IANTHUS DECISION CHANGES THE LANDSCAPE FOR CORPORATE PLANS OF ARRANGEMENT UNDER THE BCBCA BY PERMITTING THIRD-PARTY RELEASES

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In two decisions rendered less than one week apart, Justice Gomery of the Supreme Court of British Columbia held that third-party releases may be incorporated into plans of arrangement made under the British Columbia *Business Corporations Act* (the "**BCBCA**"). According to the rulings in *iAnthus Capital Holdings, Inc. et al. (Re)*,[1] now upheld by the Court of Appeal for British Columbia,[2] third-party releases may be acceptable so long as they are incidental and supplemental to an order sanctioning the plan of arrangement, and necessary to ensure the arrangement is fully and effectively carried out. Significantly, the ruling means that the BCBCA now offers an attractive option to companies looking to undergo a plan of arrangement containing third-party releases.

Background to the Case

iAnthus Capital Holdings, Inc ("**iAnthus**" or the "**Company"**) is incorporated under the BCBCA. The Company is the publicly traded, top-level holding company for the broader group of companies that operate under the iAnthus brand as owners and operators of medical and adult-use licensed cannabis cultivation, processing, and dispensary facilities throughout the United States. At the end of March, 2020, iAnthus missed an interest payment due on certain secured notes issued to secured creditors in the principal amount of approximately US$100 million. iAnthus had insufficient liquidity to make the interest payment. The missed interest payment resulted in cross defaults on the secured notes and outstanding unsecured debentures.

After a months' long strategic review process, the Company entered into a restructuring support agreement with the secured noteholders and unsecured debentureholders. The agreement contemplated a restructuring implemented under the BCBCA or, alternatively, under the *Companies' Creditors Arrangement Act* ("**CCAA**") if the BCBCA restructuring was not successful. The BCBCA restructuring provided for a compromise of the debt owing on the secured notes and unsecured debentures, in exchange for the issuance of new shares to the compromising creditors that would leave them with 97.25% of the total outstanding common shares of the Company. Accordingly, under the BCBCA arrangement, existing shareholders would retain 2.75% of the

outstanding common shares of iAnthus. Under the alternative CCAA plan, existing shareholders would recover nothing.

Fairness of the BCBCA Plan

Creditors voting on the BCBCA plan approved it unanimously. In addition, 66.32% of existing shareholders voting on the BCBCA plan (excluding related parties) also voted in favour of a resolution approving the BCBCA plan.[3] Nevertheless, at a hearing to determine whether an order should be issued sanctioning the plan, certain dissenting shareholders and parties to existing litigation with iAnthus argued that the plan fell short of requisite statutory requirements, was advanced in bad faith and was not fair and reasonable such that the request for a sanction order ought to be denied.

Following the framework for consideration of a corporate plan of arrangement articulated by the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*,[4] Justice Gomery considered whether, with respect to the iAnthus BCBCA plan: (i) the statutory requirements were met; (ii) the arrangement was advanced in good faith; and (iii) the arrangement was fair and reasonable.

With respect to the statutory requirements of the BCBCA, Justice Gomery observed, following *Re Telus Corp.*,[5] that section 288 of the BCBCA did not mandate plan approval by shareholders, because the plan did not impact their legal rights. In any event, the interim order granted in advance of the shareholder vote set an approval threshold of 50% + 1, which threshold was achieved. All other statutory requirements were otherwise met.

Justice Gomery was also satisfied that the plan was put forward in good faith, being the product of arms-length negotiations between a special committee of the iAnthus board, and the compromising creditors. The plan resolved an immediate problem for iAnthus in that it was in default under its secured debt arrangements and its secured creditors were in a position to enforce on their collateral.

The last component of the *BCE* framework, whether the plan was fair and reasonable, turned on whether the plan had a valid business purpose and resolved objections in a fair and balanced way. The Court was satisfied that the plan had a valid business purpose insofar as it was aimed at resolving the Company's existing financial difficulties.

The Court was also satisfied, with one caveat, that the plan resolved objections in a fair and balanced way. This conclusion flowed from Justice Gomery's analysis of the process leading to the restructuring support agreement and the inferior alternative transactions presented to the Company. Justice Gomery also considered the strong support from stakeholders evidenced by their votes. Nevertheless, Justice Gomery was not prepared to sanction the plan because of the scope and impact of releases provided for in the plan as

presented to the Court.

Third-Party Releases in Corporate Plans of Arrangement

The BCBCA plan provided for broad releases to the Company, those creditors that were parties to the restructuring support agreement, and other third parties including current and former directors, officers, advisors and shareholders of iAnthus that might have claims for indemnity against the Company. As first presented to the Court, the releases would permit a fresh start for iAnthus after the implementation of the plan in connection with the company shares and compromised debt.

Before Justice Gomery, iAnthus and the creditors supporting the plan argued that the releases, though broad, were comparable to releases commonly provided for in plans of arrangement approved by a court under the CCAA. They argued that releases comparable to those available in a CCAA plan were fair in the context of a corporate plan of arrangement, particularly where shareholders were retaining value in a restructured company that would not be available to them if the company were forced to file for protection under the CCAA.

Though sympathetic to these arguments, Justice Gomery was not satisfied that the BCBCA permitted releases in arrangements that were as broad as releases permitted under the CCAA. Importantly, the Court in *iAnthus* rejected the reasoning of the Ontario Superior Court of Justice in *Re Concordia International Corp.*[6] where that court applied principles developed under the CCAA in deciding that third-party releases were appropriate in an unopposed plan of arrangement made under the *Canada Business Corporations Act* ("**CBCA**"). Justice Gomery decided that the arrangement provisions of the BCBCA and CBCA served different purposes and operated differently than the CCAA. Accordingly, the Ontario Court of Appeal's analysis in *ATB Financial v Metcalf & Mansfield Alternative Investments II Corp.*,[7] the leading authority for the provision of third-party releases in CCAA plans, was not wholly applicable in the context of iAnthus' plan advanced under the BCBCA.

As assessed through the lens of the BCBCA, Justice Gomery held that the releases initially presented to the Court in *iAnthus* were not justified under the BCBCA insofar as they risked impacting substantive rights of certain parties that had no say in the plan, such as historical shareholders, in connection with claims that preceded the plan's development. However, since the Court would otherwise have approved the plan[8] but for the form of releases, iAnthus was given leave to amend the plan to narrow the releases provided for, and return to court for approval of an amended plan.

iAnthus accepted the Court's invitation, and returned with an amended plan of arrangement three days after Justice Gomery's initial ruling. Justice Gomery held that as amended, the plan was fair and reasonable. The amended plan contained releases that, while immunizing parties to the plan and various third parties from claims connected with its development and implementation, left open the possibility that claims by stakeholders that had no say in the plan and that concerned conduct unrelated to the plan, could proceed.[9]

After *iAnthus*, the BCBCA Offers an Avenue for Corporate Restructuring with Third-Party Releases

iAnthus decides, for the first time in a reported decision, that third-party releases are available under a plan of arrangement proposed pursuant to the BCBCA. This advancement in British Columbian law creates an attractive option for Canadian corporations looking to implement a plan of arrangement.

Prior to the *iAnthus* ruling, a company incorporated under the BCBCA looking to undergo a restructuring with embedded third-party releases might consider continuing to the CBCA, as *Concordia* served as authority for the approval of third-party releases in connection with a CBCA plan. However, such a continuance requires a special resolution of the shareholders which, as a practical matter is often a difficult hurdle for a company to overcome. Alternatively, the company could implement the restructuring under an available insolvency statute but thereby give up the ability to maintain value for shareholders.

The *iAnthus* decision, as affirmed by the Court of Appeal, is important in that it expressly holds that a British Columbia company can use the BCBCA to restructure while obtaining third-party releases. Moreover, Justice Gomery's reasons offer structured guidance to British Columbia companies wishing to advance such corporate plans of arrangement. Because of the *iAnthus* decision, we expect that going forward more companies incorporated under the BCBCA in financial difficulty will take advantage of the certainty that this case has afforded and use the BCBCA to effect corporate plans of arrangement.

[1] *Re iAnthus Capital Holdings, Inc.*, 2020 BCSC 1442 and 2020 BCSC 1484.
[2] *iAnthus Capital Holdings, Inc. et al. v Walmer Capital Limited et al.*, 2021 BCCA 48.
[3] Under the BCBCA, the Company was not required to obtain the approval of shareholders for the proposed arrangement as shareholders were not being arranged; only secured noteholders and unsecured debentureholders were being arranged. However, as the claims of optionholders and warrantholders are being compromised under the proposed arrangement, and to ensure compliance with Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions, the Company obtained majority approval of equityholders as well as majority of the minority approval of shareholders.
[4] *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69.
[5] *Re Telus Corp.*, 2020 BCSC 1919 at paras 248-251.
[6] *Re Concordia International Corp.*, 2018 ONSC 4165 at paras 37-52.
[7] *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587.
[8] The Court also took issue with an injunction against advancing claims released in the proposed plan.
[9] The amended plan also removed the injunction language originally before the court.

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A Cautionary Note