Court File No. 32-2480036
Estate File No. 32-2480036

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

IN THE MATTER OF THE PROPOSAL OF
FT ENE CANADA INC.,
OF THE CITY OF BRANTFORD,
IN THE PROVINCE OF ONTARIO

FACTUM AND BOOK OF AUTHORITIES OF THE PROPOSAL TRUSTEE
(Returnable September 18, 2019)

PALLETT VALO LLP
Lawyers & Trade-Mark Agents
77 City Centre Drive, West Tower
Suite 300
Mississauga, Ontario L5B 1M5

Alex Ilchenko, C.S. / Monty Dhaliwal
LSO #33944Q / LSO #65124N

Tel: (905) 273-3300
Fax: (905) 273-6920

Lawyers for MNP LTD.
in its capacity as Proposal Trustee
of FT ENE CANADA INC.

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FACTUM OF THE PROPOSAL TRUSTEE
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PART I –OVERVIEW

1. This motion by MNP LTD. in its capacity as the trustee (in such capacity, the "**Proposal Trustee**") in the proposal (the **"Company"**) for an Order, *inter alia*, approving the Amended Proposal (the "**Amended Proposal**") of the Company as voted on and approved by the creditors at the Reconvened Meeting (the "**Reconvened Meeting**") of creditors held on August 29, 2019 (collectively with the Meeting as defined below, the "**Meeting of Creditors**").

2. Under the Amended Proposal, all of the ordinary unsecured unrelated creditors with claims under $15,000 are being paid in full, whether or not they have filed a proof of claim. The related parent company Finetex EnE Inc. ("**FTEI**") was the only other creditor that filed a proof of claim with the Proposal Trustee prior to the Meeting of Creditors, as described in greater detail below.

3. In the event of bankruptcy of the Company, very small amounts would be available for distribution to the ordinary unsecured unrelated creditors, with the vast majority of distributions

going to the parent company FTEI, if the amounts claimed in their proof of claim are accepted for distribution purposes.

4. At the Meetings of Creditors, the Amended Proposal was accepted by 100% in number and 100% by value of the unrelated Ordinary Creditors present by proxy and capable of voting.

5. The Proposal Trustee is of the view that the Amended Proposal is advantageous for the creditors of the Company (with one caveat on wording of certain releases as described more fully below) for the following reasons:

(a) the Amended Proposal provides for payment in full to the Company's ordinary unsecured, unrelated creditors under $15,000, which is all of them, that exceeds the recovery that would otherwise be available from a bankruptcy of the Company; and

(b) the Amended Proposal is calculated to benefit the general body of the creditors of the Debtors, as it specifically targets the payment, IN FULL of all of the unrelated Ordinary Creditors.

6. The Proposal Trustee is of the opinion that payment IN FULL to the unsecured unrelated Ordinary Creditors creditors under the Amended Proposal is advantageous to the unsecured creditors of the Company and maximizes their recovery. The Proposal Trustee recommends that the Amended Proposal be approved by this Honourable Court.

PART II - FACTS

I. BACKGROUND

7. That on the 27th day of February 2019, the Company lodged with the Proposal Trustee a Notice of Intention to Make a Proposal ("**NOI**") pursuant to S. 50.4 of the Bankruptcy and Insolvency Act (the "**BIA**" or the "**Act**") and that MNP consented to act as Proposal Trustee. The NOI was filed with the Official Receiver on that same date.

Trustee's Report to Creditors dated September 6, 2019 (the "Report"), paragraph 1

8. The Company is a Canadian corporation carrying on business from now leased premises in Brantford, Ontario. The Company is a wholly owned subsidiary corporation of FTEI, a company domiciled in the Republic of Korea. The Company produces nanofibers and nanofiber coated filter media for the global industrial filtration market through a proprietary electrospinning process.

Report, at Para. 2

9. On June 7, 2019 the Court issued an approval and vesting order (the "**Approval and Vesting Order**") vesting the real property of the Company in a purchaser as well as a corollary relief order (the "**Corollary Relief Order**") and an endorsement of Penny, J. (the "**Adjournment Endorsement**") that, *inter alia*:

a. Authorized and directed the Company to make a distribution to RBC up to the Company's indebtedness owing to RBC so there would be no secured creditors of the Company remaining;

b. Authorized and directed the Company to pay to the Proposal Trustee a total sum of $224,000 (the "**Reserve**") to cover potential amounts payable to employees under Subsection 65.13(8) of the Act as required to obtain Court Approval of a Proposal and to cover the Proposal Trustee's and its counsel's fees and disbursements;

c. Prohibited the destruction of any evidence, electronic or otherwise by anyone pending the return of the FTEI Motion; and

d. Directed the Company to direct BDO Canada LLP to prepare and make available to FTEI, the Proposal Trustee, and on the return of the motion, to the Court, a report regarding the 2017 fiscal year re-audit of the Company (the "**BDO Report**").

Report, at Para. 12-13 and Exhibits "I", "J" and "K" to Report

10. Penny J. in his June 27th endorsement rejected a motion brought by FTEI to, *inter alia*, replace the sole director of the Company JC Park ("**JC Park**") as director and opposing the extension of the stay period, and granted an extension to the stay of proceedings to August 7, 2019. Justice Penny also ordered an information provision protocol between the Company and FTEI, with the Proposal Trustee as an information conduit. If the parties could not arrive at an

appropriate information provision protocol, they were to obtain a case conference appointment with Penny, J.

Report, at Para. 9, 13 and 16 and Exhibits "K" and "M" to Report

11. The Company and FTEI were unable to arrive at an appropriate protocol and terms of a non-disclosure agreement, and consequently at a 9:30 Court appointment on July 22, 2019 Conway, J. scheduled a 2 hour case conference on September 26, 2019 before Penny, J. to deal with these issues.

Report, at Para. 18 and Exhibit "N" to Report

12. The Company lodged a proposal with the Proposal Trustee on the 2nd day of August 2019 (the "**Proposal**") and electronically filed with the Official Receiver on the same date.

Report, at Para. 18 and Exhibit "N" to Report

13. On August 5th 2019, FTEI advised that it had conducted a special meeting of the sole shareholder of the Company, being FTEI (the "**Special Meeting**") where it was resolved that, *inter alia*:

a. JC Park be removed as the sole director of the Company;
b. Three (3) persons be confirmed as new directors of the Company; and
c. All previously authorized bank signatories be removed and replaced with a new designated person.

Report, at Para. 19 and Exhibit "P" to Report

14. On August 6, 2019, counsel to the Company, advised that it was the Company's position that the Special Meeting was improperly held and constituted and the resolutions resulting therefrom "are of no force and effect."

Report, at Para. 19 and Exhibit "Q" to Report

The Amended Proposal

15. The Company is seeking Court approval of the Amended Proposal, as supported by the Proposal Trustee. The Proposal Trustee, as required under the BIA prior to holding a meeting of creditors for the original form of the proposal:

a. gave notice to the Company, and to every known creditor of the Company affected by the Proposal, of the calling of a meeting of creditors to be held on the 23rd day of August 2019 (the "**Meeting**") to consider the Proposal (the "**Notice**").
b. with the Notice was included a statement of the assets and liabilities of the Company ("**SOA**"), a list of the creditors affected by the Proposal showing the amount of their claims, a copy of the Proposal, a form of a proof of claim and proxy in blank and a voting letter;
c. prior to the Meeting, the Proposal Trustee made a detailed and careful inquiry into the liabilities of the Company, the Assets and their value, the Company's conduct and the causes of the Company's insolvency.

Report, at Para. 21-23 and Exhibits "S" and "T" to Report

16. Prior to the Meeting, the Proposal Trustee and its counsel held meetings with FTEI and its counsel, the Company and its counsel, and counsel for JC Park in an attempt to narrow the points of disagreement between the parties regarding the terms of the Proposal as filed, notwithstanding that each side questioned the legitimacy of the other side as the properly constituted management of the Company as a result of the resolutions passed at the Special Meeting. At the outset of these consultations, the Proposal Trustee and its counsel advised all parties that it was the view of the Proposal Trustee that FTEI, being the 100% shareholder of the Company, and having held the Special Meeting where directors were purportedly removed and new ones were appointed, was "related" to the Company within the meaning of S. 4 of the Act.

Report, at Para. 24-26

17. As a result of these discussions with the Proposal Trustee and its counsel, both FTEI and the Company circulated proposed amendments to the terms of the Proposal prior to the scheduled date for the Meeting. After lengthy discussions on August 23rd, the Meeting was adjourned to August 29th, 2019 (the "**Reconvened Meeting**") to allow the Company to assemble

and circulate the proposed amendments to the Proposal and to allow time for FTEI to review the Proposed Amendments and obtain instructions from its directing mind in Korea during the adjournment period.

Report, at Para. 28-29 and Exhibit "U" to the Report

18. At the Reconvened Meeting the terms of the Amended Proposal were discussed and a vote held as discussed in greater detail below.

Report, at Para. 30-32 and 40-41 and Exhibit "V" to the Report

The Terms of the Amended Proposal:

19. There is one class of Unsecured Creditors in this Proposal. The Proposal is only being made to Unsecured Creditors. Under the provisions of section 3.4 of the Amended Proposal, Ordinary Creditors with claims under $15,000 as recorded on the books and records of the Company are deemed "Convenience Creditors" and have their claims accepted **IN FULL** upon the Trustee reviewing their claims with management, whether or not they file proofs of claim. These Convenience Creditors are deemed to have voted **FOR** the Amended Proposal

Report, para. 36 and Amended Proposal Exhibit "N", para 3.4

20. Under the provisions of section 6.1 of the Amended Proposal, the Company must pay to the Proposal Trustee by September 9, 2019 all payments of Administrative Fees and Expenses, all distributions that must be made to the Preferred Creditors as required under the provisions of s.60(1) of the Act, and the Proposal Fund of $150,000.

Report, para. 37 and Amended Proposal Exhibit "N", para 6.1

21. As of the date of this factum, the Company has adhered to the following conditions of Amended Proposal in providing the following to the Proposal Trustee:

a. Funding of the $50,000 retainer (under section 6.1(a) of the Amended Proposal) within ten (10) days of Creditor Approval;
b. Funding of the distributions to Preferred Creditors (under section 6.1(b) of the Amended Proposal) within ten (10) days of Creditor Approval fulfilled as it has

been determined by the Proposal Trustee that there are no valid Preferred Creditors;

c. Financial information on current operations to FTEI by September 4, 2019 (under section 7.4(d)of the Amended Proposal) through a data room established by the Proposal Trustee; and

d. JC Park's resignation of his position(s) with the Company to the Proposal Trustee by September 4, 2019, to be held in escrow pending Court Approval (under section 7.4(e) of the Amended Proposal).

e. Funding for the payment of the outstanding Admistrative Fees and Expenses up to August 31, 2019 (under s.6.1(a) of the Amended Proposal;

f. Additional information requested by FTEI in connection with current operations has been supplied by the Company and added to the data room established by the Proposal Trustee for FTEI;

g. FTEI has arranged to attend to conduct the site inspection on September 17, 2019 (under section 7.4(c) of the Amended Proposal).

Report, para. 38 as updated by the Supplement to the 5th Report dated September 13, 2019 (the "Supplementary Report") at para. 8

22. As a result, on the Court Approval date, the Proposal Trustee will have all of the necessary funds payable to Creditors under the Amended Proposal in its possession, so that the Amended Proposal may be implemented, and the Convenience Creditors paid in full expeditiously after Court Approval. The only outstanding conditions to the implementation of the Amended Proposal are the obtaining of Court Approval and JC Park providing access keys and passwords and records 1 day after Court Approval.

Report, para. 38 as updated by the Supplementary Report at para. 8 and Exhibit "N" Amended Proposal at para.6.1 and 7.4

23. The Amended Proposal also provide that, subject to the restrictions in section 50(14) of the Act, the unsecured creditors will be deemed to have released and discharged all claims that arose prior to the date of the filing of the NOI against the former and current officers and directors of the Debtors. No Proofs of Claim were filed making claims against directors in the Proposals and, to the knowledge of the Proposal Trustee, the Debtors are current on their Source Deduction and HST remittances.

Report, para. 31 and Exhibit "N" Amended Proposal at para. 3.5

24. The Amended Proposal includes the following terms required under the Act:

(1) Crown claims, if any, as set out in Section 60(1.1) of the BIA, are to be paid within six months of approval of the Proposals by the Court.

(2) Preferred Claims, including amounts owing to the Debtors' employees and former employees that would be subject to Section 136(1)(d) of the BIA, are to be paid in full in the normal course, without interest;

(3) Pursuant to Section 147 of the BIA, payments to creditors under the Proposals are subject to the levy payable to the Superintendent of Bankruptcy (the "**Superintendent**").

(4) All administrative fees and expenses are to be paid in priority to creditor claims. This includes the fees and expenses of the Proposal Trustee and its legal counsel.

Report, at Para. 44

Creditor Acceptance of Amended Proposal

25. At the Reconvened Meeting the Amended Proposal was accepted by the requisite number and dollar value of the unsecured creditors entitled to vote (as per Report):

"

	FOR[1]	%	AGAINST[2]	%
Number of creditors	3	100.00%	0	0.00%
Dollar value	$2,149.17	100.00%	$0.00	0.00%

1 – The number of creditors and dollar value of claims FOR the Amended Proposal shown above represents only those creditors' who filed proofs of claims and provided voting letters and/or proxies given to MNP. The above figures exclude the eleven (11) creditors with deemed proven claims totaling $39,687.89 which are deemed under the provisions of section 3.4 of the Amended Proposal to have had their claims under $15,000 accepted in full and to have voted FOR the Amended Proposal.

2 – The number of creditors and dollar value of claims AGAINST the Amended Proposal shown above, does not include the claim and vote AGAINST made by FTEI, which was valued at $3,549,150.00 (US$2,700,000) for voting purposes only. Consistent with the position presented to the parties by the Proposal Trustee, pursuant to S. 109(6) of the Act and as it was the Chairperson's opinion that the outcome of the vote would be determined by the vote of FTEI, a party deemed not to have acted at arms-length in the preceding one (1) year (from the date of the initial bankruptcy event), FTEI's vote would be excluded and the vote redetermined. This opinion was arrived at based on the fact that FTEI is the 100% shareholder of the Company, and therefore "related" under the provisions of S.4(2) and (5) of the Act, which deems the Company and FTEI not to be dealing with each other at arms-length."

Based on the above re-determined vote, the Amend Proposal was accepted by the creditors ("**Creditor Approval**") with requisite majority in number of creditors and 2/3 in value of the claim of such creditors in person, by proxy or by voting letter.

Report, at Para. 40 and Exhibit "W"

26. The Proposal Trustee is:

(a) not aware of any facts, pursuant to Section 173 of the BIA, which may be proved against any of the Debtors; and

(b) of the view that the Debtors have been acting in good faith in advancing the Amended Proposal to be voted on by the Unsecured Creditors of the Debtors and for approval by the Court.

Report, at Para. 43

27. That on August 30, 2019, the Proposal Trustee sent Notice of Hearing of Application for Court Approval (the "**Court Approval Notice**"), together with the Amended Proposal, to those creditors that had filed claims, the CRA and those with "deemed" proven claims under the provisions of section 3.4 of the Amended Proposal. The Proposal Trustee also served a copy of the Court Approval Notice on CRA. A copy of the Report was filed with the Superintendent on September 6, 2019 and with the Court on September 16, 2019. Accordingly, the Proposal Trustee has fulfilled the requirements of s.58 of the BIA.

Report para. 41 and Exhibit "X" to Report

BIA s.58

PART III – LAW AND ARGUMENT

Acceptance by Requisite "Double Majority"

28. 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, which, in the case of the Amended Proposal, was met, as noted above.

BIA, s. 54(2)(d)

Voting on proposals by related and non-arm's length parties- s.109(6) BIA

29. Under the provisions of S. 54(3) of the Act a related party cannot not vote in favour of a proposal filed by the Company- only against. As FTEI is the 100% shareholder of the Company it is "related" under the provisions of s.4 of the BIA and deemed not to act at arm's length under s.4(5) of the BIA.

BIA S. 4 and 54(3)

30. Section 109(6) of the BIA was amended in 2009 to specify that if the chair of a meeting of creditors is of the opinion that the outcome of a vote was determined by the vote of a creditor who did not deal with the debtor at arm's length at any time during the 1 year period before the date of the initial bankruptcy event and ends on the date of the bankruptcy, the chair shall re-determine the outcome by excluding the creditor's vote. The re-determined outcome of the vote will stand unless a court, on application within 10 days, considers it appropriate to include the creditor's vote and determines another outcome.

Houlden, Morawetz & Sarra, "Bankruptcy and Insolvency Law of Canada" (4th ed.) ("H&M") G13(1), Factum Tab 1

31. Prior to 2009 the section was 109(7), which only allowed the Court to grant PRIOR permission to vote to a non-arm's length creditor if all of the creditors who dealt with the debtor at arm's length did not account for at least 20% in value. The amendment created to a broader criterion in the current version of s.109, and also made the section more practical, by only requiring the Court to subsequently approve votes where the non-arm's length creditors votes were determinative, rather than approve them in anticipation of the result.

H&M, G13(1); Factum Tab 1

32. As "related" parties are deemed not to act at arms-length under the provisions of S. 4(5) of the Act, that on any vote where the Chairperson was of the opinion that the outcome of the vote was determined by FTEI's votes, under the provisions of S. 109(6) of the Act those FTEI votes could be disregarded as the votes of a non-arm's length party, unless the inclusion of the vote was sustained at a further Court hearing.

BIA s.4(5) and 109(6)

33. The Proposal Trustee accepted the claim of FTEI for voting purposes only at $3,549,150.00 (US$2,700,000) while the other creditors voting by proxy totaled $2,149.17 and the total deemed Convenience Class creditors voting in favour would have been $39,687.89. The inclusion of the FTEI votes against the proposal clearly determined the outcome of the vote, and as a result, the Chairperson at the Reconvened Meeting did not include the FTEI votes against the Amended Proposal.

Report para. 26, 27, 40

34. The only relevant authority on this section of the BIA is *Re Saargummi Quebec Inc.* The Quebec Superior Court in determining whether to exercise its discretion to allow a parent corporation as a related party to vote on a proposal, held that allowing a related party to vote was an exception to the general rule and the onus was on the creditor to prove, on a balance of probabilities, that it was appropriate to grant such an exception. The court will exercise its authority based on six objectives of the BIA, specifically:

(i) the goal of rehabilitation of the debtor;

(ii) the timely and, organized realization of the debtor's property;

(iii) the annulment of any reviewable transactions and preferential payments;

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

(v) effective business reorganization; and

(vi) protection of the public interest; and the additional test

(vii) did the related party come to the Court with clean hands.

On balance, the Court found that the parent company had not established that such a vote was necessary to advance these objectives with respect to the proposal of its subsidiary.

> ***Re Saargummi Quebec Inc.*** **(2006), EYB 2006-106495, 2006 CarswellQue 5312,2006 QCCS 3151, 37 CB.R. (5th) 263 (Que. S.C.); Factum Tab 2 (with unofficial translation into English at Tab "E") at para. 85-92 and 115 to 124**

35. It is the position of the Proposal Trustee that FTEI cannot meet this test, and should not have its votes against the Amended Proposal included because the facts of the case at bar evidence PRECISELY the harm that 109(6) was designed to remedy, namely that insiders should not be permitted to affect the acceptance of Proposals to the detriment of ordinary unrelated unsecured creditors.

36. If the votes of the "related" parent company FTEI are not counted as votes against the Amended Proposal then the proposal passes and all of the unrelated Ordinary Creditors are paid in full. If the votes of FTEI are counted then the Amended Proposal fails and the related parent Company is paid the vast majority of the net proceeds of the liquidation of the assets of the bankrupt Company. The results are that stark.

37. Applying the *Re Saargummi* test to this case, it is the view of the Proposal Trustee that allowing the votes of the related parent FTEI to count:

(i) makes rehabilitation of the debtor impossible by creating a bankruptcy;

(ii) delays the timely and organized realization of the property by delaying any payments under the proposal to the unrelated Ordinary Creditors from immediate to until all realizations of assets are completed in the bankruptcy;

(iii) if the 95-101 Release is removed from the Amended Proposal then whether bankruptcy or proposal, the Trustee will have the same ability to set aside any reviewable transactions and preferential payments;

(iv) payment in full of the Convenience Class creditors will be impossible in a bankruptcy and FTEI will be paid the vast majority of any proceeds of realization in the bankruptcy;

(v) the Amended Proposal provides for the fair and effective reorganization of the unrelated Ordinary Creditor claims and for the continued employment of the 13 employees and preservation of the enterprise value of the Company, while bankruptcy does not; and

(vi) the public interest is protected by the continued employment of the employees of the Company and continued operation of the Company.

The test to be applied to approve the Amended Proposal

38. The BIA requires the Proposal Trustee to apply to Court to sanction a Proposal. At the hearing, s.59(2) of the BIA requires that the Court refuse to approve the proposal where its terms (a) are not reasonable, or (b) not calculated to benefit the general body of creditors.

BIA, s. 59(2)

39. In order to satisfy the test set out in s. 59(2) of the BIA, the Courts have held that the following three-pronged test must be satisfied:

(a) the proposal is reasonable;

(a) the proposal is calculated to benefit the general body of creditors; and

(b) the proposal is made in good faith.

BIA, s. 59(2).

***Kitchener Frame Limited (Re)*, 2012 ONSC 234, at para. 19 – 21,**

Factum, Tab 3

40. In the 2012 Ontario Superior Court of Justice decision *Kitchener Frame Limited (Re)*, Justice Morawetz (as he then was), stated as follows in respect of BIA s. 59(2):

"[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."

***Kitchener Frame Limited (Re)*, 2012 ONSC 234, at para. 21,**

Factum Tab 3

41. In *Kitchener Frame Limited (Re)*, Justice Morawetz noted that the Courts have also accorded substantial deference to the majority vote of creditors at a meeting of creditors. Similarly, Justice Morawetz also noted that the Courts have also accorded deference to the recommendation of the proposal trustee.

***Kitchener Frame Limited (Re)*, 2012 ONSC 234, at para. 21,**

Factum, Tab 3

42. The Proposal Trustee is of the opinion that the Amended Proposal is advantageous for the creditors of the Company for the following reasons:

(a) the Proposal Trustee believes that by paying the unrelated Ordinary Creditors in the Convenience Creditor class in full, the Amended Proposal provides for a distribution to the Unsecured Creditors of the Company which exceeds the dividend that would be otherwise available from a bankruptcy as there would be nominal recovery no recovery for unrelated unsecured creditors in a bankruptcy; and

(b) the Proposals are calculated to benefit the general body of the creditors of the Company;

43. The Proposal Trustee remains of the view that the Company has acted in good faith and with due diligence.

Report, at Para. 45

Approval of Director and Officer Releases in Amended Proposal

44. As noted above, the Amended Proposal provides in paragraph 3.5 that the Unsecured Creditors will be deemed to have released and discharged all claims that arose prior to the date of filing of the NOI against the former and current officers and directors of the Debtors, as applicable.

Amended Proposal at para. 3.5

45. Under the provisions of the BIA, claims against directors, arising prior to the commencement of proceedings, may be compromised if they relate to the obligations of the corporation that the directors are by law liable for in their capacity as directors.

BIA, s. 50(13)

46. A proposal cannot compromise the types of claims described in s. 50(14) of the BIA relating to contracts with directors or based on allegations of misrepresentation or other wrongful or oppressive conduct by directors.

BIA, s. 50(14)

47. The Order requested by the Proposal Trustee reflects the restrictions contained in s. 50(14) of the BIA. No claims against the former or current directors or the officers of the Debtors, as may be applicable, have been filed and, to the knowledge of the Proposal Trustee, the Debtors are current on their HST and source deduction remittances.

Approval of Release under BIA s.95-101

48. Further to the Proposal Trustee's review of the Company's conduct and FTEI's objection associated with the release of claims under S. 95 to S. 101 of the Act, the Proposal Trustee commented on the appropriateness of the terms of the Amend Proposal that relate to the provisions that stipulate that S. 95 to S.101 of the Act will not apply in the Amended Proposal, as is permitted under the provisions of S.101.1 of the Act (the "**95-101 Release**").

49. To assess the appropriateness of the inclusion of this provision, the Proposal Trustee commenced a limited review of the Company's banking records over the past five (5) years to identify potential preferences and transactions at undervalue, and in particular with respect to related parties. Based on the Proposal Trustee's review, the following issues were identified:

    (a) There were a number of transactions (cheques, transfers, cash withdrawals), including some with related parties, which the Proposal Trustee, at the time of writing this report, had not had the opportunity to sufficiently review in detail with the Company, in order to obtain explanations and/or supporting documentation to allow the Proposal Trustee to conclude the propriety of the transactions; and

    (b) There were a few months of missing bank statements that could not be located by the Company, at the time of writing this report, which impaired the Proposal Trustee's ability to complete its review.

Report, para. 32-33 and Exhibit "N" Amended Proposal at para. 1.1(g), 3.5 and 7.3(e)

50. Accordingly, given the current limitations of the Proposal Trustee's review, the Proposal Trustee cannot at this time, support the inclusion in the Amended Proposal of the 95-101 Release.

Conclusion

51. The Proposal Trustee is of the view that the Amended Proposal made by the Company is in good faith and provides for a full recovery for the unrelated Unsecured Creditors in the Convenience class. The Amended Proposal has been deemed approved by the overwhelming majority of Unsecured Creditors of the Company capable of voting, and is recommended by the Proposal Trustee. The Proposal Trustee submits that the Amended Proposal satisfies the test set out under s. 59(2) of the BIA.

52. The Proposal Trustee is of the opinion that the Amended Proposal is advantageous to the creditors of the Company. The Proposal Trustee recommends that the Amended Proposal be approved by the Court.

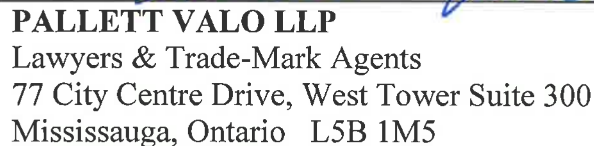
PART IV – ORDER REQUESTED

53. The Proposal Trustee respectfully requests that the Court issue an Order, *inter alia*,

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

(b) approving the Report dated September 6, 2019 the Supplementary Report and the activities of the Proposal Trustee as more particularly described therein, and the fees and disbursements of the Proposal Trustee and its counsel as set out in the fee affidavits attached to the Supplementary Report.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ~~this~~ 17th day of September, 2019



PALLETT VALO LLP
Lawyers & Trade-Mark Agents
77 City Centre Drive, West Tower Suite 300
Mississauga, Ontario L5B 1M5

Alex Ilchenko C.S. / Monty Dhaliwal
LSO# 33944Q / #65124N
Tel: (905) 273-3300
Fax: (905) 273-6920

Lawyers for MNP LTD. in its capacity as
Proposal Trustee of FT ENE CANADA INC.

SCHEDULE "A"

1. Houlden, Morawetz & Sarra, "Bankruptcy and Insolvency Law of Canada" (4th ed.) ("H&M") G13(1)

2. *Re Saargummi Quebec Inc.* (2006), EYB 2006-106495, 2006 CarswellQue 5312,2006 QCCS 3151, 37 CB.R. (5th) 263 (Que. S.C.)

3. *Kitchener Frame Limited (Re)*, 2012 ONSC 234

SCHEDULE "B"

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

RELATED PARTIES

4 (1) In this section,

entity means a person other than an individual; (entité)

related group means a group of persons each member of which is related to every other member of the group; (groupe lié)

unrelated group means a group of persons that is not a related group. (groupe non lié)

Definition of related persons

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

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

(b) an entity and

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

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

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

(c) two entities

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

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

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

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

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

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

Relationships

(3) For the purposes of this section,

(a) if two entities are related to the same entity within the meaning of subsection (2), they are deemed to be related to each other;

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

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

(d) if a person has ownership interests in two or more entities, the person is, as holder of any ownership interest in one of the entities, deemed to be related to himself or herself as holder of any ownership interest in each of the other entities;

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

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

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

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

Question of fact

(4) It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length.

Presumptions

(5) Persons who are related to each other are deemed not to deal with each other at arm's length while so related. For the purpose of paragraph 95(1)(b) or 96(1)(b), the persons are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length.

VOTING AT A MEETING OF CREDITORS

Related creditor

54 (3) A creditor who is related to the debtor may vote against but not for the acceptance of the proposal.

Chair may admit or reject proof

108 (1) The chair of any meeting of creditors has power to admit or reject a proof of claim for the purpose of voting but his decision is subject to appeal to the court.

Accept as proof

(2) Notwithstanding anything in this Act, the chair may, for the purpose of voting, accept any letter or printed matter transmitted by any form or mode of telecommunication as proof of the claim of a creditor.

In case of doubt

(3) Where the chair is in doubt as to whether a proof of claim should be admitted or rejected, he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.

Right of creditor to vote

109 (1) A person is not entitled to vote as a creditor at any meeting of creditors unless the person has duly proved a claim provable in bankruptcy and the proof of claim has been duly filed with the trustee before the time appointed for the meeting.

Voting by proxy

(2) A creditor may vote either in person or by proxy.

Form of proxy

(3) A proxy is not invalid merely because it is in the form of a letter or printed matter transmitted by any form or mode of telecommunication.

Debtor may not be proxyholder

(4) A debtor may not be appointed a proxyholder to vote at any meeting of the debtor's creditors.

Corporation

(5) A corporation may vote by an authorized proxyholder at meetings of creditors.

Vote of creditors not dealing at arm's length

(6) If the chair is of the opinion that the outcome of a vote was determined by the vote of a creditor who did not deal with the debtor at arm's length at any time during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy, the chair shall redetermine the outcome by excluding the creditor's vote. The redetermined outcome is the outcome of the vote unless a court, on application within 10 days after the day on which the chair redetermined the outcome of the vote, considers it appropriate to include the creditor's vote and determines another outcome.

(7) [Repealed, 2005, c. 47, s. 80]

Vote on proposal by creditors

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

Voting system

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

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

(i) all unsecured creditors, and

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

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

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

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

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

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

Application for court approval

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

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

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

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

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

Court to hear report of trustee, etc.

59. (1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

Court may refuse to approve the proposal

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

Reasonable security

(3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

Court may order amendment

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

Claims against directors — compromise

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

Exception

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

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

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

Powers of court

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

Application of other provisions

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

TAB 1

S. 109(6)

HMANALY G§13
Houlden & Morawetz Analysis G§13

Bankruptcy and Insolvency Law of Canada, 4th Edition

THE BANKRUPTCY AND INSOLVENCY ACT

Part V (ss. 102-115.1)
L.W. Houlden and Geoffrey B. Morawetz

G§13 — Voting by Restricted Creditors

G§13 — Voting by Restricted Creditors

See ss. 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 115.1

Sections **109(6)** and (7) and s. 113(3) restrict the right of certain persons to vote at meetings of creditors.

(1) — *Restriction on Voting by Non-Arm's Length Creditors*

Section **109(6)** was amended in 2009 to specify that if the chair is of the opinion that the outcome of a vote was determined by the vote of a creditor who did not deal with the debtor at arm's length at any time during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, the chair shall re-determine the outcome by excluding the creditor's vote. The re-determined outcome is the outcome of the vote unless a court, on application within 10 days, considers it appropriate to include the creditor's vote and determines another outcome.

Previously, parties not at arm's length were barred from voting unless they obtained court approval to vote prior to the meeting. The amended provision allowed parties not at arm's length to vote at the meeting, ensuring that the meeting is not delayed while the party seeks court permission to vote. Only if the votes of non-arm's length parties affect the outcome will there possibly be a need to apply to court to have the outcome re-determined.

"Date of the Initial Bankruptcy Event" is defined in s. 2(1), see *ante* B§16 "Date of Initial Bankruptcy Event". Date of bankruptcy is defined by s. 2.1. If the creditors who have dealt with the debtor at arm's length do not represent at least 20% in value of the claims against the debtor, then the non-arms' length creditors may, with leave of the court, vote at a meeting of creditors: s. 109(7).

In view of the wide definition of arm's length (see ss. 3 and 4), it may be difficult for the chair of a meeting to determine whether or not a creditor was or was not dealing at arm's length with the debtor.

The wife of the brother of the sole shareholder, director and officer of the bankrupt company was held to be a "related person" as defined in s. 4(2)(b)(iii) and therefore by s. 3(3) deemed not to have been dealing at arm's length with the debtor. The wife having loaned part of the money owing to her to the bankrupt company within one year preceding the bankruptcy, she was not entitled to vote at the meeting of creditors since she did not at all times within the one year preceding bankruptcy deal with the debtor at arm's length: *Re Monogram Financial Corp.* (1980), 34 C.B.R. (N.S.) 5 (Ont. S.C.).

Where there is some dispute as to whether or not an individual was a common-law spouse at the date of bankruptcy, but it was clear that he was in a non-arm's length relationship with the bankrupt, he will automatically be disentitled from voting on the appointment of inspectors: *Re Cochard* (2004), 2004 CarswellAlta 720, 3 C.B.R. (5th) 296, 2004 ABQB 422 (Alta. Q.B.).

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Whether or not dealings between the creditor and the debtor were at arm's length where the parties are not related persons is a question of fact: *Skalbania (Trustee of) v. Wedgewood Village Estates Ltd.* (1989), 74 C.B.R. (N.S.) 97, [1989] 5 W.W.R. 254, 60 D.L.R. (4th) 43 (B.C. C.A.), leave to appeal to S.C.C. refused (1989), 76 C.B.R. (N.S.) xxix (note) (S.C.C.) and see note *ante* under B§49 "Related Persons". The fact that the creditor company and the bankrupt company had a common director is not conclusive of the issue whether the parties were not dealing at arms' length, where the common director had no power to control the companies: *Irving Oil Ltd. v. Noseworthy* (1982), 42 C.B.R. (N.S.) 302 (Nfld. T.D.).

Three directors of the debtor company with large claims for severance pay and expenses were held to be prohibited by s. 113(3)(b) of the *BIA* from voting on the appointment of a trustee or inspectors. They were not, however, prohibited s. **109(6)** from filing proofs of claim and voting the dollar amount of their claims by reason of the fact that they were directors, or "active" directors, as the lower court had referred to them. The *BIA* does not distinguish between directors on the basis of their level of involvement in the debtor company: *Re Galaxy Sports Inc.* (2004), 2004 CarswellBC 1112, 1 C.B.R. (5th) 20, 29 B.C.L.R. (4th) 362, 20 R.P.R. (4th) 1, 240 D.L.R. (4th) 301, 200 B.C.A.C. 184, 2004 BCCA 284 (B.C. C.A.).

In determining whether to exercise its discretion to allow a parent corporation as a related party to vote on a proposal, the court held that allowing a related party to vote was an exception to the general rule and the onus was on the creditor to prove, on a balance of probabilities, that it was appropriate to grant such an exception. The court will exercise its authority based on six objectives of the *BIA;* specifically, the goal of rehabilitation of the debtor; the timely and organized realization of the debtor's property; the annulment of any reviewable transactions and preferential payments; fair distribution of the debtor's assets; effective business reorganization; and protection of the public interest. On balance, the court found that the parent company had not established that such a vote was necessary to advance these objectives: *Re Saargummi Québec inc.* (2006), EYB 2006-106495, 2006 CarswellQue 5372, 2006 QCCS 3151, 37 C.B.R. (5th) 263 (Que. S.C.).

(2) — *Restriction on Voting on Appointment of Trustee and Inspectors*

Section 113(3) was amended to allow an exception to the rule under s. 113(3)(a) in respect of persons that cannot vote on appointment of the trustee or inspectors on permission of the court; related parties can vote on the appointment of inspectors in certain circumstances, for example, where the majority of the creditors are related parties (2007, c. 36 proclaimed in force as of September 18, 2009).

The executor of a deceased daughter of a bankrupt has no higher rights than the daughter and cannot vote at the first meeting of creditors on the appointment of the trustee: *Re Capital Trust Corp.* (1943), 24 C.B.R. 115 and 207 (Que. S.C.). The wife of the bankrupt to whom money is owing for wages has no right to vote on the appointment of a trustee or inspectors: *Re Martineau* (1925), 7 C.B.R. 107, 64 Que. S.C. 224 (S.C.).

Section 113(3)(a) is confined to persons who are related by blood or marriage to a bankrupt individual; it has no application to a person who is related by marriage to the controlling shareholder, director and officer of the bankrupt corporation: *Re Monogram Financial Corp.* (1980), 34 C.B.R. (N.S.) 5 (Ont. S.C.). However, a person who falls within s. 113(3)(a) may not have been dealing at arm's length with the debtor so that the creditor falls within s. **109(6)** and, as a result, is not only restricted from voting on the appointment of the trustee or inspectors but is also prohibited entirely from voting at a meeting of creditors.

In *Re Galaxy Sports Inc.* (2004), 2004 CarswellBC 1112, 1 C.B.R. (5th) 20, 29 B.C.L.R. (4th) 362, 20 R.P.R. (4th) 1, 240 D.L.R. (4th) 301, 200 B.C.A.C. 184, 2004 BCCA 284 (B.C. C.A.), the court, in prohibiting three directors of the debtor company from voting on the appointment of a trustee or inspectors, noted that the *BIA* does not distinguish among directors on the basis of their level of involvement in a corporation. For the purposes of the *Act,* there is no difference between an "active" or "passive" director for voting purposes.

By s. 113(3)(c), where the bankrupt is a corporation, any wholly-owned subsidiary corporation or any officer, director or employee of the subsidiary corporation cannot vote on the appointment of a trustee or inspectors. There do not appear to have been any cases interpreting this subsection. On the basis of *Re Fintry, supra,* an officer, director or employee of a subsidiary

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corporation who has ceased to be an officer, director or employee at the time of voting is not disqualified from voting on the appointment of a trustee or inspectors.

The Ontario Superior Court of Justice, after considering the 2009 amendments to s. 133 of the *BIA*, granted an order permitting employees or retirees of the bankrupt to nominate or vote on the appointment of inspectors at the first meeting of creditors. The trustee was of the view that the principal unsecured creditors consisted of a related entity, claims by employees for unpaid severance and termination, likely among the largest claims, and members of the pension plan for which there was a deficit. Prior to its amendment in 2009, s. 11(3) of the *BIA* provided that where the bankrupt was a corporation, any director, officer or employee was not entitled to vote on the appointment of a trustee or inspectors. An officer, director or employee of a corporation owes a duty to the corporation, and the observance of that existing duty might conflict with the best interests of the creditors as to the persons to be elected trustee or as inspectors. In 2009, s. 113(3) was amended; it preserves the proscription on employees voting on the appointment of a trustee, but provides the court with the discretion to allow them to vote on the election of inspectors. In this case, apart from the priority claim for unremitted source deductions, it appeared that the remaining claims would be those of unsecured creditors and the claims of the employees for severance and termination pay and the claims of the retirees in respect of the deficit in their pension plan exceeded the claim that the related entity could assert in respect of the inter-company obligations. In the circumstances, Brown J. found it fair that the employees and retirees, who constituted the major creditors of the estate, should have some say in the selection of the inspectors; their economic welfare made up a large part of the overall economic welfare of creditors that the bankruptcy proceedings sought to protect. Brown J. was satisfied that by requiring compliance with the obligation to file proofs of claim in order to vote and by stipulating that the standard method of counting votes would apply, no undue prejudice would result in any other interested party: *Re Shaw Canada L.P.*, 2012 CarswellOnt 11923, 2012 ONSC 5333 (Ont. S.C.J. [Commercial List]).

End of Document

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TAB 2

COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE SAINT-FRANÇOIS

N° : 450-11-000274-054

DATE : 8 juin 2006

SOUS LA PRÉSIDENCE DE : L'HONORABLE GAÉTAN DUMAS, j.c.s.

Dans l'affaire de la proposition de :

SAARGUMMI QUÉBEC INC. personne morale légalement constituée ayant son siège social au 175, rue Péladeau, à Magog, province de Québec
Débitrice
et
SG OVERSEAS LIMITED, personne morale légalement constituée sous les Lois de Guernsey ayant sa place d'affaires à East Wing, Trafalgar Court, Admiral Park, St. PeterPort Guernsey
Requérante
et
SAMSON BÉLAIR DELOITTE & TOUCHE INC., personne morale légalement constituée ayant sa place d'affaires au 1, Place Ville-Marie, bureau 3000, à Montréal, province de Québec
Syndic

JUGEMENT

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[1] Le 14 février 2006, la débitrice a déposé, auprès du séquestre officiel, un avis de son intention de faire une proposition et Samson Bélair Deloitte & Touche inc. a été nommée syndic à l'avis d'intention.

2006 QCCS 3151 (CanLII)

[2] La débitrice SaarGummi Québec inc. a modifié sa dénomination sociale pour Orange Peach Real Estate inc. le 10 mai 2006.

[3] Il est admis que la requérante SG Overseas Limited est une créancière qui n'a pas droit de vote en vertu de l'article 109 (6) de la *Loi sur la faillite et l'insolvabilité* (L.F.I.) puisqu'elle a un lien de dépendance avec la débitrice.

[4] Il est également admis que, conformément à l'article 54 (3) L.F.I., la requérante pourrait voter contre la proposition déposée par la débitrice mais non en faveur.

[5] La requérante demande d'être autorisée en vertu de l'article 109 (7) L.F.I. à voter à l'assemblée des créanciers puisqu'elle allègue détenir plus de 80% des créances ordinaires contre la débitrice. La requérante allègue que, puisqu'elle détient plus de 80% des réclamations non garanties, elle rencontre les conditions d'application de l'article 109 (7) L.F.I. Il est donc dans le meilleur intérêt de la requérante que celle-ci puisse voter lors de l'assemblée sur la proposition de la débitrice.

[6] La requérante plaide principalement que, puisqu'elle est la créancière qui bénéficiera le plus de l'administration de la faillite, il serait normal qu'elle puisse voter lors des assemblées des créanciers. Selon elle, aucun préjudice ne serait causé au syndic ou à aucun autre créancier si sa requête était accueillie.

[7] Son principal argument est qu'il serait injuste et contraire aux intérêts de la justice de l'exclure du vote à l'assemblée des créanciers et permettre à une minorité de créanciers d'être les seuls à avoir un droit de vote à cette assemblée.

[8] Sa requête, produite le 1er juin, a été entendue le 6 juin et l'assemblée des créanciers sur la proposition doit être tenue le 9 juin 2006.

[9] La requérante allègue qu'elle est créancière ordinaire pour un montant de 48 339 542 $ sur un total de créanciers ordinaires de 59 637 853 $.

[10] Le syndic à la proposition de la débitrice s'oppose à la requête ainsi qu'Industrie Canada, créancière pour une somme de 2 445 000 $ et Investissement Québec, créancière pour une somme de 2 458 000 $.

[11] Bref, mis à part la requérante, Industrie Canada et Investissement Québec sont les principales créancières de la débitrice.

[12] Une bataille juridique entre les parties semble s'amorcer et il est évident que les stratégies adoptées par la requérante et les autres créanciers sont divergentes.

[13] La débitrice, quant à elle, consent à la requête de la requérante et appuie ses prétentions.

2006 QCCS 3151 (CanLII)

[14] Aucune jurisprudence ou doctrine discutant des critères d'application de l'article 109 (7) L.F.I. n'a pu être soumise par les parties ou trouvée par le tribunal.

[15] Seule une décision non rapportée rendue le 3 mars 1997 par la registraire Chantal Flamand dans le dossier *Greenberg Stores Limited*[1] a pu être consultée par le tribunal. Par contre, cette décision n'est d'aucun secours puisqu'elle n'est pas motivée et ne semble pas avoir été contestée. Cette décision avait permis à un créancier de voter en vertu de l'article 109 (7) L.F.I. mais avait limité l'exercice de son droit de vote relativement au choix du syndic et la nomination des inspecteurs.

[16] Lors des plaidoiries des procureurs, il semblait ressortir trois principaux points sur lesquels la requérante aurait intérêt à voter et sur lesquels les parties ne s'entendent pas.

[17] En vertu de l'article 52 L.F.I., il est possible, lorsque les créanciers l'exigent au moyen d'une résolution ordinaire, lors de l'assemblée à laquelle une proposition est étudiée, d'ajourner cette assemblée à une autre date pour permettre que soit effectuée une évaluation ou une investigation plus approfondie concernant les affaires et biens du débiteur.

[18] Le procureur du syndic ainsi que les procureurs d'Industrie Canada et d'Investissement Québec ont déjà annoncé qu'ils avaient l'intention de demander qu'une investigation soit faite sur des transactions entre la débitrice et la requérante. Il est donc fort possible qu'ils demandent un ajournement de l'assemblée pour que ces vérifications soient faites. La requérante, quant à elle, s'oppose à une remise de l'assemblée et allègue qu'elle veut que le dossier soit mené avec célérité. Elle entend donc s'opposer à toute remise.

[19] En cas de rejet de la proposition, il y aura faillite de la débitrice et les parties ne s'entendent pas sur la confirmation du choix du syndic. La requérante semble avoir l'intention de ne pas confirmer Samson Bélair comme syndic et semble vouloir en choisir un autre.

[20] Le troisième principal point de divergence est sur le choix des inspecteurs et du comité de créanciers prévu à la proposition. Il s'agit des trois points de discorde prévisibles à court terme mais il est évident qu'il y en aura d'autres.

[21] Il est à noter que la requérante n'a pas encore déposé sa preuve de réclamation au syndic et qu'elle n'a pas, non plus, remis au syndic les informations que celui-ci requiert d'elle depuis plusieurs mois. La collaboration entre la débitrice et le syndic semble déficiente et le syndic a d'ailleurs soulevé ce fait dans le rapport qu'il entend soumettre aux créanciers lors de l'assemblée.

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[1] C.S. 500-11-005873-977

2006 QCCS 3151 (CanLII)

2006 QCCS 3151 (CanLII)

[22] **CRITÈRE D'APPLICATION DE L'ARTICLE 109 (7) L.F.I.**

[23] La seule condition d'application de l'article 109 (7) prévue par le législateur est que le tribunal pourra accorder à un créancier ayant un lien de dépendance, et qui ne peut voter en vertu de l'article 109 (6), la permission de voter si l'ensemble des créanciers qui ont traité sans lien de dépendance ne représentent pas ensemble au moins 20% en valeur des réclamations contre le débiteur.

[24] Dans la présente cause, la requérante représente 85% des réclamations, il n'y a pas lieu d'analyser le statut des autres créanciers. Par contre, il serait possible qu'un créancier lié, qui détient seulement 50% des réclamations, puisse rencontrer les exigences de l'article 109 (7) si d'autres créanciers sont également liés. C'est la raison pour laquelle le législateur, plutôt que d'utiliser un pourcentage de 80, a utilisé l'expression «lorsque tous les créanciers qui ont traité sans lien de dépendance avec le débiteur ne représentent pas ensemble au moins 20% en valeur des réclamations.»

[25] Puisque le législateur mentionne qu'un créancier peut voter avec l'autorisation du tribunal, cela signifie, à notre avis, que le tribunal devra exercer sa discrétion pour accorder l'autorisation ou non.

[26] Si le législateur avait voulu que le droit de vote soit automatique dès qu'un créancier a plus de 80% des réclamations prouvables, il n'aurait pas prévu la nécessité d'obtenir l'autorisation du tribunal pour voter. Un créancier ne peut donc simplement se contenter d'affirmer qu'il détient 85% des créances pour que lui soit accordée cette permission.

[27] Puisque le vote d'un créancier ayant un lien de dépendance est une exception à la règle générale, il appartiendra à ce créancier de démontrer par prépondérance de preuve que le tribunal devrait exercer sa discrétion.

[28] **LES FAITS**

[29] Puisque le tribunal doit exercer une discrétion judiciaire, il nous semble que celle-ci doit être exercée selon les faits propres à chaque espèce. Il est essentiel d'analyser la situation dans laquelle se retrouvent les parties.

[30] La débitrice opérait jusqu'au 15 avril 2005, une entreprise dans le domaine de pièces de caoutchouc dans l'industrie automobile dont le siège social était situé à Magog, province de Québec. La société offrait une grande variété de pièces de caoutchouc à quelques uns des plus importants manufacturiers dans le domaine de l'automobile, et ce, principalement à General Motors Corporation (GM). La société est une filiale à part entière de SaarGummi Group qui opère des usines de production en Europe, Asie et en Amérique. Le groupe emploie plus de 3 700 personnes.

[31] Le 31 mars 2005, la débitrice vend une partie de ses opérations à KGI Automotive Systems inc. (KGI).

[32] Le 15 avril 2005, la débitrice vend le reste de ses opérations à GDX Automotive inc. (GDX).

[33] À la suite de la vente de ses opérations manufacturières, les affaires de la débitrice consistaient en l'administration des immeubles loués, lesquels sont situés à Magog et loués à GDX Automotive inc., compagnie liée à la débitrice.

[34] Le 14 février 2006, un avis d'intention de faire une proposition est déposé et une prolongation de délai est demandée les 14 mars et 27 avril 2006. Finalement, le 19 mai la débitrice dépose sa proposition auprès du syndic.

[35] À la suite de la vente des opérations manufacturières en 2005, la débitrice est demeurée propriétaire de cinq bâtiments industriels situés à Magog. Les opérations courantes de la débitrice consistent maintenant en l'administration et la location de ces propriétés qui sont louées et génèrent des revenus mensuels d'approximativment 138 000 $.

[36] Quatre de ces immeubles sont loués à GDX et KGI avec option de renouvellement.

[37] En vertu de deux certificats hypothécaires, datés des 23 décembre 2004 et 17 mars 2005, octroyés par la débitrice à sa société mère SG Overseas Ltd (la requérante), tous ses actifs, au moment du dépôt de la proposition, sont grevés en faveur de la requérante.

[38] Au moment du dépôt de la proposition, la société avait 2 416 000 $ dans un compte bancaire détenu en fidéicommis par ses conseillers juridiques.

[39] Dans une requête en prorogation de délai pour déposer sa proposition, la débitrice alléguait, entre autres, que préalablement au dépôt de l'avis d'intention A & R. Belley (Belley) a fait saisir avant jugement le 15 septembre 2005, certains biens de la débitrice dont plusieurs de ses immeubles ainsi que ses comptes bancaires auprès de la Banque Nationale dans lesquels elle détenait la somme de 1 700 000 $.

[40] Elle y allègue un jugement qui avait été rendu le 13 octobre 2005 par le soussigné sur une requête en annulation de la saisie avant jugement effectuée par Belley. Puisque ce jugement y est allégué, il fait donc partie du dossier et le tribunal peut en tenir compte.

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[41] Ledit jugement[2] mentionne entre autres que :

> [7] En avril 2005, SaarGummi a vendu à GDX Automotive ses usines de l'Estrie. GDX Automotive est une des dénominations utilisées par GDX Canada inc., une entreprise constituée en vertu d'une loi étrangère qui est spécialisée dans la fabrication de produits de caoutchouc pour automobiles et dont l'actionnaire majoritaire est GDX International Holdings S.A.R.L.
>
> [8] La vente des usines de SaarGummi a été annoncée sur le site internet de GDX Automotive par le biais d'un communiqué de presse en date du 18 avril 2005, lequel mentionnait que GDX Automotive annonce :
>
>> «GDX Automotive today announced the closing of its acquisition of SaarGummi operations in Québec, Canada and Mexico. (...) Current SaarGummi operations in Canada and in Mexico include six facilities with approximately 1,000 employees.»
>
> [9] Selon toute vraisemblance, SaarGummi a cessé ses opérations au Canada. Le site internet du Groupe SaarGummi confirme que les opérations du groupe sont désormais aux États-unis, en Amérique Latine et en Europe et en Asie. La seule compagnie qui est identifiée sur le site internet du Groupe SaarGummi à la compagnie SG Technologies a une adresse en Allemagne.
>
> [10] SaarGummi est une filiale de SaarGummi GmbH, une compagnie allemande qui détient d'autres filiales en Allemagne, au Brésil, en Espagne, en Inde, aux États-unis et à la République Tchèque.
>
> [11] Le nombre d'employés de SaarGummi est passé de 1 300 en 2004 à 1 en 2005, ce qui laisse croire que cette dernière n'a plus d'autre opération commerciale au Canada.
>
> [12] La défenderesse SaarGummi plaidera sur la requête en annulation de la saisie qu'il faudrait plutôt lire que SaarGummi n'a plus d'opération manufacturière puisque même si elle n'a qu'un employé, elle a tout de même des opérations commerciales puisqu'elle est propriétaire d'immeubles et perçoit des loyers.
>
> [13] D'autre part, suite à la vente de ses usines à GDX Canada SaarGummi est demeurée propriétaire de plusieurs immeubles dont la plupart abritent les usines vendues à GDX Canada inc.
>
> [14] En fait, quatre des huit immeubles propriétés de SaarGummi sont loués à GDX Canada. Tous ces immeubles sont situés à Magog et ceux loués à GDX Canada sont affectés de baux dans lesquels une option d'achat et un droit de premier refus en faveur de GDX Canada ont été prévus.

[2] EYB 2005-96579

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[15] Quatre des huit immeubles sont hypothéqués pour un montant total de 10 000 000,00$ soit presque l'équivalent des évaluations municipales de ces quatre immeubles mises ensemble.

[16] Deux des trois terrains vacants de SaarGummi sont hypothéqués en faveur de la Banque Nationale du Canada. Les hypothèques affectant les quatre immeubles au montant de 10 000 000,00$ ont été consenties en faveur de S.G. Overseas Limited, une compagnie vraisemblablement reliée à SaarGummi. De plus, les actes d'hypothèques consentis en 2004 et mars 2005 donnent également en garantie à SG Overseas Limited l'universalité des biens meubles de SaarGummi.

(...)

[23] La défenderesse ne peut se contenter de plaider que la bonne foi se présume et que le juge appelé à décider de la suffisance de l'affidavit doit tenir pour avéré le fait qu'elle est de bonne foi dans les transactions qu'elle a faits.

[24] Une partie est également présumée connaître les conséquences de ses actes. Le fait de se départir de tous les actifs qu'elle possède au Québec et d'hypothéquer ceux qui lui reste en faveur d'une compagnie qui lui est liée peut certes donner à une personne raisonnable de très bonnes raisons de croire que sans le bénéfice d'une saisie avant jugement le recouvrement de sa créance sera mis en péril.

(...)

[28] Dans la présente cause, le présent tribunal doit tenir les faits pour avérés. Au niveau de la fausseté des allégations de l'affidavit, le juge aura à décider si les faits allégués établissent par présomption une intention de la part de la défenderesse de se soustraire à l'exécution d'un éventuel jugement; ou plutôt si tous les faits mis en preuve peuvent faire craindre que sans la saisie, le recouvrement de la créance ne soit mis en péril.

[29] Le tribunal croit qu'une personne raisonnable ayant connaissance de faits allégués dans l'affidavit de la défenderesse tirera la conclusion que la demanderesse ne pourra jamais exécuter un jugement si elle ne met pas les biens de la défenderesse sous la main de la justice pendant l'instance.

[30] Bien sûr, le simple fait pour un défendeur d'être une compagnie étrangère n'est pas suffisant à lui seul pour justifier la saisie avant jugement des actifs. Ainsi, dans Spectra Premium Industries inc. c. Tremplon inc.[4] une saisie a été cassée bien que la défenderesse était une compagnie étrangère. Par contre, dans ce cas, la demanderesse-intimée savait dès le départ des pourparlers qu'elle avait elle-même amorcés que la défenderesse-requérante était une société commerciale incorporée selon les lois de la République de Panama. Elle n'ignorait pas non plus que les administrateurs et les actionnaires étaient européens.

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[31] Il en est de même dans Grenier c. Rauh[5] où le juge Frenette déclarait insuffisantes les allégations d'un affidavit puisque le défendeur était un médecin pratiquant sa profession en Colombie-Britannique en 1982, date de l'institution de l'action et l'était au moment de l'émission de la saisie avant jugement.

[32] Bref, un fait en lui-même peut ne pas être suffisant pour l'émission d'une saisie avant jugement. Cela ne veut pas dire que ce fait ajouté à tous les autres empêchera l'émission d'un bref de saisie avant jugement.

(...)

[35] Il faut garder à l'esprit que les biens d'un débiteur sont le gage commun de ses créanciers[7]. Un créancier faisant affaires avec un débiteur est en droit de s'attendre à ce que les actifs de celui-ci servent à payer ses dettes et non pas qu'ils soient rapatriés dans un autre pays. Dans un cas où le transfert d'actifs aux États-unis avait des conséquences similaires aux nôtres, la Cour d'appel décida[8] :

> «Dans de telles circonstances, du fait des appelants, la seule défenderesse située dans la province de Québec devenait sans biens quelconques, rendant à toutes fins utiles impossible l'exécution contre elle d'un jugement éventuel.
>
> Dans les circonstances, je ne puis qu'être d'accord avec la conclusion du juge de première instance, qui se lit comme suit :
>
>> «There is no question but that I arrive at the conclusion that a reasonable man, given the facts of this case, a reasonable man could arrive at a position of objective fear. I find that, given these facts, an objective man would arrive at the conclusion that recovery of the debt would be, and is, a jeopardy, without the remedy of a Seizure Before Judgment.» (page 430)

[4] AZ-98026241
[5] AZ-85021089
[7] Article 2644 C.c.Q.
[8] Crown Leisure Products of Canada inc. c. Maurice P. Dean, [1989] R.D.J. 426»

[42] Le rapport du syndic mentionne que la valeur des propriétés immobilières de la débitrice s'élèverait à 18 140 000 $ selon une évaluation préparée par Turcotte & Associés en date du 25 janvier 2005.

[43] La requérante est la seule créancière garantie déclarée à l'actif de la débitrice avec une réclamation garantie de 10 208 388 $.

[44] Le syndic a demandé un avis juridique à la firme Heenan Blaikie, conseillers juridiques indépendants du syndic, en ce qui a trait à la validité et l'opposabilité des garanties publiées contre les actifs de la débitrice. Ce bureau d'avocats a avisé le syndic que les actes de prêt reliés à ses garanties étaient constitués en vertu des lois

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de Guernsey et que leur firme n'était pas apte à émettre d'avis selon les lois de Guernsey. De plus, le syndic fut avisé qu'un avis simplement restreint à la validité et à l'opposabilité des garanties qui ne tiendrait pas compte des faits, incluant la vente par la société de ses opérations et des transactions intersociété impliquant la débitrice, ses actionnaires et sociétés affiliées ne remplirait pas les intérêts recherchés. En conséquence, Heenan Blaikie a refusé d'émettre un avis juridique pour le moment.

[45] Toujours selon le bilan statutaire de la débitrice, celle-ci évalue les créanciers chirographaires à 59 638 000 $ sur lequel 52 909 990 $ sont des dettes intersociétés.

[46] **PROPOSITION**

[47] La proposition déposée par la débitrice prévoit qu'une somme n'excédant pas 1 150 000 $ sera distribuée aux créanciers selon les termes de paiement suivants :

- les réclamations des employés seront payées en totalité;
- les réclamations de la Couronne seront payées en totalité dans les six mois suivant l'approbation de la proposition par le tribunal;
- les honoraires professionnels seront payés par la société en priorité de toutes les autres réclamations;
- les parties liées à la personne insolvable ont accepté de renoncer à leur participation dans la distribution dans le but de ne pas diluer le paiement à la masse des créanciers;
- tous les créanciers chirographaires recevront tout d'abord le paiement de leur réclamation jusqu'à un maximum de 2000 $. Le reliquat, s'il y a lieu, sera attribué au prorata jusqu'à un maximum de 15¢ par dollar;
- transactions révisables, paiements préférentiels, etc. : les dispositions des articles 91 à 101 de la Loi et les dispositions de toute loi provinciale ayant un objectif similaire ne s'appliqueront pas à la proposition;

[48] Dans son rapport, le syndic, de façon à évaluer la proposition déposée, a préparé une analyse des différentes possibilités de réalisation qui s'offrent aux créanciers chirographaires dans un scénario de faillite. Celui-ci croit que la valeur de liquidation dans le cadre d'une faillite à la date de la proposition s'élèverait à 14 369 000 $.

[49] Il a également établi des tableaux qui démontrent une analyse comparative de la distribution estimée à la masse des créanciers chirographaires dans les scénarios de faillite et de proposition.

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[50] Vu l'ambiguïté qui existe en ce qui a trait à la validité et l'opposabilité des garanties de la requérante, le syndic a évalué les deux possibilités impliquant des garanties valides et non valides sur les actifs de la débitrice. Les tableaux préparés par le syndic démontrent que si les garanties sont valides en cas de faillite, la distribution aux créanciers serait d'environ 7% alors qu'il serait de 20,6% si les garanties de la requérante ne sont pas valides. Dans le cas d'une proposition, la réalisation serait de 15,8%.

[51] Bien sûr, les tableaux préparés par le syndic tiennent compte que les passifs déclarés de la débitrice sont valides et opposables à l'actif. En conséquence, le scénario de distribution pour une proposition semble beaucoup plus alléchant aux créanciers ordinaires puisqu'il ne tient pas compte des réclamations de la requérante qui s'élèvent à plus 50 000 000 $.

[52] **TRANSACTIONS QUI POURRAIENT NE PAS ÊTRE SUJETTES À UNE RÉVISION CONFORMÉMENT À LA PROPOSITION**

[53] Puisque la proposition exclut la révision possible par les créanciers des transactions révisables et des paiements préférentiels assujettis aux dispositions des articles 91 à 101 de la loi, le syndic a tenté d'en résumer les principales caractéristiques. Il note de façon importante que les transactions que la débitrice propose comme n'étant pas sujettes à révision incluent la vente par la débitrice de la totalité de ses opérations manufacturières lors des deux transactions distinctes survenues en mars et avril 2005. Il résume donc deux transactions intervenues avec la débitrice et leur impact sur ses actifs.

[54] **VENTE D'ÉQUIPEMENT À KGI AUTOMOTIVE**

[55] Cette transaction a eu lieu le 31 mars 2005 et comportait deux ventes distinctes, la vente des actifs et la vente de la ligne d'extrusion.

[56] **VENTE DES ACTIFS**

[57] Le prix de vente était de 450 000 $, taxes applicables en sus (517 612,50 $).

[58] La vente des actifs inclut des produits en cours de fabrication et des matières premières. La valeur des produits en cours et des matières premières avait été établie à 139 300 $.

[59] KGI n'a pas remis le prix de vente à la débitrice mais a plutôt payé RPT Industrial inc. (RPT) jusqu'au montant de la dette qu'avait la débitrice envers RPT au 31 mars 2005 soit 571 934 $. RPT est une société liée à KGI.

[60] Lors du dépôt du rapport, le syndic n'était pas en mesure de confirmer si le solde dû à la débitrice (84 979 $) lui a été payé.

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[61] En résumé, sur un prix total payé de 656 914 $, KGI a payé 571 934 $ à RPT et un solde à payer à la débitrice s'établirait à 84 979 $.

[62] **VENTE DE LA LIGNE D'EXTRUSION**

[63] KGI a payé 520 000 $ pour les équipements ayant une valeur aux livres de 640 000 $.

[64] **TRANSACTION ENTRE LA DÉBITRICE ET GDX AUTOMOTIVE**

[65] Le syndic résume la convention ainsi : GDX a acheté de la débitrice les comptes à recevoir au 15 avril 2005 et a acheté les stocks détenus exclusivement en relation avec les opérations. GDX a également acheté de la débitrice tous les actifs corporels et a payé pour ces actifs la somme de 1 $ et a pris en charge toutes les dettes et obligations de la débitrice résultant des opérations courantes âgées de moins de soixante jours au moment de la clôture.

[66] Au 15 avril 2005, la liste des comptes à recevoir de la société montrait un solde de 9 551 885 $ net des comptes exclus qui totalisaient 1 022 765 $ à cette date. Les états financiers de la société montraient un solde des stocks antérieurs à la transaction pour un montant de 7 800 000 $. Une évaluation des actifs, préparée par une tierce partie au 21 novembre 2005, conclut que la valeur des actifs inclus dans la convention de vente était de 10 047 000 $ US (11 955 930 $ CAN).

[67] La liste des comptes fournisseurs au 15 avril 2005 totalisait 5 807 014 $.

[68] En résumé, GDX a acquis des actifs de la débitrice pour un montant de 29 296 850 $ à un coût de 1 $ plus la prise en charge de dettes s'élevant à 5 807 014 $.

[69] **RECOMMANDATION DU SYNDIC**

[70] Le syndic n'a pas été en mesure, au cours du processus de la proposition, d'obtenir un accès complet aux livres de la débitrice. Les conseillers juridiques du syndic ont confirmé leur incapacité, dans les circonstances, à fournir un avis juridique sur la validité et l'opposabilité des garanties. En conséquence, la distribution potentielle aux créanciers chirographaires comparativement à la proposition ne peut être adéquatement comparée et pourrait donc être significativement affectée.

[71] En conséquence, le syndic ne peut et refuse de faire quelque recommandation que ce soit en faveur ou contre la proposition déposée par la débitrice principalement parce que :

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«- le statut des garanties octroyées à la société mère en ce qui a trait à leur validité et opposabilité ne peut être confirmé;

- incapable de mesurer convenablement l'impact de l'exclusion des transactions révisables et des paiements préférentiels sur les créances chirographaires.»

[72] Il est également à noter que la débitrice a modifié sa dénomination sociale puisque, selon le procureur de la requérante, le fait qu'une compagnie du nom de SaarGummi fasse faillite pourrait avoir un impact négatif sur les affaires de la compagnie mère et des compagnies affiliées. Il mentionne qu'une faillite pourrait ternir la réputation de SaarGummi face aux manufacturiers automobiles.

[73] **POSITION DU SYNDIC**

[74] Le syndic mentionne qu'il n'a eu aucune collaboration de la débitrice ou des compagnies liées à celle-ci. Il n'a toujours pas reçu de preuve de réclamation de la requérante. Il lui est impossible d'obtenir une opinion sur la validité des garanties de la requérante.

[75] Il mentionne qu'un ajournement de l'assemblée des créanciers sera probablement demandé pour pouvoir enquêter sur les transactions révisables. En effet, comment les créanciers pourraient renoncer aux recours prévus aux articles 91 à 101 L.F.I. s'ils sont incapables d'analyser les recours potentiels ?

[76] Il craint que la requérante, qui est l'alter ego de la débitrice, contrôle l'élection des inspecteurs, du comité des créanciers et la confirmation de sa nomination.

[77] **POSITION D'INDUSTRIE CANADA ET INVESTISSEMENT QUÉBEC**

[78] Ils prétendent que la requérante est essentiellement l'alter ego de la débitrice. Ni la débitrice, ni la requérante n'a fait preuve de transparence dans le présent dossier. La débitrice a vendu ses actifs en catimini il y a 2 ans et l'avis d'intention de déposer une proposition fait suite à une requête pour ordonnance de séquestre déposée le 22 décembre 2005 par Investissement Québec. Ils plaident qu'une personne ne peut voter si elle n'a pas produit sa preuve de réclamation conformément à l'article 109 (1) L.F.I. et qu'en conséquence, la requête en vertu de 109 (7) L.F.I. serait irrecevable. Ils plaident qu'en accordant la requête le tribunal accorderait un droit de vote à une personne qui n'en détient pas en vertu de l'article 109 (1).

[79] Ils plaident principalement avoir une grande réserve face à la réclamation de 50 000 000 $ de la requérante.

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[80] Aucune preuve de décaissement de ce 50 000 000 $ ne leur a été faite. Le syndic demande cette information depuis 6 mois sans l'avoir obtenue. Ils plaident également que les hypothèques ont été données en garantie de dettes qui auraient été contractées dans le passé.

[81] Ils ont reçu copie d'une convention de cession de 2004 mais n'ont pas reçu copie de la convention originale à laquelle réfère celle de 2004.

[82] Bien que la convention de prêt d'août 2004 mentionne une dette de 84 000 000 $, cette dette aurait été réduite à 50 000 000 $ quelques mois plus tard, sans que l'on sache pourquoi. Les états financiers de la débitrice ne reflètent pas le dettes qu'elle admet avoir face à la requérante.

[83] Les deux créanciers mentionnent que s'il n'y a pas d'événements particuliers d'ici l'assemblée, il est vraisemblable qu'ils voteront contre la proposition. En conséquence, la débitrice sera en faillite.

[84] Ils mentionnent qu'un débat judiciaire s'engagera avec la requérante et qu'ils entendent attaquer les transactions effectuées entre la débitrice et la requérante. Ils prétendent donc qu'il ne serait pas dans l'intérêt de la masse des créanciers d'accorder la requête et d'ainsi, leur enlever l'influence qu'ils peuvent avoir lors des assemblées des créanciers.

[85] **CRITÈRE D'EXERCICE DE LA DISCRÉTION DU TRIBUNAL**

[86] Tel que déjà mentionné, une fois établies, les conditions d'exercice de la demande fondée sur l'article 109 (7) L.F.I., le tribunal doit exercer sa discrétion judiciaire.

[87] En exerçant sa discrétion, le tribunal doit éviter de s'immiscer dans le travail du syndic ou du président d'assemblée qui doit recevoir et accepter les preuves de réclamations produites.

[88] Le tribunal ne doit donc pas accorder un droit de vote à un créancier qui autrement n'en n'aurait pas eu. En conséquence, lors de l'exercice de son pouvoir discrétionnaire, le tribunal pourra prendre en considération le fait qu'une preuve de réclamation a déjà été produite et acceptée par le syndic. Bien que ce critère ne soit pas déterminant en soi, il pourra être un des critères utilisé par le tribunal pour exercer sa discrétion.

[89] Par contre, le libellé de l'article 109 (7) semble permettre au tribunal d'autoriser le vote d'un créancier même si sa preuve de réclamation n'a pas encore été déposée. L'autorisation donnée par le tribunal serait alors conditionnelle au dépôt d'une preuve de réclamation conforme à l'article 109 (1) L.F.I. et jusqu'à concurrence du montant de la preuve de réclamation.

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[90] Le tribunal croit également que dans l'exercice de sa discrétion, le juge pourrait accorder un droit de vote à un créancier mais en le limitant et en le balisant. Par exemple, le créancier pourrait être admis à voter sur un nombre limité d'inspecteurs ou de membres du comité de créanciers sur la proposition.

[91] Mais puisqu'il ne semble y avoir aucun critère établi pour l'exercice de la discrétion, le tribunal croit opportun de baser sa discrétion sur les objectifs recherchés par le législateur lors de la rédaction de la *Loi sur la faillite et l'insolvabilité*. Le tribunal basera donc l'exercice de sa discrétion sur six objectifs recherchés par le législateur lors de la rédaction et des amendements apportés à la loi, à savoir :

1- la réhabilitation du débiteur;
2- réalisation rapide et ordonnée des biens du débiteur;
3- annulation des paiements préférentiels et des transactions révisables;
4- distribution juste des actifs du débiteur;
5- réorganisation commerciale efficace des entreprises en difficulté financière;
6- protection de l'intérêt public.

[92] Aucun de ces critères n'est en soi déterminant. Ils n'ont pas tous à être rencontrés mais devraient tout de même servir à l'exercice de la discrétion judiciaire. Un septième critère qui n'est pas tiré de la *Loi sur la faillite*, mais plutôt de l'exercice général des pouvoirs discrétionnaires de la Cour supérieure, est que celui qui se présente devant le tribunal pour lui demander d'exercer une discrétion judiciaire devrait être de bonne foi et avoir «les mains propres».

[93] **RÉHABILITATION DU DÉBITEUR**

[94] Bien que la réhabilitation du débiteur soit un objectif de la *Loi sur la faillite*, le tribunal ne croit pas que celui-ci doit influencer sa décision dans la présente cause puisque nous sommes en présence d'une corporation qui ne peut, en vertu de la *Loi sur la faillite*, être libérée de ses dettes. Ce critère s'appliquerait donc dans le cas d'une proposition ou d'une faillite d'une personne physique.

[95] **RÉALISATION RAPIDE ET ORDONNÉE DES BIENS DU DÉBITEUR**

[96] Comme le mentionne la Cour d'appel dans l'arrêt de Excavation Sanoduc inc.[3] :

> «Notre Cour a pris position sur le sujet et s'est prononcée en faveur d'une application souple et large de la compétence de la division de faillite afin de faciliter le prompt règlement des affaires d'insolvabilité.»

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[3] [1991] R.D.J. 423

[97] Cette décision confirme un courant jurisprudentiel établi depuis déjà fort longtemps à l'effet qu'il doit y avoir réalisation rapide et ordonnée des biens du débiteur[4]. Que nous soyons en matière de faillite ou de proposition, il irait à l'encontre d'un objectif de la *Loi sur la faillite* de permettre que par des stratégies et des moyens dilatoires un créancier lié ayant pu effectuer des transactions révisables avec la débitrice puisse retarder la réalisation des actifs de la débitrice.

[98] Ainsi, le tribunal croit que la requérante est mue par des motifs qui vont à l'encontre des objectifs de la loi. Laisser la requérante s'ingérer dans le processus des assemblées et dans le choix du syndic et des inspecteurs pourrait facilement faire en sorte que des recours prévus à la loi ne puissent être exercés et obliger les créanciers de la débitrice à demander l'autorisation à la Cour d'intenter eux-mêmes des procédures avec tous les inconvénients que cela comporte.

[99] D'ailleurs, il est révélateur que la requérante accepte de renoncer à ses réclamations contre la débitrice si la proposition est acceptée et si les créanciers acceptent de renoncer aux recours prévus aux articles 91 à 101 de la loi. Elle ne peut donc prétendre vouloir accélérer le processus de réalisation dans le cadre de la proposition pour recevoir son dû puisqu'elle accepte à l'avance de renoncer à sa réclamation.

[100] **ANNULATION DES PAIEMENTS PRÉFÉRENTIELS ET DES TRANSACTIONS RÉVISABLES**

[101] Comme le mentionne la Cour suprême dans Hudson c. Benallack[5] :

> «La législation sur la faillite a pour objet de garantir le partage des biens du débiteur failli proportionnellement entre tous ses créanciers. L'article 112 de la loi prévoit que, sous réserve des dispositions de la loi, toutes les réclamations établies dans la faillite doivent être acquittées *pari passu*. La loi vise à mettre tous les créanciers sur un pied d'égalité. En général, jusqu'à ce qu'il soit insolvable ou projette de faire un acte de faillite, le débiteur est tout à fait libre d'administrer ses biens à sa guise et il peut préférer l'un ou l'autre de ses créanciers. Toutefois, dès qu'il devient insolvable, il ne peut plus rien faire qui sorte du cours ordinaire des affaires et ait pour effet de procurer une préférence à un créancier sur les autres. Si un créancier reçoit une préférence sur les autres par suite d'un acte délibéré et frauduleux du débiteur, le principe de l'égalité à la base de la législation sur la faillite est mis en échec.»

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[4] Re Commonwealth Investors Syndicate Ltd, [1986] 60 C.B.R. (N.S.) 193; Re Wooltex Recycling (can) Ltd, [1985] 56 C.B.R. (N.S.) 271; Re Arnco Business Service Ltd, [1993] 49 C.B.R. (N.S.) 188; Langille c. Toronto Dominion Bank, [1981], 37 C.B.R. (N.S.) 35; Markis c. Soccio, [1954] 35 C.B.R. 1

[5] [1976] 2 R.C.S. 168

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[102] Encore une fois, des transactions et des garanties ont été consenties par la débitrice peu de temps avant le dépôt d'une requête pour ordonnance de séquestre. Le tribunal n'a évidemment pas à se prononcer sur les allégations des créanciers qui contestent la requête de la requérante.

[103] Par contre, les agissements de la requérante et de la débitrice soulèvent au tribunal et soulèveraient à toute personne raisonnable de sérieuses questions sur la légalité des transactions.

[104] Le tribunal ne croit donc pas que cet objectif serait rencontré si la requête de la requérante était accordée.

[105] **DISTRIBUTION JUSTE DES ACTIFS DU DÉBITEUR**

[106] C'est, entre autres, la raison pour laquelle le législateur a prévu la suspension de toutes les procédures contre un débiteur dès le dépôt d'un avis d'intention ou contre un failli lorsqu'il fait cession de ses biens[6].

[107] Dans le présent dossier, la créance de la requérante soulève plusieurs interrogations en opposition à plusieurs créanciers, incluant deux créanciers qui gèrent des fonds publics, dont les créances ne sont pas pour le moment contestées. Il nous semble que donner raison à la requérante alors qu'elle refuse ou néglige de répondre aux demandes répétées du syndic et d'Investissement Québec et Industrie Canada de fournir des preuves de décaissement de la somme de 50 000 000 $ qu'elle prétend lui être due ne ferait que compliquer la réalisation des actifs de la débitrice et la répartition de ses biens.

[108] Accueillir la requête pourrait mettre en péril les vérifications légitimes de la créance alléguée de 50 000 000 $ de la débitrice et pourrait, par le fait même, empêcher une distribution juste des actifs de la débitrice. Si une dette n'est pas due et que l'on accepte sa réclamation, il y aura déséquilibre dans le partage des actifs.

[109] **RÉORGANISATION COMMERCIALE EFFICACE DES ENTREPRISES EN DIFFICULTÉ FINANCIÈRE**

[110] La proposition présentée s'apparente beaucoup plus à une proposition de liquidation qu'à une proposition faite dans le but de continuer ses affaires et de permettre une réorganisation financière.

[111] C'est probablement la raison pour laquelle tous les procureurs ainsi que le syndic semblaient beaucoup plus convaincus que la proposition était vouée à l'échec et que la faillite semblait inévitable.

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[6] Vachon c. Comm. d'emploi et immigration Canada, [1985] 57 C.B.R. (N.S.) 113 (C.S.C.)

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[112] Dans les circonstances, ce critère, bien qu'il pourrait être beaucoup plus décisif dans d'autres cas, devient un critère neutre en l'espèce.

[113] **PROTECTION DE L'INTÉRÊT PUBLIC**

[114] Comme le mentionnent les auteurs Boucher et Fortin[7] :

> «Afin de protéger une certaine moralité commerciale dans les relations d'affaires, le tribunal ne peut se restreindre à considérer les seuls intérêts des créanciers et du débiteur. L'intérêt public doit également être protégé, par exemple, lors de la demande d'homologation d'un concordat ou de la demande de libération d'un débiteur.»

[115] Accorder la requête enverrait, de l'avis du tribunal, un mauvais signal sur l'utilisation que peut faire un créancier de la *Loi sur la faillite et l'insolvabilité*. Le rapport du syndic soulève des questions sérieuses et troublantes. Il nous semble qu'il serait contre l'intérêt public que le tribunal exerce sa discrétion et que par le fait même, des créanciers détenant des créances totalisant 8 000 000 $ puissent être obligés de voter immédiatement sur une proposition sans pouvoir demander d'investigation de la part du syndic et les obliger à voter sur une proposition qu'ils n'auront pu étudier.

[116] **THÉORIE DES MAINS PROPRES**

[117] Lorsqu'un requérant demande à la Cour supérieure d'exercer sa discrétion judiciaire, il doit se présenter avec «les mains propres».

[118] Cette théorie des mains propres remonte au 18ième siècle et a été utilisée à plusieurs reprises au Canada et au Québec[8]. Cette théorie a été élaborée par soucis d'équité et justement la *Loi sur la faillite et l'insolvabilité* est une loi d'équité.

[119] Ainsi, les transactions faites par la requérante avec la débitrice soulèvent de nombreuses interrogations. Mais il y a plus, les comportements de la débitrice et de la requérante laissent voir que la débitrice est beaucoup plus préoccupée par les conséquences de son insolvabilité sur les compagnies liées à elle qu'à la protection des intérêts de ses créanciers ordinaires.

[120] C'est ainsi qu'elle a changé sa dénomination sociale pour ne pas nuire à ses compagnies liées. Aussi, le procureur de la requérante a lui-même affirmé que les transactions entre la requérante et la débitrice ont été faites pour éviter que le nom de SaarGummi soit lié à une compagnie qui ne respecte pas ses contrats.

[7] Bernard BOUCHER et Jean-Yves FORTIN, Faillite et insolvabilité, Une perspective québécoise de la jurisprudence canadienne

[8] Paul-Arthur GENDREAU, France THIBAULT, Denis FERLAND, Bernard CLICHE et Martine GRAVEL, L'injonction, Les Éd. Yvon Blais, 1998, page 36

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[121] De plus, la débitrice et la requérante qui, selon la preuve *prima facie*, est son alter ego, n'ont collaboré d'aucune façon avec le syndic dans l'élaboration d'une proposition viable. La requérante n'a toujours pas produit sa preuve de réclamation et n'a toujours pas fourni au syndic et aux créanciers de la débitrice des preuves que les sommes sont véritablement dues par la débitrice à la requérante. Les contrats produits au soutien de la requête sont loin d'être impressionnants et font penser beaucoup plus à une réorganisation avant faillite qu'à des transactions faites de bonne foi. Lorsqu'il y a un manque flagrant de collaboration entre la débitrice et le syndic, il ne devrait pas appartenir à la débitrice de choisir un syndic plus «collaborateur».

[122] Finalement, il me semble que la requête urgente présentée par la requérante n'est urgente que parce qu'elle a été présentée à la dernière minute. Aucun fait particulier n'est survenu dernièrement pouvant expliquer la raison pour laquelle elle a attendu à la dernière minute pour présenter sa requête.

[123] Bien sûr, il arrivera fréquemment qu'une partie demandera à la Cour d'exercer une discrétion rapidement, surtout dans des dossiers de nature commerciale. Par contre, dans le présent cas, plusieurs demandes de prorogation de délai ont été faites et la proposition a été déposée depuis près d'un mois et ce n'est qu'à la dernière minute que la demande a été présentée.

[124] La requérante ne mérite pas le droit exceptionnel qu'elle revendique.

[125] **POUR CES MOTIFS, LE TRIBUNAL :**

[126] **REJETTE** la requête pour obtenir un droit de vote à un assemblée des créanciers.

[127] **LE TOUT** avec dépens.

GAÉTAN DUMAS, j.c.s.

Me Philippe Buist
Stikeman Elliott
Procureur de la débitrice

Me Alain Gaul
Davies Ward Phillips & Vineberg
Procureur de la requérante

Me Yanick Vlasak
Heenan Blaikie
Procureur du syndic

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Me Pierre Lecavalier
Justice Canada
Procureur d'Industrie Canada

Me Éric Lalanne
De Grangpré Chait
Procureur d'Investissement Québec

Date d'audience : 6 juin 2006

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TAB E

SUPERIOR COURT

CANADA

PROVINCE OF QUEBEC

DISTRICT OF SAINT-FRANÇOIS

N °: 450-11-000274-054

DATE: June 8, 2006

UNDER THE CHAIR: HONORABLE GAÉTAN DUMAS, jcs

In the case of the proposal to:

SAARGUMMI QUÉBEC INC. legally constituted legal entity having its registered office at 175, rue Péladeau, in Magog, province of Quebec

Debtor

and

SG OVERSEAS LIMITED, a legal entity incorporated under the Laws of Guernsey having its place of business at East Wing, Trafalgar Court, Admiral Park, St. Peter Port Guernsey

applicant

and

SAMSON BÉLAIR DELOITTE & TOUCHE INC., A legally constituted corporation having its place of business at 1 Place Ville-Marie, Suite 3000, in Montréal, Province of Québec

trustee

JUDGMENT

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[1] On February 14, 2006, the Debtor filed with the Official Receiver a notice of its intention to make a proposal and Samson Bélair Deloitte & Touche inc. has been appointed trustee to the notice of intent.

[2] The debtor SaarGummi Québec inc. has changed its name to Orange Peach Real Estate inc. May 10, 2006.

[3] It is admitted that the applicant SG Overseas Limited is a creditor who is not entitled to vote under section 109 (6) of *the Bankruptcy and Insolvency Act*(BIA) since she has a relationship of dependence with the debtor.

[4] It is also accepted that, pursuant to section 54 (3) BIA , the applicant could vote against the proposal filed by the debtor but not in favor.

[5] The applicant seeks leave to be authorized under section 109 (7) BIA to vote at the creditors' meeting since it claims to hold more than 80% of the ordinary debts against the debtor. The applicant alleges that since it holds more than 80% of the unsecured claims, it meets the conditions for the application of Article 109 (7) BIA. It is therefore in the best interest of the applicant that it may vote at the meeting on the proposal of the debtor.

[6] The applicant's main plea is that since she is the creditor who will benefit the most from the administration of the bankruptcy, it would be normal for her to be able to vote at the creditors' meetings. According to her, no prejudice would be caused to the trustee or to any other creditor if his claim was successful.

[7] His main argument is that it would be unfair and contrary to the interests of justice to exclude him from the vote at the meeting of creditors and allow a minority of creditors to be the only ones to have the right to vote at the meeting. this assembly.

[8] His request, filed on 1 st June, was heard on June 6 and the creditors' meeting on the proposal to be held on 9 June 2006.

[9] The applicant alleges that she is a regular creditor for $ 48,339,542 out of a total of $ 59,637,853 of common creditors.

[10] The trustee at the proposal of the debtor opposes the motion as well as Industry Canada, creditor for $ 2,445,000 and Investissement Québec, creditor for a sum of $ 2,458,000.

[11] In short, apart from the applicant, Industry Canada and Investissement Québec are the principal creditors of the debtor.

[12] A legal battle between the parties seems to be beginning and it is clear that the strategies adopted by the applicant and the other creditors are divergent.

[13] The debtor, for her part, agrees to the applicant's motion and supports her claims.

[14] No case law or doctrine discussing the criteria for the application of section 109 (7) BIA could be submitted by the parties or found by the court.

[15] Only an unreported decision made on March 3, 1997 by Registrar Chantal Flamand in *Greenberg Stores Limited* ***[1]*** could have been consulted by the court. On the other hand, this decision is of no help since it is not motivated and does not seem to have been contested. This decision allowed a creditor to vote under section 109 (7) BIA, but limited the exercise of his right to vote in the choice of trustee and the appointment of inspectors.

[16] In the submissions of counsel, there appeared to be three main points on which the applicant would have an interest in voting and on which the parties disagreed.

[17] Pursuant to section 52 L.FI , it is possible, when the creditors so require by ordinary resolution at the meeting at which a proposal is considered, to adjourn such meeting to another date to allow for further assessment or investigation of the debtor's affairs and property.

[18] The Attorney for the Syndic and the counsel for Industry Canada and Investissement Québec have already announced that they intend to request that an investigation be conducted into transactions between the debtor and the applicant. It is therefore quite possible that they request an adjournment of the meeting for these audits to be made. The applicant, for her part, objects to a remission of the meeting and alleges that she wants the file to be carried out expeditiously. She therefore intends to oppose any discount.

[19] In the event of rejection of the proposal, the debtor will be bankrupt and the parties will not agree on the confirmation of the trustee's choice. The applicant appears to intend not to confirm Samson Bélair as trustee and appears to want to choose another.

[20] The third main point of disagreement is on the choice of inspectors and the creditor committee provided for in the proposal. These are the three foreseeable points of contention in the short term but it is obvious that there will be others.

[21] It should be noted that the applicant has not yet filed her proof of claim with the trustee and that she has not given the trustee the information that the trustee has required from her for several months. . Collaboration between the debtor and the trustee seems deficient and the trustee has raised this fact in the report he intends to submit to the creditors at the meeting.

[22] **CRITERIA FOR THE APPLICATION OF ARTICLE 109 (7) BIA**

[23] The only requirement for Parliament to apply section 109 (7) is that the court may grant a non - arm's length creditor, who can not vote under section 109 (6).) , permission to vote if all of the creditors who dealt at arm's length do not together account for at least 20% in value of the claims against the debtor.

[24] In this case, the applicant represents 85% of the claims, there is no need to analyze the status of other creditors. On the other hand, it would be possible for a tied creditor, who holds only 50% of the claims, to meet the requirements of section 109 (7) if other creditors are also related. This is why the legislator, rather than using a percentage of 80, used the phrase "when all creditors who have dealt at arm's length with the debtor do not together account for at least 20% in value claims. "

[25] Since the legislator mentions that a creditor may vote with the authorization of the court, this means, in our opinion, that the court will have to exercise its discretion to grant the authorization or not.

[26] If the legislator had intended that the right to vote be automatic as soon as a creditor has more than 80% of the provable claims, he would not have foreseen the necessity of obtaining the authorization of the court to vote. A creditor can not simply be satisfied that he holds 85% of the claims to obtain this permission.

[27] Since the vote of a non-arm's length creditor is an exception to the general rule, it will be up to that creditor to demonstrate on a preponderance of evidence that the court should exercise its discretion.

[28] **THE FACTS**

[29] Since the court must exercise judicial discretion, it seems to us that it must be exercised according to the facts of each case. It is essential to analyze the situation in which the parties find themselves.

[30] The debtor operated until April 15, 2005, a company in the field of rubber parts in the automotive industry whose head office was located in Magog, province of Quebec. The company offered a wide variety of rubber parts to some of the largest manufacturers in the automotive industry, mainly at General Motors Corporation (GM). The company is a wholly owned subsidiary of SaarGummi Group which operates production plants in Europe, Asia and America. The group employs more than 3,700 people.

[31] On March 31, 2005, the Debtor sold a portion of its operations to KGI Automotive Systems Inc. (KGI).

[32] On April 15, 2005, the Debtor sold the remainder of its operations to GDX Automotive Inc. (GDX).

[33] Following the sale of its manufacturing operations, the debtor's business consisted of the administration of the leased buildings, which are located in Magog and leased to GDX Automotive Inc., a company related to the debtor.

[34] On February 14, 2006, a notice of intention to make a proposal was filed and an extension of time was requested on March 14 and April 27, 2006. Finally, on May 19, the debtor filed her proposal with the trustee.

[35] Following the sale of the manufacturing operations in 2005, the debtor remained the owner of five industrial buildings located in Magog. The debtor's current operations now consist of the administration and rental of these leased properties and generate monthly revenues of approximately $ 138,000.

[36] Four of these properties are leased to GDX and KGI with an option to renew.

[37] Under two mortgage certificates, dated December 23, 2004 and March 17, 2005, granted by the debtor to her parent company SG Overseas Ltd (the applicant), all her assets, at the time of the filing of the proposal, are encumbered in favor of the applicant.

[38] At the time of the filing of the proposal, the corporation had $ 2,416,000 in a bank account held in trust by its legal counsel.

[39] In a motion for an extension of time to file her proposal, the Debtor alleged, among other things, that prior to the filing of the Notice of Proposal A & R. Belley (Belley) had been seized before judgment on September 15, 2005 , certain property of the debtor, including several of its properties and its bank accounts with National Bank in which it held the sum of $ 1,700,000.

[40] She alleges a judgment that was rendered on October 13, 2005 by the undersigned on a motion to annul the seizure before judgment made by Belley. Since this judgment is alleged, it is part of the record and the court can take it into account.

[41] That judgment [2] mentions inter alia that:

[7] In April 2005, SaarGummi sold its factories in Estrie to GDX Automotive. GDX Automotive is one of the names used by GDX Canada Inc., a foreign-owned company that specializes in the manufacture of automotive rubber products and whose majority shareholder is GDX International Holdings Ltd.

[8] The sale of SaarGummi's plants was announced on the GDX Automotive website through a press release dated April 18, 2005, which stated that GDX Automotive announces:

"GDX Automotive today announced the closing of its acquisition of SaarGummi operations in Quebec, Canada and Mexico. (...) Current SaarGummi operations in Canada include six facilities with approximately 1,000 employees. "

[9] In all likelihood, SaarGummi has ceased operations in Canada. The SaarGummi Group website confirms that the Group's operations are now in the United States, Latin America and Europe and Asia. The only company identified on the SaarGummi Group's website at SG Technologies has an address in Germany.

[10] SaarGummi is a subsidiary of SaarGummi GmbH, a German company with other subsidiaries in Germany, Brazil, Spain, India, the United States and the Czech Republic.

[11] The number of SaarGummi employees increased from 1,300 in 2004 to 1 in 2005, suggesting that SaarGummi has no other commercial operation in Canada.

[12] Defendant SaarGummi will plead on the motion to quash the seizure that it should read that SaarGummi no longer has a manufacturing operation since even if it has only one employee, it still has operations as it owns buildings and collects rents.

[13] On the other hand, following the sale of its plants to GDX Canada, SaarGummi has remained the owner of several buildings, most of which house factories sold to GDX Canada inc.

[14] In fact, four of SaarGummi's eight properties are leased to GDX Canada. All of these properties are located in Magog and those leased to GDX Canada are subject to leases in which a purchase option and right of first refusal in favor of GDX Canada has been provided.

[15] Four of the eight buildings are mortgaged for a total amount of $ 10,000,000.00, almost the equivalent of the municipal assessments of these four buildings put together.

[16] Two of SaarGummi's three vacant lots are mortgaged in favor of National Bank of Canada. Mortgages affecting the four properties in the amount of $ 10,000,000.00 were granted to SG Overseas Limited, a company likely to be related to SaarGummi. In addition, the mortgages granted in 2004 and March 2005 also give SG Overseas Limited the universality of SaarGummi's movable property.

(...)

[23] The defendant can not simply argue that good faith is presumed and that the judge called to decide on the sufficiency of the affidavit must hold that it is in good faith in the transactions it has done.

[24] A party is also presumed to know the consequences of his actions. To divest itself of all the assets that it owns in Quebec and to mortgage those which remain to it in favor of a company which is related to it can certainly give to a reasonable person very good reasons to believe that without the profit seizure before judgment the recovery of his debt will be jeopardized.

(...)

[28] In this case, this Tribunal must hold the facts to be true. As to the falsity of the allegations in the affidavit, the judge will have to decide whether the facts alleged presumptively establish an intention on the part of the defendant to evade the execution of a possible judgment; or rather, if all the facts put in evidence may give rise to fears that, without the seizure, the recovery of the claim may be endangered.

[29] The court believes that a reasonable person who is aware of facts alleged in the defendant's affidavit will conclude that the plaintiff will never be able to execute a judgment if she does not put the defendant's property under the control of the defendant. justice during the proceedings.

[30] Of course, the mere fact that a defendant is a foreign company is not sufficient on its own to justify the seizure of assets before judgment. Thus, in Spectra Premium Industries inc. c. Tremplon inc. [4] seizure was broken although the defendant was a foreign company. On the other hand, in this case, the plaintiff-respondent knew from the outset of the negotiations that she herself had initiated that the defendant-applicant was a commercial corporation incorporated under the laws of the Republic of Panama. She was also aware that the directors and shareholders were European.

[31] The same is true in Grenier v. Rauh [5] where Frenette J. found the allegations of an affidavit insufficient since the defendant was a practicing physician in British Columbia in 1982, the date of the institution of the action and was at the time of the issuance of the seizure before judgment.

[32] In short, a fact in itself may not be sufficient for the issuance of a seizure before judgment. This does not mean that this fact added to all others will prevent the issuance of a writ of seizure before judgment.

(...)

[35] Keep in mind that the property of a debtor is the common pledge of his creditors [7]. A creditor doing business with a debtor is entitled to expect the debtor's assets to be used to pay his debts and not to be repatriated to another country. In a case where the transfer of assets in the United States had consequences similar to ours, the Court of Appeal decided [8] :

"In such circumstances, because of the appellants, the only defendant in the province of Quebec became without any property whatsoever rendering impossible for any purpose the execution of any judgment against it.

In the circumstances, I can only agree with the trial judge's conclusion, which reads as follows:

"There is no question that I arrive at the conclusion that a reasonable man, given the facts of this case, a reasonable man could arrive at a position of objective fear. I find that, given these facts, an objective man would arrive at the conclusion that recovery of the debt would be, and is, a jeopardy, without the remedy of a Seizure Before Judgment. "(Page 430)

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[4] AZ-98026241

[5] AZ-85021089

[7] Article 2644 C.cQ .

[8] Crown Leisure Products of Canada inc. c. Maurice P. Dean , 1989 CanLII 977 (QC CA) , [1989] RDJ 426 »

[42] The trustee's report states that the value of the debtor's real estate properties would be $ 18,140,000 according to an assessment prepared by Turcotte & Associés on January 25, 2005.

[43] The applicant is the only secured creditor declared on the assets of the debtor with a guaranteed claim of $ 10,208,388.

[44] The trustee sought legal advice from Heenan Blaikie, the trustee's independent legal counsel, with respect to the validity and enforceability of the published guarantees against the debtor's assets. This law firm advised the trustee that the loan transactions related to its guarantees were constituted under Guernsey's laws and that their firm was not qualified to issue an opinion under Guernsey's laws. In addition, the trustee was advised that a notice merely

limited to the validity and enforceability of the guarantees that would not take into account the facts, including the sale by the company of its transactions and inter-company transactions involving the debtor, its shareholders and affiliated companies would not fulfill the interests sought. As a result, Heenan Blaikie refused to

[45] Also according to the statutory balance sheet of the debtor, the debtor assesses unsecured creditors at $ 59,638,000, of which $ 52,909,990 are intercompany debts.

[46] **PROPOSAL**

[47] The proposal filed by the Debtor provides that an amount not exceeding $ 1,150,000 will be distributed to the creditors according to the following payment terms:

- employee claims will be paid in full;

- the Crown's claims will be paid in full within six months of the court's approval of the proposal;

- the professional fees will be paid by the company in priority of all the other claims;

- the parties related to the insolvent person have agreed to waive their participation in the distribution in order not to dilute the payment to the creditors ;

- all unsecured creditors will first receive the payment of their claim up to a maximum of $ 2,000. The balance, if any, will be prorated to a maximum of 15 ¢ per dollar;

- revisable transactions, preferential payments, etc. : the provisions of sections 91 to 101 of the Act and the provisions of any provincial law having a similar purpose will not apply to the proposal ;

[48] In his report, the trustee, in order to evaluate the filed proposal, prepared an analysis of the various possibilities of realization available to unsecured creditors in a bankruptcy scenario. He believes that the liquidation value in a bankruptcy at the time of the proposal would be $ 14,369,000.

[49] He also compiled tables that demonstrate a comparative analysis of the estimated mass distribution of unsecured creditors in the bankruptcy and proposal scenarios.

[50] Given the ambiguity that exists with respect to the validity and enforceability of the applicant's guarantees, the trustee has assessed both possibilities involving valid and invalid securities on the debtor's assets. The tables prepared by the trustee show that if the guarantees are valid in case of bankruptcy, the distribution to the creditors would be about 7% whereas it would be 20.6% if the guarantees of the applicant are not valid. In the case of a proposal, the achievement would be 15.8%.

[51] Of course, the tables prepared by the trustee take into account that the debtor's declared liabilities are valid and enforceable against the assets. As a result, the distribution scenario for a proposal seems much more appealing to ordinary creditors since it does not take into account the applicant's claims amounting to more than $ 50,000,000.

[52] **TRANSACTIONS THAT MAY NOT BE SUBJECT TO REVISION IN ACCORDANCE WITH THE PROPOSAL**

[53] Since the proposal excludes possible review by creditors of reviewable transactions and preferential payments subject to the provisions of sections 91 to 101 of the Act, the trustee attempted to summarize its main features. It notes significantly that the transactions proposed by the debtor as not being subject to revision include the debtor's sale of all of its manufacturing operations in the two separate transactions that occurred in March and April 2005. It therefore summarizes two transactions intervened with the debtor and their impact on its assets.

[54] **SALE OF EQUIPMENT TO KGI AUTOMOTIVE**

[55] This transaction took place on March 31, 2005 and consisted of two separate sales, the sale of the assets and the sale of the extrusion line.

[56] **SALE OF ASSETS**

[57] The sale price was $ 450,000, Applicable Taxes extra ($ 517,612.50).

[58] The sale of assets includes in-process products and raw materials. The value of products in process and raw materials was set at $ 139,300.

[59] KGI did not remit the sale price to the debtor but instead paid RPT Industrial inc. (RPT) up to the amount of debt owed by the debtor to RPT as at March 31, 2005, namely $ 571,934. RPT is a company related to KGI.

[60] When filing the report, the trustee was unable to confirm whether the balance owing to the debtor ($ 84,979) had been paid to him.

[61] In summary, out of a total price paid of $ 656,914, KGI paid $ 571,934 to RPT and a balance payable to the debtor would be $ 84,979.

[62] **SALE OF THE EXTRUSION LINE**

[63] KGI paid $ 520,000 for equipment with a book value of $ 640,000.

[64] **TRANSACTION BETWEEN THE DEBITRICE AND GDX AUTOMOTIVE**

[65] The trustee summarized the agreement as follows: GDX purchased accounts receivable from the debtor as of April 15, 2005 and purchased inventory held exclusively in connection with the transactions. GDX also purchased all tangible assets from the debtor and

paid for these assets the sum of $ 1 and assumed all of the debtor's debts and obligations arising from current transactions of less than 60 days at the time of closing. .

[66] As of April 15, 2005, the Company's accounts receivable balance showed a balance of $ 9,551,885 net of excluded accounts totaling $ 1,022,765 at that date. The Company's financial statements showed a pre-transaction inventory balance of $ 7,800,000. An asset valuation, prepared by a third party on November 21, 2005, concluded that the value of the assets included in the sale agreement was US $ 10,047,000 (CAN $ 11,955,930).

[67] The accounts payable as at April 15, 2005 totaled $ 5,807,014.

[68] In summary, GDX acquired $ 29,296,850 in assets from the debtor at a cost of $ 1 plus the assumption of debt of $ 5,807,014.

[69] **RECOMMENDATION OF THE SYNDIC**

[70] The trustee was not able, during the proposal process, to obtain full access to the debtor's books. The trustee's legal counsel confirmed their inability, in the circumstances, to provide legal advice on the validity and enforceability of the collateral. As a result, the potential distribution to unsecured creditors compared to the proposal can not be adequately compared and could therefore be significantly affected.

[71] Accordingly, the trustee can not and refuses to make any recommendation in favor of or against the proposal filed by the debtor mainly because:

"- the status of the guarantees granted to the parent company with regard to their validity and opposability can not be confirmed;

- unable to properly measure the impact of the exclusion of reviewable transactions and preferential payments on unsecured receivables. "

[72] It should also be noted that the debtor changed her name since, according to the applicant's solicitor, the fact that a company named SaarGummi went bankrupt could have a negative impact on the affairs of the parent company and affiliated companies. He says bankruptcy could tarnish SaarGummi's reputation against automakers.

[73] **POSITION OF THE SYNDIC**

[74] The trustee mentions that he had no cooperation from the debtor or the companies related to it. He still has not received proof of complaint from the complainant. It is impossible for it to obtain an opinion on the validity of the applicant's guarantees.

[75] He mentions that an adjournment of the meeting of creditors will probably be requested in order to investigate the reviewable transactions. Indeed, how could creditors waive the remedies provided for in Articles 91 to 101 L.FI if they are unable to analyze potential remedies?

[76] He is concerned that the applicant, who is the alter ego of the debtor, will control the election of the inspectors, the creditors' committee and the confirmation of her appointment.

[77] **INDUSTRY CANADA AND INVESTISSEMENT QUÉBEC POSITION**

[78] They claim that the applicant is essentially the alter ego of the debtor. Neither the debtor nor the applicant has been transparent in this case. The debtor sold its assets on the sly 2 years ago and the notice of intention to file a proposal follows a request for an order for sequestration filed on December 22, 2005 by Investissement Québec. They argue that a person can not vote if they have not filed their proof of claim pursuant to section 109 (1) BIA and, therefore, the application under 109 (7) BIA would be inadmissible. They argue that in granting the petition the court would grant a right to vote to a person who does notArticle 109 (1) .

[79] They plead primarily to have a large reserve in the face of the applicant's claim of $ 50,000,000.

[80] No proof of disbursement of this $ 50,000,000 was made to them. The trustee has been requesting this information for 6 months without having obtained it. They also argue that the mortgages were given as security for debts that would have been incurred in the past.

[81] They received a copy of a 2004 surrender agreement but did not receive a copy of the original agreement to which the 2004 agreement refers.

[82] Although the loan agreement of August 2004 mentions a debt of $ 84,000,000, this debt would have been reduced to $ 50,000,000 a few months later, without anyone knowing why. The financial statements of the debtor do not reflect the debts she admits to having against the applicant.

[83] The two creditors mention that if there are no particular events by the time of the meeting, it is likely that they will vote against the proposal. As a result, the debtor will be bankrupt.

[84] They mention that a judicial debate will begin with the applicant and that they intend to attack the transactions between the debtor and the applicant. They claim, therefore, that

it would not be in the interests of the mass of creditors to grant the petition and thus to deprive them of the influence they may have in the meetings of creditors.

[85] CRITERIA FOR EXERCISING THE DISCRETION OF THE TRIBUNAL

[86] As already mentioned, once the conditions for the application under section 109 (7) BIA have been established , the court must exercise its judicial discretion.

[87] In exercising its discretion, the court must avoid interfering with the work of the syndic or the chairman of the meeting who must receive and accept the evidence of claims filed.

[88] The court must therefore not grant a vote to a creditor who would otherwise not have had a vote. Accordingly, in exercising its discretion, the court may take into consideration the fact that a proof of claim has already been filed and accepted by the trustee. Although this test is not determinative in itself, it may be one of the criteria used by the court to exercise its discretion.

[89] On the other hand, the wording of section 109 (7) seems to allow the court to authorize the vote of a creditor even though his proof of claim has not yet been filed. The authorization given by the court would then be conditional on the filing of a proof of claim in accordance with section 109 (1) BIA and up to the amount of the proof of claim.

[90] The court also believes that in exercising its discretion, the judge could grant a vote to a creditor but by limiting and marking it. For example, the creditor could be allowed to vote on a limited number of inspectors or creditor committee members on the proposal.

[91] Since, however, there does not appear to be any established test for the exercise of discretion, the court considers it appropriate to base its discretion on the objectives sought by the legislator when drafting *the Bankruptcy and Bankruptcy Act. insolvency* . The court will therefore base the exercise of its discretion on six objectives sought by the legislator when drafting and making amendments to the law, namely:

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.

[92] None of these criteria is in itself determinative. They do not all have to be met but should still serve the exercise of judicial discretion. A seventh criterion that is not drawn from the *Bankruptcy Act* , but rather from the general exercise of the discretionary powers of the Superior Court, is that the person who appears before the court to ask him to exercise judicial discretion should be in good faith and have "clean hands".

[93] **REHABILITATION OF THE DEBTOR**

[94] Although the rehabilitation of the debtor is an objective of the *Bankruptcy Act* , the court does not believe that the debtor should influence its decision in this case because we are in the presence of a corporation that can not, in under *the Bankruptcy Act* , be released from his debts. This criterion would therefore apply in the case of a proposal or a bankruptcy of a natural person.

[95] **FAST AND ORDERED REALIZATION OF THE DEBTOR'S ASSETS**

[96] As stated by the Court of Appeal in Excavation Sanoduc inc. [3] :

"This Court has taken a position on this issue and has ruled in favor of a flexible and broad application of the jurisdiction of the Bankruptcy Division to facilitate the prompt resolution of insolvency cases."

[97] This decision confirms a line of case law established for a very long time to the effect that there must be a rapid and orderly realization of the property of the debtor [4] . Whether we are in bankruptcy or in a proposal, it would be contrary to an objective of *the Bankruptcy Act* to allow by means of strategies and delaying tactics a related creditor who was able to make revisable transactions with the debtor. delay the realization of the assets of the debtor.

[98] Thus, the court believes that the applicant is motivated by reasons that run counter to the objectives of the law. Letting the applicant interfere in the assembly process and in the selection of the trustee and the inspectors could easily ensure that remedies under the law can not be exercised and oblige the creditors of the debtor to seek leave of the Court to bring proceedings themselves with all the disadvantages that entails.

[99] Moreover, it is significant that the applicant agrees to waive its claims against the debtor if the proposal is accepted and the creditors agree to waive the remedies provided for in sections 91 to 101 of the Act. It can not claim to want to accelerate the process of realization in the context of the proposal to receive its due since it agrees in advance to waive its claim.

[100] **CANCELLATION OF PREFERENTIAL PAYMENTS AND REVISABLE TRANSACTIONS**

[101] As mentioned by the Supreme Court in Hudson v. Benallack [5] :

"The purpose of bankruptcy legislation is to secure the division of the property of the bankrupt debtor proportionately among all its creditors. Article 112 of the law provides that, subject to the provisions of the law, all claims established in the bankruptcy must be paid *pari passu*. The law aims to put all creditors on an equal footing. In general, until he is insolvent or plans to bankruptcy, the debtor is completely free to administer his property as he sees fit and he may prefer one or other of his creditors . However, as soon as he becomes insolvent, he can not do anything that comes out of the ordinary course of business and has the effect of giving a preference to one creditor over the others. If a creditor receives a preference over the others as a result of a willful and fraudulent act of the debtor, the principle of equality on the basis of the bankruptcy legislation is defeated. "

[102] Once again, transactions and guarantees were granted by the debtor shortly before the filing of a request for a receivership order. The court obviously does not have to rule on the claims of the creditors who are challenging the plaintiff's claim.

[103] On the other hand, the actions of the plaintiff and the debtor raise in the court and would raise to any reasonable person serious questions about the legality of the transactions.

[104] Therefore, the court does not believe that this objective would be met if the applicant's application were granted.

[105] **JUST DISTRIBUTION OF THE ASSETS OF THE DEBTOR**

[106] This is, among other things, the reason why the legislator has provided for the suspension of all proceedings against a debtor upon the filing of a notice of intention or against a bankrupt when he disposes of his property [6] .

[107] In this case, the claim of the applicant raises several questions in opposition to several creditors, including two creditors who manage public funds, whose claims are not currently contested. It seems to us that the Applicant is correct when she refuses or neglects to respond to the repeated requests of the trustee and Investissement Québec and Industry Canada to provide proof of disbursement of the $ 50,000,000 she claims. being due would only complicate the realization of the assets of the debtor and the distribution of her property.

[108] Accommodating the application could jeopardize the legitimate audits of the debtor's alleged debt of $ 50,000,000 and could, therefore, prevent a fair distribution of the debtor's

assets. If a debt is not owed and we accept its claim, there will be imbalance in the sharing of assets.

[109] **EFFECTIVE BUSINESS REORGANIZATION OF COMPANIES IN FINANCIAL DIFFICULTY**

[110] The proposal presented is much more akin to a liquidation proposal than to a proposal made for the purpose of continuing its business and allowing a financial reorganization.

[111] This is probably the reason why all the prosecutors as well as the trustee seemed much more convinced that the proposal was doomed to fail and that the bankruptcy seemed inevitable.

[112] Under the circumstances, this test, although it could be much more decisive in other cases, becomes a neutral criterion in this case.

[113] **PROTECTION OF THE PUBLIC INTEREST**

[114] As noted by the authors Boucher and Fortin [7] :

"In order to protect a certain commercial morality in business relations, the court can not restrict itself to considering the sole interests of the creditors and the debtor. The public interest must also be protected, for example, in the application for approval of a composition or in the request for discharge of a debtor. "

[115] To grant the motion would, in the opinion of the court, send the wrong signal as to the use a creditor may make of *the Bankruptcy and Insolvency Act* . The trustee's report raises serious and troubling questions. It seems to us that it would be against the public interest for the court to exercise its discretion and that at the same time, creditors with claims totaling $ 8,000,000 may be required to vote immediately on a proposal without being able to request an investigation. on the part of the trustee and force them to vote on a proposal that they could not study.

[116] **THE THEORY OF OWN HANDS**

[117] When an applicant asks the Superior Court to exercise his judicial discretion, he must present himself with "clean hands".

[118] The clean hands doctrine dates back to the 18 th century and was used several times in Canada and Quebec [8] . This theory was developed for the sake of fairness and *the Bankruptcy and Insolvency Act* is a law of fairness.

[119] Thus, the transactions made by the applicant with the debtor raise many questions. But there is more, the behavior of the debtor and the applicant show that the debtor is

much more concerned about the consequences of her insolvency on companies related to it than the protection of the interests of its ordinary creditors.

[120] This is how she changed her name so as not to harm her related companies. Thus, counsel for the Applicant himself asserted that the transactions between the Applicant and the Debtor were made to prevent the name of SaarGummi from being linked to a company that does not respect its contracts.

[121] Moreover, the debtor and the applicant who, according to the *prima facie case* , is her alter ego, did not collaborate in any way with the trustee in the development of a viable proposition. The claimant has still not produced her proof of claim and has still not provided the trustee and creditors of the debtor with evidence that the sums are actually due by the debtor to the plaintiff. The contracts produced in support of the petition are far from impressive and are much more reminiscent of reorganization before bankruptcy than transactions made in good faith. Where there is a flagrant lack of cooperation between the debtor and the trustee,

[122] Finally, it seems to me that the urgent request made by the applicant is urgent only because it was presented at the last minute. There has been no particular fact lately that may explain why she waited at the last minute to present her request.

[123] Of course, it will often happen that a party will ask the Court to exercise discretion quickly, especially in commercial cases. However, in this case, several requests for extension of time were made and the proposal was filed for almost a month and it was only at the last minute that the request was made.

[124] The applicant does not deserve the exceptional right it claims.

[125] **FOR THESE REASONS, THE TRIBUNAL:**

[126] **REJECTS** the motion to obtain a vote at a meeting of creditors.

[127] **ALL** with costs.

GAÉTAN DUMAS, jcs

Philippe Buist

Stikeman Elliott

Prosecutor of the debtor

Me Alain Gaul

Davies Ward Phillips & Vineberg

Prosecutor of the applicant

Me Yanick Vlasak

Heenan Blaikie

Solicitor of the Syndic

Pierre Lecavalier

Justice Canada

Solicitor for Industry Canada

Eric Lalanne

From Grangpré Chait

Solicitor for Investissement Québec

Hearing date: June 6, 2006

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[1] CS 500-11-005873-977

[2] EYB 2005-96579

[3] 1991 CanLII 3680 (QC CA) , [1991] RDJ 423

[4] Re Commonwealth Investors Syndicate Ltd., 1986 CanLII 911 (BC SC) , [1986] 60 CBR (NS) 193 ; Re Wooltex Recycling (Can) Ltd, [1985] 56 CBR (NS) 271 ; Re Arnco Business Service Ltd., [1993] 49 CBR (NS) 188 ; Langillec. Toronto Dominion Bank, 1981 CanLII 2620 (NS CA) , [1981], 37 CBR (NS) 35 ; Markisc. Soccio, [1954] 35 CBR 1

[5] 1975 CanLII 158 (SCC) , [1976] 2 SCR 168

[6] Vachonc. Comm. Employment and Immigration Canada, 1985 CanLII 12 (SCC) , [1985] 57 CBR (NS) 113 (SCC)

[7] Bernard BOUCHER and Jean-Yves FORTIN,Bankruptcy and Insolvency, A Quebec Perspective of Canadian Jurisprudence

[8] Paul-Arthur GENDREAU, France THIBAULT, Denis FERLAND, Bernard CLICHE and Martine GRAVEL,The injunction, Ed. Yvon Blais, 1998, page 36

TAB 3

2012 ONSC 234
Ontario Superior Court of Justice [Commercial List]

Kitchener Frame Ltd., Re

2012 CarswellOnt 1347, 2012 ONSC 234, 212 A.C.W.S. (3d) 631, 86 C.B.R. (5th) 274

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as Amended

In the Matter of the Consolidated Proposal of Kitchener Frame Limited and Thyssenkrupp Budd Canada, Inc. (Applicants)

Morawetz J.

Judgment: February 3, 2012
Docket: CV-11-9298-00CL

Counsel: Edward A. Sellers, Jeremy E. Dacks for Applicants
Hugh O'Reilly — Non-Union Representative Counsel
L.N. Gottheil — Union Representative Counsel
John Porter for Proposal Trustee, Ernst & Young Inc.
Michael McGraw for CIBC Mellon Trust Company
Deborah McPhail for Financial Services Commission of Ontario

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Approval by court — Conditions — General principles

Applicants KFL and BC were inactive entities with no operating assets and no material liquid assets — Applicants had significant and mounting obligations including pension and other non-pension post-employment benefit (OPEB) obligations to their former employees and surviving spouses of such former employees or others entitled to claim through such persons — Affiliates of BC provided up to date funding for pension and OPEB obligations, however, given that KFL and BC had no active operations status quo was unsustainable — KFL and BC brought motion to sanction amended consolidated proposal — Motion was granted — Proposal was reasonable — Proposal was calculated to benefit general body of creditors — Proposal was made in good faith — Proposal contained broad release in favour of applicants and certain third parties — Release of third-parties was permitted — Release covered all affected claims, pension claims, and existing escrow fund claims — Release did not cover criminal or wilful misconduct with respect to any matters set out in s. 50(14) of Bankruptcy and Insolvency Act — Unaffected claims were specifically carved out of release — No creditors or stakeholders objected to scope of release which was fully disclosed in negotiations — There was no express prohibition in BIA against including third-party releases in proposal — Any provision of BIA which purported to limit ability of debtor to contract with its creditors had to be clear and explicit — Third-party releases were permissible under Companies' Creditors Arrangement Act (CCAA) and court should strive, where language of both statutes supported it, to give both statutes harmonious interpretation — There was no principled basis on which analysis and treatment of third-party release in BIA proposal proceeding should differ from CCAA proceeding — Released parties contributed in tangle and realistic way to proposal — Without inclusion of releases it was unlikely that certain parties would have supported proposal — Releases benefited applicants and creditors generally — Applicants provided full and adequate disclosure of releases and their effect.

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Allen-Vanguard Corp., Re (2011), 2011 CarswellOnt 1279, 2011 ONSC 733 (Ont. S.C.J.) — referred to

Angiotech Pharmaceuticals Inc., Re (2011), 2011 BCSC 450, 2011 CarswellBC 841, 76 C.B.R. (5th) 210 (B.C. S.C. [In Chambers]) — referred to

Ashley v. Marlow Group Private Portfolio Management Inc. (2006), 2006 CarswellOnt 3449, 22 C.B.R. (5th) 126, 270 D.L.R. (4th) 744 (Ont. S.C.J. [Commercial List]) — referred to

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

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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

Steeves, Re (2001), 25 C.B.R. (4th) 317, 208 Sask. R. 84, 2001 SKQB 265, 2001 CarswellSask 392 (Sask. Q.B.) — referred to

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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

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Generally — referred to

MOTION by applicants for court sanction of proposal under Bankruptcy and Insolvency Act which contained third-party release.

Morawetz J.:

1 At the conclusion of this unopposed motion, the requested relief was granted. Counsel indicated that it would be helpful if the court could provide reasons in due course, specifically on the issue of a third-party release in the context of a proposal under Part III of the *Bankruptcy and Insolvency Act* ("*BIA*").

2 Kitchener Frame Limited ("KFL") and Thyssenkrupp Budd Canada Inc. ("Budd Canada"), and together with KFL, (the "Applicants"), brought this motion for an order (the "Sanction Order") to sanction the amended consolidated proposal involving the Applicants dated August 31, 2011 (the "Consolidated Proposal") pursuant to the provisions of the *BIA*. Relief was also sought authorizing the Applicants and Ernst & Young Inc., in its capacity as proposal trustee of each of the Applicants (the "Proposal Trustee") to take all steps necessary to implement the Consolidated Proposal in accordance with its terms.

3 The Applicants submit that the requested relief is reasonable, that it benefits the general body of the Applicants' creditors and meets all other statutory requirements. Further, the Applicants submit that the court should also consider that the voting affected creditors (the "Affected Creditors") unanimously supported the Consolidated Proposal. As such, the Applicants submit that they have met the test as set out in s. 59(2) of the *BIA* with respect to approval of the Consolidated Proposal.

4 The motion of the Applicants was supported by the Proposal Trustee. The Proposal Trustee filed its report recommending approval of the Consolidated Proposal and indicated that the Consolidated Proposal was in the best interests of the Affected Creditors.

5 KFL and Budd Canada are inactive entities with no operating assets and no material liquid assets (other than the Escrow Funds). They do have significant and mounting obligations including pension and other non-pension post-employment benefit ("OPEB") obligations to the Applicants' former employees and certain former employees of Budcan Holdings Inc. or the surviving spouses of such former employees or others who may be entitled to claim through such persons in the *BIA* proceedings, including the OPEB creditors.

6 The background facts with respect to this motion are fully set out in the affidavit of Mr. William E. Aziz, sworn on September 13, 2011.

7 Affiliates of Budd Canada have provided up to date funding to Budd Canada to enable Budd Canada to fund, on behalf of KFL, such pension and OPEB obligations. However, given that KFL and Budd Canada have no active operations, the *status quo* is unsustainable.

8 The Applicants have acknowledged that they are insolvent and, in connection with the *BIA* proposal, proceedings were commenced on July 4, 2011.

9 On July 7, 2011, Wilton-Siegel J. granted Procedural Consolidation Orders in respect of KFL and Budd Canada which authorized the procedural consolidation of the Applicants and permitted them to file a single consolidated proposal to their creditors.

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10 The Orders of Wilton-Siegel J. also appointed separate representative counsel to represent the interests of the Union and Non-Union OPEB creditors and further authorized the Applicants to continue making payments to Blue Cross in respect of the OPEB Claims during the *BIA* proposal proceedings.

11 On August 2, 2011, an order was granted extending the time to file a proposal to August 19, 2011.

12 The parties proceeded to negotiate the terms of the Consolidated Proposal, which meetings involved the Applicants, the Proposal Trustee, senior members of the CAW, Union Representative Counsel and Non-Union Representative Counsel.

13 An agreement in principle was reached which essentially provided for the monetization and compromise of the OPEB claims of the OPEB creditors resulting in a one-time, lump-sum payment to each OPEB creditor term upon implementation of the Consolidated Proposal. The Consolidated Proposal also provides that the Applicants and their affiliates will forego any recoveries on account of their secured and unsecured inter-company claims, which total approximately $120 million. A condition precedent was the payment of sufficient funds to the Pension Fund Trustee such that when such funds are combined with the value of the assets held in the Pension Plans, the Pension Fund Trustee will be able to fully annuitize the Applicants' pension obligations and pay the commuted values to those creditors with pension claims who so elected so as to provide for the satisfaction of the Applicants' pension obligations in full.

14 On August 19, 2011, the Applicants filed the Consolidated Proposal. Subsequent amendments were made on August 31, 2011 in advance of the creditors' meeting to reflect certain amendments to the proposal.

15 The creditors' meeting was held on September 1, 2011 and, at the meeting, the Consolidated Proposal, as amended, was accepted by the required majority of creditors. Over 99.9% in number and over 99.8% in dollar value of the Affected Creditors' Class voted to accept the Consolidated Proposal. The Proposal Trustee noted that all creditors voted in favour of the Consolidated Proposal, with the exception of one creditor, Canada Revenue Agency (with 0.1% of the number of votes representing 0.2% of the value of the vote) who attended the meeting but abstained from voting. Therefore, the Consolidated Proposal was unanimously approved by the Affected Creditors. The Applicants thus satisfied the required "double majority" voting threshold required by the *BIA*.

16 The issue on the motion was whether the court should sanction the Consolidated Proposal, including the substantive consolidation and releases contained therein.

17 Pursuant to s. 54(2)(d) of the *BIA*, a proposal is deemed to be accepted by the creditors if it has achieved the requisite "double majority" voting threshold at a duly constituted meeting of creditors.

18 The *BIA* requires the proposal trustee to apply to court to sanction the proposal. At such hearing, s. 59(2) of the *BIA* requires that the court refuse to approve the proposal where its terms are not reasonable or not calculated to benefit the general body of creditors.

19 In order to satisfy s. 59(2) test, the courts have held that the following three-pronged test must be satisfied:

(a) the proposal is reasonable;

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

(c) the proposal is made in good faith.

See *Mayer, Re* (1994), 25 C.B.R. (3d) 113 (Ont. Bktcy.); *Steeves, Re* (2001), 25 C.B.R. (4th) 317 (Sask. Q.B.); *Magnus One Energy Corp., Re* (2009), 53 C.B.R. (5th) 243 (Alta. Q.B.).

20 The first two factors are set out in s. 59(2) of the *BIA* while the last factor has been implied by the court as an exercise of its equitable jurisdiction. The courts have generally taken into account the interests of the debtor, the interests of the creditors

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and the interests of the public at large in the integrity of the bankruptcy system. See *Farrell, Re* (2003), 40 C.B.R. (4th) 53 (Ont. S.C.J. [Commercial List]).

21 The courts have also accorded substantial deference to the majority vote of creditors at a meeting of creditors; see *Lofchik, Re*, [1998] O.J. No. 332 (Ont. Bktcy.). Similarly, the courts have also accorded deference to the recommendation of the proposal trustee. See *Magnus One*, *supra*.

22 With respect to the first branch of the test for sanctioning a proposal, the debtor must satisfy the court that the proposal is reasonable. The court is authorized to only approve proposals which are reasonable and calculated to benefit the general body of creditors. The court should also consider the payment terms of the proposal and whether the distributions provided for are adequate to meet the requirements of commercial morality and maintaining the integrity of the bankruptcy system. For a discussion on this point, see *Lofchik*, *supra*, and *Farrell* , *supra*.

23 In this case, the Applicants submit that, if the Consolidated Proposal is sanctioned, they would be in a position to satisfy all other conditions precedent to closing on or prior to the date of the proposal ("Proposal Implementation Date").

24 With respect to the treatment of the Collective Bargaining Agreements, the Applicants and the CAW brought a joint application before the Ontario Labour Relations Board ("OLRB") on an expedited basis seeking the OLRB's consent to an early termination of the Collective Bargaining Agreements. Further, the CAW has agreed to abandon its collective bargaining rights in connection with the Collective Bargaining Agreements.

25 With respect to the terms and conditions of a Senior Secured Loan Agreement between Budd Canada and TK Finance dated as of December 22, 2010, TK Finance provided a secured creditor facility to the Applicants to fund certain working capital requirements before and during the *BIA* proposal proceedings. As a result of the approval of the Consolidated Proposal at the meeting of creditors, TK Finance agreed to provide additional credit facilities to Budd Canada such that the Applicants would be in a position to pay all amounts required to be paid by or on behalf of the Applicants in connection with the Consolidated Proposal.

26 On the issue as to whether creditors will receive greater recovery under the Consolidated Proposal than they would receive in the bankruptcy, it is noted that creditors with Pension Claims are unaffected by the Consolidated Proposal. The Consolidated Proposal provides for the satisfaction of Pension Claims in full as a condition precedent to implementation.

27 With respect to Affected Creditors, the Applicants submit that they will receive far greater recovery from distributions under the Consolidated Proposal than the Affected Creditors would receive in the event of the bankruptcies of the Applicants. (See Sanction Affidavit of Mr. Aziz at para. 61.)

28 The Proposal Trustee has stated that the Consolidated Proposal is advantageous to creditors for the reasons outlined in its Report and, in particular:

(a) the recoveries to creditors with claims in respect of OPEBs are considerably greater under the Amended Proposal than in a bankruptcy;

(b) payments under the Amended Proposal are expected in a timely manner shortly after the implementation of the Amended Proposal;

(c) the timing and quantum of distributions pursuant to the Amended Proposal are certain while distributions under a bankruptcy are dependent on the results of litigation, which cannot be predicted with certainty; and

(d) the Pension Plans (as described in the Proposal Trustee's Report) will be fully funded with funds from the Pension Escrow (as described in the Proposal Trustee's Report) and, if necessary, additional funding from an affiliate of the Companies if the funds in the Pension Escrow are not sufficient. In a bankruptcy, the Pension Plans may not be fully funded.

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29 The Applicants take the position that the Consolidated Proposal meets the requirements of commercial morality and maintains the integrity of the bankruptcy system, in light of the superior coverage to be afforded to the Applicants' creditors under the Consolidated Proposal than in the event of bankruptcy.

30 The Applicants also submit that substantive consolidation inherent in the proposal will not prejudice any of the Affected Creditors and is appropriate in the circumstances. Although not expressly contemplated under the *BIA*, the Applicants submit that the court may look to its incidental, ancillary and auxiliary jurisdiction under s. 183 of the *BIA* and its equitable jurisdiction to grant an order for substantive consolidation. See *Ashley v. Marlow Group Private Portfolio Management Inc.* (2006), 22 C.B.R. (5th) 126 (Ont. S.C.J. [Commercial List]). In deciding whether to grant substantive consolidation, courts have held that it should not be done at the expense of, or possible prejudice of, any particular creditor. See *Ashley* , *supra*. However, counsel submits that this court should take into account practical business considerations in applying the *BIA*. See *A. & F. Baillargeon Express Inc., Re* (1993), 27 C.B.R. (3d) 36 (C.S. Que.).

31 In this case, the Applicants submit that substantive consolidation inherent in the Consolidated Proposal is appropriate in the circumstances due to, among other things, the intertwined nature of the Applicants' assets and liabilities. Each Applicant had substantially the same creditor base and known liabilities (other than certain Excluded Claims). In addition, KFL had no cash or cash equivalents and the Applicants are each dependant on the Escrow Funds and borrowings under the Restated Senior Secured Loan Agreement to fund the same underlying pension and OPEB obligations and costs relating to the Proposal Proceedings.

32 The Applicants submit that creditors in neither estate will be materially prejudiced by substantive consolidation and based on the fact that no creditor objected to the substantial consolidation, counsel submits the Consolidated Proposal ought to be approved.

33 With respect to whether the Consolidated Proposal is calculated to benefit the general body of creditors, TK Finance would be entitled to priority distributions out of the estate in a bankruptcy scenario. However, the Applicants and their affiliates have agreed to forego recoveries under the Consolidated Proposal on account of their secured and unsecured intercompany claims in the amount of approximately $120 million, thus enhancing the level of recovery for the Affected Creditors, virtually all of whom are OPEB creditors. It is also noted that TK Finance will be contributing over $35 million to fund the Consolidated Proposal.

34 On this basis, the Applicants submit that the Consolidated Proposal is calculated to benefit the general body of creditors.

35 With respect to the requirement of the proposal being made in good faith, the debtor must satisfy the court that it has provided full disclosure to its creditors of its assets and encumbrances against such assets.

36 In this case, the Applicants and the Proposal Trustee have involved the creditors pursuant to the Representative Counsel Order, and through negotiations with the Union Representative Counsel and Non-Union Representative Counsel.

37 There is also evidence that the Applicants have widely disseminated information regarding their *BIA* proposal proceedings through the media and through postings on the Proposal Trustee's website. Information packages have also prepared by the Proposal Trustee for the creditors.

38 Finally, the Proposal Trustee has noted that the Applicants' conduct, both prior to and subsequent to the commencement of the *BIA* proposal proceedings, is not subject to censure in any respect and that the Applicants' have acted in good faith.

39 There is also evidence that the Consolidated Proposal continues requisite statutory terms. The Consolidated Proposal provides for the payment of preferred claims under s. 136(1) of the *BIA*.

40 Section 7.1 of the Consolidated Proposal contains a broad release in favour of the Applicants and in favour of certain third parties (the "Release"). In particular, the Release benefits the Proposal Trustee, Martinrea, the CAW, Union Representative Counsel, Non-Union Representative Counsel, Blue Cross, the Escrow Agent, the present and former shareholders and affiliates of the Applicants (including Thyssenkrupp USA, Inc. ("TK USA"), TK Finance, Thyssenkrupp Canada Inc. ("TK Canada") and Thyssenkrupp Budd Company), as well as their subsidiaries, directors, officers, members, partners, employees, auditors,

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financial advisors, legal counsel and agents of any of these parties and any person liable jointly or derivatively through any or all of the beneficiaries of the of the release (referred to individually as a "Released Party").

41 The Release covers all Affected Claims, Pension Claims and Escrow Fund Claims existing on or prior to the later of the Proposal Implementation Date and the date on which actions are taken to implement the Consolidated Proposal.

42 The Release provides that all such claims are released and waived (other than the right to enforce the Applicants' or Proposal Trustee's obligations under the Consolidated Proposal) to the full extent permitted by applicable law. However, nothing in the Consolidated Proposal releases or discharges any Released Party for any criminal or other wilful misconduct or any present or former directors of the Applicants with respect to any matters set out in s. 50(14) of the *BIA*. Unaffected Claims are specifically carved out of the Release.

43 The Applicants submit that the Release is both permissible under the *BIA* and appropriately granted in the context of the *BIA* proposal proceedings. Further, counsel submits, to the extent that the Release benefits third parties other than the Applicants, the Release is not prohibited by the *BIA* and it satisfies the criteria that has been established in granting third-party releases under the *Companies' Creditors Arrangement Act* ("*CCAA*"). Moreover, counsel submits that the scope of the Release is no broader than necessary to give effect to the purpose of the Consolidated Proposal and the contributions made by the third parties to the success of the Consolidated Proposal.

44 No creditors or stakeholders objected to the scope of the Release which was fully disclosed in the negotiations, including the fact that the inclusion of the third-party releases was required to be part of the Consolidated Proposal. Counsel advises that the scope of the Release was referred to in the materials sent by the Proposal Trustee to the Affected Creditors prior to the meeting, specifically discussed at the meeting and adopted by the unanimous vote of the voting Affected Creditors.

45 Counsel also submits that there is no provision in the *BIA* that clearly and expressly precludes the Applicants from including the Release in the Consolidated Proposal as long as the court is satisfied that the Consolidated Proposal is reasonable and for the general benefit of creditors.

46 In this respect, it seems to me, that the governing statutes should not be technically or stringently interpreted in the insolvency context but, rather, should be interpreted in a manner that is flexible rather than technical and literal, in order to deal with the numerous situations and variations which arise from time to time. Further, taking a technical approach to the interpretation of the *BIA* would defeat the purpose of the legislation. See *N.T.W. Management Group Ltd., Re* (1994), 29 C.B.R. (3d) 139 (Ont. Bktcy.); *Olympia & York Developments Ltd., Re* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]); *Olympia & York Developments Ltd., Re* (1997), 45 C.B.R. (3d) 85 (Ont. Bktcy.).

47 Moreover, the statutes which deal with the same subject matter are to be interpreted with the presumption of harmony, coherence and consistency. See *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24 (S.C.C.). This principle militates in favour of adopting an interpretation of the *BIA* that is harmonious, to the greatest extent possible, with the interpretation that has been given to the *CCAA*.

48 Counsel points out that historically, some case law has taken the position that s. 62(3) of the *BIA* precludes a proposal from containing a release that benefits third parties. Counsel submits that this result is not supported by a plain meaning of s. 62(3) and its interaction with other key sections in the *BIA*.

49 Subsection 62(3) of the *BIA* reads as follows:

> (3) The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.

50 Counsel submits that there are two possible interpretations of this subsection:

> (a) It prohibits third party releases — in other words, the phrase "does not release any person" is interpreted to mean "cannot release any person"; or

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(b) It simply states that acceptance of a proposal does not automatically release any party other than the debtor — in other words, the phrase "does not release any person" is interpreted to mean "does not release any person without more"; it is protective not prohibitive.

51 I agree with counsel's submission that the latter interpretation of s. 62(3) of the *BIA* conforms with the grammatical and ordinary sense of the words used. If Parliament had intended that only the debtor could be released, s. 62(3) would have been drafted more simply to say exactly that.

52 Counsel further submits that the narrow interpretation would be a stringent and inflexible interpretation of the *BIA*, contrary to accepted wisdom that the *BIA* should be interpreted in a flexible, purposive manner.

53 The *BIA* proposal provisions are designed to offer debtors an opportunity to carry out a going concern or value maximizing restructuring in order to avoid a bankruptcy and related liquidation and that these purposes justify taking a broad, flexible and purposive approach to the interpretation of the relevant provisions. This interpretation is supported by *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.).

54 Further, I agree with counsel's submissions that a more flexible purposive interpretation is in keeping with modern statutory principles and the need to give purposive interpretation to insolvency legislation must start from the proposition that there is no express prohibition in the *BIA* against including third-party releases in a proposal. At most, there are certain limited constraints on the scope of such releases, such as in s. 179 of the *BIA*, and the provision dealing specifically with the release of directors.

55 In the absence of an express prohibition against including third-party releases in a proposal, counsel submits that it must be presumed that such releases are permitted (subject to compliance with any limited express restrictions, such as in the case of a release of directors). By extension, counsel submits that the court is entitled to approve a proposal containing a third-party release if the court is able to satisfy itself that the proposal (including the third-party release) is reasonable and for the general benefit for creditors such that all creditors (including the minority who did not vote in favour of the proposal) can be required to forego their claims against parties other than the debtors.

56 The Applicants also submit that s. 62(3) of the *BIA* can only be properly understood when read together with other key sections of the *BIA*, particularly s. 179 which concerns the effect of an order of discharge:

179. An order of discharge does not release a person who at the time of the bankruptcy was a partner or co-trustee with the bankrupt or was jointly bound or had made a joint contract with the bankrupt, or a person who was surety or in the nature of a surety for the bankrupt.

57 The order of discharge of a bankrupt has the effect of releasing the bankrupt from all claims provable in bankruptcy (section 178(2) *BIA*). In the absence of s. 179, this release could result in the automatic release at law of certain types of claims that are identified in s. 179. For example, under guarantee law, the discharge of the principal debt results in the automatic discharge of a guarantor. Similarly, counsel points out the settlement or satisfaction of a debt by one joint obligor generally results in the automatic release of both joint obligors. Section 179 therefore serves the limited purpose of altering the result that would incur at law, indicating that the rule that the *BIA* generally is that there is no automatic release of third-party guarantors of co-obligors when a bankrupt is discharged.

58 Counsel submits that s. 62(3), which confirms that s. 179 applies to a proposal, was clearly intended to fulfil a very limited role — namely, to confirm that there is no automatic release of the specific types of co-obligors identified in s. 179 when a proposal is approved by the creditors and by the court. Counsel submits that it does not go further and preclude the creditors and the court from approving a proposal which contains the third-party release of the types of co-obligors set out in s. 179. I am in agreement with these submissions.

59 Specific considerations also apply when releasing directors of a debtor company. The *BIA* contains specific limitations on the permissible scope of such releases as set out in s. 50(14). For this reason, there is a specific section in the *BIA* proposal

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provisions outlining the principles governing such a release. However, counsel argues, the presence of the provisions outlining the circumstances in which a proposal can contain a release of claims against the debtor's directors does not give rise to an inference that the directors are the only third parties that can be released in a proposal. Rather, the inference is that there are considerations applicable to a release or compromise of claims against directors that do not apply generally to other third parties. Hence, it is necessary to deal with this particular type of compromise and release expressly.

60 I am also in agreement with the alternative submissions made by counsel in this area to the effect that if s. 62(3) of the *BIA* operates as a prohibition it refers only to those limitations that are expressly identified in the *BIA*, such as in s. 179 of the *BIA* and the specific limitations on the scope of releases that can benefit directors of the debtor.

61 Counsel submits that the Applicants' position regarding the proper interpretation of s. 62(3) of the *BIA* and its place in the scheme of the *BIA* is consistent with the generally accepted principle that a proposal under the *BIA* is a contract. See *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.); *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.* (1976), [1978] 1 S.C.R. 230 (S.C.C.); and *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 20 C.B.R. (4th) 160 (Ont. C.A.). Consequently, counsel submits that parties are entitled to put anything into a proposal that could lawfully be incorporated into any contract (see *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List])) and that given that the prescribed majority creditors have the statutory right under the *BIA* to bind a minority, however, this principle is subject to any limitations that are contained in the express wording of the *BIA*.

62 On this point, it seems to me, that any provision of the *BIA* which purports to limit the ability of the debtor to contract with its creditors should be clear and explicit. To hold otherwise would result in severely limiting the debtor's ability to contract with its creditors, thereby the decreasing the likelihood that a viable proposal could be reached. This would manifestly defeat the purpose of the proposal provisions of the *BIA*.

63 The Applicants further submit that creditors' interests — including the interests of the minority creditors who do not vote in favour of a proposal containing a third-party release — are sufficiently protected by the overriding ability of a court to refuse to approve a proposal with an overly broad third-party release, or where the release results in the proposal failing to demonstrate that it is for the benefit of the general body of creditors. The Applicants submit that the application of the *Metcalfe* criteria to the release is a mechanism whereby this court can assure itself that these preconditions to approve the Consolidated Proposal contained in the Release have been satisfied.

64 The Applicants acknowledge that there are several cases in which courts have held that a *BIA* proposal that includes a third-party release cannot be approved by the court but submits that these cases are based on a mistaken premise, are readily distinguishable and do not reflect the modern approach to Canadian insolvency law. Further, they submit that none of these cases are binding on this court and should not be followed.

65 In *Kern Agencies Ltd., (No. 2), Re* (1931), 13 C.B.R. 11 (Sask. C.A.), the court refused to approve a proposal that contained a release of the debtor's directors, officers and employees. Counsel points out that the court's refusal was based on a provision of the predecessor to the *BIA* which specifically provided that a proposal could only be binding on creditors (as far as relates to any debts due to them from the debtor). The current *BIA* does not contain equivalent general language. This case is clearly distinguishable.

66 In *Mister C's Ltd., Re* (1995), 32 C.B.R. (3d) 242 (Ont. Bktcy.), the court refused to approve a proposal that had received creditor approval. The court cited numerous bases for its conclusion that the proposal was not reasonable or calculated to benefit the general body of creditors, one of which was the release of the principals of the debtor company. The scope of the release was only one of the issues with the proposal, which had additional significant issues (procedural irregularities, favourable terms for insiders, and inequitable treatment of creditors generally). I agree with counsel to the Applicants that this case can be distinguished.

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67 *Cosmic Adventures Halifax Inc., Re* (1999), 13 C.B.R. (4th) 22 (N.S. S.C.) relies on *Kern* and furthermore the Applicants submit that the discussion of third-party releases is technically *obiter* because the proposal was amended on consent.

68 The fourth case is *C.F.G. Construction inc., Re*, 2010 CarswellQue 10226 (C.S. Que.) where the Quebec Superior Court refused to approve a proposal containing a release of two sureties of the debtor. The case was decided on alternate grounds — either that the *BIA* did not permit a release of sureties, or in any event, the release could not be justified on the facts. I agree with the Applicants that this case is distinguishable. The case deals with the release of sureties and does not stand for any broader proposition.

69 In general, the Applicants' submission on this issue is that the court should apply the decision of the Court of Appeal for Ontario in *Metcalfe*, together with the binding principle set out by the Supreme Court in *Ted Leroy Trucking*, dictating a more liberal approach to the permissibility of third-party releases in *BIA* proposals than is taken by the Quebec court in *C.F.G. Construction Inc.* I agree.

70 The object of proposals under the *BIA* is to permit the debtor to restructure its business and, where possible, avoid the social and economic costs of liquidating its assets, which is precisely the same purpose as the *CCAA*. Although there are some differences between the two regimes and the *BIA* can generally be characterized as more "rules based", the thrust of the case law and the legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible, encouraging reorganization over liquidation. See *Ted Leroy Trucking*.

71 Recent case law has indicated that, in appropriate circumstances, third-party releases can be included in a plan of compromise and arrangement that is approved under the *CCAA*. See *Metcalfe*. The *CCAA* does not contain any express provisions permitting such third-party releases apart from certain limitations that apply to the compromise of claims against directors of the debtor company. See *CCAA* s. 5.1 and *Allen-Vanguard Corp., Re*, 2011 ONSC 733 (Ont. S.C.J.).

72 Counsel submits that although the mechanisms for dealing with the release of sureties and similar claimants are somewhat different in the *BIA* and *CCAA*, the differences are not of such significance that the presence of s. 62(3) of the *BIA* should be viewed as dictating a different approach to third-party releases generally from the approach that applies under the *CCAA*. I agree with this submission.

73 I also accept that if s. 62(3) of the *BIA* is interpreted as a prohibition against including the third-party release in the *BIA* proposal, the *BIA* and the *CCAA* would be in clear disharmony on this point. An interpretation of the *BIA* which leads to a result that is different from the *CCAA* should only be adopted pursuant to clear statutory language which, in my view, is not present in the *BIA*.

74 The most recent and persuasive example of the application of such a harmonious approach to the interpretation of the *BIA* and the *CCAA* can be found in *Ted Leroy Trucking*.

75 At issue in *Ted Leroy Trucking* was how to resolve an apparent conflict between the deemed trust provisions of the *Excise Tax Act* and the provisions of the *CCAA*. The language of the *Excise Tax Act* created a deemed trust over GST amounts collected by the debtor that was stated to apply "despite any other Act of Parliament". The *CCAA* stated that the deemed trust for GST did not apply under the *CCAA*, unless the funds otherwise specified the criteria for a "true" trust. The court was required to determine which federal provision should prevail.

76 By contrast, the same issue did not arise under the *BIA*, due to the language in the *Excise Tax Act* specifically indicating that the continued existence of the deemed trust depended on the terms of the *BIA*. The *BIA* contained a similar provision to the *CCAA* indicating that the deemed trust for GST amounts would no longer apply in a *BIA* proceeding.

77 Deschamps J., on behalf of six other members of the court, with Fish J. concurring and Abella J. dissenting, held that the proper interpretation of the statutes was that the *CCAA* provision should prevail, the deemed trust under the *Excise Tax Act*

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would cease to exist in a *CCAA* proceeding. In resolving the conflict between the *Excise Tax Act* and the *CCAA*, Deschamps J. noted the strange asymmetry which would arise if the *BIA* and *CCAA* were not in harmony on this issue:

> Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

78 It seems to me that these principles indicate that the court should generally strive, where the language of both statutes can support it, to give both statutes a harmonious interpretation to avoid the ills that can arise from "statute-shopping". These considerations, counsel submits, militate against adopting a strained reading of s. 62(3) of the *BIA* as a prohibition against third-party releases in a *BIA* proposal. I agree. In my opinion, there is no principled basis on which the analysis and treatment of a third-party release in a *BIA* proposal proceeding should differ from a CCAA proceeding.

79 The Applicants submit that it logically follows that the court is entitled to approve the Consolidated Proposal, including the Release, on the basis that it is reasonable and calculated to benefit the general body of creditors. Further, in keeping with the principles of harmonious interpretation of the *BIA* and the *CCAA*, the court should satisfy itself that the *Metcalfe* criteria, which apply to the approval of a third-party release under the CCAA, has been satisfied in relation to the Release.

80 In *Metcalfe*, the Court of Appeal for Ontario held that the requirements that must be satisfied to justify a third-party release are:

> (a) the parties to be released are necessary and essential to the restructuring of the debtor;
>
> (b) the claims to be released are rationally related to the purpose of the Plan (Proposal) and necessary for it;
>
> (c) the Plan (Proposal) cannot succeed without the releases;
>
> (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan (Proposal); and
>
> (e) the Plan (Proposal) will benefit not only the debtor companies but creditors generally.

81 These requirements have also been referenced in *Canwest Global Communications Corp., Re* (2010), 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) and *Angiotech Pharmaceuticals Inc., Re* (2011), 76 C.B.R. (5th) 210 (B.C. S.C. [In Chambers]).

82 No single requirement listed above is determinative and the analysis must take into account the facts particular to each claim.

83 The Applicants submit that the Release satisfies each of the *Metcalfe* criteria. Firstly, counsel submits that following the closing of the Asset Purchase Agreement in 2006, Budd Canada had no operating assets or income and relied on inter-company advances to fund the pension and OPEB requirements to be made by Budd Canada on behalf of KFL pursuant to the Asset Purchase Agreement. Such funded amounts total approximately $112.7 million in pension payments and $24.6 million in OPEB payments between the closing of the Asset Purchase Agreement and the Filing Date. In addition, TK Finance has been providing Budd Canada and KFL with the necessary funding to pay the professional and other costs associated with the *BIA* Proposal Proceedings and will continue to fund such amounts through the Proposal Implementation Date. Moreover, TK Canada and TK Finance have agreed to forego recoveries under the Consolidated Proposal on account of their existing secured and unsecured intercompany loans in the amount of approximately $120 million.

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84 Counsel submits that the releases provided in respect of the Applicants' affiliates are the *quid pro quo* for the sacrifices made by such affiliates to significantly enlarge recoveries for the unsecured creditors of the Applicants, particularly the OPEB creditors and reflects that the affiliates have provided over $135 million over the last five years in respect of the pension and OPEB amounts and additional availability of approximately $49 million to allow the Applicants to discharge their obligations to their former employees and retirees. Without the Releases, counsel submits, the Applicants' affiliates would have little or no incentive to contribute funds to the Consolidated Proposal and to waive their own rights against the Applicants.

85 The Release in favour of Martinrea is fully discussed at paragraphs 121-127 of the factum. The Applicants submit that the third-party releases set out in the Consolidated Proposal are clearly rationally related, necessary and essential to the Consolidated Proposal and are not overly broad.

86 Having reviewed the submissions in detail, I am in agreement that the Released Parties are contributing in a tangible and realistic way to the Consolidated Proposal.

87 I am also satisfied that without the Applicants' commitment to include the Release in the Consolidated Proposal to protect the Released Parties, it is unlikely that certain of such parties would have been prepared to support the Consolidated Proposal. The releases provided in respect of the Applicants' affiliates are particularly significant in this regard, since the sacrifices and monetary contributions of such affiliates are the primary reason that the Applicants have been able to make the Consolidated Proposal. Further, I am also satisfied that without the Release, the Applicants would be unable to satisfy the borrowing conditions under the Amended and Restated Senior Secured Loan Agreement with respect to the Applicants having only certain permitted liabilities after the Proposal Implementation Date. The alternative for the Applicants is bankruptcy, a scenario in which their affiliates' claims aggregating approximately $120 million would significantly erode recoveries for the unsecured creditors of the Applicants.

88 I am also satisfied that the Releases benefit the Applicants and creditors generally. The primary non-affiliated Creditors of the Applicants are the OPEB Creditors and Creditors with Pension Claims, together with the CRA. The Consolidated Proposal, in my view, clearly benefits these Creditors by generating higher recoveries than could be obtained from the bankruptcies of the Applicants. Moreover, the timing of any such bankruptcy recoveries is uncertain. As noted by the Proposal Trustee, the amount that the Affected Creditors would receive in the event of the bankruptcies of the Applicants is uncertain both in terms of quantum and timing, with the Applicants' funding of OPEB Claims terminating on bankruptcy, but distributions to the OPEB Creditors and other Creditors delayed for at least a year or two but perhaps much longer.

89 The Applicants and their affiliates also benefit from the Release as an affiliate of the Applicants may become enabled to use the net operating losses (NOL) following a series of transactions that are expected to occur immediately following the Proposal Implementation Date.

90 I am also satisfied that the Applicants have provided full and adequate disclosure of the Releases and their effect. Full disclosure was made in the proposal term sheet circulated to both Representative Counsel in early August 2011. The Release was negotiated as part of the Consolidated Proposal and the scope of the Release was disclosed by the Proposal Trustee in its Report to the creditors on the terms of the Consolidated Proposal, which Report was circulated by the Proposal Trustee to the Applicants' known creditors in advance of the creditors' meeting.

91 I am satisfied that the Applicants, with the assistance of the Proposal Trustee, took appropriate steps to ensure that the Affected Creditors were aware of the existence of the release provisions prior to the creditors' meeting.

92 For the foregoing reasons, I have concluded that the Release contained in the Consolidated Proposal meets the *Metcalfe* criteria and should be approved.

93 In the result, I am satisfied that the section 59(2) *BIA* test has been met and that it is appropriate to grant the Sanction Order in the form of the draft order attached to the Motion Record. An order has been signed to give effect to the foregoing.

Motion granted.

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IN THE MATTER OF THE PROPOSAL FT ENE CANADA INC.

Court File No. 32-2480036
Estate File No. 32-2480036

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

(PROCEEDING COMMENCED AT TORONTO)

FACTUM AND BOOK OF AUTHORITIES OF THE PROPOSAL TRUSTEE

(Motion Returnable September 18, 2019)

PALLETT VALO LLP
Lawyers & Trade-Mark Agents
77 City Centre Drive, West Tower
Suite 300
Mississauga, Ontario L5B 1M5

Alex Ilchenko, C.S. / Monty Dhaliwal
LSUC# 33944Q / #65124N

Tel: (905) 273-3300
Fax: (905) 273-6920

Lawyers for MNP LTD.
in its capacity as Proposal Trustee
of FT ENE CANADA INC.