Court File No.: 31-2551574
Estate File No.: 31-2551574

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,*
R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE PROPOSAL OF WISP INTERNET SERVICES INC., OF THE TOWNSHIP OF SCUGOG, IN THE PROVINCE OF ONTARIO

BOOK OF AUTHORITIES

January 20, 2020

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TO: SERVICE LIST

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TAB 1

2019 ONSC 5793
Ontario Superior Court of Justice [Commercial List]

FT ENE Canada Inc. (Re)

2019 CarswellOnt 16581, 2019 ONSC 5793, 311 A.C.W.S. (3d) 25

IN THE MATTER OF THE PROPOSAL OF FT ENE CANADA INC., of the City of Brantford, in the Province of Ontario

Penny J.

Heard: September 26, 2019
Judgment: October 7, 2019
Docket: 31-OR-208344-T, CV-18-61369

Counsel: Alexander Ilchenko, for Proposal Trustee
Mervyn Abramowitz, Alexandra Teodorescu, for FT ENE Canada Inc.
Michael Nowina, for Finetex ENE Inc.
Timothy R. Dunn, for JC Park
Patrick Shea, for Yoonjun Park

Subject: Insolvency
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
FT Canada Inc. was wholly owned subsidiary of F Inc. — FT Canada Inc. operated manufacturing facility in nanofibre business — P was owner of principal technology used by F Inc. and FT Canada Inc. — P had falling out with F Inc. and was removed as director — P purported to terminate licencing agreement with F Inc. — P remained as director of FT Canada Inc., which continued to use P's technology — F Inc., as 100 per cent shareholder of FT Canada Inc., passed shareholders resolution to remove P as director of FT Canada Inc. — Proposal was made by proposal trustee of FT Canada Inc. — F Inc. was largest creditor of FT Canada Inc. — All creditors apart from F Inc. voted in favour of proposal — Proposal trustee disregarded vote of F Inc. as non-arm's-length party under s. 109(6) of Bankruptcy and Insolvency Act — Proposal trustee brought motion for approval of proposal — Motion granted — Section 109(6) of Act was designed to prevent insider from determining acceptance or rejection of proposal to detriment of ordinary, unrelated creditors — Permitting F Inc. vote would result in bankruptcy of FT Canada Inc. with F Inc. receiving vast majority of proceeds of liquidation — Proposal trustee was not demonstrably wrong in disregarding F Inc.'s vote — Proposal was reasonable and was calculated to benefit general body of creditors — There was no evidence that proposal was made in bad faith — Proposal, as approved by voting creditors, was approved — Activities of proposal trustee and payment of fees and disbursements as well as those of counsel were also approved.
Table of Authorities
Cases considered by *Penny J.*:

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

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Innovative Coating Systems Inc., Re (2017), 2017 ONSC 3070, 2017 CarswellOnt 7607, 2017 ONSC 3237, 48 C.B.R. (6th) 278 (Ont. S.C.J.) — referred to

Juhasz (Trustee of) v. Cordeiro (2015), 2015 ONSC 1781, 2015 CarswellOnt 4744, 24 C.B.R. (6th) 69 (Ont. S.C.J.) — referred to

Kitchener Frame Ltd., Re (2012), 2012 ONSC 234, 2012 CarswellOnt 1347, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List]) — considered

McLarty v. R. (2008), 2008 SCC 26, 2008 CarswellNat 1380, 2008 CarswellNat 1381, *(*sub nom. *R. v. McLarty)* 2008 D.T.C. 6354 (Eng.), *(*sub nom. *R. v. McLarty)* 2008 D.T.C. 6366 (Fr.), [2008] 4 C.T.C. 221, *(*sub nom. *McLarty v. Minister of National Revenue)* 374 N.R. 311, *(*sub nom. *McLarty v. Canada)* 293 D.L.R. (4th) 659, 46 B.L.R. (4th) 1, *(*sub nom. *Canada v. McLarty)* [2008] 2 S.C.R. 79 (S.C.C.) — referred to

Piikani Nation v. Piikani Energy Corp. (2013), 2013 ABCA 293, 2013 CarswellAlta 1567, 5 C.B.R. (6th) 185, [2013] 12 W.W.R. 436, 86 Alta. L.R. (5th) 203, *(*sub nom. *Piikani Energy Corp. (Bankrupt), Re)* 556 A.R. 200, *(*sub nom. *Piikani Energy Corp. (Bankrupt), Re)* 584 W.A.C. 200, 367 D.L.R. (4th) 173 (Alta. C.A.) — considered

Swiss Bank Corp. v. Minister of National Revenue (1972), [1972] C.T.C. 614, 72 D.T.C. 6470, 31 D.L.R. (3d) 1, [1974] S.C.R. 1144, 1972 CarswellNat 176, 1972 CarswellNat 417 (S.C.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 4(4) — referred to

s. 50(14) — considered

s. 54(3) — considered

s. 59(2) — considered

ss. 95-101.1 — referred to

s. 109(6) — considered

s. 178 — considered

Debtor Rehabilitation and Bankruptcy Act, 2009

Generally — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

MOTION by proposal trustee for approval of proposal.

***Penny J.*:**

Overview

1 This is a motion by the proposal trustee of FTE Canada, MNP Ltd., for an order approving FTE Canada's proposal. The proposal was approved by100% of the creditors permitted to vote.

2 Finetex is the parent of FTE Canada. It has by far the largest monetary claim of FT Canada's creditors. Its vote against the proposal was disregarded by the chair of the creditors' meeting by virtue of ss. 54(3) and 109(6) of the BIA.

3 Finetex opposes the motion, as is its right under s. 109(6) of the BIA. Its principal objection is the scope of the release being granted to JC Park under the proposal. JC Park is the sole director of FTE Canada.

4 For the reasons that follow, the motion is granted.

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Background

5 Finetex ENE Inc. (Finetex) and FT ENE Canada Inc. ("FTE Canada") are in the nanofibre business. FTE Canada is a wholly-owned subsidiary of Finetex, which is a Korean company. FTE Canada operates a manufacturing facility in Brantford which employs 13 people.

6 JC Park is the founder of this business. He has had a falling out with Finetex. Park has been removed from office as a "representative director" of the parent Finetex.

7 Park is the owner of the principal technology/IP necessary to this business. He granted a license to Finetex to use that technology. Finetex is itself embroiled in insolvency proceedings in Korea under the *Debtor Rehabilitation and Bankruptcy Act*.

8 As a result of his falling out with Finetex and Finetex's insolvency proceedings, Park has purported to terminate the licence agreement with Finetex. He has an agreement with FTE Canada, however, which enables FTE Canada to continue to use the technology. Finetex has taken the position that the termination is ineffective.

9 Finetex has also made serious allegations of wrongdoing against Park, which include fraud, breach of fiduciary duty and various forms of self-dealing.

10 FTE Canada filed an NOI to avoid being drawn into and controlled by Finetex's Korean insolvency proceedings. The proposal trustee is MNP. The NOI was filed in February 2019.

11 As is apparent from this summary, FTE Canada's NOI proceedings are taking place in the context of a larger corporate commercial/shareholder dispute between the shareholders of the Korean parent, Finetex. This circumstance has had profound implications for the conduct of the NOI proceedings and the positions taken by FTE Canada, Park and Finetex in these proceedings.

12 In June 2019 I dismissed a motion by Finetex to remove Park as the director of FTE Canada. I did so in part because Finetex had not attempted to avail itself of its prerogative, as 100% shareholder of FTE Canada, to remove Park by shareholder resolution at a properly constituted meeting of FTE Canada's shareholders.

13 In August 2019 (that is, shortly after the release of my decision dismissing the Finetex motion), Finetex called a special meeting of shareholders of FTE Canada and, as 100% shareholder, passed a resolution which, among other things, removed Park as a director of FTE Canada.

14 FTE Canada and Park have taken the position that the shareholder meeting was improperly held and that the resolution is of no force or effect. That issue remains outstanding as Finetex has taken no further steps to enforce its purported resolution and removal of Park.

15 A proposal was made to the proposal trustee by FTE Canada on August 2, 2019. Notice was given to all creditors of a meeting to consider the proposal. The proposal trustee ultimately concluded that Finetex, being the 100% shareholder of FTE Canada, was "related" to FTE Canada. Finetex claimed to be owed about $7.5 million by FTE Canada. Its claim vastly overwhelms all other debts, which are essentially trade creditors owed about $46,000. Finetex's claim was accepted for voting purposes at $3.5 million. However, at the meeting, the chair concluded, under section 109(6) of the BIA, that the outcome of the vote was determined by the Finetex vote against the proposal and, as a non-arm's-length party, its vote should be disregarded. The remaining creditors, all trade creditors who, under the proposal, would recover 100 cents on the dollar, voted in favour of the proposal and the proposal was accepted.

16 A significant aspect of the proposal involves Park's removal as a director immediately upon the proposal being approved. Another significant aspect of the proposal is the grant of a release to FTE Canada's officers and directors. Significant attempts were made to negotiate the form of release before the creditor vote but, although significant progress was made, the parties were unable to achieve comprehensive agreement on this issue.

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17 The proposal trustee brings this motion for an order:

(a) approving FTE Canada's proposal and the associated release of the officers and directors; and

(b) approving the activities of the proposal trustee and the payment of its fees and disbursements as well as those of its counsel.

18 Having had its vote disregarded, such that its otherwise deciding vote against the proposal was ineffective, Finetex has asserted its rights under s. 109(6) of the BIA to ask the *court* to include Finetex's vote and to determine another outcome, i.e., that the proposal has been rejected, triggering a bankruptcy of FTE Canada. Finetex also argues that the proposal should not be approved on other grounds.

19 Although Finetex made a number of arguments, the essential issue in dispute is the scope of the release that should be made available to the officers and the director of FTE Canada. Specifically, the issue is whether possible claims under ss. 95 to 101.1 of the BIA should be included in the release (the "95 - 101.1 release" issue).

The Exclusion of the Finetex Vote

20 The two issues, exclusion of the Finetex vote and the 95 - 101.1 release, are intertwined. This is because the importance to Finetex of its vote to reject the proposal was not really to assert its monetary claim in a bankruptcy. The liquidation value of FTE Canada is around $1.8 million. The consequence of the proposal, if approved, apart from costs, is a payment of $46,000 to trade creditors. Another important consequence of the proposal, if approved, is the resignation of Park as a director. Thus, although in a bankruptcy Finetex would receive the lion's share of available funds from a liquidation (while trade creditors would get a fraction of their claims), under the proposal Finetex regains control of FTE Canada without further litigation and, therefore, obtains indirect control of all FTE Canada's assets. Finetex wanted its vote to count because of the leverage it would gain in extracting a more limited release for Park, i.e., no 95 - 101.1 release.

21 Nevertheless, the Finetex vote having been excluded, Finetex maintains its position that its vote against the proposal should be counted, therefore triggering a bankruptcy.

22 The only authority on the issue of the Court's review of the chair's decision to disregard a vote is the decision of the Québec Superior Court in *Re Saargummi Quebec Inc.* (2006), EYB 2006-106495. As noted, the BIA provides that the vote as counted by the chair excluding a related party vote stands unless the court "considers it appropriate to include the creditor's vote and determines another outcome." In *Saargummi* the Québec Superior Court found that there was no established test for the exercise of this discretion. Dumas J., therefore, found that the exercise of the Court's discretion under s. 109(6) should be based on "the objectives sought by the legislator when drafting" the BIA. This involves a consideration of six factors:

(1) the rehabilitation of the debtor;

(2) rapid and orderly realization of the debtor's property;

(3) cancellation of preferential payments and revisable transactions;

(4) fair distribution of the debtor's assets;

(5) effective business reorganization of companies in financial difficulty;

(6) protection of the public interest; and

(7) the person asking for the exercise of judicial discretion must be acting in good faith and have "clean hands."

No one factor is determinative. Not all factors must be met but they all inform the exercise of judicial discretion.

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23 This is a very unusual case. As noted in my June 2019 decision, the bankruptcy issues have been influenced by the strategic considerations of both parties in the larger corporate/shareholder dispute between Park and Finetex.

24 Finetex's main argument is that the chair of the creditors' meeting was wrong to conclude that just because Finetex was "related" to FTE Canada, it was not dealing "with the debtor at arm's length" within the prior year.

25 The term "arm's-length" is not defined in the BIA. Whether the parties were at arm's-length is a question of fact, BIA, s. 4(4).

26 The leading case on the meaning of arm's length in the BIA is *Piikani Nation v. Piikani Energy Corp.*, 2013 ABCA 293 (Alta. C.A.). In *Piikani*, the Alberta Court of Appeal held that jurisprudence under the *Income Tax Act* provides the most appropriate guidance for determining whether two parties deal at arm's-length in connection with the BIA. The court came to this conclusion for essentially four reasons: 1) the terms 'related persons' and 'arm's-length' are similar in both statutes; 2) when these terms were incorporated into the BIA, they had already existed in the ITA for some time; 3) cases defining arm's-length in the BIA had already drawn on ITA jurisprudence for interpretive guidance; and 4) the "statute book" approach to interpretation seeks to minimize conflict or incoherence between similar language used in different enactments of the same legislative entity.

27 The general concern in non-arm's-length transactions is that there is no assurance that such a transaction "will reflect ordinary commercial dealing between parties acting in their separate interests." Provisions dealing with non-arm's-length parties are "intended to preclude artificial transactions from conferring" benefits on one or more of the parties, *McLarty v. R.*, 2008 SCC 26 (S.C.C.) at 43, citing *Swiss Bank Corp. v. Minister of National Revenue*, [1974] S.C.R. 1144 (S.C.C.) at p 1152.

28 Thus, the concept of a non-arm's length relationship is one in which there is no incentive for the transferor to maximize the consideration for the property being transferred in negotiations with the transferee. It is intended to address situations in which the economic self-interest of the transferor is, or is likely to be, displaced by other non-economic factors that result in the consideration for the transfer failing to reflect the value of the transferred property, *Juhasz (Trustee of) v. Cordeiro*, 2015 ONSC 1781 (Ont. S.C.J.).

29 Finetex maintains that it has been in opposition to Park (and FTE Canada by virtue of Park's control and direction) for some time. Park has caused FTE Canada to "shut out" Finetex from both information about and control of FTE Canada. Thus, Finetex argues, the outcome of the vote (before Finetex's vote was disregarded) was not determined by the vote of someone who was not dealing at arm's length with the debtor.

30 There is some evidence to support the proposition that Finetex and Park have been in opposition since October 2018. I am not satisfied, however, that this necessarily leads to the conclusion that Finetex and FTE Canada were not "at arm's length." This is in part because Finetex owns 100% of FTE Canada's shares and has been seeking to remove Park for many months. It will, if the proposal is approved, immediately regain control of FTE Canada because Park must resign.

31 As the proposal trustee argues at para. 36 of its factum, if the vote of Finetex is counted, triggering a bankruptcy, Finetex would be achieving a result which is precisely what s. 109(6) of the BIA was designed to prevent - a result where the insider determines the acceptance (or rejection) of a proposal to the detriment of ordinary, unrelated creditors. If the vote of Finetex remains excluded and the proposal is approved, all the unrelated, ordinary creditors are paid in full (and will presumably be willing to continue to do business with the post-proposal FTE Canada). By contrast, counting the vote of Finetex results in "another outcome;" the proposal is rejected, triggering a bankruptcy, and the related party is paid the vast majority of the net proceeds of the liquidation of FTE Canada's assets while the unrelated trade creditors receive but a small fraction of their entitlements.

32 I am not prepared to say that the chair was demonstrably wrong in deciding to disregard Finetex's vote.

33 Finetex's second argument focuses on the discretion available to the Court under s. 109(6) of the BIA. However, I assess the *Saargummi* factors as follows:

(1) the proposal advances the rehabilitation of the debtor;

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(2) the proposal involves a rapid and orderly realization of the debtor's property;

(3) there is no evidence of any preferential payments or revisable transactions (this is discussed in more detail below);

(4) there is nothing unfair about the distribution of the debtor's assets under the proposal because, once the proposal is approved, Park resigns and Finetex can take control of FTE Canada and its assets;

(5) there is no evidence the proposal does not entail an effective business reorganization in light of FTE Canada's financial difficulty;

(6) under the proposal the FTE Canada business survives and continues to employ a dozen or more people in the Brantford area, all in the public interest; and

(7) there is no evidence of bad faith or that Finetex does not come to the Court with clean hands.

34 Factors one through six all support non-interference with the vote under s. 109(6). Since factor seven is a threshold issue (a necessary but not sufficient condition for the exercise of the Court's discretion), it cannot, standing alone, carry the day.

35 For these reasons, I find it is not appropriate to exercise my discretion under s. 109(6) of the BIA to overturn the chair's determination of the appropriate vote at the meeting of creditors.

The 95 - 101.1 Release

36 Sections 95 to 101.1 of the BIA deal with preferences (transfers of property which give one creditor preference over another) and transfers at undervalue (dispositions of property for no consideration or consideration which is conspicuously less than the fair market value).

The Proposal Provisions

37 The following sections of the proposal are relevant to the proper analysis of this issue.

38 As noted, s. 1.1(g) of the proposal defines "Claim" to include "any claims which might be made by a trustee in bankruptcy or creditor or any other party pursuant to sections 95 to 101.1 of the *BIA* or under a statute or common law rule similar to these sections."

39 Section 3.5 of the proposal "Claims Against Directors or Deemed Director" provides:

Any Claims (other than those set out in section 50(14) of the *BIA*, which for greater certainty includes a claim for oppression, breach of fiduciary duty or that falls within section 178 of the *BIA*, including without limitation allegations of fraud, embezzlement, misappropriation and/or defalcation) against any Director, including any deemed director, that relate to obligations of such persons to the Company or actions taken by such person on behalf of or to support the interests of the Company or where the directors are under any law liable in their capacity as directors for the payment or performance of such obligations which occurred prior to the filing date (a "**Director Claim**") shall, on the Implementation Date be and are hereby, compromised and released and forever discharged as against the directors of the Company.

40 Section 7.3, "Consents, Waivers and Agreements" provides that each creditor, including related parties, "will be deemed":

(c) to have released the Company, the Proposal Trustee and all of their respective affiliates, employees, agents, officers, shareholders, advisors (including without limitation counsel for the directors), consultants and solicitors from any and all demands, claims, actions, causes of action, counter claims, suits, debts, sums of money, accounts, covenants, damages, judgements, expenses, executions, liens, set off rights and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Person may be entitled to assert, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising based in whole or in part on any act or omission,

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> transaction, dealing or other occurrence existing or taking place on or prior to the Implementation Date, relating to or arising out of or in connection with the matters herein, including, without limitation, those claims which could have been advanced or pursued pursuant to sections 95 to 101.1 of the *BIA*.

"Directors" are conspicuously absent from this list.

41 Subsection (e) of this section goes on to provide that:

> Notwithstanding s. 7.3(d), nothing in this Proposal or in 7.3(d) constitutes a release of the Company and/or its employees, affiliates, officers and directors in respect of a claim for oppression, breach of fiduciary duty or that falls within section 178 of the *BIA*, including without limitation allegations of fraud, embezzlement, misappropriation and/or defalcation.

"Directors" are included in this list.

42 Finally, s. 7.4, "Conditions Precedent to Proposal Implementation" provides that the implementation of the Proposal is conditional upon fulfilment or satisfaction of certain conditions, which include:

> Finetex will be provided with an opportunity to conduct a site visit and orientation at the Company's leased premises prior to September 17, 2019;
>
> Finetex shall be provided with all available current operational information relating to the Company as well as all operational information in the three months preceding the date of the Proposal including but not limited to lease information, details on capital assets and government remittances, accounts receivables and account payable information and customer and sales information;
>
> JC Park shall resign from all positions with the Company effective one day after the Approval Date; and
>
> Finetex will be provided with keys to the Company's leased premises, passwords to access the Company's premises and data and access to the Company's books and records.

The Finetex Position

43 Finetex represents that it and FTE Canada have possible claims against Park and his son-in-law Yoonjun Park. The evidence of Yongwon Kim, Finetex's "representative director," is that he filed a "statement of claim" with a Korean district prosecutor's office on behalf of Finetex. The "claim" is said to allege that Park "(a)...manipulated the accounting of Finetex and FT Philippines by creating false sales in order to publish the profit and loss of Finetex being in the black in the quarterly reports of 2017, and (b) had FT Philippines deal with the company under their control for their own good." No translated copy of this "claim" has been put in evidence before the Court nor is there any evidence of civil proceedings in any other jurisdiction.

44 There is also a report, described in my June 2019 endorsement, which alleges that Park and others, among other things, fraudulently created a "middle man" corporation which bought products from one FTE entity and sold them to another FTE entity at a markup, thereby secretly diverting profits that would otherwise have accrued to the FTE business, to himself.

45 Finetex objects to Park receiving a release of any kind. In particular, Finetex objects to the inclusion, in the definition of "Claim" in the proposal, of "any claims which might be made by a trustee in bankruptcy or creditor or any other party pursuant to sections 95 to 101.1 of the *BIA* or under a statute or common law rule similar to these sections."

46 Finetex argues that, even if I approve the proposal, I should only do so conditional upon the release of sections 95 to 101.1 claims being excised from the proposal, relying on the decision of Garson J. in *Innovative Coating Systems Inc., Re*, 2017 ONSC 3070 (Ont. S.C.J.) at paras 30 and 31.

The Law

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47 In *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List]) Morawetz J. (as he then was) confirmed the three-part test for the approval of a proposal under s. 59(2) of the BIA; that is, the proposal must be:

(1) reasonable;

(2) calculated to benefit the general body of creditors; and

(3) made in good faith.

48 The nature and scope of releases under a proposal are an important consideration in evaluating the reasonableness of that proposal. In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.), the Court of Appeal for Ontario set out the criteria for assessing a release in the context of a Plan under the CCAA. I am aware of no reason why these criteria are not equally applicable to a proposal. They include:

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

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

(c) the 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 proposal;

(e) the proposal will benefit not only the debtor company but creditors generally;

(f) the voting creditors who have approved the proposal did so with knowledge of the nature and effect of the releases; and that

(g) the releases are fair and reasonable and not overly broad or offensive to public policy.

Analysis

49 It is common ground that the parties to this disagreement about the 95 - 101.1 release were consulted and had input into the terms and the language of the amended proposal. The report of the proposal trustee documents a process by which the original creditors' meeting was adjourned to consider proposed amendments to the proposal and allow time for Finetex and its counsel to review the proposed amendments and obtain instructions from Mr. Kim. During the adjournment period, there were discussions and negotiations, following which FTE Canada amended its proposal to reflect some of the things Finetex had demanded. There was no agreement, however, about excising the 95 - 101.1 release from the proposal.

50 In light of the controversy over this issue, the proposal trustee undertook a limited review of the FTE Canada's banking records over the past five years to identify potential preferences and transactions at undervalue and, in particular, with respect to related parties. Based on the proposal trustee's review, two issues were identified:

(i) there were a number of transactions, including some with related parties (including Finetex), which the proposal trustee did not have the time to review in detail or obtain explanations or supporting documents which might have enabled the proposal trustee to comment on the propriety of the transaction; and

(ii) there were a few months of missing bank statements that could not be located which impaired the proposal trustee's ability to complete its review.

Accordingly, the proposal trustee concluded that it would neither support nor oppose the inclusion in the amended proposal of the 95 - 101.1 release.

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51 It is also relevant to my analysis of this issue that no one, other than the proposal trustee (as outlined above) filed any evidence to support their position for or against the inclusion of the 95 - 101.1 release in the proposal.

52 Examining the factors set out in *Metcalfe*, *supra*, I find as follows.

(a) Necessary and Essential

53 Park was necessary and essential to FTE Canada's proposal. It was at his direction that the proposal was initiated and brought forward.

(b) Rationally Related

54 Lack of evidence on this issue makes the analysis more difficult. In effect, Park and FTE Canada argue that the 95 - 101.1 release is rationally related to the proposal because that is what it took for the amended proposal to be approved by the directing mind of FTE Canada. I do not find this approach particularly helpful, although I acknowledge that in the ebb and flow of insolvency litigation, what a party is prepared to accept on one issue may in some circumstances be evidence that it is rationally related to the proposal as a whole.

55 I view the issue differently, however. Finetex's allegation is that it has claims against Park for, among other things, the secret diversion of profits from FTE entities to himself and the intentional misrepresentation of revenues to improve the "look" of FTE entities' financial statements.

56 The release language which forms part of the proposal excludes from the release claims under s. 50(14) and s. 178 of the BIA. Thus, excluded from the release in the proposal are claims against directors that relate to contractual rights of creditors arising out of contracts with one or more directors or are based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors. The proposal also excludes from the release claims arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or any debt or liability resulting from obtaining property or services by false pretenses or fraudulent misrepresentation.

57 In light of these exclusions, any conduct of Park which fell into one of these categories, even if it related to a ss. 95 to 101.1 preference or undervalue transaction, would not be released.

58 During argument, I asked counsel for Finetex what his client would be getting by excising the 95 - 101.1 release that it would not already be getting by virtue of the limitations on the release in the existing proposal. Mr. Nowina could not articulate a specific, or a general category of, claim that, having regard to Finetex's pending allegations and concerns, would not be excluded from the release under the existing terms of the proposal. The concern, he said, is "we do not know what we do not know."

59 Given that the release defined in the proposal excludes every category of claim which Finetex has, to date, described and that Finetex cannot describe a potential claim it might have against Park that would not be caught by the existing exclusions from the release, I find the release is rationally related to the proposal in the circumstances.

(c) Cannot Succeed Without

60 Again, given the limited nature of the evidence, what I have to go on is the representations of counsel for Park and FTE Canada to the effect that the existing proposal, as amended through negotiation as described above, is what the company, through Park, is willing to accept. The lack of evidence makes it difficult to say this criterion has been fulfilled.

(d) Contribution By Releasee

61 As described in sub-heading (a) above, Park has contributed to the proposal in a material way although it is clear he has made no financial contribution.

(e) Benefit Creditors Generally

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62 I have no hesitation in concluding that the proposal benefits creditors generally because, in the absence of the proposal being approved, FTE Canada will be liquidated and the trade creditors will receive only a fraction of what they are owed. The employees will also all lose their jobs.

(f) Knowledge of Voting Creditors

63 The amended proposal was put before the creditors at the continued creditors' meeting. It is clear the terms of the release were known to the creditors. It was common ground among counsel at the hearing, however, that the trade creditors were entirely indifferent to the terms of the release one way or the other.

(g) Fair and Reasonable

64 The proposal, if approved, results in the unrelated, ordinary creditors being paid in full, the business continuing and the empoyees' jobs being preserved. The scope of the exclusions from the release under the proposal appears to cover any claim articulated by Finetex. I find the release to be fair and reasonable.

Approval of the Proposal

65 For reasons outlined in this decision, I find the proposal is reasonable. I also find that the proposal is calculated to benefit the general body of creditors. Finally, there is no evidence that the proposal has been made in bad faith. Accordingly, the proposal, as approved by the voting creditors, is approved. The activities of the proposal trustee and the payment of its fees and disbursements as well as those of its counsel are also approved.

Motion granted.

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TAB 2

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

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have supported proposal — Releases benefited applicants and creditors generally — Applicants provided full and adequate disclosure of releases and their effect.

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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

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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

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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

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

Generally — referred to

Pt. III — referred to

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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.

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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.

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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.

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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.

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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

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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:

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> 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*

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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.

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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;

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(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

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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.

End of Document

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TAB 3

2016 ONSC 5600
Ontario Superior Court of Justice

Wasaya Airways Limited Partnership, Re

2016 CarswellOnt 16382, 2016 ONSC 5600, 272 A.C.W.S. (3d) 472, 41 C.B.R. (6th) 289

IN THE MATTER OF THE PROPOSAL OF WASAYA AIRWAYS LIMITED PARTNERSHIP AND WASAYA GENERAL PARTNER LIMITED OF THE CITY OF THUNDER BAY IN THE PROVINCE OF ONTARIO

G.B. Morawetz R.S.J.

Heard: June 8, 2016
Judgment: October 19, 2016
Docket: 21-2109581, 21-2109607

Counsel: Alex Ilchenko, for Vine and Williams Inc., Proposal Trustee
Alex MacFarlane, for Applicants
Jeremy Nemers, for Royal Bank of Canada
Vern DaRe, for Business Development Bank of Canada

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.a General principles
Headnote
Bankruptcy and insolvency --- Proposal — Approval by court — General principles
Debtors provided air transportation services to northern Ontario and were First Nations owned — Debtors had support of their secured creditors and key equipment lessors for restructuring on basis provided for in proposals — Debtors filed joint proposal — Proposals were being made to only unsecured creditors — Liabilities of debtors were virtually identical — Creditors voted on and approved proposals at meeting of creditors — Proposal trustee recommended proposals be approved by court — Proposal trustee brought motion for approval of proposals — Motion granted — Proposals were reasonable and calculated to benefit creditors — Debtors made proposals in good faith — Joint filing was not prohibited, and it was appropriate for official receiver to accept joint proposal — Public interest served by operations of debtors was of considerable importance because debtors provided essential services to several remote First Nations communities in northern Ontario — Releases requested were reasonable and did not prejudice any creditors.
Table of Authorities
Cases considered by *G.B. Morawetz R.S.J.*:
Convergix Inc., Re (2006), 2006 NBQB 288, 2006 CarswellNB 460, 24 C.B.R. (5th) 289, 307 N.B.R. (2d) 259, 795 A.P.R. 259 (N.B. Q.B.) — considered
Howe, Re (2004), 2004 CarswellOnt 1253, 49 C.B.R. (4th) 104 (Ont. S.C.J.) — considered
Kitchener Frame Ltd., Re (2012), 2012 ONSC 234, 2012 CarswellOnt 1347, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List]) — considered
Nitsopoulos, Re (2001), 2001 CarswellOnt 1994, 25 C.B.R. (4th) 305, [2001] O.T.C. 430 (Ont. Bktcy.) — considered
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

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s. 2 "person" — considered

s. 50(13) — considered

s. 50(14) — considered

MOTION by proposal trustee for approval of proposals.

***G.B. Morawetz R.S.J.*:**

1 Vine and Williams Inc., in its capacity as the Trustee (the "Proposal Trustee") in the proposal of Wasaya Airways Leasing Ltd. ("WALL") (the "WALL Proposal") and the joint proposal of Wasaya Airways Limited Partnership ("WALP") and Wasaya General Partner Limited ("WGPL"), (the "Joint Proposal") (WALL, WALP and WGPL being collectively, the "Debtors") brought these motions for orders, *inter alia*, approving these proposals (the "WALL Proposal and the Joint Proposal" being collectively, the "Proposals") as voted on and approved by creditors at the meeting of creditors held on May 17, 2016 (the "Meetings of Creditors").

2 At the conclusion of the hearing I endorsed the record of both motions as follows:

June 8, 2016 - "Motion granted. Order signed. Reasons will follow."

3 These are the reasons.

4 The Wasaya Group of Companies and limited partnerships, which includes the Debtors, are 100% First Nations owned. The Debtors provide air transportation services in northern Ontario.

5 The Debtors have been in operation for more than twenty-six years. WALP is the primary operating arm of the Debtors.

6 WALP serves 25 destinations and has bases located in Thunder Bay, Sioux Lookout, Pickle Lake and Red Lake, Ontario. WALP provides air transportation services including passenger, charter and cargo, and is a critical lifeline for the delivery of food, medical supplies and other essential services to several remote First Nations communities. It also supplies and delivers bulk fuel for many of the Hydro One and community owned power generating plants in remote northern communities.

7 WALL is an affiliate of WGPL and WALP and owns or leases the aircraft and other critical assets used by WALP in its operations. The operations of the Debtors are integrated and dependent on one another and, consequently, it is a condition of the proposal of WGPL and WALP that the WALL Proposal be approved, and vice-versa.

8 The Debtors seek court approval of the Joint Proposal. WALP is a limited partnership and, WGPL, as the general partner of WALP, is liable in law for all the obligations of WALP. WGPL does not carry on business independently, and has no separate purpose, other than to serve as the general partner of the WALP.

9 The Official Receiver accepted the filing of the Joint Proposal and the holding of a combined meeting of creditors for the unsecured creditors of WGPL and WALP.

10 The Debtors have experienced negative cash flow, losses and operational problems resulting in financial difficulties for several years leading up to 2014, at which time a comprehensive operational and financial restructuring was initiated. R.e.l. group inc. ("REL") was retained to act as Chief Restructuring Officer of the Debtors to assist in the development and implementation of the turnaround plan.

11 The Debtors have the support of their secured creditors and key equipment lessors for the restructuring on the basis provided for in the proposals. Royal Bank of Canada ("RBC") holds general security agreements over all of the assets of the Debtors as security for its loans. The total amount owing to RBC is approximately $7.85 million.

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12 Business Development Bank of Canada ("BDC") has specific security on certain aircraft and other assets of WALL and holds general security agreements against WALL ranking behind RBC's security. BDC is owed approximately $2.6 million.

13 RBC and BDC entered into forbearance agreements with the Debtors to maintain their loans if the Proposals are accepted and implemented. The claims of secured creditors are not being compromised.

14 Each Proposal provides that there is one class of unsecured creditors that is comprised of all Unsecured Creditors for each entity to the extent of their proven unsecured claims. Proposals are only being made to unsecured creditors.

15 Unaffected creditors under the Proposals include claims of:

(a) secured creditors;

(b) the Proposal Trustee, its counsel and counsel to the Debtors for administrative fees and expenses;

(c) the Crown with respect to certain Crown claims which are not subject to compromise under the *Bankruptcy and Insolvency Act* ("BIA");

(d) any creditors for amounts owing by the Debtors on account of goods, property and services received after the filing date; and

(e) employees of WALP and WGPL who shall continue to receive payment of their earnings on a regular basis.

16 Upon implementation of each of the Proposals, each unsecured creditor will receive payment as follows:

(a) for proven claims of less than $1,000, a dividend payment equal to the full amounts of the claim;

(b) for proven claims between $1,000 and less than $10,000, a dividend payment of $1,000 within 30 days of the effective date;

(c) for proven claims in excess of $10,000, a dividend payment of ten cents on the dollar payable in four equal payments over 12 months; and

(d) creditors having proven claims in excess of $10,000 who notify the Proposal Trustee at least three days before the first dividend payment, may elect to receive $1,000 on the first dividend payment in full and final satisfaction of their claim.

17 The Proposals also provide that certain related party creditors will waive their rights to receive dividends on their unsecured claims and, in the case of WALL, that certain First Nations creditors agree to irrevocably direct that the dividends payable on their claims be reinvested as unsecured loans to WALL.

18 The Proposal Trustee further reports that the liabilities of WGPL and WALP are virtually identical, with the only creditors unique to WGPL, being individual claims related to the payroll for the WALP Senior Management Team, all of which will be satisfied in full.

19 In the event of bankruptcy of each of the Debtors, the Proposal Trustee reports that the unsecured creditors would receive no distribution, and any proceeds of any liquidation of the assets of each of the Debtors would be paid to the secured creditors.

20 On May 17, 2016, the Meeting of Creditors for the Debtors was held. The Proposals were accepted by the requisite value and dollar value of the unsecured creditors of each of the Debtors entitled to vote at the Meeting of Creditors.

21 With respect to WALP and WGPL, 96.15% in number representing 99% in dollar value voted in favour of the Proposal.

22 With respect to the Proposal of WALL, 87.5% in number representing 99.76% in dollar value voted in favour of the Proposal.

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23 The Proposal Trustee is of the opinion that the Proposals are advantageous to the creditors of the Debtors. The Proposal Trustee recommended that the Proposals be approved by the court.

24 The significant issue on this motion was whether it was appropriate to approve the filing of a Joint Division I Proposal by WGPL and WALP.

25 The Joint Proposal provides that:

(a) all claims asserted by Unsecured Creditors against either WGPL or WALP will be treated as claims in each estate;

(b) Unsecured Creditors only need to submit one proof of claim with respect to their claim;

(c) only one joint meeting of the Unsecured Creditors of WGPL and WALP would be held;

(d) if an Unsecured Creditor wished to submit a proxy or voting letter, only one proxy or voting letter need be submitted; and

(e) dividends will be based on proven claims submitted by Unsecured Creditors (without duplication) and only one distribution will be made to each Unsecured Creditor with a proven claim. Distributions will be made or issued by WALP, however, WGPL will be jointly liable for all payments.

26 There is very little authority or guidance on the subject of whether the filing of a Joint Proposal by related corporations is permitted under the BIA and whether an order should issue approving a Joint Proposal.

27 Counsel to the Proposal Trustee submits that the filing of a Joint Proposal by related corporations is permitted under the BIA and that, on the facts of this case, an order should issue approving the Joint Proposal.

28 Counsel to the Proposal Trustee referenced the proposal of *Golden Hill Ventures Limited Partnership* and *Golden Hill Ventures Ltd.*, Estate No.: 11-1292335 and 11-252902 (Yukon, S.C.), unreported, where the court approved a single proposal for both the general partner and the limited partnership. No reasons were provided. According to counsel to the Proposal Trustee, the proposal in that case did not provide for a consolidated estate, but rather, similar to the terms of the Joint Proposal, the *Golden Hill* proposal provided that all claims asserted against either Debtor, or both Debtors, would be treated as claims against the limited partnership for which the general partner was also liable by operation of law.

29 Counsel further noted that in *Howe, Re*, [2004] O.J. No. 4257 (Ont. S.C.J.), Registrar Sproat allowed for the filing of a "joint proposal" by spouses who carried on a business together.

30 In *Convergix Inc., Re*, 2006 NBQB 288 (N.B. Q.B.), Glennie J. of the New Brunswick Court of Queen's Bench expanded the category of parties eligible for the filing of a "joint proposal" to related entities. In allowing the filing of a "joint proposal", Glennie J. took into account the inter-relatedness of the insolvent corporations, that the "joint proposal" would not prejudice any creditors and that the filing of a "joint proposal" by related companies in certain circumstances may be consistent with the filing of a "joint proposal" by partners in a partnership.

31 Justice Glennie opined that the filing of a joint proposal is permitted under the BIA and, in that case, the filing of a joint proposal by the related corporations was permitted. Glennie J. noted that the BIA should not be construed so as to prohibit the filing of a joint proposal. In his analysis, Glennie J. referenced *Nitsopoulos, Re*, [2001] O.J. No. 2181 (Ont. Bktcy.) where Farley J. concluded that the BIA should not be construed so as to prohibit the filing of a Joint Division I Proposal.

32 Justice Glennie also took into account that:

(a) the cost of reviewing and vetting all inter-corporate transactions of the insolvent corporations in order to prepare separate proposals;

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(b) the cost of reviewing and vetting all arms-length creditors' claims to determine which insolvent corporation they are actually a creditor of; and

(c) the cost of reviewing and determining ownership and title to the assets of the insolvent corporations;

would be unduly and counterproductive to the goal of restructuring and rehabilitating the insolvent corporations.

33 As noted by Vern Da Re in "The treatment of Joint Division I Proposals, 2004 Annual Review of Insolvency Law 21":

... Joint consumer proposals are explicitly permitted under section 66.12(1.1) of the BIA...

By contrast, Joint Division I Proposals are not specifically permitted under the BIA. Section 50(1) provides that "a proposal may be made by an insolvent person ...". The words "a proposal" and "an insolvent person" are singular and, arguably, limit Division 1 Proposals to one person per filing. While the definition of "person" under section 2(1) of the BIA is inclusive, rather than exhaustive, and includes "a partnership", there is no reference to the word in its plural form.

34 The issue identified by Mr. Da Re had been considered by Farley J. in *Nitsopoulos, Re*, who referred to the definition of "person" under section 2(1) of the BIA and concluded that since the definition was inclusive, rather than exhaustive, he was unwilling to prohibit the joint filing.

35 I agree with the approach taken by Farley J. in *Nitsopoulos, Re*. I do not see anything in the definition which would prohibit the joint filing. In my view, it was appropriate for the Official Receiver to accept the Joint Proposal.

36 I accept the submissions of counsel to the Proposal Trustee. In doing so, I have taken into account that:

(a) the operations of WALP and WGPL are completely intertwined;

(b) WGPL is liable in law for all of the obligations of WALP;

(c) the creditors of WGPL and WALP are not prejudiced by the filing of the Joint Proposal, as the only separate claims in WGPL will be satisfied in full as provided in the Joint Proposal and as required under s. 60 of the BIA;

(d) the official Receiver permitted the filing of the Joint Proposal; and

(e) the creditors of both WGPL and WALP voted overwhelmingly in favour of the Joint Proposal.

37 In order to approve a proposal, a three-pronged test must be satisfied:

(a) the Proposal is reasonable;

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

(c) the Proposal is made in good faith.

(see: *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List])).

38 In *Kitchener*, I stated the following at para. 20:

The first two factors are set out in section 59(2), while the last factor has been implied by the court as an exercise of its equitable jurisdiction. The courts have generally taken into account the interests of the debtor, the interests of the creditors, and the interests of the public at large in the integrity of the bankruptcy system.

39 As I stated in *Kitchener*, it is appropriate to accord substantial deference to the majority vote of creditors at a meeting of creditors.

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40 In this particular case, it is also important to take into account the operations of the Debtors. The public interest served by the operations of the Debtors is of considerable importance. The Debtors provide essential services to several remote First Nations communities in northern Ontario.

41 The Proposal Trustee has opined that the Proposals are advantageous to the creditors. The Proposals provide for distribution to the unsecured creditors which exceed the dividend that would otherwise be available from a bankruptcy, as there would be no recovery for unsecured creditors in a bankruptcy, and the Proposals are calculated to benefit the general body of creditors of the Debtors. Further, the Proposal Trustee is of the view that the Debtors have acted in good faith and with due diligence.

42 The Proposal Trustee is of the view that the releases requested are reasonable, necessary and do not prejudice any creditors. I agree. The orders requested by the Proposal Trustee incorporate a Director and Officer Release. I am satisfied that the orders requested by the Proposal Trustee reflect the required restrictions contained in section 50(13) and 50(14) of the BIA.

43 In summary, each of the Proposals satisfies the requirements of the BIA and, accordingly, the Proposals are approved.

44 An order shall issue:

(a) approving the WALL Proposal and releases of the former and current officers and directors of WALL contained therein;

(b) approving the Joint Proposal of WALP and WGPL and the releases of the former officers and directors contained therein; and

(c) approving the WALL Report and the WALP/WGPL Report, each dated May 27, 2016 and the activities of the Proposal Trustee as described therein.

Motion granted.

End of Document

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Court File No.: 31-2551574
Estate File No.: 31-2551574

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE PROPOSAL OF WISP INTERNET SERVICES INC., OF THE TOWNSHIP OF SCUGOG, IN THE PROVINCE OF ONTARIO

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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