Estate No.51-1793121
Court No. 19522

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

IN BANKRUPTCY AND INSOLVENCY

JUDICIAL DISTRICT OF MONCTON

IN THE MATTER OF the Proposal of
JEANIE MARSHAL FOODS CANADA INC.,
under the *Bankruptcy and Insolvency Act*,
R.S.C. 1985, c. B-3

JEANIE MARSHAL FOODS CANADA INC.

Applicant

BOOK OF AUTHORITIES OF THE APPLICANT

Ben Durnford
McInnes Cooper
Solicitors for the Applicant, being
the Proposal Trustee of Jeanie Marshal Foods Canada Inc.
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INDEX

TAB 1

Case Name:

W.R.T. Equipment Ltd. (Re)

IN THE MATTER OF the proposal of W.R.T. Equipment Ltd., an insolvent person
AND IN THE MATTER OF an application by the Trustee of the proposal of W.R.T. Equipment Ltd. for Court approval pursuant to section 58 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

[2003] S.J. No. 181

2003 SKQB 93

231 Sask.R. 129
41 C.B.R. (4th) 288
39 C.C.P.B. 153
121 A.C.W.S. (3d) 420
2003 CarswellSask 184

Bankruptcy No. 8751 of J.C.R.

Saskatchewan Court of Queen's Bench
(In Bankruptcy and Insolvency)
Judicial Centre of Regina

Zarzeczny J.

February 27, 2003.

(18 paras.)

Bankruptcy — Proposals — Application of bankruptcy provisions to proposals — Court approval, considerations — Public interest — Creditors — Priorities — Precedence of Bankruptcy and Insolvency Act over provincial legislation.

Application by WRT Equipment for court approval of a Proposal pursuant to section 58 of the Bankruptcy and Insolvency Act. On January 13, 2003, the Trustee made an application to the Registrar in Bankruptcy for court approval of the Proposal. Tilk, a former employee of WRT and an unsecured creditor, filed a Notice of Objection. WRT was bound by a collective bargaining agreement with its employees in which it agreed to fund a pension plan. Under the terms of the Agreement, Tilk had a deficiency in his pension plan of $18,834. Tilk took the position that the members of the employee pension plan, who had been classified as unsecured creditors, should be reclassified. He submitted that the unfunded pension liabilities constituted trust funds pursuant to the Pension Benefits Act. According to Tilk, the pension fund claimants were entitled to preferred or secured creditor status in the Proposal.

HELD: Order granting court approval of the Proposal. The evidence indicated that the unsecured creditors would do better under WRT's Proposal than if the Proposal was rejected by the Court. If it were to be rejected, WRT would be placed into bankruptcy. The Proposal fulfilled all statutory and judicial criteria, taking into account the interests of the debtor, general body of creditors and

the public. Provincially created statutory trusts, such as the one created by The Pension Benefits Act, were not recognized in bankruptcy, including Proposals submitted under the Bankruptcy and Insolvency Act. Accordingly, Tilk's objection did not constitute a valid ground legal objection to the Proposal.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 50(13), 58, 59(1), 59(2), 66(1), 67(2), 92, 198, 199, 200. Pension Benefits Act, 1992, S.S. 1992, c. P-6.001, s. 43(3).

Counsel:

Jeffrey M. Lee, for W.R.T. Equipment Ltd., an insolvent person.
M. Kim Anderson, for Precismeca Ltd., an unsecured creditor.
Eldon Tilk, for himself, an unsecured creditor.
Jeffrey W. Pinder, Trustee for the Proposal of W.R.T. Equipment Ltd.

JUDGMENT

1 ZARZECZNY J.:— W.R.T. Equipment Ltd. ("W.R.T." or the "Company") applies for an order granting court approval of a proposal made by it to its creditor (the "W.R.T. Proposal" or "Proposal") pursuant to Part III of Division I of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA").

2 Section 59 of the BIA governs applications for approval of an insolvent person's Proposal under the BIA and it provides as follows:

> 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 Mr. Jeffrey Pinder, a chartered insolvency and restructuring practitioner and a principal of the firm, Jeffrey Pinder & Associates Inc., a trustee licensed in bankruptcy pursuant to the BIA has been appointed by the Company to act as trustee of its Proposal (the "Trustee"). Since filing the Proposal with the Official Receiver for the Saskatoon Bankruptcy District on November 12, 2002, two meetings of the creditors were held on December 3, 2002 and December 17, 2002. At the December 3 meeting approximately 93 percent of W.R.T.'s creditors who had proven claims voted in favour of accepting the Proposal. The meeting of creditors was adjourned to December 17 to allow certain questions raised by the creditors at the December 3 meeting to be further investigated and to permit examination of the director of the Company. At the reconvened December 17, 2002 meeting approximately 89 percent of the creditors voted in favour of acceptance of the Proposal.

4 On January 13, 2003 the Trustee made an application to the Registrar in Bankruptcy for court approval of the Proposal. A Notice of Objection to this application was filed on behalf of an

unsecured creditor, Mr. Eldon Tilk, which necessitated the Proposal being referred to a judge of this Court in Bankruptcy & Insolvency for court approval.

5 Mr. Tilk is a former 28-year employee of the Company. The Company was bound by the terms of a collective bargaining agreement applicable to certain of its production employees including Mr. Tilk. Under the agreement the Company and employees agreed to fund a pension plan. Because of the Company's financial difficulties (ultimately leading to these proceedings under the BIA) steps were taken by the Superintendent of Pensions for Saskatchewan to transfer the pension plan out of the Company's hands which has now been done. A new plan administrator has been appointed.

6 It is common ground that although the Company made all of its regular required contributions to this pension plan as of the date of its transfer a significant unfunded liability existed determined to be $156,249.00. Under the terms of the collective agreement any such deficiency was the responsibility of the Company. Insofar as its impact upon Mr. Tilk is concerned it left a deficiency in his pension plan of $18,834.00.

7 Mr. Tilk objects to the requested court approval of the Proposal on the following grounds:

(1) that the pension plan members should be treated as a different class of creditor than the unsecured creditor classification ascribed to them by the Proposal;

(2) that the indemnification of past directors etc. proposed by the terms of the Proposal is inappropriately wide.

8 The applicant Company and the Trustee accept that the terms of the indemnity set out in the Proposal with respect to present and past officers and directors etc. is too widely cast and inappropriate. In other words the proponents are in agreement with the second ground of Mr. Tilk's objection and they accede to an amendment of the Proposal on this basis as a clerical amendment. Apparently this clause may well have been somewhat of a "boiler plate" not appropriately inserted into the terms of this Proposal.

9 Since there will be no prejudice to the creditors in accepting and treating it as such the Court authorizes the amendment of the Proposal as set out in the revised para. 2 of the draft order filed upon this application pursuant to Rule 92 of the BIA Rules (see Re Cosmic Adventures Halifax Inc. (1999), 13 C.B.R. (4th) 22 (N.S.S.C.)). In the result the proposed amended para. 9.1 of the W.R.T. Proposal is now consistent with the provisions of ss. 50(13) of the BIA and it is ordered accordingly.

10 The Court now turns its attention to the more substantive basis upon which Mr. Tilk opposes court approval of the applicant's Proposal namely; that members of the employee pension plan who have been classified unsecured creditors (by virtue of the Company's indebtedness for the unfunded portion of their pension plans) should be reclassified in some other category of creditor. Mr. Tilk proposes a separate class with an enhanced recovery over and above the approximately 0.275 cents on the dollar which unsecured creditors whose claims exceed $1,500.00 are expected to receive under the Proposal. It should be noted at this point that there are 15 employees in the same position as Mr. Tilk; 12 voted in favour of the Proposal, 2 failed to file proofs of their claims and 1, Mr. Tilk, opposes.

11 Mr. Tilk submits that the unfunded pension liabilities constitute trust funds pursuant to provincial pensions legislation (s. 43(3) of The Pension Benefits Act, 1992, S.S. 1992, c. P-6.001). As such the pension fund claimants are entitled to preferred or secured creditor status and this should be recognized in the Proposal.

12 The Court is much in sympathy with the concerns which Mr. Tilk has raised by his objection and the submissions made on his behalf at the hearing of this application. Absent the application

of the provisions of the BIA to an employer it is clear that an employer's indebtedness to an employee pension plan does give the pensioners preferred creditor status by virtue of s. 43(3) of The Pension Benefits Act, 1992. With the intervention of the BIA, and proceedings under that Act, including the presentation of a Proposal, a combination of s. 66(1) and s. 67(2) of the Act as judicially interpreted results in another conclusion (see Continental Casualty Co. et al. v. Macleod-Stedman Inc. (1996), 141 D.L.R. (4th) 36 (Man. C.A.); Husky Oil Operations Ltd. v. M.N.R. (1995), 128 D.L.R. (4th) 1 (S.C.C.)). Provincially created statutory trusts, such as the one created by The Pension Benefits Act, 1992 are not recognized in bankruptcy, including Proposals submitted under the BIA.

13 That is the legal position in which Mr. Tilk and his fellow pensioners find themselves in the face of this Proposal and the provisions of the BIA. The Trustee and the Company acted appropriately in identifying the nature and status of the pensioners' claims. The specific objection raised by Mr. Tilk, although it might have reflected the status of his claim against the employer outside of the BIA, does not constitute a valid ground of legal objection to the Proposal made pursuant to the BIA.

14 The Court is satisfied that the evidence presented overwhelmingly supports the conclusion that the unsecured creditors will do better under the applicant's Proposal than they stand to do if the Proposal is rejected by this Court. If rejected the applicant is placed into bankruptcy by virtue of the BIA. It is noteworthy that at present 89 percent of all creditors have reached the same apparent conclusion in voting in favour of acceptance of the Proposal.

15 This Court's obligation under s. 59(2) of the BIA is to consider whether the Proposal is reasonable and calculated to benefit the general body of creditors. Decisions interpreting this provision have established the proposition that determining whether or not a proposal is reasonable means that a proposal must have a reasonable possibility of being successfully completed in accordance with its terms (see Re McNamara and McNamara (1984), 53 C.B.R. (N.S.) 240 (Ont. S.C.)).

16 The function of the Court when called upon to approve a proposal is to take into account several interests including; (a) 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), (b) the general body of creditors (to protect creditors generally by insuring that what is put up by way of a proposal is a reasonable one), and (c) the public-at-large in maintaining the integrity of bankruptcy legislation (including considering whether or not the proposal complies with standards of commercial morality). (See Re Stone (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.); Re Sumner Co. (1984) Ltd. (1987), 64 C.B.R. (N.S.) 218 (N.B.Q.B.); Irving Oil Ltd. v. Noseworthy et al. (1982), 42 C.B.R. (N.S.) 302 (Nfld S.C.)).

17 Taking into account all of these interests the Court has concluded, in the circumstances reviewed and for the reasons outlined in this judgment, that the Proposal presented by W.R.T. does meet the statutory and judicial criteria for acceptance by this Court. Accordingly the Proposal is accepted and the draft order filed may issue including the amendment to para. 9.1 of the Proposal.

18 No costs are awarded for or against any of the parties each of whom shall assume their own costs of representation at the hearing.

ZARZECZNY J.

cp/e/nc/qw/qlebh

Search Terms [W.R.T.] (3) View search details

Source [Saskatchewan Judgments]

TAB 2

Indexed as:

Gardner (Re)

[1921] O.J. No. 131

49 O.L.R. 252
59 D.L.R. 555
1 C.B.R. 424

Ontario Supreme Court - High Court Division

Orde J. (In Chambers)

January 31, 1921

Bankruptcy and Insolvency — Scheme of Arrangement of Insolvent Debtors Affairs — Bankruptcy Act, 1919, sec. 13(8), (9), (16) — Interests of Debtor and Creditors — Approval of Scheme notwithstanding Dissent of two Creditors.

Where the approval of a scheme of arrangement of an insolvent debtor's affairs is asked, it is the duty of the Court 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.

A scheme whereby the largest creditor, an incorporated company, whose claim was for a sum amounting to more than two-thirds of the total claims, was to advance a sum sufficient to pay all the other creditors 55 cents in the dollar, retaining the right to call for payment of its own claim in full, while the other creditors were to forgo 45 per cent. of their claims was approved-none of the creditors holding any security upon the property of the debtor, no preferential claims being made, and the effect of the scheme as regarded the principal creditor being fully disclosed-notwithstanding the opposition of two creditors for small amounts.

Section 13, sub-secs. 8, 9, and 16, of the Bankruptcy Act, 1919, referred to.

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1 AN application by the Canadian Credit Men's Association, authorised trustee of the estate of William Gardner, an insolvent debtor, under the Bankruptcy Act, 1919, for the approval by the Court of a scheme of arrangement of the insolvent debtor's affairs, prepared by himself.

2 January 26 and 28. The motion was heard by ORDE J., in Chambers.

J. M. Bullen, for the applicant.

Wm. Croft & Sons Limited, was represented by one of its officers.

3 The opposing creditor, Wm. Croft & Sons Limited, was represented by one of its officers, who actively opposed the scheme.

4 January 31. ORDE J.:-- The report of the authorised trustee shews that the debtor had assets consisting of stock in trade and fixtures nominally of the value of $66,183.44 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 realise more than 35 cents in 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. Limited is the largest, its 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. is willing to advance a sum sufficient to pay all the creditors, other than itself, 55 cents in the dollar. This means, of course, that Gordon Mackay & Co. will still retain the right to call for payment of its claim in full, while the other creditors, if the scheme is approved by the Court, will forgo 45 per cent. of their claims.

5 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.

6 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 appears and objects to the scheme being approved, on the ground that its effect is to give a preference to Gordon Mackay & Co. by allowing it 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 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. was 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.

7 In determining whether or not this scheme should be approved, I am governed by the provisions of sub-secs. 8, 9, and 16 of sec. 13 of the Bankruptcy Act, 1919. None of the creditors holds any security upon the property of the debtor, and there are no preferential claims, so that sub-sec. 16 does not apply.

8 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 in the dollar. Gordon Mackay & Co. is willing to take the risk of getting payment of its claim from the debtor. If the arrangement whereby Gordon Mackay & Co. is to be entitled to payment in full, if it is 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, 11th ed., pp. 784-5.

9 The only case to which I was referred which approaches the point raised here, was Re E.A.B., 9 Mans. 105, [1902] 1 K.B. 457. It really does not afford much assistance, except as illustrating the care with which the Court will scrutinise 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.

10 The scheme of arrangement will therefore be approved, and an order of the Court will issue accordingly. The scheme provides that the trustee's costs and expenses are to be included in the amount to be advanced by Cordon Mackay & Co. Limited.

qp/s/qlwlh/qlajg

TAB 3

Indexed as:

Mister C's Ltd. (Re)

IN THE MATTER OF the proposal of Mister C's Limited, a company incorporated under the laws of the Province of Ontario, having its head office in the Town of Markham, in the Province of Ontario

[1995] O.J. No. 1390

32 C.B.R. (3d) 242
55 A.C.W.S. (3d) 245

Court File No. 31/292901

Ontario Court of Justice (General Division)
In Bankruptcy - Toronto, Ontario

MacPherson J.

Heard: May 3, 1995.
Judgment: May 17, 1995.

(9 pp.)

Counsel:

A. Schorr, for the appellant.
G. Gringorten, for the trustee (supporting).
J. Eversley, for Afton Foods Group Ltd. (supporting).
I. Duncan, for S.G. Cunningham (Kitchener) Ltd. (opposing creditor).
C. Rasbach, for Attorney General of Canada (opposing creditor).
J. Schelling, for Madorin, Snyder (opposing creditor).
G.A. Moffat, for DCA Canada Ltd. (taking no position).

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1 MACPHERSON J. (endorsement):— The Trustee of an insolvent corporation, Mister C's Limited ("Mister C"), applies for approval of a Proposal pursuant to sections 50-66 of the Bankruptcy and Insolvency Act. The corporation is a franchisor of retail donut stores throughout Ontario. It currently has approximately 38 franchise contracts with franchisees, down from a high of 53. It also has four or five franchise buildings under construction. The president and Vice-president of the company are Martin Cohen and Morris Feder who are also personally insolvent.

2 The Trustee has filed a detailed Proposal on behalf of Mister C. There have been two meetings of creditors. The first on February 10, 1995 was adjourned so that Mister C could amend its Proposal. At the second meeting on February 24, 1995 all three classes of unsecured creditors represented at the meeting voted in favour of the Proposal as follows:

Class 1: One creditor voted to

accept - total value of $162,000 (100%)

Class 2: Thirty-six creditors voted to accept - total value of $1,829,610 (78.7%); seven creditors voted to reject - total value of $495,707 (21.3%)

Class 3: Six creditors voted to accept with claims totalling $1,564 (100%)

Accordingly, the Proposal has been approved by the requisite majority of creditors mandated by s. 54 of the Act.

3 The Proposal is opposed by three creditors - Revenue Canada, S.G. Cunningham (Kitchener) Limited, a construction company owed about $103,000, and Madorin, Snyder, owed about $50,000.

4 Section 59(2) of the Act provides, inter alia:

> 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.

5 In forming its opinion about the factors prescribed by this provision, a court should take three interests into account:

(1) the interests of the debtor in making a settlement with creditors;

(2) the interests of the creditors in procuring a settlement which is reasonable and which does not prejudice their rights; and

(3) 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.

See: Re Gardner (1921), 1 C.B.R. 424 at 426 (Ont.S.C.) and Re Mernick (1994), 24 C.B.R. (3d) 8 at 13 (Ont.Gen.Div.).

6 Although substantial deference should be accorded to the majority vote of creditors at a meeting of creditors, in my view this is a case where the Proposal should not receive judicial approval. I reach this conclusion for two reasons.

7 First, I believe that the process leading up to the vote of creditors at the second meeting was seriously defective and taints the resulting vote. I attach significance to the following factors:

(a) One unsecured creditor, a numbered company owned by the wives of Cohen and Feder, stands to benefit far more than all the other creditors - secured and unsecured - under the Proposal. Indeed, if the Proposal unfolds according to the Trustee's scenario, most unsecured creditors will receive about 20 cents on the dollar whereas the wives' numbered company will receive about $425,000 on an unsecured claim of $295,000.

However, it is not this discrepancy alone that troubles me. In its initial report to

creditors, the Trustee did not inform the creditors that the numbered company that stood to benefit most from the Proposal was owned by the wives of Cohen and Feder. When challenged about this at the first meeting of creditors, the Trustee acknowledged the error but called it "an oversight". I find it difficult to accept this explanation in light of the fact that in the Trustee's report to creditors there is a separate section titled Related Parties which discusses the status, as creditors of Mister C, of Cohen and Feder.

The Trustee also contends that the "oversight" was cured by the fact that the creditors at the second meeting knew that the wives owned the numbered company and voted in favour of the proposal in any event. I disagree. The minutes of the first meeting were not prepared and circulated to the creditors before the second meeting. Hence many of the creditors had no knowledge of this issue before they sent in voting letters and proxies which were used by the Trustee to vote in favour of the Proposal. In his supplementary report the Trustee acknowledged that if the votes in the Voting Letters were recorded against the proposal, the vote in favour of the proposal would still be 67.3% which is above the statutory minimum. My observation is that it is barely above a minimum. Moreover, the non-disclosure in the original report to creditors of such a fundamental relationship, and the failure to take vigorous steps to correct it before the second meeting, taint the entire process. Decisions about voting letters, proxies and attendance at the meetings might have been different if all the creditors had known that the exceptional treatment proposed for one unsecured creditor would, in fact, benefit a numbered company owned by the wives of the principals of Mister C.

(b) Under the Proposal, one secured creditor, C. Douglas Cardoza Limited, is treated differently from all other secured creditors and in priority to all unsecured creditors. Its claim of about $162,000 will be paid in full, even though the Trustee admits that at no time before the creditors' meeting did it investigate this claim to determine its validity.

(c) In the ranks of the unsecured creditors is one company, M.S.C. Food Brokers Inc., which is owned by Cohen and claims to be an unsecured creditor for $25,170. This relationship was not disclosed in the Related Parties section of the Trustee's report to creditors.

8 Second, the proposal places a very heavy emphasis on the personal financial situation of Cohen and Feder which detracts, in my view, from the principal focus of most proposals, namely the fair and equitable treatment of creditors. I attach significance to the following factors:

(a) Under the Proposal, a "Condition Precedent" (paragraph 12) is acceptance by the creditors and approval by the court of the personal Proposals of Cohen and Feder.

(b) Under the proposal, another "Condition Precedent" (paragraph 12) is that all creditors will release Cohen and Feder from any claims that could be made against them. I agree with the critical commentary on, and rejection of, a proposal which included this type of clause in Re Kern Agencies Limited (No.2) (1931), 13 C.B.R. 11 (Sask.C.A.).

(c) Cohen and Feder are listed as unsecured creditors of Mister C for $136,534 and $131,634 respectively. Yet, the Trustee admitted in his testimony that he has not been provided with documentation to support these claims; however, he said Feder had told him that he was "working on" the relevant documentation. In my view this is not good enough for such a large claim made by the principals of an insolvent company, especially in light of the fact that they are not prepared to waive their claims because they intend to use any money they obtain under the Proposal to fund their personal Proposals.

9 For these reasons I do not think that, pursuant to s. 59(2) of the Act, Mister C's Proposal is "reasonable" or "calculated to benefit the general body of creditors". The process leading up to the second meeting of creditors was marred by serious non-disclosure of relevant and important information and by failure to investigate the validity of large claims, including one that would take precedence over those of all unsecured creditors. And the Proposal itself, when all the evidence is examined, is not really intended to benefit the general body of creditors. Rather, it is designed to benefit Cohen and Feder, both directly and through the mechanisms of undisclosed related companies, releases and coerced approvals of their personal Proposals.

10 In my view, two of the three factors set out in Re Gardner and Re Mernick - the interests of debtors and the integrity of the bankruptcy process - tell against judicial approval of the Proposal. Accordingly, approval of Mr. C's Proposal is refused.

MACPHERSON J.

qp/d/mii

TAB 4

Case Name:

Silbernagel (Re)

IN THE MATTER OF the proposal of Franz Apul Silbernagel of the Town of Richmond Hill in the Province of Ontario, Real Estate Representative

[2006] O.J. No. 1674

81 O.R. (3d) 152
20 C.B.R. (5th) 155
147 A.C.W.S. (3d) 940
2006 CarswellOnt 2523
[2006] O.T.C. 390

Court File No. 31-447102

Ontario Superior Court of Justice

J.D. Ground J.

Heard: April 11, 2006.
Judgment: April 26, 2006.

(18 paras.)

Insolvency law — Proposals — Court approval — Court approved proposal containing compliance clause requiring bankrupt to make monthly remittances to Canada Revenue Agency, major creditor — Compliance clause accorded with commercial morality and public interest in ensuring debtor lived up to obligations as taxpayer and Canadian citizen — Inclusion of compliance clause did not mean proposal did not benefit general body of creditors.

Motion for approval of bankruptcy proposal of debtor, Silbernagel, to creditors -- Proposal approved by all represented creditors at meeting -- Canada Revenue Agency, Capital One Bank and Del Financial filed proofs of claim for $113,535, $1,882 and $2,300 respectively -- Silbernagel's debt to Canada Revenue arose from his failure to pay income tax between 1998 and 2005 -- Bankruptcy largely tax driven -- Proposal contained compliance clause requiring Silbernagel to make monthly remittances to Canada Revenue -- HELD: Approval of proposal by creditors not determinative of court's approval -- Motion allowed and proposal approved -- Inclusion of compliance clause did not mean proposal did not benefit general body of creditors -- Compliance clause would have rehabilitative effect on Silbernagel -- Proposal was structured to ensure Silbernagel lived up to obligations as taxpayer and Canadian citizen -- Inclusion of compliance clause was not unreasonable, was in accord with commercial morality and public interest.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 2, s. 59(2), s. 121(1), s. 136

Financial Administration Act, R.S.C. 1985, c. F-11,

Counsel:

William J. Meyer for Harris & Partners Inc., Trustee

Nancy Arnold and Alexander Zendegs for Canada Revenue Agency

REASONS

1 J.D. GROUND J.:— The motion before this court is for approval of an Amended Proposal of Franz Apul Silbernagel (the "Debtor") to his creditors dated March 15, 2006 (the "Amended Proposal"). The Amended Proposal was approved by all creditors represented at a meeting of creditors held March 15, 2006. The only creditors to have filed proofs of claims in the bankruptcy are Canada Revenue Agency ("CRA") for a total of $113,535.13, Capital One Bank in the amount of $1,882.93 and Del Financial Services in the amount of approximately $2,300. The liability to CRA arose out of the failure of the Debtor to file returns and pay installments of income tax or to file returns and remit payments of GST over the years 1998 to 2005. The Debtor had filed a previous Assignment in Bankruptcy on April 9, 1997 and was discharged on January 8, 1998. In that bankruptcy, the Statement of Affairs indicated unsecured liabilities in the amount of $322,730 including liability to CRA in the amount of $88,556.40.

2 The Amended Proposal before this court includes paragraph 4 being a compliance clause which provides as follows:

> 4. THAT the Debtor covenants and agrees that during the course of the proposal he shall:
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> a) Keep all filings, remittances and installments, if any, to Canada Revenue Agency current for the post-Proposal period, until issuance of the Certificate of Compliance. Should the debtor fall into arrears by
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> i) more than $5,000 and
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> ii) more than (2) months
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> and should the Trustee be notified in writing of such arrears, the Trustee may then request that the Inspectors declare the Proposal to be in default, or alternatively, request that the Inspectors temporarily waive such default based on its investigation of the underlying circumstances.
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> b) Upon notice in writing to the Trustee by Canada Revenue Agency, of a default with respect to filing, remitting and installment requirements for the post-Proposal period outlined under paragraph 4(a), the proponent shall be given 30 days from the date of the notice to rectify any such default. Should the default not be rectified within the 30-day period, a request can be made to the Trustee to have the Proposal Annulled.

3 Clause (a) of paragraph 4 of the Amended Proposal is substantially similar to paragraph 8.4 of the Proposal of Ronald Michael McClory considered by Registrar Nettie on February 6, 2006 in his judgment rendered February 20, 2006. Registrar Nettie found the McClory Proposal to be unreasonable due to the illegality of paragraph 6(c) of the Proposal which provided for an assignment to the Trustee of income tax refunds which are not assignable under the provisions of the *Financial Administration Act*, R.S.C. (1985) Ch. F. 11.

4 Registrar Nettie also found the McClory Proposal not calculated to benefit the general body of creditors. After having found that paragraph 8.4 was of rehabilitative benefit, particularly with a debtor whose insolvency arose from a failure to make tax payments, in mandating that the debtor be current in filing tax returns and making required tax payments, Registrar Nettie found that the effect of the inclusion of paragraph 8.4 in the McClory Proposal was that the Proposal was not calculated to benefit the general body of creditors. He concluded that the effect of the compliance clause would be that the Debtor would almost certainly prefer CRA over other future creditors in that the failure to make payments to CRA might result in a deemed bankruptcy. In his Judgment Registrar Nettie stated as follows at paragraph 21:

> In any event, notwithstanding any salutary effect of paragraph 8.4 on the Proponent's financial rehabilitation, it is clear to me that the paragraph has the effect of potentially prejudicing future creditors of the Proponent. With paragraph 8.4 in the Amended Proposal, the Proponent will almost certainly prefer CRA's future debts over any other future creditor, as a failure to do so may result in his deemed bankruptcy. Faced, for example, with only enough funds to make a future required payment to CRA, or to some other creditor, but not both, it is reasonable to presume that the Proponent, acting in his own en lightened self-interest, will prefer CRA, as a failure to pay the other creditor will not put completion of the Amended Proposal at risk or be as likely to result in his involuntary bankruptcy. This has the effect of providing a benefit to CRA, in the form of a preference, over those future creditors, when those future creditors did not have a vote on the Amended Proposal (which, of course, they could not have as they, by definition, were not creditors at the time of the Proposal). Since I have found that the general body of creditors includes future creditors of the Proponent, I cannot find that a term such as paragraph 8.4 benefits the general body of creditors. I do not find the arguable rehabilitative effect of the paragraph to outweigh its negative impact on future creditors, especially when I consider the array of remedies uniquely available to CRA to enforce and realize upon any future indebtedness to it by the Proponent. Few other future creditors have such a panoply of remedies. The insertion of paragraph 8.4, having been done at the instance of CRA, is an example of the recklessness and carelessness of creditors as to their own affairs, and others, as referred to in Reed, and is very clearly an example of the kind of conduct by the majority of creditors that Parliament has seen fit to curtail by requiring the Court to also approve these proposals. It is clear from the facts at bar that creditors are prepared to require the insertion of terms into proposals in order to gain future benefit for themselves, at the expense of others not even entitled to be heard in the approval process. While the evidence does not expressly indicate that CRA indicated that it would withhold approval if paragraph 8.4 was not inserted, I am prepared to infer that it must have, otherwise there would be no conceivable reason for the Proponent to tender the Amended Proposal with both its higher payment terms, and the compliance obligations of paragraph 8.4. In the absence of evidence to the contrary, I infer such an inducement to obtain the terms of the Amended Proposal. This is the type of recklessness and carelessness referred to in Reed, in that the creditors are being careless as to the rights of the future creditors, and reckless as to whether a bankruptcy, with a clearly lesser realization for the creditors, ensues or not.
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> In the result, I find that the Amended Proposal, containing as it does, paragraph 8.4, is not calculated to benefit the general body of creditors, but is, in fact, calculated (by CRA) to provide CRA with a Damoclean sword to ensure that for the duration of the Amended Proposal, the Proponent prefers its indebtedness over any other future creditor. This is offensive to commercial morality, and to the integrity of the insolvency system. If the result is that the Amended Proposal is rejected and a deemed bankruptcy occurs, then all of the present creditors will be treated equally,

> according to class, and so will the future creditors, whose debts will be outside of the bankruptcy. This is, to the Court, a preferable result, if the creditors remain insistent on terms such as paragraph 8.4 being inserted. The tyranny of a majority will not be permitted to be imposed on future creditors who have no say in the proposal. The Court will balance those rights, as it is obligated to do.
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> Having found the Amended Proposal to be unreasonable due to the illegality of paragraph 66(c), and also not calculated to benefit the general body of creditors, the Amended Proposal is not approved. The Proponent is deemed, as of the date hereof, to have made an assignment in bankruptcy.

5 Registrar Nettie's finding that the general body of creditors includes future creditors is contained in paragraph 16 of his judgment where he stated:

> In considering the question, I am required to turn my mind to what is meant by the general body of creditors. I am of the view that the general body of creditors includes not only the creditors to whom the Amended Proposal is made, but also future, or post-proposal, creditors of the Proponent. In this regard, I am persuaded by the decision of the Chief Justice of the New Brunswick Court of Queen's Bench, in Re Sumner Company (1984) Limited, 1987 Carswell NB 26. Therein, Richard CJQB, at paragraph 37, quotes with favour the following passage from Houlden and Morawetz on Bankruptcy law of Canada, now found at E 15(9) of the 2005 annotation:
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> > ... In determining whether or not to approve the proposal, the court must consider not only the wishes and interest of creditors but the conduct of the debtor and the interest of the public and future creditors (emphasis added) ...

6 With great respect to the learned Registrar, I must disagree with his conclusion that the McClory Proposal, [2006] O.J. No. 639, because of the inclusion of the compliance clause, did not benefit the general body of creditors. "Creditor" is defined in Section 2 of the *Bankruptcy and Insolvency Act*, R.S.C. (1985) Ch. B.3 as amended (the "*BIA*") as "a person having a claim, unsecured, preferred by virtue of priority under Section 136 or secured, provable as a claim under this Act". Subsection 121(1) of the *BIA* defines claims provable as follows:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason or any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

7 The *BIA* therefore, in my view, specifically determines that a person who may become a creditor of the Bankrupt at some future date is not a "creditor" as defined in the *BIA.* The principles of statutory interpretation provide that, if a term is defined in a statute, such term is used with that definition throughout the statute and accordingly, the reference to "general body of creditors" in Subsection 59(2) of the *BIA* would not include future creditors.

8 More significantly, the authorities relied upon by Registrar Nettie in concluding that future creditors are included in the general body of creditors do not, in my view, support that proposition. Subsection 59(2) of the *BIA* establishes a two-prong test to be applied by the court in determining whether to approve a proposal. Subsection 59(2) provides 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.

9 The reference by Richard, CJQB in *Re Sumner Company 1984 Limited*, [1987] N.B.J. No. 205, 1987 CarswellNB 26 to the passage from Houlden and Morawetz, Bankruptcy Law of Canada states in full as follows:

> The law is clear that the court must look beyond the wishes of creditors when considering a proposal. In volume 1 of Houlden and Morawetz on Bankruptcy Law of Canada, it is stated at page E-16 that:
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> Section 41(2) raises two questions for the court to consider on an application for approval of a proposal. (1) Are the terms of the proposal reasonable? (2) Are the terms of the proposal calculated to benefit the general body of creditors? In determining whether or not to approve the proposal, the court must consider not only the wishes and interest of creditors but the conduct of the debtor and the interest of the public and future creditors and the requirements of commercial morality.

10 It appears to me that the passage from *Houlden and Morawetz, supra*, quoted with approval in *Re Sumner, supra*, stands for the proposition that the interest of future creditors are taken into account in determining whether the terms of the proposal are reasonable. The authors appear to be saying that in determining whether the proposal is calculated to benefit the general body of creditors, the court must consider the interest of the creditors (as defined in the *BIA*) but, in determining whether the terms of the proposal are reasonable, the court must also consider the conduct of the debtor, the interest of the public and future creditors and the requirements of commercial morality. The balance of the authorities referred to by Registrar Nettie in this context do not, in my view, support the proposition that the general body of creditors includes future creditors; they rather stand for the proposition that approval of a proposal by a majority of the creditors is not determinative in and of itself that the proposal ought to be approved by the court.

11 I am, therefore, of the view that the interest of future creditors is one element that the court must take into consideration in determining whether, looking at the terms of the proposal as a whole, such terms are reasonable. For example, in determining whether the proposal is likely to have a rehabilitative effect on the debtor, the interest of future creditors should be kept in mind.

12 In the case at bar, the insolvency was clearly tax driven. The claim of CRA is approximately 95% of the total claims filed and arises from failure to file returns or pay installments of income tax or to file returns and make GST payments in the years 1998 through to 2005. It is to be noted that these failures commenced with the year 1998, which was the year in which the debtor was discharged from his prior bankruptcy in which CRA again had by far the most significant claim filed. It is my view that a compliance clause such as that contained in paragraph 8.4 of the Amended Proposal cannot help but have a rehabilitative effect on this particular debtor. Registrar Nettie, in fact, acknowledged the rehabilitative benefit of such a provision in *McClory, supra*, at paragraph 20 where he stated "there is no doubt certain rehabilitative benefit, particularly with a debtor whose insolvency arises from a failure to make tax payments, to mandate that the debtor be and continue to be current in his tax affairs". The reasonableness of such a provision from a rehabilitative point of view with respect to the debtor in the case at bar seems to me to be self-evident.

13 Registrar Nettie, however, in *McClory, supra*, concluded that the rehabilitative effect of the compliance clause did not outweigh its negative impact on future creditors of the debtor in that the effect of the compliance clause would be that the debtor would almost certainly prefer the payment of future debts to CRA over payments to other future creditors. Even if this is the potential result of the compliance clause, I am not satisfied that an inclusion of a compliance

clause in a proposal leads to the conclusion that the terms of the proposal are, therefore, unreasonable. I accept the submission of counsel for CRA that the inclusion of the compliance clause redresses certain inequities as between CRA and future creditors of the debtor. The relationship between CRA and a tax debtor is dissimilar from the debtor's relationship with other creditors. The relationship with CRA is non-consensual in nature and is established by a statutory scheme. Unlike other creditors, CRA does not voluntarily choose to do business with a taxpayer and in that sense CRA, unlike other creditors, is an involuntary creditor. It is also to be remembered that a debt to CRA is a debt to the people of Canada. In *Re Johnson* [1987] O.J. No. 11 (S.C.O.) Saunders, J. stated at page 3:

> The remarkable feature of this particular application is the failure by the bankrupt to pay any significant amount towards income tax for the years 1983 and 1984 notwithstanding the substantial income earned in those years. While it is proper to arrange one's affairs to attract the minimum amount of tax, once tax has been assessed it is the duty of all Canadian taxpayers to pay the tax imposed. While family responsibilities are, of course, important, there is apart from emergency medical expenses, no debt more important that the payment of taxes by persons enjoying a good income. If a taxpayer does not pay his fair share, the burden arising from that failure falls on the other members of the community. Most Canadians have their tax collected at source or pay what is owing when they file their return. They must provide for their personal expenses and savings from what is left over. Here, the bankrupt was prepared to let Revenue Canada stand last in line and it is not surprising that by June, 1985, he was being pressed for payment. It seems to me that if he has the financial ability to do so, he should not make some substantial payment as a condition of his discharge in order to preserve the integrity of the bankruptcy system. It would be manifestly unfair to all taxpayers if one of their numbers were to be allowed not pay tax on income received over a period of years and then in effect wipe out the indebtedness by an assignment in bankruptcy.

14 It is surely in accord with commercial morality and with the public interest that a proposal be structured to attempt to ensure that the proponent lives up to his obligations as a taxpayer and as a Canadian citizen. There is, in a case at bar, no evidence that CRA insisted on the inclusion of the compliance clause in order to gain an unfair advantage over prospective future creditors as opposed to ensuring future compliance by the debtor with his obligations as a taxpayer and to prevent a re-occurrence of the conditions that led to both of his bankruptcies. In addition, from the prospective of future creditors, compliance by the debtor with the compliance clause would ensure that future creditors do not find themselves submerged by huge claims by CRA against the debtor's assets in the event of any future financial difficulties of the debtor.

15 As noted above, in *McClory, supra*, Registrar Nettie also concluded at paragraph 21 that "The insertion of paragraph 8.4 (the compliance clause) having been done at the insistence of CRA, is an example of the recklessness and carelessness of creditors as to their own affairs and others, as referred to in Reed, and is very clearly an example of the kind of conduct by the majority of creditors that Parliament has seen fit to curtail by requiring the court to also approve these proposals". In *Re Reed and Bowen* (1886) Q.B.D. Vol. xvii 244 (C.A.), the creditors had approved a scheme proposed by the debtors whereby the debtors would be permitted to continue to carry out large and onerous contracts in South America and elsewhere which had resulted in the financial difficulties of the debtors in the first place with no evidence to indicate that there would be any net earnings available to the creditors as contemplated by the scheme. Lord Esber, M.R. stated at pages 252 and 253:

> Therefore there are these large contracts, but the contractors have no means, in hand or in credit, to carry them out. Then what is the scheme? They are to be allowed to carry out these contracts. If this scheme is approved they are immediately made masters of the mode of carrying them out, and then they offer to set by a certain

> amount each year for three years of the net profits. The official receiver says that there is no evidence whatever to show the probable amount of the net earnings of which the debtors propose to set apart one-third part for the creditors during the next three years, nor any evidence that any sum will be earned by them, or either of them. He is quite right, there is not a tittle of evidence to show it. On the contrary, the business inference is that, even if they could carry on the contracts, the first three years would be onerous to them, and there would not be any net profits at all. Under these circumstances the official receiver says that he is unable to report that the creditors will receive any dividend whatever from the proposal. It seems to me that this is a good objection; I cannot see any reasonable prospect of a dividend.

16 Similarly, in other old English authorities, *Re Burr* (1891) 2 Q.B. 467 and *Re Webb* (1914) 3 K.B. 387, the creditors appear to have approved schemes where there was no reasonable likelihood that they would produce any beneficial results for the creditors and, although these authorities may be examples of the recklessness and carelessness of creditors as to their own affairs, the fact situations in those cases are in no way analogous to the case at bar. I am, therefore, unable to conclude that the inclusion of the compliance clause in the Amended Proposal before this court is in any way unreasonable or not in accord with commercial morality or the public interest.

17 I, accordingly, find that the terms of the Amended Proposal before this court are reasonable and are calculated to benefit the general body of creditors and the Amended Proposal is approved.

18 Any party who wishes to make submissions as to the costs of this proceeding may do so by brief written submissions to me, on or before, May 12, 2006.

J.D. GROUND J.

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