COURT FILE NUMBER	25 – 2172984
ESTATE NUMBER	25 – 2172984
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, C. B-3, AS AMENDED
	AND IN THE MATTER OF MICROPLANET TECHNOLOGY CORP.
DOCUMENT	**BRIEF OF ARGUMENT OF THE APPLICANT, MICROPLANET TECHNOLOGY CORP.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** 4500 Bankers Hall East 855 2nd Street SW Calgary, AB T2P 4K7 Attention: Alexis Teasdale / Michael Selnes Telephone No.: (403) 298-3067 / 3311 Fax No.: (403) 265-7219 Client File No.: 55088.16

Commercial List Chambers Application
Scheduled for the 15th day of December, 2016 at 2:00 p.m.
Before the Honourable Madam Justice Horner

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I. OVERVIEW

1. The Applicant, MicroPlanet Technology Corp. ("**MTC**" or the "**Company**") seeks an order approving its Amended proposal dated November 21, 2016 as further amended at the Reconvened Meeting (the "**Twice Amended Proposal**") as it may be further modified, amended, varied or supplemented in accordance with its terms pursuant to section 59 of the *Bankruptcy and Insolvency Act*, RSA 1985 c B-3 (the "***BIA***"). The Company also seeks an order vesting title to MTC's sole asset in and to the Proposal Sponsor, as part of the Twice Amended Proposal.

2. All capitalized terms not otherwise defined herein have the meanings given to such terms in the Twice Amended Proposal or the Affidavit of Wolfgang Struss, sworn on December 5, 2016 (the "**Struss Affidavit**"), as applicable.

3. MTC was created for the purpose of raising funds to be used in the operations of its wholly-owned U.S. subsidiary, MicroPlanet, Inc. ("**MI**"). MTC has experienced substantial operating losses since inception, and has been functionally insolvent for at least the past two years. It is unable to raise capital to fund MI's operations because of its debt, which means MI's operations are insufficient to generate funds to repay that debt. MTC's attempts at informal restructuring were unsuccessful as a result of its financial situation, its inability to fund such a restructuring, and the spectre of unforeseen future claims arising. These are the circumstances that led MTC to undertake these proposal proceedings.

4. The Twice Amended Proposal will result in MTC's creditors recovering up to 10% of the principal amount of their claims – more than ten times the estimated realizable value of its sole asset. That asset, namely MTC's shares in MI, is being transferred to the proposal sponsor, a company funded by a group of investors, who are shareholders and past investors of MTC. In consideration for the transfer, the sponsor is paying well over $300,000 to MTC for distribution to its creditors. The Twice Amended Proposal is made in good faith and represents a fair and reasonable compromise that is calculated to benefit the general body of MTC's creditors.

5. A significant majority of MTC's creditors voted in favour of the Twice Amended Proposal at the reconvened general meeting of creditors to consider it, representing 74% in value and 69% in number of MTC's creditors present and voting at the meeting in person or by proxy.

6. The Trustee has considered the orderly liquidation of MTC's assets as an alternative to the Twice Amended Proposal, and has concluded that the Twice Amended Proposal is fair, reasonable, and preferable to liquidation, as it will result in a significantly higher recovery for all Affected Creditors, and will allow for MI to transition and continue operating as a going concern.

7. The only active opposition to the Twice Amended Proposal comes from two of MTC's shareholders, Brett Ironside and Myron Tetreault. Both are former directors of MTC, and Mr. Ironside was President and CEO for a number of years. Mr. Ironside appears in the company's books as a holder of secured convertible debentures. Mr. Tetreault purports to be a creditor.

8. Messrs. Ironside and Tetreault each raise a number of grounds of opposition, none of which has any merit. While they may be sorely disappointed that a company in which they invested time and money has failed, they offer no reasonable alternatives to the Twice Amended Proposal. Nor, despite numerous attempts by MTC and its counsel to discuss their concerns and explore options, have Mr. Ironside or Mr. Tetreault engaged in any meaningful way.

9. Mr. Ironside and Mr. Tetreault are savvy businessmen who must know that they occupy a risky position as shareholders, and, to the extent they are creditors, that they alone are responsible for protecting their positions as such. Their opposition suggests that they are not interested in a solution that would see MTC's creditors as a whole benefit. Apparently, they would rather see MTC bankrupted and its creditors left with no hope of any recovery than to see MI survive as a subsidiary of the proposal sponsor, with the chance to grow and profit.

II. FACTS

A. Evidence Before This Court

10. The facts relevant to this application are set out in a number of documents filed with the Court, including:

(a) the Struss Affidavit;

(b) the Affidavit of Wayne Smith, sworn December 5, 2016 (the "**Smith Affidavit**"); and

(c) the Trustee's Report Pursuant to Section 59(1) and paragraph 58(d) of the BIA, dated December 6, 2016 (the "**Trustee's Third Report**"), which attaches as Exhibits the following documents:

(i) the Report of Trustee on Proposal, dated October 4, 2016 (the "**Trustee's First Report**") attached as Exhibit "C" to the Trustee's Third Report; and

(ii) the Trustee's Supplemental Report to Creditors, dated November 21, 2016 (the "**Trustee's Second Report**") attached as part of Exhibit "G" to the Trustee's Third Report.

B. The Creation and Business of MTC and MI

11. MTC was formerly called HF Capital Corp., and was incorporated under the Alberta *Business Corporations Act* on February 19, 2004. On or about March 26, 2004, MTC became a capital pool company pursuant to Policy 2.4 of the TSX Venture Exchange Inc. (the "**Exchange**"). MTC completed its initial public offering on June 30, 2004 and its shares were listed on the Exchange. On April 8, 2005, MTC acquired the outstanding securities of MI, a Washington entity.

- Struss Affidavit, at paras 7 and 8

12. MI is in the business of developing and commercializing technologies to precisely regulate voltage for the utility and commercial markets. MI's products are sold to electric utilities and business for the purposes of regulating voltage within compliance standards, conserving electricity and increasing equipment life. MI's customers are located primarily in Australia. MI's operations constitute all of the operations of the combined company, while MTC's sole business was and remains raising money to fund MI's operations.

- Struss Affidavit, at paras 8 and 9

C. Historical Operations and Financial Health

13. MTC's consolidated audited financial statements disclose net losses and include statements of going concern uncertainty in every year from 2007 to 2013.

- Struss Affidavit, para 16

14. After 2013, MTC lacked the financial resources to retain its auditors, and has not been able to prepare or file audited financial statements since that time. MTC also lacked the resources to meet its file its continuous disclosure documents and as a result, trading of MTC's common shares was suspended in Alberta, British Columbia, Manitoba and Ontario in May of 2015. MTC is also in default of its obligations under Saskatchewan securities laws.

- Struss Affidavit, paras 18, 19 and 20

15. By mid-2015, MTC's history of operating losses and the resulting Cease Trade Orders had rendered it unable to raise further capital to fund MI's operations – the only source of potential revenue the company had – which were already dormant at that time.

- Struss Affidavit, at paras 22

D. The Efforts to Revitalize MTC

16. Over the course of 2015, MTC's President and CEO, Wolfgang Struss, pursued potential strategies to generate investment in MTC, without compensation. The initial strategy was to negotiate forbearance agreements with MTC's key secured creditors. However, prospective lenders indicated that even if forbearance arrangements could be achieved it would not be enough to motivate them to invest.

- Struss Affidavit, at paras 23-25

17. MTC then undertook plans to raise new capital through a debt to equity conversion. In order to pursue this strategy, MTC was required to obtain a partial variance of the Cease Trade Orders, which required a substantial amount of legal work, further reducing MTC's severely limited capital reserves.

- Struss Affidavit, at paras 25-26

18. In December 2015, MTC was sued by Mr. Ironside for the alleged breach of his executive employment contract. This required MTC to expend more of its limited financial resources on assessing and responding to Mr. Ironside's claim, and created uncertainty for prospective lenders. The strain on the Company's financial and other resources caused by MTC's debt load, its efforts to become re-listed, and the impact of Mr. Ironside's lawsuit, led to the decision not to proceed with the debt to equity conversion.

- Struss Affidavit, at paras 27-28

19. Finally, the decision was made to try and unwind MI from MTC, with the hope of allowing MI's developing technology and any future potential growth derived therefrom to survive. The Twice Amended Proposal will allow this plan to take place.

- Struss Affidavit, at para 29

Funding MI's Ongoing Operations

20. During MTC's strategic process to restructure its debt, MTC's skeleton operations were ongoing and funds were needed to pay operating expenses. At present, MI is focused on completing two purchase orders, one from an Australian entity, SA Power Networks, dated May 19, 2016, and the other from a French electricity distributor, ERDF, dated June 23, 2016 (collectively, the "**Purchase Orders**").

- Struss Affidavit, at para 49

21. Most of the funding for MI's operating expenses came from members of an informal group of investors located in the Seattle, Washington area (the "**Seattle Investors**"), the majority of whom are past investors in MI and current shareholders of MTC. Between October, 2014 and June, 2016, certain Seattle Investors directly or indirectly loaned approximately $310,000 to MI (the "**Interim Operating Loans**").

- Struss Affidavit, at paras 51, 52 and 55-56

22. EVI was formed in June 2016 as a corporate vehicle through which investors, including the Seattle Investors, could formalize and secure their loans to MI. EVI purchased the Interim Operating Loans and entered into a Loan and Security Agreement with MI on June 21, 2016, which secured the Interim Operating Loans against all of MI's personal property.

- Struss Affidavit, at paras 53-54
- Smith Affidavit, at Exhibit "1"

23. Aside from the Operating Loans, certain Seattle Investors provided additional funds on the basis that they would be secured against MI's assets. Accordingly, EVI and MI entered into a second Loan and Security Agreement on August 22, 2016, secured by the receivables under the SA Power Networks Purchase Order (the "**August Security Agreement**"). Since August 22, 2016,

an additional $170,000 was advanced under the August Security Agreement, which has been used primarily to purchase raw materials and pay overhead, with a small amount going towards salaries for MI's manufacturing employees.

- Struss Affidavit, at paras 55-56

E. The Original Proposal and the First Meeting

24. On October 3, 2016 MTC lodged its original proposal (the "**Proposal**") with the Office of the Superintendent of Bankruptcy pursuant to s. 50.4 of the *BIA*, and the Trustee was appointed.

- Trustee's First Report, at page 1

25. The general meeting of creditors to consider the Proposal (the "**First Meeting**") was scheduled for October 21, 2016 at the Trustee's Calgary office. Late in the day before the First Meeting, the Trustee received a letter from Dentons Canada LLP on behalf of Brett Ironside, a creditor, shareholder, and former director and officer of MTC. Mr. Ironside challenged various aspects of the proposal, and questioned the Trustee's valuation of MI's assets.

- Struss Affidavit, at paras 62 and 63

26. As a result of Mr. Ironside's objections, and because of MTC's intent to amend the Proposal, a motion was made and a resolution passed adjourning the First Meeting to enable further investigation of MTC's affairs and property, and to permit MTC to amend the Proposal.

- Struss Affidavit, at para 64
- Trustee's Second Report, at part C

27. In the weeks following the First Meeting, MTC's counsel and the Trustee undertook to review the issues raised by Mr. Ironside. MTC's counsel reached out to Mr. Ironside's counsel eight times, both in writing and by telephone, requesting that he contact her to discuss the issues raised by Mr. Ironside.

- Struss Affidavit, at paras 65-66

28. Between the First Meeting and the Reconvened Meeting, Mr. Ironside's counsel made one telephone call to Ms. Teasdale, and Mr. Ironside called Mr. Struss once. Few particulars of Mr. Ironside's concerns were shared during these calls, and neither Mr. Ironside nor his counsel made

any effort to discuss a negotiated resolution, despite the suggestions of MTC's counsel to that effect. Neither Mr. Ironside nor his counsel sent any further correspondence to MTC's counsel.

- Struss Affidavit, at paras 65(b) and (d)

29. The Trustee has obtained a security opinion from a Seattle law firm with respect to EVI's security over the collateral of MI. That opinion provides, subject to the assumptions and qualifications set out therein, that EVI's loan documents create a perfected security interest in the collateral as security for the obligations stated in the documents to be secured. The Trustee's counsel has advised the Trustee that a Washington Uniform Commercial Code search report shows that no creditor other than EVI has filed a UCC financing statement.

- Struss Affidavit, at para 68
- Trustee's Second Report, at part E

F. The Twice Amended Proposal and the Reconvened Meeting

30. On November 21, 2016, the Amended Proposal was filed with the Office of the Superintendent of Bankruptcy, and a Notice of Amended Proposal and Reconvened Meeting to Creditors (the "**Reconvened Meeting**") was served by the Trustee on Affected Creditors pursuant to section 51 of the *BIA*, together with other documents including the Amended Proposal.

- Trustee's Third Report, at Exhibit "G"

31. On December 1, on the eve of the Reconvened Meeting, the Trustee received a flurry of correspondence and proofs of claim, most of which were from people ostensibly related to Mr. Ironside. A lawyer, not Mr. Mann, called the Trustee and identified himself as Mr. Ironside's counsel. New proofs of claim for Mr. Ironside, Toni Ironside, Jennifer Ironside and Eric Tremblay were left at the Trustee's reception, none of which included any supporting documentation. The Trustee later received a proof of claim from Cole Harris purporting to make a secured claim in the amount of $425,000, although the supporting documentation established that he once held 2009 Notes in the amount of $50,000.00, which Mr. Harris elected to convert into equity in 2011.

- Struss Affidavit, at paras 70-72 and 74

32. Despite lodging new proofs of claim the previous day, none of the Ironsides or Mr. Harris attended the Reconvened Meeting on December 2, 2016. Mr. Tetreault was in attendance and

raised numerous concerns, which were addressed by MTC's counsel, Mr. Struss and the Trustee during the meeting.

- Struss Affidavit, at paras 73, and 75-80
- Trustee's Third Report, at Exhibit "H"

33. The Amended Proposal was amended at the meeting to correct an inadvertent error, and 69% in number and 74% in value of MTC's unsecured creditors present in person or by proxy at the meeting voted in favour of the Twice Amended Proposal, including those claims marked as objected to by the Trustee.

- Struss Affidavit, at para 82
- Trustee's Third Report, at para 15

G. Fundamental Aspects of the Twice Amended Proposal

1. Purposes of the Twice Amended Proposal

34. The purposes of the Proposal are to:

(a) increase the return to MTC's Creditors compared to what they would receive in a bankruptcy of MTC through the potential opportunity to share in the Distribution Fund to be distributed among Affected Creditors

(b) allow MTC to wind-up its business;

(c) extinguish all liability of MI under the MI Guarantee and the related MI General Security Agreement;

(d) ensure MTC's subsidiary, MI, can continue to operate in the ordinary course of business, allowing it to secure additional funding, and thereby potentially realize on the value of a number of ongoing contracts;

(e) in consideration for the Proposal Sponsor providing the Distribution Fund, transfer the MTC Asset to the Proposal Sponsor, free and clear of all Claims; and

(f) avoid the liquidation of MI and the associated loss of value.

- Struss Affidavit, at para 83

35. In this way, the Affected Creditors who have an economic interest in MTC will derive a greater benefit from the implementation of the Twice Amended Proposal than would result from a bankruptcy of MTC.

2. Classification and Treatment of Claims

36. Under the Twice Amended Proposal, there are three categories of Affected Claims: Preferred Claims, Secured Claims, and Unsecured Claims. Although has secured creditors, they are treated as unsecured under the Twice Amended Proposal, as follows.

- Twice Amended Proposal, at Arts 1.1(e) and 1.1(uu)

37. A "Secured Creditor" is defined in the Twice Amended Proposal as "a Creditor holding a Secured Claim, solely in respect of its Secured Claim." In turn, a "Secured Claim" is defined to include only Claims that are secured to the extent of the realizable value of the collateral. The collateral held by the 2009 Noteholders has been valued at nil by the Trustee, such that there are no "Secured Claims" against MTC under the Twice Amended Proposal.

- Twice Amended Proposal, at Arts 1.1(uu) and 1.1(nn)
- Trustee's First Report, at para 22 and Schedule "1"

38. The 2009 Notes are secured by all of MTC's present and after-acquired personal property. MTC's only asset is its ownership interest in all of the issued and outstanding common shares of MI. In turn, the MTC Asset is subject to valid, enforceable and perfected security in favour of EVI over all of MI's present and after-acquired personal property. As such, the Trustee anticipates that a liquidation of the MI Assets would result in a shortfall to EVI, leaving nothing for subordinate creditors.

- Struss Affidavit, at para 35 and Exhibit "14"
- Trustee's First Report, at paras 3, 18 and Schedule "1"

3. Funding of the Proposal and transfer of MI's shares

39. The payments to Affected Creditors under the Twice Amended Proposal will be generated through the sale of the MTC Asset to EVI, the Proposal Sponsor. The total consideration provided by EVI under the Twice Amended Proposal (in excess of $330,000) will be paid to the Trustee within 10 days of the fulfillment of two conditions precedent including the acceptance of the Twice Amended Proposal by MTC's creditors and Court approval of the Twice Amended Proposal and the transfer of the MTC Asset to EVI.

- Twice Amended Proposal, at Arts 3.2, 4.1(a) and 4.1(b)

40. The funds provided by EVI constitute the Distribution Fund under the Twice Amended Proposal, which will then be distributed in satisfaction of all Proven Claims within 60 days of the Effective Date in the following order:

(a) first, an amount sufficient to pay all Administrative Fees and Expenses on the full implementation of the Twice Amended Proposal;

(b) second, amounts required to be paid pursuant to s. 60(1.1) of the BIA;

(c) third, to any Secured Creditors on their Proven Secured Claims;

(d) fourth, to the Preferred Creditors, if any; and

(e) fifth, to all Unsecured Creditors, a cash distribution equal to 10% of the Principal Amount of each Proven Unsecured Claim, provided that:

(i) if 10% of the total Principal Amount of all Proven Unsecured Claims exceeds the total amount of the Distribution Fund, the Unsecured Creditors will receive a pro rata cash distribution; and

(ii) if there are surplus funds remaining in the Distribution Fund after the Trustee has made the distributions contemplated in this Article III, the surplus will be paid to the Proposal Sponsor.

- Twice Amended Proposal, at Art 3.3

4. Releases

41. The Twice Amended Proposal includes releases in favour of MTC and the release of MI's obligations to the 2009 Noteholders under a guarantee and related security agreement.

- Twice Amended Proposal, at Arts 7.1 and 7.2

5. Conditions Precedent

42. As noted above, Article IV of the Twice Amended Proposal includes the Conditions Precedent which must be fulfilled in order to implement the Twice Amended Proposal, including:

(a) the required majority of Creditors accepting the Twice Amended Proposal;

(b) the Court Approval Order being granted, in a form satisfactory to MTC and the Proposal Sponsor, acting reasonably; and

(c) the transfer of the MTC Asset to the Proposal Sponsor and the Distribution Fund being paid by the Proposal Sponsor to the Trustee in accordance with Section 3.2 of this Proposal.

- Twice Amended Proposal, at Art 4.1

6. The Trustee's Report on the Twice Amended Proposal

43. In the Trustee's view, the Twice Amended Proposal is reasonable, and MTC's creditors will receive a timelier and greater distribution under this Twice Amended Proposal than they would otherwise experience in a bankruptcy scenario.

- Trustee's First Report, at paras 44-46
- Trustee's Second Report, at part J

III. ISSUES

44. The sole issue to be determined in this application is whether the Approval Order and the Approval and Vesting Order ought to be granted.

IV. LAW AND ARGUMENT

A. The Statutory Requirements for Approval of the Twice Amended Proposal Are Met

1. MTC is an insolvent person

45. Pursuant to the *BIA*, a Proposal can only be advanced by an insolvent person, a receiver, a liquidator, a bankruptcy, or the trustee of a bankrupt's estate.

- *BIA*, s 50 **[TAB 1]**

46. MTC is an insolvent person within the meaning of the BIA. It has ceased paying its current obligations in the ordinary course as they become due, including outstanding Notes (which have all matured), and its trade creditors. Furthermore, the aggregate of MTC's property is not, at fair valuation, sufficient to enable payment of all its obligations, due and accruing due.

- Struss Affidavit, at paras 16-22
- Trustee's First Report, at para 20
- *BIA*, s 2, "insolvent person" **[TAB 1]**

2. The requisite majority of creditors voted in favour of the Twice Amended Proposal

47. In order for a proposal to be deemed to be accepted by the debtor's creditors, all classes of unsecured creditors, other than those with equity claims, must vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution.

- *BIA*, ss 51, 54(2)(d) **[TAB 1]**

48. Including claims marked as objected to at the meeting, 69% in number and 74% in value of MTC's unsecured creditors present in person or by proxy at the Reconvened Meeting voted in favour of the Twice Amended Proposal, clearly surpassing the statutory double majority requirement.

- Struss Affidavit, at para 82
- Trustee's Third Report, at para 15

3. The application for approval was properly brought and the requisite notice was given to MTC's creditors

49. Upon acceptance of a proposal by the requisite double majority of creditors, the trustee is required to:

(a) within five days of the acceptance, apply for court approval of the proposal;

(b) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor who has proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;

(c) forward a copy of the trustee's report on the proposal to the official receiver at least ten days before the date of the hearing; and

(d) at least two days before the date of the hearing, file with the court the trustee's report on the proposal.

- *BIA*, s 58 **[TAB 1]**

50. Each of these requirements has been, or is anticipated to be, met. The application for approval of the Twice Amended Proposal was filed on December 6, 2016, four days after the Creditor's Meeting. Notice of the hearing was provided in the prescribed manner on November 21, 2016, when the Trustee sent the Notice of Hearing of Application for Court Approval of Proposal to MTC's known creditors, and it is anticipated that the Trustee will forward a copy of each of its reports to the official receiver at least 10 days before the hearing.

4. The Test for Court Approval of the Twice Amended Proposal is Met

51. The general requirements for court approval of a *BIA* proposal are well-established. The Court must be satisfied that the following three conditions are met, namely that:

(a) the terms of the proposal are reasonable;

(b) the terms of the proposal are calculated to the benefit of the general body of creditors, and

(c) the proposal is made in good faith.

- *Re Magnus One Energy Corp*, 2009 ABQB 200 [***Magnus***] at para 10 **[TAB 2]**
- *Re Kitchener Frame Limited*, 2012 ONSC 234 [***Kitchener***] at para 19 **[TAB 3]**
- *Re Wasaya Airways Limited Partnership*, 2016 ONSC 5600 [**Wasaya**] at para 37 **[TAB 4]**

52. In considering these requirements, certain interests must be taken into account: the interest of the debtor to meet with its creditors and to find a way of producing assets or revenue which will provide the creditors with a dividend outside of a bankruptcy; the interest of the creditors, i.e. to ensure that what is offered under the proposal is reasonable and supported by the majority of creditors; and the interest of the public at large and the integrity of bankruptcy legislation.

- *Re Stone*, (1976), 22 CBR (NS) 152 (Ont SC), at para 2 **[TAB 5]**

53. Although the court is not bound to approve a proposal even though it has been recommended by the trustee and given the overwhelming support of creditors, substantial deference should be afforded to these views.

- *Magnus*, at para 11 **[TAB 2]**

- *Kitchener*, at para 21 **[TAB 3]**
- *Re Lofchik*, [1998] OJ No 322 (Ont Bktcy), at para 13 [***Lofchik***] **[TAB 6]**

54. 69% in number and 74% in value of Affected Creditors voted in favour of the Twice Amended Proposal, and the Trustee has recommended the acceptance of the Twice Amended Proposal because the Twice Amended Proposal is likely to result in a significantly greater recovery to MTC's creditors than they otherwise would recover in bankruptcy.

- Struss Affidavit, at para 82
- Trustee's First Report, at paras 44-46
- Trustee's Second Report, at para J

(a) The Terms of the Twice Amended Proposal are Reasonable

55. To satisfy this branch of the test, the debtor must demonstrate that the proposal is reasonable, which means there must be a reasonable possibility, not a certainty, that the proposal will be completed in accordance with its terms. The proposal must also meet the requirements of commercial morality and maintain the integrity of the bankruptcy system.

- *Lofchick*, at para 10 **[TAB 6]**
- *Re McNamara and McNamara* (1984), 53 CBR (NS) 240 (Ont SC) at para 41 **[TAB 7]**
- *Re Farkvam* (1966), 39 CBR (3d) 293 (BC Master), aff'd (May 28, 1996), Doc Prince George 32237 (BCSC) at para 26 **[TAB 8]**

56. Completion of the Twice Amended Proposal is reasonably possible. EVI is funded by a group of investors who have already demonstrated their commitment to MI and their ability to provide funds quickly by lending money over a short period of time to allow MI to continue work on the Purchase Orders, a purchase agreement is in place for the transfer of the MTC Asset, and once the Distribution Fund is paid to the Trustee, it is only a matter of administration to effect its distribution to MTC's creditors.

- Struss Affidavit, para 53-57

57. In terms of commercial morality, nothing about the Twice Amended Proposal is contrary to good commercial conscience, or harms the integrity of the proposal process. The transfer of the MTC Asset has been openly disclosed throughout the proposal process. No secret advantage is

gained by the investors who are funding the Twice Amended Proposal. They are willing to pay fair consideration for the MTC Asset, and take the significant risk of being repaid the amounts they invested in MI.

- *Re Gardner* (1921), 1 CBR 424 (Ont Div Ct), at para 5 **[TAB 9]**

58. The alternative to the Twice Amended Proposal is bankruptcy, which will result in the liquidation of MI's assets, which the Trustee has determined will result in no recovery for MTC's creditors. MTC does not have, and has never had, the resources to run a sales process for MI, nor is there any evidence before this Court of a better offer waiting in the wings.

- Trustee's First Report, at para 46

(b) The terms of the Twice Amended Proposal are calculated to benefit the general body of MTC's creditors

59. If a proposal will yield sufficiently more return to creditors than they would recover in a bankruptcy, a proposal will be considered to be made in for the general benefit of creditors.

- *Re Rennie* (2010), 64 CBR (5^{th}) 278 (Ont SCJ), at para 44 **[TAB 10]**

60. The Trustee valued the MTC Asset at USD $31,179, more than ten times lower than the amount of the Distribution Fund. MTC's creditors will therefore receive a significantly higher recovery under the MTC Proposal than they could expect in a liquidation scenario.

- Trustee's First Report, at Schedule 1
- Trustee's Second Report, at part B

(c) The Twice Amended Proposal is made in good faith

61. For a proposal to be made in good faith, the debtor must make full disclosure of all of its assets and any encumbrances over those assets. Decisions will generally be considered to be made in good faith if the debtor company is exercising its legitimate rights to resolve its debt through the proposal mechanisms enumerated in the *BIA*.

- *Lofchick*, at para 10 **[TAB 6]**
- *Re Mayer* (1994), 25 CBR (3d) 113 (Ont Gen Div), at paras 5-6 **[TAB 11]**
- *Magnus*, at para 20 **[TAB 2]**

62. MTC made full disclosure of its assets and any known and legitimate encumbrances thereon to the Trustee. MTC is exercising its legitimate rights under the *BIA* to resolve its significant debts, thereby permitting MI the chance to become a going concern. MTC has met the good faith requirement of the test for approval of the Twice Amended Proposal.

63. At the Reconvened Meeting, Mr. Tetreault asserted that MTC had not disclosed certain assets, namely accumulated tax losses, an Australian subsidiary, and certain purchase orders. MI's active sales orders were disclosed in the First Trustee Proposal Report, and Mr. Struss has explained that the Australian subsidiary is a shell with no meaningful business, as MI did not have the funding to ship product to Australia or enter into purchase orders in Australia and New Zealand. MTC's accumulated tax losses are subject to restrictions, and were not recognized as having value by MTC's auditors given that realization of the losses is highly speculative and uncertain.

- Trustee's First Report, at para 17
- Struss Affidavit, at paras 30 and 75-78

B. This Court has jurisdiction to approve the transfer of the MTC Asset to EVI

1. The test for a sale of assets in the course of proposal proceedings is met

64. Pursuant to section 62(1) of the *BIA*, a proposal debtor may sell assets outside of the normal course if authorized to do so by the Court after consideration of six non-exhaustive factors:

(a) whether the process leading to the proposal sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

- *BIA*, ss 62, 65.13(1), and 65.13(4) **[TAB 1]**

(b) The Trustee supports the Transaction

65. In the Trustee's First and Second Reports, the Trustee unequivocally states that the sale of MI's shares to EVI will result in a significantly higher recovery than MTC would otherwise receive in a liquidation scenario, and has recommended the acceptance of the Twice Amended Proposal, including the transfer of the MTC Asset to EVI.

- Trustee's First Report, at paras 44-46
- Trustee's Second Report, at part J

(c) The Transaction will have a positive effect on MTC's creditors and other interested parties

66. Not only will the transfer of MI's shares to EVI result in a significantly higher recovery to MTC's creditors than in a bankruptcy, but MI will have a chance to continue developing and marketing its technology, resulting in opportunities for MI's trade creditors and former employees to benefit from its continued operation.

- Struss Affidavit, at paras 59, and 83-84

(d) The consideration for the MI Shares is reasonable and fair

67. The Trustee has estimated the net realizable liquidation value of the MI Shares to be between USD $16,463 and USD $31,179. The consideration to be provided by EVI for the MTC Asset is more than ten times greater than its liquidation value and is therefore fair and reasonable.

- Trustee's First Report, at paras 46 and Schedule 1

(e) A sales process is not justified or feasible in the circumstances

68. MI's assets include certain patents of nominal value, minimal cash on hand and prepaid expenses, and inventory, tools and equipment, office furniture and software. In light of the nature and extremely limited value of MI's assets (and therefore, its shares), the cost of running a sales process in an attempt to generate greater than liquidation value would very likely outstrip any benefit gained by such a process, and ultimately reduce the recovery of MTC's Creditors. MTC's

limited resources would not permit it to embark on the type of sales process needed to market a specialized entity like MTC.

- Trustee's First Report, at paras 16-21 and Schedule "1"

69. During the Reconvened Meeting, Mr. Tetreault referred to a higher offer made for MI's assets in the recent past, which MTC believes was a reference to an offer made in the fall of 2014 by Dominion, a large US utility, to purchase MI. Dominion's initial offer to MTC was viewed as being totally inadequate, and despite further negotiations, the discussions with Dominion were not ultimately pursued due to MTC's financial status and the related risks.

- Struss Affidavit, at paras 79 and 80

(f) MTC's creditors were consulted through and during the proposal proceedings

70. MTC's creditors were provided with notice of the planned sale to EVI when they received notice of the Twice Amended Proposal. Through the proposal process itself, creditors had the opportunity to consider the sale of the MTC Asset to EVI, raise any objection, and, if they wished, vote against the Twice Amended Proposal. Ultimately, 69% in number and 74% in value of the creditors present in person or by proxy voted in favour of the Twice Amended Proposal.

- Struss Affidavit, at paras 24-29 and 82

71. As for Messrs. Ironside and Tetreault, who have signaled their intention to oppose approval of the Twice Amended Proposal, they have made very little effort to particularize their concerns, nor have they offered any suggestion as to an alternative process. Attempts have been made by MTC and its counsel to engage with Mr. Ironside without success, and despite Mr. Tetreault being aware of the proposal proceedings since at least October 31, 2016, his level of engagement was minimal up until the day of the Reconvened Meeting.

- Struss Affidavit, at paras 73, 75-81

(g) MTC and EVI are not related parties

72. Section 65.13(5) of the *BIA* stipulates that a court must consider if a non-ordinary course sale or disposition of assets during proposal proceedings is made to a related person. Therefore, it must be determined whether or not MTC and EVI are "related persons" as defined under the *BIA*.

- *BIA*, ss 65.13(5) **[TAB 1]**

73. The tests for determining whether individuals or entities are related persons are set out in section 4 of the *BIA*. This case involves the relationship between two entities. Under section 4, two entities are considered related if the person or group of people that controls each entity are related to one another. An entity may be controlled by a single person, a related group of persons (in which each member of the group is related to every other member of the group) or an unrelated group of persons (a group that is not a related group). In this context, "control" means majority control over the affairs of the entity.

- *BIA*, s 4 **[TAB 1]**
- *A Zimit Ltd (Trustee of) v Woodbine Summit Ltd* (1982), 44 CBR (NS) 136 (Ont Reg in Bankruptcy); aff'd (1985), 56 CBR (NS) 320 (Ont Bktcy); aff'd (1987), 64 CBR (NS) 89 (Ont CA) **[TAB 12]**

74. Wayne Smith currently controls EVI as its sole shareholder. MTC is a widely held public company with over 200 million outstanding shares. On the face of MTC's share register, no individual or group, whether related or unrelated, appears to have majority control of MTC. EVI and MTC could only be related pursuant to section 4(2) of the *BIA* if Mr. Smith is related to a related group or unrelated group that has majority control over MTC. As MTC has no control person or group, the test under section 4(2) does not apply.

- *BIA*, s 4 **[TAB 1]**
- Smith Affidavit, at Exhibit 3
- Struss Affidavit, at para 53
- Smith Affidavit, at paras 2-7

75. Section 4(3)(a) to (h) of the *BIA* expand upon the general tests set out in section 4(2). The only one of the scenarios enumerated in section 4(3)(a) to (h) that could apply is section 4(3)(c). This section provides that a person or group with the right (whether present, future, absolute or contingent) to acquire ownership interests or control voting rights in an entity will be treated as though he or she owns the interests. If there is a group of people with the right to acquire a majority of EVI's shares or control voting rights in EVI, section 4(3)(c) would apply. It is conceivable that the Seattle Investors have a right to become shareholders of EVI, and possibly could become

majority shareholders of EVI. However, this does not change the fact that the Seattle Investors are not related to a group that controls MTC, because there is no group that controls MTC.

- *BIA*, s 4(3) **[TAB 1]**
- Struss Affidavit, at para 52

76. In addition to the definition of related persons in section 4 of the BIA, section 65.13(6) expands the definition of related person to include (1) directors and officers of the insolvent person, (2) persons who have or have had, whether directory or indirectly, control in fact of the insolvent person; and (3) persons who are related to those persons described under (1) and (2).

- *BIA*, s 65.13(6) **[TAB 1]**

77. In this case, the sole director and officer of the MTC (the insolvent person) is Wolfgang Struss. EVI, not Mr. Struss, is purchasing the MTC Asset, and Mr. Struss is not related to EVI or Mr. Smith. EVI does not have, and has never had, a right to acquire direct or indirect control in fact of MTC. EVI is not related to Mr. Struss or any person who now has, or has had, control whether directly or indirectly of MTC. Therefore, even under the expanded definition of related persons under section 65.13, EVI and MTC are not related and the Court need not consider the additional factors enumerated therein when approving the Transaction.

- Smith Affidavit, at paras 4-7
- Struss Affidavit, at para 53

C. The MI Guarantee and Related Security can be Compromised

78. A proposal under the *BIA* is a contact between the proposal debtor and its creditors. The proposal debtor is entitled to include any term in the proposal that could lawfully be incorporated into any contract.

- *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp (Ltd)*, 2008 ONCA 587, at para 62 [**Metcalfe**] **[TAB 13]**

79. After the 2009 amendments to the *BIA* and *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "***CCAA***"), a growing body of jurisprudence has recognized that in appropriate circumstances, claims against third parties not subject to a plan (or proposal) may be compromised. Five conditions must be considered to determine if a compromise is warranted:

(a) the parties to be released are necessary and essential to the debtor's restructuring;

(b) the claims to be released are rationally related to the purpose of the plan (proposal) and necessary for it;

(c) the plan (proposal) cannot succeed without the releases;

(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the plan (proposal); and

(e) The plan (proposal) will benefit the debtor company and creditors generally.

- *Kitchener*, at para 80 **[TAB 3]**
- *Metcalfe*, at para 71 **[TAB 13]**
- *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corp*, 2013 ONSC 1078, at para 50 **[TAB 14]**

1. MI is necessary and essential to the Twice Amended Proposal, the released claims are related to the purpose of the Twice Amended Proposal, and the Twice Amended Proposal will fail if those claims are not released

80. MI is necessary and essential to the restructuring contemplated by the Twice Amended Proposal – the MTC Asset is the consideration for EVI funding the Twice Amended Proposal.

81. The release of the MI Guarantee and related security is directly related to the purposes of the Twice Amended Proposal, which include avoiding MI's liquidation, allowing MI to operate and secure funding to realize on ongoing contracts, and increasing the return to MTC's creditors over what they would receive in bankruptcy. If MI were not released from liability under the MI Guarantee and MI GSA, 2009 Noteholders with valid guarantee claims could liquidate MI at will.

82. This is likely to discourage potential lenders and investors, and discourage EVI from paying the Distribution Fund to the benefit of MTC's creditors. For the same reasons, the Twice Amended Proposal is likely to fail if claims under the MI Guarantee and the MI GSA are not released.

2. The prospective parent of MI is contributing to the Twice Amended Proposal

83. Ultimately, the party receiving the benefit of the Release is not MI, but EVI. EVI is contributing to the Twice Amended Proposal by paying the Distribution Fund, and ensuring MTC's creditors receive more than they would in a bankruptcy.

3. The Twice Amended Proposal will benefit the general body of MTC's creditors

84. MTC's sole asset has been valued by the Trustee at USD$31,179.00, at most, in a liquidation scenario – more than ten times less than the value of the Distribution Fund. It is obvious that MTC's creditors will benefit from the Twice Amended Proposal. The benefit to MTC's creditors is reflected in their votes in favour of the Twice Amended Proposal. Several significant creditors whose guarantee claims against MI will be released were among those that voted in favour.

- Struss Affidavit, at para 82
- Statement of Affairs [**TAB 15**]
- Trustee's Third Report, at para 15

85. Although MI was not marketed in a sales process, there are reasons why a sales process (which MTC cannot afford in any event) is unlikely to attract more value than that offered by EVI in the Twice Amended Proposal. The opponents of the Twice Amended Proposal have produced no evidence that the Trustee's valuation of MI's assets is incorrect, and it is unlikely that MI would attract any value if sold as a going concern. The most compelling reason is that MI's operations have never made money. MTC's audited consolidated financial statements record a loss for every year of its existence. It is hard to imagine a buyer would be willing to offer more than 10 times the liquidation value of an entity with uncertain prospects and a poor track record.

- Struss Affidavit, para 16

86. The low likelihood of MTC attracting a higher offer for MI's assets is illustrated by the fact that the most recent offer for MI's assets was ultimately not pursued due to MTC's financial status and the risks related thereto. If an offer for MI's assets could not be achieved before MTC was embroiled in insolvency proceedings, it is even less likely that such an offer would exist inside insolvency proceedings.

- Struss Affidavit, at para 80

4. Application to this case

87. Relying on the foregoing reasoning regarding the compromise of claims against third parties in the Sino-Forest CCAA proceedings, Justice Morawetz approved the compromise of certain guarantees given by a US subsidiary of the Canadian debtor, despite the fact that the guarantees explicitly stated that they were not subject to compromise:

> Guarantee Unconditional. The obligations of each Subsidiary Guarantor hereunder are unconditional and absolute and, without limiting the generality of the foregoing, will not be released, discharged or otherwise affected by:
>
> (a) any extension, renewal, settlement, *compromise*, waiver or release in respect of any obligation of the Company under this Indenture or any Note, by operation of law of otherwise [*emphasis added*];

- Sino-Forest Corporation 4.25% Convertible Note Indenture dated December 17, 2009 at s 5.02; Sino-Forest Corporation 9.125% Note Indenture dated August 17, 2004, at s 11.02 [**TAB 16]**

88. The language of the MI Guarantee is analogous:

> … [MI] shall not be released from any of its obligations under this Guarantee as a consequence of, and this Guarantee shall be effective and binding on [MI] notwithstanding:
>
> (h) … any reorganization of any or all of the obligations of … [MI, MTC,] or any other Person, or any transaction including any amalgamation, merger, consolidation, arrangement, transfer, sale, lease or other disposition, whereby all or any part of the undertaking, property and assets of [MI, MTC,] or any other Person become the property of any other Person or Persons;

- Struss Affidavit, at para 37 and Exhibit "17"

89. Despite this express language, Justice Morawetz considered and applied the five factors outlined by Justice Blair in *Metcalfe* and approved an arrangement that included the compromise of the subsidiary guarantees, stating:

> … The Subsidiaries are effectively contributing their assets to SFC to satisfy SFC's obligations under their guarantees of SFC's note indebtedness, for the benefit of the Affected Creditors. As such, counsel submits the releases benefit SFC and the creditors generally.
>
> … it seems to me that the Plan cannot succeed without the releases of the Subsidiaries. I am satisfied that the releases are fair and reasonable and are rationally connected to the overall purpose of the Plan

- *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corp*, 2012 ONSC 7050, at paras 73-74 **[TAB 17]**

90. This same analysis applies to the compromise of the MI Guarantee and related security. MI is contributing its assets to EVI, who in turn is contributing the Distribution Fund for the benefit of the Affected Creditors. EVI is unlikely to make such a contribution without the release of the MI Guarantee and related security, which is fair, reasonable, and rationally connected to the overall purposes of the Twice Amended Proposal.

D. The Issues Raised by Ironside and Tetreault are Without Merit

91. Mr. Ironside and Mr. Tetreault have advised they intend to oppose MTC's application for approval of the Twice Amended Proposal. Neither has provided evidence to substantiate their position, and neither has engaged with MTC to discuss possible alternatives to the Twice Amended Proposal. The issues they raise in opposition have no merit and their position is contrary to the interest of the general body of MTC's creditors, given that the failure of the Twice Amended Proposal would result in MTC's bankruptcy, and the general body of creditors, including themselves, stand to receive nothing in a liquidation scenario.

1. Mr. Ironside's Objection: MI's valuation should be significantly higher

92. The Trustee has prepared an estimated value of the MI Assets in a liquidation scenario, based on MTC's most recent unaudited financial statements and information provided by current management. Despite MTC's attempts to obtain supporting information from Mr. Ironside's counsel, Mr. Ironside has provided no evidence to support his position.

- Trustee's First Report, at Schedule "1"
- Struss Affidavit, at paras 65-66

93. MTC's historical financial performance supports the Trustee's valuation. MTC's consolidated audited financial statements for the years ended 2005 through 2013 show that the company suffered substantial net losses in each of these years. Moreover, the three most recent consolidated audited financial statements of MTC include a qualification from the auditor that MTC's ability to continue as a going concern is doubtful.

- Struss Affidavit, at para 16

2. Mr. Ironside's Objection: the EVI security is not valid and is subordinate to Mr. Ironside's security, which is allegedly perfected by possession

94. The Trustee has obtained a security opinion from independent US counsel, which, subject to appropriate assumptions and qualifications, provides that EVI's security is valid, enforceable, and perfected. Recent personal property registry and Uniform Commercial Code searches establish that there are no registered security interests in any of the provinces in which MTC traded its securities including Alberta, and that the sole registration in Washington state is that in favour of EVI.

- Struss Affidavit, at para 68
- Trustee's Second Report, at part E

95. MTC provided copies of the EVI security documents to Mr. Ironside's counsel in early November, and evidence of the advances made to MI several weeks ago. Mr. Ironside has provided no contrary security opinion or evidence to substantiate his suggestion that EVI's security is invalid or subordinate to the 2009 Noteholders' position.

- Struss Affidavit, at para 65(c) and Exhibit "30"

96. According to his counsel, Mr. Ironside does not have possession of the MI Share Certificate, and Mr. Ironside has produced no evidence to establish that any other 2009 Noteholder has possession of it. The only evidence before this Court respecting the MI Share Certificate is that it was sent to MI's US counsel following the merger transaction by which MI became MTC's wholly-owned subsidiary, but that MTC's management has been unable to find the physical certificate, such that a new certificate has been issued.

- Struss Affidavit, at paras 31-32, 65(b) and 66

3. Mr. Ironside's Objection: the proposal cannot release MI's obligations

97. This objection has no merit in law, as established in the jurisprudence discussed in paragraphs 76-88, above.

4. Mr. Tetreault's Objection: the Twice Amended Proposal does not take the interests of MTC's shareholders into account

98. While MTC's shareholders are stakeholders in these proceedings in a broad sense, they have no economic stake in these proceedings. Shareholders are not entitled to a dividend in respect

of an equity claim until all other claims have been satisfied. There is no possibility of MTC's unsecured creditors being paid in full, whether in these proceedings or in a bankruptcy.

- *BIA*, s 140.1 **[TAB 1]**
- *Re EarthFirst Canada Inc*, 2009 ABQB 316 at paras 1 and 5 **[TAB 18]**

5. Mr. Tetreault's Objection: MTC has undisclosed assets of significant value

99. As described in paragraph 61 of this brief, the undisclosed assets to which Mr. Tetreault referred at the Reconvened Meeting are of little to no realizable value.

6. Mr. Tetreault's Objection: MTC has failed to report to its shareholders

100. Whether MTC has fulfilled its statutory reporting obligations is irrelevant to the test for approval of a proposal. It does not bear on the fairness or reasonableness of the proposal, because full disclosure of the Company's assets and affairs has been made in the proposal proceedings, and the creditors have the ability to review that disclosure and determine whether or not to vote in favour of the Twice Amended Proposal.

101. Furthermore, there is no element of bad faith in the Company's failure to meet statutory disclosure requirements that could taint the Twice Amended Proposal. The Company's failure to report since Mr. Struss took over as sole director and officer of MTC in 2014 is a direct consequence of MTC's dire financial circumstances. The Company lacks the funding to retain auditors and staff to prepare and file disclosure documents, and to provide ongoing reports to shareholders.

- Struss Affidavit, at para 18

V. CONCLUSION

102. These proceedings, and the Twice Amended Proposal contemplated therein, are the culmination of a long and tumultuous history for MTC and MI. While MI developed promising green technology, because it is weighed down by the substantial debt of its parent, it has never been able to obtain the sustained funding needed to capitalize on its intellectual property and become a commercial success. Despite efforts to privately restructure MTC's debt and to raise additional capital, the company was far too burdened with past and newly-arising liabilities to break free from the vicious circle in which it now finds itself.

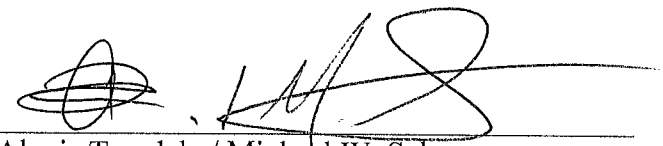
103. The Twice Amended Proposal should be approved. It was made in good faith and represents a reasonable compromise calculated to benefit the general body of its creditors, the significant majority of whom voted in favour of it. The Trustee has confirmed that the Twice Amended Proposal will result in a timelier and greater distribution to MTC's Creditors than would otherwise be achieved through a bankruptcy and liquidation of MTC's assets.

VI. RELIEF SOUGHT

104. The Applicant seeks Orders approving the Twice Amended Proposal, approving the sale of the MTC Asset to EVI, and vesting title in and to the MTC Asset in EVI, substantially in the forms attached to the Applicant's Application filed December 6, 2016.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

BENNETT JONES LLP

Per: 

Alexis Teasdale / Michael W. Selnes
Counsel for the Applicant,
Microplanet Technology Corp.

VII. AUTHORITIES

Jurisprudence

1. *Bankruptcy and Insolvency Act*, RSA 1985 c B-3;

2. *Re Magnus One Energy Corp*, 2009 ABQB 200;

3. *Re Kitchener Frame Limited*, 2012 ONSC 234;

4. *Re Wasaya Airways Limited Partnership*, 2016 ONSC 5600;

5. *Re Stone*, (1976), 22 CBR (NS) 152 (Ont SC);

6. *Re Lofchik*, [1998] OJ No 322 (Ont Bktcy);

7. *Re McNamara and McNamara* (1984), 53 CBR (NS) 240 (Ont SC);

8. *Re Farkvan* (1966), 39 CBR (3d) 293 (BC Master), aff'd (May 28, 1996), Doc Prince George 32237 (BCSC);

9. *Re Gardner* (1921), 1 CBR 424 (Ont Div Ct);

10. *Re Rennie* (2010), 64 CBR (5th) 278 (Ont SCJ);

11. *Re Mayer* (1994), 25 CBR (3d) 113 (Ont Gen Div);

12. *A Zimit Ltd (Trustee of) v Woodbine Summit Ltd* (1982), 44 CBR (NS) 136 (Ont Reg in Bankruptcy); aff'd (1985), 56 CBR (NS) 320 (Ont Bktcy); aff'd (1987), 64 CBR (NS) 89 (Ont CA)

13. *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp (Ltd)*, 2008 ONCA 587;

14. *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corp*, 2013 ONSC 1078;

15. MTC's Statement of Affairs;

16. Sino-Forest Corporation 4.25% Convertible Note Indenture dated December 17, 2009 at s 5.02; Sino-Forest Corporation 9.125% Note Indenture dated August 17, 2004, at s 11.02;

17. *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corp*, 2012 ONSC 7050;

18. *Re EarthFirst Canada Inc*, 2009 ABQB 316.

AUTHORITIES

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to November 21, 2016

Last amended on February 26, 2015

À jour au 21 novembre 2016

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence
31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts
(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to November 21, 2016. The last amendments came into force on February 26, 2015. Any amendments that were not in force as of November 21, 2016 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve
31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois
(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 21 novembre 2016. Les dernières modifications sont entrées en vigueur le 26 février 2015. Toutes modifications qui n'étaient pas en vigueur au 21 novembre 2016 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

R.S.C., 1985, c. B-3

An Act respecting bankruptcy and insolvency

Short Title

Short title

1 This Act may be cited as the *Bankruptcy and Insolvency Act*.

R.S., 1985, c. B-3, s. 1; 1992, c. 27, s. 2.

Interpretation

Definitions

2 In this Act,

affidavit includes statutory declaration and solemn affirmation; (*affidavit*)

aircraft objects [Repealed, 2012, c. 31, s. 414]

application, with respect to a bankruptcy application filed in a court in the Province of Quebec, means a motion; (*Version anglaise seulement*)

assignment means an assignment filed with the official receiver; (*cession*)

bank means

(a) every bank and every authorized foreign bank within the meaning of section 2 of the *Bank Act*,

(b) every other member of the Canadian Payments Association established by the *Canadian Payments Act*, and

(c) every local cooperative credit society, as defined in subsection 2(1) of the Act referred to in paragraph (b), that is a member of a central cooperative credit society, as defined in that subsection, that is a member of that Association; (*banque*)

L.R.C., 1985, ch. B-3

Loi concernant la faillite et l'insolvabilité

Titre abrégé

Titre abrégé

1 *Loi sur la faillite et l'insolvabilité*.

L.R. (1985), ch. B-3, art. 1; 1992, ch. 27, art. 2.

Définitions et interprétation

Définitions

2 Les définitions qui suivent s'appliquent à la présente loi.

accord de transfert de titres pour obtention de crédit Accord aux termes duquel une personne insolvable ou un failli transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible. (*title transfer credit support agreement*)

actif à court terme Sommes en espèces, équivalents de trésorerie — notamment les effets négociables et dépôts à vue —, inventaire, comptes à recevoir ou produit de toute opération relative à ces actifs. (*current assets*)

actionnaire S'agissant d'une personne morale ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette personne morale ou détenant des parts de cette fiducie. (*shareholder*)

administrateur S'agissant d'une personne morale autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre. (*director*)

income trust means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event; (*fiducie de revenu*)

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

legal counsel means any person qualified, in accordance with the laws of a province, to give legal advice; (*conseiller juridique*)

locality of a debtor means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (*localité*)

Minister means the Minister of Industry; (*ministre*)

net termination value means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

official receiver means an officer appointed under subsection 12(2); (*séquestre officiel*)

b) il a résidé au cours de l'année précédant l'ouverture de sa faillite;

c) se trouve la plus grande partie de ses biens, dans les cas non visés aux alinéas a) ou b). (*locality of a debtor*)

localité d'un débiteur [Abrogée, 2005, ch. 47, art. 2(F)]

ministre Le ministre de l'Industrie. (*Minister*)

moment de la faillite S'agissant d'une personne, le moment :

a) soit du prononcé de l'ordonnance de faillite la visant;

b) soit du dépôt d'une cession de biens la visant;

c) soit du fait sur la base duquel elle est réputée avoir fait une cession de biens. (*time of the bankruptcy*)

opération sous-évaluée Toute disposition de biens ou fourniture de services pour laquelle le débiteur ne reçoit aucune contrepartie ou en reçoit une qui est manifestement inférieure à la juste valeur marchande de celle qu'il a lui-même donnée. (*transfer at undervalue*)

ouverture de la faillite Relativement à une personne, le premier en date des événements suivants à survenir :

a) le dépôt d'une cession de biens la visant;

b) le dépôt d'une proposition la visant;

c) le dépôt d'un avis d'intention par elle;

d) le dépôt de la première requête en faillite :

(i) dans les cas visés aux alinéas 50.4(8) a) et 57 a) et au paragraphe 61(2),

(ii) dans le cas où la personne, alors qu'elle est visée par un avis d'intention déposé aux termes de l'article 50.4 ou une proposition déposée aux termes de l'article 62, fait une cession avant que le tribunal ait approuvé la proposition;

e) dans les cas non visés à l'alinéa d), le dépôt de la requête à l'égard de laquelle une ordonnance de faillite est rendue;

f) l'introduction d'une procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*. (*date of the initial bankruptcy event*)

personne

(c) the event that causes an assignment by the person to be deemed; (*moment de la faillite*)

title transfer credit support agreement means an agreement under which an insolvent person or a bankrupt has provided title to property for the purpose of securing the payment or performance of an obligation of the insolvent person or bankrupt in respect of an eligible financial contract; (*accord de transfert de titres pour obtention de crédit*)

transfer at undervalue means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor; (*opération sous-évaluée*)

trustee or ***licensed trustee*** means a person who is licensed or appointed under this Act. (*syndic* ou *syndic autorisé*)

R.S., 1985, c. B-3, s. 2; R.S., 1985, c. 31 (1st Supp.), s. 69; 1992, c. 1, s. 145(F), c. 27, s. 3; 1995, c. 1, s. 62; 1997, c. 12, s. 1; 1999, c. 28, s. 146, c. 31, s. 17; 2000, c. 12, s. 8; 2001, c. 4, s. 25, c. 9, s. 572; 2004, c. 25, s. 7; 2005, c. 3, s. 11, c. 47, s. 2; 2007, c. 29, s. 91, c. 36, s. 1; 2012, c. 31, s. 414; 2015, c. 3, s. 6(F).

du paragraphe 5(1) de la *Loi sur le Bureau du surintendant des institutions financières*. (*Superintendent of Financial Institutions*)

syndic ou ***syndic autorisé*** Personne qui détient une licence ou est nommée en vertu de la présente loi. (*trustee* or *licensed trustee*)

tribunal Sauf aux alinéas 178(1)a) et a.1) et aux articles 204.1 à 204.3, tout tribunal mentionné aux paragraphes 183(1) ou (1.1). Y est assimilé tout juge de ce tribunal ainsi que le greffier ou le registraire de celui-ci, lorsqu'il exerce les pouvoirs du tribunal qui lui sont conférés au titre de la présente loi. (*court*)

union de fait Relation qui existe entre deux conjoints de fait. (*common-law partnership*)

valeurs nettes dues à la date de résiliation La somme nette obtenue après compensation des obligations mutuelles des parties à un contrat financier admissible effectuée conformément à ce contrat. (*net termination value*)

L.R. (1985), ch. B-3, art. 2; L.R. (1985), ch. 31 (1er suppl.), art. 69; 1992, ch. 1, art. 145(F), ch. 27, art. 3; 1995, ch. 1, art. 62; 1997, ch. 12, art. 1; 1999, ch. 28, art. 146, ch. 31, art. 17; 2000, ch. 12, art. 8; 2001, ch. 4, art. 25, ch. 9, art. 572; 2004, ch. 25, art. 7; 2005, ch. 3, art. 11, ch. 47, art. 2; 2007, ch. 29, art. 91, ch. 36, art. 1; 2012, ch. 31, art. 414; 2015, ch. 3, art. 6(F).

Designation of beneficiary

2.1 A change in the designation of a beneficiary in an insurance contract is deemed to be a disposition of property for the purpose of this Act.

1997, c. 12, s. 2; 2004, c. 25, s. 8; 2005, c. 47, s. 3.

Désignation de bénéficiaires

2.1 La modification de la désignation du bénéficiaire d'une police d'assurance est réputée être une disposition de biens pour l'application de la présente loi.

1997, ch. 12, art. 2; 2004, ch. 25, art. 8; 2005, ch. 47, art. 3.

Superintendent's division office

2.2 Any notification, document or other information that is required by this Act to be given, forwarded, mailed, sent or otherwise provided to the Superintendent, other than an application for a licence under subsection 13(1), shall be given, forwarded, mailed, sent or otherwise provided to the Superintendent at the Superintendent's division office as specified in directives of the Superintendent.

1997, c. 12, s. 2.

Bureau de division

2.2 Sauf dans le cas de la demande de licence prévue au paragraphe 13(1), les notifications et envois de documents ou renseignements à effectuer au titre de la présente loi auprès du surintendant le sont au bureau de division spécifié par ses instructions.

1997, ch. 12, art. 2.

3 [Repealed, 2005, c. 47, s. 4]

3 [Abrogé, 2005, ch. 47, art. 4]

Definitions

4 (1) In this section,

entity means a person other than an individual; (*entité*)

related group means a group of persons each member of which is related to every other member of the group; (*groupe lié*)

Définitions

4 (1) Les définitions qui suivent s'appliquent au présent article.

entité Personne autre qu'une personne physique. (*entity*)

unrelated group means a group of persons that is not a related group. (*groupe non lié*)

groupe lié Groupe de personnes dont chaque membre est lié à chaque autre membre du groupe. (*related group*)

groupe non lié Groupe de personnes qui n'est pas un groupe lié. (*unrelated group*)

Definition of *related persons*

(2) For the purposes of this Act, persons are related to each other and are *related persons* if they are

(a) individuals connected by blood relationship, mar-riage, common-law partnership or adoption;

(b) an entity and

(i) a person who controls the entity, if it is con-trolled by one person,

(ii) a person who is a member of a related group that controls the entity, or

(iii) any person connected in the manner set out in paragraph (a) to a person described in subpara-graph (i) or (ii); or

(c) two entities

(i) both controlled by the same person or group of persons,

(ii) each of which is controlled by one person and the person who controls one of the entities is relat-ed to the person who controls the other entity,

(iii) one of which is controlled by one person and that person is related to any member of a related group that controls the other entity,

(iv) one of which is controlled by one person and that person is related to each member of an unre-lated group that controls the other entity,

(v) one of which is controlled by a related group a member of which is related to each member of an unrelated group that controls the other entity, or

(vi) one of which is controlled by an unrelated group each member of which is related to at least one member of an unrelated group that controls the other entity.

Définition de *personnes liées*

(2) Pour l'application de la présente loi, des personnes sont liées entre elles et constituent des *personnes liées* si elles sont :

a) soit des particuliers unis par les liens du sang, du mariage, d'une union de fait ou de l'adoption;

b) soit une entité et, selon le cas :

(i) la personne qui la contrôle, si elle est contrôlée par une seule personne,

(ii) toute personne qui est membre du groupe lié qui la contrôle,

(iii) toute personne unie de la manière indiquée à l'alinéa a) à une personne visée aux sous-alinéas (i) ou (ii);

c) soit, selon le cas, deux entités :

(i) contrôlées par la même personne ou le même groupe de personnes,

(ii) dont chacune est contrôlée par une seule per-sonne et si la personne qui contrôle l'une d'elles est liée à celle qui contrôle l'autre,

(iii) dont l'une est contrôlée par une seule personne qui est liée à un membre du groupe lié qui contrôle l'autre,

(iv) dont l'une est contrôlée par une seule personne qui est liée à chacun des membres du groupe non lié qui contrôle l'autre,

(v) dont l'une est contrôlée par un groupe lié dont l'un des membres est lié à chacun des membres du groupe non lié qui contrôle l'autre,

(vi) dont l'une est contrôlée par un groupe non lié dont chaque membre est lié à au moins un membre du groupe non lié qui contrôle l'autre.

Relationships

(3) For the purposes of this section,

Liens

(3) Pour l'application du présent article :

(a) if two entities are related to the same entity within the meaning of subsection (2), they are deemed to be related to each other;

(b) if a related group is in a position to control an entity, it is deemed to be a related group that controls the entity whether or not it is part of a larger group by whom the entity is in fact controlled;

(c) a person who has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acquire, ownership interests, however designated, in an entity, or to control the voting rights in an entity, is, except when the contract provides that the right is not exercisable until the death of an individual designated in the contract, deemed to have the same position in relation to the control of the entity as if the person owned the ownership interests;

(d) if a person has ownership interests in two or more entities, the person is, as holder of any ownership interest in one of the entities, deemed to be related to himself or herself as holder of any ownership interest in each of the other entities;

(e) persons are connected by blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;

(f) persons are connected by marriage if one is married to the other or to a person who is connected by blood relationship or adoption to the other;

(f.1) persons are connected by common-law partnership if one is in a common-law partnership with the other or with a person who is connected by blood relationship or adoption to the other; and

(g) persons are connected by adoption if one has been adopted, either legally or in fact, as the child of the other or as the child of a person who is connected by blood relationship, otherwise than as a brother or sister, to the other.

a) lorsque deux entités sont liées à la même entité au sens où l'entend le paragraphe (2), elles sont réputées liées entre elles;

b) lorsqu'un groupe lié est en mesure de contrôler une entité, il est réputé être un groupe lié qui contrôle l'entité, qu'il fasse ou non partie d'un groupe plus considérable par lequel l'entité est en fait contrôlée;

c) la personne qui a, en vertu d'un contrat, en equity ou autrement, un droit de participation aux capitaux propres d'une entité, soit immédiatement, soit à l'avenir, et de façon absolue ou conditionnelle, ou le droit d'acquérir un tel droit, ou de contrôler ainsi les droits de vote de l'entité, est réputée, sauf si le contrat stipule que le droit ne peut être exercé qu'au décès d'une personne qui y est désignée, occuper la même position à l'égard du contrôle de l'entité que si elle était titulaire de ce droit;

d) la personne qui détient un droit de participation aux capitaux propres de deux ou plusieurs entités est réputée être liée à elle-même à titre de titulaire du droit de participation dans chacune de ces entités;

e) des personnes sont unies par les liens du sang si l'une est l'enfant ou autre descendant de l'autre ou si l'une est le frère ou la sœur de l'autre;

f) des personnes sont unies par les liens du mariage si l'une est mariée à l'autre ou à une personne qui est unie à l'autre par les liens du sang ou de l'adoption;

f.1) des personnes sont unies par les liens d'une union de fait si l'une vit en union de fait avec l'autre ou avec une personne qui est unie à l'autre par les liens du sang ou de l'adoption;

g) des personnes sont unies par les liens de l'adoption si l'une a été adoptée, en droit ou de fait, comme enfant de l'autre ou comme enfant d'une personne unie à l'autre par les liens du sang, autrement qu'à titre de frère ou de sœur.

Question of fact

(4) It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length.

Question de fait

(4) La question de savoir si des personnes non liées entre elles n'avaient pas de lien de dépendance, à tel ou tel moment, est une question de fait.

Presumptions

(5) Persons who are related to each other are deemed not to deal with each other at arm's length while so related. For the purpose of paragraph 95(1)(b) or 96(1)(b), the

Présomption

(5) Les personnes liées entre elles sont réputées avoir un lien de dépendance tant qu'elles sont ainsi liées et il en va

Future property not to be considered

(7) In the determination of the realizable assets of a bankrupt for the purposes of subsection (6), no regard shall be had to any property that may be acquired by the bankrupt or devolve on the bankrupt before the bankrupt's discharge.

Where subsection (6) ceases to apply

(8) The official receiver may direct that subsection (6) shall cease to apply in respect of the bankrupt where the official receiver determines that

(a) the realizable assets of the bankrupt, after the claims of secured creditors are deducted, exceed five thousand dollars or the amount prescribed, as the case may be, or

(b) the costs of realization of the assets of the bankrupt are a significant proportion of the realizable value of the assets,

and the official receiver considers that such a direction is appropriate.

R.S., 1985, c. B-3, s. 49; 1992, c. 1, s. 15, c. 27, s. 17; 1997, c. 12, s. 29; 2004, c. 25, s. 31(E); 2005, c. 47, s. 33.

Exclusion des biens futurs

(7) Il n'est pas tenu compte pour la détermination des avoirs réalisables du failli des biens que celui-ci peut acquérir ou qui peuvent lui être dévolus avant sa libération.

Cessation d'effet du paragraphe (6)

(8) Le séquestre officiel peut ordonner que le paragraphe (6) cesse de s'appliquer au failli s'il détermine que les avoirs réalisables de celui-ci, déduction faite des réclamations des créanciers garantis, dépassent cinq mille dollars ou le montant prescrit, ou que les coûts de réalisation de ces avoirs représentent une partie importante de leur valeur réalisable, et s'il estime pareille mesure indiquée.

L.R. (1985), ch. B-3, art. 49; 1992, ch. 1, art. 15, ch. 27, art. 17; 1997, ch. 12, art. 29; 2004, ch. 25, art. 31(A); 2005, ch. 47, art. 33.

PART III

Proposals

DIVISION I

GENERAL SCHEME FOR PROPOSALS

Who may make a proposal

50 (1) Subject to subsection (1.1), a proposal may be made by

(a) an insolvent person;

(b) a receiver, within the meaning of subsection 243(2), but only in relation to an insolvent person;

(c) a liquidator of an insolvent person's property;

(d) a bankrupt; and

(e) a trustee of the estate of a bankrupt.

Where proposal may not be made

(1.1) A proposal may not be made under this Division with respect to a debtor in respect of whom a consumer

PARTIE III

Propositions concordataires

SECTION I

DISPOSITIONS D'APPLICATION GÉNÉRALE

Admissibilité

50 (1) Sous réserve du paragraphe (1.1), une proposition peut être faite par :

a) une personne insolvable;

b) un séquestre au sens du paragraphe 243(2), mais seulement relativement à une personne insolvable;

c) le liquidateur des biens d'une personne insolvable;

d) un failli;

e) le syndic de l'actif d'un failli.

Inadmissibilité

(1.1) Il ne peut être fait de proposition aux termes de la présente section relativement au débiteur à l'égard de qui

proposal has been filed under Division II until the administrator under the consumer proposal has been discharged.

To whom proposal made

(1.2) A proposal must be made to the creditors generally, either as a mass or separated into classes as provided in the proposal, and may also be made to secured creditors in respect of any class or classes of secured claim, subject to subsection (1.3).

Idem

(1.3) Where a proposal is made to one or more secured creditors in respect of secured claims of a particular class, the proposal must be made to all secured creditors in respect of secured claims of that class.

Classes of secured claims

(1.4) Secured claims may be included in the same class if the interests or rights of the creditors holding those claims are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts giving rise to the claims;

(b) the nature and rank of the security in respect of the claims;

(c) the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies;

(d) the treatment of the claims under the proposal, and the extent to which the claims would be paid under the proposal; and

(e) such further criteria, consistent with those set out in paragraphs (a) to (d), as are prescribed.

Court may determine classes

(1.5) The court may, on application made at any time after a notice of intention or a proposal is filed, determine, in accordance with subsection (1.4), the classes of secured claims appropriate to a proposal, and the class into which any particular secured claim falls.

une proposition de consommateur a été produite aux termes de la section II tant que l'administrateur désigné dans le cadre de la première proposition n'a pas été libéré.

Destinataires

(1.2) La proposition est faite aux créanciers en général, étant entendu qu'elle s'adresse, selon ce qu'elle prévoit, soit à la masse de ceux-ci, soit aux diverses catégories auxquelles ils appartiennent; elle peut en outre, sous réserve du paragraphe (1.3), être faite aux créanciers garantis d'une ou de plusieurs catégories.

Idem

(1.3) La proposition portant sur des réclamations garanties d'une catégorie particulière doit être faite à tous les créanciers garantis dont la réclamation appartient à cette catégorie.

Catégories de créances garanties

(1.4) Peuvent faire partie de la même catégorie les créances garanties des créanciers ayant des droits ou intérêts à ce point semblables, compte tenu des critères énumérés ci-après, qu'on peut en conclure qu'ils ont un intérêt commun :

a) la nature des créances donnant lieu aux réclamations en cause;

b) la nature de la garantie en question et le rang qui s'y rattache;

c) les recours dont les créanciers peuvent se prévaloir, abstraction faite de la proposition, et la mesure dans laquelle ils pourraient, en se prévalant de ces recours, obtenir satisfaction à leurs réclamations;

d) le sort réservé à leurs créances par la proposition et, notamment, la mesure dans laquelle celles-ci seraient payées aux termes de la proposition;

e) tous autres critères — compatibles avec ceux énumérés aux alinéas a) à d) — qui peuvent être prescrits.

Décision du tribunal

(1.5) Sur demande présentée après le dépôt de l'avis d'intention ou de la proposition, le tribunal peut, en conformité avec le paragraphe (1.4), déterminer quelles sont, dans le cadre de cette proposition, les diverses catégories de créances garanties; il peut également déterminer à quelle catégorie appartient telle créance garantie en particulier.

Report to creditors

(11) An interim receiver who has been directed under subsection 47.1(2) to carry out the duties set out in subsection (10) in substitution for the trustee shall deliver a report on the state of the insolvent person's business and financial affairs, containing any prescribed information, to the trustee at least fifteen days before the meeting of creditors referred to in subsection 51(1), and the trustee shall send the report to the creditors and the official receiver, in the prescribed manner, at least ten days before the meeting of creditors referred to in that subsection.

Court may declare proposal as deemed refused by creditors

(12) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1 or a creditor, at any time before the meeting of creditors, declare that the proposal is deemed to have been refused by the creditors if the court is satisfied that

(a) the debtor has not acted, or is not acting, in good faith and with due diligence;

(b) the proposal will not likely be accepted by the creditors; or

(c) the creditors as a whole would be materially prejudiced if the application under this subsection is rejected.

Effect of declaration

(12.1) If the court declares that the proposal is deemed to have been refused by the creditors, paragraphs 57(a) to (c) apply.

Claims against directors — compromise

(13) A proposal made in respect of a corporation may include in its terms provision for the compromise of claims against directors of the corporation that arose before the commencement of proceedings under this Act and that relate to the obligations of the corporation where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(14) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors arising from contracts with one or more directors; or

Rapport à l'intention des créanciers

(11) Le séquestre intérimaire qui, aux termes du paragraphe 47.1(2), s'est vu confier l'exercice, en remplacement du syndic, des fonctions visées au paragraphe (10) est tenu de remettre à celui-ci, au moins quinze jours avant la tenue de l'assemblée des créanciers prévue au paragraphe 51(1), un rapport portant sur les affaires et les finances de la personne insolvable et contenant les renseignements prescrits; le syndic expédie, de la manière prescrite, ce rapport aux créanciers et au séquestre officiel au moins dix jours avant la tenue de l'assemblée des créanciers prévue à ce paragraphe.

Présomption de refus de la proposition

(12) À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut, avant l'assemblée des créanciers, déclarer que la proposition est réputée refusée par les créanciers, s'il est convaincu que, selon le cas :

a) le débiteur n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

b) la proposition ne sera vraisemblablement pas acceptée par les créanciers;

c) le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Effet de la déclaration

(12.1) Si le tribunal déclare que la proposition est réputée avoir été refusée par les créanciers, les alinéas 57a) à c) s'appliquent.

Transaction — réclamations contre les administrateurs

(13) La proposition visant une personne morale peut comporter, au profit de ses créanciers, des dispositions relatives à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.

Restriction

(14) La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou plusieurs créanciers à l'égard de contrats conclus avec un ou plusieurs administrateurs, ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

(b) are based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(15) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be just and equitable in the circumstances.

Application of other provisions

(16) Subsection 62(2) and section 122 apply, with such modifications as the circumstances require, in respect of claims against directors compromised under a proposal of a debtor corporation.

Determination of classes of claims

(17) The court, on application made at any time after a proposal is filed, may determine the classes of claims of claimants against directors and the class into which any particular claimant's claim falls.

Resignation or removal of directors

(18) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the corporation shall be deemed to be a director for the purposes of this section.

R.S., 1985, c. B-3, s. 50; 1992, c. 27, s. 18; 1997, c. 12, s. 30; 2001, c. 4, s. 27(E); 2004, c. 25, s. 32; 2005, c. 47, s. 34; 2007, c. 36, s. 16.

Secured creditor may file proof of secured claim

50.1 (1) Subject to subsections (2) to (4), a secured creditor to whom a proposal has been made in respect of a particular secured claim may respond to the proposal by filing with the trustee a proof of secured claim in the prescribed form, and may vote, on all questions relating to the proposal, in respect of that entire claim, and sections 124 to 126 apply, in so far as they are applicable, with such modifications as the circumstances require, to proofs of secured claim.

Proposed assessed value

(2) Where a proposal made to a secured creditor in respect of a claim includes a proposed assessed value of the security in respect of the claim, the secured creditor may file with the trustee a proof of secured claim in the prescribed form, and may vote as a secured creditor on all questions relating to the proposal in respect of an amount equal to the lesser of

(a) the amount of the claim, and

Pouvoir du tribunal

(15) Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

Application

(16) Le paragraphe 62(2) et l'article 122 s'appliquent, avec les adaptations nécessaires, aux réclamations visées au paragraphe (13).

Détermination des catégories de réclamations

(17) Le tribunal peut, sur demande faite après le dépôt de la proposition, déterminer les catégories de réclamations contre les administrateurs et indiquer la catégorie à laquelle appartient une réclamation donnée.

Démission ou destitution des administrateurs

(18) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la personne morale est réputé un administrateur pour l'application du présent article.

L.R. (1985), ch. B-3, art. 50; 1992, ch. 27, art. 18; 1997, ch. 12, art. 30; 2001, ch. 4, art. 27(A); 2004, ch. 25, art. 32; 2005, ch. 47, art. 34; 2007, ch. 36, art. 16.

Preuve de créance garantie

50.1 (1) Sous réserve des paragraphes (2) à (4), le créancier garanti à qui une proposition a été faite relativement à une réclamation garantie en particulier peut déposer auprès du syndic, en la forme prescrite, une preuve de réclamation garantie à cet égard; il peut, pour la totalité de sa réclamation, voter sur toute question se rapportant à la proposition. Les articles 124 à 126, dans la mesure où ils sont applicables, s'appliquent, avec les adaptations nécessaires, aux preuves de réclamations garanties.

Valeur attribuée

(2) En cas d'inclusion, dans la proposition faite à un créancier garanti relativement à une réclamation, d'une évaluation de la valeur de la garantie en cause, le créancier garanti peut déposer auprès du syndic, en la forme prescrite, une preuve de réclamation garantie et peut, à titre de créancier garanti, voter sur toutes questions relatives à la proposition jusqu'à concurrence d'un montant égal au moindre du montant de la réclamation et de la valeur attribuée à la garantie.

(b) the proposed assessed value of the security.

Idem

(3) Where the proposed assessed value is less than the amount of the secured creditor's claim, the secured creditor may file with the trustee a proof of claim in the prescribed form, and may vote as an unsecured creditor on all questions relating to the proposal in respect of an amount equal to the difference between the amount of the claim and the proposed assessed value.

Idem

(4) Where a secured creditor is dissatisfied with the proposed assessed value of his security, the secured creditor may apply to the court, within fifteen days after the proposal is sent to the creditors, to have the proposed assessed value revised, and the court may revise the proposed assessed value, in which case the revised value henceforth applies for the purposes of this Part.

Where no secured creditor in a class takes action

(5) Where no secured creditor having a secured claim of a particular class files a proof of secured claim at or before the meeting of creditors, the secured creditors having claims of that class shall be deemed to have voted for the refusal of the proposal.

1992, c. 27, s. 19; 1997, c. 12, s. 31(F).

Excluded secured creditor

50.2 A secured creditor to whom a proposal has not been made in respect of a particular secured claim may not file a proof of secured claim in respect of that claim.

1992, c. 27, s. 19.

Rights in bankruptcy

50.3 On the bankruptcy of an insolvent person who made a proposal to one or more secured creditors in respect of secured claims, any proof of secured claim filed pursuant to section 50.1 ceases to be valid or effective, and sections 112 and 127 to 134 apply in respect of a proof of claim filed by any secured creditor in the bankruptcy.

1992, c. 27, s. 19.

Notice of intention

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

Idem

(3) Si la valeur attribuée à la garantie est moindre que le montant de la réclamation du créancier garanti, celui-ci peut déposer auprès du syndic, en la forme prescrite, une preuve de réclamation et peut, à titre de créancier non garanti, voter sur toutes questions relatives à la proposition jusqu'à concurrence d'un montant égal à la différence entre le montant de la réclamation et la valeur attribuée à la garantie.

Idem

(4) S'il n'est pas d'accord avec la valeur attribuée à sa garantie, le créancier garanti peut, dans les quinze jours suivant l'envoi de la proposition aux créanciers, demander au tribunal de réviser l'évaluation proposée. Le tribunal peut procéder à la révision souhaitée, auquel cas la présente partie s'applique par la suite en fonction de la valeur révisée.

Rejet présumé de la proposition

(5) Les créanciers visés au paragraphe (1) qui possèdent une réclamation garantie appartenant à une catégorie particulière sont réputés avoir voté en faveur du rejet de la proposition si aucun d'entre eux n'a déposé une preuve de réclamation garantie avant l'assemblée des créanciers ou lors de celle-ci.

1992, ch. 27, art. 19; 1997, ch. 12, art. 31(F).

Le cas des autres créanciers garantis

50.2 Le créancier garanti à qui aucune proposition n'a été faite relativement à une réclamation garantie en particulier n'est pas admis à produire une preuve de réclamation garantie à cet égard.

1992, ch. 27, art. 19.

Droits en cas de faillite

50.3 En cas de faillite d'une personne insolvable ayant fait une proposition à un ou plusieurs créanciers garantis relativement à des réclamations garanties, les preuves de réclamations garanties déposées aux termes de l'article 50.1 sont sans effet, et les articles 112 et 127 à 134 s'appliquent aux preuves de réclamations déposées par des créanciers garantis dans le cadre de la faillite.

1992, ch. 27, art. 19.

Avis d'intention

50.4 (1) Avant de déposer copie d'une proposition auprès d'un syndic autorisé, la personne insolvable peut, en la forme prescrite, déposer auprès du séquestre officiel de sa localité un avis d'intention énonçant :

a) son intention de faire une proposition;

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

b) les nom et adresse du syndic autorisé qui a accepté, par écrit, les fonctions de syndic dans le cadre de la proposition;

c) le nom de tout créancier ayant une réclamation s'élevant à au moins deux cent cinquante dollars, ainsi que le montant de celle-ci, connu ou indiqué aux livres du débiteur.

L'avis d'intention est accompagné d'une copie de l'acceptation écrite du syndic.

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Documents à déposer

(2) Dans les dix jours suivant le dépôt de l'avis d'intention visé au paragraphe (1), la personne insolvable dépose les documents suivants auprès du séquestre officiel :

a) un état établi par la personne insolvable — appelé « l'état » au présent article — portant, projections au moins mensuelles à l'appui, sur l'évolution de son encaisse, et signé par elle et par le syndic désigné dans l'avis d'intention après que celui-ci en a vérifié le caractère raisonnable;

b) un rapport portant sur le caractère raisonnable de l'état, établi, en la forme prescrite, par le syndic et signé par lui;

c) un rapport contenant les observations — prescrites par les Règles générales — de la personne insolvable relativement à l'établissement de l'état, établi, en la forme prescrite, par celle-ci et signé par elle.

Creditors may obtain statement

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Copies de l'état

(3) Sous réserve du paragraphe (4), tout créancier qui en fait la demande au syndic peut obtenir une copie de l'état.

Exception

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

Exception

(4) Le tribunal peut rendre une ordonnance de non-communication de tout ou partie de l'état, s'il est convaincu que sa communication à l'un ou l'autre ou à l'ensemble des créanciers causerait un préjudice indu à la personne insolvable ou encore que sa non-communication ne causerait pas de préjudice indu au créancier ou aux créanciers en question.

Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is

Immunité

(5) S'il agit de bonne foi et prend toutes les précautions voulues pour bien réviser l'état, le syndic ne peut être

not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

tenu responsable des dommages ou pertes subis par la personne qui s'y fie.

Notification

(6) Dans les cinq jours suivant le dépôt de l'avis d'intention, le syndic qui y est nommé en fait parvenir à tous les créanciers connus, de la manière prescrite, une copie contenant les renseignements mentionnés aux alinéas (1)a) à c).

Obligation de surveillance

(7) Sous réserve de toute instruction émise par le tribunal aux termes de l'alinéa 47.1(2)a), le syndic désigné dans un avis d'intention se rapportant à une personne insolvable :

a) a, dans le cadre de la surveillance des affaires et des finances de celle-ci et dans la mesure où cela est nécessaire pour lui permettre d'estimer adéquatement les affaires et les finances de la personne insolvable, accès aux biens — locaux, livres, registres et autres documents financiers, notamment — de cette personne, biens qu'il est d'ailleurs tenu d'examiner, et ce depuis le dépôt de l'avis d'intention jusqu'au dépôt de la proposition ou jusqu'à ce que la personne en question devienne un failli;

b) dépose un rapport portant sur l'état des affaires et des finances de la personne insolvable et contenant les renseignements prescrits :

(i) auprès du séquestre officiel dès qu'il note un changement négatif important au chapitre des projections relatives à l'encaisse de la personne insolvable ou au chapitre de la situation financière de celle-ci,

(ii) auprès du tribunal au plus tard lors de l'audition de la demande dont celui-ci est saisi aux termes du paragraphe (9) et aux autres moments déterminés par ordonnance du tribunal;

c) envoie aux créanciers un rapport sur le changement visé au sous-alinéa b)(i) dès qu'il le note.

Cas de cession présumée

(8) Lorsque la personne insolvable omet de se conformer au paragraphe (2) ou encore lorsque le syndic omet de déposer, ainsi que le prévoit le paragraphe 62(1), la proposition auprès du séquestre officiel dans les trente jours suivant le dépôt de l'avis d'intention aux termes du paragraphe (1) ou dans le délai supérieur accordé aux termes du paragraphe (9) :

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

a) la personne insolvable est, à l'expiration du délai applicable, réputée avoir fait une cession;

b) le syndic en fait immédiatement rapport, en la forme prescrite, au séquestre officiel;

b.1) le séquestre officiel délivre, en la forme prescrite, un certificat de cession ayant, pour l'application de la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49;

c) le syndic convoque, dans les cinq jours suivant la délivrance du certificat de cession, une assemblée des créanciers aux termes de l'article 102, assemblée à laquelle les créanciers peuvent, par résolution ordinaire, nonobstant l'article 14, confirmer sa nomination ou lui substituer un autre syndic autorisé.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Prorogation de délai

(9) La personne insolvable peut, avant l'expiration du délai de trente jours — déjà prorogé, le cas échéant, aux termes du présent paragraphe — prévu au paragraphe (8), demander au tribunal de proroger ou de proroger de nouveau ce délai; après avis aux intéressés qu'il peut désigner, le tribunal peut acquiescer à la demande, pourvu qu'aucune prorogation n'excède quarante-cinq jours et que le total des prorogations successives demandées et accordées n'excède pas cinq mois à compter de l'expiration du délai de trente jours, et pourvu qu'il soit convaincu, dans le cas de chacune des demandes, que les conditions suivantes sont réunies :

a) la personne insolvable a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue;

b) elle serait vraisemblablement en mesure de faire une proposition viable si la prorogation demandée était accordée;

c) la prorogation demandée ne saurait causer de préjudice sérieux à l'un ou l'autre des créanciers.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Non-application du paragraphe 187(11)

(10) Le paragraphe 187(11) ne s'applique pas aux délais prévus par le paragraphe (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any

Interruption de délai

(11) À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut mettre fin, avant son expiration normale, au délai de trente jours — prorogé, le cas

extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17.

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

Individuals

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

échéant — prévu au paragraphe (8), s'il est convaincu que, selon le cas :

a) la personne insolvable n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

b) elle ne sera vraisemblablement pas en mesure de faire une proposition viable avant l'expiration du délai;

c) elle ne sera vraisemblablement pas en mesure de faire, avant l'expiration du délai, une proposition qui sera acceptée des créanciers;

d) le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s'appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17.

Préparation de la proposition

50.5 Le syndic désigné dans un avis d'intention doit, entre le dépôt de l'avis d'intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens du débiteur sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter au débiteur la somme qu'il approuve compte tenu de l'état — visé à l'alinéa 50(6)a) ou 50.4(2)a), selon le cas — portant sur l'évolution de l'encaisse et des besoins de celui-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Personne physique

(2) Toutefois, lorsque le débiteur est une personne physique, il ne peut présenter la demande que s'il exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

Priority

(3) The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

Priority — previous orders

(4) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

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

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

2005, c. 47, s. 36; 2007, c. 36, s. 18.

Calling of meeting of creditors

51 (1) The trustee shall call a meeting of the creditors, to be held within twenty-one days after the filing of the proposal with the official receiver under subsection 62(1), by sending in the prescribed manner to every known creditor and to the official receiver, at least ten days before the meeting,

(a) a notice of the date, time and place of the meeting;

(b) a condensed statement of the assets and liabilities;

(c) a list of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books;

(d) a copy of the proposal;

Priorité — créanciers garantis

(3) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis du débiteur.

Priorité — autres ordonnances

(4) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens du débiteur au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Facteurs à prendre en considération

(5) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard du débiteur sous le régime de la présente loi;

b) la façon dont les affaires financières et autres du débiteur seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la présentation d'une proposition viable à l'égard du débiteur;

e) la nature et la valeur des biens du débiteur;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers du débiteur;

g) le rapport du syndic visé aux alinéas 50(6)b) ou 50.4(2)b), selon le cas.

2005, ch. 47, art. 36; 2007, ch. 36, art. 18.

Convocation d'une assemblée des créanciers

51 (1) Le syndic convoque immédiatement une assemblée des créanciers — qui doit avoir lieu dans les vingt et un jours suivant le dépôt de la proposition auprès du séquestre officiel aux termes du paragraphe 62(1) — en adressant, de la manière prescrite, à chaque créancier connu et au séquestre officiel, au moins dix jours avant l'assemblée, les documents suivants :

a) un avis des date, heure et lieu de l'assemblée;

b) un état succinct des avoirs et obligations;

c) une liste des créanciers que vise la proposition, avec des réclamations se chiffrant à deux cent cinquante dollars ou plus, et des montants de leurs réclamations, connus ou indiqués aux livres du débiteur;

(e) the prescribed forms, in blank, of

(i) proof of claim,

(ii) in the case of a secured creditor to whom the proposal was made, proof of secured claim, and

(iii) proxy,

if not already sent; and

(f) a voting letter as prescribed.

d) une copie de la proposition;

e) si elles n'ont pas déjà été envoyées, les formules prescrites — en blanc — devant servir à l'établissement d'une procuration, d'une preuve de réclamation ou, dans le cas d'un créancier garanti à qui la proposition a été faite, d'une preuve de réclamation garantie;

f) une formule prescrite de votation.

In case of a prior meeting

(2) Where a meeting of his creditors at which a statement or list of the debtor's assets, liabilities and creditors was presented was held before the trustee is required by this section to convene a meeting to consider the proposal and at the time when the debtor requires the convening of the meeting the condition of the debtor's estate remains substantially the same as at the time of the former meeting, the trustee may omit observance of the provisions of paragraphs (1)(b) and (c).

En cas d'une assemblée antérieure

(2) Lorsqu'il est tenu une assemblée des créanciers à laquelle a été présenté un état ou une liste de l'actif, du passif et des créanciers du débiteur, avant que le syndic soit ainsi requis de convoquer une assemblée aux termes du présent article pour étudier la proposition, et que, à la date à laquelle le débiteur requiert la convocation de cette assemblée, l'état de l'actif du débiteur reste sensiblement le même qu'à l'époque de l'assemblée précédente, le syndic n'est pas tenu d'observer les alinéas (1)b) et c).

Chair of first meeting

(3) The official receiver, or the nominee thereof, shall be the chair of the meeting referred to in subsection (1) and shall decide any questions or disputes arising at the meeting, and any creditor may appeal any such decision to the court.

R.S., 1985, c. B-3, s. 51; 1992, c. 1, s. 20, c. 27, s. 20; 1999, c. 31, s. 19(F); 2005, c. 47, s. 123(E).

Président de la première assemblée

(3) Le séquestre officiel, ou la personne qu'il désigne, préside l'assemblée des créanciers visée au paragraphe (1) et décide des questions posées ou des contestations soulevées à l'assemblée; tout créancier peut appeler d'une telle décision devant le tribunal.

L.R. (1985), ch. B-3, art. 51; 1992, ch. 1, art. 20, ch. 27, art. 20; 1999, ch. 31, art. 19(F); 2005, ch. 47, art. 123(A).

Adjournment of meeting for further investigation and examination

52 Where the creditors by ordinary resolution at the meeting at which a proposal is being considered so require, the meeting shall be adjourned to such time and place as may be fixed by the chair

(a) to enable a further appraisal and investigation of the affairs and property of the debtor to be made; or

(b) for the examination under oath of the debtor or of such other person as may be believed to have knowledge of the affairs or property of the debtor, and the testimony of the debtor or such other person, if transcribed, shall be placed before the adjourned meeting or may be read in court on the application for the approval of the proposal.

R.S., 1985, c. B-3, s. 52; 2005, c. 47, s. 123(E).

Ajournement d'une assemblée pour investigation et examen supplémentaires

52 Lorsque les créanciers l'exigent au moyen d'une résolution ordinaire lors de l'assemblée à laquelle une proposition est étudiée, l'assemblée est ajournée aux date, heure et lieu que peut déterminer le président, aux fins de, selon le cas :

a) permettre que soient effectuées une évaluation et une investigation plus approfondies concernant les affaires et biens du débiteur;

b) interroger sous serment le débiteur ou toute autre personne censée avoir connaissance des affaires ou des biens du débiteur, et le témoignage de ce dernier ou de cette autre personne, s'il est transcrit, est présenté à l'assemblée ajournée, ou il peut être lu devant le tribunal lors de la demande d'approbation de la proposition.

L.R. (1985), ch. B-3, art. 52; 2005, ch. 47, art. 123(A).

Creditor may assent or dissent

53 Any creditor who has proved a claim, whether secured or unsecured, may indicate assent to or dissent from the proposal in the prescribed manner to the trustee prior to the meeting, and any assent or dissent, if received by the trustee at or prior to the meeting, has effect as if the creditor had been present and had voted at the meeting.

R.S., 1985, c. B-3, s. 53; 1992, c. 1, s. 20, c. 27, s. 21.

Accord ou désaccord du créancier

53 Tout créancier qui a prouvé une réclamation — garantie ou non — peut, de la manière prescrite, indiquer au syndic, avant l'assemblée, s'il approuve ou désapprouve la proposition; si cette approbation ou désapprobation est reçue par le syndic avant l'assemblée ou lors de celle-ci, elle a le même effet que si le créancier avait été présent et avait voté à l'assemblée.

L.R. (1985), ch. B-3, art. 53; 1992, ch.1, art. 20, ch. 27, art. 21.

Vote on proposal by creditors

54 (1) The creditors may, in accordance with this section, resolve to accept or may refuse the proposal as made or as altered at the meeting or any adjournment thereof.

Vote sur la proposition

54 (1) Les créanciers peuvent, conformément aux autres dispositions du présent article, décider d'accepter ou rejeter la proposition ainsi qu'elle a été faite ou modifiée à l'assemblée ou à un ajournement de celle-ci.

Voting system

(2) For the purpose of subsection (1),

(a) the following creditors with proven claims are entitled to vote:

(i) all unsecured creditors, and

(ii) those secured creditors in respect of whose secured claims the proposal was made;

(b) the creditors shall vote by class, according to the class of their respective claims, and for that purpose

(i) all unsecured claims constitute one class, unless the proposal provides for more than one class of unsecured claim, and

(ii) the classes of secured claims shall be determined as provided by subsection 50(1.4);

(c) the votes of the secured creditors do not count for the purpose of this section, but are relevant only for the purpose of subsection 62(2); and

(d) the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors — other than, unless the court orders otherwise, a class of creditors having equity claims — vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution.

Mode de votation

(2) La votation est régie par les règles suivantes :

a) tous les créanciers non garantis, ainsi que les créanciers garantis dont les réclamations garanties ont fait l'objet de la proposition, ont le droit de voter s'ils ont prouvé leurs réclamations;

b) les créanciers votent par catégorie, selon celle des catégories à laquelle appartiennent leurs réclamations respectives; à cette fin, toutes les réclamations non garanties forment une seule catégorie, sauf si la proposition prévoit plusieurs catégories de réclamations non garanties, tandis que les catégories de réclamations garanties sont déterminées conformément au paragraphe 50(1.4);

c) le vote des créanciers garantis n'est pas pris en considération pour l'application du présent article; il ne l'est que pour l'application du paragraphe 62(2);

d) la proposition est réputée acceptée par les créanciers seulement si toutes les catégories de créanciers non garantis — mis à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant des réclamations relatives à des capitaux propres — votent en faveur de son acceptation par une majorité en nombre et une majorité des deux tiers en valeur des créanciers non garantis de chaque catégorie présents personnellement ou représentés par fondé de pouvoir à l'assemblée et votant sur la résolution.

Certain Crown claims

(2.1) For greater certainty, subsection 224(1.2) of the *Income Tax Act* shall not be construed as classifying as secured claims, for the purpose of subsection (2), claims of

Certaines réclamations de la Couronne

(2.1) Il demeure entendu que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* n'a pas pour effet d'assimiler, pour l'application du paragraphe (2), aux réclamations garanties les réclamations de Sa Majesté du chef du

and at either meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

R.S., 1985, c. B-3, s. 57; 1992, c. 27, s. 23; 1997, c. 12, s. 33; 2005, c. 47, s. 38.

À cette assemblée, les créanciers peuvent, par résolution ordinaire, nonobstant l'article 14, confirmer la nomination du syndic ou lui substituer un autre syndic autorisé.

L.R. (1985), ch. B-3, art. 57; 1992, ch. 27, art. 23; 1997, ch. 12, art. 33; 2005, ch. 47, art. 38.

Appointment of new trustee

57.1 Where a declaration has been made under subsection 50(12) or 50.4(11), the court may, if it is satisfied that it would be in the best interests of the creditors to do so, appoint a trustee in lieu of the trustee appointed under the notice of intention or proposal that was filed.

1997, c. 12, s. 34.

Nomination par le tribunal

57.1 Dans les cas prévus aux paragraphes 50(12) ou 50.4(11), le tribunal peut substituer au syndic nommé dans l'avis d'intention ou la proposition un autre syndic s'il est convaincu que cette mesure est dans l'intérêt des créanciers.

1997, ch. 12, art. 34.

Application for court approval

58 On acceptance of a proposal by the creditors, the trustee shall

(a) within five days after the acceptance, apply to the court for an appointment for a hearing of the application for the court's approval of the proposal;

(b) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor who has proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;

(c) forward a copy of the report referred to in paragraph (d) to the official receiver at least ten days before the date of the hearing; and

(d) at least two days before the date of the hearing, file with the court, in the prescribed form, a report on the proposal.

R.S., 1985, c. B-3, s. 58; 1992, c. 1, s. 20, c. 27, s. 23; 1997, c. 12, s. 35.

Demande d'approbation

58 En cas d'acceptation de la proposition par les créanciers, le syndic :

a) dans les cinq jours suivants, demande au tribunal de fixer la date d'audition de la demande d'approbation de la proposition par celui-ci;

b) adresse, selon les modalités prescrites, un préavis d'audition d'au moins quinze jours au débiteur, à l'auteur de la proposition, à chaque créancier qui a prouvé une réclamation, garantie ou non, et au séquestre officiel;

c) adresse au séquestre officiel, au moins dix jours avant la date de l'audition, une copie du rapport visé à l'alinéa d);

d) au moins deux jours avant la date de l'audition, dépose devant le tribunal, en la forme prescrite, un rapport sur la proposition.

L.R. (1985), ch. B-3, art. 58; 1992, ch. 1, art. 20, ch. 27, art. 23; 1997, ch. 12, art. 35.

Court to hear report of trustee, etc.

59 (1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

Audition préalable

59 (1) Avant d'approuver la proposition, le tribunal entend le rapport du syndic dans la forme prescrite quant aux conditions de la proposition et à la conduite du débiteur; en outre, il entend le syndic, le débiteur, l'auteur de la proposition, tout créancier adverse, opposé ou dissident, ainsi que tout témoignage supplémentaire qu'il peut exiger.

Court may refuse to approve the proposal

(2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that

Le tribunal peut refuser d'approuver la proposition

(2) Lorsqu'il est d'avis que les conditions de la proposition ne sont pas raisonnables ou qu'elles ne sont pas destinées à avantager l'ensemble des créanciers, le tribunal refuse d'approuver la proposition; et il peut refuser d'approuver la proposition lorsqu'il est établi que le débiteur

Power of court

(5) Subject to subsections (1) to (1.7), the court may either approve or refuse to approve the proposal.

R.S., 1985, c. B-3, s. 60; 1992, c. 27, s. 24; 1997, c. 12, s. 37; 2000, c. 30, s. 144; 2005, c. 47, s. 39; 2007, c. 36, ss. 22, 99; 2009, c. 33, s. 22; 2012, c. 16, s. 79.

Annulment of bankruptcy

61 (1) The approval by the court of a proposal made after bankruptcy operates to annul the bankruptcy and to revest in the debtor, or in such other person as the court may approve, all the right, title and interest of the trustee in the property of the debtor, unless the terms of the proposal otherwise provide.

Non-approval of proposal by court

(2) Where the court refuses to approve a proposal in respect of an insolvent person a copy of which has been filed under section 62,

(a) the insolvent person is deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

(3) [Repealed, 1992, c. 27, s. 25]

Costs when proposal refused

(4) No costs incurred by a debtor on or incidental to an application to approve a proposal, other than the costs incurred by the trustee, shall be allowed out of the estate of the debtor if the court refuses to approve the proposal.

R.S., 1985, c. B-3, s. 61; 1992, c. 27, s. 25; 1997, c. 12, s. 38; 2005, c. 47, s. 40.

Filing of proposal

62 (1) If a proposal is made in respect of an insolvent person, the trustee shall file with the official receiver a copy of the proposal and the prescribed statement of affairs.

Pouvoirs du tribunal

(5) Sous réserve des paragraphes (1) à (1.7), le tribunal peut approuver ou refuser la proposition.

L.R. (1985), ch. B-3, art. 60; 1992, ch. 27, art. 24; 1997, ch. 12, art. 37; 2000, ch. 30, art. 144; 2005, ch. 47, art. 39; 2007, ch. 36, art. 22 et 99; 2009, ch. 33, art. 22; 2012, ch. 16, art. 79.

Annulation de faillite

61 (1) L'approbation par le tribunal d'une proposition faite après la faillite a pour effet d'annuler la faillite et de réattribuer au débiteur, ou à toute autre personne que le tribunal peut approuver, le droit, le titre et l'intérêt complets du syndic aux biens du débiteur, à moins que les conditions de la proposition n'en stipulent autrement.

Refus d'approuver une proposition

(2) Lorsque le tribunal refuse d'approuver une proposition visant une personne insolvable, proposition dont une copie a été déposée aux termes de l'article 62 :

a) celle-ci est réputée avoir fait dès lors une cession;

b) le syndic en fait immédiatement rapport, en la forme prescrite, au séquestre officiel;

b.1) le séquestre officiel délivre, en la forme prescrite, un certificat de cession ayant, pour l'application de la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49;

c) le syndic convoque, dans les cinq jours suivant la délivrance du certificat de cession, une assemblée des créanciers aux termes de l'article 102, assemblée à laquelle les créanciers peuvent, par résolution ordinaire, nonobstant l'article 14, confirmer sa nomination ou lui substituer un autre syndic autorisé.

(3) [Abrogé, 1992, ch. 27, art. 25]

Frais lorsque la proposition est refusée

(4) Si le tribunal refuse d'approuver une proposition, il ne peut être accordé sur l'actif du débiteur aucuns frais qu'a entraînés ou occasionnés pour ce dernier une demande d'approbation de la proposition sauf ceux qu'a subis le syndic.

L.R. (1985), ch. B-3, art. 61; 1992, ch. 27, art. 25; 1997, ch. 12, art. 38; 2005, ch. 47, art. 40.

Dépôt d'une proposition

62 (1) Le syndic dépose, auprès du séquestre officiel, une copie de toute proposition visant une personne insolvable ainsi que du bilan prescrit.

(c) the failure to issue the order is likely to result in irreparable damage to the insolvent person.

c) elle subirait vraisemblablement des dommages irréparables s'il ne la rendait pas.

No delay on vote on proposal

(3) The vote of the creditors in respect of a proposal may not be delayed solely because the period provided in the laws of the jurisdiction governing collective bargaining between the insolvent person and the bargaining agent has not expired.

Vote sur la proposition

(3) Le vote des créanciers sur la proposition ne peut être retardé pour la seule raison que le délai imparti par les règles de droit applicables aux négociations collectives entre les parties à la convention collective n'a pas expiré.

Claims arising from revision of collective agreement

(4) If the parties to the collective agreement agree to revise the collective agreement after proceedings have been commenced under this Act in respect of the insolvent person, the bargaining agent that is a party to the agreement has a claim, as an unsecured creditor, for an amount equal to the value of concessions granted by the bargaining agent with respect to the remaining term of the collective agreement.

Réclamation consécutive à la révision

(4) Si les parties acceptent de réviser la convention collective après que des procédures ont été intentées sous le régime de la présente loi à l'égard d'une personne insolvable, l'agent négociateur en cause est réputé avoir une réclamation à titre de créancier non garanti pour une somme équivalant à la valeur des concessions accordées pour la période non écoulée de la convention.

Order to disclose information

(5) On the application of the bargaining agent and on notice to the person to whom the application relates, the court may, subject to any terms and conditions it specifies, make an order requiring the person to make available to the bargaining agent any information specified by the court in the person's possession or control that relates to the insolvent person's business or financial affairs and that is relevant to the collective bargaining between the insolvent person and the bargaining agent. The court may make the order only after the insolvent person has been authorized to serve a notice to bargain under subsection (1).

Ordonnance visant la communication de renseignements

(5) Sur demande de l'agent négociateur partie à la convention collective et sur avis aux personnes intéressées, le tribunal peut ordonner à celles-ci de communiquer au demandeur, aux conditions qu'il précise, tous renseignements qu'elles ont en leur possession ou à leur disposition — sur les affaires et la situation financière de la personne insolvable — qui ont un intérêt pour les négociations collectives. Le tribunal ne peut rendre l'ordonnance qu'après l'envoi à l'agent négociateur de l'avis de négociations collectives visé au paragraphe (1).

Unrevised collective agreements remain in force

(6) For greater certainty, any collective agreement that the insolvent person and the bargaining agent have not agreed to revise remains in force.

Maintien en vigueur des conventions collectives

(6) Il est entendu que toute convention collective que la personne insolvable et l'agent négociateur n'ont pas convenu de réviser demeure en vigueur.

Parties

(7) For the purpose of this section, the parties to a collective agreement are the insolvent person and the bargaining agent who are bound by the collective agreement.

2005, c. 47, s. 44.

Parties

(7) Pour l'application du présent article, les parties à la convention collective sont la personne insolvable et l'agent négociateur liés par elle.

2005, ch. 47, art. 44.

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale

Restriction à la disposition d'actifs

65.13 (1) Il est interdit à la personne insolvable à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement

or disposition even if shareholder approval was not obtained.

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(4) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

(b) the consideration to be received is superior to the consideration that would be received under any other

des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Personne physique

(2) Toutefois, lorsque l'autorisation est demandée par une personne physique qui exploite une entreprise, elle ne peut viser que les actifs acquis ou utilisés dans le cadre de l'exploitation de celle-ci.

Avis aux créanciers

(3) La personne insolvable qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Facteurs à prendre en considération

(4) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du syndic au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Autres facteurs

(5) Si la personne insolvable projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la personne insolvable;

b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de

offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(6) For the purpose of subsection (5), a person who is related to the insolvent person includes

(a) a director or officer of the insolvent person;

(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

2005, c. 47, s. 44; 2007, c. 36, s. 27.

Insolvent person may disclaim or resiliate commercial lease

65.2 (1) At any time between the filing of a notice of intention and the filing of a proposal, or on the filing of a proposal, in respect of an insolvent person who is a commercial lessee under a lease of real property or an immovable, the insolvent person may disclaim or resiliate the lease on giving thirty days notice to the lessor in the prescribed manner, subject to subsection (2).

Lessor may challenge

(2) Within fifteen days after being given notice of the disclaimer or resiliation of a lease under subsection (1), the lessor may apply to the court for a declaration that subsection (1) does not apply in respect of that lease, and the court, on notice to any parties that it may direct, shall, subject to subsection (3), make that declaration.

toute autre offre reçue dans le cadre du projet de disposition.

Personnes liées

(6) Pour l'application du paragraphe (5), les personnes ci-après sont considérées comme liées à la personne insolvable :

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas a) ou b).

Autorisation de disposer des actifs en les libérant de restrictions

(7) Le tribunal peut autoriser la disposition d'actifs de la personne insolvable, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

Restriction à l'égard des employeurs

(8) Il ne peut autoriser la disposition que s'il est convaincu que la personne insolvable est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 60(1.3)a) et (1.5)a) s'il avait approuvé la proposition.

2005, ch. 47, art. 44; 2007, ch. 36, art. 27.

Résiliation d'un bail commercial

65.2 (1) Entre le dépôt d'un avis d'intention et celui d'une proposition relative à une personne insolvable qui est un locataire commercial en vertu d'un bail sur un immeuble ou un bien réel, ou lors du dépôt d'une telle proposition, cette personne peut, sous réserve du paragraphe (2), résilier son bail sur préavis de trente jours donné de la manière prescrite.

Contestation

(2) Sur demande du locateur, faite dans les quinze jours suivant le préavis, et sur préavis aux parties qu'il estime indiquées, le tribunal déclare le paragraphe (1) inapplicable au bail en question.

Postponement of equity claims

140.1 A creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied.

2005, c. 47, s. 90; 2007, c. 36, s. 49.

Réclamations relatives à des capitaux propres

140.1 Le créancier qui a une réclamation relative à des capitaux propres n'a pas droit à un dividende à cet égard avant que toutes les réclamations qui ne sont pas des réclamations relatives à des capitaux propres aient été satisfaites.

2005, ch. 47, art. 90; 2007, ch. 36, art. 49.

Claims generally payable rateably

141 Subject to this Act, all claims proved in a bankruptcy shall be paid rateably.

R.S., c. B-3, s. 112.

Réclamations généralement payables au prorata

141 Sous réserve des autres dispositions de la présente loi, toutes les réclamations établies dans la faillite sont acquittées au prorata.

S.R., ch. B-3, art. 112.

Partners and separate properties

142 (1) Where partners become bankrupt, their joint property shall be applicable in the first instance in payment of their joint debts, and the separate property of each partner shall be applicable in the first instance in payment of his separate debts.

Associés et biens distincts

142 (1) Dans le cas où des associés deviennent en faillite, leurs biens communs sont applicables en premier lieu au paiement de leurs dettes communes, et les biens distincts de chaque associé sont applicables en premier lieu au paiement de ses dettes distinctes.

Surplus of separate properties

(2) Where there is a surplus of the separate properties of the partners, it shall be dealt with as part of the joint property.

Surplus des biens distincts

(2) Lorsqu'il existe un surplus des biens distincts, il en est disposé comme partie des biens communs.

Surplus of joint properties

(3) Where there is a surplus of the joint property of the partners, it shall be dealt with as part of the respective separate properties in proportion to the right and interest of each partner in the joint property.

Surplus des biens communs

(3) Lorsqu'il existe un surplus des biens communs, il en est disposé comme partie des biens distincts respectifs en proportion du droit et de l'intérêt de chaque associé dans les biens communs.

Different properties

(4) Where a bankrupt owes or owed debts both individually and as a member of one or more partnerships, the claims shall rank first on the property of the individual or partnership by which the debts they represent were contracted and shall only rank on the other estate or estates after all the creditors of the other estate or estates have been paid in full.

Actifs différents

(4) Lorsque le failli a ou a eu des dettes, à la fois à titre individuel et comme membre d'une ou de plusieurs sociétés de personnes, les réclamations prennent rang d'abord contre les biens du particulier ou de la société de personnes, par qui ont été contractées les dettes que représentent ces réclamations, et ne peuvent prendre rang contre l'autre ou les autres actifs qu'après que tous les créanciers de cet autre ou de ces autres actifs ont été intégralement payés.

Costs out of joint and separate properties

(5) Where the joint property of any bankrupt partnership is insufficient to defray any costs properly incurred, the trustee may pay such costs as cannot be paid out of the joint property out of the separate property of the bankrupts or one or more of them in such proportion as he may determine, with the consent of the inspectors of the estates out of which the payment is intended to be

Les frais sont acquittés sur les biens indivis et les biens distincts

(5) Lorsque l'actif commun d'une société de personnes en faillite est insuffisant à payer les frais régulièrement subis, le syndic peut payer les frais, qui ne peuvent être acquittés sur les biens communs, sur les biens distincts de ces faillis, ou de l'un ou de plusieurs d'entre eux, selon telle proportion qu'il peut déterminer, avec le consentement des inspecteurs des actifs sur lesquels il a l'intention de faire tel paiement, ou, si ces inspecteurs négligent

TAB 2

2009 ABQB 200
Alberta Court of Queen's Bench

Magnus One Energy Corp., Re

2009 CarswellAlta 488, 2009 ABQB 200, [2009] A.W.L.D. 2130, 176 A.C.W.S. (3d) 334, 53 C.B.R. (5th) 243

In the Matter of the Proposal of Magnus One Energy Corp.

And In the Matter of the Proposal of Magnus Energy Inc.

B.E. Romaine J.

Heard: January 27, 2009
Judgment: April 2, 2009
Docket: Calgary BE01-080637, BE01-080668

Counsel: John L. Ircandia for Applicant
James R. Farrington for Pedro's Services Ltd., Taber Water Disposal Inc.

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.iii Interests of creditors

Headnote

Bankruptcy and insolvency --- Proposal — Approval by court — Conditions — Interests of creditors

ME Inc. and MO Corp. were oil and gas exploration and development companies — MO Corp. was wholly-owned subsidiary of ME Inc. — Each ME Inc. and MO Corp. filed notice of intention to make proposal under Bankruptcy and Insolvency Act — Proposals were accepted by 91.7 percent of creditors of ME Inc. and 92.3 percent of creditors of MO Corp. — Only creditors who voted against were P and T who claimed as unsecured creditors — Parent company of ME Inc. held security over all assets of ME Inc. and MO Corp. — Secured indebtedness owing to parent company was $4.3 million — ME Inc. and MO Corp. brought application for approval by court of their proposals — Under proposals, parent company agreed to be treated as unsecured creditors for purpose of most of its claim — Unsecured creditors would receive lesser of $2,500 and full amount of their claim plus pro rata amount of remaining funds — P and T opposed application on basis that ME Inc. and MO Corp. did not act in good faith and that s. 173 of Bankruptcy and Insolvency Act factors could be established against them — Application granted — There was no lack of good faith or proof of facts under s. 173 of Act to preclude approval of proposals — Terms of proposals were reasonable, they were calculated to benefit general body of creditors, and no creditors were being unduly prejudiced — Nothing in evidence called into question integrity of process or requirements of commercial morality — Situation was substantially better for unsecured creditors than it would be under general bankruptcy.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

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Garritty, Re (2006), 2006 CarswellAlta 950, 2006 ABQB 545, 62 Alta. L.R. (4th) 96, 25 C.B.R. (5th) 95, [2006] 11 W.W.R. 459, (sub nom. *Garritty (Bankrupt), Re*) 398 A.R. 123 (Alta. Q.B.) — referred to

Man With Axe Ltd. (No. 2), Re (1961), 1961 CarswellMan 4, 2 C.B.R. (N.S.) 12 (Man. Q.B.) — referred to

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Stone, Re (1976), 22 C.B.R. (N.S.) 152, 1976 CarswellOnt 56 (Ont. S.C.) — referred to

Sumner Co. (1984), Re (1987), 79 N.B.R. (2d) 191, 201 A.P.R. 191, 1987 CarswellNB 26, 64 C.B.R. (N.S.) 218 (N.B. Q.B.) — referred to

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Generally — referred to

s. 173 — referred to

s. 173(1)(a) — referred to

Business Corporations Act, R.S.A. 2000, c. B-9
Generally — referred to

Civil Enforcement Act, R.S.A. 2000, c. C-15
s. 57(4) — considered

s. 57.1 [en. 2006 c. S-4.5 s. 107] — referred to

APPLICATION by two companies for approval of proposals filed under *Bankruptcy and Insolvency Act*.

***B.E. Romaine J.*:**

Introduction

1 Magnus Energy Inc. ("Magnus Energy") and Magnus One Energy Corp. ("Magnus One") apply for approval by the Court of their proposals filed pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 and accepted by the required majority of their creditors. Two creditors, Pedro's Services Ltd. ("Pedro") and Taber Water Disposals Inc. ("Taber"), oppose the application on the basis that Magnus Energy and Magnus One have not acted in good faith and that factors set out under section 173 of the *Bankruptcy and Insolvency Act* can be established against them.

Facts

2 Magnus Energy and Magnus One were oil and gas exploration and development companies engaged in operations primarily in Alberta and Saskatchewan. Magnus One is a wholly-owned subsidiary of Magnus Energy. They each filed a Notice of Intention to make a Proposal under the *Bankruptcy and Insolvency Act* on June 18, 2008, naming RSM Richter Inc. as Trustee.

3 The Magnus companies are no longer operating. Their assets available for distribution to creditors consist of cash on hand and minor accounts receivable. No value has been attributed to any of their undeveloped oil and gas properties.

4 The parent company of Magnus Energy, Questerre Energy Corporation, holds security over all of the assets of Magnus Energy and Magnus One. As of August 31, 2008, the secured indebtedness owing to Questerre was approximately $4.3 million.

5 Magnus Energy and Magnus One each filed a Proposal with the Official Receiver on September 5, 2008, and these Proposals were accepted by 91.7% of the creditors of Magnus Energy (22 out of 24 creditors) and 92.3% of the creditors of Magnus One (24 out of 26 creditors). The only creditors who voted against the Proposals were Pedro and Taber, who are controlled by the same principal. Pedro and Taber claim as unsecured creditors of both Magnus Energy and Magnus One pursuant to a default judgment obtained on November 14, 2007 in the amount of $50,557.32.

6 Under the Proposals, Questerre agrees to be treated as an unsecured creditor for the purpose of most of its claim. Unsecured creditors would receive the lesser of $2,500 and the full amount of their claim plus a pro rata amount of remaining funds.

7 At the meetings of creditors, the Trustee advised of ongoing discussions with the Energy Resources Conservation Board over abandonment liabilities relating to the wells drilled by the debtors and the priority of such contingent claims over other debts, and advised that Questerre had agreed to deal with such abandonment costs so that any claim by the ERCB would not impact the amount available for distribution under the Proposals. Counsel for Pedro raised the following matters at the meetings:

> a) that the Trustee had not obtained a legal opinion on the validity of Questerre's security over the assets of the debtor companies, pointing out that litigation relating to the enforceability and priority of that security as against execution creditors was stayed as a result of the filing of the Notices of Intention. The Trustee responded that a legal opinion on the validity of the security had been obtained by Brookfield and K2, the previous secured creditors that had subsequently been bought out by Questerre, that he was satisfied with such opinion and did not believe that the expense of obtaining a further opinion was justifiable;
>
> b) that the Trustee should closely scrutinize and segregate the debtors' legal costs and Questerre's legal costs as they had the same counsel. The Trustee noted that he did not believe this to be an issue, but agreed to do so; and
>
> c) that counsel understood that more than $3 million of the unsecured debt of the debtors (excluding debt owed to Questerre) had been paid in full since February, 2008. The Trustee explained that the $3 million paid to creditors was incurred subsequent to Questerre's acquisition of Magnus Energy's debt, was paid by Questerre and went to the funding of flow-through share obligations. The Trustee was thus satisfied that no creditor had been preferred.

8 Pedro and Taber's counsel also alleged at the meeting that at the time Magnus One's assets were transferred to Questerre, all of Magnus One's shares were under seizure, and it was their position that a sale could not be authorized and that the transaction was reviewable. The Trustee responded that he was of the view that the seizure of shares would not have prevented the transaction from occurring as Questerre as secured creditor could have affected the transfer of assets through the appointment of a receiver or by seizing the assets.

9 The Trustee in its report to the Court on this approval application gives the opinion that the Proposals are advantageous for the creditors because they result in a greater distribution to the unsecured creditors, as there would be no distribution to unsecured creditors in a bankruptcy scenario.

Analysis

10 Prior to approving a Proposal, the Court must be satisfied that:

i) the terms of the Proposal are reasonable,

ii) the terms of the Proposal are calculated to benefit the general body of creditors, and

iii) the Proposal is made in good faith.

11 The Court must consider, not only the wishes and interests of creditors, but also the conduct and interests of the debtor, the interests of the public and future creditors and the requirements of commercial morality. I am not bound to approve the Proposals even though they have been recommended by the Trustee and given the overwhelming support of creditors, but substantial defence should be afforded to these views: The 2009 *Annotated Bankruptcy and Insolvency Act*, Houlden, Morawetz and Sarra, at page 264, citing *Gardner, Re* (1921), 1 C.B.R. 424 (Ont. S.C.); *Sumner Co. (1984), Re* (1987), 64 C.B.R. (N.S.) 218 (N.B. Q.B.) ; *Stone, Re* (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.); *National Fruit Exchange Inc., Re* (1948), 29 C.B.R. 125 (C.S. Que.); *Man With Axe Ltd. (No. 2), Re* (1961), 2 C.B.R. (N.S.) 12 (Man. Q.B.); *Abou-Rached, Re* (2002), 35 C.B.R. (4th) 165, 2002 CarswellBC 1642 (B.C. S.C.); *Garritty, Re*, [2006] A.J. No. 890 (Alta. Q.B.).

12 It is not suggested that the formalities of the *Bankruptcy and Insolvency Act*. have not been complied with nor that the Proposals do not have a reasonable possibility of being successfully completed in accordance with their terms.

13 Pedro and Taber submit that the Proposals should not be approved because the debtor companies have not acted in good faith and that there are facts as set out under section 173 of the *Bankruptcy and Insolvency Act* that can be established against them.

14 Firstly, these creditors allege that they were not given proper notice of a plan of arrangement involving Magnus Energy and Questerre that received final approval of the Court on October 31, 2007. Pursuant to that plan of arrangement, Magnus Energy shares were transferred to Questerre in return for Questerre shares. The final order provides that the Court is satisfied that service of the application was effected in accordance with the interim order, which required that the application, meeting materials and the interim order be served on Magnus Energy shareholders, its directors and auditors. There was no requirement to serve creditors. The affidavit of the President of Magnus Energy that supported the application for an initial order states that no creditors of Magnus Energy would be adversely affected by the arrangement, as they would continue to hold rights as creditors, and that neither Magnus nor Questerre had entered into the arrangement for the purpose of hindering, delaying or defrauding creditors. Pedro and Taber were thus not entitled to notice of the arrangement, although it appears from comments of their counsel that they were aware of it in any event.

15 With respect to the arrangement, Pedro and Taber suggest that a press release that gave specific details of the plan of arrangement and the Court approval process was somehow flawed because it referred to the arrangement as a "merger". This complaint is unfounded, as the press release is quite specific with respect to the arrangement details.

16 Pedro and Taber also allege that no proper disclosure of the insolvent situation of the Magnus entities was made to the Court at the time the arrangement was approved. However, it is clear from the record that the Court had before it at both the interim and final order stage the Information Circular that was sent to Magnus shareholders that would have included disclosure as mandated by securities regulation, including reference to financial statements that would disclose the details of secured debt.

17 The principal of Pedro and Taber also states that he is "not aware" if Magnus or Questerre disclosed to the Court the fact that "Questerre intended to assert in due course a security position over other creditors." It is, however, also clear from the record that it was a condition of the arrangement that all secured debt of Magnus would be paid or satisfied.

18 The gist of the objection by Pedro and Taber appears to be that Questerre took an assignment of Magnus Energy's secured debt on October 16, 2007, which they allege resulted in abuse. The specifics of that alleged abuse are as follows:

19 A. Following the plan of arrangement and assignment of secured debt, in January, 2008, Pedro and Taber registered writs of enforcement against Magnus Energy and Magnus One, and served various garnishee summons from January 17, 2008 to February 21, 2008. On February 12, 2008 Questerre demanded payment of its secured debt and issued a Notice of Intention to Enforce Security to Magnus Energy and Magnus One in the amount of indebtedness then outstanding, roughly $17 million. Questerre as secured creditor claimed priority over any funds realized by Pedro and Taber through their garnishee summons on the basis that Questerre's security interest had been registered in the Personal Property Registry on December 19, 2007, before Pedro and Taber's writ of enforcement.

20 Pedro and Taber complain that the question of who was entitled to funds paid into Court pursuant to the garnishees was stayed by the debtors' Notices of Intention. A decision by the debtor companies to exercise their legitimate rights to attempt to resolve their debts through the proposal mechanisms of the *Bankruptcy and Insolvency Act* cannot be considered bad faith.

21 B. On March 19, 2008, Magnus Energy and Magnus One transferred oil and gas assets to Questerre in partial satisfaction of the roughly $22 million of secured debt that was at that time owed to Questerre. The transfer satisfied debt to the extent of $19.5 million, leaving $2,226.618 owing to Questerre. An independent valuation of the assets was obtained, and the Trustee advised that the property transferred was valued at about $17.5 million by such report. To be conservative, the secured debt was debited at the higher amount of $19.5 million.

22 On March 18, 2008, as instructed by Pedro and Taber, a bailiff attended at the registered office of the Magnus companies and the offices of counsel for Questerre and left a Notice of Seizure of the shares of Magnus One "pursuant to Section 51 of the [*Securities Transfer Act*] and Section 57 (2) [of an unspecified Act]". Section 57(2) of the *Civil Enforcement Act* provides that an agency may seize "the interest of an enforcement debtor" in a security issued by a private company by serving a notice of seizure on the issuer at its chief executive office. Section 57(4) provides that the interest of an enforcement debtor in a security seized is subject to a prior security interest, the seizure does not affect the prior security interest, and the ability of the agency to deal with the security is limited to those rights and powers that the enforcement debtor would have had but for the seizure. The security held by Questerre over the assets of Magnus Energy appears to extend to all of the property of Magnus Energy, including the shares of Magnus One.

23 The attempted seizure thus gives rise to a number of issues relating to validity and priority that were not addressed in the submissions made at the hearing before me, but nevertheless, Pedro and Taber submit that the assignment of properties to Questerre can and should be attacked by the Trustee because no approval by the shareholders of Magnus One to a sale of substantially all of the property of the corporation was obtained as required by the *Business Corporation Act*, as Magnus Energy was not in a position to consent to a special resolution authorizing the sale because the shares were under seizure. Even if I was satisfied that the seizure had been validly executed and was unaffected by s. 57(4) of the *Civil Enforcement Act*, the party who would be entitled to raise an objection to the conveyance of assets would be the bailiff, pursuant to section 57.1 of the *Civil Enforcement Act*, and no such objection is in evidence.

C. Pedro and Taber also submit, as they did at the creditor meetings, that the debtors paid roughly 3.5 million to various creditors when other payables were left unpaid, giving rise to undue preferences. A press release issued by Questerre on November 2, 2007 after the arrangement had been completed indicates that Questerre would be using proceeds of a private placement of securities to fund the flow-through commitments of Magnus, including Magnus' share of drilling costs committed with respect to a particular well.

24 The Trustee explains that Questerre loaned the money in question to the Magnus companies so that they could meet their flow-through share obligations. He is satisfied that the payments were made in order to preserve an asset of the companies and that only creditors providing new work were paid. He is therefore satisfied that there was no significant undue preference of creditors.

25 Pedro and Taber submit that the disclosure relating to the Proposals is deficient because they speculate that the reason Questerre is willing to give up its secured creditors status in order to benefit the unsecured creditors is that there must be significant undisclosed tax losses that are of great benefit to Questerre and that the extent of that benefit should be disclosed. The Trustee agrees that there may be some tax losses totalling roughly $2 million, but submits that it is sheer speculation at this time as to whether these losses may be available to Questerre for use in the future. I am satisfied that the issue of the possible use of tax losses is not information so material that it makes the disclosure to creditors or the Court in these applications deficient.

26 Pedro and Taber also submit that it is obvious that the remaining assets of the Magnus companies are not of a value equal to fifty cents on the dollar on the amount of their unsecured liabilities as set out in s. 173(1)(a) of the *Bankruptcy and Insolvency Act* and that I must thus refuse to approve the Proposals without reasonable security. I am satisfied by the evidence of the conveyance of assets to Questerre to reduce secured debt that this state of affairs has arisen from circumstances for which the Magnus companies cannot justly be held responsible, and therefore, section 173.(1)(a) does not require me to order security. In coming to this determination, I take into account Questerre's agreement to be treated as an unsecured creditor for the remainder of its debt.

27 I therefore do not find either lack of good faith or proof of facts under section 173 that would preclude the approval of these Proposals. I am satisfied that the terms of the Proposals are reasonable, that they are calculated to benefit the general body of creditors, and that no creditors are being unduly prejudiced. There is nothing in the evidence before me that calls into question the integrity of the process or the requirements of commercial morality. It is persuasive that Questerre is willing to forego the remainder of its secured position and to take on the potentially material contingent claim for reclamation and abondment liabilities in order to allow Proposals with some recovery to the unsecured creditors, and I am persuaded that the situation is substantially better for unsecured creditors than it would be under a general bankruptcy. I therefore approve the Proposals. If the parties wish to make representation with respect to costs, they may do so.

Application granted.

End of Document

TAB 3

2012 ONSC 234
Ontario Superior Court of Justice [Commercial List]

Kitchener Frame Ltd., Re

2012 CarswellOnt 1347, 2012 ONSC 234, 212 A.C.W.S. (3d) 631, 86 C.B.R. (5th) 274

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as Amended

In the Matter of the Consolidated Proposal of Kitchener Frame Limited and Thyssenkrupp Budd Canada, Inc. (Applicants)

Morawetz J.

Judgment: February 3, 2012
Docket: CV-11-9298-00CL

Counsel: Edward A. Sellers, Jeremy E. Dacks for Applicants
Hugh O'Reilly — Non-Union Representative Counsel
L.N. Gottheil — Union Representative Counsel
John Porter for Proposal Trustee, Ernst & Young Inc.
Michael McGraw for CIBC Mellon Trust Company
Deborah McPhail for Financial Services Commission of Ontario

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.i General principles

Headnote

Bankruptcy and insolvency --- Proposal — Approval by court — Conditions — General principles

Applicants KFL and BC were inactive entities with no operating assets and no material liquid assets — Applicants had significant and mounting obligations including pension and other non-pension post-employment benefit (OPEB) obligations to their former employees and surviving spouses of such former employees or others entitled to claim through such persons — Affiliates of BC provided up to date funding for pension and OPEB obligations, however, given that KFL and BC had no active operations status quo was unsustainable — KFL and BC brought motion to sanction amended consolidated proposal — Motion was granted — Proposal was reasonable — Proposal was calculated to benefit general body of creditors — Proposal was made in good faith — Proposal contained broad release in favour of applicants and certain third parties — Release of third-parties was permitted — Release covered all affected claims, pension claims, and existing escrow fund claims — Release did not cover criminal or wilful misconduct with respect to any matters set out in s. 50(14) of Bankruptcy and Insolvency Act — Unaffected claims were specifically carved out of release — No creditors or stakeholders objected to scope of release which was fully disclosed in negotiations — There was no express prohibition in BIA against including third-party releases

in proposal — Any provision of BIA which purported to limit ability of debtor to contract with its creditors had to be clear and explicit — Third-party releases were permissible under Companies' Creditors Arrangement Act (CCAA) and court should strive, where language of both statutes supported it, to give both statutes harmonious interpretation — There was no principled basis on which analysis and treatment of third-party release in BIA proposal proceeding should differ from CCAA proceeding — Released parties contributed in tangle and realistic way to proposal — Without inclusion of releases it was unlikely that certain parties would have supported proposal — Releases benefited applicants and creditors generally — Applicants provided full and adequate disclosure of releases and their effect.

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Allen-Vanguard Corp., Re (2011), 2011 CarswellOnt 1279, 2011 ONSC 733 (Ont. S.C.J.) — referred to

Angiotech Pharmaceuticals Inc., Re (2011), 2011 BCSC 450, 2011 CarswellBC 841, 76 C.B.R. (5th) 210 (B.C. S.C. [In Chambers]) — referred to

Ashley v. Marlow Group Private Portfolio Management Inc. (2006), 2006 CarswellOnt 3449, 22 C.B.R. (5th) 126, 270 D.L.R. (4th) 744 (Ont. S.C.J. [Commercial List]) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — followed

C.F.G. Construction inc., Re (2010), [2010] R.J.Q. 2360, 2010 CarswellQue 10226, 2010 QCCS 4643 (C.S. Que.) — considered

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Cosmic Adventures Halifax Inc., Re (1999), 13 C.B.R. (4th) 22, 1999 CarswellNS 320 (N.S. S.C.) — considered

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Farrell, Re (2003), 2003 CarswellOnt 1015, 40 C.B.R. (4th) 53 (Ont. S.C.J. [Commercial List]) — referred to

Kern Agencies Ltd., (No. 2), Re (1931), 1931 CarswellSask 3, [1931] 2 W.W.R. 633, 13 C.B.R. 11 (Sask. C.A.) — considered

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N.T.W. Management Group Ltd., Re (1994), 29 C.B.R. (3d) 139, 1994 CarswellOnt 325 (Ont. Bktcy.) — referred to

NAV Canada c. Wilmington Trust Co. (2006), 2006 CarswellQue 4890, 2006 CarswellQue 4891, 2006 SCC 24, (sub nom. *Greater Toronto Airports Authority v. International Lease Finance Corp.*) 80 O.R. (3d) 558 (note), (sub nom. *Canada 3000 Inc., (Bankrupt), Re*) 349 N.R. 1, (sub nom. *Canada 3000 Inc., Re*) [2006] 1 S.C.R. 865, 10 P.P.S.A.C. (3d) 66, 20 C.B.R. (5th) 1, (sub nom. *Canada 3000 Inc. (Bankrupt), Re*) 212 O.A.C. 338, (sub nom. *Canada 3000 Inc., Re*) 269 D.L.R. (4th) 79 (S.C.C.) — referred to

Olympia & York Developments Ltd., Re (1995), 34 C.B.R. (3d) 93, 1995 CarswellOnt 340 (Ont. Gen. Div. [Commercial List]) — referred to

Olympia & York Developments Ltd., Re (1997), 45 C.B.R. (3d) 85, 143 D.L.R. (4th) 536, 1997 CarswellOnt 657 (Ont. Bktcy.) — referred to

Society of Composers, Authors & Music Publishers of Canada v. Armitage (2000), 2000 CarswellOnt 4120, 20 C.B.R. (4th) 160, 50 O.R. (3d) 688, 137 O.A.C. 74 (Ont. C.A.) — referred to

Steeves, Re (2001), 25 C.B.R. (4th) 317, 208 Sask. R. 84, 2001 SKQB 265, 2001 CarswellSask 392 (Sask. Q.B.) — referred to

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Pt. III — referred to

s. 50(14) — considered

s. 54(2)(d) — considered

s. 59(2) — considered

s. 62(3) — considered

s. 136(1) — referred to

s. 178(2) — referred to

s. 179 — considered

s. 183 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 5.1 [en. 1997, c. 12, s. 122] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

MOTION by applicants for court sanction of proposal under Bankruptcy and Insolvency Act which contained third-party release.

***Morawetz J.*:**

1 At the conclusion of this unopposed motion, the requested relief was granted. Counsel indicated that it would be helpful if the court could provide reasons in due course, specifically on the issue of a third-party release in the context of a proposal under Part III of the *Bankruptcy and Insolvency Act* ("*BIA*").

2 Kitchener Frame Limited ("KFL") and Thyssenkrupp Budd Canada Inc. ("Budd Canada"), and together with KFL, (the "Applicants"), brought this motion for an order (the "Sanction Order") to sanction the amended consolidated proposal involving the Applicants dated August 31, 2011 (the "Consolidated Proposal") pursuant to the provisions of the *BIA*. Relief was also sought authorizing the Applicants and Ernst & Young Inc., in its capacity as proposal trustee of each of the Applicants (the "Proposal Trustee") to take all steps necessary to implement the Consolidated Proposal in accordance with its terms.

3 The Applicants submit that the requested relief is reasonable, that it benefits the general body of the Applicants' creditors and meets all other statutory requirements. Further, the Applicants submit that the court should also consider that the voting affected creditors (the "Affected Creditors") unanimously supported the Consolidated Proposal. As such, the Applicants submit that they have met the test as set out in s. 59(2) of the *BIA* with respect to approval of the Consolidated Proposal.

4 The motion of the Applicants was supported by the Proposal Trustee. The Proposal Trustee filed its report recommending approval of the Consolidated Proposal and indicated that the Consolidated Proposal was in the best interests of the Affected Creditors.

5 KFL and Budd Canada are inactive entities with no operating assets and no material liquid assets (other than the Escrow Funds). They do have significant and mounting obligations including pension and other non-pension post-employment benefit ("OPEB") obligations to the Applicants' former employees and certain former employees of Budcan Holdings Inc. or the surviving spouses of such former employees or others who may be entitled to claim through such persons in the *BIA* proceedings, including the OPEB creditors.

6 The background facts with respect to this motion are fully set out in the affidavit of Mr. William E. Aziz, sworn on September 13, 2011.

7 Affiliates of Budd Canada have provided up to date funding to Budd Canada to enable Budd Canada to fund, on behalf of KFL, such pension and OPEB obligations. However, given that KFL and Budd Canada have no active operations, the *status quo* is unsustainable.

8 The Applicants have acknowledged that they are insolvent and, in connection with the *BIA* proposal, proceedings were commenced on July 4, 2011.

9 On July 7, 2011, Wilton-Siegel J. granted Procedural Consolidation Orders in respect of KFL and Budd Canada which authorized the procedural consolidation of the Applicants and permitted them to file a single consolidated proposal to their creditors.

10 The Orders of Wilton-Siegel J. also appointed separate representative counsel to represent the interests of the Union and Non-Union OPEB creditors and further authorized the Applicants to continue making payments to Blue Cross in respect of the OPEB Claims during the *BIA* proposal proceedings.

11 On August 2, 2011, an order was granted extending the time to file a proposal to August 19, 2011.

12 The parties proceeded to negotiate the terms of the Consolidated Proposal, which meetings involved the Applicants, the Proposal Trustee, senior members of the CAW, Union Representative Counsel and Non-Union Representative Counsel.

13 An agreement in principle was reached which essentially provided for the monetization and compromise of the OPEB claims of the OPEB creditors resulting in a one-time, lump-sum payment to each OPEB creditor term upon implementation of the Consolidated Proposal. The Consolidated Proposal also provides that the Applicants and their affiliates will forego any recoveries on account of their secured and unsecured inter-company claims, which total approximately $120 million. A condition precedent was the payment of sufficient funds to the Pension Fund Trustee such that when such funds are combined with the value of the assets held in the Pension Plans, the Pension Fund Trustee will be able to fully annuitize the Applicants' pension obligations and pay the commuted values to those creditors with pension claims who so elected so as to provide for the satisfaction of the Applicants' pension obligations in full.

14 On August 19, 2011, the Applicants filed the Consolidated Proposal. Subsequent amendments were made on August 31, 2011 in advance of the creditors' meeting to reflect certain amendments to the proposal.

15 The creditors' meeting was held on September 1, 2011 and, at the meeting, the Consolidated Proposal, as amended, was accepted by the required majority of creditors. Over 99.9% in number and over 99.8% in dollar value of the Affected Creditors' Class voted to accept the Consolidated Proposal. The Proposal Trustee noted that all creditors voted in favour of the Consolidated Proposal, with the exception of one creditor, Canada Revenue Agency (with 0.1% of the number of votes representing 0.2% of the value of the vote) who attended the meeting but abstained from voting. Therefore, the Consolidated Proposal was unanimously approved by the Affected Creditors. The Applicants thus satisfied the required "double majority" voting threshold required by the *BIA*.

16 The issue on the motion was whether the court should sanction the Consolidated Proposal, including the substantive consolidation and releases contained therein.

17 Pursuant to s. 54(2)(d) of the *BIA*, a proposal is deemed to be accepted by the creditors if it has achieved the requisite "double majority" voting threshold at a duly constituted meeting of creditors.

18 The *BIA* requires the proposal trustee to apply to court to sanction the proposal. At such hearing, s. 59(2) of the *BIA* requires that the court refuse to approve the proposal where its terms are not reasonable or not calculated to benefit the general body of creditors.

19 In order to satisfy s. 59(2) test, the courts have held that the following three-pronged test must be satisfied:

(a) the proposal is reasonable;

(b) the proposal is calculated to benefit the general body of creditors; and

(c) the proposal is made in good faith.

See *Mayer, Re* (1994), 25 C.B.R. (3d) 113 (Ont. Bktcy.); *Steeves, Re* (2001), 25 C.B.R. (4th) 317 (Sask. Q.B.); *Magnus One Energy Corp., Re* (2009), 53 C.B.R. (5th) 243 (Alta. Q.B.).

20 The first two factors are set out in s. 59(2) of the *BIA* while the last factor has been implied by the court as an exercise of its equitable jurisdiction. The courts have generally taken into account the interests of the debtor, the interests of the creditors and the interests of the public at large in the integrity of the bankruptcy system. See *Farrell, Re* (2003), 40 C.B.R. (4th) 53 (Ont. S.C.J. [Commercial List]).

21 The courts have also accorded substantial deference to the majority vote of creditors at a meeting of creditors; see *Lofchik, Re*, [1998] O.J. No. 332 (Ont. Bktcy.). Similarly, the courts have also accorded deference to the recommendation of the proposal trustee. See *Magnus One*, *supra*.

22 With respect to the first branch of the test for sanctioning a proposal, the debtor must satisfy the court that the proposal is reasonable. The court is authorized to only approve proposals which are reasonable and calculated to benefit the general body of creditors. The court should also consider the payment terms of the proposal and whether the distributions provided for are adequate to meet the requirements of commercial morality and maintaining the integrity of the bankruptcy system. For a discussion on this point, see *Lofchik*, *supra*, and *Farrell* , *supra*.

23 In this case, the Applicants submit that, if the Consolidated Proposal is sanctioned, they would be in a position to satisfy all other conditions precedent to closing on or prior to the date of the proposal ("Proposal Implementation Date").

24 With respect to the treatment of the Collective Bargaining Agreements, the Applicants and the CAW brought a joint application before the Ontario Labour Relations Board ("OLRB") on an expedited basis seeking the OLRB's consent to an early termination of the Collective Bargaining Agreements. Further, the CAW has agreed to abandon its collective bargaining rights in connection with the Collective Bargaining Agreements.

25 With respect to the terms and conditions of a Senior Secured Loan Agreement between Budd Canada and TK Finance dated as of December 22, 2010, TK Finance provided a secured creditor facility to the Applicants to fund certain working capital requirements before and during the *BIA* proposal proceedings. As a result of the approval of the Consolidated Proposal at the meeting of creditors, TK Finance agreed to provide additional credit facilities to Budd Canada such that the Applicants would be in a position to pay all amounts required to be paid by or on behalf of the Applicants in connection with the Consolidated Proposal.

26 On the issue as to whether creditors will receive greater recovery under the Consolidated Proposal than they would receive in the bankruptcy, it is noted that creditors with Pension Claims are unaffected by the Consolidated Proposal. The Consolidated Proposal provides for the satisfaction of Pension Claims in full as a condition precedent to implementation.

27 With respect to Affected Creditors, the Applicants submit that they will receive far greater recovery from distributions under the Consolidated Proposal than the Affected Creditors would receive in the event of the bankruptcies of the Applicants. (See Sanction Affidavit of Mr. Aziz at para. 61.)

28 The Proposal Trustee has stated that the Consolidated Proposal is advantageous to creditors for the reasons outlined in its Report and, in particular:

> (a) the recoveries to creditors with claims in respect of OPEBs are considerably greater under the Amended Proposal than in a bankruptcy;
>
> (b) payments under the Amended Proposal are expected in a timely manner shortly after the implementation of the Amended Proposal;
>
> (c) the timing and quantum of distributions pursuant to the Amended Proposal are certain while distributions under a bankruptcy are dependent on the results of litigation, which cannot be predicted with certainty; and
>
> (d) the Pension Plans (as described in the Proposal Trustee's Report) will be fully funded with funds from the Pension Escrow (as described in the Proposal Trustee's Report) and, if necessary, additional funding from an affiliate of the Companies if the funds in the Pension Escrow are not sufficient. In a bankruptcy, the Pension Plans may not be fully funded.

29 The Applicants take the position that the Consolidated Proposal meets the requirements of commercial morality and maintains the integrity of the bankruptcy system, in light of the superior coverage to be afforded to the Applicants' creditors under the Consolidated Proposal than in the event of bankruptcy.

30 The Applicants also submit that substantive consolidation inherent in the proposal will not prejudice any of the Affected Creditors and is appropriate in the circumstances. Although not expressly contemplated under the *BIA*, the Applicants submit that the court may look to its incidental, ancillary and auxiliary jurisdiction under s. 183 of the *BIA* and its equitable jurisdiction to grant an order for substantive consolidation. See *Ashley v. Marlow Group Private Portfolio Management Inc.* (2006), 22 C.B.R. (5th) 126 (Ont. S.C.J. [Commercial List]). In deciding whether to grant substantive consolidation, courts have held that it should not be done at the expense of, or possible prejudice of, any particular creditor. See *Ashley* , *supra*. However, counsel submits that this court should take into account practical business considerations in applying the *BIA*. See *A. & F. Baillargeon Express Inc., Re* (1993), 27 C.B.R. (3d) 36 (C.S. Que.).

31 In this case, the Applicants submit that substantive consolidation inherent in the Consolidated Proposal is appropriate in the circumstances due to, among other things, the intertwined nature of the Applicants' assets and liabilities. Each Applicant had substantially the same creditor base and known liabilities (other than certain Excluded Claims). In addition, KFL had no cash or cash equivalents and the Applicants are each dependant on the Escrow Funds and borrowings under the Restated Senior Secured Loan Agreement to fund the same underlying pension and OPEB obligations and costs relating to the Proposal Proceedings.

32 The Applicants submit that creditors in neither estate will be materially prejudiced by substantive consolidation and based on the fact that no creditor objected to the substantial consolidation, counsel submits the Consolidated Proposal ought to be approved.

33 With respect to whether the Consolidated Proposal is calculated to benefit the general body of creditors, TK Finance would be entitled to priority distributions out of the estate in a bankruptcy scenario. However, the Applicants and their affiliates have agreed to forego recoveries under the Consolidated Proposal on account of their secured and unsecured intercompany claims in the amount of approximately $120 million, thus enhancing the level of recovery for the Affected Creditors, virtually all of whom are OPEB creditors. It is also noted that TK Finance will be contributing over $35 million to fund the Consolidated Proposal.

34 On this basis, the Applicants submit that the Consolidated Proposal is calculated to benefit the general body of creditors.

35 With respect to the requirement of the proposal being made in good faith, the debtor must satisfy the court that it has provided full disclosure to its creditors of its assets and encumbrances against such assets.

36 In this case, the Applicants and the Proposal Trustee have involved the creditors pursuant to the Representative Counsel Order, and through negotiations with the Union Representative Counsel and Non-Union Representative Counsel.

37 There is also evidence that the Applicants have widely disseminated information regarding their *BIA* proposal proceedings through the media and through postings on the Proposal Trustee's website. Information packages have also prepared by the Proposal Trustee for the creditors.

38 Finally, the Proposal Trustee has noted that the Applicants' conduct, both prior to and subsequent to the commencement of the *BIA* proposal proceedings, is not subject to censure in any respect and that the Applicants' have acted in good faith.

39 There is also evidence that the Consolidated Proposal continues requisite statutory terms. The Consolidated Proposal provides for the payment of preferred claims under s. 136(1) of the *BIA*.

40 Section 7.1 of the Consolidated Proposal contains a broad release in favour of the Applicants and in favour of certain third parties (the "Release"). In particular, the Release benefits the Proposal Trustee, Martinrea, the CAW, Union Representative Counsel, Non-Union Representative Counsel, Blue Cross, the Escrow Agent, the present and former shareholders and affiliates of the Applicants (including Thyssenkrupp USA, Inc. ("TK USA"), TK Finance, Thyssenkrupp Canada Inc. ("TK Canada") and Thyssenkrupp Budd Company), as well as their subsidiaries, directors, officers, members, partners, employees, auditors, financial advisors, legal counsel and agents of any of these parties and any person liable jointly or derivatively through any or all of the beneficiaries of the of the release (referred to individually as a "Released Party").

41 The Release covers all Affected Claims, Pension Claims and Escrow Fund Claims existing on or prior to the later of the Proposal Implementation Date and the date on which actions are taken to implement the Consolidated Proposal.

42 The Release provides that all such claims are released and waived (other than the right to enforce the Applicants' or Proposal Trustee's obligations under the Consolidated Proposal) to the full extent permitted by applicable law. However, nothing in the Consolidated Proposal releases or discharges any Released Party for any criminal or other wilful misconduct or any present or former directors of the Applicants with respect to any matters set out in s. 50(14) of the *BIA*. Unaffected Claims are specifically carved out of the Release.

43 The Applicants submit that the Release is both permissible under the *BIA* and appropriately granted in the context of the *BIA* proposal proceedings. Further, counsel submits, to the extent that the Release benefits third parties other than the Applicants, the Release is not prohibited by the *BIA* and it satisfies the criteria that has been established in granting third-party releases under the *Companies' Creditors Arrangement Act* ("*CCAA*"). Moreover, counsel submits that the scope of the Release is no broader than necessary to give effect to the purpose of the Consolidated Proposal and the contributions made by the third parties to the success of the Consolidated Proposal.

44 No creditors or stakeholders objected to the scope of the Release which was fully disclosed in the negotiations, including the fact that the inclusion of the third-party releases was required to be part of the Consolidated Proposal. Counsel advises that the scope of the Release was referred to in the materials sent by the Proposal Trustee to the Affected Creditors prior to the meeting, specifically discussed at the meeting and adopted by the unanimous vote of the voting Affected Creditors.

45 Counsel also submits that there is no provision in the *BIA* that clearly and expressly precludes the Applicants from including the Release in the Consolidated Proposal as long as the court is satisfied that the Consolidated Proposal is reasonable and for the general benefit of creditors.

46 In this respect, it seems to me, that the governing statutes should not be technically or stringently interpreted in the insolvency context but, rather, should be interpreted in a manner that is flexible rather than technical and literal, in order to deal with the numerous situations and variations which arise from time to time. Further, taking a technical approach to the interpretation of the *BIA* would defeat the purpose of the legislation. See *N.T.W. Management Group Ltd., Re* (1994), 29 C.B.R. (3d) 139 (Ont. Bktcy.); *Olympia & York Developments Ltd., Re* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]); *Olympia & York Developments Ltd., Re* (1997), 45 C.B.R. (3d) 85 (Ont. Bktcy.).

47 Moreover, the statutes which deal with the same subject matter are to be interpreted with the presumption of harmony, coherence and consistency. See *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24 (S.C.C.). This principle militates in favour of adopting an interpretation of the *BIA* that is harmonious, to the greatest extent possible, with the interpretation that has been given to the *CCAA*.

48 Counsel points out that historically, some case law has taken the position that s. 62(3) of the *BIA* precludes a proposal from containing a release that benefits third parties. Counsel submits that this result is not supported by a plain meaning of s. 62(3) and its interaction with other key sections in the *BIA*.

49 Subsection 62(3) of the *BIA* reads as follows:

> (3) The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.

50 Counsel submits that there are two possible interpretations of this subsection:

> (a) It prohibits third party releases — in other words, the phrase "does not release any person" is interpreted to mean "cannot release any person"; or
>
> (b) It simply states that acceptance of a proposal does not automatically release any party other than the debtor — in other words, the phrase "does not release any person" is interpreted to mean "does not release any person without more"; it is protective not prohibitive.

51 I agree with counsel's submission that the latter interpretation of s. 62(3) of the *BIA* conforms with the grammatical and ordinary sense of the words used. If Parliament had intended that only the debtor could be released, s. 62(3) would have been drafted more simply to say exactly that.

52 Counsel further submits that the narrow interpretation would be a stringent and inflexible interpretation of the *BIA*, contrary to accepted wisdom that the *BIA* should be interpreted in a flexible, purposive manner.

53 The *BIA* proposal provisions are designed to offer debtors an opportunity to carry out a going concern or value maximizing restructuring in order to avoid a bankruptcy and related liquidation and that these purposes justify taking a broad, flexible and purposive approach to the interpretation of the relevant provisions. This interpretation is supported by *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.).

54 Further, I agree with counsel's submissions that a more flexible purposive interpretation is in keeping with modern statutory principles and the need to give purposive interpretation to insolvency legislation must start from the proposition that there is no express prohibition in the *BIA* against including third-party releases in a proposal. At most, there are certain limited constraints on the scope of such releases, such as in s. 179 of the *BIA*, and the provision dealing specifically with the release of directors.

55 In the absence of an express prohibition against including third-party releases in a proposal, counsel submits that it must be presumed that such releases are permitted (subject to compliance with any limited express restrictions, such as in the case of a release of directors). By extension, counsel submits that the court is entitled to approve a proposal containing a third-party release if the court is able to satisfy itself that the proposal (including the third-party release) is reasonable and for the general benefit for creditors such that all creditors (including the minority who did not vote in favour of the proposal) can be required to forego their claims against parties other than the debtors.

56 The Applicants also submit that s. 62(3) of the *BIA* can only be properly understood when read together with other key sections of the *BIA*, particularly s. 179 which concerns the effect of an order of discharge:

> 179. An order of discharge does not release a person who at the time of the bankruptcy was a partner or co-trustee with the bankrupt or was jointly bound or had made a joint contract with the bankrupt, or a person who was surety or in the nature of a surety for the bankrupt.

57 The order of discharge of a bankrupt has the effect of releasing the bankrupt from all claims provable in bankruptcy (section 178(2) *BIA*). In the absence of s. 179, this release could result in the automatic release at law of certain types of claims that are identified in s. 179. For example, under guarantee law, the discharge of the principal debt results in the automatic discharge of a guarantor. Similarly, counsel points out the settlement or satisfaction of a debt by one joint obligor generally results in the automatic release of both joint obligors. Section 179 therefore serves the limited purpose of altering the result that would incur at law, indicating that the rule that the *BIA* generally is that there is no automatic release of third-party guarantors of co-obligors when a bankrupt is discharged.

58 Counsel submits that s. 62(3), which confirms that s. 179 applies to a proposal, was clearly intended to fulfil a very limited role — namely, to confirm that there is no automatic release of the specific types of co-obligors identified in s. 179 when a proposal is approved by the creditors and by the court. Counsel submits that it does not go further and preclude the creditors and the court from approving a proposal which contains the third-party release of the types of co-obligors set out in s. 179. I am in agreement with these submissions.

59 Specific considerations also apply when releasing directors of a debtor company. The *BIA* contains specific limitations on the permissible scope of such releases as set out in s. 50(14). For this reason, there is a specific section in the *BIA* proposal provisions outlining the principles governing such a release. However, counsel argues, the presence of the provisions outlining the circumstances in which a proposal can contain a release of claims against the debtor's directors does not give rise to an inference that the directors are the only third parties that can be released in a proposal. Rather, the inference is that there are considerations applicable to a release or compromise of claims against directors that do not apply generally to other third parties. Hence, it is necessary to deal with this particular type of compromise and release expressly.

60 I am also in agreement with the alternative submissions made by counsel in this area to the effect that if s. 62(3) of the *BIA* operates as a prohibition it refers only to those limitations that are expressly identified in the *BIA*, such as in s. 179 of the *BIA* and the specific limitations on the scope of releases that can benefit directors of the debtor.

61 Counsel submits that the Applicants' position regarding the proper interpretation of s. 62(3) of the *BIA* and its place in the scheme of the *BIA* is consistent with the generally accepted principle that a proposal under the *BIA* is a contract. See *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.); *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.* (1976), [1978] 1 S.C.R. 230 (S.C.C.); and *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 20 C.B.R. (4th) 160 (Ont. C.A.). Consequently, counsel submits that parties are entitled to put anything into a proposal that could lawfully be incorporated into any contract (see *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List])) and that given that the prescribed majority creditors have the statutory right under the *BIA* to bind a minority, however, this principle is subject to any limitations that are contained in the express wording of the *BIA*.

62 On this point, it seems to me, that any provision of the *BIA* which purports to limit the ability of the debtor to contract with its creditors should be clear and explicit. To hold otherwise would result in severely limiting the debtor's ability to contract with its creditors, thereby the decreasing the likelihood that a viable proposal could be reached. This would manifestly defeat the purpose of the proposal provisions of the *BIA*.

63 The Applicants further submit that creditors' interests — including the interests of the minority creditors who do not vote in favour of a proposal containing a third-party release — are sufficiently protected by the overriding ability of a court to refuse to approve a proposal with an overly broad third-party release, or where the release results in the proposal failing to demonstrate that it is for the benefit of the general body of creditors. The Applicants submit that the application of the *Metcalfe* criteria to the release is a mechanism whereby this court can assure itself that these preconditions to approve the Consolidated Proposal contained in the Release have been satisfied.

64 The Applicants acknowledge that there are several cases in which courts have held that a *BIA* proposal that includes a third-party release cannot be approved by the court but submits that these cases are based on a mistaken premise, are readily distinguishable and do not reflect the modern approach to Canadian insolvency law. Further, they submit that none of these cases are binding on this court and should not be followed.

65 In *Kern Agencies Ltd., (No. 2), Re* (1931), 13 C.B.R. 11 (Sask. C.A.), the court refused to approve a proposal that contained a release of the debtor's directors, officers and employees. Counsel points out that the court's refusal was based on a provision of the predecessor to the *BIA* which specifically provided that a proposal could only be binding on creditors (as far as relates to any debts due to them from the debtor). The current *BIA* does not contain equivalent general language. This case is clearly distinguishable.

66 In *Mister C's Ltd., Re* (1995), 32 C.B.R. (3d) 242 (Ont. Bktcy.), the court refused to approve a proposal that had received creditor approval. The court cited numerous bases for its conclusion that the proposal was not reasonable or calculated to benefit the general body of creditors, one of which was the release of the principals of the debtor company. The scope of the release was only one of the issues with the proposal, which had additional significant issues (procedural irregularities, favourable terms for insiders, and inequitable treatment of creditors generally). I agree with counsel to the Applicants that this case can be distinguished.

67 *Cosmic Adventures Halifax Inc., Re* (1999), 13 C.B.R. (4th) 22 (N.S. S.C.) relies on *Kern* and furthermore the Applicants submit that the discussion of third-party releases is technically *obiter* because the proposal was amended on consent.

68 The fourth case is *C.F.G. Construction inc., Re*, 2010 CarswellQue 10226 (C.S. Que.) where the Quebec Superior Court refused to approve a proposal containing a release of two sureties of the debtor. The case was decided on alternate grounds — either that the *BIA* did not permit a release of sureties, or in any event, the release could not be justified on the facts. I agree with the Applicants that this case is distinguishable. The case deals with the release of sureties and does not stand for any broader proposition.

69 In general, the Applicants' submission on this issue is that the court should apply the decision of the Court of Appeal for Ontario in *Metcalfe*, together with the binding principle set out by the Supreme Court in *Ted Leroy Trucking*, dictating a more liberal approach to the permissibility of third-party releases in *BIA* proposals than is taken by the Quebec court in *C.F.G. Construction Inc*. I agree.

70 The object of proposals under the *BIA* is to permit the debtor to restructure its business and, where possible, avoid the social and economic costs of liquidating its assets, which is precisely the same purpose as the *CCAA*. Although there are some differences between the two regimes and the *BIA* can generally be characterized as more "rules based", the thrust of the case law and the legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible, encouraging reorganization over liquidation. See *Ted Leroy Trucking*.

71 Recent case law has indicated that, in appropriate circumstances, third-party releases can be included in a plan of compromise and arrangement that is approved under the *CCAA*. See *Metcalfe*. The *CCAA* does not contain any express provisions permitting such third-party releases apart from certain limitations that apply to the compromise of claims against directors of the debtor company. See *CCAA* s. 5.1 and *Allen-Vanguard Corp., Re*, 2011 ONSC 733 (Ont. S.C.J.).

72 Counsel submits that although the mechanisms for dealing with the release of sureties and similar claimants are somewhat different in the *BIA* and *CCAA*, the differences are not of such significance that the presence of s. 62(3) of the *BIA* should be viewed as dictating a different approach to third-party releases generally from the approach that applies under the *CCAA*. I agree with this submission.

73 I also accept that if s. 62(3) of the *BIA* is interpreted as a prohibition against including the third-party release in the *BIA* proposal, the *BIA* and the *CCAA* would be in clear disharmony on this point. An interpretation of the *BIA* which leads to a result that is different from the *CCAA* should only be adopted pursuant to clear statutory language which, in my view, is not present in the *BIA*.

74 The most recent and persuasive example of the application of such a harmonious approach to the interpretation of the *BIA* and the *CCAA* can be found in *Ted Leroy Trucking*.

75 At issue in *Ted Leroy Trucking* was how to resolve an apparent conflict between the deemed trust provisions of the *Excise Tax Act* and the provisions of the *CCAA*. The language of the *Excise Tax Act* created a deemed trust over GST amounts collected by the debtor that was stated to apply "despite any other Act of Parliament". The *CCAA* stated that the deemed trust for GST did not apply under the *CCAA*, unless the funds otherwise specified the criteria for a "true" trust. The court was required to determine which federal provision should prevail.

76 By contrast, the same issue did not arise under the *BIA*, due to the language in the *Excise Tax Act* specifically indicating that the continued existence of the deemed trust depended on the terms of the *BIA*. The *BIA* contained a similar provision to the *CCAA* indicating that the deemed trust for GST amounts would no longer apply in a *BIA* proceeding.

77 Deschamps J., on behalf of six other members of the court, with Fish J. concurring and Abella J. dissenting, held that the proper interpretation of the statutes was that the *CCAA* provision should prevail, the deemed trust under the *Excise Tax Act* would cease to exist in a *CCAA* proceeding. In resolving the conflict between the *Excise Tax Act* and the *CCAA*, Deschamps J. noted the strange asymmetry which would arise if the *BIA* and *CCAA* were not in harmony on this issue:

> Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

78 It seems to me that these principles indicate that the court should generally strive, where the language of both statutes can support it, to give both statutes a harmonious interpretation to avoid the ills that can arise from "statute-shopping". These considerations, counsel submits, militate against adopting a strained reading of s. 62(3) of the *BIA* as a prohibition against third-party releases in a *BIA* proposal. I agree. In my opinion, there is no principled basis on which the analysis and treatment of a third-party release in a *BIA* proposal proceeding should differ from a CCAA proceeding.

79 The Applicants submit that it logically follows that the court is entitled to approve the Consolidated Proposal, including the Release, on the basis that it is reasonable and calculated to benefit the general body of creditors. Further, in keeping with the principles of harmonious interpretation of the *BIA* and the *CCAA*, the court should satisfy itself

that the *Metcalfe* criteria, which apply to the approval of a third-party release under the CCAA, has been satisfied in relation to the Release.

80 In *Metcalfe*, the Court of Appeal for Ontario held that the requirements that must be satisfied to justify a third-party release are:

> (a) the parties to be released are necessary and essential to the restructuring of the debtor;
>
> (b) the claims to be released are rationally related to the purpose of the Plan (Proposal) and necessary for it;
>
> (c) the Plan (Proposal) cannot succeed without the releases;
>
> (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan (Proposal); and
>
> (e) the Plan (Proposal) will benefit not only the debtor companies but creditors generally.

81 These requirements have also been referenced in *Canwest Global Communications Corp., Re* (2010), 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) and *Angiotech Pharmaceuticals Inc., Re* (2011), 76 C.B.R. (5th) 210 (B.C. S.C. [In Chambers]).

82 No single requirement listed above is determinative and the analysis must take into account the facts particular to each claim.

83 The Applicants submit that the Release satisfies each of the *Metcalfe* criteria. Firstly, counsel submits that following the closing of the Asset Purchase Agreement in 2006, Budd Canada had no operating assets or income and relied on inter-company advances to fund the pension and OPEB requirements to be made by Budd Canada on behalf of KFL pursuant to the Asset Purchase Agreement. Such funded amounts total approximately $112.7 million in pension payments and $24.6 million in OPEB payments between the closing of the Asset Purchase Agreement and the Filing Date. In addition, TK Finance has been providing Budd Canada and KFL with the necessary funding to pay the professional and other costs associated with the *BIA* Proposal Proceedings and will continue to fund such amounts through the Proposal Implementation Date. Moreover, TK Canada and TK Finance have agreed to forego recoveries under the Consolidated Proposal on account of their existing secured and unsecured intercompany loans in the amount of approximately $120 million.

84 Counsel submits that the releases provided in respect of the Applicants' affiliates are the *quid pro quo* for the sacrifices made by such affiliates to significantly enlarge recoveries for the unsecured creditors of the Applicants, particularly the OPEB creditors and reflects that the affiliates have provided over $135 million over the last five years in respect of the pension and OPEB amounts and additional availability of approximately $49 million to allow the Applicants to discharge their obligations to their former employees and retirees. Without the Releases, counsel submits, the Applicants' affiliates would have little or no incentive to contribute funds to the Consolidated Proposal and to waive their own rights against the Applicants.

85 The Release in favour of Martinrea is fully discussed at paragraphs 121-127 of the factum. The Applicants submit that the third-party releases set out in the Consolidated Proposal are clearly rationally related, necessary and essential to the Consolidated Proposal and are not overly broad.

86 Having reviewed the submissions in detail, I am in agreement that the Released Parties are contributing in a tangible and realistic way to the Consolidated Proposal.

87 I am also satisfied that without the Applicants' commitment to include the Release in the Consolidated Proposal to protect the Released Parties, it is unlikely that certain of such parties would have been prepared to support the Consolidated Proposal. The releases provided in respect of the Applicants' affiliates are particularly significant in this

regard, since the sacrifices and monetary contributions of such affiliates are the primary reason that the Applicants have been able to make the Consolidated Proposal. Further, I am also satisfied that without the Release, the Applicants would be unable to satisfy the borrowing conditions under the Amended and Restated Senior Secured Loan Agreement with respect to the Applicants having only certain permitted liabilities after the Proposal Implementation Date. The alternative for the Applicants is bankruptcy, a scenario in which their affiliates' claims aggregating approximately $120 million would significantly erode recoveries for the unsecured creditors of the Applicants.

88 I am also satisfied that the Releases benefit the Applicants and creditors generally. The primary non-affiliated Creditors of the Applicants are the OPEB Creditors and Creditors with Pension Claims, together with the CRA. The Consolidated Proposal, in my view, clearly benefits these Creditors by generating higher recoveries than could be obtained from the bankruptcies of the Applicants. Moreover, the timing of any such bankruptcy recoveries is uncertain. As noted by the Proposal Trustee, the amount that the Affected Creditors would receive in the event of the bankruptcies of the Applicants is uncertain both in terms of quantum and timing, with the Applicants' funding of OPEB Claims terminating on bankruptcy, but distributions to the OPEB Creditors and other Creditors delayed for at least a year or two but perhaps much longer.

89 The Applicants and their affiliates also benefit from the Release as an affiliate of the Applicants may become enabled to use the net operating losses (NOL) following a series of transactions that are expected to occur immediately following the Proposal Implementation Date.

90 I am also satisfied that the Applicants have provided full and adequate disclosure of the Releases and their effect. Full disclosure was made in the proposal term sheet circulated to both Representative Counsel in early August 2011. The Release was negotiated as part of the Consolidated Proposal and the scope of the Release was disclosed by the Proposal Trustee in its Report to the creditors on the terms of the Consolidated Proposal, which Report was circulated by the Proposal Trustee to the Applicants' known creditors in advance of the creditors' meeting.

91 I am satisfied that the Applicants, with the assistance of the Proposal Trustee, took appropriate steps to ensure that the Affected Creditors were aware of the existence of the release provisions prior to the creditors' meeting.

92 For the foregoing reasons, I have concluded that the Release contained in the Consolidated Proposal meets the *Metcalfe* criteria and should be approved.

93 In the result, I am satisfied that the section 59(2) *BIA* test has been met and that it is appropriate to grant the Sanction Order in the form of the draft order attached to the Motion Record. An order has been signed to give effect to the foregoing.

Motion granted.

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TAB 4

2016 ONSC 5600, 2016 CarswellOnt 16382

2016 ONSC 5600
Ontario Superior Court of Justice

Wasaya Airways Limited Partnership, Re

2016 CarswellOnt 16382, 2016 ONSC 5600

IN THE MATTER OF THE PROPOSAL OF WASAYA AIRWAYS LIMITED PARTNERSHIP AND WASAYA GENERAL PARTNER LIMITED OF THE CITY OF THUNDER BAY IN THE PROVINCE OF ONTARIO

G.B. Morawetz R.S.J.

Heard: June 8, 2016
Judgment: October 19, 2016
Docket: 21-2109581, 21-2109607

Counsel: Alex Ilchenko, for Vine and Williams Inc., Proposal Trustee
Alex MacFarlane, for Applicants
Jeremy Nemers, for Royal Bank of Canada
Vern DaRe, for Business Development Bank of Canada

Subject: Insolvency

Headnote
Bankruptcy and insolvency

Table of Authorities

Cases considered by *G.B. Morawetz R.S.J.*:

Convergix Inc., Re (2006), 2006 NBQB 288, 2006 CarswellNB 460, 24 C.B.R. (5th) 289, 307 N.B.R. (2d) 259, 795 A.P.R. 259 (N.B. Q.B.) — considered

Howe, Re (2004), 2004 CarswellOnt 1253, 49 C.B.R. (4th) 104 (Ont. S.C.J.) — considered

Kitchener Frame Ltd., Re (2012), 2012 ONSC 234, 2012 CarswellOnt 1347, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List]) — considered

Nitsopoulos, Re (2001), 2001 CarswellOnt 1994, 25 C.B.R. (4th) 305, [2001] O.T.C. 430 (Ont. Bktcy.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 2 "person" — considered

s. 50(13) — considered

s. 50(14) — considered

***G.B. Morawetz R.S.J.*:**

1 Vine and Williams Inc., in its capacity as the Trustee (the "Proposal Trustee") in the proposal of Wasaya Airways Leasing Ltd. ("WALL") (the "WALL Proposal") and the joint proposal of Wasaya Airways Limited Partnership ("WALP") and Wasaya General Partner Limited ("WGPL"), (the "Joint Proposal") (WALL, WALP and WGPL being collectively, the "Debtors") brought these motions for orders, *inter alia*, approving these proposals (the "WALL Proposal and the Joint Proposal" being collectively, the "Proposals") as voted on and approved by creditors at the meeting of creditors held on May 17, 2016 (the "Meetings of Creditors").

2 At the conclusion of the hearing I endorsed the record of both motions as follows:

June 8, 2016 - "Motion granted. Order signed. Reasons will follow."

3 These are the reasons.

4 The Wasaya Group of Companies and limited partnerships, which includes the Debtors, are 100% First Nations owned. The Debtors provide air transportation services in northern Ontario.

5 The Debtors have been in operation for more than twenty-six years. WALP is the primary operating arm of the Debtors.

6 WALP serves 25 destinations and has bases located in Thunder Bay, Sioux Lookout, Pickle Lake and Red Lake, Ontario. WALP provides air transportation services including passenger, charter and cargo, and is a critical lifeline for the delivery of food, medical supplies and other essential services to several remote First Nations communities. It also supplies and delivers bulk fuel for many of the Hydro One and community owned power generating plants in remote northern communities.

7 WALL is an affiliate of WGPL and WALP and owns or leases the aircraft and other critical assets used by WALP in its operations. The operations of the Debtors are integrated and dependent on one another and, consequently, it is a condition of the proposal of WGPL and WALP that the WALL Proposal be approved, and vice-versa.

8 The Debtors seek court approval of the Joint Proposal. WALP is a limited partnership and, WGPL, as the general partner of WALP, is liable in law for all the obligations of WALP. WGPL does not carry on business independently, and has no separate purpose, other than to serve as the general partner of the WALP.

9 The Official Receiver accepted the filing of the Joint Proposal and the holding of a combined meeting of creditors for the unsecured creditors of WGPL and WALP.

10 The Debtors have experienced negative cash flow, losses and operational problems resulting in financial difficulties for several years leading up to 2014, at which time a comprehensive operational and financial restructuring was initiated. R.e.l. group inc. ("REL") was retained to act as Chief Restructuring Officer of the Debtors to assist in the development and implementation of the turnaround plan.

11 The Debtors have the support of their secured creditors and key equipment lessors for the restructuring on the basis provided for in the proposals. Royal Bank of Canada ("RBC") holds general security agreements over all of the assets of the Debtors as security for its loans. The total amount owing to RBC is approximately $7.85 million.

12 Business Development Bank of Canada ("BDC") has specific security on certain aircraft and other assets of WALL and holds general security agreements against WALL ranking behind RBC's security. BDC is owed approximately $2.6 million.

13 RBC and BDC entered into forbearance agreements with the Debtors to maintain their loans if the Proposals are accepted and implemented. The claims of secured creditors are not being compromised.

14 Each Proposal provides that there is one class of unsecured creditors that is comprised of all Unsecured Creditors for each entity to the extent of their proven unsecured claims. Proposals are only being made to unsecured creditors.

15 Unaffected creditors under the Proposals include claims of:

(a) secured creditors;

(b) the Proposal Trustee, its counsel and counsel to the Debtors for administrative fees and expenses;

(c) the Crown with respect to certain Crown claims which are not subject to compromise under the *Bankruptcy and Insolvency Act* ("BIA");

(d) any creditors for amounts owing by the Debtors on account of goods, property and services received after the filing date; and

(e) employees of WALP and WGPL who shall continue to receive payment of their earnings on a regular basis.

16 Upon implementation of each of the Proposals, each unsecured creditor will receive payment as follows:

(a) for proven claims of less than $1,000, a dividend payment equal to the full amounts of the claim;

(b) for proven claims between $1,000 and less than $10,000, a dividend payment of $1,000 within 30 days of the effective date;

(c) for proven claims in excess of $10,000, a dividend payment of ten cents on the dollar payable in four equal payments over 12 months; and

(d) creditors having proven claims in excess of $10,000 who notify the Proposal Trustee at least three days before the first dividend payment, may elect to receive $1,000 on the first dividend payment in full and final satisfaction of their claim.

17 The Proposals also provide that certain related party creditors will waive their rights to receive dividends on their unsecured claims and, in the case of WALL, that certain First Nations creditors agree to irrevocably direct that the dividends payable on their claims be reinvested as unsecured loans to WALL.

18 The Proposal Trustee further reports that the liabilities of WGPL and WALP are virtually identical, with the only creditors unique to WGPL, being individual claims related to the payroll for the WALP Senior Management Team, all of which will be satisfied in full.

19 In the event of bankruptcy of each of the Debtors, the Proposal Trustee reports that the unsecured creditors would receive no distribution, and any proceeds of any liquidation of the assets of each of the Debtors would be paid to the secured creditors.

20 On May 17, 2016, the Meeting of Creditors for the Debtors was held. The Proposals were accepted by the requisite value and dollar value of the unsecured creditors of each of the Debtors entitled to vote at the Meeting of Creditors.

21 With respect to WALP and WGPL, 96.15% in number representing 99% in dollar value voted in favour of the Proposal.

22 With respect to the Proposal of WALL, 87.5% in number representing 99.76% in dollar value voted in favour of the Proposal.

23 The Proposal Trustee is of the opinion that the Proposals are advantageous to the creditors of the Debtors. The Proposal Trustee recommended that the Proposals be approved by the court.

24 The significant issue on this motion was whether it was appropriate to approve the filing of a Joint Division I Proposal by WGPL and WALP.

25 The Joint Proposal provides that:

(a) all claims asserted by Unsecured Creditors against either WGPL or WALP will be treated as claims in each estate;

(b) Unsecured Creditors only need to submit one proof of claim with respect to their claim;

(c) only one joint meeting of the Unsecured Creditors of WGPL and WALP would be held;

(d) if an Unsecured Creditor wished to submit a proxy or voting letter, only one proxy or voting letter need be submitted; and

(e) dividends will be based on proven claims submitted by Unsecured Creditors (without duplication) and only one distribution will be made to each Unsecured Creditor with a proven claim. Distributions will be made or issued by WALP, however, WGPL will be jointly liable for all payments.

26 There is very little authority or guidance on the subject of whether the filing of a Joint Proposal by related corporations is permitted under the BIA and whether an order should issue approving a Joint Proposal.

27 Counsel to the Proposal Trustee submits that the filing of a Joint Proposal by related corporations is permitted under the BIA and that, on the facts of this case, an order should issue approving the Joint Proposal.

28 Counsel to the Proposal Trustee referenced the proposal of *Golden Hill Ventures Limited Partnership* and *Golden Hill Ventures Ltd.*, Estate No.: 11-1292335 and 11-252902 (Yukon, S.C.), unreported, where the court approved a single proposal for both the general partner and the limited partnership. No reasons were provided. According to counsel to the Proposal Trustee, the proposal in that case did not provide for a consolidated estate, but rather, similar to the terms of the Joint Proposal, the *Golden Hill* proposal provided that all claims asserted against either Debtor, or both Debtors, would be treated as claims against the limited partnership for which the general partner was also liable by operation of law.

29 Counsel further noted that in *Howe, Re*, [2004] O.J. No. 4257 (Ont. S.C.J.), Registrar Sproat allowed for the filing of a "joint proposal" by spouses who carried on a business together.

30 In *Convergix Inc., Re*, 2006 NBQB 288 (N.B. Q.B.), Glennie J. of the New Brunswick Court of Queen's Bench expanded the category of parties eligible for the filing of a "joint proposal" to related entities. In allowing the filing of a "joint proposal", Glennie J. took into account the inter-relatedness of the insolvent corporations, that the "joint proposal" would not prejudice any creditors and that the filing of a "joint proposal" by related companies in certain circumstances may be consistent with the filing of a "joint proposal" by partners in a partnership.

31 Justice Glennie opined that the filing of a joint proposal is permitted under the BIA and, in that case, the filing of a joint proposal by the related corporations was permitted. Glennie J. noted that the BIA should not be construed so as to prohibit the filing of a joint proposal. In his analysis, Glennie J. referenced *Nitsopoulos, Re*, [2001] O.J. No. 2181 (Ont. Bktcy.) where Farley J. concluded that the BIA should not be construed so as to prohibit the filing of a Joint Division I Proposal.

32 Justice Glennie also took into account that:

(a) the cost of reviewing and vetting all inter-corporate transactions of the insolvent corporations in order to prepare separate proposals;

(b) the cost of reviewing and vetting all arms-length creditors' claims to determine which insolvent corporation they are actually a creditor of; and

(c) the cost of reviewing and determining ownership and title to the assets of the insolvent corporations;

would be unduly and counterproductive to the goal of restructuring and rehabilitating the insolvent corporations.

33 As noted by Vern Da Re in "The treatment of Joint Division I Proposals, 2004 Annual Review of Insolvency Law 21":

... Joint consumer proposals are explicitly permitted under section 66.12(1.1) of the BIA...

By contrast, Joint Division I Proposals are not specifically permitted under the BIA. Section 50(1) provides that "a proposal may be made by an insolvent person ...". The words "a proposal" and "an insolvent person" are singular and, arguably, limit Division 1 Proposals to one person per filing. While the definition of "person" under section 2(1) of the BIA is inclusive, rather than exhaustive, and includes "a partnership", there is no reference to the word in its plural form.

34 The issue identified by Mr. Da Re had been considered by Farley J. in *Nitsopoulos, Re*, who referred to the definition of "person" under section 2(1) of the BIA and concluded that since the definition was inclusive, rather than exhaustive, he was unwilling to prohibit the joint filing.

35 I agree with the approach taken by Farley J. in *Nitsopoulos, Re*. I do not see anything in the definition which would prohibit the joint filing. In my view, it was appropriate for the Official Receiver to accept the Joint Proposal.

36 I accept the submissions of counsel to the Proposal Trustee. In doing so, I have taken into account that:

(a) the operations of WALP and WGPL are completely intertwined;

(b) WGPL is liable in law for all of the obligations of WALP;

(c) the creditors of WGPL and WALP are not prejudiced by the filing of the Joint Proposal, as the only separate claims in WGPL will be satisfied in full as provided in the Joint Proposal and as required under s. 60 of the BIA;

(d) the official Receiver permitted the filing of the Joint Proposal; and

(e) the creditors of both WGPL and WALP voted overwhelmingly in favour of the Joint Proposal.

37 In order to approve a proposal, a three-pronged test must be satisfied:

(a) the Proposal is reasonable;

(b) the Proposal is calculated to benefit the general body of creditors; and

(c) the Proposal is made in good faith.

(see: *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List])).

38 In *Kitchener*, I stated the following at para. 20:

> The first two factors are set out in section 59(2), while the last factor has been implied by the court as an exercise of its equitable jurisdiction. The courts have generally taken into account the interests of the debtor, the interests of the creditors, and the interests of the public at large in the integrity of the bankruptcy system.

39 As I stated in *Kitchener*, it is appropriate to accord substantial deference to the majority vote of creditors at a meeting of creditors.

40 In this particular case, it is also important to take into account the operations of the Debtors. The public interest served by the operations of the Debtors is of considerable importance. The Debtors provide essential services to several remote First Nations communities in northern Ontario.

41 The Proposal Trustee has opined that the Proposals are advantageous to the creditors. The Proposals provide for distribution to the unsecured creditors which exceed the dividend that would otherwise be available from a bankruptcy, as there would be no recovery for unsecured creditors in a bankruptcy, and the Proposals are calculated to benefit the general body of creditors of the Debtors. Further, the Proposal Trustee is of the view that the Debtors have acted in good faith and with due diligence.

42 The Proposal Trustee is of the view that the releases requested are reasonable, necessary and do not prejudice any creditors. I agree. The orders requested by the Proposal Trustee incorporate a Director and Officer Release. I am satisfied that the orders requested by the Proposal Trustee reflect the required restrictions contained in section 50(13) and 50(14) of the BIA.

43 In summary, each of the Proposals satisfies the requirements of the BIA and, accordingly, the Proposals are approved.

44 An order shall issue:

> (a) approving the WALL Proposal and releases of the former and current officers and directors of WALL contained therein;
>
> (b) approving the Joint Proposal of WALP and WGPL and the releases of the former officers and directors contained therein; and
>
> (c) approving the WALL Report and the WALP/WGPL Report, each dated May 27, 2016 and the activities of the Proposal Trustee as described therein.

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TAB 5

1976 CarswellOnt 56
Ontario Supreme Court, In Bankruptcy

Stone, Re

1976 CarswellOnt 56, 22 C.B.R. (N.S.) 152

Re Stone

Henry J.

Judgment: May 18, 1976

Counsel: *J. N. Berman*, for creditor.
C. H. Morawetz, Q.C., for debtor.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

VI Proposal
VI.4 Approval by court
VI.4.a General principles

Headnote
Bankruptcy --- Proposal — Approval by Court — General

Proposals — Approval of — Governing considerations.

The function of the court when called upon to approve a proposal is a matter of taking several interests into account. The first interest is that of the debtor: to give him an opportunity to meet with his creditors and to find a way of producing assets or revenue which will provide them with a dividend outside of bankruptcy. The second interest is that of the creditors: to protect the creditors generally by ensuring that what is put up by way of a proposal is reasonable, but bearing in mind that by the time it gets to the court the proposal has been supported by and is therefore desired by the majority of creditors. The third interest is that of the public at large in the integrity of the bankruptcy legislation.

***Henry J.* (orally):**

1 As I conceive the function of the court when called upon to approve a proposal, it is a matter of taking several interests into account.

2 The first interest is that of the debtor: to give him an opportunity to meet with his creditors and to find a way of producing assets or revenue which will provide them with a dividend outside of bankruptcy. The second interest is that of the creditors: to protect the creditors generally by ensuring that what is put up by way of a proposal is a reasonable one, but bearing in mind that by the time it gets to the court the proposal has been supported by and is therefore desired by the majority of creditors. The third interest is that of the public at large in the integrity of the bankruptcy legislation.

3 In the present case I am faced with a situation where the history of this proposal does not inspire confidence in the ability of the debtor to bring about the implementation of the proposal that he has made to his creditors. I am very mindful of the delay that has occurred and I should like the objecting creditor to understand that this factor is very firmly in my mind. I must, however, consider the position of the majority of creditors, and there is one significant creditor who is objecting and who has objected from the very beginning to the proposal. But it is clear to me that the majority of the creditors, rightly or wrongly, have some faith in the likelihood of some dividend from the proposal.

4 As to the integrity of the Bankruptcy Act, R.S.C. 1970, c. B-3, we are coming to the point that any further failure to implement the proposal in a prompt and satisfactory way will have to be considered an abuse of process.

5 But it would be doing an injustice to the majority of the creditors if I should dispose of this matter now; not only are they entitled to have my adjudication on the basis of the best evidence, but they are also entitled to have me wait for a further short period to see whether or not the mainstay of this proposal is put in place.

6 If I were to reject the proposal on the basis of the available evidence before me, based on the trustee's earlier reports, there is little hope that the creditors would obtain anything from the estate if I now placed the debtor in bankruptcy.

7 I should like to make it clear, however, that while I intend to adjourn this matter for a few weeks I am stating, most firmly, that this must be the last time; therefore I will adjourn the matter to the bankruptcy Court in the last week in June, that would be 29th June; that would be the first motion day of the last week of June. I suggest that day because I have been told that, at the outside, if this contract is executed it will be executed within five weeks.

8 I have not been shown any reason why the objecting creditor will be prejudiced by this delay. He cannot expect to receive a dividend if the debtor is put into bankruptcy immediately. So I cannot see how I would be acting properly if I put the debtor into bankruptcy today. Therefore I will adjourn this matter until 29th June next.

End of Document

TAB 6

1998 CarswellOnt 194
Ontario Court of Justice, General Division (In Bankruptcy)

Lofchik, Re

1998 CarswellOnt 194, [1998] O.J. No. 332, 1 C.B.R. (4th) 245, 52 O.T.C. 220, 77 A.C.W.S. (3d) 249

In The Matter of the Proposal of Thomas Ronald Lofchik of the Town of Ancaster in the Regional Municipality of Hamilton-Wentworth in the Province of Ontario

Farley J.

Heard: January 8, 1998
Judgment: January 28, 1998
Docket: 32-092921, Commercial List No. BK-000217

Counsel: P. Pichelli, a principal of Scott, Pichelli & Graci Ltd., the trustee of the proposal.
Mario Cupido, a representative of the opposing creditor, Centregate Properties Ltd.

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.iii Interests of creditors

Headnote

Bankruptcy --- Proposal — Approval by court — Conditions — Interests of creditors

Trustee applied for court approval of proposal of debtor — Application opposed by creditor who claimed not to have received notice of creditors' meeting until after date — At creditors' meeting, only one creditor attended and voted in favour of proposal — Proposal of debtor was technically correct in terms of content, mechanics and procedure — Full material disclosure was made, proposal was calculated to benefit general body of creditors rather than particular creditor and proposal was made in good faith — Payment terms of proposal were adequate as debtor agreed to make payments of significant sum that would generate meaningful returns to unsecured creditors — Furthermore, debtor agreed to enhance proposal by assigning interest in joint venture to general benefit of creditors — No default on part of debtor and trustee in that notice of meeting was mailed to all creditors including opposing creditor — Debtor's proposal approved.

Table of Authorities

Cases considered by *Farley J.*:

Gareau, Re (1922), 2 C.B.R. 265, 61 Que. S.C. 57 (C.S. Que.) — referred to

Ilford-Riverton Airways Ltd., Re (1974), 19 C.B.R. (N.S.) 186 (Man. Q.B.) — referred to

McNamara v. McNamara (1984), 53 C.B.R. (N.S.) 240 (Ont. Bktcy.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 54(1) [rep. & sub. 1992, c. 27, s. 22] — referred to

s. 57(a) — referred to

s. 59(1) [rep. & sub. 1997, c. 12, s. 36] — considered

s. 59(2) — considered

s. 59(3) — considered

s. 173 — referred to

s. 177 — referred to

s. 198 — referred to

s. 199 — referred to

s. 200 — referred to

APPLICATION for approval of debtor's proposal to creditors.

***Farley J.*:**

1 Thomas Ronald Lofchik ("debtor") made a proposal to his creditors on October 21, 1997 following his notice of intention to do so the previous month. Notice of the meeting of creditors called to consider and vote on the proposal (together with the other required information) was mailed out by the trustee on October 27th. The meeting was held on November 12th. No creditor attended the meeting in person or by proxy. The only voting presence of a creditor at the meeting was that of the Toronto-Dominion Bank ("T-D Bank") which submitted a voting letter in favour of the proposal as to its proof of claim for $4,400. Thus the proposal was approved by the vote of that creditor.

2 The C.I.B.C. Mortgage Corporation submitted a proof of claim for $43,928.02 in time for the meeting but did not send in its voting letter in favour of the proposal until after meeting.

3 The opposing creditor, Centregate Properties Limited ("Centregate") which was aware of the debtor's intention to file a proposal, having received the debtor's notice in September, advised the trustee that it did not receive notice of the November 12th meeting and was unaware of it and the approval of the proposal until it received notice from the trustee of the motion for court approval. It was owed $72,000. The trustee subsequently verified that the other creditors in fact received notice of the November 12th meeting. Incidental to this follow up the trustee to see if motions had been received, some advised the trustee that they favoured the proposal but a majority in number did not. These other creditors did not attend the meeting in person or by proxy nor did they submit a voting letter for or against to be dealt with at the meeting. Neither did they attend the hearing before me.

4 The trustee's report indicated that the debtor had minimal assets as follows:

Household Goods	$ 2,000
1996 Mercury Marquis automobile	$27,000 ({*} fully encumbered)

9.2% interest - joint venture	unknown value{**}
25% interest - joint venture	unknown value{**}
Total assets	$29,000{**}

Notes: * It appears that the $27,000 secured debt relates to the automobile.** The joint ventures were said to be of an unknown value; one may therefore question how the total assets are said to be $29,000. However the trustee elsewhere in the material to creditors indicated that it seemed that of the two joint ventures only the Corunna one may have some value to a possible maximum of some $10,000 to $12,000 attributable to the debtor.

As against liabilities as follows:

Secured creditors	$27,000{*}
Unsecured creditors	$301,145
Total liabilities	$328,145

Notes: * It appears that the $27,000 secured debt relates to the automobile.

The trustee provided further details as to the joint venture interest including real estate broker opinions of value. The 9.2% interest was as to a Hamilton building in which the debtor previously practised law. In fact the interest had been reduced to 7.4% as the debtor had missed paying several cash calls. It was submitted that there was no equity at present in the building as it was valued at $700,000 but subject to a mortgage for $699,000 and a cash flow shortfall was being experienced. The 25% interest referred to a 28-unit building in Corunna, Ontario. It was submitted that there was no material equity present in this project as it was valued at $550,000 but subject to a mortgage for $500,000 and a 21% vacancy rate was being experienced. Disposition costs and the difficulty of disposing of a minority interest had been ignored in each joint venture. The opposing creditor had not seen the estimates of value before and was quite justified in its concern that the values had not been able to be verified

5 However, assuming that there is no realizable equity in the joint venture at the present, then the debtor's net position is that he has unencumbered assets of $2,000 (but being household goods, these would be exempt on a bankruptcy) and unsecured liabilities of $301,145. The debtor is presently a judge of the Ontario Court of Justice (General Division). The trustees report went on to advise:

> The debtor's financial difficulties are the result of investing in various development projects when he was a solicitor in the City of Hamilton. Of his total debts, approximately $235,300 is strictly related to various condominium projects and other real estate ventures. The debtor is unable to meet the shortfall demands on the various real estate projects and as a result thereof, has submitted this proposal. The proposal calls for payment through its term totalling $44,400.
>
> . . . . .
>
> We are further of the opinion that the debtor's proposal is an advantageous one for the creditors for the following reasons: the trustee is of the opinion that the proposal is more advantageous than a bankruptcy. In a bankruptcy, the only asset the trustee is entitled to is surplus income for a period of nine months. The said surplus income based on the Senate Committee Guidelines would be $2,070 per month for nine months, totalling $18,630. There would be no other free assets or assets with any value which would realize the creditors any additional funds, with the exception of Corunna (joint venture), which may realize $10,000 to $12,000 but it may be difficult to liquidate because it is a minority interest. The proposal will provide a higher realization than a bankruptcy liquidation. The proposal will also assist in rehabilitating the debtor and will cause the least disruption to the debtor and his family as well as generate a higher return to the unsecured creditors.

6 A judge's gross salary is $160,000. After taking off taxes and other deductions the debtor's net monthly income is $6,900. His wife (who has always owned the family residence) also has a monthly income of $700 so that the family's net monthly income is $7,600. Their expenses are $6,300 a month for an estimated surplus of $1,300. The debtor's two children are approaching university age. The debtor's net income should not be minimized; it would place him in the top 10% (and probably top 5%) of salaried persons in Canada.

7 The proposal is for the payment of $44,400 over 36 months at the rate of $1,000 per month for the first year, $1,200 for the second year and $1,500 for the third year.

8 The trustee advised that the proposal was precipitated by the prospect of garnishment proceedings being instituted by two creditors; Centregate verified that it was one of those creditors. Its claim arose out of the debtor buying two units out of an 80 unit project it was developing when it agreed to reduce its customary 25% cash at closing to 10% cash and a 15% vendor take back second mortgage. Centregate submitted that this was a speculation by the debtor but acknowledged that it knew it as such at the time. The debtor's financial woes are not unique; this court has seen numerous (all too numerous I regret to say) instances of persons investing heavily in assets (usually real estate or stocks) on the basis of high leverage loans with the expectation of increasing prices. When values plunge, as they did for real estate at the turn of the last decade, the result is the classic squeeze which it seems people have to rediscover every ten or twenty years.

9 Section 59 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B.-3 as amended ("BIA") provides:

> s.59.(1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.
>
> (2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.
>
> (3) Where any of the facts mentioned in sections 173 and 177 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

10 In dealing with this matter I am guided and constrained by the legislation and jurisprudence. As set forth in Houlden & Morawetz, *The 1998 Annotated Bankruptcy and Insolvency Act* (1997, Carswell Thomson Professional Publishing, Scarborough) at p. 162:

> ...In deciding whether the proposal should be approved, the court must take the following interests into account: (a) the interests of the debtor in making a settlement with creditors; (b) the interests of creditors in procuring a settlement which is reasonable and which does not prejudice their rights; and (c) the interests of the public in the fashioning of a settlement which preserves the integrity of the bankruptcy process and complies with the requirements of commercial morality: *Re Gardner* (1921), 1 C.B.R. 424 (Ont. S.C.); *Re Summer Co. (1984) Ltd.* (1987), 64 C.B.R. (N.S.) 218 (N.B.Q.B.); *Re Stone* (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.); *Re National Fruit Exchange Inc.* (1948), 29 C.B.R. 125 (C.S. Que.); *Re The Man With The Axe Ltd. (No.2)* (1961), 2 C.B.R. (N.S.) 12 (Man. Q.B.)

Houlden & Morawetz went on to state at pp. 164-5:

> **(9) Conditions that Must be Met Before the Court will Approve a Proposal**
>
> ***(a) Generally***

Under s. 59(2), the court before it can approve a proposal must be satisfied: (a) that the terms are reasonable; and (b) that the terms are calculated to benefit the general body of creditors. In addition, the court must be satisfied that the formalities of the Act have been complied with, see *ante* E§4 "Procedure for Filing a Notice of Intention or Proposal"; and that the terms required by the Act to be included in a proposal are in the proposal (see *infra* in this section).

In determining whether to approve a proposal, the court must consider not only the wishes and interests of creditors, but also the conduct and interests of the debtor, the interests of the public and future creditors and the requirements of commercial morality: *Re Gardner* (1921), 1 C.B.R. 424 (Ont. S.C.); *Re Summer Co. (1984) Ltd.* (1987), 64 C.B.R. (N.S.) 218 (N.B.Q.B.); *Re Stone* (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.); *Re National Fruit Exchange Inc.* (1948), 29 C.B.R. 125 (C.S. Que.); *Re The Man With The Axe Ltd.* (No. 2) (1961), 2 C.B.R. (N.S.) 12 (Man.Q.B.)

(b) Terms are Reasonable

In order for the court to approve a proposal, it must be satisfied that the term are reasonable: s. 59(2). To be reasonable, the proposal must have a reasonable possibility of being successfully completed in accordance with its terms: *Re McNamara and McNamara* (1984), 53 C.B.R. (N.S.) 240 (Ont. S.C.); *Re Gareau (English & Scotch Woollen Co.)* (1922), 2 C.B.R. 265 (C.S. Que.). In *Re Farkvam* (1966), 39 C.B.R. (3d) 293 (B.C. Master), affirmed (May 28, 1996), Doc. Prince George 32237 (B.C.S.C.), The Registrar was of the opinion that "reasonable", in addition to requiring that there is a reasonable possibility that the debtor will be able to meet the terms of the proposal, also requires that the proposal meets the requirements of commercial morality and maintains the integrity of the bankruptcy system.

(c) Calculated to Benefit the General Body of Creditors

The court will refuse to approve a proposal that might harm or prejudice the interests of creditors. If, for example, a proposal provided that the trustee could delegate his duties under the proposal to a committee of creditors, such a delegation could prejudice creditors, and the court would likely find that such a proposal was not calculated to benefit the general body of creditors.

A proposal that has been skilfully and craftily drafted to serve the interests of persons other than the creditors is not calculated to benefit the general body of creditors: *Re Summer Co. (1984) Ltd.* (1987), 64 C.B.R. (N.S.) 218 (N.B.Q.B.).

A proposal that fails to make full disclosure of the assets of the debtor and the encumbrances against them is not calculated to benefit the general body of creditors: *Re Mayer* (1994), 25 C.B.R. (3d) 113 (Ont. Gen. Div.).

(d) Good Faith

A person seeking court approval of a proposal must be acting in good faith. Good faith requires full disclosure of the assets of the debtor and the encumbrances against them. In *Re Mayer* (1994), 25 C.B.R. (3d) 113 (Ont. Gen. Div.), creditors were required, by the terms of a proposal, to accept in full settlement of their claims the debtor's equity in the premises in which the debtor resided, but the materials given to creditors did not disclose that the premises were held jointly with the debtor's spouse, nor did it disclose the extent of the encumbrances. In addition, there was no proper appraisal of the property. The court found that the debtor was not acting in good faith and refused to approve the proposal.

(d) Terms that Must be Contained in a Proposal in Order for It to be Approved by the Court

In order for a proposal to be approved by the court, there are certain statutory terms which must be contained in it. These are detailed *ante* E§3(2) "Terms of Proposal - Statutory Terms Which Must be Included in a Proposal". If a proposal does not contain these terms, the court cannot approve it. Thus, if a proposal does not provide for

payment in full of claims of preferred creditors, the court will not approve it: *Re Masvoir Corp.; Rainville v. Dep. Minister of Revenue (Que.)* (1979), 30 C.B.R. (N.S.) 197 (C.S. Que.). Preferred creditors may, however, waive or compromise their claims: *Re Kenmore Building Materials Ltd.* (1966), 9 C.B.R. (N.S.) 41 (Ont. C.A.).

11 The proposal of the debtor and the trustee's application for court approval appears to be technically correct as to the contents, mechanics and procedure. There has been full material disclosure, the proposal appears to be calculated to benefit the general body of creditors and not just some particular creditor or special interest and it appears to have been made in good faith. As well there does not appear to have been any infraction by the debtor of any one of the offences mentioned in sections 198, 199 and 200 of BIA. As well there would not appear to be any difficulty with sections 173 and 177 (specifically although the assets of debtor are not of the value equal to 50 cents on the dollar of the debtor's unsecured liabilities, it would appear that this has arisen from circumstances for which the debtor cannot justly be held responsible in light of the downturn in the property market). I am satisfied on the financial information presented that the debtor will be able to fulfill the terms of the proposal by making the monthly payments as it appears that there is sufficient surplus income at the present time and in the third year I would assume that the budget could be somewhat trimmed if there were no adjustment in the revenue.

12 Is the proposal generous? The answer is no. But that is not the question although it is obvious that the debtor could pay more by extending the payments out over a longer period of time. If he had done so, then it appears that he would not have invoked what appears to be the sincerely held indignation of Centregate. Rather the question is whether the (payment) terms of the proposal are reasonable in the sense of being adequate enough to meet the requirements of commercial morality and maintaining the integrity of the bankruptcy system. In my view the payment terms of this proposal are adequate for that purpose and the debtor is obligating himself to make payments of a significant sum which will generate a meaningful percentage dividend for the unsecured creditors. The debtor while enjoying a significant salary as indicated above, is on a fixed income in the sense that his salary scale is established and he does not have the opportunity as he previously did either as a lawyer of earning more by working harder, more efficiently or more successfully or as a knowledgeable investor who may successfully invest in an upswing asset. In my view the monetary terms are right on the edge of acceptability particularly when one considers that someone in similar circumstances in a bankruptcy discharge hearing would likely have to pay in total something in the nature of what this proposal provides (it should be kept in mind in this regard that with the 1997 amendments there are mandatory features with respect to surplus income and this factor in my view will have to be taken into account in crafting discharge terms).

13 The proposal has been advanced for approval by the trustee; it has been unanimously approved by the (sole) creditor voting on it. As indicated in Houlden & Morawetz at p. 165:

> **(10) Effect of Acceptance of Proposal by Creditors**
>
> Even if a proposal receives the unqualified recommendation of the trustee and the overwhelming support of creditors, this does not mean that the court must approve it: *Re Gardner* (1921), 1 C.B.R. 424 (Ont. H.C.): *Re Allen Theatres Ltd.* (1922), 3 C.B.R. 147 (Ont. S.C.); *Re Alberta Western Wholesale Lumber Ltd.* (1961), 2 C.B.R. (N.S.) 151, 27 D.L.R. (2d) 598 (B.C.S.C.).
>
> If, however, a large majority of creditors, i.e., substantially in excess of the statutory majority, have voted for acceptance of a proposal, it will take strong reasons for the court to substitute its judgment for that of the creditors: *Re McIntyre* (1922), 2 C.B.R. 396 (N.B.K.B.); *Re Landsmann & Wexler* (1936), 17 C.B.R. 240 (C.S. Que.); *École Int. de Haute Esthetique Edith Serei Inc. (Receiver of) v. Edith Serei Int. (1987) Inc.* (1989), 78 C.B.R. (N.S.) 36 (C.S. Qué.); *Re Leger and Lamoureaux* (1925), 7 C.B.R. 280 (C.S. Que.); *Re Slavik* (1993), 21 C.B.R. (3d) 278 (B.C.S.C).

I am however mindful of the fact that the sole creditor voting had a much smaller claim than Centregate which is in court objecting. *McNamara v. McNamara* (1984), 53 C.B.R. (N.S.) 240 (Ont. Bktcy.) observed that there is no requirement for any written or formal objection to be filed prior to the hearing. Further I note that the onus is on the debtor (not the opposing creditors) to establish that the proposal should be approved by the court: see *McNamara*, supra, *Gareau,*

Re (1922), 2 C.B.R. 265 (C.S. Que.). I was cognizant of Centregate's concern about there possibly being equity in the two joint ventures at the present time; it also seems to me that it is conceivable that property values may increase in the future in such a way that these interests may become of some realizable value. A court has only a very limited power to make alterations or amendments of a proposal although it should be noted that the meeting of creditors can do so (that is, the creditors may negotiate with a debtor making a proposal on the basis that they will turn down the proposal if the debtor does not amend it): see s. 54(1):

> s.54(1) The creditors may, in accordance with this section, resolve to accept or may refuse the proposal as made or as altered at the meeting or any adjournment thereof. (emphasis added)

This illustrates the significant benefit of creditors actually participating in meetings of creditors. However the trustee has now provided me following my inquiry at the hearing with assignments of the debtor's interest in the two joint ventures for the general benefit of the creditors. (It is interesting to note that the one assignment for the Hamilton building describes the debtor's interest being conveyed as 22.5%; however this does not affect the end result). This thereby eliminates the concern about there either being equity in the two joint ventures presently or in the future if the property market improves as this is now being added to the proposal as a supplement over and above the monetary terms. I am of the view that this beneficial addition is an acceptable procedure in the spirit of *Ilford-Riverton Airways Ltd., Re* (1974), 19 C.B.R. (N.S.) 186 (Man. Q.B.). As to Centregate's other concern that the proposal is not generous enough, I would observe that: (i) as discussed above it is (marginally) adequate; (ii) the only creditor who did participate in the voting process did vote in favour; and (iii) there has been an enhancement (although of some indeterminate value, if any) by virtue of the aforesaid assignment of the joint venture interests for the general benefit of the creditors. None of the other creditors (and specifically those which the trustee advised he contacted after the meeting to determine whether they had received the material and who then indicated that they were not favourably disposed to the proposal) attended this hearing to voice their opposition to the court approving the proposal.

14 What then of Centregate's submission that it did not vote because it did not receive notice of the November 12th meeting? It emphatically states that if it had received notice, it would have voted against the creditors approving the proposal as it found it quite distasteful. If that event (of Centregate voting against) actually did take place with no other changes then there would have been two creditors voting (the T-D Bank $4,400 for and Centregate $72,000 against). The proposal would have been defeated on both a numbers of creditors and dollar of claim basis and the debtor would have been deemed to have made an assignment in bankruptcy (s.57(a)). However as I observed at the hearing the difficulty is that it appears that the debtor and the trustee did what was mechanically required of them and particularly that such notice was mailed to all creditors of the debtor - including Centregate. Thus there has been no default on their part. While the results may be very unfortunate for Centregate's position if it did not receive that notice and as a result did not voice (because it could not for lack of notice), there is a general policy concern. I would emphasize that my following comments are general comments and they are not directed at Centregate. Unless every creditor in a proposal situation were to attend the meeting or indicate in advance of the meeting that he would not be attending then the result of any meeting would always be open to question if someone claimed that they did not receive notice. Not only would there be the situation of such creditor possibly being able to swing the negative vote into a majority situation but also that creditor could claim that he would have been able to provide the other creditors attending with such information as would make them change their positive votes into negative ones. It is quite conceivable that this could be subject to abuse by unscrupulous creditors lying in the wait. The opposite situation is also a danger: a proposal otherwise voted down could have the debtor and friendly creditors who had not attended the meeting arguing that the proposal should be approved. In this regard it may be that it would be desirable to have notices sent out by combination of registered and ordinarily mail (the combination being desirable as many people do not respond to registered mail) perhaps with the one mailing to advise only of the nature of the other. Possibly a legal notice in a local newspaper of general circulation in addition to an ordinary mailing would be helpful.

15 In the end result the debtor's proposal as approved by the creditors and amended by the addition of the joint venture assignments is approved.

Application granted.

End of Document

TAB 7

1984 CarswellOnt 186
Ontario Supreme Court, In Bankruptcy

McNamara, Re

1984 CarswellOnt 186, [1984] O.J. No. 2345, 53 C.B.R. (N.S.) 240

RE McNAMARA and McNAMARA

Saunders J.

Judgment: November 16, 1984
Docket: No. 32-29886

Counsel: *M.H. Greenglass* , for debtors.
G.S. Gringorten , for opposing creditors.
D. Snider , for trustee.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

VI Proposal
VI.4 Approval by court
VI.4.a General principles

Bankruptcy and insolvency

VI Proposal
VI.4 Approval by court
VI.4.c Bankrupt offering less than 50? on dollar

Headnote

Bankruptcy --- Proposal — Approval by Court — General

Bankruptcy --- Proposal — Approval by Court — Bankrupt offering less than 50¢ on dollar

Proposals — Approval of proposal by court — Debtor offering less than 50 cents on the dollar — Terms of proposal must be reasonable and calculated to benefit the general body of creditors — Trustee's report mentioning facts under s. 143 — Proposal having no reasonable possibility of working out — Proposal not approved.

Proposals — Procedure under Bankruptcy Act — Objecting creditor allowed to make representations on application for approval of proposal without filing written objection.

Proposals for a husband and wife provided for the vesting of all the debtors' assets, with certain exceptions, in the trustee. The trustee's report mentioned two facts under s. 143.

Held:

Proposals not approved.

Having found that two facts under s. 143 had been proved, it was mandatory that the Proposal not be approved unless security were furnished. Security must be reasonable for the payment of not less than 50 cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct. The vesting of assets can be accepted as security within the meaning of s. 41(3). However, the failure to be able to provide security up to the statutory requirements is a factor to be taken into account in assessing the reasonableness of a proposal, that is whether it has a reasonable possibility of working out, an issue which the court may decide. Further factors to be considered in assessing this issue are whether the proposal received the overwhelming support of the voting creditors, both in numbers and amount, whether the proposal is advantageous for the creditors, and the chance of the proposal being complied with. In view of the inadequacy of the evidence as to the viability of the proposal, the court did not exercise its discretion to reduce the amount of security to be provided from the amount set out in s. 41(3).

Bankruptcy R. 4 does not require an objecting creditor to file a written objection before being allowed to make representation on an application for the approval of a proposal.

Table of Authorities

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 41, 143, 147, 169-171.

Rules considered:

Bankruptcy Rules, C.R.C. 1978, c. 368, s. 4.

Application for approval of proposals.

***Saunders J.*:**

1 This is an application to approve two proposals under s. 41 of the Bankruptcy Act, R.S.C. 1970, c. B-3. The debtors are a husband and wife. There were lengthy and exhaustive arguments on behalf of the trustee, the debtors and the opposing creditors. For reasons which are apparent from the material, it is important that the matter be dealt with without delay.

2 The proposals were considered by the creditors at a meeting held on 2nd October 1984. Each was passed by a substantial majority of the votes cast. The approval of each proposal is dependent on the approval of the other. Written objections were made on behalf of certain creditors and the court was informed of at least one other objecting creditor.

3 Mr. Gringorten made submissions on behalf of all objecting creditors. An issue was raised as to the status of the creditors to make submissions on this application. The objections were based on the fact that certain of the objectors might not have provable claims and that the others had not filed formal notices of objection. There appeared at the hearing at least one creditor in each estate whose claim had been accepted by the trustee and who had voted on the

proposal. Those creditors were included in the group represented by Mr. Gringorten. The statute provides that objecting creditors shall be heard on the approval application and there is no provision to which I was referred that would require any written or formal objection to be made prior to the hearing. I was referred to Bankruptcy R. 4 [Bankruptcy Rules, C.R.C. 1978, c. 368, s.4] to the effect that the practice in civil matters shall in cases not provided for by the Bankruptcy Act so far as applicable apply to bankruptcy proceedings. I do not consider that R. 4 compels me to require a written objection before allowing a creditor to make representation on an approval hearing either in person or by counsel. I am satisfied that there was at least one creditor in each estate entitled to object who was represented by Mr. Gringorten. I therefore propose to consider his submissions in reaching my conclusion on these applications.

4 This is a complex matter as illustrated by the fact that the hearing occupied more than one day. Remi McNamara, up until 1981, was employed as an educational consultant. The background material filed by the trustee states that for a number of years he acted as a tax consultant and traded in securities on a part-time basis. In 1981 he became engaged in these activities full time and became registered as a securities dealer. There was no evidence that Mr. McNamara had any special qualifications to give tax or security advice. In carrying on his business he formed a number of corporations. His operations were extensive and substantial, involving large sums of money. Again referring to the background material, it is said that as of 28th June of this year he had assets of approximately $14,500,000 and liabilities of $13,500,000.

5 A number of the transactions apparently were carried out for the benefit of, or in the name of, Michelle McNamara, but it seems to be agreed that the operating head of the enterprise was Remi McNamara and indeed a feature of the proposals is that the assets of Michelle McNamara will be pooled with those of her husband and vested in the trustee so that from now on when I refer to amounts, unless I otherwise specify, I will be referring to the combined assets and liabilities of both debtors.

6 Financial difficulties were experienced over a period of time and by August of this year Remi McNamara was prepared to acknowledge that he was insolvent.

7 The report of the trustee to the court indicates combined assets with a realizable value of $1,061,000 and liabilities of $5,907,000 of which $859,000 represent preferred claims of Revenue Canada. If the liquidation occurred on an ongoing basis rather than as a result of a bankruptcy, it is recognized that the actual realization might be greater but the trustee does not anticipate that it would be substantially greater. It is also suggested that some of the claims may be overstated. Specifically there is a suggestion that the claim of Revenue Canada may be substantially reduced. Furthermore the debtor attacks some of the claims by creditors and in particular the claim by Tax Plan Financial Planning Systems Inc. whose claim is at $400,000. The debtor's position is that rather than Tax Plan being a creditor it is in fact a debtor to the McNamara enterprise.

8 The opinion was expressed on behalf of the debtor that the total of the moneys owing to unsecured creditors might be as low as $2,500,000 rather than $5,907,000 as stated in the report. There were no details as to how that reduction might be achieved. There was no financial analysis of how the apparent surplus in June 1984 of approximately $1,000,000 became a deficit of nearly $6,000,000 in the following August. Some matters are alluded to in the background information attached to the trustee's report. They include internal confusion, failure to obtain necessary tax rulings, borrowing at excessively generous and unrealistic interest rates, failure to account for normal recession after a rapid period of growth, inadequate planning of expansion, diminution and uncertainty in the value of assets, illiquidity resulting in cash flow problems.

9 The report of the trustee lists the following causes of the insolvency of Remi McNamara:

1. Lack of management skills.

2. Excessive spending.

3. Improper legal and tax advice.

4. Litigation regarding sale of companies to the MacBean Group.

I pause to mention that at some time in 1984 certain assets including shares in one or more of the McNamara corporations were sold to John MacBean who had been a colleague of Remi McNamara. There is a substantial dispute between them as to their respective obligations and rights arising out of those transactions.

5. Purchase of over a million of M.U.R.B. investments at the end of 1983 in order to allow projects to be completed.

6. Providing of security of $575,000 in Canada Savings Bonds on purchase of building.

7. Inability to generate cash flow because of litigation and uncertainty of situation. The litigation referred to would appear to be the litigation involving John MacBean.

10 In Ex. G to the trustee's report there is a document apparently prepared by Remi McNamara in which he lists a number of problems encountered by the McNamara family but full details and explanation of such problems are not given.

11 The proposals, which are before the court for approval, are based on Remi McNamara continuing in the business of providing tax planning advice and investments related to that advice. The proposals are set out in the trustee's report and the salient features would appear to be:

12 1. All assets are to be vested in the trustee except for certain specific personal assets of both debtors and except for certain interests required by law for licensing or similar purposes to be retained by Remi McNamara. The trustee would still maintain some measure of control over such interests. Furthermore, it was stipulated on behalf of the debtor and by the trustee that they were each unaware of any particular interest to which that exception to vesting would now apply.

13 2. Cash flow from all sources would be used to retire the debts until the debt to the unsecured creditors was fully paid, except for:

14 (a) Necessary business expenses including the expenses of the trustee in supervising the proposals:

15 (b) Income for the McNamara family. The scheme of the proposals is that the debtors are each entitled to retain up to $60,000 in each year provided that Michelle McNamara is only entitled to retain $30,000 out of moneys derived from the business:

16 (c) The cost of servicing of a second mortgage on the matrimonial home, which is said to have been given as security for a loan to the business. It is not clear what the cost will be but it was suggested by the opposing creditor and not denied that it would be $25,000 on account of principal plus interest. The current principal balance is $125,000. It is noted that such payments would increase the equity in the matrimonial home and that the home is an asset excluded from the proposal.

17 3. Broad flexibility in Remi McNamara to conduct his business. As mentioned by one creditor at the meeting, flexibility would be desirable if he is to have any prospect of being successful. There are safeguards in the proposals to provide the trustee with some supervisory and monitoring rights.

18 4. An amount of $200,000 a year will be available for creditors, unsecured and preferred, after payment of all expenses including the expenses of the trustee and after deduction for current income tax liability. It is stressed on behalf of the debtors that the $200,000 is a minimum amount. Recognition must be given to the preferred claims which are claimed to be approximately $860,000. If those claims are proved at that amount and if only minimum payments are made it will be four years before any money will be available to the unsecured creditors. It is to be hoped that the preferred claim can be reduced substantially but there is no estimate given as to when such reduction could be effected. It takes time to settle tax claims. Until they are settled the trustee would be unable to distribute to the unsecured creditors moneys

that might have to be eventually paid to the preferred creditor. However, once the current tax liabilities have been dealt with taxes would not be of significance as there is a provision for deduction of current tax liabilities on an estimated basis before the amount available for distribution is calculated. Current taxes do not come out of the $200,000 minimum.

19 Turning now to the provisions of the Bankruptcy Act dealing with the function of the court in approving a proposal. Section 41(2) provides in part:

> (2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal...

The subsection goes on to deal with the powers of the court if the debtor has committed the offences mentioned in ss. 169 to 171. There is no allegation that such offences have been committed.

20 Reference should also be made to s. 41(3) which states:

> (3) Where any of the facts mentioned in sections 143 and 147 are proved against the debtor...

I should mention that there are in the trustee's report facts mentioned in s. 143 but none mentioned in s. 147. I will be coming back to s. 143 in a moment. If any such facts are proved the subsection goes on to say:

> (3) ... the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents in the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

21 Every proposal that comes to this court for approval bears with it the approval of at least 75 per cent of the creditors. The inference is that Parliament did not intend that support by even a substantial number of creditors should necessarily result in the approval of a proposal by the court.

22 I have no reason to doubt the good intention of the debtors or that they have in general terms come up with the best proposal that they are now able to make. There are, as I pointed out in the course of argument, certain wording problems in the proposal, but I have no power of which I am aware to alter the terms. I do not consider the wording problems to be, relatively, of great significance.

23 With reference to s. 41(2), I consider that the proposal is calculated to benefit the general body of creditors. So the only issue remaining in s. 41(2) is whether the proposal is not reasonable. Before dealing with that I would like to go back to s. 41(3) which provides for the furnishing of security if certain facts are proved.

24 The trustee's report on the proposal of Remi McNamara states that the assets of the debtor are not of a value equal to 50 cents on the dollar on the amount of his unsecured liabilities. The statement is of a fact mentioned in s. 143(1)(*a*) and is evidence of that fact. There is no dispute as to that fact. However, s. 143(1)(*a*) goes on to say in effect that the fact should not be considered if the fact has arisen from circumstances for which the debtor cannot justly be held responsible. The onus of showing that he cannot be held responsible is on the debtor. There may have been unforeseeable factors which were beyond the control of Remi McNamara. However, from the evidence available there was, at the very least, serious mismanagement. As a result, the creditors, who no doubt relied on his abilities and expertise, find themselves in their present plight. In my opinion, the debtor has not satisfied the onus that is on him to show that he cannot justly be held responsible for the fact that his assets are less than half of his unsecured liabilities. The fact mentioned in s. 143(1)(*a*) is proved against the debtors.

25 A second fact alleged in the trustee's report is that the debtor has continued to trade after knowing himself to be insolvent. Again, the statement is evidence of a s. 143 fact. There was no evidence given to the contrary and therefore I consider the fact mentioned in s. 143(1)(*c*) to also have been proved. It was pointed out that no particulars of such trading activity were given but once there is a statement of a fact in the trustee's report, it is, in my opinion, up to the debtor to contradict it otherwise it will be regarded as proved.

26 There are two other facts alleged in the trustee's report. Both were qualified by counsel for the trustee in making his submissions. I do not propose to deal with them further and I do not regard either of them as proved s. 143 facts.

27 Having found two facts under s. 143 that have been proved, there is a mandatory requirement that the proposal not be approved unless security is furnished. Security must be reasonable for the payment of not less than 50 cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

28 The proposal provides that the assets of the enterprise are to be vested in the trustee. As I have said, there are some problems in the wording of the document and some problems in the monitoring of the activities of the debtor by the trustee. The trustee has broad powers and there is provision for maintenance and inspection of financial records. Nevertheless the nature of the business appears to be such that there may be practical difficulties in effective supervision at a reasonable cost. Be that as it may, I am prepared to accept the vesting of the assets as security within the meaning of s. 41(3).

29 On the basis of the trustee's report the vested assets at the moment have a realizable value of approximately $1,000,000 which, again based on the trustee's report as to the liabilities, would provide security only to the extent of less than 20 cents on the dollar. It is recognized that the debtor considers that the realization will be higher and the debts lower. Even if his optimism is borne out, the security provided would still fall short of the statutory standard of 50 cents on the dollar.

30 I was asked to exercise my discretion on the basis that the debtors have done the best they could to provide security. I do not question that contention but it does not seem to me to be the point. It is the interests of the creditors with which I am concerned. I agree with counsel for the trustee that is comes back to the reasonableness of the proposal. It seems to me that the failure to be able to provide security up to the statutory requirement is a factor to be taken into account in assessing the reasonableness of the proposal.

31 In considering the issue of reasonableness there are factors which would appear to me to be positive. First, the proposals received the overwhelming support of the voting creditors, both in number and amount. As I have said, that circumstance alone is not enough but in my view it is a very powerful factor. There were two lengthy meetings. The minutes of those meetings, which are attached to the trustee's report, indicate that the concerns which were expressed at this hearing and which I have alluded to were dealt with or discussed. I would agree with counsel for the debtor that the court should be very reluctant in these circumstances to not approve a proposal.

32 Second, the trustee states in its report that it is of the opinion that the proposals are advantageous for the creditors in that they provide for payment of claims in full plus interest over a number of years. As I have said, I do not question the intention of the debtors but the issue as it seems to me is one of the viability of the proposal. The chance of the proposals being complied with must be assessed.

33 Third, the trustee says that the estimated realizable value of the debtor's assets would probably result in no dividend to the unsecured creditors. On the basis of the report, that may be an overstatement, although not a substantial overstatement. The argument proceeded on the assumption that there were realizable assets of somewhere over a million dollars and preferred claims, which might be reduced, of about $850,000. Even after taking into account the fees of the trustees, there would still be some money for the unsecured creditors. In addition there were assets of the debtors excluded from the proposals which would be included in a bankruptcy. Furthermore, in a bankruptcy there might be additional assets availble after further investigation based on transactions which have been made by the debtors. Although this circumstance is referred to in the reports, the trustee is unable to say at present whether there will be any such additional assets.

34 Fourth, the trustee considers the proposals to be advantageous because the assets will be all vested in it. That aspect of the proposals has already been referred to.

35 The reasons why the trustee considers the proposals to be advantageous are set out in the reports. They are substantially the same in each report. It is the trustee's opinion that the debtor's assistance and ongoing efforts to realize on the assets are vital but, as already mentioned that opinion was qualified in the course of argument. The trustee did not consider that realization would be substantially less on a bankruptcy than on an ongoing basis.

36 There were other matters referred to in the reports in support of the opinion that the proposals were advantageous to the creditors. In my opinion, they do not weigh one way or the other on the issue of reasonableness, but for completeness I set them out as printed in subparas. 4, 5, 6 of para. 15 of the report on the Remi McNamara proposal:

37 4. The first payment under the proposal is due on 15th January 1985, by which time the viability of the proposal can be better determined.

38 5. The proposal provides for specific supervision by the trustee and the inspectors, (previously referred to).

39 6. The carrying out of the proposal depends to a very large extent on the debtor's capabilities and because of the complexity of the inter-company transactions and the ongoing litigation, the end result of the proposal cannot be determined at this time.

40 There are some negative factors. First, the deficiency in the security from the statutory standards set out in s. 41(3). Second, if only minimum payments are made and the preferred claims are not reduced, there will be nothing for the unsecured creditors until the fourth year whereas there might be some realization for the unsecured creditor on a bankruptcy although perhaps it will not be very much. The best that I can say about the choice between the proposal or a bankruptcy is that it has not been demonstrated that the creditors on a liquidation would be worse off under a bankruptcy. The issue then becomes an assessment of the potential of Remi McNamara to generate income for the creditors. Third, I should say something about the conduct of the debtor because it is part of the statutory obligation of the court to consider conduct. The trustee's reports state, after investigation, that the debtors are not subject to censure. There were allegations that misrepre sentations had been made. There were statements to the effect that police investigation were underway as a result of complaints by creditors. The debtors also invited the police to investigate. There is not sufficient evidence before me to arrive at a conclusion that the conduct of the debtor is such that it should have a negative effect on the reasonableness of the proposal. Neither do I consider his conduct as weighing in favour of the proposal. Fourth, I have made reference to some defects in the proposal documents which are not capable of amendment in these proceedings. Again, although the defects might create some problems, I would not reject the proposals as unreasonable because of them.

41 Finally, it comes down to the ability of Remi McNamara to generate sufficient cash to meet his obligations under the proposal. At first blush a creditor might say "What have we got to lose? The assets are tied up and if he is successful perhaps we can do better. Where is the prejudice to the creditors in giving him a chance?" If that was all there was to it then the function of the court would be quite limited. Almost all proposals could meet that test. The court has, in my opinion, a deeper function to perform and that is to decide whether or not the proposal is reasonable. I take that to mean a determination of whether the proposal has a reasonable possibility of working out.

42 Remi McNamara undeniably deals in large amounts of money but it was not shown in these proceedings how such dealing would translate into cash distributable to his creditors. It is said that I can infer from his tax liability in previous years and from the sale price of some of his companies that he can generate substantial amounts of cash. There were no details of the taxes payable and no financial analysis of the asset transactions. There was no marketing plan or projection presented. The future was sketched in the vaguest terms. Remi McNamara did not testify, notwithstanding the expressed concerns as to the viability of his proposal. I must conclude that he would have had nothing to add to what is now before us. He has the onus to satisfy the court that his proposal is not unreasonable.

43 I do not consider that I should, in view of the inadequacy of the evidence as to the viability of the proposal, exercise my discretion to reduce the amount of the security to be provided from the amount set out in s. 41(3). Furthermore, in all the circumstances I consider the proposals not to be reasonable and that they should not be approved.

44 It is therefore unnecessary for me to deal with the issue as to whether or not the trustee was right in denying voting privileges to the objecting creditor, Tax Plan Financial Planning Systems Incorporated.

45 Opposing creditors shall have costs out of the estates.

Proposals not approved.

TAB 8

1996 CarswellBC 541
British Columbia Supreme Court

Farkvam, Re

1996 CarswellBC 541, [1996] B.C.W.L.D. 990, 39 C.B.R. (3d) 293, 61 A.C.W.S. (3d) 863

Re proposal of DAVID OSCAR FARKVAM

Registrar Chamberlist

Heard: February 12, 1996
Judgment: March 1, 1996
Docket: Doc. Prince George 32237

Counsel: *R.B. Hagen*, trustee in bankruptcy, for Mr. Farkvam.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.ii Reasonable terms

Bankruptcy and insolvency

VI Proposal
VI.4 Approval by court
VI.4.e Appeal from order approving or rejecting proposal

Headnote

Bankruptcy --- Proposal — Approval by court — Appeal from order approving or rejecting proposal

Bankruptcy --- Proposal — Approval by court — Conditions — Reasonable terms

Proposals — Approval by court — Approval refused where 76 per cent of debt being student loans — Debtor just beginning career as veterinarian and not providing any information about anticipated future earnings — No hardship or special circumstances shown — Proposal found to be unreasonable in circumstances.

Of the $91,000 the debtor owed to his unsecured creditors, a total of $69,000 was owed to student loan programs. The debtor had just completed his veterinarian training and was beginning his career. Under his proposal, the debtor proposed to pay a total of $9,100 to his trustee on behalf of his ordinary creditors at a rate of $300 per month. The proposal did not indicate the debtor's likely future earnings. It also did not disclose any hardship or special circumstances that made the debtor's proposal necessary. The proposal did not give any evidence that the debtor qualified as an insolvent person under s. 50(1) of the *Bankruptcy and Insolvency Act*. There was no indication of any attempt by the debtor to meet his financial obligations.

The trustee applied for an order approving the approval. The only creditor that had appeared at the first meeting of creditors had approved the proposal.

Held:

The application was dismissed.

Under s. 59(2) of the Act, the court is required to consider the reasonableness of the proposal. This test requires the court to determine not only whether the proposal itself is reasonable but whether, in the circumstances, the proposal is reasonable in relation to commercial morality and the integrity of the bankruptcy system. The proposal was not reasonable in the circumstances as disclosed by the evidence.

Table of Authorities

Cases considered:

Industrial Acceptance Corp. v. Lalonde, [1952] 2 S.C.R. 109, [1952] 3 D.L.R. 348 — *referred to*

Legault, Re (February 25, 1994), Doc. Vancouver CA016123, Southin, Hollinrake and Rowles JJ.A. (B.C. C.A.) — *considered*

Marshall v. Bank of Nova Scotia (1986), 62 C.B.R. (N.S.) 118 (B.C. C.A.) — *referred to*

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 —

s. 2 "locality of a debtor"

s. 49(3)

s. 50(1)

s. 58

s. 59

s. 59(2)

s. 66(1)

s. 173

s. 173(1)(a)

s. 177

s. 187(7)

Application by trustee for approval of proposal.

***Registrar Chamberlist*:**

Introduction

1 This matter came before me ab initio on the 12th day of February 1996. At that time, I advised the Trustee that on the face of the materials I was not satisfied that the terms of the proposal were reasonable or calculated to benefit the general body of creditors, however, I would reserve to consider the application. No application was made by the Trustee to adjourn or to file additional material or make further submissions.

Nature of Application

2 This is an application to approve a proposal made by an insolvent person, namely David Oscar Farkvam, of Terrace, British Columbia ("the debtor").

3 Pursuant to Sections 58 and 59 of the *Bankruptcy and Insolvency Act* (the *Act*), the proposal was made by the debtor on the 15th day of December 1995 and was lodged with the Trustee the same day. A copy of the proposal was filed with the official receiver on the 22nd day of December 1995, and the same day the Trustee gave notice by ordinary pre-paid mail to the Superintendent of Bankruptcy and to every known creditor affected by the proposal, of a calling of a meeting of creditors to be held on the 12th day of January 1996 to consider the proposal.

4 The initial meeting was adjourned, first to the 19th of January 1996, and subsequently, to the 23rd day of January 1996. The initial date set for consideration of the proposal was adjourned by the Trustee as a quorum was not present. On the next date, January 19th, 1996, the meeting was again adjourned to January 23rd, 1996 because, according to the minutes of that meeting:

> One claim had been received from a creditor voting in favour of the proposal but who is a related person and therefore the vote cannot be accepted. Another claim had been received by facsimile which had not been clearly transmitted and therefore the chairman adjourned the meeting to enable the creditor to transmit a clear claim.

5 At the meeting of January 23rd, 1996, only one creditor, the Royal Bank of Canada, proved its claim, in the amount of $4,164.33 and assented to the proposal.

6 Thus, the application for approval of the proposal came before me as a proposal having passed the requirements of a special resolution.

Background

7 The particulars and circumstances of the debtor are generally unknown to me. His proposal is skeletal in presentation and contains what I would call only the essential requirements contemplated by the *Act*.

8 Paragraph 3 of the proposal provides for payment of the Trustee's fees in the amount of $1,000.00, which has been paid to the Trustee, and further fees being 15% of all funds paid to the Trustee for distribution to the creditors.

9 At paragraph 4 of the proposal, the debtor sets out the payments, when made to the Trustee for the benefit of the unsecured creditors, being firstly, the sum of $1,000.00 which has been paid and a further sum of $10,800.00 to be paid at the rate of $300.00 per month, commencing in the month following the month in which the proposal is approved.

10 In the Trustee's report to the creditors, the Trustee provides information pertaining to the debtor. The debtor had been attending university until 1995 and has secured a degree in veterinary medicine. He is currently employed in his field. The Trustee reports that "the debtor incurred the subject debts in order to maintain his family and himself while obtaining an education".

11 The Trustee then summarizes the proposal as one providing for the payments as set out, of which 85% will be paid in distribution to creditors subject to the levy of 5% to the Superintendent in Bankruptcy. He reports, under the heading assets, that the debtor has no unencumbered assets other than personal effects which are exempt from execution. The estimated heading, estimated realization, assuming all payments are paid, is then reviewed and a figure of $9,100.00 given as being the amount available for ordinary claims.

12 The Trustee recommends acceptance in this report to creditors for the reason "that the proposal is to pay a dividend of 10% whereas a bankruptcy would likely not produce anything".

13 In the report of the Trustee submitted in support of this application, the Trustee reports that the liabilities of the debtor proven at the date of the report, being January 23, 1996, are firstly, secured $9,715.86 and secondly, ordinary $14,064.32. He reports his opinion that the conduct of the debtor is not subject to censure and that none of the facts mentioned in Sections 173 and 177 of the *Act* may be proved against the debtor except Section 173 (1)(a) in that the debtor's assets are not of a value equal to 50¢ on the amount of his unsecured liabilities. The Trustee then opines that this fact has arisen from circumstances for which the debtor cannot be justly held responsible and that the Trustee has not discerned any element of culpability, recklessness or blind disregard by the debtor for his financial well being.

14 The Trustee then concludes once again that the debtor's proposal is advantageous for the reason "that the proposal provides for the payment of 9% which will provide more for the creditors than would a bankruptcy".

15 It is interesting to note that the dividend appears to have dropped by 1%.

Discussion

16 The list of unsecured creditors of the debtor as disclosed in the material consists of the following:

B.C. Student Loan Centre 2nd Floor, 1489 West Broadway, Vancouver, B.C. V6H 1H6	$30,000.00
Bank of Nova Scotia 4602 Lakelse Ave Terrace, B.C. V8G 1R1	1,000.00
Bank of Nova Scotia Canada Student Loan 4602 Lakelse Ave Terrace B.C. V8G 1R1	29,000.00
Bank of Nova Scotia Visa CRC PO Box 11501 650 W. Georgia St Vancouver B.C. V6B 4N7	4,600.00
Margaret Evans RR2 395 Dogwood Ladysmith, B.C. VOR 2FO	9,900.00
Royal Bank Visa Card Centre 2015 Main Street Vancouver, B.C. V5T 4L8	3,700.00
Royal Bank of Canada 705 Central Ave Saskatoon, Sask. S7N 2S4 5122106	600.00
Scotia Student Loan Bank of Nova Scotia	

4602 Lakelse Ave. Terrace, B.C. V8G 1R1	10,000.00
Sears Canada Inc. 2820 Underhill Avenue Burnaby, B.C. V5A 3C5	2,200.00

	$91,000.00

17 As can readily be ascertained, student loans, either British Columbia or Canada, total $69,000.00 and account for approximately 76% of the total debts disclosed.

18 The debtor's condensed statement of affairs discloses net monthly income of $2,700.00 per month, with monthly living costs given as $2,200.00 and a surplus cash flow of $500.00 per month. The projected cash flow does not state the length of time this cash flow is projected for or whether there is an anticipation by the debtor that it will remain stagnant or is expected to change. All that is said by the debtor is "the foregoing reasonably reflects the state of my affairs as of the above date".

19 It does not reflect the fact the debtor has only recently completed his veterinarian training and is just commencing his professional career. Further, it does not, in my opinion, provide any indication of his anticipated earnings into the future. There is nothing in the material to disclose any hardship or special circumstance which has resulted in the debtor having to resort to the provisions of the *Act* to restructure his debt. If anything, all that can be gleaned from the material before the court is that the one hardship which has occurred is that his student loans may have become due and payable as the result of his studies having concluded.

20 The debtor has now completed his studies. There is no evidence to indicate whether he was in default of any of his financial obligations at the time he made his proposal. There is no evidence that the burden of his debt load became so overwhelming that he was unable to meet his financial obligations generally as they became due. There is in fact no evidence that he is an insolvent person as contemplated by Section 50(1) of the *Act*. On the evidence, he is a person who has accumulated some $91,000.00 in ordinary debt and some $9,715.86 in secured debt while attaining his degree in his chosen vocation, veterinary medicine. No doubt, if there was some evidence that he had attempted to meet his financial obligations or some uncontemplated disaster or circumstances had occurred, I might have a different view of the application. Likewise, if the totality of the creditors did not include student loans to the extent they do, I might again have a different view of this application. Regretfully, that is not the case here.

21 Although the purpose of the *Bankruptcy and Insolvency Act* are often quoted with reference to the application of a bankrupt for his discharge, these purposes and observations by many courts in various jurisdictions should, in my view, be applied mutatis mutandis to the role of the court in determining whether to approve or reject a proposal made under the *Act*. Such general observations and discharge cases include the observation of the Supreme Court of Canada in *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109, at 120, where the court said:

> The purpose and object of the *Bankruptcy Act* is to equitably distribute the assets of the debtor and to permit his rehabilitation as a citizen, unfettered by past debts.

22 A similar comment was made in *Marshall v. Bank of Nova Scotia* (1986), 62 C.B.R. (N.S.) 118 (B.C. C.A.) at page 122 where the court said:

> The judge in bankruptcy must consider two principles: the first is that of the rehabilitation of the bankrupt and the second is that of the integrity of the bankruptcy system.

23 Dealing specifically with student loans, I am mindful of the comments of our Court of Appeal in the recent decision of *Re Legault* (unreported) (February 25, 1994), Doc. Vancouver CA016123. That decision involved an appeal from the order of the chambers judge who had ordered that the bankrupt's discharge from bankruptcy be conditional upon payment by the bankrupt of some $12,000.00, being 50% of her Canada student loan liability, in monthly payments of $100.00 per month. The application before the Court of Appeal was to vary the chambers judge's order to $3,600.00 from the amount he had ordered, with the monthly payments to remain the same. At page 25 of the majority decision, the court said:

> ... The circumstances that must be considered on a discharge application can be set out in a certain way where a student loan is involved.

And further, on the same page

> ... On a discharge application, while student loans are not to be treated differently from other debts in terms of the principles to be applied by the court, the court can and should, as part of its deliberations, be mindful of the unique characteristics of a student loan.

24 Although the majority of the Court of Appeal disagreed with the ultimate decision of the Honourable Madam Justice Southin, in her dissent, it did agree with her Ladyship's comments that the *Bankruptcy Act* is not to be used as a "fiscal car wash".

25 Section 59(2) of the *Bankruptcy and Insolvency Act* provides:

> Where the court is of the opinion that the terms of the proposal are not reasonable, or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal.

26 In my view, the use of the word "reasonable" in this Section is not restricted to the reasonableness of the proposal as it affects the ability of the payor to meet the terms of the proposal or as it reflects the relationship between the debtor and his creditors. I believe this test also incorporates within it a test as to whether or not in all the circumstances, the proposal is one that is reasonable when applying tests of commercial morality and considerations of maintaining the integrity of the Bankruptcy system. In addition, the court should apply the criteria which has been applied to student loans as evidenced in the *Legault* decision. In other words, is the proposal to pay 9%-10% of a student loan obligation by a recent graduate who has just embarked on his professional calling reasonable in all the circumstances?

27 Student loans are provided without security and in circumstances where the lender relies primarily on the anticipated ability of the borrower to pay back the loans from the anticipated greater earnings which will be created by the enhanced education and employability of the borrower. Different considerations might apply if there were no student loan creditors. The court might be satisfied that the commercial creditors have covered the anticipated default of many of its debtors by providing in their overhead for such an eventually. But that is not the case here. Student loans are so predominant in our post-secondary education environment that they should be viewed as part and parcel of what has been called the social contract that exists between a country and its citizenry.

28 In Houlden & Morawetz, Bankruptcy and Insolvency Law of Canada, 3rd Edition, in relation to Section 59(2) at page 2-144.7, the learned authors say:

> In determining whether to approve a proposal the court must consider not only the wishes and interests of creditors, but also the conduct and interests of the debtor, the interests of the public and future creditors and the requirements of commercial morality.

29 In the context that I have discussed in this decision, I do not see the proposal as being reasonable in all the circumstances and on the evidence before me. Given the mandatory language of Section 59(2), the application to approve the proposal, filed by the debtor, is therefore refused.

30 One further matter should be addressed with respect to the application. The debtor resides in Terrace, British Columbia. The closest bankruptcy registry is in Prince Rupert. By virtue of Section 49(3) of the *Act*, an assignment is to be offered to the Official Receiver in the locality of the debtor and "it is inoperative until filed with that Official Receiver".

31 Section 2 of the *Act* defines "locality of a debtor" as meaning the principal place (a) where the debtor has carried on business during the year immediately preceding his or her bankruptcy, (b) where the debtor has resided during that year, and (c) in cases not coming within (a) or (b), where the greater portion of the debtor's property is situated.

32 In the present case, there is no connection with the Prince George Registry other than the fact that the Trustee's place of business is in Prince George. By virtue of Section 66(1) of the *Act*, all provisions of the *Act*, insofar as they are applicable, apply, with such modifications as the circumstances require to proposals. Thus, although it appears the Official Receiver did not take exception to the filing of the proposal in Prince George, the filing should have been made in Prince Rupert Registry. Although by virtue of Section 187(7) the court has power to transfer any proceedings that are pending to another bankruptcy district or division, this section contemplates that the discretion of the court could only be exercised if the assignment was validly filed. Houlden & Morawetz, supra, comment on the court's discretion at page 2-84:

> It would seem that the power conferred by Section 187(7) could only be exercised if the assignment which is sought to be transferred was validly filed. For example, if an assignment is validly filed where the debtor resides, but it is proved that the bankruptcy could be more economically administered in the bankruptcy district where the debtor carried on business, an order could be made under Section 187(7). But if the assignment was filed in a jurisdiction that did not meet one of the three criteria for locality of the debtor in Section 2, an order of transfer under Section 187(7) could not be made.

Application dismissed.

End of Document

TAB 9

1921 CarswellOnt 3
Ontario Divisional Court

Gardner, Re

1921 CarswellOnt 3, 1 C.B.R. 424, 49 O.L.R. 252, 59 D.L.R. 555

In re Gardner

Order, J.

Judgment: January 31, 1921

Counsel: *J. M. Bullen*, for the Canadian Credit Men's Association, authorized trustee.
The opposing creditor, trading as Wm. Croft & Sons, in person.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.i General principles

Headnote
Bankruptcy --- Proposal — Approval by Court — General

Scheme of Arrangement — Composition with All but the Principal Creditor Advancing Fund for Payment of Dividend to Others — Benefit to General Body of Creditors — Reservation to Advancing Creditor of His Entire Claim — Bankruptcy Act, S. 13.

A scheme of arrangement may be approved notwithstanding the objection of a minority creditor under sec. 13 of *The Bankruptcy Act*, although it affords an opportunity for one of the creditors financing the scheme to retain his right to payment in full while all other creditors receive only a portion of their claims. Approval ordered as calculated to benefit the general body of creditors where the largest creditor agreed to advance a sum sufficient to pay all other creditors a substantially larger dividend than would be obtainable on a forced sale.

Application made by the authorized trustee under sec. 13 of *The Bankruptcy Act* for the approval by the Court of a scheme of arrangement of the insolvent debtor's affairs prepared by the debtor. The scheme is actively opposed by a creditor.

***Orde, J.*:**

1 The report of the authorized trustee shows that the debtor had assets consisting of stock in trade and fixtures nominally of the value of $66,163.44 and unsecured liabilities to the extent of $61,007.35, leaving an apparent surplus of $5,156.09. It was stated before me and not contradicted that the assets if forced to sale would hardly realize more than 35 cents on the dollar. Proof of claims to the amount of $57,636.07 was made to the trustee by 37 creditors. Of these creditors Gordon MacKay & Co., Ltd., are the largest, their claim amounting to $41,848.69. The next largest claim is

for $2,081.28, there are two for about $1,500 each and the remainder are all under $1,000 each. The proposal submitted to the creditors is that Gordon MacKay & Co. are willing to advance a sum sufficient to pay all the creditors, other than themselves, 55 cents on the dollar. This means, of course, that Gordon MacKay & Co. will still retain the right to call for payment of their claim in full, while the other creditors of the scheme if approved by the Court will forego 45 per cent of their claims.

2 At the meeting of creditors called by the trustee to consider the proposal, there were 29 creditors present or who had communicated their decision to the trustee by letter. Apart from Gordon MacKay & Co. 26 of these with claims aggregating $11,316.01 assented to the scheme, while two creditors with claims of $211.96 and $954.10 respectively dissented. I think it may fairly be assumed that those creditors who were notified and who failed either to attend or to communicate their decision to the trustee either assent, or at least do not actively dissent.

3 Upon the application for the approval of the scheme, the dissenting creditor for $954.10 did not appear but Wm. Croft & Sons whose claim amounts to $211.96 appear and object to the scheme being approved on the ground that its effect is to give a preference to Gordon MacKay & Co. by allowing them to be paid in full, and that in the interest of the debtor as well as of the other creditors, no minority creditor, no matter how small his claim may be, should be forced in effect to release part of his claim may be, should be forced in effect to release part of his claim unless all the creditors are placed upon an equal footing. There is much force in this objection, because if the object of such a scheme as this is not only to clear off the claims of the creditors, but to put the debtor on his feet again, that object may be defeated. The debtor's future solvency would undoubtedly be much greater if all the creditors were to abandon 45 cents on the dollar of their claims, whereas under the proposed scheme he will still have liabilities, all to one creditor, of approximately $51,000 or $52,000. This argument would have more weight if the debtor were proposing to borrow money elsewhere sufficient not only to compound with the other creditors but to pay Gordon MacKay & Co. in full. He could not, of course, obtain a loan of that amount, and if he did it would hardly seem proper to approve of it. But here a large creditor is willing to advance an additional $10,000 or $11,000, and to take the chance of getting repayment of that sum and also of its existing claim from the debtor, provided that it is permitted to retain the right to call for payment in full. It was pointed out that if Gordon MacKay & Co. were offering to buy the assets for a sum which would be sufficient to pay all the creditors 55 cents in the dollar, there could be no reasonable objection to the proposal. And yet the result here will be in many respects the same, so far as the creditors other than Gordon MacKay & Co. are concerned. The scheme of arrangement seems to me to be one which in the interests of the general body of creditors and of the debtor, ought to be approved unless there is some rule or principle applicable in bankruptcy matters which would make it improper or inequitable that I should, in the exercise of my discretion, give the Court's approval to it.

4 In determining whether or not this scheme should be approved, I am governed by the provisions of subsecs. (8), (9) and (16) of sec. 13. None of the creditors hold any security upon the property of the debtor and there are no preferential claims, so that subsec. (16) does not apply.

5 The terms of the proposal are reasonable, and they are calculated to benefit the general body of creditors, and they will provide for the immediate payment to the creditors, other than Gordon MacKay & Co., of more than 50 cents on the dollar. Gordon MacKay & Co. are willing to take the risk of getting payment of their claim from the debtor. If the arrangement whereby Gordon MacKay & Co. are to be entitled to payment in full, if they are ultimately able to obtain it, had not been disclosed to the creditors, the scheme could not be approved, but with full disclosure I am unable to find any principle which requires that the Court ought to exercise its discretion by disapproving of the scheme. It is my duty to take into consideration not only the wishes and interests of the creditors but the conduct of the debtor, the interests of the public and future creditors, and the requirements of commercial morality. The burden of proof is on the party who opposes the approval of the composition or scheme. *Baldwin on Bankruptcy*, 11 ed., pp. 784-5. The only case to which I was referred which approaches the point raised here, was *In re E.A.B.*, 9 Manson 105, [1902] 1 K.B. 457, 71 L.J.K.B. 356. It really does not afford much assistance, except as illustrating the care with which the Court will scrutinize the matter if there is any suggestion of collusion or secret advantage. Many of the cases cited were cases where a bankrupt was applying for an annulment of the bankruptcy order. The effect of such an order is different from that of a discharge,

because an annulment enables the debtor to face the world, not as a discharged bankrupt, but as one who has not been, or ought not to have been, declared bankrupt. In such cases the Court applies certain principles which do not seem to be necessarily applicable to an application of this sort.

6 The scheme of arrangement will therefore be approved, and an order of the Court will issue accordingly. The scheme provides that trustee's costs and expenses are to be included in the amount to be advanced by Gordon MacKay & Co.

Approval order granted.

End of Document

TAB 10

Most Negative Treatment: Distinguished
Most Recent Distinguished: James, Re | 2011 ONSC 493, 2011 CarswellOnt 268, 73 C.B.R. (5th) 216, 197 A.C.W.S. (3d) 331 | (Ont. S.C.J., Jan 20, 2011)

2010 CarswellOnt 1047
Ontario Superior Court of Justice

Rennie, Re

2010 CarswellOnt 1047, 185 A.C.W.S. (3d) 826, 64 C.B.R. (5th) 278

In Bankruptcy and Insolvency

In the Matter of the Proposal of Grant Holden Rennie of the City of Toronto, in the Province of Ontario

Reg. Scott W. Nettie

Heard: January 25, 2010; February 3, 2010
Judgment: February 24, 2010
Docket: Toronto Estate No. 31-1120405

Counsel: Bruce A. Simpson for Applicant
Miles D. O'Reilly, Q.C. for Trustee

Subject: Insolvency; Contracts; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.iii Interests of creditors

Headnote

Bankruptcy and insolvency --- Proposal — Approval by court — Conditions — Interests of creditors

Debtor made proposal under Bankruptcy and Insolvency Act (BIA) — Proposal committed debtor to pay $33,600 over 60 months — Debtor owned recreational vehicles with realization value of $1,000 — Debtor also owned one-third interest in mortgaged cottage property (cottage interest) — Realization value of cottage interest was at least $54,000 — Debtor and co-owners of cottage made declarations that cottage interest was charged with entire amount of mortgage — Debtor took position that doctrine of exoneration applied and that there was no equity in cottage interest — Proposal was accepted by debtor's creditors — Debtor brought application for court approval of proposal — Application dismissed — Proposal did not satisfy test under s. 59(2) of BIA — Proposal was not reasonable or calculated to benefit general body of creditors — Deemed assignment in bankruptcy would yield significantly more return to creditors than proposal — Deemed assignment would result in debtor making payments of $11,330.55 under surplus income provisions of BIA — When cottage interest and recreational vehicles were added to these payments, creditors should expect to receive in excess of $65,000 from deemed assignment — Cottage interest would vest in trustee and would not be subject to exoneration — Doctrine of exoneration did not apply to facts at bar — There was no evidence of written agreement by co-owners to have cottage interest bear burden of mortgage

repayment — There was no evidence to support assertion that all mortgage payments were made by debtor — There was no demonstration of disability or undue influence.

Table of Authorities

Cases considered by *Reg. Scott W. Nettie*:

Abou-Rached, Re (2002), 2002 BCSC 1022, 2002 CarswellBC 1642, 35 C.B.R. (4th) 165 (B.C. S.C.) — considered

Banks v. Diegel & Feick Inc. (1981), 39 C.B.R. (N.S.) 311, 1981 CarswellOnt 211 (Ont. S.C.) — distinguished

Booth, Re (1998), 4 C.B.R. (4th) 45, 1998 CarswellOnt 2053 (Ont. Bktcy.) — followed

Fox v. Burns (May 31, 1978), Gould D.C.J. (Ont. Dist. Ct.) — referred to

McClory, Re (2006), 19 C.B.R. (5th) 305, 2006 CarswellOnt 911 (Ont. S.C.J.) — considered

Pittortou, Re (1984), [1985] 1 W.L.R. 58, [1985] 1 All E.R. 285 (Eng. Ch. Div.) — followed

Silbernagel, Re (2006), 2006 CarswellOnt 2523, 20 C.B.R. (5th) 155, 81 O.R. (3d) 152 (Ont. S.C.J.) — considered

Slan v. Blumenfeld (1997), 34 O.R. (3d) 713, 1997 CarswellOnt 3062, 34 O.T.C. 183 (Ont. Gen. Div.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Pt. III, Div. I — referred to

s. 59 — referred to

s. 59(2) — considered

Statute of Frauds, R.S.O. 1990, c. S.19
Generally — referred to

s. 4 — considered

APPLICATION by debtor for court approval of his proposal under *Bankruptcy and Insolvency Act*.

***Reg. Scott W. Nettie*:**

1 This was the application by Grant Holden Rennie (the "Debtor") for Court approval of his proposal under Division I of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). The hearing occurred on two separate days before me. It proceeded on the report of Killen Landau & Associates Ltd., trustee under the Proposal (the "Trustee"), and other documents filed at the hearing. These include the January 22, 2010, declaration of the Debtor (the "Debtor's

Declaration"), and the January 21, 2010, declaration of the Debtor's father, John MacLeod Rennie (the "Father's Declaration") [1] . The Court heard submissions and argument from counsel on behalf of the Debtor and the Trustee.

2 The Debtor is a 49 year old married man with one child. His wife is the proponent under a separate proposal to her creditors, wherein she is obliged to make payments of $275.00 per month. According to the Trustee's report in this Proposal, there is a good deal of overlap between their two sets of creditors.

3 The Debtor has declared $74,060.00 on his Statement of Affairs. He is self employed, through his corporation, as a general contractor and carpenter. He offers, in this Proposal, to pay his creditors $560.00 per month over 59 months, plus an initial deposit of $560.00, for a total of $33,600.00.

4 The Proposal was accepted by the requisite double majority at the meeting of creditors called to consider the Proposal. [2] From the Trustee's report, it appears that this vote was cast by voting letter. Thus, we will never know what analysis, if any, the creditor [3] undertook in deciding to accept the proposal.

5 What we do know is that s. 59 BIA requires Court approval of a proposal, even when accepted by the creditors. The two prong test set out for Court approval is as follows:

> Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

6 We know also from decisions such as *McClory, Re* (2006), 19 C.B.R. (5th) 305 (Ont. S.C.J.), and *Silbernagel, Re*, 2006 CarswellOnt 2523 (Ont. S.C.J.), that the Court is charged with carrying out its duty, independent of the wishes of the creditors. It is for the Court to be satisfied as to satisfaction of the s. 59(2) BIA test. The Court, even on an unopposed application for approval before the Registrar, is not the handmaiden of the creditors, and will not simply rubber stamp its approval. That is not what Parliament intended in Division I of the BIA.

7 That aside, it is also true that the Court should take into consideration in deciding to exercise its discretion to approve a proposal, or not, the wishes of the creditors, expressed through their acceptance of the proposal. Since every proposal before the Court for approval was necessarily accepted by creditors, the Court must balance this interest finely. It is fair to say, and supported in cases such as *Abou-Rached, Re* (2002), 35 C.B.R. (4th) 165 (B.C. S.C.), that where a large majority of creditors has accepted a proposal, substantial deference may be accorded to those wishes. In that case, a substantial number of creditors representing significant dollar value due by the debtor voted and participated in the approval process.

8 In the case at bar, we have one lone voting letter representing 14% of the debtors by number, and approximately 12% of possible unsecured debt. Even removing the contingent claim of Canadian Imperial Bank of Commerce in the amount of $60,000.00, the vote by Royal Bank of Canada is only 22% of the debt. This is not, in my view, the kind of substantial majority meant in the cases, even though it is 100% of the votes at the meeting. Having presided over countless of these applications, and having spent a significant amount of my time in practice as counsel to another Canadian bank, I think it fair to observe that the debt being voted, from the VISA department of Royal Bank of Canada, was in all likelihood voted on by a harried collections officer, or a third party collections and insolvency agent engaged by the creditor, and not with an eye to anything other than taking the obvious deal on the table and closing a file, one of thousands. I cannot infer from the vote any meaningful consideration which ought to be accorded any particular deference in carrying out this Court's duties under s. 59(2) BIA.

9 Against this backdrop, I must consider the s. 59(2) BIA tests.

10 One of the exercises that the Court, on such an application, goes through is a consideration of the effects of a refusal of Court approval. The BIA provides that in such a case, the debtor is deemed to have made an assignment in bankruptcy as at the date of refusal by the Court. It is appropriate to consider what, if any, benefit or realizations may be had by the creditors in the case of a deemed assignment in bankruptcy. This has the effect of guarding against debtors trying to shelter too much of their distributable assets in a proposal. For example, if a debtor proposed only $10,000.00 to her creditors, while thereby reserving to her own use a $100,000.00 house, it would seem unreasonable for the creditors to accept in the proposal 1/10 of that which would vest in the trustee on an assignment. Of course, this is an extreme example, and the Court must be careful to consider other factors such as costs of realization, and of administration of each type of potential estate -the proposal estate or the bankruptcy estate which issues on the deemed assignment.

11 Such a consideration is relevant to the case at bar. The Debtor has presented two cash flow statements, or budgets - one at the outset of the Proposal and one as at February 1, 2010. As well, the Statement of Affairs indicates a 1/3 interest in a cottage property in Burks Falls, Ontario (the "Cottage"). The Statement of Affairs also discloses some nominally valued recreational assets with a realization value of $1,000.00. [4]

12 Turning first to a consideration of the amount of surplus income which the creditors could expect to receive from the Debtor in the event of an assignment in bankruptcy, we see that at the time of the filing of the Proposal, family unit income of $5,260.00 net per month was indicated for a family unit of three. The Debtor earns 45% of this income. Against Superintendent's Standards for a family of three of $2,862.00, this leaves surplus income of $2,398.00 per month. The Debtor's share is 45% or $1,079.10 per month. Under the surplus income provisions of the BIA as they now stand [5], the Debtor would be obliged to make payments to the bankruptcy trustee of 50% of this amount for 21 months. This totals $11,330.55.

13 If the only other realizations to be expected in a bankruptcy were the recreational vehicles, or even the GMC cube van, it is readily apparent that the proposal, even over 60 months as it is, is a better realization for the creditors. Assuming it to be financially viable, and I will return to this point below, it would appear to be reasonable and calculated to benefit the general body of creditors.

14 As the February 1, 2010 budget shows an even lower family unit income, on this specific analysis, the same outcome follows. The reduced income in the February 1, 2010, budget will be a factor in the viability analysis, below.

15 For this Debtor, the analysis does not end with the surplus income and the vehicles.

16 The Cottage was acquired by the Debtor and his parents, John MacLeod Rennie and Kathleen Rennie, on or about June 17, 1994. The evidence and documents tendered at the hearing establish that until November 23, 2004, there were no encumbrances against title to the Cottage. The Cottage has had various values ascribed to it. The sworn Statement of Affairs of the Debtor indicates it to have a value of $350,000.00 as at October 15, 2008, yet documents filed at the hearing by the Debtor include a realtor's opinion of value with a range of $299,000.00 to $310,000.00, as at May, 2009. All agree that the only outstanding encumbrance is the November, 2004, mortgage to Canadian Imperial Bank of Commerce ("CIBC"), in the present outstanding amount of approximately $120,000.00.

17 For the purposes of this Application, I need not resolve the quantum of equity in the Cottage. I will work from the figure of $299,000.00, being the lowest, and most beneficial to the Debtor, value advanced. At 5% commission, and legal fees on a sale, and net of the mortgage, it is fair, in my view, to consider that the Cottage is worth $162,000.00. It may, in fact, be worth much more. This would indicate that the value of the Debtor's admitted 1/3 share of the Cottage is $54,000.00, or more.

18 If we add $54,000.00 to the amount of surplus income prescribed for this family unit, and the recreational vehicles, creditors should expect to receive in a bankruptcy (which is what would follow from a refusal of Court approval of the Proposal) in excess of $65,000.00, subject, of course to fees of the trustee, and any legal fees to enforce the trustee's rights

in the Cottage. This is nearly double that offered in the Proposal. If this analysis holds true, then how can any Court, exercising its discretion under s. 59(2) BIA, even according any deference to the creditors' slimly expressed wishes, find that the Proposal is reasonable or calculated to benefit the general body of creditors?

19 It cannot.

20 The analysis does not, however, end there. The Debtor has claimed, presumably on behalf of his parents, that the doctrine of the equity of exoneration applies to the facts at bar. As a result, the Debtor claims that his 1/3 interest in the Cottage is charged with the entire amount of the mortgage to CIBC, resulting in absolutely no equity being available to his creditors.

21 Curiously, the Trustee, who would, *prima facie*, become trustee in bankruptcy on any deemed assignment if the Proposal is not approved by the Court, supports this position. Perhaps the Trustee confuses its role in working with the Debtor to craft and present the Proposal with its overarching duty to the creditors to maximize return.

22 In effect, the Debtor, and his father, in their declarations, state that there was agreement between the three co-owners that the mortgage placed by all three over the Cottage in 2004 was for the entire benefit of the Debtor and that, as a result, the co-owners would consider that it was, as amongst themselves, the Debtor's interest which must bear first dollar burden to pay the mortgage. The reasons for this alleged agreement are set out in the Debtor's Declaration and the Father's Declaration. Allegedly, the Debtor received all of the benefit of the mortgage advance, and has made all payments on the mortgage from his own funds.

23 Four questions for analysis flow from this assertion, even supposing that it lies in the mouth of a potential bankrupt or his trustee to make it given their duties to aid and act, respectively, to the utmost in realizing assets for distribution amongst creditors.

24 These questions are: what is the doctrine?; does it exist in Ontario?; does it apply to the facts at bar?; and should the Court apply the doctrine, it being equitable relief?

What is the doctrine?

25 In a learned and well written decision, *Slan v. Blumenfeld* (1997), 34 O.R. (3d) 713 (Ont. Gen. Div.), Madam Justice Kitely explores the doctrine thoroughly, in the context of matrimonial litigation. At Paragraph 10, Justice Kitely states the doctrine, and its underpinning, succinctly:

> The principle of exoneration is that a person who has charged property to secure the debt of another stands only in the position of a surety and is entitled to be exonerated by the principal debtor. The doctrine is said to reflect the intentions of the parties.

26 Thus, the principle itself is straightforward. It is the divining of the intention of the parties, almost always, and certainly in the case at bar, which provides the difficulty.

Does the doctrine exist in Ontario?

27 *Slan* is a spirited defense of the doctrine and its continued existence in Ontario. However, buried in the decision, and, while not distinguished, but correctly stated as not being binding authority on Justice Kitely, is the decision in 1981 of the then Registrar of this Court, in *Banks v. Diegel & Feick Inc.* (1981), 39 C.B.R. (N.S.) 311 (Ont. S.C.).

28 *Banks* takes issue with the very existence of the doctrine in a modern society, and in the face of the *Statute of Frauds*, R.S.O. 1990 chapter S.19.

29 The doctrine has its origins in providing equitable relief to the harsh legal reality suffered by married women in centuries gone past, in respect of their ability to own and control their property upon marriage. Societal and legal norms

were such that married women were reduced to little more than chattel of their husbands, and their properties were their husbands' to pledge and, very often, squander. Equity, it would seem, saw fit to intervene and develop a doctrine that if the wife's property was pledged by the husband for his sole benefit, then it would presume that the parties intended his estate in her lands to indemnify her, and that she was no more than a surety. Thus, as against his creditors, she could assert her rights in her property.

30 Registrar Ferron, in *Banks*, rightly points out that the lot of a married woman in Ontario in 1981, and indeed, I would add, today, is vastly changed, and finds that the doctrine no longer exists. Registrar Ferron especially questioned this in light of the *Statute of Frauds*, reference to which seems curiously missing in the cases on the doctrine. Perhaps it is as Robert A. Klotz writes in *Bankruptcy and Family Law* (Toronto: Carswell, 1994), at 98 (referring to the *Banks* decision):

> This case is overly formalistic and should not be followed. There is no good reason to impose a writing requirement on what is really the application of accepted equitable rules to appropriate circumstances. To do so would be to reverse the role equity has played in ameliorating the harsh results of common law.

31 I cannot say that I agree with Mr. Klotz.

32 Firstly, with the greatest of respect to him, Mr. Klotz seems to fall prey to the temptation of a practitioner who is also an author to, in effect, assume away a decision which he does not favour. By this I mean that it is circular to argue that the case should not be followed because it flies in the face of accepted application of equitable rules, when the very case is about whether or not, in law, said accepted application of equitable rules still exists, and finds that it does not. That is a decision open to the Court to make, and not the author.

33 Secondly, Mr. Klotz posits that there is no good reason to impose the writing requirement of the *Statute of Frauds*. Yet, Mr. Klotz does not assert that there is no good reason *not* to impose it. Registrar Ferron found that all of the facts militating in favour of dispensing with the writing requirement (in effect, the harsh legal rule being ameliorated by equity) no longer existed, in the matrimonial context.

34 Justice Kitely, in coming to the contrary conclusion that the doctrine still exists, finds that Registrar Ferron was wrong in his conclusion that the doctrine has not existed in Ontario since 1882. While it is factually true that the doctrine has been applied since 1882, I am still left to weigh the competing conclusions of Justice Kitely and Registrar Ferron.

35 In doing this, I note that they are decisions of equal weight in that they were rendered by triers of fact sitting in the same Court, and exercising coterminous jurisdiction. Justice Kitely was not sitting on appeal from a Registrar of the Bankruptcy Court, and her decision is, with the greatest of respect, no more binding on this Court than that of Registrar Ferron's Court, in *Banks*, was on hers.

36 I have reviewed all of the cases in *Slan* (including the reference to *Fox v. Burns*, [1978] 2 A.C.W.S. 320 (Ont. Dist. Ct.) [(May 31, 1978), Gould D.C.J. (Ont. Dist. Ct.)] which was a decision of the District Court, and not the Supreme Court as they both then were). I can see no good reason to deviate from the requirement in the *Statute of Frauds* that:

> "No action shall be brought to charge any executor or administrator upon any special promise to answer damages out of the executor's or administrator's own estate, or to charge any person upon any special promise to answer for the debt, default or miscarriage of any other person, or to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which the action is brought, or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some person thereunto lawfully authorized by the party." [6]

37 No reason is advanced in the cases or by the parties at bar as to why it is sufficiently harsh that an equitable doctrine is required to intervene that parties express their intentions regarding real property in writing. While I concur that such a requirement is overly harsh in an environment where women are chattel of their husbands, not only is that no longer the case, but the facts at bar relate to the lack of documentation of intentions between not spouses but adult

parents and their adult child. I fail to see why the doctrine need exist any longer in Ontario, except in the most unusual of cases, perhaps involving parties under a disability. There are no such parties in the case at bar.

38 I would conclude that the doctrine still exists in Ontario. I would and do find that it exists to do that which it originated to do which is to presume an interest being evidenced, the failure of which would result in a harsh legal outcome, where the failure to evidence the interest is the result of some legal or societal, and in any event demonstrated, disability. By disability, I would include such a demonstrated imbalance of power between the parties as to presume, in effect, an imposition of disability by one upon the other.

Does the Doctrine apply to the facts at bar

39 On my analysis of the doctrine in Ontario today, I do not find applicability to the facts at bar.

40 The parties are all adults, of apparently full competency and ability. While it was certainly open to them to arrange their affairs as they now all depose to, after the fact, I see no reason that they could not have evidenced this arrangement in writing at the time. This would have obviated the need for this entire inquiry. I find that the parties have not otherwise evidenced their intention in writing. I do not find the after the fact declarations to be of assistance. Neither do I find the assertion of all payments having been made by the Debtor, without other evidence that this is so, sufficiently compelling to invoke the doctrine. I note that the mortgage application was not proffered. I infer from this that it does not support the allegation that the parties had agreed to have the debtor's 1/3 interest in the Cottage bear first dollar burden of repayment of the mortgage debt in the event of realization on the Cottage. I draw the adverse inference that the application is in the usual form, and represents to CIBC that all three were co-borrowers and that their interests were as on title to the Cottage.

41 Even if I am incorrect in my view of the doctrine in present day Ontario, I would not find the doctrine to be applicable to the facts at bar.

42 All but one English decision that I have been referred to parse the doctrine in the light of relations between spouses, and not between unmarried adults. As well, the presumption of the parties' intentions inherent in the doctrine is just that: a presumption. It is, as is pointed out in *Pittortou, Re* (1984), [1985] 1 W.L.R. 58 (Eng. Ch. Div.), a presumption which may not be supportable in all cases and on all facts. On the facts at bar, including the lack of any demonstration of disability or even undue influence; the lack of any corroborating evidence that payments were, in fact all made by the Debtor; and the lack of a complete explanation as to the disbursement of the funds by the Debtor, I do not find, if the doctrine is as expansive as counsel would have the Court believe, that the presumption is warranted.

Should equity intervene on the facts at bar

43 For all of the reasons aforesaid, whether or not I am correct in my findings on the nature of the doctrine today, I am not persuaded that a Court would intervene and exercise its discretion to do equity. While that is not the decision that is being asked of me today, my view of the answer, and the foregoing analysis, properly informs me as to the question that I am being asked to answer, and that is whether or not the Proposal is reasonable or calculated to benefit the general body of creditors.

44 Having concluded that the doctrine is limited in its scope in our modern society, and would not apply; and having concluded that even if it is not so limited, it would not apply to these facts; and being of the view that it would not be an appropriate case for equity to intervene in any event, I must conclude that in a bankruptcy by deemed assignment, the Debtor's 1/3 interest in the Cottage would vest in his trustee, and not be subject to the equity of exoneration in favour of his co-owners. This results in the effect of a bankruptcy being that it will yield significantly more return to the creditors than the Proposal, and, as such, I cannot find the Proposal to be reasonable or calculated to benefit the general body of creditors. The Proposal is much more calculated, in my view, to benefit the Debtor and his parents.

45 Finally, even if I am found to be completely incorrect in my analysis thus far, or if I am found to have strayed too far beyond the ambit of the approval application in performing my analysis herein, I would not approve the Proposal on the basis that it is not demonstrably viable, from a financial perspective.

46 The February 1, 2010, budget indicates a shortfall in cash for this family of $744.00 each and every month, after payment of the Proposal amount of $560.00 and the spouse's proposal amount of $275.00. As in the case of *Booth, Re*, 1998 CarswellOnt 2053 (Ont. Bktcy.) at paragraph 6:

> The court is authorized to approve only proposals which are reasonable and calculated to benefit the general body of creditors. "Reasonable" means that on a dispassionate view, the court is satisfied that the things proposed can, in fact, be carried out. The court, in other words, reviews the terms of the proposal in order to ensure that the creditors have not, in their enthusiasm or lack of attention approved a proposal which is bound to fail.

47 As in *Booth, Re*, a budget showing a significant shortfall is proxy for a proposal doomed to failure. Counsel submitted that the general contracting income of the Debtor may increase, but also candidly advised that the numbers were based on 2009 revenues, and they are, I observe, similar to the 2007 numbers in the original budget, which counsel submitted was a good year. I take judicial notice of the recent ending of the federal Home Renovation Tax Credit and conclude that its one year existence probably accounts for 2009 being a much better year for the Debtor than 2008, and that it is more likely than not that general residential contracting and carpentry, the Debtor's business, will be slower this year than last without the continuation of the Home Renovation Tax Credit as stimulation for that sector.

48 Counsel for the Debtor also advised, and there is no evidence on the point, that the Debtor's wife is committed to getting a second job to ensure the success of this Proposal. I find that to be understandable but wishful thinking on her part when I observe that her present income is $2,215.00 per month, and that to bring this family to the mere breakeven point, she would need a second, part-time, job which has the effect of increasing her monthly income by at least $744.00 or some 33%. This is a huge increase, and not sufficiently likely in my estimation as to be realistic. Without this, there is no hope of the Proposal succeeding.

49 I conclude, therefore, that the Proposal is not reasonable as it is not financially viable.

50 In such a circumstance, s. 59(2) BIA is clear that the Court shall not approve the Proposal.

51 For all of these reasons, the Proposal is not approved, and the Debtor is deemed to have made an assignment in Bankruptcy as at today. The Trustee is directed to register its interest in the Cottage, on title thereto, forthwith.

Application dismissed.

Footnotes

1 The Father's Declaration was commissioned by one of Mr. Simpson's staff, Laura Whitney Carbis. It is commissioned in excess of the authority granted her by the Minster in appointing her a Commissioner for Oaths, as her appointment was territorially limited to the City of Toronto, and Ms. Carbis purports to have commissioned the document at the City of Barrie, in the County of Simcoe. Nonetheless, in the interest of commercial and judicial efficiency, I have treated the Father's Declaration as properly commissioned.

2 In the case at bar, this sounds somewhat more of a resounding acceptance than it is. At the meeting, one creditor, out of a total of 7 declared creditors, voted its $17,998.60 interest in favour, out of a total of $134,060.00 in declared unsecured debt, including contingent debt.

3 Royal Bank of Canada

4 I note also a claim for exemption for two automobiles. If, as one presumes, the 2004 GMC cube van is claimed exempt as a tool of the trade, which is not evidenced on the Statement of Affairs, one then wonders how this can be for someone who is expressed to be operating his business through a corporation, and is, presumably, receiving salary from the business.

5 It is the present surplus income obligations which would adhere to a deemed assignment made after September 17, 2009.

6 *Statue of Frauds*, R.S.O. 1990 chapter S.19, s. 4

End of Document

TAB 11

1994 CarswellOnt 268
Ontario Court of Justice (General Division), In Bankruptcy

Mayer, Re

1994 CarswellOnt 268, 25 C.B.R. (3d) 113

Re proposal of JOSEPH MOISE MAYER

Registrar Ferron

Judgment: March 3, 1994
Docket: Doc. 31-279696

Counsel: *Kenneth H. Page*, for insolvent.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.iii Interests of creditors

Headnote
Bankruptcy --- Proposal — Approval by Court — General

Proposals — Approval by court — Proposal being wholly inadequate because of lack of vital financial information — In circumstances bankruptcy being more advantageous to creditors than proposal — Proposal rejected.

An insolvent person applied for approval of his proposal.

Held:

The proposal was rejected.

The proposal was inadequate. The insolvent person did not make full disclosure in his application. The proposal required the acceptance by creditors in full payment of their claims of the insolvent person's equity in his "family home" or "principal residence". Neither the proposal, the trustee's report to creditors, nor the report to the court disclosed that the property: (1) was held by the insolvent person's spouse, (2) was encumbered by two mortgages, a charge in favour of Revenue Canada and a charge for a line of credit, and (3) was subject to $24,000 in municipal tax arrears.

No appraisal of the property was made available to the creditors. The appraisal requested by the court was a two-line letter suggesting that the property was worth about $750,000; no creditor had seen that appraisal. Further, the property had been on the market for some time without success. Therefore, the property might never sell and might not sell for $750,000. The proposal did not give details as to the value of the insolvent person's assets. Therefore, the creditors could not evaluate the value of the proposal.

A bankruptcy would be significantly more advantageous to the creditors than the proposal.

Table of Authorities

Cases considered:

Allen Theatres Ltd., Re (1992) 3 C.B.R. 147, 23 O.W.N. 74 (S.C.) — *referred to*

Rideau Carleton Raceway Holdings Ltd. (1971), 15 C.B.R. (N.S.) 72 (Ont. S.C.) — *referred to*

Application for approval of proposal.

Registrar *Ferron*:

1 The application for the approval of the proposal of Joseph Moise Mayer came before the Court on February, 1994 and has been adjourned on two occasions for further information.

2 In order to affirm a proposal, the Court must be satisfied that the proposal is:

3 1. reasonable;

4 2. calculated to benefit the general body of creditors; and

5 3. made in good faith.

6 The first two provisions are statutory, while the third is implied. The Bankruptcy Court is a court of equity. An insolvent person asking for the Court's approval of a plan must do so in good faith requires full disclosure. There has not been full disclosure by the insolvent person in this application.

7 The central provision of the proposal requires the acceptance by creditors in full payment of claims of the insolvent person's equity in "the premises in which the debtor resides".

8 Nowhere, not in the proposal, not in the Trustee's report to creditors (where the property is called "family home" and "principal residence"), and not in the report to the Court is it disclosed that:

1. the premises which is to fund the proposal is held with the insolvent person's spouse; (the statement of affairs does make reference to a half interest in three properties including the property referred to in the proposal; that is ambiguous and might not be appreciated by the creditors); or

2. the property is encumbered by two mortgages, a charge in favour of Revenue Canada, and a charge for a line of credit; or

3. that municipal taxes of $24,000 for arrears are owing.

9 Moreover, there was no appraisal for the property available to creditors or, initially, to the Court, so that the Creditors can have no idea of what equity might be available, assuming there is an equity available to creditors.

10 When this matter came on before the Court initially, I directed counsel's attention to the omission of the appraisal, and I now have before me what is called an "appraisal". That appraisal consists of a two-line letter signed by sales representatives of a real estate company. The letter is addressed "To whom it may concern" and suggests that the property has a value of "about $750,000 in today's marketplace". The property, I am advised, has been on the market for some considerable time without result and one can only speculate that the property is overpriced. In any event, I repeat, no creditor has seen that appraisal.

11 Even if the property were to sell for $750,000, the funds available for purposes of the proposal would be only $73,000 and when one deducts the selling commission, the additional interest accruing on the encumbrances, legal costs both of the proposal and of the sale of the property and the Trustee's fees, the amount available to creditors would be minimal.

12 Moreover, the property has been on the market for some considerable time without results. The property may never sell for its so called appraised value. The proposal provides for no cut off date so that creditors may never be paid. In addition, if the property is sold for less than $750,000 the dividend to creditors would be reduced even more.

13 The statutory report of the Trustee to the Court on the application for the approval of the proposal is deficient. Statutory Form Number 42, "Report of Trustee on Proposal", paragraph 9, provides by way of direction to the Trustee: "Set out assets in detail, giving the value as carried on the books of the Debtor and the Trustee's estimate in each case of the realizable value thereof."

14 Neither the Creditors nor the Court has been given the information required by the statute with which to gauge the value of the insolvent person's plan. That information which is available reveals the proposal not calculated to benefit the general body of creditors.

15 Accordingly, the statement in the Trustee's Report to Creditors (Section 51(1)), viz under the heading "Recommendations and Summary", viz, "Based on a review of the condensed statement of assets and liabilities, it is estimated that there would be less of a distribution to Creditors in a bankruptcy scenario. Accordingly, the proposal produces a higher realization for Creditors", is incorrect and misleading. Since there is no appraisal there can be no estimate, and the statement in the report is of no value. It is skewed unfairly in favour of the insolvent person and cannot be supported.

16 Nor is the Trustee entitled to make the statement under the heading, "Financial Position and Evaluation of Assets" simply because he cannot know what the assets will realize on bankruptcy for the same reason that he cannot know what will be available to Creditors in the proposal.

17 Moreover, the Creditors have not been advised that they would be able to get at least as much and probably more in a bankruptcy of the Debtor as opposed to the proposal.

18 In bankruptcy, the exact same asset, that is the principal residence, would be available to them, and the encumbrance to Revenue Canada for arrears of taxes would presumably abate, so that on that basis alone, the bankruptcy is more advantageous to Creditors than a proposal.

19 In addition, on bankruptcy creditors would obtain the following assets which are not available on the proposal:

1. After acquired assets, that is contributions from the Debtor's income; and

2. The mortgage receivable and automobile referred to in the statement of affairs; and

3. The Debtor's accounts receivable, that is, the OHIP payments owing to the doctor at the date of bankruptcy; and

4. Assets not encumbered or the equity therein.

20 The admitted combined net income of the insolvent person, a doctor, and his spouse, is $7,690 per month, from which a payment order would probably be obtainable in a bankruptcy. In particular, the insolvent person's statement of earnings carries an item of disbursements entitled "Mortgage and Loans" — $6,547 per month. In bankruptcy, the "Loan" portion of that payment would probably be available to Creditors. The Trustee's report to the Court states, "The Debtor's main assets are mostly encumbered" which indicates that there are other than "main assets" and these are not encumbered. Such assets would be available to creditors. The above information was not given or made available to Creditors.

21 It is clear that a plan to be approved by the Court must be more advantageous to Creditors than would be the case in a bankruptcy. See *Re Allen Theatres Ltd.* (1922), 3 C.B.R. 147 (Ont. S.C.) and *Re Rideau Carleton Raceway Holdings Ltd.* (1971), 15 C.B.R. (N.S.) 72 (Ont. S.C.) at 75. The proposal submitted does not meet that test.

22 Finally, I note that of the thirteen Creditors with declared liabilities of $277,000, only one attended the Creditors' meeting. The proposal was approved by that Creditor and by one proxy which the Trustee voted in favour of the proposal. This is hardly an overwhelming or representative showing of creditors. How much of this rather dismal showing can be attributed to the paucity of information made available to Creditors is conjecture, but the Court must, notwithstanding, protect Creditors from themselves. See Honsberger, "Debt Restructuring", page 8-64.

23 The proposal cannot be approved and is accordingly rejected.

Approval denied.

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TAB 12

1982 CarswellOnt 224
Ontario Supreme Court, In Bankruptcy

A. Zimet Ltd. (Trustee of) v. Woodbine Summit Ltd.

1982 CarswellOnt 224, [1982] O.J. No. 2518, 17 A.C.W.S. (2d) 277, 21 B.L.R. 89, 44 C.B.R. (N.S.) 136

Re A. ZIMET LIMITED and WOODBINE SUMMIT LIMITED

Ferron, Q.C., Registrar

Judgment: December 6, 1982

Counsel: *F.M. Catzman, Q.C.*, for the trustee.
R.P. Biderman, for Allenwood Investments Limited.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XI Avoidance of transactions prior to bankruptcy
XI.2 Fraudulent preferences
XI.2.b What constituting preference
XI.2.b.iii Miscellaneous

Headnote

Bankruptcy --- Avoidance of transactions prior to bankruptcy — Fraudulent preferences — What constituting preference — General

Avoidance of transactions prior to bankruptcy — Fraudulent preferences — Classes of transactions — Related persons — "Control".

"Control" as used in the Bankruptcy Act means de jure control, that is the right of the majority to order the affairs of the company. The majority rule resolved itself largely into a matter of the right of the majority to elect the directors. A majority means, in the absence of any provisions in the by-laws or letters patent of the company, not a majority of persons holding shares but a person or persons holding a majority of shares.

The bankrupt was a partnership of two corporations. One of these corporations was controlled by A.Z. while the other corporation was controlled by his spouse S.Z. A payment by the bankrupt company to a corporation took place within one year before bankruptcy. It was found that the bankrupt corporations and the payee were related persons within the meaning of the Bankruptcy Act notwithstanding the fact that two trusts were interposed as majority shareholders of the payee corporation.

Held:

Issue decided in trustee's favour.

Since the payor and payee were related companies within the meaning of s. 4 of the Bankruptcy Act, the payment constituted a fraudulent preference within the meaning of ss. 73 and 74 of the Bankruptcy Act and therefore the issue should be decided in favour of the trustee.

Table of Authorities

Cases considered:

Pender v. Lushington (1877), 6 Ch. D. 70 — *referred to*

Phillips v. Mfrs.' Securities Ltd. (1917), 86 L.J. Ch. 305 (C.A.) — *referred to*

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 4, 73, 74.

Business Corporations Act, R.S.O. 1980, c. 54, ss. 111(1), 112.

Application by trustee to have payment declared a fraudulent preference.

***Ferron, Q.C.*, Registrar:**

1 The questions to be tried on this issue are set out in para. 1, subparas. (a) and (b) of the order of Hollingworth J., dated 16th June 1981.

2 On 16th October 1978 Westbury Developments (hereinafter referred to as "Westbury"), a name under which A. Zimet Limited and Woodbine Summit Limited carried on business, paid the sum of $424,773.52 to Allenwood Investments Limited, a company to which it was indebted. Westbury's financial obligation to Allenwood Investments Limited (hereinafter referred to as "Allenwood") arose through its financing of Westbury in order to enable the latter to purchase certain building lots in Caledon, Ontario. The funds were advanced over a period from March 1976 to July 1978. The advances, totalling $377,335.32, were evidenced by a series of eight demand promissory notes all signed by Arthur Zimet on behalf of Westbury and each bearing interest at the rate of 10 $^{3}/_{4}$ per cent per annum. Zimet arranged the transaction and set the terms of the loan.

3 Concurrently with that payment Allenwood paid the sum of $204,000 to Westbury and received as security therefore second mortgages on nine lots of the property aforesaid which were held by Arthur Smith & Sons Builders Limited in trust for Westbury. Both cheques aforesaid were signed by Arthur Zimet on behalf of Westbury and Allenwood, respectively.

4 Allenwood was, prior to the bankruptcy, paid in full with respect to the mortgages which it held on four of the lots to which I have referred. Five of the mortgaged properties were subsequently sold under power of sale by the first mortgagee and some $50,000 is held in trust pending the results of this issue.

5 The date of bankruptcy of A. Zimet Limited and Woodbine Summit Limited, carrying on business as Westbury Developments, was 28th March 1979.

6 Since the transaction which is the subject of this issue took place beyond the three-month period set out in s. 73(1) of the Bankruptcy Act, R.S.C. 1970, c. B-3, the trustee must, in order to establish that the payment was a fraudulent preference, prove that the bankrupts and Allenwood were, at the date of the transaction, related companies within the meaning of s. 4 of the Bankruptcy Act.

7 A. Zimet Limited was at all material times controlled by Arthur Zimet while Woodbine Summit Limited was controlled by his spouse, Suzanne Zimet. Westbury was a joint venture of the two companies and Arthur Zimet was the general manager of Westbury and the general manager in control of the day-to-day affairs of Allenwood. Because of that relationship, knowledge attributed to Westbury was also knowledge in Allenwood.

8 At the relevant date, that is, 16th October 1978, the issued common shares of Allenwood were held as follows: 2 shares registered in the name of Suzanne Zimet in trust for the Abby Zimet trust; 1 share registered in the name of Suzanne Zimet in trust for the Andrew Zimet trust; 1 share registered in the name of Martin Gross in trust for the Andrew Zimet trust; and 48 shares, each registered in the name of the Abby Zimet trust and the Andrew Zimet trust, respectively.

9 The trustees of the Abby Zimet trust were Herbert Epstein and Suzanne Zimet, while the trustees of the Andrew Zimet trust were Martin Gross and the said Suzanne Zimet.

10 The directors of Allenwood at the relevant time were the said Martin Gross and Suzanne Zimet.

11 Under art. VIII (g) of each of the trust indentures of the trust aforesaid, Arthur Zimet was empowered to remove and replace the trustees of the trust so that the trustees held office at his pleasure.

12 It is clear that a person holding shares in trust may vote those shares at any meeting of the shareholders without regard to the implementation of the trust. Section 111(1) of the Business Corporations Act, R.S.O. 1980, c. 54, so provides and art. 10 of the first by-law of Allenwood is in the same terms.

13 It is equally clear that joint holders of shares must, at any meeting, vote such shares in concert or not at all. Section 112 of the Business Corporations Act so provides and this is reflected in art. 12 of the first by-law of Allenwood aforesaid.

14 "Control" as used in the Bankruptcy Act means de jure control, that is, the right of the majority to order the affairs of the company. The majority rule resolved itself largely into a matter of the right of the majority to elect the directors. A majority means, in the absence of other provisions in the by-laws or letters patent of the company, not a majority of persons holding shares but a person or persons holding a majority of shares.

15 Manifestly, that person with reference to Allenwood was Suzanne Zimet. She is able to elect the directors simply by her votes. If her co-trustee of the Abby Zimet and Andrew Zimet trusts vote with her, the directors she wishes to be installed are elected. If, on the other hand, they will not vote as she indicated, the shares held by the Abby Zimet and Andrew Zimet trusts cannot be voted, and since she holds the majority of the shares which can under the circumstances be voted, the director whom she wishes to elect will be in fact elected.

16 In practice Arthur Zimet nominated the directors for Allenwood but the shareholders of Allenwood made the decision whether to accept his nominations or not. Since the slate was put forth on consultation with Suzanne Zimet, there was no question that the nominees suggested by Arthur and Suzanne Zimet would be elected by Suzanne Zimet, who held the majority of shares and accordingly held the power to do so.

17 Suzanne Zimet, then, had the immediate de jure control of Allenwood while, it is equally evident, Arthur Zimet through his power to appoint trustees of the trusts had the ultimate control.

18 Some reference was made to a fiduciary duty in Suzanne Zimet but it is plain that a shareholder qua shareholder is under no fiduciary duty to other shareholders: see *Phillips v. Mfrs.' Securities Ltd.* (1917), 86 L.J. Ch. 305 at 311 (C.A.); *Pender v. Lushington* (1877), 6 Ch. D. 70 at 75. Since Westbury was controlled jointly by Arthur and Suzanne Zimet, who controlled A. Zimet Limited and Woodbine Summit Limited, and since Suzanne Zimet controlled Allenwood, it follows that Westbury and Allenwood are related companies within the meaning of s. 42(2)(*a*) and s. 4(2)(*c*)(ii) of the Bankruptcy Act.

19 Evidence was given by the accountant of Allenwood that for purposes of the corporate income tax return of Allenwood, the accountants did not disclose a relationship with Westbury because they did not consider that those companies were related. That, of course, proves nothing. Revenue Canada never questioned the declaration so made and in all probability for income tax purposes the companies were not related because of the interposition of the two trusts as majority shareholders of Allenwood.

20 At the date of the bankruptcy the statement of affairs of Westbury disclosed liabilities to secured creditors in the amounts of $13,556,481, to preferred creditors of $25,788 and to ordinary unsecured creditors of $1,668,840. The deficit of assets over those liabilities is set out in the statement of affairs as $496,163. It was conceded that no unsecured creditor would be paid a dividend in the administration of this estate.

21 The evidence given by Norman Pigeon, president of Aspen wood Roofing and Sheet Metal Limited, Harry D. Smith, president of Glen Echo Nurseries Limited and J.R. Pickett, president of Pickett's Garden Supplies Limited, was that at the date of the transaction aforesaid Westbury was indebted to their respective companies and that such indebtedness in varying degrees persisted to the date of bankruptcy. Each of the companies is shown in the statement of affairs of Westbury sworn by Arthur Zimet as a creditor.

22 Certainly, so far as those creditors are concerned, the effect of the payment of $424,773.52 by Westbury to Allenwood was to prefer the latter over them. If more is required, it is clear from the evidence that that in fact occurred.

23 Arthur Zimet in his evidence cited the requirement of Westbury to pay its trade creditors as the reason for the concurrent payment of $204,000 by Allenwood to Westbury. The evidence shows that the payment by Westbury to Allenwood aforesaid left Westbury without funds with which to pay those trade creditors. The cheque for $204,000 was repaid for that purpose. In the event, however, that money never reached trade creditors but was instead paid to Westbury's banker, to whom Arthur Zimet was personally liable on a guaranty. It was furthermore admitted in evidence that without the payment of $424,773.52 by Westbury to Allenwood, Allenwood could not have made the concurrent payment of $204,000 to Westbury.

24 Arthur Zimet, in response to a questioning by counsel for Allenwood, said that on 16th October 1978 there were no mechanics' liens registered against Westbury property. That was true, so far as it went.

25 Reed Lumber Company Limited, through its two subsidiaries, Main Lumber Company and Newmar Windows, had been supplying building materials to Westbury. The account for such materials had fallen into arrears and on 30th June 1978 Reed registered a mechanics' lien against two of Westbury's building properties. Certificates of action were registered in connection therewith on 12th September and 15th September, respectively.

26 Westbury was unable to pay the indebtedness to Reed, which then totalled some $85,000, and a settlement of the mechanics' lien action was effected by Westbury giving Reed a second mortgage for $120,000 which secured the outstanding balance then owing as well as future anticipated requirements of Westbury.

27 Hugh Taylor, manager of Reed Lumber Company Limited, stated in his cross-examination that Westbury was usually late in making payments and that he had no alternative but to take the security in lieu of payment although he would rather have been paid.

28 The mortgage given by Westbury to Reed Lumber Company Limited recites an indebtedness as of 4th August 1978 in the amount of $75,861.16 and provided, "and whereas the guarantor has requested that the mortgagee continued to furnish supplies to the guarantors and the mortgagor has agreed to provide mortgage security for the price of supplies heretofore and hereinafter furnished the guarantor ..."

29 One must conclude an anticipation by Westbury of an inability to pay for future building materials and that the mortgage was given in an inflated amount to cover that eventuality. This in my opinion, shows an awareness of an

increased precarious financial position and an inability by Westbury to pay its debts to Reed Lumber Company Limited and to creditors generally, which condition existed and persisted on the date in which the cheque aforesaid was given by Westbury to Allenwood. That transaction in settlement of the mechanics' lien registered by Reed Lumber Company Limited was completed on 26th September 1978 just prior to the payment of the $424,773.52 by Westbury to Allenwood. It is clear that at that date Westbury was indebted to Reed Lumber Company Limited for about $85,000 which it could not pay and had no hope of paying in the reasonably near future. As it in fact turned out, the mortgage was never paid. The first mortgagee sold the property on which the mortgage to Reed Lumber Company Limited was registered, under power of sale, and the value of the property was not sufficient to discharge the indebtedness of Westbury to Reed. The statement of affairs sworn on 30th April 1979 on behalf of Westbury shows an indebtedness to Main Lumber Company for $51,287.98 and to Newmar Windows for $7,913.93.

30 In my opinion, on this evidence Westbury was on 16th October 1978 insolvent within the meaning of the Bankruptcy Act and the effect of the payment by Westbury to Allenwood was to prefer Allenwood over those other creditors to whom reference has been made in these reasons.

31 The indebtedness of Westbury to Allenwood prior to the payment aforesaid was evidenced by promissory notes bearing interest at 10 $^{3}/_{4}$ per cent per annum. The payment of $427,773.52 and the concurrent repayment of $204,000, which was then secured by nine mortgages to which I have referred, had the effect of converting the balance of the unsecured indebtedness of Westbury to Allenwood into secured indebtedness which must have been obvious to both companies. That transaction in its proper perspective was really a payment by Westbury to Allenwood of $220,773.52, with nine mortgages for $20,000 each as security for the balance of the past due indebtedness.

32 The accountant for Westbury said that the method of payment, that is, the payment of $424,773.52 and the repayment of $204,000 of that money back to Westbury, was an acceptable method of recording the payment and one favoured by accountants and bookkeepers. I think that no one would disagree with that observation but what is objectionable is the use of that method to obtain security where none previously existed, on the pretext that the payment to Westbury of its own money was a fresh advance.

33 No purpose has been shown by the defendant Allenwood for the payment which satisfactorily displaces the onus of a preference. The only intent which arises from the evidence is an intent on behalf of Allenwood to be paid and an intent on behalf of Westbury to pay Allenwood an indebtedness owed to it at a time when the payor was insolvent.

34 I find that the payment of $427,773.52 by Westbury to Allenwood is a fraudulent preference within the meaning of ss. 73 and 74 of the Bankruptcy Act and that the five remaining mortgages described in the order of Hollingworth J. aforesaid are fraudulent charges and accordingly void within the meaning of ss. 73 and 74 of the Bankruptcy Act against the trustee.

35 I accordingly find in favour of the trustee in this issue with costs. There shall be the usual order with respect to the trustee's costs out of the assets of the estate.

Issue decided in favour of trustee.

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TAB 13

Metcalfe & Mansfield Alternative Investments II Corp. (Re)

92 O.R. (3d) 513

Court of Appeal for Ontario,
Laskin, Cronk and Blair JJ.A.
August 18, 2008

Debtor and creditor -- Companies' Creditors Arrangement Act -- Companies' Creditors Arrangement Act permitting inclusion of third-party releases in plan of compromise or arrangement to be sanctioned by court where those releases are reasonably connected to proposed restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

In response to a liquidity crisis which threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"), a creditor-initiated Plan of Compromise and Arrangement was crafted. The Plan called for the release of third parties from any liability associated with ABCP, including, with certain narrow exceptions, liability for claims relating to fraud. The "double majority" required by s. 6 of the Companies' Creditors Arrangement Act ("CCAA") approved the Plan. The respondents sought court approval of the Plan under s. 6 of the CCAA. The application judge made the following findings: (a) the parties to be released were necessary and essential to the restructuring; (b) the claims to be released were rationally related to the purpose of the Plan and necessary for it; (c) the Plan could not succeed without the releases; (d) the parties who were to have claims against them released were contributing in a tangible and realistic way to the Plan; and (e) the Plan would benefit not only the debtor companies but creditor noteholders generally. The application judge sanctioned the Plan. The appellants were holders of ABCP notes who opposed the Plan. On appeal, they argued that the CCAA does

not permit a release of claims against third parties and that the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867.

Held, the appeal should be dismissed.

On a proper interpretation, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; and (c) the express statutory effect of the "double majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to interpretation. The second provides the entre to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

While the principle that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect is an important one, Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself.

Interpreting the CCAA as permitting the inclusion of third-party releases in a plan of compromise or arrangement is not unconstitutional under the division-of-powers doctrine and does not contravene the rules of public order pursuant to the Civil Code of Quebec. The CCAA is valid federal legislation under the federal insolvency power, and the power to sanction a plan of compromise or arrangement that contains third-party releases is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action or trump Quebec rules of public order is constitutionally immaterial. To the extent that the provisions of the CCAA are inconsistent with provincial legislation, the federal legislation is paramount.

The application judge's findings of fact were supported by the evidence. His conclusion that the benefits of the Plan to the creditors as a whole and to the debtor companies outweighed the negative aspects of compelling the unwilling appellants to execute the releases was reasonable.

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Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 2000 ABQB 442, [2000] 10 W.W.R. 269, 84 Alta. L.R. (3d) 9, 265 A.R. 201, 9 B.L.R. (3d) 41, 20 C.B.R. (4th) 1, 98 A.C.W.S. (3d) 334 (Q.B.); NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749, 181 D.L.R. (4th) 37, 127 O.A.C. 338, 1 B.L.R. (3d) 1, 15 C.B.R. (4th) 67, 47 C.C.L.T. (2d) 213, 93 A.C.W.S. (3d) 391 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 2001 BCSC 1721, 19 B.L.R. (3d) 286, 110 A.C.W.S. (3d) 259 (S.C.); Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883, 261 D.L.R. (4th) 368, 204 O.A.C. 205, 11 B.L.R. (4th) 185, 15

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Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3, s. 92, (13), (21)

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APPEAL from the sanction order of C.L. Campbell J., [2008] O.J. No. 2265, 43 C.B.R. (5th) 269 (S.C.J.) under the Companies' Creditors Arrangement Act.

See Schedule "C" -- Counsel for list of counsel.

The judgment of the court was delivered by

BLAIR J.A.: --

A. Introduction

[1] In August 2007, a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

[2] By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007, pending an attempt to resolve the crisis

through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

[3] Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the [page517] application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to appeal

[4] Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument, we encouraged counsel to combine their submissions on both matters.

[5] The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and -- given the expedited timetable -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as Cineplex Odeon Corp. (Re) (2001), 24 C.B.R. (4th) 201 (Ont. C.A.) and Re Country Style Food Services, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) are met. I would grant leave to appeal.

Appeal

[6] For the reasons that follow, however, I would dismiss the appeal.

B. Facts

The parties

[7] The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third-party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer and several holding companies and energy companies.

[8] Each of the appellants has large sums invested in ABCP -- in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants -- slightly over $1 billion -- represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

[9] The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies and some smaller holders of ABCP product. They participated in the market in a number of different ways. [page518]

The ABCP market

[10] Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment -- usually 30 to 90 days -- typically with a low-interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

[11] ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

[12] The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP, the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

[13] As I understand it, prior to August 2007, when it was frozen, the ABCP market worked as follows.

[14] Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

[15] The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

[16] When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP

[page519] Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The liquidity crisis

[17] The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature, there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

[18] When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

[19] The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes -- partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

[20] The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze -- the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement -- known as the Montreal Protocol -- the parties committed [page520] to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

[21] The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two-thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

[22] Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

[23] Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian

ABCP market.

The Plan

(a) Plan overview

[24] Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution". The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper -- which has been frozen and therefore effectively worthless for many months -- into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

[25] The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan [page521] adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

[26] Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

[27] The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1 million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be

designed to secure votes in favour of the Plan by various Noteholders and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

(b) The releases

[28] This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in art. 10.

[29] The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers and other market participants -- in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" -- from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

[30] The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

[31] The releases, in effect, are part of a quid pro quo. Generally speaking, they are designed to compensate various participants in [page522] the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

(a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets and provide below-cost financing for margin funding facilities that are

designed to make the notes more secure;
(b) Sponsors -- who in addition have co-operated with the Investors' Committee throughout the process, including by sharing certain proprietary information -- give up their existing contracts;
(c) the Canadian banks provide below-cost financing for the margin funding facility; and
(d) other parties make other contributions under the Plan.

[32] According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation".

The CCAA proceedings to date

[33] On March 17, 2008, the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25. The vote was overwhelmingly in support of the Plan -- 96 per cent of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan -- 99 per cent of those connected with the development of the Plan voted positively, as did 80 per cent of those Noteholders who had not been involved in its formulation.

[34] The vote thus provided the Plan with the "double majority" approval -- a majority of creditors representing two-thirds in value of the claims -- required under s. 6 of the CCAA.

[35] Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 [page523] and 13. On May 16, the application judge

issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

[36] The result of this renegotiation was a "fraud carve-out" -- an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

[37] A second sanction hearing -- this time involving the amended Plan (with the fraud carve-out) -- was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

[38] The appellants attack both of these determinations.

C. Law and Analysis

[39] There are two principal questions for determination on this appeal:

(1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its

directors?
(2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it? [page524]
(1) Legal authority for the releases

[40] The standard of review on this first issue -- whether, as a matter of law, a CCAA plan may contain third-party releases -- is correctness.

[41] The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [See Note 1 below] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:
(a) on a proper interpretation, the CCAA does not permit such releases;
(b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
(c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867;
(d) the releases are invalid under Quebec rules of public order; and because
(e) the prevailing jurisprudence supports these conclusions.

[42] I would not give effect to any of these submissions.

Interpretation, "gap filling" and inherent jurisdiction

[43] On a proper interpretation, in my view, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of

(a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including [page525] those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entre to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

[44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: Canadian Red Cross Society (Re), [1998] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[t]he history of CCAA law has been an evolution of judicial interpretation".

[45] Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

[46] These issues have recently been canvassed by the

Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", [See Note 2 below] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools -- statutory interpretation, gap-filling, discretion and inherent jurisdiction [page526] -- it is not necessary, in my view, to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

[47] The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to 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": Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, quoting E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983); Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

[48] More broadly, I believe that the proper approach to the judicial interpretation and application of statutes -- particularly those like the CCAA that are skeletal in nature -- is succinctly and accurately summarized by Jackson and Sarra in their recent article, supra, at p. 56:

The exercise of a statutory authority requires the statute to

be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in Qubec as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

[49] I adopt these principles. [page527]

[50] The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 318 C.B.R., Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a

reorganization or compromise or arrangement under which the company could continue in business.

[51] The CCAA was enacted in 1933 and was necessary -- as the then secretary of state noted in introducing the Bill on First Reading-- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, House of Commons Debates (Hansard) (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.), per Doherty J.A. in dissent; Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).

[52] In this respect, I agree with the following statement of Doherty J.A. in Elan, supra, at pp. 306-307 O.R.:

> [T]he Act was designed to serve a "broad constituency of investors, creditors and employees". [See Note 3 below] Because of that "broad constituency" the court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.

(Emphasis added)

Application of the principles of interpretation

[53] An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the [page528] application judge pointed out, the restructuring underpins the financial viability of the Canadian

ABCP market itself.

[54] The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

[55] This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP Dealers, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as Asset Providers and Liquidity Providers, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore -- as the application judge found -- in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and . . . providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark, at para. 50, that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments, at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, it is unduly technical to classify

the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring.
(Emphasis added)

[56] The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper . . ." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor [page529] and creditors. His focus was on the effect of the restructuring, a perfectly permissible perspective given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated, at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal".

[57] I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The statutory wording

[58] Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:
(a) the skeletal nature of the CCAA;

(b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in

(c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

[59] Sections 4 and 6 of the CCAA state:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs. [page530]
>
> . . . . .
>
> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and

> Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or arrangement

[60] While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: L.W. Houlden and C.H. Morawetz, Bankruptcy and Insolvency Law of Canada, looseleaf, 3rd ed., vol. 4 (Scarborough, Ont.: Carswell, 1992) at 10A-12.2, N10. It has been said to be "a very wide and indefinite [word]": Reference re Timber Regulations, [1935] A.C. 184, [1935] 2 D.L.R. 1 (P.C.), at p. 197 A.C., affg [1933] S.C.R. 616, [1933] S.C.J. No. 53. See also Guardian Assurance Co. (Re), [1917] 1 Ch. 431 (C.A.), at pp. 448, 450 Ch.; T&N Ltd. and Others (No. 3) (Re), [2007] 1 All E.R. 851, [2006] E.W.H.C. 1447 (Ch.).

[61] The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement". I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

[62] A proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") is a contract: Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, at p. 239 S.C.R.; [page531] Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 50 O.R. (3d) 688,

[2000] O.J. No. 3993 (C.A.), at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes and, therefore, is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See Air Canada (Re), [2004] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.), at p. 518 O.R.

[63] There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan -- including the provision for releases -- becomes binding on all creditors (including the dissenting minority).

[64] T&N Ltd. and Others (Re), supra, is instructive in this regard. It is a rare example of a court focusing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. Companies Act 1985, a provision virtually identical to the scheme of the CCAA -- including the concepts of compromise or arrangement. [See Note 4 below]

[65] T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the EL claimants)

would assert their claims. In return, T&N's former employees and dependants (the EL claimants) agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of [page532] compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

[66] Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The court rejected this argument. Richards J. adopted previous jurisprudence -- cited earlier in these reasons -- to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example. [See Note 5 below] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many

> years to give the term its widest meaning. Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.

(Emphasis added)

[67] I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in T&N were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial [page533] third parties are making to the ABCP restructuring. The situations are quite comparable.

The binding mechanism

[68] Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes [See Note 6 below] and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The required nexus

[69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be

made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

[70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan. This nexus exists here, in my view.

[71] In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

(a) The parties to be released are necessary and essential to the restructuring of the debtor; [page534]

(b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;

(c) the Plan cannot succeed without the releases;

(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and

(e) the Plan will benefit not only the debtor companies but creditor Noteholders generally.

[72] Here, then -- as was the case in T&N -- there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being

released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77, he said:

> I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

[73] I am satisfied that the wording of the CCAA -- construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation -- supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The jurisprudence

[74] Third-party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's [page535] Bench in Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 1028, 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, 293 A.R. 351. In Muscletech Research and Development Inc. (Re), [2006] O.J. No. 4087, 25 C.B.R. (5th) 231 (S.C.J.), Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

[75] We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of Canadian Airlines (Re), however, the releases in those restructurings -- including Muscletech -- were not opposed. The appellants argue that those cases are wrongly decided because the court simply does not have the authority to approve such releases.

[76] In Canadian Airlines (Re) the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the wellspring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

[77] Justice Paperny began her analysis of the release issue with the observation, at para. 87, that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company". It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in Michaud v. Steinberg, [See Note 7 below] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument -- dealt with later in these reasons -- that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92). [page536]

[78] Respectfully, I would not adopt the interpretive

principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court-sanctioning statutory mechanism that makes them binding on unwilling creditors.

[79] The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are Michaud v. Steinberg, supra; NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.); and Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883 (C.A.) ("Stelco I"). I do not think these cases assist the appellants, however. With the exception of Steinberg, they do not involve third-party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that Steinberg does not express a correct view of the law, and I decline to follow it.

[80] In Pacific Coastal Airlines, Tysoe J. made the following comment, at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

[81] This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question, it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to

certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of res judicata or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

[82] The facts in Pacific Coastal are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian -- at a contractual level -- may have had some involvement with the particular dispute. [page537] Here, however, the disputes that are the subject matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

[83] Nor is the decision of this court in the NBD Bank case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly owned subsidiary of Dofasco. The bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors". Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the bank. On appeal, he argued that since the bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process -- in short, he was personally protected by the CCAA release.

[84] Rosenberg J.A., writing for this court, rejected this argument. The appellants here rely particularly upon his following observations, at paras. 53-54:

> In my view, the appellant has not demonstrated that

allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289 at p. 297, . . . the CCAA is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.

In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of The 2000 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may [page538] not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. (Footnote omitted)

[85] Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third-party releases was not under consideration at all. What the court was determining in NBD Bank was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in NBD to the facts now before the Court" (para. 71). Contrary to the facts of this case, in NBD Bank the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release -- as is the situation here. Thus, NBD Bank is of little assistance in determining whether the court has authority to sanction a plan that calls for third-party releases.

[86] The appellants also rely upon the decision of this court in Stelco I. There, the court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement, one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis--vis the creditors themselves and not directly involving the company.

(Citations omitted; emphasis added)
See Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297 (S.C.J.), at para. 7.

[87] This court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the [page539] need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the court were quite different from those raised on this appeal.

[88] Indeed, the Stelco plan, as sanctioned, included third-party releases (albeit uncontested ones). This court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and, therefore, that they were entitled to a separate civil action to determine their rights under the agreement: Stelco Inc. (Re), [2006] O.J. No. 1996, 21 C.B.R. (5th) 157 (C.A.) ("Stelco II"). The court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The court said (para. 11):

> In [Stelco I] -- the classification case -- the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company . . . [H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process.

(Emphasis added)

[89] The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third-party releases here are very closely connected to the ABCP restructuring process.

[90] Some of the appellants -- particularly those represented by Mr. Woods -- rely heavily upon the decision of the Quebec

Court of Appeal in Michaud v. Steinberg, supra. They say that it is determinative of the release issue. In Steinberg, the court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 -- English translation):

> Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> . . . . .
>
> The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> . . . . . [page540]
>
> The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

[91] Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third-party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' and Their Officers and Employees Creditors Arrangement Act -- an awful mess -- and likely not attain its purpose, which is to enable the company to survive in the face of its creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of

> operation, contrary to its purposes and, for this reason, is to be banned.

[92] Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature -- they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company -- rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para., 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms encompass all that should enable the person who has recourse to it to fully dispose of his debts, both those that exist on the date when he has recourse to the statute and those contingent on the insolvency in which he finds himself . . .

(Emphasis added)

[93] The decision of the court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself", however. On occasion, such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in Steinberg, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision [page541] appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analyzing the Act -- an approach inconsistent with the jurisprudence referred to above.

[94] Finally, the majority in Steinberg seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases -- as I have concluded it does -- the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

[95] Accordingly, to the extent Steinberg stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in Steinberg considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 amendments

[96] Steinberg led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances. [page542]

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

[97] Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third-party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? Expressio unius est exclusio alterius, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

[98] The maxim is not helpful in these circumstances, however. The reality is that there may be another explanation why Parliament acted as it did. As one commentator has noted: [See Note 8 below]

Far from being a rule, [the maxim expressio unius] is not

even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

[99] As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in Steinberg. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden and Morawetz, vol. 1, supra, at 2-144, E11A; Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associs lte), [2003] J.Q. no. 9223, [2003] R.J.Q. 2157 (C.S.), at paras. 44-46.

[100] Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the [page543] BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third-party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The deprivation of proprietary rights

[101] Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect: Halsbury's Laws of England, 4th ed. reissue, vol. 44(1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., supra, at 183; E.A. Driedger and Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed., (Markham, Ont.: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The division of powers and paramountcy

[102] Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the Constitution Act, 1867, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the Civil Code of Quebec. [page544]

[103] I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: Reference re: Constitutional Creditors Arrangement Act (Canada), [1934] S.C.R. 659, [1934] S.C.J. No. 46. As the Supreme Court confirmed in that case (p.

661 S.C.R.), citing Viscount Cave L.C. in Royal Bank of Canada v. Larue, [1928] A.C. 187 (J.C.P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament". Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

[104] That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action -- normally a matter of provincial concern -- or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion with respect to legal authority

[105] For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "fair and reasonable"

[106] The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

[107] Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In [page545] the absence of a demonstrable error, an appellate court will not interfere: see Ravelston Corp. Ltd. (Re), [2007] O.J. No. 1389, 31 C.B.R. (5th) 233 (C.A.).

[108] I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties -- including leading Canadian financial institutions -- that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end, he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

[109] The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

[110] The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers; (ii) limits the type of damages that may be claimed (no punitive damages, for example); (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order; and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

[111] The law does not condone fraud. It is the most serious kind of civil claim. There is, therefore, some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: Fotini's Restaurant Corp. v. White Spot Ltd., [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

[112] The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, [page546] that the need "to avoid the potential cascade of litigation that . . . would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

[113] At para. 71, above, I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here -- with two additional findings -- because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

(a) The parties to be released are necessary and essential to the restructuring of the debtor;
(b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
(c) the Plan cannot succeed without the releases;
(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the

Plan;
(e) the Plan will benefit not only the debtor companies but creditor Noteholders generally;
(f) the voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
(g) the releases are fair and reasonable and not overly broad or offensive to public policy.

[114] These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

[115] The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they -- as individual creditors -- make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, [page547] Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

[116] All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only

acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

[117] In insolvency restructuring proceedings, almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices", inasmuch as everyone is adversely affected in some fashion.

[118] Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of all Noteholders, not just the interests of the appellants, whose notes represent only about 3 per cent of that total. That is what he did.

[119] The application judge noted, at para. 126, that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out [page548] specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized, at para. 134, that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity

among all stakeholders.

[120] In my view, we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. Disposition

[121] For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

Appeal dismissed.

SCHEDULE "A" -- CONDUITS

Apollo Trust
Apsley Trust
Aria Trust
Aurora Trust
Comet Trust
Encore Trust
Gemini Trust
Ironstone Trust
MMAI-I Trust
Newshore Canadian Trust
Opus Trust
Planet Trust
Rocket Trust
Selkirk Funding Trust
Silverstone Trust
Slate Trust
Structured Asset Trust
Structured Investment Trust III
Symphony Trust
Whitehall Trust

SCHEDULE "B" -- APPLICANTS

ATB Financial
Caisse de dpt et placement du Qubec
Canaccord Capital Corporation [page549]
Canada Mortgage and Housing Corporation
Canada Post Corporation
Credit Union Central Alberta Limited
Credit Union Central of BC
Credit Union Central of Canada

Credit Union Central of Ontario
Credit Union Central of Saskatchewan
Desjardins Group
Magna International Inc.
National Bank of Canada/National Bank Financial Inc.
NAV Canada
Northwater Capital Management Inc.
Public Sector Pension Investment Board
The Governors of the University of Alberta

SCHEDULE "C" -- COUNSEL

(1) Benjamin Zarnett and Frederick L. Myers, for the Pan-Canadian Investors Committee
(2) Aubrey E. Kauffman and Stuart Brotman, for 4446372 Canada Inc. and 6932819 Canada Inc.
(3) Peter F.C. Howard, and Samaneh Hosseini, for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG
(4) Kenneth T. Rosenberg, Lily Harmer, and Max Starnino, for Jura Energy Corporation and Redcorp Ventures Ltd.
(5) Craig J. Hill and Sam P. Rappos, for the Monitors (ABCP Appeals)
(6) Jeffrey C. Carhart and Joseph Marin, for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor
(7) Mario J. Forte, for Caisse de Dpt et Placement du Qubec
(8) John B. Laskin, for National Bank Financial Inc. and National Bank of Canada [page550]
(9) Thomas McRae and Arthur O. Jacques, for Ad Hoc Retail Creditors Committee (Brian Hunter, et al.)
(10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.
(11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank
(12) Jeffrey S. Leon, for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

(13) Usman Sheikh, for Coventree Capital Inc.
(14) Allan Sternberg and Sam R. Sasso, for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
(15) Neil C. Saxe, for Dominion Bond Rating Service
(16) James A. Woods, Sbastien Richemont and Marie-Anne Paquette, for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aroports de Montral, Aroports de Montral Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Mtropolitaine de Transport (AMT), Giro Inc., Vtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP
(17) Scott A. Turner, for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
(18) R. Graham Phoenix, for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Notes

Note 1: Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

Note 2: Georgina R. Jackson and Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., Annual Review of Insolvency Law, 2007 (Vancouver, B.C.: Carswell, 2007).

Note 3: Citing Gibbs J.A. in Chef Ready Foods, supra, at pp. 319-20 C.B.R.

Note 4: The legislative debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the Companies Act 1985 (U.K.): see House of Commons Debates (Hansard), supra.

Note 5: See Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 192; Ontario Business Corporations Act, R.S.O. 1990, c. B.16, s. 182.

Note 6: A majority in number representing two-thirds in value of the creditors (s. 6).

Note 7: Steinberg was originally reported in French: Steinberg Inc. c. Michaud, [1993] J.Q. no. 1076, [1993] R.J.Q. 1684 (C.A.). All paragraph references to Steinberg in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

Note 8: Reed Dickerson, The Interpretation and Application of Statutes (Boston: Little Brown and Company, 1975) at pp. 234-35, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at p. 621.

TAB 14

2013 ONSC 1078
Ontario Superior Court of Justice [Commercial List]

Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.

2013 CarswellOnt 3361, 2013 ONSC 1078, 100 C.B.R. (5th) 30, 227 A.C.W.S. (3d) 930, 37 C.P.C. (7th) 135

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Sino-Forest Corporation, Applicant

The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, The Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Sjunde Ap-Fonden, David Grant and Robert Wong, Plaintiffs and Sino-Forest Corporation, Ernst & Young LLP, BDO Limited (Formerly Known as BDO McCabe Lo Limited), Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, William E. Ardell, James P. Bowland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, Garry J. West, Pöyry (Beijing) Consulting Company Limited, Credit Suisse Securities (Canada) In., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lunch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated (Successor by Merger to Banc of America Securities LLC), Defendants

Morawetz J.

Heard: February 4, 2013
Judgment: March 20, 2013
Docket: CV-12-9667-00CL, CV-11-431153-00CP

Counsel: Kenneth Rosenberg, Max Starnino, A. Dimitri Lascaris, Daniel Bach, Charles M. Wright, Jonathan Ptak, for Ad Hoc Committee of Purchasers including the Class Action Plaintiffs
Peter Griffin, Peter Osborne, Shara Roy, for Ernst & Young LLP, John Pirie and David Gadsden, for Pöyry (Beijing) Consulting Company Ltd.
Robert W. Staley for Sino-Forest Corporation
Won J. Kim, Michael C. Spencer, Megan B. McPhee for Objectors, Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndical National de Retraite Bâtirente Inc.
John Fabello Rebecca Wise, for Underwriters
Ken Dekker, Peter Greene for BDO Limited
Emily Cole, Joseph Marin for Allen Chan
James Doris for U.S. Class Action
Brandon Barnes for Kai Kit Poon
Robert Chadwick, Brendan O'Neill for Ad Hoc Committee of Noteholders
Derrick Tay, Cliff Prophet for Monitor, FTI Consulting Canada Inc.
Simon Bieber for David Horsley
James Grout for Ontario Securities Commission
Miles D. O'Reilly, Q.C. for Junior Objectors, Daniel Lam and Senthilvel Kanagaratnam

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial; Securities

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

I Bankruptcy and insolvency jurisdiction
I.2 Jurisdiction of courts
I.2.b Jurisdiction of general courts

Bankruptcy and insolvency

VI Proposal
VI.4 Approval by court
VI.4.a General principles

Civil practice and procedure

V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iii Termination of proceedings

Headnote

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Jurisdiction of courts — Jurisdiction of general courts

To approve settlement in class proceedings — Representative plaintiffs were some of stakeholders who claimed defendant forestry company and other defendants misstated its financial results, misrepresented its timber rights, overstated value of its assets and concealed material information about its business operations from investors, causing collapse of artificially inflated share price — Representative plaintiffs began class proceedings against forestry company, which was comprised of components related to shareholders and noteholders — Forestry company entered protection under Companies' Creditors Arrangement Act — Settlement reached between representative plaintiffs and particular defendant — Representative plaintiffs brought motion for approval of settlement — Motion granted — Proceedings were appropriate for approval of settlement, and court had jurisdiction in respect of both Companies' Creditors Arrangement Act and Class Proceeding Act — CCAA proceedings could not be ignored despite any ill-effect on opt-out rights in class proceedings — Claim fell within the Companies' Creditors Arrangement Act, and could be subject of settlement and could include claims of all creditors in class — Until settlement was concluded and proceeds paid, there could be no distribution of settlement proceeds to parties entitled to receive them, and approval of release in settlement was necessary to effect any distribution.

Bankruptcy and insolvency --- Proposal — Approval by court — General principles

Where class proceedings ongoing — Representative plaintiffs were some of stakeholders who claimed defendant forestry company and other defendants misstated its financial results, misrepresented its timber rights, overstated value of its assets and concealed material information about its business operations from investors, causing collapse of artificially inflated share price — Representative plaintiffs began class proceedings against forestry company, which was comprised of components related to shareholders and noteholders — Forestry company entered protection under Companies' Creditors Arrangement Act — Settlement reached between representative plaintiffs and particular defendant — Representative plaintiffs brought motion for approval of settlement — Motion granted — Claims in release were rationally related to purpose of the plan in Companies' Creditors Arrangement Act and were necessary for it — Without approval of settlement, objectives of plan remained unfulfilled due to practical inability to distribute settlement proceeds — Defendant made significant monetary contribution to plan -- Plan benefited claimants in form of tangible distribution -- Release was fair and reasonable and not overly broad

or offensive to public policy — Clear that claims asserted against forestry company had to be addressed as part of restructuring — Unencumbered participation of forestry company's subsidiaries is crucial to restructuring.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Termination of proceedings

Settlement — Representative plaintiffs were some of stakeholders who claimed defendant forestry company and other defendants misstated its financial results, misrepresented its timber rights, overstated value of its assets and concealed material information about its business operations from investors, causing collapse of artificially inflated share price — Representative plaintiffs began class proceedings against forestry company, which was comprised of components related to shareholders and noteholders — Forestry company entered protection under Companies' Creditors Arrangement Act — Settlement reached between representative plaintiffs and particular defendant — Representative plaintiffs brought motion for approval of settlement — Motion granted — Claims in release were rationally related to purpose of the plan in Companies' Creditors Arrangement Act and were necessary for it — Without approval of settlement, objectives of plan remained unfulfilled due to practical inability to distribute settlement proceeds — Defendant made significant monetary contribution to plan -- Plan benefited claimants in form of tangible distribution -- Release was fair and reasonable and not overly broad or offensive to public policy — Clear that claims asserted against forestry company had to be addressed as part of restructuring — Unencumbered participation of forestry company's subsidiaries is crucial to restructuring.

Table of Authorities

Cases considered by *Morawetz J.*:

Allen-Vanguard Corp., Re (2011), 2011 ONSC 5017, 2011 CarswellOnt 8984, 81 C.B.R. (5th) 270 (Ont. S.C.J. [Commercial List]) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — referred to

Durling v. Sunrise Propane Energy Group Inc. (2011), 2011 ONSC 266, 2011 CarswellOnt 77, 10 C.P.C. (7th) 188 (Ont. S.C.J.) — referred to

Eidoo v. Infineon Technologies AG (2012), 2012 CarswellOnt 16498, 2012 ONSC 7299 (Ont. S.C.J.) — referred to

Fischer v. IG Investment Management Ltd. (2012), 2012 ONCA 47, 2012 CarswellOnt 635, 287 O.A.C. 148, 109 O.R. (3d) 498, 346 D.L.R. (4th) 598, 15 C.P.C. (7th) 81 (Ont. C.A.) — referred to

Grace Canada Inc., Re (2008), 50 C.B.R. (5th) 25, 2008 CarswellOnt 6284 (Ont. S.C.J. [Commercial List]) — referred to

Mangan v. Inco Ltd. (1998), 1998 CarswellOnt 801, 16 C.P.C. (4th) 165, 38 O.R. (3d) 703, 27 C.E.L.R. (N.S.) 141 (Ont. Gen. Div.) — referred to

Muscletech Research & Development Inc., Re (2007), 30 C.B.R. (5th) 59, 2007 CarswellOnt 1029 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2010), 63 C.B.R. (5th) 44, 81 C.C.P.B. 56, 2010 CarswellOnt 1754, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]) — considered

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Sino-Forest Corp., Re (2012), 2012 ONCA 816, 2012 CarswellOnt 14701 (Ont. C.A.) — referred to

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

s. 9 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 2(1) "equity claim" — considered

MOTION by representative plaintiffs for approval of settlement in class proceeding.

***Morawetz J.*:**

Introduction

1 The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers' Committee" or the "Applicant"), including the representative plaintiffs in the Ontario class action (collectively, the "Ontario Plaintiffs"), bring this motion for approval of a settlement and release of claims against Ernst & Young LLP [the "Ernst & Young Settlement", the "Ernst & Young Release", the "Ernst & Young Claims" and "Ernst & Young", as

further defined in the Plan of Compromise and Reorganization of Sino-Forest Corporation ("SFC") dated December 3, 2012 (the "Plan")].

2 Approval of the Ernst & Young Settlement is opposed by Invesco Canada Limited ("Invesco"), Northwest and Ethical Investments L.P. ("Northwest"), Comité Syndical National de Retraite Bâtirente Inc. ("Bâtirente"), Matrix Asset Management Inc. ("Matrix"), Gestion Férique and Montrusco Bolton Investments Inc. ("Montrusco") (collectively, the "Objectors"). The Objectors particularly oppose the no-opt-out and full third-party release features of the Ernst & Young Settlement. The Objectors also oppose the motion for a representation order sought by the Ontario Plaintiffs, and move instead for appointment of the Objectors to represent the interests of all objectors to the Ernst & Young Settlement.

3 For the following reasons, I have determined that the Ernst & Young Settlement, together with the Ernst & Young Release, should be approved.

Facts

Class Action Proceedings

4 SFC is an integrated forest plantation operator and forest productions company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China. SFC's registered office is in Toronto, and its principal business office is in Hong Kong.

5 SFC's shares were publicly traded over the Toronto Stock Exchange. During the period from March 19, 2007 through June 2, 2011, SFC made three prospectus offerings of common shares. SFC also issued and had various notes (debt instruments) outstanding, which were offered to investors, by way of offering memoranda, between March 19, 2007 and June 2, 2011.

6 All of SFC's debt or equity public offerings have been underwritten. A total of 11 firms (the "Underwriters") acted as SFC's underwriters, and are named as defendants in the Ontario class action.

7 Since 2000, SFC has had two auditors: Ernst & Young, who acted as auditor from 2000 to 2004 and 2007 to 2012, and BDO Limited ("BDO"), who acted as auditor from 2005 to 2006. Ernst & Young and BDO are named as defendants in the Ontario class action.

8 Following a June 2, 2011 report issued by short-seller Muddy Waters LLC ("Muddy Waters"), SFC, and others, became embroiled in investigations and regulatory proceedings (with the Ontario Securities Commission (the "OSC"), the Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police) for allegedly engaging in a "complex fraudulent scheme". SFC concurrently became embroiled in multiple class action proceedings across Canada, including Ontario, Quebec and Saskatchewan (collectively, the "Canadian Actions"), and in New York (collectively with the Canadian Actions, the "Class Action Proceedings"), facing allegations that SFC, and others, misstated its financial results, misrepresented its timber rights, overstated the value of its assets and concealed material information about its business operations from investors, causing the collapse of an artificially inflated share price.

9 The Canadian Actions are comprised of two components: first, there is a shareholder claim, brought on behalf of SFC's current and former shareholders, seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; and second, there is a noteholder claim, brought on behalf of former holders of SFC's notes (the "Noteholders"), in the amount of approximately $1.8 billion. The noteholder claim asserts, among other things, damages for loss of value in the notes.

10 Two other class proceedings relating to SFC were subsequently commenced in Ontario: *Smith et al. v. Sino-Forest Corporation et al.*, which commenced on June 8, 2011; and *Northwest and Ethical Investments L.P. et al. v. Sino-Forest Corporation et al.*, which commenced on September 26, 2011.

11 In December 2011, there was a motion to determine which of the three actions in Ontario should be permitted to proceed and which should be stayed (the "Carriage Motion"). On January 6, 2012, Perell J. granted carriage to the Ontario Plaintiffs, appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario class action, and stayed the other class proceedings.

CCAA Proceedings

12 SFC obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") on March 30, 2012 (the "Initial Order"), pursuant to which a stay of proceedings was granted in respect of SFC and certain of its subsidiaries. Pursuant to an order on May 8, 2012, the stay was extended to all defendants in the class actions, including Ernst & Young. Due to the stay, the certification and leave motions have yet to be heard.

13 Throughout the CCAA proceedings, SFC asserted that there could be no effective restructuring of SFC's business, and separation from the Canadian parent, if the claims asserted against SFC's subsidiaries arising out of, or connected to, claims against SFC remained outstanding.

14 In addition, SFC and FTI Consulting Canada Inc. (the "Monitor") continually advised that timing and delay were critical elements that would impact on maximization of the value of SFC's assets and stakeholder recovery.

15 On May 14, 2012, an order (the "Claims Procedure Order") was issued that approved a claims process developed by SFC, in consultation with the Monitor. In order to identify the nature and extent of the claims asserted against SFC's subsidiaries, the Claims Procedure Order required any claimant that had or intended to assert a right or claim against one or more of the subsidiaries, relating to a purported claim made against SFC, to so indicate on their proof of claim.

16 The Ad Hoc Securities Purchasers' Committee filed a proof of claim (encapsulating the approximately $7.3 billion shareholder claim and $1.8 billion noteholder claim) in the CCAA proceedings on behalf of all putative class members in the Ontario class action. The plaintiffs in the New York class action filed a proof of claim, but did not specify quantum of damages. Ernst & Young filed a proof of claim for damages and indemnification. The plaintiffs in the Saskatchewan class action did not file a proof of claim. A few shareholders filed proofs of claim separately. No proof of claim was filed by Kim Orr Barristers P.C. ("Kim Orr"), who represent the Objectors.

17 Prior to the commencement of the CCAA proceedings, the plaintiffs in the Canadian Actions settled with Pöyry (Beijing) Consulting Company Limited ("Pöyry") (the "Pöyry Settlement"), a forestry valuator that provided services to SFC. The class was defined as all persons and entities who acquired SFC's securities in Canada between March 19, 2007 to June 2, 2011, and all Canadian residents who acquired SFC securities outside of Canada during that same period (the "Pöyry Settlement Class").

18 The notice of hearing to approve the Pöyry Settlement advised the Pöyry Settlement Class that they may object to the proposed settlement. No objections were filed.

19 Perell J. and Émond J. approved the settlement and certified the Pöyry Settlement Class for settlement purposes. January 15, 2013 was fixed as the date by which members of the Pöyry Settlement Class, who wished to opt-out of either of the Canadian Actions, would have to file an opt-out form for the claims administrator, and they approved the form by which the right to optout was required to be exercised.

20 Notice of the certification and settlement was given in accordance with the certification orders of Perell J. and Émond J. The notice of certification states, in part, that:

> IF YOU CHOOSE TO OPT OUT OF THE CLASS, YOU WILL BE OPTING OUT OF THE **ENTIRE** PROCEEDING. THIS MEANS THAT YOU WILL BE UNABLE TO PARTICIPATE IN ANY FUTURE SETTLEMENT OR JUDGMENT REACHED WITH OR AGAINST THE REMAINING DEFENDANTS.

21 The opt-out made no provision for an opt-out on a conditional basis.

22 On June 26, 2012, SFC brought a motion for an order directing that claims against SFC that arose in connection with the ownership, purchase or sale of an equity interest in SFC, and related indemnity claims, were "equity claims" as defined in section 2 of the CCAA, including the claims by or on behalf of shareholders asserted in the Class Action Proceedings. The equity claims motion did not purport to deal with the component of the Class Action Proceedings relating to SFC's notes.

23 In reasons released July 27, 2012 [*Sino-Forest Corp., Re*, 2012 ONSC 4377 (Ont. S.C.J. [Commercial List])], I granted the relief sought by SFC (the "Equity Claims Decision"), finding that "the claims advanced in the shareholder claims are clearly equity claims". The Ad Hoc Securities Purchasers' Committee did not oppose the motion, and no issue was taken by any party with the court's determination that the shareholder claims against SFC were "equity claims". The Equity Claims Decision was subsequently affirmed by the Court of Appeal for Ontario on November 23, 2012 [*Sino-Forest Corp., Re*, 2012 ONCA 816 (Ont. C.A.)].

Ernst & Young Settlement

24 The Ernst & Young Settlement, and third party releases, was not mentioned in the early versions of the Plan. The initial creditors' meeting and vote on the Plan was scheduled to occur on November 29, 2012; when the Plan was amended on November 28, 2012, the creditors' meeting was adjourned to November 30, 2012.

25 On November 29, 2012, Ernst & Young's counsel and class counsel concluded the proposed Ernst & Young Settlement. The creditors' meeting was again adjourned, to December 3, 2012; on that date, a new Plan revision was released and the Ernst & Young Settlement was publicly announced. The Plan revision featured a new Article 11, reflecting the "framework" for the proposed Ernst & Young Settlement and for third-party releases for named third-party defendants as identified at that time as the Underwriters or in the future.

26 On December 3, 2012, a large majority of creditors approved the Plan. The Objectors note, however, that proxy materials were distributed weeks earlier and proxies were required to be submitted three days prior to the meeting and it is evident that creditors submitting proxies only had a pre-Article 11 version of the Plan. Further, no equity claimants, such as the Objectors, were entitled to vote on the Plan. On December 6, 2012, the Plan was further amended, adding Ernst & Young and BDO to Schedule A, thereby defining them as named third-party defendants.

27 Ultimately, the Ernst & Young Settlement provided for the payment by Ernst & Young of $117 million as a settlement fund, being the full monetary contribution by Ernst & Young to settle the Ernst & Young Claims; however, it remains subject to court approval in Ontario, and recognition in Quebec and the United States, and conditional, pursuant to Article 11.1 of the Plan, upon the following steps:

> (a) the granting of the sanction order sanctioning the Plan including the terms of the Ernst & Young Settlement and the Ernst & Young Release (which preclude any right to contribution or indemnity against Ernst & Young);
>
> (b) the issuance of the Settlement Trust Order;
>
> (c) the issuance of any other orders necessary to give effect to the Ernst & Young Settlement and the Ernst & Young Release, including the Chapter 15 Recognition Order;
>
> (d) the fulfillment of all conditions precedent in the Ernst & Young Settlement; and
>
> (e) all orders being final orders not subject to further appeal or challenge.

28 On December 6, 2012, Kim Orr filed a notice of appearance in the CCAA proceedings on behalf of three Objectors: Invesco, Northwest and Bâtirente. These Objectors opposed the sanctioning of the Plan, insofar as it included Article 11, during the Plan sanction hearing on December 7, 2012.

29 At the Plan sanction hearing, SFC's counsel made it clear that the Plan itself did not embody the Ernst & Young Settlement, and that the parties' request that the Plan be sanctioned did not also cover approval of the Ernst & Young Settlement. Moreover, according to the Plan and minutes of settlement, the Ernst & Young Settlement would not be consummated (*i.e.* money paid and releases effective) unless and until several conditions had been satisfied in the future.

30 The Plan was sanctioned on December 10, 2012 with Article 11. The Objectors take the position that the Funds' opposition was dismissed as premature and on the basis that nothing in the sanction order affected their rights.

31 On December 13, 2012, the court directed that its hearing on the Ernst & Young Settlement would take place on January 4, 2013, under both the CCAA and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"). Subsequently, the hearing was adjourned to February 4, 2013.

32 On January 15, 2013, the last day of the opt-out period established by orders of Perell J. and Émond J., six institutional investors represented by Kim Orr filed opt-out forms. These institutional investors are Northwest and Bâtirente, who were two of the three institutions represented by Kim Orr in the Carriage Motion, as well as Invesco, Matrix, Montrusco and Gestion Ferique (all of which are members of the Pöyry Settlement Class).

33 According to the opt-out forms, the Objectors held approximately 1.6% of SFC shares outstanding on June 30, 2011 (the day the Muddy Waters report was released). By way of contrast, Davis Selected Advisors and Paulson and Co., two of many institutional investors who support the Ernst & Young Settlement, controlled more than 25% of SFC's shares at this time. In addition, the total number of outstanding objectors constitutes approximately 0.24% of the 34,177 SFC beneficial shareholders as of April 29, 2011.

Law and Analysis

Court's Jurisdiction to Grant Requested Approval

34 The Claims Procedure Order of May 14, 2012, at paragraph 17, provides that any person that does not file a proof of claim in accordance with the order is barred from making or enforcing such claim as against any other person who could claim contribution or indemnity from the Applicant. This includes claims by the Objectors against Ernst & Young for which Ernst & Young could claim indemnity from SFC.

35 The Claims Procedure Order also provides that the Ontario Plaintiffs are authorized to file one proof of claim in respect of the substance of the matters set out in the Ontario class action, and that the Quebec Plaintiffs are similarly authorized to file one proof of claim in respect of the substance of the matters set out in the Quebec class action. The Objectors did not object to, or oppose, the Claims Procedure Order, either when it was sought or at any time thereafter. The Objectors did not file an independent proof of claim and, accordingly, the Canadian Claimants were authorized to and did file a proof of claim in the representative capacity in respect of the Objectors' claims.

36 The Ernst & Young Settlement is part of a CCAA plan process. Claims, including contingent claims, are regularly compromised and settled within CCAA proceedings. This includes outstanding litigation claims against the debtor and third parties. Such compromises fully and finally dispose of such claims, and it follows that there are no continuing procedural or other rights in such proceedings. Simply put, there are no "opt-outs" in the CCAA.

37 It is well established that class proceedings can be settled in a CCAA proceeding. See *Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 1647 (Ont. S.C.J. [Commercial List]) [*Robertson*].

38 As noted by Pepall J. (as she then was) in *Robertson*, para. 8:

> When dealing with the consensual resolution of a CCAA claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceedings settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

39 In this case, the notice and process for dissemination have been approved.

40 The Objectors take the position that approval of the Ernst & Young Settlement would render their opt-out rights illusory; the inherent flaw with this argument is that it is not possible to ignore the CCAA proceedings.

41 In this case, claims arising out of the class proceedings are claims in the CCAA process. CCAA claims can be, by definition, subject to compromise. The Claims Procedure Order establishes that claims as against Ernst & Young fall within the CCAA proceedings. Thus, these claims can also be the subject of settlement and, if settled, the claims of all creditors in the class can also be settled.

42 In my view, these proceedings are the appropriate time and place to consider approval of the Ernst & Young Settlement. This court has the jurisdiction in respect of both the CCAA and the CPA.

Should the Court Exercise Its Discretion to Approve the Settlement

43 Having established the jurisdictional basis to consider the motion, the central inquiry is whether the court should exercise its discretion to approve the Ernst & Young Settlement.

CCAA Interpretation

44 The CCAA is a "flexible statute", and the court has "jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order". The CCAA affords courts broad jurisdiction to make orders and "fill in the gaps in legislation so as to give effect to the objects of the CCAA." [*Nortel Networks Corp., Re*, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]), paras. 66-70 ("*Re Nortel*")); *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]), para. 43]

45 Further, as the Supreme Court of Canada explained in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), para. 58:

> CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly described as "the hothouse of real time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (internal citations omitted). ...When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the Debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA.

46 It is also established that third-party releases are not an uncommon feature of complex restructurings under the CCAA [*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) ("*ATB Financial*"); *Nortel Networks Corp., Re*, *supra*; *Robertson*, *supra*; *Muscletech Research & Development Inc., Re* (2007), 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22 (Ont. S.C.J. [Commercial List]) ("*Muscle Tech*"); *Grace Canada Inc., Re* (2008), 50 C.B.R. (5th) 25 (Ont. S.C.J. [Commercial List]); *Allen-Vanguard Corp., Re*, 2011 ONSC 5017 (Ont. S.C.J. [Commercial List])].

47 The Court of Appeal for Ontario has specifically confirmed that a third-party release is justified where the release forms part of a comprehensive compromise. As Blair J. A. stated in *ATB Financial*, *supra*:

> 69. In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement

between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70. The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan ...

71. In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

a) The parties to be released are necessary and essential to the restructuring of the debtor;

b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;

c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72. Here, then — as was the case in T&N — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed ...

73. I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

. . .

78. ... I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

. . .

113. At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

a) The parties to be released are necessary and essential to the restructuring of the debtor;

b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;

c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;

f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,

g) The releases are fair and reasonable and not overly broad or offensive to public policy.

48 Furthermore, in *ATB Financial*, *supra*, para. 111, the Court of Appeal confirmed that parties are entitled to settle allegations of fraud and to include releases of such claims as part of the settlement. It was noted that "there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given".

Relevant CCAA Factors

49 In assessing a settlement within the CCAA context, the court looks at the following three factors, as articulated in *Robertson*, *supra*:

(a) whether the settlement is fair and reasonable;

(b) whether it provides substantial benefits to other stakeholders; and

(c) whether it is consistent with the purpose and spirit of the CCAA.

50 Where a settlement also provides for a release, such as here, courts assess whether there is "a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan". Applying this "nexus test" requires consideration of the following factors: [*ATB Financial*, *supra*, para. 70]

(a) Are the claims to be released rationally related to the purpose of the plan?

(b) Are the claims to be released necessary for the plan of arrangement?

(c) Are the parties who have claims released against them contributing in a tangible and realistic way? and

(d) Will the plan benefit the debtor and the creditors generally?

Counsel Submissions

51 The Objectors argue that the proposed Ernst & Young Release is not integral or necessary to the success of Sino-Forest's restructuring plan, and, therefore, the standards for granting thirdparty releases in the CCAA are not satisfied. No one has asserted that the parties require the Ernst & Young Settlement or Ernst & Young Release to allow the Plan to go forward; in fact, the Plan has been implemented prior to consideration of this issue. Further, the Objectors contend that the $117 million settlement payment is not essential, or even related, to the restructuring, and that it is concerning, and telling, that varying the end of the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs would extinguish the settlement.

52 The Objectors also argue that the Ernst & Young Settlement should not be approved because it would vitiate opt-out rights of class members, as conferred as follows in section 9 of the CPA: "Any member of a class involved in a

class proceeding may opt-out of the proceeding in the manner and within the time specified in the certification order." This right is a fundamental element of procedural fairness in the Ontario class action regime [*Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47 (Ont. C.A.), para. 69], and is not a mere technicality or illusory. It has been described as absolute [*Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 266 (Ont. S.C.J.)]. The opt-out period allows persons to pursue their self-interest and to preserve their rights to pursue individual actions [*Mangan v. Inco Ltd.* (1998), 16 C.P.C. (4th) 165, 38 O.R. (3d) 703 (Ont. Gen. Div.)].

53 Based on the foregoing, the Objectors submit that a proposed class action settlement with Ernst & Young should be approved solely under the CPA, as the Pöyry Settlement was, and not through misuse of a third-party release procedure under the CCAA. Further, since the minutes of settlement make it clear that Ernst & Young retains discretion not to accept or recognize normal opt-outs if the CPA procedures are invoked, the Ernst & Young Settlement should not be approved in this respect either.

54 Multiple parties made submissions favouring the Ernst & Young Settlement (with the accompanying Ernst & Young Release), arguing that it is fair and reasonable in the circumstances, benefits the CCAA stakeholders (as evidenced by the broad-based support for the Plan and this motion) and rationally connected to the Plan.

55 Ontario Plaintiffs' counsel submits that the form of the bar order is fair and properly balances the competing interests of class members, Ernst & Young and the non-settling defendants as:

> (a) class members are not releasing their claims to a greater extent than necessary;
>
> (b) Ernst & Young is ensured that its obligations in connection to the Settlement will conclude its liability in the class proceedings;
>
> (c) the non-settling defendants will not have to pay more following a judgment than they would be required to pay if Ernst & Young remained as a defendant in the action; and
>
> (d) the non-settling defendants are granted broad rights of discovery and an appropriate credit in the ongoing litigation, if it is ultimately determined by the court that there is a right of contribution and indemnity between the co-defendants.

56 SFC argues that Ernst & Young's support has simplified and accelerated the Plan process, including reducing the expense and management time otherwise to be incurred in litigating claims, and was a catalyst to encouraging many parties, including the Underwriters and BDO, to withdraw their objections to the Plan. Further, the result is precisely the type of compromise that the CCAA is designed to promote; namely, Ernst & Young has provided a tangible and significant contribution to the Plan (notwithstanding any pitfalls in the litigation claims against Ernst & Young) that has enabled SFC to emerge as Newco/NewcoII in a timely way and with potential viability.

57 Ernst & Young's counsel submits that the Ernst & Young Settlement, as a whole, including the Ernst & Young Release, must be approved or rejected; the court cannot modify the terms of a proposed settlement. Further, in deciding whether to reject a settlement, the court should consider whether doing so would put the settlement in "jeopardy of being unravelled". In this case, counsel submits there is no obligation on the parties to resume discussions and it could be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort.

Analysis and Conclusions

58 The Ernst & Young Release forms part of the Ernst & Young Settlement. In considering whether the Ernst & Young Settlement is fair and reasonable and ought to be approved, it is necessary to consider whether the Ernst & Young Release can be justified as part of the Ernst & Young Settlement. See *ATB Financial*, *supra*, para. 70, as quoted above.

59 In considering the appropriateness of including the Ernst & Young Release, I have taken into account the following.

60 Firstly, although the Plan has been sanctioned and implemented, a significant aspect of the Plan is a distribution to SFC's creditors. The significant and, in fact, only monetary contribution that can be directly identified, at this time, is the $117 million from the Ernst & Young Settlement. Simply put, until such time as the Ernst & Young Settlement has been concluded and the settlement proceeds paid, there can be no distribution of the settlement proceeds to parties entitled to receive them. It seems to me that in order to effect any distribution, the Ernst & Young Release has to be approved as part of the Ernst & Young Settlement.

61 Secondly, it is apparent that the claims to be released against Ernst & Young are rationally related to the purpose of the Plan and necessary for it. SFC put forward the Plan. As I outlined in the Equity Claims Decision, the claims of Ernst & Young as against SFC are intertwined to the extent that they cannot be separated. Similarly, the claims of the Objectors as against Ernst & Young are, in my view, intertwined and related to the claims against SFC and to the purpose of the Plan.

62 Thirdly, although the Plan can, on its face, succeed, as evidenced by its implementation, the reality is that without the approval of the Ernst & Young Settlement, the objectives of the Plan remain unfulfilled due to the practical inability to distribute the settlement proceeds. Further, in the event that the Ernst & Young Release is not approved and the litigation continues, it becomes circular in nature as the position of Ernst & Young, as detailed in the Equity Claims Decision, involves Ernst & Young bringing an equity claim for contribution and indemnity as against SFC.

63 Fourthly, it is clear that Ernst & Young is contributing in a tangible way to the Plan, by its significant contribution of $117 million.

64 Fifthly, the Plan benefits the claimants in the form of a tangible distribution. Blair J.A., at paragraph 113 of *ATB Financial*, *supra*, referenced two further facts as found by the application judge in that case; namely, the voting creditors who approved the Plan did so with the knowledge of the nature and effect of the releases. That situation is also present in this case.

65 Finally, the application judge in *ATB Financial*, *supra*, held that the releases were fair and reasonable and not overly broad or offensive to public policy. In this case, having considered the alternatives of lengthy and uncertain litigation, and the full knowledge of the Canadian plaintiffs, I conclude that the Ernst & Young Release is fair and reasonable and not overly broad or offensive to public policy.

66 In my view, the Ernst & Young Settlement is fair and reasonable, provides substantial benefits to relevant stakeholders, and is consistent with the purpose and spirit of the CCAA. In addition, in my view, the factors associated with the *ATB Financial* nexus test favour approving the Ernst & Young Release.

67 In *Nortel Networks Corp., Re*, *supra*, para. 81, I noted that the releases benefited creditors generally because they "reduced the risk of litigation, protected Nortel against potential contribution claims and indemnity claims and reduced the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs". In this case, there is a connection between the release of claims against Ernst & Young and a distribution to creditors. The plaintiffs in the litigation are shareholders and Noteholders of SFC. These plaintiffs have claims to assert against SFC that are being directly satisfied, in part, with the payment of $117 million by Ernst & Young.

68 In my view, it is clear that the claims Ernst & Young asserted against SFC, and SFC's subsidiaries, had to be addressed as part of the restructuring. The interrelationship between the various entities is further demonstrated by Ernst & Young's submission that the release of claims by Ernst & Young has allowed SFC and the SFC subsidiaries to contribute their assets to the restructuring, unencumbered by claims totalling billions of dollars. As SFC is a holding company with no material assets of its own, the unencumbered participation of the SFC subsidiaries is crucial to the restructuring.

69 At the outset and during the CCAA proceedings, the Applicant and Monitor specifically and consistently identified timing and delay as critical elements that would impact on maximization of the value and preservation of SFC's assets.

70 Counsel submits that the claims against Ernst & Young and the indemnity claims asserted by Ernst & Young would, absent the Ernst & Young Settlement, have to be finally determined before the CCAA claims could be quantified. As such, these steps had the potential to significantly delay the CCAA proceedings. Where the claims being released may take years to resolve, are risky, expensive or otherwise uncertain of success, the benefit that accrues to creditors in having them settled must be considered. See *Nortel Networks Corp., Re*, *supra*, paras. 73 and 81; and *Muscletech*, *supra*, paras. 19-21.

71 Implicit in my findings is rejection of the Objectors' arguments questioning the validity of the Ernst & Young Settlement and Ernst & Young Release. The relevant consideration is whether a proposed settlement and third-party release sufficiently benefits all stakeholders to justify court approval. I reject the position that the $117 million settlement payment is not essential, or even related, to the restructuring; it represents, at this point in time, the only real monetary consideration available to stakeholders. The potential to vary the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs is futile, as the court is being asked to approve the Ernst & Young Settlement and Ernst & Young Release as proposed.

72 I do not accept that the class action settlement should be approved solely under the CPA. The reality facing the parties is that SFC is insolvent; it is under CCAA protection, and stakeholder claims are to be considered in the context of the CCAA regime. The Objectors' claim against Ernst & Young cannot be considered in isolation from the CCAA proceedings. The claims against Ernst & Young are interrelated with claims as against SFC, as is made clear in the Equity Claims Decision and Claims Procedure Order.

73 Even if one assumes that the opt-out argument of the Objectors can be sustained, and optout rights fully provided, to what does that lead? The Objectors are left with a claim against Ernst & Young, which it then has to put forward in the CCAA proceedings. Without taking into account any argument that the claim against Ernst & Young may be affected by the claims bar date, the claim is still capable of being addressed under the Claims Procedure Order. In this way, it is again subject to the CCAA fairness and reasonable test as set out in *ATB Financial*, *supra*.

74 Moreover, CCAA proceedings take into account a class of creditors or stakeholders who possess the same legal interests. In this respect, the Objectors have the same legal interests as the Ontario Plaintiffs. Ultimately, this requires consideration of the totality of the class. In this case, it is clear that the parties supporting the Ernst & Young Settlement are vastly superior to the Objectors, both in number and dollar value.

75 Although the right to opt-out of a class action is a fundamental element of procedural fairness in the Ontario class action regime, this argument cannot be taken in isolation. It must be considered in the context of the CCAA.

76 The Objectors are, in fact, part of the group that will benefit from the Ernst & Young Settlement as they specifically seek to reserve their rights to "opt-in" and share in the spoils.

77 It is also clear that the jurisprudence does not permit a dissenting stakeholder to opt-out of a restructuring. [*Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]).] If that were possible, no creditor would take part in any CCAA compromise where they were to receive less than the debt owed to them. There is no right to opt-out of any CCAA process, and the statute contemplates that a minority of creditors are bound by the plan which a majority have approved and the court has determined to be fair and reasonable.

78 SFC is insolvent and all stakeholders, including the Objectors, will receive less than what they are owed. By virtue of deciding, on their own volition, not to participate in the CCAA process, the Objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

79 Further, even if the Objectors had filed a claim and voted, their minimal 1.6% stake in SFC's outstanding shares when the Muddy Waters report was released makes it highly unlikely that they could have altered the outcome.

80 Finally, although the Objectors demand a right to conditionally opt-out of a settlement, that right does not exist under the CPA or CCAA. By virtue of the certification order, class members had the ability to opt-out of the class action. The Objectors did not opt-out in the true sense; they purported to create a conditional opt-out. Under the CPA, the right to opt-out is "in the manner and within the time specified in the certification order". There is no provision for a conditional opt-out in the CPA, and Ontario's single opt-out regime causes "no prejudice...to putative class members". [CPA, section 9; *Osmun v. Cadbury Adams Canada Inc.* (2009), 85 C.P.C. (6th) 148 (Ont. S.C.J.), paras. 43-46; and *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299 (Ont. S.C.J.).]

Miscellaneous

81 For greater certainty, it is my understanding that the issues raised by Mr. O'Reilly have been clarified such that the effect of this endorsement is that the Junior Objectors will be included with the same status as the Ontario Plaintiffs.

Disposition

82 In the result, for the foregoing reasons, the motion is granted. A declaration shall issue to the effect that the Ernst & Young Settlement is fair and reasonable in all the circumstances. The Ernst & Young Settlement, together with the Ernst & Young Release, is approved and an order shall issue substantially in the form requested. The motion of the Objectors is dismissed.

Motion granted.

End of Document

TAB 15

District of: Alberta
Division No. 02 - Calgary
Court No.
Estate No.

[X] Original [ ] Amended

-- Form 78 --

Statement of Affairs (Business Proposal) made by an entity
(Subsection 49(2) and Paragraph 158(d) of the Act / Subsections 50(2) and 62(1) of the Act)

In the matter of the proposal of
MicroPlanet Technology Corp.
of the City of Calgary, in the Province of Alberta

To the debtor:

You are required to carefully and accurately complete this form and the applicable attachments showing the state of your affairs on the date of the filing of your proposal (or notice of intention, if applicable), on the 3rd day of October 2016. When completed, this form and the applicable attachments will constitute the Statement of Affairs and must be verified by oath or solemn declaration.

LIABILITIES
(as stated and estimated by the officer)

1. Unsecured creditors as per list "A"	235,761.00
Balance of secured claims as per list "B"	2,724,999.00
Total unsecured creditors	2,960,760.00
2. Secured creditors as per list "B"	1.00
3. Preferred creditors as per list "C"	0.00
4. Contingent, trust claims or other liabilities as per list "D" estimated to be reclaimable for	350,000.00
Total liabilities	3,310,761.00
Surplus	NIL

ASSETS
(as stated and estimated by the officer)

1. Inventory		0.00
2. Trade fixtures, etc.		0.00
3. Accounts receivable and other receivables, as per list "E"		
Good	0.00	
Doubtful	0.00	
Bad	0.00	
Estimated to produce		0.00
4. Bills of exchange, promissory note, etc., as per list "F"		0.00
5. Deposits in financial institutions		0.00
6. Cash		0.00
7. Livestock		0.00
8. Machinery, equipment and plant		0.00
9. Real property or immovable as per list "G"		0.00
10. Furniture		0.00
11. RRSPs, RRIFs, life insurance, etc.		0.00
12. Securities (shares, bonds, debentures, etc.)		1.00
13. Interests under wills		0.00
14. Vehicles		0.00
15. Other property, as per list "H"		0.00
If debtor is a corporation, add:		
Amount of subscribed capital	0.00	
Amount paid on capital	0.00	
Balance subscribed and unpaid		0.00
Estimated to produce		0.00
Total assets		1.00
Deficiency		3,310,760.00

I, Wolfgang Struss, of the City of Poulsbo in the State of Washington, do swear (or solemnly declare) that this statement and the attached lists are to the best of my knowledge, a full, true and complete statement of my affairs on the 3rd day of October 2016 and fully disclose all property of every description that is in my possession or that may devolve on me in accordance with the Act.

SWORN (or SOLEMNLY DECLARED)
before me at the City of _____ in _____, on this 3rd day of October 2016.

_____

_____
Wolfgang Struss

District of: Alberta
Division No. 02 - Calgary
Court No.
Estate No.

FORM 78 -- Continued

List "A"
Unsecured Creditors

MicroPlanet Technology Corp.

No.	Name of creditor	Address	Unsecured claim	Balance of claim	Total claim
1	Alan Richardson	121 Audubon Place Hailey Idaho 83333 USA	1.00	0.00	1.00
2	Bennett Jones LLP - Calgary	4500 Bankers Hall East, 855 2nd Street SW Calgary AB T2P 4K7	80,000.00	0.00	80,000.00
3	Brett Ironside	403 8 Ave SW, Suite 710 Calgary AB T2P 1C2	0.00	424,999.00	424,999.00
4	Brett Ironside	710, 304 8th Ave. SW Calgary AB T2P 1C2	1.00	0.00	1.00
5	Broadridge	PO Box 57461, Postal Station A Toronto ON M5W 5M5	478.00	0.00	478.00
6	Calafate Holdings Ltd.	304 8 Ave SW Calgary AB T2P 1C2	1.00	0.00	1.00
7	Chorus Call	1055 W Georgia Street Suite 2020 Vancouver BC V6E 3R5	420.00	0.00	420.00
8	CNW Group	Bow Valley Square III 255-5th Avenue SW Suite 730 Calgary AB T2P 3G6	1,125.00	0.00	1,125.00
9	Cole Harris	7027 Kenosee Place S.W. Calgary AB T2V 2Z6	1.00	0.00	1.00
10	Collins Barrow Calgary LLP Attn: Nancy Harrison	1400 - 777 8th Avenue SW First Alberta Place Calgary AB T2P 3R5	16,900.00	0.00	16,900.00
11	CRA - Canada Revenue Agency - Tax - Prairie	c/o Edmonton Tax Services Office Revenue Collections Division Regional Intake Centre for Insolvency 9700 Jasper Avenue Edmonton AB T5J 4C8	1.00	0.00	1.00
12	David Andrews	680 Exceller Circle New Market ON L3X 1P4	1.00	0.00	1.00
13	Douglas and Elizabeth McPhee	420 Sierra Morena Place SW Calgary AB T3H 2X2	25,000.00	0.00	25,000.00
14	Eamon Hurley	2310, 700 - 2 St. SW Calgary AB T2P 2W2	1.00	0.00	1.00
15	Elizabeth McPhee	420 Sierra Morena Place SW Calgary AB T3H 2X2	1.00	0.00	1.00
16	Eric Tremblay	30319 Woodland Heights Calgary AB T3R 1G9	0.00	50,000.00	50,000.00
17	Exuma Beach Ltd.	PO Box N-4825 New Providence Nassau Bahamas	1.00	0.00	1.00
18	Front Street Capital Attn: Brent Millar	33 Yonge Street, Suite 600 Toronto ON M5E 1G4	0.00	1,250,000.00	1,250,000.00
19	Gary Tanner	2728 Plumb Street Houston TX 77005 USA	0.00	100,000.00	100,000.00
20	Ghost River Investments	1205 - 39 Ave S.W. Calgary AB T2T 2K6	1.00	0.00	1.00
21	Grahame Foulger	37 Oxley Terrace Corinda Queensla 4075 Australia	1.00	0.00	1.00
22	Grant Thornton LLP	1701 Scotia Place 2 10060 Jasper Avenue NW Edmonton AB T5J 3R8	24,471.00	0.00	24,471.00

03-Oct-2016
Date

Wolfgang Struss

District of: Alberta
Division No. 02 - Calgary
Court No.
Estate No.

FORM 78 -- Continued

List "A"
Unsecured Creditors

MicroPlanet Technology Corp.

No.	Name of creditor	Address	Unsecured claim	Balance of claim	Total claim
23	Howard Group	350, 318 - 11th Avenue SE Calgary AB T2G 0Y2	24,959.00	0.00	24,959.00
24	IA Clarington Tactical Income Fund Attn: Dan Bastasic	26 Wellington Street East, Suite 500 Toronto ON M5E 1S2	0.00	800,000.00	800,000.00
25	Jack Gillespie	299 Oakmere Close Chestermere AB T1X 1L2	1.00	0.00	1.00
26	Jacqueline Christina Stahl	23118 Two Harbors Glen Street Katy TX 77494 USA	0.00	50,000.00	50,000.00
27	Jason Cottle	1100, 888 - 3 St. SW Calgary AB T2P 1C2	1.00	0.00	1.00
28	Jennifer Ironside c/o Canaccord Capital Corp	450 1 St. SW Calgary AB T2P 5H1	1.00	0.00	1.00
29	John M. Jr.	6 Columbia Key Bellevue WA 98006 USA	1.00	0.00	1.00
30	Kim K McConnel	Box 21, Site 3, RR2 Okotoks AB T1S 1A2	1.00	0.00	1.00
31	Mark Schilling	372 Canterville Drive S.W Calgary AB T2W 3Z9	1.00	0.00	1.00
32	Martin Lambert	4 Bowbank Crescent NW Calgary AB T3B 2E1	1.00	0.00	1.00
33	Marylin Farmer	700-850 2 St SW Calgary AB T2P 0R8	1.00	0.00	1.00
34	Michelle Ranks	206 - 18A Street N.W. Calgary AB T2N 2G9	1.00	0.00	1.00
35	Myron Tetrault	710, 304 - 8 Ave SW Calgary AB T2P 1C2	1.00	0.00	1.00
36	Patrick Floreani	59 Wentworth Heights S.W. Calgary AB T3H 5K2	1.00	0.00	1.00
37	Robert Savin	15 Roselawn Cres. N.W. Calgary AB T2K 1K7	1.00	0.00	1.00
38	Royal & Sun Alliance Insurance Company of Canada	800 - 18 York Street Toronto ON M5J 2T8	1.00	0.00	1.00
39	RR Donnelley Canada	PO Box 3583 Station A Toronto ON M5W 3G4	5,193.00	0.00	5,193.00
40	Sunnylea Capital Inc.	3611 13A Street SW Calgary AB T2T 3S8	6,825.00	0.00	6,825.00
41	The Brett Ironside Family Trust	403 8 Ave SW, Suite 710 Calgary AB T2P 1C2	1.00	0.00	1.00
42	Toni Ironside	156 Valley Ridge Heights N.W. Calgary AB T3B 5T3	1.00	0.00	1.00
43	Utilogy Pty Ltd.	37 Oxley Terrace Corinda Brisbane QLD 4075 Australia	44,000.00	0.00	44,000.00
44	Valiant Trust Company	750 Cambie Street, Suite 600 Vancouver BC V6B 0A2	6,363.00	0.00	6,363.00
45	Wayne Smith	60 Helm Port Ludlow WA 98365 USA	0.00	50,000.00	50,000.00
46	WCB Workers Compensation Board of Alberta Attn: Collection Department	PO Box 2415 Edmonton AB T5J 2S5	1.00	0.00	1.00

03-Oct-2016
Date

Wolfgang Struss

FORM 78 -- Continued

Total:	**235,761.00**	**2,724,999.00**	**2,960,760.00**

03-Oct-2016
Date

Wolfgang Struss

District of: Alberta
Division No. 02 - Calgary
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FORM 78 -- Continued

List "B"
Secured Creditors

MicroPlanet Technology Corp.

No.	Name of creditor	Address	Amount of claim	Particulars of security	When given	Estimated value of security	Estimated surplus from security	Balance of claim
1	Brett Ironside	403 8 Ave SW, Suite 710 Calgary AB T2P 1C2	425,000.00	Securities - Shareholdings - Share in MicroPlanet, Inc.	19-Jul-2016	1.00		424,999.00
2	Eric Tremblay	30319 Woodland Heights Calgary AB T3R 1G9	50,000.00	Securities - Shareholdings - Share in MicroPlanet, Inc.	19-Jul-2016	0.00		50,000.00
3	Front Street Capital Attn: Brent Millar	33 Yonge Street, Suite 600 Toronto ON M5E 1G4	1,250,000.00	Securities - Shareholdings - Share in MicroPlanet, Inc.	19-Jul-2016	0.00		1,250,000.00
4	Gary Tanner	2728 Plumb Street Houston TX 77005 USA	100,000.00	Securities - Shareholdings - Share in MicroPlanet, Inc.	19-Jul-2016	0.00		100,000.00
5	IA Clarington Tactical Income Fund Attn: Dan Bastasic	26 Wellington Street East, Suite 500 Toronto ON M5E 1S2	800,000.00	Securities - Shareholdings - Share in MicroPlanet, Inc.	19-Jul-2016	0.00		800,000.00
6	Jacqueline Christina Stahl	23118 Two Harbors Glen Street Katy TX 77494 USA	50,000.00	Securities - Shareholdings - Share in MicroPlanet, Inc.	19-Jul-2016	0.00		50,000.00
7	Wayne Smith	60 Helm Port Ludlow WA 98365 USA	50,000.00	Securities - Shareholdings - Share in MicroPlanet, Inc.	19-Jul-2016	0.00		50,000.00
		Total:	**2,725,000.00**			**1.00**	**0.00**	**2,724,999.00**

03-Oct-2016
Date

Wolfgang Struss

District of: Alberta
Division No. 02 - Calgary
Court No.
Estate No.

FORM 78 -- Continued

List "C"
Preferred Creditors for Wages, Rent, etc.

MicroPlanet Technology Corp.

No.	Name of creditor	Address and occupation	Nature of claim	Period during which claim accrued	Amount of claim	Amount payable in full	Difference ranking for dividend
				Total:	**0.00**	**0.00**	**0.00**

03-Oct-2016
Date

Wolfgang Struss

District of: Alberta
Division No. 02 - Calgary
Court No.
Estate No.

FORM 78 -- Continued

List "D"
Contingent or Other Liabilities

MicroPlanet Technology Corp.

No.	Name of creditor or claimant	Address and occupation	Amount of liability or claim	Amount expected to rank for dividend	Date when liability incurred	Nature of liability
1	Brett Ironside	403 8 Ave SW, Suite 710 Calgary AB T2P 1C2	350,000.00	0.00		Employment
		Total:	**350,000.00**	**0.00**		

03-Oct-2016
Date

Wolfgang Struss

District of: Alberta
Division No. 02 - Calgary
Court No.
Estate No.

FORM 78 -- Continued

List "E"
Debts Due to the Debtor

MicroPlanet Technology Corp.

No.	Name of debtor	Address and occupation	Nature of debt	Amount of debt (good, doubtful, bad)	Folio of ledgers or other book where particulars to be found	When contracted	Estimated to produce	Particulars of any securities held for debt
				0.00				
			Total:	0.00			0.00	
				0.00				

03-Oct-2016
Date

Wolfgang Struss

District of: Alberta
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FORM 78 -- Continued

List "F"

Bills of Exchange, Promissory Notes, Lien Notes, Chattel Mortgages, etc., Available as Assets

MicroPlanet Technology Corp.

No.	Name of all promissory, acceptors, endorsers, mortgagors, and guarantors	Address	Occupation	Amount of bill or note, etc.	Date when due	Estimated to produce	Particulars of any property held as security for payment of bill or note, etc.
			Total:	**0.00**		**0.00**	

03-Oct-2016
Date

Wolfgang Struss

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FORM 78 -- Continued

List "G"
Real Property or Immovables Owned by Debtor

MicroPlanet Technology Corp.

Description of property	Nature of debtor interest	In whose name does title stand	Total value	Particulars of mortgages, hypothecs, or other encumbrances (name, address, amount)	Equity or surplus
		Total:	**0.00**		**0.00**

03-Oct-2016
Date

Wolfgang Struss

District of: Alberta
Division No. 02 - Calgary
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Estate No.

FORM 78 -- Concluded

List "H"
Property

MicroPlanet Technology Corp.

FULL STATEMENT OF PROPERTY

Nature of property	Location	Details of property	Original cost	Estimated to produce
(a) Stock-in-trade			0.00	0.00
(b) Trade fixtures, etc.			0.00	0.00
(c) Cash in financial institutions			0.00	0.00
(d) Cash on hand			0.00	0.00
(e) Livestock			0.00	0.00
(f) Machinery, equipment and plant			0.00	0.00
(g) Furniture			0.00	0.00
(h) Life insurance policies, RRSPs, etc.			0.00	0.00
(i) Securities		Shareholdings - Share in MicroPlanet, Inc.	1.00	1.00
(j) Interests under wills, etc.			0.00	0.00
(k) Vehicles			0.00	0.00
(l) Taxes			0.00	0.00
(m) Other			0.00	0.00
			Total:	**1.00**

03-Oct-2016
Date

Wolfgang Struss

TAB 16

Execution Version

SINO-FOREST CORPORATION

AND

THE ENTITIES LISTED IN SCHEDULE A HERETO AS SUBSIDIARY GUARANTORS

AND

THE BANK OF NEW YORK MELLON AS TRUSTEE

INDENTURE
DATED AS OF DECEMBER 17, 2009

4.25% CONVERTIBLE SENIOR NOTES DUE 2016

to the Holder, in respect of each US$1,000 principal amount of Notes surrendered for conversion, a number of Common Shares equal to the applicable Conversion Rate (except that the Company will deliver cash in lieu of fractional Common Shares in accordance with Section 4.03).

(ii) If the Company elects to satisfy its conversion obligation through Cash Settlement, it shall pay to the Holder, in respect of each US$1,000 principal amount of Notes surrendered for conversion, cash in an amount equal to the Conversion Value.

(iii) If the Company elects to satisfy its conversion obligation through Combination Settlement, it shall pay or deliver, as the case may be, to the Holder, in respect of each US$1,000 principal amount of Notes surrendered for conversion:

(A) an amount in cash equal to the lesser of (1) the Conversion Value and (2) US$1,000; and

(B) if the Conversion Value is greater than US$1,000, a number of Common Shares per US$1,000 principal amount of Notes to be converted equal to the sum of the Daily Common Share Amounts for each of the Trading Days in the Cash Settlement Averaging Period (except that the Company will deliver cash in lieu of fractional Common Shares in accordance with Section 4.03).

ARTICLE 5
SUBSIDIARY GUARANTEES

Section 5.01. *The Subsidiary Guarantees.* Subject to the provisions of this Article 5, each of the Subsidiary Guarantors (whether originally a signatory hereto or added pursuant to a supplemental indenture) hereby, jointly and severally, Guarantees as principal obligor to each Holder of a Note authenticated by the Trustee or the Authenticating Agent and to the Trustee and its successors and assigns the due and punctual payment of the principal of, and interest on, and all other amounts payable under, the Notes and this Indenture.

Section 5.02. *Guarantee Unconditional.* The obligations of each Subsidiary Guarantor hereunder are unconditional and absolute and, without limiting the generality of the foregoing, will not be released, discharged or otherwise affected by:

(a) any extension, renewal, settlement, compromise, waiver or release in respect of any obligation of the Company under this Indenture or any Note, by operation of law or otherwise;

(b) any modification or amendment of or supplement to this Indenture or any Note;

(c) any change in the corporate existence, structure or ownership of the Company, or any insolvency, bankruptcy, reorganization or other similar proceeding affecting the Company or its assets or any resulting release or discharge of any obligation of the Company contained in this Indenture or any Note;

(d) the existence of any claim, set-off or other rights which the Subsidiary Guarantor may have at any time against the Company, the Trustee or any other Person, whether in connection with this Indenture or any unrelated transactions; *provided* that nothing herein prevents the assertion of any such claim by separate suit or compulsory counterclaim;

(e) any invalidity, irregularity, or unenforceability relating to or against the Company for any reason of this Indenture or any Note; or

(f) any other act or omission to act or delay of any kind by the Company, the Trustee or any other Person or any other circumstance whatsoever which might, but for the provisions of this paragraph, constitute a legal or equitable discharge of or defense to such Subsidiary Guarantor's obligations hereunder.

Section 5.03. *Discharge; Reinstatement.* Each Subsidiary Guarantor's obligations hereunder will remain in full force and effect until the principal of, and interest on, the Notes and all other amounts payable by the Company under this Indenture have been paid in full. If at any time any payment of the principal of, or interest on, any Note or any other amount payable by the Company under this Indenture is rescinded or must be otherwise restored or returned upon the insolvency, bankruptcy or reorganization of the Company or otherwise, each Subsidiary Guarantor's obligations hereunder with respect to such payment will be reinstated as though such payment had been due but not made at such time. All payments under the Subsidiary Guarantees will be made in such coins or currency of the United States as at the time of payment will be legal tender for the payment of public and private debt.

Section 5.04. *Waiver by Each Subsidiary Guarantor.* Each Subsidiary Guarantor irrevocably waives acceptance hereof, presentment, demand, protest and any notice not provided for herein, as well as any requirement that at any time any action be taken by any Person against the Company or any other Person. In particular, each Subsidiary Guarantor irrevocably waives its right to require the Trustee to pursue or exhaust the Trustee's legal or equitable remedies against the Company prior to exercising the Trustee's rights under the Subsidiary Guarantee.

Section 5.05. *Subrogation and Contribution.* Upon making any payment with respect to any obligation of the Company under this Article 5, the Subsidiary Guarantor making such payment will be subrogated to the rights of the payee against the Company with respect to such obligation; *provided* that the Subsidiary Guarantor may not enforce either any right of subrogation, or any right to receive payment in the nature of contribution, or otherwise, from any other Subsidiary Guarantor, with respect to such payment so long as any amount payable by the Company hereunder or under the Notes remains unpaid.

Section 5.06. *Stay of Acceleration.* If acceleration of the time for payment of any amount payable by the Company under this Indenture or the Notes is stayed upon the insolvency, bankruptcy or reorganization of the Company, all such amounts otherwise subject to acceleration under the terms of this Indenture are nonetheless payable by the Subsidiary Guarantors hereunder forthwith on demand by the Trustee or the Holders.

Section 5.07. *Limitation on Amount of Subsidiary Guarantee.* Notwithstanding anything to the contrary in this Article 5, each Subsidiary Guarantor, and by its acceptance of Notes, each

Holder, hereby confirms that it is the intention of all such parties that the Subsidiary Guarantee of such Subsidiary Guarantor not constitute a fraudulent conveyance under applicable fraudulent conveyance provisions of the United States Bankruptcy Code or any comparable law of any other jurisdiction. To effectuate that intention, the Trustee, the Holders and the Subsidiary Guarantors hereby irrevocably agree that the obligations of each Subsidiary Guarantor under its Subsidiary Guarantee are limited in an amount not to exceed the maximum amount that can be Guaranteed by the applicable Subsidiary Guarantor without rendering the Subsidiary Guarantee, as it relates to such Subsidiary Guarantor, voidable under applicable law relating to fraudulent conveyance or fraudulent transfer or similar laws affecting the rights of creditors generally.

Section 5.08. *Ranking of Subsidiary Guarantees.* The Subsidiary Guarantee of each Subsidiary Guarantor: (a) is a general senior unsubordinated obligation of such Subsidiary Guarantor; (b) is effectively subordinated to secured obligations of such Subsidiary Guarantor, to the extent of the value of the assets serving as security therefor; (c) ranks senior in right of payment to all existing and future obligations of such Subsidiary Guarantor expressly subordinated in right of payment to the Subsidiary Guarantee; and (d) ranks at least *pari passu* in right of payment with all other unsecured, unsubordinated Indebtedness of such Subsidiary Guarantor (subject to any priority rights of such unsubordinated Indebtedness pursuant to applicable law).

Section 5.09. *Further Subsidiary Guarantors.*

(a) The Company will, for the benefit of the Holders of the Notes, cause each of its future Subsidiaries (other than Persons organized under the laws of the People's Republic of China or any other jurisdiction that prohibits such Subsidiary from guaranteeing payments under the Notes), after the Issue Date, immediately upon becoming a Subsidiary, to execute and deliver to the Trustee a supplemental indenture to this Indenture pursuant to which such future Subsidiary will Guarantee the payment of the Notes.

(b) If Sino-Capital Global Inc. (BVI) (the "**Initial Non-Guarantor Subsidiary**"), would not be required to register as an investment company under the Investment Company Act of 1940, as amended, as determined in good faith by the Company within 30 days after the date on which the most recently available non-consolidated financial statements of the Initial Non-Guarantor Subsidiary and consolidated financial statements of the Company have been provided to the Trustee (or if not timely provided, would have been required to be provided) pursuant to this Indenture, the Company will promptly cause the Initial Non-Guarantor Subsidiary to execute and deliver to the Trustee a supplemental indenture to this Indenture, pursuant to which the Initial Non-Guarantor Subsidiary will Guarantee the payment of the Notes.

(c) If the Non-consolidated Cash of the Initial Non-Guarantor Subsidiary accounts for more than 10% of the Consolidated Cash of the Company, based on the most recently available non-consolidated financial statements of the Initial Non-Guarantor Subsidiary and consolidated financial statements of the Company which have been provided to the Trustee (or if not timely provided, required to be provided) pursuant to this Indenture, the Company shall, within 30 days after the date on which such financial statements are available and have been so provided (or if not timely provided, required to be provided), cause the Initial Non-Guarantor Subsidiary to execute and deliver to the Trustee a supplemental indenture to this Indenture, pursuant to which

the Initial Non-Guarantor Subsidiary will Guarantee the payment of the Notes, to ensure that after giving effect to such new Subsidiary Guarantee, the foregoing condition with respect to the Consolidated Cash of the Company will cease to exist.

(d) Each Subsidiary that Guarantees the Notes after the Issue Date is referred to as a "**Future Subsidiary Guarantor**" and, upon execution of the applicable supplemental indenture, will be a Subsidiary Guarantor.

Section 5.10. *Execution and Delivery of Guarantee.* The execution by each Subsidiary Guarantor of this Indenture (or a supplemental indenture in the form of Exhibit E) evidences the Subsidiary Guarantee of such Subsidiary Guarantor, whether or not the person signing as an Officer of the Subsidiary Guarantor still holds that office at the time of authentication of any Note. The delivery of any Note by the Trustee after authentication constitutes due delivery of the Subsidiary Guarantee set forth in this Indenture on behalf of each Subsidiary Guarantor.

Section 5.11. *Release of the Subsidiary Guarantees.*

(a) A Subsidiary Guarantee given by a Subsidiary Guarantor will be released:

(i) upon repayment in full of the Notes;

(ii) upon the sale of a Subsidiary Guarantor in compliance with the terms of this Indenture (including Section 7.02); and

(iii) if at any time when no Default has occurred and is continuing with respect to the Notes, such Subsidiary Guarantor no longer Guarantees any other Indebtedness of the Company or any other Subsidiary Guarantor; *provided* that, at the time of such release, the Subsidiary Guarantor is not a guarantor of any Relevant Indebtedness.

(b) No release of a Subsidiary Guarantor from its Subsidiary Guarantee shall be effective against the Trustee or the Holders of Notes (i) if a Default or Event of Default shall have occurred and be continuing under this Indenture as of the time of such proposed release until such time as such Default or Event of Default is cured or waived and (ii) until the Company has delivered to the Trustee an Officers' Certificate stating that all conditions precedent provided for in this Indenture relating to such release have been complied with and that such release is authorized and permitted under this Indenture. At the request of the Company, the Trustee will execute and deliver an instrument evidencing such release.

ARTICLE 6
COVENANTS

Section 6.01. *Payment of Notes.*

(a) The Company shall promptly make all payments in respect of the Notes on the dates and in the manner provided in the Notes and this Indenture. A payment of principal or interest shall be considered paid on the date it is due if the Paying Agent (other than the Company) holds no later than 10:00 a.m., New York City time, on the Business Day prior to that

SINO-FOREST CORPORATION

and

LAW DEBENTURE TRUST COMPANY OF NEW YORK
as Trustee

and

The entities listed on Schedule I hereto
as Subsidiary Guarantors

Indenture

Dated as of August 17, 2004

US$300,000,000

9 1/8% Guaranteed Senior Notes
Due 2011

Section 10.06. *Release of the Collateral.* (a) The security interest in respect of the Collateral granted hereby shall be fully released, upon (i) the repayment in full of the Notes or (ii) upon defeasance and discharge of the Notes as provided under Section 8.01 and 8.02; and may be partially or fully released, as the case may be, (iii) upon certain dispositions of Collateral in compliance with Sections 4.11, 4.14 or 5.01; or (iv) with respect to security granted by a Subsidiary Guarantor Pledgor, upon the release of the Subsidiary Guarantee of such Subsidiary Guarantor Pledgor in accordance with the terms of the Indenture.

(b) Upon request of the Company or any Subsidiary Guarantor, in connection with any sale, lease, sale and leaseback, assignment, conveyance, transfer or other disposition of assets or property permitted by this Indenture (including, without limitation, Sections 4.11, 4.14 and 5.01 hereof), the Trustee shall (without notice to, or vote or consent of, any Holder) take such actions as shall be required to release its security interest in any Collateral being disposed in such disposition, to the extent necessary to permit consummation of such disposition in accordance with this Indenture and the Security Documents and the Trustee shall receive full payment therefor from the Company for any costs incurred thereby.

(c) Any release of Collateral made in compliance with this Section 10.06 shall not be deemed to impair the Lien under the Security Documents or the Collateral thereunder in contravention of the provisions of this Indenture or the Security Documents.

(d) No purchaser or grantee of any property or rights purporting to be released herefrom shall be bound to ascertain the authority of the Trustee to execute the release or to inquire as to the existence of any conditions herein prescribed for the exercise of such authority; nor shall any purchaser or grantee of any property or rights permitted by this Indenture to be sold or otherwise disposed of by the Company and the Subsidiary Guarantors be under any obligation to ascertain or inquire into the authority of the Company or any Subsidiary Guarantor to make such sale or other disposition.

ARTICLE 11
SUBSIDIARY GUARANTIES

Section 11.01. *The Subsidiary Guaranties.* Subject to the provisions of this Article, each of the Subsidiary Guarantors (whether originally a signatory hereto or added pursuant to a supplemental indenture) hereby, jointly and severally, Guarantees as principal obligor to each Holder of a Note authenticated by the Trustee or the Authentication Agent and to the Trustee and its successors and assigns the due and punctual payment of the principal of, premium, if any, and interest on, and all other amounts payable under, the Notes.

Section 11.02. *Guarantee Unconditional.* The obligations of each Subsidiary Guarantor hereunder are unconditional and absolute and, without limiting the generality of the foregoing, will not be released, discharged or otherwise affected by

(1) any extension, renewal, settlement, compromise, waiver or release in respect of any obligation of the Company under the Indenture or any Note, by operation of law or otherwise;

(2) any modification or amendment of or supplement to the Indenture or any Note;

(3) any change in the corporate existence, structure or ownership of the Company, or any insolvency, bankruptcy, reorganization or other similar proceeding affecting the Company or its assets or any resulting release or discharge of any obligation of the Company contained in the Indenture or any Note;

(4) the existence of any claim, set-off or other rights which the Subsidiary Guarantor may have at any time against the Company, the Trustee or any other Person, whether in connection with the Indenture or any unrelated transactions, *provided* that nothing herein prevents the assertion of any such claim by separate suit or compulsory counterclaim;

(5) any invalidity, irregularity, or unenforceability relating to or against the Company for any reason of the Indenture or any Note, or

(6) any other act or omission to act or delay of any kind by the Company, the Trustee or any other Person or any other circumstance whatsoever which might, but for the provisions of this paragraph, constitute a legal or equitable discharge of or defense to such Subsidiary Guarantor's obligations hereunder.

Section 11.03. *Discharge; Reinstatement.* Each Subsidiary Guarantor's obligations hereunder will remain in full force and effect until the principal of, premium, if any, and interest on the Notes and all other amounts payable by the Company under the Indenture have been paid in full. If at any time any payment of the principal of, premium, if any, or interest on any Note or any other amount payable by the Company under the Indenture is rescinded or must be otherwise restored or returned upon the insolvency, bankruptcy or reorganization of the Company or otherwise, each Subsidiary Guarantor's obligations hereunder with respect to such payment will be reinstated as though such payment had been due but not made at such time. All payments under the Subsidiary Guarantees will be made in U.S. dollars.

Section 11.04. *Waiver by the Subsidiary Guarantors.* Each Subsidiary Guarantor irrevocably waives acceptance hereof, presentment, demand, protest and any notice not provided for herein, as well as any requirement that at any time any action be taken by any Person against the Company or any other Person.

Section 11.05. *Subrogation and Contribution.* Upon making any payment with respect to any obligation of the Company under this Article, the Subsidiary Guarantor making such payment will be subrogated to the rights of the payee against the Company with respect to such obligation, *provided* that the Subsidiary Guarantor may not enforce either any right of subrogation, or any right to receive payment in the nature of contribution, or otherwise, from any other Subsidiary Guarantor, with respect to such payment so long as any amount payable by the Company hereunder or under the Notes remains unpaid.

Section 11.06. *Stay of Acceleration.* If acceleration of the time for payment of any amount payable by the Company under the Indenture or the Notes is stayed upon the insolvency, bankruptcy or reorganization of the Company, all such amounts otherwise subject to acceleration under the terms of the Indenture are nonetheless payable by the Subsidiary Guarantors hereunder forthwith on demand by the Trustee or the Holders.

Section 11.07. *Limitation on Amount of Subsidiary Guarantee.* Notwithstanding anything to the contrary in this Article, each Subsidiary Guarantor, and by its acceptance of Notes, each Holder, hereby confirms that it is the intention of all such parties that the Subsidiary Guarantee of such Subsidiary Guarantor not constitute a fraudulent conveyance under applicable fraudulent conveyance provisions of the United States Bankruptcy Code or any comparable law of any other jurisdiction. To effectuate that intention, the Trustee, the Holders and the Subsidiary Guarantors hereby irrevocably agree that the obligations of each Subsidiary Guarantor under its Subsidiary Guarantee are limited in an amount not to exceed the maximum amount that can be guaranteed by the applicable Subsidiary Guarantor without rendering the Subsidiary Guarantee, as it relates to such Subsidiary Guarantor, voidable under applicable law relating to fraudulent conveyance or fraudulent transfer or similar laws affecting the rights of creditors generally.

Section 11.08. *Execution and Delivery of Guarantee.* The execution by each Subsidiary Guarantor of the Indenture (or a supplemental indenture in the form of Exhibit K) evidences the Subsidiary Guarantee of such Subsidiary Guarantor, whether or not the person signing as an officer of the Subsidiary Guarantor still holds that office at the time of authentication of any Note. The delivery of any Note by the Trustee after authentication constitutes due delivery of the Subsidiary Guarantee set forth in the Indenture on behalf of each Subsidiary Guarantor.

Section 11.09. *Release of the Subsidiary Guarantees.* (a) A Subsidiary Guarantee given by a Subsidiary Guarantor will be released upon,

(1) repayment in full of the Notes;

(2) a defeasance as provided in Section 8.02 and Section 8.03;

(3) the designation by the Company of a Subsidiary Guarantor as an Unrestricted Subsidiary in compliance with terms of the Indenture; or

(4) the sale of a Subsidiary Guarantor in compliance with the terms of the Indenture (including Sections 4.11, 4.14 and 5.01) resulting in such Subsidiary Guarantor no longer being a Restricted Subsidiary, so long as (i) such Subsidiary Guarantor is simultaneously released from its obligations in respect of any of the Company's other Indebtedness or any Indebtedness of any other Restricted Subsidiary and (ii) the proceeds from such sale or disposition are used for the purposes permitted or required by the Indenture.

(b) No release and discharge of the Subsidiary Guarantee will be effective against the Trustee, any Agent or the Holders of Notes (i) if a Default or Event of Default shall have occurred and be continuing under this Indenture as of the time of such proposed release and discharge until such time as such Default or Event of Default is cured or waived and (ii) until the Company shall have delivered to the Trustee an Officers' Certificate stating that all conditions precedent provided for in this Indenture and the Security Documents relating to such release and discharge have been complied with and that such release and discharge is authorized and permitted under this Indenture and the Security Documents. At the request of the Company, the Trustee will execute and deliver an instrument evidencing such release and discharge.

ARTICLE 12
MISCELLANEOUS

Section 12.01. *Ranking.* The Notes are (i) general obligations of the Company, (ii) guaranteed by the Subsidiary Guarantors on a senior basis, subject to certain limitations set forth in Article 11, (iii) senior in right of payment to any existing and future obligations of the Company expressly subordinated in right of payment to the Notes; and (iv) at least *pari passu* in right of payment with all other unsecured, unsubordinated Indebtedness of the Company (subject to any priority rights of such unsubordinated Indebtedness pursuant to applicable law). In addition, after the pledge of the Collateral by the Company and certain Subsidiary Guarantor Pledgors as set forth in Article 10 and subject to the

TAB 17

CITATION: Sino-Forest Corporation (Re), 2012 ONSC 7050
COURT FILE NO.: CV-12-9667-00CL
DATE: 20121212

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **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 SINO-FOREST CORPORATION, Applicant

BEFORE: **MORAWETZ J.**

COUNSEL: **Robert W. Staley, Kevin Zych, Derek J. Bell and Jonathan Bell, for Sino-Forest Corporation**

Derrick Tay, Jennifer Stam, and Cliff Prophet for the Monitor, FTI Consulting Canada Inc.

Robert Chadwick and Brendan O'Neill, for the Ad Hoc Committee of Noteholders

Kenneth Rosenberg, Kirk Baert, Max Starnino, and A. Dimitri Lascaris, for the Class Action Plaintiffs

Won J. Kim, James C. Orr, Michael C. Spencer, and Megan B. McPhee, for Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc.

Peter Griffin, Peter Osborne and Shara Roy, for Ernst & Young Inc.

Peter Greene and Ken Dekkar, for BDO Limited

Edward A. Sellers and Larry Lowenstein, for the Board of Directors of Sino-Forest Corporation

John Pirie and David Gadsden, for Poyry (Beijing)

James Doris, for the Plaintiff in the New York Class Action

David Bish, for the Underwriters

Simon Bieber and Erin Pleet, for David Horsley

James Grout, for the Ontario Securities Commission

Emily Cole and Joseph Marin, for Allen Chan

Susan E. Freedman and Brandon Barnes, for Kai Kit Poon

Paul Emerson, for ACE/Chubb

Sam Sasso, for Travelers

HEARD: DECEMBER 7, 2012

ENDORSED: DECEMBER 10, 2012

REASONS: DECEMBER 12, 2012

ENDORSEMENT

[1] On December 10, 2012, I released an endorsement granting this motion with reasons to follow. These are those reasons.

Overview

[2] The Applicant, Sino-Forest Corporation ("SFC"), seeks an order sanctioning (the "Sanction Order") a plan of compromise and reorganization dated December 3, 2012 as modified, amended, varied or supplemented in accordance with its terms (the "Plan") pursuant to section 6 of the *Companies' Creditors Arrangement Act* ("CCAA").

[3] With the exception of one party, SFC's position is either supported or is not opposed.

[4] Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc. (collectively, the "Funds") object to the proposed Sanction Order. The Funds requested an adjournment for a period of one month. I denied the Funds' adjournment request in a separate endorsement released on December 10, 2012 (*Re Sino-Forest Corporation*, 2012 ONSC 7041). Alternatively, the Funds requested that the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants".

[5] The defined terms have been taken from the motion record.

[6] SFC's counsel submits that the Plan represents a fair and reasonable compromise reached with SFC's creditors following months of negotiation. SFC's counsel submits that the Plan, including its treatment of holders of equity claims, complies with CCAA requirements and is consistent with this court's decision on the equity claims motions (the "Equity Claims Decision")

(2012 ONSC 4377, 92 C.B.R. (5th) 99), which was subsequently upheld by the Court of Appeal for Ontario (2012 ONCA 816).

[7] Counsel submits that the classification of creditors for the purpose of voting on the Plan was proper and consistent with the CCAA, existing law and prior orders of this court, including the Equity Claims Decision and the Plan Filing and Meeting Order.

[8] The Plan has the support of the following parties:

(a) the Monitor;

(b) SFC's largest creditors, the Ad Hoc Committee of Noteholders (the "Ad Hoc Noteholders");

(c) Ernst & Young LLP ("E&Y");

(d) BDO Limited ("BDO"); and

(e) the Underwriters.

[9] The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers Committee", also referred to as the "Class Action Plaintiffs") has agreed not to oppose the Plan. The Monitor has considered possible alternatives to the Plan, including liquidation and bankruptcy, and has concluded that the Plan is the preferable option.

[10] The Plan was approved by an overwhelming majority of Affected Creditors voting in person or by proxy. In total, 99% in number, and greater than 99% in value, of those Affected Creditors voting favoured the Plan.

[11] Options and alternatives to the Plan have been explored throughout these proceedings. SFC carried out a court-supervised sales process (the "Sales Process"), pursuant to the sales process order (the "Sales Process Order"), to seek out potential qualified strategic and financial purchasers of SFC's global assets. After a canvassing of the market, SFC determined that there were no qualified purchasers offering to acquire its assets for qualified consideration ("Qualified Consideration"), which was set at 85% of the value of the outstanding amount owing under the notes (the "Notes").

[12] SFC's counsel submits that the Plan achieves the objective stated at the commencement of the CCAA proceedings (namely, to provide a "clean break" between the business operations of the global SFC enterprise as a whole ("Sino-Forest") and the problems facing SFC, with the aspiration of saving and preserving the value of SFC's underlying business for the benefit of SFC's creditors).

Facts

[13] SFC is an integrated forest plantation operator and forest products company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China ("PRC"). SFC's registered office is located in Toronto and its principal business office is located in Hong Kong.

[14] SFC is a holding company with six direct subsidiaries (the "Subsidiaries") and an indirect majority interest in Greenheart Group Limited (Bermuda), a publicly-traded company. Including SFC and the Subsidiaries, there are 137 entities that make up Sino-Forest: 67 companies incorporated in PRC, 58 companies incorporated in British Virgin Islands, 7 companies incorporated in Hong Kong, 2 companies incorporated in Canada and 3 companies incorporated elsewhere.

[15] On June 2, 2011, Muddy Waters LLC ("Muddy Waters"), a short-seller of SFC's securities, released a report alleging that SFC was a "near total fraud" and a "Ponzi scheme". SFC subsequently became embroiled in multiple class actions across Canada and the United States and was subjected to investigations and regulatory proceedings by the Ontario Securities Commission ("OSC"), Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police.

[16] SFC was unable to file its 2011 third quarter financial statements, resulting in a default under its note indentures.

[17] Following extensive arm's length negotiations between SFC and the Ad Hoc Noteholders, the parties agreed on a framework for a consensual resolution of SFC's defaults under its note indentures and the restructuring of its business. The parties ultimately entered into a restructuring support agreement (the "Support Agreement") on March 30, 2012, which was initially executed by holders of 40% of the aggregate principal amount of SFC's Notes. Additional consenting noteholders subsequently executed joinder agreements, resulting in noteholders representing a total of more than 72% of aggregate principal amount of the Notes agreeing to support the restructuring.

[18] The restructuring contemplated by the Support Agreement was commercially designed to separate Sino-Forest's business operations from the problems facing the parent holding company outside of PRC, with the intention of saving and preserving the value of SFC's underlying business. Two possible transactions were contemplated:

(a) First, a court-supervised Sales Process to determine if any person or group of persons would purchase SFC's business operations for an amount in excess of the 85% Qualified Consideration;

(b) Second, if the Sales Process was not successful, a transfer of six immediate holding companies (that own SFC's operating business) to an acquisition vehicle to be owned by Affected Creditors in compromise of their claims against SFC. Further, the creation of a litigation trust (including funding) (the "Litigation Trust") to enable SFC's litigation claims against any person not otherwise released within the CCAA proceedings,

preserved and pursued for the benefit of SFC's stakeholders in accordance with the Support Agreement (concurrently, the "Restructuring Transaction").

[19] SFC applied and obtained an initial order under the CCAA on March 30, 2012 (the "Initial Order"), pursuant to which a limited stay of proceedings ("Stay of Proceedings") was also granted in respect of the Subsidiaries. The Stay of Proceedings was subsequently extended by orders dated May 31, September 28, October 10, and November 23, 2012, and unless further extended, will expire on February 1, 2013.

[20] On March 30, 2012, the Sales Process Order was granted. While a number of Letters of Intent were received in respect of this process, none were qualified Letters of Intent, because none of them offered to acquire SFC's assets for the Qualified Consideration. As such, on July 10, 2012, SFC announced the termination of the Sales Process and its intention to proceed with the Restructuring Transaction.

[21] On May 14, 2012, this court granted an order (the "Claims Procedure Order") which approved the Claims Process that was developed by SFC in consultation with the Monitor.

[22] As of the date of filing, SFC had approximately $1.8 billion of principal amount of debt owing under the Notes, plus accrued and unpaid interest. As of May 15, 2012, Noteholders holding in aggregate approximately 72% of the principal amount of the Notes, and representing more than 66.67% of the principal amount of each of the four series of Notes, agreed to support the Plan.

[23] After the Muddy Waters report was released, SFC and certain of its officers, directors and employees, along with SFC's former auditors, technical consultants and Underwriters involved in prior equity and debt offerings, were named as defendants in a number of proposed class action lawsuits. Presently, there are active proposed class actions in four jurisdictions: Ontario, Quebec, Saskatchewan and New York (the "Class Action Claims").

[24] *The Labourers v. Sino-Forest Corporation Class Action* (the "Ontario Class Action") was commenced in Ontario by Koskie Minsky LLP and Siskinds LLP. It has the following two components: first, there is a shareholder claim (the "Shareholder Class Action Claims") brought on behalf of current and former shareholders of SFC seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; second, there is a $1.8 billion noteholder claim (the "Noteholder Class Action Claims") brought on behalf of former holders of SFC's Notes. The noteholder component seeks damages for loss of value in the Notes.

[25] The Quebec Class Action is similar in nature to the Ontario Class Action, and both plaintiffs filed proof of claim in this proceeding. The plaintiffs in the Saskatchewan Class Action did not file a proof of claim in this proceeding, whereas the plaintiffs in the New York Class Action did file a proof of claim in this proceeding. A few shareholders filed proofs of claim separately, but no proof of claim was filed by the Funds.

[26] In this proceeding, the Ad Hoc Securities Purchasers Committee - represented by Siskinds LLP, Koskie Minsky, and Paliare Roland Rosenberg Rothstein LLP - has appeared to represent the interests of the shareholders and noteholders who have asserted Class Action Claims against SFC and others.

[27] Since 2000, SFC has had the following two auditors ("Auditors"): E&Y from 2000 to 2004 and 2007 to 2012 and BDO from 2005 to 2006.

[28] The Auditors have asserted claims against SFC for contribution and indemnity for any amounts paid or payable in respect of the Shareholder Class Action Claims, with each of the Auditors having asserted claims in excess of $6.5 billion. The Auditors have also asserted indemnification claims in respect the Noteholder Class Action Claims.

[29] The Underwriters have similarly filed claims against SFC seeking contribution and indemnity for the Shareholder Class Action Claims and Noteholder Class Action Claims.

[30] The Ontario Securities Commission ("OSC") has also investigated matters relating to SFC. The OSC has advised that they are not seeking any monetary sanctions against SFC and are not seeking monetary sanctions in excess of $100 million against SFC's directors and officers (this amount was later reduced to $84 million).

[31] SFC has very few trade creditors by virtue of its status as a holding company whose business is substantially carried out through its Subsidiaries in PRC and Hong Kong.

[32] On June 26, 2012, SFC brought a motion for an order declaring that all claims made against SFC arising in connection with the ownership, purchase or sale of an equity interest in SFC and related indemnity claims to be "equity claims" (as defined in section 2 of the CCAA). These claims encapsulate the commenced Shareholder Class Action Claims asserted against SFC. The Equity Claims Decision did not purport to deal with the Noteholder Class Action Claims.

[33] In reasons released on July 27, 2012, I granted the relief sought by SFC in the Equity Claims Decision, finding that the "the claims advanced in the shareholder claims are clearly equity claims." The Auditors and Underwriters appealed the decision and on November 23, 2012, the Court of Appeal for Ontario dismissed the appeal.

[34] On August 31, 2012, an order was issued approving the filing of the Plan (the "Plan Filing and Meeting Order").

[35] According to SFC's counsel, the Plan endeavours to achieve the following purposes:

(a) to effect a full, final and irrevocable compromise, release, discharge, cancellation and bar of all affected claims;

(b) to effect the distribution of the consideration provided in the Plan in respect of proven claims;

(c) to transfer ownership of the Sino-Forest business to Newco and then to Newco II, in each case free and clear of all claims against SFC and certain related claims against the Subsidiaries so as to enable the Sino-Forest business to continue on a viable, going concern basis for the benefit of the Affected Creditors; and

(d) to allow Affected Creditors and Noteholder Class Action Claimants to benefit from contingent value that may be derived from litigation claims to be advanced by the litigation trustee.

[36] Pursuant to the Plan, the shares of Newco ("Newco Shares") will be distributed to the Affected Creditors. Newco will immediately transfer the acquired assets to Newco II.

[37] SFC's counsel submits that the Plan represents the best available outcome in the circumstances and those with an economic interest in SFC, when considered as a whole, will derive greater benefit from the implementation of the Plan and the continuation of the business as a going concern than would result from bankruptcy or liquidation of SFC. Counsel further submits that the Plan fairly and equitably considers the interests of the Third Party Defendants, who seek indemnity and contribution from SFC and its Subsidiaries on a contingent basis, in the event that they are found to be liable to SFC's stakeholders. Counsel further notes that the three most significant Third Party Defendants (E&Y, BDO and the Underwriters) support the Plan.

[38] SFC filed a version of the Plan in August 2012. Subsequent amendments were made over the following months, leading to further revised versions in October and November 2012, and a final version dated December 3, 2012 which was voted on and approved at the meeting. Further amendments were made to obtain the support of E&Y and the Underwriters. BDO availed itself of those terms on December 5, 2012.

[39] The current form of the Plan does not settle the Class Action Claims. However, the Plan does contain terms that would be engaged if certain conditions are met, including if the class action settlement with E&Y receives court approval.

[40] Affected Creditors with proven claims are entitled to receive distributions under the Plan of (i) Newco Shares, (ii) Newco notes in the aggregate principal amount of U.S. $300 million that are secured and guaranteed by the subsidiary guarantors (the "Newco Notes"), and (iii) Litigation Trust Interests.

[41] Affected Creditors with proven claims will be entitled under the Plan to: (a) their *pro rata* share of 92.5% of the Newco Shares with early consenting noteholders also being entitled to their *pro rata* share of the remaining 7.5% of the Newco Shares; and (b) their *pro rata* share of the Newco Notes. Affected Creditors with proven claims will be concurrently entitled to their *pro rata* share of 75% of the Litigation Trust Interests; the Noteholder Class Action Claimants will be entitled to their *pro rata* share of the remaining 25% of the Litigation Trust Interests.

[42] With respect to the indemnified Noteholder Class Action Claims, these relate to claims by former noteholders against third parties who, in turn, have alleged corresponding indemnification claims against SFC. The Class Action Plaintiffs have agreed that the aggregate

amount of those former noteholder claims will not exceed the Indemnified Noteholder Class Action Limit of $150 million. In turn, indemnification claims of Third Party Defendants against SFC with respect to indemnified Noteholder Class Action Claims are also limited to the $150 million Indemnified Noteholder Class Action Limit.

[43] The Plan includes releases for, among others, (a) the subsidiary; (b) the Underwriters' liability for Noteholder Class Action Claims in excess of the Indemnified Noteholder Class Action Limit; (c) E&Y in the event that all of the preconditions to the E&Y settlement with the Ontario Class Action plaintiffs are met; and (d) certain current and former directors and officers of SFC (collectively, the "Named Directors and Officers"). It was emphasized that non-released D&O Claims (being claims for fraud or criminal conduct), conspiracy claims and section 5.1 (2) D&O Claims are not being released pursuant to the Plan.

[44] The Plan also contemplates that recovery in respect of claims of the Named Directors and Officers of SFC in respect of any section 5.1 (2) D&O Claims and any conspiracy claims shall be directed and limited to insurance proceeds available from SFC's maintained insurance policies.

[45] The meeting was carried out in accordance with the provisions of the Plan Filing and Meeting Order and that the meeting materials were sent to stakeholders in the manner required by the Plan Filing and Meeting Order. The Plan supplement was authorized and distributed in accordance with the Plan Filing and Meeting Order.

[46] The meeting was ultimately held on December 3, 2012 and the results of the meeting were as follows:

(a) the number of voting claims that voted on the Plan and their value for and against the Plan;

(b) The results of the Meeting were as follows:

a. the number of Voting Claims that voted on the Plan and their value for and against the Plan:

	Number of Votes	%	Value of Votes	%
Total Claims Voting For	250	98.81%	$ 1,465,766,204	99.97%
Total Claims Voting Against	3	1.19%	$ 414,087	0.03%
Total Claims Voting	253	100.00%	$ 1,466,180,291	100.00%

b. the number of votes for and against the Plan in connection with Class Action Indemnity Claims in respect of Indemnified Noteholder Class Action Claims up to the Indemnified Noteholder Limit:

	Vote For	Vote Against	Total Votes
Class Action Indemnity Claims	4	1	5

c. the number of Defence Costs Claims votes for and against the Plan and their value:

	Number of Votes	%		Value of Votes	%
Total Claims Voting For	12	92.31%	$	8,375,016	96.10%
Total Claims Voting Against	1	7.69%	$	340,000	3.90%
Total Claims Voting	13	100.00%	$	8,715,016	100.00%

d. the overall impact on the approval of the Plan if the count were to include Total Unresolved Claims (including Defence Costs Claims) and, in order to demonstrate the "worst case scenario" if the entire $150 million of the Indemnified Noteholder Class Action Limit had been voted a "no" vote (even though 4 of 5 votes were "yes" votes and the remaining "no" vote was from BDO, who has now agreed to support the Plan):

	Number of Votes	%		Value of Votes	%
Total Claims Voting For	263	98.50%	$	1,474,149,082	90.72%
Total Claims Voting Against	4	1.50%	$	150,754,087	9.28%
Total Claims Voting	267	100.00%	$	1,624,903,169	100.00%

[47] E&Y has now entered into a settlement ("E&Y Settlement") with the Ontario plaintiffs and the Quebec plaintiffs, subject to several conditions and approval of the E&Y Settlement itself.

[48] As noted in the endorsement dated December 10, 2012, which denied the Funds' adjournment request, the E&Y Settlement does not form part of the Sanction Order and no relief is being sought on this motion with respect to the E&Y Settlement. Rather, section 11.1 of the Plan contains provisions that provide a framework pursuant to which a release of the E&Y claims under the Plan will be effective if several conditions are met. That release will only be granted if all conditions are met, including further court approval.

[49] Further, SFC's counsel acknowledges that any issues relating to the E&Y Settlement, including fairness, continuing discovery rights in the Ontario Class Action or Quebec Class Action, or opt out rights, are to dealt with at a further court-approval hearing.

Law and Argument

[50] Section 6(1) of the CCAA provides that courts may sanction a plan of compromise if the plan has achieved the support of a majority in number representing two-thirds in value of the creditors.

[51] To establish the court's approval of a plan of compromise, the debtor company must establish the following:

(a) there has been strict compliance with all statutory requirements and adherence to previous orders of the court;

(b) nothing has been done or purported to be done that is not authorized by the CCAA; and

(c) the plan is fair and reasonable.

(See *Re Canadian Airlines Corporation*, 2000 ABQB 442, leave to appeal denied, 2000 ABCA 238, aff'd 2001 ABCA 9, leave to appeal to SCC refused July 21, 2001, [2001] S.C.C.A. No. 60 and Re Nelson Financial Group Limited, 2011 ONSC 2750, 79 C.B.R. (5th) 307).

[52] SFC submits that there has been strict compliance with all statutory requirements.

[53] On the initial application, I found that SFC was a "debtor company" to which the CCAA applies. SFC is a corporation continued under the *Canada Business Corporations Act* ("CBCA") and is a "company" as defined in the CCAA. SFC was "reasonably expected to run out of liquidity within a reasonable proximity of time" prior to the Initial Order and, as such, was and continues to be insolvent. SFC has total claims and liabilities against it substantially in excess of the $5 million statutory threshold.

[54] The Notice of Creditors' Meeting was sent in accordance with the Meeting Order and the revised Noteholder Mailing Process Order and, further, the Plan supplement and the voting procedures were posted on the Monitor's website and emailed to each of the ordinary Affected Creditors. It was also delivered by email to the Trustees and DTC, as well as to Globic who disseminated the information to the Registered Noteholders. The final version of the Plan was emailed to the Affected Creditors, posted on the Monitor's website, and made available for review at the meeting.

[55] SFC also submits that the creditors were properly classified at the meeting as Affected Creditors constituted a single class for the purposes of considering the voting on the Plan. Further, and consistent with the Equity Claims Decision, equity claimants constituted a single class but were not entitled to vote on the Plan. Unaffected Creditors were not entitled to vote on the Plan.

[56] Counsel submits that the classification of creditors as a single class in the present case complies with the commonality of interests test. See *Re Canadian Airlines Corporation*.

[57] Courts have consistently held that relevant interests to consider are the legal interests of the creditors hold *qua* creditor in relationship to the debtor prior to and under the plan. Further, the commonality of interests should be considered purposively, bearing in mind the object of the CCAA, namely, to facilitate reorganizations if possible. See *Stelco Inc*. (2005), 78 O.R. (3d) 241 (Ont. C.A.), *Re Canadian Airlines Corporation*, and *Re Nortel Networks Corporation* (2009) O.J. No. 2166 (Ont. S.C.). Further, courts should resist classification approaches that potentially jeopardize viable plans.

[58] In this case, the Affected Creditors voted in one class, consistent with the commonality of interests among Affected Creditors, considering their legal interests as creditors. The classification was consistent with the Equity Claims Decision.

[59] I am satisfied that the meeting was properly constituted and the voting was properly carried out. As described above, 99% in number, and more than 99% in value, voting at the meeting favoured the Plan.

[60] SFC's counsel also submits that SFC has not taken any steps unauthorized by the CCAA or by court orders. SFC has regularly filed affidavits and the Monitor has provided regular reports and has consistently opined that SFC is acting in good faith and with due diligence. The court has so ruled on this issue on every stay extension order that has been granted.

[61] In *Nelson Financial*, I articulated relevant factors on the sanction hearing. The following list of factors is similar to those set out in *Re Canwest Global Communications Corporation*, 2010 ONSC 4209, 70 C.B.R. (5th) 1:

1. The claims must have been properly classified, there must be no secret arrangements to give an advantage to a creditor or creditor; the approval of the plan by the requisite majority of creditors is most important;

2. It is helpful if the Monitor or some other disinterested person has prepared an analysis of anticipated receipts and liquidation or bankruptcy;

3. If other options or alternatives have been explored and rejected as workable, this will be significant;

4. Consideration of the oppression rights of certain creditors; and

5. Unfairness to shareholders.

6. The court will consider the public interest.

[62] The Monitor has considered the liquidation and bankruptcy alternatives and has determined that it does not believe that liquidation or bankruptcy would be a preferable alternative to the Plan. There have been no other viable alternatives presented that would be acceptable to SFC and to the Affected Creditors. The treatment of shareholder claims and related indemnity claims are, in my view, fair and consistent with CCAA and the Equity Claims Decision.

[63] In addition, 99% of Affected Creditors voted in favour of the Plan and the Ad Hoc Securities Purchasers Committee have agreed not to oppose the Plan. I agree with SFC's submission to the effect that these are exercises of those parties' business judgment and ought not to be displaced.

[64] I am satisfied that the Plan provides a fair and reasonable balance among SFC's stakeholders while simultaneously providing the ability for the Sino-Forest business to continue as a going concern for the benefit of all stakeholders.

[65] The Plan adequately considers the public interest. I accept the submission of counsel that the Plan will remove uncertainty for Sino-Forest's employees, suppliers, customers and other stakeholders and provide a path for recovery of the debt owed to SFC's non-subordinated creditors. In addition, the Plan preserves the rights of aggrieved parties, including SFC through the Litigation Trust, to pursue (in litigation or settlement) those parties that are alleged to share some or all of the responsibility for the problems that led SFC to file for CCAA protection. In addition, releases are not being granted to individuals who have been charged by OSC staff, or to other individuals against whom the Ad Hoc Securities Purchasers Committee wishes to preserve litigation claims.

[66] In addition to the consideration that is payable to Affected Creditors, Early Consent Noteholders will receive their *pro rata* share of an additional 7.5% of the Newco Shares ("Early Consent Consideration"). Plans do not need to provide the same recovery to all creditors to be considered fair and reasonable and there are several plans which have been sanctioned by the courts featuring differential treatment for one creditor or one class of creditors. See, for example, *Canwest Global* and *Re Armbro Enterprises Inc.* (1993), 22 C.B.R. (3d) 80 (Ont. Gen. Div.). A common theme permeating such cases has been that differential treatment does not necessarily result in a finding that the Plan is unfair, as long as there is a sufficient rational explanation.

[67] In this case, SFC's counsel points out that the Early Consent Consideration has been a feature of the restructuring since its inception. It was made available to any and all noteholders and noteholders who wished to become Early Consent Noteholders were invited and permitted to do so until the early consent deadline of May 15, 2012. I previously determined that SFC made available to the noteholders all information needed to decide whether they should sign a joinder agreement and receive the Early Consent Consideration, and that there was no prejudice to the noteholders in being put to that election early in this proceeding.

[68] As noted by SFC's counsel, there was a rational purpose for the Early Consent Consideration. The Early Consent Noteholders supported the restructuring through the CCAA proceedings which, in turn, provided increased confidence in the Plan and facilitated the negotiations and approval of the Plan. I am satisfied that this feature of the Plan is fair and reasonable.

[69] With respect to the Indemnified Noteholder Class Action Limit, I have considered SFC's written submissions and accept that the $150 million agreed-upon amount reflects risks faced by both sides. The selection of a $150 million cap reflects the business judgment of the parties making assessments of the risk associated with the noteholder component of the Ontario Class Action and, in my view, is within the "general range of acceptability on a commercially reasonable basis". See *Re Ravelston Corporation*, (2005) 14 C.B.R. (5^{th}) 207 (Ont. S.C). Further, as noted by SFC's counsel, while the New York Class Action Plaintiffs filed a proof of claim, they have not appeared in this proceeding and have not stated any opposition to the Plan, which has included this concept since its inception.

[70] Turning now to the issue of releases of the Subsidiaries, counsel to SFC submits that the unchallenged record demonstrates that there can be no effective restructuring of SFC's business and separation from its Canadian parent if the claims asserted against the Subsidiaries arising out of or connected to claims against SFC remain outstanding. The Monitor has examined all of the releases in the Plan and has stated that it believes that they are fair and reasonable in the circumstances.

[71] The Court of Appeal in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corporation*, 2008 ONCA 587, 45 C.B.R. (5th) 163 stated that the "court has authority to sanction plans incorporating third party releases that are reasonably related to the proposed restructuring".

[72] In this case, counsel submits that the release of Subsidiaries is necessary and essential to the restructuring of SFC. The primary purpose of the CCAA proceedings was to extricate the business of Sino-Forest, through the operation of SFC's Subsidiaries (which were protected by the Stay of Proceedings), from the cloud of uncertainty surrounding SFC. Accordingly, counsel submits that there is a clear and rational connection between the release of the Subsidiaries in the Plan. Further, it is difficult to see how any viable plan could be made that does not cleanse the Subsidiaries of the claims made against SFC.

[73] Counsel points out that the Subsidiaries who are to have claims against them released are contributing in a tangible and realistic way to the Plan. The Subsidiaries are effectively contributing their assets to SFC to satisfy SFC's obligations under their guarantees of SFC's note indebtedness, for the benefit of the Affected Creditors. As such, counsel submits the releases benefit SFC and the creditors generally.

[74] In my view, the basis for the release falls within the guidelines previously set out by this court in *ATB Financial*, *Re Nortel Networks*, 2010 ONSC 1708, and *Re Kitchener Frame Limited*, 2012 ONSC 234, 86 C.B.R. (5th) 274. Further, it seems to me that the Plan cannot succeed without the releases of the Subsidiaries. I am satisfied that the releases are fair and reasonable and are rationally connected to the overall purpose of the Plan.

[75] With respect to the Named Directors and Officers release, counsel submits that this release is necessary to effect a greater recovery for SFC's creditors, rather than having those directors and officers assert indemnity claims against SFC. Without these releases, the quantum of the unresolved claims reserve would have to be materially increased and, to the extent that any such indemnity claim was found to be a proven claim, there would have been a corresponding dilution of consideration paid to Affected Creditors.

[76] It was also pointed out that the release of the Named Directors and Officers is not unlimited; among other things, claims for fraud or criminal conduct, conspiracy claims, and section 5.1 (2) D&O Claims are excluded.

[77] I am satisfied that there is a reasonable connection between the claims being compromised and the Plan to warrant inclusion of this release.

[78] Finally, in my view, it is necessary to provide brief comment on the alternative argument of the Funds, namely, the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants". The Plan was presented to the meeting with Article 11 in place. This was the Plan that was subject to the vote and this is the Plan that is the subject of this motion. The alternative proposed by the Funds was not considered at the meeting and, in my view, it is not appropriate to consider such an alternative on this motion.

Disposition

[79] Having considered the foregoing, I am satisfied that SFC has established that:

(i) there has been strict compliance with all statutory requirements and adherence to the previous orders of the court;

(ii) nothing has been done or purported to be done that is not authorized by the CCAA; and

(iii) the Plan is fair and reasonable.

[80] Accordingly, the motion is granted and the Plan is sanctioned. An order has been signed substantially in the form of the draft Sanction Order.

MORAWETZ J.

Date: December 12, 2012

TAB 18

2009 ABQB 316
Alberta Court of Queen's Bench

EarthFirst Canada Inc., Re

2009 CarswellAlta 1069, 2009 ABQB 316, [2009] A.W.L.D. 3179,
[2009] A.W.L.D. 3180, 183 A.C.W.S. (3d) 631, 56 C.B.R. (5th) 102

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 EarthFirst Canada Inc.

B.E. Romaine J.

Heard: May 13, 2009
Judgment: May 27, 2009 *
Docket: Calgary 0801-13559

Counsel: Kelly J. Bourassa, Scott Kurie for Indemnity Claimants of EarthFirst Canada Inc.
Howard A. Gorman for EarthFirst Canada Inc.
A. Robert Anderson, Q.C., Eric D. Stearns for Monitor, Ernst & Young Inc.

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

IX Proving claim
IX.1 Provable debts
IX.1.g Claims of director, officer or shareholder of bankrupt corporation

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.e Proceedings subject to stay
XIX.2.e.vi Miscellaneous

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Company issued flow-throw common shares — Under subscription agreement for shares, company made covenant to renounce to subscriber qualifying expenditures under ss. 66(12.6) and 66(12.66) of Income Tax Act, or indemnify subscriber for tax payable as consequence of failure to renounce — Company brought application for declaration as to proper characterization of claims under indemnity for purpose of proposed plan of arrangement under Companies' Creditors Arrangement Act — Potential claims were in substance equity obligations rather than debt or creditor obligations — Claims ranked behind claims made by creditors of company and would not participate in any creditor plan or distribution — Issue was determined by finding of Court of Appeal in prior case that debt features associated with indemnity did not transform that part of relationship from shareholder relationship into debt relationship.

Bankruptcy and insolvency --- Proving claim — Provable debts — Claims of director, officer or shareholder of bankrupt corporation

Company issued flow-throw common shares — Under subscription agreement for shares, company made covenant to renounce to subscriber qualifying expenditures under ss. 66(12.6) and 66(12.66) of Income Tax Act, or indemnify subscriber for tax payable as consequence of failure to renounce — Company brought application for declaration as to proper characterization of claims under indemnity for purpose of proposed plan of arrangement under Companies' Creditors Arrangement Act — Potential claims were in substance equity obligations rather than debt or creditor obligations — Claims ranked behind claims made by creditors of company and would not participate in any creditor plan or distribution — Issue was determined by finding of Court of Appeal in prior case that debt features associated with indemnity did not transform that part of relationship from shareholder relationship into debt relationship.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

Canada Deposit Insurance Corp. v. Canadian Commercial Bank (1992), 5 Alta. L.R. (3d) 193, [1992] 3 S.C.R. 558, 16 C.B.R. (3d) 154, 7 B.L.R. (2d) 113, (sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3)*) 131 A.R. 321, (sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3)*) 25 W.A.C. 321, 1992 CarswellAlta 790, 97 D.L.R. (4th) 385, (sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3)*) 143 N.R. 321, 1992 CarswellAlta 298 (S.C.C.) — referred to

I. Waxman & Sons Ltd., Re (2008), 89 O.R. (3d) 427, 39 E.T.R. (3d) 49, 44 B.L.R. (4th) 295, 2008 CarswellOnt 1245, 40 C.B.R. (5th) 307, 64 C.C.E.L. (3d) 233 (Ont. S.C.J. [Commercial List]) — referred to

National Bank of Canada v. Merit Energy Ltd. (2001), 2001 ABQB 583, 2001 CarswellAlta 913, 28 C.B.R. (4th) 228, [2001] 10 W.W.R. 305, 95 Alta. L.R. (3d) 166, 294 A.R. 15 (Alta. Q.B.) — followed

National Bank of Canada v. Merit Energy Ltd. (2002), 2002 ABCA 5, 2002 CarswellAlta 23, [2002] 3 W.W.R. 215, 96 Alta. L.R. (3d) 1, 299 A.R. 200, 266 W.A.C. 200 (Alta. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 140.1 [en. 2005, c. 47, s. 90; rep. & sub. 2007, c. 36, s. 49] — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

APPLICATION for declaration as to proper characterization of flow-through shares for purpose of proposed plan of arrangement under *Companies' Creditors Arrangement Act*.

***B.E. Romaine J.*:**

Introduction

1 Earthfirst Canada Inc. seeks a declaration as the proper characterization of potential claims of holders of its flow-through common shares for the purpose of a proposed plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended. The issue is whether contingent claims that the flow-through subscribers may have are, at their core, equity obligations rather than debt or creditor obligations and, as such, necessarily rank behind claims made by the creditors of Earthfirst. I decided that the potential claims are in substance equity obligations and these are my reasons.

Facts

2 The flow-through shares at issue were distributed in December, 2007 as part of an initial public offering of common shares and flow-through shares. The common shares plus one-half of a warrant were offered at a price of $2.25 per unit. The flow-through shares were offered at a price of $2.60 per share. Investors who wished to purchase flow-through shares were required to execute a subscription agreement which included the following covenants of Earthfirst:

> 6.(b) to incur, during the Expenditure Period, Qualifying Expenditures in such amount as enables the Corporation to renounce to each Subscriber, Qualifying Expenditures in an amount equal to the Commitment Amount of such Subscriber;
>
> (c) to renounce to each Subscriber, pursuant to subsection 66(12.6) and 66(12.66) of the Tax Act and this Subscription Agreement, effective on or before December 31, 2007, Qualifying Expenditures incurred during the Expenditure Period in an amount equal to the Commitment Amount of such Subscriber;
>
> . . . . .
>
> (g) if the Corporation does not renounce to the Subscriber, Qualifying Expenditures equal to the Commitment Amount of such Subscriber effective on or before December 31, 2007 and as the sole recourse to the Subscriber for such failure, the Corporation shall indemnify the Subscriber as to, and pay to the Subscriber, an amount equal to the amount of any tax payable under the Tax Act (and under any corresponding provincial legislation) by the Subscriber (or if the Subscriber is a partnership, by the partners thereof) as a consequence of such failure, such payment to be made on a timely basis once the amount is definitively determined, provided that for certainty the limitation of the Corporation's obligation to indemnify the Subscriber pursuant to this Section shall not apply to limit the Corporation's liability in the event of a breach by the Corporation of any other covenant, representation or warranty pursuant to this Agreement or the Underwriting Agreement;

3 Certain conditions were required to be satisfied before expenditures made by Earthfirst would qualify as "Qualifying Expenditures" pursuant to the *Income Tax Act* and the associated regulations. Because construction of Earthfirst's Dokie 1 wind power project was interrupted by events triggered by the CCAA filing, it may be that Earthfirst will not be able to satisfy some of these conditions. While Earthfirst is seeking a purchaser of the Dokie 1 project assets, and that purchaser may complete the necessary requirements for expenditures to be considered "Qualifying Expenditures", there is presently no guarantee that the necessary conditions will be met. The subscribers for flow-through shares may therefore have a claim under the indemnity set out in the subscription agreement.

Issue

Are the claims under the indemnity debt claims or claims for the return of an equity investment?

Analysis

The flow-through share subscribers submit that their indemnity claims are not claims for the return of capital. Counsel for the flow-through share subscribers makes some persuasive arguments in that regard, including:

> (a) that the underlying rights that form the basis of the claims are severable and distinct from the status of subscribers as shareholders of Earthfirst, in that the flow-through shares are composed of two distinct

components, being common shares and the subscriber's right to the renunciation of a certain amount of tax credit or the right to be indemnified for tax credit not so renounced. It is submitted that further evidence of the distinct and severable nature of the indemnity claim can be found in the fact that, while the common share component of the flow-through shares can be transferred, the flow-through benefits accrue only to original subscribers;

(b) that the claimants in advancing a claim under the indemnity are not advancing a claim for the return of their investment in common shares;

(c) that the rights and obligations that form the basis of the indemnity claim are set out in the subscription agreement, which indicates an intention to create a debt obligation in the indemnity provisions; and

(d) that the claim under the indemnity is limited to a specific amount as compared to the unlimited upside potential of any equity investment, and that thus one of the policy reasons for drawing a distinction between debt and equity in the context of insolvency does not apply to an indemnity claim.

[4] On the other side of the argument, it is clear that the indemnity claim derives from the original status of the subscribers as subscribers of shares, that the claim was acquired as part of an investment in shares, and that any recovery on the indemnity would serve to recoup a portion of what the subscriber originally invested, primarily qua shareholder. While it may be true that equity may become debt, as, for instance, in the case of declared dividends or a claim reduced to a judgment debt (*I. Waxman & Sons Ltd., Re*, [2008] O.J. No. 885 (Ont. S.C.J. [Commercial List]) at para 24 and 25), the indemnity claim has not undergone a transformation from its original purpose as a "sweetener" to the offering of common shares, even if individual subscribers have since sold the shares to which it was attached. The renunciation of flow-through tax credits, despite the payment of a premium for this feature, can be characterized as incidental or secondary to the equity features of the investment, a marketing feature that provided an alternative to the share plus warrant tranche of the public offering for investors who found the feature attractive: *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] S.C.J. No. 96 (S.C.C.) at para. 54.

[5] This type of indemnity skirts close to the line that courts are attempting to draw with respect to the characterization and ranking of equity and equity-type investments in the insolvency context. In Alberta, that line is drawn by the decision of LoVecchio, J. in *National Bank of Canada v. Merit Energy Ltd.*, [2001] A.J. No. 918 (Alta. Q.B.), upheld by the Court of Appeal at [2002] A.J. No. 6 (Alta. C.A.). The indemnity at issue in Merit Energy was substantially identical to the one at issue in this case. While Lovecchio, J. appeared to refer to elements of misrepresentation arising from prospectus disclosure with respect to the Merit indemnity claim at para. 29 of the decision, it is clear that he considered the debt features of the indemnity in his later analysis, and noted at para. 54 that:

> While the Flow-Through Shareholders paid a premium for the shares (albeit to get the deductions), in my view the debt features associated with the CEE indemnity from Merit do not "transform' that part of the relationship from a shareholder relationship into a debt relationship. That part of the relationship remains "incidental" to being a shareholder.

The Court of Appeal in dismissing the appeal commented:

> Counsel for the appellant stresses the express indemnity covenant here, but in our view, it is ancillary to the underlying right, as found by the chambers judge. Characterization flows from the underlying right, not from the mechanism for its enforcement, nor from its non-performance.

The decision in Merit Energy thus determines the issue in this case, which is not distinguishable on any basis that is relevant to the issue. I also note that, while it is not determinative of the issue as the legislation has not yet been proclaimed, section 49 of Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act*, the *Companies' Creditors Act*, the *Wage Protection Program Act* and Chapter 47 of the *Statues of Canada*, 2005, 2 nd Sess., 39 th Parl., 2007, ss. 49, 71

[Statute c.36] provides that a creditor is not entitled to a dividend in respect of any equity claim until all other claims are satisfied. Equity Claims are defined as including:

> (a) a dividend or similar payment,
>
> (b) a return of capital,
>
> (c) a redemption or retraction obligation,
>
> (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> (e) contribution or indemnity in respect of a claim referred to in any paragraphs (a) to (d) [emphasis added].

Conclusion

I therefore grant:

> a) a declaration that potential claims that holders of flow-through common shares in Earthfirst may have against Earthfirst, if any, are at their core equity obligations rather than debt or creditor obligations, and, as such, necessarily rank behind in priority to claims made by creditors of Earthfirst and will not participate in any creditor plan or distribution; and
>
> b) an order permitting Earthfirst to make certain payment to its creditors pursuant to a Plan of Arrangement in an amount and upon such terms to be determined by this Honourable Court at the date of this application without regard to any contingent or other claims of the flow-through shareholders or subscribers.
>
> *Order accordingly.*

Footnotes

* A corrigendum issued by the court on July 8, 2009 has been incorporated herein.

End of Document