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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

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Commercial List Application Scheduled for the 24th day of August, 2020
before The Honourable Madam Justice Romaine

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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 Services**"); 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 title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (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.

- Affidavit of Warren Zemplak, sworn on July 22, 2020, paras. 3 and 21 and Exhibits "1", "10 and "11" ("**Zemplak Affidavit No. 1**").
- Affidavit No. 3 of Warren Zemplak, sworn on August 12, 2020, paras. 3 and 10 ("**Zemplak 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**").

- Zemplak Affidavit No. 3, para. 4.
- Order granted by the Honourable Madam Justice J. E. Topolniski on July 28, 2020.

3. On August 14, 2020, this Honourable Court granted the Amended Foreign Representative Order with respect to recognition of the foreign main proceedings of BJ Services as well as BJ Canada, and also recognized the Cementing Bidding Procedures Order

and Fracking Bidding Procedures Order granted by the U.S. Bankruptcy Court on July 29, 2020.

- Orders granted by the Honourable Madam Justice K. M. Horner on August 14, 2020.

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

- 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;
- recognizing and enforcing a sale order granted by the U.S. Bankruptcy Court as summarized below;
- approving the sale of those assets of the Chapter 11 Debtors included within the said sale order over which this Honourable Court has jurisdiction and which are situated in Canada, and vesting those assets in and to the purchaser thereof;
- authorizing the Chapter 11 Debtors to take such steps and execute such additional documents as may be necessary or desirable for the completion of the sale contemplated by the sale order; and
- seeking approval of its legal counsel's fees and disbursements;

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

5. The sale transaction, if approved, will preserve hundreds of jobs and provide much needed liquidity to the Chapter 11 Debtors. The Chapter 11 Debtors have acted in good faith and in the exercise of their business judgment to maximize the value of the Cementing Business and Fracturing Business through the court approved sale processes and, with the assistance of

their sales advisor, have thoroughly canvassed the market as demonstrated by the multiple bids received and the multiple sales entered into.

- Affidavit of Warren Zemlak, sworn on August 21, 2020, paras. 9, 19-20 ("**Zemlak Affidavit No. 4**").
- Affidavit of Anthony C. Schnur, sworn on August 21, 2020, para. 16-18, 23-24 ("**Schnur Affidavit**").

6. The Foreign Representative submits that this Court has the jurisdiction to recognize the sales and that it is appropriate to do so in the circumstances.

7. Capitalized terms not otherwise defined herein shall bear the meanings given them in the Affidavits of Warren Zemlak sworn in these proceedings.

II. STATEMENT OF FACTS

A. Sales Process

8. The Chapter 11 Debtors chose to pursue two going-concerns sales as a result of urgent liquidity needs and following unsuccessful attempts to pursue a consensual corporate reorganization in order to save jobs. The two going-concern sales involve the sale of the Chapter 11 Debtors' Cementing Business (the "**Cementing Business Transaction**") and the sale of four of the Chapter 11 Debtors' Fracturing Business fleets and certain intellectual property (the "**Fracturing Fleet Transaction**"). Both the Cementing Business Transaction and the Fracturing Fleet Transaction (collectively, the "**Transactions**") involve stalking horse asset purchase agreements.

- Zemlak Affidavit No. 3, paras. 6-7.
- Zemlak Affidavit No. 4, para. 5.

9. An asset purchase agreement in relation to the Fracturing Fleet Transaction was entered into on July 24, 2020 as between BJ Services and BJ Canada as sellers and TES Asset Acquisition, LLC ("**TES**") as buyer ("**Fracturing Stalking Horse APA**"). TES is an affiliate of one of the Chapter 11 Debtors' equity sponsors, CSL Management, L.P. In deciding to enter

into the Fracturing Stalking Horse APA, the Chapter 11 Debtors had regard to factors including but not limited to: (i) the Fracturing Stalking Horse APA contains no bid protections; (ii) it is subject to higher and better bids through an auction; (iii) the Fracturing Stalking Horse APA provides a floor for the sales price that was acceptable to the Prepetition ABL Lenders; and (iv) the Fracturing Stalking Horse APA would save approximately 300 jobs including 76 jobs in Canada.

- Zemlak Affidavit No. 4, paras. 8-9.

10. An asset purchase agreement in relation to the Cementing Transaction was entered into on August 6, 2020, as between BJ Services as seller and American Cement Co, LLC ("**American Cement**") as buyer ("**Cementing Business Stalking Horse APA**"), following Simmons Energy, a division of Piper Sandler & Co. ("**Simmons**"), sales advisor to the Chapter 11 Debtors, reaching out to a number of potential buyers. American Cement was one of two parties to submit a bid. In deciding to enter into the Cementing Business Stalking Horse APA, the Chapter 11 Debtors had regard to factors including but not limited to: (i) the offer exceeded the Chapter 11 Debtors' estimation of liquidation value; (ii) it is subject to higher and better bids through an auction; (iii) the Cementing Business Stalking Horse APA provides a floor for the sales price that was acceptable to the Prepetition ABL Lenders; and (iv) the Cementing Business Stalking Horse APA would save approximately 300 jobs.

- Zemlak Affidavit No. 4, paras. 6-7.

11. Since entering into the stalking horse agreements, Simmons has continued to market the Fracturing Assets and Cementing Business. Simmons conducted sales processes for approximately one month, with the deadlines being extended from what was initially approved by the U.S. Bankruptcy Court and this Honourable Court. An even longer process was not feasible given the liquidity constraints of the Chapter 11 Debtors, who have only secured funding for the Chapter 11 Proceedings until August 29, 2020.

- Zemlak Affidavit No. 4, para. 12.

12. The sales processes concluded with an auction that took place over two days and resulted in five asset purchase agreements including the Cementing Business Stalking Horse

APA and the Fracturing Stalking Horse APA as well as the following three additional asset purchase agreements (each of which are subject to further amendments):

- (a) Asset Purchase Agreement dated August 20, 2020 between BJ Services, LLC as seller and Alamo Pressure Pumping, LLC as purchaser (the "**Alamo APA**") for the purchase of certain equipment related to the Fracturing Business;
- (b) Asset Purchase Agreement between BJ Services, LLC as seller and Baker Hughes Oilfield Operations LLC as purchaser (the "**Baker Hughes Cementing Equipment APA**") for the purchase of certain equipment related to the Cementing Business;
- (c) Asset Purchase Agreement between BJ Services, LLC as seller and Baker Hughes Oilfield Operations LLC as purchaser (the "**Baker Hughes Shared Lab Equipment APA**") for the purchase of equipment and other tangible assets located in a shared lab facility at 11211 FM 2920, Tomball, Texas, 77375.

- Zemlak Affidavit No. 4, para. 13 and Exhibit "1".

13. The independent directors on the Board of Directors of the Company has approved BJ Services, LLC entering into the transactions contemplated by the Cementing Business Stalking Horse APA, the Fracturing Stalking Horse APA, the Alamo APA, the Baker Hughes Cementing Equipment APA, and the Baker Hughes Shared Lab Equipment APA (collectively referred to herein as the "**APAs**").

- Zemlak Affidavit No. 4, para. 14.

B. U.S. Bankruptcy Court Approval

14. On August 21, 2020, the U.S. Bankruptcy Court granted the following Order:

- (a) the Order authorizes the sale of certain of the Debtors' Fracturing Fleet Equipment and Intellectual Property (the "**Fracturing Fleet Sale Order**" or "**Sale Order**"). The Fracturing Fleet Sale Order provides that it does not bind

the Chapter 11 Debtors or any other party with respect to the allocation of the purchase price.

15. The Sale Order refers to the record for the U.S. Bankruptcy Court's findings of fact and conclusions of law in granting the same. A review of the record indicates that in granting the Order, the U.S. Bankruptcy Court considered (i) the severe cash constraints facing the Chapter 11 Debtors; (ii) the impacts of the transactions on allowing the Chapter 11 Debtors to continue to operate and preserve jobs; (iii) that the sales would be more beneficial to stakeholders than a sale under a Chapter 7 liquidation; (iv) the extent to which the creditors were consulted; (v) the effects of the proposed sales on creditors and other interested parties, (vi) whether the consideration is reasonable and fair, considering market value, and, (vii) specifically with respect to the Fracturing Fleet Transaction, given that the proposed purchaser of the fracturing assets is a related party to the sellers, the U.S. Bankruptcy Court considered whether good faith efforts were made to sell the assets to purchasers unrelated to the sellers, and whether the consideration to be received was superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

- Schnur Affidavit, para. 20.
- Zemlak Affidavit No. 4, para. 19 and Exhibits "2" to "3".

16. Further, Judge Isgur of the U.S. Bankruptcy Court commented, in granting the Fracturing Fleet Sale Order, that:

- (a) the evidence was uncontroverted that the auction was done properly, and that the Fracturing Stalking Horse APA was the highest and best bid;
- (b) the purchaser is at arm's length and is a good faith purchaser; and
- (c) that the allocation of the purchase price is to be determined at a later hearing before the U.S. Bankruptcy Court.

- Zemlak Affidavit No. 4, para. 20.

17. The sale contemplated by the Fracturing Fleet Sale Order will save approximately 300 jobs including 76 jobs in Canada and yield proceeds of approximately USD \$34 million for the Chapter 11 Debtors.

- Zemlak Affidavit No. 4, para. 21.

18. The assets to be sold pursuant to the Fracturing Fleet Transaction include assets of BJ Canada and other assets of BJ Services which are situated in Canada and over which this Honourable Court has jurisdiction.

- Zemlak Affidavit No. 4, para. 22.

19. In an effort to further ensure consistency, efficiency and cooperation, BJ Canada as Foreign Representative seeks recognition by this Honourable Court of the Sale Orders.

III. ISSUES

20. There are two questions on this application:

- (a) Whether the Court should grant recognition of the Sale Order and such other relief as is necessary to effect the Sale Order; and
- (b) Whether the Court ought to approve the professional fees and disbursements of BJ Canada's legal counsel.

IV. ANALYSIS

A. Jurisdiction of the Court to Recognize the Sale Order

21. 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**]

22. 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**].

23. 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, as was done in this matter with respect to BJ Canada and BJ Services, 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**].

24. It is appropriate for this Court to recognize the Sale Order and such relief as is necessary to effect the APA, and to protect the interests of the Chapter 11 Debtors' creditors and other stakeholders. To do so would be consistent with the principles of comity and cooperation.

25. 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) [**Babcock**] at paras. 9-10 citing *Taylor v Dow Corning Australia Pty. Ltd.* (December 19, 1997), Doc. 8438/95 (Australia Vic. Sup. Ct.) [**Tab 3**].

Hollander Sleep Products, LLC (Re), [2019] O.J. No. 2817 at paras 43-48 [**Tab 4**].

Minden Schipper & Associates Inc., 2006 MBQB 292, at paras 13-14 [***Tab 5***].

26. When a court considers whether it will recognize a foreign order, including sale approval 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; and
- (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 3**].

Re Xerium Technologies Inc., (2010), 71 CBR (5th) 300 (Ont SCJ) at paras. 26-27 citing ***Babcock*** [**Tab 6**].

27. In addition to the above factors, Canadian Courts in considering approval of the sale or disposition of a company's assets may also consider whether the sales process satisfies the *Soundair* principles, whether the sale is fair and reasonable in the circumstances, whether Canadian creditors will be disadvantaged, and general compliance with the CCAA.

Re Digital Domain Media Group Inc., 2012 BCSC 1567 [***Digital Domain***] at paras. 15-19. [**Tab 7**]

28. Section 36(3) of the CCAA sets out the following factors to be considered by the Court when deciding to approve a sale:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or dispositions;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

***CCAA*, supra**, at s. 36(3)[**Tab 2**].

29. Additional guidance is provided in section 36(4) of the CCAA with respect to transactions involving related persons, in which case the following additional factors have to be considered:

- (a) whether good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

CCAA, *supra*, at s. 36(4)[**Tab 2**].

30. The *Soundair* principles overlap with some of the above noted factors and include consideration of the following factors: whether sufficient efforts were made to get the best price and the seller did not act improvidently; the interests of all parties; the efficacy and integrity of the process by which offers were obtained; and whether there was any unfairness in the sales process.

Royal Bank of Canada v. Soundair Corp., 1991 CarswellOnt 205 (CA) as referenced in *Digital Domain*, *supra*, at paras 15-19[**Tab 7**]

31. The Sale Order satisfies the numerous factors set out above, and recognition of same should be granted to provide the best opportunity for recovery for the Chapter 11 Debtors and their stakeholders. First, the sale process was approved by the U.S. Bankruptcy Court and recognized by this Honourable Court, was conducted by a third party, and was reasonable given the limited liquidity of the Chapter 11 Debtors. The marketing process resulted in multiple bidders and culminated in a two-day auction. The Fracturing Stalking Horse APA represents the highest and best offer, has been approved by the disinterested directors of BJ Services, and is supported by the primary stakeholders of the Chapter 11 Debtors and by the Chief Restructuring Officer. The Sale Order was made in good faith and in the interests of the Chapter 11 Debtors' creditors and other stakeholders who were engaged in court approved sales process, and is not contrary to public policy. Absent the closing of the transaction, the Chapter

11 Debtors may not have sufficient funds to pursue restructuring and may face a value-destructing liquidation of their business and the loss of hundreds of jobs.

- Schnur Affidavit, paras. 16-19, 25.
- Zemplak Affidavit No. 4, paras. 4-14, 18-19.

32. Paragraph 15 hereof sets out the considerations of the U.S. Bankruptcy Court in granting the Fracturing Fleet Sale Order.

- Schnur Affidavit, para. 20.
- Zemplak Affidavit No. 4, para. 19 and Exhibits "2" to "3".

B. Assignment of the Canadian Assumed Contracts

33. The Fracturing Stalking Horse APA provides for the assumption of certain agreements by the purchasers.

34. Canadian Courts have recognized orders made by foreign courts authorizing the assignment of agreements to a purchaser as part of a transaction. Such orders are consistent with section 11.3 of the CCAA, which permits the court to make orders assigning rights and obligations of debtor companies under agreements upon notice to every party to an agreement and the monitor. The factors to be considered in deciding whether to grant the relief sought includes:

- (a) whether the monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

Hartford Computer Hardware, Inc (Re), (March 9, 2012), Ont SCJ [Commercial List], Court File No. CV-11-9514-00CL (Recognition, Approval and Vesting Order). [**Tab 8**]

CCAA, supra, at s. 11.3[**Tab 2**].

35. While there is no monitor in this case, the Chief Restructuring Officer has provided his support for the relief sought. BJ Canada submits that the assignment of the Assigned Contracts is in the best interests of the Chapter 11 Debtors and the purchaser as they are an integral part of the assets being purchased. The assignment does not disadvantage the Canadian contract counterparties (sections 2.3 and 3.2 of the Fracturing Stalking Horse APA provides for payment of cure costs by the purchaser, as does section 365 of the U.S. Bankruptcy Code), nor are the proposed assignments contrary to the CCAA or in violation of public policy. The approval of the assignments pursuant to the Fracturing Stalking Horse APA was fair, reasonable and appropriate in the circumstances.

- Zemlak Affidavit #4, Exhibit "1", Exhibit "B" thereto, sections 2.3 and 3.2.

C. Recognition of Foreign Order

36. BJ Canada, in its capacity as Foreign Representative, seeks an Order:

- (a) recognizing and enforcing the Sale Order in Canada;
- (b) approving the sale of those assets of the Chapter 11 Debtors included within the Sale Order over which this Honourable Court has jurisdiction and which are situated in Canada, and vesting those assets in and to the purchasers thereof; and
- (c) authorizing the Chapter 11 Debtors to take such steps and execute such additional documents as may be necessary or desirable for the completion of the sale contemplated by the Sale Order.

D. Approval of Fees

37. BJ Canada as Foreign Representative also seeks approval of its Canadian legal counsel fees, disbursements and other charges that have been incurred by BJ Canada since the commencement of the Chapter 11 Proceedings. BJ Canada submits that these fees are fair and reasonable given the assistance provided to date in keeping the Canadian Court apprised of the Chapter 11 Proceedings, seeking recognition of orders of the U.S. Bankruptcy Court where

necessary or appropriate, and providing legal advice with respect of the offers received for the purchase of assets.

V. RELIEF SOUGHT

38. 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 21st 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. *Babcock & Wilcox Canada Ltd., Re*, 2000 CarswellOnt 704.
4. *Hollander Sleep Products, LLC (Re)*, [2019] O.J. No. 2817.
5. *Minden Schipper & Associates Inc.*, 2006 MBQB 292.
6. *Xerium Technologies Inc., Re*, 2010 ONSC 3974.
7. *Digital Domain Media Group Inc., Re*, 2012 BCSC 1567
8. *Hartford Computer Hardware, Inc, Re*, (March 9, 2012), Ont SCJ

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 Xinerdy 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.

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

À jour au 6 juin 2016

Last amended on February 26, 2015

Dernière modification le 26 février 2015

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

consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65; 2019, c. 29, s. 138.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

- a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;
- b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;
- c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;
- d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;
- e) la nature et la valeur des biens de la compagnie;
- f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;
- g) le rapport du contrôleur visé à l'alinéa 23(1)b).

Facteur additionnel : demande initiale

(5) Lorsqu'une demande est faite au titre du paragraphe (1) en même temps que la demande initiale visée au paragraphe 11.02(1) ou durant la période visée dans l'ordonnance rendue au titre de ce paragraphe, le tribunal ne rend l'ordonnance visée au paragraphe (1) que s'il est également convaincu que les modalités du financement temporaire demandé sont limitées à ce qui est normalement nécessaire à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 36, art. 65; 2019, ch. 29, art. 138.

Cessions

11.3 (1) Sur demande de la compagnie débitrice et sur préavis à toutes les parties au contrat et au contrôleur, le tribunal peut, par ordonnance, céder à toute personne qu'il précise et qui y a consenti les droits et obligations de la compagnie découlant du contrat.

Exceptions

(2) Le paragraphe (1) ne s'applique pas aux droits et obligations qui, de par leur nature, ne peuvent être cédés ou qui découlent soit d'un contrat conclu à la date à laquelle une procédure a été intentée sous le régime de la

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 29, s. 107, c. 36, ss. 65, 112.

11.31 [Repealed, 2005, c. 47, s. 128]

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

présente loi ou par la suite, soit d'un contrat financier admissible, soit d'une convention collective.

Facteurs à prendre en considération

(3) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) l'acquiescement du contrôleur au projet de cession, le cas échéant;

b) la capacité de la personne à qui les droits et obligations seraient cédés d'exécuter les obligations;

c) l'opportunité de lui céder les droits et obligations.

Restriction

(4) Il ne peut rendre l'ordonnance que s'il est convaincu qu'il sera remédié, au plus tard à la date qu'il fixe, à tous les manquements d'ordre pécuniaire relatifs au contrat, autres que ceux découlant du seul fait que la compagnie est insolvable, est visée par une procédure intentée sous le régime de la présente loi ou ne s'est pas conformée à une obligation non pécuniaire.

Copie de l'ordonnance

(5) Le demandeur envoie une copie de l'ordonnance à toutes les parties au contrat.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 29, art. 107, ch. 36, art. 65 et 112.

11.31 [Abrogé, 2005, ch. 47, art. 128]

Fournisseurs essentiels

11.4 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer toute personne fournisseur essentiel de la compagnie s'il est convaincu que cette personne est un fournisseur de la compagnie et que les marchandises ou les services qu'elle lui fournit sont essentiels à la continuation de son exploitation.

Obligation de fourniture

(2) S'il fait une telle déclaration, le tribunal peut ordonner à la personne déclarée fournisseur essentiel de la compagnie de fournir à celle-ci les marchandises ou services qu'il précise, à des conditions compatibles avec les modalités qui régissaient antérieurement leur fourniture ou aux conditions qu'il estime indiquées.

Obligations and Prohibitions

Obligation to provide assistance

35 (1) A debtor company shall provide to the monitor the assistance that is necessary to enable the monitor to adequately carry out the monitor's functions.

Obligation to duties set out in section 158 of the *Bankruptcy and Insolvency Act*

(2) A debtor company shall perform the duties set out in section 158 of the *Bankruptcy and Insolvency Act* that are appropriate and applicable in the circumstances.

2005, c. 47, s. 131.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b)** whether the monitor approved the process leading to the proposed sale or disposition;
- (c)** whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d)** the extent to which the creditors were consulted;
- (e)** the effects of the proposed sale or disposition on the creditors and other interested parties; and

Obligations et interdiction

Assistance

35 (1) La compagnie débitrice est tenue d'aider le contrôleur à remplir adéquatement ses fonctions.

Obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité*

(2) Elle est également tenue de satisfaire aux obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité* selon ce qui est indiqué et applicable dans les circonstances.

2005, ch. 47, art. 131.

Restriction à la disposition d'actifs

36 (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Avis aux créanciers

(2) La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Facteurs à prendre en considération

(3) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

- a)** la justification des circonstances ayant mené au projet de disposition;
- b)** l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;
- c)** le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;
- d)** la suffisance des consultations menées auprès des créanciers;
- e)** les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

- (a) a director or officer of the company;
- (b) a person who has or has had, directly or indirectly, control in fact of the company; and
- (c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Autres facteurs

(4) Si la compagnie projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

- a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la compagnie;
- b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

Personnes liées

(5) Pour l'application du paragraphe (4), les personnes ci-après sont considérées comme liées à la compagnie :

- a) le dirigeant ou l'administrateur de celle-ci;
- b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;
- c) la personne liée à toute personne visée aux alinéas a) ou b).

Autorisation de disposer des actifs en les libérant de restrictions

(6) Le tribunal peut autoriser la disposition d'actifs de la compagnie, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

Restriction à l'égard des employeurs

(7) Il ne peut autoriser la disposition que s'il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 6(5)a) et (6)a) s'il avait homologué la transaction ou l'arrangement.

Restriction à l'égard de la propriété intellectuelle

(8) Si, à la date à laquelle une ordonnance est rendue à son égard sous le régime de la présente loi, la compagnie est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans la disposition d'actifs autorisée en vertu du paragraphe (6), cette disposition n'empêche pas l'autre partie

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.

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.

autres parties intéressées, y compris les compagnies débitrices;

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.

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'équité 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

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 state 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 drafters 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

FRIDAY, THE 25TH DAY OF

MR. JUSTICE FARLEY

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

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
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Solicitors for the Applicant

TAB 4

 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 CCAA³.

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.

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 5

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.	)	No one appeared for
AND DAVID SCUSE,	)	the plaintiffs
	)	
	plaintiffs,	) <u>W.C. Kushneryk, Q.C.</u>
	)	for the defendant COH
- and -	)	Holdings (US) Inc.
	)	
CANCERCARE MANITOBA, COH HOLDINGS	)	
(US) INC., VARIAN MEDICAL SYSTEMS	)	<u>Erin Romeo</u>
INC., AND VARIAN MEDICAL SYTSEMS,	)	for the defendants Varian
CANADA INC.	)	Medical Systems, Inc. and
	)	Varian Medical Systems,
	defendants,	) Canada Inc.
	)	
- and -	)	
	)	No one appeared for
AMERISOURCE BERGEN CORPORATION,	)	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 6

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 "CCA") 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 its 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.

TAB 7

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Digital Domain Media Group, Inc. (Re)*,
2012 BCSC 1567

Date: 20120925
Docket: S126501
Registry: Vancouver

**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 Delaware with respect to the companies listed on
Schedule "A" hereto
(the "Debtors")**

**Application of Digital Domain Media Group, Inc. under Part IV of the
Companies' Creditors Arrangement Act
(Cross-Border Insolvencies)**

Petitioner

Corrected Judgment: Counsel appearance amended on the front page on
January 17, 2013

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Canadian Counsel for the Petitioner:	D. Grieve (via telephone) D. Ward K. Gerra
United States Counsel for the Petitioner:	D. Grassgreen(via telephone) R. Feinstein (via telephone) J. Rosell
Counsel for Respondent Galloping Horse America, LLC:	K. Lenz
Counsel for Respondent Searchlight Capital LP:	T. Jeffries
Counsel for Respondent Tenor Opportunity Master Fund, Ltd. and others:	P. Rubin
Counsel for the Information Officer:	M. Buttery

Place and Date of Trial/Hearing:	Vancouver, B.C. September 25, 2012
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Place and Date of Judgment:	Vancouver, B.C. September 25, 2012
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I. BACKGROUND

[1] This is a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “CCAA”). The proceedings with respect to the petitioner, Digital Domain Media Group, Inc. (“Digital Domain”), and other members of its corporate group began by way of Chapter 11 proceedings in the United States commencing September 11, 2012. At that time, Digital Domain and various other members of the corporate group filed petitions with the United States Bankruptcy Court for the District of Delaware.

[2] On September 12, 2012, the United States court granted various First Day Orders which included orders relating to a very quick sale of the assets. Included in those First Day Orders was one approving certain debtor-in-possession (“DIP”) financing, and another appointing Digital Domain as a foreign representative for the purpose of bringing an application before this Court.

[3] On September 18, 2012, Digital Domain applied for various relief under the CCAA. On that day, I granted two orders: firstly, an order recognizing Digital Domain as a “foreign representative” and recognizing the Chapter 11 proceedings as a “foreign main proceeding” in accordance with Part IV of the CCAA; and secondly, an order granting various ancillary relief, including expanding the stay provisions and appointing Alvarez & Marsal Canada Inc. as the Information Officer in these proceedings: see *Digital Domain Media Group, Inc. (Re)*, 2012 BCSC 1565.

[4] Since September 18, 2012, the sale proceedings in the U.S. have continued to evolve very quickly, as was anticipated at the outset. Again, that sale was arranged on an urgent basis so as to bring some certainty and structure to the quite serious financial circumstances of Digital Domain and the other parties. The evidence before both the United States court and this Court suggested that if such a sale could not be concluded quickly in order to regularize the operations of the corporate group, then much of the enterprise value of the group could possibly disappear, to the detriment of all stakeholders.

[5] Returning to the United States proceedings, the Bid Procedure Order that had been granted by the United States court on September 12, and recognized by my order on September 18, was later confirmed on September 20. The bid procedures called for an auction to be held on September 21. As part of the sales process, the Bid Procedures Order approved a stalking-horse bid of approximately US\$15 million.

[6] A significant factor on this application is that on September 18, an Unsecured Creditors' Committee was appointed in the United States proceedings in accordance with the United States *Bankruptcy Code*. Part of the Committee's mandate was, of course, to review the background of this matter and attempt to understand the contention that there was a need for urgency in selling the assets. The Committee was also asked to provide its opinion on the proposed process by which a sale of the group's assets would be sought.

[7] Importantly, the Committee, presumably understanding the urgency of the situation, filed a document with the United States Bankruptcy Court confirming that it had completed certain due diligence and that it was fully supportive of the proposed sales process going forward.

[8] The auction was held in New York City on September 21, 2012. The results were wildly successful. There were a number of significant parties prior to that date who had expressed interest in purchasing the assets, and who had signed various non-disclosure agreements and had completed certain due diligence. In all, five bidders participated in the auction, including the stalking-horse bidder.

[9] The successful bidder at the auction was Galloping Horse America, LLC, whose bid was in the amount of US\$30.2 million. It is plain to see that the amount of the stalking-horse bid was exceeded, and that a sale to Galloping Horse will result in a substantially greater recovery for the stakeholders.

[10] As anticipated by the process put in place under the Chapter 11 proceedings, a motion was brought before Judge Shannon of the United States Bankruptcy Court on September 24, 2012 to approve the sale to Galloping Horse. Counsel has

provided me with a certified copy of that extensive order; suffice it to say that the order appears to be substantially in accordance with previous orders granted by the United States Bankruptcy Court. Of particular note is paragraph 40, where the United States Bankruptcy Court has requested that this Court recognize the sale approval order and give full force and effect to the terms of that order. I would also note paragraph five, which provides that the sale proceeds are to be held in trust in place of the assets being sold and are not to be distributed to the DIP lender or the senior secured creditors until after a "Challenge Period". It is somewhat unclear as to who is to independently review the validity of the security of the secured creditors and possibly take up any "challenge", although I expect that the Committee would likely be the entity to undertake that. I also expect that the Information Officer may take some role in ensuring that this is done, but I do not direct that the Information Officer take any action in that regard; it appears that others, including the Committee, will look at that issue.

[11] I am advised that the sale to Galloping Horse includes the assets of Digital Domain Productions (Vancouver) Ltd. ("Digital Vancouver"), which is the only Canadian company in this group, and which assets are located in this jurisdiction. I am advised that the Galloping Horse sale will provide certain benefits to Canadian stakeholders. In particular, there will be an assumption of various contracts. The Information Officer also advises that cure payments of Cdn\$1 million will be made to thirty of Digital Vancouver's creditors. Various obligations in the amount of Cdn\$425,000 owed by Digital Vancouver to its employees are to be assumed by Galloping Horse. Approximately 220 Canadian jobs will be saved.

[12] Unfortunately, what is not addressed by reason of this sale, at least in the Canadian proceedings, is approximately Cdn\$245,000 of unsecured claims, together with approximately Cdn\$675,000 owed for HST. I am also advised that there may be certain equipment lease issues that have not yet been sorted out, given the speed with which these proceedings have taken place.

II. ISSUE

[13] This application is for an order recognizing and implementing in Canada the order of the United States Bankruptcy Court, as pronounced by Judge Shannon yesterday. The order sought also includes additional provisions with respect to vesting the Canadian assets in Galloping Horse in accordance with the asset purchase agreement dated September 24, 2012.

III. DISCUSSION

[14] The applicable statutory provision on this application is s. 49(1) of the CCAA, the same provision I considered on the earlier application. This provision provides that having recognized a foreign proceeding, I may make further orders as I consider appropriate if I am satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors.

[15] It is well taken that this Court and other Canadian courts have recognized sale orders granted within United States Chapter 11 proceedings, particularly where those proceedings have been found to be foreign main proceedings. Counsel for Digital Domain has referred me to the leading authority in Canada with respect to sales of assets: *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.). In that case, in assessing the reasonableness of a proposed sale of assets, the court considered various factors: whether the party conducting the sale had made sufficient efforts to get the best price and had not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers were obtained; and whether there had been any unfairness in the sales process.

[16] As I have already stated, the bid procedures were dictated by the exigent circumstances of the Digital Domain group. Nevertheless, it appears that many of the stakeholders, both in Canada and in the United States, have worked very hard to implement a process that, while expedited, fully canvassed the market for appropriate offers. Again, those bid procedures were approved in the Bid Procedures Order granted by Judge Shannon and were recognized by me earlier

this month. The Information Officer in its report to the court sets out the sales process; it concludes that the auction was conducted in a fair manner and that the sale and vesting order is appropriate under the circumstances. The evidence indicates, and I find, that the approved sales process which resulted in the Galloping Horse sale was in compliance with those orders.

[17] It remains a consideration as to whether recognition of the sale order is necessary for the protection of the Digital Domain group's property or the interests of a creditor or creditors. I would note that the net sale proceeds are to be held in trust pending a potential review of the security held by the DIP lender and the pre-petition secured creditor. The Information Officer also points out that it understands that the distribution of the net sale proceeds will be subject to further consideration within the Chapter 11 proceedings.

[18] It appears that if that security is valid, then the entirety of the sale proceeds will be required to repay both the DIP facility and some portion of the pre-petition debt. To that extent, unsecured creditors, both in Canada and in the United States, will find that there is no recovery for them. There is, of course, some recovery for those parties who will remain within the context of the business operations, to the extent that they are to be satisfied by Galloping Horse, and they continue to do business with the new entity.

[19] Nevertheless, Canadian creditors will be fully able to participate in the United States proceedings. Accordingly, they will not suffer any prejudice by reason of the sale process having been concluded in this manner.

IV. DISPOSITION

[20] Having considered all of these circumstances, I am satisfied that recognition of the sale order is appropriate. It appears to me, as I stated on the earlier application, that a coordinated approach is one that best serves the interests of all the stakeholders which would, of course, include the Canadian creditors. It appears

that the parties again have acted quickly to deal with the corporate group's property and assets, with great success.

“Fitzpatrick J.”

SCHEDULE "A"
DEBTORS

Digital Domain Media Group, Inc.
Digital Domain
DDH Land Holdings, LLC
Digital Domain Institute, Inc.
Digital Domain Stereo Group, Inc.
DDH Land Holdings II, LLC
Digital Domain International, Inc.
Tradition Studios, Inc.
Digital Domain Tactical, Inc.
Digital Domain Productions, Inc.
Mothership Media, Inc.
D2 Software, Inc.
Digital Domain Productions (Vancouver) Ltd.
Tembo Productions, Inc.

TAB 8

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.) FRIDAY, THE 9th
)
JUSTICE MORAWETZ) DAY OF MARCH, 2012



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

APPLICATION OF HARTFORD COMPUTER HARDWARE, INC.
UNDER SECTION 46 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
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION WITH
RESPECT TO HARTFORD COMPUTER HARDWARE, INC.,
NEXICORE SERVICES, LLC, HARTFORD COMPUTER GROUP,
INC. AND HARTFORD COMPUTER GOVERNMENT, INC.
(COLLECTIVELY, THE "CHAPTER 11 DEBTORS")

RECOGNITION, APPROVAL AND VESTING ORDER

THIS MOTION, made by Hartford Computer Hardware, Inc. (the "**Applicant**"), in its capacity as the foreign representative (the "**Foreign Representative**") of the Chapter 11 Debtors in the proceedings commenced on December 12, 2011 in the United States Bankruptcy Court for the Northern District of Illinois Eastern Division (the "**U.S. Court**") under Chapter 11 of Title 11 of the United States Code (the "**Chapter 11 Proceeding**"), pursuant to section 49 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C.-36, as amended (the "**CCAA**") for an Order, substantially in the form enclosed in the Applicant's Motion Record, recognizing the

Sale Order (as defined herein) granted by the U.S. Court was heard this day at 330 University Avenue, Toronto, Ontario;

ON READING the notice of motion dated March 2, 2012 (the “**Notice of Motion**”), the affidavit of Brian Mittman sworn on February 28, 2012, the affidavit of Alana Shepherd sworn on March 2, 2012 and the second report of FTI Consulting Canada Inc., in its capacity as Information Officer dated March 2, 2012 (the “**Information Officer’s Second Report**”), each filed;

AND UPON HEARING the submissions of counsel for the Foreign Representative, counsel for the Information Officer, and counsel for Avnet, Inc. and Avnet International (Canada) Ltd. (the “**Canadian Purchaser**” and collectively with Avnet, Inc., the “**Purchaser**”), no one appearing for Delaware Street Capital Master Fund, L.P. (the “**DIP Lender**”) or for any other person on the Service List although duly served as appears from the affidavit of service of Bobbie-Jo Brinkman sworn on March 5, 2012,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

RECOGNITION OF FOREIGN SALE ORDER

2. **THIS COURT ORDERS AND DECLARES** that the Order authorizing the sale of property of the estates under U.S. Bankruptcy Code § 363 pursuant to the sale transaction (the “**Transaction**”) contemplated by an asset purchase agreement between the Chapter 11 Debtors,

Hartford Computer Group, Inc. and Nexicore Services, LLC, and the Purchaser dated December 12, 2011 (the “**Agreement**”) and the assumption and assignment of executory contracts and leases under U.S. Bankruptcy Code § 365 (the “**Sale Order**”) of the U.S. Court made in the Chapter 11 Proceeding attached to this Order as Schedule “A” is hereby recognized and given full force and effect in all provinces and territories of Canada pursuant to Section 49 of the CCAA and shall be implemented and become effective in all provinces and territories of Canada upon the issuance of this Order in accordance with its terms.

ADDITIONAL PROVISIONS REGARDING APPROVAL AND VESTING

3. **THIS COURT ORDERS AND DECLARES** that The Chapter 11 Debtors are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and, in particular, for the conveyance of the Canadian Assets (as defined in the Agreement) to the Canadian Purchaser.

4. **THIS COURT ORDERS AND DECLARES** that upon Closing (as defined in the Agreement), all of the Chapter 11 Debtors’ right, title and interest in and to the Canadian Assets described in the Agreement shall vest absolutely in the Canadian Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the “**Claims**”) including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Supplemental Order of the Honourable Justice Morawetz dated December 21, 2011; and (ii) all charges, security interests or claims evidenced

by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system (all of which are collectively referred to as the “**Encumbrances**”) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Canadian Assets are hereby expunged and discharged as against the Canadian Assets.

5. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Canadian Assets shall stand in the place and stead of the Canadian Assets, and that from and after Closing all Claims and Encumbrances shall attach to the net proceeds from the sale of the Canadian Assets with the same priority as they had with respect to the Canadian Assets immediately prior to the sale, as if the Canadian Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

6. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* (Canada), the relevant Chapter 11 Debtors are authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Chapter 11 Debtor’s records pertaining to the Chapter 11 Debtor’s past and current Canadian employees. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Chapter 11 Debtors.

7. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of any of the Chapter 11 Debtors and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of any Chapter 11 Debtor;

the vesting of the Canadian Assets in the Canadian Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Chapter 11 Debtors and shall not be void or voidable by creditors of the Chapter 11 Debtors, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

8. **THIS COURT ORDERS AND DECLARES** that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario), Section 6 of the *Retail Sales Tax Act* (Ontario) and any equivalent or similar legislation under any province or territory in Canada and that such legislation does not apply to the Transaction.

9. **THIS COURT ORDERS AND DECLARES** that each of the Chapter 11 Debtors and the Purchaser have leave to reapply for a further Order or Orders that may be necessary to carry out the terms of the Transaction.

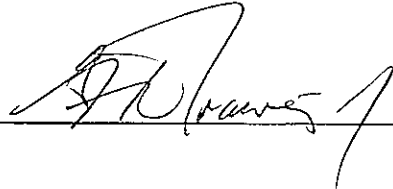
INFORMATION OFFICER'S REPORT

10. **THIS COURT ORDERS** that the Information Officer's Second Report and the activities of the Information Officer as described therein be and are hereby approved.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:



MAR 12 2012



SCHEDULE "A"

Sale Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
HARTFORD COMPUTER HARDWARE,	)	Case No. 11-49744 (PSH)
INC., <i>et al.</i> , ¹	)	(Joint Administration Pending)
	)	
Debtors.	)	Hon. Pamela S. Hollis

**ORDER AUTHORIZING THE SALE OF PROPERTY OF THE ESTATES UNDER
BANKRUPTCY CODE § 363 AND THE ASSUMPTION AND ASSIGNMENT OF
EXECUTORY CONTRACTS AND LEASES UNDER BANKRUPTCY CODE § 365**

This matter comes before the Court for entry of a final order on the *Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a), 363, 365 and Fed. R. Bankr. P. 2002, 6004, 6006 for (I) Entry of an Order (A) Approving Bidding Procedures; (B) Granting Certain Bid Protections; (C) Approving Form and Manner of Sale Notices; (D) Setting Sale Hearing Date in Connection With Sale of Substantially All of Debtors' Assets; and (II) Entry of an Order (A) Approving the Sale of Debtors' Assets Free and Clear of All Liens, Claims, Encumbrances and Interests; (B) Authorizing the Assumption And Assignment of Certain Executory Contracts and Unexpired Leases; (C) the Assumption of Certain Liabilities; and (D) Granting Certain Related Relief* (the "Motion")²; the Court having reviewed the Motion, the *Declaration of Brian Mittman in Support of the Sale Motion*, and the *Declaration of Michael Levy in Support of the Sale Motion*; the Court having found that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) venue is proper in this district pursuant to 28 U.S.C. § 1408 and 1409, (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (d) notice of the Motion is sufficient under the

¹ The Debtors are Hartford Computer Hardware, Inc. (FEIN 27-4297525), Nexicore Services, LLC (FEIN 03-0489686), Hartford Computer Group, Inc. (FEIN 36-2973523), and Hartford Computer Government, Inc (FEIN 20-0845960).

² Capitalized terms not defined herein shall have the meaning given to them in the Motion.

circumstances; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted in this order;

THE COURT FINDS AND CONCLUDES that:

1. In accordance with this Court's *Order (i) Approving Bidding Procedures, (ii) Granting Bid Protections, (iii) Approving Form and Manner of Sale Notices, and (iv) Setting Sale Hearing Date in Connection With Sale of Substantially All of the Debtors' Assets* (Docket No. 128) (the "Sale Procedures Order"), the Debtors served notice of, among other things, the Motion, the proposed sale of the Acquired Assets, the proposed assumption and assignment of the Contracts and Leases, the proposed Cure Amounts, the opportunity to submit Competing Bids, the deadline to object to the Court's entry of an order granting the Motion, and the date and time of the final hearing on the Motion on all parties required to receive such notice under the Sale Procedures Order, including, without limitation, all creditors and all counterparties to the Contracts and Leases. (See Affidavit of Service filed on February 9, 2012, Docket No. 158; Affidavit of Service filed on February 13, 2012, Docket No. 168.) In addition, pursuant to the Sale Procedures Order, the Debtors caused to be published a notice of the sale, the deadline to object to the Court's entry of an order granting the Motion, and the date and time of the final hearing on the Motion in the national edition of *The Wall Street Journal*. (See Affidavit of Publication of Notice of Sale in *The Wall Street Journal* filed on February 9, 2012, Docket No. 160.) Such notice was adequate under Bankruptcy Rules 2002, 6004, and 6006 and the circumstances of these cases; no additional notice is necessary.

2. The Debtors received one Qualified Bid, which was made by the stalking-horse bidders Avnet, Inc. and Avnet International (Canada) Ltd. (collectively, the "Purchaser") pursuant to the *Asset Purchase Agreement* dated December 12, 2011 (the "Agreement").

3. Having received no Qualified Bids from any Qualified Bidders by the deadlines set forth in the Sale Procedures Order, other than the Purchaser's Qualified Bid, the Debtors cancelled the Auction.

4. The Court considered the Motion and conducted a hearing (the "Sale Hearing") on February 28, 2012, at which statements of counsel for the Debtors, any objectors, the Official Committee of Unsecured Creditors (the "Committee"), Delaware Street Capital Master Fund, L.P. ("Delaware Street"), and the Purchaser were heard.

5. The Debtor has identified, and the Court recognizes, the Purchaser as the prevailing bidder for the Acquired Assets in accordance with the Sale Procedures Order. The Purchaser's bid is the highest and best bid for the Acquired Assets, and the Purchase Price represents the highest value for the Acquired Assets under the circumstances. With the entry of this Order, the Purchaser's bid has no material unsatisfied conditions, is not subject to significant execution risk, and therefore should be able to close pursuant to the terms of the Agreement.

6. The transactions contemplated in the Agreement and this Order (the "Transaction"), including an immediate sale of the Acquired Assets to the Purchaser and the Debtors' assumption and assignment to the Purchaser of the Assumed Contracts, are in the best interests of the estates and creditors.

7. The Debtors have demonstrated sufficient and sound business justifications and compelling circumstances for the sale of the Acquired Assets other than in the ordinary course of the Debtors' business under Bankruptcy Code § 363(b) before, and outside of, a plan of reorganization because, among other things, the immediate consummation of the Transaction with the Purchaser is necessary and appropriate to maximize the value of the estates. Entry of an

order in the form and substance of this Order is a necessary condition precedent to the Purchaser's consummation of the Transaction.

8. The Purchaser and the Debtors negotiated the sale of the Acquired Assets without collusion, in good faith, and at arm's length. The Purchaser is, therefore, entitled to the protections afforded under Bankruptcy Code § 363(m). There was no agreement among the Purchaser, any of the Qualified Bidders, and any other potential bidder for the Acquired Assets, to control the price to be paid for the Acquired Assets under the Motion. Accordingly, nothing would cause the sale authorized by this Order to be avoided under Bankruptcy Code § 363(n).

9. The Debtors are the sole, lawful owners of the Acquired Assets. The transfer of the Acquired Assets to the Purchaser under the Agreement will be a legal, valid, and effective transfer of the Acquired Assets, vesting the Purchaser with all title to the Acquired Assets free and clear of all liens, claims (as defined in Bankruptcy Code § 101(5)), encumbrances, obligations, liabilities, contractual commitments, or interests of any kind (collectively, the "Interests"), including without limitation (i) any Interest that purports to give a party a right to forfeit, modify, or terminate the Debtors' interests in the Acquired Assets, or any similar right, and (ii) any Interest relating to taxes arising under or out of, in connection with, or in any way relating to the operation of the Debtors' business before the closing of the sale authorized in this Order. All Interests shall attach to the proceeds, including, without limitation, all elements of the "Purchase Price" as defined in Section 3.2(a) of the Agreement, attributable to the property against or in which such Interests are asserted, subject to the terms of such Interests, with the same validity and in the same priority that such Interests now have against the Acquired Assets or their proceeds, subject to any rights, claims, and defenses the Debtors or their estates may possess with respect to such Interests, including any ultimately successful "Challenge" (as that

term is defined in the *Final Order (I) Authorizing the Debtors to Obtain Post-Petition Financing Pursuant to 11 U.S.C. § 364, (II) Authorizing the Use of Cash Collateral Pursuant to 11 U.S.C. § 363, (III) Granting Adequate Protection to the Prepetition Secured Lender Pursuant to 11 U.S.C. §§ 361 and 363, and (IV) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001*, hereinafter the "Final DIP Financing Order") [Dkt. No. 137] asserted by any party ultimately determined to have the requisite standing.

10. The Debtors may sell the Acquired Assets free and clear of all Interests because, with respect to each Interest, one or more of the standards set forth in Bankruptcy Code § 363(f)(1)-(5) is satisfied. Each entity asserting an Interest in the Acquired Assets: (i) has, subject to the terms and conditions of this Order, consented or is deemed to have consented to the sale of the Acquired Assets; (ii) has an Interest that is subject to bona fide dispute; (iii) could be compelled in a legal or equitable proceeding to accept money satisfaction of its Interest; or (iv) otherwise falls within the provisions of Bankruptcy Code § 363(f). Those holders of Interests who did not timely object to the Motion are deemed, subject to the terms of this Order, to have consented under Bankruptcy Code § 363(f)(2). All holders of Interests are adequately protected by having their Interests attach to the proceeds ultimately attributable to the property against or in which such Interests are asserted.

11. The Debtors' assumption and assignment to the Purchaser of the Assumed Contracts is integral to the Agreement and is in the best interests of the Debtors and their estates, creditors, and all other parties in interest, and represents the reasonable exercise of the Debtors' business judgment. The Debtors or the Purchaser have, to the extent necessary, cured or provided adequate assurance of cure of any default existing before the date of this Order with respect to the Assumed Contracts within the meaning of Bankruptcy Code § 365(b)(1)(A) and (f)(2)(A).

The Purchaser's promise to perform the obligations under the Assumed Contracts after closing constitutes adequate assurance of future performance within the meaning of Bankruptcy Code § 365(b)(1)(C), (b)(3) (to the extent applicable), and (f)(2)(B).

12. The Transaction may include the transfer of Personally Identifiable Information, as defined in Bankruptcy Code § 101(41A). No Consumer Privacy Ombudsman need be appointed because the Purchaser has agreed to adhere to any privacy policies applying to the Debtors.

13. The objections filed by any objectors have been resolved or withdrawn based on the provisions of this Order to which all objectors, the Purchaser, and the Debtors stipulate as indicated by their respective signatures of counsel below.

14. Good cause appears for granting the relief requested in the Motion.

IT IS HEREBY ORDERED as follows:

A. The Motion is GRANTED as provided in this Order.

B. All objections to the Motion or the relief requested in the Motion that have not been made, withdrawn, waived, or settled, and all reservations of rights included any such objection, are overruled on the merits.

C. The Agreement and the Transaction are APPROVED as provided in this Order. The Debtors are authorized and directed to: (a) execute the Agreement, along with any additional documents that may be reasonably necessary or appropriate to implement the Agreement but do not materially change the its terms; (b) consummate the Transaction; and (c) take any action reasonably necessary to implement the Transaction in a manner not inconsistent with this Order. The Agreement and any related agreements and documents may be modified by the parties to it, in writing and in accordance with its terms, without further order of this Court if the modification

does not materially and adversely affect the estates, and upon three (3) business days' prior written notice to the Committee and Delaware Street.

D. The stays of this Order under Bankruptcy Rules 6004(h) and 6006(d) are waived. This Order is effective and enforceable immediately on entry.

E. Except as expressly provided in the Agreement or this Order, the sale of the Acquired Assets to the Purchaser is free and clear of all Interests under Bankruptcy Code § 363(f). All Interests are released, terminated, and discharged as to the Acquired Assets and the Purchaser (and its successors and assigns). Any Interest, if valid, legal, and enforceable, shall attach to, and be satisfied, if at all, from the proceeds of the sale, including, without limitation, all elements of the "Purchase Price" as set forth in Section 3.2(a) of the Agreement, in the same order and priority as the Interest had in the Acquired Assets before the sale.

F. The Transaction, the Agreement, and all of its related documents constitute a duly authorized, legally valid, and binding transfer, specifically performable and enforceable against, and not subject to rejection or avoidance by, the Debtors or any representative of the Debtors' estates under any chapter of the Bankruptcy Code. Every federal, state, and local governmental agency or department is directed to accept any document or instrument necessary and appropriate to consummate the transactions contemplated by this Order. The Transaction may not be avoided under Bankruptcy Code § 363(n).

G. The purchase of the Acquired Assets is undertaken by the Purchaser in good faith, as that term is used in Bankruptcy Code §363(m). Accordingly, the reversal or modification on appeal of the authorization provided in this Order to consummate the Transaction will not affect the validity of the sale of the Acquired Assets to the Purchaser, unless this Order is duly stayed

pending such an appeal. The Purchaser, as a purchaser in good faith of the Acquired Assets, is entitled to all protections afforded under Bankruptcy Code § 363(m).

H. Under no circumstance may the Purchaser or any of its affiliates be deemed a successor of any one of the Debtors for any Interest in the Acquired Assets. Any person holding an Interest in any component of the Acquired Assets is permanently enjoined from asserting, prosecuting, or otherwise pursuing its Interest against the Purchaser, its property, its affiliates, its successors, its assignees, its employees, its agents, or against the Acquired Assets with respect to that Interest. The provisions of this paragraph and all other provisions of this Order are intended to have effect in all federal, state, and local jurisdictions in the United States and, in accordance with the Recognition Orders, in all federal, provincial, and local jurisdictions in Canada.

I. On and after the closing of the Transaction, no holder of an Interest or any claim against any Debtor or its estate may interfere with Purchaser's title to, or use and enjoyment of, the Acquired Assets. All entities, including without limitation the Debtors, their present and former employees, administrative agencies, governmental tax and regulatory authorities, secretaries of state, federal, state, and local officials, lenders, contract parties, bidders, lessors, warehousemen, customs brokers, freight forwarders, carriers, and other parties in possession of any Acquired Assets at any time, all creditors, and all other persons holding Interests of any kind arising under or out of, in connection with, or in any way relating to, the Debtors, the Acquired Assets, the operation of the Debtors' business before the closing of the Transaction, or with respect to any Interests arising out of or related to the Transaction, are forever barred and permanently enjoined from commencing, prosecuting, or continuing in any manner any action or other proceeding of any kind against the Purchaser, its property, its successors and assigns, its employees and agents, its affiliates, or the Acquired Assets. Following the Closing Date, no

holder of an Interest in the Debtors may interfere in any way with the Purchaser's title to or use and enjoyment of the Acquired Assets based on or related to such Interest, or any actions that the Debtors may take in these cases.

J. Any entity in possession of or control over any component of the Acquired Assets must surrender such possession or control either to the Debtors before the Transaction's closing or the Purchaser no later than the Transaction's closing.

K. The Debtors are authorized to assume and assign to the Purchaser the Assumed Contracts effective as of the entry of this Order. Each counterparty to an Assumed Contract is forever barred and enjoined from asserting against the Debtors or the Purchaser, or their respective property, any assignment fee, default, breach, claim, pecuniary loss, liability, or obligation arising under or related to the Assumed Contracts existing as of the closing of the Transaction. With respect to the Transaction and the assignment of the Assumed Contracts to the Purchaser as authorized in this Order, any provision in any Assumed Contract that prohibits or conditions the assignment of such Assumed Contract or allows a party to such Assumed Contract to terminate, recapture, impose any penalty, or modify any term on the assignment of such Assumed Contract constitutes an unenforceable anti-assignment provision and is void.

L. If any license or permit necessary for the operation of the acquired business is determined not to be an executory contract assumable and assignable under Bankruptcy Code § 365, the Purchaser must apply for and obtain any necessary license or permit promptly after the Transaction's closing. The Debtors' licenses or permits must remain in place for the Purchaser's benefit until the Purchaser obtains all its necessary licenses and permits.

M. Except as provided in paragraph N below, in accordance with the Agreement, the Purchaser must pay to any counter-party to an Assumed Contract any Cure Amount identified on

Exhibit 1 to the Assumption and Cure Notice for that Assumed Contract to cure all monetary defaults and breaches under that Assumed Contract required under Bankruptcy Code § 365(b). The payment of any applicable Cure Amount (a) effects a cure of all defaults existing under the applicable Assumed Contract as of the Transaction's closing, (b) compensates any counter-party to such Assumed Contract for any actual pecuniary loss resulting from such default, and (c) together with the assignment of Assumed Contract to the Purchaser, constitutes adequate assurance of future performance of the Assumed Contract. Any counterparty to an Assumed Contract shall have no remaining claim against the Debtors on account of any alleged breaches under the Assumed Contract.

N. In the event the disputes regarding the proposed cure amounts on Assumed Contracts to which Sony Electronics Inc. and Sony Service Company (collectively, "Sony") is a counterparty (the "Sony Assumed Contracts") are unresolved prior to the closing of the Transaction, the Sony Assumed Contracts shall be assumed and assigned to the Purchaser (unless the Purchaser provides written notice to the Debtors that it does not seek an assumption and assignment of the Sony Assumed Contracts) effective as of the closing of the Transaction, provided (i) the Purchaser will pay into escrow at the closing the disputed portion of the cure amounts with respect to each Sony Assumed Contract (the "Escrowed Funds") as set forth in the Stipulation and Order Regarding Procedures to Resolve Proposed Cure Amounts by and among the Debtors and Sony, which the parties are in the process of finalizing (the "Sony Stipulation"), (ii) will pay the undisputed portion of the cure amounts in the amount of not less than \$34,456.26 with respect to the Sony Assumed Contracts to Sony within two (2) business days after the closing, and (iii) will pay the disputed portion of the cure amounts with respect to each Sony

Assumed Contract from the Escrowed Funds within two (2) business days after a determination by agreement or Court order regarding the correct cure amount.

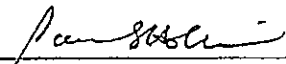
O. Upon the closing of the transactions contemplated by this Order and the Agreement, the Debtors are directed to pay a portion of the proceeds to Delaware Street to pay and indefeasibly satisfy the DIP Obligations, as that term is defined in the Final DIP Financing Order (including, without limitation, the DIP Obligations incurred under paragraph 6 thereof), upon three (3) business days' written notice to the Committee of the amount to be so paid; provided, that the Committee shall have no right to object to such repayment absent mathematical error. All remaining proceeds shall be retained by the Debtor pending further order of this Court.

P. Nothing in any chapter 11 plan confirmed in the Debtors' cases, any order confirming any such plan, or any other order in these cases (including any order entered after any conversion of these cases into cases under chapter 7) may alter, conflict with, or derogate from the provisions of the Agreement or this Order.

Q. This Court retains jurisdiction to enforce and implement the terms and provisions of this Order and any agreements or instruments executed in connection with this Order, including without limitation jurisdiction to resolve any disputes arising under or related to this Order and to interpret, implement, and enforce this Order's provisions.

R. The Purchaser, the Debtors, all holders of Interests, and any objectors are authorized and directed to enter into any agreement or take any action reasonably necessary or appropriate to consummate the Transaction, transfer title in the Acquired Assets to the Purchaser, and otherwise effect and implement the Agreement and the provisions of this Order.

Dated: FEB 28 2012, 2012


UNITED STATES BANKRUPTCY JUDGE

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

APPLICATION OF HARTFORD COMPUTER HARDWARE, INC. UNDER SECTION 46 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 NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION WITH RESPECT TO HARTFORD COMPUTER HARDWARE, INC., NEXICORE SERVICES, LLC, HARTFORD COMPUTER GROUP, INC. AND HARTFORD COMPUTER GOVERNMENT, INC. (COLLECTIVELY, THE "CHAPTER 11 DEBTORS")

Court File No.: CV-11-9514-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

RECOGNITION, APPROVAL AND VESTING ORDER
(MARCH 9, 2012)

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Toronto-Dominion Centre
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