COURT FILE NUMBER	2001-08972
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C C-36, AS AMENDED
	APPLICATION OF BJ SERVICES HOLDINGS CANADA, ULC
DOCUMENT	**BRIEF OF THE APPLICANT, BJ SERVICES HOLDINGS CANADA ULC**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500 Bankers Hall East 855-2nd Street SW Calgary, Alberta T2P 4K7 Attention: Kelsey Meyer / Keely Cameron Telephone No.: 403-298-3323 / 403-298-3324 Fax No.: 403-265-7219 Client File No.: 78081-9

Commercial List Application Scheduled for the 14th day of August, 2020
before The Honourable Madam Justice K.M. Horner

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I. INTRODUCTION

1. On July 20, 2020, BJ Services Holdings Canada, ULC ("**BJ Canada**") and its affiliates, BJ Services, LLC; BJ Management Services, L.P.; and BJ Services Management Holdings Corp. (collectively with BJ Canada, the "**Chapter 11 Debtors**") commenced voluntary proceedings (the "**Chapter 11 Proceedings**") in the United States Bankruptcy Court, Southern District of Texas, Houston Division (the "**U.S. Bankruptcy Court**") by each filing a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "**U.S. Bankruptcy Code**"), Case No 20-33627. On July 21, 2020, the U.S. Bankruptcy Court granted an Order authorizing BJ Canada to act as foreign representative of the estate of BJ Canada for the purpose of the within proceedings ("**Foreign Representative Order**") and on August 10, 2020 the U.S. Bankruptcy Court granted an amended Foreign Representative Order authorizing BJ Canada to also act as foreign representative of the estate of BJ Services, LLC.

- Affidavit of Warren Zemlak, sworn on July 22, 2020, paras. 3 and 21 and Exhibits "1", "10 and "11" ("**Zemlak Affidavit**").

- Affidavit No. 3 of Warren Zemlak, sworn on August 12, 2020, paras. 3 and 10 ("**Zemlak Affidavit No. 3**").

2. On July 28, 2020, this Honourable Court recognized the Chapter 11 Proceedings in respect of BJ Canada as foreign main proceedings and granted certain ancillary relief including recognition of certain orders granted in the Chapter 11 Proceedings (the "**July 28 Order**").

- Zemlak Affidavit No. 3, para. 4.

3. Since the commencement of the Chapter 11 Proceedings, the Chapter 11 Debtors have without success, attempted to work with their secured creditors to pursue a corporate reorganization in order to save jobs. Their efforts have included participation in mediation. Based on discussions with their various constituencies during the mediation, and in consultation with Chief Judge Jones, who presided over the mediation, the Chapter 11 Debtors have shifted their focus to two going-concern sales: the sale of the Chapter 11 Debtors' cementing business (the "**Cementing Business Transaction**") and the sale of four of the

Debtors' fracturing business fleets and certain intellectual property (the "**Fracking Fleet Transaction**"), in order to provide urgently-needed liquidity to the Chapter 11 Debtors.

- Zemlak Affidavit No. 3 at paras. 6-7.

4. The Chapter 11 Debtors have not foreclosed the possibility of reaching agreement with their stakeholders on a consensual Chapter 11 plan, and will endeavour to seek confirmation of a plan following consummation of the sale transactions.

- Zemlak Affidavit No. 3 at para. 8.

5. This Bench Brief is filed in support of the application of BJ Canada, in its capacity as foreign representative of its estate, pursuant to Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order:

(a) abridging the time for service of this application and the materials filed at this Court in support thereof, declaring service of this application and supporting materials to be good and sufficient, and dispensing with further service;

(b) amending the July 28 Order to:

(i) declare that pursuant to section 45 of the CCAA, the Applicant BJ Canada is a foreign representative with respect to the Chapter 11 Proceedings commenced by BJ Services, LLC in the U.S. Bankruptcy Court, and that BJ Canada as the foreign representative is entitled to bring this application pursuant to section 46 of the CCAA;

(ii) declare that the Chapter 11 Proceedings in relation to BJ Services, LLC are recognized as "foreign main proceedings" for the purposes of section 47 of the CCAA;

(iii) otherwise grant all relief as set out in the July 28 Order in respect of BJ Canada, in respect of BJ Services, LLC, as well;

(c) in respect of BJ Canada and BJ Services, LLC, recognizing and enforcing certain orders granted by the U.S. Bankruptcy Court summarized below;

to ensure consistency, efficiency and cooperation between the Chapter 11 Proceedings and these proceedings.

6. Other than the Chapter 11 Proceedings and these proceedings, there are currently no other foreign proceedings in respect of BJ Canada or BJ Services, LLC.

- Zemlak Affidavit, para. 21.
- Zemlak Affidavit No. 3, para. 13.

II. STATEMENT OF FACTS

A. BJ Services, LLC

7. BJ Services, LLC is the parent company of all of the Chapter 11 Debtors. Collectively, the Chapter 11 Debtors are a leading provider of hydraulic fracturing and cementing services to upstream oil and gas companies engaged in the exploration and production ("**E&P**") of North American oil and natural gas resources.

- Zemlak Affidavit, para. 4.

8. BJ Services, LLC was incorporated pursuant to the laws of the State of Delaware, and is the direct or indirect parent company of the other Chapter 11 Debtors. BJ Services, LLC is not extra-provincially registered in Canada.

- Zemlak Affidavit No. 3, para. 14.

9. The Chapter 11 Debtors function as an integrated business and other than day-to-day operations, all decisions for BJ Canada and BJ Services, LLC, including in respect of the corporate governance matters, are centralized at the Chapter 11 Debtors' corporate headquarters in Tomball, Texas. The Chapter 11 Debtors maintain their corporate headquarters in Tomball, Texas. The Chapter 11 Debtors manage their operations at their Tomball, Texas headquarters. All members of the Chapter 11 Debtors' senior management responsible for its corporate governance matters are located at the corporate headquarters in Tomball, Texas.

- Zemlak Affidavit, paras. 22-28.

10. BJ Services, LLC owns certain Canadian intellectual property and other assets located in Canada. A sale of those assets would require Canadian recognition of any Order of the U.S. Bankruptcy Court approving such a sale. As such, BJ Canada, as foreign representative, seeks recognition by the Canadian Court of the Chapter 11 Proceedings in relation to BJ Services, LLC.

- Zemlak Affidavit No. 3, para. 10.

11. BJ Services, LLC does not have any offices, facilities, employees or operations in Canada (or in any other jurisdiction other than in the United States). Its only assets in Canada are intellectual property assets and some equipment.

- Zemlak Affidavit No. 3, para. 17.

III. ISSUES

12. There are two questions on this application:

(a) Whether the July 28 Order should be amended to make BJ Canada the Foreign Representative of BJ Services, LLC and to recognize that the Chapter 11 Proceedings in relation to BJ Services, LLC are "foreign main proceedings"; and

(b) Whether the Court ought to grant the ancillary relief sought, namely recognition of certain orders granted by the U.S. Bankruptcy Court.

IV. ANALYSIS

A. Appointment of BJ Canada as Foreign Representative of BJ Services, LLC

13. A Foreign Representative is required with respect to the estate of BJ Services, LLC to facilitate Canadian recognition of any sale of the Canadian intellectual property and other Canadian assets of BJ Services, LLC in a manner that protects the interests of the BJ Services, LLC and its stakeholders, and ensures a fair and efficient administration of its estate.

14. The purpose of Part IV of the CCAA is to effect cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada. Orders

under this part are intended, among other things, to promote cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions and to promote the fair and efficient administration of cross-border insolvencies which also protects the interests of debtors, creditors and other interested persons.

Horsehead Holding Corp., Re, 2016 ONSC 958 at para. 15 [***Tab 1***]

CCAA, *supra* at s. 44 [***Tab 2***]

15. In the context of Part IV of the CCAA, the Court is granted the authority to apply any legal or equitable rules necessary, provided that they are not inconsistent with the provisions of the CCAA.

CCAA, *supra*, at s. 61(1) [***Tab 2***].

16. Subsection 46(1) of the CCAA provides that a foreign representative may apply to the Court for recognition of a foreign proceeding in respect of which he or she is a foreign representative. Subsection 47(1) states that "If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding." [*emphasis added*]

CCAA, *supra*, at s. 46(1) and 47(1) [***Tab 2***].

17. Under section 47 of the CCAA, two requirements must be satisfied for the court to grant an order recognizing a foreign proceeding:

(a) The proceeding is a "foreign proceeding"; and

(b) The applicant is a "foreign representative" in respect of the foreign proceeding.

CCAA, *supra*, at s. 47 [***Tab 2***].

18. What is considered to be a "foreign proceeding" for the purpose of section 47(1) of the CCAA is governed by subsection 45(1) of the CCAA, which provides the following definition for "foreign proceeding":

> "Foreign Proceeding" means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction

> outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.
>
> ***CCAA***, *supra,* at s. 45(1) [***Tab 2***].

19. Canadian courts have consistently recognized proceedings under Chapter 11 of the U.S. Bankruptcy Code to be "foreign proceedings" for the purposes of the CCAA since they meet the definition set out in the CCAA.

> ***CCAA***, *supra*, at s. 45(1) [***Tab 2***].
>
> ***Horsehead***, *supra*, at para. 20 [***Tab 1***].
>
> ***Massachusetts Elephant & Castle Group Inc., Re***, 2011 ONSC 4201 at para. 13 [***Tab 3***].
>
> ***Caesars Entertainment Operating Co., Re***, 2015 ONSC 712 at para. 28 [***Tab 4***].
>
> ***Ultra Petroleum Corp***., 2017 YKSC 9 at para. 5 [***Tab 5***].
>
> ***Hollander Sleep Products, LLC (Re)***, [2019] O.J. No. 2817 at para 27 [***Tab 6***].

20. A "foreign representative" for the purpose of subsection 46(1) of the CCAA is defined by subsection 45(1) of the CCAA, which provides:

> "Foreign Representative" means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding with respect of a debtor company, to
>
> (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or
>
> (b) act as a representative in respect of the foreign proceeding.
>
> ***CCAA***, *supra* at s. 45(1) [***Tab 2***].

21. Subsection 46(2) of the CCAA sets out the documents that must accompany an application by a foreign representative for recognition of a foreign proceeding:

> 46(2) Documents that must accompany application – subject to subsection (3), the application must be accompanied by

(a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;

(b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and

(c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

CCAA, *supra* at s. 46(2) [***Tab 2***].

22. While the CCAA provides that the foreign representative must submit certain documents in its application to prove both the existence of the foreign proceeding and also the foreign representative's authority to act, the Court may, in the absence of those documents, accept any other evidence of the existence of the foreign proceedings and the foreign representative's authority that the court considers appropriate, provided that there is some reasonable explanation provided as to why the enumerated records are unavailable and why the alternative form of proof should be accepted.

Probe Resources Ltd., Re, 2011 BCSC 552 at paras. 13-16 [***Tab 7***].

CCAA, *supra*, at s. 46(4) [***Tab 2***].

23. BJ Canada has provided filed, but not certified, copies of the enumerated records in its Affidavit filed in support of this application because the U.S. Bankruptcy Court does not provide certified copies. In particular, BJ Canada has provided:

(a) a filed copy of the Amended Foreign Representative Order granted by the U.S. Bankruptcy Court on August 10, authorizing BJ Canada to act as a foreign representative of BJ Services, LLC's estate (and also of the estate of BJ Canada) for the purpose of these proceedings;

(b) a filed copy of the petition of BJ Services, LLC filed with the U.S. Bankruptcy Court on July 20, 2020; and

(c) a statement, as set out at paragraph 13 of the Zemlak Affidavit No. 3, that the Chapter 11 Proceedings are the only foreign proceedings in respect of BJ Canada and BJ Services, LLC that are known to the foreign representative.

- Zemlak Affidavit No. 3, paras. 10- 13 and Exhibits "2" and "3".

24. Further, a U.S. Court order appointing a person the foreign representative of a chapter 11 debtor has been confirmed by Canadian Courts to satisfy the statutory requirement for evidence of the existence of the foreign proceeding and of the foreign representative's authority, as expressly permitted by s. 46(4) of the CCAA.

CCAA, *supra*, at s. 46(2)(a) and (4) [***Tab 2***].

Massachusetts Elephant, *supra* at paras. 15-16 [***Tab 3***].

25. BJ Canada submits that filed copies of the Order and the petition as referenced provide sufficient evidentiary basis for the Court to conclude that BJ Canada and BJ Services, LLC have met the statutory requirements for Canadian recognition of their Chapter 11 Proceedings. As such, it is appropriate that this Honourable Court recognize the Chapter 11 Proceedings of BJ Services, LLC as foreign proceedings (in addition to those of BJ Canada).

Foreign Main Proceedings

26. Section 47(2) of the CCAA requires the Court to specify in the order whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding". A "foreign main proceeding" is defined as a "foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests" ("**COMI**"). In the absence of proof to the contrary, a debtor company's registered office is deemed to be the COMI.

CCAA, *supra*, at s. 45(1) and (2) and 47 [***Tab 2***].

27. With respect to BJ Services, LLC, it is not necessary to go beyond the analysis set out in subsection 45(2) of the CCAA. The COMI for BJ Services, LLC is clearly in the United States, even more so than for BJ Canada, whose COMI was also found to be in the United States. In support of this, BJ Services, LLC is incorporated in the United States, is not extra-provincially registered anywhere in Canada, does not carry out business in Canada, and its

only assets in Canada are certain Canadian intellectual property and equipment. Further analysis is included in the Zemlak Affidavit No. 3.

- Zemlak Affidavit No. 3, paras. 10, 14-20.

28. In these circumstances, BJ Canada submits that it is appropriate to amend the Foreign Representative Order to recognize BJ Canada as the foreign representative for BJ Services, LLC and grant all relief that was granted in respect of BJ Canada in the July 28 Order, in respect of BJ Services, LLC. Doing so will allow for this Honourable Court to recognize any Order granted at a later date by the U.S. Bankruptcy Court that approves any sale of the Canadian intellectual property or equipment owned by BJ Services, LLC.

29. Where the Court recognizes a foreign proceeding under subsection 47(1) of the CCAA and specifies same to be a "foreign main proceeding" pursuant to subsection 47(2) of the CCAA, subsection 48(1) of the CCAA requires the court to grant certain enumerated relief subject to any terms and conditions it considers appropriate. Section 48 provides as follows:

> Order relating to recognition of a foreign main proceeding
>
> 48 (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
>
> (d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the

> debtor company from selling or otherwise disposing of any of its other property in Canada.
>
> Scope of order
>
> (2) The order made under subsection (1) must be consistent with any order that may be made under this Act.
>
> When subsection (1) does not apply
>
> (3) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.
>
> Application of this and other Acts
>
> (4) Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act in respect of the debtor company.
>
> ***CCAA***, *supra* at s. 48 [***Tab 2***].

B. <u>Ancillary Orders</u>

30. In addition to seeking amendments to the July 28 Order with respect to the inclusion of BJ Services, LLC, BJ Canada also seeks an Order recognizing in Canada and enforcing the "First Amended Foreign Representative Order", the "Second Interim Cash Collateral Order", the "Second Interim Cash Management Order", the "Second Interim Critical Vendors and Lienholders Order", the "Surety Bond Order", the "Taxes Order", the "Cementing Bidding Procedures Order", the "Fracking Bidding Procedures Order", and the "Rejection – Assumption Procedures Order".

- Zemlak Affidavit No. 3, paras. 24-34.

31. The initial Interim Cash Collateral Order, Interim Cash Management Order and Interim Critical Vendors and Lienholders Order were previously recognized by this Honourable Court pursuant to the July 28, 2020 Order of the Honourable Madam Justice J.E. Topolniski.

32. Pursuant to section 49 of the CCAA, this Honourable Court can make any order that it considers appropriate as long as the Court is satisfied that these orders are necessary for the protection of the debtor company's property, or that the orders are in the interests of a creditor

or creditors. Further, once an order recognizing a foreign proceeding is made, the Court is required to cooperate, to the maximum extent possible with the foreign representative and the foreign court, so long as the requested relief is not inconsistent with the CCAA or would raise concerns regarding public policy.

> ***CCAA***, *supra*, at ss. 49, 52(1) and 61(2) [***Tab 2***].

33. In cross-border insolvency, restructuring or liquidation proceedings, Canadian and U.S. Courts have made efforts to complement, coordinate and, where appropriate, accommodate the proceedings of the other. Comity and cooperation are increasingly important in the bankruptcy context as internationalization increases, as more parties have assets and carry on activities in several jurisdictions. Without some coordination, there would be multiple proceedings, inconsistent judgments and general uncertainty.

> ***Re Babcock & Wilcox Canada Ltd***. (2000), 18 CBR (4th) 157 (Ont SCJ) at paras. 9-10 citing *Taylor v Dow Corning Australia Pty. Ltd*. (December 19, 1997), Doc. 8438/95 (Australia Vic. Sup. Ct.) [***Tab 8***].
>
> ***Hollander Sleep Products,*** *supra* at paras 43-48 [***Tab 6***].
>
> ***Minden Schipper & Associates Inc.***, 2006 MBQB 292, at paras 13-14 [***Tab 9***].

34. When a court considers whether it will recognize a foreign order, including Chapter 11 proceeding orders, it considers the following factors:

(a) Recognizing comity and cooperation between courts of various jurisdictions is to be encouraged.

(b) According respect to foreign bankruptcy and insolvency legislation unless in substance generally it is so different from the bankruptcy and insolvency laws of Canada or the legal process that generates the foreign order diverges radically from the processes in Canada.

(c) Treating stakeholders equitably, and to the extent reasonably possible, common or equally, regardless of the jurisdiction to which they reside.

(d) Promoting plans that allow the enterprise to reorganize globally, especially where there is an established interdependence on a transnational basis. To the extent reasonably practical, one jurisdiction should take charge of the principal administration of the enterprise's reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of stakeholders and does not detract from the net benefits that may be available from alternative approaches.

(e) Recognizing the appropriate level of court involvement, which depends to a significant degree upon the court's nexus to the enterprise. Where one jurisdiction has an ancillary role, the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments regarding the reorganizational efforts in the foreign jurisdiction and stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.

(f) Ensuring that effective notice is given to all affected stakeholders, and affording opportunities to stakeholders to return to court to review the granted order.

Babcock, *supra* at para. 21 [***Tab 8***].

Re Xerium Technologies Inc., (2010), 71 CBR (5th) 300 (Ont SCJ) at paras. 26-27 citing ***Babcock*** [***Tab 10***]**.**

35. The Orders summarized below satisfy the numerous factors set out in the cases. These Orders were made in good faith and in the interests of the Chapter 11 Debtors' creditors and other stakeholders and are not contrary to public policy. They ought to be recognized by this Honourable Court to ensure that the purposes of the CCAA are satisfied and the Chapter 11 Debtors have the best opportunity to restructure their affairs.

1. Amended Foreign Representative Order

36. The First Amended Order Authorizing BJ Services Holdings Canada, ULC to Act as Foreign Representative Pursuant To 11 U.S.C. § 1505, granted by the U.S. Bankruptcy Court on August 10, 2020 (the "**Amended Foreign Representative Order**") authorizes BJ Canada to act as foreign representative on behalf of the estates of BJ Canada and BJ Services, LLC.

- Zemlak Affidavit, Exhibit "10".

- Zemlak Affidavit No.3, para. 25, Exhibit "2".

2. Second Interim Cash Collateral Order

37. The Second Interim Order (I) Authorizing Debtors to Use Cash Collateral Pursuant To Section 363(c) of the Bankruptcy Code, (II) Granting Adequate Protection to the Prepetition Secured Parties, (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(b), and (IV) Granting Related Relief, granted by the U.S. Bankruptcy Court on August 3, 2020 (the "**Second Interim Cash Collateral Order**"), which, *inter alia*, (a) authorizes the Chapter 11 Debtors to continue to use the cash collateral of the Prepetition ABL Secured Parties, CLMG Collateral of the CLMG Secured Parties and GACP Collateral of the GACP Secured Parties (as those terms are defined therein) in accordance with the terms and conditions set forth therein, (b) grants superpriority claims and automatically perfected liens, security interests and other adequate protection, as applicable, to the Prepetition ABL Secured Parties, CLMG Secured Parties and the GACP Secured Parties to the extent of any diminution in value of their interest in the Prepetition ABL Collateral, including Cash Collateral, in the CLMG Collateral, as applicable, or in the GACP Collateral, as applicable, under or in connection with the Prepetition ABL Loan Documents, the CLMG Term Loan Agreement, or the GACP Term Loan Agreement (as those terms are defined therein), (c) subject to certain challenge rights of certain parties in interest, approves certain stipulations by the Chapter 11 Debtors with respect to the Prepetition ABL Loan Documents, CLMG Term Loan Credit Agreement, and the liens and security interests arising therefrom, (d) vacates and modifies the automatic stay imposed by section 362 of the U.S. Bankruptcy Code; (e) subject to the Final Order, waives the Chapter 11 Debtors' right to assert with respect to the Prepetition ABL Collateral, the Cash Collateral or the Adequate Protection Collateral (as defined therein), any claims to surcharge pursuant to section 506(c) of the U.S. Bankruptcy Code, any "equities of the case" exception pursuant to section 552(b) of the U.S. Bankruptcy Code and the equitable doctrine of marshalling or any similar doctrine, (f) schedules a final hearing to consider entry of a final order, (g) waives any applicable stay with respect to the effectiveness and enforceability of the Second Interim Cash Collateral Order, and (f) grants related relief. Considering that the Interim Cash Collateral Order has been recognized by this Honourable Court and the Second Interim Cash Collateral

Order continues to authorize the Chapter 11 Debtors to use the cash collateral of the Prepetition ABL Lenders, the CLMG Collateral of the CLMG Secured Parties and (with respect to the Chapter 11 Debtors other than BJ Canada), the GACP Collateral of the GACP Secured Parties, and grants other relief in relation to the Chapter 11 Debtors, BJ Canada seeks an Order recognizing and giving force and effect in Canada to the Second Interim Cash Collateral Order.

- Zemlak Affidavit, Exhibit "14".
- Zemlak Affidavit No. 3, para.26, Exhibit "6".

3. Second Interim Cash Management Order

38. The Second Interim Order Authorizing the Debtors to Continue to (I) Operate Their Cash Management System and Maintain Existing Bank Accounts and (II) Perform Limited Intercompany Transactions, granted by the U.S. Bankruptcy Court on July 31, 2020 (the "**Second Interim Cash Management Order**"), which authorizes the Chapter 11 Debtors to, *inter alia*: (a) continue to operate their Cash Management System (as defined therein); (b) honour their prepetition obligations related thereto, including the Bank Fees (as defined therein); (c) continue to perform Intercompany Transactions (as defined therein) to the limited extent set forth therein; (d) maintain existing Business Forms (as defined therein); and (e) maintain the Investment Practices (as defined therein) consistent with historical practice. Considering that the Interim Cash Management Order has been recognized by this Honourable Court and the Second Interim Cash Management Order continues to enable the Chapter 11 Debtors to manage their financial affairs in a manner that minimizes disruption to the Chapter 11 Debtors' operations, BJ Canada seeks an Order recognizing and giving force and effect in Canada to the Second Interim Cash Management Order.

- Zemlak Affidavit, Exhibit "16".
- Zemlak Affidavit No. 3, para. 27, Exhibit "7".

4. Second Interim Critical Vendors and Lienholders Order

39. The Second Interim Order (I) Authorizing the Debtors to Pay Certain Prepetition Claims On Account of (A) Critical Vendors Claims, (B) Lien Claims, and (C) 503(b)(9)

Claims, (II) Confirming Administrative Expense Priority of Outstanding Orders, and (III) Granting Related Relief, granted by the U.S. Bankruptcy Court on July 29, 2020 (the "**Second Interim Critical Vendors and Lienholders Order**"), which authorizes but does not direct the Chapter 11 Debtors to *inter alia:* (a) pay certain prepetition (i) Critical Vendor Claims, (ii) Mineral Contractor Claims, (iii) Shipping Claims, and (iv) 503(b)(9) Claims (as each of those terms are defined therein), provided that the Chapter 11 Debtors are not authorized to pay any amounts under the Second Interim Critical Vendors and Lienholders Order to any Specified Trade Claimant (as defined therein) that is not expected to provide goods and services to the Chapter 11 Debtors on or prior to the final hearing; (b) confirms the administrative expense priority status of Outstanding Orders and authorizes but does not direct payment of undisputed amounts related to the Outstanding Orders in the ordinary course of business consistent with the parties' customary practices in effect prior to the Petition Date; and (c) grants related relief. Considering that the Interim Critical Vendors and Lienholders Order has been recognized by this Honourable Court and the Second Interim Critical Vendors and Lienholders Order continues to protect and preserve the Chapter 11 Debtors' estates, BJ Canada seeks an Order recognizing and giving force and effect in Canada to the Second Interim Critical Vendors and Lienholders Order.

- Zemlak Affidavit, Exhibit "18".
- Zemlak Affidavit No. 3, para. 28, Exhibit "8".

5. Surety Bond Order

40. The Order (I) Authorizing the Debtors to Continue Their Surety Bond Program, and (II) Granting Related Relief, granted by the U.S. Bankruptcy Court on July 29, 2020 (the "**Surety Bond Order**"), which *inter alia,* (a) authorizes the Chapter 11 Debtors to maintain, renew and modify their Surety Bond Program (as defined therein) – including but not limited to the procurement of new sureties – in the ordinary course of business on a postpetition basis and pay outstanding prepetition amounts, if any, as of the Petition Date (as defined therein); and (b) grants related relief. Considering that the Surety Bond Order permits the Chapter 11 Debtors to maintain the Surety Bond Program which in turn provides financial assurances and enables the Chapter 11 Debtors to undertake essential functions related to their operations, BJ

Canada seeks an Order recognizing and giving force and effect in Canada to the Surety Bond Order.

- Zemlak Affidavit No. 3, para. 29, Exhibits "9" and "10".

6. Taxes Order

41. The Order (I) Authorizing the Payment of Certain Prepetition Taxes and Fees, and (II) Granting Related Relief, granted by the U.S. Bankruptcy Court on July 29, 2020 (the "**Taxes Order**"), which authorizes the Chapter 11 Debtors to *inter alia*, remit and pay (or use tax credits to offset) the amounts due for Taxes and Fees (as defined therein) in the ordinary course of business, and grants related relief. Considering that the Taxes Order will enable the Chapter 11 Debtors to pay taxes to minimize disruptions to their business operations, BJ Canada seeks an Order recognizing and giving force and effect in Canada to the Taxes Order.

42. With respect to the Taxes Order, it is acknowledged that the Taxes Order permits the payment of certain pre-filing taxes, which differs from the approach taken in Canadian proceedings. Notwithstanding this difference, BJ Canada seeks Canadian recognition of the Taxes Order, to ensure a consistent approach as between the Canadian and U.S. proceedings to ensure fair treatment of the stakeholders. Consistent with the decisions in *Babcock, supra,* and *Xerium, supra*, Canadian recognition of the Taxes Order would: (i) be consistent with comity and cooperation; (ii) accord respect to foreign bankruptcy and insolvency legislation; and (iii) treat stakeholders equitably, and to the extent reasonably possible, common or equally, regardless of the jurisdiction in which they reside. As is set forth in the Taxes Order itself and the motion in support thereof, the legal process of the U.S. Bankruptcy Court that generated the Taxes Order does not diverge radically from Canadian processes. Further, Canadian Courts have recognized similar Taxes Orders with respect to permitting payment of certain prepetition taxes – in particular, granted by the Ontario Superior Court of Justice in Canadian recognition proceedings on August 9, 2019 *In the Matter of Jack Cooper Ventures Inc, et al*. and on April 21, 2020, *In the Matter of Pier 1 Imports, Inc. et al.*

Hollander Sleep Products, supra at para. 42 [***Tab 6***].

Babcock, *supra* at para. 21 [***Tab 8***].

Xerium, *supra* at paras. 26-27 citing ***Babcock*** [***Tab 10***]**.**

- Zemlak Affidavit No. 3, paras. 30-31, Exhibits "11", "12" and "13".

7. Cementing Bidding Procedures Order

43. The Order (I) Establishing Bidding Procedures for the Sale of the Cementing Business, (II) Scheduling Bid Deadlines and an Auction, (III) Approving the Form and Manner of Notice Thereof, (IV) Approving Contract Assumption and Assignment Procedures, and (V) Granting Related Relief, granted by the U.S. Bankruptcy Court on July 29, 2020 (the "**Cementing Bidding Procedures Order**"), which, *inter alia*, (a) authorizes and approves the Bidding Procedures (as defined therein) for the Sale of the Cementing Business (as those terms are defined therein), (b) establishes certain dates and deadlines including the Bid Deadline and the date of the Auction (as those terms are defined therein), if any, (c) approves the form and manner of the Auction, if any, and Winning Bidder (as defined therein), (d) approves the Assumption and Assignment Procedures (as defined therein) for the assumption and assignment of certain executory contracts and unexpired leases and related cure amounts, and (e) grants related relief. Considering that the Cementing Bidding Procedures Order includes certain assets of BJ Canada located in Canada, BJ Canada seeks an Order recognizing and giving force and effect in Canada to the Cementing Bidding Procedures Order.

- Zemlak Affidavit No. 3, para. 32. Exhibits "14" and "15".

8. Fracking Bidding Procedures Order

44. The Order (I) Approving the Bidding Procedures With Respect to Certain of the Debtor's Fracking Equipment and Intellectual Property, (II) Scheduling an Auction and a Sale Hearing, (III) Approving the Form and Manner of Notices Related Thereto, (IV) Approving Contract Assumption and Assignment Procedures, and (V) Granting Related Relief, granted by the U.S. Bankruptcy Court on July 29, 2020 (the "**Fracking Bidding Procedures Order**") which, *inter alia*, (a) authorizes and approves the Bidding Procedures (as defined therein) for the Sale of the Assets (as those terms are defined therein), (b) establishes certain dates and deadlines, including the Bid Deadline and the date of the Auction (as those terms are defined therein), if any, (c) approves the form and manner of the Auction, if any, and the Sale Hearing

(as defined therein), (d) approves the Assumption and Assignment Procedures (as defined therein) for the assumption and assignment of certain executory contracts and unexpired leases and related cure amounts, and (e) grants related relief. Considering that the Fracking Bidding Procedures Order includes certain intellectual property assets of BJ Services, LLC located in Canada, BJ Canada seeks an Order recognizing and giving force and effect in Canada to the Fracking Bidding Procedures Order.

- Zemlak Affidavit No. 3, para. 33, Exhibits "16" and "17".

9. Rejection-Assumption Procedures Order

45. The Order (I) Authorizing and Approving Procedures to Assume, Assume and Assign, and Reject Executory Contracts and Unexpired Leases, and (II) Granting Related Relief, granted by the U.S. Bankruptcy Court on July 29, 2020 (the "**Rejection – Assumption Procedures Order**") which authorizes and approves procedures by which the Chapter 11 Debtors may assume, assume and assign, and reject certain of their prepetition executory contracts and unexpired leases, and grants related relief. Considering that the Rejection – Assumption Procedures Order will prevent the Chapter 11 Debtors from having to file separate motions to reject or assume individual contracts and leases and minimize the cost to the respective Chapter 11 Debtors' estates, BJ Canada seeks an Order recognizing and giving force and effect in Canada to the Rejection – Assumption Procedures Order.

- Zemlak Affidavit No. 3, para. 34, Exhibits "18" and "19".

V. RELIEF SOUGHT

46. BJ Canada seeks Orders on the terms proposed in the draft form of Orders submitted along with this Bench Brief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 12th day of August 2020.

BENNETT JONES LLP

Per: _____

Kelsey Meyer / Keely Cameron
Counsel for the Applicant,
BJ Services Holdings Canada, ULC

VI. TABLE OF AUTHORITIES

TAB

1. *Horsehead Holding Corp., Re,* 2016 ONSC 958.
2. *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36.
3. *Massachusetts Elephant & Castle Group Inc., Re*, 2011 ONSC 4201.
4. *Caesars Entertainment Operating Co., Re,* 2015 ONSC 712.
5. *Ultra Petroleum Corp.*, 2017 YKSC 9.
6. *Hollander Sleep Products, LLC (Re*), [2019] O.J. No. 2817.
7. *Probe Resources Ltd., Re*, 2011 BCSC 552.
8. *Babcock & Wilcox Canada Ltd., Re*, 2000 CarswellOnt 704.
9. *Minden Schipper & Associates Inc.,* 2006 MBQB 292.
10. *Xerium Technologies Inc.,* Re, 2010 ONSC 3974.

TAB 1

2016 ONSC 958
Ontario Superior Court of Justice [Commercial List]

Horsehead Holding Corp., Re

2016 CarswellOnt 1748, 2016 ONSC 958, 263 A.C.W.S. (3d) 21, 33 C.B.R. (6th) 276

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of Certain Proceedings Taken in the United States Bankruptcy Court with Respect to Horsehead Holding Corp., Horsehead Corporation, Horsehead Metal Products, LLC, the International Metals Reclamation Company, LLC and Zochem Inc. (collectively, the "Debtors")

Newbould J.

Heard: February 5, 2016
Judgment: February 8, 2016
Docket: CV-16-11271-00CL

Counsel: Sam Babe, Martin E. Kovnats, Jeffrey Merk, J. Nemers, for Applicant
Ryan Jacobs, Jane Dietrich, Natalie Levine, for DIP lenders
Christopher G. Armstrong, Sydney Young, Caroline Descours, for Richter Advisory Group as proposed Information Officer
Linc A. Rogers, Christopher Burr, for PNC Bank, National Association
Denis Ellickson, for UNIFOR Local 591G

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Debtors operated in zinc and nickel-bearing waste industries — They held market-leading position in zinc production in United States, zinc oxide production in North America, EAF dust recycling in North America, and were leading environmental service provider to U.S. steel industry — Debtor Z Inc. was Canadian corporation and was foreign representative of debtors — Other debtors were U.S. corporations — Z Inc. and U.S. debtors maintained highly integrated business — Debtors reached agreement for senior secured super-priority debtor-in-possession (DIP) credit facility in amount of US $90 million to allow Z Inc. to pay off obligations to U.S. bank and to finance debtors' operations and chapter 11 proceedings — Condition of advance under DIP facility was granting of super-priority charge over assets of debtors in Canada in favour of DIP lender — Debtors brought application for orders recognizing First Day Orders made by U.S. Bankruptcy Court in chapter 11 proceedings brought by debtors under U.S. Bankruptcy Code — Application granted — Purpose of Part IV of Corporations' Creditors Arrangement Act was to effect cross-border insolvencies and create system under which foreign insolvency proceedings could be recognized in Canada — There was no question but that chapter 11 proceeding was foreign proceeding and that Z Inc. was foreign representative — Debtors established that foreign proceeding was foreign main proceeding — Order was granted recognizing U.S. interim financing order, and granting security requested for DIP.

APPLICATION for orders recognizing First Day Orders made by U.S. Bankruptcy Court in chapter 11 proceedings brought by debtors under U.S. *Bankruptcy Code*.

***Newbould J.*:**

1 On February 5, 2016 an application was brought by Zochem Inc. ("Zochem"), in its capacity as foreign representative of itself as well as Horsehead Holding Corp., Horsehead Corporation, Horsehead Metal Products, LLC ("Horsehead Metals"), and The International Metals Reclamation Company, LLC ("INMETCO") for orders pursuant to sections 46 through 49 of the *CCAA* recognizing First Day Orders made by Judge Mary Walrath of the U.S. Bankruptcy Court for the District of Delaware in chapter 11 proceedings brought by the debtors under the U.S. Bankruptcy Code.

2 At the conclusion of the hearing I made the orders sought with reasons to follow. These are my reasons for making the orders.

3 The debtors operate in the zinc and nickel-bearing waste industries through three business units: Horsehead Corporation and its subsidiaries (collectively, "Horsehead"), Zochem, and INMETCO. Horsehead is a prominent recycler of electric arc furnace ("EAF") dust, a zinc-containing waste generated by North American steel "mini-mills", and in turn uses the recycled EAF dust to produce specialty zinc and zinc-based products. Zochem is a producer of zinc oxide. INMETCO is a recycler of nickel-bearing wastes and nickel-cadmium batteries, and a producer of nickel-chromium-molybdenum-iron remelt alloy for the stainless steel and specialty steel industries. Collectively, the debtors hold a market-leading position in zinc production in the United States, zinc oxide production in North America, EAF dust recycling in North America, and are a leading environmental service provider to the U.S. steel industry.

4 Zochem is a Canada Business Corporations Act corporation with its head office in Pittsburgh, Pennsylvania and its operations located in owned premises at 1 Tilbury Court, Brampton, Ontario. Zochem's registered office address is the Ontario premises.

5 Zochem is one of the largest single-site producers of zinc oxide in North America. Zinc oxide is used as an additive in various materials and products, including plastics, ceramics, glass, rubbers, cement, lubricants, pigments, sealants, ointments, fire retardants, and batteries. The debtors sell zinc oxide to over 250 producers of tire and rubber products, chemicals, paints, plastics, and pharmaceuticals, and have supplied zinc oxide to the majority of their largest customers for over ten years.

6 As of December 31, 2015, Zochem had 19 salaried personnel and 25 hourly personnel. Approximately 25 of these employees are organized under Unifor and its Local 591-G-850, whose collective labour agreement is set to expire on June 30, 2016.

7 Zochem maintains separate pension plans for its salaried and hourly personnel, which have been closed to new members since July 1, 2012. Newer employees have joined Zochem's group RRSP. According to a report prepared by Corporate Benefit Analysis, Inc., the pensions were, collectively, overfunded as at December 31, 2015, though the salaried plan had a small unfunded projected benefit obligation in the amount of $181,499, which is to be paid next week. Neither plan has been wound up.

8 On April 29, 2014, Zochem, as borrower, and Horsehead Holding, as guarantor, entered into a U.S. $20 million secured revolving credit facility (the "Zochem Facility") with PNC Bank, National Association ("PNC"), as agent and lender. The Zochem Facility is secured by a first priority lien (subject to certain permitted liens) on substantially all of Zochem's tangible and intangible personal property, and a charge on the Brampton, Ontario premises of Zochem. Zochem's obligations to PNC are guaranteed by its parent, Horsehead Holding. On January 27, 2016, PNC assigned its position as lender under the Zochem Facility to an arm's length party. PNC remains the agent under Zochem Facility.

9 Three out of four of Zochem's officers and three out of four of its directors are residents of Pennsylvania. Most of Zochem's officers are also officers of each of the other debtors. Zochem's statutorily required one Canadian director (representing 25% of the board) is a partner at the law firm Aird & Berlis LLP, the debtors' Canadian counsel. The only Zochem officer resident in Canada is the plant's general manager, who formerly was resident in Pennsylvania and employed by the U.S. debtors. Otherwise, all local functions associated with managing and operating the Zochem facility are performed from the debtors' Pittsburgh, Pennsylvania headquarters in the United States.

10 Zochem and the U.S. debtors maintain a highly integrated business. Zochem's communications decisions, pricing decisions, and business development decisions are made in Pittsburgh. Zochem's accounts receivable, accounts payable and treasury departments are also located in Pittsburgh.

11 Zochem operates a cash management system whereby:

a. all receipts flow into a collection account at PNC in the United States, in part via a lockbox maintained at PNC;

b. funds from the PNC collection account are transferred daily into an operating account at PNC in the United States; and

c. funds are then transferred, as the debtors' treasury department (in Pittsburgh) determines is required, to a U.S. dollar operating account and a Canadian dollar operating account at Scotiabank in Canada to pay vendors and payroll, as applicable.

12 The debtors in the United States have had limited access to liquidity since January 5, 2016 when their lender, Macquarie Bank Limited ("Macquarie"), issued a notice of default and froze certain of their bank accounts, including their main operating account. On January 6, 2016, Zochem's lender, PNC, also asserted an event of default. On January 13, 2016, PNC froze certain of the debtors' bank accounts associated with their Zochem operations, and demanded immediate payment of all outstanding obligations. PNC's demand was accompanied by a notice of intention to enforce security under section 244 of the *BIA*. Although the debtors entered into forbearance agreements with Macquarie and PNC, the term of those agreements expired on February 1, 2016.

13 With the assistance of Lazard Middle Market LLC, the debtors reached agreement for a senior secured super priority debtor-in-possession credit facility in the amount of U.S. $90 million from a group of Horsehead Holding secured noteholders. The DIP facility is intended to pay off the Zochem's obligations to PNC and to finance the debtors' operations and the chapter 11 proceedings. A condition of advance under the DIP facility is the granting of a super-priority charge over the assets of the debtors in Canada in favour of the DIP lender.

14 On February 3, 2016 Judge Walrath of the U.S. Bankruptcy Court granted the following First Day Orders:

(a) Joint Administration Order;

(b) Foreign Representative Order;

(c) Interim Cash Management Order;

(d) Interim Wages and Benefits Order;

(e) Interim Shippers and Lien Claimants Order;

(f) Interim Utilities Order;

(g) Interim Insurance Order;

(h) Interim Prepetition Taxes Order;

(i) Interim Critical Vendors Order; and

(j) Interim Financing Order.

Analysis

15 The purpose of Part IV of the *CCAA* is to effect cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada. See my comments on the *BIA* version of the same provisions in *MtGox Co., Re* (2014), 20 C.B.R. (6th) 307 (Ont. S.C.J. [Commercial List]).

16 Pursuant to section 46(1) of the *CCAA*, a foreign representative may apply to the court for recognition of a foreign proceeding in respect of which he or she is a foreign representative.

17 Pursuant to section 47 of the *CCAA*, two requirements must be met for an order recognizing a foreign proceeding:

a. the proceeding is a "foreign proceeding"; and

b. the applicant is a "foreign representative" in respect of that foreign proceeding.

18 Section 45(1) of the *CCAA* defines a "foreign proceeding" as any judicial proceeding, including interim proceedings, in a jurisdiction outside of Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

19 Section 45(1) of the *CCAA* defines a "foreign representative" to include one who is authorized in a foreign proceeding in respect of a debtor company to act as a representative in respect of the foreign proceeding. In the chapter 11 proceeding, the debtors applied to have Horsehead Holding Corp. named as the foreign representative. Judge Walrath for reasons I will discuss had concerns regarding the position of Zochem and directed that Zochem be named as the foreign representative.

20 There is no question but that the chapter 11 proceeding is a foreign proceeding and that Zochem is a foreign representative. Thus it has been established that the chapter 11 proceeding should be recognized in this Court as a foreign proceeding.

21 Once it has determined that a proceeding is a foreign proceeding, a court is required, pursuant to section 47(2) of the *CCAA*, to specify in its order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

22 Section 45(1) of the *CCAA* defines a foreign main proceeding as a "foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests" ("COMI"). Section 45(2) of the *CCAA* provides that, in the absence of proof to the contrary, a debtor company's registered office is deemed to be its COMI. In circumstances where it is necessary to go beyond the s. 45 (2) registered office presumption, the following principal factors, considered as a whole, will indicate whether the location in which the proceeding has been filed is the debtor's centre of main interests:

(1) the location is readily ascertainable by creditors,

(2) the location is one in which the debtor's principal assets or operations are found; and

(3) the location is where the management of the debtor takes place.

23 See *Lightsquared LP, Re* (2012), 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List]). In *Lightsquared*, Justice Morawetz further stated:

> 26. In most cases, these factors will all point to a single jurisdiction as the centre of main interests. In some cases, there may be conflicts among the factors, requiring a more careful review of the facts. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. In all cases, however, the review is designed to determine that the location of the proceeding, in fact, corresponds to where the debtor's true seat or principal place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings.

24 In this case, all of the factors do not point to a single jurisdiction as the COMI as Zochem's operations are located in Brampton, Ontario.

25 In the present case, the applicants, supported by the proposed Information Officer, contend that Zochem's COMI is in the United States because:

(i) all the debtors other than Zochem, comprising Zochem's corporate family, are incorporated, and have their registered head office, in the United States;

(ii) all the debtors, including, Zochem are managed from Pittsburgh, Pennsylvania;

(iii) all three of Zochem's "inside" directors (comprising 75% of the board) are residents of Pennsylvania;

(iv) all of Zochem's officers are Pennsylvania residents, with the one exception of its general manager who is a former Pennsylvania resident and employee of the other debtors;

(v) most of Zochem's officers are also officers of each of the other debtors;

(vi) Zochem is operational in its focus and all local functions associated with managing and operating the Zochem facility are performed from the debtors' Pittsburgh headquarters;

(vii) Zochem's communications decisions, pricing decisions, and business development decisions are made in Pittsburgh;

(viii) Zochem's accounts receivable, accounts payable and treasury departments are located in Pittsburgh;

(ix) Zochem's cash management system is centred in the United States;

(x) Zochem's existing credit facilities are with a bank in Pittsburgh; and

(xi) the debtors are all managed in the United States as an integrated group from a corporate, strategic, financial and management perspective.

26 In this case it is perhaps an academic exercise to decide if the foreign proceeding is a main or non-main proceeding because it is appropriate for a stay to be ordered in either event. However, I am satisfied that for our purposes the applicants have established that the foreign proceeding is a foreign main proceeding.

27 The only matter that is somewhat contentious is the recognition of the interim financing order (interim DIP order) made by Judge Walrath and the request for an order providing for a charge for the benefit of the DIP lender.

28 Counsel for the Union went on the record as opposing the granting of a charge because although there will be no underfunding of the pension plans upon the granting of the DIP facility, it is possible in the future that there may be underfunding. The pension plans are not being wound up and there is no evidence at the moment that there is a risk of future underfunding or in what amount. In the circumstances I do not see the position of the Union as an impediment to the granting of the relief requested.

29 When recognizing a financing order granted by a foreign court, consideration should be given as to whether there would be any material adverse interest to any Canadian interests. See *Re Xinergy Ltd.*, 2015 ONSC 2692 (Ont. S.C.J. [Commercial List]), at para 20.

30 It was such a concern that led Judge Walrath to require changes to the interim DIP order that was applied for.

31 The debtors sought interim approval from the U.S. Court of a senior secured super priority DIP credit facility in the amount of $90 million offered by the DIP lenders. The Proposed DIP Facility contemplated that the liens granted in connection with the DIP Facility would be first-priority liens over a portion of the debtors' assets (including all of the assets of Zochem and the assets of the debtors subject to a first-priority lien in respect of the Senior Secured Notes), and second-priority liens with respect to the assets of the U.S. debtors that are presently subject to a first-priority lien in favour of Macquarie.

32 Under the Proposed DIP Facility, the maximum amount permitted to be advanced on an interim basis was $40 million, and it was contemplated that all of the debtors would be jointly and severally liable for all advances made. The contemplated uses of the initial $40 million DIP advance were approximately $18.5 million to pay out the Zochem Facility (including a $1 million forbearance fee), with the balance of the advances being used to fund the operations and restructuring activities of the Debtors during the interim period until a final order approving the Proposed DIP Facility is sought from the U.S. Court in late February.

33 At the hearing on February 3, 2016, Judge Walrath raised concerns about the position of Zochem, including her concern that no independent counsel for Zochem considered whether the DIP facility was in the best interest of Zochem as there was a conflict of interest in the three U.S. directors of Zochem approving Zochem to be jointly and severally liable for the entire DIP loan. Judge Walrath stated that she would consider a DIP facility that obligates Zochem only to the extent there is a direct benefit to Zochem, i.e. payment of its debt or a loan which they use in their operations for working capital.

34 After an adjournment, the debtors and the DIP lenders agreed to certain interim amendments to the Proposed DIP Facility including a provision that the maximum liability of Zochem pursuant to the Proposed DIP Facility in the interim period would be capped at $25 million (reduced from the prior contemplated maximum amount of $40 million). Counsel for the debtors advised Judge Walrath that the $25 million would reflect both the payoff of the PNC loan and reflect the fact that Zochem continues to have a funding need. The debtors also proffered testimony that

> 1. Zochem is approximately break-even on a cash flow basis, and was projected to be approximately $1 million dollars cash flow positive over the following four week period, not accounting for any disruption in its business, including, for example, a notice that the debtors received from one of the largest vendors saying that they will reprice their business with the debtors, and that they will demand that the debtors pay one month in advance.
>
> 2. The break-even cash position did not take into account any bankruptcy related costs, all of which are allocated to Horsehead.
>
> 3. The debtors, in their business judgement, determined that it would not be prudent to operate the business on a break-even basis given business pressures, and liquidity from the Proposed DIP Facility would be available to Zochem to provide a liquidity cushion for the first four weeks of the case.

35 What essentially Judge Walrath was told in answer to her concerns was that the difference between the approximately $18.5 million needed to pay Zochem's loan facility with PNC and the $25 million limit of Zochem's liability was to be used as a cushion for Zochem's cash flow needs. In the circumstances, and taken the proffered testimony that Zochem required a cushion, I suggested to the parties that a term of my order recognizing the U.S. interim financing order should be that the difference between the $18.5 million and the $25 million was in the interim to be used only for Zochem working capital requirements.

36 After a break to permit the parties to discuss this situation, counsel for the DIP lenders said they were not prepared to lend on that basis and that they wished to adjourn the matter until the following Monday. The problem with this request was two-fold. The first was that it was a requirement of the DIP that an order be made by this Court by the date of the hearing on February 5, 2016, and without an order the debtors had no right to the DIP facility. The second was that the interim advance under the DIP was required to meet the payroll that day.

37 The proposed Information Officer pointed out that it is estimated by the debtors that up to $38.5 million will be drawn under the Proposed DIP Facility in the interim period to be used as follows:

> (a) approximately $18.5 million will be used to repay the Zochem Facility (including the $1 million forbearance fee payable to PNC);
>
> (b) approximately $4 million will be used to pay fees associated with the Proposed DIP Facility; and
>
> (c) approximately $15.6 million will be used to finance the debtors' operations and restructuring activities pursuant to an agreed upon budget, including payment of professional fees, utility deposits and certain critical materials and freight vendors.

38 In the circumstances I made the order recognizing the U.S. interim financing order, and granting the security requested for the DIP, which in my view met the tests as enunciated in the authorities, including the factors set out in *Indalex Ltd., Re* (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List]) for the guarantee of a Canadian debtor of its U.S. parent's obligations under

the DIP facility, and as set out in *Crystallex International Corp., Re* (2012), 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]); aff'd (2012), 4 B.L.R. (5th) 1 (Ont. C.A.).

39 However I stated at the hearing, and reiterate, that if in the interim period a request is made for further funding for working capital requirements of Zochem because not enough available cash was kept for that purpose, I would be extremely loathe to grant any such further relief.

40 The directors of Zochem have fiduciary duties to Zochem. In *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), at 123; aff'd (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), at 122 Justice Farley stated clearly that the directors' duties are to the corporation of which they are directors and they cannot just be yes men for the controlling shareholders:

> It may well be that the corporate life of a nominee director who votes against the interest of his "appointing" shareholder will be neither happy nor long. However, the role that any director must play (whether or not a nominee director) is that he must act in the best interests of the corporation. If the interests of the corporation (and indirectly the interests of the shareholders as a whole) require that the director vote in a certain way, it must be the way that he conscientiously believes after a reasonable review is the best for the corporation. The nominee director's obligation to his "appointing" shareholder would seem to me to include the duty to tell the appointer that his requested course of action is wrong if the director in fact feels this way. Such advice, although likely initially unwelcome, may well be valuable to the appointer in the long run. The nominee director cannot be a "Yes man"; he must be an analytical person who can say "Yes" or "No" as the occasion requires (or to put it another way, as the corporation requires).

41 I trust the directors of Zochem will keep these principles in mind. I direct that they be given a copy of these reasons for judgment.

42 I also recognized all of the other First Day Orders made by Judge Walrath. They were appropriate and no opposition to their recognition was voiced.

Application granted.

End of Document

TAB 2

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to June 6, 2016

Last amended on February 26, 2015

À jour au 6 juin 2016

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PART II

Jurisdiction of Courts

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

R.S., c. C-25, s. 9.

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made

PARTIE II

Juridiction des tribunaux

Le tribunal a juridiction pour recevoir des demandes

9 (1) Toute demande prévue par la présente loi peut être faite au tribunal ayant juridiction dans la province où est situé le siège social ou le principal bureau d'affaires de la compagnie au Canada, ou, si la compagnie n'a pas de bureau d'affaires au Canada, dans la province où est situé quelque actif de la compagnie.

Un seul juge peut exercer les pouvoirs, sous réserve d'appel

(2) Les pouvoirs conférés au tribunal par la présente loi peuvent être exercés par un seul de ses juges, sous réserve de l'appel prévu par la présente loi. Ces pouvoirs peuvent être exercés en chambre, soit durant une session du tribunal, soit pendant les vacances judiciaires.

S.R., ch. C-25, art. 9.

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état

Miscellaneous

Certain sections of *Winding-up and Restructuring Act* do not apply

41 Sections 65 and 66 of the *Winding-up and Restructuring Act* do not apply to any compromise or arrangement to which this Act applies.

2005, c. 47, s. 131.

Act to be applied conjointly with other Acts

42 The provisions of this Act may be applied together with the provisions of any Act of Parliament, or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

2005, c. 47, s. 131.

Claims in foreign currency

43 If a compromise or an arrangement is proposed in respect of a debtor company, a claim for a debt that is payable in a currency other than Canadian currency is to be converted to Canadian currency as of the date of the initial application in respect of the company unless otherwise provided in the proposed compromise or arrangement.

2005, c. 47, s. 131.

PART IV

Cross-border Insolvencies

Purpose

Purpose

44 The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

Dispositions diverses

Inapplicabilité de certains articles de la *Loi sur les liquidations et les restructurations*

41 Les articles 65 et 66 de la *Loi sur les liquidations et les restructurations* ne s'appliquent à aucune transaction ni à aucun arrangement auxquels la présente loi est applicable.

2005, ch. 47, art. 131.

Application concurrente d'autres lois

42 Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

2005, ch. 47, art. 131.

Créances en monnaies étrangères

43 Dans le cas où une transaction ou un arrangement est proposé à l'égard d'une compagnie débitrice, la réclamation visant une créance en devises étrangères doit être convertie en monnaie canadienne au taux en vigueur à la date de la demande initiale, sauf disposition contraire de la transaction ou de l'arrangement.

2005, ch. 47, art. 131.

PARTIE IV

Insolvabilité en contexte international

Objet

Objet

44 La présente partie a pour objet d'offrir des moyens pour traiter des cas d'insolvabilité en contexte international et de promouvoir les objectifs suivants :

a) assurer la coopération entre les tribunaux et les autres autorités compétentes du Canada et ceux des ressorts étrangers intervenant dans de tels cas;

b) garantir une plus grande certitude juridique dans le commerce et les investissements;

c) administrer équitablement et efficacement les affaires d'insolvabilité en contexte international, de manière à protéger les intérêts des créanciers et des

(d) the protection and the maximization of the value of debtor company's property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

2005, c. 47, s. 131.

d) protéger les biens des compagnies débitrices et en optimiser la valeur;

e) faciliter le redressement des entreprises en difficulté, de manière à protéger les investissements et préserver les emplois.

2005, ch. 47, art. 131.

Interpretation

Definitions

45 (1) The following definitions apply in this Part.

foreign court means a judicial or other authority competent to control or supervise a foreign proceeding. (*tribunal étranger*)

foreign main proceeding means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests. (*principale*)

foreign non-main proceeding means a foreign proceeding, other than a foreign main proceeding. (*secondaire*)

foreign proceeding means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization. (*instance étrangère*)

foreign representative means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to

(a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or

(b) act as a representative in respect of the foreign proceeding. (*représentant étranger*)

Centre of debtor company's main interests

(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

2005, c. 47, s. 131.

Définitions

Définitions

45 (1) Les définitions qui suivent s'appliquent à la présente partie.

instance étrangère Procédure judiciaire ou administrative, y compris la procédure provisoire, régie par une loi étrangère relative à la faillite ou à l'insolvabilité qui touche les droits de l'ensemble des créanciers et dans le cadre de laquelle les affaires financières et autres de la compagnie débitrice sont placées sous la responsabilité ou la surveillance d'un tribunal étranger aux fins de réorganisation. (*foreign proceeding*)

principale Qualifie l'instance étrangère qui a lieu dans le ressort où la compagnie débitrice a ses principales affaires. (*foreign main proceeding*)

représentant étranger Personne ou organe qui, même à titre provisoire, est autorisé dans le cadre d'une instance étrangère à surveiller les affaires financières ou autres de la compagnie débitrice aux fins de réorganisation, ou à agir en tant que représentant. (*foreign representative*)

secondaire Qualifie l'instance étrangère autre que l'instance étrangère principale. (*foreign non-main proceeding*)

tribunal étranger Autorité, judiciaire ou autre, compétente pour contrôler ou surveiller des instances étrangères. (*foreign court*)

Lieu des principales affaires

(2) Pour l'application de la présente partie, sauf preuve contraire, le siège social de la compagnie débitrice est présumé être le lieu où elle a ses principales affaires.

2005, ch. 47, art. 131.

Recognition of Foreign Proceeding

Application for recognition of a foreign proceeding

46 (1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

Documents that must accompany application

(2) Subject to subsection (3), the application must be accompanied by

(a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;

(b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and

(c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

Documents may be considered as proof

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

Other evidence

(4) In the absence of the documents referred to in paragraphs (2)(a) and (b), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

Translation

(5) The court may require a translation of any document accompanying the application.

2005, c. 47, s. 131.

Order recognizing foreign proceeding

47 (1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

Reconnaissance des instances étrangères

Demande de reconnaissance de l'instance étrangère

46 (1) Le représentant étranger peut demander au tribunal de reconnaître l'instance étrangère dans le cadre de laquelle il a qualité.

Documents accompagnant la demande de reconnaissance

(2) La demande de reconnaissance est accompagnée des documents suivants :

a) une copie certifiée conforme de l'acte — quelle qu'en soit la désignation — introductif de l'instance étrangère ou le certificat délivré par le tribunal étranger attestant l'introduction de celle-ci;

b) une copie certifiée conforme de l'acte — quelle qu'en soit la désignation — autorisant le représentant étranger à agir à ce titre ou le certificat délivré par le tribunal étranger attestant la qualité de celui-ci;

c) une déclaration faisant état de toutes les instances étrangères visant la compagnie débitrice qui sont connues du représentant étranger.

Documents acceptés comme preuve

(3) Le tribunal peut, sans preuve supplémentaire, accepter les documents visés aux alinéas (2)a) et b) comme preuve du fait qu'il s'agit d'une instance étrangère et que le demandeur est le représentant étranger dans le cadre de celle-ci.

Autre preuve

(4) En l'absence des documents visés aux alinéas (2)a) et b), il peut accepter toute autre preuve — qu'il estime indiquée — de l'introduction de l'instance étrangère et de la qualité du représentant étranger.

Traduction

(5) Il peut exiger la traduction des documents accompagnant la demande de reconnaissance.

2005, ch. 47, art. 131.

Ordonnance de reconnaissance

47 (1) S'il est convaincu que la demande de reconnaissance vise une instance étrangère et que le demandeur est un représentant étranger dans le cadre de celle-ci, le tribunal reconnaît, par ordonnance, l'instance étrangère en cause.

Nature of foreign proceeding to be specified

(2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

2005, c. 47, s. 131.

Order relating to recognition of a foreign main proceeding

48 (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and

(d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

Scope of order

(2) The order made under subsection (1) must be consistent with any order that may be made under this Act.

When subsection (1) does not apply

(3) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.

Application of this and other Acts

(4) Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

2005, c. 47, s. 131.

Nature de l'instance

(2) Il précise dans l'ordonnance s'il s'agit d'une instance étrangère principale ou secondaire.

2005, ch. 47, art. 131.

Effets de la reconnaissance d'une instance étrangère principale

48 (1) Sous réserve des paragraphes (2) à (4), si l'ordonnance de reconnaissance précise qu'il s'agit d'une instance étrangère principale, le tribunal, par ordonnance, selon les modalités qu'il estime indiquées :

a) suspend, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoit, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdit, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie;

d) interdit à la compagnie de disposer, notamment par vente, des biens de son entreprise situés au Canada hors du cours ordinaire des affaires ou de ses autres biens situés au Canada.

Compatibilité

(2) L'ordonnance visée au paragraphe (1) doit être compatible avec les autres ordonnances rendues sous le régime de la présente loi.

Non-application du paragraphe (1)

(3) Le paragraphe (1) ne s'applique pas si au moment où l'ordonnance de reconnaissance est rendue une procédure a déjà été intentée sous le régime de la présente loi contre la compagnie débitrice.

Application de la présente loi et d'autres lois

(4) Le paragraphe (1) n'a pas pour effet d'empêcher la compagnie débitrice d'intenter ou de continuer une procédure sous le régime de la présente loi, de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*.

2005, ch. 47, art. 131.

Other orders

49 (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and

(c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

Restriction

(2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

Application of this and other Acts

(3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

2005, c. 47, s. 131.

Terms and conditions of orders

50 An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

2005, c. 47, s. 131.

Commencement or continuation of proceedings

51 If an order is made recognizing a foreign proceeding, the foreign representative may commence and continue proceedings under this Act in respect of a debtor company as if the foreign representative were a creditor of the debtor company, or the debtor company, as the case may be.

2005, c. 47, s. 131.

Autre ordonnance

49 (1) Une fois l'ordonnance de reconnaissance rendue, le tribunal, sur demande présentée par le représentant étranger demandeur, peut, s'il est convaincu que la mesure est nécessaire pour protéger les biens de la compagnie débitrice ou les intérêts d'un ou plusieurs créanciers, rendre toute ordonnance qu'il estime indiquée, notamment pour :

a) s'il s'agit d'une instance étrangère secondaire, imposer les interdictions visées au paragraphe 48(1);

b) régir l'interrogatoire des témoins et la manière de recueillir des preuves ou fournir des renseignements concernant les biens, affaires financières et autres, dettes, obligations et engagements de la compagnie débitrice;

c) autoriser le représentant étranger à surveiller les affaires financières et autres de la compagnie débitrice qui se rapportent à ses opérations au Canada.

Restriction

(2) Si, au moment où l'ordonnance de reconnaissance est rendue, une procédure a déjà été intentée sous le régime de la présente loi contre la compagnie débitrice, l'ordonnance prévue au paragraphe (1) doit être compatible avec toute ordonnance qui peut être rendue dans le cadre de cette procédure.

Application de la présente loi et d'autres lois

(3) L'ordonnance rendue au titre de l'alinéa (1)a) n'a pas pour effet d'empêcher que soit intentée ou continuée, contre la compagnie débitrice, une procédure sous le régime de la présente loi, de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*.

2005, ch. 47, art. 131.

Conditions

50 Le tribunal peut assortir les ordonnances qu'il rend au titre de la présente partie des conditions qu'il estime indiquées dans les circonstances.

2005, ch. 47, art. 131.

Début et continuation de la procédure

51 Une fois l'ordonnance de reconnaissance rendue, le représentant étranger en cause peut intenter ou continuer la procédure visée par la présente loi comme s'il était créancier de la compagnie débitrice ou la compagnie débitrice elle-même, selon le cas.

2005, ch. 47, art. 131.

Obligations

Cooperation — court

52 (1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Cooperation — other authorities in Canada

(2) If any proceedings under this Act have been commenced in respect of a debtor company and an order recognizing a foreign proceeding is made in respect of the debtor company, every person who exercises powers or performs duties and functions under the proceedings under this Act shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Forms of cooperation

(3) For the purpose of this section, cooperation may be provided by any appropriate means, including

(a) the appointment of a person to act at the direction of the court;

(b) the communication of information by any means considered appropriate by the court;

(c) the coordination of the administration and supervision of the debtor company's assets and affairs;

(d) the approval or implementation by courts of agreements concerning the coordination of proceedings; and

(e) the coordination of concurrent proceedings regarding the same debtor company.

2005, c. 47, s. 131; 2007, c. 36, s. 80.

Obligations of foreign representative

53 If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall

(a) without delay, inform the court of

(i) any substantial change in the status of the recognized foreign proceeding,

(ii) any substantial change in the status of the foreign representative's authority to act in that capacity, and

(iii) any other foreign proceeding in respect of the same debtor company that becomes known to the foreign representative; and

Obligations

Collaboration — tribunal

52 (1) Une fois l'ordonnance de reconnaissance rendue, le tribunal collabore dans toute la mesure possible avec le représentant étranger et le tribunal étranger en cause dans le cadre de l'instance étrangère reconnue.

Collaboration — autres autorités compétentes

(2) Si une procédure a été intentée sous le régime de la présente loi contre une compagnie débitrice et qu'une ordonnance a été rendue reconnaissant une instance étrangère visant cette compagnie, toute personne exerçant des attributions dans le cadre de cette procédure collabore dans toute la mesure possible avec le représentant étranger et le tribunal étranger en cause.

Moyens d'assurer la collaboration

(3) Pour l'application du présent article, la collaboration peut être assurée par tout moyen approprié, notamment :

a) la nomination d'une personne chargée d'agir suivant les instructions du tribunal;

b) la communication de renseignements par tout moyen jugé approprié par celui-ci;

c) la coordination de l'administration et de la surveillance des biens et des affaires de la compagnie débitrice;

d) l'approbation ou l'application par les tribunaux des accords concernant la coordination des procédures;

e) la coordination de procédures concurrentes concernant la même compagnie débitrice.

2005, ch. 47, art. 131; 2007, ch. 36, art. 80.

Obligations du représentant étranger

53 Si l'ordonnance de reconnaissance est rendue, il incombe au représentant étranger demandeur :

a) d'informer sans délai le tribunal :

(i) de toute modification sensible du statut de l'instance étrangère reconnue,

(ii) de toute modification sensible de sa qualité,

(iii) de toute autre procédure étrangère visant la compagnie débitrice qui a été portée à sa connaissance;

order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph (1)(a) and the value referred to in paragraph (1)(b) is of that creditor's claim.

2005, c. 47, s. 131.

Court not prevented from applying certain rules

61 (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

Public policy exception

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

2005, c. 47, s. 131; 2007, c. 36, s. 81.

PART V

Administration

Regulations

62 The Governor in Council may make regulations for carrying out the purposes and provisions of this Act, including regulations

(a) specifying documents for the purpose of paragraph 23(1)(f); and

(b) prescribing anything that by this Act is to be prescribed.

2005, c. 47, s. 131; 2007, c. 36, s. 82.

Review of Act

63 (1) Within five years after the coming into force of this section, the Minister shall cause to be laid before both Houses of Parliament a report on the provisions and operation of this Act, including any recommendations for amendments to those provisions.

Reference to parliamentary committee

(2) The report stands referred to the committee of the Senate, the House of Commons or both Houses of Parliament that is designated or established for that purpose, which shall

que la sienne dans l'ordre de collocation prévu par la présente loi n'ont pas reçu un dividende dont le pourcentage d'acquittement est égal au pourcentage d'acquittement des éléments visés aux alinéas (1)a) et b).

2005, ch. 47, art. 131.

Application de règles étrangères

61 (1) La présente partie n'a pas pour effet d'empêcher le tribunal d'appliquer, sur demande faite par le représentant étranger ou tout autre intéressé, toute règle de droit ou d'equity relative à la reconnaissance des ordonnances étrangères en matière d'insolvabilité et à l'assistance à prêter au représentant étranger, dans la mesure où elle n'est pas incompatible avec les dispositions de la présente loi.

Exception relative à l'ordre public

(2) La présente partie n'a pas pour effet d'empêcher le tribunal de refuser de prendre une mesure contraire à l'ordre public.

2005, ch. 47, art. 131; 2007, ch. 36, art. 81.

PARTIE V

Administration

Règlements

62 Le gouverneur en conseil peut, par règlement, prendre toute mesure d'application de la présente loi, notamment :

a) préciser les documents pour l'application de l'alinéa 23(1)f);

b) prendre toute mesure d'ordre réglementaire prévue par la présente loi.

2005, ch. 47, art. 131; 2007, ch. 36, art. 82.

Rapport

63 (1) Dans les cinq ans suivant l'entrée en vigueur du présent article, le ministre présente au Sénat et à la Chambre des communes un rapport sur les dispositions de la présente loi et son application dans lequel il fait état des modifications qu'il juge souhaitables.

Examen parlementaire

(2) Le comité du Sénat, de la Chambre des communes, ou mixte, constitué ou désigné à cette fin, est saisi d'office du rapport et procède dans les meilleurs délais à l'étude de celui-ci et, dans l'année qui suit le dépôt du rapport ou le délai supérieur accordé par le Sénat, la

TAB 3

2011 ONSC 4201
Ontario Superior Court of Justice

Massachusetts Elephant & Castle Group Inc., Re

2011 CarswellOnt 6610, 2011 ONSC 4201, 205 A.C.W.S. (3d) 25, 81 C.B.R. (5th) 102

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

And In the Matter of Certain Proceedings Taken in the United States Bankruptcy Court for the District of Massachusetts Eastern Division with Respect to the Companies Listed on Schedule "A" Hereto (The "Chapter 11 Debtors") Under Section 46 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

MASSACHUSETTS ELEPHANT & CASTLE GROUP, INC. (Applicant)

Morawetz J.

Heard: July 4, 2011
Oral reasons: July 4, 2011
Written reasons: July 11, 2011
Docket: CV-11-9279-00CL

Counsel: Kenneth D. Kraft, Sara-Ann Wilson for Applicant
Heather Meredith for GE Canada Equipment Financing GP

Subject: Insolvency; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Recognition of foreign main proceeding — Debtor companies were integrated business involving locations in U.S. and Canada — Each of debtors, including debtor companies with registered offices in Canada (Canadian Debtors), were managed centrally from U.S. — Debtors brought proceedings in U.S. pursuant to Chapter 11 of United States Bankruptcy Code — U.S Court appointed applicant as foreign representative of Chapter 11 Debtors — Applicant applied to have U.S. Chapter 11 proceedings recognized as foreign main proceeding in Canada under Companies' Creditors Arrangements Act (Act) — Application granted — It was appropriate to recognize foreign proceeding — Foreign proceeding in present case was foreign main proceeding — "Foreign main proceeding" is defined in s. 45(1) of Act as foreign proceeding in jurisdiction where debtor company has centre of its main interest (COMI) — There was sufficient evidence to rebut presumption in s. 45(2) of Act that COMI is registered office of debtor company — For purposes of application, each entity making up Chapter 11 Debtors, including Canadian Debtors, had their COMI in U.S. — Location of debtors' headquarters or head office functions or nerve centre was in U.S. — Debtor's management was located in U.S. — Significant creditor did not oppose relief sought — Mandatory stay ordered under s. 48(1) of Act — Discretionary relief recognizing various orders of U.S. Court, appointing information officer, and limiting quantum of administrative charge, was appropriate and was granted.

APPLICATION for order recognizing U.S. Chapter 11 Proceeding as foreign main proceeding under *Companies' Creditors Arrangement Act*, and other relief.

***Morawetz J.*:**

1 Massachusetts Elephant & Castle Group, Inc. ("MECG" or the "Applicant") brings this application under Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*"). MECG seeks orders pursuant to sections 46 — 49 of the *CCAA* providing for:

(a) an Initial Recognition Order declaring that:

(i) MECG is a foreign representative pursuant to s. 45 of the *CCAA* and is entitled to bring its application pursuant s. 46 of the *CCAA*;

(ii) the Chapter 11 Proceeding (as defined below) in respect of the Chapter 11 Debtors (as set out in Schedule "A") is a "foreign main proceeding" for the purposes of the *CCAA*; and

(iii) any claims, rights, liens or proceedings against or in respect of the Chapter 11 Debtors, the directors and officers of the Chapter 11 Debtors and the Chapter 11 Debtors' property are stayed; and

(b) a Supplemental Order:

(i) recognizing in Canada and enforcing certain orders of the U.S. Court (as defined below) made in the Chapter 11 Proceeding (as defined below);

(ii) granting a super-priority change over the Chapter 11 Debtors' property in respect of administrative fees and expenses; and

(iii) appointing BDO Canada Limited ("BDO") as Information Officer in respect of these proceedings (the "Information Officer").

2 On June 28, 2011, the Chapter 11 Debtors commenced proceedings (the "Chapter 11 Proceeding") in the United States Bankruptcy Court for the District of Massachusetts Eastern Division (the "U.S. Court"), pursuant to Chapter 11 of the *United States Bankruptcy Code*, 11 U.S.C. § 1101-1174 ("*U.S. Bankruptcy Code*").

3 On June 30, 2011, the U.S. Court made certain orders at the first-day hearing held in the Chapter 11 Proceeding, including an order appointing the Applicant as foreign representative in respect of the Chapter 11 Proceeding.

4 The Chapter 11 Debtors operate and franchise authentic, full-service British-style restaurant pubs in the United States and Canada.

5 MECG is the lead debtor in the Chapter 11 Proceeding and is incorporated in Massachusetts. All of the Chapter 11 Debtors, with the exception of Repechage Investments Limited ("Repechage"), Elephant & Castle Group Inc. ("E&C Group Ltd.") and Elephant & Castle Canada Inc. ("E&C Canada") (collectively, the "Canadian Debtors") are incorporated in various jurisdictions in the United States.

6 Repechage is incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ("*CBCA*") with its registered office in Toronto, Ontario. E&C Group Ltd. is also incorporated under the *CBCA* with a registered office located in Halifax, Nova Scotia. E&C Canada Inc. is incorporated under the *Business Corporations Act*, R.S.O. 1990, c. B. 16, and its registered office is in Toronto. The mailing office for E&C Canada Inc. is in Boston, Massachusetts at the location of the corporate head offices for all of the debtors, including Repechage and E&C Group Ltd.

7 In order to comply with s. 46(2) of the *CCAA*, MECG filed the affidavit of Ms. Wilson to which was attached certified copies of the applicable Chapter 11 orders.

8 MECG also included in its materials the declaration of Mr. David Dobbin filed in support of the first-day motions in the Chapter 11 Proceeding. Mr. Dobbin, at paragraph 19 of the declaration outlined the sale efforts being entered into by MECG. Mr. Dobbin also outlined the purpose of the Chapter 11 Proceeding, namely, to sell the Chapter 11 Debtors' businesses as a

going concern on the most favourable terms possible under the circumstances and keep the Chapter 11 Debtors' business intact to the greatest extent possible during the sales process.

9 The issues for consideration are whether this court should grant the application for orders pursuant to ss. 46 — 49 of the *CCAA* and recognize the Chapter 11 Proceeding as a foreign main proceeding.

10 The purpose of Part IV of the *CCAA* is set out in s. 44:

> 44. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote
>
> (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
>
> (b) greater legal certainty for trade and investment;
>
> (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
>
> (d) the protection and the maximization of the value of debtor company's property; and
>
> (e) the rescue of financially troubled businesses to protect investment and preserve employment.

11 Section 46(1) of the *CCAA* provides that "a foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative."

12 Section 47(1) of the *CCAA* provides that there are two requirements for an order recognizing a foreign proceeding:

> (a) the proceeding is a foreign proceeding, and
>
> (b) the applicant is a foreign representative in respect of that proceeding.

13 Canadian courts have consistently recognized proceedings under Chapter 11 of the *U.S. Bankruptcy Code* to be foreign proceedings for the purposes of the *CCAA*. In this respect, see: *Babcock & Wilcox Canada Ltd., Re* (2000), 5 B.L.R. (3d) 75 (Ont. S.C.J. [Commercial List]); *Magna Entertainment Corp., Re* (2009), 51 C.B.R. (5th) 82 (Ont. S.C.J.); *Lear Canada, Re* (2009), 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]).

14 Section 45(1) of the *CCAA* defines a foreign representative as:

> a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor company, to
>
> (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or
>
> (b) act as a representative in respect of the foreign proceeding.

15 By order of the U.S. Court dated June 30, 2011, the Applicant has been appointed as a foreign representative of the Chapter 11 Debtors.

16 In my view, the Applicant has satisfied the requirements of s. 47(1) of the CCAA. Accordingly, it is appropriate that this court recognize the foreign proceeding.

17 Section 47(2) of the *CCAA* requires the court to specify in its order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

18 A "foreign main proceeding" is defined in s. 45(1) of the *CCAA* as "a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interest" ("COMI").

19 Part IV of the *CCAA* came into force in September 2009. Therefore, the experience of Canadian courts in determining the COMI has been limited.

20 Section 45(2) of the *CCAA* provides that, in the absence of proof to the contrary, the debtor company's registered office is deemed to be the COMI. As such, the determination of COMI is made on an entity basis, as opposed to a corporate group basis.

21 In this case, the registered offices of Repechage and E&C Canada Inc. are in Ontario and the registered office of E&C Group Ltd. is in Nova Scotia. The Applicant, however, submits that the COMI of the Chapter 11 Debtors, including the Canadian Debtors, is in the United States and the recognition order should be granted on that basis.

22 Therefore, the issue is whether there is sufficient evidence to rebut the s. 45(2) presumption that the COMI is the registered office of the debtor company.

23 In this case, counsel to the Applicant submits that the Chapter 11 Debtors have their COMI in the United States for the following reasons:

> (a) the location of the corporate head offices for all of the Chapter 11 Debtors, including the Canadian Debtors, is in Boston, Massachusetts;
>
> (b) the Chapter 11 Debtors including the Canadian Debtors function as an integrated North American business and all decisions for the corporate group, including in respect to the operations of the Canadian Debtors, is centralized at the Chapter 11 Debtors head office in Boston;
>
> (c) all members of the Chapter 11 Debtors' management are located in Boston;
>
> (d) virtually all human resources, accounting/finance, and other administrative functions associated with the Chapter 11 Debtors are located in the Boston offices;
>
> (e) all information technology functions of the Chapter 11 Debtors, with the exception of certain clerical functions which are outsourced, are provided out of the United States; and
>
> (f) Repechage is also the parent company of a group of restaurants that operate under the "Piccadilly" brand which operates only in the U.S.

24 Counsel also submits that the Chapter 11 Debtors operate a highly integrated business and each of the debtors, including the Canadian Debtors, are managed centrally from the United States. As such, counsel submits it is appropriate to recognize the Chapter 11 Proceeding as a foreign main proceeding.

25 On the other hand, Mr. Dobbin's declaration discloses that nearly one-half of the operating locations are in Canada, that approximately 43% of employees work in Canada, and that GE Canada Equipment Financing G.P. ("GE Canada") is a substantial lender to MECG. GE Canada does not oppose this application.

26 Counsel to the Applicant referenced *Angiotech Pharmaceuticals Inc., Re*, 2011 CarswellBC 124 (B.C. S.C. [In Chambers]) where the court listed a number of factors to consider in determining the COMI including:

> (a) the location where corporate decisions are made;
>
> (b) the location of employee administrations, including human resource functions;
>
> (c) the location of the debtor's marketing and communication functions;

(d) whether the enterprise is managed on a consolidated basis;

(e) the extent of integration of an enterprise's international operations;

(f) the centre of an enterprise's corporate, banking, strategic and management functions;

(g) the existence of shared management within entities and in an organization;

(h) the location where cash management and accounting functions are overseen;

(i) the location where pricing decisions and new business development initiatives are created; and

(j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

27 It seems to me that, in considering the factors listed in *Re Angiotech*, the intention is not to provide multiple criteria, but rather to provide guidance on how the single criteria, *i.e.* the centre of main interest, is to be interpreted.

28 In certain circumstances, it could be that some of the factors listed above or other factors might be considered to be more important than others, but nevertheless, none is necessarily determinative; all of them could be considered, depending on the facts of the specific case.

29 For example:

(a) the location from which financing was organized or authorized or the location of the debtor's primary bank would only be important where the bank had a degree of control over the debtor;

(b) the location of employees might be important, on the basis that employees could be future creditors, or less important, on the basis that protection of employees is more an issue of protecting the rights of interested parties and therefore is not relevant to the COMI analysis;

(c) the jurisdiction whose law would apply to most disputes may not be an important factor if the jurisdiction was unrelated to the place from which the debtor was managed or conducted its business.

30 However, it seems to me, in interpreting COMI, the following factors are usually significant:

(a) the location of the debtor's headquarters or head office functions or nerve centre;

(b) the location of the debtor's management; and

(c) the location which significant creditors recognize as being the centre of the company's operations.

31 While other factors may be relevant in specific cases, it could very well be that they should be considered to be of secondary importance and only to the extent they relate to or support the above three factors.

32 In this case, the location of the debtors' headquarters or head office functions or nerve centre is in Boston, Massachusetts and the location of the debtors' management is in Boston. Further, GE Canada, a significant creditor, does not oppose the relief sought. All of this leads me to conclude that, for the purposes of this application, each entity making up the Chapter 11 Debtors, including the Canadian Debtors, have their COMI in the United States.

33 Having reached the conclusion that the foreign proceeding in this case is a foreign main proceeding, certain mandatory relief follows as set out in s. 48(1) of the *CCAA*:

> 48. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
>
> (d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

34 The relief provided for in s. 48 is contained in the Initial Recognition Order.

35 In addition to the mandatory relief provided for in s. 48, pursuant to s. 49 of the *CCAA*, further discretionary relief can be granted if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors. Section 49 provides:

> 49. (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order
>
> (a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);
>
> (b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and
>
> (c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

36 In this case, the Applicant applies for orders to recognize and give effect to a number of orders of the U.S. Court in the Chapter 11 Proceeding (collectively, the "Chapter 11 Orders") which are comprised of the following:

> (a) the Foreign Representative Order;
>
> (b) the U.S. Cash Collateral Order;
>
> (c) the U.S. Prepetition Wages Order;
>
> (d) the U.S. Prepetition Taxes Order;
>
> (e) the U.S. Utilities Order;
>
> (f) the U.S. Cash Management Order;
>
> (g) the U.S. Customer Obligations Order; and
>
> (h) the U.S. Joint Administration Order.

37 In addition, the requested relief also provides for the appointment of BDO as an Information Officer; the granting of an Administration Charge not to exceed an aggregate amount of $75,000 and other ancillary relief.

38 In considering whether it is appropriate to grant such relief, portions of s. 49, s. 50 and 61 of the *CCAA* are relevant:

> 50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.
>
> . . . . .
>
> 61. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.
>
> (2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

39 Counsel to the Applicant advised that he is not aware of any provision of any of the U.S. Orders for which recognition is sought that would be inconsistent with the provisions of the CCAA or which would raise the public policy exception as referenced in s. 61(2). Having reviewed the record and having heard submissions, I am satisfied that the supplementary relief, relating to, among other things, the recognition of Chapter 11 Orders, the appointment of BDO and the quantum of the Administrative charge, all as set out in the Supplemental Order, is appropriate in the circumstances and is granted.

40 The requested relief is granted. The Initial Recognition Order and the Supplemental Order have been signed in the form presented.

Schedule "A"

1. Massachusetts Elephant & Castle Group Inc.
2. Repechage Investments Limited
3. Elephant & Castle Group Inc.
4. The Elephant and Castle Canada Inc.
5. Elephant & Castle, Inc. (a Texas Corporation)
6. Elephant & Castle Inc. (a Washington Corporation)
7. Elephant & Castle International, Inc.
8. Elephant & Castle of Pennsylvania, Inc.
9. E & C Pub, Inc.
10. Elephant & Castle East Huron, LLC
11. Elephant & Castle Illinois Corporation
12. E&C Eye Street, LLC
13. E & C Capital, LLC
14. Elephant & Castle (Chicago) Corporation

Application granted.

2011 ONSC 4201, 2011 CarswellOnt 6610, 205 A.C.W.S. (3d) 25, 81 C.B.R. (5th) 102

End of Document

TAB 4

2015 ONSC 712
Ontario Superior Court of Justice

Caesars Entertainment Operating Co., Re

2015 CarswellOnt 3284, 2015 ONSC 712, [2015] O.J. No. 1201, 23 C.B.R. (6th) 154, 251 A.C.W.S. (3d) 553

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C 36, as Amended

In the Matter of the Caesars Entertainment Operating Company, Inc. and the Debtors Listed on Schedule "A" (Collectively, the "Chapter 11 Debtors") Application of Caesars Entertainment Windsor Limited under Section 46 of the Companies' Creditors Arrangement Act

G.B. Morawetz R.S.J.

Heard: January 19, 2015
Judgment: January 19, 2015
Docket: CV-15-10837

Counsel: Katherine McEachern, Matthew Kanter for Caesars Entertainment Operating Company, Inc. et al.
Robin B. Schwill for Ontario Lottery and Gaming Corporation

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Costs — Miscellaneous

Foreign proceeding — Casino/entertainment company CE Inc. and certain subsidiaries filed voluntary petitions in Illinois for Chapter 11 proceedings under U.S. Bankruptcy Code — Three days earlier, competing involuntary petition in respect of CE Inc., but not subsidiaries, had been filed by creditors in Delaware — Delaware court ordered stay of Illinois proceeding pending determination of proper venue — CW Ltd., Ontario corporation, was indirect subsidiary of CE Inc — CW Ltd. intended to continue operating casino in Canada and had no intention to restructure — CW Ltd. brought application in Ontario under Companies' Creditors Arrangement Act (CCAA) for order recognizing Illinois proceeding as foreign main proceeding, declaring CW Ltd. to be foreign representative, and staying proceedings against all Chapter 11 debtors — CW Ltd. also sought Supplemental Order recognizing certain orders made in Illinois, staying proceedings against Chapter 11 debtors, and other relief — Application granted — Chapter 11 proceeding was foreign proceeding for purposes of CCAA — Under s. 45(1) of CCAA, foreign main proceeding was foreign proceeding in debtor's "centre of main interest" (COMI) — In absence of proof to contrary, debtor company's registered office is deemed to be COMI — While CW Ltd. was incorporated and had its registered head office in Ontario, COMI for Chapter 11 Debtors was U.S. — Of 173 Chapter 11 debtors, CW Ltd. was only one not incorporated in U.S. — Chapter 11 proceeding recognized as foreign main proceeding — Foreign representative did not have to be appointed by court — Authorization by CE Inc. and own shareholder was enough to give CW Ltd. such status — In order to maintain status quo and allow CW Ltd. to continue its business during Chapter 11 proceeding, relief in Supplemental Order also granted, except for stay of actions against officers and directors of Chapter 11 debtors.

APPLICATION by subsidiary of foreign debtor company for order declaring it to be foreign representative, recognizing foreign main proceeding, staying proceedings, and other relief under *Companies' Creditors Arrangement Act*.

***G.B. Morawetz R.S.J.*:**

Introduction and Facts

1 On January 15, 2015, Caesars Entertainment Operating Company Inc. ("CEOC") and certain of its subsidiaries (collectively, the "Chapter 11 Debtors") commenced voluntary reorganization proceedings (the "Chapter 11 Proceeding") in the United States Bankruptcy Court for the Northern District of Illinois (the "Illinois Court") by each filing a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 — 1532 (the "Bankruptcy Code").

2 Caesars Windsor Entertainment Limited ("CEWL" or the "Applicant"), an Ontario corporation, is an indirect subsidiary of CEOC. CEWL is a Chapter 11 Debtor.

3 Pursuant to a written resolution (the "Foreign Representation Resolution") of its sole shareholder, Caesars World, Inc. ("Caesars World") CEWL has been authorized to act as the foreign representative of all of the Chapter 11 Debtors for the purposes of recognizing the Chapter 11 Proceeding in Canada, and has been authorized to commence this Application for recognition of the Chapter 11 Proceeding as a foreign proceeding. CEOC has confirmed its authorization of CEWL to act as foreign representative on behalf of the Chapter 11 Debtors.

4 CEWL manages Caesars Windsor Hotel and Casino in Windsor, Ontario (the "Windsor Casino"), for and on behalf of the Ontario Lottery and Gaming Corporation ("OLG").

5 In order to (a) ensure the protection of the Chapter 11 Debtors' Canadian assets and (b) enable the Chapter 11 Debtors, including CEWL, to operate their businesses in the ordinary course during the Chapter 11 Proceeding, CEWL seeks the following orders pursuant to sections 44 and 49 of the *Companies' Creditors Arrangement Act*, R.S.C., 1985 c. C-36 (the "CCAA"):

> a. an "Initial Recognition Order," *inter alia*: (i) declaring that CEWL is a "foreign representative" pursuant to section 45 of the CCAA; (ii) declaring that the Chapter 11 Proceeding is recognized as a "foreign main proceeding" under the CCAA; and (iii) granting a stay of proceedings against the Chapter 11 Debtors; and
>
> b. a "Supplemental Order" pursuant to section 49 of the CCAA, *inter alia*: (i) recognizing in Canada and enforcing certain "first day" orders of the Illinois Court made in the Chapter 11 Proceeding (the "First Day Orders"); (ii) staying any claims, rights, liens or proceedings against or in respect of the Chapter 11 Debtors, the business and property of the Chapter 11 Debtors and the directors and officers of the Chapter 11 Debtors; and (iii) restraining the right of any person or entity to, among other things, discontinue or terminate any supply of products or services to the Chapter 11 Debtors.

6 CEWL submits that the requested orders are necessary and appropriate in the circumstances of this case.

7 On January 12, 2015, a competing involuntary petition in respect of CEOC was filed in the United States Bankruptcy Court for the District of Delaware (the "Delaware Court"). By order of the Delaware Court, the Chapter 11 Proceeding in the Illinois Court has been stayed pending a determination of the proper venue for the Chapter 11 case of CEOC and its subsidiaries (the "Delaware Stay Order"). However, as more fully detailed below, the Delaware Stay Order has permitted the Illinois Court to enter the First Day Orders. CEWL seeks recognition of these First Day Orders in order to ensure stability and the status quo pending the outcome of the venue dispute, and will return to this Court to advise of the outcome of that dispute and to seek any further orders as may be advisable or appropriate in the circumstances.

8 The Chapter 11 Debtors are part of a geographically diversified casino-entertainment group of companies (collectively, "Caesars") headed by Caesars Entertainment Corporation ("CEC"), a U.S. publicly traded company that owns, operates or manages 50 casinos in five countries in three continents, with properties in the United States, Canada, the United Kingdom, South Africa, and Egypt. CEC is not a Chapter 11 Debtor.

9 CEC is the majority shareholder of CEOC, a Chapter 11 Debtor. The remaining Chapter 11 Debtors, including CEWL, are direct and indirect subsidiaries of CEOC. The Chapter 11 Debtors are the primary operating units of the Caesars gaming enterprise.

10 On January 12, 2015, certain petitioning creditors filed an involuntary petition against CEOC under Chapter 11 of the Bankruptcy Code (but not as against the other Chapter 11 Debtors, including CEWL). That involuntary petition has not been resolved.

11 Meanwhile, the Chapter 11 Debtors commenced their own voluntary proceedings in the Illinois Court on January 15, 2015. Hearings were conducted in both the Delaware Court and the Illinois Court on January 15, 2015, which have culminated in the entering of the Delaware Stay Order, and the First Day Orders.

12 Notwithstanding the stay, the Delaware Court has permitted CEOC to obtain the First Day Orders from the Illinois Court, which are currently in effect pending litigation over the appropriate venue for the Chapter 11 case of CEOC and its subsidiaries. As such, while any further steps in the Chapter 11 Proceeding in the Illinois Court beyond the First Day Orders are currently stayed, the Applicant submits it is necessary to obtain recognition of the First Day Orders in Canada pending further developments in the Delaware Court. CEWL will advise the Court of any further developments in respect of the venue litigation, and will seek such further orders as may be advisable in the circumstances.

13 CEWL is the only one of the 173 Chapter 11 Debtors that is not incorporated in the United States. It is a wholly-owned indirect subsidiary of CEOC.

14 The almost exclusive function of CEWL is to manage the Windsor Casino pursuant to an operating agreement dated as of December 14, 2006 (the "Operating Agreement") between Caesars Entertainment Windsor Holding, Inc. (now CEWL) and the Ontario Lottery and Gaming Corporation ("OLG").

15 CEWL supplies the management services set out in the Operating Agreement to OLG, in consideration for an operating fee. CEWL does not have an ownership interest in the Windsor Casino.

16 CEWL operates the Windsor Casino under Caesars' trademarks and branding. The trademarks have been licenced to OLG by Caesars World, a U.S.-based Chapter 11 Debtor and, in turn, sublicensed by OLG.

17 CEWL's primary assets in Canada consist of (a) its rights under the Operating Agreement and (b) cash on deposit from time to time in its corporate bank accounts.

18 Windsor Casino Limited ("WCL") is a wholly-owned subsidiary of CEWL. WCL employs the approximately 2,800 employees who work at the Windsor Casino. Certain of the WCL employees are unionized members of Unifor Local 444 (the "Union"). Neither CEWL nor WCL administers a defined benefit pension plan although WCL does administer a defined contribution pension plan. WCL is not a Chapter 11 Debtor and as such is not a subject of this Application.

19 CEWL intends to operate the Windsor Casino pursuant to the Operating Agreement in the normal course through the Chapter 11 Proceeding. It is not currently contemplated that the Chapter 11 Debtors will restructure any of the business or operations of CEWL or WCL, or compromise any of their obligations.

20 The Record establishes that the Chapter 11 Debtors, including CEWL, are managed from the United States as an integrated group from a corporate, strategic, financial, and management perspective. In particular:

> a. pursuant the USD, CEWL's corporate decision-making (including with respect to the Operating Agreement and the Chapter 11 Proceeding) is done by its sole shareholder, Caesars World, a Florida corporation;

b. the Chief Executive Officer and President of CEWL (who is resident in Windsor, Ontario), reports to the Chairman of the Board of CEWL (the "Chairman"). The Chairman, who is also an officer of CEOC, resides in the United States and works from the Caesars head office in Las Vegas, Nevada;

c. certain centralized services critical to CEWL's functioning, including the administration of the Caesars brand and intellectual property rights, services related to online hotel booking, and administration of the loyalty "Total Rewards" program for customers are administered and handled from the United States;

d. the majority of the strategic marketing and communications decisions regarding the brand and loyalty programs are made, and related functions taken, on behalf of all Chapter 11 Debtors, including CEWL, in the United States;

e. management fees earned by CEWL under the Operating Agreement may be paid by way of dividend from time to time to CEWL's U.S. corporate partners; and

f. strategic and directional decisions for CEWL are ultimately made in the United States.

21 CEWL is party to a unanimous shareholder declaration (the "USD") that grants CEWL's sole shareholder, Caesar's World, all the rights, powers and liabilities of the directors of CEWL. The Foreign Representation Resolution authorized CEWL to file as a Chapter 11 Debtor and to act as the foreign representative of all of the Chapter 11 Debtors for the purposes of recognizing the Chapter 11 Proceeding in Canada. By letter dated January 16, 2015, CEOC confirmed CEWL's authorization to act as foreign representative for the Chapter 11 Debtors.

Issues

22 The issues on this Application are:

a. Should this Court recognize the Chapter 11 Proceeding as a foreign main proceeding pursuant to sections 46 through 48 of the CCAA and grant the Initial Recognition Order sought by the Applicant?

b. Should this Court grant the Supplemental Order sought by the Applicant under section 49 of the CCAA?

Analysis

23 Subsection 46(1) of the CCAA provides that a foreign representative may apply to the Court for recognition of a foreign proceeding in respect of which he or she is a foreign representative.

24 CEWL has been authorized to act as foreign representative of the Chapter 11 Debtors pursuant to the Foreign Representative Resolution executed by CEWL's sole shareholder. CEOC, for itself and on behalf of its subsidiaries, has written to CEWL confirming its authorization to act as foreign representative of the Chapter 11 Debtors. It is CEWL's position that this authorization is sufficient for purposes of subsection 45(1) of the CCAA.

25 There is no language in Part IV of the CCAA that requires a foreign representative to be appointed by order of the court in the foreign proceeding.

26 I accept that for the purposes of this application that CEWL is a "foreign representative".

27 In response to an application brought by a foreign representative under subsection 46(1) of the CCAA, subsection 47(1) of the CCAA provides that the Court shall grant an order recognizing the foreign proceeding if the proceeding is a foreign proceeding and the applicant is a foreign representative in respect of that proceeding.

28 Canadian courts have consistently held that court proceedings under chapter 11 of the Bankruptcy Code constitute "foreign proceedings" for the purposes of the CCAA (see: *Digital Domain Media Group Inc., Re*, 2012 BCSC 1565 (B.C. S.C.

[In Chambers]) at para. 15; and *Lightsquared LP, Re*, 2012 ONSC 2994, 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List]) at para. 18). I am satisfied that the Chapter 11 Proceeding is a "foreign proceeding".

29 CEWL submits that it is appropriate for this Court to recognize the Chapter 11 Proceeding as a foreign main proceeding.

30 If the foreign proceeding is recognized as a foreign main proceeding, there is an automatic stay provided in section 48(1) of the CCAA against proceedings concerning the debtor's property, debts, liabilities or obligations and prohibitions against selling or disposing of property in Canada.

31 Subsection 45(1) of the CCAA provides that a "foreign main proceeding" is a foreign proceeding in the jurisdiction of the debtor company's centre of main interests ("COMI")."

32 For the purposes of Part IV of the CCAA, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the COMI.

33 In *Lightsquared*, the Court found that the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor's COMI:

> a. the location is readily ascertainable by creditors;
>
> b. the location is one in which the debtor's principal assets or operations are found; and
>
> c. the locations where the management of the debtor takes place.

(see: *Lightsquared LP, Re, supra* at para. 25; and *MtGox Co., Re*, 2014 ONSC 5811, 245 A.C.W.S. (3d) 280 (Ont. S.C.J. [Commercial List]) at para. 21)

34 While CEWL is incorporated in Ontario and has its registered head office in Ontario, the Applicant submits that Ontario is not its centre of main interests.

35 I am satisfied that the COMI for the Chapter 11 Debtors is the United States. In arriving at this decision, I have taken into account that CEWL is the only Chapter 11 Debtor that is not incorporated in a U.S. jurisdiction. All of the other 172 Chapter 11 Debtors have their head office or headquarters located in the United States. In addition:

> a. the Chapter 11 Debtors operate as an functionally integrated group from a corporate, strategic, financial and management perspective;
>
> b. pursuant to the USD, CEWL's corporate decisions are made by its sole shareholder, Caesars World, a Florida corporation;
>
> c. CEWL's Chief Executive Officer and President report to the Chairman, who resides in the United States and works from the Caesars head office in Las Vegas, Nevada;
>
> d. centralized services critical to CEWL's operations, including the administration of the Caesars brand and intellectual property rights, services related to online hotel booking, the Windsor Casino website, and administration of the "Total Rewards" loyalty program are operated from the United States;
>
> e. strategic and directional decisions for CEWL are ultimately made in the United States.

36 In the result, I am satisfied that the Chapter 11 Proceeding should be recognized as a "foreign main proceeding".

37 The relief requested in the Initial Recognition Order is granted.

38 In the context of cross-border insolvencies, Canadian courts have consistently encouraged comity and cooperation between courts in various jurisdictions in order to enable enterprises to restructure on a cross-border basis (see: *Lear Canada, Re* (2009), 55 C.B.R. (5th) 57, 2009 CarswellOnt 4232 (Ont. S.C.J. [Commercial List]) at paras. 11 and 17; and *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157, 2000 CarswellOnt 704 (Ont. S.C.J. [Commercial List]) at para. 9).

39 Having reviewed the Record, I am satisfied, based on the facts in Mr. James Smith's affidavit and for the reasons set out in the Applicant's factum, that it is appropriate for the Court in this case to exercise its authority under sections 49(1) and 50 of the CCAA to grant the relief sought in the Supplemental Order, in order to maintain the status quo and protect the assets of the Chapter 11 Debtors, while permitting CEWL to continue operating its business as usual in Canada during the Chapter 11 Proceeding.

Disposition

40 In the result, the Application is granted. The Initial Recognition Order and the Supplemental Order have been signed, with the Supplemental Order having been modified to exclude a stay of actions against directors and officers of the Chapter 11 Debtors, as I consider such requested relief to be beyond the scope of appropriate relief in the Supplemental Order at this time.

Schedule "A" — List of Chapter 11 Debtors

Legal Name	***State of Formation***
CZL Development Company, LLC	Delaware
Harrah's Iowa Arena Management, LLC	Delaware
PHW Manager, LLC	Nevada
190 Flamingo, LLC	Nevada
AJP Holdings, LLC	Delaware
AJP Parent, LLC	Delaware
B I Gaming Corporation	Nevada
Bally's Midwest Casino, Inc.	Delaware
Bally's Park Place, Inc.	New Jersey
Benco, Inc.	Nevada
Biloxi Hammond, LLC	Delaware
Biloxi Village Walk Development, LLC	Delaware
BL Development Corp.	Minnesota
Boardwalk Regency Corporation	New Jersey
Caesars Entertainment Canada Holding, Inc.	Nevada
Caesars Entertainment Finance Corp.	Nevada
Caesars Entertainment Golf, Inc.	Nevada
Caesars Entertainment Retail, Inc.	Nevada
Caesars India Sponsor Company, LLC	Nevada
Caesars Marketing Services Corporation (f/k/a Harrah's Marketing Services Corporation)	Nevada
Caesars New Jersey, Inc.	New Jersey
Caesars Palace Corporation	Delaware
Caesars Palace Realty Corporation	Nevada
Caesars Palace Sports Promotions, Inc.	Nevada
Caesars Riverboat Casino, LLC	Indiana
Caesars Trex, Inc.	Delaware
Caesars United Kingdom, Inc.	Nevada
Caesars World Marketing Corporation	New Jersey
Caesars World Merchandising, Inc.	Nevada
Caesars World, Inc.	Florida
California Clearing Corporation	California
Casino Computer Programming, Inc.	Indiana
Chester Facility Holding Company, LLC	Delaware
Consolidated Supplies, Services and Systems	Nevada
DCH Exchange, LLC	Nevada

DCH Lender, LLC	Nevada
Desert Palace, Inc.	Nevada
Durante Holdings, LLC	Nevada
East Beach Development Corporation	Mississippi
GCA Acquisition Subsidiary, Inc.	Minnesota
GNOC, Corp.	New Jersey
Grand Casinos of Biloxi, LLC (f/k/a Grand Casinos of Mississippi, Inc. - Biloxi)	Minnesota
Grand Casinos of Mississippi, LLC — Gulfport	Mississippi
Grand Casinos, Inc.	Minnesota
Grand Media Buying, Inc.	Minnesota
Harrah South Shore Corporation	California
Harrah's Arizona Corporation	Nevada
Harrah's Bossier City Investment Company, L.L.C.	Louisiana
Harrah's Bossier City Management Company, LLC	Nevada
Harrah's Chester Downs Investment Company, LLC	Delaware
Harrah's Chester Downs Management Company, LLC	Nevada
Harrah's Illinois Corporation	Nevada
Harrah's Interactive Investment Company	Nevada
Harrah's International Holding Company, Inc.	Delaware
Harrah's Investments, Inc. (f/k/a Harrah's Wheeling Corporation)	Nevada
Harrah's Management Company	Nevada
Harrah's MH Project, LLC	Delaware
Harrah's NC Casino Company, LLC	North Carolina
Harrah's North Kansas City LLC (f/k/a Harrah's North Kansas City Corporation)	Missouri
Harrah's Operating Company Memphis, LLC	Delaware
Harrah's Pittsburgh Management Company	Nevada
Harrah's Reno Holding Company, Inc.	Nevada
Harrah's Shreveport Investment Company, LLC	Nevada
Harrah's Shreveport Management Company, LLC	Nevada
Harrah's Shreveport/Bossier City Holding Company, LLC	Delaware
Harrah's Shreveport/Bossier City Investment Company, LLC	Delaware
Harrah's Southwest Michigan Casino Corporation	Nevada
Harrah's Travel, Inc.	Nevada
Harrah's West Warwick Gaming Company, LLC	Delaware
Harveys BR Management Company, Inc.	Nevada
Harveys C.C. Management Company, Inc.	Nevada
Harveys Iowa Management Company, Inc.	Nevada
Harveys Tahoe Management Company, Inc.	Nevada
H-BAY, LLC	Nevada
HBR Realty Company, Inc.	Nevada
HCAL, LLC	Nevada
HCR Services Company, Inc.	Nevada
HEI Holding Company One, Inc.	Nevada
HEI Holding Company Two, Inc.	Nevada
HHLV Management Company, LLC	Nevada
Hole in the Wall, LLC	Nevada
Horseshoe Entertainment	Louisiana
Horseshoe Gaming Holding, LLC	Delaware
Horseshoe GP, LLC	Nevada
Horseshoe Hammond, LLC	Indiana
Horseshoe Shreveport, L.L.C.	Louisiana
HTM Holding, Inc.	Nevada
Koval Holdings Company, LLC	Delaware
Koval Investment Company, LLC	Nevada
Las Vegas Golf Management, LLC	Nevada
Las Vegas Resort Development, Inc.	Nevada
Martial Development Corp.	New Jersey
Nevada Marketing, LLC	Nevada

New Gaming Capital Partnership	Nevada
Ocean Showboat, Inc.	New Jersey
Players Bluegrass Downs, Inc.	Kentucky
Players Development, Inc.	Nevada
Players Holding, LLC	Nevada
Players International, LLC	Nevada
Players LC, LLC	Nevada
Players Maryland Heights Nevada, LLC	Nevada
Players Resources, Inc.	Nevada
Players Riverboat II, LLC	Louisiana
Players Riverboat Management, LLC	Nevada
Players Riverboat, LLC	Nevada
Players Services, Inc.	New Jersey
Reno Crossroads LLC	Delaware
Reno Projects, Inc.	Nevada
Rio Development Company, Inc.	Nevada
Robinson Property Group Corp.	Mississippi
Roman Entertainment Corporation of Indiana	Indiana
Roman Holding Corporation of Indiana	Indiana
Showboat Atlantic City Mezz 1, LLC	Delaware
Showboat Atlantic City Mezz 2, LLC	Delaware
Showboat Atlantic City Mezz 3, LLC	Delaware
Showboat Atlantic City Mezz 4, LLC	Delaware
Showboat Atlantic City Mezz 5, LLC	Delaware
Showboat Atlantic City Mezz 6, LLC	Delaware
Showboat Atlantic City Mezz 7, LLC	Delaware
Showboat Atlantic City Mezz 8, LLC	Delaware
Showboat Atlantic City Mezz 9, LLC	Delaware
Showboat Atlantic City Operating Company, LLC	New Jersey
Showboat Atlantic City Propco, LLC	Delaware
Showboat Holding, Inc.	Nevada
Southern Illinois Riverboat/Casino Cruises, Inc.	Illinois
Tahoe Garage Propco, LLC	Delaware
TRB Flamingo, LLC	Nevada
Trigger Real Estate Corporation	Nevada
Tunica Roadhouse Corporation (f/k/a Sheraton Tunica Corporation)	Delaware
Village Walk Construction, LLC	Delaware
Winnick Holdings, LLC	Delaware
Winnick Parent, LLC	Delaware
3535 LV Corp. (f/k/a Harrah's Imperial Palace)	Nevada
Caesars License Company, LLC (f/k/a Harrah's License Company, LLC)	Nevada
FHR Corporation	Nevada
FHR Parent, LLC	Delaware
Flamingo-Laughlin Parent, LLC	Delaware
Flamingo-Laughlin, Inc. (f/k/a Flamingo Hilton-Laughlin, Inc.)	Nevada
Harrah's New Orleans Management Company	Nevada
LVH Corporation	Nevada
Parball Corporation	Nevada
Caesars Escrow Corporation (f/k/a Harrah's Escrow Corporation)	Delaware
Caesars Operating Escrow LLC (f/k/a Harrah's Operating Escrow LLC)	Delaware
Corner Investment Company Newco, LLC	Delaware
Harrah's Maryland Heights Operating Company	Nevada
BPP Providence Acquisition Company, LLC	Delaware
Caesars Air, LLC	Delaware
Caesars Baltimore Development Company, LLC	Delaware
Caesars Massachusetts Acquisition Company, LLC	Delaware
Caesars Massachusetts Development Company, LLC	Delaware
Caesars Massachusetts Investment Company, LLC	Delaware

Caesars Massachusetts Management Company, LLC	Delaware
CG Services, LLC	Delaware
Christian County Land Acquisition Company, LLC	Delaware
CZL Management Company, LLC	Delaware
HIE Holdings Topco, Inc.	Delaware
PH Employees Parent LLC	Delaware
PHW Investments, LLC	Delaware
Caesars Entertainment Operating Company, Inc. (f/k/a Harrah's Operating Company, Inc.)	Delaware
Caesars Entertainment Windsor Limited (f/k/a Caesars Entertainment Windsor Holding, Inc.)	Canada
Octavius Linq Holding Co., LLC	Delaware
Caesars Baltimore Acquisition Company, LLC	Delaware
Caesars Baltimore Management Company, LLC	Delaware
PHW Las Vegas, LLC	Nevada
3535 LV Parent, LLC	Delaware
Bally's Las Vegas Manager, LLC	Delaware
Cromwell Manager, LLC	Delaware
JCC Holding Company II Newco, LLC	Delaware
Laundry Parent, LLC	Delaware
LVH Parent, LLC	Delaware
Parball Parent, LLC	Delaware
The Quad Manager, LLC	Delaware
Des Plaines Development Limited Partnership	Delaware

Application granted.

End of Document

TAB 5

SUPREME COURT OF YUKON

Citation: *Ultra Petroleum Corp.,* 2017 YKSC 9

Date: 20170207
S.C. No. 16-A0023
Registry: Whitehorse

ULTRA PETROLEUM CORP.

Petitioner

Before Mr. Justice R.S. Veale

Appearances:
Paul Lackowicz — Counsel for the Petitioner

REASONS FOR JUDGMENT

INTRODUCTION

[1] Ultra Petroleum Corp. ("Ultra Petroleum") applies for an order recognizing a foreign main proceeding pursuant to s. 48 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "*CCAA*") under Part IV Cross-border Insolvencies.

[2] The issue before this Court is not the comity of this Court recognizing a foreign insolvency proceeding but rather the issue of whether Ultra Petroleum should have the discretion to lift the mandatory stay of proceedings against it or whether that discretion should be retained by this Court.

BACKGROUND

[3] Ultra Petroleum is a Yukon corporation incorporated pursuant to the laws of the Yukon Territory with a registered office located in Yukon. Ultra Petroleum owns oil and gas properties in Wyoming, Utah and Pennsylvania in the United States. Ultra Petroleum and several wholly owned subsidiaries commenced a voluntary Chapter 11 Proceedings in the United States Bankruptcy Court Southern District of Texas,

Houston Division and seeks recognition of these proceedings in Yukon, Canada, pursuant to s. 46 of the *CCAA*, which provides for cooperation between courts in cases of cross-border insolvencies to ensure the fair and efficient administration in the interests of creditors and debtors.

[4] Sections 47 and 48 of the *CCAA* provide for the following:

> 47. (1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.
>
> Nature of foreign proceeding to be specified
>
> (2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.
>
> 48. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
>
> (d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting

> the debtor company from selling or otherwise disposing of any of its other property in Canada.
>
> *Scope of order*
>
> (2) The order made under subsection (1) must be consistent with any order that may be made under this Act.
>
> *When subsection (1) does not apply*
>
> (3) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.
>
> *Application of this and other Acts*
>
> (4) Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act in respect of the debtor company.

DISPOSITION

[5] This Court has no difficulty in finding that the U.S. bankruptcy proceedings are a foreign main proceeding based on the location of the centre of its main interests and granting the order in s. 48(1)(a) to stay proceedings that might be taking against Ultra Petroleum or one of its wholly-owned subsidiaries. The issue that I wish to address is whether it is appropriate to grant Ultra Petroleum the right to remove or lift the stay on its own written consent.

[6] Specifically, counsel applied for the inclusion of the following order:

> 14. Notwithstanding anything else contained in this Order, Ultra Petroleum may, by written consent of its counsel of record, agree to waive any of its protections provided in this Order.

[7] The proposed Order also included the specific right to give the written consent of Ultra Petroleum to lift the general stay of proceedings.

[8] There is nothing nefarious about this request as it would certainly be cost efficient. However, s. 48(1)(a) provides a mandatory stay of proceedings "until otherwise ordered by the court". In my view, this section does not permit the court to relinquish its control of the mandatory stay to the debtor company despite the discretion in s. 50 to make terms and conditions "that the court considers appropriate in the circumstances".

[9] Counsel has been permitted to take out the order without the clause permitting the lifting of the stay or proceedings on the written consent of the debtor.

_____

VEALE J.

TAB 6

Hollander Sleep Products, LLC (Re), [2019] O.J. No. 2817

Ontario Judgments

Ontario Superior Court of Justice

Commercial List

G.A. Hainey J.

Heard: May 23, 2019.

Judgment: May 30, 2019.

Court File No.: CV-19-620484-00CL

[2019] O.J. No. 2817 | 2019 ONSC 3238

RE: IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C. C-36, as Amended, and AND IN THE MATTER OF Hollander Sleep Products, LLC, Hollander Sleep Products Canada Limited, Dream II Holdings, LLC, Hollander Home Fashions Holdings, LLC, Pacific Coast Feather, LLC, Hollander Sleep Products Kentucky, LLC, and Pacific Coast Feather Cushion, LLC, Application of Hollander Sleep Products, LLC under Section 46 of the Companies' Creditors Arrangement Act, R.S.C. 1985, C. C-36, as Amended

(58 paras.)

Counsel

Shawn Irving and Marc Wasserman, for the Applicant.

Virginie Gauthier, for KSV Kofman Inc.

L. Joseph Latham, for Wells Fargo.

Milly Chow and Kelly Bourassa, for Barings Finance LLC.

ENDORSEMENT

G.A. HAINEY J.

BACKGROUND

1 On May 23, 2019 I granted the application brought by Hollander Sleep Products, LLC ("Hollander Sleep Products"), for orders pursuant to Section 46 through 49 of the *Companies' Creditors Arrangement Act*, *R.S.C. 1985, c. C-36* as amended ("***CCAA***"). I made the following orders:

a) Recognition of the Chapter 11 Cases as foreign main proceedings pursuant to *Part IV of the **CCAA**;*

b) Recognition of certain First Day Orders;

c) Appointment of KSV Kofman Inc. ("KSV") as Information Officer;

d) Granting of the DIP ABL Charge; and

e) Granting of the Administration Charge.

2 I indicated in my endorsement that written reasons would follow. These are my written reasons.

3 Hollander Sleep Products brings this application in its capacity as the foreign representative (the "Foreign Representative") of itself and Hollander Sleep Products Canada Limited ("Hollander Canada"), Dream II Holdings, LLC, Hollander Home Fashions Holdings, LLC, Pacific Coast Feather, LLC, Hollander Sleep Products Kentucky, LLC, and Pacific Coast Feather Cushion, LLC (collectively, the "Chapter 11 Debtors", and with their other non-debtor affiliates, "Hollander").

FACTS

4 Hollander is an industry leader in the bedding products market. Hollander manufactures bedding products including pillows, comforters and mattress pads for well-known licensed brands. Hollander also owns and manufactures bedding products under several of its own proprietary brands and also partners with major retailers and hotel chains.

5 Hollander's corporate headquarters is in Boca Raton, Florida. Hollander has 13 manufacturing facilities located across North America -- 11 in the United States and 2 in Canada -- and a primary show room in New York City. Most of Hollander's sales come from wholesale distribution.

Chapter 11 Cases

6 On May 19, 2019 (the "Petition Date") each of the Chapter 11 Debtors filed voluntary petitions for relief pursuant to Chapter 11 of the *U.S. Bankruptcy Code* (the "Chapter 11 Cases") with the United States Bankruptcy Court for the Southern District of New York (the "U.S. Court"). Certain first day motions (the "First Day Motions") were also filed on May 19, 2019. On May 21, 2019, the U.S. Court heard several of the First Day Motions, and on May 22 and 23, 2019 the court entered various interim or final orders in respect of these motions (the "First Day Orders").

Chapter 11 Debtors

7 The Chapter 11 Debtors operate on an integrated basis and are incorporated or established under the laws of the United States except for Hollander Canada, which is incorporated under the laws of British Columbia. Each of the Chapter 11 Debtors, including Hollander Canada, is a direct or indirect wholly-owned subsidiary of Dream II Holdings, LLC.

Hollander Canada

8 Hollander Canada is a fully integrated subsidiary of Hollander. Hollander Canada operates one manufacturing facility in Toronto, one manufacturing facility in Montreal, and maintains a sales office in Toronto.

9 Hollander Canada employs approximately 240 employees, all of whom are located in Canada. Hollander Canada's workforce is not unionized and it does not maintain any registered pension plans. Its primary stakeholders include employees, lenders, customers, landlords, creditors, and trade-suppliers.

10 On a standalone basis, Hollander Canada is not profitable. Its 2018 financial statement reflects a net loss of approximately $2.6 million after allocation of selling, general and administrative expenses, including royalties and procurement fees, incurred by the U.S. Chapter 11 Debtors and allocated across the manufacturing facilities for which it provides these and other shared services (the "U.S. Shared Services"). Losses have continued for the four-

month period ended April 30, 2019. Currently, approximately $7.2 million of Hollander Canada's $9 million of accounts payable is past due. If the amount owing to Hollander Canada from the U.S. Chapter 11 Debtors was written down to its realizable value and Hollander Canada's allocation of U.S. Shared Services was recorded for the four months ended April 30, 2019, Hollander Canada's shareholder equity would be entirely eroded.

11 Hollander Canada is entirely dependent on Hollander's U.S. head office for managerial, administrative, IT, strategic services and decisions, and it uses intellectual property almost wholly owned by U.S. Hollander entities. Hollander Canada is also entirely reliant on supply arrangements and relationships of the Hollander enterprise.

Principal Indebtedness

12 The Chapter 11 Debtors' principal pre-petition indebtedness consists of the following:

a) **Prepetition ABL Facility** -- a $125 million senior revolving asset-based credit facility (the "ABL Facility") under which all the Chapter 11 Debtors, including Hollander Canada, are obligors. Hollander Canada may borrow a maximum of $40 million from this facility. Hollander Canada is not jointly or severally liable for the obligations of the U.S. Chapter 11 Debtors under the ABL Facility; however, the U.S. Chapter 11 Debtors are liable for Hollander Canada's borrowings under the ABL Facility. As of the Petition Date, approximately $61 million remains outstanding against the ABL Facility, not including approximately $5 million in letters of credit (the "Prepetition ABL Obligations"). The Prepetition ABL Obligations include approximately $6 million of borrowings by Hollander Canada.

b) **Prepetition Term Loan** -- a $190 million senior secured term loan facility (the "Term Loan Facility"). Each Chapter 11 Debtor except Hollander Canada is an obligor under this facility. Hollander Canada is not a borrower or a guarantor of the Term Loan Facility. As of the Petition Date, approximately $166.5 million remains outstanding against the Term Loan Facility.

Recent Events and Proposed Restructuring

13 Recent substantial price increases on materials have significantly reduced Hollander's already low profit margins for many products. In addition, Hollander acquired one of its major competitors in June 2017. This necessitated the expenditure of additional capital. With approximately $233 million of outstanding indebtedness and limited access to credit, Hollander is facing severe liquidity constraints.

14 These circumstances necessitated comprehensive restructuring negotiations with the Chapter 11 Debtors' primary constituency groups. The Chapter 11 Debtors recently agreed with their secured lenders and their majority equity-holder, Sentinel, on a comprehensive restructuring process to ensure the viability of the business. The Chapter 11 Debtors, 100% of the Term Loan Lenders, and Sentinel entered into a restructuring support agreement dated May 19, 2019 (the "RSA"). The RSA contemplates, and the Chapter 11 Debtors have filed, a comprehensive Chapter 11 restructuring plan (the "Plan").

15 In connection with the RSA, Hollander's asset-based secured lenders have agreed to provide a $90 million debtor-in-possession asset-based loan facility (the "DIP ABL Facility") and certain Term Loan Lenders have agreed to provide an additional $28 million term loan facility (the "DIP Term Loan Facility" and together with the DIP ABL Facility, the "DIP Facilities") to fund the administration of the Chapter 11 Cases.

16 I am not, at this time, being asked to approve or grant any relief in connection with the Plan. However, the Chapter 11 Debtors have negotiated and incorporated certain protections into the Plan to mitigate against any prejudice to current creditors of Hollander Canada that might result incidentally from a global restructuring. I am satisfied that the Plan represents the Chapter 11 Debtors' best prospect of reorganizing their business operations and emerging as a healthy going-concern enterprise, maximizing recoveries for all stakeholders.

17 If the Chapter 11 Debtors do not obtain the relief requested on this application, including post-petition financing, they will be unable to restructure pursuant to the Plan. In such a case, a liquidation of the business and assets of the Chapter 11 Debtors, including Hollander Canada, will be the likely result. In a liquidation scenario, there will be a nominal recovery, if any, available for Hollander Canada's unsecured creditors.

Proposed Postpetition Financing

18 On May 21, 2019, the U.S. Court heard certain of the First Day Motions, including the DIP Motion. At the hearing, the U.S. Court requested certain changes to the DIP Order, which were subsequently made by the Chapter 11 Debtors in consultation with the DIP Lenders. Access to the DIP Facilities is vital to the preservation and maintenance of the going-concern value of Hollander and the Chapter 11 Debtors' successful reorganization.

19 The $90 million DIP ABL Facility is the critical facility from the perspective of Hollander Canada. Hollander Canada is neither a borrower nor a guarantor of the DIP Term Loan Facility. The DIP ABL Facility is a senior secured credit facility for which all the Chapter 11 Debtors, including Hollander Canada, are borrowers. The DIP ABL Facility provides for an initial "creeping (or gradual) roll-up" whereby the Chapter 11 Debtors will use receipts from the Chapter 11 Debtors' operations to pay down pre-filing obligations pending the issuance of the Final DIP Order, whereupon there will be a deemed draw on the DIP ABL Facility to satisfy the then outstanding prepetition debt, if any, under the ABL Facility. Hollander Canada is entitled to borrow up to $20 million under the DIP ABL Facility, less the amount of Hollander Canada's prepetition obligations under the ABL Facility that are to be rolled-up into the DIP ABL Facility.

20 With respect to prepetition debt under the ABL Facility, Hollander Canada is not jointly or severally liable for amounts drawn down by the U.S. Chapter 11 Debtors. However, Hollander Canada will be jointly and severally liable with the other Chapter 11 Debtors in respect of borrowings under the DIP ABL Facility, including borrowings to repay amounts drawn down under the prepetition ABL Facility by the U.S. Chapter 11 Debtors. The DIP ABL Lenders have indicated they are unwilling to enter into the DIP ABL Facility unless Hollander Canada is jointly and severally liable for all obligations under the DIP ABL Facility, including those incurred by the U.S. borrowers.

21 It is a condition of the DIP Facilities that the Chapter 11 Debtors obtain an order from this Court recognizing the DIP Order within three business days of when the DIP Order was issued by the U.S. Court. The DIP ABL Facility requires that the DIP Order be recognized by this Court before any borrowing by Hollander Canada will be permitted under the DIP ABL Facility.

22 I have concluded that the ability of the Chapter 11 Debtors, including Hollander Canada, to maintain business relationships with their vendors, suppliers and customers, to pay their employees and otherwise finance their operations requires the availability of working capital from the DIP Facilities. The Chapter 11 Debtors, including Hollander Canada on a standalone basis, do not have sufficient available sources of working capital and financing to operate their businesses without immediate access to the DIP Facilities.

ISSUES

23 I must decide the following issues:

a) Are the Chapter 11 Cases "foreign main proceedings" pursuant to Part IV of the ***CCAA***?

b) If so, are the Chapter 11 Debtors entitled to the relief sought in the Initial Recognition Order and Supplemental Order, including,

(i) Granting the Stay of Proceedings;

(ii) Recognition of the First Day Orders;

(iii) Granting the DIP ABL Charge;

(iv) Appointing KSV as Information Officer; and

(v) Granting the Administration Charge?

ANALYSIS

Are the Chapter 11 Cases Foreign Main Proceedings?

Are the Chapter 11 Cases Foreign Proceedings?

24 I must first determine if the Chapter 11 Cases are foreign proceedings. It is important to note that the purpose of Part IV of the ***CCAA*** is to facilitate the administration of cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada. Section 44 of the ***CCAA*** provides as follows:

44. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(d) the protection and the maximization of the value of debtor company's property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

25 Pursuant to S. 46(1) of the ***CCAA***, a person who is a foreign representative may apply to the court for recognition of a foreign proceeding in respect of which that person is a foreign representative. Pursuant to S. 47 of the ***CCAA***, the two following requirements must be met for an order recognizing a foreign proceeding:

a) the proceeding is a "foreign proceeding"; and

b) the applicant is a "foreign representative" in respect of that foreign proceeding.

26 In the Chapter 11 Cases, an order was made appointing Hollander Sleep Products as foreign representative by the U.S. Court on May 23, 2019. (the "Foreign Representative Order").

27 Section 45(1) of the ***CCAA*** defines a "foreign proceeding" as any judicial proceeding in a jurisdiction outside of Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization. Courts have consistently recognized proceedings under Chapter 11 of the United States Bankruptcy Code to be foreign proceedings for the purposes of the ***CCAA***.

28 Because Hollander Sleep Products has been appointed a "foreign representative" by the U.S. Court in the Chapter 11 Cases, I am satisfied that the Chapter 11 cases should be recognized as a "foreign proceeding" pursuant to S. 47(1) of the ***CCAA***.

Are the Chapter 11 Cases Foreign Main Proceedings?

29 Once I have determined that a proceeding is a "foreign proceeding", I am required, pursuant to Section 47(2) of the ***CCAA***, to specify in my order whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding." A "foreign main proceeding" is defined as a "foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests" ("COMI").

30 The ***CCAA*** does not provide a definition of COMI. Section 45(2) of the ***CCAA*** establishes a rebuttable presumption that, in the absence of proof to the contrary, the location of a debtor company's registered office is deemed to be its COMI. Evidence regarding the debtor company's operations can rebut this presumption. Part IV of the ***CCAA*** does not specifically consider the circumstances facing corporate groups. It is therefore necessary to conduct the COMI analysis on an entity-by-entity basis.

31 In this case the registered offices of all of the Chapter 11 Debtors except for Hollander Canada, are situated in the United States. Therefore, the presumption in s. 45(2) of the ***CCAA*** deems the COMI of each of those entities to be in the United States.

32 Hollander Canada's registered head office is in Vancouver. Where a Canadian entity is operating as part of a larger corporate group, several Canadian authorities have considered how COMI should be determined. In *Angiotech*[1], the Court considered the following factors:

a) the location where corporate decisions are made;
b) the location of employee administrations, including human resource functions;
c) the location of the company's marketing and communication functions;
d) whether the enterprise is managed on a consolidated basis;
e) the extent of integration of an enterprise's international operations;
f) the centre of an enterprise's corporate, banking, strategic and management functions;
g) the existence of shared management within entities and in an organization;
h) the location where cash management and accounting functions are overseen;
i) the location where pricing decisions and new business development initiatives are created; and
j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

33 In ***Elephant*** *& Castle*[2] , Morawetz J. (as he then was) recognized the *Angiotech* factors listed above and identified what he considered to be the most significant factors as follows:

> However, it seems to me, in interpreting COMI, the following factors are usually significant:
>
> (a) the location of the debtor's headquarters or head office functions or nerve centre;
>
> (b) the location of the debtor's management; and
>
> (c) the location which significant creditors recognize as being the centre of the company's operations.

34 The jurisprudence is clear that where a Canadian debtor company is the only Canadian entity among a number of other Chapter 11 debtors that are all incorporated in the United States, the COMI for the Canadian debtor company is the United States.

35 I have concluded for the following reasons that Hollander Canada's COMI is in the United States:

a) Hollander Canada's business is closely integrated into Hollander's business in the U.S. and its registered office is listed in Canada only for corporate purposes;
b) Managerial functions for Hollander Canada, including finance, buying, logistics, marketing, and strategic decisions, are provided from Hollander's U.S. head office by Hollander Sleep Products;

c) Hollander Canada is almost wholly dependent on Hollander's U.S. office for administrative functions such as overhead services, accounting, and IT, which are provided by Hollander Sleep Products in the U.S.;

d) Data for Hollander Canada's operations is housed within IT systems, located and operated out of the U.S.;

e) Hollander Canada is reliant on the purchasing power and supplier relationships of the Hollander enterprise, and on its own could not replicate the supply arrangements necessary for its continued functioning;

f) Hollander Canada's books and records are maintained at Hollander's head office in Boca Raton, Florida;

g) All of Hollander Canada's directors reside in the United States;

h) Canadian revenues make up only 10.7% of Hollander's revenues;

i) Hollander Canada is entirely dependent on the U.S. Chapter 11 Debtors for the majority of licensing agreements, design partnerships, and company-owned brands;

j) Substantially all of the trademarks and intellectual property relied on by Hollander Canada are owned by the U.S. Chapter 11 Debtors;

k) The Chapter 11 Debtors, including Hollander Canada, operate an integrated, centralized cash management system; and

l) Hollander Canada is dependent on the U.S. Chapter 11 Debtors for the establishment, maintenance, and administration of certain customer promotional programs involving Hollander Canada's key customers.

36 Since all the Chapter 11 Debtors except Hollander Canada have registered offices in the United States, and since a review of Hollander Canada's business indicates that its COMI is in the United States, The COMI of all the Chapter 11 Debtors is in the United States and therefore the Chapter 11 Cases should be recognized as "foreign main proceedings".

SHOULD THE INITIAL RECOGNITION ORDER AND SUPPLEMENTAL ORDER BE GRANTED?

Is a Stay of Proceedings Required and Appropriate?

37 Section 48(1) of the ***CCAA*** provides that once the Court has found that a foreign proceeding is a "foreign main proceeding", it is required to grant certain mandatory relief, including a stay of proceedings:

38 In addition to the automatic relief provided for in s. 48, s.49 of the ***CCAA*** grants me the broad discretion to make any appropriate order if I am satisfied that it is necessary for the protection of the debtor company's property or the interests of creditors.

39 Section 52(1) of the ***CCAA*** requires that if an order recognizing a foreign proceeding is made, the Court "shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding."

40 Because of the circumstances facing Hollander, Hollander Canada and the other Chapter 11 Debtors, I am satisfied that a stay of proceedings is necessary in order to implement the proposed restructuring.

Should the First Day Orders be Recognized?

41 The central principle governing Part IV of the ***CCAA*** is comity, which mandates that Canadian courts should

recognize and enforce the judicial acts of other jurisdictions, provided that those other jurisdictions have assumed jurisdiction on a basis consistent with principles of order, predictability and fairness.

42 Canadian courts have emphasized the importance of comity and cooperation in cross-border insolvency proceedings to avoid multiple proceedings, inconsistent judgments and general uncertainty. Coordination of international insolvency proceedings is particularly critical in ensuring the equal and fair treatment of creditors regardless of their location.

43 I am satisfied that the First Day Orders should be recognized for the following reasons:

a) The U.S. Court has appropriately taken jurisdiction over the Chapter 11 Cases, so comity will be furthered by this Court's recognition of and support for the Chapter 11 Cases already under way in the United States;

b) Coordination of proceedings in the two jurisdictions will ensure equal and fair treatment of all stakeholders, whether they are in the United States or Canada;

c) Given the close connection between Hollander and the United States, it is reasonable and sensible for the U.S. Court to have principal control over the insolvency process. This will produce the most efficient restructuring for the benefit of all stakeholders;

d) The Chapter 11 Debtors must act quickly because of the expeditious timetable established under the Plan for their restructuring. It is imperative that there be a centralized and co-ordinated process for these insolvency proceedings to maximize the prospect of a successful restructuring and preserve value for stakeholders; and

e) The Canadian and U.S. operations of Hollander are highly integrated.

Should the DIP ABL Charge be Granted?

44 The Chapter 11 Debtors are facing a liquidity crisis and require DIP financing to fund their operations while they pursue a restructuring pursuant to the Plan or a sale in accordance with the marketing process to be conducted as part of the Chapter 11 proceeding. The ability of the Chapter 11 Debtors, including Hollander Canada, to maintain and finance their operations requires working capital from the DIP Facilities. If interim financing through the DIP Facilities is not obtained, neither the Chapter 11 Debtors as a whole, nor Hollander Canada on a standalone basis, have the funds to finance going-concern operations.

45 The DIP ABL Facility includes an initial creeping roll-up provision pursuant to which the Chapter 11 Debtors will use receipts from their operations to pay down pre-filing obligations pending the issuance of the Final DIP Order. The amount borrowed under the DIP ABL Facility is proposed to be secured by, among other things, a court-ordered charge on Hollander Canada's property and the property of the other Chapter 11 Debtors in Canada (the "DIP ABL Charge").

46 This court has concluded in previous proceedings that there is no impediment to granting approval of interim DIP financing including a full roll-up provision in foreign recognition proceedings under Part IV of the ***CCAA***[3].

47 In *Hartford*, an application under Part IV of the ***CCAA***, this court recognized a DIP facility authorized by the U.S. Court that included a full roll-up, and emphasized the importance of comity in foreign recognition proceeding as follows:

> The Information Officer and Chapter 11 Debtors recognize that in ***CCAA*** proceedings, a partial "roll up" provision would not be permissible as a result of s.11.2 of the ***CCAA***, which expressly provides that a DIP charge may not secure an obligation that exists before the Initial Order is made.

> Section 49 of the ***CCAA*** provides that, in recognizing an order of a foreign court, the court may make any order that it considers appropriate, provided the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of the creditor or creditors.
>
> It is necessary, in my view, to emphasize that this is a motion to recognize an order made in the "foreign main proceeding"...
>
> A significant factor to take into account is that the Final DIP Facility Order was granted by the U.S. Court. In these circumstances, I see no basis for this court to second guess the decision of the U.S. Court.

48 For the same reasons I am satisfied that the DIP Order should be approved. The U.S. Court granted the DIP Order because it is necessary for the protection of Hollander's property and for the interests of creditors in Canada and the U.S.

49 The DIP ABL Facility provides that Hollander Canada is jointly and severally liable for the borrowings of other Chapter 11 Debtors under the DIP ABL Facility.

50 I have concluded that the following factors support recognizing Hollander Canada's joint and several liability under the DIP Order and the DIP ABL Charge:

a) The DIP ABL Charge furthers the objectives of the ***CCAA*** and is commercially reasonable as it allows the Chapter 11 Debtors to continue operations and pursue a restructuring or going-concern sale as outlined in the proposed Plan;

b) An estimated cash flow forecast extracted from the DIP budget reveals that Hollander Canada is projected to generate negative cash flow until at least July 1, 2019;

c) The Chapter 11 Debtors, including Hollander Canada, need immediate access to the DIP ABL Facility to ensure their continued operations during these proceedings;

d) The DIP ABL Lenders are unwilling to provide funding to the Chapter 11 Debtors without Hollander Canada's joint and several liability under the DIP ABL Facility;

e) The proposed DIP Facilities and Plan are supported by all secured creditors with an economic interest in Hollander Canada; and

f) If the DIP ABL Charge is not granted, the restructuring contemplated by the Plan will not be implemented, likely resulting in liquidation. In a liquidation scenario, Hollander Canada's creditors will likely obtain only nominal recoveries, if any.

51 To protect the interests of Hollander Canada and its creditors, the Chapter 11 Debtors negotiated certain protections to mitigate any prejudice to Hollander Canada's creditors. Specifically, the DIP Order includes a quasi-marshalling construct whereby the DIP ABL Agent is obligated to first look to proceeds of the Chapter 11 Debtors' U.S. collateral to satisfy any outstanding obligations of the U.S. Chapter 11 Debtors under the DIP ABL Facility, and to the proceeds of the Chapter 11 Debtors' Canadian collateral to satisfy any outstanding obligations of Hollander Canada under the DIP ABL Facility. Only once collateral in the U.S. has been exhausted can the DIP ABL Lenders look to the Canadian assets to satisfy any outstanding U.S. obligation.

52 The absence of prejudice to creditors of Hollander Canada, and the DIP ABL Lenders' consent to the quasi-marshalling construct, are key factors distinguishing this case from *Payless Holdings Inc. LLC, (Re)*. In *Payless*, also a proceeding under Part IV of the ***CCAA***, this court declined to approve a DIP order and lenders' charge that would have required the solvent Canadian applicants to guarantee borrowings from the DIP facility even though they would not receive advances from it. The DIP facility was opposed by the Canadian landlords who were uniquely prejudiced by its terms. The DIP facility in that case specifically precluded marshalling.

53 I have concluded that the Court's decision in *Payless* is distinguishable from this case for the following reasons

as set out in the applicant's factum:

a) In *Payless*, the Canadian Applicants were not insolvent, were not prepetition borrowers, had never granted security and were not borrowers under the DIP facility. In this case, Hollander Canada is insolvent, its assets are encumbered, and it is incapable of maintaining going concern operations without urgent funding support from the DIP ABL Facility. For instance, $7.2 million of Hollander Canada's accounts payable are currently past due; without support from the DIP ABL Facility, Hollander does not have sufficient liquidity to satisfy these obligations.

b) In *Payless*, there was evidence of material prejudice to Canadian creditors and certain Canadian creditor groups opposed the DIP order because they were disadvantaged. In this case, no such material prejudice or unequal treatment exists with respect to the creditors of Hollander Canada or the other Chapter 11 Debtors.

c) In *Payless*, the Court intimated that if marshalling had been permitted, the inequitable treatment of Canadian creditors would have been resolved. In this case, the DIP ABL Lenders have specifically agreed to a quasi marshalling concept to ensure that Canadian assets are used first to satisfy Canadian DIP ABL indebtedness, and not applied to satisfy U.S. DIP ABL indebtedness until all U.S. assets are first exhausted.

54 I have concluded that the DIP ABL Charge should be granted for these reasons.

SHOULD KSV BE APPOINTED INFORMATION OFFICER?

55 I am satisfied that an information officer should be appointed to assist with the cooperation between the Canadian foreign recognition proceeding and the foreign representative and the U.S. Court. Further, KSV, a licensed insolvency trustee, is appropriate to act in this capacity.

SHOULD AN ADMINISTRATIVE CHARGE BE APPROVED?

56 Finally, I am satisfied that an administration charge in the maximum amount of $200,000 is reasonable and appropriate.

CONCLUSION

57 For these reasons I have granted the Initial Recognition Order and the Supplemental Order.

58 I am grateful to the applicant's counsel for their helpful submission.

G.A. HAINEY J.

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1 *Angiotech Pharmaceuticals Inc. (Re)*, 2011 BCSC 115 at para 7.

2 ***Massachusetts Elephant*** *& Castle Group Inc., (Re)*, 2011 ONSC 4201 (S.C.J. [Commercial List]).

3 *Hartford Computer Hardware Inc., (Re)*, 2012 ONSC 964 at paras. 18-19.

TAB 7

2011 BCSC 552
British Columbia Supreme Court

Probe Resources Ltd., Re

2011 CarswellBC 1043, 2011 BCSC 552, [2011] B.C.W.L.D. 4720, [2011] B.C.W.L.D. 4721, [2011] B.C.W.L.D. 4722, [2011] B.C.J. No. 802, 202 A.C.W.S. (3d) 74, 79 C.B.R. (5th) 148

In Bankruptcy and Insolvency

In the Matter of the Companies' Creditors Arrangement Act Part IV Cross-Border Insolvencies R.S.C. 1985, C. C-36, as amended

In the Matter of Probe Resources Ltd. (Petitioner)

S. Fitzpatrick J.

Heard: March 31, 2011
Oral reasons: March 31, 2011
Docket: Vancouver S112111

Counsel: P.J. Reardon for Petitioner

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court

Company was subject to cease trade order — Company operated through four wholly owned subsidiaries, all incorporated in United States — Restructuring officer was appointed and company and subsidiaries began proceedings in American court — Company brought application to recognize cross-border proceedings — Application granted — Company was foreign representative of itself and subsidiaries as required by s. 45 of Companies' Creditors Arrangement Act — It was clear that restructuring proceedings in U.S. were foreign proceeding as required by s. 45 of Act — Although not all documents required by Act had been filed to recognize proceedings, court was entitled to exercise discretion to rely on copies of court documents and affidavit evidence — American proceedings were foreign main proceedings — Centre of main interest of company and subsidiaries was United States — Company and subsidiaries operated in Texas and Louisiana — All company's business operations were through U.S. subsidiaries — Financial statements indicated all of group's revenues were derived in U.S. and that all operating assets were located in U.S. — Only nominal assets were located in Canada; other than administration and organization matters, all activities were in the U.S. — Company had little connection to British Columbia outside its incorporation — Third parties would expect that U.S. law would govern — Approval given for recognition of certain orders in American courts, and for board of company to issue new common shares in accordance with restructuring plan — Recognition of U.S. proceedings was necessary to ensure fair and efficient administration of insolvency proceeding — No prejudice to any Canadian interests .

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Company was subject to cease trade order — Company operated through four wholly owned subsidiaries, all incorporated in United States — Restructuring officer was appointed and company and subsidiaries began proceedings in American court — Company brought application to recognize cross-border proceedings — Application granted — Company was foreign representative of itself and subsidiaries as required by s. 45 of Companies' Creditors Arrangement Act — It was clear that restructuring proceedings in U.S. were foreign proceeding as required by s. 45 of Act — Although not all

documents required by Act had been filed to recognize proceedings, court was entitled to exercise discretion to rely on copies of court documents and affidavit evidence — American proceedings were foreign main proceedings — Centre of main interest of company and subsidiaries was United States — Company and subsidiaries operated in Texas and Louisiana — All company's business operations were through U.S. subsidiaries — Financial statements indicated all of group's revenues were derived in U.S. and that all operating assets were located in U.S. — Only nominal assets were located in Canada; other than administration and organization matters, all activities were in the U.S. — Company had little connection to British Columbia outside its incorporation — Third parties would expect that U.S. law would govern — Approval given for recognition of certain orders in American courts, and for board of company to issue new common shares in accordance with restructuring plan — Recognition of U.S. proceedings was necessary to ensure fair and efficient administration of insolvency proceeding — No prejudice to any Canadian interests.

APPLICATION by company involved in restructring proceedings for recognition of cross-border proceedings, pursuant to *Companies' Creditors Arrangement Act*.

***S. Fitzpatrick J.*:**

1 This is an application pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"), and, specifically Part IV entitled "Cross-Border Insolvencies", to recognize certain cross-border insolvency proceedings relating to the petitioner, Probe Resources Ltd. ("Probe Canada").

2 By way of background, Probe Canada is a British Columbia corporation incorporated pursuant to the *Business Corporations Act*, S.B.C. 2002, c.57 (the "*BCA*"). Its registered office is located in Vancouver, British Columbia. It is listed as a public company on the TSX Venture Exchange. As at December 10, 2010, Probe Canada had approximately 106 million issued and outstanding common shares. At present, Probe Canada is subject to a cease trade order issued by securities regulators.

3 Probe Canada operates through four wholly owned subsidiaries, all of which are incorporated in the U.S. Its business operations include oil and natural gas exploration and production. I am advised that those subsidiaries operate businesses near the Gulf of Mexico in Texas and Louisiana. None of the business operations take place in Canada.

4 The impetus behind the restructuring proceedings, discussed in more detail below, arises from the secured debt owing by Probe Canada and its U.S. subsidiaries in the amount of approximately $27 million.

5 In November 2010, Mr. T. Coy Gallatin was engaged by the board of Probe Canada to become the chief restructuring officer of Probe Canada and its subsidiaries. Mr. Gallatin is a resident of Texas. Shortly after Mr. Gallatin's appointment, on November 16, 2010, the Probe U.S. subsidiaries commenced proceedings in the United States Bankruptcy Court for the Southern District of Texas Houston Division (the "U.S. Bankruptcy Court") pursuant to Chapter 11 of the *United States Bankruptcy Code*. The Chapter 11 proceedings of Probe Canada followed shortly thereafter, on December 10, 2010. I understand that joint administration of the bankruptcy cases for all five companies has been ordered by the U.S. Bankruptcy Court.

6 It appears that the Chapter 11 proceedings have progressed at a fairly rapid rate. Various orders have been granted in those proceedings approving the disclosure requirements relating to the joint plan of arrangement that was proposed, and approving the voting procedures so that the stakeholders could consider the plan. On March 18, 2011, Probe Canada and its subsidiaries confirmed to the U.S. Bankruptcy Court that the plan had been approved by the requisite majorities of the classes of creditors. Ultimately, on March 21, 2011, the Honourable Judge Karen Brown of the U.S. Bankruptcy Court granted an order confirming the joint plan as presented by Probe Canada and its U.S. subsidiaries.

7 The provisions of the *CCAA* relating to cross-border insolvencies that Probe Canada seeks to rely on have been in place for many years now. They were recently amended in late 2009 to, in large part, adopt the *United Nations Commission on International Trade Law* ("*UNCITRAL*") Model Law on cross-border insolvencies. I am advised by Mr. Reardon, counsel for the applicant, that there has been little judicial consideration of these new provisions.

8 The application is brought specifically under s. 46(1), which provides:

> A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

9 The first question is whether or not the requirement of there being a "foreign representative" has been met. Section 45(1) defines a "foreign representative" as:

> ... a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to
>
> (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or
>
> (b) act as a representative in respect of the foreign proceeding.

10 I have been referred to Judge Brown's order in the U.S. Bankruptcy Court on March 21, 2011, which specifically authorizes Probe Canada to act as a foreign representative on behalf of itself and the U.S. subsidiaries in any judicial or other proceeding held in a foreign country. Accordingly, I am satisfied that Probe Canada stands before the Court today as a foreign representative as that term is defined in the *CCAA*.

11 The next question is whether there is a "foreign proceeding". Section 45(1) defines a foreign proceeding as meaning:

> ... a judicial or an administrative proceeding ... in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

12 It is clear in this case that the foreign proceedings are those under Chapter 11 of the *United States Bankruptcy Code*. I am satisfied that those proceedings were commenced in the U.S. Bankruptcy Court by Probe Canada and its U.S. subsidiaries, as I have earlier described. Proceedings under the *United States Bankruptcy Code* are well known in this Court and in other superior courts across Canada, and I do not believe that there is any controversy that those proceedings would constitute a foreign proceeding in this Court.

13 The *CCAA* provides that the foreign representation must submit certain documents in its application materials to prove both the existence of the foreign proceeding and also the foreign representative's authority to act as such. Subsections 46(2)(a) and (b) of the *CCAA* provide that an application must be accompanied by a certified copy of the instrument that both commences the foreign proceeding and that authorizes the foreign representative to act. In the alternative, the foreign representation must provide a certificate from the foreign court affirming the existence of the foreign proceedings and affirming the foreign representative's authority to act. Lastly, s. 46(2)(c) provides that the foreign representative must provide a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative. These documents may be accepted by the Court as evidence without further proof: s. 46(3).

14 In this case, certified copies of those U.S. Bankruptcy Court documents have not been provided. Nor has the U.S. Bankruptcy Court provided a certificate as required. Appended to Mr. Gallatin's affidavit are simply copies of the various court documents.

15 Counsel for Probe Canada made submissions regarding the manner of proof provided. Counsel for Probe Canada has referred me to s. 46(4) of the *CCAA* which provides that the Court may, in the absence of those documents, accept any other evidence of the existence of the foreign proceeding and the foreign representative's authority that it considers appropriate. I am satisfied on the basis of the affidavit evidence and copies of documents provided that the necessary evidentiary basis has been brought before this Court to establish both the commencement of the foreign proceeding and the authority of the foreign representative.

16 I would say, however, as a matter of practice, that s. 46(2) is clear in the sense of dictating the ideal evidence that should be brought before courts on these types of proceedings: the certified copies, or the certificate from the foreign court. In respect of future applications, however, it is my view that there must be some basis upon which courts would resort to s. 46(4) in considering a potential alternate form of proof of those matters. For example, I would have expected and will expect in future cases that if certified copies or court certificates are not available, there will be some reasonable explanation provided by the moving party as to why those are not available and why the alternate form of proof should be accepted.

17 Accepting that the evidentiary basis under s. 46 of the *CCAA* has been met, the next question to be considered is whether this is a "foreign main proceeding" or a "foreign non-main proceeding", as those terms as defined in s. 45. This determination is important in two respects. Firstly, the *CCAA* dictates under s. 47(2) that the Court shall specify in the order whether it is one or the other, i.e., either a main proceeding or a foreign non-main proceeding. Secondly, that finding is not necessarily determinative of what relief might be granted by the Court under Part IV of the *CCAA*, but it does dictate whether certain provisions are mandatory or, alternatively, within the discretion of the Court.

18 Section 45(1) of the *CCAA* defines a "foreign main proceeding" as "a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests." This definition derives in large part from the *UNCITRAL* Model Law and is known colloquially before this Court and other courts around the world as establishing where the "COMI" is.

19 Section 45(2) of the *CCAA* provides that:

> For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

The registered office of Probe Canada is in British Columbia. Nevertheless, counsel for Probe Canada takes the position that the COMI of Probe Canada is in fact in the U.S. and that the recognition order should be granted by the Court on that basis.

20 As I said earlier, the 2009 amendments have been sparsely considered by Canadian courts to date. In particular, the definition of "foreign main proceeding" has received little judicial attention in Canada.

21 I have been referred by Probe Canada's counsel to Dr. Janis P. Sarra's text, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007) at 295-296. There, Professor Sarra states that the *UNCITRAL Legislative Guide on Insolvency Law* defines centre of main interest as "the place where the debtor conducts the administration of its interests on a regular basis and that is therefore ascertainable by third parties." Professor Sarra also states that the presumption that the centre of main interest is the registered office of the debtor company can be rebutted if there are factors which, viewed objectively by third parties, would lead to the conclusion that the centre of main interest is other than at the location of the registered office.

22 I also note the statement in Kevin P. McElcheran's text, *Commercial Insolvency in Canada*, 2nd ed., (Markham, Ont: LexisNexis Inc., 2011), at 376:

> Case law decided under other statutes based on the Model Law, such as the European Union *Insolvency Proceedings Regulation* [footnote omitted] and Chapter 15 of the U.S. *Bankruptcy Code*, provide guidance to Canadian courts in interpreting the meaning of COMI. European Union and American precedents suggest that COMI will be determined by reference to criteria that are objective and ascertainable by third parties. Such relevant factors include:
>
> (1) the location of headquarters;
>
> (2) the location of those who manage the debtor's business;
>
> (3) the location of primary assets and operations, and
>
> (4) the location of majority of creditors.

In deciding whether the debtor has proven that its COMI is in the jurisdiction of the foreign proceeding, Canadian courts, as the U.S. courts have done, may consider the connections between the debtor and the foreign jurisdiction comprehensively in order to give effect to the legitimate expectations of the debtor's constituents as to which substantive laws will apply to their relationship with the debtor.

23 In *Xerium Technologies Inc., Re*, 2010 ONSC 3974 (Ont. S.C.J. [Commercial List]), Justice Campbell referenced an earlier recognition order that he had granted under Part IV of the *CCAA*. In that case, the applicant was Xerium, a Delaware company which had various direct and indirect subsidiaries, including one in Canada. The Delaware Chapter 11 proceedings were recognized in Ontario as a foreign main proceeding. Among other things, Justice Campbell noted that Xerium and its subsidiaries operated a highly integrated business and were managed centrally from the United States.

24 In this case, Mr. Gallatin has provided certain evidence in support of his contention that the U.S. is the COMI of Probe Canada and its subsidiaries. Probe Canada and its subsidiaries operate within Texas and Louisiana near the Gulf of Mexico. All of Probe Canada's business operations are through the U.S. subsidiaries. I was referred to consolidated financial statements of Probe Canada and its subsidiaries which indicate that all of the group's revenues are derived in the U.S. and that all of the operating assets are located in the U.S. Only nominal assets are located in Canada. All of the operations of Probe Canada, other than administration and organization matters, are in the U.S.

25 During counsel's submission, it was not apparent what the connection to British Columbia was, apart from Probe Canada's incorporation under the *BCA*. Although there was no evidence on these matters, I am prepared to accept the submissions of Mr. Reardon on these points. There does not appear to be any physical presence of Probe Canada in British Columbia, or in Canada. I was advised that the registered office of Probe Canada is in fact Mr. Reardon's law offices. Only one of the directors resides in British Columbia. I was not, unfortunately, advised as to where other directors might be located. Finally, I was also advised that the Chief Executive Officer and Chairman of Probe Canada, who was terminated shortly after the appointment of Mr. Gallatin, resided in Texas.

26 Mr. Gallatin also gave evidence that the operations of this group in the Gulf of Mexico are heavily regulated, particularly by the United States Bureau of Ocean Energy Management, Regulation and Enforcement.

27 Mr. Gallatin in his affidavit states, quite presumptively in my opinion, that he believes that the centre of main interest of Probe Canada is in the U.S. Mr. Reardon quite properly pointed out that the decision on that matter is within the Court's bailiwick and not Mr. Gallatin's.

28 In any event, I do agree with Mr. Gallatin. I conclude that, in all of the circumstances, the centre of main interest, or COMI, of Probe Canada and its subsidiaries is in the U.S. and that the Chapter 11 proceedings should be recognized on that basis. Looking objectively at the factors present in this case, I conclude that the legitimate expectations of third parties dealing with the group would consider that U.S. law would govern. These are the stakeholders who stand to be materially affected by the restructuring proceedings in the U.S. Accordingly, I find that the presumption in s. 45(2) of the *CCAA* has been rebutted in respect of Probe Canada.

29 Having concluded that the U.S. proceedings are a foreign main proceeding, ss. 48(1) and (2) of the *CCAA* dictate that I must make certain orders staying or prohibiting certain proceedings or dealing with the debtor company's assets:

Order relating to recognition of a foreign main proceeding

48 (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and

(d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

Scope of order

(2) The order made under subsection (1) must be consistent with any order that may be made under this Act.

30 The terms of the order proposed by Probe Canada are consistent with these provisions. I note that the proposed order is also consistent with the same type of terms contained in British Columbia's model *CCAA* initial order and therefore it complies with s. 48(2).

31 Even if I had concluded that the U.S. bankruptcy proceedings were not a foreign main proceeding, but a "foreign non-main proceeding", this Court has the jurisdiction to consider a recognition order. A "foreign non-main proceeding" is defined as a foreign proceeding other than a foreign main proceeding. If, for example, the COMI of Probe Canada and its subsidiaries was other than the U.S., the Court may exercise its discretion to essentially order the same relief in appropriate circumstances. Section 49(1)(a) provides:

Other orders

49 (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and

(c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

32 If necessary, and if the U.S. proceedings were a "foreign non-main proceeding", I would have considered the same relief relating to a "foreign main proceeding" to be appropriate in these circumstances. Probe Canada seeks the relief relating to the stays of proceedings in order to allow the U.S. proceedings to be finalized in an orderly fashion. There are substantial factors connecting Probe Canada and its subsidiaries to the U.S. as noted above. To that extent, these provisions would be necessary for the protection of Probe Canada and its subsidiaries' property, and the interests of their creditor or creditors, whether in the U.S., Canada or elsewhere.

33 Probe Canada also seeks various ancillary orders pursuant to s. 49 of the *CCAA* which it says are appropriate in this case.

34 Probe Canada is seeking specific recognition of various court orders of Judge Brown granted in the U.S. bankruptcy proceedings, and orders allowing implementation of those orders, as follows:

(a) Order Approving Joint Disclosure Statement regarding Joint Chapter 11 Plan of Reorganization of Probe Canada and the U.S. Subsidiaries made March 1, 2011; and

(b) Amended Order approving:

(i) the Confirmation Hearing Notice, the contents of the Solicitation Package, and the manner of mailing and service of the Solicitation Package and Confirmation Hearing Notice;

(ii) the procedures for voting and tabulation of ballots;

(iii) the form of ballot; and

(iv) the procedures for allowing claims for voting purposes only made March 1, 2011; and

(c) Order confirming Joint Chapter 11 Plan and Reorganization of Probe Canada and the U.S. Subsidiaries made March 21, 2011. (By this order, Judge Brown confirmed that all requirements under the *United States Bankruptcy Code* had been met, that the joint plan was fair and reasonable, that the requisite number and value of claims had approved the joint plan and that the joint plan was to be implemented. This order has been filed with the U.S. Bankruptcy Court but has not yet been signed by Judge Brown.)

35 Mr. Reardon has referred me to the plan that has been approved by the U.S. Bankruptcy Court. I will briefly summarize the provisions in that plan. Basically, they provide for new common shares of Probe Canada to be issued to various classes of creditors whose claims are to be impaired by the plan. There are three classes of creditors whose claims will be impaired:

1. the senior secured creditor, who, as I said earlier, is owed in excess of $27 million;

2. certain creditors whose claims arise from a debt restructuring agreement (I am advised that these are essentially akin to administrative charges); and

3. the general creditors.

36 Under the joint plan, the senior secured creditor is to receive 90% of the new common stock and the class of debt restructuring creditors are to receive 10%. In essence, the majority of the new shares will be held by those two parties, and the existing shareholders of Probe Canada are to hold no more than 3% of the shares in the reorganized company.

37 The general creditors, which are the third class of creditors, are to receive a *pro rata* share of distributions from recoveries under certain avoidance actions available to restructured companies in the U.S.

38 Consistent with the requirement under s. 46(2)(c) of the *CCAA*, Mr. Gallatin states that a Canadian creditor, Cypress Acquisitions Ltd., just recently, on March 21, 2011, filed a notice of civil claim in this Court against Probe Canada, seeking recovery of approximately $70,600. I am advised that the general creditors under the joint plan in the U.S. include Cypress Acquisitions Ltd. In fact, I am advised by Mr. Reardon that the Chapter 11 proceedings in the U.S. have included all of the Canadian creditors of either Probe Canada or any of its subsidiaries and that those proceedings were equally available to the Canadian creditors, including Cypress Acquisitions Ltd.

39 The further ancillary relief sought by Probe Canada relates to the manner in which the new common shares are to be issued towards effecting the restructuring of the shareholdings in Probe Canada. Probe Canada seeks an order allowing its board of directors to take certain steps to effect the transactions. Those steps would include:

• Firstly, continuing Probe Canada under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44;

• Secondly, changing the name of Probe Canada to a name identified by the board; and,

• Thirdly, consolidating the common shares of Probe Canada in a ratio determined by the board, all pursuant to duly passed resolutions of the board.

All of these matters are consistent with the joint plan of arrangement as approved by the U.S. Bankruptcy Court on March 21, 2011.

40 The jurisdiction to grant such ancillary relief is found in s. 6(2) of the *CCAA*:

> If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

The applicability of that provision in the context of cross-border proceedings follows from s. 48(2) of the *CCAA*, which provides that an order under Part IV must be consistent with any order that may be made under the *CCAA*. Accordingly, to the extent that this Court may have granted this relief in other types proceedings under the *CCAA*, that relief is equally available in the context of recognition proceedings such as this one. I also note that to the extent that this provision allows the Court to override what might be requirements under provincial legislation in that respect (for example, under the *BCA*), the paramountcy doctrine might be invoked under the *CCAA*: see *Loewen Group Inc., Re* (2001), 32 C.B.R. (4th) 54 (Ont. S.C.J. [Commercial List]).

41 In conclusion, I am satisfied that I have the jurisdiction under Part IV of the *CCAA* to grant the order sought. In my view, a recognition order such as is sought here is consistent with the purpose of Part IV the *CCAA*, as articulated in s. 44:

> **Purpose**
>
> 44 The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote
>
> (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
>
> (b) greater legal certainty for trade and investment;
>
> (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
>
> (d) the protection and the maximization of the value of debtor company's property; and
>
> (e) the rescue of financially troubled businesses to protect investment and preserve employment.

42 In *Xerium*, at para. 27, Justice Campbell quotes certain factors from *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]), which may be considered in a recognition application. In *Xerium*, the Court was considering recognition of the final order of a U.S. Bankruptcy court approving a plan, having earlier granted an order recognizing the foreign proceeding and the authority of the foreign representative. Similar factors are at play here. The Probe companies are a highly integrated business that is managed centrally from the U.S. The confirmation of the U.S. proceedings and the joint plan is sought in accordance with standard and well-established procedures and practices from the U.S. Bankruptcy Court. Probe Canada is a full participant in those proceedings. Recognition of the U.S. proceedings is necessary to ensure that there is a fair and efficient administration of this insolvency proceeding. This is a situation where there is no prejudice to Canadian interests. Canadian creditors have had, and will enjoy, full rights of participation, along with the U.S. creditors, in those proceedings.

43 Mr. Reardon, I have one point on your draft form of order that I wish to address with you, unless you wish to take me through the order in some detail.

44

> MR. REARDON: I'm happy to, My Lady. I was going to say the only thing that I would suggest is — I can't say it's out of the ordinary but what caused me a little concern — is the service of the material, which is at para. 12, page 5. All Part IV

says about the obligation of the foreign representative is that it will advertise twice. We've asked for one advertisement. These advertisements are fairly expensive. It doesn't say anything else about serving anybody. Now, all of the creditors, of course, pursuant to the orders made in the U.S. have received notice of the U.S. bankruptcy proceeding, and so I have asked in the order that we comply with s. 53, which is placing at least one ad in either of the national papers but that there be no other necessity of notification, but then ask for an order about how to effect service if we have to, and I had in mind, particularly with para. 13, serving the one company that has started the action.

45

THE COURT: Well, I think that would certainly be the minimum, to serve Cypress Acquisitions Ltd. without delay. Section 53(b) of the *CCAA* requires that the foreign representation must publish once a week for two consecutive weeks, unless otherwise directed by the courts. In light of the lateness of the recognition proceeding, I am going to make you comply with publication for two consecutive weeks, and you can choose between the *Globe* or the *Post* in addition to, as I have said, serving Cypress Acquisitions Ltd.

46 I also wish to address the filing of this order in the U.S. Bankruptcy Court. What happens typically in these U.S. proceedings, of course, is that there is an internet portal through which interested parties can look at documents. I do not know if it is the same here as what has happened in cases where I was involved, but in my experience what typically happens is that the debtors retain an entity to post all of the court documents and allow people access to those documents over the internet. You have to sign up and then you get access to all of these documents, because there is typically a myriad of these documents that are filed and it is an ongoing process. So I am going to order that if there is such a posting of the documents in the U.S. proceedings, that this order be similarly posted. I do not know whether that can arise directly or whether you have to file this order with the U.S. Bankruptcy Court in the first place. I am assuming that you are going to file this in the Chapter 11 proceedings in any event.

47

MR. REARDON: That will be up to counsel in the U.S. I will deliver the order to them and they will do, I guess, what they're supposed to do with it. I don't know, but certainly if you order that we post it, if this service exists, then that's easy. I mean, I will deliver it to them. I'm not sure we can order that it be filed in the Chapter 11 proceeding.

48

THE COURT: I do not know the answer to that either. What I am saying is that if there is this type of a process where you can post documents so that the public is aware of it, I am also ordering that it happen.

49

THE COURT: Regarding para. 6 of the draft order, I find it a bit odd that this Court would be asked to declare that "[t]he U.S. Court has the jurisdiction to determine, compromise or otherwise affect the interests of claimants, including creditors and shareholders of Probe Canada, against Probe Canada". The U.S. Bankruptcy Court's order approving the joint plan on March 21, 2010 specifically finds that that court has jurisdiction under the *United States Bankruptcy Code* in that respect. The order sought from this Court is simply to recognize the taking of that jurisdiction by the U.S. Bankruptcy Court and to grant ancillary relief to allow an orderly implementation of that approval order in Canada on the basis of comity. I do not see that it is necessary or desirable for this Court to make declarations on matters not within the purview of these recognition proceedings. It seems to me that it is implicit from this Court recognizing the U.S. orders that have been granted that the taking of that jurisdiction is to be recognized and enforced in Canada. I do not frankly think you need this provision.

50 Accordingly, the order sought is approved with the changes as discussed above.

Application granted.

End of Document

TAB 8

Ontario Supreme Court
Babcock & Wilcox Canada Ltd.,
Date: 2000-02-25

In the Matter of Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of Babcock & Wilcox Canada Ltd.

Ontario Superior Court of Justice [Commercial List] Farley J.

Heard: February 25, 2000

Judgment: February 25, 2000

Docket: 00-CL-3667

Derrick Toy, for Babcock & Wilcox Canada Ltd.

Paul Macdonald, for Citibank North America Inc., Lenders under the Post-Petition Credit Agreement.

***Farley J.*:**

[1] I have had the opportunity to reflect on this matter which involves an aspect of the recent amendments to the insolvency legislation of Canada, which amendments have not yet been otherwise dealt with as to their substance. The applicant, Babcock & Wilcox Canada Ltd. ("BW Canada"), a solvent company, has applied for an interim order under s. 18.6 of the *Companies' Creditors Arrangement Act* ("CCAA"):

> (a) that the proceedings commenced by BW Canada's parent U.S. corporation and certain other U.S. related corporations (collectively "BWUS") for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with mass asbestos claims before the U.S. Bankruptcy Court be recognized as a "foreign proceeding" for the purposes of s. 18.6;
>
> (b) that BW Canada be declared a company which is entitled to avail itself of the provisions of s. 18.6;
>
> (c) that there be a stay against suits and enforcements until May 1, 2000 (or such later date as the Court may order) as to asbestos related proceedings against BW Canada, its property and its directors;

(d) that BW Canada be authorized to guarantee the obligations of its parent to the DIP Lender (debtor in possession lender) and grant security therefor in favour of the DIP Lender; and

(e) and for other ancillary relief.

[2] In Chapter 11 proceedings under the U.S. Bankruptcy Code, the U.S. Bankruptcy Court in New Orleans issued a temporary restraining order on February 22, 2000 wherein it was noted that BW Canada may be subject to actions in Canada similar to the U.S. asbestos claims. U.S. Bankruptcy Court Judge Brown's temporary restraining order was directed against certain named U.S. resident plaintiffs in the asbestos litigation:

> …and towards all plaintiffs and potential plaintiffs in Other Derivative Actions, that they are hereby restrained further prosecuting Pending Actions or further prosecuting or commencing Other Derivative Actions against Non-Debtor Affiliates, until the Court decides whether to grant the Debtors' request for a preliminary injunction.

Judge Brown further requested the aid and assistance of the Canadian courts in carrying out the U.S. Bankruptcy Court's orders. The "Non-Debtor Affiliates" would include BW Canada.

[3] Under the 1994 amendments to the U.S. Bankruptcy Code, the concept of the establishment of a trust sufficient to meet the court determined liability for a mass torts situations was introduced. I am advised that after many years of successfully resolving the overwhelming majority of claims against it on an individual basis by settlement on terms BWUS considered reasonable, BWUS has determined, as a result of a spike in claims with escalating demands when it was expecting a decrease in claims, that it is appropriate to resort to the mass tort trust concept. Hence its application earlier this week to Judge Brown with a view to eventually working out a global process, including incorporating any Canadian claims. This would be done in conjunction with its joint pool of insurance which covers both BWUS and BW Canada. Chapter 11 proceedings do not require an applicant thereunder to be insolvent; thus BWUS was able to make an application with a view towards the 1994 amendments (including s. 524(g)). This subsection would permit the U.S. Bankruptcy Court on confirmation of a plan of reorganization under Chapter 11 with a view towards rehabilitation in the sense of avoiding insolvency in a mass torts situation to:

> …enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claims or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust.

[4] In 1997, ss. 267-275 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended ("BIA") and s. 18.6 of the CCAA were enacted to address the rising number of international insolvencies ("1997 Amendments"). The 1997 Amendments were introduced after a lengthy consultation process with the insolvency profession and others. Previous to the 1997 Amendments, Canadian courts essentially would rely on the evolving common law principles of comity which permitted the Canadian court to recognize and enforce in Canada the judicial acts of other jurisdictions.

[5] La Forest J in *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256 (S.C.C.), at p. 269 described the principle of comity as:

> "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws…

[6] In *ATL Industries Inc. v. Han Eol Ind. Co.* (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div. [Commercial List]), at pp. 302-3 I noted the following:

> Allow me to start off by stating that I agree with the analysis of MacPherson J. in *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.) when in discussing *Morguard Investments Ltd. v. De Savoye,* [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, 52 B.C.L.R. (2d) 160, 122 N.R. 81, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, he states at p.411:
>
> > The leading case dealing with the enforcement of "foreign" judgments is the decision of the Supreme Court of Canada in *Morguard Investments, supra.* The question in that case was whether, and the circumstances in which, the judgment of an Alberta court could be enforced in British Columbia. A unanimous court, speaking through La Forest J., held in favour of enforceability and, in so doing, discussed in some detail the doctrinal principles governing inter-jurisdictional

enforcement of orders. I think it fair to say that the overarching theme of La Forest J.'s reasons is the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure. He expressed this theme in these words, at p. 1095:

> Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem,* such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. *This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the slate where the judgment was given has power over the litigants, the judgments of its courts should be respected.* (emphasis added in original)

Morguard Investments was, as stated earlier, a case dealing with the enforcement of a court order across provincial boundaries. However, the historical analysis in La Forest J.'s judgment, of both the United Kingdom and Canadian jurisprudence, and the doctrinal principles enunciated by the court are equally applicable, in my view, in a situation where the judgment has been rendered by a court in a foreign jurisdiction. This should not be an absolute rule - there will be some foreign court orders that should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process. (my emphasis added)

Certainly the substantive and procedural aspects of the U.S. Bankruptcy Code including its 1994 amendments are not so different and do not radically diverge from our system.

[7] After reviewing La Forest J.'s definition of comity, I went on to observe at p. 316:

> As was discussed by J.G. Castel, *Canadian Conflicts of Laws,* 3rd ed. (Toronto: Butterworths, 1994) at p. 270, there is a presumption of validity attaching to a foreign judgment unless and until it is established to be invalid. It would seem that the same type of evidence would be required to impeach a foreign judgment as a domestic one: fraud practiced on the court or tribunal: see *Sun Alliance Insurance Co. v. Thompson* (1981), 56 N.S.R. (2d) 619, 117 A.P.R. 619 (T.D.), Sopinka, supra, at p. 992.

La Forest J. went on to observe in *Morguard* at pp. 269-70:

> In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.
>
> . . .
>
> Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.

See also *Hunt v. T & N plc* (1993), 109 D.L.R. (4th) 16 (S.C.C.), at p. 39.

[8] While *Morguard* was an interprovincial case, there is no doubt that the principles in that case are equally applicable to international matters in the view of MacPherson J. and myself in *Arrowmaster* (1993), 17 O.R. (3d) 407 (Ont. Gen. Div.), and *ATL* respectively. Indeed the analysis by La Forest J. was on an international plane. As a country whose well-being is so heavily founded on international trade and investment, Canada of necessity is very conscious of the desirability of invoking comity in appropriate cases.

[9] In the context of cross-border insolvencies, Canadian and U.S. Courts have made efforts to complement, coordinate and where appropriate accommodate the proceedings of the other. Examples of this would include *Olympia & York Developments Ltd., Ever fresh Beverages Inc.* and *Loewen Group Inc. v. Continental Insurance Co. of Canada* (1997), 48 C.C.L.I. (2d) 119 (B.C. S.C.). Other examples involve the situation where a multi-jurisdictional proceeding is specifically connected to one jurisdiction with that jurisdiction's court being allowed to exercise principal control over the insolvency process: see *Roberts v. Picture Butte Municipal Hospital* (1998), 23 C.P.C. (4th) 300 (Alta. Q.B.), at pp. 5-7 [[1998] A.J. No. 817];

Microbiz Corp. v. Classic Software Systems Inc. (1996), 45 C.B.R. (3d) 40 (Ont. Gen. Div.), at p. 4; *Tradewell Inc. v. American Sensors Electronics, Inc.,* 1997 WL 423075 (S.D.N.Y. 1997).

[10] In *Roberts,* Forsythe J. at pp. 5-7 noted that steps within the proceedings themselves are also subject to the dictates of comity in recognizing and enforcing a U.S. Bankruptcy Court stay in the *Dow Corning* litigation [*Taylor v. Dow Corning Australia Pty. Ltd.* (December 19, 1997), Doc. 8438/95 (Australia Vic. Sup. Ct.)] as to a debtor in Canada so as to promote greater efficiency, certainty and consistency in connection with the debtor's restructuring efforts. Foreign claimants were provided for in the U.S. corporation's plan. Forsyth J. stated:

> Comity and cooperation are increasingly important in the bankruptcy context. *As internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination there would be multiple proceedings, inconsistent judgments and general uncertainty.*
>
> *…I find that common sense dictates that these matters would be best dealt with by one court, and in the interest of promoting international comity it seems the forum for this case is in the U.S. Bankruptcy Court.* Thus, in either case, whether there has been an attornment or not, I conclude it is appropriate for me to exercise my discretion and apply the principles of comity and grant the Defendant's stay application. I reach this conclusion based on all the circumstances, including the clear wording of the U.S. Bankruptcy Code provision, the similar philosophies and procedures in Canada and the U.S., the Plaintiffs attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding… (emphasis added)

[11] The CCAA as remedial legislation should be given a liberal interpretation to facilitate its objectives. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at p. 320; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

[12] David Tobin, the Director General, Corporate Governance Branch, Department of Industry in testifying before the Standing Committee on Industry regarding Bill C-5, An Act to amend the BIA, the CCAA and the Income Tax Act, stated at 1600:

> Provisions in Bill C-5 attempt to actually codify, which has always been the practice in Canada. They include the Court recognition of foreign representatives; Court authority to

> make orders to facilitate and coordinate international insolvencies; provisions that would make it clear that foreign representatives are allowed to commence proceedings in Canada, as per Canadian rules – however, they clarify that foreign stays of proceedings are not applicable but a foreign representative can apply to a court for a stay in Canada; and Canadian creditors and assets are protected by the bankruptcy and insolvency rules.

The philosophy of the practice in international matters relating to the CCAA is set forth in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165 (Ont. Gen. Div.), at p. 167 where Blair J. stated:

> The Olympia & York re-organization involves proceedings in three different jurisdictions: Canada, the United States and the United Kingdom. Insolvency disputes with international overtones and involving property and assets in a multiplicity of jurisdictions are becoming increasingly frequent. Often there are differences in legal concepts – sometimes substantive, sometimes procedural – between the jurisdictions. The Courts of the various jurisdictions should seek to cooperate amongst themselves, in my view, in facilitating the trans-border resolution of such disputes as a whole, where that can be done in a fashion consistent with their own fundamental principles of jurisprudence. The interests of international cooperation and comity, and the interests of developing at least some degree of certitude in international business and commerce, call for nothing less.

Blair J. then proceeded to invoke inherent jurisdiction to implement the Protocol between the U.S. Bankruptcy Court and the Ontario Court. See also my endorsement of December 20, 1995, in *Everfresh Beverages Inc.* where I observed: “I would think that this Protocol demonstrates the ‘essence of comity’ between the Courts of Canada and the United States of America.” *Everfresh* was an example of the effective and efficient use of the Cross-Border Insolvency Concordat, adopted by the Council of the International Bar Association on May 31, 1996 (after being adopted by its Section on Business Law Council on September 17, 1995), which Concordat deals with, inter alia, principal administration of a debtor’s reorganization and ancillary jurisdiction. See also the UNCITRAL Model Law on Cross-Border Insolvency.

[13] Thus it seems to me that this application by BW Canada should be reviewed in light of (i) the doctrine of comity as analyzed in *Morguard, Arrowmaster* and *ATL, supra,* in regard to

its international aspects; (ii) inherent jurisdiction; (iii) the aspect of the liberal interpretation of the CCAA generally; and (iv) the assistance and codification of the 1997 Amendments.

"Foreign proceeding" is defined in s. 18.6(1) as:

> In this section,
>
> > "foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally;…

Certainly a U.S. Chapter 11 proceeding would fit this definition subject to the question of "debtor". It is important to note that the definition of "foreign proceeding" in s. 18.6 of the CCAA contains no specific requirement that the debtor be insolvent. In contrast, the BIA defines a "debtor" in the context of a foreign proceeding (Part XIII of the BIA) as follows:

> s. 267 In this Part,
>
> > "debtor" means an *insolvent person* who has property in Canada, a *bankrupt* who has property in Canada or a *person who has the status of a bankrupt* under foreign law in a foreign proceeding and has property in Canada;… (emphasis added)

I think it a fair observation that the BIA is a rather defined code which goes into extensive detail. This should be contrasted with the CCAA which is a very short general statute which has been utilized to give flexibility to meet what might be described as the peculiar and unusual situation circumstances. A general categorization (which of course is never completely accurate) is that the BIA may be seen as being used for more run of the mill cases whereas the CCAA may be seen as facilitating the more unique or complicated cases. Certainly the CCAA provides the flexibility to deal with the thornier questions. Thus I do not think it unusual that the draftees of the 1997 Amendments would have it in their minds that the provisions of the CCAA dealing with foreign proceedings should continue to reflect this broader and more flexible approach in keeping with the general provisions of the CCAA, in contrast with the corresponding provisions under the BIA. In particular, it would appear to me to be a reasonably plain reading interpretation of s. 18.6 that recourse may be had to s. 18.6 of the CCAA in the case of a solvent debtor. Thus I would conclude that the aspect of insolvency is not a condition precedent vis-a-vis the "debtor" in the foreign proceedings (here the Chapter 11 proceedings) for the proceedings in Louisiana to be a foreign proceeding

under the definition of s. 18.6. I therefore declare that those proceedings are to be recognized as a “foreign proceeding” for the purposes of s. 18.6 of the CCAA.

[14] It appears to me that my conclusion above is reinforced by an analysis of s. 18.6(2) which deals with concurrent filings by a debtor under the CCAA in Canada and corresponding bankruptcy or insolvency legislation in a foreign jurisdiction. This is not the situation here, but it would be applicable in the *Loewen* case. That subsection deals with the coordination of proceedings as to a “debtor company” initiated pursuant to the CCAA and the foreign legislation.

> s. 18.6(2). The court may, in respect of a *debtor company,* make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a coordination of proceedings under the Act with any foreign proceeding. (emphasis added)

[15] The definition of “debtor company” is found in the general definition section of the CCAA, namely s. 2 and that definition incorporates the concept of insolvency. Section 18.6(2) refers to a “debtor company” since only a “debtor company” can file under the CCAA to propose a compromise with its unsecured or secured creditors: ss. 3, 4 and 5 CCAA. See also s. 18.6(8) which deals with currency concessions “[w]here a compromise or arrangement is proposed in respect of a debtor company…”. I note that “debtor company” is not otherwise referred to in s. 18.6; however “debtor” is referred to in both definitions under s. 18.6(1).

[16] However, s. 18.6(4) provides a basis pursuant to which a company such as BW Canada, a solvent corporation, may seek judicial assistance and protection in connection with a foreign proceeding. Unlike s. 18.6(2), s. 18.6(4) does not contemplate a full filing under the CCAA. Rather s. 18.6(4) may be utilized to deal with situations where, notwithstanding that a full filing is not being made under the CCAA, ancillary relief is required in connection with a foreign proceeding.

> s. 18.6(4) Nothing in this section prevents the court, on the application of a foreign representative or *any other interested persons,* from applying such legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives as are not inconsistent with the provisions of this Act. (emphasis added)

BW Canada would fit within “any interested person” to bring the subject application to apply the principles of comity and cooperation. It would not appear to me that the relief requested is of a nature contrary to the provisions of the CCAA.

[17] Additionally there is s. 18.6(3) whereby once it has been established that there is a foreign proceeding within the meaning of s. 18.6(1) (as I have concluded there is), then this court is given broad powers and wide latitude, all of which is consistent with the general judicial analysis of the CCAA overall, to make any order it thinks appropriate in the circumstances.

> s. 18.6(3) An order of the court under this Section may be made on such terms and conditions as the court considers appropriate in the circumstances.

This subsection reinforces the view expressed previously that the 1997 Amendments contemplated that it would be inappropriate to pigeonhole or otherwise constrain the interpretation of s. 18.6 since it would be not only impracticable but also impossible to contemplate the myriad of circumstances arising under a wide variety of foreign legislation which deal generally and essentially with bankruptcy and insolvency but not exclusively so. Thus, the Court was entrusted to exercise its discretion, but of course in a judicial manner.

[18] Even aside from that, I note that the Courts of this country have utilized inherent jurisdiction to fill in any gaps in the legislation and to promote the objectives of the CCAA. Where there is a gap which requires bridging, then the question to be considered is what will be the most practical common sense approach to establishing the connection between the parts of the legislation so as to reach a just and reasonable solution. See *Westar Mining Ltd., Re* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.), at pp. 93-4; *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* (1995), 34 C.B.R. (3d) 4 (B.C. C.A.), at p. 2; *Lehndorff General Partner Ltd.* at p. 30.

[19] The Chapter 11 proceedings are intended to resolve the mass asbestos related tort claims which seriously threaten the long term viability of BWUS and its subsidiaries including BW Canada. BW Canada is a significant participant in the overall Babcock & Wilcox international organization. From the record before me it appears reasonably clear that there is an interdependence between BWUS and BW Canada as to facilities and services. In addition there is the fundamental element of financial and business stability. This interdependence has

been increased by the financial assistance given by the BW Canada guarantee of BWUS' obligations.

[20] To date the overwhelming thrust of the asbestos related litigation has been focussed in the U.S. In contradistinction BW Canada has not in essence been involved in asbestos litigation to date. The 1994 amendments to the U.S. Bankruptcy Code have provided a specific regime which is designed to deal with the mass tort claims (which number in the hundreds of thousands of claims in the U.S.) which appear to be endemic in the U.S. litigation arena involving asbestos related claims as well as other types of mass torts. This Court's assistance however is being sought to stay asbestos related claims against BW Canada with a view to this stay facilitating an environment in which a global solution may be worked out within the context of the Chapter 11 proceedings trust.

[21] In my view, s. 18.6(3) and (4) permit BW Canada to apply to this Court for such a stay and other appropriate relief. Relying upon the existing law on the recognition of foreign insolvency orders and proceedings, the principles and practicalities discussed and illustrated in the Cross-Border Insolvency Concordat and the UNCITRAL Model Law on Cross-Border Insolvencies and inherent jurisdiction, all as discussed above, I would think that the following may be of assistance in advancing guidelines as to how s. 18.6 should be applied. I do not intend the factors listed below to be exclusive or exhaustive but merely an initial attempt to provide guidance:

(a) The recognition of comity and cooperation between the courts of various jurisdictions are to be encouraged.

(b) Respect should be accorded to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada.

(c) All stakeholders are to be treated equitably, and to the extent reasonably possible, common or like stakeholders are to be treated equally, regardless of the jurisdiction in which they reside.

(d) The enterprise is to be permitted to implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis

of the enterprise and to the extent reasonably practicable, one jurisdiction should take charge of the principal administration of the enterprise's reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of the stakeholders and does not inappropriately detract from the net benefits which may be available from alternative approaches.

(e) The role of the court and the extent of the jurisdiction it exercises will vary on a case by case basis and depend to a significant degree upon the court's nexus to that enterprise; in considering the appropriate level of its involvement, the court would consider:

(i) the location of the debtor's principal operations, undertaking and assets;

(ii) the location of the debtor's stakeholders;

(iii) the development of the law in each jurisdiction to address the specific problems of the debtor and the enterprise;

(iv) the substantive and procedural law which may be applied so that the aspect of undue prejudice may be analyzed;

(v) such other factors as may be appropriate in the instant circumstances.

(f) Where one jurisdiction has an ancillary role,

(i) the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments in respect of that debtor's reorganizational efforts in the foreign jurisdiction;

(ii) stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.

(g) As effective notice as is reasonably practicable in the circumstances should be given to all affected stakeholders, with an opportunity for such stakeholders to come back into the court to review the granted order with a view, if thought desirable, to rescind or vary the granted order or to obtain any other appropriate relief in the circumstances.

[22] Taking these factors into consideration, and with the determination that the Chapter 11 proceedings are a "foreign proceeding" within the meaning of s. 18.6 of the CCAA and that it is appropriate to declare that BW Canada is entitled to avail itself of the provisions of s. 18.6, I would also grant the following relief. There is to be a stay against suits and enforcement as

requested; the initial time period would appear reasonable in the circumstances to allow BWUS to return to the U.S. Bankruptcy Court. Assuming the injunctive relief is continued there, this will provide some additional time to more fully prepare an initial draft approach with respect to ongoing matters. It should also be recognized that if such future relief is not granted in the U.S. Bankruptcy Court, any interested person could avail themselves of the "comeback" clause in the draft order presented to me and which I find reasonable in the circumstances. It appears appropriate, in the circumstances that BW Canada guarantee BWUS' obligations as aforesaid and to grant security in respect thereof, recognizing that same is permitted pursuant to the general corporate legislation affecting BW Canada, namely the *Business Corporations Act* (Ontario). I note that there is also a provision for an "Information Officer" who will give quarterly reports to this Court. Notices are to be published in the Globe & Mail (National Edition) and the National Post. In accordance with my suggestion at the hearing, the draft order notice has been revised to note that persons are alerted to the fact that they may become a participant in these Canadian proceedings and further that, if so, they may make representations as to pursuing their remedies regarding asbestos related claims in Canada as opposed to the U.S. As discussed above the draft order also includes an appropriate "comeback" clause. This Court (and I specifically) look forward to working in a cooperative judicial way with the U.S. Bankruptcy Court (and Judge Brown specifically).

[23] I am satisfied that it is appropriate in these circumstances to grant an order in the form of the revised draft (a copy of which is attached to these reasons for the easy reference of others who may be interested in this area of s. 18.6 of the CCAA).

[24] Order to issue accordingly.

Application granted.

Appendix

Court File No. 00-CL-3667

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR. JUSTICE FARLEY

FRIDAY, THE 25TH DAY OF FEBRUARY, 2000

IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

INITIAL ORDER

THIS MOTION made by the Applicant Babcock & Wilcox Canada Ltd. for an Order substantially in the form attached to the Application Record herein was heard this day, at 393 University Avenue, Toronto, Ontario.

ON READING the Notice of Application, the Affidavit of Victor J. Manica sworn February 23, 2000 (the "Manica Affidavit"), and on notice to the counsel appearing, and upon being advised that no other person who might be interested in these proceedings was served with the Notice of Application herein.

SERVICE

1. *THIS COURT ORDERS* that the time for service of the Notice of Application and the Affidavit in support of this Application be and it is hereby abridged such that the Application is properly returnable today, and, further, that any requirement for service of the Notice of Application and of the Application Record upon any interested party, other than the parties herein mentioned, is hereby dispensed with.

RECOGNITION OF THE U.S. PROCEEDINGS

2. *THIS COURT ORDERS AND DECLARES* that the proceedings commenced by the Applicant's United States corporate parent and certain other related corporations in the United States for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with asbestos claims before the U.S. Bankruptcy Court (the "U.S. Proceedings") be and hereby is recognized as a "foreign proceeding" for purposes of

Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended, (the "CCAA").

APPLICATION

3. *THIS COURT ORDERS AND DECLARES* that the Applicant is a company which is entitled to relief pursuant to s. 18.6 of the CCAA.

PROTECTION FROM ASBESTOS PROCEEDINGS

4. *THIS COURT ORDERS* that until and including May 1, 2000, or such later date as the Court may order (the "Stay Period"), no suit, action, enforcement process, extra-judicial proceeding or other proceeding relating to, arising out of or in any way connected to damages or loss suffered, directly or indirectly, from asbestos, asbestos contamination or asbestos related diseases ("Asbestos Proceedings") against or in respect of the Applicant, its directors or any properly of the Applicant, wheresoever located, and whether held by the Applicant in whole or in part, directly or indirectly, as principal or nominee, beneficially or otherwise shall be commenced, and any Asbestos Proceedings against or in respect of the Applicant, its directors or the Applicant's Property already commenced be and are hereby stayed and suspended.

5. *THIS COURT ORDERS* that during the Stay Period, the right of any person, firm, corporation, governmental authority or other entity to assert, enforce or exercise any right, option or remedy arising by law, by virtue of any agreement or by any other means, as a result of the making or filing of these proceedings, the U.S. Proceedings or any allegation made in these proceedings or the U.S. Proceedings be and is hereby restrained.

DIP FINANCING

6. *THIS COURT ORDERS* that the Applicant is hereby authorized and empowered to guarantee the obligations of its parent, The Babcock & Wilcox Company, to Citibank, N.A., as Administrative Agent, the Lenders, the Swing Loan Lender, and Issuing Banks (as those terms are defined in the Post-Petition Credit Agreement (the "Credit Agreement")) dated as of February 22, 2000 (collectively, the "DIP Lender"), and to grant security (the "DIP Lender's Security") for such guarantee substantially on the terms and conditions set forth in the Credit Agreement.

7. *THIS COURT ORDERS* that the obligations of the Applicant pursuant to the Credit Agreement, the DIP Lender's Security and all the documents delivered pursuant thereto constitute legal, valid and binding obligations of the Applicant enforceable against it in accordance with the terms thereof, and the payments made and security granted by the Applicant pursuant to such documents do not constitute fraudulent preferences, or other challengeable or reviewable transactions under any applicable law.

8. *THIS COURT ORDERS* that the DIP Lender's Security shall be deemed to be valid and effective notwithstanding any negative covenants, prohibitions or other similar provisions with respect to incurring debt or the creation of liens or security contained in any existing agreement between the Applicant and any lender and that, notwithstanding any provision to the contrary in such agreements,

(a) the execution, delivery, perfection or registration of the DIP Lender's Security shall not create or be deemed to constitute a breach by the Applicant of any agreement to which it is a party, and

(b) the DIP Lender shall have no liability to any person whatsoever as a result of any breach of any agreement caused by or resulting from the Applicant entering into the Credit Agreement, the DIP Lender's Security or other document delivered pursuant thereto.

REPORT AND EXTENSION OF STAY

9. As part of any application by the Applicant for an extension of the Stay Period:

(a) the Applicant shall appoint Victor J. Manica, or such other senior officer as it deems appropriate from time to time, as an information officer (the "Information Officer");

(b) the Information Officer shall deliver to the Court a report at least once every three months outlining the status of the U.S. Proceeding, the development of any process for dealing with asbestos claims and such other information as the Information Officer believes to be material (the "Information Reports"); and

(c) the Applicant and the Information Officer shall incur no liability or obligation as a result of the appointment of the Information Officer or the fulfilment of the duties of the Information Officer in carrying out the provisions of this Order and no action or other proceedings shall be commenced against the Applicant or Information Officer as an result of or relating in any way to the appointment of the Information Officer or the

fulfilment of the duties of the Information Officer, except with prior leave of this Court and upon further order securing the solicitor and his own client costs of the Information Officer and the Applicant in connection with any such action or proceeding.

SERVICE AND NOTICE

10. *THIS COURT ORDERS* that the Applicant shall, within fifteen (15) business days of the date of entry of this Order, publish a notice of this Order in substantially the form attached as Schedule “A” hereto on two separate days in the Globe & Mail (National Edition) and the National Post.

11. *THIS COURT ORDERS* that the Applicant be at liberty to serve this Order, any other orders in these proceedings, all other proceedings, notices and documents by prepaid ordinary mail, courier, personal delivery or electronic transmission to any interested party at their addresses as last shown on the records of the Applicant and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

MISCELLANEOUS

12. *THIS COURT ORDERS* that notwithstanding anything else contained herein, the Applicant may, by written consent of its counsel of record herein, agree to waive any of the protections provided to it herein.

13. *THIS COURT ORDERS* that the Applicant may, from time to time, apply to this Court for directions in the discharge of its powers and duties hereunder or in respect of the proper execution of this Order.

14. *THIS COURT ORDERS* that, notwithstanding any other provision of this Order, any interested person may apply to this Court to vary or rescind this order or seek other relief upon 10 days’ notice to the Applicant and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

15. *THIS COURT ORDERS AND REQUESTS* the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada (including the assistance of any court in Canada pursuant to Section 17 of the CCAA) and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any

province and any court or any judicial, regulatory or administrative body of the United States and the states or other subdivisions of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

Schedule “A”

NOTICE

RE: IN THE MATTER OF S. 18.6 OF THE COMPANIES’ CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED (the “CCAA”)

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

PLEASE TAKE NOTICE that this notice is being published pursuant to an Order of the Superior Court of Justice of Ontario made February 25, 2000. The corporate parent of Babcock & Wilcox Canada Ltd. and certain other affiliated corporations in the United States have filed for protection in the United States under Chapter 11 of the Bankruptcy Code to seek, as the result of recent, sharp increases in the cost of settling asbestos claims which have seriously threatened the Babcock & Wilcox Enterprise’s long term health, protection from mass asbestos claims to which they are or may become subject. Babcock & Wilcox Canada Ltd. itself has not filed under Chapter 11 but has sought and obtained an interim order under Section 18.6 of the CCAA affording it a stay against asbestos claims in Canada. Further application may be made to the Court by Babcock & Wilcox Canada Ltd. to ensure fair and equal access for Canadians with asbestos claims against Babcock & Wilcox Canada Ltd. to the process established in the United States. Representations may also be made by parties who would prefer to pursue their remedies in Canada.

Persons who wish to be a party to the Canadian proceedings or to receive a copy of the order or any further information should contact counsel for Babcock & Wilcox Canada Ltd., Derrick C. Tay at Meighen Demers (Telephone (416) 340-6032 and Fax (416) 977-5239).

DATED this day of, 2000 at Toronto, Canada

Court File No. 00-CL-3667

IN THE MATTER OF S. 18.6 of THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST PROCEEDINGS

INITIAL ORDER

MEIGHEN DEMERS
Barristers & Solicitors
Suite 1100, Box 11
Merrill Lynch Canada Tower
Sun Life Centre
200 King Street West
Toronto, Ontario M5H 3T4

DERRICK C. TAY ORESTES PASPARAKIS
Tel: (416) 340-6000
Fax:(416)977-5239
Solicitors for the Applicant

TAB 9

Date: 20061219
Docket: CI 05-01-45377
(Winnipeg Centre)
Indexed as: Minden Schipper & Associates Inc. et al v. Cancercare Manitoba et al
Cited as: 2006 MBQB 292

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

MINDEN SCHIPPER & ASSOCIATES INC. AND DAVID SCUSE,	)	No one appeared for the plaintiffs
plaintiffs,	)	W.C. Kushneryk, Q.C. for the defendant COH
- and -	)	Holdings (US) Inc.
CANCERCARE MANITOBA, COH HOLDINGS (US) INC., VARIAN MEDICAL SYSTEMS INC., AND VARIAN MEDICAL SYTSEMS, CANADA INC.	)	Erin Romeo for the defendants Varian Medical Systems, Inc. and Varian Medical Systems, Canada Inc.
defendants,	)	
- and -	)	
AMERISOURCE BERGEN CORPORATION,	)	No one appeared for the third party
third party.	)	JUDGMENT DELIVERED: DECEMBER 19, 2006

NURGITZ, J.

[1] The applicant in these proceedings, COH Holdings (US) Inc. ("COH"), seeks a stay of all of the claims asserted against it in these proceedings in Manitoba. In addition, COH seeks an order of the court recognizing the receivership process ongoing in the State of Colorado in the United States.

[2] The plaintiff issued a Statement of Claim in this court on December 15, 2005 seeking an accounting of software sales for the year 2004 and subsequent years. The applicant COH is a named defendant, as are responding parties Varian Medical Systems Inc. and Varian Medical Systems, Canada Inc. ("the Varian companies").

[3] The Varian companies filed a Statement of Defence to the main action and a crossclaim against COH on January 30, 2006. As well, an amended Statement of Defence and Crossclaim was filed on May 23, 2006 in which a crossclaim was made by the Varian companies against Cancercare Manitoba, one of the other named defendants. In addition to the filing of Statements of Defence and the making of crossclaims, there have also been third party claims against Amerisource Bergen Corporation ("ABC") on January 30, 2006.

[4] It is relevant to consider the status of proceedings in the State of Colorado. In the District Court (Denver County) in the State of Colorado, insolvency proceedings are moving ahead. On October 20, 2005, the District Court in Colorado appointed an interim receiver for COH and that appointment was made permanent on November 18, 2005.

[5] The Receiver has sought the approval of the Colorado court to establish a claims administration procedure, and as part of this process, the court in Colorado has imposed a cut-off date of January 5, 2007. This would require all claims against COH to be filed by that date, failing which the receiver will be proceeding and further claims will not be considered.

[6] It is clear that the parties involved in the Manitoba Court of Queen's Bench action are certainly free, and in fact invited, to participate in the claims administration procedure.

[7] The claim is made by COH. Most of its assets and undertakings are situate in the State of Colorado. Mr. Kushneryk, on behalf of COH, asserts in his brief that there is approximately $1,300,000.00 USD arising from the liquidation of assets. This pool of money will be the subject of claims being made against COH.

[8] It is asserted that recognition of the receivership proceedings in Colorado and the granting of a stay of proceedings against COH in the Manitoba action will assist in an orderly and efficient administration of the receivership estate in Colorado and that this would be a benefit to all creditors.

[9] Section 38 of ***The Court of Queen's Bench Act*** of Manitoba, C.C.S.M. c. C280 provides:

> **Stay of Proceedings**
>
> 38. The Court, on its own initiative or on motion by a person, whether or not a party, may stay a proceeding on such terms as are considered just.

[10] Manitoba Court of Queen's Bench Rules 17.06(1)(b) and 17.06(4) provide as follows:

> **Motion to Stay Proceedings**
>
> 17.06(1) A party who has been served with an originating process outside Manitoba may move, before filing or serving a defence
>
> b) for an Order staying the proceeding;

. . .

Submission to Jurisdiction

> 17.06(4) A party served outside Manitoba shall not be held to have submitted to the jurisdiction of the Court by serving a Notice of Motion pursuant to subrule (1) or by appearing on such a motion.

[11] The motion of COH requests the court to apply common law principles of comity which permit this court to recognize and enforce in Canada judicial acts of other competent jurisdictions in an appropriate case. The request further is for a recognition and accommodation and enforcement of the judicial acts and orders made by the District Court, Denver County, State of Colorado, as those acts and orders pertain to COH in the receivership proceedings in the State of Colorado.

[12] Paragraph 16 of the Colorado Receivership Order provides as follows:

> 16. All rights and remedies against COH, the Receiver, or affecting the Property, including, but not limited to, the exercise of any contractual rights, including but not limited to a right of setoff, are hereby stayed and suspended except with the written consent of the Receiver or order of this Court.

[13] Counsel for COH makes the point that with increased cross-border trade between Canada and the United States, it is likely desirable, if not advisable, for courts to attempt to cooperate in relation to cross-border insolvency and liquidation proceedings. This is more a matter of comity than of the finding of the proper forum. In ***Morguard Investments Ltd. v. De Savoye***, [1990] 3 S.C.R. 1077, LaForest, J., at p. 1096, dealt with the question of comity as follows:

> 'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard

> both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws ...

[14] In the decision of Mr. Justice Farley of the Ontario Superior Court of Justice in the ***Ravelston Corporation*** case rendered in July of 2005:

> [21] The principles underlying comity are respect for other national jurisdictions, necessity and convenience: see *Morguard* at p. 1078. Canadian courts generally and specifically this court has had a very long tradition of exercising comity generally and specifically in respect of decisions of courts of the United States. Similarly our courts have enjoyed the exercise of comity towards Canadian decisions by the courts of the United States.

[15] I note with interest the plaintiffs, through counsel, have filed a consent indicating their approval and consent to the application by COH. As well, court has heard that counsel for Cancercare Manitoba has advised that he takes no position on the motion and, further, that counsel for the third party Amerisource Bergen Corporation takes no position as well.

[16] Considering many factors, including the position (or lack thereof) of the various parties and as well the governing principles, I find that the application before me is requesting relief that is appropriate. Considering these various matters and the principles of comity, I will exercise my discretion and grant the order recognizing and enforcing the receivership proceedings against COH pursuant to the order of the District Court for the County and City of Colorado dated October 20, 2005 and confirmed on November 18, 2005.

[17] I would further order a stay of all proceedings and claims asserted against COH in this action.

[18] If counsel are unable to agree on the question of costs, they may seek an appointment with the trial coordinator.

Nurgitz, J.

TAB 10

2010 ONSC 3974
Ontario Superior Court of Justice [Commercial List]

Xerium Technologies Inc., Re

2010 CarswellOnt 7712, 2010 ONSC 3974, 193 A.C.W.S. (3d) 1066, 71 C.B.R. (5th) 300

IN THE MATTER OF the Companies' Creditors Arrangement ACT, R.S.C. 1985, c. C-36, AS AMENDED

XERIUM TECHNOLOGIES, INC., IN ITS CAPACITY AS THE FOREIGN REPRESENTATIVE OF XERIUM TECHNOLOGIES, INC., HUYCK LICENSCO INC., STOWE WOODWARD LICENSCO LLC, STOWE WOODWARD LLC, WANGNER ITELPA I LLC, WANGNER ITELPA II LLC, WEAVEXX, LLC, XERIUM ASIA, LLC, XERIUM III (US) LIMITED, XERIUM IV (US) LIMITED, XERIUM V (US) LIMITED, XTI LLC, XERIUM CANADA INC., HUYCK.WANGNER AUSTRIA GMBH, XERIUM GERMANY HOLDING GMBH, AND XERIUM ITALIA S.P.A. (collectively, the "Chapter 11 Debtors") (Applicants)

C. Campbell J.

Heard: May 14, 2010
Judgment: September 28, 2010
Docket: 10-8652-00CL

Counsel: Derrick Tay, Randy Sutton for Applicants

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Foreign Proceedings — Debtors commenced proceedings in U.S. under Chapter 11 of U.S. Bankruptcy Code ("U.S. Code") — Recognition order was granted in Canada recognizing Chapter 11 Proceedings as foreign main proceeding in respect of Debtors, pursuant to Pt. IV of Companies' Creditors Arrangements Act ("CCAA") — U.S. Bankruptcy Court made various orders in respect of Debtors' ongoing business operations ("Orders") and confirmed Debtors' Joint Plan of Reorganization ("Plan") under U.S. Code ("Confirmation Order") — Applicant company, Foreign Representative of Debtors, brought motion to have Orders, Confirmation Order and Plan recognized and given effect in Canada — Motion granted — Provisions of Plan were consistent with purposes set out in s. 61(1) of CCAA — Plan was critical to restructuring of Debtors as global corporate unit — Recognition of Confirmation Order was necessary to ensure fair and efficient administration of cross-border insolvency — U.S. Bankruptcy Court concluded Plan complied with U.S. Bankruptcy principles, and that Plan was made in

good faith; did not breach any applicable law; was in interests of Debtors' creditors and equity holders; and would not likely be followed by need for liquidation or further financial reorganization of Debtors — Such principles also underlay CCAA, and thus dictated in favour of Plan's recognition and implementation in Canada.

Table of Authorities

Cases considered by *C. Campbell J.*:

Babcock & Wilcox Canada Ltd., Re (2000), 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157, 2000 CarswellOnt 704 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Generally — referred to

Chapter 11 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Pt. IV — referred to

s. 44 — considered

s. 53(b) — referred to

s. 61(1) — considered

MOTION by applicant for orders recognizing and giving effect to certain orders of U.S. Bankruptcy Court in Canada.

C. Campbell J.:

1 The Recognition Orders sought in this matter exhibit the innovative and efficient employment of the provisions of Part IV of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C.36, as amended (the "CCAA") to cross border insolvencies.

2 Each of the "Chapter 11 Debtors" commenced proceedings on March 30, 2010 in the United States under Chapter 11 of Title 11 of the United States Bankruptcy Code (the "U.S. Bankruptcy Code") in the U.S. Bankruptcy Court for the District of Delaware (the "Chapter 11 Proceedings.")

3 On April 1, 2010, this Court granted the Recognition Order sought by, *inter alia*, the Applicant, Xerium Technologies

Inc. ("Xerium") as the "Foreign Representative" of the Chapter 11 Debtors and recognizing the Chapter 11 Proceedings as a "foreign main proceeding" in respect of the Chapter 11 Debtors, pursuant to Part IV of the CCAA.

4 On various dates in April 2010, Judge Kevin J. Carey of the U.S. Bankruptcy Court made certain orders in respect of the Chapter 11 Debtors' ongoing business operations.

5 On May 12, 2010, Judge Carey confirmed the Chapter 11 Debtors' amended Joint Prepackaged Plan of Reorganization dated March 30, 2010 as supplemented (the "Plan")[1] pursuant to the U.S. Bankruptcy Code (the "U.S. Confirmation Order.")

6 Xerium sought in this motion to have certain orders made by the U.S. Bankruptcy Court in April 2010, the U.S Confirmation Order and the Plan recognized and given effect to in Canada.

7 The Applicant together with its direct and indirect subsidiaries (collectively, the "Company") are a leading global manufacturer and supplier of products used in the production of paper products.

8 Both Xerium, a Delaware limited liability company, Xerium Canada Inc. ("Xerium Canada"), a Canadian company, together with other entities forming part of the Chapter 11 Debtors are parties to an Amended and Restated Credit and Guarantee Agreement dated as of May 30, 2008 as borrowers, with various financial institutions and other persons as lenders. The Credit Facility is governed by the laws of the State of New York.

9 Due to a drop in global demand for paper products and in light of financial difficulties encountered by the Company due to the drop in demand in its products and is difficulty raising funds, the Company anticipated that it would not be in compliance with certain financial covenants under the Credit Facility for the period ended September 30, 2009. The Chapter 11 Debtors, their lenders under the Credit Facility, the Administrative Agent and the Secured Lender Ad Hoc Working Group entered into discussions exploring possible restructuring scenarios. The negotiations progressed smoothly and the parties worked toward various consensual restructuring scenarios.

10 The Plan was developed between the Applicant, its direct and indirect subsidiaries together with the Administrative Agent and the Secured Lender Ad Hoc Working Group.

11 Pursuant to the Plan, on March 2, 2010, the Chapter 11 Debtors commenced the solicitation of votes on the Plan and delivered copies of the Plan, the Disclosure Statement and the appropriate ballots to all holders of claims as of February 23, 2010 in the classes entitled to vote on the Plan.

12 The Disclosure Statement established 4:00 p.m. (prevailing Eastern time) on March 22, 2010 as the deadline for the receipt of ballots to accept or reject the Plan, subject to the Chapter 11 Debtors' right to extend the solicitation period. The Chapter 11 Debtors exercised their right to extend the solicitation period to 6:00 p.m. (prevailing Eastern time) on March 26, 2010. The Plan was overwhelmingly accepted by the two classes of creditors entitled to vote on the Plan.

13 On March 31, 2010, the U.S. Bankruptcy Court entered the Order (I) Scheduling a Combined Hearing to Consider (a) Approval of the Disclosure Statement, (b) Approval of Solicitation Procedures and Forms of Ballots, and (c) Confirmation of the Plan; (II) Establishing a Deadline to Object to the Disclosure Statement and the Plan; and (III) Approving the Form and Manner of Notice Thereof (the "Scheduling Order.")

14 Various orders were made by the U.S. Bankruptcy Court in April 2010, which orders were recognized by this Court.

15 On May 12, 2010, at the Combined Hearing, the U.S. Bankruptcy Court confirmed the Plan, and made a number of findings, *inter alia*, regarding the content of the Plan and the procedures underlying its consideration and approval by interested parties. These included the appropriateness of notice, the content of the Disclosure Statement, the voting process, all of which were found to meet the requirements of the U.S. Bankruptcy Code and fairly considered the interests of those affected.

16 The Plan provides for a comprehensive financial restructuring of the Chapter 11 Debtors' institutional indebtedness and capital structure. According to its terms, only Secured Swap Termination Claims, claims on account of the Credit

Facility, Unsecured Swap Termination Claims, and Equity Interests in Xerium are "impaired" under the Plan. Holders of all other claims are unimpaired.

17 Under the Plan, the notional value of the Chapter 11 Debtors' outstanding indebtedness will be reduced from approximately U.S.$640 million to a notional value of approximately U.S.$480 million, and the Chapter 11 Debtors will have improved liquidity as a result of the extension of maturity dates under the Credit Facility and access to an U.S. $80 million Exit Facility.

18 The Plan provides substantial recoveries in the form of cash, new debt and equity to its secured lenders and swap counterparties and provides existing equity holders with more than $41.5 million in value.

19 Xerium has been unable to restructure its secured debt in any other manner than by its secured lenders voluntarily accepting equity and the package of additional consideration proposed to be provided to the secured lenders under the Plan.

20 The Plan benefits all of the Chapter 11 Debtors' stakeholders. It reflects a global settlement of the competing claims and interests of these parties, the implementation of which will serve to maximize the value of the Debtors' estates for the benefit of all parties in interest.

21 I conclude that the Plan is not likely to be followed by the liquidation or the need for further financial reorganization of the Chapter 11 Debtors.

22 On April 1, 2010, the Recognition Order granted by this Court provided, among other things:

> (a) Recognition of the Chapter 11 Proceedings as a "foreign main proceeding" pursuant to Subsection 47(2) of the CCAA;
>
> (b) Recognition of the Applicant as the "foreign representative" in respect of the Chapter 11 Proceedings;
>
> (c) Recognition of and giving effect in Canada to the automatic stay imposed under Section 362 of the U.S. Bankruptcy Code in respect of the Chapter 11 Debtors;
>
> (d) Recognition of and giving effect in Canada to the U.S. First Day Orders in respect of the Chapter 11 Debtors;
>
> (e) A stay of all proceedings taken or that might be taken against the Chapter 11 Debtors under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (f) Restraint on further proceedings in any action, suit or proceeding against the Chapter 11 Debtors;
>
> (g) Prohibition of the commencement of any action, suit or proceeding against the Chapter 11 Debtors; and
>
> (h) Prohibition of the Chapter 11 Debtors from selling or otherwise disposing of, outside the ordinary course of its business, any of the Chapter 11 Debtors' property in Canada that relates to their business and prohibiting the Chapter 11 Debtors from selling or otherwise disposing of any of their other property in Canada, unless authorized to do so by the U.S. Bankruptcy Court.

23 I am satisfied that this Court does have the authority and indeed obligation to grant the recognition sought under Part IV of the CCAA. The recognition sought is precisely the kind of comity in international insolvency contemplated by Part IV of the CCAA.

24 Section 44 identifies the purpose of Part IV of the CCAA. It states

The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(d) the protection and the maximization of the value of debtor company's property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

25 I am satisfied that the provisions of the Plan are consistent with the purposes set out in s. 61(1) of the CCAA, which states:

Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

26 In *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) at para. 21, this Court held that U.S. Chapter 11 proceedings are "foreign proceedings" for the purposes of the CCAA's cross-border insolvency provisions. The Court also set out a non exclusive or exhaustive list of factors that the Court should consider in applying those provisions.

27 The applicable factors from *Babcock & Wilcox Canada Ltd., Re* that dictate in favour of recognition of the U.S. Confirmation Order are set out in paragraph 45 of the Applicant's factum;

(a) The Plan is critical to the restructuring of the Chapter 11 Debtors as a global corporate unit;

(b) The Company is a highly integrated business and is managed centrally from the United States. The Credit Facility which is being restructured is governed by the laws of the State of New York. Each of the Chapter 11 Debtors is a borrower or guarantor, or both, under the Credit Facility;

(c) Confirmation of the Plan in the U.S. Court occurred in accordance with standard and well established procedures and practices, including Court approval of the Disclosure Statement and the process for the solicitation and tabulation of votes on the Plan;

(d) By granting the Initial Order in which the Chapter 11 Proceedings were recognized as Foreign Main Proceedings, this Honourable Court already acknowledged Canada as an ancillary jurisdiction in the reorganization of the Chapter 11 Debtors;

(e) The Applicant carries on business in Canada through a Canadian subsidiary, Xerium Canada, which is one of Chapter 11 Debtors and has had the same access and participation in the Chapter 11 Proceedings as the other Chapter 11 Debtors;

(f) Recognition of the U.S. Confirmation Order is necessary for ensuring the fair and efficient administration of this cross-border insolvency, whereby all stakeholders who hold an interest in the Chapter 11 Debtors are treated equitably.

28 Additionally, the Plan is consistent with the purpose of the CCAA. By confirming the Plan, the U.S. Bankruptcy Court has concluded that the Plan complies with applicable U.S. Bankruptcy principles and that, *inter alia*:

(a) it is made in good faith;

(b) it does not breach any applicable law;

(c) it is in the interests of the Chapter 11 Debtors' creditors and equity holders; and

(d) it will not likely be followed by the need for liquidation or further financial reorganization of the Chapter 11 Debtors.

These are principles which also underlie the CCAA, and thus dictate in favour of the Plan's recognition and implementation in Canada.

29 In granting the recognition order sought, I am satisfied that the implementation of the Plan in Canada not only helps to ensure the orderly completion to the Chapter 11 Debtors' restructuring process, but avoids what otherwise might have been a time-consuming and costly process were the Canadian part of the Applicant itself to make a separate restructuring application under the CCAA in Canada.

30 The Order proposed relieved the Applicant from the publication provisions of s. 53(b) of the CCAA. Based on the positive impact for creditors in Canada of the Plan as set out in paragraph 27 above, I was satisfied that given the cost involved in publication, the cost was neither necessary nor warranted.

31 The requested Order is to issue in the form signed.

Motion granted.

Footnotes

1 Capitalized terms used herein not otherwise defined shall have the meanings ascribed to them in the Plan. Unless otherwise stated, all monetary amounts contained herein are expressed in U.S. Dollars.