Court File / Estate File No. 31-2675583

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE PROPOSAL TO CREDITORS OF CONFORTI HOLDINGS LIMITED, A CORPORATION INCORPORATED UNDER THE ONTARIO BUSINESS CORPORATIONS ACT, R.S.O. 1990, C. B.16

FACTUM OF MOROCCANOIL, INC.

Proposal Approval Motion
(Returnable July 19, 2022)

July 14, 2022

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PART I – OVERVIEW

1. Conforti Holdings Limited ("**CHL**") operates approximately fifty two salons across Ontario under the guidance of its principal Tony Conforti ("**Mr. Conforti**").

2. CHL has over the last seven years been engaged in litigation (the "**New Jersey Proceedings**") in New Jersey with Moroccanoil, Inc. ("**Moroccanoil**") in the United States District Court District of New Jersey (the "**New Jersey Court**") in connection with CHL's willful breach of a settlement agreement.

3. On September 28, 2020, CHL filed a Notice of Intention to Make a Proposal (the "**NOI**") pursuant to Subsection 50.4(1) of *the Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"). Crowe Soberman Inc. ("**Crowe**") was appointed as proposal trustee (the "**Proposal Trustee**") in the NOI proceedings (the "**NOI Proceedings**").

4. Despite its obligations under the BIA, CHL hid its NOI filing from Moroccanoil and the New Jersey Court for more than eight months.

5. CHL's disregard for its obligations under the BIA unfortunately does not start and stop with the concealment of the NOI Proceedings from Moroccanoil. As part of these NOI Proceedings, CHL and Mr. Conforti tried to credit bid illegitimate secured debt (the "**BEI Debt**" and "**BEI Security**") held by a related entity Beauty Experts Inc. ("**BEI**") to the prejudice of CHL's unsecured creditors. Prior to doing so, CHL hid the existence of the BEI Debt and BEI Security from CHL's creditors and the Court.

6. CHL's attempt to advance its concealed and illegitimate credit bid was ultimately foiled when Moroccanoil discovered the NOI Proceedings and brought a motion seeking to set-aside the credit bid. On the hearing of that motion, this Court determined that the BEI Debt was not supported by valid consideration.

7. On March 21, 2022, CHL submitted a formal proposal to its unsecured creditors (as amended, the "**March Conforti Proposal**"). CHL and the Proposal Trustee now seek Court approval of the March Conforti Proposal. They do so notwithstanding that the March Conforti Proposal is not in compliance with the terms of the BIA.

8. In its factum, CHL in an attempt to whitewash its breaches of the BIA, have sought to portray Moroccanoil as a bitter litigant that does not represent its general creditor body and is seeking to bankrupt CHL for an ulterior motive. This motion however is not about Moroccanoil. It is about a debtor (CHL) who has thoroughly breached its obligations under the BIA and in doing so brought the integrity of the bankruptcy system into disrepute. This debtor now seeks to take advantage of the BIA and compromise the claims of its creditors notwithstanding having failed to meet its obligations under the BIA.

9. The BIA however is clear; where a debtor has failed to meet its statutory and Court-ordered obligations a proposal cannot be approved unless it provides for reasonable security for the payment of at least fifty cents for every dollar of unsecured claims against the debtor or such lower amount as may be set by the Court. It is not contested in this case that the March Conforti Proposal does not provide for recovery of fifty cents for every dollar of unsecured claims against CHL. It is Moroccanoil's position, as will be further set out below, that in light of the clear breaches of the BIA committed by CHL and in order to avoid undermining the integrity of the BIA, this Court should decline to approve the March Conforti Proposal, or, in the alternative, should exercise its discretion to adjourn the approved hearing and require CHL to provide consideration to satisfy the fifty cent threshold.

PART II – THE FACTS

The Parties:

10. The following parties will be referenced in this factum:

11. Salon Distribution Inc. Salon Distribution, Inc. (hereafter included in the definition of CHL) ("**SDI**") is a predecessor to CHL.

12. CHL: CHL is the debtor in these proceedings. It is the successor by amalgamation to SDI.[1] As will be detailed below, CHL has also consistently breached its obligations and duties under the BIA since the NOI Proceedings were commenced.

13. Beauty Experts: Beauty Experts operates a wholesale business and purportedly provides management services to CHL. It has the same principal as CHL.[2] As part of these NOI proceedings, Beauty Experts and CHL sought to credit bid certain debt and security granted to it by CHL (being the BEI Debt and the BEI Security).[3] As previously noted, this Court ultimately determined that the BEI Debt was not supported by valid consideration.

14. Crowe: Crowe is the Proposal Trustee of CHL's NOI.

15. Moroccanoil: Moroccanoil is a manufacturer of luxury hair care and body care products. In April 2015, Moroccanoil commenced proceedings against SDI (now CHL) in the New Jersey Court on the basis that SDI and Mr. Conforti breached a settlement agreement with Moroccanoil (the **"Settlement Agreement**").[4] Unbeknownst to Moroccanoil, at the time the Settlement Agreement was executed, SDI had been amalgamated with CHL. This amalgamation was not disclosed to Moroccanoil for six years, despite both the Settlement Agreement and the Settlement Enforcement Motion described below.[5] CHL breached the Settlement Agreement by reselling large quantities of Moroccanoil products to an unauthorized retail store in Macau and by failing to maintain required records.[6] As a result of the breaches of the Settlement Agreement by CHL and Mr. Conforti, Moroccanoil moved before the New Jersey Court to enforce the Settlement Agreement in April, 2015 (the "**Settlement Enforcement Motion**").[7] CHL and Mr. Conforti brought a cross-motion in response to Moroccanoil's Settlement Enforcement Motion. Despite the fact that the Settlement Agreement required only a specified amount of product supply by Moroccanoil to CHL, in clear terms, the cross-motion by CHL and Mr. Conforti claims

[1] Affidavit of Marie-Eve Bérubé-Côté Sworn October 31, 2021 ("**Côté Affidavit**"), para 12, Moroccanoil Compendium, Tab 1.
[2] Conforti Transcript, Q71 and 72, Moroccanoil Compendium, Tab 2.
[3] Côté Affidavit, para 29, Moroccanoil Compendium, Tab 1.
[4] Côté Affidavit, para 16, Moroccanoil Compendium, Tab 1.
[5] Côté Affidavit, paras 11-12, Moroccanoil Compendium, Tab 1.
[6] Côté Affidavit, paras 14-16, Moroccanoil Compendium, Tab 1.
[7] Côté Affidavit, paras 14-16, Moroccanoil Compendium, Tab 1.

damages from Moroccanoil for breach of an alleged obligation to supply an unlimited amount of product in perpetuity. Moroccanoil has never had any obligation to supply CHL or Mr. Conforti beyond the terms prescribed under the Settlement Agreement.[8] Based on the discovery taken to date and the evidence, Moroccanoil is owed $2,807,478.12 by CHL (the "**Moroccanoil Debt**").[9] The vast majority of the evidence of CHL's diversion of products to Macau has not been refuted or challenged by CHL.[10]

CHL's Conduct Throughout These Proceedings:

16. Central to this motion are CHL and Mr. Conforti's consistent breaches of their obligations under the BIA. CHL and Mr. Conforti: (i) hid these proceedings from Moroccanoil for over eight months; (ii) failed to disclose the BEI Debt for over seven months, and then when it was disclosed, sought to credit bid the BEI Debt notwithstanding that it was not supported by valid consideration; and (iii) selectively breached the stay of proceedings imposed under the BIA. The relevant timeline and facts relating to CHL's breaches of its obligations under the BIA are as follows:

Omissions From Initial Creditor List:

(a) On September 28, 2020, CHL filed the NOI.[11] Under Subsection 50.4(1) of the BIA, at the time of the filing of the NOI, CHL was required to prepare a list of its creditors with claims of $250 or more (the "**Initial List of Creditors**").[12] The BEI Debt was alleged to be in the amount of $1,500,000.[13] The Moroccanoil Debt is $2,807,478.12. Despite this, Mr. Conforti signed and caused CHL to file an Initial List of Creditors on September 28, 2020, that did not include the BEI Debt, the BEI Security, the Moroccanoil Debt, or indeed any reference to Moroccanoil as a creditor at all.[14]

(b) In advance of the filing of CHL's Initial Creditor List, Crowe required Mr. Conforti on behalf of CHL to sign engagement letters (collectively, the "**Disclosure Acknowledgements**") confirming that: (a) there were no lien or encumbrances other than as would be disclosed on the Initial Creditor List;[15] (b) CHL had disclosed all

[8] Reply Affidavit of Mark Riedel sworn November 25, 2021, para 8, Compendium, Tab 12.
[9] Côté Affidavit, para 20, Moroccanoil Compendium, Tab 1.
[10] Reply Affidavit of Mark Riedel sworn November 25, 2021, para 5, Moroccanoil Compendium, Tab 12.
[11] Côté Affidavit, para 21, Moroccanoil Compendium, Tab 1.
[12] *BIA*, Section 50.4(1).
[13] Côté Affidavit, para 33, Moroccanoil Compendium, Tab 1.
[14] Initial Creditor List, Moroccanoil Compendium, Tab 3; Côté Affidavit, paras 25-26, Moroccanoil Compendium, Tab 1.
[15] September 25 Letter Agreement, Section 4, Moroccanoil Compendium, Tab 5.

transactions with "*related parties (directors, officers, shareholders, and affiliated companies*)"[16] and (c) that CHL had "*fully, truthfully and faithfully*" disclosed to the Proposal Trustee all information related to CHL's financial affairs, property, assets and liabilities and any other pertinent matters.[17]

(c) Crowe additionally had Mr. Conforti acknowledge that it was an offense under the BIA to make a false entry or material omission in statement filed as part of the proceedings.[18]

(d) Despite this, Mr. Conforti did not disclose the BEI Debt or Moroccanoil's claim in the Initial Creditor List. When pressed on examination Mr. Conforti refused to express any contrition for these omissions.[19] However, Mr. Conforti acknowledged that the accuracy of the Initial Creditor List was important to CHL's creditors.[20]

(e) As a result of CHL's failure to include Moroccanoil on the Initial Creditor List Moroccanoil did not receive notice of the filing of the NOI. CHL's U.S. counsel also failed to directly provide Moroccanoil or the New Jersey Court notice of the filing of the NOI, notwithstanding that the New Jersey Proceedings were ongoing with multiple steps taken during this period.[21]

Omissions in Court Materials:

(f) When CHL sought, among other things, an extension of the stay of proceedings just under a month after the filing of the Initial Creditor List, Mr. Conforti continued to hide the BEI Debt and made no mention of its ongoing litigation with Moroccanoil. In support of a stay extension, Mr. Conforti swore an extensive affidavit dated as of October 21, 2020 (the "**October 24 Affidavit**").[22] As part of the October 24 Affidavit, Mr. Conforti described in over seven paragraphs CHL's secured creditors (the "**Disclosed Secured Creditors**") and the registrations held by the Disclosed Secured Creditors.[23] This included certain related party debt owed to Mr. Conforti.[24] The BEI Debt and the BEI Security were not disclosed in these paragraphs or anywhere else in the

[16] September 25 Letter Agreement, Section 6, Moroccanoil Compendium, Tab 5.
[17] Acknowledgement Notice of Intention, Section 17, Moroccanoil Compendium, Tab 6.
[18] Notice to Insolvent Person Filing a Proposal, Section 5(c), Moroccanoil Compendium, Tab 7.
[19] Conforti Transcript, Q580-581, Moroccanoil Compendium, Tab 2.
[20] Conforti Transcript, Q518-521, Moroccanoil Compendium, Tab 2.
[21] Côté Affidavit, para 26, Moroccanoil Compendium, Tab 1.
[22] October 24 Conforti Affidavit, Moroccanoil Compendium, Tab 8.
[23] October 24 Conforti Affidavit, paras 9-16, Moroccanoil Compendium, Tab 8.
[24] October 24 Conforti Affidavit, paras 10-11, Moroccanoil Compendium, Tab 8.

October 24 Affidavit. In the October 24 Affidavit, Mr. Conforti specifically advised CHL's creditors and the Court that CHL did not have any secured creditors other than the Disclosed Secured Creditors stating that CHL's "remaining creditors are unsecured and are owed approximately $5,700,000".[25]

(g) In November of 2020, Mr. Conforti advised the Proposal Trustee of the BEI Debt and the BEI Security.[26] No disclosure was made at this time to CHL's creditors nor was there any attempt to correct the inaccurate statements made by Mr. Conforti in his October 24 Affidavit.[27]

(h) CHL subsequently obtained a further stay extension on December 14, 2020.[28] In its materials, in support of this stay extension, neither the BEI Debt, the BEI Security, nor the Moroccanoil Debt were disclosed to the Court or CHL's creditors and again no attempt was made to correct the inaccurate statements made by Mr. Conforti in his October 24 Affidavit.[29]

(i) Four days later, on December 18, 2021, the Proposal Trustee's counsel wrote to CHL's counsel and suggested that CHL may want to disclose the BEI Debt and the BEI Security in CHL's next court materials.[30] CHL subsequently obtained a stay extension on January 25, 2020.[31] In its materials in support of this stay extension and despite the Proposal Trustee's suggestion, the BEI Debt, the BEI Security and the Moroccanoil Debt, were not disclosed to the Court or CHL's creditors and no attempt was made to correct the inaccurate statements made by Mr. Conforti in his October 24 Affidavit.[32]

Breach of Stay of Proceedings and Continued Non Disclosure:

(j) Just before receiving its January 25 stay extension, on January 7, 2021, Mr. Conforti and CHL sought to enforce security held by Mr. Conforti by way of a power of sale in breach of the very stay proceedings that

[25] October 24 Conforti Affidavit, para 16, Moroccanoil Compendium, Tab 8.
[26] Written Reponse of the Proposal Trustee to Interrogatories, Moroccanoil Compendium, Tab 11.
[27] Conforti Transcript, Q627, Moroccanoil Compendium, Tab 2.
[28] Cote Affidavit, para 28(a), Moroccanoil Compendium, Tab 1.
[29] This continued omission occurred, notwithstanding the statutory requirement that a stay extension can only be granted where a debtor has shown that it is acting in good faith and with due diligence. Conforti Transcript, Q627, Moroccanoil Compendium, Tab 2.
[30] Correspondence Between Proposal Trustee and counsel to CHL dated December 18, 2020, Moroccanoil Compendium, Tab 9
[31] Cote Affidavit, para 28(a), Moroccanoil Compendium, Tab 1.
[32] Conforti Transcript, Q627, Moroccanoil Compendium, Tab 2.

CHL was sheltering under. Its efforts were eventually rebuffed by the Proposal Trustee.[33]

(k) On March 12, 2021, seven months after commencing the NOI Proceedings, CHL and Beauty Experts finally disclosed the BEI Debt and the BEI Security, in a statement of affairs filed in advance of a creditors meeting.[34] Two months later CHL and Beauty Experts sought to implement a credit bid of the BEI Debt.[35]

Moroccanoil Denied Notice of Motions / Meetings in Proceedings

(l) On June 7, 2021 (the "**Disclosure Date**"), Moroccanoil first learned of the NOI Proceedings. This was more than eight months after the NOI was filed. It only learned of the proceedings because its U.S. counsel discovered the Proposal Trustee's case website in advance of a deposition of CHL.[36] Having not been advised of the NOI Proceedings until the Disclosure Date, Moroccanoil was not provided notice of or given the opportunity to participate in several creditors meetings and hearings, including in respect of stay extensions that occurred in the NOI Proceedings.

(m) Moroccanoil subsequently brought a motion seeking, among other things, a declaration that the BEI Debt was not valid. That motion was heard on March 15, 2022. In May of 2022, this Court granted Moroccanoil's motion and declared that no secured debt was owing to Beauty Experts on the basis that there was no valid consideration underlying the secured debt (the "**BEI Endorsement**"). On the same date that the BEI Endorsement was released, this Court issued a further endorsement (the "**Advice and Direction Endorsement**" together with the BEI Endorsement, the "**Endorsements**") denying a motion by the Proposal Trustee that would have directed the Proposal Trustee to not adjudicate Moroccanoil's claim. Both the Proposal Trustee and CHL have sought leave to appeal the Advice and Direction Endorsement.

Moroccanoil Files Proposal:

17. On March 21, 2022, prior to the release of the Endorsements, CHL submitted the March Conforti Proposal to its unsecured creditors. This proposal was amended a number of times before being voted on by CHL's unsecured creditors on

[33] Correspondence Between Proposal Trustee and Counsel to CHL dated January 11, 2021; Moroccanoil Compendium, Tab 9;
[34] Subsequent Creditor List, Moroccanoil Compendium, Tab 10; Conforti Transcript, Q627, Moroccanoil Compendium, Tab 2.
[35] November 11 Conforti Affidavit, paras 28-29, Moroccanoil Compendium, Tab 4.
[36] Côté Affidavit, para 27, Moroccanoil Compendium, Tab 1.

March 31, 2022 (the "**March 31 Creditors Meeting**").

18. The March Conforti Proposal as originally served contained broad and unqualified releases for Mr. and Ms. Conforti that would have released them from claims of wrongful or oppressive conduct, contrary to Subsection 50(14) of the BIA. These unqualified releases were only removed when Moroccanoil expressed its concerns with the unamended proposal.

19. The March Conforti Proposal was subsequently approved in its amended form by the requisite number of creditors at the March 31 Creditor Meeting.

20. To its prejudice, Moroccanoil's claim was valued at $1.00 for voting purposes at the March 31 Creditors Meeting. Moroccanoil voted against the March Conforti Proposal.

PART III – ISSUES

21. The issue addressed in this factum is should this Court approve the March Conforti Proposal?

PART IV – LAW AND ARGUMENT

The March Conforti Proposal is not in Compliance With Subsection 59(3) of the BIA

22. This Court should not approve the March Conforti Proposal or in the alternative should adjourn this approval hearing and require CHL to provide consideration sufficient to satisfy the fifty cent threshold mandated by Subsection 59(3) of the BIA.

23. Subsection 59(3) of the BIA provides that where any of the facts mentioned in Section 173 of the BIA are proven against a debtor the Court shall refuse any proposal by that debtor that does not provide for reasonable security for the payment of at least fifty cents on each dollar of unsecured claims or such percentage thereof as the court may direct.

> **Reasonable Security**
>
> 59 (3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

Section 173 Facts are Present in the Circumstances

24. Subsection 59(3) applies in the circumstances. Clear Section 173 facts exist in this case. Specifically, CHL has failed to perform the duties imposed on it under the BIA (Section 173(1)(o)).[37]

> **Facts for which discharge may be refused, suspended or granted conditionally**
>
> 173 (1) The facts referred to in section 172 are:
>
> (o) the bankrupt has failed to perform the duties imposed on the bankrupt under this Act or to comply with any order of the court.

Subsection 173(1)(o) - CHL has Failed to Perform its Statutory Duties

25. Under Subsection 50.4(1) of the BIA, on the commencement of an NOI, a debtor has a duty to file an initial creditor list, which includes the names of creditors with claims amounting to two hundred and fifty dollars or more.

Section 158 Duties

26. The duties of a debtor include those set out in Section 158. Failing to properly disclose debts and liabilities on the Initial Creditor List (the equivalent of a statement of affairs in a bankruptcy[38]), is a breach of the statutory duty established pursuant to Section 158(d). [39]

> **Duties of Bankrupt**
>
> A bankrupt shall
> …
> 158 (d) within five days following the bankruptcy, unless the time is extended by the official receiver, prepare and submit to the trustee in quadruplicate a statement of the bankrupt's affairs in the prescribed form verified by affidavit and showing the particulars of the bankrupt's assets and liabilities, the names and addresses of the bankrupt's creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be required, but where the affairs of the bankrupt are so involved or complicated that the bankrupt alone cannot reasonably prepare a proper statement of affairs, the official receiver may, as an expense of the administration of the estate, authorize the employment of a qualified person to assist in the preparation of the statement;

[37] BIA, Subsection 173(1)(o)
[38] BIA, Section 66.
[39] *Re Mott* [2005] O.J. No. 4469, paras 8-9 and 15-16; *Re McCague* 26 C.B.R. (5th) 255, paras 7-9.

27. Mr. Conforti on behalf of CHL was fully aware of what did and did not have to be disclosed in this list having signed the Disclosure Acknowledgement confirming that (a) there were no liens or encumbrances other than as would be disclosed on the Initial Creditor List:[40] (b) CHL had disclosed all transactions with "*related parties (directors, officers, shareholders, and affiliated companies*)"[41] (c) and that CHL had "*fully, truthfully and faithfully*" disclosed to the Proposal Trustee all information related to CHL's financial affairs, property, assets and liabilities and any other pertinent matters.[42]

28. Mr. Conforti has offered no compelling reason as to why he did not include Moroccanoil's claim on the Initial Creditor List.

29. With respect to the BEI Debt, Mr. Conforti has asserted that he did not believe he had to disclose related party debt. This assertion lacks credibility and is clearly contradicted by the Disclosure Acknowledgements signed prior to filing the Initial Creditor List which fully and completely made clear to Mr. Conforti that he had to include all debts in the Initial Creditor List including related party debts. It is further contradicted, by the October 24 Affidavit, where he chose to disclose other related party debt but chose to exclude the BEI Debt.[43]

30. The only rational conclusion that can be reached on the evidence is that Mr. Conforti knowingly omitted the claims of Moroccanoil and BEI from the Initial Creditor List.

General Duty of Good Faith

31. In addition to the general duties set out in Section 158 of the BIA, all interested persons in a BIA proceeding, including a debtor, have a general duty to act in good faith under Subsection 4.2(1) of the BIA. CHL has equally breached this duty of good faith.

32. Although there is limited case law under Subsection 4.2(1) on what constitutes good faith, the case law indicates that an examination under Subsection 4.2(1) should focus on not just actions undertaken during the proceedings themselves

[40] September 25 Letter Agreement, Section 4, Moroccanoil Compendium, Tab 5.
[41] September 25 Letter Agreement, Section 6, Moroccanoil Compendium, Tab 5.
[42] Acknowledgement Notice of Intention, Section 17, Moroccanoil Compendium, Tab 6.
[43] October 24 Conforti Affidavit, paras 10-11, Moroccanoil Compendium, Tab 8

but as well actions undertaken as part of the preparation for the filing of the proceedings.[44] This would include the preparation of an initial creditor list as part of an NOI proceeding under the BIA.

33. In *CWB Maxium*, one of the few cases addressing Section 4.2(1) since it was enacted, the Alberta Court of Queen's Bench examined whether a secured creditor had breached its duty of good faith in the context of a receivership application. In its decision, the Court noted the following principals which Moroccanoil submits apply equally in the context before the Court in these proceedings:

(a) the statutory requirement of good faith in an insolvency requires that an interested party not act with an oblique motive or improper purpose;

(b) secured creditors should not lie to or mislead others with respect to the status of the loan or the state of the lender-borrower relationship;

(c) whether dishonesty has occurred in a given case is fact-specific and may, depending on the circumstances, include lies, half-truths, omissions and even silence; and

(d) the conduct of the party alleged to have breached the good faith requirement should be assessed in light of the intent and policy objectives of the BIA.[45]

34. Since the preparation for, and filing of the NOI, Conforti (on behalf of CHL and Beauty Experts) has clearly acted in bad faith. Mr. Conforti intentionally and knowingly:

(a) swore an inaccurate Initial Creditor List in support of the appropriateness of CHL's insolvency filing that omitted the BEI Debt, the BEI Security, and the Moroccanoil claim and that directly breached Subsection 50.4(1) of the BIA;

[44] *CWB Maxium Financial Inc v 2026998 Alberta Ltd*, 2021 ABQB 137, para 40 ["**CWB Maxium**"].
[45] CWB Maxium, para 59.

(b) signed an acknowledgement to the Proposal Trustee that in preparing the Initial Creditor List he had "fully, truthfully and faithfully" provided all information related to CHL's financial affairs, property, assets and liabilities, when CHL clearly had not;

(c) swore and filed an affidavit seeking, among other things, a stay extension from the Court in which not only did he not disclose the BEI Debt and the BEI Security, but in which he advised the Court that CHL's only secured creditors were those listed in that affidavit;

(d) breached the stay of proceeding by trying to commence a power of sale in respect of non arms length security while at the same time seeking to extend that stay of proceedings to shelter CHL from its creditors; and

(e) failed to provide Moroccanoil or the New Jersey Court notice of the filing of the NOI despite multiple steps having been taken in the New Jersey Proceedings after the NOI was filed.

35. With respect, unless this Honourable Court finds that Mr. Conforti (on behalf of CHL) acted in bad faith contrary to Subsection 4.2(1) of the BIA, this provision will be robbed of its clear meaning. Failing to find a want of good faith in these circumstances will import a standard for a determination of bad faith that is so it would strip the provision of any practical or realistic effect.

The March Conforti Proposal does not Provide for Fifty Cents on the Dollar

36. Under the March Conforti Proposal, CHL will make $2,430,000 available to its creditors in the aggregate (the "**Creditor Fund**"). It is not in dispute that the March Conforti Proposal does not provide reasonable security for the payment of at least fifty cents for each dollar of unsecured claims against CHL. The Creditor Fund only provides for distribution to each unsecured creditor in the amount of approximately 16% of each unsecured claim.[46]

37. Moroccanoil notes that the Proposal Trustee in its factum has attempted to assert that the percentage of reasonable security provided for under the March Conforti Proposal is actually 37.2% percent. This number appears to have been calculated by inflating the creditors' potential recovery with highly contingent and speculative distributions that may be

[46] Report of Trustee on Proposal, para 22, Motion Record of the Proposal Trustee June 22, 2022, Tab 2.

available if CHL is successful in its litigation with Moroccanoil. Without getting into the merits of CHL's claim against Moroccanoil (which are to be clear meritless), contingent and speculative amounts that may be made available in the future are on their face not "reasonable security" as they provide no "security" (assurance) within the plain meaning of that word. In this respect the only true security in place are the funds BEI is required to pay over to CHL in respect of its illegitimate credit bid ($1,500,000) and certain cash held by CHL (in the amount of $550,000).

This Court Should not Lower the Fifty Cent Threshold

38. Under Subsection 59(3) the starting point for a Court is to refuse to approval a proposal that does not provide reasonable security for the payment of not less than fifty cents on the dollar. Although a Court has the discretion under Subsection 59(3) to lower this threshold, the power to do so should be used sparingly and with great care and caution.

39. As a proposal substantially interferes with creditors' rights, the provisions of the BIA must be complied with strictly by a debtor, including a debtor's disclosure obligations.[47]

40. In considering the approval of a proposal including in the context of Subsection 59(3), a Court should consider the interests of the public in preserving the integrity of the bankruptcy process and commercial morality.[48] Section 173 facts serve to protect the integrity of the BIA and are a reflection of wider fundamental public policy aims.[49]

41. The BIA including the proposal provisions of the Act are intended to at their core facilitate the financial rehabilitation of honest but unfortunate debtors.[50] The term "honest debtor" does not include a debtor who breaches its disclosure obligations under the BIA.[51]

42. The integrity of the BIA requires full and complete disclosure by a debtor throughout its insolvency proceeding to enable its creditors (whose claims may be compromised) and the court to determine whether the proceedings are reasonable and in the best interests of all interested parties. Through its intentional omission of material claims against it and its behavior otherwise in these proceedings, CHL has undermined the integrity of the BIA and robbed its creditors of the ability to make

[47] *Re Wandler* 2007 ABQB 153, para 10 ("***Re Wandler***").
[48] *Re Wandler,* para 11; *Re Milan*, 2012 ONSC 2899, paras 27-42.
[49] *Re Wandler,* para 27.
[50] *Re Assaly* 2021 ONSC 3155 paras 64-68 ("***Re Assaly***"); *Re Berthiaume* 2019 ONSC 2727 paras 118-123 ("***Re Berthiaume***").
[51] *Re Assaly* para 68; *Re Berthiaume* paras 122-123.

point-in time decisions based on the full scope of information that the Act requires be made available to them. Approving CHL's proposal would be tantamount to sanctioning its behavior in these proceedings and would effectively allow it to pick and choose which provision of the BIA apply to its restructuring.

43. In their factums filed in support of the March Conforti Proposal, the Proposal Trustee and CHL appear to take the position that the fifty cent threshold should be lowered in the circumstances because the proposal has been approved by the vast majority of CHL's creditors and provides for a better outcome than in a bankruptcy. This position is contradicted by clear case law.[52] These are separate and distinct requirements under the BIA for the approval of a proposal. An interpretation that would provide that these two requirements should be given such weight as to override Subsection 59(3) would be contrary to basic principles of statutory interpretation, and would (a) render the protections afforded to the integrity of the BIA under Subsection 59(3) meaningless as these two factors will be present in all proposals brought before a Court for approval; and (b) allow a debtor to ignore its statutory obligations to minority creditors based on the economic motives of majority creditors. Such a result should not be countenanced by the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of July, 2022.

Clifton Prophet / Thomas Gertner

[52] *Sumner Co. (1984), Re* 1987 CarswellNB 26, paras 37-41; *Re Wandler*, para 11.

SCHEDULE "A"

JURISPRUDENCE

1. *Re Mott* [2005] O.J. No. 4469.
2. *Re McCague* 26 C.B.R. (5th) 255.
3. *CWB Maxium Financial Inc v 2026998 Alberta Ltd*, 2021 ABQB 137.
4. *Re Wandler* 2007 ABQB 153.
5. *Re Milan*, 2012 ONSC 2899.
6. *Re Assaly* 2021 ONSC 3155.
7. *Re Berthiaume* 2019 ONSC 2727.
8. *Sumner Co. (1984), Re* 1987 CarswellNB 26.

SCHEDULE "B"
TEXT OF STATUTES

***BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3**

DUTY OF GOOD FAITH

Good faith
4.2 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

…

PART III – PROPOSALS

Exception
50 (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.

…

Notice of intention
50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

…

Reasonable security
59 (3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

…

Act to apply
66 (1) All the provisions of this Act, except Division II of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division.

Assignments

(1.1) For the purposes of subsection (1), in deciding whether to make an order under subsection 84.1(1), the court is to consider, in addition to the factors referred to in subsection 84.1(3), whether the trustee approved the proposed assignment.

Final statement of receipts and disbursements
(1.2) For the purposes of subsection (1), the trustee is to prepare the final statement of receipts and disbursements referred to in section 151 without delay after

(a) the debtor files or is deemed to have filed an assignment;

(b) the trustee informs the creditors and the official receiver of a default made in the performance of any provision in a proposal; or

(c) the trustee gives the certificate referred to in section 65.3 in respect of the proposal.

Examination by official receiver
(1.3) For the purposes of subsection (1), the examination under oath by the official receiver under subsection 161(1) is to be held — on the attendance of the person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) — before the proposal is approved by the court or the person becomes bankrupt.

Division to be applied conjointly with other Acts
(1.4) The provisions of this Division may be applied together with the provisions of an Act of Parliament, or of the legislature of a province, that authorizes or provides for the sanction of compromises or arrangements between a corporation and its shareholders or any class of its shareholders.

Effect of Companies' Creditors Arrangement Act
(2) Notwithstanding the Companies' Creditors Arrangement Act,

(a) proceedings commenced under that Act shall not be dealt with or continued under this Act; and

(b) proceedings shall not be commenced under Part III of this Act in respect of a company if a compromise or arrangement has been proposed in respect of the company under the Companies' Creditors Arrangement Act and the compromise or arrangement has not been agreed to by the creditors or sanctioned by the court under that Act.

…

PART VI – BANKRUPTS

Duties of bankrupt
158 A bankrupt shall

(a) make discovery of and deliver all his property that is under his possession or control to the trustee or to any person authorized by the trustee to take possession of it or any part thereof;

(a.1) in such circumstances as are specified in directives of the Superintendent, deliver to the trustee, for cancellation, all credit cards issued to and in the possession or control of the bankrupt;

(b) deliver to the trustee all books, records, documents, writings and papers including, without restricting the generality of the foregoing, title papers, insurance policies and tax records and returns and copies thereof in any way relating to his property or affairs;

(c) at such time and place as may be fixed by the official receiver, attend before the official receiver or before any other official receiver delegated by the official receiver for examination under oath with respect to his conduct, the causes of his bankruptcy and the disposition of his property;

(d) within five days following the bankruptcy, unless the time is extended by the official receiver, prepare and submit to the trustee in quadruplicate a statement of the bankrupt's affairs in the prescribed form verified by affidavit and showing the particulars of the bankrupt's assets and liabilities, the names and addresses of the bankrupt's creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be required, but where the affairs of the bankrupt are so involved or complicated that the bankrupt alone cannot reasonably prepare a proper statement of affairs, the official receiver may, as an expense of the administration of the estate, authorize the employment of a qualified person to assist in the preparation of the statement;

(e) make or give all the assistance within his power to the trustee in making an inventory of his assets;

(f) make disclosure to the trustee of all property disposed of within the period beginning on the day that is one year before the date of the initial bankruptcy event or beginning on such other antecedent date as the court may direct, and ending on the date of the bankruptcy, both dates included, and how and to whom and for what consideration any part thereof was disposed of except such part as had been disposed of in the ordinary manner of trade or used for reasonable personal expenses;

(g) make disclosure to the trustee of all property disposed of by transfer at undervalue within the period beginning on the day that is five years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;

(h) attend the first meeting of his creditors unless prevented by sickness or other sufficient cause and submit thereat to examination;

(i) when required, attend other meetings of his creditors or of the inspectors, or attend on the trustee;

(j) submit to such other examinations under oath with respect to his property or affairs as required;

(k) aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors;

(l) execute any powers of attorney, transfers, deeds and instruments or acts that may be required;

(m) examine the correctness of all proofs of claims filed, if required by the trustee;

(n) in case any person has to his knowledge filed a false claim, disclose the fact immediately to the trustee;

(n.1) inform the trustee of any material change in the bankrupt's financial situation;

(o) generally do all such acts and things in relation to his property and the distribution of the proceeds among his creditors as may be reasonably required by the trustee, or may be prescribed by the General Rules, or may be directed by the court by any special order made with reference to any particular case or made on the occasion of any special application by the trustee, or any creditor or person interested; and

(p) until his application for discharge has been disposed of and the administration of the estate completed, keep the trustee advised at all times of his place of residence or address.

…

Facts for which discharge may be refused, suspended or granted conditionally

173 (1) The facts referred to in section 172 are:

(a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;

(b) the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by the bankrupt and as sufficiently disclose the business transactions and financial position of the bankrupt within the period beginning on the day that is three years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;

(c) the bankrupt has continued to trade after becoming aware of being insolvent;

(d) the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities;

(e) the bankrupt has brought on, or contributed to, the bankruptcy by rash and hazardous speculations, by unjustifiable extravagance in living, by gambling or by culpable neglect of the bankrupt's business affairs;

(f) the bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt;

(g) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred unjustifiable expense by bringing a frivolous or vexatious action;

(h) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, when unable to pay debts as they became due, given an undue preference to any of the bankrupt's creditors;

(i) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred liabilities in order to make the bankrupt's assets equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities;

(j) the bankrupt has on any previous occasion been bankrupt or made a proposal to creditors;

(k) the bankrupt has been guilty of any fraud or fraudulent breach of trust;

(l) the bankrupt has committed any offence under this Act or any other statute in connection with the bankrupt's property, the bankruptcy or the proceedings thereunder;

(m) the bankrupt has failed to comply with a requirement to pay imposed under section 68;

(n) the bankrupt, if the bankrupt could have made a viable proposal, chose bankruptcy rather than a proposal to creditors as the means to resolve the indebtedness; and

(o) the bankrupt has failed to perform the duties imposed on the bankrupt under this Act or to comply with any order of the court.

Application to farmers
(2) Paragraphs (1)(b) and (c) do not apply in the case of an application for discharge by a bankrupt whose principal occupation and means of livelihood on the date of the initial bankruptcy event was farming or the tillage of the soil.

…

IN THE MATTER OF THE PROPOSAL TO CREDITORS OF CONFORTI HOLDINGS LIMITED, A CORPORATION INCORPORATED UNDER THE ONTARIO BUSINESS CORPORATIONS ACT, R.S.O. 1990, C. B.16

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

FACTUM OF MOROCCANOIL, INC.
Proposal Approval Motion

Dated July 14, 2022

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