

Court No. 32-2714829  
Estate No. 32-2714829

**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 PROPOSAL OF O.B. WIJK CANADA LTD.,**  
**OF THE TOWN OF SIMCOE IN THE PROVINCE OF ONTARIO**

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

May 12, 2021

**GOLDMAN SLOAN NASH & HABER LLP**  
Barristers and Solicitors  
480 University Avenue, Suite 1600  
Toronto, ON M5G 1V2

**Mario Forte** (LSO #27293F)  
Tel: 416-597-6477  
Email: forte@gsnh.com

Lawyers for the Proposal Trustee, KSV  
Restructuring Inc.

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**PART I – OVERVIEW**

1. This motion is brought by KSV Restructuring Inc. in its capacity as proposal trustee (the “**Proposal Trustee**”) of O.B. Wiik Canada Ltd. (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 “**Approval Order**”), among other things, approving the Proposal (defined below), which was submitted by the Company and unanimously approved by its creditors voting on the Proposal.
2. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Proposal.
3. The key features of the Proposal provide:
  - a) for the subordination of the intercompany claims of O.B. Wiik A.S., the parent of the Company of approximately \$2.5 million in favour of Proven Claims of Creditors under certain terms and conditions set out in the Proposal:

- b) for the payment of a dividend of up to \$.24 on the dollar of Proven Claims;
- c) for the release of all claims against the Company and the Company's directors and officers to the extent permitted by law; and
- d) 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.

## **PART II – FACTS**

### **Background**

- 4. The Company was incorporated under *Business Corporations Act* (New Brunswick) on January 18, 2017 and is the wholly owned foreign subsidiary of O.B. Wiik A.S. (the "Sponsor").

**First Report at Section 2, para 1, Motion Record, Tab 2 , p. 29**

- 5. The Company was a supplier of fabric covered steel buildings, pop-up tents and tarpaulins servicing a variety of industries including agriculture, construction, waste management, manufacturing and aid and relief.

**First Report at Section 2, para 2, Motion Record, Tab 2 , p. 29**

6. At the time of filing the Company's notice of intention to make of proposal (the "NOI") it had 3 full-time employees and carried on business from leased premises in Simcoe, Ontario and Dunville Ontario, its storage location.

**First Report at Section 2, para 3, Motion Record, Tab 2 , p. 29**

7. Since the commencement of operations, the Company has operated in a deficit position requiring intercompany loans from the Sponsor to fund its losses. At the time of the Filing Date, intercompany indebtedness to O.B. Wiik A.S. comprised approximately \$2.5 million of the approximately \$2.7 million of the Company's total indebtedness.

**First Report at Section 2, para 5, Motion Record, Tab 2 , p. 29**

**Report to Creditors at Section 3.2, para 3, Motion Record, Tab 2, Appendix  
"C", p. 58**

8. Since the Filing Date, the Company has wound down its operations and filed the Proposal to, among other things, provide for a structured, coordinated and transparent exit from business in Canada.

**First Report at Section 2, para 6, Motion Record, Tab 2, p. 30**

9. In order to provide liquidity to the Company throughout the proposal proceedings, the Sponsor agreed to purchase the Company's remaining specialized inventory for 75% of the book value thereof, representing proceeds of approximately \$124,000. In the Proposal

Trustee's view, this purchase represents a significant premium to market for these assets whose realizable value would otherwise be nominal.

**First Report at Section 4, para 5, Motion Record, Tab 2, p. 31**

10. In fact, apart from the cash generated by the sale and any contribution from the Sponsor, the Proposal Trustee estimates that the realizable value of the Company's assets would be nil.

**First Report at Section 4, para 6, Motion Record, Tab 2, p. 31**

**Proposal**

11. Apart from the cessation of business operations in Canada, the Proposal was intended to give effect to:
  - (a) the distribution of funds from the Distributable Funds to Proven Creditors;
  - (b) effect releases of any and all Proven Claims; and
  - (c) the subordination the intercompany claims of the Sponsor to Proven Claims on the terms and conditions set forth in the Proposal; and
  - (d) releases in respect of the directors and officers of the Company.

**First Report at Section 4, paras 1-3, Motion Record, Tab 2, p. 30-31**

12. Distributable Funds in the Proposal includes:

- (a) All the Company's cash on hand, if any;
- (b) Proceeds from the realization of the Company's remaining Property; and
- (c) Any funds paid to the Company by the Sponsor to make \$50,000 available for distribution to the unsecured creditors with Proven Claims (the "**Unsecured Creditors Pool**").

**First Report at Section 4, para 3, Motion Record, Tab 2, p. 30**

### **Conditions to Implementation**

- 13. The Proposal is subject to the following conditions:
  - (a) Acceptance of the Proposal by the statutory majorities of Creditors as required under the BIA;
  - (b) An order of the Court approving the Proposal;
  - (c) Payments by the Company, and if applicable, the Sponsor, of the Distributable Funds to the Proposal Trustee;
  - (d) The effect and execution of all other actions, documents and agreements necessary to implement the Proposal, in the reasonable judgement of the Proposal Trustee.

**Report to Creditors at Section 3.7, para 1, Motion Record, Tab 2, Appendix "C", p. 60**

- 14. The other key terms of the Proposal include a claims bar on any Person making a Claim or sharing in and dividend who has not filed a Claim within thirty days of the Final

Dividend Notice, subject to the statutory exceptions set out in the BIA, and excepting from the Proposal the provisions of Sections 95 to 101 of the BIA on the terms set out in the Proposal.

**Report to Creditors at Section 3.8, para 1(a), Motion Record, Tab 2,  
Appendix “C”, p. 60**

#### **No Preferences and Transfers at Undervalue**

15. 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.

**First Report at Section 4, para 7, Motion Record, Tab 2 , p. 31**

**Report to Creditors at Section 4, paras 1-4, Motion Record, Tab 2, Appendix  
“C”, p. 61**

16. The Proposal Trustee understands that two of the Company’s employees terminated on the Filing Date received termination pay in addition to wages and vacation pay, but the Proposal Trustee does not consider these payments would be pursued as preferences and do not reduce the Unsecured Creditors Pool in any event.

**First Report at Section 4, para 7, Motion Record, Tab 2, p. 31**

**The Proposal is Unanimously Accepted by the Creditors**

17. The Proposal was unanimously accepted by the creditors entitled to vote at a duly convened meeting of creditors on April 14, 2021.

**First Report at Section 4.2, para 1, Motion Record, Tab 2, p. 32 and  
Appendix “E”, p. 67**

**The Proposal is Recommended by the Proposal Trustee**

18. The economic terms of the Proposal will potentially see a dividend of up to \$.24 on the dollar versus a nil return 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 Proposal is reasonable and calculated to benefit the general body of creditors.

**First Report at Section 4, para 6, Motion Record, Tab 2, p. 32**

**PART III – ISSUE**

19. 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**

20. 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 unanimously accepted by the Company's creditors entitled to vote at the Creditors' Meeting.

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

21. 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'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**

22. 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 "B"**

23. 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**

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

**Re Kitchener Frame Ltd, 2012 ONSC 234 [Kitchener Frame] at para 19**

25. 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**

26. 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**

27. 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**

28. 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**

29. Given that (i) the creditors voting at the Creditors' Meeting unanimously 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**

30. 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**

31. 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**

32. In the present case, the Proposal provides for a floor of recovery for the affected creditors by means of the creation of the Unsecured Creditors' Pool and the subordination of the Sponsor's Claim there is minimum available dividend in circumstances where the Proposal Trustee has determined that the recovery to unsecured creditors would be nil. The Proposal is clearly capable of being implemented in accordance with its terms, and was unanimously approved by the Company's creditors.
33. Furthermore, nothing in this Proposal offends commercial morality or undermines the integrity of the bankruptcy system.
34. 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**

35. 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**

36. 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.
37. 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;**

38. 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 Proposal is reasonable.

**First Report at Section 4, para 8, Motion Record, Tab 2 , p. 31**

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

39. 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**

40. 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**

41. None of those circumstances are present in this case. Rather, the 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 Proposal prior to the Creditors' Meeting and voted unanimously in support of the Proposal.

***Re Gardner (1921), 1 CBR 424 (Ont Div Ct) at para 5, Tab 3, Brief of Authorities***

42. The material details of the subordination of the of the Sponsor' Claims were set out in the Report on Proposal, which report was mailed to the Company's creditors on April 1, 2021.

**Report to Creditors, Section 3.4, para 2, Motion Record, Tab 2, Appendix "C", p 59**

***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 was then) in Re Target Canada Co.***

43. 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.

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

**The Proposal is Made in Good Faith**

45. Based on the clarity of disclosure made to Creditors, the favourable economic terms to Creditors, and the even-handed distribution proposed in the Proposal, the Proposal Trustee has determined that the Proposal has been made in good faith.

46. The Company has been acting in good faith throughout the NOI Proceedings. The Proposal, once implemented, will benefit the Company's stakeholders generally, while permitting the Company to exit business in Canada.

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

**PART V – ORDER REQUESTED**

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

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 12<sup>th</sup> day of May, 2021.

**GOLDMAN SLOAN NASH & HABER LLP**

Per:



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Counsel to the Proposal Trustee, KSV Restructuring  
Inc. as Proposal Trustee of O.B. Wiik Canada Ltd.

## **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



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**Proceeding commenced TORONTO**

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**FACTUM OF THE PROPOSAL TRUSTEE**

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**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto ON M5G 1V2

**Mario Forte (LSO # 27293F)**  
Tel: 416.597.6477  
Email: [forte@gsnh.com](mailto:forte@gsnh.com)

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