

Court File No.: 32-2670414  
Estate No.: 32-2670414

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
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  
GEOX CANADA INC., OF THE CITY OF MISSISSAUGA, IN THE PROVINCE OF  
ONTARIO

**FACTUM OF THE PROPOSAL TRUSTEE  
(Approval of Proposal)**

February 16, 2021

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**PART I - OVERVIEW**

1. This motion is brought by Richter Advisory Group Inc., in its capacity as proposal trustee (in such capacity, the “**Proposal Trustee**”) of Geox Canada Inc. (the “**Company**”) seeking an order substantially in the form of the draft order attached as Schedule “B” to the Proposal Trustee’s notice of motion (the “**Proposal Approval Order**”), among other things, approving the Proposal (defined below), which was submitted by the Company and overwhelmingly approved by its creditors.
2. Capitalized terms not otherwise defined in this factum have the meaning ascribed to them in the Proposal.
3. Among other features, the Proposal provides:
  - (a) for postponement of claims of Geox S.p.A., the Company’s ultimate parent and the Proposal sponsor (“**Topco**”), such that Topco will not share in any distribution to the Company’s creditors and its claims will not be compromised as part of the Proposal; and

- (b) for a payment by Topco in the amount of \$475,000 to fund a distribution to Proven Creditors;
  - (c) for the inclusion of Convenience Creditors in the Unsecured Creditor Class, which Convenience Creditors shall have their claims paid in full up to \$2,000 and shall be deemed to accept the Proposal;
  - (d) for the release of all claims against the Company and certain claims that could be asserted against the Company's directors and officers; and
  - (e) that the provisions of Sections 95 to 101 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B.-3, as amended (the "BIA") and any similar provision of any federal or provincial statute shall not apply to the Proposal.
4. The Proposal was accepted by creditors representing 97% in number and 99% in dollar value of those creditors voting at the meeting to consider and vote on the Proposal (the "**Creditors' Meeting**"), either in person, by proxy or via voting letter, which acceptance satisfies the statutory requirements under the BIA for acceptance of a proposal by creditors.
5. The Proposal Trustee has recommended that the Court approve the Proposal and grant the Proposal Approval Order.

## **PART II - FACTS**

### **Background**

6. On September 8, 2020, the Company filed a Notice of Intention to Make a Proposal pursuant to Section 50.4(1) of the BIA, and the Proposal Trustee was appointed on that date. The

proceedings commenced by the Company under the BIA are herein referred to as the “**NOI Proceedings**”.

**Fourth Report of Richter Advisory Group Inc. in its Capacity as Trustee under the Notice of Intention to Make a Proposal of Geox Canada Inc. dated February 12, 2021 (“Fourth Report”) at para 1, Motion Record of the Proposal Trustee (“Motion Record”), Tab 2, p 25.**

7. The primary objectives of the NOI Proceedings were to: (i) stabilize the Company’s business, (ii) facilitate the Company’s ongoing operations, and (iii) provide the Company with an opportunity to restructure its business and affairs, including, but not limited to, reducing overhead costs, renegotiating the terms of its commercial leases and growing its online and multi-channel strategy.

**Fourth Report at para 2, Motion Record, Tab 2, p 25.**

8. On October 6, 2020, this Court issued an order, which, among other things, granted:

- (a) a priority charge over the Company’s property, assets and undertaking in the principal amount of \$150,000 to secure the fees and disbursements of the Proposal Trustee, the Proposal Trustee’s legal counsel, Fasken Martineau DuMoulin LLP, and the Company’s legal counsel, Aird & Berlis LLP, pursuant to section 64.2 of the BIA; and
- (b) an extension of the period in which the Company must file its proposal (the “**Proposal Period**”) from October 8, 2020 to November 22, 2020.

**Fourth Report at para 3, Motion Record, Tab 2, p 25.**

9. On November 20, 2020 and January 4, 2021, this Court issued orders, *inter alia*, further extending the Proposal Period to January 6, 2021 and February 20, 2021, respectively.

**Fourth Report at para 4, Motion Record, Tab 2, p 25.**

## **The Proposal**

### ***Amendment of the Initial Proposal***

10. On January 8, 2021, the Company lodged a proposal with the Proposal Trustee, which was filed with the Office of the Superintendent of Bankruptcy (the “**Superintendent**”) on that date (the “**Initial Proposal**”). The Company subsequently amended certain terms of the Initial Proposal and lodged the amended proposal (the “**Proposal**”) with the Proposal Trustee. The Proposal was filed with the Superintendent on January 18, 2021.

**Fourth Report at paras 17–18, Motion Record, Tab 2, p 30.**

11. The terms of the Initial Proposal provided for, among other things, a payment by Topco in the amount of \$400,000 (the “**Initial Sponsor Funds**”) to fund a distribution to Proven Creditors.

**Fourth Report at para 17, Motion Record, Tab 2, p 25.**

12. Following discussions among the Company, the Proposal Trustee and their respective legal counsel, the Initial Proposal was amended to (i) include two entities related to the Company in the definition of Related Persons, which are to be treated as Unsecured Creditors for distribution purposes, and (ii) increased the amount of the Initial Sponsor Funds from \$400,000 to

\$475,000 (the “**Sponsor Funds**”) such that the estimated net distribution to arms-length Unsecured Creditors would be unaffected by their inclusion as Unsecured Creditors under the Proposal.

**Fourth Report at para 18, Motion Record, Tab 2, p 30.**

13. All other terms of the Proposal, including those described below, remained unchanged from the Initial Proposal.

**Fourth Report at para 19, Motion Record, Tab 2, p 30.**

***Key Terms of the Proposal***<sup>1</sup>

14. In connection with the Proposal, Topco has agreed to postpone approximately \$6.0 million of its unsecured claims against the Company, which include Unsecured Claims that it has purchased from certain creditors of the Company, provided that the Proposal (i) is accepted by the Company’s creditors and approved the Court, and (ii) is implemented.

**Fourth Report at para 20, Motion Record, Tab 2, p 30.**

15. Secured Claims and Topco’s Unsecured Claims (*i.e.*, the Sponsor Claims) shall be unaffected by the Proposal.

**Proposal at s 2.3, Motion Record, Tab 2, Appendix “D”, p 58.**

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<sup>1</sup> The following is a brief summary of only certain key terms of the Proposal. Reference should be had to the Proposal itself for its specific terms.

16. The Proposal provides for the distribution of the Sponsor Funds to Proven Creditors. If the Proposal is approved by the Court, the Company is to pay the Sponsor Funds to the Proposal Trustee within five Business Days following the date of the Proposal Approval Order.

**Proposal at s 2.4, Motion Record, Tab 2, Appendix “D”, p 58.**

17. The Proposal provides for the inclusion of Convenience Creditors in the Unsecured Creditor Class, which Convenience Creditors:

- (a) include Unsecured Creditors with a Proven Claim in an amount that is less than or equal to \$2,000 or that have duly delivered a Convenience Creditor Election to the Proposal Trustee;
- (b) shall be paid an amount in cash equal to the lesser of \$2,000 and the value of their Proven Claim; and
- (c) are irrevocably deemed to have voted the full amount of their Proven Claims in favour of acceptance of the Proposal at the Creditors’ Meeting.

**Proposal at ss 1.1, 2.2, 2.5, 3.6 & 3.8, Motion Record, Tab 2, Appendix “D”, pp 53, 57–59 & 61–63 .**

18. Upon remittance of the Sponsor Funds to the Proposal Trustee in accordance with the Proposal, the Company, its successors and assigns, and their directors shall be deemed to have fully satisfied the terms of the Proposal.

**Proposal at s 2.7, Motion Record, Tab 2, Appendix “D”, p 59.**

19. The Proposal provides for a full and final release and discharge of all claims against the Company and certain claims that could be asserted against the Company's directors and officers.

**Proposal at ss 2.8, 3.4 & 8.1, Motion Record, Tab 2, Appendix "D", pp 59–61 & 65–66.**

20. The Proposal provides that the provisions of sections 95 to 101 of the BIA, and any similar provision of any federal or provincial statute, shall not apply to the Proposal.

**Proposal at s 10.2, Motion Record, Tab 2, Appendix "D", p 67.**

### **The Creditors' Meeting**

21. The Creditors' Meeting was held on January 28, 2021 and presided over by a representative of the Superintendent. As mentioned above, the Proposal was overwhelmingly approved by creditors representing 97% in number and 99% in dollar value of those creditors voting at the Creditors' Meeting, either in person, by proxy or via voting letter, which satisfies the statutory requirements under the BIA for acceptance of a proposal by creditors.

**Fourth Report at paras 26–27, Motion Record, Tab 2, p 32.**

### **The Proposal Trustee's Review, Investigation and Recommendation**

22. Prior to the Creditors' Meeting, the Proposal Trustee conducted a review of the Company's assets and the estimated value thereof, the liabilities of the Company and causes of the Company's insolvency. In addition, the Proposal Trustee performed an investigation regarding the Company's conduct. In connection with the foregoing review and investigation, the Proposal Trustee is of the opinion that:



- (a) the assets of the Company and their fair realizable value are as reflected on the Company's statement of affairs, sworn January 8, 2021 (the "SOA");
- (b) the liabilities of the Company are materially consistent with the liabilities as reflected on the SOA;
- (c) based on information provided by the Company, the Company experienced financial difficulties due to a combination of factors, including market challenges, unsuccessful promotional campaigns in the wholesale channel, over-stocking of inventory, onerous overhead costs and, most recently, the devastating impacts of the COVID-19 pandemic on the retail industry generally;
- (d) the exclusion of sections 95 to 101 of the BIA from the Proposal, is reasonable; and
- (e) the Proposal Trustee is not aware of any facts, pursuant to section 173 of the BIA, which may be proved against the Company.

**Fourth Report at para 24, Motion Record, Tab 2, p 31.**

23. The Proposal Trustee is further of the opinion that the Proposal is advantageous for the Company's Unsecured Creditors for the following reasons:

- (a) if the Proposal is not approved by the Court, the Company will become bankrupt and, in such a scenario, it is unlikely that any funds would be available for distribution to the Unsecured Creditors as the expected realizations from the Company's assets as noted on the SOA would result in a shortfall to Topco in respect of its Secured Claim;

- (b) the Proposal Trustee understands that, if the Proposal is not implemented and the Company is deemed bankrupt, Topco would pursue recovery of its full Unsecured Claim against the Company, which, subject to section 137(1) of the BIA, would reduce recoveries for arms-length Unsecured Creditors, in the unlikely scenario whereby funds would be available for distribution to them (for the purposes of section 137(1) of the BIA, nothing has come to the Proposal Trustee's attention to suggest that the unsecured transactions between the Company and Topco were improper); and
- (c) the Proposal, if approved by the Court, will result in a going concern solution for the Company that will benefit the Company's stakeholders generally, including continued employment for a substantial majority of the Company's employees, an ongoing tenant for its landlords, and a customer for its suppliers.

**Fourth Report at para 25, Motion Record, Tab 2, pp 31–32.**

24. For the foregoing reasons and the further reasons set out in the Fourth Report of the Proposal Trustee dated February 12, 2021, the Proposal Trustee recommends that the Court grant the Proposal Approval Order.

**Fourth Report at para 37, Motion Record, Tab 2, p 34.**

### **PART III – ISSUE**

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

**PART IV – LAW AND ARGUMENT**

26. 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 Proposal was accepted by the requisite double majority of the Company’s creditors (*i.e.*, majorities of 97% in number and 99% in dollar value).

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

27. Section 58 of the BIA provides that, on acceptance of the 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, 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.**

28. 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, Motion Record, Tab 2, Appendix “I”.**

29. 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.**

30. 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.](#)**

31. 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.](#)**

32. 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.](#)**

33. 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.](#)

34. If a large 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 para 66.](#)

35. Given that (i) an overwhelming majority of creditors voting at the Creditors' Meeting, both in number and dollar value, voted in favour of the Proposal, (ii) the Proposal Trustee has recommended the approval of the 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**

36. 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.](#)

37. 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.](#)

38. In the present case, the Proposal provides for certain recovery for the affected creditors: there is a guaranteed payment by means of an infusion of cash from Topco. The Proposal is clearly capable of being implemented in accordance with its terms, and was overwhelmingly approved by the Company's creditors.

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

39. 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.**

40. 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 misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors.

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

41. 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 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.

42. As part of its statutory duties under section 50(10)(b) the BIA, the Proposal Trustee performed a review of the Company's financial records in order to identify (i) any disbursements greater than \$25,000 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; Report of the Proposal Trustee on the Financial Situation of the Debtor and the Proposal, dated January 18, 2021 ("Report on Proposal"), Section F, Motion Record, Tab 2, Appendix "F", p 91.**

43. While the Company entered into a loan agreement with Topco (the "**Topco Loan Agreement**") and granted Topco security (the "**Topco Security**") during the prescribed look-back period as provided for in section 95 of the BIA, the Proposal Trustee is of the view that the exclusion of sections 95 to 101 of the BIA, and any similar provision of any federal or provincial statute, from the Proposal is reasonable.

44. As discussed in detail in the Report of the Proposal Trustee on the Financial Situation of the Debtor and the Proposal dated January 18, 2021 (the "**Report on Proposal**"), the Company was in need of critical financing immediately, in the absence of which, the Company could no longer operate as a going concern (including funding day to day operations). Topco was only prepared to advance the funds required by the Company for ongoing working capital requirements if the Company entered into the Topco Loan Agreement and granted the Topco Security to secure advances made thereunder, including the repayment of previously advanced

intercompany indebtedness. This critical funding from Topco allowed the Company to maintain its operations, and Topco has advised the Company that it will continue to make funds available to the Company after the implementation of the Proposal. Most importantly, the Proposal, if approved, will result in a going concern solution for the Company that will benefit the Company's stakeholders generally.

**Report on Proposal, Section F, Motion Record, Tab 2, Appendix "F", pp 92–93.**

45. The Proposal Trustee provided detailed disclosure to the Company's creditors on the Topco Loan Agreement and Topco Security in the Report on Proposal, and the Company's creditors are overwhelmingly supportive of the Proposal (including the exclusion of sections 95 to 101 of the BIA), as evidenced by the votes cast at the Creditors' Meeting.

**The Proposal is Calculated to Benefit the General Body of Creditors**

46. 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.](#)**

47. 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.](#)**



48. None of those circumstances are present in this case. Rather, the Proposal provides for an even-handed distribution to affected creditors. In addition, creditors were provided with full and frank disclosure of the terms of the Proposal prior to the Creditors' Meeting and voted overwhelmingly in support of the Proposal.

49. In this case, Topco is funding the Sponsor Funds and its unsecured claims are unaffected by the Proposal. The law is clear that, if full disclosure is made of an arrangement by which a creditor financing the payments under a proposal is to postpone its claim and is to be entitled to payment of its claim in full if the proposal proves successful, the Court can approve the proposal, provided that the other requirements of section 59(2) are met.

***Re Gardner (1921), 1 CBR 424 (Ont Div Ct) at para 5, Schedule "A.1" to the Trustee's Factum.***

50. The material details of the postponement of the Sponsor Claims were set out in the Report on Proposal, which report was mailed to the Company's creditors on January 18, 2021.

**Report on Proposal, Section L, Motion Record, Tab 2, Appendix "F", p 95; Fourth Report at para 21, Motion Record, Tab 2, p 30.**

51. Additionally, the Proposal includes the payment in full of Convenience Creditors, or those creditors who delivered a Convenience Creditor Election to the Proposal Trustee by the Convenience Creditor Election Deadline. While each case must be reviewed in its unique circumstances, a payout of the type provided to the Convenience Creditors is not uncommon in Canadian restructurings. This Court has accepted that creditors who receive payout of such claims may be deemed to have voted in favour of a compromise and arrangement of the debtor's affairs.

**[Re Lutheran Church - Canada, 2016 ABQB 419 at para 155; for example, see plan and sanction and vesting order granted by Morawetz RSJ \(as he then was\) in Re Target Canada Co.](#)**

52. In this case, 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.

**Fourth Report at para 24, Motion Record, Tab 2, p 31; Statement of Affairs, Motion Record, Tab 2, Appendix "G"; Report on Proposal, Section M, Motion Record, Tab 2, Appendix "F", p 97.**

53. The Proposal Trustee submits that the Proposal satisfies this second prong of the test.

### **The Proposal is Made in Good Faith**

54. As explained above, the principal purpose of the NOI Proceedings has been to: (i) stabilize the Company's business, (ii) facilitate the Company's ongoing operations, and (iii) provide the Company with an opportunity to restructure its business and affairs, including, but not limited to, reducing overhead costs, renegotiating the terms of its commercial leases and growing its online and multi-channel strategy.

**Fourth Report at para 2, Motion Record, Tab 2, p 25.**

55. The Company has been acting in good faith throughout the NOI Proceedings. The Proposal, once implemented, will result in a going concern solution that will benefit the Company's stakeholders generally.

56. For these reasons, among others, the Proposal has been made in good faith and should be approved by the Court.

**PART V – ORDER REQUESTED**

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

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 16<sup>th</sup> day of February, 2021.

**FASKEN MARTINEAU DuMOULIN LLP**

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Counsel to the Proposal Trustee,  
Richter Advisory Group Inc.

**SCHEDULE “A”**  
**AUTHORITIES CITED**

1. *Re Kitchener Frame Ltd*, 2012 ONSC 234
2. *Re Abou-Rached*, 2002 BCSC 1022
3. *Re Gardner* (1921), 1 CBR 424 (Ont Div Ct)
4. *Re Lutheran Church - Canada*, 2016 ABQB 419

**SCHEDULE “A.1”**

***Re Gardner (1921), 1 CBR 424 (Ont Div Ct)***

*[see attached]*

1921 CarswellOnt 3  
Ontario Divisional Court

Gardner, Re

1921 CarswellOnt 3, 1 C.B.R. 424, 49 O.L.R. 252, 59 D.L.R. 555

**In re Gardner**

Order, J.

Judgment: January 31, 1921

Counsel: *J. M. Bullen*, for the Canadian Credit Men's Association, authorized trustee.  
The opposing creditor, trading as Wm. Croft & Sons, in person.

Subject: Corporate and Commercial; Insolvency

**Headnote**

Bankruptcy --- Proposal — Approval by Court — General

Scheme of Arrangement — Composition with All but the Principal Creditor Advancing Fund for Payment of Dividend to Others — Benefit to General Body of Creditors — Reservation to Advancing Creditor of His Entire Claim — Bankruptcy Act, S. 13. A scheme of arrangement may be approved notwithstanding the objection of a minority creditor under sec. 13 of *The Bankruptcy Act*, although it affords an opportunity for one of the creditors financing the scheme to retain his right to payment in full while all other creditors receive only a portion of their claims. Approval ordered as calculated to benefit the general body of creditors where the largest creditor agreed to advance a sum sufficient to pay all other creditors a substantially larger dividend than would be obtainable on a forced sale.

Application made by the authorized trustee under sec. 13 of *The Bankruptcy Act* for the approval by the Court of a scheme of arrangement of the insolvent debtor's affairs prepared by the debtor. The scheme is actively opposed by a creditor.

**Orde, J.:**

1 The report of the authorized trustee shows that the debtor had assets consisting of stock in trade and fixtures nominally of the value of \$66,163.44 and unsecured liabilities to the extent of \$61,007.35, leaving an apparent surplus of \$5,156.09. It was stated before me and not contradicted that the assets if forced to sale would hardly realize more than 35 cents on the dollar. Proof of claims to the amount of \$57,636.07 was made to the trustee by 37 creditors. Of these creditors Gordon MacKay & Co., Ltd., are the largest, their claim amounting to \$41,848.69. The next largest claim is for \$2,081.28, there are two for about \$1,500 each and the remainder are all under \$1,000 each. The proposal submitted to the creditors is that Gordon MacKay & Co. are willing to advance a sum sufficient to pay all the creditors, other than themselves, 55 cents on the dollar. This means, of course, that Gordon MacKay & Co. will still retain the right to call for payment of their claim in full, while the other creditors of the scheme if approved by the Court will forego 45 per cent of their claims.

2 At the meeting of creditors called by the trustee to consider the proposal, there were 29 creditors present or who had communicated their decision to the trustee by letter. Apart from Gordon MacKay & Co. 26 of these with claims aggregating \$11,316.01 assented to the scheme, while two creditors with claims of \$211.96 and \$954.10 respectively dissented. I think it may fairly be assumed that those creditors who were notified and who failed either to attend or to communicate their decision to the trustee either assent, or at least do not actively dissent.

3 Upon the application for the approval of the scheme, the dissenting creditor for \$954.10 did not appear but Wm. Croft & Sons whose claim amounts to \$211.96 appear and object to the scheme being approved on the ground that its effect is to give a preference to Gordon MacKay & Co. by allowing them to be paid in full, and that in the interest of the debtor as well as of

the other creditors, no minority creditor, no matter how small his claim may be, should be forced in effect to release part of his claim unless all the creditors are placed upon an equal footing. There is much force in this objection, because if the object of such a scheme as this is not only to clear off the claims of the creditors, but to put the debtor on his feet again, that object may be defeated. The debtor's future solvency would undoubtedly be much greater if all the creditors were to abandon 45 cents on the dollar of their claims, whereas under the proposed scheme he will still have liabilities, all to one creditor, of approximately \$51,000 or \$52,000. This argument would have more weight if the debtor were proposing to borrow money elsewhere sufficient not only to compound with the other creditors but to pay Gordon MacKay & Co. in full. He could not, of course, obtain a loan of that amount, and if he did it would hardly seem proper to approve of it. But here a large creditor is willing to advance an additional \$10,000 or \$11,000, and to take the chance of getting repayment of that sum and also of its existing claim from the debtor, provided that it is permitted to retain the right to call for payment in full. It was pointed out that if Gordon MacKay & Co. were offering to buy the assets for a sum which would be sufficient to pay all the creditors 55 cents in the dollar, there could be no reasonable objection to the proposal. And yet the result here will be in many respects the same, so far as the creditors other than Gordon MacKay & Co. are concerned. The scheme of arrangement seems to me to be one which in the interests of the general body of creditors and of the debtor, ought to be approved unless there is some rule or principle applicable in bankruptcy matters which would make it improper or inequitable that I should, in the exercise of my discretion, give the Court's approval to it.

4 In determining whether or not this scheme should be approved, I am governed by the provisions of subsecs. (8), (9) and (16) of sec. 13. None of the creditors hold any security upon the property of the debtor and there are no preferential claims, so that subsec. (16) does not apply.

5 The terms of the proposal are reasonable, and they are calculated to benefit the general body of creditors, and they will provide for the immediate payment to the creditors, other than Gordon MacKay & Co., of more than 50 cents on the dollar. Gordon MacKay & Co. are willing to take the risk of getting payment of their claim from the debtor. If the arrangement whereby Gordon MacKay & Co. are to be entitled to payment in full, if they are ultimately able to obtain it, had not been disclosed to the creditors, the scheme could not be approved, but with full disclosure I am unable to find any principle which requires that the Court ought to exercise its discretion by disapproving of the scheme. It is my duty to take into consideration not only the wishes and interests of the creditors but the conduct of the debtor, the interests of the public and future creditors, and the requirements of commercial morality. The burden of proof is on the party who opposes the approval of the composition or scheme. *Baldwin on Bankruptcy*, 11 ed., pp. 784-5. The only case to which I was referred which approaches the point raised here, was *In re E.A.B.*, 9 Manson 105, [1902] 1 K.B. 457, 71 L.J.K.B. 356. It really does not afford much assistance, except as illustrating the care with which the Court will scrutinize the matter if there is any suggestion of collusion or secret advantage. Many of the cases cited were cases where a bankrupt was applying for an annulment of the bankruptcy order. The effect of such an order is different from that of a discharge, because an annulment enables the debtor to face the world, not as a discharged bankrupt, but as one who has not been, or ought not to have been, declared bankrupt. In such cases the Court applies certain principles which do not seem to be necessarily applicable to an application of this sort.

6 The scheme of arrangement will therefore be approved, and an order of the Court will issue accordingly. The scheme provides that trustee's costs and expenses are to be included in the amount to be advanced by Gordon MacKay & Co.

*Approval order granted.*

## **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.

**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 GEOX CANADA INC., OF THE CITY OF MISSISSAUGA, IN THE PROVINCE OF ONTARIO**

Court File No.: 32-2670414

Estate No.: 32-2670414

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***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**  
**COMMERCIAL LIST**  
PROCEEDING COMMENCED AT TORONTO

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**FACTUM OF THE PROPOSAL TRUSTEE**

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