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.[25]

37. This Court has relied upon section 11 of the CCAA for jurisdiction to grant vesting orders where such jurisdiction was not found in section 36 of the CCAA.[26]

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[25] *CCAA*, *supra*, s 11.

[26] See *Harte Gold Corp (Re)*, 2022 ONSC 653 at para 37.

38. Section 100 of the CJA together with either section 37(1) of the CLPA, section 36(1) of the CCAA or section 11 of the CCAA collectively provide jurisdiction to this Court to make the Vesting Order.

A Transfer by Vesting Order is Outside the Purview of the *Planning Act*

39. If the Settlement Agreement had provided for a transfer of the Subject Property in the absence of a Vesting Order, the subdivision control provisions of the *Planning Act*, RSO 1990, c P.13 (the "**Planning Act**") would need to be complied with. This would increase the expense of, and delay any possible resolution of the Action, and issues relating to the Encroachments.[27]

40. The subdivision control provisions of the Planning Act are engaged when there is a conveyance by way of deed or transfer.[28] In *Terrace Bay Pulp Inc (Re)*, Justice Morawetz (as he then was), found that the granting of a vesting order is not, for the purposes of section 50(3) of the Planning Act, a conveyance by way of deed or transfer.[29] This determination was made with reference to *Lama v. Coltsman*, where the court found that the vesting of land by court order does not constitute a "conveyance" by way of "deed or transfer" and, therefore, "a vesting order comes outside the purview of the Planning Act."[30]

41. It has been accepted in Ontario courts that land transferred pursuant to a vesting order does not engage the subdivision control provisions of the Planning Act.[31]

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[27] Fontaine Affidavit at para 35, Motion Record, Tab 2.

[28] Planning Act, s 50(3).

[29] *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247 [*Terrace Bay*] at paras 69–72.

[30] *Lama v Coltsman* (1978), 20 O.R. (2d) 98 (Ont. Co. Ct.).

[31] *Holmsten v Karson Kartage & Konstruction Ltd.*, [1997] O.J. No. 1532 (Ont. Gen. Div.) at para 13; *724597 Ontario Inc v Merol Power Corp*, 2005 CarswellOnt 6445 (Ont. S.C.) [*Merol Power*] at para 14.

42. The power to grant a vesting order is equitable in nature, and discretionary.[32] When exercising such judicial discretion, it should be exercised cautiously and be consistent with appropriate planning principles.[33]

43. The University is not aware of any opposition to the requested Vesting Order, and no party has raised that if the Vesting Order was granted it would be inconsistent with planning principles. The City of Greater Sudbury has confirmed it does not oppose the motion, and the City Solicitor and the Director of Planning Services have been served with the University's Motion Record.[34]

44. This Court need not make any specific orders or declarations concerning matters relating to subdivision control or the Planning Act, in order for the Vesting Order to be effective.[35]

The Vesting Order is Appropriate and Should Be Granted

45. The Action, issues relating to the Encroachments and the Publicity Campaign, and matters relating to the Settlement Agreement have, and continue to, cost the University professional fees and disbursements.[36]

46. If the Settlement Agreement is not completed, it may distract the University's senior management and members of the Board of Governors from various post-emergence steps to be undertaken.[37]

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[32] *Chippewas of Sarnia Band v Canada (A.G.)*, 2000 CarswellOnt 4836 (Ont. C.A.) at para 281.

[33] *Merol Power*, *supra* at para 14; *Nobrega and Elder v Trustees of the Estate of Gasparovich*, 2018 ONSC 2901 [*Nobrega*] at para 18.

[34] Fontaine Affidavit at paras 42, 43(c), Motion Record, Tab 2.

[35] *Terrace Bay*, *supra*, at para 72.

[36] Fontaine Affidavit at para 43(a), Motion Record, Tab 2.

[37] Fontaine Affidavit at para 32, Motion Record, Tab 2.

47. The Vesting Order is sought within the CCAA Proceeding, rather than the underlying Action relating to the Encroachments, because:

(a) charges created by the Initial Order and the DIP Approval Order encumber the Subject Property, even though those Court-ordered charges are now discharged following implementation of the Plan of Arrangement;

(b) the Vesting Order affects the Debenture held by the Exit Lender upon implementation of the Plan of Arrangement in the CCAA Proceeding;

(c) the service list established for use in the CCAA Proceeding provides a mechanism whereby a broader group of the University's stakeholders can receive notice of the motion and Vesting Order that is sought;

(d) the CCAA Proceeding provides a forum wherein the University's stakeholders can make submissions in respect of the requested Vesting Order, if they so choose;

(e) the supervising judge in the CCAA Proceeding is familiar with the CCAA Instruments that are sought to be expunged from title to the Subject Property pursuant to the requested Vesting Order; and

(f) it is most efficient.

48. In the absence of a Vesting Order being granted, the University and the Neighbours would need to either: (i) negotiate a new settlement, which may not be attainable, or (ii) continue

litigating the Action. In either event, the costs relating to the Action, the Encroachments and the Publicity Campaign will continue to be incurred, and the issues entailed thereby will persist.[38]

49. It is appropriate to grant the Vesting Order in the circumstances because:

(a) the University has incurred considerable expense and devoted significant resources addressing the issues caused by the Encroachments and the Publicity Campaign since 2016;[39]

(b) the Vesting Order represents an efficient, cost-effective, and timely resolution to the longstanding litigation between the University and the Neighbours and will result in the cessation of the Publicity Campaign;[40]

(c) the University is not aware of any party that opposes the transfer by the University of the Subject Property to the Neighbours by way of a Vesting Order;[41]

(d) MCU supports completion of the Settlement Agreement. MCU's consent is required for any sale of real property pursuant to section 11.1(f) of the Exit Loan Agreement;[42]

(e) further costs would be incurred by the University if the Vesting Order was not granted and a different procedure for severing and transferring the

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[38] Fontaine Affidavit at para 34, Motion Record, Tab 2.
[39] Fontaine Affidavit at para 43(a), Motion Record, Tab 2.
[40] Fontaine Affidavit at para 43(b), Motion Record, Tab 2.
[41] Fontaine Affidavit at para 43(c), Motion Record, Tab 2.
[42] Fontaine Affidavit at para 43(d), Motion Record, Tab 2.

Subject Property was required – assuming the parties to the Settlement Agreement were prepared to entertain such a process, which is not the terms that have been agreed;[43] and

(f) any party who may have an interest in the transfer of the Subject Property to the Neighbours is being served with the Motion Record, including Infrastructure Ontario, the Ministry of Northern Development, Mines, Natural Resources and Forests, Conservation Sudbury, and the Director of Planning Services of the City of Greater Sudbury (each for the reasons provided in the Motion Record).[44]

The Land Registrar should be Directed to Delete the CCAA Instruments

50. The proposed Vesting Order also directs the Land Registrar to discharge, delete and expunge from title the CCAA Instruments that are listed on Schedule "C" to the Vesting Order.

51. The University has reviewed existing registrations on title to the University Property and determined that it is appropriate to request that the CCAA Instruments be deleted from title as: (i) they are specific to the CCAA proceeding which is temporal in nature; (ii) they relate to Orders issued by the supervising judge in the CCAA Proceeding who will be hearing the within motion; or, (iii) in the case of the Debenture in favour of the Exit Lender, are subject to that party's consent pursuant to the Exit Loan Agreement.

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[43] Fontaine Affidavit at para 43(e), Motion Record, Tab 2.
[44] Fontaine Affidavit at pars 43(f), Motion Record, Tab 2.

52. CCAA courts have directed the applicable Land Registrar to delete specified instruments from title in other proceedings, where appropriate.[45]

53. All parties who would be affected by the requested deletion from title of the CCAA Instruments pursuant to the Vesting Order are being served with the Motion Record.[46]

54. A description of the CCAA Instruments listed in Schedule "C" to the Vesting Order is contained in the Affidavit filed by the University in support of the Vesting Order.

PART V - ORDER REQUESTED

55. For all of the foregoing reasons, the University requests that the Vesting Order be granted, substantially in the form of the draft Order included at Tab 3 of its Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of January, 2023.

Thornton Grout Finnigan LLP
Counsel for Laurentian University of Sudbury

[45] *Target Canada Co. (Re)*, 2015 CarswellOnt 7633 (Ont. S.C.); *AbitibiBowater Inc. (Re)*, 2010 QCCS 1742;, *Terrace Bay Pulp Inc., (Re)*, 2014 CarswellOnt 18956 (Ont. S.C.); *Canwest Publishing Inc., Re*, 2010 CarswellOnt 18861 (Ont. S.C.).

[46] Fontaine Affidavit at para 46, Motion Record, Tab 2; Affidavit of Service of Derek Harland sworn January 12, 2023.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Third Eye Capital Corporation v Dianor Resources Inc*, 2019 ONCA 508

2. *Harte Gold Corp (Re)*, 2022 ONSC 653

3. *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247

4. *Lama v Coltsman* (1978), 20 O.R. (2d) 98 (Ont. Co. Ct.)

5. *Holmsten v Karson Kartage & Konstruction Ltd.*, [1997] O.J. No. 1532 (Ont. Gen. Div.)

6. 724597 Ontario Inc v Merol Power Corp, 2005 CarswellOnt 6445 (Ont. S.C.)

7. *Chippewas of Sarnia Band v Canada (A.G.)*, 2000 CarswellOnt 4836 (Ont. C.A.)

8. *Nobrega and Elder v Trustees of the Estate of Gasparovich*, 2018 ONSC 2901

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BYLAWS

***Courts of Justice Act*, RSO 1990, c C.43**

Vesting orders

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

***Conveyancing and Law of Property Act*, RSO 1990, c C.34**

Lien on lands for improvements under mistake of title

37 (1) Where a person makes lasting improvements on land under the belief that it is the person's own, the person or the person's assigns are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements, or are entitled or may be required to retain the land if the Superior Court of Justice is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court directs.

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

General power of court

11 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.

Restriction on disposition of business assets

36 (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.

***Planning Act*, RSO 1990, c. P.13**

Subdivision control

50 (3) No person shall convey land by way of a deed or transfer, or grant, assign or exercise a power of appointment with respect to land, or mortgage or charge land, or enter into an agreement of sale and purchase of land or enter into any agreement that has the effect of granting the use of or right in land directly or by entitlement to renewal for a period of twenty-one years or more unless…

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