Estate/Court File Nos.: 31-459200
31-2734090

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

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

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP, A LIMITED PARTNERSHIP ESTABLISHED UNDER THE LAWS OF MANITOBA CARRYING ON BUSINESS IN THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

AND

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF YSL RESIDENCES INC., A CORPORATION FORMED UNDER THE LAWS OF ONTARIO CARRYING ON BUSINESS IN THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

BOOK OF AUTHORITIES OF APPLICANTS
(Motion in Writing)

May 14, 2021

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TAB 1

COURT FILE NO.: 05-CL-005797
DATE: 2006.01.17

ONTARIO
SUPERIOR COURT OF JUSTICE
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B E T W E E N:	)	
	)	
DAVID ASHELY, ALEX CHAPMAN, MICHAEL DePENCIER, ESTATE OF CLIVE BENNETT MORTIMER, BRUCE HEYLAND, DAVID WILLIAMS and XENOLITH	)	Tanya Pagliaroli, for the Plaintiffs (The "Ashley Group")
Plaintiffs	)	
- and -	)	
MARLOW GROUP PRIVATE PORTFOLIO MANAGEMENT INC., MARLOW GROUP SECURITIES INC., MARLOW GROUP INC., MARLOW PRIVATE ESTATE BUILDERS INC. and TERRENCE W. MARLOW	)	Derek J.Bell and Raj Sanhi, for the Receiver, A. Farber & Partners Inc.
	)	Terrence J O'Sullivan and M. Paul Michell for John Goudey, Thomas Abel, Shobana Ananth, Shane Anderson, Donald Bayer, Michael Caicco, Charles Cutts, John Coudey, Arnold H. Hochman, Mark Irwin, Gary Levy, Karen Malatest, Hamish McEwan, Pierre Meunier, Paul Oakley, Barry Reiter, Mike Stroud, Michelle Szames, Stephen Szames, James Turner, John Unger, and 2044102 Ontario Inc. (The "Goudey Group")
Defendants	)	

) Arnie Herschorn for Paul Benson,
) Brenda Benson and 145403 Ontario Inc.
) (The "Benson Group")
)
) O. Pasparakis for Goodman & Company,
) Investment Counsel Ltd.
)
) M. McNaughton and B. Wong for
) Canadian Investor Protection Fund
)
) Roy Lee for The Superintendent In
) Bankruptcy

) Jeff Carhart and Arthi Sambasivan for
) Ron Eden
)
) **HEARD:** January 6, 2006

MESBUR J

REASONS FOR DECISION

Nature of the motion:

[1] There is very little jurisprudence concerning Part XII of the *Bankruptcy and Insolvency Act*. At issue on this motion is the correct interpretation of the term "securities firm" within the meaning of Part XII of *Act,* whether trust claims can be made to cash or securities under Part XII, and whether the court should consider compelling the re-registration of certain securities on the eve of a bankruptcy.

[2] If the defendants or some of them are found to be securities firms, are assigned into bankruptcy, and if Part XII of the *Bankruptcy and Insolvency Act* applies, then the court must also address whether securities held for the Goudey Group[1], are "customer held securities" within the meaning of s.253 of the *Act*, or whether they would fall into the "customer pool fund" for distribution among all customers on a *pro rata* basis. It

[1] John Goudey, Thomas Abel, Shobana Ananth, Shane Anderson, Donald Bayer, Michael Caicco, Charles Cutts, John Coudey, Arnold H. Hochman, Mark Irwin, Gary Levy, Karen Malatest, Hamish McEwan, Pierre Meunier, Paul Oakley, Barry Reiter, Mike Stroud, Michelle Szames, Stephen Szames, James Turner, John Unger, and 2044102 Ontario Inc.

must also decide if certain limited partnership units held for the Benson Group[2] and Mr. Eden should be registered in their names prior to a bankruptcy.

[3] In addition to the analysis of these broad issues, the court must also consider receiving the Receiver's Third Report, the Supplement to it, and the Receiver's Fourth Report and approving the Receiver's activities described in them. It must also determine whether to authorize the Receiver to assign the defendants other than Terrence W. Marlow into bankruptcy, and whether, in doing so, the court should procedurally and substantively consolidate their bankrupt estates into one bankruptcy estate, so that the assets of all would form one pool against which the creditors of all could claim.

General Factual Background and the Various Stakeholders:

[4] The corporate defendants collectively referred to themselves as the "Marlow Group" or the "Marlow Financial Group". The companies making up the group are Marlow Group Private Portfolio Management Inc. ("Management Inc."), Marlow Group Securities Inc. ("Securities Inc."), Marlow Group Inc. ("Group Inc.") and Marlow Private Estate Builders Inc. ("Estate Builders Inc."). I am advised that the proper name of Estate Builders Inc. is "Private Estate Builders Inc.". The title of proceedings will be amended to reflect this correction. The defendant Terrence W. Marlow is the sole shareholder, officer and director of each of these corporate entities.

[5] Mr. Marlow operated the four companies out of one office, with one telephone number, one fax number, one set of staff, one bank account, and one set of poorly kept books. He referred to them collectively as Marlow Group, and used letterhead styled "Marlow Financial Group".

[6] Through the companies, Mr. Marlow provided a number of investor services. Management Inc. is an investment advisor and securities dealer that was registered as an investment counsel, portfolio manager and limited market dealer with the Ontario Securities Commission (the "OSC"). Securities Inc. is a securities dealer and registered investment dealer that was registered with the Investment Dealers Association of Canada (the "IDA"). Securities Inc. was also, until it ceased to be a member of the IDA, a member of the Canadian Investor Protection Fund (the "CIPF"). Estate Builders Inc. is a life insurance agency, and Group Inc. is a management company that provided services to the other three companies.

[7] Mr. Marlow was registered with the OSC as a director and advising and trading officer of Management Inc., as well as its chief compliance officer. Mr. Marlow was also registered with the OSC as a trading officer of both Management Inc. and Securities

[2] Paul Benson, Brenda Benson and 145403 Ontario Inc.

Inc. Unfortunately, Mr. Marlow apparently suffers from an addiction to crack cocaine, for which he is currently receiving rehabilitative treatment.

[8] Because it was a registered investment counsel and portfolio manager, Management Inc. was required to file annual audited financial statements with the OSC within 90 days of its fiscal year ended December 31. It failed to do so following its 2003 year end. After that, the OSC imposed some conditions on Management Inc. One of these was to file a satisfactory reconciliation of its client accounts.

[9] Management Inc. then hired a chartered accountant, Wally Rudensky, to help meet the OSC's demands. Mr. Rudensky's reconciliation concluded there was a significant deficiency between the actual cash that Management Inc. had in its accounts, and the amount it was supposed to be holding in trust for its clients. Mr. Rudensky concluded there would be a trust cash shortfall of about $3.3 million. As a result, the OSC immediately suspended Management Inc.'s operations until an audit was complete.

[10] Mr. Rudensky worked to complete an audited version of his reconciliation. It disclosed that Management Inc. held a large number of securities for its customers, but very few of these were registered in their clients' names. Management Inc. mostly purchased large blocks of securities, and then allocated them to individual investors, although they did not register them in the clients' names. Some securities were registered in clients' names, but were held in their own personal accounts, unaffiliated with the Marlow Group.

[11] The plaintiffs, who are referred to as the "Ashley Group" comprise a group of customers all of whom were essentially in a cash position at this time. They tried to reach an agreement to have Management Inc. return their securities and cash. When that failed, they moved to have the Receiver appointed. Justice Campbell made a Receivership Order on March 9, 2005, appointing A. Farber & Partners Inc. as Receiver over the corporate defendants' assets.

[12] This motion began as the Receiver's motion to assign each of the corporate defendants into bankruptcy. Ancillary to that relief, the Receiver suggests that Management Inc. is a "securities firm" as defined in section 253 of the *Act,* and, as a result, the special provisions of Part XII of the *Act* would apply to this bankruptcy. The Receiver seeks a declaration that only those securities that were actually registered, or in the process of being registered, in the name of customers are to be considered as "customer name securities". It also wishes the bankruptcies of the corporate defendants to be consolidated both procedurally and substantively, so that the assets of all would be available to the creditors of all, and the estates would be administered as one estate. In this regard, it asks the court to consider all the

corporate defendants as one entity, operating as a securities firm, and subject to Part XII on bankruptcy.

[13] In response to the Receiver's motion, other parties and stakeholders responded, and filed cross motions. The Ashley Group supports the Receiver's position completely.

[14] The other participants on this motion are other stakeholders. The Goudey Group comprises a group of customers where were in a securities position at the time of the receivership. The Benson Group was similarly situated, as was Mr Eden. The Benson and Eden holdings were in two limited partnerships. Management Inc. holds sufficient securities to meet all its obligations to hold securities for its customers. It is only in the trust cash area that there is a significant shortfall. The Goudey and Benson Groups, along with Mr. Eden, have all brought cross-motions and oppose the Receiver's motion.

[15] The Canadian Investor Protection Fund (CIFP) is a fund that covers customers of CIPF members that have suffered or may suffer financial loss solely as a result of the insolvency of a member. CIPF is a "customer compensation body" under Part XII of the *Bankruptcy and Insolvency Act.* Of all the companies making up the Marlow Group, only Securities Inc. was a CIPF member. CIPF has participated on the motion in response to the Receiver's request for a substantive consolidation of the bankruptcies of the corporate defendants.

[16] Finally, the Superintendent in Bankruptcy has intervened pursuant to the provisions of section 5(4)(a) of the *Act.* The guiding principles for the Superintendent's intervention under s 5(4)(a) are set out in subsection 2 of Section VIII of the *Superintendent in Bankruptcy's Programs Effective April 1, 1994.* The guiding principle is stated as:

> The Superintendent may intervene in court under this paragraph where it is a question of national interest or importance concerning the bankruptcy process or where the Superintendent feels it is in the public interest to do so.

[17] The Superintendent intervenes here to make submissions on various questions of law relating to the interpretation of Part XII of the *Bankruptcy and Insolvency Act.* The Superintendent is of the view that the legal issues of what constitutes a securities firm, whether trust claims can be advanced under Part XII of the *Act,* and whether a creditor should be able to require a re-registration of securities in order to circumvent Part XII are issues of national importance.

Positions of the various stakeholders:

[18] In order to understand the motion and cross motions, it is important to understand the positions of the various stakeholders on the various issues.

The Receiver

[19] The Receiver takes the position that the corporate defendants should be assigned into bankruptcy, and that bankruptcy should proceed under the provisions of Part XII of the *Act* because Management Inc. is a securities firm as that term is defined in the *Bankruptcy and Insolvency Act*, and all the companies acted essentially as one entity. The Receiver also says that Part XII prevails in any conflict between it and any other provisions of the *Act.* For that reason, the Receiver suggests that trust claims are not permitted in security firm bankruptcies.

[20] The Receiver says that apart from some shares of Stealth Minerals Ltd. actually registered in individual clients' names, the securities that Management Inc. held for the Goudey Group, the Benson Group, and Mr. Eden are not "customer name securities" as that term is defined in the *Act.* Thus, they say that these securities should, with the remaining cash, be placed in the customer pool fund, to be shared proportionally among all the customers.

[21] The Receiver says that it would be contrary to public policy to permit the Benson Group and Mr. Eden to require that their shares be transferred into their names prior to a bankruptcy, and thus convert them into customer name securities in order to avoid their pooling with those of other customers.

The Superintendent of Bankruptcy

[22] The Superintendent of Bankruptcy has intervened on this motion in order to support the Receiver's interpretation of the definition of "securities firm", the Receiver's position that trust claims cannot be made to cash or securities under Part XII, and the Receiver's position that the court should not order the registration of certain securities in the names of certain investors on the eve of bankruptcy. The Superintendent says these legal issues are of national importance and require adjudication.

The Plaintiffs (the Ashley Group)

[23] The Ashley Group supports the Receiver's position, and that of the Superintendent in Bankruptcy.

The Goudey Group

[24] The Goudey Group puts forward a number of arguments. First, it suggests that Management Inc. is not a securities firm. Second, they say that even if it is, and Part XII applies, their securities are customer name securities, because they can be identified as "theirs". Finally, even if the securities are not customer name securities, the Goudey Group says that they can assert a trust claim to the securities which should be returned to them, and not form part of the customer pool to be shared with other investors.

The Benson Group

[25] The Benson Group wants to have Benson's name and address entered on the Register of the CMP 2003 Resource Limited Partnership and the CMP 2004 Resource Limited Partnership ("CMP"). The Benson group has added Goodman & Company, Investment Counsel Ltd. to the motion. Goodman & Company is the Manager appointed by CMP to provide investment, management, administrative and other services in relation to these two limited partnerships. The Benson Group points to these securities being a particular type of tax shelter/limited partnership investment. They say that pursuant to the Limited Partnership Agreement and the provisions of the Prospectus, Goodman & Company is required to list them as the owners of their respective percentage holdings and has failed to do so. The want the court to make an order compelling this registration, prior to the bankruptcy, in order to become customer name securities, and not fall into the customer pool fund.

Mr. Eden

[26] Mr. Eden wants to be treated similarly to the Benson Group if they have success, or the Goudey Group, if they have success. Simply put, Mr. Eden wants securities to be returned to him, however that may be accomplished.

Goodman & Company

[27] Goodman & Company takes no position on whether it should re-register the CMP partnership units or not. However, it denies that it has acted improperly in failing to register any CMP units in the names of the Benson Group or Mr. Eden. It says that the actual subscriber for the limited partnership units was Management Inc. and that is who is recorded as the subscriber for CMP 2003 and CMP 2004 on the Partnership Register. Goodman & Company wishes to be exonerated of any wrongdoing or impropriety.

Canadian Investor Protection Fund

[28] The Canadian Investor Protection Fund has participated on this motion only to oppose the substantive consolidation of the bankruptcies. A substantive consolidation, it says, could prejudice their position. It also takes the position that there are no compelling reasons to order substantive consolidation.

The Law and analysis:

[29] In order to put the issues into context, it is important to consider Part XII of the *Bankruptcy and Insolvency Act*, and its purpose. It is a relatively new part of the *Act,* having come into force in 1997, in response to what were seen as undue complexities involved in the bankruptcies of securities firms.

[30] Part XII of the *Bankruptcy and Insolvency Act* was enacted to simplify and streamline the administration of a bankrupt securities firm's estate. Before Part XII, administration of these estates was time-consuming, complex, uncertain, and costly to both investors and creditors. Customers of the bankrupt firm would raise trust and tracing concepts, which proved difficult to determine. Often, while waiting for adjudication of these trust claims, the Trustee would have to continue to hold potentially volatile securities, whose value could plummet, while customers battled over their entitlement to them.

[31] What Part XII does is to create a particular class of securities that are to be returned to customers. These are called "customer name securities". All other securities and cash held by the bankrupt firm are to be pooled in a "customer pool fund", and distributed among all the customers of the firm on a *pro rata* basis. It is easy to see why some customers would like to avoid the application of Part XII altogether, or, alternatively, have their securities designated as customer name securities, in order to avoid pooling them with other customers.

[32] It should be noted that the customer pool fund is paid out before any creditors are paid at all. If significant securities are returned to customers and do not fall into the pool, the pool will obviously be smaller. Here, if the Receiver's position prevails, the customer pool fund of securities and cash will give all the customers a return of about 60 cents on the dollar. If the Ashley/Benson/Eden positions prevail, they will have securities returned to them, and realize about 95 cents on the dollar for their claims, while the Ashley Group customers will receive less than 5 cents on the dollar.

Bankruptcy?

[33] Under the terms of the Receivership Order, the Receiver has the power to assign all the corporate defendants, apart from Securities Inc., into bankruptcy. Securities Inc.'s exclusion from this general power was made part of the Receivership Order at CIPF's request, presumably because of CIPF's particular potential obligations on the bankruptcy of one of its members. As a result, an order is required to put Securities Inc. into bankruptcy. As far as the other corporate defendants are concerned, the Receiver seeks approval of its decision to assign them into bankruptcy.

[34] There is no question that all the corporate defendants are insolvent, and that it would be in the interests of all the customers and creditors for them to be assigned into bankruptcy. No one now opposes an assignment. The only issue is whether the bankruptcy should proceed under Part XII of the *Act*, or whether it should be a "regular" bankruptcy. Determination of this issue will depend on whether some or all of the corporate defendants are "securities firms", or indeed, whether the Marlow Group should be considered as a single entity which itself is a securities firm.

[35] The "securities firm" issue has focused primarily on Management Inc., since it is the company that seems to holding the bulk of the securities and cash for the customers. As to the other corporate defendants, there is no question that Securities Inc. is a securities firm. It, however, has virtually no assets. Estate Builders Inc. is clearly not itself a securities firm. This may be relevant on the issue of substantive consolidation, but is essentially moot, since the company apparently has no assets either. Group Inc. simply provided management services to the other companies. It has some assets. This leaves the question of whether Management Inc. is a securities firm. If the bankruptcies are substantively consolidated, and Management Inc. is a securities firm, then presumably a consolidated bankruptcy would proceed under Part XII.

Securities Firm?

[36] Section 258 of the *Bankruptcy and Insolvency Act* defines the term "securities firm" as follows:

> "securities firm" means a person who carries on the business of buying and selling securities from, to or for a customer, whether or not as a member of an exchange, as principal or agent, and includes any person required to be registered to enter into securities transactions with the public, but does not include a corporate entity that is not a corporation within the meaning of section 2.

[37] The French version of the statute contains the following definition:

> *« courtier en valeurs mobilières » Toute personne, membre ou non d'une bourse de valeurs, qui achète des titres a un client ou pour celui-ci ou vend des titres a un client ou pour celui-ci, pour son compte ou en qualité de mandataire, et notamment celle qui a l'obligation de s'inscrire pour avoir le droit de conclure avec le public des opérations sur les titres, a l'exception des personnes qui sont exclues de la définition de « personne morale » a l'article 2.*

[38] The Goudey Group sets much store in the phrase "carries on the business" in the English definition. It takes the position that in order to qualify for treatment under Part XII, a firm's primary business must be the buying and selling of securities. It says that Management Inc. held itself out primarily as an advisor. It was registered as an investment counsel, portfolio manager and limited market dealer with the OSC. Since Management Inc. never carried on business as a limited market dealer, the Goudey Group concludes that this necessarily implies Management Inc. was no more than an investment counsel and portfolio manager, and thus cannot be considered a securities firm. While the Goudey Group concedes that Management Inc. did buy securities on their behalf, they say it was only incidental to their primary business of investment counsellors. Thus, they say Management Inc. cannot be held to be a securities firm.

[39] The Superintendent points to the absence of the phrase "carries on the business" in the French version of the *Act.* Section 18 of the *Charter of Rights and Freedoms* provides in section 18 that both the English and French language versions of a Federal statute are equally authoritative. Therefore, the court must examine both to determine Parliament's intention. Each version "forms part of the context in which the other must be read".[3] The court must therefore find a common interpretation for both equally authoritative versions.

[40] While the English version includes the term "carries on the business", the French version does not. A literal translation of the phrase "*Toute personne, membre ou non d'une bourse de valeurs, qui achète des titres a un client ou pour celui-ci ou vend des titres a un client ou pour celui-ci",* from the French version is "Every person, whether or not a member of an exchange, who buys securities from a customer or for him or sells securities to a customer or for him, ...".

[41] The French version does not contain any language to suggest that buying and selling securities must be the person's *primary* business. This forms part of the context in which one must read the English version.

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[3] *Re Estabrooks Pontiac Buick* (1982), 44 N.B.R. (2d) 201, (C.A) at paragraph 19, and *Aeric Inc. v. Canada Post Corp* (1985), 16 D.L.R. (4th) 686 (F.C.A.) at p. 707

[42] The Superintendent suggests[4] that "[u]nderstanding the definition of "securities firm" to include a corporation that buys and sells securities for its customers in the course of doing business even if it also engages in other commercial activities is both a reasonable interpretation of the English version and one that is consistent with the French version". I agree.

[43] The Goudey Group says that this approach is equivalent to "reading out" the phrase "carries on the business" in the English version, and thus cannot comply with the "shared meaning rule." [5] I disagree. What the Goudey Group really wants the court to do is to read in the word "primarily" into the English definition. There is no need to do this. When one gives the usual meaning to all the words in both English and French versions, there is no inconsistency between them. Part of the firm's business must be the buying and selling of securities; it may be its primary business, or it may simply be a part of its overall business. If it is, it is a "securities firm" within the meaning of Part XII, in both English and French. This interpretation is a reasonable interpretation of the English version, and is also consistent with the French version.

[44] The Goudey Group goes on to suggest that "securities firm" should be interpreted to be consistent with the securities law definition of a securities dealer. In this regard, it points to section 1(1) of the *Securities Act* [6] and the definition there of the term "dealer" as "a person or company who trades in securities in the capacity of principal or agent." They point out that this definition differs from the definition of an "advisor", namely "a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising others as to the investing in or the buying or selling of securities." They suggest that since Management Inc. was registered as an advisor under Ontario legislation, and the Goudey Group retained Management Inc. to provide them with investment advice, Management Inc. must therefore be an advisor, not a dealer, and hence not a securities firm.

[45] It would have been an easy matter for Parliament to define "securities firm" in a parallel fashion to provincial securities legislation. It did not. It has created a broad definition in Part XII. The definition carries no ambiguity.

[46] Management Inc. clearly bought and sold securities for all of its customers, whether it did so as its primary business, or as ancillary to its primary business of providing investment advice. In this regard, I note that some of the customers signed Private Client Account Agreements with Management Inc. These Agreements provided: "Individual Securities, including stocks and bonds may be purchased from time to time." The Agreements authorized the Marlow Group "to place

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[4] Superintendent's factum, paragraph 12
[5] see Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes,* 4th ed. (Markham, Ont.: Butterworths, 2002) at 80
[6] R.S.O. 1990 c. S.5

orders with brokers, investment dealers, banks or trust companies for the purchase and sale of securities."

[47] It is important to note that the definition of "securities firm" under the *Bankruptcy and Insolvency Act* includes a person "required to be registered to enter into securities transactions with the public". This, no doubt, includes firms the Goudey Group describes as brokerage firms, or stockbrokers, who must, of course be registered as dealers. Such firms are firms defined as "dealers" under Ontario securities law. However, by stating that the definition includes such persons, it must, by implication be taken to mean that the definition is not limited to such persons. Thus, the definition must include persons who need not be registered in this way. This would encompass a firm like Management Inc.

[48] As a result, it is clear that Management Inc. "carried on the business of buying and selling securities from, to or for a customer, whether or not as a member of an exchange, as principal or agent, and includes any person required to be registered to enter into securities transactions with the public". I thus conclude they are a securities firm, and therefore Part XII will apply to their bankruptcy.

Customer Name Securities?

[49] Part XII carves out a very limited class of securities that are to be returned to customers when a securities firm goes bankrupt. These are defined as "customer name securities" in section 253 in the following way:

> "customer name securities" means securities that on the date of bankruptcy of a securities firm are held by or on behalf of the securities firm for the account of a customer and are registered in the name of the customer or are in the process of being so registered.

[50] The Goudey Group points to the fact that the term "registered" is nowhere defined in Part XII. They suggest that as a result, it is enough for the securities to be identifiable as belonging to a customer, in order to be a customer name security. They reason that since Management Inc. made allocations of various securities among its customers, those securities can be identified as belonging to the customers. They say that Mr. Rudensky's Account Balance Reconciliation confirms that all of the customer assets held by the Marlow Group have been identified, and the respective owners of those assets have confirmed their ownership. They conclude their argument by stating that this ability to identify the respective owners is equivalent to registration, as contemplated by section 253. To bolster this position, they rely on the re-wording of

the section proposed in Bill C-55 [7]. There, the definition of customer name securities reads as follows:

> "customer name securities" means securities that on the date of bankruptcy of a securities firm are held by or on behalf of the securities firm for the account of a customer and are registered or recorded in the appropriate manner in the name of the customer or are in the process of being so registered or recorded, but does not include securities registered or recorded in the appropriate manner in the name of the customer that, by endorsement or otherwise, are negotiable by the securities firm. [underlining in the original]

[51] The Goudey Group suggests that this new definition clearly supports their view that it is enough simply to be able to identify the beneficial owner of a security, since this would constitute "recording in the appropriate manner" in the records of the securities firm. As a result, they say that their securities are customer name securities and must be returned to them. I disagree with this analysis.

[52] In my view, the addition of the words "or recorded in the appropriate manner" in the amendments in Bill C-55 are designed to cover situations where there is no actual registration of securities, but there is another specified method of recording ownership. This, for example, would cover limited partnerships for whom the *Limited Partnership Act* requires that general partner to maintain a record of the limited partners. This would be a name "recorded in the appropriate manner."

[53] Here, there is no evidence that any particular securities were recorded in any fashion in the names of the Ashley Group. Bill C-55 offers no assistance. The Ashley Group's securities are not customer name securities. They will form part of the customer pool fund, unless they can be excluded on the basis of a trust claim.

Trust Claims allowed under Part XII?

[54] The provisions of Part XII of the *Act* are paramount if there is a conflict with other parts of the *Act.* Section 255 of Part XII says:

> All the provisions of this Act, in so far as they are applicable, apply in respect of bankruptcies under this Part, but if a conflict arises between the application of the provisions of this Part and the other provisions of this Act, the provisions of this Part prevail.

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[7] *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*

[55] In regular bankruptcies, section 67 of the *Act* applies. It clearly states that assets held in trust by the bankrupt do not form part of the bankrupt estate. In securities firm bankruptcies, Part XII creates a kind of "super-priority" for customers. Section 261(1) vests in the trustee any securities held by the firm itself, as well as any securities and cash held by or for the account of the securities firm for a customer. The trustee is then directed to use these securities and cash to create what is called the "customer pool fund". All other assets form what is called the "general fund".

[56] By virtue of s. 262(1), the customer pool fund is allocated first to the costs of administration, if there are insufficient funds in the general fund to pay the costs, and then to distribute the balance to all the firm's customers (except deferred customers) on a *pro rata* basis. Any funds remaining after that distribution are paid into the general fund, which is disbursed according to s. 262(2.1).

[57] What does the concept of the customer pool fund do to the notion of trust claims in a Part XII bankruptcy? To date, there is only one reported case in Canada dealing with this issue.[8]

[58] In *Vantage,* Brenner J considered a Trustee's position that any trust claim to either cash or securities held by a securities firm at the date of bankruptcy vests in the Trustee. Justice Brenner held that the plain wording of the language of the section supported that view. In coming to this conclusion he considered both the plain language of the section, as well as the underlying policy of Part XII.

[59] In order to discern the policy, Justice Brenner relied on an article by B.D. Turcotte, entitled "Securities Firm Bankruptcies" [9]. That article outlined the historical complexities of securities firm bankruptcies prior to Part XII, particularly the difficulties of sorting out ownership of, or claims to securities that securities firms generally hold in many different ways for their customers. Justice Brenner concluded:

> By passing Part XII, Parliament decided to try to simplify securities firm bankruptcies by doing away with the myriad of competing trust claims and the associated legal costs and time delays in securities firm bankruptcies. Parliament recognized that securities firms deal in principally two assets: cash and securities, and so for those two asset classes, Parliament enacted the new rules in Part XII. Under s. 261, Parliament removed the entire concept of trust law for securities (except where those securities are "customer named securities") and cash.

[60] In the context of the *Vantage* case, Justice Brenner was dealing with the issue of cash. He concluded that by virtue of s. 261, all cash held by a securities firm at

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[8] *Re Vantage Securities* (1998), 9 C.B.R. (4th) 169
[9] (1997) 17:3 *Insolvency Bulletin* 75

the date of bankruptcy vested in the trustee, not just the cash owned beneficially by the securities firm. Section 261 is equally applicable to securities, and I thus agree with Brenner J's analysis, and find that all securities held by a securities firm at the date of bankruptcy vest it the trustee, not just the securities owned beneficially by the firm. The only exclusion from the pool is those securities that fall into the definition of "customer name securities". Surely the plain reading of the section suggests that cash and securities "held …for a customer" must mean cash and securities held in trust or for the benefit of a customer. If cash and securities held in trust for a customer are to vest in the trustee in a securities firm bankruptcy, then clearly this provision is in conflict with the general provisions of section 67 that exclude trust assets from the estate. Since there is a conflict, Part XII prevails, and trust claims must be prohibited.

[61] Since I have held that Management Inc. is a securities firm, the Goudey Group's securities are not customer name securities, and have also found that they cannot assert a trust claim to them, their securities must vest in the trustee, and form part of the customer pool. This addresses the Goudey Group motion. I turn now to the arguments advanced by the Benson Group and Mr. Eden.

Require registration of the Benson Group and Eden securities?

[62] The Benson Group and Mr. Eden were also Management Inc. customers. They invested in two limited partnerships, CMP 2003 Resource Limited Partnership and CMP 2004 Resource Limited Partnership ("CMP"), as well as earlier CMP Limited Partnerships for prior years. The CMP limited partnership units are not registered in the Benson Group or Mr. Eden's names. They say their units should be registered in their names, and ask the court to require Goodman & Company to effect this registration, before any bankruptcy occurs. This, of course, would make their CMP units customer name securities that would be returned to them, since they would be registered in their names prior to bankruptcy.

[63] Simply put, the Benson Group and Mr. Eden say that both the Limited Partnership Agreement and the *Limited Partnership Act* [10] require that the names and addresses of all limited partners of the Limited Partnership must be registered in the records of the limited partnership. They also say that Prospectuses for these two limited partnerships state that shares will be registered in the name of a partner, if the partner requests it. They say they have a right to demand registration, and they are doing so now. They go further, and say that Goodman & Company has acted improperly in failing to maintain their names as owners in the records, and further, has

[10] See s. 4(1) of the *Limited Partnership* Act, R.S.O. 1990 c. L.16, and s. 3a of Regulation 713 made under the *Limited Partnership Act*

made a misrepresentation in the prospectus, namely that it would keep a record of the limited partners.

[64] The Benson Group and Mr. Eden say that in the years before 2003, their investments in the CMP limited partnerships for the prior years were registered in their names. They also received their expected tax benefits from the investments, received tax receipts, and were acknowledged by the Limited Partnerships to be limited partners.

[65] In the years since, they also received their expected tax receipts for CMP 2003 and 2004. They say that the Receiver says Marlow's records show Marlow was holding 4500 CMP units on behalf of its customers. They point to these facts to support their view that they must therefore be limited partners of the 2003 and 2004 CMP limited partnerships, and thus are entitled to registration of their interests. This will make the investments customer name securities.

[66] Goodman & Company points out that as far as CMP and its records are concerned, in prior years, the Benson Group and Eden subscribed for the partnership units in their own names. They were recorded as limited partners for these investments. However, it was Management Inc. that subscribed for units in CMP 2003 and 2004. In compliance with its obligations under the *Limited Partnership Act*, and the Limited Partnership Agreement, CMP kept registers for unit subscribers for CMP 2003 and 2004. These register show Management Inc. as the subscriber for these units.

[67] As it did for many other securities, Management Inc. purchased blocks of CMP as subscriber, and was thus registered as the holder in its own name. It later allocated them to clients. In my view, this puts the CMP units in exactly the same position as the other securities, which I have found, are not customer name securities. Although the Benson Group and Eden do not assert a trust claim to the CMP units, it is clear to me, on the basis of who subscribed for the units, that Management Inc. was the registered holder, and held the units in trust for the Benson Group and Eden. I see no basis upon which they can require the register to be altered, since they were not the subscribers for these units. I deny their request on this basis. As a result, I need not address whether there are also public policy grounds upon which to deny it as well.

[68] This leaves the last issue; that is whether there should be both a procedural and substantive consolidation of the bankruptcies of the corporate defendants, essentially treating them as one bankruptcy of one securities firm.

Procedural and Substantive Consolidation?

[69] All the stakeholders support procedural consolidation of the bankruptcy of all the corporate defendants. No one opposes a substantive consolidation apart from

the CIPF. In order to assess its position, it is important to consider what the effect of a substantive consolidation would be.

[70] Essentially, a substantive consolidation would treat all of the corporate defendants as one entity. The assets of each would fall into one common pool, to be shared by all their creditors on a *pari passu* basis.

[71] There is no specific authority in the *Bankruptcy and Insolvency Act* to grant an order for substantive consolidation. It is common ground, however, that the court has the authority to do so under its equitable jurisdiction under section 183 of the *Act.*

[72] Few Canadian cases have dealt with substantive consolidation, although the American courts have written extensively on the subject, setting out various, and disparate, tests to support an order for substantive consolidation. We have no such assistance here.

[73] The Receiver seeks a substantive consolidation for a number of reasons. Just as it said the "Marlow Group" as a whole should be treated as a securities firm, so it says, the four corporate defendants should be treated as one legal entity for the purposes of bankruptcy. They say it is appropriate to consolidate bankrupt estates in order to avoid multiplicity of proceedings, and where the bankrupt companies have shared or pooled resources, assets, and bank accounts. Also, they say where related companies are organized in an intertwined manner, it will be reasonable that the estates be dealt with *en bloc* to realize the greatest value for all interested parties.[11]

[74] The Receiver goes on to say that all four companies operated as an interrelated entity, with shared premises, telephone, fax, bank accounts and accounting records. The Receiver says that they were operated as a single, consolidated enterprise, and should be treated as such for bankruptcy purposes, because to do so would be most expedient and cost-effective.

[75] What emerges from the few Canadian cases, however, is that although expediency is an appropriate consideration in deciding whether to grant consolidation, it should not be done at the expense or possible prejudice of any particular creditor.[12] I take this to include any possible prejudice to someone like the CIPF, which as a customer compensation body under the *Act* has some concerns about possible additional expose to claims if there is substantive consolidation, and all creditors, and perhaps customers, then have potential claims against Securities Inc., and thus against the Fund. While there is no evidence of this actually occurring, it is a concern.

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[11] *Re J.P. Capital Corp.* (1995), 31 C.B.R. (3d) 102 (Ont. Gen. Div.), and *Re Associated Freezers of Canada Inc.,* [1995] O.J. No. 2862 (Ont. Gen. Div. In Bankruptcy)
[12] *Re Associated Freezers,* above, at paragraph 5

[76] CIPF also points out that the Receiver wishes to use the only assets of Securities Inc., some cash, to fund the bankruptcy, and thus there is no practical advantage to any of Securities Inc.'s creditors to having a substantive consolidation of all the estates.

[77] CIPF says that substantive consolidation profoundly affects the substantive rights of debtors and creditors, and thus should be considered an extreme remedy and carefully scrutinized. It involves more than procedural convenience, which of course can be accomplished by the procedural consolidation that everyone supports.

[78] The Receiver has not provided evidence concerning the effect on all the creditors of all the corporate defendants if there is a substantive consolidation, and whether this will adversely affect the rights of any creditor of any individual company. Without that evidence, I cannot determine whether a consolidation would occur at the expense or to the prejudice of any particular creditor. I echo the concerns of Chadwick J in *Re J.P. Capital Corp.*[13] where he stated:

> I am concerned with consolidating the actions which will provide for pari passu distribution without knowing the effect that such an order will have on all creditors. Although expediency is an appropriate consideration it should not be done at the possible prejudice or expense of any particular creditor."

[79] I am also concerned about whether there can be a substantive consolidation where Part XII clearly applies to two of the bankrupt companies (Management Inc. and Securities Inc.), but not to Estate Builders Inc. It is a life insurance agency – there is no suggestion that it is also a securities firm. Because of this, I am not persuaded, on the record I have, that all four companies should be treated as a single securities firm for the purposes of Part XII. This has an impact on the claim for consolidation. Although Estate Builders Inc. may not have any assets, or indeed any creditors, substantive consolidation may have the unintended effect of attempting to deal with Estate Builder's bankruptcy under Part XII. Counsel for the receiver was not able to provide me with sufficient evidence to address either of my concerns.

[80] For these reasons, the motion for substantive consolidation is dismissed, without prejudice to its being renewed on further and better material. The motion for procedural consolidation of all the corporate bankrupt estates is granted.

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[13] Note 10, above, at paragraph 19

Receiver's Third and Fourth Reports

[81] There is no objection to the receipt of the Receiver's Third Report, the Supplement to it, and the Receiver's Fourth Report. There is no objection to approving the actions taken by the receiver to date. Accordingly, an order will go as requested in that regard.

[82] The receiver raised an issue concerning paragraph 28 of the Receivership Order. It is of particular relevance now, given my disposition of the motion for substantive consolidation. That paragraph relates to the Receiver's use of the assets of Securities Inc. The only asset Securities Inc. has is cash of about $120,000. The Receiver needs access to this money in order to fund its fees as the Trustee on the bankruptcies. Without substantive consolidation, this may create some difficulty. No one opposes these funds being used by the Trustee to administer all the estates. An order will therefore go deleting paragraph 28 of the Receivership Order so that the receiver can access all the money in Securities Inc. to cover trustee's fees on the procedurally consolidated bankruptcy of the corporate defendants.

Disposition:

[83] For all these reasons, an order will go as follows:

(a) Receiving the Third Report of the Receiver dated August 15, 2005, the Supplement to the Third report of the Receiver dated August 17, 2005, and the Fourth Report of the Receiver dated September 30, 2005, and approving the activities of the Receiver set out in them;

(b) Authorizing and directing the Receiver to assign all of the corporate defendants into bankruptcy, and that A. Farber & Partners Inc. shall be the trustee in bankruptcy ("Trustee");

(c) The bankruptcy estates of the corporate defendants shall be procedurally consolidated and administered together;

(d) Dismissing the Receiver's motion for substantive consolidation, without prejudice to its being renewed on further and better material;

(e) The bankruptcies of Management Inc. and Securities Inc. will proceed under Part XII of the *Bankruptcy and Insolvency Act*;

(f) The Goudey Group's motion to have certain securities declared to be customer name securities, or alternatively for a trust to be imposed on them and their being returned is dismissed;

(g) The Benson Group's and Eden's motion for the re-registration of CMP 2003 and 2004 Limited Partnership units into their names is dismissed;

(h) Declaring the 3,346,667 shares in the capital of Stealth Minerals Limited described in paragraph 7 of the Third Report are the only "customer name securities" held by Management Inc. and Securities Inc., and that the remainder of the securities they hold are not customer name securities and shall be grouped into either the "customer pool fund" or the "general fund" as appropriate in accordance with Part XII of the *Bankruptcy and Insolvency Act*;

(i) Deleting paragraph 28 of the Receivership Order of Campbell J. dated March 9, 2005;

(j) That the Trustee shall be authorized to sell sufficient securities and any other property from the bankruptcy estates in order to realize up to $250,000 of net proceeds to fund the costs of the bankruptcy, including without limitation the fees and costs of the Trustee and its counsel, and that the Trustee may apply to the Court at any time and from time to time to sell any further securities or other property from the bankruptcy estate as it may deem necessary to fund the ongoing costs of the bankruptcy;

(k) That after the assigning the corporate defendants into bankruptcy, the Receiver is authorized and directed to bring a motion before this Court to terminate the Receivership in respect of the corporate defendants and to seek approval of its final statement of receipts and disbursements as Receiver, including approval of its fees and costs and fees and costs of its counsel and the costs payable from the estate pursuant to the Order of this Court made on March 9, 2005 to counsel for the Plaintiffs and to seek a discharge of the Receiver in respect of the corporate defendants;

(l) That the Receiver and the Trustee, upon its appointment, shall incur no liability or obligation as a result of the carrying out the provisions of this Order, except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Receiver by the Order dated March 9, 2005, or by section 14.06 of the *Bankruptcy and Insolvency Act,* or any other applicable legislation.

(m) Amending the title of proceedings to change the name "Marlow Private Estate Builders Inc." to "Private Estate Builders Inc.".

[84] If the parties are unable to agree on the disposition of costs of the motion and cross motions, they may make brief written submissions to me. The Receiver's are

to be delivered within 15 days of the release of these reasons, with all other parties delivering their responses within 15 days following.

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MESBUR J

Released: 20060117

TAB 2

CITATION: Electro Sonic Inc. (Re), 2014 ONSC 942
COURT FILE NO.: 31-1835443 and 31-1835488
DATE: 20140210

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: IN THE MATTER OF the Notice of Intention to Make a Proposal of Electro Sonic Inc.

AND IN THE MATTER OF the Notice of Intention to Make a Proposal of Electro Sonic of America LLC

BEFORE: D. M. Brown J.

COUNSEL: H. Chaiton, for the Applicants, Electro Sonic Inc. and Electro Sonic of America LLC

I. Aversa, for the Royal Bank of Canada

HEARD: February 10, 2014

REASONS FOR DECISION

I. Motions for administrative consolidation of NOI proceedings, an Administrative Professionals Charge and authorization to initiate Chapter 15 proceedings

[1] Electro Sonic Inc. ("ESI") is an Ontario corporation with its registered office in Markham, Ontario. Electro Sonic of America LLC ("ESA") is a Delaware limited liability corporation which carries on business from a facility in Tonawanda, New York. Both companies are owned by the Rosenthal family. Both companies are involved in the distribution of electronic and electrical parts.

[2] On February 6, 2014, both companies filed notices of intention to make proposals pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. MNP Ltd. was appointed proposal trustee.

[3] Both companies applied for three types of relief: (i) the administrative consolidation of the two proceedings; (ii) the approval of an Administrative Professionals Charge on the property of both companies to secure payment of the reasonable fees of the legal advisors; and, (iii) authorization that the proposal trustee could act as foreign representative of the NOI proceedings and could apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code* (the "Code"). At the hearing I granted the orders sought; these are my reasons for so doing.

II. Administrative consolidation

[4] Bankruptcy proceedings in this Court operate subject to the general principle that the litigation process should secure the just, most expeditious and least expensive determination of every proceeding on its merits: *Bankruptcy and Insolvency General Rules*, s. 3; *Ontario Rules of Civil Procedure*, Rule 1.04(1). One practical application of that general principle occurs when courts join together two closely-related bankruptcy proceedings so that they can proceed and be managed together. This procedural or administrative consolidation does not involve the substantive merger or consolidation of the bankruptcy estates, merely their procedural treatment together by the court. Administrative consolidation of two bankruptcy proceedings would be analogous to bringing two separate civil actions under common case management.

[5] In the present case, the evidence disclosed that the operations of ESI and ESA are highly integrated, sharing a common managing director as well as consolidated accounting, finance and human resource functions, including payroll. As well, ESI has been the sole customer of ESA in 2013 and 2014.

[6] Given the possibility of the applicants applying together at future dates for relief such as stay extensions and sale approvals, and given that both companies share the same lender – Royal Bank of Canada – it made sense to order that both bankruptcy proceedings be consolidated for the purposes of future steps in this order. For those reasons, I granted the administrative consolidation order sought.

III. Administrative Charge

[7] The applicants seek a charge in the amount of $250,000 on the property of ESI and ESA to secure payment of the reasonable fees and expenses of the legal advisors retained by the applicants, MNP and its legal counsel (the "Administrative Professionals"). The applicants sought an order granting such an Administrative Professionals Charge priority over security interests and liens, save that the Charge would be subordinate to the security held by RBC and all secured claims ranking in priority thereto.

[8] The applicants filed evidence identifying their creditors, as well as the results of searches made under the Personal Property Registration systems in Ontario and British Columbia and under the Uniform Commercial Code in respect of ESA. The applicants complied with the service requirements of *BIA* s. 64.2(1).

[9] RBC did not oppose the Charge sought, but advised that it might later bring a motion to lift the stay of proceedings to enable it to enforce its security or to appoint an interim receiver.

[10] As noted, ESA is a Delaware corporation with its place of business in New York State. ESA filed evidence that it has a U.S. dollar bank account in Canada, although it did not disclose the amount of money in that account.

[11] *BIA* s. 50(1) authorizes an "insolvent person" to make a proposal. Section 2 of the *BIA* defines an "insolvent person" as, *inter alia*, one "who resides, carries on business or has property

in Canada". That statutory definition would seem to establish the criteria upon which an Ontario court can assume jurisdiction in proposal proceedings, rather than the common law real and substantial connection test articulated by the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17.

[12] In the present case, I took into account several factors in granting a Charge over the property of both applicants, including property in New York State:

(i) the senior secured for both companies, RBC, did not oppose the granting of the Charge;

(ii) according to the results of the UCC search, the other secured creditor of ESA which has filed a collateral registration is ESI, a related company, which seeks the Charge;

(iii) the operations of ESI and ESA are highly integrated;

(iv) ESA has filed evidence of some assets in Canada, thereby technically meeting the definition of "insolvent person" in the *BIA*: *Callidus Capital Corporation v. Xchange Technology Group LLC*, 2013 ONSC 6783, para. 19; and,

(v) the proposal trustee intends to apply immediately for recognition of these proceedings under Chapter 15 of the *Code* which will afford affected persons in the United States an opportunity to make submissions on the issue.

IV. Proposal trustee as representative in foreign proceedings

[13] The proposal trustee was the most appropriate person to act as a representative in respect of any proceeding under the *BIA* for the purpose of having it recognized in a jurisdiction outside Canada: *BIA*, s. 279. It followed that the proposal trustee should be authorized to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *Code*.

D. M. Brown J.

Date: February 10, 2014

TAB 3

J.P. Capital Corp. (Re)

Ontario Judgments

Ontario Court of Justice (General Division)

Ottawa, Ontario

Chadwick J.

Oral judgment: February 28, 1995.

Court File Nos. 074183, 073885, 073910

[1995] O.J. No. 538 | 31 C.B.R. (3d) 102 | 54 A.C.W.S. (3d) 12

IN THE MATTER OF the Bankruptcy and Insolvency Act AND IN THE MATTER OF the Bankruptcy of J.P. Capital Corporation (Bankruptcy Court File No. 074183) AND IN THE MATTER OF the Bankruptcy of Jose Perez (Bankruptcy Court File No. 073885) AND IN THE MATTER OF the Bankruptcy of J.P. Corporation (Bankruptcy Court File No. 073910)

(8 pp.)

Case Summary

Bankruptcy — Practice — Joinder and consolidation — Consolidation of estates — Bars.

The trustee in bankruptcy sought an order consolidating three estates. The application was opposed by the individual bankrupt who at one time controlled the bankrupt companies. However, shortly before the bankruptcies, there was a restructuring and he distanced himself from the control of these companies.

HELD: The application was dismissed without prejudice to the trustee to renew the application once there was a clearer identification of the corporate structure, the assets and the effect of a pari passu distribution on the unsecured creditors.

Although the law provided for consolidation of actions to avoid multiplicity, the bankruptcy was extremely complex and there was concern that consolidating the actions would provide for pari passu distribution without knowing the effect that such an order would have on all creditors.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, s. 4. Courts of Justice Act, s. 138.
Ontario Rules of Civil Procedure, Rule 6.01(1).

Counsel

Denis J. Power, Q.C., for the Trustee, Deloitte & Touche Inc. Martin Z. Black, for Jose Perez.

CHADWICK J. (Orally)

1 The trustee in bankruptcy of the above three bankrupt estates seeks and order consolidating the three estates under one title of proceedings. Further they seek an order that any realization of assets in any of the three bankruptcies shall be deemed to be for the credit of the consolidated proceedings with the intent that all creditors, regardless of which proceeding under which they filed proofs of claim, shall be entitled to share dividends on a pari passu in the division of such assets.

2 The application is opposed by counsel on behalf of the bankrupt, Jose Perez, and others.

3 At one time, the two bankrupt companies were controlled by the bankrupt Jose Perez. Shortly before the bankruptcies, there was a restructuring of the corporations and the individual bankrupt Jose Perez distanced himself from the control of these corporations.

4 Beside the two bankrupt corporation there are a number of other related corporations which are not part of the bankrupt estate, but in some cases, creditors of the bankrupt estates.

5 Counsel for the trustee acknowledges that there is no authority in the provisions of the Bankruptcy and Insolvency Act to provide for consolidation other than the general provisions of the act.

6 Section 4 B.I.A. states:

> The practice of the court in civil actions or matters, including the practice in chambers, shall, in cases not provided for by the act or these rules, insofar as it is applicable and not inconsistent with the act or these rules, apply to all proceedings under the act or these rules.

7 The Courts of Justice Act s.138 and the Rules of Practice R.6.01(1) attempt to avoid multiplicity of proceedings and provide for the consolidation of actions. The rule provides that there must be a common question of fact or law or the relief claim arises out of the same transactions or occurrences or a series of transactions or occurrences.

8 In Re A. and F. Baillargeon Express Inc. *37 C.B.R. (3d) 36*, Greenberg J. of the Quebec Superior Court dealt with a similar application. In that case there were five bankrupt companies, and twenty-one related companies that were not bankrupt but an interim receiver had been appointed. The five bankrupt companies were operated as one company with an intermingling of customer lists, bank accounts and assets without any separate corporate identity. In addition, the twenty-one companies that were not bankrupt also operated in a similar manner; there was a total intermingling of assets, operations, creditors and liabilities of all twenty-six companies.

9 The trustee brought a motion seeking the consolidation and the administration of five bankrupt estates. The registrar in bankruptcy dismissed the motion and on appeal Greenberg J. allowed the consolidation order to issue.

10 Greenberg J. acknowledged that there was no provision in the B.I.A. for consolidation of actions, but reviewed the American Authorities and in particular an article in California Law Review, Vol. LXV, p.720 entitled "Flow-of-Assets Approach". The article referred to an American case in Chemical Bank New York Trust Company v. Kheel 369 F. 2d 845 (2d CIR. 1966) where there was a similar situation where the companies paid no attention to the formalities of a corporation and operated by intermingling all the assets and accounts and were controlled by the same board of directors. In allowing the appeal, Greenberg J. stated at p.44:

> There is also the consideration that in Bankruptcy matters the Court exercises an equitable as well as a legal jurisdiction, and that practicality is always the order of the day. It is frequently said in the jurisprudence that the Act is a "businessman's law" and that practical business considerations should not be disregarded, as they sometimes are in other domains where a strict interpretation of the law must be followed and observed.

11 I am satisfied that the general provisions of s.4 of the B.I.A. and the Rules of Civil Procedure and the Courts of Justice Act in Ontario provide for consolidation of actions in order to avoid multiplicity of proceedings providing there are common questions of fact and law or the relief claimed arises out of the same transaction or occurrence or series of transactions or occurrences.

12 This consolidation application goes further than to consolidate for the purpose of avoiding multiplicity of proceedings and actually intermingles the assets of the corporate bankrupt into one common pool to be distributed on a pari passu basis. Rule 6.01(1) and s.138 Courts of Justice Act does not provide for an intermingling of assets and distribution from a common pool of funds.

13 The situation in this application differs somewhat from the facts in A. & F. Baillargeon Express Inc. in that the two bankrupt corporations maintained distinct and separate bank accounts and have acted as separate legal entities.

14 The other distinguishing factor is that Jose Perez, as an individual, may be in a different position relating to his discharge and that of the corporate bankrupts.

para15] A number of the major unsecured creditors are creditors in both estates and some claim guarantees over against the bankrupt Jose Perez. The majority of the creditors although served with this motion have not appeared and in fact have consented to the consolidation.

16 This consolidation application goes further than to consolidate for the purpose of avoiding multiplicity of proceedings and actually intermingles the assets of the corporate bankrupt into one common pool to be distributed on a pari passu basis. Rule 6.01(1) and s.138 Courts of Justice Act does not provide for an intermingling of assets and distribution from a common pool of funds.

17 I accept the evidence of Chris St. Germain, senior manager at Deloitte & Touche with reference to the fact that the consolidation of the actions will make the administration easier and no doubt in the long run, will probably save administrative fees.

18 My concern at this time is we are dealing with an extremely complex bankruptcy involving and touching on a number of companies and assets. Cross-examination of various people have been conducted over the past three or four months and have not yet been concluded. The actual corporate structure of the various companies and the tracing of assets in relationship to the parties is clearly in issue.

19 I am concerned with consolidating the actions which will provide for pari passu distribution without knowing the effect that such an order will have on all creditors. Although expediency is an appropriate consideration it should not be done at the possible prejudice or expense of any particular creditor.

20 Under the circumstances the application for consolidation is dismissed without prejudice to the trustee to renew the application once there has been a clearer identification of the corporate structure, the assets, and the effect a pari passu distribution would have on the unsecured creditors.

CHADWICK J.

TAB 4

CITATION: Kitchener Frame Limited (Re), 2012 ONSC 234
COURT FILE NO.: CV-11-9298-00CL
DATE: 20120203

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

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

RE: **IN THE MATTER OF THE CONSOLIDATED PROPOSAL OF KITCHENER FRAME LIMITED AND THYSSENKRUPP BUDD CANADA, INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **Edward A. Sellers and Jeremy E. Dacks, for the Applicants**

Hugh O'Reilly, Non-Union Representative Counsel

L. N. Gottheil, Union Representative Counsel

John Porter, for Ernst & Young Inc., Proposal Trustee

Michael McGraw, for CIBC Mellon Trust Company

Deborah McPhail, for Financial Services Commission of Ontario

ENDORSEMENT

[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 CBR (3d) 113; *Steeves (Re)*, 25 CBR (4th) 317; *Magnus One Energy Corp. (Re)*, 53 CBR (5th) 243.

[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 CBR (4th) 53.

[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. 322 (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 CBR (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. (Trustee of) (Re)* (1993), 27 CBR (3d) 36.

[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 inter-company 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 *NTW Management Group (Re)* (1994), 29 CBR (3d) 139; *Olympia & York Developments Ltd. (Re)* (1995), 34 CBR (3d) 93; *Olympia & York Developments Ltd. (Re)* (1997), 45 CBR (3d) 85.

[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. 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.

[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 *Metcalfe & Mansfield Alternative Investments II Corp. (Ltd.)*, 2008 ONSC 587; *Employers' Liability Assurance Corp. v. Ideal Petroleum (1953) Ltd*., [1978] 1 SCR 230; and *Society of Composeurs, Authors & Music Publishers of Canada v. Armitage* (2000), 20 CBR (4th) 160 (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 CBR (5th) 4) 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 CBR 11, 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 CBR (3d) 242, 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] *Re Cosmic Adventures Halifax Inc*. (1999) 13 CBR (4th) 22 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 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 Corporation (Re),* 2011 ONSC 733.

[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)*, 70 CBR (5th) 1 and *Angiotech Pharmaceuticals Inc. (Re)* 76 CBR (5th) 210.

[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 inter-company 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.

MORAWETZ J.

Date: February 3, 2012

TAB 5

CITATION: Ornge Global GP Inc. (Re), 2013 ONSC 4518
COURT FILE NO.: 32-158452
32-158453
DATE: 20130710

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **IN THE MATTER OF THE BANKRUPTCY OF ORNGE GLOBAL GP INC., A CORPORATION INCORPORATED UNDER THE LAWS OF ONTARIO, CARRYING ON BUSINESS IN THE CITY OF MISSISSAUGA, IN THE PROVINCE OF ONTARIO,**

AND:

IN THE MATTER OF THE BANKRUPTCY OF ORNGE GLOBAL HOLDINGS LP, A LIMITED PARTNERSHIP, ESTABLISHED UNDER THE LAWS OF ONTARIO, CARRYING ON BUSINESS IN THE CITY OF MISSISSAUGA, IN THE PROVINCE OF ONTARIO,

BEFORE: **MORAWETZ J.**

COUNSEL: **L. Coodin, for Duff & Phelps, Trustee in Bankruptcy**

HEARD: **JUNE 28, 2013**

ENDORSED: **JUNE 28, 2013**

REASONS: **JULY 10, 2013**

ENDORSEMENT

[1] Duff & Phelps Canadian Restructuring Inc. ("D&P"), in its capacity as trustee in bankruptcy (the "Trustee") of Ornge Global GP Inc. (the "GP") and Ornge Global Holdings LP (the "LP" and, together with the GP, the "Estates") brought a motion for an order authorizing and directing the procedural and substantive consolidation of the Estates.

[2] The motion was not opposed and the Trustee advised that the Office of the Superintendent of Bankruptcy confirmed that it had reviewed the motion record and advised that it would not be attending.

[3] The GP was incorporated under the *Business Corporations Act (Ontario)* on November 26, 2010. The LP is a limited partnership which was established under the laws of Ontario on

December 24, 2010. The GP and the LP are part of a group of for-profit and not-for-profit entities (collectively, "Ornge") that provide air transport medical services to patients requiring critical, acute or emergency medical care in Ontario.

[4] Pursuant to an agreement dated December 24, 2010 (the "Limited Partnership Agreement"), the GP has the exclusive authority to manage, control, administer and operate the LP and, subject to the provisions of the Limited Partnership Agreement, to make all decisions in connection therewith.

[5] On February 2, 2012, an order was made pursuant to the *Bankruptcy and Insolvency Act* ("BIA"), adjudging the GP bankrupt. The GP was the sole partner of the LP, which was adjudged bankrupt at the same time. The applications for the bankruptcy orders of both the GP and the LP were made by Ornge Global Real Estate Inc. ("OGRE"), the largest creditor of the Estates and a company related to, or affiliated with, the LP.

[6] D&P was appointed trustee of both Estates.

[7] Counsel to the Trustee advised that the books and records of the GP and the LP are in the possession of the Ministry of Finance (the "Ministry") and/or the Ontario Provincial Police (the "OPP") as a result of an ongoing investigation into the activities of Ornge. Counsel further advised that the Trustee has met with representatives of the Ministry and was informed that many of the electronic and physical books and records of the GP and the LP are co-mingled with the books and records of other Ornge entities.

[8] Proofs of claim ("POCs") have been filed and are summarized below:

Creditor	Amount Claimed Against GP ($)	Amount Claimed Against LP ($)
Byron Capital Markets Ltd.		88,115.65
Cassels Brock & Blackwell		11,300.00
Christopher Mazza	withdrawn	
Fasken Martineau DuMoulin LLP	294,898.99	201,381.12
KPMG LLP		289,847.31
Ministry of Finance	1,168.93	
Ornge Global Air Inc.	38,729.62	38,729.62
Ornge Global Corporate Services Inc.	169,809.62	169,809.62
Ornge Global Real Estate Inc.	5,599,677.27	5,599,677.27
Ornge	27,554.39	27,554.39
Rhoda Beecher Human Resource Consulting	63,205.95	
WSIB	100.76	

[9] D&P submits that procedural consolidation is warranted in this case and will result in the most efficient use of the Estates' limited resources and will provide for greater and more certain and timely recoveries for the Estates' stakeholders than would otherwise result if consolidation were not approved.

[10] Further, D&P takes the position that procedural consolidation will also save significant estate resources by avoiding duplication in the administration of the Estates and by avoiding the need for the Trustee to resolve complex factual and legal issues among the Estates relating to, among other things, accounting for funds in the two separate bank accounts between the creditors of the LP and the GP, and the allocation of professional fees as between the LP and the GP. In addition, unless the Estates are consolidated, the Trustee will either have to get each creditor that filed against the LP to withdraw their claims and re-issue them in the name of the GP, or disallow each claim.

[11] Counsel submits that, of primary importance in considering the appropriateness of substantive consolidation, is the treatment of limited partnerships in the context of bankruptcy. Counsel submits that, pursuant to the *Limited Partnerships Act (Ontario)* (the "LPA"), the GP is liable for the debts of the LP because, while each partner of the LP is only liable to the extent of their contribution, the GP's liability is unlimited. Section 85(1) of the BIA provides that, "on all the general partners of a limited partnership becoming bankrupt, the property of the limited partnership vests in the trustee". Therefore, counsel submits that by operation of law, the assets of the LP vested in the Trustee of the GP on the GP's bankruptcy and as a result the Trustee of the GP holds all of the assets of both Estates. See *Re Tartan Goldfish Farms Limited*, (1996) 41 C.B.R. (3d) 245 at para. 6. Counsel further submits that a creditor does not need to file an application for a bankruptcy order as against all members of a partnership. Section 43(15) of the BIA provides that a creditor, "may present an application against any one or more partners of the firm without including the others". Section 43(16) provides that if a bankruptcy order has been made against one member of a partnership…the court may give any directions for consolidating the proceedings under the applications that it thinks just". Thus, counsel submits that the court has the explicit power to consolidate the Estates. See also *Re Kingsberry Properties Limited Partnership*, (1997) 3 C.B.R. (4th) 124 (Ontario Court of Justice (General Division) (In Bankruptcy), affirmed (1998), 3 C.B.R. (4th) 135 (Ont. C.A.).

[12] In *Kingsberry, supra*, at para. 12, Farley J. found that, "A creditor need not petition all the members of the partnership into bankruptcy: see s. 43(15) BIA; however, where there are separate petitions against members of the same partnership, proceedings may be consolidated: See s. 43(16). It is therefore the choice of the plaintiff as to s. 43(15) and the discretion of the court as to s. 43(16), not the constitution of the partnership".

[13] I accept the submissions of counsel and its conclusion that, by operation of law, the assets of the LP vested in the Trustee of the GP on the GP's bankruptcy and, as a result, the Trustee of the GP holds all the assets of both Estates. Further, in view of s. 85(1) of the BIA, it is unlikely that any creditor will be prejudiced through substantive consolidation. For the foregoing reasons, I have concluded that substantive consolidation is appropriate in the circumstances.

[14] From a procedural standpoint, I am of the view that consolidation of the Estates is also warranted. Procedural consolidation of the Estates will provide for greater administrative efficiency by the Trustee by avoiding unnecessary duplication in the administration of the Estates, both of which arise out of the same transactions and occurrences.

[15] Although there is no express power to consolidate the administration of the bankrupt estates, I am satisfied that the inherent jurisdiction of the court permits such an order to be made.

[16] In the result, the motion is granted and an order shall issue authorizing and directing the procedural and substantive consolidation of the Estates.

Morawetz J.

Date: July 10, 2013

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP, A LIMITED PARTNERSHIP ESTABLISHED UNDER THE LAWS OF MANITOBA CARRYING ON BUSINESS IN THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO
AND
IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF YSL RESIDENCES INC., A CORPORATION FORMED UNDER THE LAWS OF ONTARIO CARRYING ON BUSINESS IN THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

Estate/Court File Nos.: 31-459200, 31-2734090

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

Proceedings commenced in Toronto

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