Court File No. CV-24-00730869-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

TWO SHORES CAPITAL CORP.

Applicant

and

PRODUCTIVITY MEDIA INC., PRODUCTIVITY MEDIA INCOME FUND I LP, PRODUCTIVITY MEDIA LENDING CORP. I, and 8397830 CANADA INC.

Respondents

Court File No.CV-24-00731806-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

PRODUCTIVITY MEDIA INCOME FUND I LP, by its general partner, PRODUCTIVITY MEDIA INC., by its court-appointed receiver and manager, KSV RESTRUCTURING INC.

Plaintiff

and

THE ESTATE OF WILLIAM GREGORY SANTOR by its Executrix, SONJA SANTOR, SONJA SANTOR, also known as SONJA NISTELBERGER, RADIANT FILMS INTERNATIONAL INC., DARK STAR PICTURES (CANADA) INC., CONCOURSE MEDIA INC., JOKER FILMS PRODUCTIONS INC., 8397830 CANADA INC., PRODUCTIVITY MEDIA RELEASING INC., PRODUCTIVITY MEDIA RENTALS INC., PRODUCTIVITY MEDIA PRODUCTIONS (CAYMAN) LTD., PROSAPIA CAPITAL MANAGEMENT CORP., PROSAPIA HOLDINGS INC., PROSAPIA PROPERTY MANAGEMENT INC., PROSAPIA WEALTH MANAGEMENT LTD., ERBSCHAFT CAPITAL CORP., STREAM.TV (CAYMAN) LTD., STARK INDUSTRIES

**LIMITED, JOHN DOE,
MARY DOE, and ABC COMPANY**

Defendants

**SUBMISSIONS OF THE MAREVA DEFENDANTS
(Settlement Approval Hearing – July 15, 2025)**

July 3, 2025

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PART I – OVERVIEW

1. KSV Restructuring Inc. (the **Receiver**), is the court-appointed receiver and manager of Productivity Media Inc. (**PMI**), Productivity Media Income Fund I LP (the **Fund**), Productivity Media Lending Corp. I (**PMLC**), and 8397830 Canada Inc. (**839 Canada).**

2. These submissions are filed by Sonja Santor ("**Sonja**") in her personal capacity and her capacity as the executrix of the estate of her late husband, William Santor (the "**Estate**"), each an interested party in the receivership bearing Court File No. CV-24-00730869-00CL (the **Receivership**), and each named Defendants in Court File No.CV-24-00731806-00CL (the **Fraud Recovery Action** and collectively with the Receivership, the "**Proceedings"**).

3. Sonja is the widow of William Santor who died by suicide on December 28, 2024, shortly after the court granted Mareva injunctions in Ontario and the Cayman Islands earlier that month. After William's passing, Sonja and her two children were forced to move residences as a result of the Mareva injunctions and lack of access to funds. Sonja and her children have no immigration status in the Cayman Islands where they have lived since 2019 (their status was tied to William's immigration status) and Sonja does not even have a bank account in the Caymans. Despite authorization from the Receiver to open an account, her attempts to do so have been refused.

4. As a result of her tragic circumstances, Sonja has been, for the last 6 months, completely dependant on the Court ordered living allowance for her survival and that of her children. Notwithstanding her dire circumstances, she has devoted much of her time over the last 6 months, volunteering to assist the Receiver with its investigations, its activities to identify and secure assets of the Estate and coordinating with the Receiver's agents and third parties to store, maintain and dispose of her assets and those of the Estate.

5. With the Mareva injunctions in place, Sonja is not able to start rebuilding her life, which she will need to do now that she is widowed and solely responsible for her two minor children.

6. Sonja and her counsel, over the course of several months, have negotiated a Settlement Agreement with the Receiver and its counsel that aims to secure Sonja's continued cooperation that has been instrumental to the Receiver's efforts to preserve value, and maximize the preservation of assets for the Fund's investors. The Settlement Agreement contemplates lifting the Mareva Injunctions against Sonja (thereby also reducing the Receiver's expenses with the elimination of Sonja's living allowance) and permits Sonja and her children to move on and start rebuilding their lives. To that end, the Receiver has brought motions in the Proceedings for, *inter alia*, the following relief, which is supported by Sonja and the Estate:

The Receivership

a. approving and giving effect to the terms of settlement as set out in the settlement agreement executed June 16, 2025 (the **Settlement Agreement**) as between the Receiver, Sonja and the Estate;

b. authorizing and directing the Receiver to take any and all steps necessary to give effect to the Settlement Agreement;

c. amending paragraph 3(i) of the Amended and Restated Receivership Order, pronounced on April 16, 2025 (the **ARRO**), to authorize the Receiver to pay the reasonable fees and disbursements of Fogler Rubinoff LLP, counsel for the Mareva Defendants, from available cash flow up to a maximum amount of US$150,000;

d. directing that, in accordance with the terms of the Settlement Agreement, Sonja and Fogler Rubinoff LLP shall receive the remaining proceeds of the sale of the property located at 203, 12045 Guerin Street, Studio City, California, USA (the "**Studio City Property**"), free and clear of any competing claims, including those of Alan Plaunt and 1401713 Alberta Ltd (collectively, the "**Plaunt Plaintiffs**") in Court File No. CV-23-00696306-0000 (the "**Plaunt Action**");

e. releasing Sonja, in her personal capacity, of and from all claims of PMI, the Fund, PMLC, 839 Canada, the Receiver, and all current or past investors in the Fund arising from or related to the Fraud Recovery Action, conditional on Sonja's compliance with the terms of the Settlement Agreement; and

f. requesting the aid and recognition of courts, tribunals, regulatory or administrative bodies, having jurisdiction in Canada, the United States, and/or the Cayman Islands to assist the Receiver in carrying out the terms of the Settlement Agreement Approval Order.

The Fraud Recovery Action

a. varying the Order of Justice Black dated December 2, 2024 (the ***Mareva* Order**) to remove Sonja and 839 Canada from the definition of "Mareva Defendants";

b. discharging the *Mareva* Order and making it of no further effect respecting the assets of 839 Canada and Sonja (except for her interest in the property located at West Bay Beach North Block 10A Parcel 150, Vista Del Mar, Cayman Islands (the **VDM Property**));

c. directing that the VDM Property shall remain subject to the terms of the Injunction Prohibiting Disposal of Assets in the Cayman Islands (the **Cayman Order**) granted by the Grand Court of the Cayman Islands (the **Cayman Court**) on December 6, 2024;

d. permitting Sonja to deposit, remove, or transfer monies or assets from any accounts, registered savings plans, investment accounts, or other assets held with the Financial Institutions in Sonja's name, including but not limited to TD bank account 6372309 (the **TD Account**);

e. directing that Sonja shall no longer be required to provide KSV, through their respective counsel, a daily screenshot of activity in the TD Account or any other bank account;

f. authorizing the Receiver to dispose of or sell any assets of the Mareva Defendants as defined after the removal of Sonja and 839 Canada from the definition (the **Remaining Mareva Defendants**),

    i. Upon the mutual written consent the Receiver and Sonja, but only during any time prior to payment to Sonja in full of the US$500,000 described in the Settlement Agreement as the "Second Payment, "and

    ii. Following payment to Sonja in full of the "Second Payment," with the cooperation of Sonja, which shall be provided at no further cost other than out-of-pocket expenses, but without her consent being required;

g. authorizing the Receiver to coordinate with Sonja in respect of her efforts to sell the VDM Property on terms subject to the consent of the Receiver, such consent

being subject to the approval of this Court on notice to the Service List in the Receivership;

h. directing Sonja to obtain the Receiver's express written consent prior to selling, encumbering, or otherwise dealing with any property identified in section 2(c) of the Settlement Agreement;

i. declaring that Sonja's entitlement to payment of ordinary living expenses from the assets of the Mareva Defendants shall cease effective May 31, 2025;

j. directing that Sonja and Fogler Rubinoff LLP shall be entitled to the proceeds, if any, of the IRS non-resident tax withholdings and California Tax Board non-resident tax withholdings in connection with the sale of the Studio City Property, of which a portion shall be paid to Fogler Rubinoff LLP, in trust, for the payment of legal fees and disbursements, and the balance shall be paid to Sonja;

k. dismissing the Fraud Recovery Action as against Sonja, in her personal capacity, without costs, subject to the terms of the Settlement Agreement;

l. removing Sonja as a defendant in the Fraud Recovery Action and granting leave to the Plaintiff to file an Amended Statement of Claim; and

m. otherwise continuing the terms of the *Mareva* Order until trial or disposition of the Fraud Recovery Action against the Remaining Mareva Defendants, or the expiry of 60 days following pronouncement of final judgment.

7. The Settlement Agreement between Sonja and the Receiver represents a fair, reasonable, and considered resolution of the issues between the parties. It was reached following a principled

negotiation process and reflects the Receiver's careful assessment of the facts, risks, and benefits, all in accordance with its duties as an officer of the Court. In the absence of any evidence of bad faith or impropriety, the Receiver's decision is entitled to considerable deference and should be approved by this Honourable Court.

PART II – FACTS

8. To secure Sonja's ongoing cooperation, reduce costs and delay, avoid unnecessary litigation, and maximize net recoveries, the Receiver, with the assistance of counsel, has engaged in extensive settlement negotiations with Sonja and her legal counsel.

9. On or about June 16, 2025, the Receiver and Sonja entered into a Settlement Agreement. This settlement is contingent upon Sonja's continuing cooperation with the Receiver's efforts to identify, locate, and liquidate the assets of the Mareva Defendants.

10. The Settlement Agreement is in the best interest of all stakeholders and will assist the Receiver in completing its investigations, advancing its claim and maximizing the return of funds to the investors.

11. As confirmed in the Receiver's Third Report, **the Receiver has not identified any information that indicates that Sonja had any role in the Fraudulent Scheme.**

12. With the assistance of her counsel, Sonja has been cooperative in assisting the Receiver with multiple issues, leading to greater efficiency and lower costs in liquidating the assets of the Mareva Defendants and addressing other issues arising in the Receivership. Sonja's cooperation has included but is not limited to:

a. assisting the Receiver with identifying, and providing information and records regarding the assets of the various Mareva Defendants, including the VDM Property discussed below;

b. assisting with the maintenance, storage, and sale of various assets, particularly given her location in the Cayman Islands, where most of the Mareva Defendants' assets are located;

c. as the Executrix of Santor's estate, dealing with various issues arising out of Mr. Santor's passing; and

d. by agreeing to assume the role as director of the various corporate Mareva Defendants previously controlled by Mr. Santor, providing directions to banks and other third parties without the need for further orders of the Ontario Court or Cayman Court.

13. The Receiver has confirmed that without this past and future cooperation, the Receiver would have been, and will be, faced with numerous additional impediments and delays. Further, significantly greater professional fees would need to be incurred to investigate, identify, maintain, and liquidate the assets of the Mareva Defendants. Thus far, Sonja's cooperation has resulted in the identification of new, previously unknown assets, and claims, and has been key in allowing the Receiver to collect information required to fulfill its mandate.

14. The Settlement Agreement requires the parties to make reasonable commercial efforts to sell and liquidate the assets of the Mareva Defendants during the duration of the Settlement Agreement, with the joint goal of maximizing the value of the realizations. As detailed below, the

payments to Sonja under the Settlement Agreement have been structured in a manner to incentivize her ongoing cooperation.

15. As Mr. Santor's spouse and the Executrix of the Estate, Sonja is uniquely positioned to assist the Receiver with its ongoing efforts to identify and locate the assets of the Mareva Defendants. Sonja is also able to assist the Receiver with selling and liquidating personal property held in her own name or in the name of the Estate with minimal administrative hassle.

16. Since Mr. Santor's death, Sonja has been made an officer and director of the various corporate Mareva Defendants. This provides the Receiver with significant efficiency in dealing with the records, accounts, and other assets of those corporate entities.

17. A complete tracing of the assets of the Mareva Defendants would be exceedingly time-consuming and costly, and therefore impracticable. A settlement with Sonja avoids the need for this tracing, as well as potentially costly and time-consuming litigation over entitlement to assets.

18. The most valuable known asset currently in control of the Mareva Defendants is the 9,400 sq. ft. luxury property located at West Bay Beach North Block 10A Parcel 150, Vista Del Mar, Cayman Islands (the "**VDM Property**"). As of September 27, 2023, the property had an appraised value of US$8,421,000. As of the time the Cayman Injunction Order was obtained, the VDM Property had no mortgages or other encumbrances registered against it. The registered owners of the VDM Property were Mr. Santor and Sonja, as joint tenants. By right of survivorship, upon Mr. Santor's death, Sonja became and remains the sole legal owner of the VDM Property.

19. Under the Settlement Agreement, no further tracing of funds or litigation over the VDM Property or other Mareva Defendant assets will be required, the weekly living allowance will cease

as of May 31, 2025, and the vast majority of the net proceeds from the sale of the VDM Property will be paid to the Receiver for the benefit of the Fund's investors and other affected stakeholders.

PART III – ISSUES

20. These motions raise three questions:

a. Should the Settlement Agreement and the related releases be approved?

b. Should the *Mareva* Variation Order be granted?

c. Should Plaunt's objection prevent the court from approving the Settlement Agreement?

PART IV – LAW AND ARGUMENT

The Settlement Agreement and Releases Should be Approved

The Settlement Agreement

21. The Receiver, as an officer of the Court, is mandated to act with neutrality, independence, and in the best interests of the stakeholders. Courts have repeatedly confirmed that they will afford significant deference to the actions and recommendations of a Receiver, particularly where, as is the case here, the Receiver has acted diligently, consulted with stakeholders, and undertaken a reasoned and transparent process in arriving at a proposed resolution.

22. The Settlement Agreement was reached after several months of negotiation and careful consideration of the competing interests involved. The Receiver conducted the process in good faith, and ensured that the terms of the settlement were reasonable in light of the costs, and delays associated with continued investigations, litigation, including in the Cayman Islands, and the ensuing risks. The Settlement Agreement is the product of extensive negotiations through counsel,

provides significant benefits to the Fund's creditors and investors, and its Court approval is now being sought through a fair and open process on notice to affected parties.

23. Underlying these considerations are the principles the courts apply when reviewing a sale (or we submit, as here, Settlement Agreement) by a court-appointed receiver. Courts exercise considerable caution when doing so and will interfere only in special circumstances -- particularly when the receiver is dealing with an unusual or difficult asset (in this case it is a series of disparate assets that need to be secured, stored, marketed and sold). Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown[1].

24. As outlined in the Receiver's Third Report, there is no evidence to indicate Sonja had any role in the fraud that is the subject of the Fraud Recovery Action.

25. The Receiver has confirmed that Sonja, through counsel, has provided consistent and ongoing cooperation to the Receiver from the time she was first served. Since the parties last appeared before the Court on March 24, 2025, Sonja has, without obligation, continued to cooperate with the Receiver in identifying, maintaining, and liquidating various assets of the Mareva Defendants and in dealing with various issues arising out of the death of Mr. Santor.[2]

26. The Receiver acknowledges that Sonja's ongoing involvement will result in significant efficiencies, cost savings, and higher net recoveries, to the benefit of affected stakeholders. Chief

[1] *Regal Constellation Hotel Ltd.*, Re, 2004 CanLII 206 (ON CA) at paragraph 23

[2] Receiver's Third Report at paras 3.0.2.

among these beneficiaries will be the Fund's investors. The benefits of the Settlement Agreement are set out in detail in the Receiver's factum. These considerations are the exact considered business decisions made by the Receiver in arriving at its recommendations that are entitled to significant deference by the Court.

The Third-Party Releases

27. The Court has jurisdiction to approve a receiver's settlement agreement that includes the release of third-party claims, where such relief is integral to the proposed transaction and serves the broader objectives of fairness, finality, and maximizing value for stakeholders.

28. In *Metcalfe & Mansfield Alternative Investments (Re)*, 2008 ONCA 587[3], the Ontario Court of Appeal confirmed that third-party releases may be granted in insolvency proceedings where they are necessary and reasonable, and where they are fair and appropriate in the context of the restructuring or realization process. Although *Metcalfe* arose under the Companies' Creditors Arrangement Act ("**CCAA**"), its underlying principles have been extended beyond the CCAA context.

29. Like in *Metcalfe*, the third-party releases are necessary for the implementation of the Settlement Agreement. The releases are limited in scope, both in terms of who is released (Sonja) and the claims that are released, and there are carve-outs if it is later discovered that Sonja engaged in fraudulent activities. Importantly, none of the third-parties subject to the released claims are opposing the Settlement Agreement or the provision for the release of their claims as third-parties. Further, the release of third-party claims was negotiated in the context of the Receiver resolving the Fraudulent Recovery Action against Sonja, resulting, more broadly, in most of Sonja and the

[3] *Metcalfe & Mansfield Alternative Investments (Re)*, 2008 ONCA 587

Estate's assets flowing to the Receiver uncontested, without tracing and with Sonja's cooperation and assistance. These are effectively one and the same as any claims that the investors would maintain, so if Sonja is being released (and releasing) the Receiver she should also be released (and releasing) PMI's investors. In the circumstances, the releases are fair and reasonable.

30. Courts have since recognized that *Metcalfe* is not confined to CCAA proceedings. In *Kitchener Frame Ltd., Re*, 2012 ONSC 234[4], Morawetz J. (as he then was) held that the reasoning in *Metcalfe* applies equally in BIA proceedings, emphasizing that the court has the authority under the Bankruptcy and Insolvency Act and its inherent jurisdiction to approve third-party releases where appropriate:

> …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.
>
> 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.

31. There is nothing in the reasoning of the Court of Appeal in *Metcalfe* to suggest that the rationale applies only in CCAA proceedings. The logic applies equally to a situation under the BIA where a court is called upon to sanction a settlement or compromise involving multiple stakeholders.

[4] *Kitchener Frame Ltd., Re, 2012 ONSC 234* at paras. 78 and 79

The Mareva Variation Order

32. Sonja respectfully submits that the Mareva injunction currently in place should be varied to release her, in accordance with the Settlement Agreement entered into with the Receiver. That agreement, which the Receiver has confirmed is fair, reasonable, and in the best interests of the stakeholders, provides a practical and principled basis for resolving the outstanding issues in this proceeding as they relate to her.

33. Sonja has cooperated with the Receiver to reach a resolution, and her continued cooperation moving forward will be significantly enhanced if she is no longer subject to the harsh restrictions imposed by the Mareva injunctions. The lifting of the Mareva injunctions is a necessary and proportionate step in allowing Sonja to turn the page on this chapter of her life.

34. The Mareva injunctions have imposed significant constraints on Sonja's ability to meet her basic obligations and care for her children, a problem compounded by her husband's suicide, and the resulting lack of immigration status in the Cayman Islands. The Mareva injunctions have limited her financial independence, restricted access to resources, and created a state of prolonged uncertainty and anxiety for which she has had to seek medical intervention. With the resolution of the Receiver's claims against her, there is no continuing justification for such extraordinary relief to remain in place.

35. By lifting the Mareva order as it pertains to Sonja, this Honourable Court will permit her to move forward with her life, provide stability for her children, and begin rebuilding her financial and personal circumstances. This, in turn, will allow her to engage more fully and constructively in any ongoing proceedings or inquiries, without the disproportionate burden of an asset-freeze order no longer justified by the circumstances.

Plaunt's Objection

36. The objection raised by Plaunt should not prevent this Honourable Court from approving the Settlement Agreement between the Receiver and Sonja.

37. First, Plaunt's own proceeding is currently stayed and cannot be advanced unless and until he obtains an Order to Continue against the estate of Mr. Santor, who died December 28, 2024—more than six months ago. Rule 11.01 of the *Rules of Civil Procedure* provides:

> **11.01** Where at any stage of a proceeding the interest or liability of a party is transferred or transmitted to another person by assignment, bankruptcy, **death** or other means, **the proceeding shall be stayed with respect to the party whose interest or liability has been transferred or transmitted until an order to continue the proceeding by or against the other person has been obtained. (emphasis added)**[5]

38. To date, Mr. Plaunt has neither obtained an Order to Continue against the Estate, nor taken any steps to do so since Mr. Santor's death.

39. Moreover, Sonja is not a named defendant in Mr. Plaunt's action. Accordingly, she is not a party against whom any claim is actively asserted by Mr. Plaunt. As such, he has no standing to oppose the Settlement Agreement between Sonja and the Receiver, particularly where that agreement does not purport to resolve or affect any claim against him.

40. In any event, Plaunt's asserted constructive trust claim over the Studio City proceeds is not a basis to withhold approval of the Settlement Agreement. His claim, even if valid (which the Receiver has reasonably concluded it is not), relates to the **priority** of his alleged interest vis-à-vis

[5] Rule 11, R.R.O. 1990, Reg. 194*: RULES OF CIVIL PROCEDURE*

PMI's investors and other unsecured creditors. It does not affect the Receiver's ability to settle discrete claims against Sonja and bargain for her cooperation which will minimize expense and enhance recovery for the Fund.

41. The Receiver has carefully reviewed Plaunt's claim and determined that (i) he cannot meet the legal threshold for a constructive trust, and (ii) in any event, the applicable limitation period has expired. These conclusions are well within the Receiver's expertise and mandate and are entitled to deference.

42. Furthermore, Plaunt's claim is limited to a monetary interest in cash, which is fungible. There is no risk that approval of the Settlement Agreement will result in the dissipation of a unique or traceable asset. Even if the Court were to conclude that Plaunt's claim warrants further consideration, the appropriate remedy is not to delay or derail the Settlement Agreement, but rather to direct the Receiver to hold a reasonable reserve from the receivership assets, pending a determination of Plaunt's entitlement, whilst allowing the Receiver and Sonja to proceed with the Settlement Agreement.

43. In sum, Plaunt has not taken the necessary steps to advance his claim, nor has he demonstrated any legal or equitable basis to prevent this Honourable Court from approving a fair and reasonable settlement reached by the Receiver in the discharge of its duties. The objection should be dismissed.

PART V - CONCLUSION

44. Sonja respectfully requests that this Honourable Court grant the relief sought by the Receiver and approve the Settlement Agreement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of July, 2025.

FOLGER RUBINOFF LLP
Per:

David Levangie

Schedule "A"

List of Authorities

1. *Regal Constellation Hotel Ltd.*, Re, 2004 CanLII 206 (ON CA)
2. *Metcalfe & Mansfield Alternative Investments (Re)*, 2008 ONCA 587
3. *Kitchener Frame Ltd., Re, 2012 ONSC 234 (see **Schedule "C")***

Schedule "B"

Statutory Provisions

Effect of Transfer or Transmission

11.01 Where at any stage of a proceeding the interest or liability of a party is transferred or transmitted to another person by assignment, bankruptcy, death or other means, the proceeding shall be stayed with respect to the party whose interest or liability has been transferred or transmitted until an order to continue the proceeding by or against the other person has been obtained. R.R.O. 1990, Reg. 194, r. 11.01; O. Reg. 14/04, s. 9.

Schedule "C"

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

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

***Morawetz J.*:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Consolidated Proposal was unanimously approved by the Affected Creditors. The Applicants thus satisfied the required "double majority" voting threshold required by the *BIA*.

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

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

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

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

(a) the proposal is reasonable;

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

(c) the proposal is made in good faith.

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

20 The first two factors are set out in s. 59(2) of the *BIA* while the last factor has been implied by the court as an exercise of its equitable jurisdiction. The courts have generally taken into account the interests of the debtor, the interests of the creditors and the interests of the public at large in the integrity of the bankruptcy system. See *Farrell, Re* (2003), 40 C.B.R. (4th) 53 (Ont. S.C.J. [Commercial List]).

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

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

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

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

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

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

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

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

> (a) the recoveries to creditors with claims in respect of OPEBs are considerably greater under the Amended Proposal than in a bankruptcy;
>
> (b) payments under the Amended Proposal are expected in a timely manner shortly after the implementation of the Amended Proposal;
>
> (c) the timing and quantum of distributions pursuant to the Amended Proposal are certain while distributions under a bankruptcy are dependent on the results of litigation, which cannot be predicted with certainty; and
>
> (d) the Pension Plans (as described in the Proposal Trustee's Report) will be fully funded with funds from the Pension Escrow (as described in the Proposal Trustee's Report) and, if necessary, additional funding from an affiliate of the Companies if the funds in the Pension Escrow are not sufficient. In a bankruptcy, the Pension Plans may not be fully funded.

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

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

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

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

33 With respect to whether the Consolidated Proposal is calculated to benefit the general body of creditors, TK Finance would be entitled to priority distributions out of the estate in a bankruptcy scenario. However, the Applicants

and their affiliates have agreed to forego recoveries under the Consolidated Proposal on account of their secured and unsecured intercompany claims in the amount of approximately $120 million, thus enhancing the level of recovery for the Affected Creditors, virtually all of whom are OPEB creditors. It is also noted that TK Finance will be contributing over $35 million to fund the Consolidated Proposal.

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

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

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

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

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

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

40 Section 7.1 of the Consolidated Proposal contains a broad release in favour of the Applicants and in favour of certain third parties (the "Release"). In particular, the Release benefits the Proposal Trustee, Martinrea, the CAW, Union Representative Counsel, Non-Union Representative Counsel, Blue Cross, the Escrow Agent, the present and former shareholders and affiliates of the Applicants (including Thyssenkrupp USA, Inc. ("TK USA"), TK Finance, Thyssenkrupp Canada Inc. ("TK Canada") and Thyssenkrupp Budd Company), as well as their subsidiaries, directors, officers, members, partners, employees, auditors, financial advisors, legal counsel and agents of any of these parties and any person liable jointly or derivatively through any or all of the beneficiaries of the of the release (referred to individually as a "Released Party").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

59 Specific considerations also apply when releasing directors of a debtor company. The *BIA* contains specific limitations on the permissible scope of such releases as set out in s. 50(14). For this reason, there is a specific section in the *BIA* proposal provisions outlining the principles governing such a release. However, counsel argues, the presence of the provisions outlining the circumstances in which a proposal can contain a release of claims against the debtor's directors does not give rise to an inference that the directors are the only third parties that can be released in a proposal. Rather, the inference is that there are considerations applicable to a release or compromise of claims against directors that do not apply generally to other third parties. Hence, it is necessary to deal with this particular type of compromise and release expressly.

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

61 Counsel submits that the Applicants' position regarding the proper interpretation of s. 62(3) of the *BIA* and its place in the scheme of the *BIA* is consistent with the generally accepted principle that a proposal under the *BIA* is a contract. See *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.); *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.* (1976), [1978] 1 S.C.R. 230 (S.C.C.); and *Society of*

Composers, Authors & Music Publishers of Canada v. Armitage (2000), 20 C.B.R. (4th) 160 (Ont. C.A.). Consequently, counsel submits that parties are entitled to put anything into a proposal that could lawfully be incorporated into any contract (see *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List])) and that given that the prescribed majority creditors have the statutory right under the *BIA* to bind a minority, however, this principle is subject to any limitations that are contained in the express wording of the *BIA*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

77 Deschamps J., on behalf of six other members of the court, with Fish J. concurring and Abella J. dissenting, held that the proper interpretation of the statutes was that the *CCAA* provision should prevail, the deemed trust under the *Excise Tax Act* would cease to exist in a *CCAA* proceeding. In resolving the conflict between the *Excise Tax Act* and the *CCAA*, Deschamps J. noted the strange asymmetry which would arise if the *BIA* and *CCAA* were not in harmony on this issue:

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

78 It seems to me that these principles indicate that the court should generally strive, where the language of both statutes can support it, to give both statutes a harmonious interpretation to avoid the ills that can arise from "statute-shopping". These considerations, counsel submits, militate against adopting a strained reading of s. 62(3) of the *BIA* as

a prohibition against third-party releases in a *BIA* proposal. I agree. In my opinion, there is no principled basis on which the analysis and treatment of a third-party release in a *BIA* proposal proceeding should differ from a CCAA proceeding.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Motion granted.

End of Document

Court File No.CV-24-00730869-00CL

TWO SHORES CAPITAL CORP.	and	**PRODUCTIVITY MEDIA INC., ET AL**
Applicant		Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

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