

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

IN THE MATTER OF THE *CREDIT UNIONS AND CAISSES POPULAIRES ACT, 2020*, S.O. 2020, C. 36, SCHED. 7, AS AMENDED

AND IN THE MATTER OF PACE SAVINGS & CREDIT UNION LIMITED

APPLICATION OF PACE SAVINGS & CREDIT UNION LIMITED UNDER SECTION 240 OF THE *CREDIT UNIONS AND CAISSES POPULAIRES ACT, 2020*, S.O. 2020, C. 36, SCHED. 7, AS AMENDED

**FACTUM OF THE APPLICANT
(WINDING UP & APPOINTING LIQUIDATOR)**

August 19, 2022

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PART I - OVERVIEW

1. This is an application by PACE Savings & Credit Union Limited (the “**Applicant**” or “**Credit Union**”), which is under the administration of the Financial Services Regulatory Authority of Ontario (“**FSRA**”, or, in such capacity, the “**Administrator**”) pursuant to the Administration Orders (defined below).

2. On this application, the Credit Union, under the direction and authority of the Administrator, seeks an Order pursuant to section 240 of the *Credit Unions and Caisses Populaires Act, 2020*, S.O. 2020, c. 36, Sched. 7, as amended (the “**CUCPA**”) winding up the Credit Union and appointing KPMG Inc. (“**KPMG**”) as liquidator (in such capacity, the “**Liquidator**”), without security, of all of the remaining assets, undertakings, and properties of the Credit Union following completion of the Alterna Sale Transaction (defined below).

3. FSRA is the regulator of credit unions in Ontario under the CUCPA and oversees insured deposit protection for credit unions in Ontario through its administration of the Deposit Insurance Reserve Fund (the “**DIRF**”). The Credit Union has been under administration by FSRA, formerly DICO (defined below), since September 28, 2018, which DICO initiated in response to, among other things, certain misconduct and regulatory breaches committed by the Credit Union’s former President and former CEO.

The Affidavit of Mehrdad Rastan, sworn August 17, 2022 [Tab 4] (the “Rastan Affidavit”), paras. 4, 14-15, 19-23.

4. The initial purpose and goal of the administration was to resolve the governance issues which gave rise to the administration, enhance the financial stability of the Credit Union, and return the Credit Union to member-controlled governance in due course. Between September 2018 and April 2020 (i.e., the onset of the COVID-19 pandemic), the Credit Union, under FSRA’s

administration, made significant initial progress on the path toward exiting administration and returning to member-controlled governance.

Rastan Affidavit, paras. 5, 26-29.

5. Ultimately, the consequences of the misconduct and regulatory breaches committed by the Credit Union's former President and former CEO, combined with those of the COVID-19 pandemic on the Credit Union, and certain other factors, compromised the Credit Union's financial position to such an extent that the Administrator was forced to explore additional options for the Credit Union rather than just the "recovery option" which had been the primary goal up until that point. These additional options included exploring a purchase and assumption transaction for the Credit Union and/or a liquidation and winding up of the Credit Union.

Rastan Affidavit, paras. 6, 30-40.

6. The Credit Union's financial position continued to deteriorate throughout 2020 and 2021. Ultimately, the Administrator determined that potential losses to the Credit Union's stakeholders could be mitigated more effectively, and FSRA's regulatory objectives better achieved, by pursuing a purchase and assumption transaction for the Credit Union and a sale of the Credit Union's subsidiary, CCE (defined below), followed by a liquidation and wind-up strategy. This determination ultimately led to the Alterna Sale Transaction (defined below) and CCE Sale Transaction (defined below)—which closed in June 2022 and March 2022, respectively—and now to this Application.

Rastan Affidavit, paras. 7, 36-40, 42, and 48.

7. At present, as a result of the Alterna Sale Transaction, the Credit Union has no employees, virtually no member deposits,¹ and no branches. Further, virtually all of the Credit Union's

¹ With certain limited exceptions, namely the Smith Accounts (defined below).

members have been granted membership in and are being served by another credit union, Alterna (defined below). As described further below, all that remains of the Credit Union are certain assets and liabilities which were excluded from the Alterna Sale Transaction.

Rastan Affidavit, para. 8.

8. Under the provisions of the CUCPA, the Credit Union may apply to this Court for an order winding up the Credit Union where it cannot continue its business and it is advisable to wind the Credit Union up, *or* where it is just and equitable that the Credit Union should be wound up. The Applicant submits that it satisfies each of these criteria and, therefore, an order granting the winding up and appointment of the Liquidator is appropriate under the CUCPA.

CUCPA, ss. 240(1)(c), (d).

9. Quite simply, the Credit Union is no longer operating as a credit union and can no longer carry on the business of a credit union or perform the statutory object of a credit union under the CUCPA. In the circumstances of this case, including having regard to the nature and complexity of the remaining assets, operations, and liabilities of the Credit Union, the Administrator is of the view that a court-ordered winding up of the Credit Union by a court-appointed liquidator pursuant to the CUCPA is advisable and would be just and equitable.

Rastan Affidavit at paras. 10, 81, and 83; CUCPA, s. 23(1) (“The object of a credit union is to provide on a co-operative basis financial services primarily for its members.”)

10. Through the course of the administration, FSRA, in its capacity as administrator of the DIRF, has provided certain financial support to the Credit Union and has claims against the Credit Union, both existing and contingent, all of which are in respect of the DIRF. These include, without limitation, FSRA’s claims against the Credit Union in relation to: (a) FSRA’s guarantee of certain post-closing obligations of the Credit Union in connection with the Alterna Sale Transaction, and (b) an unsecured non-interest bearing promissory note issued by the Credit Union in favour of the

DIRF (the FSRA Promissory Note, defined below) in connection with the settlement of certain investors' claims (the Investor Settlement, defined below).

Rastan Affidavit at paras. 35, 44.

11. As part of this Application, the Applicant is seeking to have KPMG appointed as Liquidator of the Credit Union. KPMG is well-known for its expertise in complex commercial matters and liquidation proceedings and is an appropriate choice to serve in this capacity. KPMG, through a previous advisory engagement with FSRA, also has experience with the Credit Union and its assets, undertakings, properties, liabilities, and claims, all of which will benefit the Credit Union, its stakeholders, and the Court if KPMG were appointed as Liquidator.

Rastan Affidavit at paras. 11, 42, 48, and 86.

12. The Applicant is also seeking, among other things, the following relief: (a) approval of the Liquidator Nomination Agreement (defined below) between FSRA and KPMG; (b) granting and approval of the Liquidator's Charge (defined below); (c) granting and approval of the Liquidator's power to borrow funds; and (d) granting and approval of the Liquidator's Borrowings Charge (defined below). A draft order had been included with the application materials along with a comparison to the model receivership order for this Court's reference.

See Order (Winding Up & Appointing Liquidator) [Tab 2] (the "Winding Up Order") and Comparison to Model Receivership Order [Tab 3].

13. The Administrator believes that all of the relief requested on this Application is reasonable and appropriate in the circumstances of this case, and is reasonably necessary to ensure the successful and timely winding up of the Credit Union. As described further below, the wind up must be completed in a timely manner because the Credit Union no longer has any employees and must rely on transition services and information provided by Alterna (defined below), the

purchaser in the Alterna Sale Transaction, which services and information will eventually be withdrawn.

Rastan Affidavit, paras. 13, 45, 84.

PART II - FACTS

A. The Parties

i. FSRA

14. FSRA is a corporation established without share capital under the *Financial Services Regulatory Authority of Ontario Act, 2016*, S.O. 2016, c. 37, Sched. 8 (the “*FSRA Act*”). Since its launch in June 2019 and its amalgamation with DICO (defined below), FSRA has been the regulator of credit unions in Ontario under the CUCPA.

15. Among its other statutory objects and responsibilities, FSRA is the prudential market conduct regulator of credit unions in Ontario, it may act as the “administrator” of credit unions in appropriate circumstances, and it oversees insured deposit protection for credit unions in Ontario through its administration of the DIRF.

Rastan Affidavit, paras. 14-16.

16. Effective June 8, 2019, FSRA amalgamated with the Deposit Insurance Corporation of Ontario (“**DICO**”), the former entity that carried out the prudential regulation of credit unions in Ontario under the CUCPA and provided deposit insurance through the DIRF.²

Rastan Affidavit, para. 17.

ii. The Credit Union

17. The Applicant is a credit union incorporated under the CUCPA and is therefore an entity regulated by FSRA. Before the Alterna Sale Transaction (defined below), the Credit Union had

² For ease of reference, the regulator and Administrator of the Credit Union shall sometimes be referred to as FSRA or the Administrator regardless of whether the event described took place before or after June 8, 2019.

approximately 34,000 members and 13 branches throughout southwestern Ontario and had approximately \$900 million in assets recorded in its financial statements.

Rastan Affidavit, para. 18.

B. Relevant Background Relating to the Administration of the Credit Union

18. The relevant background relating to FSRA’s administration of the Credit Union is set out in detail in Part 3 of the Rastan Affidavit.

Rastan Affidavit, paras. 19-48.

i. The Administration Orders

19. DICO issued an administration order on September 28, 2018 (the “**First Administration Order**”), pursuant to its authority under section 294(1) of the *Credit Unions and Caisses Populaires Act, 1994*, S.O. 1994, c. 11 (which legislation was repealed effective March 1, 2022, and replaced with the CUCPA)³ ordering that the Credit Union be subject to administration by the Administrator. The Order was supported by written reasons (the “**Reasons**”) issued on the same day, which identified five prudential findings (i.e., misconduct related to the prudence of actions, conflicts of interest, and breaches of fiduciary duties) and five regulatory findings (i.e., breaches of the CUCPA and the regulations thereunder) which caused DICO to issue the First Administration Order.

Rastan Affidavit, paras. 19-21.

20. Broadly speaking, the Reasons set out a number of regulatory breaches and instances of self-dealing and improvident and improper transactions orchestrated primarily by the Credit Union’s former President and former CEO. DICO concluded it had reasonable grounds to believe that the Credit Union was conducting its affairs in a way that might be expected to harm the

³ For ease of reference, the 1994 and 2020 Acts are both hereinafter referred to as the CUCPA, regardless of whether the event being described took place before or after March 1, 2022.

interests of members, depositors, or shareholders, or that would tend to increase the risk of claims by depositors against DICO, and that it was therefore appropriate to issue the First Administration Order to effect certain, necessary changes.

Rastan Affidavit, paras. 21-23 and Exhibit “B” (Reasons at paras. 25, 27, and 29 and Schedule “A”).

21. Further administration orders were issued in respect of the Credit Union on February 19, 2020, April 28, 2020, and March 26, 2021 (the “**Second, Third, and Fourth Administration Orders**”, and, together with the First Administration Order, the “**Administration Orders**”).

Rastan Affidavit, para. 24 and Exhibits “A”, “C”, “D”, “E” (Administration Orders from First to Fourth, respectively).

ii. The COVID-19 Pandemic and Other Circumstances Prevented the Credit Union from Exiting Administration

22. At the time the First Administration Order, the purpose and goal of the administration was to resolve the governance issues which gave rise to the First Administration Order and to return the Credit Union to member-controlled governance in due course. With a view toward that goal, the Administrator had initially determined that the Credit Union could be removed from administration after a new board of directors had been elected and that board had hired a new management team. By April 2020, a new board of directors and management team had been instated, and the Credit Union had made significant initial progress on the path toward exiting administration and returning to member-controlled governance.

Rastan Affidavit, paras. 26-29.

23. At this time, Canada was more than one month into the COVID-19 pandemic. The economic impact of the pandemic and the related Investor Claims (defined below) represented unanticipated events which ultimately forced the Administrator to conclude that a recovery strategy was not possible and to consider other options, such as a purchase and assumption

transaction and/or a wind-up and liquidation strategy. The various impacts of the pandemic and the Investor Claims on the Credit Union and their significance are summarized below:

(a) **Failure of CCE:** Continental Currency Exchange (“CCE”) was a wholly-owned subsidiary of the Credit Union engaged in the business of a retail currency exchange that had been acquired by the Credit Union under its former management in contravention of the CUCPA and which was one of the bases for the First Administration Order. The pandemic had a drastic impact on the business of CCE, and it sustained significant operating losses in the 2020 financial year. After determining that a recovery of the Credit Union was not likely, the Administrator ultimately caused the Credit Union to sell CCE as part of the CCE Sale Transaction (defined and described in more detail below).

(b) **Failure of PSC and the Related Investor Claims:** PACE Securities Corporation (“PSC”) was a wholly-owned subsidiary of the Credit Union engaged in the business of a securities dealer. Among other things, PSC distributed preferred shares of its subsidiary, Pace Financial Limited (“PFL”) and preferred shares of First Hamilton Holdings (“FHH”), an unaffiliated entity under the control of persons managing PSC or related to such persons. Certain developments caused by the pandemic led to the court-ordered wind-up of PSC, PFL, and FHH, which crystallized substantial losses by investors in the preferred shares of PFL and FHH and gave rise to complaints from Credit Union members and the investors in the preferred shares of PFL and FHH. The claims of these investors (the “Investor Claims”) were settled in June 2021 for \$40 million, with a significant portion to be paid by the Credit Union (the “Investor Settlement”). In connection with the Investor Settlement, FSRA, as administrator of the DIRF, provided an assurance that if the Credit Union was unable to fund its contribution towards the settlement for any reason, FSRA would ensure payment in full of the Credit

Union's contribution. This assurance gave rise to an unsecured non-interest bearing promissory note in the amount of \$25 million issued by the Credit Union in favour of the DIRF, dated October 27, 2021 (the "**FSRA Promissory Note**").

(c) **Resignation of the Directors and Senior Management:** In late 2020, the Credit Union was still in the midst of the pandemic and dealing with the Recovery Litigation (defined below) and the various claims asserted therein as well as the continued operating losses at CCE and the failure of PSC and related Investor Claims. The Credit Union was also facing regulatory capital shortfalls which would require regulatory forbearance and an aggressive plan to restore capital adequacy. In this context, in late 2020, all of the directors of the Credit Union and its CEO and CRO resigned from their positions. This left the Credit Union without a functioning Board of Directors and with only one member of senior management, its CFO.

Rastan Affidavit, paras. 30-37.

iii. Administrator's Decision to Pursue a Purchase and Assumption Transaction and Resolution Strategy for the Credit Union

24. At the outset of 2021, the Credit Union's long-term viability remained uncertain in light of the ongoing pandemic, and the Credit Union's financial condition continued to deteriorate throughout 2021. Indeed, in or around early 2021, the Credit Union was required to seek a variance from the CEO of FSRA regarding its regulatory capital requirements.

Rastan Affidavit, para. 38.

25. In light of the foregoing circumstances, the Administrator ultimately determined that the long-term operation of the Credit Union's business was not reasonably likely to minimize the losses to the Credit Union's depositors and other creditors and ultimately to the DIRF. The Administrator further determined that these losses would be mitigated more effectively, and its regulatory objects under the *FSRA Act* would be better served, by pursuing a purchase and

assumption transaction for the Credit Union and a sale of CCE followed by a liquidation and wind-up strategy. This strategy was initiated by the Administrator in late May 2021 with the commencement of the CCE Sale Process (defined below), and the commencement of the Alterna Sale Process (defined below) in June 2021.

Rastan Affidavit, para. 39.

26. Following the completion of the CCE Sale Process and the Alterna Sale Process, the Administrator publicly announced that there would be a liquidation of the remaining assets and liabilities of the Credit Union by press release dated July 6, 2022.

Rastan Affidavit, para. 40.

iv. The Alterna Sale Transaction

27. On April 20, 2022, following a careful assessment of the various options available to the Credit Union and the completion of a formal competitive sale process conducted in consultation with the proposed liquidator, KPMG⁴ (the “**Alterna Sale Process**”), the Credit Union and FSRA entered into a purchase and assumption agreement (the “**Alterna Sale Agreement**”) with Alterna Savings and Credit Union Limited (“**Alterna**”). Pursuant to the Alterna Sale Agreement, Alterna would acquire and assume substantially all of the assets and liabilities of the Credit Union except for certain excluded assets and liabilities and would continue the Credit Union’s normal course business operations as part of Alterna (the “**Alterna Sale Transaction**”). KPMG served as financial advisor to the Administrator and the Credit Union in connection with the Alterna Sale Process and Alterna Sale Transaction.

Rastan Affidavit, paras. 41-42.

⁴ At the time, KPGM was acting solely as a financial advisor and was not proposed to be the liquidator in these proceedings.

28. The Alterna Sale Transaction closed on June 30, 2022 (the “**Alterna Closing Date**”). On closing, Alterna acquired and assumed substantially all of the member deposits, both insured and uninsured, and substantially all retail and commercial loans. As part of the Alterna Sale Transaction, Alterna offered employment to substantially all of the Credit Union’s employees, assumed all of the Credit Union’s existing branches and agreed to keep them open for a period of time following the Alterna Closing Date, and provided substantially all of the Credit Union’s existing members with membership in Alterna.

Rastan Affidavit, paras. 41-42.

29. A critical aspect of the Alterna Sale Transaction was continuity for members of the Credit Union: on the Alterna Closing Date, the Credit Union’s existing members became Alterna members served by the Credit Union’s former employees and branches, both of which were also assumed by Alterna. The membership of the Credit Union was not changed by the Alterna Sale Transaction; those individuals who were members of the Credit Union prior to the closing retained their membership in the Credit Union after closing and also (with very few exceptions) became members of Alterna.

Rastan Affidavit, para. 43.

30. In connection with the Alterna Sale Transaction: (a) the Credit Union has certain potential post-closing liabilities, which may or may not result in certain payments to Alterna, which exposure is guaranteed by FSRA, subject to a monetary cap and FSRA’s rights of subrogation under the guarantee; and (b) Alterna has agreed to provide certain transition services to the Credit Union for a limited period of time, which include various finance and accounting services and information technology services for the purpose of facilitating the Credit Union’s dealing with its remaining assets and liabilities.

Rastan Affidavit, paras. 44-45.

31. Subsequent to the Alterna Sale Transaction, the Credit Union retained certain assets and liabilities which relate to, among other things, the CCE Sale Transaction (defined below), the Prepaid Card Business (defined below), claims asserted in the Recovery Litigation (defined below), and the FSRA Promissory Note, certain member deposits and accounts, certain loans, certain insurance claims or entitlements to proceeds of insurance, certain funds held in trust by the Credit Union for the benefit of former employees, and certain severance obligations which may be owed by the Credit Union to former employees. The remaining assets and liabilities of the Credit Union are described in more detail below.

Rastan Affidavit, para. 46.

v. The CCE Sale Transaction

32. As indicated above, CCE is a retail currency exchange business which, until March 31, 2022, was a wholly-owned subsidiary of the Credit Union that had been improperly acquired while the Credit Union was under its pre-administration management. On January 11, 2022, following a careful assessment of the various options available to the Credit Union and completion of a formal competitive sale process conducted in consultation with KPMG (which served as financial advisor to the Administrator in connection with the sale of all of the shares of CCE held by the Credit Union) (the “**CCE Sale Process**”, which was run in parallel to the Alterna Sale Process), the Credit Union, FSRA, and the successful bidder, DUCA Credit Union (“**DUCA**”), entered into a share purchase agreement (the “**CCE Sale Agreement**”) in respect of the sale of all of the issued and outstanding shares in the capital of CCE (the “**CCE Sale Transaction**”). The CCE Sale Transaction closed on March 31, 2022 and resulted in a loss to the Credit Union which further eroded its already diminished financial capacity.

Rastan Affidavit, paras. 47-48.

C. Remaining Assets, Operations, and Liabilities of the Credit Union Requiring Resolution by the Liquidator

33. All that remains of the Credit Union following the Alterna Sale Transaction are certain assets and liabilities, which, taken together, cannot carry on the business of a credit union or perform the statutory object of a credit union under the CUCPA. The remaining assets, operations, and liabilities of the Credit Union, which must be overseen and resolved by the Liquidator, are described below (collectively, the “**Remaining Assets and Liabilities**”) (*with pinpoint references to the Rastan Affidavit in parentheses*):

(a) **Recovery Litigation (paras. 50-58)**: On April 17, 2019, the Credit Union commenced a claim in the Ontario Superior Court of Justice (Commercial List) against the former President and former CEO of the Credit Union (Larry Smith and Phillip Smith, respectively), their affiliates, certain of the Credit Union’s former directors, and a number of other parties who received improper benefits from the Credit Union. The Credit Union’s claim, the Smiths’ third party claims, Phillip Smith’s claim, and all related counterclaims and crossclaims against the Credit Union are referred to herein collectively as the “**Recovery Litigation**”.⁵ The Rastan Affidavit provides full particulars of the Recovery Litigation. Pursuant to a permanent preservation order made by Justice Conway, on consent, on May 7, 2019 and a subsequent endorsement by Justice Koehnen dated October 26, 2020, the Credit Union is maintaining certain accounts held by Larry Smith at the Credit Union as a liability on its financial statements in the total, approximate amount of \$5 million (the “**Smith Accounts**”). Should this

⁵ The Credit Union’s claim bears the Court File No. CV-19-00616388-00CL. Phillip Smith’s third party claim bears the Court File No. CV-19-00616388-CLA2, and his wrongful dismissal claim bears the Court File No. CV-19-00628710-0000. The Credit Union through its Administrator is represented by the law firm of Lax O’Sullivan Lissus Gottlieb LLP in those proceedings.

Application be granted, the Applicant expects that the Liquidator will continue to prosecute the claims, and defend the counterclaims, made in the Recovery Litigation, subject to the terms of the Liquidator Nomination Agreement (defined below). Accordingly, the Applicant is not seeking to stay the Recovery Litigation, and that proceeding will be expressly excluded from the stay provision in the Winding Up Order. In connection with a pending motion brought by the Smiths in the Recovery Litigation for relief relating to the Smith Accounts, Justice Gilmore, on July 25, 2022, ordered the Credit Union to maintain the status quo pending the return of the Smiths' motion. Her Honour also ordered that, in the event the Credit Union seeks to take additional steps, including "further dissipation of assets", it may do so on the consent of the parties or order of the Court. Her Honour's endorsement is attached as Exhibit "J" to the Rastan Affidavit.

(b) **Default Loans and Liabilities (para. 59):** The Credit Union has retained certain loans and accounts that are in default, having a face value of more than \$8 million in Credit Union assets. A Credit Union member associated with most of these loans and accounts commenced a claim against the Credit Union in January 2022, which remains outstanding.

(c) **Proceeds of CCE Sale Transaction (para. 60):** As indicated above, the Credit Union completed the sale of all of the issued and outstanding shares of CCE to DUCA on March 31, 2022. As of May 31, 2022, the Credit Union held net proceeds from the CCE Sale Transaction in the amount of approximately \$16.3 million.

(d) **The CUMIS Bond Claim (paras. 61-63):** The Credit Union has a claim against CUMIS General Insurance Company ("CUMIS") under a fidelity insurance bond issued by CUMIS. The claim is for losses incurred as a result of dishonest acts by former employees and directors of the Credit Union, including its former President and former CEO (the "**CUMIS Bond**

Claim”). In the proof of loss, the Administrator calculated the Credit Union’s losses to be approximately \$23,579,078. CUMIS is liable to indemnify the Credit Union for covered losses under the bond to a maximum of \$10 million. The Credit Union, by its Administrator, has claimed the maximum amount available under the CUMIS Bond. To date, CUMIS has only made partial payment to the Credit Union in the approximate amount of \$1.0 million. The Credit Union has commenced an action against CUMIS in relation to the unpaid portion of the CUMIS Bond Claim.⁶

(e) **The Berkshire Bond Claim (para. 64):** The Credit Union also has a claim against National Liability & Fire Insurance Company, carrying on business as Berkshire Hathaway Specialty Insurance (“**Berkshire**”) under a fidelity insurance bond issued by Berkshire. This claim is for losses incurred by the Credit Union in connection with dishonest or fraudulent acts of the Credit Union’s former Manager Retail Loans, acting alone or in collusion with other individuals or entities, and certain litigation arising therefrom (the “**Berkshire Bond Claim**”). In the proof of loss, the Administrator calculated the Credit Union’s losses to be approximately \$9,445,000. Berkshire is liable to indemnify the Credit Union for covered losses under the bond to a maximum of \$10 million. The Credit Union, by its Administrator, has claimed \$9,445,000 under the bond, but Berkshire has not yet made payment.

(f) **Prepaid Card Business (paras. 66-69):** The Credit Union acts as the issuer of prepaid cards (the “**Prepaid Cards**”) pursuant to various prepaid card programs transacting on the Mastercard and Visa networks and operated in conjunction with several program managers (the “**Prepaid Card Business**”). Amounts loaded by consumers on Prepaid Cards are held

⁶ Court File No. CV-22-00677550-0000 (Toronto).

separate and apart for the benefit of cardholders in a commercial account at The Toronto-Dominion Bank in the name of a subsidiary of the Credit Union, 1961783 Ontario Limited. The Credit Union is in the process of transitioning or winding-down the Prepaid Card Business. This process of transition and wind-down is expected to take a period of months to complete, and, while that is occurring, the Prepaid Card Business will continue to operate in the normal course.

(g) **Expected Distributions from the Wind Up of PSC and Its Subsidiaries (*paras. 70-72*):** In connection with the court-ordered wind-up of PSC and its direct and indirect subsidiaries, including PFL and PACE Capital Partners LP (“**PCP**”), the Credit Union expects to receive interim distributions which would satisfy most, if not all, of the Credit Union’s claims against PSC, both as creditor and sole shareholder, in the total, approximate amount of \$4.7 million, subject to receipt of comfort letters from Canada Revenue Agency and approvals of the Court.

(h) **BC Class Action (*paras. 73-74*):** The Credit Union and others are named as defendants in a certified class action in British Columbia (the “**BC Class Action**”),⁷ in which the plaintiff, on behalf of the class, alleges, among other things, that the defendants (which includes the Credit Union) breached provisions of consumer protection legislation by selling prepaid credit cards that allegedly have an expiry date and contain fees for the purchase and use of such cards. The BC Class Action remains in the documentary discovery phase. The Applicant is seeking a stay of the BC Class Action in order to see if a consensual resolution can be achieved.

⁷ British Columbia Supreme Court, Action No. S-147229, Vancouver Registry.

(i) **Potential Claims by FSRA (*paras. 75*):** The Credit Union remains subject to certain potential claims by FSRA in its capacities as both the administrator of the DIRF and the statutory Administrator of the Credit Union. These include a potential claim relating to FSRA's guarantee of certain post-closing obligations owed by the Credit Union in connection with the Alterna Sale Transaction, which may or may not ultimately result in payments to Alterna.

(j) **Other Excluded Assets, Liabilities, and Obligations (*para. 76*):** The Credit Union's other excluded assets, liabilities, and obligations include the following: (A) a relatively small asset reflecting the Credit Union's remaining investments in certain completed joint venture projects; (B) an accrued dividend and capital payments in connection with certain Class A profit and Class B investment shares it issued; (C) a deferred tax asset in the form of an accrued credit for past losses; and (D) other ordinary course litigation and claims, which exist or may in the future exist.

D. The Liquidator Nomination Agreement

34. Given all of the circumstance described herein—including, without limitation, that FSRA has certain claims against the Credit Union, both existing and contingent, all of which are in respect of the DIRF (as referred to in paragraph 33(i) above) —KPMG and FSRA, in its capacity as the Administrator of the Credit Union, have entered into a liquidator nomination agreement (the “**Liquidator Nomination Agreement**”). Pursuant to the Liquidator Nomination Agreement, the Administrator agreed to nominate or support the nomination of KPMG, and KPMG agreed to accept such nomination and consent to its appointment, as court-appointed liquidator of the Credit Union in these proceedings on the terms set out therein and in the Winding Up Order. The Liquidator Nomination Agreement provides for consultation and cooperation between the Liquidator and FSRA in connection with the liquidation and winding-up of the Credit Union

including, without limitation, in connection with the Recovery Action, the CUMIS Bond Claim, the Berkshire Bond Claim, the Remaining Assets and Liabilities, and the other ongoing litigation.

Rastan Affidavit, para. 77 and Exhibit “K” (the Liquidator Nomination Agreement).

35. In connection with the appointment of the proposed Liquidator, the Applicant is seeking the Court’s approval of the Liquidator Nomination Agreement.

PART III - ISSUES

36. The sole issue to be decided on this application is whether the Credit Union satisfies one or more of the criteria in section 240(1) of the CUCPA, any one of which, if satisfied, gives this Court the jurisdiction to wind up a credit union. The Administrator respectfully submits that the Credit Union satisfies both 240(1)(c) and (d), and that therefore this Court has and ought to exercise its jurisdiction under the CUCPA to grant the Winding Up Order.

PART IV - LAW & ARGUMENT

A. This Court’s Jurisdiction Under the CUCPA

37. The CUCPA is the statutory regime governing the dissolution of credit unions generally. Section 240, in particular, contains the provisions governing the winding up of a credit union by court order. Under that section, a credit union may apply to the Ontario Superior Court of Justice for a winding up order and other ancillary relief, including, among other things, an order appointing a liquidator.

CUCPA, ss. 240(3), (7).

38. To grant the Winding Up Order, the Court need only be satisfied that the Credit Union falls into one of the four situations enumerated in section 240(1) of the CUCPA. Those include, among other things, (a) cases where a credit union cannot by reason of its liabilities continue its business

and it is advisable to wind it up, and (b) cases where, in the opinion of the court, it is just and equitable that the credit union be wound up. The test under section 240(1) is disjunctive: only one criterion need be satisfied. Section 240(1) reads, in relevant part:

240(1) A credit union may be wound up by order of the court if,

[...]

(c) it is proved to the satisfaction of the court that the credit union, 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) in the opinion of the court it is just and equitable for some reason other than the bankruptcy or insolvency of the credit union that it should be wound up.

CUCPA, s. 240(1).

39. In deciding an application under section 240, the Court has broad discretion and may: (a) make the order applied for; (b) dismiss the application with or without costs; (c) adjourn the hearing conditionally or unconditionally; (d) make an interim or such other order as it considers appropriate; or (e) refer the proceedings for the winding-up to an officer of the court for inquiry and report and authorize the officer to exercise such powers of the court as are necessary for the reference.

CUCPA, s. 240(6).

40. Once the winding up order has been made by the court, the proceedings for the winding up of the credit union must be taken in the same manner and with the like consequences as are provided for in the general winding up provisions, subject to certain stipulations, including, among other things, that all proceedings in the winding up are subject to the order and direction of the court. In addition, once the winding up order has been made, no suit, action, or other proceeding shall be proceeded with or commenced against the credit union, except with the leave of the court and subject to such terms as the court imposes.

CUCPA, s. 240(13), (18).

B. A Court-Ordered Wind Up of the Credit Union Is Advisable and Just and Equitable

41. The Credit Union no longer has member deposits,⁸ employees, or branches and therefore can no longer carry on the business of a credit union or fulfill its statutory object under section 23(1) of the CUCPA “to provide on a co-operative basis financial services primarily for its members”. Quite simply, the Remaining Assets and Liabilities of the Credit Union cannot comprise and will never again comprise a credit union. In addition, the Remaining Assets and Liabilities are of a contingent nature and are sufficiently complex that a court-ordered, court-supervised winding up process by a court-appointed liquidator is appropriate and necessary for the timely winding up of the Credit Union. Further, a timely and efficient wind-up process is necessary because the Credit Union no longer has any employees and must rely on transition services and information provided by Alterna, which services and information will eventually be withdrawn.

CUCPA, s. 23(1); Rastan Affidavit, paras. 80 and 84.

42. In addition, as a result of the sale of substantially all of the Credit Union’s assets to Alterna and the departure of all of its employees, the substratum of the Credit Union’s business no longer exists. The Credit Union is left with miscellaneous assets and liabilities to administer and significant and complex litigation to be prosecuted or defended.

43. In view of all the circumstances herein, including the absence of any employees to deal with the Credit Union’s Remaining Assets and Liabilities, the Credit Union satisfies section 240(1)(c) and (d) of the CUCPA in that it is advisable and just and equitable that the Credit Union be wound up.

⁸ Subject to certain limited exceptions, namely the Smith Accounts.

44. The Administrator is not aware of any reported decision dealing with a court-ordered winding up of a credit union in Ontario or in any other province or territory. By all appearances, this is a case of first instance. In the Administrator's view, this is not surprising: the credit union industry is tightly regulated and the probability that a credit union will need to undergo a court-supervised winding up process is rather low. Using this case as an exemplar: the winding up of the Credit Union only became necessary following the onset of a global pandemic which exacerbated the financial difficulties the Credit Union was already suffering on account of the regulatory breaches and other misconduct of its former President and former CEO. The circumstances of this case are exceptional, to say the least.

45. Because this is a case of first instance, this Court ought to rely on the principles of statutory interpretation as well as judicial decisions involving the interpretation of similar wind-up provisions in Canadian corporate statutes. In regards to the former, the Supreme Court of Canada summarized the principles of statutory interpretation in *Canada (Minister of Citizenship and Immigration) v. Vavilov* as requiring that the words of a statute be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" and with regard to "the text, context and purpose" of the legislation.

[2019 SCC 65](#) at para. 117-8; see also [Auditor General of Ontario v. Laurentian University of Sudbury, 2022 ONSC 109](#) at paras. 19, 71 (per Morawetz C.J.O.).

46. In other words, this application needs to be decided on the wording of the CUCPA, which is a comprehensive statute governing all aspects of credit unions in Ontario, including their incorporation, operation, and dissolution and winding up. The Administrator respectfully submits that the circumstances in which a court-ordered wind up may be granted under the CUCPA are

clearly defined, and that the Credit Union satisfies two such criteria by virtue of having sold its operating business to Alterna.

47. In regards to the latter, Canadian courts have provided guidance regarding the winding up provisions of Canadian corporate statutes, which contemplate the making of a winding up order where it is just and equitable as in section 240(1)(d) of the CUCPA.⁹ Such courts have determined that, while the “just and equitable” grounds cannot be limited or defined in an exhaustive manner, it will be just and equitable to wind up a corporation when the substratum of the company no longer exists such that it is impossible for the company to carry on the business for which it was formed. Given this, the Winding Up Order sought herein is consistent with the body of Canadian law addressing the wind up of a corporation in a “loss of substratum” scenario.

See e.g. [Ontario’s Business Corporations Act, R.S.O. 1990, c. B.16, s. 207\(1\)\(b\)\(iv\)](#). See also [Hamilton Ideal Manufacturing Co. Limited, Rev \(1915\), 23 D.L.R. 640 \(Ont. S.C.\)](#); [Jury Gold Mine Development Co., Re, \[1928\] 4 D.L.R. 735 \(ONCA\)](#); [Dominion Steel Corp., Re, \[1927\] 4 D.L.R. 337 at 349 \(N.S. C.A.\)](#); [Columbia Gypsum Co., Re \(1958\), 17 D.L.R. \(2d\) 280 at 283-4 \(B.C.S.C.\)](#).

C. The Appointment of KMPG as Liquidator and Other Ancillary Relief is Reasonable and Appropriate

48. On an application under section 240 of the CUCPA, the court making the winding up order may: (a) appoint one or more persons as liquidator of the estate and effects of the credit union for the purpose of winding up its affairs and distributing its property; (b) at any time, fix the remuneration of the liquidator and the costs, charges, and expenses of the winding-up; and (c) make an interim or such other order as it considers appropriate.

CUCPA, s. 240(6)(d), (7), (8).

⁹ There appears to be no judicial interpretation of language similar to section 240(1)(c) of the CUCPA.

49. The Administrator nominates KPMG to serve as the court-appointed Liquidator of the Credit Union in these proceedings. KPMG is well-known for its expertise in complex commercial matters and liquidation proceedings and is an appropriate choice to serve in this capacity. FSRA believes that KPMG's engagement in respect of the Alterna Sale Process, Alterna Sale Transaction, CCE Sale Process, and CCE Sale Transaction and the background and experience gained in its financial advisory role regarding the Credit Union, its assets, undertakings, properties, liabilities, and claims will benefit the Credit Union, its stakeholders, and the Court if KPMG were appointed as Liquidator.

Rastan Affidavit, para. 85.

50. The proposed Liquidator has requested a charge on the remaining assets of the Credit Union to secure payment of its reasonable fees and expenses and those of its counsel, in each case at their standard rates and charges unless otherwise ordered by this Court on the passing of accounts (the "**Liquidator's Charge**"). The Liquidator's Charge is to rank in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any person, but subordinate in priority to validly perfected security interests existing as of the date of the Winding Up Order. The Administrator believes that the Liquidator's Charge is reasonable and appropriate in the circumstances of this case.

Rastan Affidavit, para. 86.

51. The proposed Liquidator may have to borrow monies for the purpose of funding the exercise of its powers and duties related to the winding-up of the Credit Union. For this reason, the Applicant is seeking an Order (a) empowering the Liquidator to borrow such monies, provided that the outstanding principal amount does not exceed \$3,000,000.00 and (b) granting a fixed and specific charge on the remaining assets of the Credit Union as security for the payments of the

monies borrowed, together with interest and charges thereon (the “**Liquidator’s Borrowings Charge**”). Pursuant to the terms of the Winding Up Order, the Liquidator shall not borrow any monies during the first 15 days following the date of the Order, unless approved by further order of this Court. The Liquidator’s Borrowings Charge is to rank in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any person, but subordinate in priority to the Liquidator’s Charge. The Administrator believes that the Liquidator’s Borrowings Charge is reasonable and appropriate in the circumstances of this case.

Rastan Affidavit, para. 87.

D. FSRA’s Authority

52. The Chief Executive Officer of FSRA ordered that the Credit Union be subject to administration pursuant to the provisions of the CUCPA. Pursuant to the Administration Orders, the Administrator was granted and has retained the authority to, among other things, exercise the powers of the Credit Union for matters outside of the ordinary course of business, and of the directors, officers, and committees. Accordingly, the Administrator has the authority to cause the Credit Union to bring this application to the Court seeking an order winding-up the Credit Union under the provisions of the CUCPA.

Rastan Affidavit, para. 82 and Exhibit “E” (Fourth Administration Order at para. 3(a): “The Administrator shall continue to retain the authority to [...] [e]xercise the powers of the Credit Union for matters outside the ordinary course of business, and of the directors, officers and committees”).

PART V - ORDER REQUESTED

53. For the reasons stated herein, the Applicant respectfully requests that this Court grant the Winding Up Order which provides for, among other things, the following relief:

- (a) winding up the Credit Union;

- (b) appointing KPMG as liquidator, without security, of all of the remaining assets, undertakings, and properties of the Credit Union following completion of the Alterna Sale Transaction;
- (c) approving the Liquidator Nomination Agreement between FSRA and KPMG;
- (d) granting and approving the Liquidator's Charge;
- (e) granting and approving the Liquidator's power to borrow funds;
- (f) granting and approving the Liquidator's Borrowings Charge; and
- (g) such further and other relief as counsel may advise and this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of August, 2022.

FASKEN MARTINEAU DuMOULIN LLP

Per: 

Lawyers for the Administrator of the Applicant

SCHEDULE A
LIST OF AUTHORITIES

1. [*Canada \(Minister of Citizenship and Immigration\) v. Vavilov*, 2019 SCC 65, \[2019\] 4 S.C.R. 653](#)
2. [*Auditor General of Ontario v. Laurentian University of Sudbury*, 2022 ONSC 109](#)
3. [*Hamilton Ideal Manufacturing Co. Limited, Rev* \(1915\), 23 D.L.R. 640 \(Ont. S.C.\)](#)
4. [*Jury Gold Mine Development Co., Re*, \[1928\] 4 D.L.R. 735 \(ONCA\)](#)
5. [*Dominion Steel Corp., Re*, \[1927\] 4 D.L.R. 337 at 349 \(N.S. C.A.\)](#)
6. [*Columbia Gypsum Co., Re*, 17 D.L.R. \(2d\) 280 at 283-4 \(B.C.S.C.\)](#)

SCHEDULE B
TEXT OF STATUTES, REGULATIONS & BY - LAWS

Credit Unions and Caisses Populaires Act, 2020
S.O. 2020, CHAPTER 36
SCHEDULE 7

Objects

23 (1) The object of a credit union is to provide on a co-operative basis financial services primarily for its members.

[...]

Winding up by court order

240 (1) A credit union may be wound up by order of the court if,

(a) the members, by a special resolution passed at a general meeting called for that purpose, authorize an application to be made to the court to wind up the credit union;

(b) proceedings have been started to wind up the credit union voluntarily and 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;

(c) it is proved to the satisfaction of the court that the credit union, 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) in the opinion of the court it is just and equitable for some reason other than the bankruptcy or insolvency of the credit union that it should be wound up.

If more than one class of shares

(2) If the credit union has more than one class of issued shares, the special resolution referred to in clause (1) (a) shall be in the form of a special resolution passed by the holders of each class of shares.

Applicants

(3) A winding-up order may be made upon the application of,

(a) the credit union;

(b) if the credit union is being wound up voluntarily, the liquidator or a contributor; or

(c) the Chief Executive Officer.

Notice to credit union

(4) Except if the application is made by the credit union, four days notice of the application must be given to the credit union.

Notice to Chief Executive Officer

(5) Except if the application is made by the Chief Executive Officer, four days notice of the application must be given to the Chief Executive Officer.

Power of court

(6) The court may,

(a) make the order applied for;

(b) dismiss the application with or without costs;

(c) adjourn the hearing conditionally or unconditionally;

(d) make an interim or such other order as it considers appropriate; or

(e) refer the proceedings for the winding-up to an officer of the court for inquiry and report and authorize the officer to exercise such powers of the court as are necessary for the reference.

Appointment of liquidator

(7) The court making the winding-up order may appoint one or more persons as liquidator of the estate and effects of the credit union for the purpose of winding up its affairs and distributing its property.

Remuneration

(8) The court may at any time fix the remuneration of the liquidator and the costs, charges and expenses of the winding-up.

Vacancy

(9) If a liquidator who is appointed by the court dies or resigns or the office becomes vacant for any reason, the court may fill the vacancy.

Removal

(10) The court may, by order for cause, remove a liquidator appointed by it and appoint another liquidator in the stead of the removed liquidator.

Notice of court order

(11) A liquidator appointed by the court shall give notice to the Chief Executive Officer of the court order respecting the winding up promptly after the liquidator's appointment.

Notice of appointment

(12) The Chief Executive Officer shall publish a notice of the liquidator's appointment on the website of the Authority.

Proceedings in winding-up after order

(13) If a winding-up order has been made by the court, proceedings for the winding up of the credit union must be taken in the same manner and with the like consequences as are provided for a voluntary winding-up, except that,

(a) the list of contributories shall be settled by the court unless it has been settled by the liquidator before the winding-up order; and

(b) all proceedings in the winding-up are subject to the order and direction of the court.

Review by court

(14) If the list of contributories has been settled by the liquidator before the winding-up order, it is subject to review by the court.

Meeting of members may be ordered

(15) If a winding-up order has been made by the court, the court may direct meetings of the members of the credit union to be called, held and conducted in such manner as the court thinks fit for the purpose of ascertaining their wishes, and may appoint a person to act as chair of the meeting and to report the results of it to the court.

Order for delivery of property

(16) If a winding-up order has been made by the court, the court may require any contributory for the time being settled on the list of contributories, or any director, employee, trustee, receiver, banker, agent or officer of the credit union, to pay, deliver, convey, surrender or transfer promptly, or within such time as the court directs, to the liquidator any money, record, document, estate or effects that are in any such person's hands and to which the credit union is apparently entitled.

Inspection of documents and records

(17) If a winding-up order is made by the court, the court may make an order for the inspection of the records and documents of the credit union by its creditors and contributories, and any records and documents in the possession of the credit union may be inspected in conformity with the order.

No proceedings against credit union without leave

(18) After a winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the credit union, except with the leave of the court and subject to such terms as the court imposes.

Attachments, etc., void

(19) Every attachment, sequestration, distress or execution put in force against the estate or effects of a credit union after a winding-up order is made is void.

Provision for discharge of liquidator and distribution by the court

(20) If the realization and distribution of the property of a credit union being wound up under an order of the court has proceeded so far that, in the opinion of the court it is expedient that the liquidator should be discharged and that the property of the credit union remaining in the liquidator's hands can be better realized and distributed by the court, the court may make an order discharging the liquidator and for payment, delivery and transfer into court, or to such officer or person as the court directs, of such property, and it shall be realized and distributed by or under the direction of the court among the persons entitled thereto in the same way as nearly as may be as if the distribution were being made by the liquidator and the court may make an order directing how the documents and records of the credit union and of the liquidator are to be disposed of, and may order that they be deposited in court or otherwise dealt with as the court considers appropriate.

Order for dissolution

(21) The court at any time after the affairs of the credit union have been fully wound up may, upon the application of the liquidator or any other interested person, make an order dissolving it, and it is dissolved on the date fixed in the order.

Notice to Chief Executive Officer

(22) The person on whose application the order was made shall, within 10 days after it was made, file with the Chief Executive Officer a certified copy of the order and the Chief Executive Officer shall publish notice of the dissolution on the website of the Authority.

Business Corporations Act
R.S.O. 1990, CHAPTER B.16

Winding up by court

207 (1) A corporation may be wound up by order of the court,

(a) where the court is satisfied that in respect of the corporation or any of its affiliates,

(i) any act or omission of the corporation or any of its affiliates effects a result,

(ii) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(iii) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer; or

(b) where the court is satisfied that,

(i) a unanimous shareholder agreement entitled a complaining shareholder to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred,

(ii) proceedings have been begun to wind up voluntarily and it is in the interest of contributories and creditors that the proceedings should be continued under the supervision of the court,

(iii) the corporation, though it may not be insolvent, cannot by reason of its liabilities continue its business and it is advisable to wind it up, or

(iv) it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up; or

(c) where the shareholders by special resolution authorize an application to be made to the court to wind up the corporation.

IN THE MATTER OF THE *CREDIT UNIONS AND CAISSES POPULAIRES ACT*, 2020, S.O. 2020, C. 36, SCHED. 7, AS AMENDED
AND IN THE MATTER OF PACE SAVINGS & CREDIT UNION LIMITED
APPLICATION OF PACE SAVINGS & CREDIT UNION LIMITED UNDER SECTION 240 OF THE *CREDIT UNIONS AND CAISSES POPULAIRES ACT*, 2020, S.O. 2020, C. 36, SCHED. 7, AS AMENDED

Court File No. CV-22-00685736-00CL

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

**Proceeding commenced at
Toronto**

**FACTUM OF THE APPLICANT
(WINDING UP & APPOINTING LIQUIDATOR)**

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