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COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
PROCEEDINGS	IN THE MATTER OF THE NOTICE OF INTENTION TO FILE A PROPOSAL OF OLYMPUS FOOD (CANADA) INC.	
APPLICANT	BDO CANADA LIMITED in its capacity as Proposal Trustee of Olympus Food (Canada) Inc.	
DOCUMENT	**Brief of Law of the Applicant** **Re: Proposal Approval Application** **December 14, 2020 at 2:00pm**	

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INTRODUCTION

1 This Bench Brief is filed by BDO Canada Limited in its capacity as the Proposal Trustee of Olympus Food (Canada) Ltd. (**Olympus**) in support of an order approving the proposal filed by Olympus on October 29 and amended on November 3, 2020 (**Proposal**) pursuant to Part III, Division 1 of the *Bankruptcy and Insolvency Act* (**BIA**).[1]

2 The Proposal was accepted by the voting creditors of Olympus unanimously and the Proposal Trustee is not aware of any opposition to the Proposal's approval.

3 The Proposal Trustee is of the view that:

(a) the Proposal is reasonable;

(b) the Proposal is calculated to benefit the general body of creditors;

(c) the Proposal is made in good faith; and

(d) the formalities of the BIA have been satisfied.

4 Therefore, the Proposal Trustee respectfully submits that the Proposal should be approved by this Honourable Court.

BACKGROUND

A. Introduction

5 Olympus owned and operated sixty-five (65) Kentucky Fried Chicken (**KFC**), KFC / Taco Bell and KFC / Pizza Hut franchise restaurants; however, it was forced to sell or close all of its restaurants upon failing to fund a development plan under its franchise agreement. Olympus sold forty-seven (47) locations to FMI Atlantic Inc. in two separate sale transactions but the resulting sale proceeds were insufficient to fully pay Olympus's debts. Olympus also retained liabilities under certain assigned and un-assigned leases. Claims by landlords resulted.

6 Olympus had sold or closed all of its restaurants prior to December 31, 2019. Olympus currently has no employees of its own. Its limited operations are carried out by the staff of a related party, Hi-Flyer Food (Canada) Inc. (**Hi-Flyer**), at the direction of Olympus's directors.

[1] RSC 1985, c B-3, as amended [**Tab 1**].

7 On May 1, 2020, Olympus filed a Notice of Intention to Make a Proposal (**NOI**) to its creditors pursuant to Part III, Division I of the BIA. The Proposal was designed to provide a greater distribution to the creditors of Olympus than would be achieved in a bankruptcy scenario, while providing Hi-Flyer with a potential opportunity to utilize approximately $10 million of non-capital tax losses in Olympus (**Tax Losses**).

8 Olympus filed its Proposal on October 29, 2020. Minor amendments were made on November 3, 2020.

B. Claims Process

9 On June 24, 2020, the Court granted an order approving a Claims Solicitation Process (**Claims Process** and **Claims Process Order**) and establishing a claims bar date of July 31, 2020 (**Claims Bar Date**). Under the Claims Process Order, any creditor who failed to submit a proof of claim on or before the Claims Bar Date would be barred from asserting or enforcing its claim.

10 Total claims against Olympus were accepted in the Claims Process in the approximate amount of $1,881,532, excluding (a) late and disallowed claims, and (b) Hi-Flyer's unaffected claim in the amount of $11,491,408. All of the accepted claims are unsecured and without priority with the exception of one, very small secured claim in the approximate amount of $21.

11 To the best of the Proposal Trustee's knowledge, no applications have been filed by creditors whose claims were revised or disallowed (as late or otherwise); however, as of the date of this Brief, the thirty (30) day deadline for the filing of such applications under s. 135(4) of the BIA has not expired in respect of all such creditors.[2]

12 On October 14, 2020, the Court granted an order approving a settlement agreement (**Settlement Agreement**) between Olympus and The Cadillac Fairview Corporation Limited (**CF**) as agent for three of Olympus's former landlords: Le Carrefour Laval (2013) Inc., Les Galeries D'Anjou Leaseholds Inc. and Ontrea Inc. The claims accepted in the Claims Process include the three represented by CF in the combined approximate amount of $910,103. CF agreed to support the Proposal conditionally under the Settlement Agreement.

[2] Claims Process Order at para 16; BIA, Tab 1 at s 135(4).

C. Proposal

13 The terms of the Proposal are summarized in detail in the Trustee's Report. The following are among the key terms:

(a) a proposal fund (**Proposal Fund**) will be available to fund distributions to unsecured creditors and Hi-Flyer will ensure that such fund is not less than $360,000;[3]

(b) proven claims of $1,500 or less are to be paid in full from the Proposal Fund and creditors with claims of $1,500 or less are therefore deemed to vote in favour of the Proposal;[4]

(c) each proven claim of more than $1,500 is to be paid $1,500 plus a *pro rata* share of the remainder of the Proposal Fund;[5]

(d) any claim by a landlord resulting from a lease disclaimer is calculated as the lesser of such landlord's actual loss and the output of the formula under s. 65.2(4)(b) of the BIA;[6]

(e) priority claims (if any) will be paid in full;[7]

(f) Hi-Flyer's claim is unaffected;[8]

(g) post-filing claims are unaffected;[9]

(h) all distributions are subject to the levy payable to the Office of the Superintendent of Bankruptcy under s. 147 of the BIA (**OSB Levy**);[10]

(i) the Proposal Trustee's fees and those of its counsel and consultants are to be paid in priority to any distributions to creditors; however, such fees are contemplated to be covered by a retainer and, if necessary, from funds to be provided by Hi-Flyer;[11] and

(j) post-implementation, Hi-Flyer and Olympus will undertake an amalgamation which may allow Hi-Flyer to utilize Olympus's tax losses.[12]

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[3] Proposal at ss 1.1 (def'n of "Proposal Fund"), 2.4.
[4] Proposal at s 3.1.
[5] Proposal at s 3.1.
[6] Proposal at s 3.2.
[7] Proposal at s 4.2.
[8] Proposal at ss 1.1 (def'ns of "Related Party Creditor" and "Unaffected Creditors"), 2.3.
[9] Proposal at ss 1.1 (def'n of "Unaffected Creditors"), 2.3
[10] Proposal at s 6.3.
[11] Proposal at s 4.1.
[12] Proposal at s 2.5.

14 The Proposal Fund will be comprised of cash in Olympus and a substantial contribution from Hi-Flyer. The Proposal contemplates that Hi-Flyer's contribution is inclusive of the proceeds of a sale of certain restaurant equipment by Olympus to Hi-Flyer in the approximate amount of $19,361.

Creditors' Meeting

15 The Proposal Trustee convened a creditors' meeting on November 19, 2020 (**Creditors' Meeting**). Counsel for CF was appointed at the Creditors' Meeting as the sole inspector.

16 The Proposal was approved unanimously by the subset of creditors who voted at the Creditors' Meeting. Twenty-six (26) claims by creditors totalling $1,773,388 were counted in favour of the Proposal.

17 Of the claims counted in favour, seventeen (17) were claims of less than $1,500 that will be paid in full (subject only to the OSB Levy) and were therefore deemed to be cast in favour of the Proposal. No creditor raised any concern in relation to this procedure.

LAW AND ANALYSIS

A. Sanctioning of the Proposal

18 Upon being accepted by the creditors, a proposal must be approved by the Court under s. 59 of the BIA.[13] To be so approved, the Court must be satisfied that:

(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.

19 In addition, the proposal must comply with the formalities under the BIA.[14]

20 To be reasonable, a proposal must be consistent with commercial morality and not undermine the integrity of the bankruptcy system. A proposal should be accepted as benefiting the body of creditors if it does not harm or prejudice creditors' interests and yields sufficiently more to creditors than would be the case in the event of the debtor's bankruptcy.[15]

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[13] BIA, Tab 1 at s 59.
[14] BIA, Tab 1 at s 59(2); *Re Magnus One Energy Corp* (2009), 53 CBR (5th) 243 (ABQB) at paras 10-11 [*Magnus*] [**Tab 2**]; *Kitchener Frame Ltd, Re*, 2012 ONSC 234 (Ont SCJ [Commercial List]) at paras 19 and 21 [*Kitchener Frame*] [**Tab 3**].
[15] *Kitchener Frame*, Tab 3 at paras 20 and 22

21 The Proposal of Olympus contemplates the establishment and distribution of a Proposal Fund in the amount of $360,000, which will provide an average estimated recovery to unsecured creditors with proven claims of 19.1 percent. That is substantially greater than the estimated recovery in the bankruptcy scenario, which ranges from 1.3 to 2.3 percent.

22 The substantially greater recovery to creditors under the Proposal versus a bankruptcy scenario is the result of the following:

(a) Hi-Flyer's claim (submitted in the amount of $11,491,408) is unaffected under the Proposal and Hi-Flyer is accordingly not entitled to a distribution under the Proposal; and

(b) Hi-Flyer will contribute significantly to the Proposal Fund under the Proposal.

23 Hi-Flyer's incentive to forego its substantial claim and contribute to the Proposal Fund results from the potential for Hi-Flyer to utilize the Tax Losses upon amalgamating with Olympus after the Proposal is implemented. The Proposal Trustee has not provided tax advice or obtained a formal tax opinion with respect to the availability, usability or transferability of the Tax Losses to Hi-Flyer, and the Proposal Trustee has offered no opinion or advice as to whether the Proposal will achieve any tax advantage for Hi-Flyer.

24 The reasonableness, benefit and commercial morality of the Proposal is borne out by its unanimous support by the voting creditors of Olympus. Substantial deference must be shown to the support of creditors,[16] particularly when it is overwhelming.

25 The Proposal does not, in any way, undermine the integrity of the bankruptcy system.[17]

26 The Proposal Trustee has reported to the Court with regularity throughout these proceedings. As is clear from those Reports, the Proposal Trustee has never had reason to doubt the good faith or due diligence of Olympus.

27 Finally, the Proposal Trustee is of the view that all statutory requirements under the BIA are satisfied, including as a result of the following:

(a) the unanimous support from the voting creditors at the Creditors' Meeting is more than sufficient to satisfy the voting thresholds (majority in number and two-thirds in value) under s. 59(2) of the BIA;

[16] *Kitchener Frame*, Tab 3 at para 21; *Magnus*, Tab 2 at para 11.
[17] *Kitchener Frame*, Tab 3 at para 22; BIA, Tab 1 at s 4.2(1).

(b) all timelines were complied with under various orders of the Court and the BIA, including s. 58 thereof;[18]

(c) security for performance as contemplated by s. 59(3) of the BIA is not reasonably required since the Proposal involves a one-time payment from the Proposal Fund (to be funded by Olympus and Hi-Flyer), and no creditors' claims will be released under the Proposal unless and until such payment is made;[19]

(d) no bankruptcy offences have been committed under ss. 198 to 200 of the BIA or otherwise such that approval of the Proposal ought not be withheld by the Court under s. 59(2) of the BIA.[20]

28 Therefore, the Proposal Trustee respectfully submits that the Proposal meets the test for Court approval under s. 59 of the BIA and should be approved accordingly.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF DECEMBER, 2020

NORTON ROSE FULBRIGHT CANADA LLP

D. Aaron Stephenson
Counsel for BDO Canada Limited, Proposal Trustee

[18] BIA, Tab 1 at s 58.
[19] The Proposal does not contemplate ongoing payments by the debtor to creditors after implementation by way of a payment plan or otherwise.
[20] BIA, Tab 1 at s 59(2), 198-200.

TABLE OF AUTHORITIES

TAB	DOCUMENT TITLE	CITATION
1	*Bankruptcy and Insolvency Act*	RSC 1985, c B-3, at ss 4.2(1), 58, 59, 65.2(4)(b), 135(4), 147, 198-200
2	*Re Magnus One Energy Corp* (2009)	53 CBR (5th) 243 (ABQB) at paras 10-11
3	*Kitchener Frame Ltd, Re*	2012 ONSC 234 (Ont SCJ [Commercial List]) at paras 19 to 22

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 17, 2020

Last amended on November 1, 2019

À jour au 17 novembre 2020

Dernière modification le 1 novembre 2019

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persons are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length.

R.S., 1985, c. B-3, s. 4; 2000, c. 12, s. 9; 2004, c. 25, s. 9(F); 2005, c. 47, s. 5; 2007, c. 36, s. 2.

de même, sauf preuve contraire, pour l'application des alinéas 95(1)b) ou 96(1)b).

L.R. (1985), ch. B-3, art. 4; 2000, ch. 12, art. 9; 2004, ch. 25, art. 9(F); 2005, ch. 47, art. 5; 2007, ch. 36, art. 2.

Her Majesty

Binding on Her Majesty

4.1 This Act is binding on Her Majesty in right of Canada or a province.

1992, c. 27, s. 4.

Sa Majesté

Obligation de Sa Majesté

4.1 La présente loi lie Sa Majesté du chef du Canada ou d'une province.

1992, ch. 27, art. 4.

Duty of Good Faith

Good faith

4.2 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstances.

2019, c. 29, s. 133.

Obligation d'agir de bonne foi

Bonne foi

4.2 (1) Tout intéressé est tenu d'agir de bonne foi dans le cadre d'une procédure intentée au titre de la présente loi.

Bonne foi — pouvoirs du tribunal

(2) S'il est convaincu que l'intéressé n'agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu'il estime indiquée.

2019, ch. 29, art. 133.

PART I

Administrative Officials

Superintendent

Appointment

5 (1) The Governor in Council shall appoint a Superintendent of Bankruptcy to hold office during good behaviour for a term of not more than five years, but the Superintendent may be removed from office by the Governor in Council for cause. The Superintendent's term may be renewed for one or more further terms.

Salary

(1.1) The Superintendent shall be paid the salary that the Governor in Council may fix.

Extent of supervision

(2) The Superintendent shall supervise the administration of all estates and matters to which this Act applies.

Duties

(3) The Superintendent shall, without limiting the authority conferred by subsection (2),

PARTIE I

Fonctionnaires administratifs

Surintendant

Nomination

5 (1) Le gouverneur en conseil nomme à titre inamovible un surintendant des faillites pour un mandat renouvelable d'au plus cinq ans, sous réserve de révocation motivée de la part du gouverneur en conseil.

Traitement

(1.1) Le surintendant des faillites reçoit le traitement que fixe le gouverneur en conseil.

Surveillance

(2) Le surintendant contrôle l'administration des actifs et des affaires régis par la présente loi.

Fonctions

(3) Le surintendant, sans que soit limitée l'autorité que lui confère le paragraphe (2) :

(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 either

(i) forthwith call a meeting of creditors present at that time, which meeting shall be deemed to be a meeting called under section 102, or

(ii) if no quorum exists for the purpose of subparagraph (i), send notice, within five days after the day the certificate mentioned in paragraph (b.1) is issued, of the meeting of creditors under section 102,

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; 2017, c. 26, s. 7.

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 est tenu :

(i) de convoquer aussitôt une assemblée des créanciers présents à ce moment-là, assemblée qui est réputée convoquée aux termes de l'article 102,

(ii) faute de quorum pour l'application du sous-alinéa (i), de convoquer, dans les cinq jours suivant la délivrance du certificat visé à l'alinéa b.1), une assemblée des créanciers aux termes de l'article 102.

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; 2017, ch. 26, art. 7.

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

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.

(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.

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.

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 the debtor has committed any one of the offences mentioned in sections 198 to 200.

Reasonable security

(3) Where any of the facts mentioned in section 173 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.

Court may order amendment

(4) If a court approves a proposal, it may order that the debtor's constating instrument be amended in accordance with the proposal to reflect any change that may lawfully be made under federal or provincial law.

R.S., 1985, c. B-3, s. 59; 1997, c. 12, s. 36; 2000, c. 12, s. 10; 2007, c. 36, s. 21.

Priority of claims

60 (1) No proposal shall be approved by the court that does not provide for the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of a debtor and for the payment of all proper fees and expenses of the trustee on and incidental to the proceedings arising out of the proposal or in the bankruptcy.

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.

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 a commis l'une des infractions mentionnées aux articles 198 à 200.

Garantie raisonnable

(3) Lorsque l'un des faits mentionnés à l'article 173 est établi contre le débiteur, le tribunal refuse d'approuver la proposition, à moins qu'elle ne comporte des garanties raisonnables pour le paiement d'au moins cinquante cents par dollar sur toutes les réclamations non garanties prouvables contre l'actif du débiteur ou pour le paiement de tel pourcentage en l'espèce que le tribunal peut déterminer.

Modification des statuts constitutifs

(4) Le tribunal qui approuve une proposition peut ordonner la modification des statuts constitutifs du débiteur conformément à ce qui est prévu dans la proposition, pourvu que la modification soit légale au regard du droit fédéral ou provincial.

L.R. (1985), ch. B-3, art. 59; 1997, ch. 12, art. 36; 2000, ch. 12, art. 10; 2007, ch. 36, art. 21.

Priorité des réclamations

60 (1) Le tribunal ne peut approuver aucune proposition qui ne prescrive pas le paiement, en priorité sur les autres réclamations, de toutes les réclamations dont le paiement est ainsi ordonné dans la distribution des biens d'un débiteur, et le paiement de tous les honoraires et dépenses convenables du syndic relatifs et connexes aux procédures découlant de la proposition ou survenant dans la faillite.

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.

Restriction — intellectual property

(9) If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2005, c. 47, s. 44; 2007, c. 36, s. 27; 2018, c. 27, s. 266.

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.

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.

Restriction à l'égard de la propriété intellectuelle

(9) Si, à la date du dépôt de l'avis d'intention prévu à l'article 50.4 ou du dépôt d'une copie de la proposition prévu au paragraphe 62(1), la personne insolvable est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans la disposition d'actifs autorisée en vertu du paragraphe (7), cette disposition n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2005, ch. 47, art. 44; 2007, ch. 36, art. 27; 2018, ch. 27, art. 266.

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.

Circumstances for not making declaration

(3) No declaration under subsection (2) shall be made if the court is satisfied that the insolvent person would not be able to make a viable proposal without the disclaimer or resiliation of the lease and all other leases that the lessee has disclaimed or resiliated under subsection (1).

Effects of disclaimer or resiliation

(4) If a lease is disclaimed or resiliated under subsection (1),

(a) the lessor has no claim for accelerated rent;

(b) the proposal must indicate whether the lessor may file a proof of claim for the actual losses resulting from the disclaimer or resiliation, or for an amount equal to the lesser of

(i) the aggregate of

(A) the rent provided for in the lease for the first year of the lease following the date on which the disclaimer or resiliation becomes effective, and

(B) fifteen per cent of the rent for the remainder of the term of the lease after that year, and

(ii) three years' rent; and

(c) the lessor may file a proof of claim as indicated in the proposal.

Classification of claim

(5) The lessor's claim shall be included in either

(a) a separate class of similar claims of lessors; or

(b) a class of unsecured claims that includes claims of creditors who are not lessors.

Lessor's vote on proposal

(6) The lessor is entitled to vote on the proposal in whichever class referred to in subsection (5) the lessor's claim is included, and for the amount of the claim as proven.

Determination of classes

(7) The court may, on application made at any time after the proposal is filed, determine the classes of claims of lessors and the class into which the claim of any of those particular lessors falls.

Réserve

(3) Le tribunal ne peut prononcer la déclaration s'il est convaincu que, sans la résiliation du bail et de tout autre bail résilié en application du paragraphe (1), la personne insolvable ne pourrait faire de proposition viable.

Effets de la résiliation

(4) Si le locataire résilie le bail aux termes du paragraphe (1) :

a) le locateur n'a pas de réclamation pour le loyer exigible par anticipation;

b) la proposition doit indiquer que le locateur peut produire une preuve de réclamation pour le préjudice subi du fait de la résiliation ou pour une somme équivalant au moindre des montants suivants :

(i) le montant du loyer stipulé pour la première année suivant la date de résiliation à laquelle elle est devenue effective, majoré de quinze pour cent du loyer à courir après la première année,

(ii) le montant équivalant à trois ans de loyer;

c) le locateur peut produire une réclamation selon les termes de la proposition.

Catégorie de la réclamation

(5) La réclamation du locateur appartient :

a) soit à la catégorie distincte à laquelle appartiennent les réclamations semblables produites par des locateurs;

b) soit à la catégorie des réclamations des créanciers non garantis à laquelle appartiennent les réclamations des créanciers qui ne sont pas des locateurs.

Vote

(6) Le locateur peut voter sur la proposition, dans la catégorie en question, pour le montant de la réclamation qu'il a prouvée.

Détermination des catégories

(7) Sur demande faite après le dépôt de la proposition, le tribunal peut déterminer les catégories de réclamations des locateurs et indiquer la catégorie à laquelle appartient la réclamation d'un locateur donné.

Secured creditor may amend

132 (1) Where the trustee has not elected to acquire the security as provided in this Act, a creditor may at any time amend the valuation and proof on showing to the satisfaction of the trustee or the court that the valuation and proof were made in good faith on a mistaken estimate or that the security has diminished or increased in value since its previous valuation.

Amendment at cost of creditor

(2) An amendment pursuant to subsection (1) shall be made at the cost of the creditor and on such terms as the court orders, unless the trustee allows the amendment without application to the court.

Rights and liabilities of creditor where valuation amended

(3) Where a valuation has been amended pursuant to this section, the creditor

(a) shall forthwith repay any surplus dividend that he may have received in excess of that to which he would have been entitled on the amended valuation; or

(b) is entitled to be paid out of any money for the time being available for dividend any dividend or share of dividend that he may have failed to receive by reason of the amount of the original valuation before that money is made applicable to the payment of any future dividend, but he is not entitled to disturb the distribution of any dividend declared before the amendment is filed with the trustee.

R.S., c. B-3, s. 103.

Exclusion for non-compliance

133 Where a secured creditor does not comply with sections 127 to 132, he shall be excluded from any dividend.

R.S., c. B-3, s. 104.

No creditor to receive more than 100 cents in dollar

134 Subject to section 130, a creditor shall in no case receive more than one hundred cents on the dollar and interest as provided by this Act.

R.S., c. B-3, s. 105.

Admission and Disallowance of Proofs of Claim and Proofs of Security

Trustee shall examine proof

135 (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

Le créancier garanti peut modifier l'évaluation

132 (1) Lorsque le syndic n'a pas choisi d'acquérir la garantie dans les conditions prévues à la présente loi, un créancier peut modifier l'évaluation et la preuve en démontrant, à la satisfaction du syndic ou du tribunal, que l'évaluation et la preuve ont été faites de bonne foi sur une estimation erronée, ou que la garantie a diminué ou augmenté en valeur depuis son évaluation précédente.

Modification aux frais du créancier

(2) Une modification conforme au paragraphe (1) est faite aux frais du créancier et selon les modalités que le tribunal prescrit, à moins que le syndic ne permette la modification sans requête au tribunal.

Droits et obligations du créancier lorsque l'évaluation est modifiée

(3) Lorsqu'une évaluation a été modifiée conformément au présent article, le créancier, selon le cas :

a) doit rembourser sans retard tout surplus de dividende qu'il peut avoir reçu en sus du montant auquel il aurait eu droit sur l'évaluation modifiée;

b) a droit de recevoir, sur les deniers alors applicables à des dividendes, tout dividende ou part de dividende qu'il peut ne pas avoir reçu à cause du montant de l'évaluation primitive, avant que ces montants soient attribués au paiement d'un dividende futur; il n'a toutefois pas le droit de déranger la distribution d'un dividende déclaré avant que la modification soit déposée chez le syndic.

S.R., ch. B-3, art. 103.

Exclusion pour défaut de se conformer

133 Lorsqu'un créancier garanti ne se conforme pas aux articles 127 à 132, il est exclu de tout dividende.

S.R., ch. B-3, art. 104.

Aucun créancier ne peut recevoir plus de cent cents par dollar

134 Sous réserve de l'article 130, un créancier ne peut dans aucun cas recevoir plus de cent cents par dollar avec l'intérêt prévu par la présente loi.

S.R., ch. B-3, art. 105.

Admission et rejet des preuves de réclamation et de garantie

Examen de la preuve

135 (1) Le syndic examine chaque preuve de réclamation ou de garantie produite, ainsi que leurs motifs, et il peut exiger de nouveaux témoignages à l'appui.

Determination of provable claims

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

Disallowance by trustee

(2) The trustee may disallow, in whole or in part,

(a) any claim;

(b) any right to a priority under the applicable order of priority set out in this Act; or

(c) any security.

Notice of determination or disallowance

(3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

Determination or disallowance final and conclusive

(4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

Expunge or reduce a proof

(5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

R.S., 1985, c. B-3, s. 135; 1992, c. 1, s. 20, c. 27, s. 53; 1997, c. 12, s. 89.

Scheme of Distribution

Priority of claims

136 (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(a) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the

Réclamations éventuelles et non liquidées

(1.1) Le syndic décide si une réclamation éventuelle ou non liquidée est une réclamation prouvable et, le cas échéant, il l'évalue; sous réserve des autres dispositions du présent article, la réclamation est dès lors réputée prouvée pour le montant de l'évaluation.

Rejet par le syndic

(2) Le syndic peut rejeter, en tout ou en partie, toute réclamation, tout droit à un rang prioritaire dans l'ordre de collocation applicable prévu par la présente loi ou toute garantie.

Avis de la décision

(3) S'il décide qu'une réclamation est prouvable ou s'il rejette, en tout ou en partie, une réclamation, un droit à un rang prioritaire ou une garantie, le syndic en donne sans délai, de la manière prescrite, un avis motivé, en la forme prescrite, à l'intéressé.

Effet de la décision

(4) La décision et le rejet sont définitifs et péremptoires, à moins que, dans les trente jours suivant la signification de l'avis, ou dans tel autre délai que le tribunal peut accorder, sur demande présentée dans les mêmes trente jours, le destinataire de l'avis n'interjette appel devant le tribunal, conformément aux Règles générales, de la décision du syndic.

Rejet total ou partiel d'une preuve

(5) Le tribunal peut rayer ou réduire une preuve de réclamation ou de garantie à la demande d'un créancier ou du débiteur, si le syndic refuse d'intervenir dans l'affaire.

L.R. (1985), ch. B-3, art. 135; 1992, ch. 1, art. 20, ch. 27, art. 53; 1997, ch. 12, art. 89.

Plan de répartition

Priorité des créances

136 (1) Sous réserve des droits des créanciers garantis, les montants réalisés provenant des biens d'un failli sont distribués d'après l'ordre de priorité de paiement suivant :

any liability insurance policy applied in or toward the satisfaction of the claim.

R.S., c. B-3, s. 116.

suite d'un dommage causé à un bien transporté dans ou sur un véhicule automobile, de faire appliquer le produit d'une police d'assurance-garantie à l'acquittement, ou en vue de l'acquittement, d'une telle réclamation.

S.R., ch. B-3, art. 116.

Application of provincial law to lessors' rights

146 Subject to priority of ranking as provided by section 136 and subject to subsection 73(4) and section 84.1, the rights of lessors are to be determined according to the law of the province in which the leased premises are situated.

R.S., 1985, c. B-3, s. 146; 2004, c. 25, s. 72(E); 2007, c. 36, s. 50.

Application de la loi provinciale aux droits des propriétaires d'immeubles

146 Sauf quant à la priorité de rang que prévoit l'article 136 et sous réserve du paragraphe 73(4) et de l'article 84.1, les droits des propriétaires sont déterminés conformément au droit de la province où sont situés les lieux loués.

L.R. (1985), ch. B-3, art. 146; 2004, ch. 25, art. 72(A); 2007, ch. 36, art. 50.

Levy payable out of dividends for supervision

147 (1) For the purpose of defraying the expenses of the supervision by the Superintendent, there shall be payable to the Superintendent for deposit with the Receiver General a levy on all payments, except the costs referred to in subsection 70(2), made by the trustee by way of dividend or otherwise on account of the creditor's claims, including Her Majesty in right of Canada or of a province claiming in respect of taxes or otherwise.

Prélèvement sur les dividendes pour défrayer le surintendant

147 (1) Afin de défrayer le surintendant des dépenses qu'il engage dans le cadre de sa mission de surveillance, il lui est versé pour dépôt auprès du receveur général un prélèvement sur tous paiements, à l'exception des frais mentionnés au paragraphe 70(2), opérés par le syndic par voie de dividende ou autrement pour le compte des réclamations de créanciers, y compris les réclamations fiscales et autres de Sa Majesté du chef du Canada ou d'une province.

Rate of levy

(2) The levy referred to in subsection (1) shall be at a rate to be fixed by the Governor in Council and shall be charged proportionately against all payments and deducted therefrom by the trustee before payment is made.

R.S., 1985, c. B-3, s. 147; 2005, c. 47, s. 91.

Taux du prélèvement

(2) Ce prélèvement est au taux que le gouverneur en conseil fixe, et est imputé proportionnellement à tous ces paiements et en est déduit par le syndic avant que le paiement soit fait.

L.R. (1985), ch. B-3, art. 147; 2005, ch. 47, art. 91.

Dividends

Trustee to pay dividends as required

148 (1) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the trustee shall, from time to time as required by the inspectors, declare and distribute dividends among the unsecured creditors entitled thereto.

Disputed claims

(2) Where the validity of any claim has not been determined, the trustee shall retain sufficient funds to provide for payment thereof in the event that the claim is admitted.

No action for dividend

(3) No action for a dividend lies against the trustee, but, if the trustee refuses or fails to pay any dividend after having been directed to do so by the inspectors, the court

Dividendes

Le syndic doit payer les dividendes requis

148 (1) Sous réserve de la retenue des sommes qui peuvent être nécessaires pour les frais d'administration ou autrement, le syndic doit, selon que l'exigent les inspecteurs, déclarer et distribuer les dividendes entre les créanciers non garantis qui y ont droit.

Réclamation contestée

(2) Lorsque la validité d'une réclamation n'a pas été déterminée, le syndic retient un montant suffisant pour pourvoir à son acquittement dans le cas où la réclamation serait admise.

Aucun droit d'action en recouvrement de dividende

(3) Aucun droit d'action en recouvrement de dividende n'existe contre le syndic, mais si le syndic refuse ou omet de payer un dividende après en avoir reçu l'ordre des

estate under the conditional order, including any amount brought into the estate under the consent to the judgment.

Costs where opposition frivolous or vexatious

(7) If a creditor opposes the discharge of a bankrupt and the court finds the opposition to be frivolous or vexatious, the court may order the creditor to pay costs, including legal costs, to the estate.

(8) [Repealed, 2005, c. 47, s. 110]

R.S., 1985, c. B-3, s. 197; 1997, c. 12, s. 106; 2004, c. 25, s. 89; 2005, c. 47, s. 110.

Frais en cas d'opposition futile ou vexatoire

(7) Si le tribunal conclut que l'opposition d'un créancier à la libération est futile ou vexatoire, il peut, s'il l'estime indiqué, adjuger à l'actif contre le créancier les frais de justice et autres.

(8) [Abrogé, 2005, ch. 47, art. 110]

L.R. (1985), ch. B-3, art. 197; 1997, ch. 12, art. 106; 2004, ch. 25, art. 89; 2005, ch. 47, art. 110.

PART VIII

Offences

Bankruptcy offences

198 (1) Any bankrupt who

(a) makes any fraudulent disposition of the bankrupt's property before or after the date of the initial bankruptcy event,

(b) refuses or neglects to answer fully and truthfully all proper questions put to the bankrupt at any examination held pursuant to this Act,

(c) makes a false entry or knowingly makes a material omission in a statement or accounting,

(d) after or within one year immediately preceding the date of the initial bankruptcy event, conceals, destroys, mutilates, falsifies, makes an omission in or disposes of, or is privy to the concealment, destruction, mutilation, falsification, omission from or disposition of, a book or document affecting or relating to the bankrupt's property or affairs, unless the bankrupt had no intent to conceal the state of the bankrupt's affairs,

(e) after or within one year immediately preceding the date of the initial bankruptcy event, obtains any credit or any property by false representations made by the bankrupt or made by any other person to the bankrupt's knowledge,

(f) after or within one year immediately preceding the date of the initial bankruptcy event, fraudulently conceals or removes any property of a value of fifty dollars or more or any debt due to or from the bankrupt, or

(g) after or within one year immediately preceding the date of the initial bankruptcy event, hypothecates,

PARTIE VIII

Infractions

Infractions en matière de faillite

198 (1) Commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de cinq mille dollars et un emprisonnement maximal de un an, ou l'une de ces peines, ou, par mise en accusation, une amende maximale de dix mille dollars et un emprisonnement maximal de trois ans, ou l'une de ces peines, tout failli qui, selon le cas :

a) dispose d'une façon frauduleuse de ses biens avant ou après l'ouverture de la faillite;

b) refuse ou néglige de répondre complètement et véridiquement à toutes les questions qui lui sont posées à bon droit au cours d'un interrogatoire tenu conformément à la présente loi;

c) fait une fausse inscription ou commet sciemment une omission importante dans un état ou un compte;

d) après l'ouverture de la faillite, ou dans l'année précédant l'ouverture de la faillite, cache, détruit, mutile ou falsifie un livre ou document se rapportant à ses biens ou affaires, en dispose ou y fait une omission, ou participe à ces actes, à moins qu'il n'ait eu aucunement l'intention de cacher l'état de ses affaires;

e) après l'ouverture de la faillite, ou dans l'année précédant l'ouverture de la faillite, obtient tout crédit ou tout bien au moyen de fausses représentations faites par lui ou par toute autre personne à sa connaissance;

f) après l'ouverture de la faillite, ou dans l'année précédant l'ouverture de la faillite, cache ou transporte frauduleusement tout bien d'une valeur de cinquante dollars ou plus, ou une créance ou dette;

pawns, pledges or disposes of any property that the bankrupt has obtained on credit and has not paid for, unless in the case of a trader the hypothecation, pawning, pledging or disposing is in the ordinary way of trade and unless the bankrupt had no intent to defraud,

is guilty of an offence and is liable, on summary conviction, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year or to both, or on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding three years, or to both.

g) après l'ouverture de la faillite, ou dans l'année précédant l'ouverture de la faillite, hypothèque ou met en gage ou nantit tout bien qu'il a obtenu à crédit et qu'il n'a pas payé, ou en dispose, à moins que, dans le cas d'un commerçant, l'acte ne soit effectué selon les pratiques ordinaires du commerce et à moins qu'il n'ait eu aucunement l'intention de frauder.

Failure to comply with duties

(2) A bankrupt who, without reasonable cause, fails to comply with an order of the court made under section 68 or to do any of the things required of the bankrupt under section 158 is guilty of an offence and is liable

(a) on summary conviction, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both; or

(b) on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding three years, or to both.

R.S., 1985, c. B-3, s. 198; 1992, c. 27, s. 71; 1997, c. 12, s. 107; 2004, c. 25, s. 90(F).

Manquement aux obligations

(2) Le failli qui, sans motif raisonnable, ne se conforme pas à une ordonnance rendue en application de l'article 68 ou omet de remplir une obligation imposée par l'article 158 commet une infraction et encourt, sur déclaration de culpabilité :

a) par procédure sommaire, une amende maximale de cinq mille dollars et un emprisonnement maximal de un an, ou l'une de ces peines;

b) par mise en accusation, une amende maximale de dix mille dollars et un emprisonnement maximal de trois ans, ou l'une de ces peines.

L.R. (1985), ch. B-3, art. 198; 1992, ch. 27, art. 71; 1997, ch. 12, art. 107; 2004, ch. 25, art. 90(F).

Failure to disclose fact of being undischarged

199 An undischarged bankrupt who

(a) engages in any trade or business without disclosing to all persons with whom the undischarged bankrupt enters into any business transaction that the undischarged bankrupt is an undischarged bankrupt, or

(b) obtains credit to a total of $1,000 or more from any person or persons without informing them that the undischarged bankrupt is an undischarged bankrupt,

is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both.

R.S., 1985, c. B-3, s. 199; 1992, c. 27, s. 72; 2005, c. 47, s. 111.

Failli non libéré qui ne se déclare pas tel

199 Commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de cinq mille dollars et un emprisonnement maximal d'un an, ou l'une de ces peines, le failli non libéré qui, selon le cas :

a) entreprend un commerce ou un négoce sans révéler, à toutes les personnes avec qui il conclut des affaires, qu'il est un failli non libéré;

b) obtient du crédit de toutes personnes, pour un montant total de mille dollars ou plus, sans les informer qu'il est un failli non libéré.

L.R. (1985), ch. B-3, art. 199; 1992, ch. 27, art. 72; 2005, ch. 47, art. 111.

Bankrupt failing to keep proper books of account

200 (1) Any person becoming bankrupt or making a proposal who has on any previous occasion been bankrupt or made a proposal to the person's creditors is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars

Failli qui ne tient pas des livres de comptabilité appropriés

200 (1) Toute personne devenant en faillite ou présentant une proposition, qui, dans une occasion antérieure, a été en faillite ou a présenté une proposition à ses créanciers, commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende

or to imprisonment for a term not exceeding one year, or to both, if

(a) being engaged in any trade or business, at any time within the period beginning on the day that is two years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, that person has not kept and preserved proper books of account; or

(b) within the period mentioned in paragraph (a), that person conceals, destroys, mutilates, falsifies or disposes of, or is privy to the concealment, destruction, mutilation, falsification or disposition of, any book or document affecting or relating to the person's property or affairs, unless the person had no intent to conceal the state of the person's affairs.

maximale de cinq mille dollars et un emprisonnement maximal d'un an ou l'une de ces peines, dans les cas suivants :

a) se livrant à un commerce ou à une entreprise, au cours de la période allant du premier jour de la deuxième année précédant l'ouverture de la faillite jusqu'à la date de la faillite inclusivement, elle n'a pas tenu ni conservé des livres de comptabilité appropriés;

b) pendant la même période, elle cache, détruit, mutile ou falsifie un livre ou document se rapportant à ses biens ou à ses affaires, ou en dispose, ou participe à ces actes, à moins qu'elle n'ait eu aucunement l'intention de cacher l'état de ses affaires.

Proper books of account defined

(2) For the purposes of this section, a debtor shall be deemed not to have kept proper books of account if he has not kept such books or accounts as are necessary to exhibit or explain his transactions and financial position in his trade or business, including a book or books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealings in goods, also accounts of all goods sold and purchased, and statements of annual and other stock-takings.

R.S., 1985, c. B-3, s. 200; 1992, c. 27, s. 73; 1997, c. 12, s. 108; 2004, c. 25, s. 91(F).

Définition de *livres de comptabilité appropriés*

(2) Pour l'application du présent article, un débiteur est réputé ne pas avoir tenu des livres de comptabilité appropriés s'il n'a pas tenu les livres ou comptes qui sont nécessaires pour montrer ou expliquer ses opérations et sa situation financière dans son commerce ou son entreprise, y compris un ou des livres renfermant des inscriptions au jour le jour et suffisamment détaillées de tous les encaissements et décaissements, et, lorsque le commerce ou l'entreprise a comporté la vente et l'achat de marchandises, les comptes de toutes les marchandises vendues et achetées, et des états des inventaires annuels et autres.

L.R. (1985), ch. B-3, art. 200; 1992, ch. 27, art. 73; 1997, ch. 12, art. 108; 2004, ch. 25, art. 91(F).

False claim, etc.

201 (1) Where a creditor, or a person claiming to be a creditor, in any proceedings under this Act, wilfully and with intent to defraud makes any false claim or any proof, declaration or statement of account that is untrue in any material particular, the creditor or person is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year, or to both.

Fausse réclamation

201 (1) Lorsque, dans une procédure sous le régime de la présente loi, un créancier ou toute personne prétendant être un créancier fait, volontairement et avec l'intention de frauder, une fausse réclamation ou une preuve, déclaration ou un état de compte qui est faux dans un détail important, ce créancier ou cette personne commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de cinq mille dollars et un emprisonnement maximal d'un an, ou l'une de ces peines.

Inspectors accepting unlawful fee

(2) Where an inspector accepts from the bankrupt or from any person, firm or corporation acting on behalf of the bankrupt or from the trustee any fee, commission or emolument other than or in addition to the regular fees provided for by this Act, the inspector is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year, or to both.

Inspecteurs qui acceptent des honoraires illégaux

(2) Lorsqu'un inspecteur accepte du failli ou de toute personne, firme ou personne morale agissant en son nom, ou du syndic, des honoraires, commissions ou émoluments quelconques, autres que les honoraires réguliers que la présente loi prévoit ou en supplément de tels honoraires, il commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de cinq mille dollars et un emprisonnement maximal d'un an, ou l'une de ces peines.

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
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.*:
Abou-Rached, Re (2002), 2002 BCSC 1022, 2002 CarswellBC 1642, 35 C.B.R. (4th) 165 (B.C. S.C.) — referred to
Gardner, Re (1921), 1921 CarswellOnt 3, 1 C.B.R. 424, 49 O.L.R. 252, 59 D.L.R. 555 (Ont. S.C.) — referred to
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
National Fruit Exchange Inc., Re (1948), 1948 CarswellQue 21, 29 C.B.R. 125 (C.S. Que.) — referred to

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

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
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.

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
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.

Table of Authorities

Cases considered by *Morawetz J.*:

A. & F. Baillargeon Express Inc., Re (1993), 27 C.B.R. (3d) 36, 1993 CarswellQue 49 (C.S. Que.) — referred to

Air Canada, Re (2004), 2004 CarswellOnt 1842, 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) — referred to

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

Canwest Global Communications Corp., Re (2010), 70 C.B.R. (5th) 1, 2010 ONSC 4209, 2010 CarswellOnt 5510 (Ont. S.C.J. [Commercial List]) — referred to

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

Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd. (1976), 1976 CarswellQue 32, [1978] 1 S.C.R. 230, 26 C.B.R. (N.S.) 84, 75 D.L.R. (3d) 63, (sub nom. *Employers' Liability Assurance Corp. v. Ideal Petroleum (1969) Ltd.)* 14 N.R. 503, 1976 CarswellQue 25 (S.C.C.) — referred to

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

Lofchik, Re (1998), 1998 CarswellOnt 194, 1 C.B.R. (4th) 245 (Ont. Bktcy.) — referred to

Magnus One Energy Corp., Re (2009), 2009 CarswellAlta 488, 2009 ABQB 200, 53 C.B.R. (5th) 243 (Alta. Q.B.) — referred to

Mayer, Re (1994), 25 C.B.R. (3d) 113, 1994 CarswellOnt 268 (Ont. Bktcy.) — referred to

Mister C's Ltd., Re (1995), 1995 CarswellOnt 372, 32 C.B.R. (3d) 242 (Ont. Bktcy.) — considered

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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