

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

**IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
RSC 1985, c B-3, AS AMENDED**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE
A PROPOSAL OF PROSYSCO LTD. OF THE CITY OF MISSISSAUGA
IN THE PROVINCE OF ONTARIO**

**AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A
PROPOSAL OF 1110615 ONTARIO LTD. OF THE CITY OF
MISSISSAUGA IN THE PROVINCE OF ONTARIO**

FACTUM OF THE PROPOSAL TRUSTEE
(Approval of Prosysco Amended Proposal)

January 17, 2024

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PART I – OVERVIEW

1. This motion is brought by Albert Gelman Inc. in its capacity as proposal trustee (the “**Proposal Trustee**”) of Prosysco Ltd. (the (“**Company** or **Debtor**”) seeking an order substantially in the form of the draft order attached as Schedule “B” to the Proposal Trustee’s notice of motion (the “**Approval Order**”), among other things, approving the Amended Proposal (defined below), which was submitted by the Company and unanimously approved by its creditors present in person or by proxy and voting on the Amended Proposal.
2. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Amended Proposal.
3. The Amended Proposal was intended to give effect to:

- (a) the distribution of funds on an orderly basis to CRA and to Creditors with Proven Claims in accordance with the terms and timing set out in the Amended Proposal respecting the relative priorities of such interests;
 - (b) releases of any and all Proven Claims upon the Completion Date; and
 - (c) releases in respect of the directors and officers of the Company upon the Completion Date.
4. The other key terms of the Amended Proposal are as follows:
- (a) Excepting sections 95 to 101 of the BIA from application to the Amended Proposal of the *Bankruptcy and Insolvency Act*, R.S.C., c.B-3 (the “**BIA**”);
 - (b) Establishing Reserve funds each in the amount of \$15000 have been reserved to the Proposal Trustee to fund costs and expenses of annulment proceedings or bankruptcy should either event be necessary; and
 - (c) The agreement that certain related parties to the Company (including 1110615) shall not file Claims in the Amended Proposal.

PART II – FACTS

Background

5. The Company was incorporated under *Business Corporations Act* (Ontario) on March 4, 1988 and is owned and controlled by 1110615 Ontario Ltd. (“**1110615**”) which owns and controls 100% of the Class A Common voting shares of the Company and is a holding company that does not conduct business nor have any employees. 1110615 has filed a companion proposal to that of the Prosysco’s.
6. The Company is a manufacturer, designer and supplier of highly specialized engineering process solutions targeting the biotech, pharmaceutical, food, beverage, and dairy

industries. Prosysco is the only supplier in Canada capable of providing a full spectrum of design / build / installation / commissioning services for high purity process equipment required for vaccine production. At the commencement of these proceedings, it had 62 employees, and still has over 50.

7. The Company has suffered from the combination of rapid growth and a chronic and persistent undercapitalization which was addressed in ways which led to the creation of significant obligations to the Canada Revenue Agency (“**CRA**”) on account of unremitted source deductions and as well creating defaults under its operating loan arrangements with its primary operating lender, Royal Bank of Canada (“**RBC**”). These factors, among others led to the filing of Notices of Intention to make a Proposal under the BIA.

Form 40 Report at Section 17, para (a), Motion Record, Tab 2, p. 34

8. The meeting process to approve the Amended Proposal was subject to five successive adjournments to permit the secured parties to settle their due diligence and to work out the terms of security sharing arrangements discussed below in paragraph 11.

Form 40 Report at Sections 8-12, Motion Record, Tab 2, p. 34

Amended Proposal

9. The Debtor’s Amended Proposal provides for the following:
 - (a) Payment in full of the CRA’s deemed trust claim in respect of unpaid source deduction which totals approximately \$1,631,000 payable in twenty-four (24)

equal consecutive monthly installments of \$67,953.33 each commencing the month following to Final Approval;

- (b) A Proposal Fund of \$250,000, for the benefit of the Debtor's unsecured creditors, payable in equal consecutive monthly installments of \$20,833.33 each commencing in the twenty-fifth (25th) month following Final Approval;
- (c) Reserve Funds to be set aside for the payment of professional and administrative fees in the event an annulment proceeding is required to be brought and to fund the administration of a bankruptcy in the event that were to occur;
- (d) Non-arm's length creditors of the Debtor have each agreed not to file claims in the Amended Proposal and will not participate in any distribution of the Proposal Fund; and
- (e) The Amended Proposal is not being made to RBC in respect of its secured claim. The Debtor, RBC and others have entered into a certain forbearance agreement which contractual arrangement is intended to work in concert with the Amended Proposal.

Form 40 Report at Section 18, para c, Motion Record, Tab 2, p. 35

10. In addition, a principal of the Debtor has provided a limited guarantee to RBC and CRA in respect of their claims against the Debtor which limited guarantee is secured against the property municipally known as 126 Jasper Drive, Kirkfield, Ontario which security is to be shared between them.

Form 40 Report at Section 18, para d, Motion Record, Tab 2, p. 35

Conditions to Implementation

11. The Amended Proposal is subject to the following conditions:
 - (a) Acceptance of the Amended Proposal by the statutory majorities of Creditors as required under the BIA;
 - (b) Acceptance of the Amended Proposal of 111615 by the statutory majorities of creditors as required under the BIA; and
 - (c) An order of the Court approving the Amended Proposal.

Form 40 Report to Creditors at Exhibit “K” Motion Record, Tab 2, p. 186

No Preferences and Transfers at Undervalue

12. Following its review of the period of twelve months immediately preceding the Filing Date, and focussing on those transactions above \$10,000, the Proposal Trustee could identify no transactions that could be considered a preference or transfer at undervalue.

Form 40 Report at Section 17, para c, Motion Record, Tab 2, p. 34

The Amened Proposal is Unanimously Accepted by the Creditors

13. The Amended Proposal was unanimously accepted by the creditors present in person or by proxy and entitled to vote at a duly reconvened meeting of creditors on December 4, 2023.

Form 40 Report at Section 14, Motion Record, Tab 2, p. 32 and Appendix “K”, p. 187

The Amended Proposal is Recommended by the Proposal Trustee

14. The economic terms of the Amended Proposal will provide a more favourable return than in bankruptcy. Based on this favourable recovery and the Proposal Trustee not having identified any transactions which would be considered to be reviewable or transfers at undervalue, and the unanimous acceptance of the proposal, the Proposal Trustee is of the view that the Amended Proposal is reasonable and calculated to benefit the general body of creditors.

Form 40 Report at Section 18, para e, Motion Record, Tab 2, p. 35

PART III – ISSUE

15. The issue on this motion is whether the Court should grant the Approval Order approving the Amended Proposal pursuant to section 59 of the BIA.

PART IV – LAW AND ARGUMENT

16. Pursuant to section 54(2)(d) of the BIA, a proposal is deemed to be accepted by the creditors if it has achieved the requisite “double majority” vote at a duly constituted meeting of creditors. At the Creditors’ Meeting, the Amended Proposal was unanimously accepted by the Company’s creditors present in person or by proxy and entitled to vote at the Creditors’ Meeting.

BIA, s. 54(2)(d), Schedule B to the Trustee’s Factum

17. Section 58 of the BIA provides that, on acceptance of the Amended Proposal by the Company’s creditors, the Proposal Trustee was to:

- (a) schedule this hearing within five days;
- (b) give at least 15 days' notice of this hearing in the prescribed form to the Company's creditors and the Official Receiver;
- (c) send a report in the prescribed form to the Official Receiver at least 10 days before this hearing; and
- (d) file such report with the Court two days before this hearing.

BIA, s. 58, Schedule B to the Trustee's Factum

18. The Proposal Trustee has complied with all statutory requirements that must be satisfied before a proposal is approved, including the requirements set out in section 58 of the BIA, described above.

**Court Approval Hearing Notice, Form 40 Report Section 15 Motion Record,
Tab 2, p. 34 and Exhibit "L" p. 190**

19. Section 59(2) of the BIA requires that the Court refuse to approve a proposal accepted by a debtor's creditors where its terms are not reasonable or are not calculated to benefit the general body of creditors.

BIA, s. 59(2), Schedule B to the Trustee's Factum

20. Courts have held that in order to satisfy section 59(2) of the BIA, the following three-pronged test must be satisfied:
- (a) the proposal must be reasonable;
 - (b) the proposal must be calculated to benefit the general body of creditors; and
 - (c) the proposal must be made in good faith.

[Re Kitchener Frame Ltd, 2012 ONSC 234 \[Kitchener Frame\] at para 19](#)

21. The first two factors are expressly set out in s. 59(2) of the BIA while the last factor has been implied by this Court as an exercise of its equitable jurisdiction.

[Kitchener Frame, supra at para 20](#)

22. In considering the foregoing factors, courts have generally taken into account the interests of the debtor, the interests of the creditors and the interests of the public at large in the integrity of the bankruptcy system.

[Kitchener Frame, supra at para 20](#)

23. In doing so, courts have accorded substantial deference to both the majority vote of creditors at a meeting of creditors and the recommendation of the proposal trustee.

[Kitchener Frame, supra at para 21; Re Abou-Rached, 2002 BCSC 1022 \[Abou-Rached\] at paras 65-66](#)

24. If a majority of creditors (i.e., substantially in excess of the statutory majority) have voted for acceptance of a proposal, it will take strong reasons for a court to substitute its judgment for that of the creditors.

[Abou-Rached, supra at 66](#)

25. Given that (i) the creditors voting at the Creditors' Meeting unanimously voted in favour of the Amended Proposal, (ii) the Proposal Trustee has recommended the approval of the Amended Proposal, and (iii) no strong reasons weigh against the judgment of the

Company's creditors and the Proposal Trustee, the test for the application of section 59(2) is satisfied. Each of the three prongs of the test are described in greater detail below.

The Terms of the Proposal are Reasonable

26. With respect to the first branch of the test for sanctioning a proposal, the debtor must satisfy the Court that the proposal is reasonable.

Kitchener Frame, supra at para 22

27. What is "reasonable" in this context has been determined to mean that the proposal must have a reasonable possibility of being successfully completed in accordance with its terms. In addition, the proposal must meet the requirements of commercial morality and must maintain the integrity of the bankruptcy system.

Abou-Rached, supra at para 68

28. In the present case, the Amended Proposal provides for a floor of recovery for the affected creditors by means of the creation of the Proposal Fund and the withdrawal of the claims of related parties means there is minimum available dividend in circumstances where the Proposal Trustee has determined that the recovery to unsecured creditors would be nil. The Amended Proposal is clearly capable of being implemented in accordance with its terms and was unanimously approved by the Company's creditors.

29. Furthermore, nothing in this Amended Proposal offends commercial morality or undermines the integrity of the bankruptcy system.

30. Section 50(13) of the BIA sets out that a proposal may provide for a compromise of claims against directors of a corporation that relate to the obligations of the corporation where the directors are by law liable in their capacity as directors for the payment of such obligations.

BIA, s. 50(13), Schedule B to the Trustee's Factum

31. Section 50(14) of the BIA provides that a proposal may not compromise claims against directors that:

- (a) relate to contractual rights of one or more creditors arising from contracts with one or more directors; or
- (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

BIA, s. 50(14), Schedule B to the Trustee's Factum

32. The proposal provides for a release of claims against the Directors and Officers for which they may be liable in their capacity as a Director or Officer. The Amended Proposal further provides that it does not affect claims against the Directors and Officers that are not permitted to be released under section 50(14) of the BIA.

33. As part of its statutory duties under section 50(10)(b) of the BIA, the Proposal Trustee performed a review of the Company's financial records in order to identify (i) any disbursements greater than \$10,000 that may be considered preferences pursuant to the

BIA, and (ii) any transactions that may be considered transfers at undervalue pursuant to the BIA.

BIA, s. 50(10)(b), Schedule B to the Trustee's Factum;

34. The Proposal Trustee found no transactions entered into during the prescribed look-back period as provided for in section 95 of the BIA, and consequently is of the view the exclusions of sections 95 to 101 of the BIA, and any similar provision of any federal or provincial statute, from the Amended Proposal is reasonable.

Form 40 Report at Section 17, para c, Motion Record, Tab 2 , p. 34

The Proposal is Calculated to Benefit the General Body of Creditors

35. Under the second branch of the test for sanctioning a proposal, the Court must be satisfied that the proposal is calculated to benefit the general body of creditors.

Kitchener Frame, supra at para 22

36. Courts have refused to approve proposals on this basis where, for example, the proposal serves the interest of persons other than the creditors, where there has not been full disclosure of the assets of the debtor and the encumbrances against those assets, or where the proposal, by its terms, is bound to fail.

Abou-Rached, supra at para 78

37. None of those circumstances are present in this case. Rather, the Amended Proposal provides for an even-handed distribution to affected creditors in circumstances where no dividend would otherwise be available. In addition, creditors were provided with full and frank disclosure of the terms of the Amended Proposal prior to the Creditors' Meeting which insofar as unsecured creditors had changed very little and voted unanimously in support of the Amended Proposal.
38. In this case, the Proposal Trustee is satisfied that there has been full disclosure of the Company's assets and encumbrances, and the recovery for affected creditors under the Proposal is greater than it would be in the event of a bankruptcy.
39. The Proposal Trustee submits that the Proposal satisfies this second prong of the test.

The Proposal is Made in Good Faith

40. Based on the clarity of disclosure made to Creditors, the favourable economic terms to Creditors, and the even-handed distribution proposed in the Amended Proposal while respecting the priorities of CRA and RBC, the Proposal Trustee has determined that the Amended Proposal has been made in good faith.
41. The Company has been acting in good faith throughout the NOI Proceedings. The Proposal, once implemented, will benefit the Company's stakeholders generally.
42. For these reasons, among others, the Amended Proposal has been made in good faith and should be approved by the Court.

PART V – ORDER REQUESTED

43. For the foregoing reasons, the Proposal Trustee recommends that the Court grant the Approval Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of January, 2024.

GOLDMAN SLOAN NASH & HABER LLP

Per:

A handwritten signature in blue ink, appearing to be 'A. Gelman', written in a cursive style.

Counsel to the Proposal Trustee, Albert Gelman
Inc. as Proposal Trustee

SCHEDULE “A”

AUTHORITIES CITED

1. [*Re Kitchener Frame Ltd*, 2012 ONSC 234](#)
2. [*Re Abou-Rached*, 2002 BCSC 1022](#)

SCHEDULE “B”

LEGISLATION CITED

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Trustee to monitor and report

50 (10) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a proposal in respect of an insolvent person shall, for the purpose of monitoring the insolvent person’s business and financial affairs, have access to and examine the insolvent person’s property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person’s business and financial affairs, from the filing of the proposal until the proposal is approved by the court or the insolvent person becomes bankrupt, and shall [...]

(b) send, in the prescribed manner, a report on the state of the insolvent person’s business and financial affairs – containing the trustee’s opinion as to the reasonableness of a decision, if any, to include in a proposal a provision that sections 95 to 101 do not apply in respect of the proposal and containing the prescribed information, if any – to the creditors and the official receiver at least 10 days before the day on which the meeting of creditors referred to in subsection 51(1) is to be held. [...]

Claims against directors – compromise

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

Exception

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

- (a) relate to contractual rights of one or more creditors arising from contracts with one or more directors; or
- (b) are based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors.

Vote on proposal by creditors

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

Voting system

(2) For the purpose of subsection (1), [...]

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

Application for court approval

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

- (a) within five days after the acceptance, apply to the court for an appointment for a hearing of the application for the court's approval of the proposal;
- (b) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor who has

proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;

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

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

Court may refuse to approve the proposal

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

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**Court File No. BK-23-02929201-0032
Estate No. 32-2929201**

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Proceeding commenced TORONTO

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