Court File Number: CV 16-11582-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PERFORMANCE SPORTS GROUP LTD., BAUER HOCKEY CORP., BAUER HOCKEY RETAIL CORP., BAUER PERFORMANCE SPORTS UNIFORMS CORP., BPS CANADA INTERMEDIATE CORP., BPS DIAMOND SPORTS CORP., EASTON BASEBALL/SOFTBALL CORP., KBAU HOLDINGS CANADA INC., PERFORMANCE LACROSSE GROUP CORP., PSG INNOVATION CORP., BAUER HOCKEY RETAIL INC., BAUER HOCKEY, INC., BAUER PERFORMANCE SPORTS UNIFORMS INC., BPS DIAMOND SPORTS INC., BPS US HOLDINGS INC., EASTON BASEBALL/SOFTBALL INC., PERFORMANCE LACROSSE GROUP INC., PSG INNOVATION INC.

(Applicants)

FACTUM OF Q30 SPORTS, LLC, Q30 SPORTS SCIENCE, LLC, BRUCE ANGUS AND THOMAS HOEY

(Returnable February 6, 2017)
(Re: Objection to the Sale Motion and the Proposed Assumption and Assignment of the Q30 Agreements)

February 4, 2017

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I. OVERVIEW

1. Q30 Sports, LLC ("**Q30 Sports**"), Q30 Sports Science, LLC ("**Q30 Parent**", together with Q30 Sports, "**Q30**"), both Delaware limited liability companies, Bruce Angus ("**Mr. Angus**") and Thomas Hoey ("**Mr. Hoey**" together with Q30 and Mr. Angus, the "**Q30 Respondents**"), object to the assignment of the Q30 Agreements (as defined below).

2. When Q30 entered into its License Agreement, it granted a perpetual, exclusive world-wide license to its innovative Q30 Technology with a partner that Q30 believed: (a) had a well-established, broad sports platform which platform would be expanding into additional sports (such as football); (b) was financially viable; (c) had an executive team experienced in the medical device and regulatory areas; and (d) was motivated and committed to seek and obtain regulatory approval for and commercialize the Q30 Technology.

3. Now, however, Q30 finds itself partnered with an insolvent entity that has failed to perform its obligations under the License Agreement over the last 15 months, has lost its one executive who had any true medical device expertise, and does not have the relevant regulatory experience necessary to navigate the regulatory approval process in the various target markets. The proposed assignment to the Purchaser, an entity formed by a number of financial investors that has made no assurances it has the subject matter expertise needed to perform under the License Agreement provides Q30 little reason for optimism looking ahead. In fact, what the Purchaser has said is that it plans to retain existing management to implement a "go forward plan" the details of which have not been provided to Q30.

4. Q30 has made detailed and thoughtful requests for applicable Performance Information (defined below). However, based on the actions of PSG over the last 15 months and the bare bones assurances sent to Q30 in the 11th hour, which were completely non-responsive to Q30's specific request for assurances from the Purchaser, Q30 is simply not going to receive the benefit of the bargain it struck with PSG in October 2015. The Q30 Respondents cannot be reasonably expected to consent to the assignment of the Q30 Agreements, nor should the Court force such assignment upon the Q30 Respondents.

5. As set out in more detail herein:

   a. License Agreement & Trademark Agreement: PSG is in breach of its obligations to perform under the License Agreement. These breaches are ongoing, non-monetary and cannot be cured. The Purchaser has provided no evidence or assurance that it will be able to perform where PSG has not and in fact, has said it plans to retain existing management to allow counterparties to "step into the shoes" of PSG, who has failed to perform in the first place. The Trademark Agreement is inextricably connected to the License Agreement. In these circumstances it is inappropriate for the Court to interfere with Q30's contractual right to withhold consent and grant the assignment order.

   b. IC Agreements. The IC Agreements with Mr. Angus and Mr. Hoey are clearly personal services agreements which, by their nature cannot be assigned. The Applicants have conceded this point in the Chapter 11 Proceedings but are inexplicably still requesting an assignment order in the CCAA Proceedings.

c. Equity Agreement. The Equity Agreement has been fully performed. There are no ongoing rights or obligations left to be assigned.[1]

II. FACTS

6. On October 31, 2016 Performance Sports Group Ltd., PSG Innovation Corp. ("**PSG Innovation**") and certain other related companies (the "**Applicants**" or "**PSG**") sought and obtained an Order of this Court providing creditor protection under the CCAA (the "**CCAA Proceedings**"). On the same date, all of the Applicants, including PSG Innovation, also filed petitions pursuant to Chapter 11 Title 11 of the United States Code (the "**Chapter 11 Proceedings"**).

7. At the time of the filing, the Applicants announced that they had entered into a stalking horse agreement (the "**Sale Agreement**") with 9938982 Canada Inc. (the "**Purchaser**"), a newly formed entity controlled by a group of investors led by Sagard Capital Partners L.P. and Fairfax Financial Holdings Limited (the "**Investor Group**"). The former, a private equity firm, is a significant shareholder in PSG. On November 30, 2016, certain bidding procedures orders were granted by this Court and the United States Court for the District of Delaware (the "**U.S. Court**"). No subsequent bids were received and the Applicants are now seeking approval of the Sale Agreement in both the CCAA Proceedings and the Chapter 11 Proceedings.

8. In connection with the approval of the Sale Agreement, the Applicants are seeking orders assigning the Q30 Agreements (defined below) to the Purchaser pursuant to Section 11.3 of the CCAA and Section 365 of United States Code.[2]

Q30

9. Q30 is a dynamic research and development company dedicated to developing innovative products to reduce traumatic brain injury.[3] Since its founding in August 2012, Q30 has

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[1] PSG's reply in the Chapter 11 Proceedings implied that they may be looking to assign the membership interests themselves, not assign the Equity Agreement.

[2] Despite the provision of the U.S. Bidding Procedures Order outlining the jurisdiction for adjudication of Contract Objections, the Applicants have taken the position that all Contracts must be assigned pursuant to Orders of both this Court and the U.S. Court. Each Court, however, is entitled to seek the advice and direction of the other Court on matters or law relating to the other jurisdiction (Amended and Restated Initial Order, Schedule 1, paragraph 14) (Brief of Authorities of Q30 ("**Q30 BOA**"), Tab 1).

invested heavily in creating a robust patent portfolio. Its principal focus is on the development of a commercially viable medical device known as the "Q-Collar" to protect athletes from traumatic brain injury caused by head impacts.[4] The potential significance of this technology is undisputed.

10. The development of the Q30 Technology and the Q-Collar is the sole focus of Q-30's business. The Q-Collar is an incredibly unique and novel approach that has the potential to be used for immense public good. The device reduces the ability of the brain to "slosh" inside the head by applying a specific amount of pressure to the muscles surrounding the inner jugular veins that slightly increases the blood volume within the venous structures inside the head, thereby creating a tighter fit of the brain inside the cranium.[5] Nothing like it has ever existed to provide real brain injury protection to athletes engaged in contact sports, including un-helmeted sports, and the Q-Collar has the capability of changing the sporting landscape worldwide.[6]

Partnership with PSG

11. In late 2014, Q30 decided that it should partner with a well-established sports equipment or medical device company to speed the commercialization of the Q-Collar. Q30 expected that such a company would provide manufacturing, marketing, distribution and regulatory expertise, as well as sufficient capital, management commitment and brand recognition to accelerate the worldwide commercialization and use of the patented technology.[7]

12. During conversations with PSG from January through May 2015, including with its then-CEO Kevin Davis and other high level executives, PSG indicated, in no uncertain terms, that it was in a position to be the strategic partner that Q30 was looking for.[8]

13. Mr. Davis had more than five years' experience as an executive at medical device companies, including Boston Scientific, which gave him valuable insight and knowledge concerning the medical device approval process. Mr. Davis also had more than ten years in senior management

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[3] Affidavit of Bruce Angus, sworn January 25, 2017 ("**Angus Affidavit**") para 3 (Objection of Q30 Sports, LLC, Q30 Sports Science, LLC, Brian Angus and Thomas Hoey filed January 25, 2017 (the "**Q30 Objection**"), Tab 2). Capitalized terms used herein and not otherwise defined have the meaning given to them in the Q30 Objection.
[4] Angus Affidavit, para 4 (Q30 Objection, Tab 2).
[5] Affidavit of Dr. Julian E. Bailes, sworn January 24, 2017 ("**Bailes Affidavit**") para 4 (Q30 Objection, Tab 3).
[6] Bailes Affidavit, paras 4 and 5 (Q30 Objection, Tab 3).
[7] Angus Affidavit, para 5 (Q30 Objection, Tab 2).
[8] Angus Affidavit, para 6 (Q30 Objection, Tab 2).

of PSG/Bauer Hockey. As Mr. Davis indicated to Q30 repeatedly, PSG was a multi-sport, multi-brand public company, with substantial good will, access to working capital in excess of $100 million with growing revenue and profits, and a robust market capitalization that would be able to support the rapid worldwide commercialization of the Q30 technology to protect athletes. This economic vitality combined with its operational resources were essential considerations for Q30's decision to partner with PSG.[9]

14. To solidify the partnership, Q30 and its founders, Mr. Angus and Mr. Hoey, entered into a series of agreements:

a. License Agreement: On October 15, 2015 (the "**Effective Date**"), PSG Innovation and Q30 entered into an Exclusive License Agreement (the "**License Agreement**"), through which Q30 granted to PSG Innovation, subject to various rights expressly retained by Q30 as licensor, an ***exclusive, perpetual worldwide license*** under Q30's right in the Q30 Technology to use, make, have made, sell, offer for sale, import, export, market, advertise, promote and otherwise to commercialize products and ancillary products within the Field of Use.[10] Virtually all of the patents licensed pursuant to the License Agreement are U.S. patents and subject to U.S. federal patent law.

b. Trademark Agreement. In conjunction with the License Agreement, Q30 and PSG entered into a Trademark License Agreement dated as of the Effective Date (the "**Trademark Agreement"**). Pursuant to the Trademark Agreement, Q30 licensed to PSG the Trademarks (as defined in the Trademark Agreement) to enable PSG to brand the Products and Ancillary Products in the Field of Use with brands and marks owned by Q30.[11]

c. IC Agreements. Also on the Effective Date, Mr. Angus and Mr. Hoey separately entered into Independent Contract Agreements with PSG (the "**IC Agreements**"),

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[9] Angus Affidavit, para 6 (Q30 Objection, Tab 2).
[10] Exclusive License Agreement, Exhibit "A" to the Angus Affidavit ("**License Agreement**") (Q30 Objection, Tab 2A).
[11] Angus Affidavit, para 14 (Q3 Objection, Tab 2); Trademark License Agreement, Exhibit "B" to the Angus Affidavit ("**Trademark Agreement**") (Q30 Objection, Tab 2B).

pursuant to which they agreed to provide PSG advice and services in connection with the Products in exchange for stock options in PSG.[12]

d. Equity Agreement. Finally, simultaneously with the execution of the License Agreement, PSG and Q30 entered into a Membership Interest Purchase Agreement (the "**Equity Agreement**").[13] In exchange for a one million dollar investment by PSG in Q30 Parent, PSG received a membership interest in Q30 Parent of approximately 1.3%.[14]

15. The License Agreement, Trademark Agreement, IC Agreements and Equity Agreement are collectively referred to herein as the "Q30 Agreements". The License Agreement, Trademark Agreement and IC Agreements are governed by New York State law. The Equity Agreement is governed by Delaware law.[15]

16. Pursuant to the terms of the License Agreement, PSG has the responsibility for obtaining necessary regulatory approvals in connection with the commercialization of the Q30 Technology. PSG was obligated to make commercially reasonable efforts to commercialize the Q30 Technology within one (1) year of receiving Regulatory Approval in a Market (but only to the extent such approval was required).[16] To the extent Regulatory Approval was not required within a particular Market, the expectation was that PSG would make good faith, commercially reasonable effort to begin commercialization in such Market as soon as practicable and, in no event, no later than one (1) year after such determination was made.[17]

17. After entering into the Q30 Agreements, PSG's CEO stated that the Q-Collar would launch in Canada in November 2016, followed by a launch in Europe and then in Australia. The commercial launch in the United States was uncertain given the more extensive regulatory requirements of the US Food and Drug Administration ("**FDA**").[18]

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[12] Angus Affidavit, para 15 (Q30 Objection, Tab 2).
[13] Angus Affidavit, para 16 (Q30 Objection, Tab 2); Membership Interest Purchase Agreement, Exhibit "E" to the Angus Affidavit ("**Equity Agreement**") (Q30 Objection, Tab 2E).
[14] Angus Affidavit, para 16 (Q30 Objection, Tab 2).
[15] License Agreement, section 13.9 (Q30 Objection, Tab 2A); Trademark Agreement, section 13.4 (Q30 Objection, Tab 2B); IC Agreements, section 11 (Q30 Objection, Tabs 2C and 2D); Equity Agreement, section 8 (Q30 Objection, Tab 2E).
[16] License Agreement, section 4.2.6 (Q30 Objection, Tab 2A).
[17] Angus Affidavit, para 10 (Q30 Objection, Tab 2).
[18] Angus Affidavit, para 17 (Q30 Objection, Tab 2).

18. Unfortunately, none of these predictions have materialized. Instead, PSG has now breached a number of its obligations under the License Agreement and failed to perform its obligations:

a. Canadian Market. In November 2015, Health Canada approved the Q-Collar as a Class 1 medical device and, in fact, Q30 Sports Canada, Inc., a subsidiary of Q30 Parent, received its "Medical Device Establishment License" in Canada on August 14, 2014 that provided authorization to sell in Canada. Despite such Regulatory Approval, PSG indicated that, instead of launching Products in Canada, it wanted Health Canada to engage in a pre-marketing review process that well-exceeded the normal regulatory process in Canada and for which there is no precedent. In doing so, PSG committed to submitting documentation supporting its marketing claims. As of January 25, 2017, it had been over fourteen months since PSG made its commitment to Health Canada, and no substantive submission has been made.[19] As a result, no Products have been launched, and PSG had indicated that it did not plan to launch the Q-Collar until June 2017.[20] Now, despite repeated assurances for a June launch, Q30 learned for the first time on February 3, 2017 at the deposition of Jamie Eno that they expect the launch to be August 4, 2017. Even this target launch date appears dubious as it appears that only 20,000 Q-Collars have been ordered from Q30's manufacturer, which order cannot even be shipped from the United States to Canada until at least mid-August.[21]

b. U.S. Market. PSG has made virtually no attempt to obtain regulatory approval in the U.S. market and has had limited engagement with regulatory authorities. In fact, it was Q30 that ended up commencing the regulatory review process with the FDA. From the Effective Date until September 2016, PSG had no communication with the FDA, despite Q30 having previously initiated the regulatory review process. Eventually in September 2016, at the persistent insistence of Q30, PSG submitted a "Study Risk Determination" request letter with the FDA which received a positive response from the FDA on December 28, 2016. [22]

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[19] Angus Affidavit, para 19 (Q30 Objection, Tab 2).
[20] Angus Affidavit, para 21 (Q30 Objection, Tab 2).
[21] Angus Affidavit, paras 19 and 21 (Q30 Objection, Tab 2).
[22] Angus Affidavit, para 18 (Q30 Objection, Tab 2).

c. Other Markets. To Q30's knowledge, no other efforts to engage any regulatory body in Europe or to commercialize in Australia (where the Q-Collar is exempt from medical device regulation) have been made by PSG.[23]

19. Any production of the Q-Collar by PSG (or the Purchaser) at this point is entirely questionable. PSG does not have its own production tooling and only ordered their tooling in October 2016. PSG has no long term supply agreement with the only manufacturer in the world that is currently capable and certified to make the Q-Collar. Lastly, to Q30's knowledge, PSG has not finalized the manufacturing process, testing, packaging, labeling or marketing plans for the Canadian launch.[24]

PSG Management

20. PSG has also undergone material changes at the executive level. In March 2016, shortly after certain questions regarding accounting irregularities arose, Mr. Davis abruptly departed from PSG. With Mr. Davis' departure, there was no one at the executive level who had any medical device expertise. Subsequently, PSG hired Harlan Kent who is PSG's current CEO. Mr. Kent has no sports equipment nor medical device experience.[25] As Mr. Kent himself has declared, his most recent experience has been with Yankee Candle and Alex and Ani, a jewelry producer. None of his previous experience relates in any way to medical devices.[26]

21. Q30 believes that the Q-Collar project has been led on the PSG end by Jamie Eno. Mr. Eno is a certified public accountant who does not have the operational, marketing or distribution experience to launch a new sports equipment or medical device. Mr. Eno further does not have any relevant regulatory experience. Recently, PSG hired Susan Burnley to assume regulatory responsibility. Ms. Burnley has experience as a director of marketing at medical device companies but no experience guiding a regulatory approval process.[27]

[23] Angus Affidavit, para 20 (Q30 Objection, Tab 2).
[24] Angus Affidavit, para 22 (Q30 Objection, Tab 2).
[25] Angus Affidavit, para 23 (Q30 Objection, Tab 2).
[26] Declaration of Harlan Kent, February 1, 2017, paras 2-4 (Compendium of Applicants' U.S. Materials, Tab 3).
[27] Angus Affidavit, paras 24 and 25 (Q30 Objection, Tab 2).

22. Q30's concerns about the lack of regulatory expertise is heightened by the fact that the contract with PSG's regulatory consultant, RavenOye Group, does not appear to be on the list of contracts to be assigned as part of the sale.[28]

III. LAW AND ARGUMENT

23. The Applicants have brought motions in both the U.S. Court and the Canadian Court for approval of the Sale Agreement to the Purchaser. The sole issue, as it relates to Q30, is whether it is appropriate for the Q30 Agreements to be assigned to the Purchaser absent consent of Q30.

24. Section 11.3(1) of the CCAA provides:

> On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the ***rights and obligations of the company*** under the agreement to any person who is specified by the court and agrees to the assignment. [emphasis added]

25. Section 11.3(3) of the CCAA sets out a non-exclusive list of factors to be considered by the Court in whether to approve the assignment of such rights and obligations as follows:

   a. whether the monitor approved the proposed assignment;

   b. whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

   c. whether it would be appropriate to assign the rights and obligations to that person.

26. The ability to assign is restricted by Sections 11.3(2) and (4) of the CCAA.

   a. Section 11.3(2) of the CCAA provides, among other things, that agreements which cannot be assigned by reason of their nature cannot be assigned under Section 11.3(1).

   b. Section 11.3(4) of the CCAA further restricts the ability of the Court to make an order assigning contracts in that it may not make an order assigning a contract unless it is satisfied that all monetary defaults - other than those arising by reason only of the company's insolvency, the commencement of the proceedings under the CCAA or the

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[28] Angus Affidavit, para 26 (Q30 Objection, Tab 2).

company's failure to perform a non-monetary obligation - will be remedied on or before the day fixed by the Court.

(A) The Purchaser failed to provide sufficient evidence it will be able to perform the obligations it intends to assume

27. In order to determine whether a purchaser has provided sufficient evidence that it can perform the obligations under a contract, the nature of those obligations should be considered. In this case, whether the Purchaser can perform under the License Agreement is not just a matter of receiving the Purchaser's balance sheet. The technology behind the Q-Collar is complex, revolutionary and unique. Q30 partnered with PSG because of the latter's represented ability to leverage its capital and expertise to promptly and effectively commercialize the Q-Collar and obtain necessary Regulatory Approvals. PSG's non-monetary obligations under the License Agreement are extensive and require not only a significant capital investment but also expertise including in seeking and obtaining regulatory approvals for medical devices.

28. The Purchaser is a financial buyer formed by the Investor Group which includes a major equity holder of PSG. The Purchaser has provided virtually no information (other than basic financial information) as to its ability to perform under the License Agreement. In particular, at the time of the filing of the Q30 Objection, PSG has failed to provide, among other things: (a) even a rudimentary business plan; (b) any information on who will actually be managing the day-to-day operation of the business and its various divisions, and whether they will have the necessary expertise and experience to perform under the License Agreement; (c) information regarding the company's commitment to the rollout schedule and pursuing various Markets; (d) any forward-looking budget, or sources and uses of capital, for operation of the business and how it relates to the licensee's obligations under the License Agreement; (e) any analysis of the assets, liabilities, and leverage of the business acquisition; or (f) any discussion or evidence regarding whether the Purchaser is purchasing the business with the intent to run it long term, or simply with the intent to deleverage, cut expenses, and flip the business (collectively, "**Performance Information**"). This Performance Information was specifically requested by Q30 and never provided.

29. The Purchaser has now indicated that it intends to retain the existing senior management of PSG on a go forward basis and that they have "developed a go-forward plan" for the Q-Collar project.[29] No further details regarding the "go-forward plan" have been provided. Q30 does not have confidence in the existing management, who have relatively little experience with medical devices or regulatory experience.[30] This vague statement cannot be considered adequate assurance that the Purchaser will be able to perform post-closing.

30. The failure of existing management to perform under the License Agreement is what gives rise to the non-monetary breaches under the License Agreement. The statement that the Purchaser will be "stepping into the shoes" of and be performing obligations "in the same manner" as PSG is precisely what is troubling to Q30. Q30 has no assurance that, post-closing, anything will change and, in fact, given the lack of regulatory expertise, necessary production equipment or long term manufacturing agreements, there is serious doubt as to whether the Purchaser can perform its obligations under the License Agreement.

(B) It is not appropriate to assign the License Agreement and Trademark Agreement

31. In determining whether it is appropriate to force the assignment of a contract against the wishes of the counterparty, the Court should:

   a. be cognizant of all of the various interests at stake, including those who do business with the debtor;[31]

   b. consider whether the assignment meets the "twin goals" of "assisting the reorganization process…while also treating a counterparty fairly and equitable"; [32] and

   c. only interfere with the contractual rights of the parties sparingly, where it is important to and only to the extent necessary to facilitate the reorganization process and where such

[29] Declaration of Neil Augustine, February 1, 2017, para 10 (Compendium of Applicants' U.S. Materials, Tab 5).
[30] Angus Affidavit, paras 24-26 (Q30 Objection, Tab 2).
[31] *Primus Telecommunications Canada Inc., Re*, 2016 ONSC 5251, ["***Primus***"] at para 36 (Q30 BOA, Tab 2).
[32] *Veris Gold Corp., Re* 2015 BCSC 1204 ["***Veris***"] at para 58 (Book of Authorities of the Applicant ("**Applicants' BOA**"), Tab 6); *Primus*, at para 38 (Q30 BOA, Tab 2).

interference does not "entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party".[33]

32. It is not appropriate to assign the License Agreement given:

a. the assignment would interfere with Q30's contractual rights including to withhold consent and potentially eliminate any rights Q30 has as a result of PSG's breaches;

b. the impact of the assignment, absent further assurances of the Purchaser would directly and severely impact Q30's business; and

c. there is not sufficient evidence that the Purchaser will be able to perform its obligations and, in fact, given the intention of the Purchaser (a newly incorporated vehicle owned by financial backers, not industry participants) to retain existing management post-closing, there is serious grounds for concern that there will be an ongoing failure to perform.

33. Given the connection of the Trademark Agreement to the License Agreement, it is similarly not appropriate for the Trademark Agreement to be assigned.

<u>(i) Q30 has not unreasonably withheld its consent</u>

34. Prior to the enactment in 2009 of Section 11.3 of the CCAA, it was generally accepted that where a contract required consent to assignment, that consent had to be obtained except in rare circumstances.[34] While there is no explicit requirement to obtain consent under s. 11.3, courts have suggested that the enactment of this section to some extent merely codified the common law.[35] The CCAA, itself, is skeletal in nature and is designed to provide a framework for reorganization rather than a complete code.[36] As such, Section 11.3 should not be read in a vacuum without consideration of the common law and contractual rights of the parties.[37]

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[33] *Nexient Learning Inc., Re*, 2009 CarswellOnt 8071 (Ont SCJ) at para 59 (Applicants' BOA, Tab 17).
[34] *Ford Credit Canada Ltd v Welcome Ford Sales Ltd.*, 2011 ABCA 158 at para 37 (with respect to the BIA counterpart section to 11.3 of the CCAA) (Applicants' BOA, Tab 15).
[35] *Veris*, para 56 (Applicants' BOA, Tab 6); *Barafield Realty Ltd. v Just Energy (B.C. Limited Partnership)*, 2015 BCCA 421, at para 35 (Q30 BOA, Tab 3).
[36] *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at para 44 (Q30 BOA, Tab 4).
[37] *Primus*, at para 51 (Q30 BOA, Tab 2).

35. It is clear that even subsequent to the amendments, whether or not a third party consents to the assignment remains an important factor for a court to consider.[38]

36. The License Agreement and Trademark Agreement contain nearly identical assignment provisions, both of which state that the express written consent of the counterparty to a proposed assignment is required, which consent shall not be "unreasonably withheld, delayed or conditioned."[39] New York State law governs the License Agreement and Trademark Agreement and it is the law of the contract that governs the vast majority of the substantive issues relating to the validity, interpretation, performance and discharge of the contract.[40] This Court is entitled to seek the advice and direction of the U.S. Court if it so chooses on matters pertaining to U.S. law.[41]

37. It may still be a relevant factor to this Court in determining whether an assignment is appropriate whether consent has been reasonably withheld under Canadian law. In Canada, in order to determine whether a counterparty's withholding of consent has been unreasonable, the Court has applied the following test:

   a. The burden is on the party seeking consent to demonstrate that the refusal to consent was unreasonable. The question is not whether a reasonable person might have given consent; it is whether a reasonable person could have withheld consent;
   b. Information available to the party refusing consent at the time of the refusal is relevant to the determination of reasonableness, not any subsequent facts or reasons;
   c. A refusal will be unreasonable if it was designed to achieve a collateral purpose wholly unconnected with the bargain reflected in the terms of the agreement;
   d. A probability that the proposed assignee will default in its obligations may be a reasonable ground for withholding consent;
   e. The financial position of the assignee may be a relevant consideration; and

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[38] See for example *Hayes Forest Services Ltd., Re*, 2009 BCSC 1169 [*"**Hayes**"*], (Q30 BOA, Tab 5) where the Court found that the counterparty's consent was unreasonably withheld but still devoted a large part of the decision to the consent analysis.
[39] License Agreement, s. 13.5 (Q30 Objection, Tab 2A); Trademark Agreement, s. 11 (Q30 Objection, Tab 2B).
[40] *Pope and Talbot Ltd., Re*, 2009 BCSC 1552 at para 33 (Q30 BOA, Tab 6); Janet Walker & Jean-Gabriel Castel, *Castel & Walker: Canadian Conflict of Laws*, 6th ed, loose-leaf (consulted on February 3, 2017), (Markham: LexisNexis, 2005), ch 31 at para 31.5 (Q30 BOA, Tab 7)
[41] Amended and Restated Initial Order, Schedule 1, para 14 (Q30 BOA, Tab 1)

f. The question of reasonableness is essentially one of fact that must be determined on the circumstances of the particular case.[42]

38. Canadian Courts have also determined that the commercial realities of the marketplace and the economic impact of the assignment on the counterparty are important factors.[43] In *Exxonmobil Canada Energy v Novagas Canada Ltd.*, the Court found consent to be reasonably withheld and stressed the counterparty's "real and reasonable issues" that it had to consider in its assessment of the assignee as a future partner. The Court stated that the considerations by the counterparty were simply "the same considerations that [the counterparty] considered in its decision to enter the Agreement with the financially solvent [debtor]", and that the very reason for the consent requirement was to allow the counterparty to assess the suitability of any future contractual partners.[44]

39. Unlike many ordinary commercial contracts, the License Agreement is a true partnering of interests, the importance of which cannot be overstated and a central reason why it is so important for Q30 to ensure that it is working with the right counterparty. Additionally, the License Agreement is an exclusive, world-wide license of the Q30 Technology within its "field of use".[45] By its nature, only one such license can be given. Outside of the License Agreement, Q30 is restricted in how it can commercialize its technology. As such, the identity of its partner and licensee is crucial to Q30's own business and financial viability.

40. In that context, it is reasonable for Q30 to withhold its consent where:

a. PSG has failed to perform under the License Agreement in serious and material ways which cannot be remedied under the License Agreement and such failures directly and significantly impact Q30;

b. Q30 has not received sufficient Performance Information, including any meaningful response to Q30's diligence request on January 20, 2017, other than that the Purchaser

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[42] *1455202 Ontario Inc. v Welbow Holdings Ltd.*, 2003 CarswellOnt 1761 (Ont SCJ), at para 9 (Q30 BOA, Tab 8).
[43] *Hayes*, at para 32 (Q30 BOA, Tab 5).
[44] *Exxonmobil Canada Energy v Novagas Canada Ltd.*, 2002 ABQB 455 at para 54 (Q30 BOA, Tab 9).
[45] The "field of use" is "the use of Q30 Technology in order to reduce the risk for or severity of traumatic brain injury experienced by adults or children while engaged in sports, athletics, exercise activities or active play, but excluding, without limitation, (a) any use in the military ("Military Field"); (b) occupational uses (other than sports, athletics, exercise activities or active play); and (c) use for any medical or therapeutic purpose."

intends to retain existing management (the people who have failed to perform thus far) and implement a "go forward plan", the details of which have not been disclosed to Q30;

c. the lack of regulatory and medical device expertise at the executive level, production tooling, long term manufacturing contracts all indicate a likelihood that the Purchaser will continue to default under the License Agreement if assigned;

d. there is no collateral purpose in Q30 withholding its consent; although Q30 had originally proposed some non-monetary amendments, Mr. Angus has since confirmed that those amendments are no longer being requested; and

e. Q30 cannot be commercially reasonably be expected to provide an exclusive world-wide license for commercialization of a product where it has grounds to believe that there will be no meaningful ability or commitment to perform.

<u>(ii) There is no evidence to show that the failure to assign the Q30 Agreements would outweigh the potential negative impact on Q30 if the assignment order is made</u>

41. The License Agreement and Trademark Agreement are only two of many contracts and assets to be assigned or sold under the Sale Agreement. There is no evidence as to the financial value the Purchaser places on the License Agreement. It has not said it would terminate if the License Agreement were terminated. On the other hand, Q30 has clearly demonstrated the commercial importance of the "right" partner who can achieve the goals that Q30 originally believed would be achieved by its relationship with PSG.

<u>(iii) The existing non-monetary breaches cannot be remedied, waived or cured</u>

42. As set out above, PSG has and continues to fail to perform many of its obligations under the License Agreement. Those breaches amount to non-monetary defaults which are ongoing and cannot be cured, which is a relevant consideration for whether it is appropriate to grant the assignment order.[46]

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[46] *Playdium Entertainment Corp., Re,* 2001 CarswellOnt 3893 at para 19 (Q30 BOA, Tab 10).

43. Section 11.3(4) of the CCAA is a restrictive section which restricts how the calculation of cure cost should be made. It does not stand for the proposition that the existence of a non-monetary breach or default should (a) not be a consideration of the Court in whether it is appropriate to assign the contract; or (b) give rise to a termination right of the counterparty once the stay is no longer applicable.

44. If the License Agreement were assigned, the existence of ongoing non-monetary breaches and defaults post-closing would afford Q30 whatever rights and remedies are available to it under the License Agreement, which might include termination. Any Order under Section 11.3 of the CCAA should not operate to waive or nullify any such rights in respect of an ongoing breach or default. Courts have held that the preservation of the rights and remedies of the objecting counterparty should be a consideration in whether the Court should grant the assignment order.[47]

45. Any assignment would potentially be rendered useless by the immediate breach by the Purchaser for failure to perform, which right has been preserved in previous cases involving assignment orders.[48] Both the assignment orders in *Golftown* and *TBS Acquireco* were made with the Court's notice that the parties were not aware of any actual non-monetary breaches that would continue post-assignment and either were either on consent or were not opposed by the counterparty appearing in Court. That is clearly not the case here.[49]

(C) The Proposed Cure Amount is incorrect

46. The cure amounts purportedly owed to Q30 as currently set out in the schedule to the Approval and Vesting Order is $15,373.39.[50] This amount is incorrect.

47. Pursuant to the License Agreement, Q30 and PSG agreed to share certain patent related expenses, including, but not limited to, those relating to patent prosecution and maintenance

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[47] *Nexient* at para 59 (Applicants' BOA, Tab 17).
[48] *Golftown Canada Holdings Inc., (Re),* (27 October 2016), Toronto, Ontario, Court File No. CV-16-11527-00CL (Ont SCJ) [Commercial List], ["***Golftown***"] Assignment Order (Applicants' BOA, Tab 14); *Re TBS Acquireco Inc.*, 2013 ONSC 4663 ["***TBS Acquireco***"] at para 24 (Applicants' BOA, Tab 7).
[49] *Golftown*, Endorsement (Q30 BOA, Tab 11); TBS *Acquireco,* at para 24 (Applicants' BOA, Tab 7).
[50] Approval and Vesting Order (Motion Record of the Applicants, Tab 3).

and work performed by consultants assisting in the effort to obtain regulatory approvals.[51] As set forth in more detail in the Invoices, the Applicants owe Q30 US$208,295.76.[52]

(D) The IC Agreements and Equity Agreement are Not Assignable by Their Nature

(i) The IC Agreements are Personal Service Agreements

48. Section 11.3(2) of the CCAA provides that agreements that are not assignable by reason of their nature cannot be assigned under 11.3(1). Included in this category are personal service agreements.[53] This position is consistent with the common law.[54] Personal service agreements are agreements which are based on confidences or considerations applicable to special personal characteristics, and cannot be usefully performed to or by another.[55]

49. The IC Agreements are clearly personal service agreements and subject to the exception to assignment under Section 11.3(2). Mr. Angus and Mr. Hoey do not consent to the assignment of their respective IC Agreements.

50. Even if there was any uncertainty about that (which there is not), in the Chapter 11 Proceedings, PSG has conceded that the IC Agreements are personal services contracts that cannot be assumed in the Chapter 11 Proceedings without the consent of Mr. Angus and Mr. Hoey respectively.[56] Despite that, in the CCAA Proceedings, PSG still argues that an order in Canada should force the assignment of the IC Agreements.[57] PSG has said that they are of the view Orders in respect of all of the contracts to be assigned under the Sale Agreement (including the IC Agreements) must be made in both this Court and the U.S. Court. The relief they are asking for as it relates to the IC Agreements, however, now appears inconsistent in as between the U.S Court and the Canadian Court.

(ii) There are no ongoing rights or obligations under the Equity Agreement

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[51] Angus Affidavit, para 32 (Q30 Objection, Tab 2); License Agreement, ss 5.1.1(f) and 7.1 (Q30 Objection, Tab 2A).
[52] Unpaid Invoices, Exhibit "F" to the Angus Affidavit, (Q30 Objection, Tab 2F).
[53] Office of the Superintendent of Bankruptcy Canada, *Summary of Key Legislative Changes in Chapter 47 of the Statutes of Canada, 2005, and Chapter 36 of the Statutes of Canada, 2007*, online: Innovation, Science and Economic Development Canada https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01782.html (Q30 BOA, Tab 12).
[54] See for example, *Fredrikson v Insurance Corp of British Columbia*, 1986 CarswellBC 131 (BCCA) at para 48 (Q30 BOA, Tab 13).
[55] *Black Hawk Mining Inc v Manitoba (Provincial Assessor)*, 2002 MBCA 51 at para 82 (Q30 BOA, Tab 14), citing with approval from *Maloney v Campbell*, 1897 CarswellOnt 18, 28 SCR 228 (SCC) at para 11 (Q30 BOA, Tab 15).
[56] Debtor's Reply to Q30 Objection, para 67 (Compendium of Applicants' U.S. Materials, Tab 2).
[57] Factum of the Applicants, para 70(g).

51. Section 11.3(1) allows the assignment of "rights and obligations" of a debtor company. Where a contract has been fully performed and no rights or obligations remain, on a plain reading of the CCAA, Section 11.3(1) cannot apply.

52. Pursuant to the Equity Agreement, PSG made an equity investment in Q30 Parent in exchange for becoming a member of Q30 Parent.[58] There are no further rights or obligations to be assigned under Section 11.3(1).

53. It now appears that in the Chapter 11 Proceedings, PSG has clarified that it intends to transfer the underlying "Membership Interests", not assign the Equity Agreement. PSG has not clarified its intent in these CCAA Proceedings.

IV. CONCLUSION

54. Q30 finds itself in this regrettable position. It does not wish to be in this position. However, the lack of virtually any information coupled with the historical breaches and failure to perform under existing management has eliminated any confidence that Q30 has that the Purchaser can or will perform under the License Agreement. For the reasons set out above, Q30 respectfully submits that its objection to the assignment of the Q30 Agreements be sustained.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of February, 2017.

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[58] Angus Affidavit, para 16 (Q30 Objection, Tab 2); Equity Agreement at ss 1-3 (Q30 Objection, Tab 2E).

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Performance Sports Group, et al.*, CV-16-11582-00CL (October 31, 2016), Amended and Restated Initial Order
2. *Veris Gold Corp., Re* 2015 BCSC 1204
3. *Primus Telecommunications Canada Inc., Re*, 2016 ONSC 5251
4. *Nexient Learning Inc., Re*, 2009 CarswellOnt 8071 (Ont SCJ)
5. *Ford Credit Canada Ltd v Welcome Ford Sales Ltd.*, 2011 ABCA 158
6. *Barafield Realty Ltd. v Just Energy (B.C. Limited Partnership)*, 2015 BCCA 421
7. *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*., 2008 ONCA 587
8. *Hayes Forest Services Ltd., Re*, 2009 BCSC 1169
9. *Pope and Talbot Ltd., Re*, 2009 BCSC 1552
10. Janet Walker & Jean-Gabriel Castel, *Castel & Walker: Canadian Conflict of Laws, 6th ed*, loose-leaf (consulted on February 3, 2017), (Markham: LexisNexis, 2005), ch 31 at para 31.5
11. *1455202 Ontario Inc. v Welbow Holdings Ltd.*, 2003 CarswellOnt 1761 (Ont SCJ)
12. *Exxonmobil Canada Energy v Novagas Canada Ltd.*, 2002 ABQB 455
13. *Playdium Entertainment Corp., Re,* 2001 CarswellOnt 3893
14. *Golftown Canada Holdings Inc., (Re)*, (27 October 2016), Toronto, Ontario, Court File No. CV-16-11527-00CL (Ont SCJ) [Commercial List], Assignment Order
15. *Re TBS Acquireco Inc.*, 2013 ONSC 4663
16. *Golftown Canada Holdings Inc., (Re)*, (27 October 2016), Toronto, Ontario, Court File No. CV-16-11527-00CL (Ont SCJ) [Commercial List], Endorsement
17. Office of the Superintendent of Bankruptcy Canada, *Summary of Key Legislative Changes in Chapter 47 of the Statutes of Canada, 2005, and Chapter 36 of the Statutes of Canada, 2007*, online: Innovation, Science and Economic Development Canada https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01782.html
18. *Fredrikson v Insurance Corp of British Columbia*, 1986 CarswellBC 131 (BCCA)
19. *Black Hawk Mining Inc v Manitoba (Provincial Assessor)*, 2002 MBCA 51
20. *Maloney v Campbell*, 1897 CarswellOnt 18, 28 SCR 228 (SCC)

SCHEDULE “B”
RELEVANT STATUTES

Companies’ Creditors Arrangement Act, RSC 1985, c.C-36

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

> **(a)** an agreement entered into on or after the day on which proceedings commence under this Act;
>
> **(b)** an eligible financial contract; or
>
> **(c)** a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

> **(a)** whether the monitor approved the proposed assignment;
>
> **(b)** whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
>
> **(c)** whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company’s insolvency, the commencement of proceedings under this Act or the company’s failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Court File No. CV-16-11582-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PERFORMANCE SPORTS GROUP LTD. ET AL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

FACTUM OF Q30 SPORTS, LLC, Q30 SPORTS SCIENCE, LLC, BRUCE ANGUS AND THOMAS HOEY
(RETURNABLE FEBRUARY 6, 2017)

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