Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF ROCKPORT BLOCKER, LLC, THE ROCKPORT GROUP HOLDINGS, LLC, TRG 1-P HOLDINGS, LLC, TRG INTERMEDIATE HOLDINGS, LLC, TRG CLASS D, LLC, THE ROCKPORT GROUP, LLC, THE ROCKPORT COMPANY, LLC, DRYDOCK FOOTWEAR, LLC, DD MANAGEMENT SERVICES LLC AND ROCKPORT CANADA ULC (THE "DEBTORS")

APPLICATION OF ROCKPORT BLOCKER, LLC, UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

BRIEF OF AUTHORITIES OF THE APPLICANT, ROCKPORT BLOCKER, LLC

(Re: Application Returnable May 16, 2018)

May 15, 2018

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In the Matter of Babcock & Wilcox Canada Ltd.

Farley J.

Heard: February 25, 2000
Judgment: February 25, 2000
Docket: 00-CL-3667

Counsel: *Derrick Tay*, for Babcock & Wilcox Canada Ltd.
Paul Macdonald, for Citibank North America Inc., Lenders under the Post-Petition Credit Agreement.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
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APPLICATION by solvent corporation for interim order under s. 18.6 of *Companies' Creditors Arrangement Act.*

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 Plaintiff's attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding . . . (emphasis added)

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

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

> Provisions in Bill C-5 attempt to actually codify, which has always been the practice in Canada. They include the Court recognition of foreign representatives; Court authority to make orders to facilitate and coordinate international insolvencies; provisions that would make it clear that foreign representatives are allowed to commence proceedings in Canada, as per Canadian rules - however, they clarify that foreign stays of proceedings are not applicable but a foreign representative can apply to a court for a stay in Canada; and Canadian creditors and assets are protected by the bankruptcy and insolvency rules.

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

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

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

13 Thus it seems to me that this application by BW Canada should be reviewed in light of (i) the doctrine of comity as analyzed in *Morguard, Arrowmaster* and *ATL, supra*, in regard to its international aspects; (ii) inherent jurisdiction; (iii) the aspect of the liberal interpretation of the CCAA generally; and (iv) the assistance and codification of the 1997 Amendments.

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

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

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

> s. 267 In this Part,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) The enterprise is to be permitted to implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis of the enterprise and to the extent reasonably practicable, one jurisdiction should take charge of the principal administration of the enterprise's

reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of the stakeholders and does not inappropriately detract from the net benefits which may be available from alternative approaches.

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

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

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

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

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

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

(f) Where one jurisdiction has an ancillary role,

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

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

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

22 Taking these factors into consideration, and with the determination that the Chapter 11 proceedings are a "foreign proceeding" within the meaning of s. 18.6 of the CCAA and that it is appropriate to declare that BW Canada is entitled to avail itself of the provisions of s. 18.6, I would also grant the following relief. There is to be a stay against suits and enforcement as requested; the initial time period would appear reasonable in the circumstances to allow BWUS to return to the U.S. Bankruptcy Court. Assuming the injunctive relief is continued there, this will provide some additional time to more fully prepare an initial draft approach with respect to ongoing matters. It should also be recognized that if such future relief is not granted in the U.S. Bankruptcy Court, any interested person could avail themselves of the "comeback" clause in the draft order presented to me and which I find reasonable in the circumstances. It appears appropriate, in the circumstances that BW Canada guarantee BWUS' obligations as aforesaid and to grant security in respect thereof, recognizing that same is permitted pursuant to the general corporate legislation affecting BW Canada, namely the *Business Corporations Act* (Ontario). I note that there is also a provision for an "Information Officer" who will give quarterly reports to this Court. Notices are to be published in the Globe & Mail (National Edition) and the National Post. In accordance with my suggestion at the hearing, the draft order notice has been revised to note that persons are alerted to the fact that they may become a participant in these Canadian proceedings and further that, if so, they may make representations as to pursuing their remedies regarding asbestos related claims in Canada as opposed to the U.S. As discussed above the draft order also includes an appropriate "comeback" clause. This Court (and I specifically) look forward to working in a cooperative judicial way with the U.S. Bankruptcy Court (and Judge Brown specifically).

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

24 Order to issue accordingly.

Application granted.

APPENDIX

Court File No. 00-CL-3667

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR. JUSTICE FARLEY — FRIDAY, THE 25{TH} DAY OF FEBRUARY, 2000

IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

INITIAL ORDER

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

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

SERVICE

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

RECOGNITION OF THE U.S. PROCEEDINGS

2. *THIS COURT ORDERS AND DECLARES* that the proceedings commenced by the Applicant's United States corporate parent and certain other related corporations in the United States for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with asbestos claims before the U.S. Bankruptcy Court (the "U.S. Proceedings") be and hereby is recognized as a "foreign proceeding" for purposes of Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended, (the "CCAA").

APPLICATION

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

PROTECTION FROM ASBESTOS PROCEEDINGS

4. *THIS COURT ORDERS* that until and including May 1, 2000, or such later date as the Court may order (the "Stay Period"), no suit, action, enforcement process, extra-judicial proceeding or other proceeding relating to, arising out of or in any way connected to damages or loss suffered, directly or indirectly, from asbestos, asbestos contamination or asbestos related diseases ("Asbestos Proceedings") against or in respect of the Applicant, its directors or any property 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

Tab 2

2012 BCSC 1565
British Columbia Supreme Court [In Chambers]

Digital Domain Media Group Inc., Re

2012 CarswellBC 3210, 2012 BCSC 1565, [2013] B.C.W.L.D. 919, 223 A.C.W.S. (3d) 16, 95 C.B.R. (5th) 318

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

Fitzpatrick J.

Heard: September 18, 2012
Judgment: September 18, 2012
Docket: Vancouver S126501

Counsel: D. Grieve, D. Ward, E. Morris for Petitioner
D. Grassgreen, J. Rosell (United States Counsel) for Petitioner
P. Rubin for Tenor Opportunity Master Fund, Ltd., others
C. Brousson for Comvest Capital II, LP
C. Ramsay, J. Dietrich for Searchlight Capital LP/VFX Holdings LLC
M. Buttery for Third Party, Proposal Information Officer, Alvarez & Marsal Canada Inc.

Subject: Insolvency

Headnote

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

Recognition of foreign proceeding — Petitioner American debtor was parent company of Canadian company and thirteen American companies (together, "corporate group") — Corporate group filed under Chapter 11 of United States Bankruptcy Code and obtained foreign representation order and interim financing orders detailing debtor-in-possession (DIP) financing facility — Debtor brought petition for order recognizing Chapter 11 proceedings and for ancillary relief — Petition granted — Chapter 11 proceeding was "foreign proceeding" as defined in s. 45(1) of Companies' Creditors Arrangement Act ("CCAA") — Debtor was "foreign representative" for purposes of CCAA — Chapter 11 proceedings were "foreign main proceeding" in accordance with CCAA — Centre of main interest of entire corporate group, including Canadian company, was United States of America ("USA") — Debtor was highly-integrated corporate group centrally managed out of USA — Ancillary orders were granted, as they were appropriate to make — Coordinated approach was appropriate in these circumstances.

Table of Authorities

Cases considered by *Fitzpatrick J.*:

Allied Systems Holdings Inc., Re (2012), 2012 ONSC 4343 (Ont. S.C.J. [Commercial List]) — referred to

Angiotech Pharmaceuticals Inc., Re (2011), 2011 BCSC 115, 2011 CarswellBC 124, 76 C.B.R. (5th) 317 (B.C. S.C. [In Chambers]) — followed

Lightsquared LP, Re (2012), 2012 ONSC 2994, 2012 CarswellOnt 8614, 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List]) — considered

Massachusetts Elephant & Castle Group Inc., Re (2011), 81 C.B.R. (5th) 102, 2011 CarswellOnt 6610, 2011 ONSC 4201 (Ont. S.C.J.) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Generally — referred to

Chapter 11 — referred to

s. 1505 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Pt. IV — referred to

s. 44 — referred to

s. 45(1) "foreign proceeding" — considered

s. 45(2) — considered

s. 47(1) — referred to

s. 47(2) — considered

s. 48(1)(a)-48(1)(d) — referred to

s. 49 — considered

s. 52(1) — considered

s. 52(3) — considered

PETITION by parent company debtor for order recognizing bankruptcy proceedings in United States of America, and ancillary relief.

***Fitzpatrick J.*:**

I. Introduction

1 The petitioner, Digital Domain Media Group, Inc. ("Digital Domain"), brings this proceeding under Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") seeking an order recognizing certain proceedings underway in the United States in respect of Digital Domain and several of its subsidiaries. Other ancillary relief is also sought.

2 Digital Domain is the parent company of an extensive corporate group consisting of fourteen companies. The corporate group specializes in computer-generated imagery, animation and visual effects for major motion picture

studios and advertisers. Thirteen members of the group are American corporations which are incorporated in either Florida, California or Delaware. All of those corporations conduct business in the United States.

3 The British Columbia connection to this group is the fourteenth corporation, Digital Domain Productions (Vancouver) Ltd. ("Digital Vancouver"). Digital Vancouver's operations are an integral part of the overall business of the corporate group. As I understand it, a substantial portion of the corporate group's operations are conducted through Digital Vancouver, presumably because of the tax advantages that are available in this jurisdiction.

4 The corporate group as a whole has approximately 765 employees. That number arises even after a substantial reduction in the number of employees after certain recent downsizing of operations. Digital Vancouver operates from leased premises in the Vancouver area and now has approximately 260 employees.

5 There are various secured creditors of the corporate group. Firstly, a syndicate of first secured note holders is owed approximately US$75 million. Secondly, Comvest Capital II, LP is a subordinated secured creditor who is owed approximately US$8 million.

6 The evidence as to the background of this matter is contained in the affidavit of Michael Katzenstein, the current Chief Restructuring Officer of the corporate group. In late August 2012, he was appointed as Interim Chief Operating Officer of the Debtors. Mr. Katzenstein sets out in detail the difficult circumstances in which the Digital Domain group finds itself. Essentially, cash flow appears to have recently dried up, which in turn has led to defaults under various lending agreements.

7 The exigent financial circumstances of the Digital Domain group led to a filing under Chapter 11 of the United States *Bankruptcy Code* on September 11, 2012 in the United States Bankruptcy Court for the District of Delaware. The following day, the Honourable Brendan Shannon granted relief pursuant to Chapter 11, and in particular, he granted various First Day Orders, the details of which I will outline below.

II. Background

8 This matter is quite urgent. The reasons for the urgency are, for the most part, set out in paragraph 70 of Mr. Katzenstein's affidavit. In summary, it appears that the movie studios which use the services of the Digital Domain group have expressed significant concern about the financial circumstances of the corporate group and accordingly, the corporate group's ability to deliver the goods and services that are to be provided to the studios in respect of ongoing productions. The movie studios have made repeated demands for immediate assurances that the corporate group can make the required deliveries. There was considerable concern under those circumstances that if action was not taken very quickly, the lifeblood or the core business of the Digital Domain group would disappear, leaving no enterprise value whatsoever.

9 Accordingly, the Digital Domain group has moved very quickly to seek relief, and Judge Shannon recently did grant the various First Day Orders. Those First Day Orders include a Foreign Representative Order appointing the parent company, Digital Domain, as a foreign representative with the authorization to seek recognition of the Chapter 11 proceedings, to request that the Canadian court lend assistance in protecting the property of the corporate group, and to seek any other appropriate relief.

10 Other First Day Orders include: a Cash Management Order to permit the management of the cash within the group, and allow intercompany advances; an Interim Pre-Petition Wages Order to allow for the payment of wages to employees so as to ensure they continue working, thereby preserving the value of their work; an Insurance Order to allow payment of ongoing insurance; and a Critical Vendor Order to allow payments to certain critical vendors.

11 Interim Financing Orders were also granted. Those orders detail a debtor-in-possession ("DIP") financing facility, as approved by Judge Shannon. Following some initial orders in relation to the DIP facility, the third order authorizes a DIP facility up to a maximum of US$20 million, although only approximately US$11.8 million has been made available

on an interim basis. Only approximately US$6 million has been advanced by the DIP lenders on an interim basis until things are more certain in respect of both the Chapter 11 proceedings and these proceedings. The Interim Financing Orders provide for a charge on the United States assets in respect of the DIP financing.

12 The final First Day Order for which recognition is now sought is a Bid Procedures Order. This order speaks to the urgency with which the United States proceedings were brought, and also presumably to the basis upon which this application is brought. By this order, an asset purchase agreement dated September 11, 2012 between the corporate group and a stalking-horse bidder, VFX Holdings LLC, was approved. It is intended that a sale of the corporate group's assets be completed in an extremely quick manner.

13 So that it is apparent just how urgent these matters are, I will review the intended procedures in some detail. That there is urgency in completing a sale has been accepted by the American court. There is to be a hearing by September 20, 2012 that is intended to confirm the bid procedures and allow for any creditor to object to those bid procedures. I am advised by counsel for the proposed Information Officer, Alvarez & Marsal Canada Inc., that there appears to be one party who wishes to weigh in on that procedure, although it is not clear if it will object to the proposed process. An auction is also intended to be held on September 21, 2012 to consider the bids. Finally, it is intended that there will be an application on September 24, 2012 before the United States Bankruptcy Court to consider approval of a sale. Assuming that approval is granted, it is intended that the sale will close that very day on September 24. As I already stated, the rapidity with which this is intended to happen is illustrative of the fact that the various stakeholders here are extremely concerned about the relationship between the corporate group and the movie studios, and that the business of the group may disappear unless things are regularized very quickly.

14 A further hearing within the United States proceedings is scheduled for October 1, 2012, at which date the court will consider confirming certain matters relating to the DIP financing. That will obviously be driven to some extent by whether a sale completes on September 24. I am advised, however, that even if a sale closes, the DIP financing will be required in order to deal with the remaining assets in the corporate group.

III. Discussion

A. Order recognizing the U.S. proceeding

(i) Is the U.S. proceeding a "foreign proceeding"?

15 The first issue relates to the recognition order being sought under Part IV of the *CCAA*. The first question is whether this is a "foreign proceeding". Chapter 11 proceedings under the United States *Bankruptcy Code* are well known to this Court and other Canadian courts. There is no mystery in that respect, and I think it is well taken that a Chapter 11 proceeding is a "foreign proceeding" as defined in s. 45(1) of the *CCAA*.

(ii) Is Digital Domain a "foreign representative"?

16 The second issue is whether Digital Domain is a "foreign representative". "Foreign representative" is also a defined term under s. 45(1) of the *CCAA*. In that respect, the petitioner's counsel has referred me to the order authorizing Digital Domain to act as foreign representative pursuant to s. 1505 of the United States *Bankruptcy Code*. As earlier stated, Judge Shannon's order dated September 12, 2012 specifically authorizes Digital Domain to act as a "foreign representative" for the purposes that I earlier stated.

17 Accordingly, I am satisfied that Digital Domain is a "foreign representative" for the purposes of the *CCAA*.

(iii) Is the U.S. proceeding a "foreign main proceeding"?

18 If the court is satisfied that this is a foreign proceeding and that the applicant is a foreign representative, it is then required to make an order recognizing the foreign proceeding under s. 47(1). Section 47(2) provides that the court must specify in the order whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding".

Both of those are defined terms, again found in s. 45(1) of the *CCAA*. In addition, s. 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 the centre of its main interest.

19 The registered offices of all thirteen American members of the corporate group are situated in the United States. Therefore, the presumption in s. 45(2) of the *CCAA* would deem their centres of main interest ("COMI") to be in the United States, which would in turn dictate a finding, subject to any other evidence, that it is a "foreign main proceeding". I am satisfied that the COMI of each of the thirteen American corporate group members is located in the United States.

20 The more difficult issue relates to Digital Vancouver, which I am advised has its registered office in British Columbia. Subsection 45(2) of *CCAA* deems its COMI to be Canada, subject to that presumption being rebutted by other evidence.

21 A number of Canadian authorities have addressed this issue. In *Angiotech Pharmaceuticals Inc., Re*, 2011 BCSC 115 (B.C. S.C. [In Chambers]) at para. 7, Mr. Justice Walker outlined various factors that are to be considered:

> [7] The factors considered by the courts in Canada that are relevant to the centre of main interest issue are:
>
> (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.

22 In *Massachusetts Elephant & Castle Group Inc., Re*, 2011 ONSC 4201 (Ont. S.C.J.), Mr. Justice Morawetz, at para. 26, recognized the *Angiotech* factors as above, and also identified what he considered to be the most significant factors:

> [30] However, it seems to me, in interpreting COMI, the following factors are usually significant:
>
> (a) the location of the debtor's headquarters or head office functions or nerve centre;
>
> (b) the location of the debtor's management; and
>
> (c) the location which significant creditors recognize as being the centre of the company's operations.

23 Mr. Justice Morawetz had further opportunity to revisit the issue on two other occasions. In *Lightsquared LP, Re*, 2012 ONSC 2994 (Ont. S.C.J. [Commercial List]), he indicated that the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor's COMI:

> [25] In circumstances where it is necessary to go beyond the s. 45 (2) registered office presumption, in my view, the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor's centre of main interests. The factors are:

(i) the location is readily ascertainable by creditors;

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

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

See also *Allied Systems Holdings Inc., Re*, 2012 ONSC 4343 (Ont. S.C.J. [Commercial List]) at para. 7.

24 Clearly, a determination of this issue will depend on the particular circumstances and facts of each case.

25 Counsel for Digital Domain identified a variety of factors which he says support a finding that the COMI for not only the United States Debtors, but also Digital Vancouver, is in the United States. I will summarize those briefly:

(1) The corporate group is a very integrated group, and the nerve centre of the group's digital production business is in California, which is a location readily ascertainable by creditors.

(2) The principal assets of the group are the movie projects that produce 90% of the revenue for the group. These projects emanate from and are managed and operated from the United States It appears to be the case that a significant portion of the work on those movie projects is conducted in Vancouver.

(3) The management of the entire group takes place in the United States. All operational, strategic and legal decision-making, marketing, communications, cash-management functions, bidding, sales and pricing, payroll, and accounting oversight of the business are conducted from the group's California headquarters.

(4) All of the directors and officers and all members of senior management of the Debtors are located and reside in the United States. I am advised that Mr. Katzenstein, the CRO, is from New York and is now the sole director of Digital Vancouver here in British Columbia.

(5) General counsel for all of the Debtors are situated in the U.S.

(6) Digital Vancouver personnel, including production crews and support staff, are required to report directly to senior management in California. A number of managerial or executive-level employees of Digital Domain Productions, Inc. ("Digital Productions") in the United States provide temporary production and/or administrative services on behalf of Digital Vancouver.

(7) Digital Vancouver's accounts receivable and collections efforts are managed in California.

(8) All proprietary technology, systems and processes used by Digital Vancouver are owned by and fully integrated with Digital Productions.

(9) All of Digital Vancouver's production projects are developed and documented by employees in California. Digital Vancouver has no authorization or infrastructure to engage in any marketing or sales, or to solicit, create or submit bids.

26 In summary, this highly-integrated corporate group is centrally managed out of the United States. The main connection to this jurisdiction is that Digital Vancouver's registered office is in Vancouver. There are also assets, of course, in Vancouver. There are some cash accounts that are owned and managed in Vancouver by Digital Vancouver. In addition, there are other assets, such as desks and chairs and technology equipment. As a member of the corporate group, however, Digital Vancouver has guaranteed the secured debt that I have earlier outlined in these reasons. Accordingly, those assets are tied into the financing which is done on a group-wide basis, and which is coordinated with the assets in the United States.

27 I would also add that the proposed Information Officer has commented on the COMI issue in its first report dated September 17, 2012. It identifies the same factors as did Digital Domain in support of a finding that the COMI of the entire corporate group is in the United States.

28 In the above circumstances, I conclude that the COMI of the entire corporate group, including Digital Vancouver, is in the United States. The fact that Vancouver is the location of Digital Vancouver's registered office is not conclusive, particularly in light of the other factors which point to the United States: its management functions take place in the United States; its operations are, to a large extent, conducted in the United States; and any creditor dealing with Digital Vancouver would, I think, gravitate to the United States connections.

29 I find that the United States Chapter 11 proceedings are a "foreign main proceeding" in accordance with the *CCAA*. Having made that determination, s. 48 of the *CCAA* dictates that I shall make certain orders staying proceedings as are set out in subparagraphs (a) through (d) of that section. Accordingly, the first order sought is granted.

B. Order for ancillary relief

30 The petitioner also seeks a second order for various ancillary relief. Section 49 of the *CCAA* provides that if a recognition order is made, the court may make any order that it considers appropriate if it is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors.

31 The ancillary relief sought by Digital Domain includes: an order appointing Alvarez & Marsal Canada Inc. as the Information Officer, and providing the powers and duties flowing from that appointment; an order granting a broader stay of proceedings; an order recognizing the various First Day Orders granted by Judge Shannon which I have earlier outlined in these reasons; and finally, an order granting a charge in favour of the DIP lenders over the property and assets in Canada to secure the obligations of the Debtors under what has been called the Interim Financing Orders. These are, of course, the same DIP lenders approved in the Chapter 11 proceedings.

32 With respect to the proposed Information Officer, counsel for Digital Domain refers to ss. 52(1) and (3) of the *CCAA*, which provide that the court shall cooperate with the foreign representative and foreign court. That cooperation may be by means of the appointment of such a person. The proposed role of Alvarez & Marsal Canada Inc. is to provide information to not only this court, but to other creditors and stakeholders as may be appropriate. To some extent, this role is similar to the role of a monitor in *CCAA* proceedings.

33 In this case, I am satisfied that the appointment of Alvarez & Marsal Canada Inc. as the Information Officer is appropriate, and that the accompanying provisions relating to the Information Officer in the proposed draft order are also appropriate.

34 The order sought also includes a broader stay of proceedings, and there are various provisions in this draft order which are not dissimilar to what might be found in a typical initial order granted in *CCAA* proceedings. Counsel have taken me through those provisions, and they appear to essentially track the wording found in the British Columbia model initial order that has been published by our court for the purpose of *CCAA* proceedings. I am satisfied that those provisions are appropriate in this case.

35 The other aspect of the ancillary relief sought is an order recognizing the First Day Orders. I have already found that the COMI for the entire corporate group, since it is highly integrated, is in the United States. It is clear that the parties need to move and — more to the point — move quickly. It is in the interest of all stakeholders that there be a coordinated approach in terms of dealing with this matter so as to preserve value for the stakeholders. Accordingly, having reviewed Mr. Katzenstein's affidavit in detail in terms of the various orders that were granted and the reasons for those orders, I am satisfied that recognition of those First Day Orders is appropriate.

36 The fourth and final ancillary relief sought is an order recognizing the charge in favour of the DIP lenders and also allowing that charge over the assets in Canada. It is clear, and not unusually so, that the DIP lending in this case is an integral part of these proceedings. The charge has been granted by the United States court, and the DIP financing and charge was seen as an essential factor so as to allow these proceedings to move very quickly and with the confidence of the creditors. The financing has provided, and will provide, sufficient cash flow to allow continued operations, which again is critical in maintaining enterprise value by allaying the concerns expressed by the movie studios.

37 I am satisfied that a coordinated approach is appropriate in these circumstances. I would also note that a significant portion of the funding is required by Digital Vancouver, who, as I said, represents a significant portion of the overall operations of the Digital Domain group.

38 As mentioned earlier in these reasons, the Canadian assets are in play in these proceedings, given the guarantee of the existing secured debt by Digital Vancouver and the charge over those assets in support of that guarantee.

39 Accordingly, I am satisfied that the DIP charge as proposed in the order is appropriate at this time.

IV. Disposition

40 I am satisfied that both orders sought today are appropriate and are consistent with the stated purpose of Part IV of the *CCAA*, as set out in s. 44, in terms of promoting cooperation between the courts in cross-border insolvencies, preserving value for all stakeholders, wherever located, and providing for a fair and efficient administration of these estates.

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.

Petition granted.

End of Document

Tab 3

2012 ONSC 2994, 2012 CarswellOnt 8614, 219 A.C.W.S. (3d) 23, 92 C.B.R. (5th) 321

2012 ONSC 2994
Ontario Superior Court of Justice [Commercial List]

Lightsquared LP, Re

2012 CarswellOnt 8614, 2012 ONSC 2994, 219 A.C.W.S. (3d) 23, 92 C.B.R. (5th) 321

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C 36, as Amended Application of Lightsquared LP under Section 46 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 Lightsquared Inc., Lightsquared Investors Holdings Inc., One Dot Four Corp., One Dot Six Corp. Skyterra Rollup LLC, Skyterra Rollup Sub LLC, Skyterra Investors LLC, Tmi Communications Delaware, Limited Partnership, Lightsquared GP Inc., Lightsquared LP, ATC Technologies LLC, Lightsquared Corp., Lightsquared Finance Co., Lightsquared Network LLC, Lightsquared Inc., of Virginia, Lightsquared Subsidiary LLC, Lightsquared Bermuda Ltd., Skyterra Holdings (Canada) Inc., Skyterra (Canada) Inc. and One Dot Six TVCC Corp. (Collectively, the "Chapter 11 Debtors") (Applicants)

Morawetz J.

Heard: May 18, 2012
Judgment: May 18, 2012
Docket: CV-12-9719-00CL

Counsel: Shayne Kukulowicz, Jane Dietrich for Lightsquared LP
Brian Empey for Proposed Information Officer, Alvarez and Marsal Inc.

Subject: Insolvency; International

Headnote

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

Recognition of foreign proceedings — Related companies with some assets in Ontario entered bankruptcy protection in United States of America — Interim order was granted in Ontario putting stay of proceedings in place — Proposed foreign representative brought motion for various forms of relief including recognition of U.S. proceedings as foreign main proceedings — Motion granted — Foreign proceedings were considered foreign main proceedings, and required relief granted under Companies Creditors' Arrangement Act as set out in interim order — Foreign representative recognized as such, however, if matter were altered in American proceedings review could be necessary — When presumption in 45(2) of Companies' Creditors Arrangement Act is not operative, factors to consider in determining debtor's centre of interest should be that location is ascertainable to creditors, is where principle actors can be found, and is where management of debtor takes place — Certain orders granted by U.S. court recognized — Proposed information officer appointed.

Table of Authorities

Cases considered by *Morawetz J.*:

Lear Canada, Re (2009), 2009 CarswellOnt 4232, 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) — referred to

Massachusetts Elephant & Castle Group Inc., Re (2011), 81 C.B.R. (5th) 102, 2011 CarswellOnt 6610, 2011 ONSC 4201 (Ont. S.C.J.) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Pt. IV — referred to

ss. 44-49 — referred to

s. 45 — pursuant to

s. 45(1) "foreign main proceeding" — considered

s. 45(2) — considered

s. 46(1) — considered

s. 47(1) — considered

s. 47(2) — considered

s. 48(1) — considered

s. 49 — pursuant to

s. 49(1) — considered

s. 50 — considered

MOTION by proposed foreign representative for various forms of relief pursuant to *Companies' Creditors Arrangement Act*.

***Morawetz J.*:**

1 On May 14, 2012, Lightsquared LP ("LSLP" or the "Applicant") and various of its affiliates (collectively, the "Chapter 11 Debtors") commenced voluntary reorganization proceedings (the "Chapter 11 Proceedings") in the United States Bankruptcy Court for the Southern District of New York (the "U.S. Court") by each filing a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

2 The Chapter 11 Debtors have certain material assets in other jurisdictions, including Ontario and indicated at an interim hearing held on May 15, 2012 that they would be seeking an order from the U.S. Court authorizing LSLP to act as the Foreign Representative of the Chapter 11 Debtors, in any judicial or other proceeding, including these proceedings (the "Foreign Representative Order").

3 At the conclusion of the interim hearing of May 15, 2012, I granted the Interim Initial Order to provide for a stay of proceedings and other ancillary relief. A full hearing was scheduled for May 18, 2012.

4 At the hearing on May 18, 2012, the record demonstrated that LSLP had been authorized to act as Foreign Representative by order of The Honorable Shelley C. Chapman dated May 15, 2012. This authority was granted on an interim basis pending a final hearing scheduled for June 11, 2012.

5 LSLP brought this application pursuant to ss. 44-49 of the *Companies' Creditors Arrangement Act* ("CCAA"), seeking the following orders:

(a) an Initial Recognition Order, *inter alia*:

(i) declaring that LSLP is a "foreign representative" pursuant to s. 45 of the CCAA;

(ii) declaring that the Chapter 11 Proceeding is recognized as a "foreign main proceeding" under the CCAA; and

(iii) granting a stay of proceedings against the Chapter 11 Debtors; and

(b) a "Supplemental Order" pursuant to s. 49 of the CCAA, *inter alia*:

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

(ii) appointing Alvarez and Marsal Canada Inc. ("A&M") as the Information Officer in respect of this proceeding (in such capacity, the "Information Officer");

(iii) staying any claims against or in respect of the Chapter 11 Debtors, the business and property of the Chapter 11 Debtors and the Directors and Officers of the Chapter 11 Debtors;

(iv) restraining the right of any person or entity to, among other things, discontinue or terminate any supply of products or services to Chapter 11 Debtors;

(v) granting a super priority charge up to the maximum amount of $200,000, over the Chapter 11 Debtors' property, in favour of the Information Officer and its counsel, as security for their professional fees and disbursements incurred in respect of these proceedings (the "Administration Charge").

6 Counsel to LSLP submitted that this relief was required in order to:

(i) alleviate any potential harm to the Chapter 11 Debtors or their Canadian assets during the interim period;

(ii) ensure the protection of the Chapter 11 Debtors' Canadian assets during the course of the Chapter 11 Proceedings; and

(iii) ensure that this court and the Canadian stakeholders are kept properly informed of the Chapter 11 Proceedings.

7 The Chapter 11 Debtors are in the process of building a fourth generation long-term evolution open wireless broadband network that incorporates satellite coverage throughout North America and offers users, wherever they may be located, the speed, value and reliability of universal connectivity.

8 The Chapter 11 Debtors consist of approximately 20 entities. All but four of these entities have their head office or headquarter location in the United States.

9 Two of the Chapter 11 Debtors are incorporated pursuant to the laws of Ontario, being SkyTerra Holdings (Canada) Inc. ("SkyTerra Holdings") and SkyTerra (Canada) Inc. ("SkyTerra Canada"). One of the Chapter 11 Debtors

is incorporated pursuant to the laws of Nova Scotia, being Lightsquared Corp. "LC" and together with SkyTerra Holdings and SkyTerra Canada, the "Canadian Debtors"). Each of the Canadian Debtors is a wholly-owned subsidiary, directly or indirectly, of the Applicant.

10 Other than the Canadian Debtors and Lightsquared Bermuda Ltd., all of the Chapter 11 Debtors are incorporated pursuant to the laws of the United States.

11 The operations of the Canadian Debtors were summarized by LSLP as follows:

> (a) SkyTerra Canada: this entity was created to hold certain regulated assets which, by law, are required to be held by Canadian corporations. SkyTerra Canada holds primarily three categories of assets: (i) the MSAT — 1 satellite; (ii) certain Industry Canada licences; (iii) contracts with the Applicant's affiliates and third parties. SkyTerra Canada has no third party customers or employees at the present time and is wholly dependent on the Applicant for the funding of its operations;
>
> (b) SkyTerra Holdings: this entity has no employees or operational functions. Its sole function is to hold shares of SkyTerra Canada; and
>
> (c) LC: this entity was created for the purposes of providing mobile satellite services to customers located in Canada based on products and services that were developed by the Chapter 11 Debtors for the United States market. LC holds certain Industry Canada licences and authorizations as well as certain ground-related assets. LC employs approximately 43 non-union employees out of its offices in Ottawa, Ontario. LC is wholly dependent on the Applicant for all or substantially all of the funding of its operations.

12 Counsel to LSLP also submitted that the Chapter 11 Debtors, including the Canadian Debtors, are managed in the United States as an integrated group from a corporate, strategic and management perspective. In particular:

> (a) corporate and other major decision-making occurs from the consolidated offices in New York, New York and Ruston, Virginia;
>
> (b) all of the senior executives of the Chapter 11 Debtors, including the Canadian Debtors, are residents of the United States;
>
> (c) the majority of the management of the Chapter 11 Debtors, including the Canadian Debtors, is shared;
>
> (d) the majority of employee administration, human resource functions, marketing and communication decisions are made, and related functions taken, on behalf of all of the Chapter 11 Debtors, including the Canadian Debtors, in the United States;
>
> (e) the Chapter 11 Debtors, including the Canadian Debtors, also share a cash-management system that is overseen by employees of the United States-based Chapter 11 Debtors and located primarily in the United States; and
>
> (f) other functions shared between the Chapter 11 Debtors, including the Canadian Debtors, and primarily managed from the United States include, pricing decisions, business development decisions, accounts payable, accounts receivable and treasury functions.

13 Counsel further submits that the Canadian Debtors are wholly dependent on the Applicant and other members of the Chapter 11 Debtors located in the United States for all or substantially all of their funding requirements.

14 Further, the Canadian Debtors have guaranteed the credit facilities which were extended to LSLP as borrower and such guarantee is allegedly secured by a priority interest on the assets of the Canadian Debtors. As such, counsel submits that the majority of the creditors of the Chapter 11 Debtors are also common.

15 The Interim Initial Order granted on May 15, 2012, reflected an exercise of both statutory jurisdiction and the court's inherent juridical discretion. In arriving at the decision to grant interim relief, I was satisfied that it was appropriate to provide such relief in order to alleviate any potential harm to the Chapter 11 Debtors or their Canadian assets during the interim period.

16 The issue for consideration on this motion is whether the court should recognize the Chapter 11 Proceedings as a "foreign main proceeding" pursuant to the CCAA and grant the Initial Recognition Order sought by the Applicant and, if so, whether the court should also grant the Supplemental Order under s. 49 of the CCAA to (i) recognize and enforce in Canada certain orders of the U.S. Court made in the Chapter 11 Proceedings; (ii) appoint A&M as Information Officer in respect of these proceedings; and (iii) grant an Administration Charge over the Chapter 11 Debtors' property.

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

18 Court proceedings under Chapter 11 of the Bankruptcy Code have consistently been found to be "foreign proceedings" for the purposes of the CCAA. In this respect, see *Massachusetts Elephant & Castle Group Inc., Re* (2011), 81 C.B.R. (5th) 102 (Ont. S.C.J.) and *Lear Canada, Re* (2009), 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]).

19 I accept that the Chapter 11 Proceedings are "foreign proceedings" for the purposes of the CCAA and that LSLP is a "foreign representative".

20 However, it is noted that the status of LSLP as a foreign representative is subject to further consideration by the U.S. Court on June 11, 2012. If, for whatever reason, the status of LSLP is altered by the U.S. Court, it follows that this issue will have to be reviewed by this court.

21 LSLP submits that the Chapter 11 Proceedings should be declared a "foreign main proceeding". Under s. 47 (1) of the CCAA, it is necessary under s. 47 (2) to determine 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".

23 Section 45 (2) of the CCAA provides that for the purposes of Part IV of the CCAA, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests ("COMI").

24 In this case, the registered offices of the Canadian Debtors are in Canada. Counsel to the Applicant submits, however, that the COMI of the Canadian Debtors is not in the location of the registered offices.

25 In circumstances where it is necessary to go beyond the s. 45 (2) registered office presumption, in my view, the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor's centre of main interests. The factors are:

(i) the location is readily ascertainable by creditors;

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

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

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.

27 When the court determines that there is proof contrary to the presumption in s. 45 (2), the court should, in my view, consider these factors in determining the location of the debtor's centre of main interests.

28 The above analysis is consistent with preliminary commentary in the Report of UNCITRAL Working Group V (Insolvency Law) of its 41 st Session (New York, 30 April — 4 May, 2012) (Working Paper AICN.9/742, paragraph 52. In my view, this approach provides an appropriate framework for the COMI analysis and is intended to be a refinement of the views I previously expressed in *Massachusetts Elephant & Castle Group Inc., Re, supra.*

29 Part IV of the CCAA does not specifically take into account corporate groups. It is therefore necessary to consider the COMI issue on an entity-by-entity basis.

30 In this case, the foreign proceeding was filed in the United States and based on the facts summarized at [11] — [14], LSLP submits that the COMI of each of the Canadian Debtors is in the United States.

31 After considering these facts and the factors set out in [25] and [26], I am persuaded that the COMI of the Canadian Debtors is in the United States. It follows, therefore, that in this case, the "foreign proceeding" is a "foreign main proceeding".

32 Having recognized the "foreign proceeding" as a "foreign main proceeding", subsection 48 (1) of the CCAA requires the court to grant certain enumerated relief subject to any terms and conditions it considers appropriate. This relief is set out in the Initial Recognition Order, which relief is granted in the form submitted.

33 Additionally, s. 50 of the CCAA provides the court with the jurisdiction to make any order under Part IV of the CCAA on the terms and conditions it considers appropriate in the circumstances.

34 The final issue to consider is whether the court should grant the Supplemental Order sought by the Applicant under s. 49 of the CCAA and (i) recognize and enforce in Canada certain orders of the U.S. Court made in the Chapter 11 Proceedings; (ii) appoint A&M as Information Officer in respect of these proceedings; and (iii) grant an Administration Charge over the Chapter 11 Debtors' property.

35 If an order recognizing the "foreign proceedings" has been made (foreign main or foreign non-main), subsection 49 (1) of the CCAA provides the authority for the court, if it is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, to make any order that it considers appropriate.

36 In this case, the Applicant is requesting recognition of the first day orders granted in the U.S. Court. Based on the record, I am satisfied that it is appropriate to recognize these orders.

37 Additionally, I am satisfied that the appointment of A&M as Information Officer will help to facilitate these proceedings and the dissemination of information concerning the Chapter 11 Proceedings and this relief is appropriate on the terms set forth in the draft order. The proposed order also provides that the Information Officer be entitled to the benefit of an Administration Charge, which charge shall not exceed an aggregate amount of $200,000, as security for their professional fees and disbursements. I am satisfied that the inclusion of this Administration Charge in the draft order is appropriate.

38 The ancillary relief requested in the draft order is also appropriate in the circumstances.

39 Accordingly, the Supplemental Order is granted in the form presented. The Supplemental Order contains copies of the first day orders granted in the U.S. Court.

40 Finally, on an ongoing basis, it would be appreciated if counsel would, in addition to filing the required paper record, also file an electronic copy by way of a USB key directly with the Commercial List Office.

Motion granted.

End of Document

Tab 4

2011 ONSC 4201
Ontario Superior Court of Justice

Massachusetts Elephant & Castle Group Inc., Re

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

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

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

MASSACHUSETTS ELEPHANT & CASTLE GROUP, INC. (Applicant)

Morawetz J.

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

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

Subject: Insolvency; Corporate and Commercial

Headnote

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

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

Table of Authorities

Cases considered by *Morawetz J.*:

Angiotech Pharmaceuticals Inc., Re (2011), 2011 BCSC 115, 2011 CarswellBC 124, 76 C.B.R. (5th) 317 (B.C. S.C. [In Chambers]) — considered

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]) — referred to

Lear Canada, Re (2009), 2009 CarswellOnt 4232, 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) — referred to

Magna Entertainment Corp., Re (2009), 2009 CarswellOnt 1267, 51 C.B.R. (5th) 82 (Ont. S.C.J.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.
Chapter 11 — referred to

ss. 1101-1174 — referred to

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Pt. IV — referred to

s. 44 — considered

s. 45 — considered

s. 45(1) — considered

s. 45(2) — considered

s. 46 — considered

s. 46(1) — considered

s. 46(2) — referred to

ss. 46-49 — referred to

s. 47(1) — considered

s. 47(2) — considered

s. 48 — considered

s. 48(1) — considered

s. 49 — considered

s. 50 — considered

s. 61 — considered

s. 61(2) — considered

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

Morawetz J.:

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

(a) an Initial Recognition Order declaring that:

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

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

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

(b) a Supplemental Order:

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

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

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

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

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

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

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

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

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

8 MECG also included in its materials the declaration of Mr. David Dobbin filed in support of the first-day motions in the Chapter 11 Proceeding. Mr. Dobbin, at paragraph 19 of the declaration outlined the sale efforts being entered into by MECG. Mr. Dobbin also outlined the purpose of the Chapter 11 Proceeding, namely, to sell the Chapter 11 Debtors' businesses as a going concern on the most favourable terms possible under the circumstances and keep the Chapter 11 Debtors' business intact to the greatest extent possible during the sales process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) the location of the corporate head offices for all of the Chapter 11 Debtors, including the Canadian Debtors, is in Boston, Massachusetts;

(b) the Chapter 11 Debtors including the Canadian Debtors function as an integrated North American business and all decisions for the corporate group, including in respect to the operations of the Canadian Debtors, is centralized at the Chapter 11 Debtors head office in Boston;

(c) all members of the Chapter 11 Debtors' management are located in Boston;

(d) virtually all human resources, accounting/finance, and other administrative functions associated with the Chapter 11 Debtors are located in the Boston offices;

(e) all information technology functions of the Chapter 11 Debtors, with the exception of certain clerical functions which are outsourced, are provided out of the United States; and

(f) Repechage is also the parent company of a group of restaurants that operate under the "Piccadilly" brand which operates only in the U.S.

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

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

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

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

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

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

29 For example:

> (a) the location from which financing was organized or authorized or the location of the debtor's primary bank would only be important where the bank had a degree of control over the debtor;
>
> (b) the location of employees might be important, on the basis that employees could be future creditors, or less important, on the basis that protection of employees is more an issue of protecting the rights of interested parties and therefore is not relevant to the COMI analysis;
>
> (c) the jurisdiction whose law would apply to most disputes may not be an important factor if the jurisdiction was unrelated to the place from which the debtor was managed or conducted its business.

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

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

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

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

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

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

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

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

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

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

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

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

(a) the Foreign Representative Order;

(b) the U.S. Cash Collateral Order;

(c) the U.S. Prepetition Wages Order;

(d) the U.S. Prepetition Taxes Order;

(e) the U.S. Utilities Order;

(f) the U.S. Cash Management Order;

(g) the U.S. Customer Obligations Order; and

(h) the U.S. Joint Administration Order.

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

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

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

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

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

Schedule "A"

1. Massachusetts Elephant & Castle Group Inc.

2. Repechage Investments Limited

3. Elephant & Castle Group Inc.

4. The Elephant and Castle Canada Inc.

5. Elephant & Castle, Inc. (a Texas Corporation)

6. Elephant & Castle Inc. (a Washington Corporation)

7. Elephant & Castle International, Inc.

8. Elephant & Castle of Pennsylvania, Inc.

9. E & C Pub, Inc.

10. Elephant & Castle East Huron, LLC

11. Elephant & Castle Illinois Corporation

12. E&C Eye Street, LLC

13. E & C Capital, LLC

14. Elephant & Castle (Chicago) Corporation

Application granted.

End of Document

Tab 5

2011 BCSC 115
British Columbia Supreme Court [In Chambers]

Angiotech Pharmaceuticals Inc., Re

2011 CarswellBC 124, 2011 BCSC 115, [2011] B.C.W.L.D. 2461, 197 A.C.W.S. (3d) 635, 76 C.B.R. (5th) 317

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

And In the Matter of a Plan of Compromise or Arrangement of Angiotech Pharmaceuticals, Inc. and the other Petitioners Listed on Schedule "A" (Petitioners)

P. Walker J.

Heard: January 28, 2011
Oral reasons: January 28, 2011
Docket: Vancouver S110587

Counsel: J. Dacks, M. Wasserman, R. Morse for Angiotech Pharmaceuticals
J. Grieve for Alvarez & Marsal Canada Inc.
R. Chadwick, L. Willis for Consenting Noteholders
B. Kaplan, P. Rubin for Wells Fargo

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.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Centre of interest — Parties were involved in proceedings under Companies' Creditors Arrangement Act, with proceedings to begin in Delaware as well — Petitioners brought application for initial order — Application granted — Order would give petitioners reasonable time to organize affairs and operate as going concern — Centre of main interest in proceedings was British Columbia — Petitioners had assets in Canada — Operations of petitioners directed from head office in Canada — Chief executive officer to whom senior management reported to was based in Vancouver — Company reporting directed from Vancouver — Research and development done in Vancouver — Plant management meetings were held in Vancouver — Monitor to be representative in any main proceedings, rather than petitioners.

Table of Authorities

Cases considered by *P. Walker J.*:

Fraser Papers Inc., Re (2009), 2009 CarswellOnt 3658, 56 C.B.R. (5th) 194 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 50 C.B.R. (5th) 77, 2009 CarswellOnt 146 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Chapter 15 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

PETITION for initial order in proceedings under *Companies' Creditors Arrangement Act.*

P. Walker J.:

1 I am satisfied that the initial *CCAA* order should be granted. I am also satisfied that the order will permit the petitioners a reasonable time to reorganize their affairs in order to allow them to operate as going concerns.

2 The plan contemplated by the petitioners is aggressive in terms of time frame. The petitioners are to be complimented on their efforts to seek the Court's assistance in a very timely way, for taking an expedited approach in the face of failed efforts to avoid invoking protection under the *CCAA* regime.

3 The proposed timetable appears to reflect the petitioners' efforts to provide protection to their creditors, to maintain their employment contracts with their employees, and to continue to provide their valuable medical and pharmaceutical products to the global public.

4 I am satisfied that I have the jurisdiction to make the order, and I will grant the initial *CCAA* order.

5 I have been asked by counsel to speak to the issue of the "centre of main interest" because I am told that an application is to be made to the U.S. District Court, in Delaware, which will be filed this Sunday, January 30, 2011, and brought on Monday, January 31, 2011.

6 The petitioners' intention in that regard is reflected in the evidence. It is well described at para. 65 of their written submissions:

> Although the Petitioners intend that this Court be the main forum for overseeing their financial and operational restructuring, the Petitioners also intend to file petitions under Chapter 15 of the *United States Bankruptcy Code* seeking recognition of this proceeding as a "Foreign Main Proceeding". The Petitioners would file such petitions on the basis that British Columbia is their "centre of main interest" ("COMI"). The Petitioners intend that A&M, as proposed Monitor, would be the foreign representative in the Chapter 15 proceedings[.]

7 The factors considered by the courts in Canada that are relevant to the centre of main interest issue are:

(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.

See *Nortel Networks Corp., Re* (2009), 50 C.B.R. (5th) 77, [2009] O.J. No. 154 (Ont. S.C.J. [Commercial List]); and *Fraser Papers Inc., Re* (2009), 56 C.B.R. (5th) 194, [2009] O.J. No. 2648 (Ont. S.C.J. [Commercial List]).

8 The petitioners submit that the centre of main interest is British Columbia for a number of reasons. These are set out in their written submissions and in the affidavit of Mr. Bailey, the chief financial officer, sworn today.

9 At para. 66 of their written submissions, the petitioners state:

The Petitioners are part of a highly integrated international enterprise that is directed from Angiotech's head office in Vancouver, British Columbia. British Columbia is therefore the Petitioners' COMI [centre of main interest].

10 Mr. Bailey's affidavit deposes to the following at para. 234:

As noted previously, the Petitioners are part of an integrated business enterprise with primary operations in Canada and the United States. The Petitioners' COMI is British Columbia notwithstanding their substantial operations in the United States:

(a) all of the Petitioners have assets in Canada and each of the companies comprising Angiotech U.S. has a bank account at the Royal Bank of Canada in Vancouver containing $1,000 on deposit;

(b) the operations of the Petitioners are directed from Angiotech's head office in Canada;

(c) all of the Petitioners report to Angiotech;

(d) corporate governance for the Petitioners is directed from Canada;

(e) strategic and key operating decisions and key policy decisions for the Petitioners are made by Angiotech staff located in Vancouver;

(f) the Petitioners' tax, treasury and cash management functions are managed from Vancouver and local plant finance staff report to senior finance management in Vancouver;

(g) the Petitioners' human resources functions are administered from Vancouver and all local human resources staff report into Vancouver;

(h) primary research and development functions including new product conceptions and development, regulatory and clinical development, medical affairs and quality control are directed from and carried out in Vancouver;

(i) the Petitioners' information technology and systems are directed from Vancouver;

(j) plant management and senior staff of the Petitioners regularly attend meetings in Vancouver;

(k) all public company reporting and investor relations are directed from Vancouver; and

(l) Angiotech's chief executive officer (the "CEO") is based in Vancouver and in addition to the Senior Management referred above, all sales, manufacturing, operations and legal staff report to the CEO.

11 I have had an opportunity to read through the evidence contained in Mr. Bailey's affidavit filed in support of the application. I am satisfied on the evidence before me that the centre of main interest is British Columbia. I accept the petitioners' submissions.

12 Now I wish to address the point raised by Mr. Grieve concerning the monitor.

13 The monitor is an officer of the Court. The monitor owes its duties to the Court and does not represent the interests of the petitioners, any creditor, or any other interested party. I wish the monitor to be appointed as representative of any foreign main proceedings, instead of the petitioners (or anyone acting on their behalf) or any other party, in order to ensure that the U.S. creditors are as fairly treated as any of the other creditors in this case. I wish my request in that regard be put before the U.S. District Court in Delaware when the application concerning the foreign main proceeding is heard.

Application granted.

End of Document

Tab 6

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.

Table of Authorities

Cases considered by *Newbould J.*:

Crystallex International Corp., Re (2012), 2012 ONSC 2125, 2012 CarswellOnt 4577, 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — followed

Crystallex International Corp., Re (2012), 2012 ONCA 404, 2012 CarswellOnt 7329, 91 C.B.R. (5th) 207, 293 O.A.C. 102, 4 B.L.R. (5th) 1 (Ont. C.A.) — referred to

Indalex Ltd., Re (2009), 2009 CarswellOnt 1998, 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List]) — followed

Lightsquared LP, Re (2012), 2012 ONSC 2994, 2012 CarswellOnt 8614, 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List]) — considered

MtGox Co., Re (2014), 2014 ONSC 5811, 2014 CarswellOnt 13871, 122 O.R. (3d) 465, 20 C.B.R. (6th) 307 (Ont. S.C.J. [Commercial List]) — considered

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113, 1991 CarswellOnt 141 (Ont. Div. Ct.) — followed

Statutes considered:

Bankruptcy Code, 11 U.S.C.
Chapter 11 — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 224 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Pt. IV — referred to

s. 45(1) "foreign main proceeding" — considered

s. 45(1) "foreign proceeding" — considered

s. 45(1) "foreign representative" — considered

s. 45(2) — considered

ss. 46-49 — referred to

s. 46(1) — considered

s. 47 — considered

s. 47(2) — considered

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

***Newbould J.*:**

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

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

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

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

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

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

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

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

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

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

11 Zochem operates a cash management system whereby:

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

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

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

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

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

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

(a) Joint Administration Order;

(b) Foreign Representative Order;

(c) Interim Cash Management Order;

(d) Interim Wages and Benefits Order;

(e) Interim Shippers and Lien Claimants Order;

(f) Interim Utilities Order;

(g) Interim Insurance Order;

(h) Interim Prepetition Taxes Order;

(i) Interim Critical Vendors Order; and

(j) Interim Financing Order.

Analysis

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

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

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

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

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

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

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

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

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

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

(1) the location is readily ascertainable by creditors,

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

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

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

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

seat or principal place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) approximately $18.5 million will be used to repay the Zochem Facility (including the $1 million forbearance fee payable to PNC);

(b) approximately $4 million will be used to pay fees associated with the Proposed DIP Facility; and

(c) approximately $15.6 million will be used to finance the debtors' operations and restructuring activities pursuant to an agreed upon budget, including payment of professional fees, utility deposits and certain critical materials and freight vendors.

38 In the circumstances I made the order recognizing the U.S. interim financing order, and granting the security requested for the DIP, which in my view met the tests as enunciated in the authorities, including the factors set out in *Indalex Ltd., Re* (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List]) for the guarantee of a Canadian debtor of its U.S. parent's obligations under the DIP facility, and as set out in *Crystallex International Corp., Re* (2012), 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]); aff'd (2012), 4 B.L.R. (5th) 1 (Ont. C.A.).

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

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

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

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

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

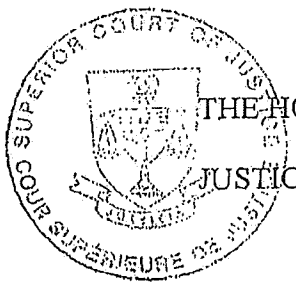
Application granted.

End of Document

Tab 7

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)



THE HONOURABLE MR.	)	WEDNESDAY, THE 21ST
	)	
JUSTICE MORAWETZ	)	DAY OF DECEMBER, 2011

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 CHAPTER 11 DEBTORS")

SUPPLEMENTAL ORDER
(FOREIGN MAIN PROCEEDING)

THIS APPLICATION, 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 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 Application Record of the Applicant was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Application dated December 13, 2011, the affidavit of Brian Mittman sworn December 12, 2011, the affidavits of Alana Shepherd sworn December 13, 16 and 19, 2011 (collectively, the "**Shepherd Affidavits**"), the preliminary report of FTI Consulting Canada Inc. ("**FTI**"), in its capacity as proposed Information Officer (the "**Proposed Information Officer**") dated December 12, 2011, and the Consent of FTI to act as the Information Officer, each filed;

AND ON BEING ADVISED that the secured creditors who are likely to be affected by the charges created herein were given notice;

AND UPON HEARING the submissions of counsel for the Foreign Representative, counsel for the Proposed Information Officer, and counsel for Avnet International (Canada) Ltd. and Avnet, Inc., 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 affidavits of service of Bobbie-Jo Brinkman sworn December 13 and 19, 2011,

SERVICE

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

INITIAL RECOGNITION ORDER

2. **THIS COURT ORDERS** that any capitalized terms not otherwise defined herein shall have the meanings given to such terms in the Initial Recognition Order dated December 21, 2011 (the "**Recognition Order**").

3. **THIS COURT ORDERS** that the provisions of this Supplemental Order shall be interpreted in a manner complementary to the provisions of the Recognition Order, and that in the event of a conflict between the provisions of this Supplemental Order and the provisions of the Recognition Order, the provisions of the Recognition Order shall govern.

RECOGNITION OF FOREIGN ORDERS

4. **THIS COURT ORDERS** that the following orders (collectively, the "**Foreign Orders**") of the U.S. Court made in the Foreign Proceeding attached to this Order as Schedules "A" through "K" are hereby recognized and given full force and effect in all provinces and territories of Canada pursuant to Section 49 of the CCAA:

(a) the Foreign Representative Order;

(b) the Joint Administration Order;

(c) the Prepetition Wages Order;

(d) the Customer Obligations Order;

(e) the Prepetition Shipping Order;

(f) the Insurance Order;

(g) the Prepetition Taxes Order;

(h) the Utilities Order;

(i) the Cash Management Order;

(j) the Claims Agent Order; and

(k) the Interim DIP Facility Order,

(each as defined in the Shepherd Affidavits),

provided, however, that in the event of any conflict between the terms of the Foreign Orders and the Orders of this Court made in the within proceedings, the Orders of this Court shall govern with respect to the Property in Canada.

APPOINTMENT OF INFORMATION OFFICER

5. **THIS COURT ORDERS** that FTI (the "**Information Officer**") is hereby appointed as an officer of this Court, with the powers and duties set out herein.

ADDITIONAL PROTECTIONS FOR CHAPTER 11 DEBTORS ETC.

6. **THIS COURT ORDERS** that, in addition to the stay of proceedings and the other protections afforded the Chapter 11 Debtors, the Property and the Business in the Recognition Order, the following protections and stay of proceedings shall continue until further Order of this Court:

(a) during the Stay Period, all Persons having oral or written agreements with the Chapter 11 Debtors or statutory or regulatory mandates for the supply of goods and/or services in Canada, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services provided in respect of the Property or Business of the Chapter 11 Debtors, are hereby

restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Chapter 11 Debtors, and that the Chapter 11 Debtors shall be entitled to the continued use in Canada of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Chapter 11 Debtors in accordance with normal payment practices of the Chapter 11 Debtors or such other practices as may be (i) agreed upon by the supplier or service provider and the relevant Chapter 11 Debtor(s), on notice to the Information Officer and the Foreign Representative, or (ii) ordered by this Court; and

(b) except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Chapter 11 Debtors with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Chapter 11 Debtors whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations.

7. **THIS COURT ORDERS** that no Proceeding shall be commenced or continued against or in respect of the Information Officer, except with leave of this Court. In addition to the rights and protections afforded the Information Officer herein, or as an officer of this Court, the Information Officer shall have the benefit of all of the rights and protections afforded to a Monitor under the CCAA, and shall incur no liability or obligation as a result of its appointment

or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part.

OTHER PROVISIONS RELATING TO THE INFORMATION OFFICER

8. **THIS COURT ORDERS** that the Information Officer:

(a) is hereby authorized to provide such assistance to the Foreign Representative in the performance of its duties as the Foreign Representative may reasonably request;

(b) shall report to this Court at least once every three months with respect to the status of these proceedings and the status of the Foreign Proceedings, which reports may include information relating to the Property, the Business, or such other matters as may be relevant to the proceedings herein;

(c) in addition to the periodic reports referred to in paragraph 8(b) above, the Information Officer may report to this Court at such other times and intervals as the Information Officer may deem appropriate with respect to any of the matters referred to in paragraph 8(b) above;

(d) shall have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Chapter 11 Debtors, to the extent that is necessary to perform its duties arising under this Order; and

(e) shall be at liberty to engage independent legal counsel or such other persons as the Information Officer deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order.

9. **THIS COURT ORDERS** that the Chapter 11 Debtors and the Foreign Representative shall (i) advise the Information Officer of all material steps taken by the Chapter 11 Debtors or the Foreign Representative in these proceedings or in the Foreign Proceedings, (ii) co-operate fully with the Information Officer in the exercise of its powers and discharge of its obligations, and (iii) provide the Information Officer with the assistance that is necessary to enable the Information Officer to adequately carry out its functions.

10. **THIS COURT ORDERS** that the Information Officer shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

11. **THIS COURT ORDERS** that the Information Officer may provide any creditor of a Chapter 11 Debtor with information provided by the Chapter 11 Debtors in response to reasonable requests for information made in writing by such creditor addressed to the Information Officer. The Information Officer shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Information Officer has been advised by the Chapter 11 Debtors is privileged or confidential, the Information Officer shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Information Officer, the Foreign Representative and the relevant Chapter 11 Debtor(s) may agree.

12. **THIS COURT ORDERS** that the Information Officer and counsel to the Information Officer shall be paid by the Chapter 11 Debtors their reasonable fees and disbursements incurred in respect of these proceedings both before and after the making of this Order subject to the

Budget (as defined in the Interim DIP Facility Order), in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts. The Chapter 11 Debtors are hereby authorized and directed to pay the accounts of the Information Officer and counsel for the Information Officer on a weekly basis and, in addition, the Chapter 11 Debtors are hereby authorized to pay to the Information Officer and counsel to the Information Officer, collectively, a retainer in the amount of U.S.$40,000, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

13. **THIS COURT ORDERS** that the Information Officer and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Information Officer and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice, and the accounts of the Information Officer and its counsel shall not be subject to approval in the Foreign Proceeding.

14. **THIS COURT ORDERS** that the Information Officer and counsel to the Information Officer, if any, shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property in Canada, which charge shall not exceed an aggregate amount of $50,000.00, as security for their professional fees and disbursements incurred in respect of these proceedings, both before and after the making of this Order. The Administration Charge shall have the priority set out in paragraphs 16 and 18 hereof.

INTERIM FINANCING

15. **THIS COURT ORDERS** that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lender's Charge**") on the Property in Canada, which DIP Lender's Charge shall be consistent with the liens and charges created by the Interim DIP

Facility Order, provided however that the DIP Lender's Charge (i) shall not secure an obligation that exists before this Order is made, and (ii) with respect to the Property in Canada, shall have the priority set out in paragraphs 16 and 18 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

16. **THIS COURT ORDERS** that the priorities of the Administration Charge and the DIP Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $50,000); and

Second – DIP Lender's Charge.

17. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge or the DIP Lender's Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

18. **THIS COURT ORDERS** that each of the Administration Charge and the DIP Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property in Canada and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

19. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Chapter 11 Debtors shall not grant any Encumbrances over any Property in Canada that rank in priority to, or *pari passu* with, the Administration Charge or

the DIP Lender's Charge, unless the Chapter 11 Debtors also obtains the prior written consent of the Information Officer and the DIP Lender, or further Order of this Court.

20. **THIS COURT ORDERS** that the Administration Charge and the DIP Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., 1985 c. B-3, as amended (the "**BIA**"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds any Chapter 11 Debtor, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges shall not create or be deemed to constitute a breach by any Chapter 11 Debtor of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(c) the payments made by the Chapter 11 Debtors to the Chargees pursuant to this Order, and the granting of the Charges, do not and will not constitute preferences,

fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

21. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the applicable Chapter 11 Debtor's interest in such real property leases.

SERVICE AND NOTICE

22. **THIS COURT ORDERS** that the Chapter 11 Debtors, the Foreign Representative and the Information Officer each be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Chapter 11 Debtors' creditors or other interested parties at their respective addresses as last shown on the records of the Debtors 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.

23. **THIS COURT ORDERS** that the Chapter 11 Debtors, the Foreign Representative and the Information Officer, and any party who has filed a Notice of Appearance, may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time.

24. **THIS COURT ORDERS** that within seven (7) days from the date of this Order, or as soon as practicable thereafter, the Information Officer shall cause to be published a notice substantially in the form attached to this Order as Schedule "L", once a week for two consecutive weeks, in the Globe and Mail.

25. **THIS COURT ORDERS** that the Information Officer (i) shall post on its website all Orders of this Court made in these proceedings, all reports of the Information Officer filed herein, and such other materials as this Court may order from time to time, and (ii) may post on its website any other materials that the Information Officer deems appropriate.

GENERAL

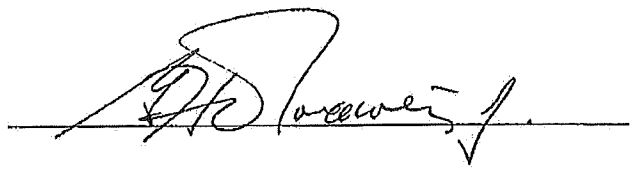
26. **THIS COURT ORDERS** that the Information Officer may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

27. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Chapter 11 Debtors, the Foreign Representative, the Information Officer, and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Chapter 11 Debtors, the Foreign Representative, and the Information Officer, the latter as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Chapter 11 Debtors, the Foreign Representative, and the Information Officer and their respective agents in carrying out the terms of this Order.

28. **THIS COURT ORDERS** that each of the Chapter 11 Debtors, the Foreign Representative and the Information Officer be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

29. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order or seek other relief on not less than seven (7) days notice to the Chapter 11 Debtors, the Foreign Representative, the Information Officer and their respective counsel, and to any other party or parties likely to be affected by the order sought, or upon such other notice, if any, as this Court may order.

30. **THIS COURT ORDERS** that this Order shall be effective as of 12:01 a.m. on the date of this Order.



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Tab 8

Court File No: CV-11-9279-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	MONDAY, THE 4TH DAY
	)	
JUSTICE MORAWETZ	)	OF JULY, 2011

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

AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MASSACHUSETTS EASTERN DIVISION WITH RESPECT TO THE COMPANIES LISTED ON SCHEDULE "A" HERETO (THE "CHAPTER 11 DEBTORS")

APPLICATION OF MASSACHUSETTS ELEPHANT & CASTLE GROUP, INC.

UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

SUPPLEMENTAL ORDER

THIS APPLICATION, made by Massachusetts Elephant & Castle Group, Inc. (the "**Applicant**") in its capacity as the foreign representative (the "**Foreign Representative**") of the Chapter 11 Debtors in the proceedings commenced on June 28, 2011, in the United States Bankruptcy Court District of Massachusetts Eastern Division (the "**U.S. Court**"), under Chapter 11 of Title 11 of the United States Code (the "**Chapter 11 Proceeding**") for an Order substantially in the form enclosed in the Application Record of the Applicant was heard on this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Application, filed, the Affidavit of Keith Radford sworn June 28, 2011 (the "**Radford Affidavit**"), filed, the Preliminary Report of BDO Canada Limited ("**BDO**"), in its capacity as proposed information officer (the "**Information Officer**"), dated June 28, 2011, filed, the consent of BDO to act as Information Officer, filed, the Affidavit of Sara-Ann Wilson sworn June 30, 2011 (the "**Wilson Affidavit**"), and upon being provided with copies of the documents required by Section 46 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), and the related orders of the U.S. Court dated June 30, 2011 in respect of the Chapter 11 Proceeding for each of the Foreign Representative and the other Chapter 11 Debtors, including the order of the U.S. Court authorizing the Applicant to act in the capacity of a Foreign Representative on behalf of the Chapter 11 Debtors (the "**Foreign Representative Order**"), and upon hearing the submissions of counsel for the Foreign Representative, ~~counsel for the proposed Information Officer~~, and counsel for GE Canada Equipment Financing G.P., no one appearing for any other person on the service list, although properly served as appears from the Affidavits of Ingrid Rowe, sworn June 29, 2011 and June 30, 2011, filed, and upon being advised that no other persons were served with the Notice of Application:

SERVICE

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

2. **THIS COURT ORDERS** that any capitalized terms not otherwise defined herein shall have the meaning given to such terms in the Initial Recognition Order dated July 4, 2011, made by this Honourable Court in these proceedings (the "**IRO**").

3. **THIS COURT ORDERS AND DECLARES** that the terms of this Supplemental Order shall not amend the IRO or in any way limit the force and effect of the IRO.

RECOGNITION OF THE CHAPTER 11 ORDERS

4. **THIS COURT ORDERS AND DECLARES** that the following orders of the U.S. Court in the Chapter 11 Proceeding, attached as Schedules "B" to "I" hereto (collectively, the "**Chapter 11 Orders**"), be and are hereby recognized and given full force and effect in all provinces and territories of Canada pursuant to Section 49 of the CCAA:

(a) the Foreign Representative Order;

(b) the U.S. Cash Collateral Order;

(c) the U.S. Prepetition Wages Order;

(d) the U.S. Prepetition Taxes Order;

(e) the U.S. Utilities Order;

(f) the U.S. Cash Management Order;

(g) the U.S. Customer Obligations Order; and

(h) the List of Creditors Order;

(each, as defined in the Wilson Affidavit),

provided, however, that in the event of any inconsistency between the terms of the Chapter 11 Orders and the IRO and this Order, the terms of the IRO and this Order shall govern with respect to the Property. except the provisions of the U.S. Cash Collateral Order which shall prevail over the terms of the IRO and this Order

INFORMATION OFFICER

5. **THIS COURT ORDERS** that:

(a) BDO be and is hereby appointed as Information Officer (in such capacity, the "**Information Officer**"), as an officer of this Court;

(b) The Information Officer be and is hereby authorized and empowered, but not obligated, to provide such assistance to the Foreign

contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation, or rehabilitation of the environment or relating to the disposal of waste or other contamination, including, but not limited to, the *Canadian Environmental Protection Act* or similar other federal or provincial legislation (collectively, the "Environmental Legislation"); provided, however, that nothing herein shall exempt the Information Officer from any duty to report or make disclosure imposed by applicable Environmental Legislation.

8. **THIS COURT ORDERS** that the appointment of the Information Officer shall not constitute the Information Officer to be an employer or a successor employer or payor within the meaning of any legislation governing employment or labour standards or pension benefits or health and safety or any other statute, regulation or rule of law or equity for any purpose whatsoever and, further, that the Information Officer shall be deemed not to be an owner or in possession, care, control, or management of the Property or Business whether pursuant to Environmental Legislation, or any other statute, regulation or rule of law or equity under any federal, provincial or other jurisdiction for any purpose whatsoever.

9. **THIS COURT ORDERS** that the Information Officer and counsel to the Information Officer shall each be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Foreign Representative as part of the costs of these proceedings. The Foreign Representative is authorized to pay the accounts of the Information Officer and counsel for the Information Officer on a bi-weekly basis or such other period as the Foreign Representative and the Information Officer and its counsel may agree, and the fees and expenses of the Information Officer and its counsel shall be subject to the passing of accounts by this Court, and the Information Officer and its counsel shall not be required to pass their accounts in the Chapter 11 Proceeding, or in any other foreign proceeding. Any payments made to the Information Officer and its counsel in respect of their accounts shall not be subject to approval in the Chapter 11 Proceeding, or in any other foreign proceeding. In addition, the Foreign Representative is authorized to pay the Information Officer a retainer of $50,000 to be held by the Information Officer as security for payment of its fees and disbursements outstanding from time to time and to pay to the Information Officer's counsel a retainer of $25,000, to be held by the Information Officer's counsel as security for payment of their respective fees and

disbursements outstanding from time to time.

10. **THIS COURT ORDERS** that the Information Officer and its counsel, as security for the professional fees and disbursements incurred in respect of the within proceedings both before and after the granting of this Order, shall be entitled to the benefit of and are hereby granted a first-ranking charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $75,000.

11. **THIS COURT ORDERS** that the Information Officer shall have the benefit of all of the rights and protections afforded to a Monitor under the CCAA, or as an officer of this Court, and the Information Officer shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or willful misconduct on its part as determined by final order of this Court.

12. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against the Foreign Representative, the other Chapter 11 Debtors, or the Information Officer in any court or other tribunal as a result of or relating in any way to the appointment of the Information Officer, the fulfillment of the duties of the Information Officer or the carrying out of this or any other orders of this Court, unless the leave of this Court is first obtained on motion on at least seven (7) days' prior notice to the Information Officer, the Foreign Representative, the Chapter 11 Debtors, and the parties on the service list.

VALIDITY AND PRIORITY OF CHARGES

13. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge in Canada shall not be required, and that the Administration Charge is and shall be valid and enforceable against the Property for all purposes in Canada and shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including, but without limitation, any and all deemed trusts whether existing as of the date hereof or arising in the future and any and all claims in respect of breaches of fiduciary duties (collectively, "**Encumbrances**").

14. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be ordered by this Court, the Chapter 11 Debtors shall not grant any Encumbrances

over any Property that rank in priority to, or *pari passu* with the Administration Charge, unless the Chapter 11 Debtors also obtain the prior written consent of the chargees entitled to the benefit of the Administration Charge (collectively, the "**Chargees**") or further Order of this Court.

15. **THIS COURT ORDERS** that the Administration Charge shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not be limited or impaired in any way by: (a) the pendency of these proceedings and any declarations of insolvency made in these proceedings; (b) any application(s) for bankruptcy order(s) issued pursuant to the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), or any bankruptcy orders made pursuant to such application(s); (c) any proceeding taken or that might be taken against the Chapter 11 Debtors under the BIA or the *Winding-Up and Restructuring Act*, R.S.C. 1985, c. W-11, as amended; (d) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (e) the provisions of any federal or provincial statutes; or (f) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of any Encumbrances contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Chapter 11 Debtors.

16. **THIS COURT ORDERS** that notwithstanding any provision to the contrary in any such Agreement or otherwise:

(i) the creation of the Administration Charge shall not create or be deemed to constitute a breach by the Chapter 11 Debtors of any Agreement to which they are party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Administration Charge; and

(iii) the payments made by the Chapter 11 Debtors pursuant to this Order and the granting of the Administration Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive

conduct, or other challengeable or voidable transactions under any applicable law.

17. **THIS COURT ORDERS** that the Administration Charge shall attach to the Property (including, without limitation, any lease, sub-lease, offer to lease, license, permit or other contract), notwithstanding any requirement for the consent of the lessor or other party to any such lease, license, permit or contract or any other person or the failure to comply with any other condition precedent.

18. **THIS COURT ORDERS** that the Administration Charge created by this Order over leases of real property in Canada shall only attach to the Chapter 11 Debtors' interest in such real property leases

AID AND ASSISTANCE OF OTHER COURTS

19. **THIS COURT HEREBY ORDERS AND REQUESTS** the aid and recognition of any court, tribunal, regulatory, governmental or administrative body having jurisdiction in Canada, the United States or elsewhere, to give effect to this Order and to assist the Foreign Representatives, the Chapter 11 Debtors, the Information Officer and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory, governmental and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Chapter 11 Debtors, the Foreign Representative, the Information Officer and their respective agents, as may be necessary or desirable to give effect to this Order or to assist the Chapter 11 Debtors, the Foreign Representative, the Information Officer and their respective agents in carrying out the terms of this Order.

NOTICE OF PROCEEDINGS

20. **THIS COURT ORDERS** that within 3 business days from the date of this Order, or as soon as practicable thereafter, the Information Officer shall publish a notice as required by subsection 53(b) of the CCAA substantially in the form attached to this Order as Schedule "J" in The Globe and Mail (National Edition) or the National Post for one (1) day in two (2) consecutive weeks without delay following the issuance of this Order.

GENERAL PROVISIONS

21. **THIS COURT ORDERS** that the Information Officer or the Foreign Representative may, from time to time, apply to this Court for advice, directions, or for such further or other relief as they may advise in connection with the proper execution of this Order or the IRO, the discharge or variation of their respective powers and duties under this Order, and the recognition in Canada of subsequent orders of the U.S. Court made in the Chapter 11 Proceeding.

22. **THIS COURT ORDERS** that nothing in this Order shall prevent the Information Officer from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Chapter 11 Debtors, or in respect of the Business or the Property, upon further order of the Court.

23. **THIS COURT ORDERS** that each of the Foreign Representative, the Chapter 11 Debtors and the Information Officer be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order or the IRO.

24. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order, and except with respect to paragraph 4 of this Order, any interested person may apply to this Court to vary or rescind this Order or seek other relief upon seven (7) days notice to the Foreign Representative, the Chapter 11 Debtors and their counsel, the Information Officer and its counsel 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.

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Tab 9

Court File No. CV-16-11656-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	TUESDAY , THE 27TH
	)	
MR. JUSTICE NEWBOULD	)	DAY OF DECEMBER, 2016

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

AND IN THE MATTER OF MODULAR SPACE INTERMEDIATE HOLDINGS, INC., MODULAR SPACE CORPORATION, RESUN MODSPACE, INC., MODSPACE GOVERNMENT FINANCIAL SERVICES, INC., MODSPACE FINANCIAL SERVICES CANADA, LTD., RESUN CHIPPEWA, LLC AND MODULAR SPACE HOLDINGS, INC. (THE "DEBTORS")

APPLICATION OF MODULAR SPACE CORPORATION UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

SUPPLEMENTAL ORDER
(FOREIGN MAIN PROCEEDING)

THIS APPLICATION, made by Modular Space Corporation ("**Modular Space Corporation**"), in its capacity as the foreign representative (the "**Foreign Representative**") of the Debtors, pursuant to 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 Application Record, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Application, the affidavit of David Orlofsky sworn December 23, 2016 (the "**Orlofsky Affidavit**"), the preliminary report of Alvarez & Marsal Canada Inc., in its capacity as proposed information officer dated December 24, 2016, and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Foreign Representative, counsel for the proposed information officer, counsel for Bank of America N.A., as Administrative Agent for the lenders under the Debtors' Post-Petition Credit

Agreement (collectively, the "**DIP Lender**"), counsel for the Ad Hoc Group of Noteholders, no one appearing for any other parties although duly served as appears from the affidavit of service of Evita Ferreira sworn December 23, 2016, and on reading the consent of Alvarez & Marsal Canada Inc. to act as the information officer:

SERVICE

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

INITIAL RECOGNITION ORDER

2. THIS COURT ORDERS that any capitalized terms not otherwise defined herein shall have the meanings given to such terms in the Initial Recognition Order (Foreign Main Proceeding) dated December 27, 2016 (the "**Recognition Order**") or in the Orlofsky Affidavit.

3. THIS COURT ORDERS that the provisions of this Supplemental Order shall be interpreted in a manner complementary and supplementary to the provisions of the Recognition Order, provided that in the event of a conflict between the provisions of this Supplemental Order and the provisions of the Recognition Order, the provisions of the Recognition Order shall govern.

RECOGNITION OF FOREIGN ORDERS

4. THIS COURT ORDERS that the following orders (collectively, the "**Foreign Orders**") of the United States Bankruptcy Court for the District of Delaware made in the Foreign Proceeding are hereby recognized and given full force and effect in all provinces and territories of Canada pursuant to Section 49 of the CCAA:

(a) an order recognizing Modular Space Corporation as the foreign representative of the Debtors;

(b) an order permitting the joint administration of the Chapter 11 cases of the Debtors in the Foreign Proceeding;

(c) an order authorizing the Debtors to pay pre-petition wages, compensation and employee benefits;

(d) an interim order authorizing, but not directing, the Debtors to maintain their existing bank accounts, cash management system and authorizing the continuation of (and administrative expense priority status of) intercompany transactions;

(e) an interim order (i) approving post-petition financing (the "**DIP Financing**"); (ii) granting liens and super-priority administrative expense claim status to pre-petition secured parties; and (iii) modifying the automatic stay; and (iv) scheduling the final hearing (the "**Interim Financing Order**");

(f) an order authorizing the Debtors to retain Kurtzman Carson Consultants LLC as Claims and Noticing Agent *nunc pro tunc* to December 21, 2016;

(g) an order authorizing the payment of pre-petition taxes and fees;

(h) an interim order (i) approving the Debtors form of adequate assurance of payment; (ii) establishing procedures to resolve objections by utility companies; and (iii) restraining utility companies from discontinuing, alternating or refusing service;

(i) an order (i) confirming the enforcement and applicability of the automatic stay pursuant to Section 362 of the United States Code and (ii) confirming the Debtors authority with respect to post-petition operations;

(j) an order establishing notification procedures and approving restrictions on certain transfers of or claims for worthlessness with respect to the Debtors' equity securities;

(k) an order authorizing the Debtors to pay their pre-petition unsecured creditors in the ordinary course of business;

(l) an order establishing bar dates for filing proofs of claim for Modular Space Intermediate Holdings, Inc. and Modular Space Holdings, Inc., approving the form and manner for filing proofs of claim and the manner for notice of same;

(m) an order (i) scheduling a combined disclosure statement approval and plan confirmation hearing; (ii) establishing a plan and disclosure statement objection date and related procedures; (iii) approving solicitation and related procedures; (iv) approving the notice procedures; (v) approving notice and objection procedures for the assumption, assignment and rejection of executory contracts and unexpired leases; and (vi) extending the time, and upon confirmation, waiving the requirements that statements and schedules be filed and a creditors' meeting be convened; and

(n) an order approving procedures for rights offering and related forms and authorizing the Debtors to conduct the rights offering in connection with the Debtors' joint plan of reorganization pursuant to Chapter 11,

provided, however, that in the event of any conflict between the terms of the Foreign Orders and the Orders of this Court made in these proceedings, the Orders of this Court shall govern with respect to Property (as defined below) in Canada. Copies of the Foreign Orders are attached as Exhibits "C" to "P" to the Orlofsky Affidavit.

APPOINTMENT OF INFORMATION OFFICER

5. THIS COURT ORDERS that Alvarez & Marsal Canada Inc. (the "**Information Officer**") is hereby appointed as an officer of this Court, with the powers and duties set out herein and in the Recognition Order.

NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

6. THIS COURT ORDERS that, subject to paragraph 20, until such date as this Court may order (the "**Stay Period**") no proceeding or enforcement process in any court or tribunal in Canada (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Debtors or affecting their business (the "**Business**") or their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situated

including all proceeds thereof (the "**Property**"), except with leave of this Court, and any and all Proceedings currently under way against or in respect of any of the Debtors or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

7. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Debtors, or affecting the Business or the Property, are hereby stayed and suspended except with leave of this Court, provided that nothing in this Order shall (i) prevent the assertion of or the exercise of rights and remedies outside of Canada, (ii) empower any of the Debtors to carry on any business in Canada which that Debtor is not lawfully entitled to carry on, (iii) affect such investigations or Proceedings by a regulatory body as are permitted by section 11.1 of the CCAA, (iv) prevent the filing of any registration to preserve or perfect a security interest, or (v) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

8. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by any of the Debtors and affecting the Business in Canada, except with leave of this Court.

ADDITIONAL PROTECTIONS

9. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services in Canada, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services provided in respect of the Property or Business of the Debtors, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as

may be required by the Debtors, and that the Debtors shall be entitled to the continued use in Canada of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names.

10. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Debtors with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Debtors whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations.

11. THIS COURT ORDERS that no Proceeding shall be commenced or continued against or in respect of the Information Officer, except with leave of this Court. In addition to the rights and protections afforded the Information Officer herein, or as an officer of this Court, the Information Officer shall have the benefit of all of the rights and protections afforded to a Monitor under the CCAA, and shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part.

OTHER PROVISIONS RELATING TO INFORMATION OFFICER

12. THIS COURT ORDERS that the Information Officer:

(a) is hereby authorized to provide such assistance to the Foreign Representative in the performance of its duties as the Foreign Representative may reasonably request;

(b) shall report to this Court at least once every three months with respect to the status of these proceedings and the status of the Foreign Proceeding, which reports may include information relating to the Property, the Business, or such other matters as may be relevant to the proceedings herein;

(c) in addition to the periodic reports referred to in paragraph 12(b) above, the Information Officer may report to this Court at such other times and intervals

as the Information Officer may deem appropriate with respect to any of the matters referred to in paragraph 12(b) above;

(d) shall have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Debtors, to the extent that is necessary to perform its duties arising under this Order; and

(e) shall be at liberty to engage independent legal counsel or such other persons as the Information Officer deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order.

13. THIS COURT ORDERS that the Debtors and the Foreign Representative shall (i) advise the Information Officer of all material steps taken by the Debtors or the Foreign Representative in these proceedings or in the Foreign Proceeding, (ii) co-operate fully with the Information Officer in the exercise of its powers and discharge of its obligations, and (iii) provide the Information Officer with the assistance that is necessary to enable the Information Officer to adequately carry out its functions.

14. THIS COURT ORDERS that the Information Officer shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

15. THIS COURT ORDERS that the Information Officer (i) shall post on its website all Orders of this Court made in these proceedings, all reports of the Information Officer filed herein, and such other materials as this Court may order from time to time, and (ii) may post on its website any other materials that the Information Officer deems appropriate.

16. THIS COURT ORDERS that the Information Officer may provide any creditor of a Debtor with information provided by the Debtors in response to reasonable requests for information made in writing by such creditor addressed to the Information Officer. The Information Officer shall not have any responsibility or liability with respect to the

information disseminated by it pursuant to this paragraph. In the case of information that the Information Officer has been advised by the Debtors is privileged or confidential, the Information Officer shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Information Officer, the Foreign Representative and the relevant Debtors may agree.

17. THIS COURT ORDERS that the Information Officer and counsel to the Information Officer shall be paid by the Debtors their reasonable fees and disbursements incurred in respect of these proceedings, both before and after the making of this Order, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts. The Debtors are hereby authorized to pay the accounts of the Information Officer and counsel for the Information Officer and, in addition, the Debtors are hereby authorized to pay to the Information Officer and counsel to the Information Officer, retainers in the amounts of $50,000, respectively, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

18. THIS COURT ORDERS that the Information Officer and its legal counsel, if any, shall pass their accounts from time to time, and for this purpose the accounts of the Information Officer and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice, and the accounts of the Information Officer and its counsel shall not be subject to approval in the Foreign Proceeding.

19. THIS COURT ORDERS that the Information Officer and counsel to the Information Officer, if any, shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property in Canada, which charge shall not exceed an aggregate amount of $300,000, as security for their professional fees and disbursements incurred in respect of these proceedings, both before and after the making of this Order. The Administration Charge shall have the priority set out in paragraphs 21 and 23 hereof.

INTERIM FINANCING

20. THIS COURT ORDERS that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lender's Charge**") on the Property in Canada, which DIP Lender's Charge shall be consistent with the liens and charges created by the Post-Petition

Credit Agreement dated December 22, 2016 (as may be amended, supplemented or restated from time to time, the "**DIP Financing Agreement**") and by the Interim Financing Order, provided however that the DIP Lender's Charge, with respect to the Property in Canada, shall have the priority set out in paragraphs 21 and 24 hereof and further provided that the DIP Lender's Charge shall not be enforced unless the DIP Lender delivers a Default Notice, as that term is defined in the U.S. Interim Financing Order, and otherwise complies with the procedure set out in paragraph 18 of the U.S. Interim Financing Order.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

21. THIS COURT ORDERS that the priorities of the Administration Charge and the DIP Lender's Charge, as among them, shall be as follows:

First – the Administration Charge to the maximum amount of $300,000

Second – the DIP Lender's Charge.

22. THIS COURT ORDERS that notwithstanding any other provision of this Order or the Recognition Order:

(a) the DIP Lender may, but is not required to, take such steps from time to time as it may deem necessary or appropriate to file, register, or record the DIP Lender's Charge or any of the related documents;

(b) the DIP Lender may administer the DIP Financing in accordance with, and subject to, the terms and conditions of the DIP Financing Agreement and the Interim Financing Order;

(c) upon the occurrence of an Event of Default (as defined in the DIP Financing Agreement), provided the DIP Lender is authorized to do so pursuant to the Interim Financing Order, and subject to any notice requirements in the Interim Financing Order, the DIP Lender may exercise its rights and remedies under the DIP Financing Agreement and the Interim Financing Order, subject to and in accordance with the terms and conditions thereof in respect of the Property of the Debtors located in Canada without further application to this Court;

(d) the Debtors are hereby authorized and directed to make all such payments under the DIP Financing Agreement, including amounts under their pre-filing asset-based revolving credit facility (the "**Pre-Filing ABL Facility**") and interest thereon, and the lenders under the Pre-Filing ABL Facility shall be entitled to apply receipts and deposits (not including any deposits on account of any advances made under the DIP Financing Agreement) made to the Debtors' bank accounts in Canada against the indebtedness of the Debtors pursuant to the Pre-Filing ABL Facility whether such indebtedness arose before or after the date of this Order and for this purpose the operation of the blocked account agreements to which the Debtors are parties in connection with the Pre-Filing ABL Facility remain unaffected by this Order and the Recognition Order.

23. THIS COURT ORDERS that the filing, registration or perfection of the DIP Lender's Charge and the Administration Charge (together, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect the Charges.

24. THIS COURT ORDERS that the Charges (all as constituted and defined herein) shall constitute a charge on the Property in Canada and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

25. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Debtors shall not grant any Encumbrances over any Property in Canada that rank in priority to, or *pari passu* with, the Charges, unless the Debtors also obtain the prior written consent of the DIP Lender and the Information Officer.

26. THIS COURT ORDERS that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by (i) the pendency of these proceedings and the declarations of insolvency made herein; (ii)

any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (iii) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (iv) the provisions of any federal or provincial statutes; or (v) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds any Debtor, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges shall not create or be deemed to constitute a breach by a Debtor of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(c) the payments made by the Debtors to the Chargees pursuant to this Order, the payments made under the Pre-Filing ABL Facility pursuant to this Order, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

27. THIS COURT ORDERS that any Charges created by this Order over leases of real property in Canada shall only be a charge in the applicable Debtor's interest in such real property leases.

SERVICE AND NOTICE

28. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil

Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: www.alvarezandmarsal.com/modspace

29. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Debtors, the Foreign Representative and the Information Officer are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtors' creditors or other interested parties at their respective addresses as last shown on the records of the applicable Debtor and that any such service or distribution by courier, personal delivery or facsimile 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.

GENERAL

30. THIS COURT ORDERS that the Information Officer may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

31. THIS COURT ORDERS that nothing in this Order shall prevent the Information Officer from acting as an interim receiver, a receiver, a receiver and manager, a monitor, a proposal trustee, or a trustee in bankruptcy of any Debtor, the Business or the Property.

32. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist the Debtors, the Foreign Representative, the Information Officer, and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Debtors, the Foreign Representative, and the Information Officer, the latter as an officer of this Court, as may be necessary or

desirable to give effect to this Order, or to assist the Debtors, the Foreign Representative, and the Information Officer and their respective agents in carrying out the terms of this Order.

33. THIS COURT ORDERS that each of the Debtors, the Foreign Representative and the Information Officer be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

34. THIS COURT ORDERS that the Guidelines for Court-to-Court Communications in Cross-Border Cases developed by the American Law Institute and attached as **Schedule "A"** hereto is adopted by this Court for the purposes of these recognition proceedings.

35. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order or seek other relief on not less than seven (7) days notice to the Debtors, the Foreign Representative, the Information Officer, the DIP Lender and their respective counsel, and to any other party or parties likely to be affected by the order sought, or upon such other notice, if any, as this Court may order.

36. THIS COURT ORDERS that, notwithstanding paragraph 35, no Order shall be made varying, rescinding or otherwise affecting the provisions of this Order with respect to the DIP Financing Agreement and the DIP Lender's Charge unless notice of a motion for such Order is served in accordance with paragraph 35 above and is returnable no later than the date of the hearing for the Final DIP Financing Order (as defined in the DIP Financing Agreement), or the Debtors, the Foreign Representative and the DIP Lender consent to such Order.

37. THIS COURT ORDERS that this Order shall be effective as of 10:00 AM on the date of this Order.

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

DEC 27 2016

PER / PAR:

Schedule "A"

Guidelines for Court-to-Court Communications in Cross-Border Cases developed by the American Law Institute

THE AMERICAN LAW INSTITUTE

TRANSNATIONAL INSOLVENCY:
COOPERATION AMONG
THE NAFTA COUNTRIES

PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES

Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases

As Adopted and Promulgated
BY
THE AMERICAN LAW INSTITUTE
AT WASHINGTON, D.C.

May 16, 2000

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Guidelines
Applicable to Court-to-Court Communications
in Cross-Border Cases

Introduction:

One of the most essential elements of cooperation in cross-border cases is communication among the administrating authorities of the countries involved. Because of the importance of the courts in insolvency and reorganization proceedings, it is even more essential that the supervising courts be able to coordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises.

These Guidelines are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communications by judges directly with judges or administrators in a foreign country, however, raise issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the process is transparent and clearly fair. Thus, communication among courts in cross-border cases is both more important and more sensitive than in domestic cases. These Guidelines encourage such communications while channeling them through transparent procedures. The Guidelines are meant to permit rapid cooperation in a developing insolvency case while ensuring due process to all concerned.

The Guidelines at this time contemplate application only between Canada and the United States because of the very different rules governing communications with and among courts in Mexico. Nonetheless, a Mexican Court might choose to adopt some or all of these Guidelines for communications by a sindico with foreign administrators or courts.

A Court intending to employ the Guidelines — in whole or part, with or without modifications — should adopt them formally before applying them. A Court may wish to make its adoption of the Guidelines contingent upon, or temporary until, their adoption by other courts concerned in the matter. The adopting Court may want to make adoption or continuance conditional upon adoption of the Guidelines by the other Court in a substantially similar form, to ensure that judges, counsel, and parties are not subject to different standards of conduct.

The Guidelines should be adopted following such notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances. If communication with other courts is urgently needed, the local procedures, including notice requirements, that are used in urgent or emergency situations should be employed, including, if appropriate, an initial period of effectiveness, followed by further consideration of the Guidelines at a later time. Questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's

consideration of any objections (for example, with or without a hearing) are governed by the Rules of Procedure in each jurisdiction and are not addressed in the Guidelines.

The Guidelines are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases and to change and evolve as the international insolvency community gains experience from working with them. They are to apply only in a manner that is consistent with local procedures and local ethical requirements. They do not address the details of notice and procedure that depend upon the law and practice in each jurisdiction. However, the Guidelines represent approaches that are likely to be highly useful in achieving efficient and just resolutions of cross-border insolvency issues. Their use, with such modifications and under such circumstances as may be appropriate in a particular case, is therefore recommended.

Guideline 1

Except in circumstances of urgency, prior to a communication with another Court, the Court should be satisfied that such a communication is consistent with all applicable Rules of Procedure in its country. Where a Court intends to apply these Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted before they are applied. Coordination of Guidelines between courts is desirable and officials of both courts may communicate in accordance with Guideline 8(d) with regard to the application and implementation of the Guidelines.

Guideline 2

A Court may communicate with another Court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdiction.

Guideline 3

A Court may communicate with an Insolvency Administrator in another jurisdiction or an authorized Representative of the Court in that jurisdiction in connection with the coordination and harmonization of the proceedings before it with the proceedings in the other jurisdiction.

Guideline 4

A Court may permit a duly authorized Insolvency Administrator to communicate with a foreign Court directly, subject to the approval of the foreign Court, or through an Insolvency Administrator in the other jurisdiction or through an authorized Representative of the foreign Court on such terms as the Court considers appropriate.

Guideline 5

A Court may receive communications from a foreign Court or from an authorized Representative of the foreign Court or from a foreign Insolvency Administrator and

should respond directly if the communication is from a foreign Court (subject to Guideline 7 in the case of two-way communications) and may respond directly or through an authorized Representative of the Court or through a duly authorized Insolvency Administrator if the communication is from a foreign Insolvency Administrator, subject to local rules concerning ex parte communications.

Guideline 6

Communications from a Court to another Court may take place by or through the Court:

(a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other Court and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;

(b) Directing counsel or a foreign or domestic Insolvency Administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the Court to the other Court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;

(c) Participating in two-way communications with the other Court by telephone or video conference call or other electronic means, in which case Guideline 7 should apply.

Guideline 7

In the event of communications between the Courts in accordance with Guidelines 2 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two Courts:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;

(b) The communication between the Courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of both Courts, should be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of either Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties

in both Courts subject to such Directions as to confidentiality as the Courts may consider appropriate; and

(d) The time and place for communications between the Courts should be to the satisfaction of both Courts. Personnel other than Judges in each Court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the Courts.

Guideline 8

In the event of communications between the Court and an authorized Representative of the foreign Court or a foreign Insolvency Administrator in accordance with Guidelines 3 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by the Court:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;

(b) The communication should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of the Court, can be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of the Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to the other Court and to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Court may consider appropriate; and

(d) The time and place for the communication should be to the satisfaction of the Court. Personnel of the Court other than Judges may communicate fully with the authorized Representative of the foreign Court or the foreign Insolvency Administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the Court.

Guideline 9

A Court may conduct a joint hearing with another Court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:

(a) Each Court should be able to simultaneously hear the proceedings in the other Court.

(b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court or made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.

(c) Submissions or applications by the representative of any party should be made only to the Court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other Court to make submissions to it.

(d) Subject to Guideline 7(b), the Court should be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.

(e) Subject to Guideline 7(b), the Court, subsequent to the joint hearing, should be entitled to communicate with the other Court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both Courts and to coordinate and resolve any procedural or nonsubstantive matters relating to the joint hearing.

Guideline 10

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof or exemplification thereof.

Guideline 11

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that Orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such Orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the Court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such Orders.

Guideline 12

The Court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a Service List that may include parties that are entitled to receive notice of proceedings before the Court in the other jurisdiction ("Non-Resident

Parties"). All notices, applications, motions, and other materials served for purposes of the proceedings before the Court may be ordered to also be provided to or served on the Non-Resident Parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the Court in accordance with the procedures applicable in the Court.

Guideline 13

The Court may issue an Order or issue Directions permitting the foreign Insolvency Administrator or a representative of creditors in the proceedings in the other jurisdiction or an authorized Representative of the Court in the other jurisdiction to appear and be heard by the Court without thereby becoming subject to the jurisdiction of the Court.

Guideline 14

The Court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the Court, not apply to applications or motions brought by such parties before the other Court or that relief be granted to permit such parties to bring such applications or motions before the other Court on such terms and conditions as it considers appropriate. Court-to-Court communications in accordance with Guidelines 6 and 7 hereof may take place if an application or motion brought before the Court affects or might affect issues or proceedings in the Court in the other jurisdiction.

Guideline 15

A Court may communicate with a Court in another jurisdiction or with an authorized Representative of such Court in the manner prescribed by these Guidelines for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other Court wherever there is commonality among the issues and/or the parties in the proceedings. The Court should, absent compelling reasons to the contrary, so communicate with the Court in the other jurisdiction where the interests of justice so require.

Guideline 16

Directions issued by the Court under these Guidelines are subject to such amendments, modifications, and extensions as may be considered appropriate by the Court for the purposes described above and to reflect the changes and developments from time to time in the proceedings before it and before the other Court. Any Directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both Courts. If either Court intends to supplement, change, or abrogate Directions issued under these Guidelines in the absence of joint approval by both Courts, the Court should give the other Courts involved reasonable notice of its intention to do so.

Guideline 17

Arrangements contemplated under these Guidelines do not constitute a compromise or waiver by the Court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the Court or before the other Court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the Orders made by the Court or the other Court.

Court File No.: CV-16-11656-00CL

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

AND IN THE MATTER OF MODULAR SPACE INTERMEDIATE HOLDINGS, INC., MODULAR SPACE CORPORATION, RESUN MODSPACE, INC., MODSPACE GOVERNMENT FINANCIAL SERVICES, INC., MODSPACE FINANCIAL SERVICES CANADA, LTD., RESUN CHIPPEWA, LLC AND MODULAR SPACE HOLDINGS, INC. (THE "DEBTORS")

APPLICATION OF MODULAR SPACE CORPORATION UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDINGS COMMENCED AT TORONTO

SUPPLEMENTAL ORDER

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Tab 10

2012 ONSC 964
Ontario Superior Court of Justice [Commercial List]

Hartford Computer Hardware Inc., Re

2012 CarswellOnt 2143, 2012 ONSC 964, 212 A.C.W.S. (3d) 315, 94 C.B.R. (5th) 20

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

Re: Hartford Computer Hardware, Inc., Nexicore Services, LLC, Hartford Computer Group, Inc. and Hartford Computer Government, Inc., (Collectively, the "Chapter 11 Debtors"), Applicants

Morawetz J.

Heard: February 1, 2012
Judgment: February 1, 2012
Written reasons: February 15, 2012
Docket: CV-11-9514-00CL

Counsel: Kyla Mahar, John Porter for Chapter 11 Debtors
Adrienne Glen for FTI Consulting Canada, Inc., Information Officer
Jane Dietrich for Avnet Inc.

Subject: Civil Practice and Procedure; Insolvency; Corporate and Commercial; International

Headnote

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

Chapter 11 proceedings were commenced in U.S. Court by Chapter 11 debtors — Chapter 11 proceeding was recognized as foreign main proceeding under Companies' Creditors Arrangement Act — U.S. Court made various orders, including final DIP facility order which contained partial "roll up" provision wherein all cash collateral in possession or control of Chapter 11 debtors on or after petition date was deemed to have been remitted to pre-petition secured lender for application to and repayment of pre-petition revolving debt facility with corresponding borrowing under DIP facility — Foreign representative of Chapter 11 debtors brought motion under s. 49 of Act for recognition and implementation in Canada of final utilities order, bidding procedures order, and final DIP facility order — Motion granted — Utilities order and bidding procedures order were routine, and it was appropriate to recognize them — Recognition of final DIP facility order was necessary for protection of debtor company's property and for interests of creditors — Final DIP facility order was granted by U.S. Court — In circumstances, there was no basis for present court to second guess decision of U.S. Court — Final DIP facility order did not raise any public policy issues.

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

Recognition of orders made in U.S. Chapter 11 proceedings — Chapter 11 proceedings were commenced in U.S. Court by Chapter 11 debtors — Chapter 11 proceeding was recognized as foreign main proceeding under

Companies' Creditors Arrangement Act — U.S. Court made various orders, including final DIP facility order which contained partial "roll up" provision wherein all cash collateral in possession or control of Chapter 11 debtors on or after petition date was deemed to have been remitted to pre-petition secured lender for application to and repayment of pre-petition revolving debt facility with corresponding borrowing under DIP facility — Foreign representative of Chapter 11 debtors brought motion under s. 49 of Act for recognition and implementation in Canada of final utilities order, bidding procedures order, and final DIP facility order — Motion granted — Utilities order and bidding procedures order were routine, and it was appropriate to recognize them — Recognition of final DIP facility order was necessary for protection of debtor company's property and for interests of creditors — Final DIP facility order was granted by U.S. Court — In circumstances, there was no basis for present court to second guess decision of U.S. Court — Final DIP facility order did not raise any public policy issues.

Table of Authorities

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Pt. IV — referred to

s. 11.2 [en. 1997, c. 12, s. 124] — referred to

s. 49 — pursuant to

s. 61(2) — considered

MOTION by foreign representative for recognition and implementation in Canada of orders of U.S. Bankruptcy Court made in Chapter 11 proceedings.

***Morawetz J.*:**

1 Hartford Computer Hardware, Inc. ("Hartford"), on its own behalf and in its capacity as foreign representative of Chapter 11 Debtors (the "Foreign Representative") brought a motion under s. 49 of the *Companies' Creditors Arrangement Act* (the "*CCAA*") for recognition and implementing in Canada the following Orders of the United States Bankruptcy Court for the Northern District of Illinois Eastern Division (the "U.S. Court") made in the proceedings commenced by the Chapter 11 Debtors:

(i) the Final Utilities Order;

(ii) the Bidding Procedures Order;

(iii) the Final DIP Facility Order.

(collectively, the U.S. Orders")

2 On December 12, 2011, the Chapter 11 Debtors commenced the Chapter 11 proceeding. The following day, I made an order granting certain interim relief to the Chapter 11 Debtors, including a stay of proceedings. On December 15, 2011, the U.S. Court made an order authorizing Hartford to act as the Foreign Representative of the Chapter 11 Debtors. On December 21, 2011, I made two orders, an Initial Recognition Order and a Supplemental Order that, among other things:

(i) declared the Chapter 11 proceedings to be a "foreign main proceeding" pursuant to Part IV of the *CCAA*;

(ii) recognized Hartford as the Foreign Representative of the Chapter 11 Debtors;

(iii) appointed FTI as Information Officer in these proceedings;

(iv) granted a stay of proceedings;

(v) recognized and made effective in Canada certain "First Day Orders" of the U.S. Court including an Interim Utilities Order and Interim DIP Facility Order.

3 On January 26, 2012, the U.S. Court made the U.S. Orders.

4 The Foreign Representative is of the view that recognition of the U.S. Orders is necessary for the protection of the Chapter 11 Debtors' property and the interest of their creditors.

5 The affidavit of Mr. Mittman and First Report of the Information Officer provide details with respect to the hearings in the U.S. Court on January 26, 2012 which resulted in the U. S. Court granting the U.S. Orders. The Utilities Order and the Bidding Procedures Order are relatively routine in nature and it is, in my view, appropriate to recognize and give effect to these orders.

6 With respect to the Final DIP Facility Order, it is noted that paragraph 6 of this Order contains a partial "roll up" provision wherein all Cash Collateral in the possession or control of Chapter 11 Debtors on December 12, 2011 (the "Petition Date") or coming into their possession after the Petition Date is deemed to have been remitted to the Pre-petition Secured Lender for application to and repayment of the Pre-petition revolving debt facility with a corresponding borrowing under the DIP Facility.

7 In making the Final DIP Facility Order, the Information Officer reports that the U.S. Court found that good cause had been shown for entry of the Final DIP Facility Order, as the Chapter 11 Debtors' ability to continue to use Cash Collateral was necessary to avoid immediate and irreparable harm to the Chapter 11 Debtors and their estates.

8 The granting of the Final DIP Facility Order was supported by the Unsecured Creditors' Committee. Certain objections were filed but the Order was granted after the U.S. Court heard the objections.

9 The Information Officer reports that Canadian unsecured creditors will be treated no less favourably than U.S. unsecured creditors. Further, since a number of Canadian unsecured creditors are employees of the Chapter 11 Debtors, these creditors benefit from certain priority claims which they would not be entitled to under Canadian insolvency proceedings.

10 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.

11 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.

12 It is necessary, in my view, to emphasize that this is a motion to recognize an order made in the "foreign main proceeding". The Final DIP Facility Order was granted after a hearing in the U.S. Court. Further, it appears from the affidavit of Mr. Mittman that, as of the end of December 2011, the Chapter 11 Debtors had borrowed $1 million under the Interim DIP Facility. The Cash Collateral on hand as of the Petition Date was effectively spent in the Chapter 11 Debtors' operations and replaced with advances under the Interim DIP Facility in December 2011 such that all cash in the Chapter 11 Debtors' accounts as of the date of the Final DIP Facility Order were proceeds from the Interim DIP Facility.

13 The Information Officer has reported that, in the circumstances, there will be no material prejudice to Canadian creditors if this court recognizes the Final DIP Facility, and that nothing is being done that is contrary to the applicable provisions of the *CCAA*. The Information Officer is of the view that recognition of the Final DIP Facility Order is appropriate in the circumstances.

14 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.

15 Based on the foregoing, I have concluded that recognition of the Final DIP Facility Order is necessary for the protection of the debtor company's property and for the interests of the creditors.

16 In making this determination, I have also taken into account the provisions of s. 61(2) of the *CCAA* which is the public policy exception. This section reads: "Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy".

17 The public policy exception has its origins in the UNCITRAL Model Law on Cross-Border Insolvency. Article 6 of the Model Law provides: "Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State". It is also important to note that the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (paragraphs 86-89) makes specific reference to the fact that the public policy exceptions should be interpreted restrictively.

18 I am in agreement with the commentary in the Guide to Enactment to the effect that s. 61(2) should be interpreted restrictively. The Final DIP Facility Order does not, in my view, raise any public policies issues.

19 I am satisfied that it is appropriate to grant the requested relief. The motion is granted and an order has been signed in the form requested to give effect to the foregoing.

Motion granted.

End of Document

Tab 11

2015 ONSC 2692, 2015 CarswellOnt 20848, 267 A.C.W.S. (3d) 517, 37 C.B.R. (6th) 331

2015 ONSC 2692
Ontario Superior Court of Justice [Commercial List]

Xinergy Ltd., Re

2015 CarswellOnt 20848, 2015 ONSC 2692, 267 A.C.W.S. (3d) 517, 37 C.B.R. (6th) 331

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 Xinergy Ltd.

Newbould J.

Heard: April 23, 2015
Judgment: April 24, 2015
Docket: CV-15-10936-00CL

Counsel: Jane Dietrich, Natalie Levine for Applicant
Aubrey E. Kauffman for Whitebox Advisors LLC, Highbridge Capital Management LLC and other DIP Lenders
Sean Sweig for Proposed Information Officer, Deloitte Restructuring Inc.
James H. Grant for Shareholder of the Applicant, Jon Nix

Subject: Insolvency; International

Headnote

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

Recognizing American proceedings — Debtor Ontario corporation and its US subsidiaries commenced voluntary reorganization proceedings in US Bankruptcy Court — Debtor brought application pursuant to Companies' Creditors Arrangement Act (CCAA) for order recognizing US proceedings as foreign main proceedings and for orders recognizing certain orders made by US court — Application granted — Proceedings in US were foreign main proceedings and order was granted under s. 48(1) of CCAA staying all proceedings against debtor — Although debtor's registered office was in Ontario, it had no operations or employees in Canada and majority of debtor's functions were shared with its US subsidiaries in US — Order was made recognizing interim DIP Facility Order granted by US court as there was no material prejudice to Canadian creditors — Other interim orders made by US court were recognized — Appointment of Information Officer with super-priority charge for its fees was approved.

Conflict of laws --- Bankruptcy — Miscellaneous

Recognizing American proceedings — Debtor Ontario corporation and its US subsidiaries commenced voluntary reorganization proceedings in US Bankruptcy Court — Debtor brought application pursuant to Companies' Creditors Arrangement Act (CCAA) for order recognizing US proceedings as foreign main proceedings and for orders recognizing certain orders made by US court — Application granted — Proceedings in US were foreign main proceedings and order was granted under s. 48(1) of CCAA staying all proceedings against debtor — Although debtor's registered office was in Ontario, it had no operations or employees in Canada and majority of debtor's functions were shared with its US subsidiaries in US — Order was made recognizing interim DIP Facility Order granted by US court as there was no material prejudice to Canadian creditors — Other interim orders made by US court were recognized — Appointment of Information Officer with super-priority charge for its fees was approved.

Table of Authorities

Cases considered by *Newbould J.*:

Hartford Computer Hardware Inc., Re (2012), 2012 ONSC 964, 2012 CarswellOnt 2143, 94 C.B.R. (5th) 20 (Ont. S.C.J. [Commercial List]) — considered

Lear Canada, Re (2009), 2009 CarswellOnt 4232, 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) — referred to

Lightsquared LP, Re (2012), 2012 ONSC 2994, 2012 CarswellOnt 8614, 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List]) — referred to

MtGox Co., Re (2014), 2014 ONSC 5811, 2014 CarswellOnt 13871, 122 O.R. (3d) 465, 20 C.B.R. (6th) 307 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Pt. IV — referred to

s. 44 — considered

s. 45(1) "foreign representative" — considered

s. 45(2) — considered

s. 46(1) — considered

s. 47(1) — considered

s. 47(2) — considered

s. 48(1) — considered

s. 49 — considered

APPLICATION by debtor corporation for order recognizing American bankruptcy proceedings as foreign main proceedings and for orders recognizing certain orders made by American court.

***Newbould J.*:**

1 On April 6, 2015, Xinergy Ltd. ("Xinergy"), an Ontario corporation, commenced a voluntary reorganization proceeding in the United States Bankruptcy Court for the Western District of Virginia (the "U.S. Court") under chapter 11 of the United States Bankruptcy Code. On the same date, 25 of Xinergy's U.S. subsidiaries also filed voluntary petitions under chapter 11 of the Bankruptcy Code with the U.S. Court.

2 On April 6 and 7, 2015 the chapter 11 Debtors filed 17 First Day Motions with the U.S. Court and on April 7 and 8, 2015, the U.S. Court entered the orders requested.

3 Xinergy has now brought an application before this Court pursuant to Part IV of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended for an order recognizing the U.S. proceedings as foreign main proceedings and for orders recognizing some of the first day orders made by the U.S. Court. At the conclusion of the hearing I granted the orders requested for short reasons to follow. These are my reasons.

Business of the applicant

4 Xinergy is a publicly traded company on the TSX under the ticker symbol XRG. As at September 30, 2014, the date of Xinergy's most recent public filing, there were approximately 58.3 million voting common shares issued and outstanding, and 7.5 million common non-voting shares issued and outstanding, totalling approximately 65.8 million common shares.

5 The Chapter 11 Debtors are a U.S.-based producer of metallurgical and thermal coal with mineral reserves, mining operations and coal properties located in the Central Appalachian regions of West Virginia and Virginia. The Chapter 11 Debtors' principal operations include two active mining complexes known as South Fork and Raven Crest located in Greenbrier and Boone Counties, West Virginia. The Chapter 11 Debtors also lease or own the mineral rights to properties located in Fayette, Nicholas and Greenbrier Counties, West Virginia and Wise County, Virginia. Collectively, the Chapter 11 Debtors lease or own mineral rights to approximately 72,000 acres with proven and probable coal reserves of approximately 77 million tons and additional estimated reserves of 40 million tons.

6 The Chapter 11 Debtors currently produce and ship coal from the South Fork mid-volatile metallurgical mine and the Raven Crest thermal operations. The Chapter 11 Debtors' primary customers for metallurgical coal — used in a chemical process that yields coke for the manufacture of steel — are steel producers, commodities brokers and industrial customers throughout North America, Europe and South America. Electric utilities and industrial companies in the southeastern United States and Europe are the principal customers for the Chapter 11 Debtors' thermal coal.

7 Recently, U.S. demand for thermal coal has fallen sharply in large part due to (i) increasingly attractive alternative sources of energy, such as natural gas, and (ii) burdensome environmental and governmental regulations impacting end users. Simultaneously, the increasingly stringent regulatory environment in which coal companies operate has driven up the *cost of* mining and processing coal. Continued weakness in **the** market for metallurgical and thermal coal, combined with an extremely cold and snowy winter that impacted the mining and shipment of coal, has continued to erode Xinergy's cash position. Prior to approval by the U.S. Court of the post-petition DIP financing, Xinergy lacked the liquidity needed to maintain operations in the near term and to sustain its current capital structure. The confluence of these factors and Xinergy's substantial debt burden has taken Xinergy to the point of unsustainability absent the relief provided by the Chapter 11 proceeding.

8 Xinergy has issued US$200 million in 9.25% Senior Secured Notes (the "Second Lien Notes"), of which approximately US$195 million (principal amount) is outstanding. As of the April 6, 2015, Xinergy was also obligated under two term loans totalling US$20 million in principal amount (the "First Lien Loans").

Requests for relief

9 Xinergy seeks recognition of four of the orders granted by the U.S. Court. The U.S. Court orders are:

(a) Order Authorizing Xinergy Ltd. to Act as a Foreign Representative (the "Foreign Representative Order");

(b) Interim Order (I) Authorizing Debtors (a) to Obtain Post-petition Financing and (b) to Utilize Cash Collateral; (II) Granting Adequate Protection to Prepetition Secured Parties; and (III) Scheduling Final Hearing (the " Interim DIP Order");

(c) Interim Trading Order Establishing Notification Procedures and Approving Restrictions on Certain Transfers of Equity Interests in the Debtors' Estates (the "Interim Trading Order"); and

(d) Interim Order (I) Authorizing Debtors to Maintain Existing Bank Accounts and Business Forms and Continue to Use Existing Cash Management System; (II) Granting Administrative Expense Status for Intercompany Claims; and (III) Waiving the Requirements of Section 345(b) of the Bankruptcy Code (the "Interim Cash Management Order")

Recognition of foreign main proceeding

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

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

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

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

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

12 In the Chapter 11 proceedings, the Chapter 11 Debtors sought the appointment of Xinergy as the foreign representative of the Chapter 11 Debtors, within the meaning of subsection 45(1) of the CCAA. The Foreign Representative Order was granted by the U.S. Court on April 7, 2015.

13 Subsection 47(1) of the CCAA provides that the Court shall grant an order recognizing the foreign proceeding if (i) the proceeding is a foreign proceeding; and (ii) the applicant is a foreign representative in respect of that proceeding. There is no question but that the Chapter 11 proceedings are foreign proceedings and should be recognized under the CCAA.

14 Subsection 47(2) of the CCAA requires that the Court specify whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding." I am satisfied that the Chapter 11 proceedings are foreign main proceedings.

15 Subsection 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 the centre of its main interests, or COMI. The registered office of Xinergy is in Toronto at its counsel's office. In considering whether the registered office presumption has been rebutted a court should consider the following factors in determining COMI (i) the location is readily ascertainable by creditors (ii) the location is one in which the debtor's principal assets and operations are found and (iii) the location is where the management of the debtor takes place. See *Lightsquared LP, Re* (2012), 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List]); *MtGox Co., Re* (2014), 20 C.B.R. (6th) 307 (Ont. S.C.J. [Commercial List]).

16 Although Xinergy's registered office is in Ontario, it has no operations in Canada. Additionally, Xinergy has no employees in Canada and no offices in Canada other than its registered office. The Chapter 11 Debtors operate on an integrated basis, with corporate and other major decision-making occurring from the consolidated offices in Knoxville, Tennessee. In particular:

(a) Corporate and other major decision-making occurs from the consolidated offices in Knoxville, Tennessee, although administrative employees frequently work remotely or from the Chapter 11 Debtors' mines in the United States;

(b) All of the senior executives of the Chapter 11 Debtors, including Xinergy, are residents of the United States;

(c) In order to fulfil the Canadian residency requirements of Ontario corporations, Xinergy has two Canadian directors;

(d) The majority of the management of the Chapter 11 Debtors, including Xinergy, is shared;

(e) Employee administration, human resource functions, marketing and communications decisions are made, and related actions taken, on behalf of all of the Chapter 11 Debtors, including Xinergy, in the United States;

(f) The Chapter 1 i Debtors, including Xinergy, share a cash management system that is largely funded by the U.S. Subsidiaries, overseen by employees of the United States-based Chapter 11 Debtors and located primarily in the United States;

(g) Other functions shared between the Chapter 11 Debtors, including Xinergy, are managed from the United States including: pricing decisions, business development decisions, accounts payable, accounts receivable and treasury functions;

(h) While Xinergy maintains a bank account with The Toronto Dominion Bank in Ontario, the Chapter 11 Debtors use this account to make Canadian denominated deposits and to pay for Canadian services. When additional funds are required, a transfer is made from the U.S. operating account at Xinergy Corp. Xinergy is dependent on the U.S. subsidiaries for substantially all of its funding requirements; and

(i) Other functions shared between the Chapter 11 Debtors, including Xinergy, are managed from the United States including: pricing decisions, business development decisions, accounts payable, accounts receivable and treasury functions.

17 As the Chapter 11 proceedings are foreign main proceedings, an order is to go under subsection 48(1) of the CCAA staying all proceedings against Xinergy.

Interim DIP Order

18 The Interim DIP Facility Order, inter alia:

(a) authorizes Xinergy Corp. to obtain post-petition financing pursuant to the DIP Facility up to an aggregate principal amount of $40 million;

(b) authorizes Xinergy and the other Chapter 11 Debtors to unconditionally guarantee all obligations arising under the DIP Facility;

(c) authorizes the Chapter 11 Debtors to use proceeds of the DIP Facility to pay in full the First Lien Loans (the holders of the First Lien Notes are the DIP lenders); and

(d) grants first priority super priority claims in connection with the DIP Facility.

19 The authorization by the U.S. Court to use the proceeds of the DIP Facility to pay out the First Lien Loans, called a "rollup" provision, is not something that can be ordered in a CCAA proceeding as subsection 11.2(1) of the CCAA provides that DIP security may not secure an obligation that existed prior to an Initial Order. However, the issue is whether our Court should recognize the U.S. Court order authorizing that DIP facility under the principles of comity recognized in section 44 of Part IV of the CCAA.

20 Such a provision has been recognized in *Hartford Computer Hardware Inc., Re* (2012), 94 C.B.R. (5th) 20 (Ont. S.C.J. [Commercial List]) by Morawetz J. (as he then was) under section 49 of the CCAA which permits an order to be made if the Court is satisfied that it is necessary to protect the debtor's property or is in the interests of its creditors.

21 It was obviously seen by the U.S. Court to be in the interests of Xinergy and the other Chapter 11 Debtors to make DIP order that it did. One question to consider is whether there would be any material adverse interest to any Canadian interests in recognizing the "rollup" features of the DIP facility. If there were such material adverse interest, it would put in play a consideration of that adverse interest vis-à-vis the principles of comity that speak to the recognition of an order made in a foreign main proceeding.

22 In this case, there are four unsecured creditors of Xinergy in Canada being (i) a director owed approximately $1,674, (ii) TMX Equity Transfer Services owed approximately $4,000, (iii) TMX owed $16,492, and (iv) the solicitors for Xinergy (who consent to the rollup DIP facility). The bank account in Canada had approximately $48,415 in it on April 6, 2015. The Canadian unsecured creditors, however, had no economic interest in that bank account as it was secured to the holders of the First Lien Notes. The DIP facility has not changed that, Deloitte, the proposed Information Officer, is of the view that there will be no material prejudice to the Canadian creditors if the Interim Dip Facility order is recognized in these proceedings, and I accept that view.

23 I am satisfied that the Interim DIP Facility Order should be recognized.

Other orders

24 The interim trading order made by the U.S. Court ordered on an interim basis certain restrictions on the trading of Xinergy stock. In light of the rules under the Internal Revenue Code in the United States, transfers of the stock may, through no fault of the Chapter 11 Debtors, deprive the Chapter 11 Debtors of important tax benefits. The Interim Trading order was made to protect against this potential harm to debtors in chapter 11 proceedings. It is appropriate to recognize it in this CCAA proceeding.

25 The relief granted by the U.S. Court in the Interim Cash Management Order will permit Xinergy and the other Chapter 11 Debtors to continue to operate in ordinary course, thereby preserving value for creditors. It is appropriate to recognize it in this CCAA proceeding.

26 Xinergy has requested an order appointing Deloitte as Information Officer and granting a super-priority charge up to a maximum of $100,000 for its fees and those of its counsel. It is appropriate to make such an order. The DIP lenders consent to the charge. The appointment of Deloitte will help facilitate these proceedings and the dissemination of information concerning the Chapter 11 proceeding. The Information Officer will: (i) act as a resource to the foreign representative in the performance of its duties; (ii) *act as an officer to the* Court, reporting to the Court on the proceedings, as required by the Court; and (iii) provide stakeholders of Xinergy with material information on the Chapter 11 proceeding. See *Lear Canada, Re* (2009), 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) at para. 23 per Pepall J. (as she then was).

27 For these reasons, I signed the orders as requested at the conclusion of the hearing.

Application granted.

End of Document

Tab 12

CITATION: Re: Performance Sports Group Ltd., 2016 ONSC 6800
COURT FILE NO.: CV-16-11582-00CL
DATE: 20161101

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PERFORMANCE SPORTS GROUP LTD., BAUER HOCKEY CORP., BAUER HOCKEY RETAIL CORP., BAUER PERFORMANCE SPORTS UNIFORMS CORP., BPS CANADA INTERMEDIATE CORP., BPS DIAMOND SPORTS CORP., EASTON BASEBALL/SOFTBALL CORP., KBAU HOLDINGS CANADA, INC., PERFORMANCE LACROSSE GROUP CORP., PSG INNOVATION CORP., BAUER HOCKEY RETAIL INC., BAUER HOCKEY, INC., BAUER PERFORMANCE SPORTS UNIFORMS INC., BPS DIAMOND SPORTS INC., BPS US HOLDINGS INC., EASTON BASEBALL/SOFTBALL INC., PERFORMANCE LACROSSE GROUP INC., PSG INNOVATION INC.

(Applicants)

BEFORE: Newbould J.

COUNSEL: *Peter Howard and Kathryn Esaw* , for the Applicants

Robert I. Thornton and Rachel Bengino, for the Proposed Monitor Ernst & Young Inc.

Bernard Boucher and John Tuzyk, for Sagard Capital Partners, L.P

David Bish and Adam Slavens, for Fairfax Financial Holdings Limited

Robert Staley, for the board of directors of Performance Sports Group Ltd.

Joseph Latham and Ryan Baulke, for the Ad Hoc Committee of certain term lenders

Tony Reyes and Evan Cobb, for Bank of America, the ABL DIP lender

HEARD: October 31, 2016

ENDORSEMENT

[1] On October 31, 2016 Performance Sports Group Ltd. ("PSG") and the other Applicants (collectively, the "Applicants" or the "PSG Entities") applied for and were granted protection under the CCAA and an Initial Order was signed, for reasons to follow. These are my reasons.

[2] PSG, a public company incorporated under British Columbia law and traded publicly on the Toronto and New York stock exchanges, is the ultimate parent of the other PSG Entities, as well as certain entities in Europe which are not applicants in the this proceeding.

[3] The PSG Entities are leading designers, developers and manufacturers of high performance sports equipment and related apparel. Historically focused on hockey, the PSG Entities expanded their business to include equipment and apparel in the baseball/softball and lacrosse markets. The hockey business operates under the BAUER, MISSION and EASTON brands; the baseball/softball business operates under the EASTON and COMBAT brands, and the lacrosse business operates under the MAVERIK and CASCADE brands.

[4] The hockey and baseball/softball markets are the PSG Entities' largest business focus, generating approximately 60% and 30% of the Applicants' sales in fiscal 2015, respectively, with remaining sales derived from the lacrosse and apparel businesses. The PSG Entities have a diverse customer base, including over 4,000 retailers across the globe and more than 60 distributors. In fiscal 2015, approximately 58% of the PSG Entities' total sales were in the U.S., approximately 24% were in Canada, and approximately 18% were in the rest of the world.

[5] The PSG Entities are generally structured so that there is a Canadian and U.S. subsidiary for each major business line. Some of the entities also perform specific functions such as risk management, accounting etc. for the benefit of the other PSG Entities. The Applicants have commenced parallel proceedings in the U.S. under Chapter 11 of the US Bankruptcy Code in the Bankruptcy Court for the District of Delaware.

Employees and benefits

[6] As of September 30, 2016, the Applicants had 728 employees globally, with 224 employees in Canada, 430 in the U.S., 23 in Asia and 51 in Europe.

[7] The majority of the PSG Entities' workforce is non-unionized. Canada is the only location with unionized employees, who are employed by Bauer Canada in Blainville, Quebec. 33 of 119 full-time Blainville situated employees are members of the United Steelworkers' Union of America Local 967 and are subject to a five-year collective bargaining agreement expiring on November 30, 2017.

[8] Under the collective bargaining agreement with the unionized employees in Blainville, Quebec, Bauer Canada maintains a simplified defined contribution pension plan registered with Retraite Quebec. Under the plan, Bauer Canada matches employee contributions up to C$0.35/per hour worked by the employee up to a maximum of 80 hours bi-weekly.

[9] Bauer Canada provides a supplemental pension plan (the "Canadian SERP") for nine former executives which is not a registered pension plan and does not accept new participants. There is no funding obligation under these plans. As at May 31, 2016, the Canadian SERP had an accrued benefit obligation of approximately C$4.53 million. The PSG Entities do not intend to continue paying the Canadian SERP obligations during the CCAA proceedings.

[10] The PSG Entities provide a post-retirement life insurance plan to most Canadian employees. The life insurance plan is not funded and as at May 31, 2016 had an accrued benefit obligation of C$614,000. In February, 2016, the PSG Entities closed a distribution facility in Mississauga, Ontario. Approximately 51 employees belonging to the Glass, Molders, Pottery, Plastics and Allied Workers International Union were terminated in January and February 2016 because of the closure.

[11] Due to the consolidation of the COMBAT operations with the EASTON operations, the PSG Entities terminated the employment of an additional 85 individuals between July and October, 2016, of whom approximately 77% were employees located in Canada and 23% were

employees located in the U.S. The workforce reductions, primarily related to consolidation of the COMBAT operations, have resulted in the number of the PSG Entities' employees falling by approximately 15% since the end of fiscal 2016 and approximately 19% since the end of calendar 2015.

Assets and liabilities

[12] As at September 30, 2016, the Applicants had assets with a book value of approximately $594 million and liabilities with a book value of approximately $608 million.

[13] The majority of the Applicants' assets are comprised of accounts receivable, inventory and intangible assets. The Applicants' intellectual property and brand assets are a significant part of their businesses. The PSG Entities' patent portfolio includes hundreds of issued and pending patent applications covering a number of essential business lines. In addition to their patent portfolio, the PSG Entities have a number of registered trademarks to protect their brands.

[14] The major liabilities of the PSG Entities are obligations under:

(a) a term loan facility (the "Term Loan Facility"): PSG is the borrower with a syndicate of lenders (the "Term Lenders") participating in the Term Loan Facility. The Term Loan Facility is governed by the term loan credit agreement dated as of April 15, 2014 (the "Term Loan Agreement"). As at October 28, 2016, approximately $330.5 million plus $1.4 million accrued interest was outstanding under the Term Loan Facility.

(b) an Asset-based revolving facility (the "ABL Facility" and together with the Term Loan Facility, the "Facilities"): a number of the PSG Entities are borrowers and BOA is the agent for a syndicate of lenders (the "ABL Lenders" and, together with the Term Lenders, the "Secured Lenders") participating in the ABL Facility. The ABL Facility is governed by the revolving ABL credit agreement dated as of April 15, 2014 (the "ABL Agreement"). As at October 28, 2016, approximately $159 million was outstanding under the ABL Facility.

Problems leading to the CCAA filing

[15] A number of industry-wide and company-specific events have caused significant financial difficulties for the Applicants in the past 18 months:

a. Several key customers, retailers of sports equipment and apparel and sporting goods stores, abruptly filed for bankruptcy in late 2015 and 2016, resulting in substantial write-offs of accounts receivable and reduced purchase orders.

b. A marked and unexpected underperformance in the two most significant of the PSG Entities' business lines, being the Bauer Business and the Easton Business, has had an extremely negative effect on the PSG Entities' overall profitability.

c. The PSG Entities' financial results have been negatively affected by currency fluctuations.

d. The PSG Entities reduced their earnings guidance for FY2016 in response to their recent financial difficulties, which triggered a sharp decline in their common share price. Due that fall in share prices, the PSG Entities incurred considerable professional fees defending a recent class action and responding to inquiries by U.S. and Canadian regulators as to their continuous disclosure record.

e. The PSG Entities have triggered an event of default under their Facilities as a result of their failure to file certain reporting materials required under U.S. and Canadian securities law. The PSG Entities have been operating under the forbearance of their secured lenders since August 29, 2016, but that forbearance expired on October 28, 2016, leaving the PSG Entities in default under their Facilities.

Anticipated stalking horse bid sales process

[16] The Applicants, in response to the myriad of issues leading to the current liquidity crisis and in particular in response to their failure to timely file the reporting materials, engaged in a thorough review of the PSG Entities' strategic alternatives. The PSG Entities concluded that

negotiating a going-concern sale of their businesses was the optimal course to maximize value, and structured a process by which do so.

[17] As part of that process, the PSG Entities have entered into an asset purchase agreement (the "Stalking Horse Agreement") for the sale of substantially all of their assets to a group of investors led by Sagard Capital Partners, L.P., the holder of approximately 17% of the shares of PSG, and Fairfax Financial Holdings Limited for a purchase price of $575 million. The Stalking Horse Agreement contemplates that the Applicants will continue as a going concern under new ownership, their secured debt will be fully repaid and payment of trade creditors. It further contemplates the preservation of a significant number of jobs in Canada and the U.S. The bid contemplated under the Stalking Horse Agreement will, subject to Court approval, serve as the stalking horse bid in a CCAA/Chapter 11 sales process to take place over the next 60 days of the proceedings and which is expected to conclude early in 2017. Approval of the sales process will be sought on the come-back motion later in November.

Analysis

[18] I am quite satisfied that each of the PSG Entities are debtor companies within the meaning of the CCAA and that they are insolvent with liabilities individually and as a whole over the threshold of $5 million.

[19] There are two DIP loans for which approval is sought, being an ABL DIP and a Term Loan DIP, as follows:

> (a) A group comprised of members of the ABL Lenders ("ABL DIP Lenders"), will provide an operating loan facility of $200 million (the "ABL DIP Facility") pursuant to an ABL DIP Credit Agreement (the "ABL DIP Credit Agreement"). The advances are expected to be made progressively and on an as-needed basis. All receipts of the Applicants will be applied to progressively replace the existing indebtedness under the ABL Credit Agreement, which is in the amount of $160 million. Accordingly, the facility provided by the ABL DIP Lenders is estimated provide up an additional $25 million of liquidity as compared to what is currently provided under the ABL Facility.

(b) The Sagard Group (the "Term Loan DIP Lenders" and together with the ABL DIP Lenders, the "DIP Lenders"), will provide a term loan facility (the "Term Loan DIP Facility" and together with the ABL DIP Facility, the "DIP Facilities") in the amount of $361.3 million pursuant to a Term Loan DIP Credit Agreement (the "Term Loan DIP Credit Agreement" and together with the ABL DIP Credit Agreement, the "DIP Agreements"). The advances are expected to be made progressively as the funds are needed. The Term Loan DIP Facility will be applied to refinance the existing indebtedness under the Term Loan Credit Agreement, in the amount of approximately $331.3 million, to finance operations and to pay expenditures pertaining to the restructuring process. Accordingly, the Term Loan DIP Facility will provide approximately $30 million in new liquidity to fund ongoing operating and capital expenses during the restructuring proceedings.

[20] The DIP Facilities were negotiated after the Applicants retained Centerview Partners LLC to assist in putting the required interim financing in place. The Applicants, with the assistance of Centerview, determined that obtaining interim financing from a third party would be extremely challenging, unless such facility was provided either junior to the ABL Facility and Term Loan Facility, on an unsecured basis, or paired with a refinancing of the existing indebtedness. The time was tight and in view of the existing charges against the assets and the very limited availability of unencumbered assets, it was thought that there would be little or no interest for third parties to act as interim financing providers. Accordingly, the Applicants decided to focus their efforts on negotiating DIP financing with its current lenders and stakeholders.

[21] I am satisfied that the DIP Facilities should be approved, taking into account the factors in section 11.2(4) of the CCAA. Without DIP financing, the PSG Entities do not have sufficient cash on hand or generate sufficient receipts to continue operating their business and pursue a post-filing sales process. The management of the PSG Entities' business throughout the CCAA process will be overseen by the Monitor, who will supervise spending under the ABL DIP

Facility. The Monitor[1] is supportive of the DIP Facilities in light of the fact that the Applicants are facing a looming liquidity crisis in the very short term and the Applicants, Centerview and the CRO have determined that there is little alternative other than to enter into the proposed DIP Agreements.

[22] Section 11.2(1) of the CCAA provides that security for a DIP facility may not secure an obligation that existed before the order authorizing the security was made. The effect of this provision is that advances under a DIP facility may not be used to repay pre-filing obligations. In this case, the ABL DIP Facility is a revolving facility. Under its terms, receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility. The applicants submit that in this case, the ABL DIP Facility preserves the pre-filing status quo by upholding the relative pre-stay priority position of each secured creditor. By requiring that the PSG Entities only use post-filing cash receipts to pay down the accrued balance under the revolving credit facility, the ABL DIP Lenders are in no better position with respect to the priority of their pre-filing debt relative to other creditors. I accept that no advances under the ABL DIP Facility will be used to pay pre-filing obligations and there has been inserted in the Initial Order a provision that expressly prevents that. The provision that receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility is approved.

[23] The PSG Entities seek authorization to pay pre-filing amounts owing to the following suppliers, so long as these payments are approved by the Monitor:

(a) Foreign suppliers located throughout Asia to which the PSG Entities predominantly source their manufacturing operations;

(b) Domestic suppliers located in the U.S. and Canada which supply critical goods and services;

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[1] Ernst & Young has filed a Report as the Proposed Monitor. For ease of reference I refer to Ernst &Young in this decision as the Monitor.

(c) Suppliers in the Applicants' extensive global shipping, warehousing and distribution network, which move raw materials to and from the Applicants' global manufacturing centers and to move finished products to the Applicants' customers;

(d) Those suppliers who delivered goods to the PSG Entities in the twenty days before October 31, 2016 - all of whom are entitled to be paid for their services under U.S. bankruptcy law; and

(e) Third parties such as contractors, builders and repairs, who may potentially assert liens under applicable law against the PSG Entities.

[24] There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. The recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern. See *Re Canwest Global Communications Corp.* (2009), 59 C.B.R. (5th) 72 at para. 43.

[25] I am satisfied that an order should be made permitting the payments as requested. Any interruption of supply or service by the critical suppliers could have an immediate materially adverse impact on the PSG Entities' business, operations and cash flow, and could thereby seriously jeopardize their ability to restructure and continue as a going concern. Certain of the critical suppliers may not be able to continue to operate if not paid for pre-filing goods and services. The PSG Entities do not have any readily available means to replace these suppliers or, alternatively, to compel them to supply goods and services. There is a substantial risk that certain of the critical suppliers, including foreign suppliers, will interrupt supply if the pre-filing arrears that they are owed are not paid, all of which would risk unanticipated delays, interruptions and shutdowns. Payment of amounts in excess of $10,000 will require Monitor approval.

[26] The PSG Entities seek approval to continue the use of their current Transfer Pricing Model to operate their business in the ordinary course. The Transfer Pricing Model is intended to ensure that each individual PSG Entity is compensated for the value of their contribution to the PSG Entities' overall business. The Applicants say that to ensure that the PSG Entities' intercompany transfers are not inhibited and stakeholder value is not eroded with regard to any particular entity, the Court should approve use of the Transfer Pricing Model. No doubt section 11 of the CCAA gives the Court jurisdiction to make the order sought and to continue the business as it has been operated prior to the CCAA and in this case it is desirable in light of the intention to sell the business as a going concern. I approve the continued use of the Transfer Pricing Model. In doing so, I am not to be taken as making any judgment as to the validity of the Transfer Pricing Model, i.e. whether it would pass muster with the relevant taxing authorities.

[27] The PSG Entities seek an administrative charge in the amount of $7.5 million, and it is supported by the Monitor. The charge is to cover the fees and disbursements of the Monitor, U.S. and Canadian counsel to the Monitor, U.S. and Canadian counsel to the Applicants and counsel to the directors of the Applicants, and as defined in the APL DIP Agreement, and is to cover the fees and disbursements incurred both before and after the making of the Initial Order.

[28] I realize that the model order provides for an administration charge to protect fees and disbursements incurred both before and after the order is made by of the Monitor, counsel to the Monitor and the Applicant's counsel. In this case, I raised a concern that past fees for a broad number of lawyers, including defence class action counsel in the U.S., could be paid from cash whereas it appeared from the material that there may be unpaid severance or other payments owing to employees in Canada that would not be paid.

[29] Normally it is not an issue what an administration charge covers, with professionals taking care when advising companies in financial trouble and contemplating CCAA proceedings that they remain current with their billings. The CCAA does not expressly state whether an administration charge can or cannot cover past outstanding fees or disbursements, but the language would appear to imply that it is to cover only current fees and disbursement. Section 11.52(1) provides:

> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[30] Regarding (a), a Monitor is appointed in the Initial Order and its duties are performed during the CCAA proceeding, not before. Regarding (b), the language "for the purpose of proceedings under this Act" would appear to relate to proceedings, and not some other work such as a lawyer for the debtor defending litigation against the debtor. The same can be said regarding the language in (c) "effective participation in proceedings under this Act".

[31] In response to my concerns about the Canadian employees being protected against past unpaid obligations, I was advised that it is the intention of the applicants to bring a motion on the come-back hearing to permit all past outstanding amounts to be paid to the Canadian employees. No counsel appearing for any of the other parties voiced any concern with that. In the circumstances I permitted the administration charge to be granted. If no such motion is brought on the come-back hearing or it is not granted, the administration charge should be revisited.

[32] It appears clear, however, that an administration charge under section 52.11(1) can only be granted to cover work done in connection with a CCAA proceeding. Thus it is not possible for such a charge to protect fees of lawyers in other jurisdictions who may be engaged by the debtor either in foreign insolvency proceedings or other litigation. In the circumstances, the administration charge in this case shall not be used to cover the fees and disbursements of any of the applicants' lawyers in the U.S. chapter 11 proceedings or in any class action or other suit brought against any of the applicants. It may be that in the future, thought should be given as to

whether it is appropriate at all to provide for an administration charge to cover pre-filing expenses.

[33] The Canadian PSG Entities are expected to have positive net cash flows during the CCAA proceeding. Part of that money will be used to fund the deficit expected to be experienced by the US PSG Entities during the same period. At this time of year, due to hockey sales, the Canadian PSG Entities fund the US PSG Entities. The Applicants seek authorization to effect intercompany advances, secured by an intercompany charge. It is said that as PSG Entities' business is highly integrated and depends on intercompany transfers, the intercompany charge will preserve the status quo between PSG Entities.

[34] Intercompany charges to protect intercompany advances have been approved before in CCAA proceedings under the general power in section 11 to make such order as the court considers appropriate. See *Walter Energy Canada Holdings, Inc. (Re),* 2016 BCSC 107 and *Fraser Papers Inc. (Re),* 2009 CanLII 32698.

[35] In this case, I also raised the issue about cash leaving Canada during the CCAA process while unpaid amounts owing to employees in Canada were outstanding. Apart from the comfort of the anticipated motion on the come-back hearing to pay these unpaid amounts, the Monitor is of the view that the intercompany charge is the best way to protect the Canadian creditors. The Monitor states that while it is difficult at this juncture to ascertain whether the intercompany charge is sufficient to protect the interest of each individual estate, considering that the Stalking Horse bid contemplates that there should be substantial funds available after the payment of the secured creditors' claims, the intercompany charge appears to offer some measure of protection to the individual estates. In view of the foregoing, the Proposed Monitor considers that the intercompany charge is reasonable in the circumstances. I approve the intercompany charge.

[36] A standard directors' charge for $7.5 million is supported by the Monitor and it is approved, as is the request that Brian J. Fox of Alvarez & Marsal North America, LLC be appointed as the Chief Restructuring Officer of the PSG Entities. Given the anticipated complexity of their insolvency proceedings, which include plenary proceedings in Canada and the United States, the PSG Entities will benefit from a CRO.

Newbould J.

Date: November 1, 2016

Court File No.:

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

AND IN THE MATTER OF ROCKPORT BLOCKER, LLC, THE ROCKPORT GROUP HOLDINGS, LLC, TRG 1-P HOLDINGS, LLC, TRG INTERMEDIATE HOLDINGS, LLC, TRG CLASS D, LLC, THE ROCKPORT GROUP, LLC, THE ROCKPORT COMPANY, LLC, DRYDOCK FOOTWEAR, LLC, DD MANAGEMENT SERVICES LLC AND ROCKPORT CANADA ULC (THE "DEBTORS")

APPLICATION OF ROCKPORT BLOCKER, LLC, UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDINGS COMMENCED AT TORONTO

BRIEF OF AUTHORITIES OF THE APPLICANT, ROCKPORT BLOCKER, LLC
(Re: Application Returnable May 16, 2018)

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