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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT AND IN THE MATTER OF THE PROPOSAL OF COMMERX CORPORATION
DOCUMENT	**BENCH BRIEF OF HARDIE & KELLY INC., THE PROPOSAL TRUSTEE**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500 Bankers Hall East 855 – 2 Street SW Calgary, Alberta T2P 4K7 Attention: Chris Simard/Keely Cameron Telephone No.: 403-298-4485/403-298-3324 Fax No.: 403-265-7219 Client File No.: 58368.11

Application Scheduled for the 11th day of October, 2019
before The Honourable Justice ~~Eidsvik~~ DARIO

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I. INTRODUCTION

1. Hardie & Kelly Inc., the Proposal Trustee (the "**Proposal Trustee**") of Commerx Corporation (the "**Company**") seeks an order approving Commerx's proposal as amended on September 6, 2019 (the "**Amended Proposal**") pursuant to section 59 of the *Bankruptcy and Insolvency Act*, RSA 1985 c B-3 (the "***BIA***")[1].

2. The Proposal Trustee is submitting this Bench Brief to provide to the Court the relevant applicable authorities in advance of the application.

II. ISSUE

3. The sole issue to be determined in this application is whether the terms of the Amended Proposal are reasonable and for the benefit of the general body of creditors such that the Amended Proposal should be approved.

III. LAW

4. Pursuant to section 50 of the *BIA*, a proposal can only be advanced by an insolvent person, a receiver, a liquidator, a bankruptcy, or the trustee of a bankrupt's estate[2].

5. In order for a proposal to be deemed to be accepted by the debtor's creditors, all classes of unsecured creditors and any secured creditors in respect of whose secured claims the proposal was made, must vote for the acceptance of the proposal by a majority in number and two thirds in value of the creditors of each class present, personally or by proxy, at the meeting and voting on the resolution[3].

6. Pursuant to section 58 of the *BIA,* upon acceptance of a proposal by the creditors, the trustee shall:

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

(b) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor

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[1] *Bankruptcy and Insolvency Act*, RSA 1985 c B-3 [*BIA*] at section 59 [**TAB 1**]
[2] *BIA, supra* at section 50 [**TAB 1**].
[3] *BIA, supra* at section 54(2) [**TAB 1**]

who has proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;

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

(d) at least two days before the date of the hearing, file with the court the trustee's report on the proposal[4].

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

(a) the terms of the proposal are reasonable;

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

(c) the proposal is made in good faith[5].

8. In considering these requirements, certain interests must be taken into account: the interest of the debtor to meet with its creditors and to find a way of producing assets or revenue which will provide the creditors with a dividend outside of a bankruptcy; the interest of the creditors, *i.e.* to ensure that what is offered under the proposal is reasonable and supported by the majority of creditors; and the interest of the public at large and the integrity of bankruptcy legislation[6] [7].

9. The debtor bears the onus of establishing that the proposal should be approved. This is to be done through demonstrating that the proposal is reasonable, which means there must be a reasonable possibility, not a certainty, that the proposal will be completed in accordance with its terms. Where the proposal calls for payment over time, the debtor must demonstrate a reasonable prospect of being able to make the payments[8].

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[4] *BIA*, *supra* at section 58 **[TAB 1]**
[5] *Re Magnus One Energy Corp.*, 2009 ABQB 200 ***[Magnus]*** at para. 10 **[TAB 2]**
[6] *Re Stone*, (1976), 22 CBR (NS) 152 (Ont SC) ***[Stone]***, at para 2 **[TAB 3]**
[7] *Re Wandler (Proposal)*, 2007 ABQB 153 ***[Wandler]*** at para. 11 **[TAB 4]**
[8] *Wandler*, *supra* at paras. 9-12 **[TAB 4]**

10. Although the court is not bound to approve a proposal even though it has been recommended by the trustee and given the overwhelming support of creditors, substantial deference should be afforded to these views[9].

IV. RELIEF SOUGHT

11. The Proposal Trustee seeks an order pursuant to section 59 of the *BIA* approving and sanctioning the Amended Proposal on the basis that it meets the statutory requirements, is reasonable, and is preferable to other potential options available to affected stakeholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 24th day of September, 2019.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

BENNETT JONES LLP

Per: _____

Chris Simard/Keely Cameron
Counsel for the Proposal Trustee,
Hardie & Kelly Inc.

[9] *Magnus, supra* at para 11 **[TAB 2]**

V. TABLE OF AUTHORITIES

TAB

1. *Bankruptcy and Insolvency Act*, RSA 1985 c B-3
2. *Re Magnus One Energy Corp.*, 2009 ABQB 200
3. *Re Stone*, (1976), 22 CBR (NS) 152 (Ont SC)
4. *Re Wandler (Proposal)*, 2007 ABQB 153

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 October 3, 2018

Last amended on May 23, 2018

À jour au 3 octobre 2018

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OFFICIAL STATUS OF CONSOLIDATIONS

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

Published consolidation is evidence

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

Inconsistencies in Acts

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

NOTE

This consolidation is current to October 3, 2018. The last amendments came into force on May 23, 2018. Any amendments that were not in force as of October 3, 2018 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

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

Codifications comme élément de preuve

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

Incompatibilité — lois

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

NOTE

Cette codification est à jour au 3 octobre 2018. Les dernières modifications sont entrées en vigueur le 23 mai 2018. Toutes modifications qui n'étaient pas en vigueur au 3 octobre 2018 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Future property not to be considered

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

Where subsection (6) ceases to apply

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

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

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

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

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

Exclusion des biens futurs

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

Cessation d'effet du paragraphe (6)

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

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

PART III

Proposals

DIVISION I

General Scheme for Proposals

Who may make a proposal

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

(a) an insolvent person;

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

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

(d) a bankrupt; and

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

Where proposal may not be made

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

PARTIE III

Propositions concordataires

SECTION I

Dispositions d'application générale

Admissibilité

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

a) une personne insolvable;

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

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

d) un failli;

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

Inadmissibilité

(1.1) Il ne peut être fait de proposition aux termes de la présente section relativement au débiteur à l'égard de qui une proposition de consommateur a été produite aux termes de la section II tant que l'administrateur désigné

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

To whom proposal made

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

Idem

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

Classes of secured claims

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

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

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

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

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

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

Court may determine classes

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

Creditors' response

(1.6) Subject to section 50.1 as regards included secured creditors, any creditor may respond to the proposal as

dans le cadre de la première proposition n'a pas été libéré.

Destinataires

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

Idem

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

Catégories de créances garanties

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

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

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

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

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

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

Décision du tribunal

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

Réponse des créanciers

(1.6) Sous réserve de l'article 50.1, tout créancier peut répondre à la proposition qui a été faite aux créanciers en

made to the creditors generally, by filing with the trustee a proof of claim in the manner provided for in

(a) sections 124 to 126, in the case of unsecured creditors; or

(b) sections 124 to 134, in the case of secured creditors.

Effect of filing proof of claim

(1.7) Hereinafter in this Division, a reference to an unsecured creditor shall be deemed to include a secured creditor who has filed a proof of claim under subsection (1.6), and a reference to an unsecured claim shall be deemed to include that secured creditor's claim.

Voting

(1.8) All questions relating to a proposal, except the question of accepting or refusing the proposal, shall be decided by ordinary resolution of the creditors to whom the proposal was made.

Documents to be filed

(2) Subject to section 50.4, proceedings for a proposal shall be commenced, in the case of an insolvent person, by filing with a licensed trustee, and in the case of a bankrupt, by filing with the trustee of the estate,

(a) a copy of the proposal in writing setting out the terms of the proposal and the particulars of any securities or sureties proposed, signed by the person making the proposal and the proposed sureties if any; and

(b) the prescribed statement of affairs.

Filing of documents with the official receiver

(2.1) Copies of the documents referred to in subsection (2) must, at the time the proposal is filed under subsection 62(1), also be filed by the trustee with the official receiver in the locality of the debtor.

Approval of inspectors

(3) A proposal made in respect of a bankrupt shall be approved by the inspectors before any further action is taken thereon.

Proposal, etc., not to be withdrawn

(4) No proposal or any security, guarantee or suretyship tendered with the proposal may be withdrawn pending the decision of the creditors and the court.

général en déposant auprès du syndic une preuve de réclamation de la manière prévue :

a) aux articles 124 à 126, dans le cas des créanciers non garantis;

b) aux articles 124 à 134, dans le cas des créanciers garantis.

Effet du dépôt d'une preuve de réclamation

(1.7) Pour l'application des dispositions de la présente section qui suivent le présent article, la mention d'un créancier non garanti vaut également mention d'un créancier garanti qui a déposé une preuve de réclamation aux termes du paragraphe (1.6), et la mention d'une réclamation non garantie vaut mention de la réclamation garantie de ce créancier.

Vote

(1.8) Toutes les décisions relatives à une proposition, sauf celles portant sur son acceptation ou son rejet, sont prises par résolution ordinaire des créanciers à qui la proposition a été faite.

Documents à déposer

(2) Sous réserve de l'article 50.4, les procédures relatives à une proposition commencent, dans le cas d'une personne insolvable, par le dépôt, auprès d'un syndic autorisé, et, dans le cas d'un failli, par le dépôt, auprès du syndic de l'actif, d'une copie de la proposition indiquant les termes de la proposition et les détails des garanties ou cautions proposées, et signée par l'auteur de la proposition et les cautions proposées, le cas échéant, ainsi qu'une copie du bilan prescrit.

Envoi au séquestre officiel

(2.1) Le syndic envoie les documents visés au paragraphe (2) au séquestre officiel de la localité du débiteur au moment du dépôt de la proposition en application du paragraphe 62(1).

Approbation des inspecteurs

(3) Une proposition visant un failli doit être approuvée par les inspecteurs avant que toute autre mesure soit prise à son égard.

Une proposition ne peut être retirée

(4) Nulle proposition ni aucun cautionnement ou garantie offerts avec cette proposition ne peuvent être retirés en attendant la décision des créanciers et du tribunal.

Assignment not prevented

(4.1) Subsection (4) shall not be construed as preventing an insolvent person in respect of whom a proposal has been made from subsequently making an assignment.

Duties of trustee

(5) The trustee shall make or cause to be made such an appraisal and investigation of the affairs and property of the debtor as to enable the trustee to estimate with reasonable accuracy the financial situation of the debtor and the cause of the debtor's financial difficulties or insolvency and report the result thereof to the meeting of the creditors.

Trustee to file cash-flow statement

(6) The trustee shall, when filing a proposal under subsection 62(1) in respect of an insolvent person, file with the proposal

(a) a statement — or a revised cash-flow statement if a cash-flow statement had previously been filed under subsection 50.4(2) in respect of that insolvent person — (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the person making the proposal, reviewed for its reasonableness by the trustee and signed by the trustee and the person making the proposal;

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

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

Creditors may obtain statement

(7) Subject to subsection (8), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception

(8) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (7) where it is satisfied that

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

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

Interprétation

(4.1) Le paragraphe (4) n'a pas pour effet d'empêcher une personne insolvable visée par une proposition de faire une cession par la suite.

Fonctions du syndic

(5) Le syndic fait, ou fait faire, relativement aux affaires et aux biens du débiteur une évaluation et une investigation qui lui permettent d'estimer avec un degré suffisant d'exactitude la situation financière du débiteur et la cause de ses difficultés financières ou de son insolvabilité, et il en fait rapport à l'assemblée des créanciers.

État de l'évolution de l'encaisse

(6) Le syndic qui dépose, à l'égard d'une personne insolvable, une proposition aux termes du paragraphe 62(1) est tenu de joindre à celle-ci :

a) un état établi par l'auteur de la proposition — ou une version révisée d'un tel état lorsqu'on en a déjà déposé un à l'égard de la même personne insolvable aux termes du paragraphe 50.4(2) —, appelé « l'état » au présent article, portant, projections au moins mensuelles à l'appui, sur l'évolution de l'encaisse de la personne insolvable, et signé par lui et par le syndic après que celui-ci en a vérifié le caractère raisonnable;

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

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

Copies de l'état

(7) Sous réserve du paragraphe (8), tout créancier qui en fait la demande au syndic peut obtenir une copie de l'état.

Exception

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

Trustee protected

(9) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, he is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to monitor and report

(10) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a proposal in respect of an insolvent person shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the proposal until the proposal is approved by the court or the insolvent person becomes bankrupt, and shall

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

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

(ii) with the court at any time that the court may order;

(a.1) send a report about the material adverse change to the creditors without delay after ascertaining the change; and

(b) send, in the prescribed manner, a report on the state of the insolvent person's business and financial affairs — containing the trustee's opinion as to the reasonableness of a decision, if any, to include in a proposal a provision that sections 95 to 101 do not apply in respect of the proposal and containing the prescribed information, if any — to the creditors and the official receiver at least 10 days before the day on which the meeting of creditors referred to in subsection 51(1) is to be held.

Report to creditors

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

Immunité

(9) S'il agit de bonne foi et prend toutes les précautions voulues pour bien réviser l'état, le syndic ne peut être tenu responsable du préjudice ou des pertes subis par la personne qui s'y fie.

Obligation de surveillance

(10) Sous réserve de toute instruction émise par le tribunal aux termes de l'alinéa 47.1(2)a), le syndic désigné dans une proposition se rapportant à une personne insolvable a, dans le cadre de la surveillance des affaires et des finances de celle-ci et dans la mesure où cela s'avère nécessaire pour lui permettre d'évaluer adéquatement les affaires et les finances de la personne insolvable, accès aux biens — locaux, livres, registres et autres documents financiers, notamment — de cette personne, biens qu'il est d'ailleurs tenu d'examiner, et ce depuis le dépôt de la proposition jusqu'à son approbation par le tribunal ou jusqu'à ce que la personne en question devienne un failli; le syndic est en outre tenu :

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

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

(ii) auprès du tribunal aux moments déterminés par ordonnance de celui-ci;

a.1) d'envoyer aux créanciers un rapport sur le changement visé au sous-alinéa a)(i) dès qu'il le note;

b) d'envoyer aux créanciers et au séquestre officiel, de la manière prescrite et au moins dix jours avant la date de la tenue de l'assemblée des créanciers prévue au paragraphe 51(1), un rapport portant sur l'état des affaires et des finances de la personne insolvable et contenant notamment, en plus des renseignements prescrits, son opinion sur le caractère raisonnable de la décision d'inclure une disposition dans la proposition prévoyant la non-application à celle-ci des articles 95 à 101.

Rapport à l'intention des créanciers

(11) Le séquestre intérimaire qui, aux termes du paragraphe 47.1(2), s'est vu confier l'exercice, en remplacement du syndic, des fonctions visées au paragraphe (10) est tenu de remettre à celui-ci, au moins quinze jours avant la tenue de l'assemblée des créanciers prévue au paragraphe 51(1), un rapport portant sur les affaires et

creditors referred to in subsection 51(1), and the trustee shall send the report to the creditors and the official receiver, in the prescribed manner, at least ten days before the meeting of creditors referred to in that subsection.

Court may declare proposal as deemed refused by creditors

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

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

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

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

Effect of declaration

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

Claims against directors — compromise

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

Exception

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

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

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

les finances de la personne insolvable et contenant les renseignements prescrits; le syndic expédie, de la manière prescrite, ce rapport aux créanciers et au séquestre officiel au moins dix jours avant la tenue de l'assemblée des créanciers prévue à ce paragraphe.

Présomption de refus de la proposition

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

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

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

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

Effet de la déclaration

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

Transaction — réclamations contre les administrateurs

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

Restriction

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

Powers of court

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

Application of other provisions

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

Determination of classes of claims

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

Resignation or removal of directors

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

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

Secured creditor may file proof of secured claim

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

Proposed assessed value

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

(a) the amount of the claim, and

(b) the proposed assessed value of the security.

Pouvoir du tribunal

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

Application

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

Détermination des catégories de réclamations

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

Démission ou destitution des administrateurs

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

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

Preuve de créance garantie

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

Valeur attribuée

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

received by the trustee at or prior to the meeting, has effect as if the creditor had been present and had voted at the meeting.

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

Vote on proposal by creditors

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

Voting system

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

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

(i) all unsecured creditors, and

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

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

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

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

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

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

Certain Crown claims

(2.1) For greater certainty, subsection 224(1.2) of the *Income Tax Act* shall not be construed as classifying as secured claims, for the purpose of subsection (2), claims of Her Majesty in right of Canada or a province for amounts that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to

désapprobation est reçue par le syndic avant l'assemblée ou lors de celle-ci, elle a le même effet que si le créancier avait été présent et avait voté à l'assemblée.

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

Vote sur la proposition

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

Mode de votation

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

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

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

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

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

Certaines réclamations de la Couronne

(2.1) Il demeure entendu que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* n'a pas pour effet d'assimiler, pour l'application du paragraphe (2), aux réclamations garanties les réclamations de Sa Majesté du chef du Canada ou d'une province pour des montants qui pourraient faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*;

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.

Application for court approval

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

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

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

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

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

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

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

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.

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.

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

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.

Certain Crown claims

(1.1) Unless Her Majesty consents, no proposal shall be approved by the court that does not provide for the payment in full to Her Majesty in right of Canada or a province, within six months after court approval of the proposal, of all amounts that were outstanding at the time of the filing of the notice of intention or of the proposal, if no notice of intention was filed, and are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a

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.

Certaines réclamations de la Couronne

(1.1) Le tribunal ne peut, sans le consentement de Sa Majesté, approuver une proposition qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'approbation, de tous les montants qui étaient dus lors du dépôt de l'avis d'intention ou, à défaut, de la proposition et qui sont de nature à faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite

TAB 2

Court of Queen's Bench of Alberta

Citation: Magnus One Energy Corp. (Re), 2009 ABQB 200

Date: 20090402
Docket: BE01 080637; BE01 080668
Registry: Calgary

Docket: BE01 080637

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

- and -

Docket: BE01 080668

In the Matter of the Proposal of
Magnus Energy Inc.

Reasons for Judgment
of the
Honourable Madam Justice B.E. Romaine

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 *Re Gardner* (1921), 1 C.B.R. 424 (Ont. S.C.); *Re Sumner Co.* (1984) Ltd. (1987), 64 C.B.R. (N.S.) 218 (NB Q.B.) ; *Re Stone* (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.); Re *National Fruit Exchange Inc.* (1948), 29 C.B.R. 125 (Que. S.C.); *Re Man With Axe Ltd.* (No. 1) (1961), 2 C.B.R. (N.S.) 12 (Man. Q.B.).; Re *Abou-Rached* (2002), 5 C.B.R. (4th) 165, 2002 CarswellBC 1642 (B.C. S.C.).; *Re Garrity* [2006] A.J. No. 890 (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.

Heard on the 27th day of January, 2009.
Dated at the City of Calgary, Alberta this 2nd day of April, 2009.

B.E. Romaine
J.C.Q.B.A.

Appearances:

John L. Ircandia
Borden Ladner Gervais LLP
for the Applicant

James R. Farrington
Krushel Farrington
for Pedro's Services Ltd. and
Taber Water Disposal Inc.

TAB 3

1976 CarswellOnt 56
Ontario Supreme Court, In Bankruptcy

Stone, Re

1976 CarswellOnt 56, 22 C.B.R. (N.S.) 152

Re Stone

Henry J.

Judgment: May 18, 1976

Counsel: *J. N. Berman*, for creditor.
C. H. Morawetz, Q.C., for debtor.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.a General principles
Headnote
Bankruptcy --- Proposal — Approval by Court — General
Proposals — Approval of — Governing considerations.
The function of the court when called upon to approve a proposal is a matter of taking several interests into account. The first interest is that of the debtor: to give him an opportunity to meet with his creditors and to find a way of producing assets or revenue which will provide them with a dividend outside of bankruptcy. The second interest is that of the creditors: to protect the creditors generally by ensuring that what is put up by way of a proposal is reasonable, but bearing in mind that by the time it gets to the court the proposal has been supported by and is therefore desired by the majority of creditors. The third interest is that of the public at large in the integrity of the bankruptcy legislation.

***Henry J.* (orally):**

1 As I conceive the function of the court when called upon to approve a proposal, it is a matter of taking several interests into account.

2 The first interest is that of the debtor: to give him an opportunity to meet with his creditors and to find a way of producing assets or revenue which will provide them with a dividend outside of bankruptcy. The second interest is that of the creditors: to protect the creditors generally by ensuring that what is put up by way of a proposal is a reasonable one, but bearing in mind that by the time it gets to the court the proposal has been supported by and is therefore desired by the majority of creditors. The third interest is that of the public at large in the integrity of the bankruptcy legislation.

3 In the present case I am faced with a situation where the history of this proposal does not inspire confidence in the ability of the debtor to bring about the implementation of the proposal that he has made to his creditors. I am very mindful of the delay that has occurred and I should like the objecting creditor to understand that this factor is very firmly in my mind. I must,

however, consider the position of the majority of creditors, and there is one significant creditor who is objecting and who has objected from the very beginning to the proposal. But it is clear to me that the majority of the creditors, rightly or wrongly, have some faith in the likelihood of some dividend from the proposal.

4 As to the integrity of the Bankruptcy Act, R.S.C. 1970, c. B-3, we are coming to the point that any further failure to implement the proposal in a prompt and satisfactory way will have to be considered an abuse of process.

5 But it would be doing an injustice to the majority of the creditors if I should dispose of this matter now; not only are they entitled to have my adjudication on the basis of the best evidence, but they are also entitled to have me wait for a further short period to see whether or not the mainstay of this proposal is put in place.

6 If I were to reject the proposal on the basis of the available evidence before me, based on the trustee's earlier reports, there is little hope that the creditors would obtain anything from the estate if I now placed the debtor in bankruptcy.

7 I should like to make it clear, however, that while I intend to adjourn this matter for a few weeks I am stating, most firmly, that this must be the last time; therefore I will adjourn the matter to the bankruptcy Court in the last week in June, that would be 29th June; that would be the first motion day of the last week of June. I suggest that day because I have been told that, at the outside, if this contract is executed it will be executed within five weeks.

8 I have not been shown any reason why the objecting creditor will be prejudiced by this delay. He cannot expect to receive a dividend if the debtor is put into bankruptcy immediately. So I cannot see how I would be acting properly if I put the debtor into bankruptcy today. Therefore I will adjourn this matter until 29th June next.

End of Document

TAB 4

Court of Queen's Bench of Alberta

Citation: Re Wandler (Proposal), 2007 ABQB 153

Date: 20070307
Docket: BE03 910082
Registry: Edmonton

In the Matter of the Proposal of Donald Phillip Wandler

Memorandum of Decision
of the
Honourable Madam Justice J.E. Topolniski

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[1] This Memorandum of Decision is supplemental to the Reasons for Decision which I delivered orally on February 2, 2007.

I. The Application

[2] Donald Wandler ("Debtor") applies for court approval of his Division I, *Bankruptcy and Insolvency Act* ("BIA")[1] proposal to his unsecured creditors, made November 18, 2006 ("Proposal"). The application is opposed by the Debtor's largest unsecured creditor, Canada Revenue Agency ("CRA"), on the ground of non-compliance with s. 59(3) of the BIA, which requires that security be provided for the performance of the Proposal ("performance security").

II. Background

[3] The facts are straightforward. The Proposal affects eight unsecured creditors ("creditors"), whose claims total $148,001.00. CRA's claim is for $90,000.00, or about 60 percent of the total unsecured debt. The Proposal provides that the Debtor will pay $18,000.00 from his future earnings in satisfaction of the Trustee's fees and expenses (about $ 5,400.00) and the creditors' claims ("Payment"). The Payment is due in thirty-six installments of $500.00 each,

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

the first due on filing of the Proposal ("Initial Payment") and continuing monthly thereafter. The Proposal also provides that the Debtor will file a provisional income tax return.

[4] A representative of CRA told the Trustee before the meeting of creditors to vote on the Proposal that she had sent CRA's negative vote and proxy via the mail, and did not plan to attend the meeting. As matters unfolded, the vote and proxy did not arrive in time for the meeting. The Proposal was approved by two creditors with a combined claim value of $13,645.56.

[5] The Trustee reports that the Debtor's insolvency is attributable to relationship breakdown, overuse of credit, tax liability, and his son's drug problems. The Debtor's 2006 net income to November was $60,000.00. The realizable value of his assets is $9,202.00, of which he claims that all but $2,002 is exempt [under the provisions of the Civil Enforcement Act[2]] or encumbered.

[6] The Trustee recommends that the Court approve the Proposal as it is advantageous to the creditors and they voted in favour of it, urging a generous interpretation of s. 59(3) to ensure that consumer debtors are not deprived of the right to make Division I proposals to their creditors. The Trustee says there is authority for the proposition that s. 59(3) may not require performance security per se, but rather a reasonable chance that the Proposal will succeed.

[7] The Debtor did not attend the application or proffer any evidence to support his application.

[8] CRA contends that s. 59(3) mandates performance security in the Debtor's circumstance.

A. General Principles Governing Applications for Court Approval of Proposals

[9] A debtor bears the onus of establishing that a proposal should be approved.[3] Where a proposal calls for payment over an extended time, the debtor must show a reasonable prospect of being able to generate the money to make the payments.[4]

[10] As a proposal substantially interferes with creditors' rights, the provisions of the BIA must be complied with strictly.[5]

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2 R.S.A. 2000, c. C-15.

3 ***Re Aquatex Corp***. (1998), 8 C.B.R. (4th) 177, 1998 ABQB 1006 at para. 20; ***Re McNamara and McNamara*** (1984), 53 C.B.R. (N.S.) 240 (Ont. S.C.).

4 ***Re Gareau*** (1922), 2 C.B.R. 265 (Que. S.C.).

5 ***Re Davis*** (1924), 5 C.B.R. 182, 27 O.W.N. 131 (Ont. S.C.).

[11] Proposals are clearly preferable to bankruptcies. Nonetheless, the court must consider all of the stakeholders' interests on an application to approve a proposal: the debtor's interest in restructuring debt; the creditors' interests in resolving claims in a reasonable fashion; and the public interest in maintaining the integrity of the bankruptcy process and commercial morality.[6]

[12] Because proposals are arrangements submitted for the approval of creditors, at least some of whom may not have had the benefit of legal advice and may be unfamiliar with legal nuance, the words used in proposals should be given their plain and ordinary meaning.[7]

B. The Statutory Framework

[13] Natural persons whose debts do not exceed $75,000.00 have recourse to the "consumer proposal" provisions in Part III, Division II of the BIA. For corporations and natural persons whose debts exceed $75,000.00, recourse is under Part III, Division I of the BIA. In either case, the law recognizes that proposals have significant impact on the stakeholders. The Act addresses those impacts through express provisions to safeguard stakeholder interests, just one of which is the requirement for court scrutiny of all proposals accepted by the creditors.

[14] Section 59 provides the framework for and considerations governing the court's scrutiny of Division I proposals. Section 59 reads as follows :

> 59(1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.
>
> (2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.
>
> (3) 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.

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6 ***Re Gardner*** (1921), 1 C.B.R. 424 (Ont. S.C.); ***Re Stone*** (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.); ***Re Sumner Co.*** (1984) Ltd. (1987), 64 C.B.R. (N.S.) 218 (N.B.Q.B.T.D.).

7 ***Re Dav-Jor Contracting Ltd.,*** [2006] 4 C.T.C. 206, 2006 BCCA 330.

[Emphasis added.]

[15] Section 173 of the BIA enumerates certain circumstances and behaviour relating to a debtor. It reads in part as follows:

> 173(1) The facts referred to in section 172 are:
>
> (a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible.

[16] The requirement of performance security for court approval of proposals has been a feature of the BIA dating to The Bankruptcy Act, S.C. 1919, c. 36, s. 13(9). In 1949, the Act was amended (Bankruptcy Act, S.C. 1949, c. 7, s. 34(3)) to allow the court the discretion to lower the percentage of the security. The requirement of performance security and the court's discretion in terms of the percentage has remained unchanged ever since.

C. The Jurisprudence

[17] A review of the jurisprudence concerning the mandate for performance security under s. 59(3) of the BIA, its predecessor provisions, and parallel legislation in the United Kingdom is helpful.

[18] ***Re P.F. Murray, A Debtor, Ex parte The Debtor v. Official Receiver***[8] concerned the performance security required for a scheme of arrangement under s. 16(10) of the English Bankruptcy Act, 1914. Like s. 59(3) of our BIA, that provision required a threshold level of performance security, but unlike s. 59(3) it did not allow the court the discretion to lower the threshold amount. The scheme of arrangement in that case provided for monthly cash payments and allowed the debtor six months to obtain planning approval to redevelop and sell his matrimonial home, failing which the trustee could sell the property. On appeal, the court reversed the initial ruling that the security was unacceptable as not providing the creditors with the required amount in the six month time allotted, finding that there was a reasonable probability that the performance security could be paid in a reasonably short period. At p. 445, Cross J. commented that a broad view of the words "reasonable security" should be taken when a proposal is highly favourable to the creditors and has been accepted by them.

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[8] [1969] 1 All ER 441 (Ch. D.).

[19] The proposal in ***Re Dolson***[9] did not provide for performance security and the payment under the proposal was by installments, the first payment being due thirty days after approval of the proposal. Anderson J. refused to approve the proposal, stating that where a debtor, as in that case, had previously taken advantage of the BIA (a bankruptcy and another proposal), only extraordinary circumstances would justify the court in exercising its discretion to reduce the percentage of the performance security. No such circumstances were found.

[20] In ***Re McNamara***,[10] the performance security offered consisted of assets minimally worth 20 cents on the dollar which had vested in the trustee. Saunders J. refused to exercise his discretion to reduce the amount of security from the statutory minimum, noting that there was inadequate evidence as to the proposal's viability, and commenting that the debtors' inability to provide security up to the statutory requirement was a factor in assessing the reasonableness of the proposal under the equivalent of s. 59(2) of the present Act.

[21] In ***Re Mernick***,[11] the proposal in effect was a bankruptcy without investigative assistance. Farley J. found the proposal unreasonable on its face, noting that it was for a fraction of a cent on the dollar and fell below the minimum statutory threshold required by s. 59(3). The case took an unusual turn when the creditor opposing the application in the first instance settled with the debtor and entered into a consent order allowing an appeal of Farley J.'s decision, which had the effect of remitting the matter for a rehearing. In granting the consent order, the Ontario Court of Appeal noted that it did not reflect on the court's view of the merits of the appeal from the initial decision. The eventual outcome of the case is not reported.

[22] ***Re Orchid Fashions Inc.***[12] is another case in which the court refused to approve a proposal for a variety of reasons. The court suggested[13] that great care and caution must be exercised before approving a proposal that does not provide for reasonable security where there is a "fact" or bankruptcy offence in the relevant predecessor provisions to s. 173 and ss. 198 to 200.

[23] ***Re Sumner Co.***[14] is yet another case where approval of a proposal was objected to on the basis of performance security. The court refused to approve the proposal, in part as the performance security failed to comply with the predecessor of s. 59(3).

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9 (1984), 49 C.B.R. (N.S.) 255 (Ont. H.C.J.).

10 (1984), 53 C.B.R. (N.S.) 240 (Ont. H.C.J.).

11 (1994), 24 C.B.R. (3d) 8 (Ont. Ct. (Gen. Div.)), rev'd (1994), 25 C.B.R. (3d) 225 (Ont. C.A.).

12 (1961), 2 C.B.R. (N.S.) 103 (Qué. S.C.).

13 at para. 8.

14 (1987) 64 C.B.R. (N.S.) 218 (N.B.Q.B.T.D.).

[24] Performance security is sometimes plainly set out as such in the proposal or it may be implicit. However, it must be meaningful, the onus of proof of which rests with the debtor. ***Re National Fruit Exchange Inc.***[15] is an example of a proposal which was not approved for want of meaningful security. The court in that case rejected the debtors' principals' personal guarantees as performance security because there was no evidence to show that the principals had assets to support the guarantees.

III. Analysis

[25] ***McNamara, Mernick***, and implicitly ***Orchid***, consider the adequacy of performance security simply to be one factor, albeit an important one, in the overall assessment of the reasonableness of a proposal. This approach requires reading in language or reading ss. 59(2) and (3) conjunctively, an exercise which, in my view, is unwarranted given the purpose of the BIA proposal provisions generally, the specific purpose of s. 59, and the express language of ss. 59(2) and (3). Another approach, which I find more appealing given the express language of s. 59(3) which directs that the court do certain things if s. 173 "facts" are made out, is to read these subsections disjunctively.

[26] The s. 59(3) requirement for performance security is designed to further the interests of creditors and the public. It is a requirement that, in my view, is additional to the requirements enunciated in s. 59(2). As compared to the s. 59(2) requirements, which apply to all proposals, the requirement under s. 59(3) for performance security applies only in a specified circumstance; where the debtor's situation or past conduct is blameworthy, falling within s. 173.

[27] While s. 173 facts might well lead to a measure of skepticism that the debtor will satisfy his or her obligations under the proposal, they serve primarily as a reflection of public policy. Section 59(3) and s. 172(2) both refer to the facts set out in s. 173.

[28] Section 172(2) stipulates that, on proof of any of those facts, the court shall refuse to discharge the bankrupt, shall suspend the discharge for a period that the court thinks proper, or shall grant the discharge on condition that the bankrupt perform such acts, pay such moneys, consent to such judgments or comply with such other terms as the court may direct.

[29] In ***Ex parte Reed***; in ***Re Reed, Bowen & Co.***,[16] Lord Esher, M.R. commented on the reason why the English Bankruptcy Act of 1883 had been passed, stating:

> It was because of the known and proved behaviour of creditors with regard to their insolvent debtors that this Act was passed, taking away from the majority of

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[15] (1948), 29 C.B.R. 125 (Que. S.C.).

[16] (1886) 17 Q.B.D. 244 at p. 250, 3 Morrell 90.

> creditors that power which they had so recklessly and carelessly used, and putting a controlling power into the hands of the Court for the purpose of protecting the creditors against their own recklessness; for the purpose of preventing a majority of creditors from dealing thus recklessly, not only with their own property, but with that of the minority, and of enforcing, so far as the legislature could, a more careful and moral conduct on the part of debtors.
> [Emphasis added.]

[30] In moving in Canada for leave to introduce Bill No. 25 in respect of bankruptcy on March 27, 1918, Mr. S.W. Jacobs stated:

> At present no distinction whatever is made as between the honest and the dishonest debtor in the matter of obtaining a discharge; they are all thrown into the discard. By this measure it is proposed that the courts shall carefully scrutinize the business dealings and the business relations of traders, and shall make a distinction - shall separate the sheep from the goats. When the court is of the opinion that a debtor has been obliged to assign through misfortune, he shall be given the necessary relief. If, on the other hand, it should be found, in scrutinizing his affairs, that he wrecked his own business wilfully, then, of course, he should receive no relief whatever. That is the crux of every bankruptcy law ... [17]
> [Emphasis added.]

[31] That Bill was not passed, but the one which was during the next session of Parliament, and which was the forerunner of the current BIA, reflected the same public policy of fostering moral conduct on the part of debtors.

[32] Like the s. 172(2) requirement, the prohibition against approving a proposal where any of the s. 173 facts have been proved against the debtor unless the debtor provides reasonable security for the payment serves to protect not only the interests of creditors but also the public's interest in commercial morality.[18]

[33] As stated in Houlden and Morawetz's *Bankruptcy and Insolvency Law of Canada*:[19]

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[17] *Official Report of the Debates of the House of Commons of the Dominion of Canada*, 13th Parliament, 1st Session, 8-9 George V, 1918, vol. 1, p. 206.

[18] ***Re Gardner*** (1921) 1 C.B.R. 424 at para. 8 (Ont. S.C.); ***Re Stone*** (1976), 22 C.B.R. (N.S.) 152 at para. 2 (Ont. S.C.); ***Re Silbernagel*** (2006), 20 C.B.R. (5th) 155 (Ont. Sup. Ct. Just.).

[19] S.W. Holden and C.A. Maires, *Bankruptcy and Insolvency Law of Canada*, looseleaf, vol. 1, 3rd ed. (Toronto: Thompson Cardwell, 2005) at p. 2 152.

> In deciding whether the proposal should be approved, the court must take the following interests into account: (a) the interests of the debtor in making a settlement with creditors; (b) the interests of creditors in procuring a settlement which is reasonable and which does not prejudice their rights; and (c) the interests of the public in the fashioning of a settlement which preserves the integrity of the bankruptcy process and complies with the requirements of commercial morality.

[34] The Debtor's assets in the present case clearly are less than fifty cents on the dollar of his unsecured liabilities. Accordingly, the onus shifts to him to show that this situation has arisen from circumstances for which he cannot justly be held responsible.[20] He offered no evidence in support of his application and chose not to appear at it. The Trustee says that he could not muster such evidence.[21] Consequently, s. 59(3) is triggered.

[35] Viewed in its best light, the Initial Payment might be considered performance security implicit in the Proposal. The Initial Payment equates to .027 percent of the total amount due under the Proposal. That is not reasonable performance security.

[36] In ***Dolson***, Anderson J. in stated that the lack of any performance security is fatal to a proposal, but suggested that the court might exercise its discretion to reduce the percentage of security required, at least in extraordinary circumstances. Presumably he meant that the court could reduce the security to zero. I disagree. I prefer the view taken in Houlden and Morawetz that if no performance security is offered under a proposal, the court cannot approve it since s. 59(3) requires that there be a percentage of fifty cents on the dollar and zero is not a percentage of fifty cents. In any event, there must be some evidence presented to justify the court exercising its discretion to lower the percentage of performance security, and here there was non other than the creditors' approval of the Proposal, which alone is insufficient.

[37] The desirability of promoting proposals over bankruptcies is obvious. However, even such a laudable objective cannot override Parliament's directive that there be reasonable creditor protection by way of performance security for Division I proposals if, as here, a s. 173 "fact" is established.

Conclusion

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[20] ***Samson v. L'Alliance Nationale***, (1935), 17 C.B.R. 304 (Que. K.B.).

[21] For a description of what evidence may discharge the onus, see the bankruptcy discharge case, ***Re Gill*** (1988), 69 C.B.R. (N.S.) 132 at para. 14 (B.C.S.C.), where it was held that there must be some element of culpability or blameworthiness, some recklessness or blind disregard for one's own financial well-being. See also ***Re Tridont Health Care Inc.*** (1991), 4 C.B.R. (3d) 290 at para.9 (Ont. Ct. (Gen. Div.)), which augments ***Gill*** by requiring a consideration of the debtor's level of sophistication and ability to obtain professional assistance, whether the matter was in the context of a discharge or a proposal.

[38] The application is dismissed.

Heard on the 2nd day of February, 2007.
Dated at the City of Edmonton, Alberta this 6th day of March, 2007.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

Tim Ludwig
for BDO Dunwoody Limited

Michael J. Lema
for the Objecting Creditor Canada Revenue Agency