

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

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

**APPLICATION UNDER SS. 243, 244 and 246 OF THE *CORPORATIONS ACT*, R.S.O.
1990, C. C.38**

DELOITTE RESTRUCTURING INC.

Applicant

FACTUM OF THE APPLICANT

**(Application for a Wind Up and Appointment of a Liquidator Order and Motion for a
Claims Procedure Order)
(Returnable June 11, 2021)**

June 7, 2021

GOWLING WLG (CANADA) LLP
Suite 1600, 1 First Canadian Place
100 King Street West
Toronto ON 5X 1G5

Virginie Gauthier LSO#: 41097D
Tel: 416-844-5391
Email: Virginie.Gauthier@gowlingwlg.com

Kate Yurkovich (LSO#: 80396R)
Tel: 416-862-4342
Email: kate.yurkovich@gowlingwlg.com

Lawyers for the Applicant, Deloitte
Restructuring Inc.

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

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

APPLICATION UNDER SS. 243, 244 and 264 OF THE *CORPORATIONS ACT*, R.S.O.
1990, C. C.38

DELOITTE RESTRUCTURING INC.

Applicant

FACTUM OF THE APPLICANT

**(Application for a Wind Up and Appointment of a Liquidator Order and Motion for a
Claims Procedure Order)
(Returnable June 11, 2021)**

PART I – OVERVIEW

1. This factum is filed in connection with an application and related motion by Deloitte Restructuring Inc. (“**Deloitte**”) in its capacity as liquidator of Ontario Electronic Stewardship (“**OES**”) (in such capacity, the “**Liquidator**”) on June 11, 2021 for: (i) an order winding up OES and appointing Deloitte as court appointed liquidator of all of the assets and undertakings of OES, pursuant to sub-sections 243(b) and (d) and 246(1) of the *Corporations Act*,¹ R.S.O. 1990, c. C. 38, as modified by Ontario Regulation 357/17² (the “*Corporations Act*”) (the “**Appointment Order**”); and (ii) an order approving a claims procedure for the identification, quantification and resolution of claims of creditors of OES (the “**Claims Procedure Order**”).

¹ *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*”]

² [O Reg 357/17](#) under the [Waste Diversion and Transition Act, 2016](#), SO 2016, c 12, Sched 2

PART II – THE FACTS

1. The facts with respect to this application and related motion are briefly recited herein and are more fully set out in the Affidavit of Richard Williams sworn May 31, 2021 (the “**Williams Affidavit**”).

Background

2. OES is an “Industry Funding Organization” (“**IFO**”) previously responsible for managing the waste diversion program for waste electrical and electronic equipment (“**Electronics**”) in Ontario (the “**OES Program**”).³

3. During its operation, the OES Program promoted the re-use and refurbishment of waste Electronics and ensured that the resources found in such waste that could not be re-used were processed and recycled in an environmentally responsible manner.⁴

4. The OES Program ceased operating on December 31, 2020.⁵

5. The *Waste Diversion Transition Act, 2016*⁶ (the “**Transition Act**”) is the main statute governing OES’ operations and wind up. The Transition Act also serves as a transition between the OES Program and the new program for managing waste Electronics established pursuant to the *Resource Recovery and Circular Economy Act, 2016*⁷ (the “**New Act**”).

³ Affidavit of Richard Williams sworn May 31, 2021, attached as Tab 3 of the Applicant’s Application Record dated June 1, 2021 [“Williams Affidavit”], para 3

⁴ Williams Affidavit para 5

⁵ Williams Affidavit para 6

⁶ [*Waste Diversion and Transition Act, 2016*](#), SO 2016, c 12, Sched 2 [the “Transition Act”]

⁷ [*Resource Recovery and Circular Economy Act, 2016*](#), SO 2016, c 12, Sched 1 [the “New Act”]

Voluntary Wind Up of OES

6. On February 8, 2018, the Minister of the Environment and Climate Change (now known as the Minister of the Environment, Conservation and Parks, the “**Minister**”) directed OES to develop a plan to wind up the OES Program and also wind up itself.⁸

7. OES submitted its first proposed wind up plan (the “**First Proposed Plan**”) to the Recourse Productivity and Recovery Authority (the organization created by the Government of Ontario to oversee IFOs, their programs and their winding up) (“**RPRA**”), for approval in November of 2018.⁹

8. Following the preparation of the First Proposed Plan, OES was successful in a tax appeal against Canada Revenue Agency (“**CRA**”) and received an approximate \$60.8 million tax refund from CRA (the “**Tax Refund**”).¹⁰

9. In February 2019, OES submitted a revised wind up plan (the “**Second Proposed Plan**”, together with the First Proposed Plan, the “**Proposed Plans**”) to RPRA for approval to update estimates of OES’ operating surplus funds (“**Surplus Funds**”), resulting largely from the Tax Refund.¹¹

10. The Proposed Plans stipulated that any Surplus Funds remaining at the end of the OES Program would be disbursed to businesses that bring Electronics into Ontario or manufacture Electronics for sale in Ontario (“**Stewards**”) since, during the operation of the OES Program,

⁸ Williams Affidavit para 12

⁹ Williams Affidavit para 14

¹⁰ Williams Affidavit para 15

¹¹ Williams Affidavit para 16

Stewards were charged fees (commonly known as environmental handling fees) (“**Steward Fees**”) that funded the OES Program.¹²

11. Following submission of the Second Proposed Plan, the Minister directed RPRA to consult stakeholders on options to ensure that the Surplus Funds would be used for the benefit of consumers.¹³

12. Following those consultations, (i) the Minister issued further directions extending both the wind up date of the OES Program and the previously instated suspension of Steward Fees payable by Stewards to December 31, 2020; (ii) OES made further revisions to the Second Proposed Plan consistent with the Minister’s direction and submitted the further revised plan to RPRA for approval; and (iii) subject to certain conditions, RPRA approved the further revised wind up plan (the “**Final Wind Up Plan**”).¹⁴

13. In contrast to the Proposed Plans, the Final Wind Up Plan requires that any Surplus Funds held by OES following its wind up be transferred to RPRA to offset registry costs incurred pursuant to the New Act.¹⁵

14. As planned, the OES Program was brought to a close on December 31, 2020. OES has not engaged in, nor arranged, any further waste diversion programs since that time.¹⁶

¹² Williams Affidavit para 17

¹³ Williams Affidavit para 18

¹⁴ Williams Affidavit para 20

¹⁵ Williams Affidavit para 21

¹⁶ Williams Affidavit para 22

Private Appointment of Deloitte as Liquidator

15. On December 1, 2020, the members of the board of directors of OES (the “**Board**”) initiated a request for proposal process (the “**RFP**”) for a qualified firm to act as liquidator of OES and wind up the OES Program.¹⁷

16. On February 24, 2021, the Board resolved to engage Deloitte as Liquidator effective April 1, 2021, to complete a formal winding up and dissolution of OES.¹⁸

17. The mandate granted to the Liquidator pursuant to the RFP process is broad and includes obligations set forth in the Transition Act and the Final Wind Up Plan that are necessary for the winding up of the business and affairs of OES and the distribution of its assets and property.¹⁹

The Proposed Claims Procedure²⁰

18. The Liquidator’s mandate requires that the Liquidator ensure all financial obligations of OES are satisfied.²¹ The proposed Claims Procedure Order, if granted by this Court, would govern the identification, quantification and resolution of claims of creditors of OES.

19. Salient features and a timeline of the proposed Claims Procedure as described in the Claims Procedure Order are contained in the below table:²²

<i>Proof of Claims to Known Claimants</i>
--

¹⁷ Williams Affidavit para 23

¹⁸ Williams Affidavit para 24

¹⁹ Williams Affidavit para 26

²⁰ Any capitalized terms used but not defined in this section of the Factum shall have the meanings given to them in the proposed Claims Procedure Order attached at Tab 7 of the Applicant’s Application Record sated June 1, 2021.

²¹ Williams Affidavit paras 8, 26

²² Williams Affidavit para 43

<p>Following the Court Appointment Date</p>	<p>Liquidator shall compile a list of Known Claimants as at the Court Appointment Date, showing for each Known Claimant, their name, address, email address (where available) and amount owed pursuant to OES' books and records.</p>
<p><i>Notification Process</i></p>	
<p>No later than June 30, 2021</p>	<p>Liquidator shall send a Claims Package (which, for greater certainty, shall include a Pre-Populated Proof of Claim) to each Known Claimant by email to the last known email address of the Known Claimant set out in the books and records of OES.</p>
<p>No later than 5:00 pm on June 30, 2021</p>	<p>Liquidator shall cause the Notice to Claimants to be published, for at least one (1) Business Day, in <i>The Globe and Mail</i> (National Edition).</p>
<p>Following Publication in <i>The Globe and Mail</i></p>	<p>Liquidator shall cause the Notice to Claimants, the Claims Package and the Claims Procedure Order to be posted to the Liquidator's Website.</p>
<p><i>Claims Bar Date</i></p>	
<p>August 31, 2021 (the "Claims Bar Date")</p>	<p>Any Person who (i) disagrees with the Claim stated in the Pre-Populated Proof of Claim, or (ii) wishes to assert a Claim, must deliver to the Liquidator, on or before the Claims Bar Date, a completed Proof of Claim, including all relevant supporting documentation.</p>
<p>Impact of the Claims Bar Date</p>	<p>If any Person who received a Pre-Populated Proof of Claim does not return a Proof of Claim in the manner noted above by the Claims Bar Date, such Claim shall be deemed to be as set out in the Pre-Populated Proof of Claim and the Claimant will be barred from disputing or appealing same, and the balance of such Claimant's Claim, if any, shall be forever barred and extinguished.</p> <p>Any Person who has not received a Pre-Populated Proof of Claim and has not filed a Proof of Claim with the Liquidator pursuant to the Claims Procedure Order by the Claims Bar Date shall:</p> <ul style="list-style-type: none"> (a) not be entitled to receive further notice with respect to, and shall not be entitled to participate as a Claimant or creditor in, the Claims Procedure or these Proceedings in respect of such Claim; and (b) be forever barred, estopped and enjoined from asserting or enforcing such Claim against OES and OES shall not have any liability whatsoever in respect of such Claim and such Claim shall be extinguished without any further act or notification by the Liquidator.

<i>Adjudication and Resolution of Claims</i>	
Following the Liquidator's receipt of Proofs of Claim	As soon as practicable after a Proof of Claim is received by the Liquidator, the Liquidator will attempt to resolve and settle the Claim with the Claimant. If the Liquidator determines, in its sole discretion, acting reasonably, that the Claim cannot be resolved or settled, the Liquidator shall issue a Notice of Revision or Disallowance in respect of such Claim.
30 Days Following Receipt of a Notice of Revision or Disallowance	Any Claimant who wishes to dispute a Claim as stated in a Notice of Revision or Disallowance shall bring a motion to the Court to seek a determination by the Court of the disputed Claim, within 30 days of the deemed receipt of the Notice of Revision or Disallowance in respect of such Claim.

PART III– ISSUES

20. The issues to be determined by the Court on this application and motion are whether:
- (a) this Court should grant the relief contemplated by the Appointment Order; and
 - (b) this Court should grant the relief contemplated by the Claims Procedure Order.

PART IV – THE LAW

A. THE COURT SHOULD GRANT THE APPOINTMENT ORDER

OES Should Be Wound Up Pursuant to Court Order

21. OES is an IFO under the Transition Act.²³
22. Section 14 of the Transition Act provides for the winding up of an IFO.²⁴ Where an IFO receives written direction from the Minister to wind itself up, such IFO is required to develop a plan for winding itself up in accordance with the provisions of the *Corporations Act* that are

²³ [Transition Act](#), *supra* note 6, s 15(3); Williams Affidavit para 3

²⁴ [Transition Act](#), *supra* note 6, s 14

prescribed to apply to it.²⁵

23. Pursuant to section 244(1) of the *Corporations Act*, a winding up order may be made upon the application of the Liquidator.²⁶

24. Section 243 of the *Corporations Act*²⁷ provides the circumstances in which an IFO may be wound up by order of the Court.

25. Section 243(b) of the *Corporations Act* provides that where proceedings have begun for an IFO to be wound up voluntarily (as in the present case), the court may make an order that the IFO be wound up where it appears to the court that it is in the interest of contributories and creditors that the proceedings should be continued under the supervision of the court.²⁸

26. In addition, pursuant to section 243(d) of the *Corporations Act*, the court may order a winding up where, in the opinion of the court, it is just and equitable that the IFO should be wound up.²⁹

27. A court-supervised process is in the interests of the stakeholders and creditors of OES as it will ensure appropriate public disclosure of information to all interested parties and an effective mechanism to complete the wind up of OES.³⁰

28. The words “just and equitable”, as referred to in section 243(d) of the *Corporations Act*, are words “of the widest significance” and must be given a broad interpretation. The court must

²⁵ [Transition Act](#), *supra* note 6, s 14(2); [O Reg 357/17, s. 1\(1\)](#)

²⁶ [Corporations Act](#), *supra* note 1, s 244(1)

²⁷ [Corporations Act](#), *supra* note 1, s 243

²⁸ [Corporations Act](#), *supra* note 1, s 243(b)

²⁹ [Corporations Act](#), *supra* note 1, s 243(d)

³⁰ Williams Affidavit para 42

be careful not to construe the authorities as setting out a series of restrictive principles that would confine the phrase “just and equitable” to rigid categories, for each case depends to a large extent on its own facts.³¹

29. It is just and equitable in the circumstances that OES be wound up pursuant to a Court-supervised process as such process will:

- (a) ensure that the wind up process is open and fair;³²
- (b) if required, provide an avenue to resolve issues that may arise during the wind up;³³
and
- (c) assist the Liquidator in carrying out its mandate.³⁴

30. Specifically, the assets of OES are material and may significantly increase depending on the outcome of certain tax litigation that the Liquidator is considering.³⁵ The court-supervised liquidation, if ordered by this Court, will provide additional comfort to stakeholders of OES that any distribution of such funds by the Liquidator at a later date is completed in accordance with statutory requirements in a fully transparent manner.

³¹ *Sobrinho v Oakville Portuguese Canadian Club*, (1982) 37 OR (2d) 581, 1982 CarswellOnt 936 (ON HCJ). See also *Re Rogers and Agincourt Holdings Ltd. et al.*, 1976 CanLII 736, 14 OR (2d) 489, 74 DLR (3d) 152 (ONCA)

³² Williams Affidavit para 41

³³ Williams Affidavit para 41

³⁴ Williams Affidavit para 41

³⁵ Williams Affidavit para 39

31. This Court has previously granted an Order for the wind-up, and appointment of a liquidator over the assets and undertakings, of an Ontario IFO on terms similar to those sought in this case.³⁶

Deloitte Should be Court Appointed Liquidator of OES

32. Pursuant to section 246(1) of the *Corporations Act*, in making a winding-up order, the Court may appoint a liquidator of the estate and effects of an IFO.³⁷

33. Deloitte has consented to act as court appointed liquidator.³⁸

34. The selection of Deloitte by OES was the result of a principled RFP process.³⁹

35. Since its appointment by the Board, the Liquidator has worked with EPRA and RPRA to familiarize itself with the applicable legislation, the Final Wind Up Plan, and the affairs of OES generally, including, the financial and operational obligations of OES.⁴⁰

36. Deloitte has worked with OES, EPRA and RPRA in advance of this application to establish its mandate, run a stakeholder consultation process and advise on the best approach to various liquidation issues based on its extensive experience acting as a court-appointed officer.⁴¹

B. THE COURT SHOULD GRANT THE CLAIMS PROCEDURE ORDER⁴²

37. Section 245 of the *Corporations Act* provides the Court, in conjunction with a winding-up

³⁶ [Re Ontario Tire Stewardship, Order granted on March 16, 2020, Court File No. CV-20-00637392-00CL, \(Ont. Sup Ct. J. \[Commercial List\]](#)

³⁷ *Corporations Act*, *supra* note 1, s 246(1)

³⁸ Consent of Deloitte Restructuring Inc. to Act as Liquidator, dated May 31, 2021, Application Record of Deloitte Restructuring Inc., Tab 6

³⁹ Williams Affidavit paras 23-25

⁴⁰ Williams Affidavit para 28

⁴¹ Williams Affidavit para 37

⁴² Any capitalized terms used but not defined in this section of the Factum shall have the meanings given to them in the proposed Claims Procedure Order attached at Tab 7 of the Applicant's Application Record dated June 1, 2021.

order, with broad discretion to “make any interim or other order as is considered just”.⁴³

38. 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*⁴⁴ (the “*Assignments and Preferences Act*”) with necessary modifications.⁴⁵

39. The proposed claims procedure (“**Claims Procedure**”) contained in the Claims Procedure Order is consistent with the proof of claims provisions of the *Assignments and Preferences Act*,⁴⁶ with minor amendments in order to maximize the efficiency of soliciting Claims, and assist stakeholders of OES in determining their Claims in a timely and cost effective manner.

40. Notably, the Claims Procedure Order contemplates a “negative” claims procedure whereby OES’ Known Claimants will be provided with a Claims Package that will include a Pre-Populated Proof of Claim listing the amount owed to a Known Claimant according to OES’ books and records. If a Known Claimant does not dispute the amount noted in the Pre-Populated Proof of Claim, no further action is required. Where a Known Claimant disagrees with the amount stipulated in the Pre-Populated Proof of Claim, such Known Claimant may file a Proof of Claim prior to the Claims Bar Date.⁴⁷

41. In the context of proceedings pursuant to the *Companies’ Creditors Arrangement Act*⁴⁸ (the “**CCAA**”), the Court has approved of such “negative” claims procedures, and granted claims procedure orders containing similar terms, noting that such procedures should be encouraged in

⁴³ [Corporations Act](#), *supra* note 1, s 245

⁴⁴ [Assignments and Preferences Act](#), RSO 1990, c A 33 [the “*Assignments and Preferences Act*”]

⁴⁵ [Corporations Act](#), *supra* note 1, s 260

⁴⁶ [Assignments and Preferences Act](#), *supra* note 44, ss 25-27

⁴⁷ Williams Affidavit para 43

⁴⁸ [Companies’ Creditors Arrangement Act](#), RSC, 1985, c C-36

appropriate circumstances as they “streamline claims processes, make it easier for all known creditor claims to be recognized and counted, and save significant time and money”.⁴⁹

42. The Claims Procedure as detailed in the Claims Procedure Order is the most efficient, fair and cost effective method for determining and resolving Claims against OES.

43. The terms of the Claims Procedure Order, if granted by this Court, will provide Known Claimants and potential unknown Claimants with adequate notice of the Claims Procedure, and an adequate opportunity to prove their Claims prior to the Claims Bar Date.⁵⁰

44. In the context of CCAA proceedings, this Court has previously stated that “[i]t is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.”⁵¹

45. The Claims Procedure will provide the Liquidator with certainty in identifying the quantum of all Claims against OES with a view to discharging the financial liabilities of OES prior to completing the winding up of OES.

PART V - ORDER SOUGHT

46. For the foregoing reasons, the Applicant respectfully requests that this Court grant Orders substantially in the form of the draft Appointment Order and Claims Procedure Order, attached at Tabs 5 and 7, respectively, to the Applicant’s Application Record.

⁴⁹ *Re Toys “R” Us (Canada) Ltd.*, 2018 ONSC 609 at para 14

⁵⁰ Williams Affidavit, para 43

⁵¹ *Timminco Limited (Re)*, 2014 ONSC 3393, at para 41

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of June, 2021.

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

Virginie Gauthier / Kate Yurkovich

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [Re Ontario Tire Stewardship, Order granted on March 16, 2020, Court File No. CV-20-00637392-00CL](#) (ONSCJ [Commercial List])
2. [Re Rogers and Agincourt Holdings Ltd. et al.](#), 1976 CanLII 736, 14 OR (2d) 489, 74 DLR (3d) 152 (ONCA)
3. [Re Toys “R” Us \(Canada\) Ltd.](#), 2018 ONSC 609, 56 CBR (6th) 271 (ONSCJ [Commercial List])
4. [Sobrinho v Oakville Portuguese Canadian Club](#), (1982) 37 OR (2d) 581, 1982 CarswellOnt 936 (ON H CJ)
5. [Timminco Limited \(Re\)](#), 2014 ONSC 3393, 14 CBR (6th) 113 (ONSCJ)

SCHEDULE “B”

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).

[...]

Non-application of subs. (4), ss. 12 and 13

(8) On and after the day the Minister makes a direction to wind up a program in full, subsection (4) and sections 12 and 13 do not apply to the program.

[...]

Contents of plan

(12) The plan shall include the following:

1. A description of the designated waste that will no longer be included in the program.
2. A description of how the program will be operated while the plan is being implemented.
4. A proposed timeline according to which key aspects of the plan will be implemented.
5. A proposal for dealing with the affected assets, liabilities, rights and obligations of any affected industry funding organization.
6. A proposal for transferring or sharing data that is within the industry funding organization's custody or control and that relates to the waste that will no longer be included in the program.
7. A description of changes to the program that are anticipated to be necessary to implement the plan.
8. Any other information the Minister specifies.

Consultation

(13) In developing the plan, the industry funding organization shall consult with,

- (a) representatives of municipalities;
- (b) representatives of persons who are designated as stewards under the rules made by an industry funding organization under section 33 or a regulation made under subsection 73 (3) in respect of the designated waste to which the waste diversion program applies; and
- (c) any other persons the industry funding organization considers to be affected by the winding up.

Consultation

(14) In assessing the plan, the Authority shall consult with,

- (a) representatives of municipalities;
- (b) representatives of persons who are designated as stewards under the rules made by an industry funding organization under section 33 or a regulation made under subsection 73 (3) in respect of the designated waste to which the waste diversion program applies; and
- (c) any other persons the industry funding organization considers to be affected by the winding up.

Approval

(15) After reviewing the industry funding organization's submission, the Authority may approve the plan, but the plan shall not be approved unless it is consistent with the Minister's direction.

Same

(16) An approval under subsection (15) shall be in writing and may include the conditions the Authority determines appropriate.

Amendments

(17) The Minister may, in writing, direct the industry funding organization to develop amendments to a plan approved under subsection (15), and subsections (10) to (16) apply with necessary modifications in respect of the amendment.

[...]

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.

[...]

Corporations Act and Corporations Information Act

23 The *Corporations Act* and the *Corporations Information Act* do not apply to an industry funding organization, except as provided by the regulations.

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

[...]

Voluntary winding up

230 (1) On or after the date on which the last waste diversion program for which the corporation is designated is to cease operation (as specified in a direction to the corporation under subsection 14 (10) or (11) of the *Waste Diversion Transition Act, 2016*, as the case may be), and ~~W~~where the shareholders or members of a corporation by a majority of the votes cast at a general meeting called for that purpose pass a resolution requiring the corporation to be wound up, the corporation may be wound up voluntarily.

Appointment of liquidator

(2) At such meeting, the shareholders or members shall appoint one or more persons who have been approved by the Authority (which shall not approve directors, officers or employees of the corporation or of another entity that has entered into an agreement with the corporation for the management and administration of a program for which the corporation is designated, nor persons who are related to any of those individuals) as liquidator ~~persons, who may be directors, officers or employees of the corporation, as liquidator~~ of the estate and effects of the corporation for the purpose of winding up its affairs and distributing its property, and may at that or any subsequent general meeting fix the liquidator's remuneration and the costs, charges and expenses of the winding up. R.S.O. 1990, c. C.38, s. 230.

Inspectors

~~**232** A corporation being wound up voluntarily may, in general meeting, by resolution, delegate to any committee of its shareholders or members, contributories or creditors hereinafter referred to as inspectors, the power of appointing the liquidator and filling any vacancy in the office of liquidator, or may by a like resolution enter into any arrangement with its creditors with respect to the powers to be exercised by the liquidator and the manner in which they are to be exercised.~~

[...]

Winding up by court

243 A corporation may be wound up by order of the court,

(a) where the shareholders or members by a majority of the votes cast at a general meeting called for that purpose pass a resolution authorizing an application to be made to the court to wind up the corporation;

(b) where proceedings have begun to wind up voluntarily and it appears to the court that it is in the interest of contributories and creditors that the proceeding should be continued under the supervision of the court;

(c) where it is proved to the satisfaction of the court that the corporation, though it may be solvent, cannot by reason of its liabilities continue its business and that it is advisable to wind it up; or

(d) where in the opinion of the court it is just and equitable for some reason, such as the reason that the wind up of the corporation is being implemented in a way that is inconsistent with the wind up plan approved under section 14 of the Waste Diversion Transition Act, 2016 or that the corporation has failed to comply with that Act or the regulations made under it, but other than the reason of ~~for some reason, other than~~ the bankruptcy or insolvency of the corporation, that it should be wound up.

Who may apply

244 (1) The winding-up order may be made upon the application of the corporation ~~or of a shareholder or of a member~~ or of the Authority or, where the corporation is being wound up voluntarily, ~~of the liquidator or of the liquidator, of the corporation, of the Authority~~ or of a contributory or of a creditor having a claim of \$200 or more.

Notice

(2) Except where the application is made by the corporation, four days notice of the application shall be given to the corporation before the making of the application.

Power of court

245 The court may make the order applied for, may dismiss the application with or without costs, may adjourn the hearing conditionally or unconditionally or may make any interim or other order as is considered just, and upon the making of the order may, according to its practice and procedure, refer the proceeding for the winding up and may also delegate any powers of the court conferred by this Act to any officer of the court.

Appointment of liquidator

246 (1) The court in making the winding-up order may appoint one or more persons as liquidator of the estate and effects of the corporation for the purpose of winding up its affairs and distributing its property but a person shall not be appointed as the liquidator under this section or section 253 if the person is a director, officer or employee of the corporation or of

another entity that has entered into an agreement with the corporation for the management and administration of a program for which the corporation is designated or is related to any of those individuals.

[...]

No proceedings against corporation after court winding up except by leave

251 After the commencement of a winding up by order of the court,

(a) no action or other proceeding shall be proceeded with or commenced against the corporation; and

(b) no attachment, sequestration, distress or execution shall be put in force against the estate or effects of the corporation,

except by leave of the court and subject to such terms as the court may impose.

[...]

Consequences of winding up

254 (1) Upon a winding up,

(a) the liquidator shall apply the property of the corporation in satisfaction of all its liabilities ~~proportionately and, subject thereto, shall distribute the property rateably among the shareholders or members according to their rights and interests in the corporation~~ and, after satisfying the liabilities, shall distribute the property in a way that is consistent with the wind up plan approved under section 14 of the *Waste Diversion Transition Act, 2016* and with the purposes set out in section 35 of that Act;

(b) in distributing the property of the corporation, the wages of all employees, apprentices and other wage earners in the employment of the corporation due at the date of the commencement of the winding up or within one month before, not exceeding three months wages and for vacation pay accrued for not more than twelve months under the *Employment Standards Act* and the regulations thereunder or under a collective agreement made by the corporation, shall be paid in priority to the claims of the ordinary creditors, and such persons are entitled to rank as ordinary creditors for the residue of their claims;

(c) all the powers of the directors cease upon the appointment of a liquidator, except in so far as the liquidator may sanction the continuance of such powers.

[...]

Payment of costs and expenses

255 The costs, charges and expenses of a winding up, including the remuneration of the liquidator, are payable out of the property of the corporation in priority to all other claims.

Powers of liquidators

256 (1) The liquidator may,

(a) bring or defend any action, suit or prosecution, or other legal proceedings, civil or criminal, in the name and on behalf of the corporation;

(b) carry on the business of the corporation so far as is necessary for the beneficial winding up of the corporation;

(c) sell in whole or in parcels the real and personal property, effects and things in action of the corporation by public auction or private sale;

(d) do all acts and execute, in the name and on behalf of the corporation, all deeds, receipts and other documents, and for that purpose use the seal of the corporation;

(e) draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the corporation;

(f) raise upon the security of the property of the corporation any requisite money;

(g) take out in the liquidator's official name letters of administration to the estate of any deceased contributory and do in the liquidator's official name any other act that is necessary for obtaining payment of any money due from a contributory or from a contributory's estate and which act cannot be done conveniently in the name of the corporation;

(h) do and execute all such other things as are necessary for winding up the affairs of the corporation and distributing its property.

[...]

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.

[...]

Rules of procedure

271 The Lieutenant Governor in Council may make rules for the due carrying out of this Part, and, except as otherwise provided by this Act or by such rules, the practice and procedure in a winding up under the *Winding-up and Restructuring Act* (Canada) apply.

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).

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

Court File No: CV-21-00663305-00CL

APPLICATION UNDER SS. 243, 244 and 246 OF THE CORPORATIONS ACT, R.S.O. 1990, C. C.38

DELOITTE RESTRUCTURING INC.

Applicant

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at: TORONTO

FACTUM OF THE APPLICANT

GOWLING WLG (CANADA) LLP

1 First Canadian Place
100 King Street West, Suite 1600
Toronto ON M5X 1G5

Virginie Gauthier (LSO#: 41097D)

Tel: 416-844-5391

Email: virginie.gauthier@gowlingwlg.com

Kate Yurkovich (LSO#: 80396R)

Tel: 416-862-4342

Email: kate.yurkovich@gowlingwlg.com

Lawyers for the Applicant, Deloitte Restructuring Inc.