COURT FILE NUMBER	24-2625289
COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985 c.B-3, as amended
	AND IN THE MATTER OF THE BANKRUPTCY OF CANADIAN HUMALITE INTERNATIONAL INC.
APPLICANT	ERNST & YOUNG INC.
DOCUMENT	**BENCH BRIEF OF TRUSTEE**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Sharek Logan & van Leenen LLP, Barristers & Solicitors 2100, 10060 Jasper Avenue, Edmonton, AB T5J 3R8 Phone: 780.413.3100 Lawyer: David Archibold File 15271/DA

Clerk's Stamp

BANKRUPTCY AND INSOLVENCY
FILED
MAY 20 2020
EDMONTON
FAILLITE ET INSOLVABILITE

TABLE OF CONTENTS

INTRODUCTION

1. This Brief of Law and Argument ("**Brief**") is submitted on behalf of Ernst & Young Inc. in its capacity as Trustee of Canadian Humalite International Inc. ("**CHI**") (the "**Trustee**") in support of the Trustee's Application returnable June 5, 2020.

2. All capitalized terms not otherwise defined in this Brief have the meanings ascribed thereto in the Trustee's Report to the Court.

3. The Trustee is applying, inter alia, for an Order:

   a) To approve the Proposal of CHI; and

   b) Directing certain corporate reorganization steps contemplated in the Proposal of CHI occur; and

   c) Annul the bankruptcy of CHI as at the date provided for in the Proposal

BACKGROUND

4. On March 3, 2020, CHI filed a voluntary assignment into bankruptcy. With the funding and support of the secured creditor, the Trustee has been able to continue to operate CHI during the administration of the bankruptcy to date.

Trustee's Preliminary Report to Creditors **[TAB 1]**

5. On May 1, 2020, CHI filed a Proposal, in bankruptcy.

6. As discussed in the Trustee's report, the secured claims greatly exceed the value of the assets of CHI:

> *The Trustee is comfortable based on information provided and discussed to date that although some difference in value may exist, the total aggregate value of the Debtor's assets will not exceed the value of secured claims.*

Trustee's Preliminary Report to Creditors **[TAB 1]**

LAW & ARGUMENT

7. The *Bankruptcy and Insolvency Act* ("BIA") provides that a Trustee may, with permission of the Inspectors, carry on the business of the bankrupt, , and a trustee may make a Proposal to the creditors of a bankrupt, provided it is approved by the Inspectors of the bankrupt, as is the case with CHI.

BIA, s. 30, s.50 **[TAB 2]**

8. The Purpose of a Proposal is to permit the debtor company to return to viability:

> *The proposal sections of the Act are designed for the reorganization of business entities that are insolvent, so that when the proposal has been accepted by creditors and approved by the court, the business will become viable in an operational sense.*

And the interests of the debtor, creditors and public are to be considered.

L.W. Houlden and Geoffrey B. Morawetz,
Bankruptcy and Insolvency Law of Canada, 4th Ed. at s. E1 **[TAB 3]**

9. Although a proposal by a Trustee is rare, a Proposal may be made by a Trustee where "the directors, officers or shareholders of the company in receivership, in liquidation or in bankruptcy have lost interest and the receiver, liquidator or trustee finds it beneficial to make a proposal that will yield creditors a larger sum than the bankruptcy, receivership or liquidation.

Ibid. at E36 **[TAB 3]**

10. In considering the proposal, the court should look to:

> (a) the interests of the debtor in making a settlement with creditors; (b) the interests of creditors in procuring a settlement which is reasonable and which does not prejudice their rights; and (c) the interests of the public in the fashioning of a settlement which preserves the integrity of the bankruptcy process and complies with the requirements of commercial morality

Ibid at E49(1) **[TAB 3]**
Mernick, Re, 24 CBR (3rd) 8 at para 18 **[TAB 4]**

11. As stated in *Re: Magnus One Energy Corp.,* at para 10 the Court must be satisfied that:

    i) the terms of the Proposal are reasonable,

    ii) the terms of the Proposal are calculated to benefit the general body of creditors, and

    ii) the Proposal is made in good faith.

2009 ABQB 200 at para 10 **[TAB 5]**

12. As contemplated in the *Business Corporations Act* (Alberta) (the "ABCA"), an Order for Reorganization of a corporation can be made in the course of accepting a proposal to amend the articles of the corporation and appoint replacement directors.

RSA 2000 c. B-9 at s. 192 **[TAB 6]**

13. The Trustee submits this is clearly the case as the Proposal provides for recovery to unsecured creditors, that in the Bankruptcy of CHI will receive nothing, the secured creditor who will be accepting less than the balance of the Estate is supportive, and in fact funding, the Proposal and is made in good faith to the various creditors.

14. The trustee further submits there is no prejudice to the Creditors in approving the Proposal.

REMEDY SOUGHT

15. The Trustee submits that the Proposal is fair and reasonable, benefits the general body of creditors and is made in good faith.

16. If the Proposal is not accepted, the unsecured creditors of CHI will not receive any recovery and the primary secured creditor is supportive of the Proposal.

17. The BIA and the ABCA provide the required statutory authority for the Court to accept the Proposal.

All of which is respectfully submitted this 19th of May, 2020.

SHAREK LOGAN & VAN LEENEN LLP
Per:

David Archibold, Barrister & Solicitor
Solicitor for Ernst & Young Inc. in its capacity as Trustee for Canadian Humalite International Inc. and not in its personal capacity

TABLE OF AUTHORITIES

TAB 1

Estate No: 24-2625289
Court No:

PRELIMINARY REPORT OF TRUSTEE
IN THE MATTER OF THE PROPOSAL OF

CANADIAN HUMALITE INTERNATIONAL INC.
(referred to as "CHI" or the "Debtor")

TRUSTEE: Ernst & Young Inc.

A. BACKGROUND

On March 3, 2020, CHI filed an assignment into bankruptcy.

CHI's primary line of business was the manufacture and sale of specialty humics. With funding and support from the secured creditor, the Trustee has continued the operations of CHI for the duration of the bankruptcy administration.

B. SUMMARY OF PROPOSAL

- Payments to Unsecured Creditors as follows:

  i.) Preferred Creditors:

  - All Preferred Claims, other than any Preferred Claim that is an Unaffected Claim, if any, will be paid in full.

  - To the extent any Employee has received a payment with respect to a portion or all of his or her Employee Claim from the WEPP, the WEPP shall be subrogated to that portion of the Employee's Preferred Claim under this Proposal that is equal to the amount paid to such Employee by the WEPP up to a maximum amount of $2,000 and the Trustee shall pay such amount directly to Service Canada in accordance with the WEPPA and not to the Employee. For greater certainty, the total amount that shall be paid under this Proposal to an Employee and/or to Service Canada on account of any Employee's Employee Claims shall not in the aggregate exceed the lesser of either (a) such Employee's Preferred Claim or (b) $2,000.

  ii.) Ordinary Unsecured Creditors:

  - The Convenience Class portion of the Ordinary Creditors' Proven Claim (ie. the first $700.00 of any Ordinary Creditor's Proven Claim) will be paid in full, without interest; and

  - An additional 20% of the value of each Ordinary Creditors' Proven Claim, calculated after deducting from the total of such Ordinary Creditors' Proven Claim the payment to be made to such Ordinary Creditor through the

Convenience Class, will be paid to each Ordinary Creditor, without interest, provided that the total amount of payments made to each Ordinary Creditor pursuant to this Proposal on account of the Convenience Class portion of the Ordinary Creditors' Proven Claim and the balance of such Ordinary Creditors' Proven Claim shall not exceed $1,500 in the aggregate.

- Arrangements with Secured Creditor
  - No payment shall be paid from the Proposal Lump Sum to the Proposal Sponsor in consideration of the Proposal Sponsor's Secured Claims. The Proposal contemplates a reorganization which stipulates that a condition of the reorganization is the settlement of the Proposal Sponsor's Secured Claims in full for no additional consideration payable to the Proposal Sponsor.

- Claims bar provision respecting all Creditors' claims
  - In accordance with section 149 of the BIA, the Trustee will, after the meeting of the Creditors, send a notice, in the prescribed manner, to every Person with a Claim of which the Trustee has notice or knowledge but whose Claim has not been proven in accordance with the Proposal and the BIA, and any Person who does not prove their Claim within a period of thirty (30) days after the sending of the notice by the Trustee (the "Claims Bar Date") shall forever be barred from making a Claim in the BIA Proceedings or from receiving any payment under this Proposal in connection with any such Claim.

C. FINANCIAL POSITION AND CAUSES OF DIFFICULTIES

The cause of CHI's financial difficulties was simply business failure.

D. INTERIM RECEIVER

None appointed.

E. IDENTIFICATION AND EVALUATION OF ASSETS

As noted on the Statement of Affairs filed in connection with these Proposal proceedings. The Trustee is comfortable based on information provided and discussed to date that although some difference in value may exist, the total aggregate value of the Debtor's assets will not exceed the value of secured claims. Given this situation, the Trustee has not commissioned a formal appraisal of the Debtor's assets.

F. CONDUCT OF DEBTOR

The Trustee's preliminary review has not shown any preferential payments, settlements, or reviewable transactions.

G. CREDITORS' CLAIMS

No significant changes from the Statement of Affairs are anticipated.

H. PREVIOUS BUSINESS DEALINGS WITH DEBTOR

Ernst & Young LLP ("EY LLP") has been in discussions with the Proposal Sponsor in relation to tax matters and concerns that may pertain to the Debtor in these circumstances. This being the case, EY LLP has not been the auditor or accountant of the Debtor at any time prior to these proceedings.

I. INFORMAL MEETINGS WITH MAJOR CREDITORS

The Trustee has had numerous discussions with the Proposal Sponsor, the Inspectors of the bankrupt estate of CHI, and the Director of CHI in relation to these proceedings.

J. REMUNERATION OF TRUSTEE

The Trustee's services will be based on the time spent by the Trustee and the various members of its staff at their respective regular billing rates plus any direct out-of-pocket expenses incurred. The Trustee's fees and disbursements will be taxed by the Court.

K. OTHER

None

L. STATEMENT OF ESTIMATED REALIZATION

As noted above, the Proposal contemplates paying preferred creditors 100% of their proven claims, and Ordinary Creditor up to $1,500.00 (in aggregate) for proven admitted claims. The Superintendent's levy payable of 5% on such claims will be paid and deducted from any payments contemplated in the proposal.

M. RECOMMENDATIONS

It is the Trustee's opinion that the Proposal is fair and reasonable to the Debtor and the creditors and that the Debtor will be able to perform it.

In the Proposal, the unsecured creditors will receive a recovery (as outlined above) whereas if the bankruptcy continues or a receiver is appointed, there will be no recovery of any amount to unsecured creditors of the Debtor the secured lender will suffer a significant shortfall on its claims.

DATED AT the City of Edmonton, in the Province of Alberta this 1st day of May 2020.

Ernst & Young Inc.

Per: ______________________

Matt McCulloch, CA, CPA, CIRP, LIT
Senior Vice President

TAB 2

CANADA

CONSOLIDATION

Bankruptcy and Insolvency Act

R.S.C., 1985, c. B-3

Current to May 4, 2020

Last amended on November 1, 2019

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

CODIFICATION

Loi sur la faillite et l'insolvabilité

L.R.C. (1985), ch. B-3

À jour au 4 mai 2020

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http://lois-laws.justice.gc.ca

with a list of and report on the unadministered property of every estate under the trustee's administration for which the trustee has not been discharged, and shall forward to such other trustee as may be appointed in the trustee's stead or, pending the appointment of the other trustee, to the official receiver all the remaining property of every estate under the trustee's administration together with all the books, records and documents relating thereto.

(2) [Repealed, 2005, c. 47, s. 22]

R.S., 1985, c. B-3, s. 29; 1997, c. 12, s. 21; 2005, c. 47, s. 22.

(2) [Abrogé, 2005, ch. 47, art. 22]

L.R. (1985), ch. B-3, art. 29; 1997, ch. 12, art. 21; 2005, ch. 47, art. 22.

Powers exercisable by trustee with permission of inspectors

30 (1) The trustee may, with the permission of the inspectors, do all or any of the following things:

(a) sell or otherwise dispose of for such price or other consideration as the inspectors may approve all or any part of the property of the bankrupt, including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt, by tender, public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;

(b) lease any real property or immovable;

(c) carry on the business of the bankrupt, in so far as may be necessary for the beneficial administration of the estate of the bankrupt;

(d) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

(e) employ a barrister or solicitor or, in the Province of Quebec, an advocate, or employ any other representative, to take any proceedings or do any business that may be sanctioned by the inspectors;

(f) accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time, subject to such stipulations as to security and otherwise as the inspectors think fit;

(g) incur obligations, borrow money and give security on any property of the bankrupt by mortgage, hypothec, charge, lien, assignment, pledge or otherwise, such obligations and money borrowed to be discharged or repaid with interest out of the property of the bankrupt in priority to the claims of the creditors;

(h) compromise and settle any debts owing to the bankrupt;

Pouvoirs du syndic avec la permission des inspecteurs

30 (1) Avec la permission des inspecteurs, le syndic peut :

a) vendre ou autrement aliéner, à tel prix ou moyennant telle autre contrepartie que peuvent approuver les inspecteurs, tous les biens ou une partie des biens du failli, y compris l'achalandage, s'il en est, ainsi que les créances comptables échues ou à échoir au crédit du failli, par soumission, par enchère publique ou de gré à gré, avec pouvoir de transférer la totalité de ces biens et créances à une personne ou à une compagnie, ou de les vendre par lots;

b) donner à bail des immeubles ou des biens réels;

c) continuer le commerce du failli, dans la mesure où la chose peut être nécessaire pour la liquidation avantageuse de l'actif;

d) intenter ou contester toute action ou autre procédure judiciaire se rapportant aux biens du failli;

e) employer un avocat ou autre représentant pour engager des procédures ou pour entreprendre toute affaire que les inspecteurs peuvent approuver;

f) accepter comme contrepartie pour la vente de tout bien du failli une somme d'argent payable à une date future, sous réserve des stipulations que les inspecteurs jugent convenables quant à la garantie ou à d'autres égards;

g) contracter des obligations, emprunter de l'argent et fournir des garanties sur tout bien du failli par voie d'hypothèque, de charge, de privilège, de cession, de nantissement ou autrement, telles obligations devant être libérées et tel argent emprunté devant être remboursé avec intérêt sur les biens du failli, avec priorité sur les réclamations des créanciers;

h) transiger sur toute dette due au failli et la régler;

PART III

Proposals

DIVISION I

General Scheme for Proposals

Who may make a proposal

50 (1) Subject to subsection (1.1), a proposal may be made by

(a) an insolvent person;

(b) a receiver, within the meaning of subsection 243(2), but only in relation to an insolvent person;

(c) a liquidator of an insolvent person's property;

(d) a bankrupt; and

(e) a trustee of the estate of a bankrupt.

Where proposal may not be made

(1.1) A proposal may not be made under this Division with respect to a debtor in respect of whom a consumer proposal has been filed under Division II until the administrator under the consumer proposal has been discharged.

To whom proposal made

(1.2) A proposal must be made to the creditors generally, either as a mass or separated into classes as provided in the proposal, and may also be made to secured creditors in respect of any class or classes of secured claim, subject to subsection (1.3).

Idem

(1.3) Where a proposal is made to one or more secured creditors in respect of secured claims of a particular class, the proposal must be made to all secured creditors in respect of secured claims of that class.

Classes of secured claims

(1.4) Secured claims may be included in the same class if the interests or rights of the creditors holding those claims are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts giving rise to the claims;

PARTIE III

Propositions concordataires

SECTION I

Dispositions d'application générale

Admissibilité

50 (1) Sous réserve du paragraphe (1.1), une proposition peut être faite par :

a) une personne insolvable;

b) un séquestre au sens du paragraphe 243(2), mais seulement relativement à une personne insolvable;

c) le liquidateur des biens d'une personne insolvable;

d) un failli;

e) le syndic de l'actif d'un failli.

Inadmissibilité

(1.1) Il ne peut être fait de proposition aux termes de la présente section relativement au débiteur à l'égard de qui une proposition de consommateur a été produite aux termes de la section II tant que l'administrateur désigné dans le cadre de la première proposition n'a pas été libéré.

Destinataires

(1.2) La proposition est faite aux créanciers en général, étant entendu qu'elle s'adresse, selon ce qu'elle prévoit, soit à la masse de ceux-ci, soit aux diverses catégories auxquelles ils appartiennent; elle peut en outre, sous réserve du paragraphe (1.3), être faite aux créanciers garantis d'une ou de plusieurs catégories.

Idem

(1.3) La proposition portant sur des réclamations garanties d'une catégorie particulière doit être faite à tous les créanciers garantis dont la réclamation appartient à cette catégorie.

Catégories de créances garanties

(1.4) Peuvent faire partie de la même catégorie les créances garanties des créanciers ayant des droits ou intérêts à ce point semblables, compte tenu des critères énumérés ci-après, qu'on peut en conclure qu'ils ont un intérêt commun :

TAB 3

HMANALY E§49
Houlden & Morawetz Analysis E§49

Bankruptcy and Insolvency Law of Canada, 4th Edition

THE BANKRUPTCY AND INSOLVENCY ACT

Proposals (ss. 50-66)
L.W. Houlden and Geoffrey B. Morawetz

E§49 — Approval of Proposals by the Court

E§49 — Approval of Proposals by the Court

See ss. 50, 50.1, 50.2, 50.3, 50.4, 50.5, 50.6, 51, 52, 53, 54, 54.1, 55, 56, 57, 57.1, 58, 59, 60, 61, 62, 62.1, 63, 64, 64.1, 64.2, 65, 65.1, 65.11, 65.12, 65.13, 65.2, 65.21, 65.22, 65.3, 66

(1) — *Generally*

After a proposal has been accepted by creditors, the trustee is required to apply to the court for approval: s. 58(a). In deciding whether the proposal should be approved, the court must take the following interests into account: (a) the interests of the debtor in making a settlement with creditors; (b) the interests of creditors in procuring a settlement which is reasonable and which does not prejudice their rights; and (c) the interests of the public in the fashioning of a settlement which preserves the integrity of the bankruptcy process and complies with the requirements of commercial morality: *Re Gardner* (1921), 1 C.B.R. 424 (Ont. S.C.); *Re Sumner Co. (1984) Ltd.* (1987), 64 C.B.R. (N.S.) 218 (N.B. Q.B.); *Re Stone* (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.); *Re National Fruit Exchange Inc.* (1948), 29 C.B.R. 125 (Que. S.C.); *Re Man With Axe Ltd. (No. 2)* (1961), 2 C.B.R. (N.S.) 12 (Man. Q.B.); *Re Mernick* (1994), 24 C.B.R. (3d) 8, 1994 CarswellOnt 257 (Ont. Gen. Div.); *Re W.R.T. Equipment Ltd.* (2003), 41 C.B.R. (4th) 288, 2003 CarswellSask 184, 2003 SKQB 93, 231 Sask. R. 129 (Sask. Q.B.).

After acceptance of a proposal by creditors, the trustee should bring the proposal before the court for approval as speedily as possible, since delaying the application may impair creditors' rights: *Re Film Opticals of Canada Ltd.* (1994), 32 C.B.R. (3d) 289, 1994 CarswellOnt 1074 (Ont. Gen. Div.).

The Ontario Superior Court of Justice held that the inclusion of a compliance clause in a proposal, specifically, a clause that provides that a debtor will keep all filings, remittances and installments to the Canada Revenue Agency current during the post-proposal period, does not lead to the conclusion that the terms of the proposal are unreasonable under s. 59(2) of the *BIA*. Here, the debtor's insolvency was clearly tax driven and 95% of total claims filed were filed by the CRA; hence the compliance clause was reasonable and would have a rehabilitative effect on the debtor. The court also held that the *BIA* specifically determines that a person who may become a creditor of a bankrupt at some future date is not a "creditor" as defined in the *BIA* and that the reference to "general body of creditors" in s. 59(2) of the *BIA* does not include future creditors. The court further held that the interest of future creditors is only one element that a court must take into consideration in determining whether the terms of a proposal are reasonable, and that it would also consider the conduct of the debtor, the interest of the public, and the requirements of commercial morality: *Re Silbernagel* (2006), 2006 CarswellOnt 2523, 20 C.B.R. (5th) 155 (Ont. S.C.J.).

Where a proposal for related companies was accepted by over 90% of creditors of each company, the Alberta Court of Queen's Bench found that there was no lack of good faith, nor was any fact proven under s. 173 to preclude approval of the proposal. The court found that the terms were reasonable and were calculated to benefit the general body of creditors; no creditors were being unduly prejudiced; nothing in the evidence called into question the integrity of the process; and the proposal was

HMANALY E§36
Houlden & Morawetz Analysis E§36

Bankruptcy and Insolvency Law of Canada, 4th Edition

THE BANKRUPTCY AND INSOLVENCY ACT

Proposals (ss. 50-66)
L.W. Houlden and Geoffrey B. Morawetz

E§36 — Proposal by a Receiver, a Liquidator or a Trustee of the Estate of a Bankrupt

E§36 — Proposal by a Receiver, a Liquidator or a Trustee of the Estate of a Bankrupt

See ss. 50, 50.1, 50.2, 50.3, 50.4, 50.5, 50.6, 51, 52, 53, 54, 54.1, 55, 56, 57, 57.1, 58, 59, 60, 61, 62, 62.1, 63, 64, 64.1, 64.2, 65, 65.1, 65.11, 65.12, 65.13, 65.2, 65.21, 65.22, 65.3, 66

A proposal may be made by a receiver as defined in s. 243(2), but the debtor company must come within the definition of an "insolvent person" in s. 2(1): s. 50(1)(b). A proposal may also be made by a liquidator of an insolvent's property and by a trustee in bankruptcy: s. 50(1)(c) and (e). The proposal will be signed by the receiver, liquidator or trustee: s. 50(2).

Proposals by a receiver, a liquidator or a trustee in bankruptcy are rare. But such a proposal can be made whenever the directors, officers or shareholders of the company in receivership, in liquidation or in bankruptcy have lost interest and the receiver, liquidator or trustee finds it beneficial to make a proposal that will yield creditors a larger sum than the bankruptcy, receivership or liquidation. In *Solcom Group Inc.*, the company had filed an assignment in bankruptcy in December, 1994 and the trustee in bankruptcy filed a proposal in March, 1995. The chief reason for filing the proposal was that a number of creditors claimed to be entitled to the accounts receivable of the bankrupt company. The proposal included claims of all the creditors, against the accounts receivable of the bankrupt company or against the bankrupt company itself. The proposal yielded a higher dividend for all creditors. The proposal was approved by the court: *Re Solcom Group Inc.*, Ontario, File #31-294396 May 3, 1995.

In *Re J.S. McMillan Fisheries Ltd.* (1998), 1 C.B.R. (4th) 226, 1998 CarswellBC 405 (B.C. S.C.), a notice of intention was filed by the debtor company. An interim receiver was appointed under s. 47.1. The directors of the debtor then resigned and an order was made authorizing the interim receiver to negotiate and file a proposal. Although s. 50(1) does not include an interim receiver in the persons who may made a proposal, s. 47(2)(d) gives power to the court to direct an interim receiver to "take such other action as the court considers advisable". This would seem sufficient to justify the making of the order.

In *Re Royal Oak Mines Inc.* (1999), 14 C.B.R. (4th) 279, 1999 CarswellOnt 4151 (Ont. S.C.J. [Commercial List]), it was held that an interim receiver appointed under s. 47(1) could validly make a proposal.

End of Document

TAB 4

Ontario Supreme Court
Mernick, Re
Date: 1994-01-04

Re proposal of Stephen Randall Mernick, insolvent person

Ontario Court of Justice (General Division [Commercial List]) Farley J.

Judgment – January 4, 1994.

Malcolm M. Mercer, for Xerox Canada Finance Inc., creditor.

Stephen R. Mernick, in person.

(Doc. 31-269152)

January 4, 1994. Endorsement.

[1] FARLEY J.: – At the beginning of the hearing Stephen R. Mernick ("Mernick") requested an adjournment until January 5, 1994 (or later) to allow his new counsel to attend. Mernick's previous counsel was successful in removing himself from the record on December 22, 1993. Well prior to that time, he had arranged with Mr. Mercer for this matter to be heard today. His new counsel was apparently under the misapprehension that the January 4, 1994 hearing date was only a tentative date; however on his enquiring about shifting the date, Mr. Mercer advised forthwith on December 23, 1993 that the January 4, 1994 date was a fixed one. Mernick's new counsel responded by voice mail that there had been a misunderstanding on new counsel's part. No effort was made, with or without reasons, to change the current date. Counsel should be well aware of the Practice Direction (1993), 13 O.R. (3d) 453 in this regard. The adjournment request was refused.

[2] No responding material was filed by Mernick or any of his counsel in response to the request of Xerox Canada Finance Inc. ("Xerox") that the Court refuse to approve Mernick's proposal.

[3] On June 9, 1993 Xerox obtained an Order from Registrar Ferron requiring that Mernick answer the undertakings given on his examination held April 26, 1993 and questions reasonably arising therefrom. Up to the date of this hearing no answers, even in piecemeal, were given.

[4] Mernick advises that he has fought the bankruptcy petitions over a long period of time in a very vigorous manner as he wishes to avoid what he feels is the automatic stigma of being a

unable to answer his undertakings using such records (s. 173(*m*). Mernick has continued to obtain credit after knowing himself to be insolvent and engaged in business deals (s. 173(1)(*c*)). The PTL deposit disposition has not been answered (s. 173(1)(*d*)). In light of the scanty information available (despite great efforts over a long time by Mr. Mercer), it is not possible to determine if Mr. Mernick has infringed s. 173(1)(*e*). Clearly in his dismissal for want of prosecution of appeal of the Xerox claim, Mernick has put Xerox to unnecessary expense (s. 173(1)(*f*)). It appears that there have been preferences within the period in question (s. 173(1)(*h*)). He has also committed a bankruptcy offence in failing to answer questions (s. 198(*c*), s. 173(1)(*l*)).

[18] Three interests must be considered on an application to approve a proposal (see *Re Stone* (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.)):

(a) the interests of the debtor;

(b) the interests of the creditors generally by ensuring that the proposal is reasonable; and

(c) the interests of the public in the integrity of bankruptcy legislation.

The Court must weigh the effect of approving the proposal and not approving the proposal. In order for the proposal to be approved, the creditors must obtain an advantage over bankruptcy: see *Re Allen Theatres Limited* (1922), 3 C.B.R. 147 (Ont. S.C.); *Re Tridont Health Care Inc.* (1991), 4 C.B.R. (3d) 290 (Ont. Bktcy.) and *Re First Toronto Mining Corp.* (1991), 3 C.B.R. (3d) 246 (Ont. Bktcy.). The conduct of the debtor is a factor to be considered and if there is any suggestion of collusion or secret advantage, the matter will be particularly scrutinized: see *Re Gardner* (1921), 1 C.B.R. 424 (Ont. S.C.) and *Re Man With Axe Ltd.* (1961), 2 C.B.R. (N.S.) 8 (Man. Q.B.).

[19] Where the facts mentioned in s. 173 BIA are proven, the Court shall refuse to approve the proposal unless the proposal provides reasonable security for the payment of not less than 50 cents on the dollar of unsecured claims or such percentage of these as the Court may direct: see *Re Dolson* (1984), 49 C.B.R. (N.S.) 255 (Ont. S.C.); *McNamara v. McNamara* (1984), 53 C.B.R. (N.S.) 240 (Ont. S.C.); *Re Tridont, supra.* The Court may refuse to approve a proposal where offences mentioned in s. 198 and s. 200 have been committed (s. 59(2) BIA).

TAB 5

Court of Queen's Bench of Alberta

Citation: Magnus One Energy Corp. (Re), 2009 ABQB 200

Date: 20090402
Docket: BE01 080637; BE01 080668
Registry: Calgary

Docket: BE01 080637

In the Matter of the Proposal of
Magnus One Energy Corp.

\- and -

Docket: BE01 080668

In the Matter of the Proposal of
Magnus Energy Inc.

Reasons for Judgment
of the
Honourable Madam Justice B.E. Romaine

Introduction

[1] Magnus Energy Inc. ("Magnus Energy") and Magnus One Energy Corp. ("Magnus One") apply for approval by the Court of their proposals filed pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 and accepted by the required majority of their creditors. Two creditors, Pedro's Services Ltd. ("Pedro") and Taber Water Disposals Inc. ("Taber"), oppose the application on the basis that Magnus Energy and Magnus One have not acted in good faith and that factors set out under section 173 of the *Bankruptcy and Insolvency Act* can be established against them.

Facts

[2] Magnus Energy and Magnus One were oil and gas exploration and development companies engaged in operations primarily in Alberta and Saskatchewan. Magnus One is a wholly-owned subsidiary of Magnus Energy. They each filed a Notice of Intention to make a

2008. The Trustee explained that the $3 million paid to creditors was incurred subsequent to Questerre's acquisition of Magnus Energy's debt, was paid by Questerre and went to the funding of flow-through share obligations. The Trustee was thus satisfied that no creditor had been preferred.

[8] Pedro and Taber's counsel also alleged at the meeting that at the time Magnus One's assets were transferred to Questerre, all of Magnus One's shares were under seizure, and it was their position that a sale could not be authorized and that the transaction was reviewable. The Trustee responded that he was of the view that the seizure of shares would not have prevented the transaction from occurring as Questerre as secured creditor could have affected the transfer of assets through the appointment of a receiver or by seizing the assets.

[9] The Trustee in its report to the Court on this approval application gives the opinion that the Proposals are advantageous for the creditors because they result in a greater distribution to the unsecured creditors, as there would be no distribution to unsecured creditors in a bankruptcy scenario.

Analysis

[10] Prior to approving a Proposal, the Court must be satisfied that:

I) the terms of the Proposal are reasonable,
ii) the terms of the Proposal are calculated to benefit the general body of creditors, and
iii) the Proposal is made in good faith.

[11] The Court must consider, not only the wishes and interests of creditors, but also the conduct and interests of the debtor, the interests of the public and future creditors and the requirements of commercial morality. I am not bound to approve the Proposals even though they have been recommended by the Trustee and given the overwhelming support of creditors, but substantial defence should be afforded to these views: The 2009 *Annotated Bankruptcy and Insolvency Act*, Houlden, Morawetz and Sarra, at page 264, citing *Re Gardner* (1921), 1 C.B.R. 424 (Ont. S.C.); *Re Sumner Co.* (1984) Ltd. (1987), 64 C.B.R. (N.S.) 218 (NB Q.B.) ; *Re Stone* (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.); Re *National Fruit Exchange Inc.* (1948), 29 C.B.R. 125 (Que. S.C.); *Re Man With Axe Ltd.* (No. 1) (1961), 2 C.B.R. (N.S.) 12 (Man. Q.B.).; Re *Abou-Rached* (2002), 5 C.B.R. (4th) 165, 2002 CarswellBC 1642 (B.C. S.C.).; *Re Garrity* [2006] A.J. No. 890 (Q.B.).

[12] It is not suggested that the formalities of the *Bankruptcy and Insolvency Act.* have not been complied with nor that the Proposals do not have a reasonable possibility of being successfully completed in accordance with their terms.

TAB 6

Province of Alberta

BUSINESS CORPORATIONS ACT

Revised Statutes of Alberta 2000
Chapter B-9

Current as of December 11, 2018

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

(17) The Court may in its discretion allow a reasonable rate of interest on the amount payable to each dissenting shareholder, from the date on which the shareholder ceases to have any rights as a shareholder by reason of subsection (14) until the date of payment.

(18) If subsection (20) applies, the corporation shall, within 10 days after

(a) the pronouncement of an order under subsection (13), or

(b) the making of an agreement between the shareholder and the corporation as to the payment to be made for the shareholder's shares,

notify each dissenting shareholder that it is unable lawfully to pay dissenting shareholders for their shares.

(19) Notwithstanding that a judgment has been given in favour of a dissenting shareholder under subsection (13)(b), if subsection (20) applies, the dissenting shareholder, by written notice delivered to the corporation within 30 days after receiving the notice under subsection (18), may withdraw the shareholder's notice of objection, in which case the corporation is deemed to consent to the withdrawal and the shareholder is reinstated to the shareholder's full rights as a shareholder, failing which the shareholder retains a status as a claimant against the corporation, to be paid as soon as the corporation is lawfully able to do so or, in a liquidation, to be ranked subordinate to the rights of creditors of the corporation but in priority to its shareholders.

(20) A corporation shall not make a payment to a dissenting shareholder under this section if there are reasonable grounds for believing that

(a) the corporation is or would after the payment be unable to pay its liabilities as they become due, or

(b) the realizable value of the corporation's assets would by reason of the payment be less than the aggregate of its liabilities.

RSA 2000 cB-9 s191;2005 c40 s7;2009 c53 s30

Part 15
Corporate Reorganization and Arrangements

Articles of reorganization resulting from court order

192(1) In this section, "order for reorganization" means an order of the Court made under

(a) section 242,

(b) the *Bankruptcy and Insolvency Act* (Canada) approving a proposal, or

(c) any other Act of the Parliament of Canada or an Act of the Legislature that affects the rights among the corporation, its shareholders and creditors.

(2) If a corporation is subject to an order for reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 173.

(3) If the Court makes an order for reorganization, the Court may also

(a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms of those debt obligations, and

(b) appoint directors in place of or in addition to all or any of the directors then in office.

(4) After an order for reorganization has been made, articles of reorganization in prescribed form shall be sent to the Registrar together with the documents required by sections 20 and 113, if applicable.

(5) On receipt of articles of reorganization, the Registrar shall issue a certificate of amendment in accordance with section 267.

(6) An order for reorganization becomes effective on the date shown in the certificate of amendment and the articles of incorporation are amended accordingly.

(7) A shareholder is not entitled to dissent under section 191 if an amendment to the articles of incorporation is effected under this section.

1981 cB-15 s185;1994 c23 s51

Court-approved arrangements

193(1) In this section, "arrangement" includes, but is not restricted to,

(a) an amendment to the articles of a corporation,

(b) an amalgamation of 2 or more corporations,