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Our File: 207907

June 22, 2022

HAND DELIVERED

The Honourable Justice Presiding in Chambers
Supreme Court of Nova Scotia
The Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7

My Lord/My Lady:

Re: CL Development Ltd., Cochran Landing Limited Partnership, and Cochran Landing GP Inc. – Division I BIA Proposal (Hfx. No 513552)

BDO Canada Limited (the "**Proposal Trustee**") is the named Trustee under Notices of Intention to Make a Proposal filed by CL Development Ltd., Cochran Landing Limited Partnership and Cochran Landing GP Inc. (the "**Cochran Group**") pursuant to the ***Bankruptcy and Insolvency Act,*** R.S.C. 1985, c. B-3 (the "**BIA**").

We are counsel to the Proposal Trustee for the limited purposes of the present Motion.

The creditors of the Cochran Group accepted the Group's BIA Proposal (the "**Proposal**") at a Creditor's Meeting on June 15, 2022. The Proposal Trustee has scheduled a Motion to be heard in Chambers in Halifax (on a date to be set by the Court) seeking an Order approving the Proposal, pursuant to BIA ss. 58-60.

The Second Report of the Proposal Trustee (the "**Second Report**") has been filed to assist the Court in its consideration of the Motion.

Please accept the following as the pre-hearing memorandum on behalf of the Proposal Trustee.

Facts

On February 25, 2022 the three individual members of the Cochran Group filed Notices of Intention to Make a Proposal with the Official Receiver, pursuant to BIA s. 50.4(1).

By Order of this Honourable Court dated March 25, 2022, the initial 30 day stay of proceedings was extended to May 9, 2022.

On May 6, 2022 the Cochran Group filed a joint Proposal with the Proposal Trustee, which was filed with the Official Receiver on that same date.

On June 1, 2022 the Proposal Trustee circulated a package of documents to the Cochran Group's creditors by email. The package contained the Certificate of Filing of a Proposal, the Proposal itself, the Trustee's Report on the Proposal, a Statement of Affairs, a Proof of Claim form, Proxy form, Voting Letter form, Supplemental Information for Meeting of Creditors, and a Pre-Registration Form. Creditors were advised that a meeting to consider the terms of and vote upon the Proposal was to be held virtually via Microsoft Teams on June 15, 2022.

On June 15, 2022 at 9:00 a.m. A.S.T., a duly constituted meeting of the Cochran Group's creditors (the "**Creditors Meeting**") was called to order to consider the Proposal. The Proposal Trustee acted as Chair, as the nominee of the Official Receiver pursuant to BIA s. 51(3).

The Creditors Meeting was opened, and the necessary quorum was duly confirmed.

The Proposal Trustee provided creditors with an overview of the affairs of the Cochran Group and the causes of its collective insolvency. The Proposal Trustee also tabled the required documentation and explained in general terms the intended operation and effect of the Proposal.

The Proposal Trustee allowed a brief adjournment to give the Cochran Group and creditors an opportunity to consider a request to add additional language to s. 2.6(b) of the Proposal, following which the additional language was incorporated into the Proposal with the Cochran Group's consent.

Following further questions and discussions, the Proposal was put to a vote. Immediately thereafter, the Proposal Trustee read out the result of the vote, as follows:

Percentage of Participating Creditors Supporting Proposal	**82%**
Percentage of Debt held by Creditors Supporting Proposal	**87%**

The Proposal was declared to have been accepted by the requisite majorities of creditors.

Following the appointment of Inspectors and the conclusion of other business, the Proposal Trustee advised the attendees that it would apply for Court approval in accordance with the BIA. The Creditors Meeting then adjourned.

Issue

1. Should this Honourable Court approve the revised Proposal?

Law and Argument

1. BIA Sections 59-60

BIA ss. 59 and 60 state (in relevant part):

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.

(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.

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.

(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 tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
> >
> > **(ii)** is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.
>
> **(1.2)** No proposal shall be approved by the court if, at the time the court hears the application for approval, Her Majesty in right of Canada or a province satisfies the court that the debtor is in default on any remittance of an amount referred to in subsection (1.1) that became due after the filing
>
> **(a)** of the notice of intention; or
>
> **(b)** of the proposal, if no notice of intention was filed.
>
> [...]
>
> **(1.7)** No proposal that provides for the payment of an equity claim is to be approved by the court unless the proposal provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.
>
> [...]
>
> > **(5)** Subject to subsections (1) to (1.7), the court may either approve or refuse to approve the proposal.

2. The Applicable Test

In ***Re W.R.T. Equipment Ltd.*** (2003) CarswellSask 184 (Sask. Q.B.) the Court considered an application for approval of a Proposal and stated (at paras. 15-16):

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

> take into account several interests including; (a) that of the debtor (to give him an opportunity to meet with his creditors and to find a way of producing assets or revenue which will provide them with a dividend outside of bankruptcy), (b) the general body of creditors (to protect creditors generally by ensuring that what is put up by way of a proposal is a reasonable one), and (c) the public-at-large in maintaining the integrity of bankruptcy legislation (including considering whether or not the proposal complies with standards of commercial morality). [...]"

In ***Kitchener Frame Ltd., Re***, 2012 ONSC 234. Morawetz J. (as he then was) phrased the test succinctly as follows:

> [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.

The Courts have also deemed it prudent to factor the debtor's conduct into the analysis (see ***Re Silbernagel*** (2006), 20 C.B.R. (5th) 155 (Ont. S.C.J.)) – e.g., where the debtor has committed offences or otherwise contravened the BIA or the requisite standard of good faith, the Court may decline to approve a Proposal notwithstanding approval thereof by a required majority of creditors.

3. The Present Case

The Proposal Trustee considers that the Proposal in the present case is both reasonable and calculated to benefit the general body of the Cochran Group's creditors. The alternative – i.e., the bankruptcy of the Cochran Group – would be less favourable outcome for creditors.

As stated in the Second Report, the Proposal Trustee is of the opinion that:

(i) no fact, matter, or circumstance has been brought to the attention of the Proposal Trustee that should cause the Court to refuse to approve the Proposal:

(ii) the conduct of the Cochran Group is not subject to censure; and

(iii) the Proposal Trustee is not aware of any facts mentioned in BIA s. 173 that may be proved against the Cochran Group.

It is further submitted that the Proposal accords with the standards of commercial morality, and that its performance will effectively balance the interests of the Cochran Group and creditors, alongside those of the public at large.

The Proposal has received the strong support of Cochran's creditors - well in excess of the required majorities under the BIA. It is submitted that the wishes of

creditors, as expressed through their voting, are worthy of deference – as per ***Re Abou-Rached***, 2002 BCSC 1022 (B.C.S.C.), wherein the Court stated (at para. 65):

> "The court is not bound to approve a proposal even if it has an unqualified recommendation of the Trustee and the overwhelming support of creditors, see *In re Orchid Fashins Inc.* (1961), 2 C.B.R. (N.S.) 103 (Que. S.C.). However, where, as here, a proposal has been approved by a large majority of creditors and recommended by the Trustee, substantial deference will be given to their views."
>
> (emphasis added)

Conclusion

The Proposal Trustee submits that the Proposal:

(i) is compliant with the requirements of the BIA;

(ii) has received the strong support of creditors; and

(ii) is worthy of the approval of this Honourable Court.

The Proposal Trustee requests that this Honourable Court grant its approval of the Proposal, in accordance with the draft form of Order which has been submitted.

All of which is respectfully submitted.

Yours very truly,

McINNES COOPER

Stephen Kingston

Hilary Gilroy

cc: The Service List
The Cochran Group

2003 SKQB 93
Saskatchewan Court of Queen's Bench

W.R.T. Equipment Ltd., Re

2003 CarswellSask 184, 2003 SKQB 93, [2003] S.J. No. 181, 121
A.C.W.S. (3d) 420, 231 Sask. R. 129, 39 C.C.P.B. 153, 41 C.B.R. (4th) 288

IN THE MATTER OF THE PROPOSAL OF W.R.T. EQUIPMENT LTD., AN INSOLVENT PERSON

IN THE MATTER OF AN APPLICATION BY THE TRUSTEE OF THE PROPOSAL OF W.R.T. EQUIPMENT LTD. FOR COURT APPROVAL PURSUANT TO SECTION 58 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3

Zarzeczny J.

Judgment: February 27, 2003
Docket: 8751

Counsel: Jeffrey M. Lee for W.R.T. Equipment Ltd.
M. Kim Anderson for Precismeca Ltd.
Eldon Tilk for himself
Jeffrey W. Pinder for Trustee for the Proposal of W.R.T. Equipment Ltd.

Subject: Insolvency; Estates and Trusts; Property

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.1 General principles
Bankruptcy and insolvency
VIII Property of bankrupt
VIII.5 Trust property
VIII.5.a General principles

Headnote

Bankruptcy --- Property of bankrupt — Trust property — General

Debtor company ran into financial difficulties — Debtor company's pension plan was transferred out of its hands — At time of transfer significant unfunded liability existed — Debtor company made proposal to its creditors under Bankruptcy and Insolvency Act — At meeting of creditors, approximately 89 per cent of creditors voted in favour of accepting proposal — Former employee objected to proposal on ground that members of company's pension plan should be treated as different class of creditor than unsecured creditors — Former employee took position that unfunded pension liabilities constituted trust funds under Pension Benefits Act, 1992 and that members of pension plan were entitled to preferred or secured status — Debtor company brought application for approval of proposal — Application granted — Although s. 43(3) of Pension Benefits Act, 1992 gives members of employee pension plan preferred creditor status in case of employer's indebtedness to pension plan, ss. 66(1) and 67(2) Bankruptcy and Insolvency Act prevent recognition of that preferred status — Provincially created statutory trusts, such as one created by Pension Benefits Act, 1992, are not recognized in bankruptcy which includes proposals under Bankruptcy and Insolvency Act — Evidence indicated overwhelmingly that unsecured creditors would do better under proposal than they would if proposal were rejected and debtor company were placed into bankruptcy — Proposal was reasonable and calculated to benefit general body of creditors.

Bankruptcy --- Proposal — General

Debtor company ran into financial difficulties — Debtor company's pension plan was transferred out of its hands — At time of transfer significant unfunded liability existed — Debtor company made proposal to its creditors under Bankruptcy and Insolvency Act — At meeting of creditors approximately 89 per cent of creditors voted in favour of accepting proposal — Former employee objected to proposal on ground that members of company's pension plan should be treated as different class of creditor than unsecured creditors — Former employee took position that unfunded pension liabilities constituted trust funds under Pension Benefits Act, 1992 and that members of pension plan were entitled to preferred or secured status — Debtor company brought application for approval of proposal — Application granted — Although s. 43(3) of Pension Benefits Act, 1992 gives members of employee pension plan preferred creditor status in case of employer's indebtedness to pension plan, ss. 66(1) and 67(2) of Bankruptcy and Insolvency Act prevent recognition of that preferred status — Provincially created statutory trusts, such as one created by Pension Benefits Act, 1992, are not recognized in bankruptcy which includes proposals under Bankruptcy and Insolvency Act — Evidence indicated overwhelmingly that unsecured creditors would do better under proposal than they would if proposal were rejected and debtor company were placed into bankruptcy — Proposal was reasonable and calculated to benefit general body of creditors.

Table of Authorities

Cases considered by *Zarzeczny J.*:

Continental Casualty Co. v. MacLeod-Stedman Inc. (1996), 141 D.L.R. (4th) 36, [1997] 2 W.W.R. 516, 13 C.C.P.B. 271, 43 C.B.R. (3d) 211, 113 Man. R. (2d) 212, 131 W.A.C. 212, 1996 CarswellMan 537, C.E.B. & P.G.R. 8318 (headnote only) (Man. C.A.) — referred to

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

Husky Oil Operations Ltd. v. Minister of National Revenue, [1995] 10 W.W.R. 161, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, 188 N.R. 1, 24 C.L.R. (2d) 131, 1995 CarswellSask 739, 1995 CarswellSask 740 (S.C.C.) — referred to

Irving Oil Ltd. v. Noseworthy, 42 C.B.R. (N.S.) 302, 1982 CarswellNfld 22 (Nfld. T.D.) — referred to

McNamara v. McNamara, 53 C.B.R. (N.S.) 240, 1984 CarswellOnt 186 (Ont. Bktcy.) — referred to

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

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

Statutes considered:

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

Generally — referred to

Pt. III, Div. I — pursuant to

s. 50(13) — referred to

s. 59(1) — considered

s. 59(2) — considered

Pension Benefits Act, 1992, S.S. 1992, c. P-6.001

Generally — referred to

s. 43(3) — referred to

s. 66(1) — referred to

s. 67(2) — referred to

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

R. 92 — referred to

APPLICATION by debtor company for approval of proposal.

***Zarzeczny J.*:**

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

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

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

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

4 On January 13, 2003 the Trustee made an application to the Registrar in Bankruptcy for court approval of the Proposal. A Notice of Objection to this application was filed on behalf of an unsecured creditor, Mr. Eldon Tilk, which necessitated the Proposal being referred to a judge of this Court in Bankruptcy & Insolvency for court approval.

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

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

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

> (1) that the pension plan members should be treated as a different class of creditor than the unsecured creditor classification ascribed to them by the Proposal;
>
> (2) that the indemnification of past directors etc. proposed by the terms of the Proposal is inappropriately wide.

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

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

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

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

12 The Court is much in sympathy with the concerns which Mr. Tilk has raised by his objection and the submissions made on his behalf at the hearing of this application. Absent the application of the provisions of the BIA to an employer it is clear that an employer's indebtedness to an employee pension plan does give the pensioners preferred creditor status by virtue of s. 43(3) of *The Pension Benefits Act, 1992*. With the intervention of the BIA, and proceedings under that Act, including the presentation of a Proposal, a combination of s. 66(1) and s. 67(2) of the Act as judicially interpreted results in another conclusion (see *Continental Casualty Co. v. MacLeod-Stedman Inc.* (1996), 141 D.L.R. (4th) 36 (Man. C.A.); *Husky Oil Operations Ltd. v. Minister of National Revenue* (1995), 128 D.L.R. (4th) 1 (S.C.C.)). Provincially created statutory trusts, such as the one created by *The Pension Benefits Act, 1992* are not recognized in bankruptcy, including Proposals submitted under the BIA.

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

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

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

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

17 Taking into account all of these interests the Court has concluded, in the circumstances reviewed and for the reasons outlined in this judgment, that the Proposal presented by W.R.T. does meet the statutory and judicial criteria for acceptance

by this Court. Accordingly the Proposal is accepted and the draft order filed may issue including the amendment to para. 9.1 of the Proposal.

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

Application granted.

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.

2006 CarswellOnt 2523
Ontario Superior Court of Justice

Silbernagel, Re

2006 CarswellOnt 2523, 20 C.B.R. (5th) 155, 81 O.R. (3d) 152

In the Matter of the proposal of Franz Apul Silbernagel of the Town of Richmond Hill in the Province of Ontario, Real Estate Representative

Ground J.

Heard: April 11, 2006
Judgment: April 26, 2006
Docket: 31-447102

Counsel: William J. Meyer for Harris & Partners Inc., Trustee
Nancy Arnold, Alexander Zendegs for Canada Revenue Agency

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
Debtor made amended proposal which was approved by all creditors and three creditors filed proofs of claims — Canada Revenue Agency ("CRA") filed 95 per cent of total claims since debtor failed to file returns or pay instalments of income tax from 1998 to 2005 — Amended proposal included compliance clause which required that if debtor failed to make payments to CRA, proposal could be annulled — Issue arose about whether compliance clause in proposal was unreasonable since it could cause debtor to prefer CRA over future creditors and not benefit general body of creditors — Motion was brought for approval of amended proposal — Motion granted — Interest of future creditors is one element that court must take into consideration in determining whether proposal terms are reasonable — Amended proposal was approved as being reasonable and calculated to benefit general body of creditors — Compliance clause would have rehabilitative effect on debtor since his insolvency was tax-driven, and clause was in accord with commercial morality and public interest — No evidence existed that CRA insisted on inclusion of compliance clause to gain unfair advantage over prospective future creditors — Clause was for ensuring future compliance by debtor with his obligations as taxpayer and preventing recurrence of condition that led to both of his bankruptcies.

Table of Authorities

Cases considered by *Ground J.*:

Burr, Re (1892), [1892] 2 Q.B. 467, 66 L.T. 553 (Eng. C.A.) — distinguished
Johnson, Re (1987), 62 C.B.R. (N.S.) 108, 1987 CarswellOnt 148 (Ont. S.C.) — considered
McClory, Re (2006), 2006 CarswellOnt 911, 19 C.B.R. (5th) 305 (Ont. S.C.J.) — considered
Reed, Bowen & Co., Re (1886), 17 Q.B.D. 244 (Eng. C.A.) — considered
Sumner Co. (1984), Re (1987), 64 C.B.R. (N.S.) 218, 79 N.B.R. (2d) 191, 201 A.P.R. 191, 1987 CarswellNB 26 (N.B. Q.B.) — followed
Webb, Re (1914), [1914] 3 K.B. 387 (Eng. C.A.) — distinguished

Statutes considered:

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

Generally — referred to

s. 2(1) "creditor" — considered

s. 59(2) — considered

s. 121(1) — considered

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

Generally — referred to

MOTION for approval of debtor's amended proposal to creditors.

***Ground J.*:**

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

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

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

3 Clause (a) of paragraph 4 of the Amended Proposal is substantially similar to paragraph 8.4 of the Proposal of Ronald Michael McClory considered by Registrar Nettie on February 6, 2006 in his judgment rendered February 20, 2006 [2006 CarswellOnt 911 (Ont. S.C.J.)]. Registrar Nettie found the McClory Proposal to be unreasonable due to the illegality of paragraph 6(c) of the Proposal which provided for an assignment to the Trustee of income tax refunds which are not assignable under the provisions of the *Financial Administration Act*, R.S.C. (1985) Ch. F. 11.

4 Registrar Nettie also found the McClory Proposal not calculated to benefit the general body of creditors. After having found that paragraph 8.4 was of rehabilitative benefit, particularly with a debtor whose insolvency arose from a failure to make tax payments, in mandating that the debtor be current in filing tax returns and making required tax payments, Registrar Nettie found that the effect of the inclusion of paragraph 8.4 in the McClory Proposal was that the Proposal was not calculated to

benefit the general body of creditors. He concluded that the effect of the compliance clause would be that the Debtor would almost certainly prefer CRA over other future creditors in that the failure to make payments to CRA might result in a deemed bankruptcy. In his Judgment Registrar Nettie stated as follows at paragraph 21:

> In any event, notwithstanding any salutary effect of paragraph 8.4 on the Proponent's financial rehabilitation, it is clear to me that the paragraph has the effect of potentially prejudicing future creditors of the Proponent. With paragraph 8.4 in the Amended Proposal, the Proponent will almost certainly prefer CRA's future debts over any other future creditor, as a failure to do so may result in his deemed bankruptcy. Faced, for example, with only enough funds to make a future required payment to CRA, or to some other creditor, but not both, it is reasonable to presume that the Proponent, acting in his own en lightened self-interest, will prefer CRA, as a failure to pay the other creditor will not put completion of the Amended Proposal at risk or be as likely to result in his involuntary bankruptcy. This has the effect of providing a benefit to CRA, in the form of a preference, over those future creditors, when those future creditors did not have a vote on the Amended Proposal (which, of course, they could not have as they, by definition, were not creditors at the time of the Proposal). Since I have found that the general body of creditors includes future creditors of the Proponent, I cannot find that a term such as paragraph 8.4 benefits the general body of creditors. I do not find the arguable rehabilitative effect of the paragraph to outweigh its negative impact on future creditors, especially when I consider the array of remedies uniquely available to CRA to enforce and realize upon any future indebtedness to it by the Proponent. Few other future creditors have such a panoply of remedies. The insertion of paragraph 8.4, having been done at the instance of CRA, is an example of the recklessness and carelessness of creditors as to their own affairs, and others, as referred to in Reed, and is very clearly an example of the kind of conduct by the majority of creditors that Parliament has seen fit to curtail by requiring the Court to also approve these proposals. It is clear from the facts at bar that creditors are prepared to require the insertion of terms into proposals in order to gain future benefit for themselves, at the expense of others not even entitled to be heard in the approval process. While the evidence does not expressly indicate that CRA indicated that it would withhold approval if paragraph 8.4 was not inserted, I am prepared to infer that it must have, otherwise there would be no conceivable reason for the Proponent to tender the Amended Proposal with both its higher payment terms, and the compliance obligations of paragraph 8.4. In the absence of evidence to the contrary, I infer such an inducement to obtain the terms of the Amended Proposal. This is the type of recklessness and carelessness referred to in Reed, in that the creditors are being careless as to the rights of the future creditors, and reckless as to whether a bankruptcy, with a clearly lesser realization for the creditors, ensues or not.
>
> In the result, I find that the Amended Proposal, containing as it does, paragraph 8.4, is not calculated to benefit the general body of creditors, but is, in fact, calculated (by CRA) to provide CRA with a Damoclean sword to ensure that for the duration of the Amended Proposal, the Proponent prefers its indebtedness over any other future creditor. This is offensive to commercial morality, and to the integrity of the insolvency system. If the result is that the Amended Proposal is rejected and a deemed bankruptcy occurs, then all of the present creditors will be treated equally, according to class, and so will the future creditors, whose debts will be outside of the bankruptcy. This is, to the Court, a preferable result, if the creditors remain insistent on terms such as paragraph 8.4 being inserted. The tyranny of a majority will not be permitted to be imposed on future creditors who have no say in the proposal. The Court will balance those rights, as it is obligated to do.
>
> Having found the Amended Proposal to be unreasonable due to the illegality of paragraph 66(c), and also not calculated to benefit the general body of creditors, the Amended Proposal is not approved. The Proponent is deemed, as of the date hereof, to have made an assignment in bankruptcy.

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

> In considering the question, I am required to turn my mind to what is meant by the general body of creditors. I am of the view that the general body of creditors includes not only the creditors to whom the Amended Proposal is made, but also future, or post-proposal, creditors of the Proponent. In this regard, I am persuaded by the decision of the Chief Justice of the New Brunswick Court of Queen's Bench, in Re Sumner Company (1984) Limited, 1987 Carswell NB 26. Therein,

> Richard CJQB, at paragraph 37, quotes with favour the following passage from Houlden and Morawetz on Bankruptcy law of Canada, now found at E 15(9) of the 2005 annotation:
>
> > ... In determining whether or not to approve the proposal, the court must consider not only the wishes and interest of creditors but the conduct of the debtor and the interest of the public and *future creditors* (emphasis added) ...

6 With great respect to the learned Registrar, I must disagree with his conclusion that the McClory Proposal, because of the inclusion of the compliance clause, did not benefit the general body of creditors. "Creditor" is defined in Section 2 of the *Bankruptcy and Insolvency Act*, R.S.C. (1985) Ch. B 3 as amended (the "*BIA*") as "a person having a claim, unsecured, preferred by virtue of priority under Section 136 or secured, provable as a claim under this Act". Subsection 121(1) of the *BIA* defines claims provable as follows:

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

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

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

> Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

9 The reference by Richard, CJQB in *Sumner Co. (1984), Re*, 1987 CarswellNB 26 (N.B. Q.B.) to the passage from Houlden and Morawetz, Bankruptcy Law of Canada) states in full as follows:

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

10 It appears to me that the passage from *Houlden and Morawetz*, *supra*, quoted with approval in *Sumner Co. (1984), Re*, *supra*, stands for the proposition that the interest of future creditors are taken into account in determining whether the terms of the proposal are reasonable. The authors appear to be saying that in determining whether the proposal is calculated to benefit the general body of creditors, the court must consider the interest of the creditors (as defined in the *BIA*) but, in determining whether the terms of the proposal are reasonable, the court must also consider the conduct of the debtor, the interest of the public and future creditors and the requirements of commercial morality. The balance of the authorities referred to by Registrar Nettie in this context do not, in my view, support the proposition that the general body of creditors includes future creditors; they rather stand for the proposition that approval of a proposal by a majority of the creditors is not determinative in and of itself that the proposal ought to be approved by the court.

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

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

13 Registrar Nettie, however, in *McClory*, *supra*, concluded that the rehabilitative effect of the compliance clause did not outweigh its negative impact on future creditors of the debtor in that the effect of the compliance clause would be that the debtor would almost certainly prefer the payment of future debts to CRA over payments to other future creditors. Even if this is the potential result of the compliance clause, I am not satisfied that an inclusion of a compliance clause in a proposal leads to the conclusion that the terms of the proposal are, therefore, unreasonable. I accept the submission of counsel for CRA that the inclusion of the compliance clause redresses certain inequities as between CRA and future creditors of the debtor. The relationship between CRA and a tax debtor is dissimilar from the debtor's relationship with other creditors. The relationship with CRA is non-consensual in nature and is established by a statutory scheme. Unlike other creditors, CRA does not voluntarily choose to do business with a taxpayer and in that sense CRA, unlike other creditors, is an involuntary creditor. It is also to be remembered that a debt to CRA is a debt to the people of Canada. In *Johnson, Re*, [1987] O.J. No. 11 (Ont. S.C.) Saunders, J. stated at page 3:

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

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

15 As noted above, in *McClory*, *supra*, Registrar Nettie also concluded at paragraph 21 that "The insertion of paragraph 8.4 (the compliance clause) having been done at the insistence of CRA, is an example of the recklessness and carelessness of

creditors as to their own affairs and others, as referred to in Reed, and is very clearly an example of the kind of conduct by the majority of creditors that Parliament has seen fit to curtail by requiring the court to also approve these proposals". In *Reed, Bowen & Co., Re* (1886), 17 Q.B.D. 244 (Eng. C.A.), the creditors had approved a scheme proposed by the debtors whereby the debtors would be permitted to continue to carry out large and onerous contracts in South America and elsewhere which had resulted in the financial difficulties of the debtors in the first place with no evidence to indicate that there would be any net earnings available to the creditors as contemplated by the scheme. Lord Esber, M.R. stated at pages 252 and 253:

> Therefore there are these large contracts, but the contractors have no means, in hand or in credit, to carry them out. Then what is the scheme? They are to be allowed to carry out these contracts. If this scheme is approved they are immediately made masters of the mode of carrying them out, and then they offer to set by a certain amount each year for three years of the net profits. The official receiver says that there is no evidence whatever to show the probable amount of the net earnings of which the debtors propose to set apart one-third part for the creditors during the next three years, nor any evidence that any sum will be earned by them, or either of them. He is quite right, there is not a tittle of evidence to show it. On the contrary, the business inference is that, even if they could carry on the contracts, the first three years would be onerous to them, and there would not be any net profits at all. Under these circumstances the official receiver says that he is unable to report that the creditors will receive any dividend whatever from the proposal. It seems to me that this is a good objection; I cannot see any reasonable prospect of a dividend.

16 Similarly, in other old English authorities, *Burr, Re*, [1892] 2 Q.B. 467 (Eng. C.A.) and *Webb, Re*, [1914] 3 K.B. 387 (Eng. C.A.), the creditors appear to have approved schemes where there was no reasonable likelihood that they would produce any beneficial results for the creditors and, although these authorities may be examples of the recklessness and carelessness of creditors as to their own affairs, the fact situations in those cases are in no way analogous to the case at bar. I am, therefore, unable to conclude that the inclusion of the compliance clause in the Amended Proposal before this court is in any way unreasonable or not in accord with commercial morality or the public interest.

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

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

Motion granted.

2002 BCSC 1022
British Columbia Supreme Court

Abou-Rached, Re

2002 CarswellBC 1642, 2002 BCSC 1022, [2002] B.C.W.L.D. 861,
[2002] B.C.J. No. 1588, 114 A.C.W.S. (3d) 991, 35 C.B.R. (4th) 165

In the Matter of the Proposal of Roger Georges Abou-Rached

In the Matter of the Proposal of R.A.R. Investments Ltd.

Ross J.

Heard: April 9-11, 24-26, 2002
Judgment: July 8, 2002
Docket: Vancouver 219307VA01, 219301VA01

Counsel: *David A. Gray*, *M. Nielsen*, for Trustee, Campbell Saunders Ltd.
Bruce E. McLeod, for Genesee Enterprises Ltd.
Alan E. Keats, for Jean de Grasse, Robert de Grasse, Andre de Grasse, Claire de Grasse, Frank de Grasse, Eric Boulton, D'Arcy Boulton, Gurdrun Kate Parkes, Kenneth James Parkes, Michael A. Parkes, Greg Findlay, Susan Findlay, Phil Argue, Glenn Morris and Four Weal Ventures Ltd.
Andrew G. Sandilands, for Roger Abou-Rached, R.A.R. Investments Ltd.
Jennifer L. Harry, for Stanley Rodham Investments Ltd., Randers International Ltd., Rosebar Enterprises Limited, Sirmac International Ltd., Veda Consult S.A., Yarold Trading Ltd.
Heather M. Ferris, for Georges Abou-Rached, Hilda Abou-Rached, RAR Consulting Ltd., Garmeco Canada International Consulting Engineers Ltd.

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.ii Reasonable terms
Bankruptcy and insolvency
VI Proposal
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VI.4 Approval by court
VI.4.d Misconduct of bankrupt
Bankruptcy and insolvency

XII Meeting of creditors
XII.4 Voting
XII.4.b Who may vote
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.6 Discovery and examinations
XVII.6.b By creditor

Headnote

Bankruptcy --- Proposal — Approval by court — Conditions — Reasonable terms

Individual debtor developed new construction technology — Debtor purchased rights to technology from employer — Debtor incorporated four companies, in which he held 100 per cent interest, to license technology — Debtor executed guarantees and pledged shares to companies' investors — Investors' repeated requests for conversion of shares were refused — Investors commenced action against individual and corporate debtors for oppression and conflict of interest — As result of litigation, investors were awarded $982,746 in damages — Debtors' major creditor issued demand — Trustee in bankruptcy recommended two proposals put forward by debtors — First proposal estimated creditors would receive 15 cents on dollar — Second proposal offered creditors right to elect potential recovery of all claims — Eighty-five per cent of creditors voted in favour of proposals — Debtors brought application for approval of proposals — Application granted — In event of bankruptcy, no unencumbered assets existed that could be available to unsecured creditors — Amount of excess income was minimal — Guaranteed payment existed for some recovery by unsecured creditors — Proposals had reasonable prospect of succeeding according to terms — Proposals were not filed solely to avoid judgment — Recovery would be greater under proposals than in bankruptcy — Proposals were in interests of creditors.

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

Individual debtor developed new construction technology — Debtor purchased rights to technology from employer — Debtor incorporated four companies, in which he held 100 per cent interest, to license technology — Debtor executed guarantees and pledged shares to companies' investors — Investors' repeated requests for conversion of shares were refused — Investors commenced action against individual and corporate debtors for oppression and conflict of interest — As result of litigation, investors were awarded $982,746 in damages — Debtors' major creditor issued demand — Trustee in bankruptcy recommended two proposals put forward by debtors — First proposal estimated creditors would receive 15 cents on dollar — Second proposal offered creditors right to elect potential recovery of all claims — Eighty-five per cent of creditors voted in favour of proposals — Debtors brought application for approval of proposals — Application granted — In event of bankruptcy, no unencumbered assets existed that could be available to unsecured creditors — Amount of excess income was minimal — Guaranteed payment existed for some recovery by unsecured creditors — Proposals had reasonable prospect of succeeding according to terms — Proposals were not filed solely to avoid judgment — Recovery would be greater under proposals than in bankruptcy — Proposals were in interests of creditors.

Bankruptcy --- Proposal — Approval by court — Bankrupt offering less than 50¢ on dollar

Individual debtor developed new construction technology — Debtor purchased rights to technology from employer — Debtor incorporated four companies, in which he held 100 per cent interest, to license technology — Debtor executed guarantees and pledged shares to companies' investors — Investors' repeated requests for conversion of shares were refused — Investors commenced action against individual and corporate debtors for oppression and conflict of interest — As result of litigation, investors were awarded $982,746 in damages — Debtors' major creditor issued demand — Trustee in bankruptcy recommended two proposals put forward by debtors — First proposal estimated creditors would receive 15 cents on dollar — Second proposal offered creditors right to elect potential recovery of all claims — Majority of creditors voted in favour of proposals — Debtors brought application for approval of proposals — Application granted — Debtors' assets were less than 50 cents on dollar for unsecured liabilities — Individual debtor had assets to support guarantees at time guarantees were given — Debtors were not responsible for shortfall in value of assets — Shortfall was attributed to circumstances for which debtors could not be held responsible — Debtors gave satisfactory account for loss of assets or deficiency of assets.

Bankruptcy --- Proposal — Approval by court — Misconduct of bankrupt

Individual debtor developed new construction technology — Debtor purchased rights to technology from employer — Debtor incorporated four companies, in which he held 100 per cent interest, to license technology — Debtor executed guarantees

and pledged shares to companies' investors — Investors' repeated requests for conversion of shares were refused — Investors commenced action against individual and corporate debtors for oppression and conflict of interest — As result of litigation, investors were awarded $982,746 in damages — Debtors' major creditor issued demand — Trustee in bankruptcy recommended two proposals put forward by debtors — First proposal estimated creditors would receive 15 cents on dollar — Second proposal offered creditors right to elect potential recovery of all claims — Majority of creditors voted in favour of proposals — Debtors brought application for approval of proposals — Application granted — Debtors' conduct during litigation was reprehensible — Dissenting creditors established pursuant to s. 173(1)(f) of Bankruptcy and Insolvency Act that debtors' defence was frivolous and vexatious — Trustee examined transactions conducted prior to litigation and concluded further investigation was necessary to determine whether transactions were settlement or fraudulent preference — Since no conviction or finding of fraud existed against debtors from judgment in criminal or civil court, finding of fraud could not be made on allegations — More than mere suspicion required to find proposals were not reasonable by virtue of debtors' conduct — Proposals were still reasonable within meaning of s. 59 of Act — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 59, 173(1)(f).

Bankruptcy --- Meeting of creditors — Voting — Who may vote

Individual debtor developed new construction technology — Debtor purchased rights to technology from employer — Debtor incorporated four companies, in which he held 100 per cent interest, to license technology — Debtor executed guarantees and pledged shares to companies' investors — Investors' repeated requests for conversion of shares were refused — Investors commenced action against individual and corporate debtors for oppression and conflict of interest — As result of litigation, investors were awarded $982,746 in damages — Debtors' major creditor issued demand — Trustee in bankruptcy recommended two proposals put forward by debtors — Majority of creditors voted in favour of proposals — Dissenting creditors appealed trustee's decision to allow certain creditors to vote at meeting of creditors — Appeal dismissed — Trustee found creditors' claims were sufficient and that promissory notes held by creditors were evidence of debt — Creditors showed they had claims provable in proposal — No evidence existed that corporate creditor's debts were not bona fide — Corporate creditor was not related person to either individual or corporate bankrupt pursuant to s. 4 of Bankruptcy and Insolvency Act — No evidence of bonds of dependence, control, influence or moral pressure existed to indicate debtors and corporate creditor were not dealing at arms' length — No evidence existed that transactions entered by individual debtor after commencement of litigation with dissenting creditors were directed to collusive end so as to prevent dissenting creditors from collecting award from litigation — Transactions in dispute were of investments in development of technology — No evidence existed that investment funds were diverted or used for other purposes — No basis existed to disallow creditors in question from voting on proposal — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 4.

Bankruptcy --- Practice and procedure in courts — Discovery and examinations — By creditor

Individual debtor developed new construction technology — Debtor purchased rights to technology from employer — Debtor incorporated four companies, in which he held 100 per cent interest, to license technology — Debtor executed guarantees and pledged shares to companies' investors — Investors' repeated requests for conversion of shares were refused — Investors commenced action against individual and corporate debtors for oppression and conflict of interest — As result of litigation, investors were awarded $982,746 in damages — Debtors' major creditor issued demand — Trustee in bankruptcy recommended two proposals put forward by debtors — Majority of creditors voted in favour of proposals — Dissenting creditors brought application for order for cross-examination of individuals — Application dismissed — Dissenting creditors did not meet threshold of sufficient cause so as to order examinations.

Table of Authorities

Cases considered by *Ross J.*:

DeGrasse v. Stephenson (June 9, 1995), Doc. Vancouver A943129 (B.C. S.C.) — considered

Forsberg, Re, 26 C.B.R. (4th) 204, 2001 SKQB 289, 2001 CarswellSask 445, (sub nom. *Forsberg (Bankrupt), Re)* 209 Sask. R. 196 (Sask. Q.B.) — referred to

Genesee Enterprises Ltd. v. Abou-Rached, 2001 BCSC 59, 2001 CarswellBC 84, 84 B.C.L.R. (3d) 277 (B.C. S.C.) — referred to

Gingras, Robitaille, Marcoux Ltée v. Beaudry, [1980] C.S. 468, (sub nom. *Tremblay, Re)* 36 C.B.R. (N.S.) 111, 1980 CarswellQue 59 (C.S. Que.) — followed

Grobstein v. Brock Mills Ltd., (sub nom. *Orchid Fashions Inc., Re)* 2 C.B.R. (N.S.) 103, 1961 CarswellQue 29 (C.S. Que.) — referred to

Gustafson Pontiac Buick Cadillac GMC Ltd., Re, 30 C.B.R. (3d) 280, (sub nom. *Gustafson Pontiac Buick Cadillac GMC Ltd. (Bankrupt), Re)* 129 Sask. R. 293, 1995 CarswellSask 4 (Sask. Q.B.) — considered

Hartland Pipeline Services Ltd. (Trustee of) v. Bennett Jones, 2000 CarswellAlta 592, 18 C.B.R. (4th) 28, (sub nom. *Hartland Pipeline Services Ltd. (Bankrupt) v. Bennett Jones)* 272 A.R. 319 (Alta. Q.B.) — considered

Herd, Re, 77 C.B.R. (N.S.) 209, 1989 CarswellBC 377 (B.C. C.A.) — distinguished

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

McNamara v. McNamara, 53 C.B.R. (N.S.) 240, 1984 CarswellOnt 186 (Ont. Bktcy.) — referred to

NsC Diesel Power Inc., Re, 1997 CarswellNS 406, 49 C.B.R. (3d) 213 (N.S. S.C. [In Chambers]) — referred to

NsC Diesel Power Inc., Re, 1998 CarswellNS 331, (sub nom. *NsC Diesel Power Inc. (Bankrupt), Re)* 170 N.S.R. (2d) 236, (sub nom. *NsC Diesel Power Inc. (Bankrupt), Re)* 515 A.P.R. 236, 6 C.B.R. (4th) 96 (N.S. C.A.) — referred to

Paskauskas, Re, 36 C.B.R. (3d) 288, 1995 CarswellOnt 948 (Ont. Bktcy.) — referred to

R.L. Coolsaet of Canada Ltd., Re, 45 C.B.R. (3d) 30, 1996 CarswellOnt 5202 (Ont. Bktcy.) — considered

Touhey v. Barnabe, 1995 CarswellOnt 3495 (Ont. Bktcy.) — considered

Statutes considered:

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

Generally — considered

s. 3 — considered

s. 4 — considered

s. 4(1) "related group" — considered

s. 4(1) "unrelated group" — considered

s. 59 — considered

s. 59(2) — considered

s. 59(3) — considered

s. 91(1) — referred to

s. 109(6) — considered

s. 111 — considered

s. 172 — considered

s. 163(1) — referred to

s. 163(2) — considered

s. 173 — considered

s. 173(1)(a) — considered

s. 173(1)(d) — considered

s. 173(1)(f) — considered

s. 173(1)(g) — considered

s. 173(1)(k) — considered

Bills of Exchange Act, R.S.C. 1985, c. B-4
s. 179(2) — considered

APPLICATION by debtors to approve proposal; APPEAL by dissenting creditors of trustee in bankruptcy's decision to allow certain creditors to vote at meeting of creditors; CROSS-APPLICATION by dissenting creditors for order to cross-examination of individuals.

***Ross J.*:**

I Introduction

1 This was a hearing to deal with several matters in relation to two proposals filed under the *Bankruptcy and Insolvency Act*, RSC 1985 c. B-3 (the "*Act*").

2 The parties are:

(a) the Trustee, Campbell Saunders Ltd.;

(b) Mr. Abou-Rached and RAR Investments Ltd. ("RAR") who each filed a proposal;

(c) two groups of creditors supporting the proposals:

(i) Stanley Rodham Investments ("SRI"), Randers International Ltd., Rosebar Enterprises Ltd., Sirmac International Ltd., Veda Consult S.A., and Yarold Trading Ltd.; and

(ii) RAR Consulting Ltd. ("RARC"), Garmeco Canada International Consulting Engineers Ltd., Georges Abou-Rached, and Hilda Abou-Rached;

(d) two creditors who are in opposition to the proposal:

(i) Genesee Enterprises Ltd., a judgment creditor ("Genesee"); and

(ii) Jean de Grasse, Robert de Grasse, Andre de Grasse, Claire de Grasse, Frank de Grasse, Eric Boulton, D'Arcy Boulton, Gurdrun Kate Parkes, Kenneth James Parkes, Michael A. Parkes, Greg Findlay, Susan Findlay, Phil Argue, Glenn Morris and Four Weal Ventures Ltd., defendants by counterclaim in litigation involving Genesee as plaintiff (the "Defendants by Counterclaim")

(collectively the "dissenting creditors".)

3 The matters are:

(a) appeals by the dissenting creditors from the decision of the Trustee to permit certain creditors to vote at the meeting of creditors;

(b) applications for court approval of the Proposals. These are opposed by the dissenting creditors on the grounds that the Proposals do not meet the criteria under s. 59 of the *Act* and that facts under s. 173 of the *Act* are present;

(c) an application by the dissenting creditors for orders for the cross-examination of several individuals.

4 On the basis of the reasons that follow, I have approved the Proposals and dismissed the balance of the relief sought.

II BACKGROUND

5 Mr. Roger Abou-Rached was born in Beirut, Lebanon in 1951. He is an engineer who received his training at the American University in Beirut and at Stanford University in California.

6 Mr. Abou-Rached's father, George Abou-Rached, is a prominent engineer. He held the position of Dean and Professor of Engineering at the American University in Beirut. In addition, he was involved in engineering projects in the Middle East, Asia and Africa through his company Garmeco International Consultants Ltd. ("Garmeco").

7 Garmeco employed Roger Abou-Rached as an engineer, at first, in Lebanon. His employment later continued in Canada when the family fled the Lebanese civil war in 1989 and immigrated to this country.

8 During the time that he was employed by Garmeco, Roger Abou-Rached developed a new construction technology (the "Technology"). The Technology is said to employ "a special reinforced concrete/pre-formed rigid insulation/cold formed metals method of construction" that utilized built-in, rectangular, hollow, metal section tubing as panel framing members. The system is said to be extremely flexible with respect to the type and quality of interior and exterior finish. It provides greater safety, energy efficiency, sound insulation and resistance to insect infestation. The system is also said to provide an environmentally sound building method potentially using recycled ferrous, plastics and organic fibers.

9 Mr. Abou-Rached acquired the rights to the Technology from Garmeco. Over the next several years a number of corporate entities became involved in the development. There were, in addition, a series of transactions, which are characterized by Mr. Abou-Rached and the creditors supporting the Proposals as being in relation to continuing efforts to raise funds in pursuit of that development. These transactions were primarily with SRI, an investment group in Europe, several private investors, as well as members of Mr. Abou-Rached's family and related companies.

10 Mr. Abou-Rached has stated that in excess of $20,000,000 has been invested in the development of the Technology, primarily by SRI, his family and related companies. He stated that in order to obtain these funds, he executed guarantees and transferred and pledged shares in his companies to the investors.

11 The transactions are characterized by the dissenting creditors as collusive efforts to prejudice them. In the background and at the root of the issue is litigation between Mr. Abou-Rached and these dissenting creditors, the judgment of which is reported at *Genesee Enterprises Ltd. v. Abou-Rached*, 2001 BCSC 59 (B.C. S.C.) (the "Litigation").

12 The principal entities in respect of the development of the Technology are described in the Trustee's Report and the reasons of Justice Levine in the Litigation. Mr. Abou-Rached incorporated four companies, holding 100% of the shares of each at the outset. These companies were:

(a) RARC,

(b) R.A.R. International Assets Inc. ("RARI"),

(c) Canadian High-Tech Manufacturing Ltd ("CHT"), and

(d) RAR.

13 Roger Abou-Rached obtained the rights to the Technology from Garmeco pursuant to an Assignment of Technology effective September 11, 1990 and executed on August 31, 1993. The purchase price was $5,000,000 US. There was a written and executed promissory note from Mr. Abou-Rached in the amount of $5,000,000 US in favour of Garmeco dated September 12, 1990. In addition, there was an agreement that provided that the debt was to be repaid on a pro-rated basis from net cash flow from dividends paid by CHT to Roger Abou-Rached.

14 Effective April 1991, by agreement executed August 31, 1993, Mr. Abou-Rached assigned the absolute rights in the Technology to RARC. RARC granted a licence to CHT for the use of the Technology in Canada and a right of first refusal for its use in any other territory in the world.

15 In May 1993, Roger Abou-Rached transferred 65% of his shares in CHT to a publicly traded company, International Hi-Tech Industries Ltd. ("IHI") and acquired control of IHI in a "reverse take over" on the Vancouver Stock Exchange. CHT transferred the rights to the Technology in Canada to IHI. IHI is currently developing and marketing the Technology.

16 In 1990 and 1991, a number of individuals had made investments in various instruments related to CHT. These individuals were either members of the de Grasse family or introduced to Mr. Abou-Rached by the de Grasse family. In late 1991, Jean de Grasse, Robert de Grasse and Mr. Abou-Rached discussed a mechanism by which these investors could convert their investments into equity in CHT. It was substantially agreed that one entity, Genesee, would hold in trust all of the CHT shares issued to these investors. RAR had an option to buy, on notice given by CHT before November 1, 1996, any or all of the CHT shares held by Genesee for a purchase price calculated according to a formula, payable at Genesee's option, in cash or shares in IHI. This agreement was finally executed in mid-1992 (the "Genesee Agreement").

17 In late 1993 several individuals who were parties to the Genesee Agreement requested conversion of their shares of CHT pursuant to that agreement. They were informed that the requests could not be honoured because the requests, pursuant to the Agreement, had to be made by Genesee.

18 Jean de Grasse, as President of Genesee, then gave notice of conversion on their behalf. That notice in turn was refused because it had not been approved by Genesee's Board of Directors.

19 The Board met, but the requests for conversion were not approved because of a deadlock on the Board. One director, Michael Stephenson, a director of both Genesee and IHI, and on behalf of Hang Guong, the fourth director, refused to approve the conversions.

20 In the result, an action was commenced in which a claim of oppression and conflict of interest was advanced. In *De Grasse v. Stephenson* (June 9, 1995), Doc. Vancouver A943129 (B.C. S.C.) (the "Petition"), Mr. Stephenson was found to be in a conflict of interest. Genesee was ordered to give notice of the requests for conversion. The requests were issued on July 7, 1995.

21 The requests were not honoured. Mr. Abou-Rached and RAR claimed that the Genesee Agreement did not provide for the conversion right claimed. The Litigation was commenced. In addition to raising several defences with respect to the Genesee Agreement, the defendants claimed that the Agreement should be rescinded on the basis of fraudulent misrepresentation. Claims of conspiracy and breach of fiduciary duty were also raised by the defendants.

22 The individuals who had sought conversion through Genesee, the Defendants by Counterclaim, were named in a counterclaim which repeated the allegations raised in the defence.

23 In June 1995, RARC granted a licence agreement for the international rights to the Technology, excluding Canada, to IHI International Holdings Ltd. ("IHIL"). IHIL is owned 51% by IHI and 49% by Mr. Abou-Rached's family.

24 Judgment in the Litigation was pronounced January 9, 2001. The plaintiff, Genesee, was awarded damages of $982,746.94 plus interest. The counterclaim was dismissed. In supplementary reasons for judgment, reported at 2001 BCSC 1172 (B.C. S.C.), Justice Levine awarded the plaintiff and the Defendants by Counterclaim special costs.

25 Following the pronouncement of the reasons for judgment SRI, one of the major creditors of Mr. Abou-Rached and RAR, issued a demand. Mr. Abou-Rached and RAR each then filed a Notice of Intention to File a Proposal, as they were unable to meet their financial obligations as they became due. Mr. Abou-Rached and RAR, after obtaining two extensions from the court, ultimately filed the Proposals on January 7, 2002.

26 Campbell Saunders Ltd. is the Trustee under the Proposals.

27 The Proposals were summarized by the Trustee as follows

Option A

a) An amount totaling $150,000 CDN, to be provided by SRI ($75,000) and the Debtor's parents or other family members ("the family") ($75,000);

b) Common shares in the capital of IHI having a market value of $150,000 as at the date of the initial bankruptcy event, to be provided by SRI ($75,000) and the family ($75,000); and

c) (a) and (b) above are to be delivered to the Trustee no later than 31 days following Court approval.

The shares will be issued in or transferred in the name of the Creditor(s), to be held and distributed by an Authorized Representative agreed upon by the Creditor(s).

The Debtor also agrees that for a period of two years from the date of Court Approval, he shall deliver to the Trustee:

- 5% of any common shares, warrants, options or escrow shares he may receive from or in the capital of IHI; or
- anytime after 120 days following Court approval of the Proposal, provide $100,000 CDN in cash; or
- that number of common shares in the capital of IHI equal to $100,000 CDN.

The future shares delivered to the Trustee shall be issued in the name of the Authorized Representative in trust for the Creditors.

The Authorized Representative shall not sell the common shares and/or future shares at a rate exceeding 2% of the original total number of common shares and/or future shares each day.

Option B

The claim of the Creditors who elect this Option will survive for seven (7) years (or as agreed to by the Debtor and the Creditors).

The Creditors will be entitled to accrue or charge a maximum of 2% interest per annum to the amount of their claim.

With the exception of 2,600,000 stock options in the capital of IHI and 21,684,958 common shares held in escrow in the capital of IHI that are held in the name of Mira Mar Overseas Ltd. and all rights or entitlement accruing in relation thereto (the "Existing Encumbered Shares"), the Debtor shall for a period not exceeding seven years (or such other period of time as may hereafter be agreed to by the Debtor and the Creditors who elect to Option B of the Proposal) from the date of filing of the initial bankruptcy event, pledge and deliver to the Trustee 30% of any options, warrants, common or preferred shares whether held in escrow or not that the Debtor may receive or be entitled to receive in the capital of IHI from and after the date of the initial bankruptcy event (hereinafter any future right to receive options, warrants, common or preferred shares, whether held in escrow or not shall collectively be referred to as the "Option B Future Shares"). For greater certainty, the Option B Future Shares do not include the existing encumbered shares.

The Option B Future Shares shall be issued in the name of the Authorized Representative in trust for the Creditors and delivered to the Trustee within 30 days of receipt or soon thereafter as may be reasonable.

The Trustee shall forward to the Authorized Representative and the Authorized Representative shall not sell the shares at a rate greater than 2,000 common shares each trading day.

The Authorized Representative shall sell the shares upon receipt of written instructions delivered to it by the Creditors.

If the Creditors' claims are not paid by the last day of the seventh year (or such other period of time as may be agreed to by the Debtor and Creditors), such claim shall be released and shall not be recoverable.

Prior to the Creditors' Meeting, the Debtor will obtain from SRI and the Family irrevocable direction agreeing that they will elect to participate in Option B and waive or release any right or entitlement of the Option A Future Shares that they may have pursuant to any security given by the Debtor prior to the initial bankruptcy event.

The Debtor will only be obligated to deliver the Option B Future Shares to the Trustee to the extent necessary to repay in full the claims of those creditors who elect Option B.

The Debtor can at any time deliver to the Trustee the sum of money or number of shares in the capital of IHI necessary to repay in full the claims of the Creditors.

Upon delivery the Debtor shall be released and proved discharges.

28 In the course of these proceedings the Proposals were amended as follows:

- All creditors, except credit cards, banks, Canada Customs and Revenue Agency, and contingent creditors, have agreed to accept Proposal Option B;

- Within 30 days of Court Approval, the Proposal will provide that the Trustee will receive $150,000 cash;

- Within 30 days of Court Approval, the Proposal will provide that the Trustee will receive the shares as stated in Paragraph 15 of the Proposal. Should the Trustee be unable to realize a total of $150,000 within 90 days of Court Approval, the Proposal will provide that the Trustee will receive the additional funds in cash;

- Within 90 days of Court Approval, the Proposal will provide that the Trustee will receive shares to a value of $100,000 and should the Trustee be unable to realize a total of $100,000 within 150 days of Court Approval, the Proposal will provide that the Trustee will receive the additional funds in cash;

- The retainer held by the Trustee in the amount of $27,500, will be applied to the Trustee's fees and Mr. Rached's parents, who provided the retainer, will have no claim in the estate for that amount.

29 The Trustee estimates that, with the amendment, the creditors in Option A will realize at least 15 cents on the dollar for their claims.

30 The Trustee recommended the Proposals, stating:

According to the Statement of Affairs, there are no unencumbered assets that would be available to the unsecured creditors in a Bankruptcy scenario. The amount of excess income that would be available is minimal and, in all likelihood, would be less than the Trustee's fees and disbursements.

The only potential recovery available to the Estate would require the voiding of the various transfers, sales and pledges described herein. As indicated in this report, this would require further investigation and, in all likelihood, expensive litigation. The cost of this process would be great and beyond the availability of funds from tangible assets. Any effort in this regard would therefore require funding by the Creditors and there is no certainty that the required funding would be forthcoming. Finally, the conclusion of further investigation may be that all of the transactions are bona fide and for fair consideration.

Accordingly, at this time we are unable to estimate with any degree of certainty the estimated realization in a Bankruptcy scenario. The terms of the Proposal, on the other hand, offer the creditors certainty as to recovery with the right to elect the potential recovery of all of their claims (under Option B) or a portion of their claims (under Option A).

In fact, the situation at the outset of the hearing and prior to the amendment was that recovery under the Proposals would have been in the order of 4 or 5 cents on the dollar.

31 The meeting of creditors was held on January 28, 2002. In the Proposal of Roger Georges Abou-Rached, the following was the result of the creditors' vote:

For: 48	$13,198,794.64	87.78%
Against: 2	$ 1,837,369.98	12.22%
	$15,036,164.62	

In the Proposal of R.A.R. Investments Ltd., the following was the result of the creditors' vote:

For: 48	$11,542,876.46	86.26%
Against: 2	$ 1,837,369.98	13.74%
	$13,380,846.44	

32 Creditors Genesee and the Defendants by Counterclaim voted against the Proposals. Their claims were with respect to the judgment arising from the litigation and the award of special costs.

33 Following the meeting of creditors, a series of appeals were brought. Registrar Sainty, in reasons dated April 3, 2002, with respect to one appeal, allowed the unsecured claim of the Defendants by Counterclaim at 70% rather than the 50% allowed by the Trustee in the RAR proposal. Accordingly, the dollars voted against that Proposal were increased, but not by enough to change the outcome of the vote.

III. APPEAL FROM THE TRUSTEE'S DECISION TO ALLOW CERTAIN CREDITORS TO VOTE ON THE PROPOSALS

34 The dissenting creditors appealed against the Trustee's decision to permit certain creditors to vote on the Proposals. First, the dissenting creditors submit that the Trustee erred in allowing the claims of Ka Po Cheung, Larry Coston, and the Five Small Creditors; namely, Han Hoang, IACS Technologies Inc., Thinh Le, Nhan Thi Le and Hong Dinh Le.

35 Han Hoang is a former director of Genesee. The dissenting creditors asserted that, following the ruling of Justice Henderson in the Petition, Ms. Hoang avoided attending the directors meeting of Genesee, which was required in order to permit Genesee to formally request conversion of the shares, and thereby assisted Mr. Abou-Rached and RAR in their opposition to the conversion requests.

36 Ms. Hoang submitted three proofs of claim in Mr. Abou-Rached's Proposal, for $1,000, $1,500 and $300,000. The $1,000 claim arises from a cheque of Ms. Hoang in the amount of $5,000, said to represent five $1,000 loans from the Five Small Creditors. She was only permitted to vote with respect to the first two claims as the Trustee concluded that the large claim was a contingent claim. In the RAR Proposal, Ms. Hoang claims $1,000 and $300,000. The Trustee's decision with respect to voting was the same with respect to that Proposal.

37 Ko Po Cheung filed a proof of claim in the Proposal of Mr. Abou-Rached in the amount of $2,159.12, Larry Coston filed a proof of claim in the amount of $1,500, The Five Small Creditors filed proofs of claim in the amount of $1,000 each.

38 The dissenting creditors' complaints with respect to these claims are that:

- There is no evidence that any consideration was given for the promissory notes provided by Mr. Abou-Rached and RAR.
- There is no evidence that Ms. Hoang received $1,000 each from IACS Technologies Inc., Thinh Le, Nhan Thi Le and Hong Dinh Le in relation to the $5,000 cheque.

• The $5,000 cheque is made out to I.H.I. Holdings Ltd. The Promissory Note is signed by Mr. Abou-Rached on behalf of both himself and RAR with no explanation.

• The timing of the debt is questionable. It arises shortly after judgment in the Litigation. Prior to that, there was no debt between the Small Five Creditors and CHT.

39 In addition, they note that Mr. Coston voted on behalf of 27 creditors with similar cheques and promissory notes filed as proofs of claim or invoices and agreements to pay. Moreover, he was observed at the meeting soliciting the assistance of Mr. Abou-Rached and his counsel in filling out the forms.

40 The Trustee submits that the proofs of claim had been reviewed by both the Trustee and representative from the office of the Superintendent of Bankruptcy. They concluded that the claims were sufficient. He submits further that a promissory note is evidence of a debt and noted that there were warnings with respect to false filings on the proof of claim forms. These claims were for amounts smaller than the potential fines. He observed that the documentation with respect to these claims was in fact more extensive than that frequently encountered in bankruptcy proceedings.

41 Upon a review of the evidence and submissions, I have concluded, for the reasons as stated by the Trustee, that the creditors Cheung, Coston, Hoang, IACS, Thinh Le, Nhan Thi Le and Hong Dinh Le have, on the balance of probabilities, and based on the evidence before me, have established that they have claims provable in the proposal.

42 The dissenting creditors also appeal the decision of the Trustee to allow SRI to vote on the proposals. The dissenting creditors submitted that SRI was not dealing at arms length, and that the debts claimed were not *bona fide*.

43 Section 109(6) of the *Act* provides:

Creditor not dealing at arm's length — Except as otherwise provided by this Act, a creditor is not entitled to vote at any meeting of creditors if the creditor did not, at all times within the period beginning on the day that is one year before the date of the initial bankruptcy event in respect of the debtor and ending on the date of the bankruptcy, both dates included, deal with the debtor at arm's length.

44 The question of what is meant by arms length, for purposes of the *Act*, is dealt with in ss. 3 and 4, which provide:

3.(1) **Reviewable transaction** — for the purposes of this Act, a person who has entered into a transaction with another person otherwise than at arm's length shall be deemed to have entered into a reviewable transaction.

(2) **Question of fact** — It is a question of fact whether persons not related to one another within the meaning of section 4 were at a particular time dealing with each other at arm's length.

(3) **Presumption** — Persons related to each other within the meaning of section 4 shall be deemed not to deal with each other at arm's length while so related.

4.(1) **Definitions** — In this section

"related group" means a group of persons each member of which is related to every other member of the group;

"unrelated group" means a group of persons that is not a related group.

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

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

(b) a corporation and

(i) a person who controls the corporation, if it is controlled by one person,

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

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

(c) two corporations

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

(ii) each of which is controlled by one person and the person who controls one of the corporations is related to the person who controls the other corporation,

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

(iv) one of which is controlled by one person and that person is related to each member of an unrelated group that controls the other corporation,

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

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

(3) **Relationships** — For the purposes of this section,

(a) where two corporations are related to the same corporation within the meaning of subsection (2), they shall be deemed to be related to each other;

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

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

d) where a person owns shares in two or more corporations, he shall, as shareholder of one of the corporations, be deemed to be related to himself as shareholder of each of the other corporations;

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

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

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

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

45 There is no evidence before me that SRI is a related person with respect to either Mr. Abou-Rached or RAR within the meaning of section 4 of the *Act*.

46 The next question is whether SRI is, in any event, not dealing at arm's length with Mr. Abou-Rached or RAR. This is a question of fact. The test articulated in *Gingras, Robitaille, Marcoux Ltée v. Beaudry* (1980), 36 C.B.R. (N.S.) 111 (C.S. Que.), at 112 is:

> . . . a transaction at arm's length could be considered to be a transaction between persons between whom there are no bonds of dependence, control or influence, in the sense that neither of the two co-contracting parties has available any moral or psychological leverage sufficient to diminish or possibly influence the free decision-making of the other. Inversely, the transaction is not at arm's length where one of the co-contracting parties is in a situation where he may exercise a control, influence or moral pressure on the free will of the other. Where one of the co-contracting parties is, by reason of his influence or superiority, in a position to pervert the ordinary rule of supply and demand and force the other to transact for a consideration which is substantially different than adequate, normal or fair market value, the transaction in question is not at arm's length.

47 While considerable time was spent in submissions with respect to this issue, there is, in my view, no evidence before me of bonds of dependence, control, influence or moral pressure between Mr. Abou-Rached and SRI such that the ordinary rules of supply and demand are not operative. The dissenting creditors have not satisfied me on a balance of probabilities that SRI and Mr. Abou-Rached were not dealing at arm's length.

48 The dissenting creditors submit that the debts of SRI and the Group of Five; namely, Randers International Ltd., Rosebar Enterprises Limited, Sirmac International Ltd., Veda consult S.A. and Yarold Trading Ltd. are not *bona fide*, but rather represent a collusive effort on the part of Mr. Abou-Rached and the creditors to deprive the dissenting creditors of the fruits of the judgment in the Litigation. This argument is premised upon the assumption that virtually every transaction entered into by Mr. Abou-Rached or his associated companies since the first attempt at conversion was in fact directed to this collusive end. There is, however, no evidence before me in support of this fundamental assumption.

49 There is another, and perhaps simpler, explanation for the transactions; namely, that the investors were investing in the development of the Technology. The Technology is a real innovation, apparently of some promise. The dissenting creditors, whatever their current views of Mr. Abou-Rached, believed in the promise of the Technology, at least at the outset. They invested in the development of the Technology. There is no reason to believe that other investors would not and did not have the same faith in the Technology as that of the dissenting creditors.

50 There is also no evidence that funds were diverted or used for some other purpose, although in fairness to the dissenting creditors, they do question whether and to what extent the funds represented by some of the proofs of claim were advanced at all. Again, however, there is no evidence before me that funds were not advanced.

51 The Trustee drew some comfort from the fact that the majority of these transactions occurred before judgment was pronounced in the Litigation and that the basic nature and kind of documentation of the transactions was similar from the very outset.

52 The dissenting creditors submit that there is reason to question the dates of many of the transactions. However, while the transactions may be questionable, there is no evidence before me which would support a conclusion that the transactions did not occur as reflected in the documents.

53 The dissenting creditors also submit that the date of judgment is not the critical date, but rather the key point is the date of the first request for conversion. However, that date is very close to the inception of the whole enterprise. Thus the period during

which the dissenting creditors allege these collusive transactions occurred covers effectively the entire period during which investors were being sought to develop the Technology. Again there is no evidence before me that the impugned transactions were other than what they purport to be.

54 In short, I am unable to conclude that the transactions criticized by the dissenting creditors are other than *bona fide*.

55 Finally, the dissenting creditors rely upon s. 111 of the *Act*. That section provides:

> 111. **Creditor secured by bill or note** — A creditor shall not vote in respect of any claim on or secured by a current bill of exchange or promissory note held by him, unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the debtor, and who is not a bankrupt, as a security in his hands and to estimate the value thereof and for the purposes of voting, but not for the purposes of dividend, to deduct it from his claim.

56 The submission with respect to s. 111 was that, with respect to the claim of the Five Small Creditors, IHI was primarily liable for the debt and the debtor was a guarantor, secondarily liable. Since IHI is not a bankrupt or filing a proposal, when the IHI amount is deducted, the value of the claim is reduced to zero.

57 A similar argument was made with respect to all but the first $1.5 million of the SRI claim. The loan was made, it was submitted, to RARC, which is neither a party to the Proposals nor a bankrupt. It is the primary debtor and RAR was merely the guarantor. The amount to which the non-bankrupt party, RARC, is liable should therefore be subtracted from the claim for voting purposes.

58 Counsel were not able to provide any authorities commenting upon the interpretation of this provision of the *Act*.

59 Counsel for SRI and the Group of Five submitted that, pursuant to s. 179(2) of the *Bills of Exchange Act*, the relevant promissory notes are, in fact, joint and several promissory notes in that the notes bear the words "I promise to pay" and are signed by two or more people.

60 Second, SRI submitted that s. 111 does not require the reduction of any claim by reason of cross guarantees. Where there is a guarantee, the guaranteed amount can be claimed in full. The Trustee also submitted that, in his experience, this represents the practice.

61 Finally, counsel notes that SRI did in fact estimate the value of its security and subtract it from the amount of its claim. Its full claim was $18,812,876.46 from which it deducted $7,425,000 representing the security it holds.

62 I have concluded that the disputed claims are evidenced by loan agreements and promissory notes. The promissory notes are joint and several notes. The value of security held by the creditor has been deducted from the claims. There is no basis on which to disallow these claims from voting with respect to the proposal.

63 Accordingly, the appeals from the Trustee's decision to permit these creditors to vote with respect to the Proposals is dismissed.

IV. REVIEW OF THE PROPOSALS PURSUANT TO SECTION 59 OF THE *ACT*

64 The process with respect to court approval of a proposal is set out in s. 59 of the *Act* which provides in part:

> (2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, 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.

65 The court is not bound to approve a proposal even if it has an unqualified recommendation of the Trustee and the overwhelming support of creditors, see *Grobstein v. Brock Mills Ltd.* (1961), 2 C.B.R. (N.S.) 103 (C.S. Que.). However, where,

as here, a proposal has been approved by a large majority of creditors and recommended by the Trustee, substantial deference will be given to their views.

66 For example, the Court in *Gustafson Pontiac Buick Cadillac GMC Ltd., Re* (1995), 30 C.B.R. (3d) 280 (Sask. Q.B.) cited the following passage from Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3rd ed., (Toronto: Carswell, 1993) in refusing to reject a proposal approved by a majority of creditors: "If, however, a large majority of creditors, i.e., substantially in excess of the statutory majority, have voted for acceptance of a proposal, it will take strong reasons for the court to substitute its judgment for that of the creditors".

67 In determining whether to approve a proposal, the court must consider the wishes and interests of the creditors, the conduct and interest of the debtor, the interests of the public and future creditors and the requirements of commercial morality, see *Lofchik, Re* (1998), 1 C.B.R. (4th) 245 (Ont. Bktcy.).

A. Are the Terms of the Proposal Reasonable?

68 The first question to be addressed is whether the terms of the proposal are reasonable. Reasonable in this context has been determined to mean that the proposal must have a reasonable possibility of being successfully completed in accordance with its terms. In addition, the proposal must meet the requirements of commercial morality and must maintain the integrity of the bankruptcy system, see *Lofchik, Re*, *supra*.

69 The onus is on the Trustee and the creditors who support the proposal to establish that the proposal is reasonable, see *McNamara v. McNamara* (1984), 53 C.B.R. (N.S.) 240 (Ont. Bktcy.).

70 The Trustee in this case concluded that there were no unencumbered assets of any value which could be ascertained that would be available to unsecured creditors in the event of a bankruptcy. The amount of excess income was minimal and likely less than the Trustee's fees and disbursements.

71 The Proposals provide for certain recovery for the unsecured creditors. There is a guaranteed payment by means of an infusion of cash.

72 The dissenting creditors submit that the Proposals are simply another attempt by the debtors to avoid honouring the judgment debt owed to Genesee and the costs awarded to the Defendants by Counterclaim in the Litigation. They submit that the proposals are not reasonable. The factors on which they rely include: the past conduct of the debtor, the reviewable transactions, the limited recovery provided by the proposal, and the fact that the proposals would preclude full investigation of the reviewable transactions. They add to this the fact that the proposal requires them to release the debtors with respect to any claims under the *Act* and any claims of fraudulent preferences, conveyance, settlement or trust.

73 It is clear that the proposal has a reasonable prospect of succeeding according to its terms. For the reasons cited by the Trustee, it is in the interests of the creditors.

74 The debtors have minimal assets. The Proposals contemplate an injection of cash and shares at a guaranteed value such that payments under the Proposals will be secured.

75 The assets which are the subjects of the allegedly fraudulent dispositions are, in any event, encumbered beyond their market value in favor of secured creditors.

76 Reprehensible conduct on the part of the debtor has been considered a basis for concluding that a discharge or proposal is not reasonable. In *Touhey v. Barnabe*, [1995] O.J. No. 2337 (Ont. Bktcy.), one such case, a discharge was refused. The grounds for refusal were summarized in the headnote as follows:

> . . . At the date of bankruptcy the bankrupt was not insolvent, and the evidence established that he declared bankruptcy solely to avoid the $100,000 debt resulting from the judgment. The bankrupt never made any payment to the creditors, nor did he ever attempt to settle with them. With the income available to him over such a long period of time it was

inconceivable that the bankrupt actually had no personal assets. He had inappropriate expenses in light of his obligations. The bankrupt attempted to flaunt the system and his behaviour was reprehensible. He did not merit a discharge.

77 In the present case, Justice Levine found Mr. Abou-Rached's conduct in the Litigation to be worthy of rebuke. I have concluded that that conduct fell within the scope of s. 173(f) of the *Act*. However, I have not concluded, nor did the Trustee, that the Proposals were filed solely to avoid the judgment; that other s. 173 facts have been made out; or that there has been other reprehensible conduct such as dissipation or diversion of assets. Without for a moment condoning Mr. Abou-Rached's conduct in the course of the Litigation, I have nonetheless concluded that the requirements of commercial morality do not necessitate a refusal to approve the Proposals. I find the Proposals to be reasonable.

B. Are the Proposals Calculated to Benefit the General Body of Creditors?

78 Courts have refused to approve proposals on this basis where, for example, the proposal serves the interests of persons other than the creditors; where there has not been full disclosure of the assets of the debtor and the encumbrances against those assets; where the proposal, by it terms, is bound to fail; or where the Trustee is able to delegate his duties to a group of the creditors, see *Houlden & Morawetz, 2001 Annotated, Bankruptcy & Insolvency Act* at para. E15(10)(c); *Lofchik, Re*, *supra*.

79 In the case of these Proposals, the Trustee and supporting creditors note that the Proposals provide for an evenhanded distribution. The claims of the family have not been included; nor have claims of related parties. There has been, it is submitted, full disclosure of assets and encumbrances. Moreover, it is submitted that the recovery is greater under the Proposals than it would be in the event of a bankruptcy.

80 The dissenting creditors submit that the Proposals are not in the interests of the creditors. They rely upon the arguments advanced in connection with the reasonableness of the proposal.

81 In addition, they submit that there has not been proper disclosure of the debtors' assets. Two matters in particular are raised in this connection:

(a) the disposition of personal assets valued by Mr. Abou-Rached in 1995 at $700,000;

(b) certain payments or income of the debtor;

82 With respect to the latter, the Trustee notes that he was aware of the payments or income. The Proposals are not dependent upon the cash flow of the debtors. They are funded by an infusion of cash from third parties. Hence the income has no effect upon the viability of the Proposals. In addition, the amounts at issue are modest.

83 With respect to the personal assets, the Trustee was aware of the issue and considered it in coming to his opinion. He was of the view, first, that the assets had been accounted for, and second, that their realizable value was not anywhere near $700,000.

84 For the reasons enumerated by the Trustee and in the earlier discussion with respect to reasonableness, I have concluded that the Proposals are in the interests of the creditors.

V. ARE ANY OF THE FACTS ENUMERATED IN SECTION 172 MADE OUT AGAINST THE DEBTORS?

85 Section 59(3) of the *Act* provides:

> Where any of the facts mentioned in s. 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payments 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.

86 In this case, the dissenting creditors submit that the Proposals should not be approved because s. 173 facts are present and the Proposals do not provide for recovery of fifty cents on the dollar.

87 The following provisions of s. 173 of the *Act* are at issue in these proceedings:

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;

. . . . .

(d) the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities;

. . . . .

(f) the bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt;

. . . . .

(k) the bankrupt has been guilty of any fraud or fraudulent breach of trust;

A. Value less than fifty cents on the dollar

88 It is common ground that the debtors' assets are less than fifty cents on the dollar of the unsecured liabilities. The question, therefore, is whether this shortfall has arisen from circumstances for which the bankrupt cannot justly be held responsible.

89 The Trustee concluded that the debtors were not responsible for the shortfall of the assets. His report states:

1. In order to raise money to finance the operations of IHI and to develop the technology licensed to IHI, the Debtor was required to pledge all of his interest in IHI as well as guarantee (directly and indirectly) various investments made by others in IHI;

2. A downturn in the stock market, and a decrease in the trading price of shares in IHI in the stock market made it more difficult to raise funds for the ongoing operations of IHI and the Debtor continued to incur further financial obligations;

3. A Judgment was pronounced and a legal action commenced against the Debtor, R.A.R. Investments Ltd. ("RAR") and CHT. The legal action that led to the Judgment was ongoing for approximately four and one-half years and throughout that time, the Debtor steadfastly believed the Plaintiff's claim would be dismissed in its entirety. A significant portion of that claim resulted in a Judgment being pronounced against the Debtor and RAR. The Debtor had not expected any part of the Plaintiff's claim to be successful. The amount of that Judgement was approximately $975,000 (excluding costs);

4. One of the Debtor's major Creditors made demand upon learning of the said Judgment; and

5. Although an appeal of the Judgment has been filed, the Debtor concluded that it would be in the best interest of his Creditors and himself if his remaining sources of funds and energy were directed to payment of all of his Creditors rather than to prosecuting the appeal.

90 The dissenting creditors, relying on *Forsberg, Re* (2001), 26 C.B.R. (4th) 204 (Sask. Q.B.), submit that Mr. Abou-Rached is responsible for the shortfall in assets because he provided guarantees in circumstances in which he knew that he did not have sufficient assets to satisfy the guarantees.

91 Counsel for Mr. Abou-Rached disputes this claim noting that, although the majority of the shares had not yet been released from escrow, Mr. Abou-Rached held some 25,000,000 shares in IHI. Between 1995 and 1999, the median share price was $2.41

(see *Genesee Enterprises Ltd.*, *supra*, at p. 337). Thus, at the time he provided the guarantees, he had assets to support the guarantees given.

92 I have concluded that the dissenting creditors have not established that the debtors are responsible for the shortfall in the value of their assets.

B. Has the debtor failed to account satisfactorily for any loss of assets or for any deficiency of assets?

93 The submissions with respect to this allegation have been dealt with above. In order for the dissenting creditors to make out this allegation, they must rely upon the values set out by Mr. Abou-Rached in earlier statements of net worth that he prepared. Mr. Abou-Rached deposed that these values were overstated. I put little weight on this assertion; however, the Trustee was of the same opinion, in other words, that the net worth statements upon which the dissenting creditors rely, do not reflect the realizable value of the assets.

94 I have concluded that the dissenting creditors have not established that the debtor has not given a satisfactory account for loss of assets or deficiency of assets.

C. Has the debtor put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him?

95 The dissenting creditors submit that the reasons of Justice Levine in the Litigation establish that this fact has been made out. That the action was properly brought is established by the fact that the plaintiff enjoyed substantial success, being awarded damages of $982,746.94 plus court order interest. However, it must also be noted that the plaintiff's success was not complete; the recovery was substantially less than the amount claimed.

96 Justice Levine made extensive findings with respect to Mr. Abou-Rached's credibility and conduct in the Litigation. First, with respect to credibility:

> Mr. Abou-Rached accuses Robert de Grasse in particular of fabricating evidence, including documents, and stealing documents relevant to the proof of the defendants' case. He claims that Jean de Grasse and the other defendants by counterclaim either misstated the facts or failed to accurately recall them.
>
> . . . . .
>
> In general, however, I find myself skeptical about the credibility of the evidence of Mr. Abou-Rached with respect to many of the details of events, documents or transactions.

97 After a second hearing to deal with costs, Justice Levine ordered special costs to the plaintiff of its claim for 45 of the 49 days of trial, special costs to the plaintiff and the Defendants by Counterclaims of defending the counterclaim . Her reasons state:

> [6] This litigation is almost a case-study on the factors that the courts have considered in awarding special costs. I have no trouble finding that the conduct of the defendants was "reprehensible, deserving of reproof or rebuke", and in some cases, "scandalous and outrageous" (*Garcia v. Crestbrook Forest Industries Ltd.* (1997), 9 B.C.L.R. (3d) 242 at 249 (C.A.)).
>
> [7] The conduct of the defendants that I find justifies an order of special costs includes improper allegations of fraud, unlawful conspiracy, breach of fiduciary duty and criminal conduct; improper conduct during the proceedings; and improper motive for bringing the proceedings.
>
> **(a) Improper allegations of fraud, unlawful conspiracy, breach of fiduciary duty and criminal conduct**
>
> [8] The allegations of criminal conduct included a claim that the plaintiff was claiming interest in excess of the criminal rate set by the *Criminal Code*. This allegation was withdrawn on the eve of trial.
>
> [9] At examination for discovery and during his testimony at trial, Mr. Abou-Rached accused Robert de Grasse of forging Mr. Abou-Rached's signature on documents, preparing false documents and stealing documents from the defendants. He

accused plaintiff's counsel of obstruction of justice, including witness tampering. There was no evidence to support any of these claims.

[10] The defendants' claims of fraudulent misrepresentation, unlawful conspiracy and breach of fiduciary duty were all dismissed. The evidence simply did not support them. The defendants repeatedly failed to give the plaintiff and defendants by counterclaim particulars of the alleged fraud, conspiracy, breach of fiduciary duty, or damages, and failed to provide any particulars of damages in their closing submissions at trial.

. . . . .

[13] The defendants conducted themselves improperly during the proceedings in a number of ways.

[14] Firstly, the defendants did not disclose documents in the manner required by the ***Rules of Court***, standards of practice, or in response to court orders. In *Clayburn Industries v. Piper* (1998), 62 B.C.L.R. (3d) 24 at 51 (S.C.), the failure to produce documents was a significant factor in determining that special costs were appropriate.

. . . . .

[16] Some documents were produced in part only (for example, one page of several of a memorandum) and documents which would have been in the defendants' possession and control were never produced (such as the executed Genesee Agreement for each investor, letters sent to prospective investors in CHT and employment records of Robert de Grasse). The defendants produced documents that supported their case (such as the "Fadel Agreement" and a document with handwritten notes purporting to confirm Mr. Abou-Rached's conversations with Robert de Grasse concerning this agreement), but did not produce those which contradicted it (such as the "Gougassian agreement").

[17] Secondly, Mr. Abou-Rached, the key witness for the defendants, was deliberately non-responsive during both examination for discovery and at trial. I commented on Mr. Abou-Rached's testimony in my reasons for judgment at paras. 31 through 38, and need not repeat those comments here.

[18] Thirdly, some of Mr. Abou-Rached's testimony was obviously fabricated. These include his claim that he discussed the terms of the "Fadel Agreement" with Robert de Grasse and the document containing the handwritten notes purporting to record that conversation; his continual denial that he signed or read documents that were supportive of the plaintiff and DCCs; and his reference to a chart setting out the value of an investment in Genesee which he purportedly discussed with Jean de Grasse and Robert de Grasse. The testimony of Sandy Lucas and Robert de Grasse regarding documents purportedly signed by Sheik Fadel must lead to the conclusion that at least some of those were signed by Mr. Abou-Rached, which he denied.

[19] I am prepared to accept that some of Mr. Abou-Rached's fabrications were not deliberate or dishonest lies, but resulted from his belief in the strength of his case. On the other hand, some of his testimony was too contrived, particularly with respect to his relationship (personal and business) with Sheik Fadel, to accept as anything other than calculated to deceive the court.

[20] Fourthly, Mr. Abou-Rached's behavior during examination for discovery and at trial was often inappropriate to the point of accurately being described as "outrageous" or "scandalous". Mr. Abou-Rached insulted the DCCs, who were also witnesses for the plaintiff, and counsel. As already noted, he accused plaintiff's counsel of obstruction of justice and witness tampering, and questioned the competence of counsel for the plaintiff and DCCs.

(c) Improper motive

[21] The defendants' conduct throughout these proceedings indicates that they sought to delay and hinder the plaintiff from recovering its claim under the Genesee Agreement and to harass the DCCs.

[22] The defendants' claims that the parties had entered into a collateral "Investment Agreement", in addition to the claims of fraudulent misrepresentation, conspiracy and breach of fiduciary duty, had the direct effect of prolonging the trial so that the entire history of the parties' relationship, in particular that of Mr. Abou-Rached, Jean de Grasse and Robert de Grasse, could be explored in great detail. All of these claims were dismissed.

> [23] The claims against the 13 DCCs other than Jean de Grasse and Robert de Grasse were particularly without merit, and were all but abandoned halfway through the trial. These DCCs had attempted to have their cases resolved by an aborted Rule 18A application, but the defendants refused to cooperate. They then sought to have their evidence admitted by affidavit, which the defendants again resisted. In ordering the 13 DCCs to attend the trial to be cross-examined, I noted that if their evidence proved not to be controversial or did not materially add to the information in the affidavits, costs could be ordered to remedy the situation (see Rules 40(50) and (51)). The 13 DCCs, other than Jean de Grasse and Robert de Grasse, are entitled to their costs of attending the trial, which their counsel has advised total $8,548.47.
>
> [24] As I pointed out in my reasons for judgment, most of the evidence about Shiek Fadel, his existence and role in the Genesee Agreement, was interesting but unnecessary. The only issue (other than Mr. Abou-Rached's credibility) that related to Shiek Fadel was whether the Fadel Agreement amended the Genesee Agreement. I found no legal basis for that part of the defendants' claim. The pre-trial applications, evidence and argument on this issue unduly prolonged the trial in support of a clearly unmeritorious claim.
>
> [25] The defendants delayed and hindered these proceedings by refusing to comply with the rules relating to document disclosure, as outlined above. Mr. Abou-Rached's non-responsiveness on examination for discovery and at trial prolonged both pre-trial proceedings and the trial, increasing the expense for all parties.
>
> . . . . .
>
> [28] Mr. Abou-Rached took an interest in the ability of the plaintiff and DCCs to afford this litigation. He admitted at trial that he commented at his examination for discovery that he wondered how the DCCs were financing the litigation and that someone must be paying their legal expenses. At trial, he said that the plaintiff and DCCs could not afford to litigate.
>
> [29] Some of the factors described above could support, on their own, an award of special costs. Taken together, I find that this is an appropriate case to exercise my discretion and order that the plaintiff and DCCs recover special costs.

98 The Trustee relied upon Mr. Abou-Rached's professed conviction in the merits of his defence in support of his conclusion that the facts in s. 173(f) were not made out.

99 Counsel for Mr. Abou-Rached and RAR submits that the defence cannot be said to have been frivolous or vexatious because it was substantially successful in that the plaintiff obtained judgment, but for significantly less than the original claim.

100 Counsel conceded that the claim against the Defendants by Counterclaim was frivolous and vexatious, but submits that since the counterclaim was a claim advanced by the debtors, it fell under s. 173 (g) of the *Act* and not 173(f). Section 173(g) has a three month time limitation period from the original bankruptcy event. In this case, the original bankruptcy event was October 1, 2001. Accordingly, the counterclaim falls outside the limitation period and s. 173(g) therefore also does not apply.

101 I have concluded that the dissenting creditors have established the s. 173(f) facts in that the conduct of the defence was frivolous and vexatious. It is clear from Justice Levine's reasons and disposition with respect to costs, and from a review of the pleadings in the action, that the distinction between the defence and the prosecution of the counterclaim urged upon me cannot be supported.

102 Moreover, the scope of the section embraces the conduct of the litigation, hence neither the debtor's belief in the merits of his position, nor the fact that he enjoyed a measure of success in the outcome is a complete answer, see *Paskauskas, Re* (1995), 36 C.B.R. (3d) 288 (Ont. Bktcy.) and *Touhey*, *supra*. Here there is reprehensible conduct including deliberate deceit and delay, and a finding of improper motive. This is, in my view, clearly sufficient evidence to support a finding of a frivolous or vexatious defence under the section.

D. Have the debtors been guilty of fraud or fraudulent breach of trust?

103 The dissenting creditors alleged that the following transactions were fraudulent dispositions of property:

(a) in late 1999 and early 2000, Roger Abou-Rached transferred 2,733,333 IHI shares to Garmeco (Lebanon) at a value of $0.75 per share.

(b) In mid 2001, Roger Abou-Rached transferred to his parents for no, or alternatively inadequate consideration, all his interests in Lebanese real estate that he had variously valued in the past at $1.8 million or in excess of $4 million (USD).

(c) In August, 2000, R.A.R. transferred its interests in commercial property on West 10th Avenue, Vancouver, B.C. to a numbered company wholly owned by Roger Abou-Rached's mother.

(d) In late 1999 and 2000 Roger Abou-Rached transferred or pledged all his interests in R.A.R. and in R.A.R. Consulting Ltd. to his parents' companies or to a group of foreign corporations represented by Marco Becker.

(e) Roger Abou-Rached has not accounted for the transfer of personal property estimated by him to be worth $700,000 in 1995. (This claim is dealt with earlier in these reasons).

1. IHI Shares

104 The essence of this claim is that Mr. Abou-Rached, on the eve of the trial of the Litigation, transferred 2 million IHI shares to Garmeco Lebanon. In February 2000, a further 733,333 shares were transferred. Mr. Abou-Rached testified that these transfers went to repay the $5 million debt owed to Garmeco Lebanon incurred from the purchase of the Technology. However, counsel submits that the money was to be repaid only from cash flow or dividends.

105 The documents in relation to the agreement to transfer the Technology are as follows:

(a) Assignment of Technology signed August 31, 1993, effective September 11, 1990;

(b) Letter dated September 12, 1990 from Garmeco to Wild Horse Industries Ltd (later IHI). This document states in part:

> As well, Garmeco and Garmeco Int'l acknowledge the transfer of the technology of the building system developed by Roger Abou-Rached while employed by Garmeco Int'l which will be utilized by Canadian HI-TECH Manufacturing Ltd.. In return for the transfer of this technology to Mr. Roger Abou-Rached, he will provide remuneration for the direct expenses incurred by Garmeco Int'l (i.e. employee wages, materials, purchase of equipment and computers, purchase of software, software development, consultation, etc.) during the research and development of the technology. The remuneration from Mr. Roger Abou-Rached to Garmeco Int'l will comprise of $5,000,000 US Dollars and will be paid on a prorata basis based on the following formula: $100,000 of every $1,000,000 of net cash flow from Canadian Hi-Tech Manufacturing Ltd. dividends to Roger Abou-Rached.

(c) a promissory note dated September 12, 1990 which provides in part:

> FOR VALUE RECEIVED THE UNDERSIGNED HEREBY ACKNOWLEDGES ITSELF INDEBTED AND PROMISES TO PAY THE ABOVE PRINCIPAL SUM, ON DEMAND, TO OR TO THE ORDER OF GARMECO INTERNATIONAL CONS. (LEB) (THE "HOLDER") AND/OR ANY OF ITS NOMINEE AND/OR ANY ASSOCIATES AND/OR ANY AFFILIATED PERSONS OR ENTITIES THE HOLDER MAY DIRECT IN WRITING.
>
> THE UNDERSIGNED MAY PAY THIS NOTE IN WHOLE OR IN PART WITHOUT NOTICE WITH 10% DISCOUNT TO BE CALCULATED AFTER THE WHOLE PRINCIPAL SUM IS PAID & PRIOR TO THE HOLDER SENDING ANY DEMAND NOTICE FOR PAYMENT OF THE ABOVE PRINCIPAL SUM IN FULL OR IN PART.

106 In response, counsel submit that there is no remedy under the *Act* with respect to this transaction because:

(a) it is not a settlement pursuant to s. 91(1) of the *Act* as it was not a gift, nor was any beneficial interest retained and it was to repay a debt;

(b) the initial bankruptcy event for both debtors was October 1, 2001 when the Notices of Intention to File Proposals were filed. The transactions fall outside the relevant limitation periods for review under the Act.

107 It is further submitted that the transactions are not reviewable under the Provincial legislation because there is no evidence that the transfers were made to delay or hinder creditors, or that they were made when the debtor was in insolvent circumstances. Moreover, it is submitted that the transfers were made for valuable consideration.

2. Lebanon Properties

108 Mr. Abou-Rached held interests in Lebanese real estate. The dissenting creditors assert that this real estate, valued in 1992 by Mr. Abou-Rached at $1,800,000, was transferred to his parents in the summer of 2001 for inadequate consideration. They asserted in addition that no transfer documents had been produced.

109 In response, it was asserted that the agreement to transfer the real estate was made on September 29, 1997. The consent of SRI was required for the transfer. Thus, there was a binding agreement to transfer the property well before the relevant limitation period, made at a time when the debtor was not insolvent.

110 It was further submitted that the transfer was made for fair and reasonable consideration. There was no evidence that it was made with an intent to hinder, delay or defraud creditors.

111 The registration of the transfer was not made until mid-2001; however, the reason for the delay in the registration was the negotiation to secure SRI's consent to the transfer.

3. RARC and RARI shares

112 The dissenting creditors also question a series of transactions which occurred at the beginning of the trial of the Litigation in which Mr. Abou-Rached transferred his interests in RARC and RARI to various companies, mainly SRI and five companies represented by Mr. Marco Becker, the principal representative of SRI. Mr. Abou-Rached transferred his interests in RARC to his parent's companies, Garmeco Canada and Garmeco Lebanon.

113 All pledges and transfers are subject to Mr. Abou-Rached recovering the shares on payment of an appropriate sum. The shareholders are obliged to maintain Mr. Abou-Rached as manager and director.

114 In response, it is submitted that these transfers were all made for fair consideration at a time when Mr. Abou-Rached was not insolvent. The transactions were not made with the intention to hinder or defeat creditors. They occurred outside the relevant limitation periods under the *Act*. In short, it is submitted that these are not reviewable transactions under the *Act* or under Provincial legislation.

4. 1096 West 10th Ave. Property

115 The final disputed transaction is in reference to the property located at 1096 West 10th Avenue, Vancouver. The dissenting creditors assert that RAR granted a second mortgage on the property to a numbered company wholly owned by Hilda Abou-Rached, 434088 B.C. Ltd. In June 1995, following the hearing of the Petition before Henderson J., Abou-Rached increased the value of the second mortgage from $400,000 to $1 million. Roger Abou-Rached has not explained or accounted for the increase.

116 RAR transferred the property to 434088 B.C. Ltd. August 2000, shortly after the conclusion of the Genesee trial. The reported consideration of $1,250,000 has not been documented. The consideration falls short of the value of $3,000,000 given by Abou-Rached in 1995.

117 In response, it is submitted that the property was owned by RARI not by Mr. Abou-Rached. In 1995, Hilda Abou-Rached, Mr. Abou-Rached's mother, purchased 434088 B.C. Ltd. (the "Company") for the amount due on the mortgage of the 1096 property when Mr. Abou-Rached could not refinance. At the time, Robert de Grasse was a director of the Company.

118 In August 2000, the property was transferred to the Company. The consideration was:

(a) the assignment of the liability under the existing mortgages; namely $700,000 to CIBC Mortgage Corporation, $600,000 to the Company and $1,500,000 to SRI,

(b) $50,000 for chattels, and

(c) payment of a fee of $100,000 to SRI to permit assignment of the mortgage.

119 The value of the property at the time of the transfer was approximately $735,000. The property has an assessed value of $330,000.

120 It was submitted that the transaction was for fair consideration and is not a reviewable transaction. The debtor was not in insolvent circumstances when the transaction was entered into. Nor is there evidence that the transfer was made with the intent to defeat, hinder, delay or defraud creditors to give the Company a preference.

121 The Trustee reviewed these and other transactions and concluded:

> Further information and review is required before the Trustee can draw any definitive conclusions as to whether or not any particular transaction constitutes a settlement or fraudulent preference under the provisions of the *Bankruptcy and Insolvency Act*. It is our preliminary view, however, certain transactions may be reviewable and warrant further investigation. To properly evaluate these transactions, an extensive forensic investigation or audit would be required and judicial consideration of the matters may be required. The time involved, expense, and risk of this process would be significant to the creditors. Moreover, if on completion of the forensic investigation or audit the inspectors and/or the creditors were of the view that one or more transactions were potentially voidable and they wished to challenge the validity of these transactions in Court, we are advised that any such challenges would be vigorously defended by the various secured and/or related parties. Therefore, although there may be an unknown recovery, there may also be a significant loss.

122 The jurisprudence in this province, binding upon me, is clear that, with respect to the factors enumerated in s. 173, an allegation of fraud or breach of trust can only be found where there had been a conviction or a finding of fraud by a judgment in a criminal or civil court, see *Herd, Re* (1989), 77 C.B.R. (N.S.) 209 (B.C. C.A.). There has been no such finding in this case.

123 The dissenting creditors submit that the *Act* is a federal statute and is to be applied consistently across Canada. There are jurisdictions in which a prior civil or criminal finding of fraud is not required. All jurisdictions require proof of fraud to have been met on at least the civil standard.

124 I am bound to follow the British Columbia jurisprudence and since there is no prior finding of fraud, that is the end of the matter. However, even if I were not so bound, I am satisfied that fraud has not been established on the evidence before me.

125 Questions arise with respect to the transactions in relation to their timing, the parties, and the underlying motivation. Mr. Abou-Rached's conduct in the Litigation was such as to give rise to questions in relation to any and all of his dealings. However, a substantial gulf separates questions and suspicions from a finding of fraud.

126 The dissenting creditors then submit, in the alternative, that if I conclude that there are "grounds for concern", the concern should form a basis upon which to conclude that the Proposals are not reasonable.

127 In the face of the Trustee's report and the approval of the majority of creditors, I am of the view that more than suspicion or grounds for concern must be shown in order for the Proposals to be found not to be reasonable. On a review of all of the circumstances, I remain satisfied that the Proposals are reasonable within the meaning of s. 59 of the *Act*.

VI. ORDER FOR CROSS-EXAMINATION

128 In the further alternative, the dissenting creditors seek orders, pursuant to s. 163(2) of the *Act* to cross examine some fifteen individuals.

129 Section 163(2) provides:

> On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court. (emphasis added)

130 Counsel for SRI submits that sufficient cause has not been shown so as to justify the order sought. She relies upon *Hartland Pipeline Services Ltd. (Trustee of) v. Bennett Jones* (2000), 18 C.B.R. (4th) 28 (Alta. Q.B.), a decision in which two secured creditors sought cross-examination on an affidavit of a principal of the bankrupt company after the trustee had conducted an examination under section 163(1). In that decision, Paperny J. approved of the following passage from *NsC Diesel Power Inc., Re* (1997), 49 C.B.R. (3d) 213 (N.S. S.C. [In Chambers]):

> There must be some demonstrated connection between evidence, if any, of something being amiss and the ability of the named person to shed some light on it as it relates to the administration of the estate.

131 Counsel also made reference to the following statement from the Nova Scotia Court of Appeal in *NsC Diesel Power Inc., Re* (1998), 6 C.B.R. (4th) 96 (N.S. C.A.).

> The wording of s. 163(2) of the Act that requires an applicant to show sufficient cause to warrant the order being granted requires that the applicant put forth factual information in affidavit form or in sworn testimony that would disclose something more than a desire to go on a fishing expedition.

132 I have concluded that the material before me does not meet the threshold of sufficient cause. In my view the application suffers from the same lack of focus identified in *R.L. Coolsaet of Canada Ltd., Re* (1996), 45 C.B.R. (3d) 30 (Ont. Bktcy.), at 33, namely, " . . . a request in such broad terms suggests a lack of focus and a speculation that in a plethora of examinations some information may be forthcoming on which to frame an action."

133 The application for cross-examination is denied.

VII. REASONABLE SECURITY

134 The final issue, a fact pursuant to s. 173 having been proved, is whether the Proposal should be approved. It is common ground that the Proposals do not provide reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims. The question is whether, pursuant to s. 59(3) of the *Act*, the court is prepared to grant approval on the basis of some lesser recovery.

135 Given that the Proposals are viable and secured and given the paucity of assets of the debtors otherwise available to the creditors, I am prepared to exercise my discretion under s. 59(3) and approve the Proposals as amended.

VII. DISPOSITION

136 In the result, the Proposals of Mr. Abou-Rached and RAR, as amended, are approved. The appeals from the decision of the Trustee are dismissed. The application for cross-examination is dismissed.

Order accordingly.