

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE LIQUIDATION AND WINDING UP OF
ONTARIO ELECTRONIC STEWARDSHIP**

MOTION PURSUANT TO S. 260 OF THE *CORPORATIONS ACT*, R.S.O. 1990, C. C.38

DELOITTE RESTRUCTURING INC.

Applicant

FACTUM OF THE APPLICANT

**(Motion for a Bar Date Order)
(Returnable October 8, 2021)**

September 23, 2021

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PART I – OVERVIEW

1. This factum is filed in connection with a motion (the “**Motion**”) by Deloitte Restructuring Inc. (“**Deloitte**”) in its capacity as Court-appointed liquidator of Ontario Electronic Stewardship (“**OES**”) (the “**Liquidator**”) on October 8, 2021 for an order (the “**Bar Date Order**”) fixing a claims bar date of October 21, 2021 (the “**Bar Date**”) with respect to the Claims Procedure as described in the Claims Procedure Order (each as defined below);

PART II – THE FACTS

1. The facts with respect to this motion are briefly recited herein and are more fully set out in the First Report of the Liquidator dated September 23, 2021, and the appendices thereto (the “**Liquidator’s Report**”).

Background

2. On February 8, 2018, the Minister of the Environment and Climate Change directed OES to develop a plan to wind up the Waste Electrical and Electronic Equipment Program pursuant to the *Resource Recovery and Circular Economy Act, 2016*.¹ OES submitted its wind-up plan (the “**Plan**”) to the Resource Productivity and Recovery Authority (“**RPR**A”) on July 25, 2019. The Plan was conditionally approved by RPR A on August 20, 2019.²

3. As contemplated by the Plan, the OES Board of Directors (the “**Board**”) passed a resolution on February 24, 2021 requiring OES to be wound up voluntarily under the provisions of the *Corporations Act*,³ (the “**Corporations Act**”). The Board appointed Deloitte as liquidator effective April 1, 2021.⁴

4. On June 11, 2021, on application to the Court made by Deloitte, in its capacity as privately-appointed liquidator of OES (the “**Application**”), Mr. Justice Dunphy issued:

- (a) an Order (the “**Appointment Order**”) appointing Deloitte as Liquidator, without security, of all of the assets, undertakings and properties of OES including all proceeds thereof or any sum or balance due from any contributory to which OES is entitled (the “**Property**”) for the purpose of winding up the business and affairs of OES and distributing the Property; and

¹ [Resource Recovery and Circular Economy Act, 2016](#), SO 2016, c 12, Sched 1

² First Report of the Liquidator dated September 23, 2021, and the appendices thereto, attached as Tab 2 to the Applicant’s Motion Record dated September 23, 2021 [the “Liquidator’s Report”], para 1

³ *Corporations Act*, R.S.O. 1990, c. C. 38, as modified by [O Reg 357/17](#) to the [Waste Diversion and Transition Act, 2016](#) [the “*Corporations Act*”]

⁴ Liquidator’s Report, para 2

- (b) an Order (the “**Claims Procedure Order**”) approving a procedure for the identification, quantification, and resolution of claims of creditors of OES (the “**Claims Procedure**”).⁵

5. At the hearing of the Application on June 11, 2021, his Honour Justice Dunphy directed that the Claims Procedure Order contemplate the Liquidator bringing a motion to the Court at a later date for an order setting a claims bar date following adequate notice to Known Claimants that had not yet filed a Proof of Claim in accordance with the provisions of the Claims Procedure Order.⁶

Applicable Legislation

6. The *Waste Diversion Transition Act, 2016*,⁷ (the “**Transition Act**”) is the main statute governing OES’ operations and wind up.

7. The Transition Act provides that the wind up of an organization such as OES may be conducted in accordance with the provisions of the *Corporations Act*.⁸

8. The winding up provisions of the *Corporations Act* import by reference the procedure for proving claims under sections 25 to 27 of the *Assignments and Preferences Act*⁹ with necessary modifications.¹⁰

PART III– ISSUES

9. The issue to be determined by the Court on this motion is whether this Court should grant

⁵ Liquidator’s Report, para 3

⁶ Liquidator’s Report, para 11

⁷ *Waste Diversion and Transition Act, 2016*, SO 2016, c 12, Sched 2 [the “Transition Act”]

⁸ *Transition Act*, *supra* note 7, s 14(2)

⁹ *Assignments and Preferences Act*, RSO 1990, c A 33 [the “Assignments and Preferences Act”]

¹⁰ *Corporations Act*, *supra* note 3, s 260

the relief contemplated by the Bar Date Order.

PART IV – THE LAW

A. THE COURT SHOULD GRANT THE BAR DATE ORDER¹¹

10. Section 25 of the *Assignments and Preferences Act*, as modified by the *Corporations Act*, provides:

Proof of claim

25 (1) All persons claiming to be entitled to rank on the estate shall furnish to the assignee particulars of their claim proved by affidavit and such vouchers as the nature of the case admits.

Limiting time for proof of claim

(2) Where a person claiming to be entitled to rank on the estate does not, within a reasonable time after receiving notice of the assignment and of the name and address of the assignee, furnish to the assignee satisfactory proofs of claim as provided by this and the preceding sections, the [court] upon summary application by the assignee or by any other person interested in the estate, of which application at least three days notice shall be given to the claimant, may order that unless the claim is proved to the satisfaction of the [court] within a time to be limited by the order, the claimant shall be deemed to be no longer a creditor of the estate and is wholly barred of any right to share in the proceeds thereof.

Consequences of neglect to prove claim

(3) If the claim is not so proved within the time so limited or within such further time as the [court] by subsequent order allows, it is wholly barred and the assignee is at liberty to distribute the proceeds of the estate as if no such claim existed, but without prejudice to the liability of the assignor therefor.¹²

11. Paragraph 18 of the Claims Procedure Order incorporates the process outlined in subsection 25(2) of the *Assignments and Preferences Act* by requiring that the Liquidator bring a

¹¹ Any capitalized terms used but not defined in this section of the Factum shall have the meanings given to them in the Claims Procedure Order granted June 11, 2021 and attached as Appendix 2 to the Liquidator's Report.

¹² [Assignments and Preferences Act](#), *supra* note 9, s 25; [Corporations Act](#), *supra* note 3, s 260

motion to the Court for an order setting a claims bar date following adequate notice (the “**Notice**”) to Known Claimants that had not yet filed a Proof of Claim in accordance with the provisions of the Claims Procedure Order. Paragraph 18 of the Claims Procedure Order provides:

“...as soon as practicable following the Proof of Claims Filing Date, and in any case no less than three (3) days following the delivery of the [Notice], the Liquidator shall bring a motion to the Court, on notice to the Service List and Known Claimants..., for an Order (the “Bar Date Order”) providing, amongst other things, for a date (the “Bar Date”)...”

12. The Proof of Claims Filing Date, being August 31, 2021, has passed.¹³ The Liquidator seeks the Bar Date Order in order to complete the Claims Procedure and continue with the winding up of OES in accordance with the Plan.¹⁴

13. On September 13, 2021, the Liquidator sent the Notice to Known Claimants (the “**Initial Notice**”) that had not yet filed a Proof of Claim, advising such Known Claimants of the Liquidator’s intention to seek the Bar Date Order on September 30, 2021 (the “**Initial Hearing Date**”).¹⁵

14. Following the delivery of the Initial Notice, the Initial Hearing Date was rescheduled to October 8, 2021 (the “**Hearing Date**”), given the Court’s closure for the observance of the National Day for Truth and Reconciliation.¹⁶

15. On September 23, 2021, the Liquidator sent a further notice (the “**Subsequent Notice**”) to the Known Claimants that had not yet filed a Proof of Claim, advising such Known Claimants of

¹³ Liquidator’s Report, para 24

¹⁴ Liquidator’s Report, para 24

¹⁵ Liquidator’s Report, para 18

¹⁶ Liquidator’s Report, para 19

the Hearing Date, providing a link to the Liquidator's Website where the Liquidator's Motion Record and supporting documentation would be available for download, and providing interested parties with information regarding how to request attendance at the hearing of the Motion on the Hearing Date.¹⁷

16. Known Claimants have had ample notice of the Hearing Date, the Bar Order and the consequences of failing to file a Proof of Claim. In addition to the Initial Notice and the Subsequent Notice, the Liquidator:

- (a) posted the Claims Procedure Order appending the Claims Package to the Liquidator's Website on June 14, 2021; and¹⁸
- (b) published the Notice to Claimants in *The Globe and Mail* (National Edition) and the *Toronto Star*.¹⁹

17. In light of the above, it is appropriate for the Court to grant the Bar Date Order at this time.

PART V - ORDER SOUGHT

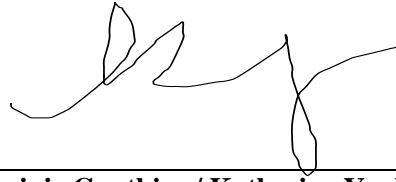
18. For the foregoing reasons, the Liquidator respectfully requests that this Court grant the Order substantially in the form of the draft Bar Date Order, attached at Tab 3 of the Liquidator's Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of September, 2021.

¹⁷ Liquidator's Report, para 20

¹⁸ Liquidator's Report, para 14

¹⁹ Liquidator's Report, para 16

A handwritten signature in black ink, consisting of several fluid, overlapping strokes. The signature is positioned above a horizontal line.

Virginie Gauthier / Katherine Yurkovich

SCHEDULE “A”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Waste Diversion Transition Act, 2016, S.O. 2016, c. 12, Sched. 2

WASTE DIVERSION PROGRAMS

Interpretation

2 In this Act,

“**Authority**” means the Resource Productivity and Recovery Authority continued under Part III of the *Resource Recovery and Circular Economy Act, 2016*.

[...]

“**Minister**” means the Minister of the Environment and Climate Change or such other member of the Executive Council as may be assigned the administration of this Act under the *Executive Council Act*;

[...]

Winding up

14 (1) An industry funding organization that receives a written direction from the Minister under this section to wind up a waste diversion program in full or in respect of a designated waste shall develop a plan in accordance with this section and shall submit it to the Authority for approval.

Direction re winding up industry funding organization

(2) A direction under this section to wind up a waste diversion program in full may also require the industry funding organization to develop a plan for winding itself up in accordance with any provisions of the *Corporations Act* that are prescribed to apply to it.

Discretionary direction

(3) The Minister may, at any time, direct an industry funding organization to wind up a waste diversion program in full or in respect of a designated waste, subject to subsection (4).

Mandatory direction

(4) The Minister shall direct an industry funding organization to wind up a waste diversion program in full if,

(a) material prescribed as a designated waste to which the program applies is also prescribed under the *Resource Recovery and Circular Economy Act, 2016* as material in a designated class within the meaning of that Act; and

(b) a regulation under the *Resource Recovery and Circular Economy Act, 2016* imposes one or more of the responsibilities mentioned in Part IV of that Act in respect of the material.

[...]

INDUSTRY FUNDING ORGANIZATIONS — CORPORATE MATTERS

Continuation of industry funding organizations, designations

15

...

Ontario Electronic Stewardship

(3) Ontario Electronic Stewardship is continued under the name Ontario Electronic Stewardship and is designated as the industry funding organization for the waste diversion program for waste electrical and electronic equipment.

Ontario Regulation 357/17: Industry Funding Organizations – Rules that Apply on Winding Up

Application of *Corporations Act* provisions

1. (1) Subject to subsections (2) to (6), Part VI (Winding Up) of the *Corporations Act* applies to an industry funding organization.
 - (2) The provisions of the *Corporations Act* that apply for the purposes of this Regulation are subject to necessary modifications, including the modifications set out in this Regulation.
 - (3) The provisions of the *Corporations Act* that apply for the purposes of this Regulation shall be read without reference to shareholders and inspectors.
 - (4) If a provision of the *Corporations Act* that applies for the purposes of this Regulation requires that a document be given to the Minister as defined in the *Corporations Act*, the provision shall be read as requiring that the document also be given to the Minister of the Environment and Climate Change and to the Authority.

(5) If a provision of the *Corporations Act* that applies for the purposes of this Regulation requires a resolution of members, the provision shall be read as requiring that the resolution be passed by majority vote.

(6) If an administrator is appointed under section 43 of the *Waste Diversion Transition Act, 2016* and has the exclusive right to exercise all the powers and perform all the duties of the members of the board and the officers of the industry funding organization, a provision of the *Corporations Act* that applies for the purposes of this Regulation that authorizes or requires the members of the industry funding organization to do a thing shall be read as authorizing or requiring the administrator to do that thing.

(7) The following provisions in Part VI of the *Corporations Act* do not apply:

1. Section 229.
2. Subsection 231(2).
3. Section 232.
4. Section 242.
5. Subsection 259(2).
6. Section 263.
7. Subsection 266(6).
8. Subsection 267(3).
9. Subsections 268(1) and (2).

Corporations Act, R.S.O. 1990, c. C.38
(shown, in part, and as modified under O. Reg. 357/17)

PART VI – WINDING UP

Proving claim

260 For the purpose of proving claims, sections 25, 26 and 27 of the Assignments and Preferences Act apply with necessary modifications, except that, where the word “judge” is used therein, the word “court” as used in this Act shall be substituted. R.S.O. 1990, c. C.38, s. 260.

Assignments and Preferences Act, R.S.O. 1990, c. A.33

Proof of claim

25 (1) All persons claiming to be entitled to rank on the estate shall furnish to the assignee particulars of their claim proved by affidavit and such vouchers as the nature of the case admits. R.S.O. 1990, c. A.33, s. 25 (1).

Limiting time for proof of claim

(2) Where a person claiming to be entitled to rank on the estate does not, within a reasonable time after receiving notice of the assignment and of the name and address of the assignee, furnish to the assignee satisfactory proofs of claim as provided by this and the preceding sections, the judge upon summary application by the assignee or by any other person interested in the estate, of which application at least three days notice shall be given to the claimant, may order that unless the claim is proved to the satisfaction of the judge within a time to be limited by the order, the claimant shall be deemed to be no longer a creditor of the estate and is wholly barred of any right to share in the proceeds thereof. R.S.O. 1990, c. A.33, s. 25 (2).

Consequences of neglect to prove claim

(3) If the claim is not so proved within the time so limited or within such further time as the judge by subsequent order allows, it is wholly barred and the assignee is at liberty to distribute the proceeds of the estate as if no such claim existed, but without prejudice to the liability of the assignor therefor. R.S.O. 1990, c. A.33, s. 25 (3).

Not to interfere with assignees

(4) Subsections (2) and (3) do not interfere with the protection afforded to assignees by section 53 of the Trustee Act. R.S.O. 1990, c. A.33, s. 25 (4).

Creditor may prove claim not due

(5) A person whose claim has not accrued due is nevertheless entitled to prove under the assignment and to vote at meetings of creditors, but in ascertaining the amount of any such claim a deduction for interest shall be made for the time that has to run until the claim becomes due. R.S.O. 1990, c. A.33, s. 25 (5).

Contestation of claim

26 (1) At any time after the assignee receives from any person claiming to be entitled to rank on the estate proof of the person's claim, notice of contestation of the claim may be served by the assignee upon the claimant. R.S.O. 1990, c. A.33, s. 26 (1).

Limitation

(2) Within thirty days after the receipt of the notice, or within such further time as the judge allows, an action shall be brought by the claimant against the assignee to establish the claim, and a copy

of the statement of claim in the action, or of the claim in case the action is brought in the Small Claims Court, shall be served on the assignee, and in default of such action being brought and statement of claim or claim served within the time limited the claim to rank on the estate is forever barred. R.S.O. 1990, c. A.33, s. 26 (2).

Service on solicitor of assignee

(3) The notice by the assignee shall contain the name and place of business of a solicitor upon whom service of the statement of claim or claim may be made, and service upon the solicitor shall be deemed sufficient service. R.S.O. 1990, c. A.33, s. 26 (3).

Right of assignee to compel plaintiff to proceed with action against assignor

(4) Where prior to the assignment an action has been commenced against the assignor and is pending at the time of the assignment, the assignee may, by notice served upon the plaintiff in the action, require the plaintiff to proceed, and the plaintiff is bound to proceed in that action to establish the claim, instead of bringing an action against the assignee as provided for by subsection (2), and the plaintiff may thereupon apply to the court in which the action is brought for an order adding the assignee as a party defendant in the action, and the assignee may be so added upon such terms as to the costs that may be subsequently incurred as the court or a judge thereof, or the judge making the order, directs. R.S.O. 1990, c. A.33, s. 26 (4).

Procedure where assignee is satisfied but assignor desires to dispute

27 (1) If the assignee is satisfied with the proof adduced in support of a claim but the assignor disputes it, the assignor shall do so by notice in writing to the assignee, stating the grounds of dispute, and the notice shall be given within ten days after the assignor is notified in writing by the assignee that the assignee is satisfied with the proof adduced and not afterwards unless by leave of the judge. R.S.O. 1990, c. A.33, s. 27 (1).

Where assignee does not require action to be brought

(2) If upon receiving the notice of dispute the assignee does not consider it proper to require the claimant to bring an action to establish the claim, the assignee shall notify the assignor in writing of the fact, and the assignor may thereupon, and within ten days of receiving the notice, apply to the judge for an order requiring the assignee to serve a notice of contestation. R.S.O. 1990, c. A.33, s. 27 (2).

Conditions

(3) The order shall be made only if, after notice to the assignee, the judge is of opinion that there are good grounds for contesting the claim. R.S.O. 1990, c. A.33, s. 27 (3).

Where decision of assignee final

(4) If the assignor does not make such an application, the decision of the assignee is, as against the assignor, final and conclusive. R.S.O. 1990, c. A.33, s. 27 (4).

Decision of judge on validity of claim

(5) If upon the application the claimant consents in writing, the judge may in a summary manner decide the question of the validity of the claim. R.S.O. 1990, c. A.33, s. 27 (5).

Intervention by assignor at trial

(6) If an action is brought by the claimant against the assignee, the assignor may intervene at the trial either personally or by counsel for the purpose of calling and examining or cross-questioning witnesses. R.S.O. 1990, c. A.33, s. 27 (6).

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