Estate File No. 32-2853708
Court File No. 32-2853708

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

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF iS5 COMMUNICATIONS INC., OF THE CITY OF MISSISSAUGA IN THE PROVINCE OF ONTARIO

BOOK OF AUTHORITIES OF IS5 COMMUNICATIONS INC.

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TO: **THE SERVICE LIST**

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TAB 1

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COURT FILE NO.: Court File No. CV-20-637735-CL
Estate No.: 31-2628872
DATE: 20200420

ONTARIO SUPERIOR COURT OF JUSTICE

- IN BANKRUPTCY-

(Commercial List)

IN THE MATTER OF THE PROPOSAL OF GREEN RELIEF INC.,
OF THE TOWNSHIP OF PUSLINCH, IN THE COUNTY OF WELLINGTON COUNTY,
IN THE PROVINCE OF ONTARIO

BEFORE: Koehnen J.

COUNSEL: *Robert I. Thornton, Rebecca L. Kennedy Paul Guy, Andrew Hanrahan*, and *Stephanie Sonawane*, for the Applicant

David Ward, Manav Singhla for Lalit Rai, Wee Meng Yap, and Matthew (Matteo) Sacco

Steven Weisz and *Christopher McGoey,* for Lyn Mary Bravo

Ranjan Das, for 1817610 Ontario Inc.

Danny Nunes, for the Proposal Trustee and the Proposed Monitor

Rory McGovern, for Steve LeBlanc

John Hammond, Amanda Jordan McInnis, Kelly Prophet and *Zoe Kalakos*, for Warren Bravo and Lyn Mary Bravo

Gustavo F. Camelino, for First Insurance Funding Canada Inc.

David P. Preger and *David Z. Seifer*, for B & M Handleman Investments Ltd., *et al.*

HEARD: April 8, 2020

ENDORSEMENT

[1] These reasons address two motions concerning corporate governance that arise in the context of a motion by Green Relief Inc. to convert a Notice of Intention to File a Proposal in

Bankruptcy (the "NOI") into a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

[2] I granted CC AA protection for 10 days and ordered that the *CCAA* issue return before me on Friday, April 17, 2020. Given that some of the reasoning concerning the governance motions turns on whether the corporation warrants *CCAA* protection, I held off a deciding the governance issues until the return of the *CCAA* motion.

[3] Green relief is a private corporation with over 700 shareholders. It was founded by Steve Leblanc and Warren Bravo.

[4] Mr. Steve Leblanc brings a motion for an order declaring that the Board of Directors that approved the Notice of Intention was not properly constituted, an order declaring him to be a director of Green Relief, and an order directing that a shareholders' meeting be held for the purpose of electing a board of directors.

[5] A second motion is brought by three shareholders who collectively hold approximately 1% of the shares of Green Relief seeking an order compelling Green Relief to hold a shareholders' meeting for the purpose of electing a board of directors.

[6] Green Relief submits that Mr. Leblanc has resigned from the board, that having him on the board at this time would be disruptive and would only invite further litigation within the *CCAA* proceeding because the company has made allegations of fraud against him.

A. Was the Board of Properly Constituted?

[7] Mr. Leblanc agrees that the board was properly constituted up until January 16, 2019. At that time the board consisted of four directors: Mr. Leblanc, Mr. Bravo, Bilal Cheema and Stephen Bulakowski.[1]

[8] On January 16, 2019 three additional directors were appointed: John Durfy, Brian Ranson and Michael Myskiw. This appears to have run afoul of section 125 of the *Ontario Business Corporations Act*, RSO 1990 c. B. 16 (the "*OBCA*"). Section 125 (3) of the *OBCA* provides that, where the articles of incorporation provide for a minimum and maximum number of directors, the number of directors of the corporation shall be determined by special resolution of the shareholders. If such a special resolution empowers the directors to determine the number of directors, then the directors can do so by resolution. Section 125 (4) provides that where no resolution has been passed under subsection 3, the number of directors of the Corporation shall be the number of directors named in the articles of incorporation.

[1] Mr. Bulakowski had in fact resigned in July 2018 but was not replaced. Pursuant to section 119 of the OBCA , until the first meeting of shareholders, the resignation of a director named in the articles does not become effective unless at the time the resignation is to become effective, a successor has been elected or appointed.

[9] In the case of Green Relief, the articles provided for a minimum and maximum number of directors but no resolution was ever passed setting the number of directors. As a result, Green Relief was limited to four directors because that is the number of directors named in its articles of incorporation.

[10] As of January 16, 2019, the board purportedly had six directors.

[11] Mr. Leblanc submits that Mr. Durfy was validly appointed to replace Mr. Bulakowski but that the appointments of Mr. Myskiw and Mr. Ranson were invalid.

[12] On March 7, 2019 Mr. Bravo and Mr. Durfy resigned. Dr. Jha and Mr. Battaglia were appointed. At that point, the board purportedly consisted of Messrs. Leblanc, Jha, Cheema, Ranson, Battaglia and Myskiw.

[13] On September 1, 2019 Mr. Myskiw resigned. On November 8, 2019 Mr. Leblanc resigned.

[14] Mr. Leblanc submits his resignation was not effective, because pursuant to section 119 of the *OBCA*, until the first meeting of shareholders, the resignation of a director named in the articles does not become effective unless at the time the resignation is to become effective, a successor has been elected or appointed. Mr. Leblanc submits that no successor was elected or appointed when he resigned.

[15] The only resignation from the board that was formally filled by a replacement director was that of Mr. Bulakowski. After he resigned, a resolution was passed which specified that he was being replaced by Mr. Durfy. The board resolution appointing Messrs. Myskiw and Ranson simply added them as directors as part of an expanded board. In March 2019 Messrs. Bravo and Durfy resigned. Dr. Jha and Mr. Battaglia were appointed. The resolution does not formally specify that they were replacing Messrs. Bravo and Durfy. One could characterize the appointments of Dr. Jha and Mr. Battaglia as replacing Messrs. Bravo and Durfy in which case their appointments were technically valid but the appointments of Messrs. Myskiw and Ranson remained invalid. One could also take a chronological approach and take the view that once Messrs. Bravo and Durfy resigned, Messrs. Myskiw and Ranson became validly appointed directors and it was Dr. Jha and Mr. Battaglia who were the additional and invalidly appointed directors. In my view it does not much matter which approach one takes. By the time of the March 11, 2020 meeting, Mr. Myskiw had resigned as had Mr. Leblanc (subject to the discussion about the effect of his resignation in the next section of these reasons). Assuming Mr. Leblanc had validly resigned, the board on March 11, 2020 consisted once again of four people.

[16] Section 128 of the *OBCA* is available to remedy situations like this in appropriate circumstances. It provides:

> An act done by a director or by an officer is not invalid by reason only of any defect that is thereafter discovered in his or her appointment, election or qualification.

[17] A further remedial provision is found in Section 187(9) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B.3 ("BIA") which provides:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an

> objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

[18] In *1552906 Ontario (Bankruptcy),* 2018 ONSC 173 1552906 Ontario (Bktcy), L.C. Leitch J. applied s. 187 (9) of the BIA in connection with a creditor's opposition to a bankrupt's proposal because, among other things, no shareholders' or directors' meeting had been called and no resolution had been passed. The court looked at all the surrounding circumstances to conclude that this was more in the nature of a technical defect rather than a substantive injustice. I come to a similar conclusion here.

[19] Mr. Leblanc agreed that the improper constitution of the board was not the product of any act of bad faith or wrongdoing but was attributable to the fact that the corporation had limited resources to pay for legal advice.

[20] Mr. Leblanc actively participated in creating the board he now alleges is improperly constituted. Mr. Leblanc attended the meetings at which directors were appointed, signed resolutions appointing the directors and treated the individuals as directors throughout the piece. Mr. Leblanc did not object to the constitution of the board until the current board raised allegations of fraud against him, Mr. Bravo and Lynn Bravo.

[21] As the court noted in *Parton v. The Queen*, 1999 CanLII 124 the court noted at paragraph 48:

> The shareholders, by their acquiescence, could be considered to have cured the irregularity regarding the number of directors on the board and their appointment: see in this respect pages 234 and 235 in the chapter entitled "Irregularities" in F.W. Wegenast, The Law of Canadian Companies (Toronto: Carswell, 1979). It would appear that the Appellants could be considered *de jure* directors. They surely were *de facto* directors.

[22] Given Mr. Leblanc's personal involvement in the constitution of the board, the lack of shareholder opposition until quite recently and the fact that the true underlying defect is the failure of board resolutions to specify that a particular new director is replacing a particular former director, the alleged deficiencies in the formation of the board are technical or formal defects that sections 128 of the *OBCA* and 187 (9) of the *BIA* are designed to remediate.

B. Was Mr. Leblanc a director as of March 11, 2020?

[23] Both sides that Mr. Leblanc resigned from the board on November 8, 2019.

[24] Mr. Leblanc submits that the resignation was ineffective because, pursuant to s. 119 (2) of the OBCA, his resignation could only be effective if a successor had been contemporaneously elected or appointed to fill his vacancy. As noted above, the failure to specifically name a director to replace Mr. Leblanc is a technical defect that I have remedied by way of s. 128 of the *OBCA* and s. 187 (9) of the *BIA*.

[25] In addition, Mr. Leblanc submits that his resignation was revoked because, within a few days of November 8, 2019, he was reinstated to the board of directors. What then is the effect of that "reinstatement"? The answer turns on a review of the facts.

[26] I begin my review of the facts in March 2019 when Mr. Bravo resigned from the board. At that time, Steve Leblanc and Warren Bravo sent a letter to Dr. Jha stating as follows:

> "Warren will step off the Board at this time and Steve will remain at your request for as long as he's required in the interest of Green Relief and will defer to your judgment on the timing. Dr. Jha, thank you for organizing emeritus Board member status for each of us as we progressively step off the Board. We appreciate this is in the mutual interest of Green Relief, as it sends a message to its founders who served honourably and no longer have a formal role or voting right the Board." [2]

[27] This clearly evidences an intention for the board to evolve with the gradual resignation of the company's founders based on the timing that Dr. Jha considered appropriate.

[28] When Mr. Leblanc resigned on November 8, 2019, he wrote the following email to Dr. Jha:

> When you started as CEO - I had offered to step off the Board at your direction at any time that you thought was in the best interest of Green Relief.
>
> As per your guidance this morning - this will serve as my resignation from the Board today.
>
> I will continue to work closely with you and do whatever I can to advance Green Relief's agenda.
>
> It has been an absolute pleasure watching you turn around this company from an impossible situation - this will be an experience I will cherish for the rest of my life and share with my grandchildren.

---

[2] See cross-examination of Dr. Jha on April 1, 2020 question 255.

> The management team you brought on is exceptional and Green Relief has never been in better hands.

[29] That too, clearly evidences a mutual intention for Dr. Jha to determine how long Mr. Leblanc would remain on the board. While there is some to debate in the record about the extent to which Dr. Jha or Mr. Leblanc drafted this email, it is clear that Mr. Leblanc sent the email. There is no suggestion that he did so under any duress.

[30] Following Mr. Leblanc's resignation there was an exchange of emails amongst the other directors thanking Mr. Leblanc for his past service.

[31] When Mr. Leblanc resigned, Green Relief was in the process of renewing its license with Health Canada. One requirement for license renewal was that at least one member of the board have received U. S. Security clearance. Mr. Leblanc was the only director at that time to have received such a clearance. As a result, Mr. Leblanc was considered to be a director notwithstanding his resignation. Dr. Jha confirmed this in an email addressed to Mr. Leblanc on November 20, 2019 stating:

> We are reviewing our Health Canada Application and as discussed you are currently on the Board of GR.

[32] What then is what is the legal effect of this arrangement? Was Mr. Leblanc brought back onto the board as a permanent director until he was removed or resigned anew or did Mr. Leblanc remain on the board only until the Health Canada license was renewed?

[33] It is clear from contemporaneous documentation that Mr. Leblanc served at the pleasure of Dr. Jha. Mr. Leblanc had clearly resigned at Dr. Jha's request. When he was brought back onto the board he was brought back on only on such terms as Dr. Jha agreed to. The evidence demonstrates on a balance of probabilities that Mr. Leblanc was brought back on solely for the purpose of renewing the Health Canada application. Once that application was renewed, his resignation would take effect. The application was completed in February 2020.

[34] While communication around the issue may not have been handled in the most elegant fashion possible, the mutual intentions of the parties reflected in contemporaneous documentation demonstrate that Mr. Leblanc was no longer a director of Green Relief on March 11, 2020.

C. Other Allegations of Misconduct

[35] Mr. Leblanc submits that the board's primary motivation in filing the NOI was the application by shareholders for an annual general meeting and that this was an improper consideration.

[36] Consideration of the shareholder application would not, in the circumstances of this case, amount to an improper consideration.

[37] It is clear that the company faces significant financial challenges and requires some form of financial assistance in the long term. By March 2020, the board had made serious allegations of fraud against its founders including Mr. Leblanc. The shareholders who sought the

shareholders' meeting were described by Mr. Leblanc's counsel as "acquaintances" of Mr. Leblanc. While the record is uncertain, it discloses a closer connection with at least one shareholder, Lalit Rai. On April 10, 2019, Mr. Leblanc wrote a memo to the board of Green Relief indicating that:

> The share transfer names listed below are private transactions that are tied to a loan agreement and the individuals would not be invested in GR without that agreement.

Lalit Rai is one of the shareholders listed.

[38] It appears that Mr. Leblanc, Mr. Bravo and their associates between them control approximately 36,000,000 shares or approximately 33% of the votes. That means that a shareholders' meeting would, in all likelihood, be associated with a proxy battle. Proxy battles are expensive. A block of 33% might be able to carry a meeting. In the foregoing circumstances the board would have to consider whether it was in the best interests of the corporation (in the sense of all of its stakeholders) to call a shareholders' meeting which may result in founders that the board believed had defrauded the company regaining control; or whether it was preferable to restructure the company through a NOI or a *CCAA* proceeding in which the conduct of the corporation will be subject to the scrutiny of a trustee/monitor as well as that of the court. In the context of the corporation's insolvency, the decision to pursue a NOI rather than a costly and litigious shareholders' meeting falls within a spectrum of reasonableness that gives the decision the protection of the business judgment rule.

[39] Mr. Leblanc submits that Dr. Jha was conflicted from voting on the NOI and the *CCAA* conversion because Dr. Jha has a 49% interest in Bhodi, a subsidiary of Green Relief and because, according to Mr. Leblanc, one of the proposals in the *CCAA* proceeding will be to inject funds into Bhodi, not into Green Relief. Whether a potential transaction that remains to be entered into creates a conflict for Dr. Jha is premature to determine at this point. Whether Dr. Jha has a conflict will depend upon the nature of the future transaction, the manner in which it evolves and is entered into and the manner in which it is approved. The proposed *CCAA* conversion would subject all of that to the scrutiny of the monitor, creditors and the court.

[40] Mr. Leblanc submits that the board did not act in good faith because it failed to deliver documentation as required in a direction I issued on March 12, 2020.

[41] Management has produced over 1000 pages of corporate records since my direction of March 12, 2020. While no final shareholder register has been produced, a provisional one has been produced. A definitive shareholders' register could not be produced at this time because there is considerable uncertainty surrounding the validity and number of certain purported shareholdings.

[42] On the record before me, I cannot find any impropriety by the directors that would warrant relief at this stage.

D. Calling a Shareholders' Meeting

[43] Pursuant to s. 94 of the OBCA, Green Relief was obliged to call a shareholders' meeting by May 1, 2019 to elect a board. That has never occurred. Although Green Relief announced on December 23, 2019, that it would hold an annual general meeting on February 25, 2020; on February 14, 2020, the meeting was postponed to March 25, 2020. The March 25, 2020 meeting was adjourned in light of the NOI.

[44] Mr. Leblanc and the moving shareholders cite *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 38 to the effect that that the fiduciary duty of directors requires, at a minimum, that they ensure that the corporation meets its statutory obligations, including the duty to hold meetings within prescribed time periods. Mr. Leblanc and the moving shareholders submit that a *CCAA* proceeding does not immunize directors "from carrying out their responsibilities" or relieve them of "their obligations to serve the company and its stakeholders diligently." Re *Richtree Inc.*, [2005] OJ No 251, at para 18. This includes the obligation to call and hold shareholders' meetings: Re *FTE Canada Inc.*, 2019 ONSC 3969, at para 23.

[45] Mr. Leblanc and the moving shareholders ask me to use my powers under s. 106 of the OBCA to call a shareholders' meeting.

[46] Section 106 of the *OBCA* provides:

> If for any reason it is impracticable to call a meeting of shareholders of a corporation in the manner in which meetings of those shareholders may be called or to conduct the meeting in the manner prescribed by the by-laws, the articles and this Act, or if for any other reason the court thinks fit, the court, upon the application of a director or a shareholder entitled to vote at the meeting, may order a meeting to be called, held and conducted in such manner as the court directs and upon such terms as to security for the costs of holding the meeting or otherwise as the court deems fit.

[47] The principles applicable to the exercise of the court's discretion when considering whether to hold a meeting were summarized by D. Brown J. (as he then was) in *Goodwood Inc. v. Cathay Forest Products Corp.*, 2012 ONSC 3548. The following key points emerge at para 44:

(a) Where a corporate remedy was open to a shareholder under the legislation, the court should not intervene.

(b) The section is not to be used for the express and sole purpose of placing control of the corporation into the hands of one contending faction of shareholders.

(c) The court's discretion should be exercised cautiously.

[48] Applying those principles to the case at bar it leads me to conclude that it would not be appropriate to call a shareholders' meeting at this time.

[49] First, I note that other corporate remedies have been available for quite some time and that shareholders have not availed themselves of those remedies. The OBCA allows shareholders with

5% of the outstanding shares to requisition a meeting. Although it was open to shareholders to have demanded a meeting at any time, they did not do so until now.

[50] The call for a meeting arose only after the current board had made allegations of fraud against the founders. The moving shareholders hold less than 1% of the shares. Their lawyer described them as "acquaintances" of Mr. Leblanc and Mr. Bravo. As noted earlier, the relationship between Mr. Leblanc and Lalit Rai appears to go beyond mere acquaintanceship.

[51] The founders were in control of the corporation for a significant period of time during which a shareholders' meeting could have been called. They chose not to call one. They changed their minds and called for one only after current management raised allegations of fraud against them.

[52] The practical reality as I see it is that the call for a shareholders' meeting is part of a battle between two factions within the corporation: the founders and the current board. This strikes me as a situation where the court is being asked to intervene for the sole purpose of giving a group of shareholders who have been accused of fraud the ability to re-assume control of the corporation.

[53] Calling a shareholders' meeting at this point creates significant difficulty. The corporation does not have audited statements to put to shareholders. There is uncertainty about the proper shareholdings within the corporation. Those issues are unlikely to be resolved within the space of a few weeks. As a practical matter, a shareholders' meeting cannot be called until those issues are resolved.

[54] Given the corporation's insolvency, the primary focus of the company should be on creditor interests. Devoting corporate resources and time to a shareholders' meeting puts the focus on a shareholders' dispute which will only further impede creditor's rights.

[55] In Re *Richtree*, the court noted at para. 11 that it was common in *CCAA* proceedings to extend the time for shareholder meetings.

[56] There is no doubt that the corporation has considerable turmoil surrounding it. This is one of the purposes that the *CCAA* is designed to address. In *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60, the Supreme Court of Canada noted at paragraph 77:

> The *CCAA* creates conditions for preserving the status quo while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.

[57] Those words are particularly apposite here. Preserving the *status quo* while attempts to find common ground among stakeholders proceed is a highly desirable outcome. It is far cheaper to negotiate a solution than it is to litigate a court imposed solution. This is not a situation where there will never be a shareholders' meeting. If the corporation survives, there must be a shareholders' meeting at some point. The question for me today is whether a shareholders' meeting should be one of the first steps in a NOI or *CCAA* proceeding. In certain circumstances a meeting might be an appropriate first step. In the circumstances that confront Green Relief, it is not. A shareholders' meeting would be an inexpensive, litigious and time-consuming affair that would only detract from efforts to move the corporation forward. There has been no information put before me to demonstrate that one shareholder group has a superior strategy or outcome in mind for the corporation. In those circumstances, the *status quo* of having the current board remain

is the most prudent. It is also the outcome that Mr. Leblanc favoured until quite recently when allegations were raised against him and other founders.

Koehnen J.

Date: April 20, 2020

TAB 2

CITATION: 1552906 Ontario (Bankruptcy), 2018 ONSC 1731
COURT FILE NO.: 35-2106711
DATE: 2018/04/05

ONTARIO SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY and INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF 1552906 Ontario Limited of the City of Windsor in the Province of Ontario	D. Swift, for the Licensed Insolvency Trustee in Bankruptcy, Price Waterhouse Coopers R. M. Godard, for Remo Valente, Kenneth Knapp and Melvin Muroff, inspectors and principals of the shareholder companies of the bankrupt T. Van Klink, for 803102 Ontario Limited, a creditor of the bankrupt **HEARD:** March 5, 2018

LEITCH J.

[1] Price Waterhouse Coopers Inc. (the "Trustee"), in its capacity as Licensed Insolvency Trustee in Bankruptcy of the bankrupt estate of 1552906 Ontario Limited ("155 Ontario"), has brought a motion seeking:

a) an order approving the proposal lodged by 155 Ontario with the Trustee on October 31, 2017 and approved by the majority in number and two-thirds in value of the creditors of 155 Ontario on November 21, 2017 (the "Proposal"); and

b) an order sealing the confidential first supplement to the second report to the court submitted by the Trustee (the "Confidential Supplement") until the completion of the sale of the 62 real property lots owned by 155 Ontario, either in the Proposal or in the bankrupt estate, subject to further order of this court.

[2] The Proposal is opposed by 803102 Ontario Limited ("803 Ontario"), a creditor of 155 Ontario.

Background facts

[3] 155 Ontario is owned by four corporate shareholders. The directors and officers of 155 Ontario are representatives of each of the four corporate shareholders.

[4] Details of the four equal shareholders of 155 Ontario and their principals are as follows:

Shareholder	Principal
1147073 Ontario Limited ("114 Ontario")	Remo Valente
1243494 Ontario Limited ("124 Ontario")	Melvin Muroff
803 Ontario	Michael Dunn
Central Vehicle Leasing of Essex Ltd. ("Central Vehicle")	Kenneth Knapp

[5] The four shareholders of 155 Ontario are parties to an agreement made in February 2006 pursuant to which 803 Ontario acquired the shares of a prior shareholder and all of the shareholders agreed to a number of related party transactions. These related party transactions included the retention of a company associated with Mr. Dunn to service the lots; borrowing from that company or one of its affiliates to finance the servicing costs with interest fixed at 1.5% above the prime rate charged by Royal Bank of Canada; the authorization of a mortgage to secure the financing; the retention of Remo Valente Investments Ltd. ("RVIL"), a company controlled by Mr. Valente to manage the property, its development and sale; and the payment of a management fee to RVIL equal to 6.5% of the sale price of the property less any real estate commissions payable in relation to any sale.

[6] Prior to the bankruptcy, 803 Ontario had suggested that 155 Ontario service the lots and sell them to a new company without the burden of the management agreement "so as to maximize the return to the creditors". This suggestion was not agreed to.

[7] 803 Ontario then demanded repayment by 155 Ontario of money owing on a promissory note. The money was not repaid. 803 Ontario brought what the parties refer to as a "collection action". 155 Ontario defended the collection action and brought a counterclaim against 803 Ontario.

[8] 803 Ontario asserts that 155 Ontario had no viable defence and no viable counterclaim and advancing same created delay which was to the advantage of Messrs. Valente, Knapp and Muroff who were motivated to maintain control over 155 Ontario's property to avoid competition to protect their investments in another development project.

[9] 803 Ontario brought a motion for summary judgment in the collection action. Just prior to that motion being heard, 155 Ontario filed a Notice of Intention to file a proposal

under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B.3 (the “*BIA*”). As a result, the collection action was stayed.

[10] 803 Ontario was awarded its costs of the collection action in the amount of $20,000. These costs remain unpaid.

[11] 155 Ontario made a proposal under the *BIA* in May 2016. 803 Ontario asserts that the first proposal was also filed for the purpose of delay.

[12] 803 Ontario opposed the first proposal. The first trustee was instructed not to proceed with the motion to approve the first proposal. The first proposal was therefore refused and 155 Ontario was deemed to have made an assignment in bankruptcy on February 22, 2017.

[13] 803 Ontario was awarded its costs in relation to the first proposal in the amount of $15,000 plus HST payable out of the bankruptcy estate (the “2017 costs”). The 2017 costs remain unpaid.

[14] The fees of the first trustee and its legal counsel in relation to the first proposal (the “first trustee’s costs”) also remain unpaid.

[15] The Trustee was appointed following the February 22, 2017 order.

[16] As at the date of its bankruptcy, 155 Ontario’s primary assets are 62 un-serviced residential building lots in Essex, Ontario, which are now vested in the Trustee pursuant to the bankruptcy.

[17] 114 Ontario, 124 Ontario, Central Vehicle, and 803 Ontario are the only unsecured creditors of 155 Ontario.

[18] All four creditors appointed the three inspectors of the bankruptcy estate. Mr. Dunn, the principal of 803 Ontario is not an inspector. The principals of 114 Ontario, 124 Ontario and Central Vehicle are Inspectors - Messrs. Valente, Muroff and Knapp (the “Inspectors”).

[19] The Inspectors requested the Trustee to complete the servicing of the lots owned by 155 Ontario but the Trustee declined to do so.

[20] While the initial decision of the Inspectors was to market the un-serviced lots, they changed their position. As a result, the Inspectors called a further meeting of creditors to consider the Proposal, which I will describe below. The four creditors met with the Trustee and voted three to one to proceed with the Proposal. Thereafter Mr. Valente filed the Proposal on behalf of 155 Ontario with the Trustee on October 27, 2017. Mr. Valente signed the Proposal as “designated representative” of 155 Ontario.

[21] No meeting of the shareholders or directors of 155 Ontario has been held to consider or approve the Proposal and no resolution has been passed by the shareholders or directors of 155 Ontario to authorize the making of the Proposal.

[22] As noted by Mr. Swift, counsel for the Trustee, no shareholder or director requested any such meetings.

[23] A meeting of the Inspectors was held on October 31, 2017. The Inspectors unanimously approved the Proposal and directed the Trustee to file the Proposal and the Statement of Affairs with the Official Receiver.

[24] On November 6, 2017, the Trustee gave notice to all necessary parties and called a meeting of creditors for November 21, 2017 to consider the Proposal.

[25] The meeting of creditors was held on November 21, 2017. The majority of the creditors in number and two-thirds in value approved the Proposal.

[26] The Proposal, if approved, would annul the bankruptcy pursuant to s. 61(1) of the *BIA*, return the lots to 155 Ontario and require 155 Ontario to complete the servicing of the lots for sale in accordance with the terms of the Proposal.

[27] 803 Ontario opposes the Proposal, preferring instead to have 155 Ontario's assets realized upon by the Trustee.

[28] On November 24, 2017, the Trustee applied to this court for a hearing to obtain approval of the Proposal and this hearing date was set.

[29] On December 20, 2017, Mr. Van Klink raised the issue of the appropriate authorization to make the Proposal, which the parties described as the threshold issue.

[30] At this hearing, the Trustee filed the Confidential Supplement containing information regarding the value of 155 Ontario's property.

The statutory provisions respecting proposals

[31] Section 50(1) of the *BIA* provides that a proposal may be made by certain enumerated parties including "a bankrupt".

[32] Pursuant to s. 58 of the *BIA*, the trustee shall, within five days after a proposal is accepted by the creditors, apply to the court for an appointment for a hearing of the application for the court's approval of the proposal. This section also sets out the requirements of notice and obliges the trustee to provide a report on the proposal. The Trustee has complied with all of these statutory requirements.

[33] Section 59 of the *BIA* states that before approving a proposal, the court shall hear a report of the trustee and shall hear the trustee; the debtor; the person making the proposal; any

opposing, objecting, or dissenting creditors; and such further evidence as the court may require.

[34] The test for approval of the proposal is set out in s. 59(2) as follows:

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

[35] Pursuant to s. 59(3), a proposal must be refused if a proposal does not provide reasonable security for the payment of not less than 50 cents on the dollar on all provable unsecured claims or such percentage thereof as the court may direct and any of the facts mentioned in s. 173 of the *BIA* are proved against the debtor.

[36] Further, pursuant to s. 60(1), a proposal must be refused if it does not provide for the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of the debtor and for the payment of all proper fees and expenses of the trustee on and incidental to the proceedings arising out of the proposal or in the bankruptcy.

The approval issues

[37] Mr. Van Klink, counsel for 803 Ontario, asserted in para. 64 of 803 Ontario's factum that this motion reveals circumstances which mandate a refusal of the Proposal:

> a) the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors [the "reasonableness issue"];
>
> b) the Proposal does not provide reasonable security for the payment of not less than 50 cents on the dollar on all provable unsecured claims and facts mentioned in s. 173 of the *BIA* are proved against 155 Ontario [the "s. 173 issue"]; and
>
> c) the Proposal does not provide for the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of 155 Ontario [the "s. 60(1) issue"].

[38] Before I discuss the threshold issue and the approval issues described above, I will briefly summarize the Proposal in issue.

The Proposal

[39] Mr. Valente provided the Trustee with information, and he formulated the Proposal. As Mr. Valente deposed in the affidavit sworn January 30, 2018, "as the Inspector with the most experience in the sector, I took the initiative, with the assistance of [the Trustee], in

the development of the Proposal”. Mr. Valente deposed that the Proposal is “creditor driven with a view to maximizing the value of [155 Ontario’s] assets for the benefit of all creditors”.

[40] The Proposal reiterated the fact that the assets of 155 Ontario are 62 residential lots. The Trustee’s report on the Proposal indicated that the estimated realizable value of those lots was provided by Mr. Valente, who is referred to as “the designated representative of the debtor”.

[41] The Proposal contemplates that 155 Ontario shall service and sell the 62 lots in 3 phases over a 5-year period, resulting in a net recovery of approximately $1,812,873 based on information provided by Mr. Valente.

[42] The Proposal outlines the anticipated costs as including the servicing costs, the management fee to RVIL, the carrying costs for the loans to Messrs. Valente and Knapp, and the Trustee’s administration costs.

[43] The servicing costs presented by Mr. Valente were verified by an opinion of an engineer retained by the Trustee.

[44] Messrs. Valente and Knapp are obliged to provide the necessary funds to finance the initial servicing of the lots.

[45] Messrs. Valente and Knapp will receive 5% interest on the funds advanced. They seek to secure their advances by a charge under s. 50.6 of the *BIA* in priority position behind an existing mortgage and the administrative fees and expenses.

[46] Net funds generated from the sale of lots will be used to fund the servicing costs, repay the loans to Messrs. Valente and Knapp and to pay ongoing administration costs.

[47] The management agreement with RVIL will continue and its 6.5% management fee is estimated at $313,000.

[48] After the last lot is sold the net proceeds will be distributed to the creditors.

[49] Pursuant to clause 3.2(d)(2) of the Proposal, creditors who vote against the Proposal have the option to elect an immediate payout based on that creditor’s proportionate share of the net proceeds of sale en bloc through bankruptcy. This payout would be made by Messrs. Valente and Knapp or their corporations and is subject to the condition that the electing creditor must assign its shares in 155 Ontario to Messrs. Valente and Knapp upon receipt of the payout.

[50] In its report on the Proposal, the Trustee stated in para. 11(a) that “with respect to the reasonableness of the Proposal, the timing and prices of the lots is dependent on demand for residential homes in the Windsor area continuing at present levels during the five-year Proposal period. The Trustee is not in a position to comment on the probability of any change in economic conditions that would impair the assumed demand”.

The threshold issue

[51] On behalf of 803 Ontario, Mr. Van Klink asserts that the filing of the Proposal was not authorized by 155 Ontario, emphasizing that no meeting of the shareholders or directors was called, and no shareholders' or directors' resolution has been passed, to authorize the filing of the Proposal.

[52] 803 Ontario contests Mr. Valente's authority to submit the Proposal as the "designated representative" of 155 Ontario. He emphasizes that Mr. Valente was clear that the Proposal is "creditor driven".

[53] Mr. Van Klink's position on behalf of 803 Ontario is that if the directors or shareholders of a bankrupt corporation wish to exercise their powers to cause a bankrupt corporation to make a proposal, they must do so in accordance with the charter and bylaws of the bankrupt corporation (see *Re Canadian Cereal and Flour Mills Co.*, 1921 CanLII 494 at paras. 12 and 13 (Ont. Sup. Ct.)).

[54] Mr. Van Klink also points out that the *BIA* is not a corporate governance statute and whether or not an action taken by a corporation has been properly authorized must be determined in accordance with the charter and bylaws of the corporation.

[55] The bylaws of 155 Ontario provide the following:

(i) Section 2.01: Subject to any unanimous shareholders' agreement, the business and affairs of the Corporation shall be managed or supervised by a board of directors.

(ii) Section 3.11: Every director or officer of the Corporation who is a party to a material contract or transaction or proposed material contract or transaction with the Corporation, or is a director or officer of or has a material interest in any person who is a party to a material contract or transaction or proposed material contract or transaction with the Corporation, shall disclose in writing to the Corporation or request to have entered in the minutes of the meeting of directors the nature and extent of his interest at the time and in the manner required by the Act. Any such contract or proposed contract shall be referred to the board or shareholders for approval even if such contract is one that in the ordinary course of the Corporation's business would not require approval by the board or the shareholders, and a director interested in the contract so referred to the board shall not vote on any resolution to approve the same except as provided by the Act.

(iii) Section 5.13: An officer shall disclose his interest in any material contract or transaction or proposed material contract or transaction with the Corporation in accordance with Section 3.11 herein.

[56] Mr. Van Klink points out that the three directors who approved this proposal were the directors who caused 155 Ontario to file the notice of intention, abandon the first proposal, and become bankrupt and that the last corporate act of 155 Ontario was to bring about its bankruptcy. Mr. Van Klink submits that these directors now want to “reverse all that” and there is no evidence that 155 Ontario, the corporate entity, wants this proposal to be undertaken.

[57] Mr. Van Klink further submits that if a directors’ meeting was called Messrs. Valente and Knapp would be precluded under the bylaws of 155 Ontario from voting on any resolution related to the Proposal given their interests as lenders once the Proposal is approved and in relation to Mr. Valente given his interest in the management fee. Therefore, according to Mr. Van Klink, without the support of Mr. Dunn, the principal of 803 Ontario, a resolution authorizing the Proposal would not pass. He asserts that the fact that there has been no attempt to hold a directors’ meeting to ratify or approve the Proposal leads to the inference that the Proposal would not have been ratified or approved.

[58] Mr. Godard, counsel for Messrs. Valente, Knapp, and Muroff, asserts that the agreement signed by all the shareholders of 155 Ontario when 803 Ontario became a shareholder is a unanimous shareholders’ agreement as that term is defined in s. 108(2) of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, in that it is a “written agreement among all the shareholders of a corporation” and it “restricts in whole or in part the powers of the directors to manage and supervise the management of the business and affairs of the corporation”.

[59] Mr. Godard points out that pursuant to this agreement, 155 Ontario retained RVIL to manage its property and oversee its development and sale and specifically set out the manager’s specific duties and its authority to retain professionals and technical advisors as manager “in its sole and absolute discretion it considers appropriate”.

[60] However, I agree with Mr. Van Klink’s submission that this agreement cannot be considered a unanimous shareholders’ agreement because it does not confer authority to govern the affairs of 155 Ontario “at large” and simply deals only with the management of corporate assets (albeit the only assets of 155 Ontario).

[61] I also agree with Mr. Van Klink’s submission (in response to the fact no meeting of directors or shareholders was requested when the Proposal was considered by the Inspectors) that failure to advise the Trustee or the supporting creditors what had to be done from a corporate governance perspective cannot confer authority on the supporting creditors if authority does not otherwise exist.

[62] However, I do not accept his submission that corporate structures are being ignored and power is being conferred on individuals “as convenient”.

[63] Mr. Swift on behalf of the Trustee pointed out that s. 187(9) of the *BIA* provides that a formal defect or other irregularity will not invalidate proceedings “unless the court before

which an objection is made to the proceeding is of the opinion that substantial injustice has been caused by the defect or irregularity and that such injustice cannot be remedied by any order of that court".

[64] As the Trustee stated in para. 34 of its factum "if there is any technical defect or irregularity with respect to the process of bringing the Proposal to the court, no substantial injustice has been caused to any party and, therefore, the motion for approval should proceed. Mr. Swift's position is that it would be an injustice to not approve this Proposal on the technicality advanced by Mr. Van Klink on behalf of 803 Ontario.

[65] In resolving this threshold issue it is significant that:

(i) the Inspectors were appointed by the four creditors through the votes of each of their four principals;

(ii) the Inspectors instructed the Trustee to accept the Proposal;

(iii) the Trustee called a meeting of creditors;

(iv) the same four principals participated in the creditors' meeting called by the Trustee to consider the Proposal;

(v) while there was not a separate directors' meeting, the four principals who represent each of the creditor shareholders are the officers and directors of 155 Ontario, they participated in the consideration of the Proposal and voted three to one in favour of it;

(vi) while the technical requirement of a directors' resolution is not met, in substance it was the directors of 155 Ontario who directed the Trustee to act;

(vii) the Proposal is not a material contract or transaction of 155 Ontario within the meaning of s. 3.11 of the bylaws of 155 Ontario;

(viii) the Proposal contemplates that RVIL will receive its management fee for performing management services in accordance with the agreement previously entered into by all shareholders (with the same parties being directors);

(ix) Mr. Knapp and Mr. Valente are obliged to fund the initial servicing costs relieving Mr. Dunn or his company from that obligation under the previous agreement; the interest rate is equivalent to the rate Mr. Dunn or his company would have been paid;

(x) there is no term of the Proposal which provides an unfair advantage or an unexpected or unreasonable benefit to any Inspector, director or shareholder or any corporation related to an Inspector, director or shareholder;

(xi) there was no objection made at the various meetings and the threshold issue was not raised until December, well after the May meeting where the Proposal was approved by the Inspectors;

(xii) Mr. Dunn, as the principal of 803 Ontario, was involved from the outset and aware of the instructions to the Trustee; and,

(xiii) there is no injustice in applying s. 187(d) of the *BIA*.

[66] I accept the Trustee's position as set forth in para. 31 of its factum as follows:

> The *BIA* does not provide who may or shall put forward a proposal on behalf of a bankrupt. In the present case, the proposal was presented to PWC [the Trustee] by the appointed designated representative of the bankrupt, who is also a director and shareholder of the bankrupt, and the representative of one of its four unsecured creditors. In addition, the proposal is supported by two of the three other directors and officers of the bankrupt, who also are representatives of two of the three other unsecured creditors of the bankrupt.

[67] The Proposal is before the court for approval with the authority and approval of three of four of its directors, officers, and shareholders.

[68] There is adequate evidence that 155 Ontario wishes the Proposal to be implemented. I am satisfied 155 Ontario has ratified and agreed to the terms of the Proposal.

The s. 173 issue

[69] As Mr. Van Klink points out, s. 59(3) of the *BIA* provides that the court shall refuse to approve a proposal when any of the facts mentioned in s. 173 are proved against the debtor unless a proposal provides reasonable security for the payment of not less than 50 cents on the dollar on all of the unsecured claims or such other percentage as the court may direct.

[70] The Proposal does not provide any security for payment of any percentage of the claims of the unsecured creditors and thus s. 59(3) is potentially applicable if any facts mentioned in s.173 of the *BIA* can be proved against 155 Ontario.

[71] Mr. Van Klink submits that 155 Ontario has put 803 Ontario, one of its creditors, to unnecessary expense by a frivolous or vexatious defence to the collection action which was properly brought against the bankrupt and thus, one of the facts in s. 173 is established. As a result, the court must refuse to approve the Proposal pursuant to s. 59(3) of the *BIA*.

[72] As Mr. Van Klink points out, ultimately the validity of the claim by 803 Ontario in the collection action was accepted without dispute. He submits that by defending the collection action and issuing a counterclaim, 155 Ontario put 803 Ontario to unnecessary expense and he points to the fact that costs were awarded to 803 Ontario in the amount of $20,000.

[73] However, on this evidentiary record, I cannot conclude that 155 Ontario advanced a frivolous or vexatious defence and counterclaim in relation to the collection action brought by 803 Ontario. The fact that costs were awarded to 803 Ontario cannot lead to the conclusion Mr. Van Klink asks me to reach. I am not prepared to find that facts mentioned in s. 173 of the BIA have been proven against 155 Ontario.

[74] I note also that the Trustee provided his opinion that there were no facts mentioned in s. 173 of the *BIA* that may be proved against the debtor.

[75] I am satisfied there is no impediment to approval of the Proposal pursuant to s. 59(3) of the *BIA*.

The s. 60(1) issue

[76] Section 60(1) of the *BIA* provides that the court shall not approve a proposal that does not provide for the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of a debtor and for the payment of all proper fees and expenses of the trustee on and incidental to the proceedings arising out of the proposal or in the bankruptcy.

[77] Mr. Van Klink asserts that the Proposal does not given effect to the priority given to the 2017 costs and the first trustee’s costs and pursuant to s. 60(1) of the *BIA*, the court shall not approve the Proposal.

[78] The Trustee’s position is that the Proposal does not contemplate any violation of s. 60(1) of the *BIA*.

[79] The Trustee points out that as a “substituted trustee”, it is obliged pursuant to s. 36(2)(e) “as soon as funds are available” to “pay to the former trustee his remuneration and disbursements as approved by the court”. Pursuant to this provision, the trustee intends to pay the first trustee’s costs “as soon as funds are available”.

[80] As the Trustee set out in para. 41 of its factum as follows:

> The costs of the former trustee and its legal counsel are payable by PWC, the substituted trustee, as soon as funds are available and will form costs of administration that are payable in priority to the unsecured creditors. It is therefore respectfully submitted that the Proposal does not improperly reorder the priorities from what they would be in a bankruptcy.

[81] Mr. Swift also acknowledges that the 2017 costs will also attract priority.

[82] Mr. Godard confirmed that the intent of the Proposal is to pay priority creditors ahead of the ordinary creditors and it was open for me to amend the Proposal if I felt necessary to add 803 Ontario as a category of priority creditor in relation to the 2017 costs.

[83] Mr. Swift submitted that the Trustee's position is that the Proposal honours these priorities and references clause 3.2 of the Proposal which provides that payments will be made first to secured creditors, then to pay administrative fees and expenses, and then to priority creditors.

[84] Mr. Swift submitted that while the Trustee did not identify priority creditors, priority creditors are to be paid and it was unnecessary to make the proposed amendment.

[85] I agree with the Trustee's position and am satisfied that the provisions of s. 60(1) create no impediment to the approval of the Proposal.

The reasonableness issue

[86] 803 Ontario filed an extensive affidavit setting out its opposition to the Proposal. It vehemently asserts that Mr. Valente, in making the Proposal (and in other corporate activities which is the subject of an oppression action I understand), has acted to retain and protect the management fee of RVIL.

[87] Mr. Van Klink points out, that in assessing whether the terms of a proposal are not reasonable or are not calculated to benefit the general body of creditors, the court must consider:

a) the interests of the debtor in making a settlement with the creditors;

b) the interests of the 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 reality (see *Milan in Bankruptcy*, 2012 ONSC 2899 at para. 27).

[88] With respect to the interests of 155 Ontario, Mr. Van Klink notes the Proposal serves no purpose in that there is no business or ongoing operation which will be salvaged for 155 Ontario once the Proposal is completed. I agree with Mr. Van Klink that the Proposal contemplates a liquidation of the assets of 155 Ontario.

[89] With respect to the interests of creditors, Mr. Van Klink asserts that:

a) the potential return to the creditors under the Proposal is uncertain and speculative;

b) the creditors will not receive any distribution before five years, whereas under a bankruptcy with the sale of the un-serviced land en bloc there will be a distribution to creditors much more quickly (within eight to ten months according to the appraisal filed by the Trustee or within a year according to Mr. Valente);

c) the Proposal was calculated to benefit the financial interests and Messrs. Valente, Knapp, and Muroff and not the interests of the creditors providing no advantages to the creditors over a bankruptcy; and

d) the funding required to implement the Proposal has not been authorized.

[90] 803 Ontario asserts in para. 89 of its factum that the Proposal is "an abuse of the bankruptcy process". Mr. Van Klink accuses Mr. Valente of putting his interests ahead of all the creditors as the Proposal allows Mr. Valente's company to collect a 6.5% management fee on the sale of the property, which would not be recoverable if the property was sold en bloc.

[91] On the other hand, Mr. Godard asserts that 803 Ontario has improperly initiated the sequence of events that led to the bankruptcy pointing out that 803 Ontario made a demand for payment within three days when it was obvious that such a demand could not be met for the express purpose of resiling from the management agreement with RVIL. While Mr. Godard also asserts that 803 Ontario had no right to demand repayment and this is important as contextual background in relation to this motion, I agree with Mr. Van Klink that the issue of 803 Ontario's right to make demand is an issue in the collection action and should have been pursued in that action.

[92] More significantly, Mr. Godard submits that this Proposal, pursuant to which RVIL would continue to manage and oversee the sale of the property on behalf of 155 Ontario, is simply giving effect to the terms of the agreement which the four shareholders/creditors originally entered into.

[93] Mr. Godard's position is succinctly set out in paras. 22–24 of the factum filed on behalf of Mr. Valente and Mr. Knapp as follows:

> …who better to deal with 155 Ontario's trustee, in whom the lands have now vested, to propose on behalf of 155 Ontario a scheme for the development and sale of those lands, in a manner that is not only in the best interests of 155 Ontario's shareholders, but also in the best interests of unsecured creditors?
>
> Additionally, the current proposal has the salutary effect in the public interest of preserving the integrity of the bankruptcy process and complying with the requirements of commercial morality in giving effect to the terms of the purchase agreement.

[94] In essence, Mr. Godard's position is that 803's objection is based on its desire to avoid its obligations under the agreement the shareholders/creditors previously entered into and more specifically, to avoid the agreed upon payment of the management fee to RVIL.

[95] Furthermore, Mr. Godard points out that 803 Ontario, which he described as a "persistent naysayer", is entitled to have its interest bought out now pursuant to para. 3.2 of the Proposal. Mr. Godard questions what more could be done to accommodate an objecting creditor other than an offer to pay it out under the most likely result from what the objecting creditor is asking for.

[96] Mr. Godard emphasizes that the Proposal is clearly made in good faith and the fact that 803 Ontario continues to object speaks to its objection not being in good faith.

[97] As Mr. Godard points out, under the Proposal according to the cash flows, there is two times the return to creditors and 803 Ontario does not have to fulfil its obligations to provide financing to service the lots (an obligation imposed on 803 Ontario pursuant to the earlier agreement as previously noted).

[98] As Mr. Godard put it, the proposers will take the risk, put up the initial funds required for servicing, and enhance the potential returns to creditors, as I will more fully elaborate on.

[99] As the Trustee reported, the Proposal contained an estimated realizable value of the 62 unserviced lots and an estimated realizable value of selling the lots after servicing them in accordance with the Proposal. As Mr. Swift points out, the Proposal forecasts that it would produce twice as much for distribution to creditors than a realization in bankruptcy.

[100] The Trustee obtained an independent appraisal of the property in both an un-serviced and serviced state and provided a copy of that appraisal as part of its Confidential Supplement.

[101] The Trustee noted that the purpose of its Confidential Report contained in the Confidential Supplement was to include a comparison of the market value of the 62 unserviced lots with the estimated realization in bankruptcy and the prospective market value of the 62 lots in a serviced state with the estimated realization according to the cash flow schedule submitted with the Proposal.

[102] As explained in the Confidential Supplement, in order to compare the prospective market value according to the appraisal with the estimated realization set out in the cash flow schedule submitted with the Proposal, the prospective market value according to the appraisal was discounted for the time value of funds generated from sales of the serviced lots during the five year period (the estimated realization in the cash flow schedule to the Proposal did not consider the present value of future net cash flows).

[103] Considering all of the information provided on this motion, I cannot accept Mr. Van Klink's assertion that Mr. Valente is putting his interests ahead of all creditors.

[104] It is true that if the Proposal is refused, RVIL will be paid no management fee and the creditors will receive some payment more quickly than under the Proposal.

[105] However, if the Proposal is approved, while RVIL will then be paid the management fee, the Proposal forecasts that it would produce twice as much for distribution to creditors than a realization in bankruptcy.

[106] I have taken into account Mr. Van Klink's submission on behalf of 803 Ontario that the result of the Proposal depends on the validity of the forecasts and that, under a bankruptcy, monies will be returned to the creditors more quickly.

[107] In considering the reasonableness issue I have relied on the following:

(i) the independent appraiser reported that the level of demand for the subject land en bloc, and as individual lots is stable and slightly higher than the available supply;

(ii) the independent appraiser reported that the increased demand for residential homes in the Windsor area has been prevalent during 2017;

(iii) the demand for residential homes in the Windsor area is described as strong;

(iv) the independent appraiser opined that "it is my opinion that the supply and demand factors influencing the subject add to its market position. These trends are expected to continue well into 2018";

(v) the above must be balanced with the fact that within the relevant five-year time frame of the Proposal, economic change could negatively impact that market; however economic change or instability are speculative;

(vi) according to the Proposal the creditors will receive a much higher recovery than what is estimated from a sale of un-serviced lots en bloc;

(vii) an independent appraiser provided validity to the values utilized in the Proposal;

(viii) the Confidential Report of the Trustee compared the net cash generated according to the values provided in the appraisal with the cash flow schedules submitted with the Proposal making appropriate adjustments as described above; and

(ix) the Trustee verified the servicing costs presented in the Proposal with an independent engineer.

[108] I accept Mr. Swift's assertion that it is reasonable that 155 Ontario be given a chance to develop the property to create more recovery for creditors over the next five years.

[109] I am satisfied that the terms of the Proposal are reasonable and are calculated to benefit the general body of creditors. I approve the Proposal.

[110] I am also satisfied that the Confidential Supplement should be sealed until completion of the sale of the 62 lots in accordance with the Proposal.

[111] Orders may issue in accordance with these reasons.

"Justice L. C. Leitch"
Justice L. C. Leitch

Released: April 5, 2018

CITATION: 1552906 Ontario (Bankruptcy), 2018 ONSC 1731
COURT FILE NO.: 35-2106711
DATE: 2018/04/05

ONTARIO

SUPERIOR COURT OF JUSTICE IN BANKRUPTCY and INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF 1552906 Ontario Limited of the City of Windsor in the Province of Ontario

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REASONS

Justice L.C. Leitch

Released: April 5, 2018

TAB 3

Ontario Superior Court of Justice
Fiber Connections Inc. v. SVCM Capital Ltd.
Date: 2005-03-10

Docket: 04-CL-5680, 31-OR-437021

Raymond S. Slattery, Timothy R. Dunn for Applicant, Fiber Connections Inc.

Jonathan H. Wigley for SVCM Capital Ltd., Russell Shoemaker

Martin Greenglass for SF Partners Inc. (Proposal Trustee)

C. Campbell J.:

[1] Two inter-related motions were heard together. One, under the *Bankruptcy & Insolvency Act,* R.S.C. 1985 c. B-3 (the "BIA"), seeks approval of a Proposal made by Fiber Connections Inc. ("Fiber.") The second, an application under the *Ontario Business Corporations Act,* R.S.O. 1990 c. B-16 (the "OBCA"), seeks termination of a Unanimous Shareholders Agreement ("USA") among Fiber and its current shareholders.

[2] Both sets of relief are opposed by SVCM Capital Ltd. ("SVCM") and its president Russell J. Shoemaker, essentially because they believe the proposal will fail and that the only value of Fibre is in a patent application that will be better realized if sold in bankruptcy.

Background Facts

[3] Most of the underlying facts are not in dispute. The Amended Proposal, dated September 15, 2004, was presented to the Court by the Proposal Trustee. It has been approved by 25 of the 26 creditors of Fiber representing approximately 98% of its indebtedness.

[4] The Proposal also has the support of the Business Development Bank ("BDB"), the major secured lender, and of the Government of Prince Edward Island, and preserves employment there and in Schomberg, Ontario. Aside from the need to deal with the position of SVCM and Mr. Shoemaker, I am satisfied that the proposal represents a conscientious and realistic effort on the part of both creditors and shareholders.

[5] There is no issue that Fiber is insolvent and has been for some months, during which time the Proposal has been initiated, negotiated, amended and finalized.

[6] The proximate cause(s) of the insolvency are not directly relevant to the relief sought, given the strong support of all creditors and shareholders with the exception of Mr.

Shoemaker and his company. There is no question but that the high tech industry crash in 2000 and the events of September 11, 2001 both contributed.

[7] As of January 2004, it was clear to all concerned that Fiber was insolvent. Mr. Shoemaker was sufficiently concerned with events that on February 5, 2004, he resigned as financial manager of Fiber, and in March 2004 as a director.

[8] SVCM advanced a claim in response to the Notice to Creditors in support of the Proposal, which was disallowed by the Trustee by Notice dated October 5, 2004.

[9] The claim, which was advanced by proof of claim in the sum of $1,712,048, was valued at Nil pursuant to s. 135(1.1) of the BIA, on the following grounds:

> (A) As trustee acting in the matter of the proposal of Fiber Connections Inc., we have determined that your unliquidated claim reflected on your proof of claim at $ 1,712,048, has been valued at NIL and therefore, there is no amount that has been a proved claim pursuant to subsection 135(1.1) of the Act.
>
> (B) As trustee acting in the matter of the proposal of Fiber Connections Inc., we have further disallowed your claim in the sum of $1,712,048 pursuant to s. 135(2) of the Act for the following reasons;
>
> (i) The said claim is an unliquidated damage claim based upon allegations of misrepresentation and/or fraudulent non-disclosure. The trustee understands that Fiber Connections Inc. disputes the allegations made and no proof has been provided to the trustee of the allegations which would entitle the trustee to determine if the claim is a valid claim.
>
> (ii) The claim as presented clearly indicates that the primary allegation is as against directors, and therefore, the claim may be a claim properly made as against someone other than Fiber Connections Inc.

[10] The disallowance has been appealed. In addition, I am satisfied that any claim that SVCM or Mr. Shoemaker has against directions personally for misrepresentation or misappropriation survive and can be pursued.

[11] In its Amended Report, the Proposal Trustee advises that in its opinion, the value of the assets of Fiber, less the secured claim of BDB, are approximately $275,000. Hence it is urged the terms of the Amended Proposal are reasonable and calculated to benefit the general body of creditors, if approved, particularly as both BDB and the Province of Prince Edward Island are in support.

The Patent Application

[12] The opposition of Mr. Shoemaker and SVCM to the Amended Proposal came from their view of the potential value of an outstanding patent application for a device that

converts electrical signals to optical signals and back, to allow configured devices to use a fibre optic link.

[13] The mechanism for advancing opposition to the Proposal is the terms of the USA.

[14] The effect of paragraph 4.4 set out below, to which Fiber is a signatory, is that the company shall not make any changes in the authorized or issued capital in the company or declare dividends without the written consent of Mr. Shoemaker. There is also what is known as a “drag along” provision that provides for a deemed consent to sell to a third party, if approved by 50% of the shareholders. Paragraph 4.4 reads as follows:

> 4.4 Notwithstanding anything else contained in this agreement, and in addition to any other approval that may be required at law, so long as Russellco owns five percent (5%) of the outstanding Common Shares, the Corporation shall not;
>
> (a) make any change in the authorized or issued capital of the Corporation, save and except that the Corporation may issue such number of Common Shares as are properly issuable pursuant to the due exercise, in whole or in part, of the Warrant; or
>
> (b) declare dividends or other distributions in respect of the Common Shares or the Class “A” Preference Shares
>
> in either case, without the prior written consent of Russell Shoemaker on behalf of Russellco, in its sole discretion. In the event of an assignment or transfer of any of the Common Shares owned by Russellco, the provisions of Section 4.4 shall not apply to the Common Shares acquired by the subsequent transferee(s).

[15] Mr. Shoemaker’s opposition comes from his belief that the Proposal Trustee has not appropriately valued the patent application in assigning an amount of $200,000 to it. In his affidavit, he attests to the possibility that the application (which is in the names of officers of Fiber) could be worth anywhere from $1,000,000 to $8,000,000 based on internal projections or in excess of $50,000,000 based on statements by Fiber’s CEO.

[16] If the events of the last few years and the high tech bubble have taught anything, it is that the value of technological innovations, whether devices, software or services, are at best risky and highly speculative.

[17] In my view, the only evidence that the Court has or should have regard to is the amount attributed by the Proposal Trustee, namely $200,000. I have no doubt that all the creditors and shareholders hope that the patent, if approved, is worth more than $200,000. Indeed, that is implicit in the Amended Proposal and is in the future.

[18] Mr. Shoemaker is alone in believing the Patent Application will realize greater value through bankruptcy than the Amended Proposal. There is simply no reliable evidence

before me to support this conclusion. Indeed, there is the suggestion that through bankruptcy, Mr. Shoemaker or his company could acquire the Patent Application for themselves to exploit.

[19] As noted, the preferable "valuation" recognizing its inherent flaws, is that of the Proposal Trustee.

[20] Without assigning a very significant value to the Patent Application, which I have not, there is no economic value to the shares of Fiber.

The Issue

[21] The question then arises: can a shareholder who has no effective value to his shares successfully oppose a Proposal under the BIA simply because the variation of Agreement to implement the Proposal requires his consent to a revised share structure?

[22] Mr. Wigley on behalf of Mr. Shoemaker and SVCM submits that the answer to the above is yes. He submits that the USA permits a shareholder, obstinate as some might think him, to withhold consent (a) because there can be no oppression of the applicant Fiber under s. 248 of the OBCA; and (b) absent an oppression finding, there is no authority in the Court under the BIA to set aside a unanimous shareholder agreement to permit alteration of share structure.

[23] The position of Fiber is that the Court should grant its approval order and terminate the USA, either pursuant to its inherent jurisdiction to enable successful restructuring under the BIA or the specific jurisdiction provided in s. 248 of the OBCA.

[24] Section 245 of the OBCA provides that for the purpose of among other matters s. 248 "complainant" means… "(c) any other person who, in the discretion of the Court, is a proper person to make an application…"

[25] Counsel for SVCM submits that in this case, Fiber should not be accorded status as a complainant since under s. 248, conduct complained of must be "oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the Corporation."

[26] It is submitted that since the interests of the Corporation are not mentioned in the section, the Corporation cannot be a proper complainant.

[27] I disagree with the proposition advanced by SVCM. In this case, I find that Fiber is a proper complainant, since as a party to the USA the contemplated reorganization cannot be carried out without change to the share structure, which requires actions on the part of the Company. See *Gainers Inc. v. Pocklington* (1992), 7 B.L.R. (2d) 87 (Alta. Q.B.) and *Dylex Ltd. (Trustee of) v. Anderson* (2003), 63 O.R. (3d) 659 (Ont. S.C.J. [Commercial List]), at 665.

[28] This is not an oppression application brought by SVCM as a minority shareholder. I conclude that when all of the other creditors and shareholders consent to the remedy sought in the name of the company, it would unduly technical to say that the remedy could not be brought in the name of the company, when it is a necessary party to the remedy.

[29] In addition, it would be oppressive to the Corporation and its stakeholders to end its existence when virtually all of the shareholders, directors, creditors and employees believe it has a future. In that sense, creditors and directors, among others, are oppressed.

[30] Counsel for SVCM relies on language from the decision of the Court of Appeal in *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (Ont. C.A.), which delineates the importance of shareholder expectation as part of shareholder interest. Reference is made in the decision to the decision of Farley J. in *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), at 113, where at p. 123 speaking of shareholder expectation, there appears the following:

> They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders.

[31] Applying the language to the facts of this case, can it be said that it was the expectation of all the shareholders of Fiber, whose shares currently have no economic value, that one shareholder could deprive them of the possibility of achieving some value by employing a veto the effect of which is to put the company in bankruptcy? I think the answer is clear. That would not have been the reasonable expectation of the shareholders as a group.

[32] I have not been referred to any authority that would suggest that shareholder expectation would necessarily exclude consideration of the majority, when one single shareholder seeks to be obstinate for his own purpose, which is not that of the rest of the stakeholders, not just the other shareholders.

[33] I conclude that the purported exercise of a veto of the amendments to the share structure proposal is oppressive of the Corporation, its shareholders and directors.

[34] The remedy is an order permitting the Company to amend its articles and/or by-laws and/or the USA including the power to create a new unanimous shareholders' agreement in the terms set forth in the Company's proposal under s. 248 and s. 168 of the OBCA. See *Bury v. Bell Gouinlock Ltd.* (1984), 12 D.L.R. (4th) 451 (Ont. H.C.) and *Walsh v. Erectoweld Co.* (1992), [1993] O.J. No. 24 (Ont. S.C.J. [Commercial List]).

The BIA

[35] In the event I am found in error in respect of the ability to find Fiber a complainant oppressed under the OBCA, it is necessary to consider the submission of SVCM that there is no jurisdiction in the BIA that would expressly permit termination of the USA and that it would be inappropriate to draw on the "inherent jurisdiction" of the Court to do so.

[36] Part of the submission under the BIA is that since the matter of the USA is specifically regulated under the OBCA, the Court should not stretch to do so under the BIA.

[37] I agree with counsel for SVCM that much of the law regarding inherent jurisdiction and cases under the *Companies Creditors Arrangement Act* are as a result of the general language in that statute, as opposed to the more specific language of the BIA. As a result, I agree that the use of "inherent jurisdiction" under the BIA, which is a much more detailed statute, must be used with caution.

[38] Much of the recent focus on the duties of directors is to recognize that there may be duties that extend beyond shareholders, to other stakeholders. See *People's Department Stores Ltd. (1992) Inc., Re,* 2004 SCC 68 (S.C.C.).

[39] For the purposes of this case, it is not in my view an extension of the concept of inherent jurisdiction, but rather the prevention of one shareholder, with no economic value of his equity, holding all the stakeholders hostages. In this respect, I conclude that the considerations expressed for the exercise of the Court's inherent jurisdiction under the CCAA are applicable under the BIA to the facts of this case. See *Algoma Steel Inc., Re* (2001), [2002] O.J. No. 66 (Ont. S.C.J. [Commercial List]) at paragraph 5; *Doman Industries Ltd., Re,* [2004] B.C.J. No. 1402 (Ont. S.C.J. [Commercial List])

[40] There is no practical reason for a distinction to be made for the consideration of "inherent jurisdiction" on the facts of this case, since it is only insolvency that prevents this having been a CCAA application. This is a proposal, not a bankruptcy. It would indeed be

scandalous if the use of "inherent jurisdiction" under one statute of the CCAA would prevent bankruptcy but a proposal to achieve the same purpose under the BIA could not.

[41] Where the corporation is insolvent and the shareholders would, upon liquidation, get nothing, it would be unfair to creditors and other stakeholders to permit one shareholder with no economic interest to block a reorganization. The alternative would be bankruptcy and nothing for most of the creditors and all of the shareholders. (See *Loewen Group Inc., Re,* [2001] O.J. No. 5640 (Ont. S.C.J. [Commercial List]), paragraph 8 and *Canadian Airlines Corp., Re,* [2000] A.J. No. 771 (Alta. Q.B.) at p. 74-79.

[42] For the foregoing reasons, I conclude that there is power under the BIA in these circumstances to set aside the USA and approve the proposal of the company, as set forth in the Report of the Proposal Trustee, and it is so ordered. Pursuant to s. 186 of the OBCA an order will issue amending the share structure of Fiber in accordance with its Proposal.

[43] If it is necessary to deal with the issue of costs, written submissions should be made within the next 10 days.

Motion and application granted.

TAB 4

Excerpt from *Business Corporations Act*, R.S.O. 1990, c. B.16

Directors' meetings

126 (1) Unless the articles or by-laws provide otherwise, the directors may meet at any place. 2017, c. 2, Sched. 12, s. 1 (6).

(2) REPEALED: 2017, c. 2, Sched. 12, s. 1 (6).

Quorum

(3) Subject to the articles or by-laws and subsection (4), a majority of the number of directors or minimum number of directors required by the articles constitutes a quorum at any meeting of directors. R.S.O. 1990, c. B.16, s. 126 (3); 2017, c. 2, Sched. 12, s. 1 (7).

Idem

(4) Where a corporation has fewer than three directors, all directors must be present at any meeting of directors to constitute a quorum. R.S.O. 1990, c. B.16, s. 126 (4).

Idem

(5) Subject to the articles or by-laws, where there is a vacancy or vacancies in the board of directors, the remaining directors may exercise all the powers of the board so long as a quorum of the board remains in office. R.S.O. 1990, c. B.16, s. 126 (5).

[…]

Estate No. 32-2853708
Court File No. 32-2853708

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

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF iS5 COMMUNICATIONS INC., OF THE CITY OF MISSISSAUGA IN THE PROVINCE OF ONTARIO

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

Proceedings commenced in Toronto

BOOK OF AUTHORITIES OF
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