

**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 TK HOLDINGS INC., AND THOSE OTHER
COMPANIES LISTED ON SCHEDULE "A" HERETO (collectively, the "Chapter
11 Debtors")**

**AND IN THE MATTER OF TAKATA CORPORATION, AND THOSE OTHER
COMPANIES LISTED ON SCHEDULE "B" HERETO (the "Japanese Debtors",
and collectively with the Chapter 11 Debtors, the "Debtors")**

**APPLICATION OF TK HOLDINGS INC. AND TAKATA CORPORATION
UNDER SECTION 46 OF THE
*COMPANIES' CREDITORS ARRANGEMENT ACT***

BRIEF OF AUTHORITIES

**(re: Order Recognizing Japanese Sale Approval)
(Returnable May 17, 2018)**

May 10, 2018

McCarthy Tétrault LLP
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6
Fax: (416) 868-0673

Heather Meredith LSUC#: 48354R
Tel: (416) 601-8342
Email: hmeredith@mccarthy.ca

Eric S. Block LSUC#: 47479K
Tel: 416-601-7792
Email: eblock@mccarthy.ca

Trevor Courtis LSUC#: 67715A
Tel: (416) 601-7643
Email: tcourtis@mccarthy.ca

Lawyers for the Foreign Representatives

TO: The Service List

AND TO: List of Plaintiffs – Japanese Debtors

**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 TK HOLDINGS INC., AND THOSE OTHER COMPANIES
LISTED ON SCHEDULE "A" HERETO (collectively, the "Chapter 11 Debtors")**

**AND IN THE MATTER OF TAKATA CORPORATION, AND THOSE OTHER
COMPANIES LISTED ON SCHEDULE "B" HERETO (the "Japanese Debtors", and
collectively with the Chapter 11 Debtors, the "Debtors")**

**APPLICATION OF TK HOLDINGS INC. AND TAKATA CORPORATION
UNDER SECTION 46 OF THE
*COMPANIES' CREDITORS ARRANGEMENT ACT***

BRIEF OF AUTHORITIES

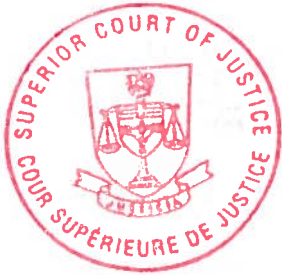
**(re: Order Recognizing Japanese Sale Approval)
(Returnable May 17, 2018)**

INDEX

Tab.	Documents
1.	Confirmation Recognition Order, Order of the Ontario Superior Court of Justice dated March 14, 2018 (excluding schedules)
2.	<i>Ultra Petroleum Corp., Re</i> , 2017 YKSC 23
3.	<i>Hartford Computer Hardware Inc., Re</i> , 2012 ONSC 964
4.	<i>Massachusetts Elephant & Castle Group Inc., Re</i> , 2011 ONSC 4201
5.	<i>Payless Holdings LLC, Re</i> , 2017 ONSC 4607
6.	<i>Babcock & Wilcox Canada Ltd., Re</i> , 2000 CarswellOnt 704 (SCJ)
7.	<i>Xerium Technologies Inc., Re</i> , 2010 ONSC 3974
8.	<i>Matlack Inc., Re</i> , 2001 CarswellOnt 1830 (SCJ)
9.	<i>In re Allied Systems Holdings Inc.</i> , Sale Approval Recognition and Vesting Order (First Lien Agents' Transaction), Order of the Ontario Superior Court of

Tab.	Documents
	Justice dated October 10, 2013, Court File No. 12-CV-9575-00CL

Tab 1



Court File No. CV-17-11857-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE MR.) WEDNESDAY, THE 14TH
JUSTICE HAINEY) DAY OF MARCH, 2018
)

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

**AND IN THE MATTER OF TK HOLDINGS INC., AND THOSE OTHER COMPANIES
LISTED ON SCHEDULE "A" HERETO ("collectively, the "Chapter 11 Debtors")**

**AND IN THE MATTER OF TAKATA CORPORATION, AND THOSE OTHER
COMPANIES LISTED ON SCHEDULE "B" HERETO (the "Japanese Debtors", and
collectively with the Chapter 11 Debtors, the "Debtors")**

**APPLICATION OF TK HOLDINGS INC. AND TAKATA CORPORATION UNDER
SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT***

CONFIRMATION RECOGNITION ORDER

THIS MOTION, made by TK Holdings Inc. in its capacity as foreign representative (the "U.S. Foreign Representative") of the Chapter 11 Debtors, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") for an order that, among other things, recognizes and gives full force and effect in all provinces and territories of Canada to certain Orders issued by the United States Bankruptcy Court for the District of Delaware (the "U.S. Bankruptcy Court") in the Chapter 11 Proceedings, and for certain related relief, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the affidavit of Kenneth Bowling, sworn March 6, 2018 (the “**Bowling Affidavit**”) and the exhibits attached thereto (including the Fifth Amended Joint Chapter 11 Plan of Reorganization of the Chapter 11 Debtors (the “**Fifth Amended Plan**” and as supplemented by the Plan Supplement and any anything incorporated into the Fifth Amended Plan hereafter, including all exhibits, schedules, and supplements accorded therein, and as otherwise amended in accordance with the Confirmation Order, the “**Chapter 11 Plan**”)), the Second Report by FTI Consulting Canada Inc., in its capacity as Information Officer (the “**Information Officer**”), dated December 28, 2017 (the “**Second Report**”) and the Third Report by the Information Officer (the “**Third Report**”), each filed,

AND UPON HEARING the submissions of Canadian counsel for the U.S. Foreign Representative, counsel for the Information Officer, counsel for the Plan Sponsor, and any such other counsel as were present:

Defined Terms and Service

1. **THIS COURT ORDERS** that all capitalized terms used but not defined herein have the meaning given to them in the Bowling Affidavit or the Chapter 11 Plan.
2. **THIS COURT ORDERS** that the time for service of each of the Notice of Motion, the Motion Record, the Second Report and the Third Report is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

Recognition of U.S. Orders

3. **THIS COURT ORDERS** that the following orders, copies of which (without exhibits) are attached as **Schedules “C” to “H”** of this Order and attached (with exhibits) as **Exhibits “C”**

and “J” to “N” of the Bowling Affidavit, of the U.S. Bankruptcy Court made in the Chapter 11 Proceedings 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 Findings of Fact, Conclusions of Law, and Order Confirming the Fifth Amended Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and its Affiliated Debtors (“**Confirmation Order**”) dated February 16, 2018;
- (b) the Corrected Order Pursuant to 11 U.S.C. §§105(a), 362, 363(b), 503, and 507, and Fed. R. Bankr. P. 4001 and 6004 (I) Authorizing Debtors to Enter Into and Perform Under Restructuring Support Agreement; (II) Approving Plan Sponsor Protections; and (III) Modifying the Automatic Stay dated December 13, 2017;
- (c) the Order Pursuant to 11 U.S.C. §§502(b)(9) and 105(a), Fed. R. Bankr. P. 2002, 3001, 3002, 3003(c)(3), 5005, and 9007, and Local Rules 2002-1(e), 3001-1, and 3003-1 to (I) Establish Supplemental Deadline and Related Procedures for Filing Proofs of Claim by, and (II) Approve Procedures for Providing Notice of Supplemental Bar Date, and Other Important Dates and Information to, Certain Potential PSAN Inflater Claimants that Purchased Vehicles Subsequent to the Commencement of the Chapter 11 Cases dated December 18, 2017;
- (d) the Order Pursuant to 11 U.S.C. §§105, 502, 1125, 1126, and 1128, Fed. R. Bankr. P. 2002, 3003, 3016, 3017, 3018, 3020, and 9006, and Local Rules 2002-1, 3017-1, and 9006-1 for Entry of an Order (I) Approving the Proposed Disclosure Statement and the Form and Manner of the Notice of a Hearing Thereon, (II) Establishing Solicitation and Voting Procedures, and (III)

Establishing Notice and Objection Procedures for Confirmation of the Debtors' Plan dated January 5, 2018;

- (e) the Order Sustaining Debtors' Third Non-Substantive Omnibus Objection to Claims (Incorrect Debtor Claims) dated February 2, 2018; and
- (f) the Order Pursuant to 11 U.S.C. §§ 502(c) and 105(a) Estimating the Maximum Amount of Certain Contingent, Unliquidated, and Disputed Claims for Purposes of Establishing Disputed Claims Reserves Under Debtors' Proposed Joint Chapter 11 Plan of Reorganization, dated February 26, 2018.

Releases, Injunctions and Sale

4. **THIS COURT ORDERS AND DECLARES** that the compromises, arrangements, releases, discharges and injunctions contained and referenced in, and the sale and transfer of the Purchased Assets to the Plan Sponsor in accordance with the terms described and set forth in, the Confirmation Order and the Chapter 11 Plan are hereby sanctioned, approved, recognized and given full force and effect in all provinces and territories of Canada in accordance with and subject to the terms of the Confirmation Order and the Chapter 11 Plan.

Information Officer

5. **THIS COURT ORDERS** that the Second Report and the Third Report and the activities of the Information Officer described therein be and are hereby approved.

Termination of Proceedings

6. **THIS COURT ORDERS** that the Information Officer shall file a certificate (the "**Information Officer's Certificate**") in substantially the form attached as **Schedule "I"** of this

Order certifying that (i) the Chapter 11 Proceedings have been terminated, and (ii) the Japanese Proceedings have been terminated. Upon filing the Information Officer's Certificate, (a) the Stay Period as defined in the Supplemental Order (Foreign Main Proceeding) issued by this Court on June 28, 2017 (the "**Supplemental Order**") as amended by this Court in the Japanese Recognition Order, dated September 1, 2017 ("**Japanese Recognition Order**") shall terminate and (b) these Canadian recognition proceedings shall be terminated.

7. **THIS COURT ORDERS** that notwithstanding section 14(b) of the Supplemental Order, as amended by this Court in the Japanese Recognition Order, the Information Officer is only required to file a further report upon becoming aware of the occurrence of a material change, and for greater certainty, the Information Officer shall have no obligation or duty to make any inquiries or to conduct any investigations as to whether a material change has occurred.

8. **THIS COURT ORDERS** that the Information Officer may rely on (i) written notice from the U.S. Foreign Representative and/or the Legacy Trustee, that authority to close the Chapter 11 Proceedings has been sought pursuant to section 5.18 of the Chapter 11 Plan and receipt of the Order of the U.S. Bankruptcy Court terminating the Chapter 11 Proceedings, and (ii) written notice from the Japanese Foreign Representative that the Japanese Proceedings have been terminated, and shall incur no liability with respect to the delivery or filing of the Information Officer's Certificate, save and except for any gross negligence or wilful misconduct on its part.

9. **THIS COURT ORDERS** that upon filing of the Information Officer's Certificate:

- (a) FTI Consulting Canada Inc. ("**FTI**") shall be discharged as Information Officer of the Debtors and all duties associated therewith. Notwithstanding its discharge,

FTI shall remain the Information Officer for the performance of such incidental duties as may be required to complete the administration of these proceedings and shall continue to have the benefit of all provisions of all Orders made in these proceedings, including all approvals, and protections and stays of proceedings in favour of FTI in its capacity as Information Officer;

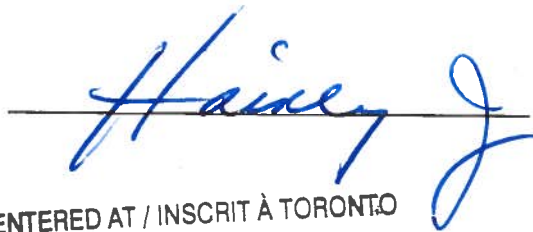
- (b) FTI and its counsel, Bennett Jones LLP (“**BJ**”), and counsel to the Foreign Representatives in these proceedings, McCarthy Tétrault LLP (collectively with BJ, “**Counsel**”), are released and discharged from any and all liability that they now or may hereafter have by reason of, or in any way arising out of, the acts and omissions while acting in their capacity as Information Officer or Counsel respectively in these proceedings, save and except for any gross negligence or willful misconduct on their part.

Aid and Assistance

10. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States of America or elsewhere, to give effect to this Order and to assist the Chapter 11 Debtors, the U.S. 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 U.S. 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 U.S.

Foreign Representative, and the Information Officer and their respective agents in carrying out the terms of this Order.

11. **THIS COURT ORDERS** that each of the Chapter 11 Debtors, the U.S. 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.

A handwritten signature in blue ink, appearing to read "Hainey J", is written over a horizontal line.

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

MAR 14 2018

PER / PAR:

Handwritten initials in blue ink, possibly "NS", are written next to the "PER / PAR:" label.

SCHEDULE "A" – Chapter 11 Debtors

1. TK Holdings Inc.
2. Takata Americas
3. TK Finance, LLC
4. TK China, LLC
5. TK Mexico Inc.
6. TK Mexico LLC
7. Interiors in Flight, Inc.
8. Takata Protection Systems Inc.
9. TK Holdings de Mexico S. de R.L. de C.V.
10. Industrias Irvin de Mexico, S.A. de C.V.
11. Takata de Mexico, S.A. de C.V.
12. Stroshe-Mex, S. de R.L. de C.V.

SCHEDULE “B” – Japanese Debtors

1. Takata Corporation
2. Takata Kyushu Corporation
3. Takata Service Corporation

IN THE MATTER OF APPLICATION OF AN APPLICATION BY TK HOLDINGS INC.
AND TAKATA CORPORATION UNDER SECTION 46 OF THE *COMPANIES'*
CREDITORS ARRANGEMENT ACT

Court File No. CV-17-11857-00CL

**ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding Commenced at Toronto

**PLAN CONFIRMATION
RECOGNITION ORDER**

McCarthy Tétrault LLP

Toronto Dominion Bank Tower
Toronto, ON M5K 1E6
Fax: (416) 868-0673

Heather Meredith LSUC#: 48354R

Tel: (416) 601-8342
Email: hmeredith@mccarthy.ca

Eric S. Block LSUC #: 47479K

Tel: (416) 601-7792
Email: eblock@mccarthy.ca

Trevor Courtis LSUC#: 67715A

Tel: (416) 601-8342
Email: tcourtis@mccarthy.ca

Adrienne Ho LSUC#: 68439N

Tel: (416) 601-8919
Email: aho@mccarthy.ca
Lawyers for the Foreign Representatives
DOCS 17458140

Tab 2

2017 YKSC 23
Yukon Territory Supreme Court

Ultra Petroleum Corp., Re

2017 CarswellYukon 38, 2017 YKSC 23, [2017] B.C.W.L.D. 3276, 278 A.C.W.S. (3d) 469

ULTRA PETROLEUM CORP. (Petitioner)

L.F. Gower J.

Judgment: March 27, 2017
Docket: Whitehorse S.C. 16-A0023

Counsel: Paul W. Lackowicz, for Petitioner

Subject: Civil Practice and Procedure; Insolvency; International

APPLICATION by company for order recognizing and giving full force and effect to claims bar order and confirmation order granted by United States bankruptcy court.

L.F. Gower J.:

INTRODUCTION

1 This is an application by Ultra Petroleum Corp. ("Ultra Petroleum") in its capacity as a foreign representative of itself pursuant to Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), for an order recognizing and giving full force and effect to: (1) a Claims Bar Order granted by the United States Bankruptcy Court, Southern District of Texas, Houston Division (the "US Bankruptcy Court") on May 3, 2016, *nunc pro tunc*; and (2) a Confirmation Order granted by the US Bankruptcy Court on March 14, 2017 (the "Confirmation Order").

2 Ultra petroleum is a Yukon corporation incorporated pursuant to the laws of the Yukon Territory, with a registered office located in Whitehorse, Yukon. Through its direct and indirect wholly owned subsidiaries it owns oil and gas properties in Wyoming, Utah and Pennsylvania, in the United States.

3 On April 29, 2016, Ultra Petroleum and a number of its subsidiaries (the "Chapter 11 debtors") commenced voluntary reorganization proceedings in the US Bankruptcy Court by each filing a voluntary petition for relief under Chapter 11 of Title 11 of the *United States Code*. Notice of the Chapter 11 proceedings was served upon over 6000 creditors or potential creditors of the Chapter 11 debtors. Three of those potential creditors are in Canada: Emera Energy Services Inc., Mowbrey Gil LLP and Enerplus Resources (USA) Corporation. None has filed proofs of claim in the Chapter 11 proceedings.

4 On May 3, 2016, the US Bankruptcy Court granted a number of orders, including an order authorizing Ultra Petroleum to act as a foreign representative of itself for the purposes of the application made to this Court on May 13, 2016.

5 On May 17, 2016, Veale J. of this Court granted an order which, among other things:

- a) appointed Ultra Petroleum as foreign representative of itself pursuant to s. 45 of the CCAA in respect of the Chapter 11 proceedings;
- b) recognized the Chapter 11 proceedings;

- c) granted a stay of proceedings against Ultra Petroleum;
- d) restrained persons with agreements with Ultra Petroleum for the supply of goods and services from discontinuing, altering or terminating the supply of such goods and services during the stay of proceedings; and
- e) granted a stay of proceedings against the former, current and future officers and directors of Ultra Petroleum.

ISSUES

6 There are two issues in this application:

- 1) Should the Claims Bar Order be recognized and given full force and effect in Canada by this Court, *nunc pro tunc*?
- 2) Should the Confirmation Order be recognized and given full force and effect in Canada by this Court?

ANALYSIS

1. The Claims Bar Order

7 The purpose of Part IV of the *CCAA* is to effect cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada. Orders under this Part are intended, among other things, to promote cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions and to promote the fair and efficient administration of cross-border insolvencies. This also protects the interests of debtors, creditors and other interested persons. See: *Horsehead Holding Corp., Re*, 2016 ONSC 958 (Ont. S.C.J. [Commercial List]), at para. 15; and s. 44 of the *CCAA*.

8 In cross-border insolvencies, Canadian and US courts have made efforts to complement, coordinate and, where appropriate, accommodate the proceedings of the other in order to enable cross-border enterprises to restructure. 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. See *Babcock & Wilcox Canada Ltd., Re*, [2000] O.J. No. 786 (Ont. S.C.J. [Commercial List]), at paras. 9 and 10.

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

- a) The recognition of comity and cooperation between courts of various jurisdictions is 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 sufficiently 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) Plans that allow the enterprise to reorganize globally, especially where there is an established interdependence on a transnational basis, should be promoted. To the extent reasonably practicable, one jurisdiction should take charge of the principle administration of the enterprises organization, were such principal type approach will facilitate a potential reorganization and will respect the claims of stakeholders and does not detract from the net benefits that may be available from alternative approaches.
- e) The recognition that the appropriate level of court involvement depends to a significant degree upon the court's nexus to the enterprise. Where one jurisdiction has an ancillary role, the court in the ancillary jurisdiction

should be provided with information on an ongoing basis and be kept apprised of developments regarding the re-organizational efforts in the foreign jurisdiction. Further, stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.

f) Notice as effective as is reasonably possible should be given to all affected stakeholders, with an opportunity for such stakeholders to come back into court to review the granted order and seek its variation.

See: *Babcock*, cited above, at para. 21; and *Xerium Technologies Inc., Re*, 2010 ONSC 3974 (Ont. S.C.J. [Commercial List]), at paras. 26 and 27.

10 The second affidavit of Garland Shaw confirms that the Claims Bar Order has been fully complied with by the Chapter 11 debtors, including Ultra Petroleum.

11 Further, as stated above, the three potential creditors of Ultra Petroleum that have addresses in Canada, have been given notice of this application.

12 As such, it is appropriate that the Claims Bar Order be recognized by this Court, notwithstanding that the recognition is *nunc pro tunc*. This recognition will ensure certainty with regard to the effect of the Claims Bar Order in Canada, with respect to creditors of Ultra Petroleum. Such recognition will also foster comity and cooperation between this Court and the US Bankruptcy Court, as well as supporting the global reorganization of the Chapter 11 debtors.

13 I note that the Court of Queen's Bench of Alberta also recently recognized, *nunc pro tunc*, a claims bar order granted by the US Bankruptcy Court in an application by C&J Energy Production Services-Canada Ltd., Court File No. 1601-08740.

2. The Confirmation Order

14 The Confirmation Order in this application satisfies the numerous factors set out in the case authorities just cited. The Order was made in good faith and in the interests of the Chapter 11 debtors, as well as the creditors and equity holders. It does not breach any applicable Canadian law. It will not likely be followed by a need for liquidation or further financial reorganization of the Chapter 11 debtors. The plan complies with US bankruptcy principles, as the US bankruptcy Court has confirmed. All holders of claims and interests in the Chapter 11 debtors, including holders of claims and interests in Ultra Petroleum who were entitled to vote on the Plan of Reorganization, have been given notice of, and the opportunity to vote on and object to, the Plan. These holders have voted overwhelmingly in support of accepting the Plan (98.84% of the Class 3 votes and 99.89% of the Class 8 votes).

15 Accordingly, it is appropriate that this Court should recognize the Confirmation Order, to ensure that the purposes of the *CCAA* are satisfied and that the Chapter 11 debtors have the best opportunity to restructure their affairs. In this regard, the comments of Campbell J. in *Xerium*, cited above, at para. 29, are appropriate:

In granting the recognition order sought, I am satisfied that the implementation of the Plan in Canada not only helps to ensure the orderly completion of the Chapter 11 Debtors' restructuring process, but avoids what otherwise might have been a time-consuming and costly process were the Canadian part of the Applicant itself to make a separate restructuring application under the *CCAA* in Canada.

16 In order to give force and effect to the Confirmation Order, the proposed Articles of Reorganization attached as Schedule "C" to the form of the order sought on this application are approved as the form of the Articles of Reorganization to be filed with the Registrar of Corporations, pursuant to s. 194(4) of the Yukon *Business Corporations Act*, R.S.Y. 2002, c. 20.

Application granted.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 3

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

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.

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

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.

Tab 5

CITATION: Payless Holdings LLC (Re), 2017 ONSC 4607
COURT FILE NO.: CV-17-011758-00CL
DATE: 2017-07-28

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF PAYLESS HOLDINGS INC LLC, PAYLESS
SHOESOURCE CANADA INC., PAYLESS SHOESOURCE CANADA GP
INC. AND THOSE OTHER ENTITIES LISTED ON SCHEDULE "A" HERETO

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

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *Patrick Riesterer*, for the Applicant

Mark Crane for Ivanhoe Cambridge Inc.

Lee Nicholson, for Alvarez & Marsal Inc., Information Officer

Lily Coodin, for the Cadillac Fairview Corporation Ltd.

Tony Reyes and Douglas Gooding, for Wells Fargo, ABL DIP Lender (Agent)

Gus Camelino, for 20 Vic; Morguard; SmartREIT, Oxford; RioCan; Triovest;
Springwood; Crombie REIT; Blackwood; Southridge Mall

HEARD by CourtCall: Friday, July 28, 2017

ENDORSEMENT

[1] This motion was brought by Payless Holdings LLC (the "Applicant"), in its capacity as foreign representative (the "Foreign Representative") of itself as well as Payless Shoe Stores Canada Inc., Payless Shoe Stores Canada GP Inc., Payless Shoe Stores Canada LP (collectively, the "Payless Canada Group") and those other entities listed in Schedule "A" that filed pursuant to Chapter 11 of the U.S. Bankruptcy Code (collectively, with the Applicant, the "Chapter 11 Debtors", and with their non-debtor affiliated companies ("Payless")).

[2] The Applicant seeks an order (the "Plan Recognition Order") under the *Companies' Creditors Arrangement Act* ("CCAA") which, among other things, recognizes and enforces an order dated July 26, 2017 (the "Confirmation Order") of the United States Bankruptcy Court for the Eastern District of Missouri (the "U.S. Court") which gave final confirmation for the *Fifth Amended Joint Plan of the Reorganization of Payless Holdings LLC and its Debtor affiliates*

pursuant to Chapter 11 of the Bankruptcy Code dated July 21, 2017 (the “Plan”), and the Plan Supplement dated July 10, 2017 (the “Plan Supplement” and, together with the Plan, the “Confirmed Plan”).

[3] On April 4, 2017, each of the Chapter 11 Debtors filed for relief pursuant to Chapter 11 of the U.S. Bankruptcy Code with the U.S. Court (the “Chapter 11 Proceedings”).

[4] By order dated April 7, 2017, this court recognized the Chapter 11 Proceedings as a foreign main proceeding and the appointment of the Foreign Representative, and established related stays of proceedings in favour of the Chapter 11 Debtors.

[5] Under the terms of the Plan, only certain impaired classes were permitted to vote on the Plan (the “Voting Classes”). Every Voting Class has voted to accept the Plan, with over 99.2% in value and 96.1% in number of creditors who voted on the Plan voting to accept it.

[6] On July 24, 2017, the U.S. Court confirmed the Plan and the Confirmation Order was entered on July 26, 2017.

[7] According to a recovery analysis prepared by Alvarez & Marsal North America, LLC, all classes of claims or interests will receive property of a value that is not less than the amount that any holder of a claim or interest would have received if the Chapter 11 Debtors were to be liquidated.

[8] The Plan provides that the claims of unsecured creditors of the Payless Canada Group are unaffected and will be reinstated on or following the effective date of the Plan (the “Effective Date”), along with any defences the Payless Canada Group may have in respect of such claims.

[9] All unsecured, non-priority claims against the Payless Canada Group (the “Canadian General Unsecured Claims”) are an unimpaired Class under the Plan. As a result, they were deemed to vote in favour of the Plan, and were not entitled to cast votes in favour of or against the Plan.

[10] The Applicant disclosed that the majority of the contracts to which members of the Payless Canada Group are a party will be assumed and will continue after the Effective Date. However, approximately twenty-five contracts to which a member of the Payless Canada Group or party are being rejected pursuant to the Confirmed Plan. The Applicant advises that the contracts being rejected are already inactive or have been terminated on their own terms, and are being rejected as a clean-up exercise. No party, at this hearing, opposed this aspect of the Confirmed Plan.

[11] The issue on this motion is whether the court should grant the Plan Recognition Order.

[12] This court has previously granted a number of orders similar to the Plan Recognition Order (see *Re Lightsquared Inc.*, 2015 ONSC 2309; *Re Lightsquared Inc.* (April 9, 2015) Ont. Sup. Ct., CV-12-9719-00CL (Order (Plan Confirmation))). I am satisfied that the court has the jurisdiction to grant the Plan Recognition Order.

[13] The principal guiding the exercise of the Court's jurisdiction under Part IV of the CCAA is comity. Canadian courts have emphasized the importance of comity, cooperation and accommodation between courts in cross-border insolvency proceedings in order to enable enterprises to restructure on a cross-border basis (see: *Re Payless Holdings Inc. LLC*, 2017 ONSC 2242 at para. 35; *Re Lear Canada*, 2009 CarswellOnt 4232 (Sup. Ct.) at para. 11).

[14] Furthermore, it has been customary for CCAA courts to recognize orders made by courts in foreign main proceedings, so long as those orders are not contrary to public policy or the purposes of the CCAA.

[15] The Applicant submits that recognition of the Confirmation Order is necessary for protecting the property of the Chapter 11 Debtors and the interests of their creditors, and is appropriate in these circumstances.

[16] The Applicant also submits that the Confirmation Order provides that the Plan satisfies the requirements of and is consistent with the objectives of the U.S. Bankruptcy Code. In particular, the Confirmation Order provides that:

- (a) the Confirmed Plan is fair, reasonable and proposed in good faith;
- (b) votes to accept the Confirmed Plan were solicited and tabulated in a manner consistent with the Disclosure Statement Order, the U.S. Bankruptcy Code and the rules pursuant to the U.S. Bankruptcy Code;
- (c) the Confirmed Plan will not likely be followed by the need for liquidation;
and
- (d) the transactions effectuating the Chapter 11 Debtors' restructuring are in the best interests of the Chapter 11 Debtors, their estates, and the holders of claims and interests.

[17] The Applicant also submits that the Confirmed Plan is essential for the restructuring of the Chapter 11 Debtors and Payless as a global enterprise. Counsel submits that this is significant for Canadian stakeholders as the operations of the Payless Canada Group are closely integrated with those of the Chapter 11 Debtors, and the successful restructuring of the Chapter 11 Debtors is essential for the Payless Canada Group's ability to continue as going concern.

[18] In addition, the Information Officer supports the granting of the Plan Recognition Order, including recognizing the Confirmation Order.

[19] The submissions of the Applicants were not challenged and I accept the submissions.

[20] Having considered the foregoing, I am satisfied that the court should exercise its discretion under section 49 of the CCAA to recognize the Confirmation Order.

[21] I am also satisfied that the court should authorize the members of the Payless Canada Group to enter into the New Credit Facilities. In arriving at this conclusion, I have been satisfied that the New Credit Facilities are an essential element of the Plan, in the best interests of the

Chapter 11 Debtors and all holders of Claims, and are necessary for the confirmation to the effect and consummation of the Plan. I accept the submissions of counsel to the Applicant that the approval of the New Credit Facilities is consistent with the policy objectives of the CCAA. CCAA courts have previously approved exit facilities in domestic Canadian proceedings, both in and before the approval of a plan of arrangement (see *Re Air Canada*, 2004 CarswellOnt 469 (Sup. Ct.) at paras. 10 and 15; *Re Boutique Jacob inc.*, 2011 QCCS 6030 at para. 26). Further, as noted by Hoy J.A. (as she then was), in *Re Crystallex*, “[e]xit or post-plan financing is often a key element, or a pre-requisite, of the plan voted on by the creditors”. (*Re Crystallex International Corp.*, 2012 ONCA 4046 at para. 68).

[23] It is also noted that the U.S. Court approved the New Credit Facilities and authorized the members of the Payless Canada Group to enter into those Facilities.

[24] In the result, I am satisfied that it is appropriate and in the best interests of all of the Chapter 11 Debtors (including the Payless Canada Group) and their creditors to recognize the Confirmation Order.

[25] The Information Officer has requested approval of its Third Report, together with the activities of the Information Officer described therein. There was no objection to this request. This relief is granted together with the ancillary relief contained in the Plan Recognition Order.

[26] Accordingly, the motion is granted and an order has been signed to reflect the foregoing.



Regional Senior Justice G.B. Morawetz

Date: July 28, 2017

SCHEDULE A

ADDITIONAL CHAPTER 11 DEBTORS

Payless Intermediate Holdings LLC
WBG PSS Holdings LLC
Payless Inc.
Payless Finance, Inc.
Collective Brands Services, Inc.
PSS Delaware Company 4, Inc.
Shoe Sourcing, Inc
Payless ShoeSource, Inc
Eastborough, Inc.
Payless Purchasing Services, Inc.
Payless ShoeSource Merchandising, Inc.
Payless Gold Value CO, Inc.
Payless ShoeSource Distribution, Inc.
Payless ShoeSource Worldwide, Inc.
Payless NYC, Inc.
Payless ShoeSource of Puerto Rico, Inc.
Payless Collective GP, LLC
Collective Licensing, LP
Collective Licensing International LLC
Clinch, LLC
Collective Brands Franchising Services, LLC
Payless International Franchising, LLC
Collective Brands Logistics, Limited
Dynamic Assets Limited
PSS Canada, Inc.

Tab 6

2000 CarswellOnt 704
Ontario Superior Court of Justice [Commercial List]

Babcock & Wilcox Canada Ltd., Re

2000 CarswellOnt 704, [2000] O.J. No. 786, 18 C.B.R. (4th) 157, 5 B.L.R. (3d) 75, 95 A.C.W.S. (3d) 608

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

In the Matter of Babcock & Wilcox Canada Ltd.

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

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 drafters of the 1997 Amendments would have it in their minds that the provisions of the CCAA dealing with foreign proceedings should continue to reflect this broader and more flexible approach in keeping with the general provisions of the CCAA, in contrast with the corresponding provisions under the BIA. In particular, it would appear to me to be a reasonably plain reading interpretation of s. 18.6 that recourse may be had to s. 18.6 of the CCAA in the case of a solvent debtor. Thus I would conclude that the aspect of insolvency is not a condition precedent vis-a-vis the "debtor" in the foreign proceedings (here the Chapter 11 proceedings) for the proceedings in Louisiana to be a foreign proceeding under the definition of s. 18.6. I therefore declare that those proceedings are to be recognized as a "foreign proceeding" for the purposes of s. 18.6 of the CCAA.

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

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

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

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

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

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

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

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

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

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

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

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

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

- (a) The recognition of comity and cooperation between the courts of various jurisdictions are to be encouraged.
- (b) Respect should be accorded to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada.
- (c) All stakeholders are to be treated equitably, and to the extent reasonably possible, common or like stakeholders are to be treated equally, regardless of the jurisdiction in which they reside.
- (d) The enterprise is to be permitted to implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis of the enterprise and to the extent reasonably practicable, one jurisdiction should take charge of the principal administration of the enterprise's reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of the stakeholders and does not inappropriately detract from the net benefits which may be available from alternative approaches.
- (e) The role of the court and the extent of the jurisdiction it exercises will vary on a case by case basis and depend to a significant degree upon the court's nexus to that enterprise; in considering the appropriate level of its involvement, the court would consider:
 - (i) the location of the debtor's principal operations, undertaking and assets;
 - (ii) the location of the debtor's stakeholders;
 - (iii) the development of the law in each jurisdiction to address the specific problems of the debtor and the enterprise;
 - (iv) the substantive and procedural law which may be applied so that the aspect of undue prejudice may be analyzed;
 - (v) such other factors as may be appropriate in the instant circumstances.
- (f) Where one jurisdiction has an ancillary role,
 - (i) the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments in respect of that debtor's reorganizational efforts in the foreign jurisdiction;

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

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

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

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

24 Order to issue accordingly.

Application granted.

APPENDIX

Court File No. 00-CL-3667

SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

THE HONOURABLE
MR. JUSTICE FARLEY

FRIDAY, THE 25TH DAY OF
FEBRUARY, 2000

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

INITIAL ORDER

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

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

SERVICE

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

RECOGNITION OF THE U.S. PROCEEDINGS

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

APPLICATION

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

PROTECTION FROM ASBESTOS PROCEEDINGS

4. *THIS COURT ORDERS* that until and including May 1, 2000, or such later date as the Court may order (the "Stay Period"), no suit, action, enforcement process, extra-judicial proceeding or other proceeding relating to, arising out of or in any way connected to damages or loss suffered, directly or indirectly, from asbestos, asbestos contamination or asbestos related diseases ("Asbestos Proceedings") against or in respect of the Applicant, its directors or any 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 a 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 7

2010 ONSC 3974
Ontario Superior Court of Justice [Commercial List]

Xerium Technologies Inc., Re

2010 CarswellOnt 7712, 2010 ONSC 3974, 193 A.C.W.S. (3d) 1066, 71 C.B.R. (5th) 300

**IN THE MATTER OF the Companies' Creditors
Arrangement ACT, R.S.C. 1985, c. C-36, AS AMENDED**

XERIUM TECHNOLOGIES, INC., IN ITS CAPACITY AS THE FOREIGN REPRESENTATIVE OF XERIUM TECHNOLOGIES, INC., HUYCK LICENSCO INC., STOWE WOODWARD LICENSCO LLC, STOWE WOODWARD LLC, WANGNER ITELPA I LLC, WANGNER ITELPA II LLC, WEAVEXX, LLC, XERIUM ASIA, LLC, XERIUM III (US) LIMITED, XERIUM IV (US) LIMITED, XERIUM V (US) LIMITED, XTI LLC, XERIUM CANADA INC., HUYCK.WANGNER AUSTRIA GMBH, XERIUM GERMANY HOLDING GMBH, AND XERIUM ITALIA S.P.A. (collectively, the "Chapter 11 Debtors") (Applicants)

C. Campbell J.

Heard: May 14, 2010

Judgment: September 28, 2010

Docket: 10-8652-00CL

Counsel: Derrick Tay, Randy Sutton for Applicants

Subject: Insolvency

MOTION by applicant for orders recognizing and giving effect to certain orders of U.S. Bankruptcy Court in Canada.

C. Campbell J.:

1 The Recognition Orders sought in this matter exhibit the innovative and efficient employment of the provisions of Part IV of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C.36, as amended (the "CCAA") to cross border insolvencies.

2 Each of the "Chapter 11 Debtors" commenced proceedings on March 30, 2010 in the United States under Chapter 11 of Title 11 of the United States Bankruptcy Code (the "U.S. Bankruptcy Code") in the U.S. Bankruptcy Court for the District of Delaware (the "Chapter 11 Proceedings.")

3 On April 1, 2010, this Court granted the Recognition Order sought by, *inter alia*, the Applicant, Xerium Technologies Inc. ("Xerium") as the "Foreign Representative" of the Chapter 11 Debtors and recognizing the Chapter 11 Proceedings as a "foreign main proceeding" in respect of the Chapter 11 Debtors, pursuant to Part IV of the CCAA.

4 On various dates in April 2010, Judge Kevin J. Carey of the U.S. Bankruptcy Court made certain orders in respect of the Chapter 11 Debtors' ongoing business operations.

5 On May 12, 2010, Judge Carey confirmed the Chapter 11 Debtors' amended Joint Prepackaged Plan of Reorganization dated March 30, 2010 as supplemented (the "Plan")¹ pursuant to the U.S. Bankruptcy Code (the "U.S. Confirmation Order.")

6 Xerium sought in this motion to have certain orders made by the U.S. Bankruptcy Court in April 2010, the U.S. Confirmation Order and the Plan recognized and given effect to in Canada.

7 The Applicant together with its direct and indirect subsidiaries (collectively, the "Company") are a leading global manufacturer and supplier of products used in the production of paper products.

8 Both Xerium, a Delaware limited liability company, Xerium Canada Inc. ("Xerium Canada"), a Canadian company, together with other entities forming part of the Chapter 11 Debtors are parties to an Amended and Restated Credit and Guarantee Agreement dated as of May 30, 2008 as borrowers, with various financial institutions and other persons as lenders. The Credit Facility is governed by the laws of the State of New York.

9 Due to a drop in global demand for paper products and in light of financial difficulties encountered by the Company due to the drop in demand in its products and is difficulty raising funds, the Company anticipated that it would not be in compliance with certain financial covenants under the Credit Facility for the period ended September 30, 2009. The Chapter 11 Debtors, their lenders under the Credit Facility, the Administrative Agent and the Secured Lender Ad Hoc Working Group entered into discussions exploring possible restructuring scenarios. The negotiations progressed smoothly and the parties worked toward various consensual restructuring scenarios.

10 The Plan was developed between the Applicant, its direct and indirect subsidiaries together with the Administrative Agent and the Secured Lender Ad Hoc Working Group.

11 Pursuant to the Plan, on March 2, 2010, the Chapter 11 Debtors commenced the solicitation of votes on the Plan and delivered copies of the Plan, the Disclosure Statement and the appropriate ballots to all holders of claims as of February 23, 2010 in the classes entitled to vote on the Plan.

12 The Disclosure Statement established 4:00 p.m. (prevailing Eastern time) on March 22, 2010 as the deadline for the receipt of ballots to accept or reject the Plan, subject to the Chapter 11 Debtors' right to extend the solicitation period. The Chapter 11 Debtors exercised their right to extend the solicitation period to 6:00 p.m. (prevailing Eastern time) on March 26, 2010. The Plan was overwhelmingly accepted by the two classes of creditors entitled to vote on the Plan.

13 On March 31, 2010, the U.S. Bankruptcy Court entered the Order (I) Scheduling a Combined Hearing to Consider (a) Approval of the Disclosure Statement, (b) Approval of Solicitation Procedures and Forms of Ballots, and (c) Confirmation of the Plan; (II) Establishing a Deadline to Object to the Disclosure Statement and the Plan; and (III) Approving the Form and Manner of Notice Thereof (the "Scheduling Order.")

14 Various orders were made by the U.S. Bankruptcy Court in April 2010, which orders were recognized by this Court.

15 On May 12, 2010, at the Combined Hearing, the U.S. Bankruptcy Court confirmed the Plan, and made a number of findings, *inter alia*, regarding the content of the Plan and the procedures underlying its consideration and approval by interested parties. These included the appropriateness of notice, the content of the Disclosure Statement, the voting process, all of which were found to meet the requirements of the U.S. Bankruptcy Code and fairly considered the interests of those affected.

16 The Plan provides for a comprehensive financial restructuring of the Chapter 11 Debtors' institutional indebtedness and capital structure. According to its terms, only Secured Swap Termination Claims, claims on account of the Credit Facility, Unsecured Swap Termination Claims, and Equity Interests in Xerium are "impaired" under the Plan. Holders of all other claims are unimpaired.

17 Under the Plan, the notional value of the Chapter 11 Debtors' outstanding indebtedness will be reduced from approximately U.S.\$640 million to a notional value of approximately U.S.\$480 million, and the Chapter 11 Debtors will have improved liquidity as a result of the extension of maturity dates under the Credit Facility and access to an U.S. \$80 million Exit Facility.

18 The Plan provides substantial recoveries in the form of cash, new debt and equity to its secured lenders and swap counterparties and provides existing equity holders with more than \$41.5 million in value.

19 Xerium has been unable to restructure its secured debt in any other manner than by its secured lenders voluntarily accepting equity and the package of additional consideration proposed to be provided to the secured lenders under the Plan.

20 The Plan benefits all of the Chapter 11 Debtors' stakeholders. It reflects a global settlement of the competing claims and interests of these parties, the implementation of which will serve to maximize the value of the Debtors' estates for the benefit of all parties in interest.

21 I conclude that the Plan is not likely to be followed by the liquidation or the need for further financial reorganization of the Chapter 11 Debtors.

22 On April 1, 2010, the Recognition Order granted by this Court provided, among other things:

- (a) Recognition of the Chapter 11 Proceedings as a "foreign main proceeding" pursuant to Subsection 47(2) of the CCAA;
- (b) Recognition of the Applicant as the "foreign representative" in respect of the Chapter 11 Proceedings;
- (c) Recognition of and giving effect in Canada to the automatic stay imposed under Section 362 of the U.S. Bankruptcy Code in respect of the Chapter 11 Debtors;
- (d) Recognition of and giving effect in Canada to the U.S. First Day Orders in respect of the Chapter 11 Debtors;
- (e) A stay of all proceedings taken or that might be taken against the Chapter 11 Debtors under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (f) Restraint on further proceedings in any action, suit or proceeding against the Chapter 11 Debtors;
- (g) Prohibition of the commencement of any action, suit or proceeding against the Chapter 11 Debtors; and
- (h) Prohibition of the Chapter 11 Debtors from selling or otherwise disposing of, outside the ordinary course of its business, any of the Chapter 11 Debtors' property in Canada that relates to their business and prohibiting the Chapter 11 Debtors from selling or otherwise disposing of any of their other property in Canada, unless authorized to do so by the U.S. Bankruptcy Court.

23 I am satisfied that this Court does have the authority and indeed obligation to grant the recognition sought under Part IV of the CCAA. The recognition sought is precisely the kind of comity in international insolvency contemplated by Part IV of the CCAA.

24 Section 44 identifies the purpose of Part IV of the CCAA. It states

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

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
- (d) the protection and the maximization of the value of debtor company's property; and

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

25 I am satisfied that the provisions of the Plan are consistent with the purposes set out in s. 61(1) of the CCAA, which states:

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

26 In *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) at para. 21, this Court held that U.S. Chapter 11 proceedings are "foreign proceedings" for the purposes of the CCAA's cross-border insolvency provisions. The Court also set out a non exclusive or exhaustive list of factors that the Court should consider in applying those provisions.

27 The applicable factors from *Babcock & Wilcox Canada Ltd., Re* that dictate in favour of recognition of the U.S. Confirmation Order are set out in paragraph 45 of the Applicant's factum:

(a) The Plan is critical to the restructuring of the Chapter 11 Debtors as a global corporate unit;

(b) The Company is a highly integrated business and is managed centrally from the United States. The Credit Facility which is being restructured is governed by the laws of the State of New York. Each of the Chapter 11 Debtors is a borrower or guarantor, or both, under the Credit Facility;

(c) Confirmation of the Plan in the U.S. Court occurred in accordance with standard and well established procedures and practices, including Court approval of the Disclosure Statement and the process for the solicitation and tabulation of votes on the Plan;

(d) By granting the Initial Order in which the Chapter 11 Proceedings were recognized as Foreign Main Proceedings, this Honourable Court already acknowledged Canada as an ancillary jurisdiction in the reorganization of the Chapter 11 Debtors;

(e) The Applicant carries on business in Canada through a Canadian subsidiary, Xerium Canada, which is one of Chapter 11 Debtors and has had the same access and participation in the Chapter 11 Proceedings as the other Chapter 11 Debtors;

(f) Recognition of the U.S. Confirmation Order is necessary for ensuring the fair and efficient administration of this cross-border insolvency, whereby all stakeholders who hold an interest in the Chapter 11 Debtors are treated equitably.

28 Additionally, the Plan is consistent with the purpose of the CCAA. By confirming the Plan, the U.S. Bankruptcy Court has concluded that the Plan complies with applicable U.S. Bankruptcy principles and that, *inter alia*:

(a) it is made in good faith;

(b) it does not breach any applicable law;

(c) it is in the interests of the Chapter 11 Debtors' creditors and equity holders; and

(d) it will not likely be followed by the need for liquidation or further financial reorganization of the Chapter 11 Debtors.

These are principles which also underlie the CCAA, and thus dictate in favour of the Plan's recognition and implementation in Canada.

29 In granting the recognition order sought, I am satisfied that the implementation of the Plan in Canada not only helps to ensure the orderly completion to the Chapter 11 Debtors' restructuring process, but avoids what otherwise might have been a time-consuming and costly process were the Canadian part of the Applicant itself to make a separate restructuring application under the CCAA in Canada.

30 The Order proposed relieved the Applicant from the publication provisions of s. 53(b) of the CCAA. Based on the positive impact for creditors in Canada of the Plan as set out in paragraph 27 above, I was satisfied that given the cost involved in publication, the cost was neither necessary nor warranted.

31 The requested Order is to issue in the form signed.

Motion granted.

Footnotes

1 Capitalized terms used herein not otherwise defined shall have the meanings ascribed to them in the Plan. Unless otherwise stated, all monetary amounts contained herein are expressed in U.S. Dollars.

Tab 8

2001 CarswellOnt 1830
Ontario Superior Court of Justice [Commercial List]

Matlack Inc., Re

2001 CarswellOnt 1830, [2001] O.J. No. 6121, [2001] O.T.C. 382, 26 C.B.R. (4th) 45

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

In the Matter of an Application of Matlack, Inc. and the Other Parties Set Out in Schedule
"A" Ancillary to Proceedings Under Chapter 11 of the United States Bankruptcy Code

Matlack, Inc. and the Other Parties Set Out in Schedule "A", Applicant

Farley J.

Heard: April 19, 2001

Judgment: April 19, 2001

Docket: 01-CL-4109

Counsel: *E. Bruce Leonard, Shahana Kar*, for Applicant, Matlack Inc.

Subject: Insolvency; International; Corporate and Commercial

APPLICATION by foreign bankrupt for recognition of proceedings commenced pursuant to Chapter 11 of United States *Bankruptcy Code* to be recognized as "foreign proceeding" for purpose of *Companies' Creditors Arrangement Act*, for stay of proceedings commenced by creditor and for ancillary relief.

Endorsement. Farley J.:

1 This was an application pursuant to section 18.6 of the *Companies' Creditors Arrangement Act* ("CCAA") for recognition of the proceedings commenced by the applicants in the U.S. Bankruptcy Court for the District of Delaware for relief under Chapter 11 of the United States Bankruptcy Code be recognized as a "foreign proceeding" for the purposes of the CCAA and to have this Court issue a stay of proceedings compatible with the Chapter 11 stay and for ancillary relief. That Order is granted with the usual comeback clause and subject to its expiry being May 11, 2001 unless otherwise extended.

2 The one applicant Matlack, Inc. ("Matlack") is a Pennsylvania corporation which is in the business of transporting chemical products throughout the United States, Mexico and Canada. It has developed a substantial Canadian business over the past 20 years and it currently operates a large leased facility in Ontario from which its Canadian licensed fleet services customers throughout Ontario and Quebec. Matlack's Canadian operations are fully integrated into Matlack's North American enterprise from both an operational and financial standpoint.

3 On March 29, 2001, Matlack and its affiliated applicants filed for relief under Chapter 11 and obtained relief precluding creditors subject to the U.S. Bankruptcy Court from commencing or continuing proceedings against the applicants. It is in the interests of all creditors and stakeholders of Matlack that its reorganization proceed in a coordinated and integrated fashion. The objective of such coordination is to ensure that creditors are treated as equitably and fairly as possible, *wherever they are located*. Harmonization of proceedings in the U.S. and in Canada will create the most stable conditions under which a successful reorganization can be achieved and will allow for judicial supervision of all of Matlack's assets and enterprise throughout the two jurisdictions. I note that a Canadian creditor of Matlack has

recently seized some of Matlack's assets and intends to sell same in satisfaction of Matlack's obligations to it. It would seem to me that in the context of the proceedings, such a seizure would be of a preferential nature and thus unfair and prejudicial to the interests of Matlack's creditors generally.

4 Canadian courts have consistently recognized and applied the principles of comity. See *Morguard Investments Ltd. v. DeSavoie* (1990), 76 D.L.R. (4th) 256; *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Ont. Gen. Div.); *ATL Industries Inc. v. Han Eol Ind. Co.* (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div. [Commercial List]); *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]), at pp. 160-2.

5 In an increasingly commercially integrated world, countries cannot live in isolation and refuse to recognize foreign judgments and orders. The Court's recognition of a foreign proceeding should depend on whether there is a real and substantial connection between the matter and the jurisdiction. The determination of whether a sufficient connection exists between a jurisdiction and a matter should be based on considerations of order, predictability and fairness rather than on a mechanical analysis of connections between the matter and the jurisdiction. See *Morguard supra*; *Hunt v. T & N plc* (1993), 109 D.L.R. (4th) 16 (S.C.C.).

6 I concur with what Forsyth J. stated in *Roberts v. Picture Butte Municipal Hospital* (1998), [1999] 4 W.W.R. 443, 64 Alta. L.R. (3d) 218, [1998] A.J. No. 817 (Alta. Q.B.), at pp. 5-7 (A.J.):

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 the U.S. Bankruptcy Court. Thus, in either case, whether there has been 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)

7 Based on principles of comity, where appropriate this Court has the jurisdiction to stay proceedings commenced against a party that has filed for bankruptcy protection in the U.S. An Ontario Court can accept the jurisdiction of a U.S. Bankruptcy Court over moveable property in Ontario of an American company which has become subject to a Chapter 11 order. See *Roberts, supra*; *Borden & Elliot v. Winston Industries Inc.* (November 1, 1983), Doc. 352/83 (Ont. H.C.).

8 Where a cross-border insolvency proceeding is most closely connected to one jurisdiction, it is appropriate for the Court in that jurisdiction to exercise principal control over the insolvency process in light of the principles of comity and in order to avoid a multiplicity of proceedings. See *Microbiz Corp. v. Classic Software Systems Inc.* (1996), [1996] O.J. No. 5094 (Ont. Gen. Div.).

9 Section 18.6(1) of the CCAA provides the following definition:

"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;

The U.S. Bankruptcy Code's Chapter 11 proceedings would be such a foreign proceeding.

10 As I indicated in *Babcock, supra*, at p. 166: "Section 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". Accordingly, it is appropriate for Matlack to be granted ancillary relief in recognizing the Chapter

11 proceedings and in enforcing the stay of proceedings resulting therefrom. In addition this Court can also grant relief pursuant to section 18.6(5). A stay in Canada would promote a stable atmosphere with a view to the reorganization of Matlack and its affiliates while allowing creditors, *wherever situate*, to be treated as equitably as possible. The stay would also assist with respect to claimants in Canada attempting to seize assets so as to get a leg up on the other creditors. See *Babcock, supra*, at pp. 165-6. Aside from the *Babcock* case, see also *Re GST Telecommunications Inc.* (May 18, 2000), Ground J. and *Re Grace Canada Inc.* (April 4, 2001), Farley J.

11 It would also seem to me that the relief requested is appropriate and in accordance with the principles set down in the Transnational Insolvency Project of the American Law Institute ("ALI"). This Project involved jurists, practitioners and academics from the NAFTA countries — the U.S., Mexico and Canada — and was completed as to the Restatement of the Law in 2000 after six years of analysis.¹ As a disclaimer, I should note that it was my privilege to tag along on this Project with the other participants who are recognized as outstanding in their fields.

12 The Project continues with the development of implementation and practical aids. Most recently this consists of the *Guidelines Applicable to Court-to-Court Communications on Cross-Border Cases*. I understand that Judge Mary Walrath is handling the Chapter 11 case. It will be my pleasure to work in coordination with her on this cross-border proceeding. To assist further with the handling of these matters, I would approve the proposed Protocol from the Canadian side, including what I understand may be the first opportunity to incorporate the *Communication Guidelines*, such to be effective if, as and when Judge Walrath is satisfied with same from the U.S. side.

13 A copy of the ALI Guidelines and the Matlack Protocol are annexed to these reasons for the benefit of other counsel involved in anything similar.

14 Order to issue accordingly.

The American Law Institute

TRANSNATIONAL INSOLVENCY PROJECT

PRINCIPLES OF COOPERATION IN TRANSNATIONAL INSOLVENCY CASES AMONG THE MEMBERS OF THE NORTH AMERICAN FREE TRADE AGREEMENT

Submitted by the Council to the Members of The American Law Institute for Discussion at the Seventy-Seventh Annual Meeting on May 15, 16, 17, and 18, 2000

The Executive Office

THE AMERICAN LAW INSTITUTE

4025 Chestnut Street

Philadelphia, Pa. 19104-3099

Amended — February 12, 2001

Appendix 2

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 administering 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 Principles of Cooperation courts 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 shall 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.

(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;

(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 to 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 or 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 submission 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 of 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 which 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 of 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.

— UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re: MATLACK SYSTEMS, INC., *et al.*, Debtors

ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)

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

IN THE MATTER OF AN APPLICATION OF MATLACK, INC. AND THE OTHER PARTIES SET OUT IN SCHEDULE "A" ANCILLARY TO PROCEEDINGS UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE

MATLACK, INC. AND THE OTHER PARTIES SET OUT IN SCHEDULE "A" Applicant

Chapter 11

Case No. 01-01114 (MFW)

Jointly Administered

CROSS-BORDER INSOLVENCY PROTOCOL

RE MATLACK, INC. AND AFFILIATES

This Cross-Border Insolvency Protocol (the "Protocol") shall govern the conduct of all parties in interest in a proceeding brought by Matlack, Inc. and certain other parties in the Ontario Superior Court of Justice and a proceeding brought by Matlack Systems, Inc. and certain other parties in the United States Bankruptcy Court for the District of Delaware as Case No. 01-01114.

A. Background

1 Matlack Systems, Inc., a Delaware corporation ("MSI"), is the parent company of a multinational transportation business that operates, through its various affiliates, in the United States, Canada and Mexico.

2 MSI and certain of its affiliates (collectively, the "Matlack Companies") have commenced reorganization cases (collectively, the "U.S. Cases") under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "U.S. Bankruptcy Court"). The Matlack Companies are continuing in possession of their respective properties and are operating and managing their businesses, as debtors in possession, pursuant to sections 1107 and 1108 of the U.S. Bankruptcy Code. An Official Committee of Unsecured Creditors has been appointed in the U.S. Cases (the "Creditor's Committee").

3 One of the Matlack Companies, Matlack, Inc. (for ease of reference, "Matlack Canada"), a United States affiliate of MSI, has assets and carries on business in Canada. The Matlack Companies have commenced proceedings (collectively, the "Canadian Case") under section 18.6 of the *Companies' Creditors Arrangement Act* (the "CCAA") in the Ontario Superior Court of Justice (the "Canadian Court"). The Matlack Companies have sought an Order of the Canadian Court (as initially made under the CCAA and as subsequently amended or modified, the "CCAA Order") under which (a) the U.S. Cases have been determined to be "foreign proceedings" for the purposes of section 18.6 of the CCAA; and (b) a stay was granted against actions, enforcements, extra-judicial proceedings or other proceeding until and including August 15, 2001 against the Matlack Companies and their property.

4 The Matlack Companies are parties to both the Canadian Case and the U.S. Cases. For convenience, the U.S. Cases and the Canadian Case are referred to herein collectively as the "Insolvency Proceedings" and the U.S. Bankruptcy Court and the Canadian Court are referred to herein collectively as the "Courts".

B. Purpose and Goals

5 While the Insolvency Proceedings are pending in the United States and Canada for the Matlack Companies, the implementation of basic administrative procedures is necessary to coordinate certain activities in the Insolvency Proceedings, to protect the rights of parties thereto, the creditors of the Matlack Companies and to ensure the maintenance of the Courts' independent jurisdiction and comity. Accordingly, this Protocol has been developed to promote the following mutually desirable goals and objectives in both the U.S. Cases and the Canadian Case:

- harmonize and coordinate activities in the Insolvency Proceedings before the U.S. Court and the Canadian Court;
- promote the orderly and efficient administration of the Insolvency Proceedings to, among other things, maximize the efficiency of the Insolvency Proceedings, reduce the costs associated therewith and avoid duplication of effort;
- honor the independence and integrity of the Courts and other courts and tribunals of the United States and Canada;
- promote international cooperation and respect for comity among the Courts, the parties to the Insolvency Proceedings and the creditors of the Matlack Companies and other parties interested in or affected by the Insolvency Proceedings;
- facilitate the fair, open and efficient administration of the Insolvency Proceedings for the benefit of all of the Debtors, creditors and other interested parties, wherever located; and
- implement a framework of general principles to address basic administrative issues arising out of the cross-border nature of the Insolvency Proceedings.

C. Comity and Independence of the Courts

6 The approval and implementation of this Protocol shall not divest or diminish the U.S. Court's and the Canadian Court's independent jurisdiction over the subject matter of the U.S. Cases and the Canadian Case, respectively. By approving and implementing this Protocol, neither the U.S. Court, the Canadian Court, the Matlack Companies nor any creditors or interested parties shall be deemed to have approved or engaged in any infringement on the sovereignty of the United States or Canada.

7 The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct and hearing of the U.S. Cases. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct and hearing of the Canadian Cases.

8 In accordance with the principles of comity and independence established in Paragraph 6 and 7 above, nothing contained herein shall be construed to:

- increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the U.S. Court, the Canadian Court or any other court or tribunal in the United States or Canada, including the ability of any such court or tribunal to provide appropriate relief under applicable law on an *ex parte* or "limited notice" basis;
- require the Matlack Companies or any Creditor's Committee or Estate Representatives to take any action or refrain from taking, any action that would result in a breach of any duty imposed on them by any applicable law;
- authorize any action that requires the specific approval of one or both of the Courts under the U.S. Bankruptcy Code or the CCAA after appropriate notice and a hearing (except to the extent that such action is specifically described in this Protocol); or
- preclude any creditor or other interested party from asserting such party's substantive rights under the applicable laws of the United States, Canada or any other jurisdiction including, without limitation, the rights of interested parties or affected persons to appeal from the decisions taken by one or both of the Courts.

9 The Matlack Companies, the Creditor's Committee, the Estate Representatives and their respective employees, members, agents and professionals shall respect and comply with the duties imposed upon them by the U.S. Bankruptcy Code, the CCAA, the CCAA Order and any other applicable laws.

D. Cooperation

10 To assist in the efficient administration of the Insolvency Proceedings, the Matlack Companies, the Creditor's Committee and the Estate Representatives shall (a) cooperate with each other in connection with actions taken in both the U.S. Bankruptcy Court and the Canadian Court, and (b) take any other appropriate steps to coordinate the administration of the U.S. Cases and the Canadian Case for the benefit of the Matlack Companies' respective estates and stakeholders.

11 To harmonize and coordinate the administration of the Insolvency Proceedings, the U.S. Bankruptcy Court and the Canadian Court each shall use its best efforts to coordinate activities with and defer to the judgment of the other Court, where appropriate and feasible. The U.S. Bankruptcy Court and the Canadian Court may communicate with one another in accordance with the Guidelines for Court-to-Court Communication in Cross-Border Cases developed by the American Law Institute and attached as Schedule "1" to this Protocol with respect to any matter relating to the Insolvency Proceedings and may conduct joint hearings with respect to any matter relating to the conduct, administration, determination or disposition of any aspect of the U.S. Cases and the Canadian Case, in circumstances where both Courts consider such joint hearings to be necessary or advisable and, in particular, to facilitate or coordinate with the proper and efficient conduct of the U.S. Cases and the Canadian Case.

12 Notwithstanding the terms of paragraph 11 above, this Protocol recognizes that the U.S. Bankruptcy Court and the Canadian Court are independent Courts and, accordingly, although the Courts will seek to cooperate and coordinate with each other in good faith, each of the Courts shall at all times exercise its independent jurisdiction and authority with respect to (a) matters presented to such Court and (b) the conduct of the parties appearing in such matters.

E. Retention and Compensation of Professionals

13 Except as provided in paragraph 16 below, any estate representatives appointed in the U.S. Cases, including any examiners or trustees appointed in accordance with section 1104 of the U.S. Bankruptcy Code and any Canadian professionals retained by the Estate Representatives (collectively, the "Estate Representatives"), shall be subject to the exclusive jurisdiction of the U.S. Court with respect to (a) the Estate Representatives' tenure in office; (b) the retention and compensation of the Estate Representatives; (c) the Estate Representatives' liability, if any, to any person or entity, including the Matlack Companies and any third parties, in connection with the U.S. Case; and (d) the hearing and determination of any other matters relating to the Estate Representatives arising in the U.S. Cases under the U.S. Bankruptcy Code or other applicable laws of the United States. The Estate Representatives and their U.S. counsel and other U.S. professionals shall not be required to seek approval of their retention in the Canadian Court. Additionally, the Estate Representatives and their U.S. counsel and other U.S. professionals (a) shall be compensated for their services in accordance with the U.S. Bankruptcy Code and other applicable laws of the United States or orders of the U.S. Bankruptcy Court, and (b) shall not be required to seek approval of their compensation in the Canadian Court.

14 Any Canadian professionals retained by or with the approval of the Matlack Companies for purposes of the Canadian Case, including Canadian professionals retained by the Creditor's Committee (collectively, the "Canadian Professionals"), shall be subject to the exclusive jurisdiction of the Canadian Court. Accordingly, the Canadian Professionals (a) shall be subject to the procedures and standards for retention and compensation applicable in Canada, and (b) shall not be required to seek approval of their retention or compensation in the U.S. Court.

15 Any United States professionals retained by the Matlack Companies and any United States professionals retained by the Creditor's Committee (collectively, the "U.S. Professionals") shall be subject to the exclusive jurisdiction of the U.S. Bankruptcy Court. Accordingly, the U.S. Professionals (a) shall be subject to the procedures and standards for retention and compensation applicable in the U.S. Bankruptcy Court under the U.S. Bankruptcy Code and any other applicable laws of the United States or orders of the U.S. Bankruptcy Court, and (b) shall not be required to seek approval of their retention or compensation in the Canadian Court.

F. Rights to Appear and Be Heard

16 The Matlack Companies, their creditors and other interested parties in the Insolvency Proceedings, including the Creditor's Committee and the U.S. Trustee, shall have the right and standing to (a) appear and be heard in either the U.S. Court or the Canadian Court in the Insolvency Proceedings to the same extent as creditors and other interested parties domiciled in the forum country, subject to any local rules or regulations generally applicable to all parties appearing in the forum, and (b) file notices of appearance or other processes with the Clerk of the U.S. Bankruptcy Court or the Canadian Court in the Insolvency Proceedings; *provided, however*, that any appearance or filing may subject a creditor or an interested party to the jurisdiction of the Court in which the appearance or filing occurs; provided further, that appearance by the Creditor's Committee in the Canadian Case shall not form a basis for personal jurisdiction in Canada over the members of the Creditor's Committee. Notwithstanding the foregoing, and in accordance with paragraph 13 above, the Canadian Court shall have jurisdiction over the Estate Representatives and the U.S. Trustee with respect to the particular matters as to which the Estate Representatives or the U.S. Trustee appear before the Canadian Court.

G. Notice

17 Notice of any motion, application or other pleading or paper filed in one or both of the Insolvency Proceedings and notice of any related hearings or other proceedings mandated by applicable law in connection with the Insolvency Proceedings, or this Protocol shall be given by appropriate means (including, where circumstances warrant, by courier, telecopier or other electronic forms of communication) to the following: (a) all creditors, including the Creditor's Committee, and other interested parties in accordance with the practice of the jurisdiction where the papers are filed or the proceedings are to occur; and (b) to the extent not otherwise entitled to receive notice under clause (a) above, the U.S. Trustee, the Office of the United States Trustee, and such other parties as may be designated by either of the Courts from time to time.

H. Joint Recognition of Stays of Proceedings Under the U.S. Bankruptcy Code and the CCAA

18 In recognition of the importance of the stay of proceedings and actions against the Matlack Companies and their assets under section 18.6 of the CCAA and the CCAA Order (the "Canadian Stay") on the successful completion of the Insolvency Proceedings for the benefit of the Matlack Companies and their respective estates and stakeholders, to the extent necessary and appropriate, the U.S. Bankruptcy Court shall extend and enforce the Canadian Stay in the United States (to the same extent such stay of proceedings and actions is applicable in Canada) to prevent adverse actions against the assets, rights and holdings of the Matlack Companies. In implementing the terms of this paragraph, the U.S. Bankruptcy Court may consult with the Canadian Court regarding (a) the interpretation and application of the Canadian Stay and any orders of the Canadian Court modifying or granting relief from the Canadian Stay, and (b) the enforcement in the United States of the Canadian Stay.

19 In recognition of the importance of the stay of proceedings and actions against the Matlack Companies and their assets under section 362 of the U.S. Bankruptcy Code (the "U.S. Stay") to the successful completion of the Insolvency Proceedings for the benefit of the Matlack Companies and their respective estates and stakeholders, to the extent necessary and appropriate, the Canadian Court shall extend and enforce the U.S. Stay in Canada (to the same extent such stay of proceedings and action is applicable in the United States) to prevent adverse actions against the assets, rights and holdings, of the Matlack Companies in Canada. In implementing the terms of this paragraph, the Canadian Court may consult with the U.S. Court regarding (a) the interpretation and application of the U.S. Stay and any order of the U.S. Court modifying or granting relief from the U.S. Stay, and (b) the enforcement in Canada of the U.S. Stay.

20 Nothing contained herein shall affect or limit the Matlack Companies' or other parties' rights to assert the applicability or non-applicability of the U.S. Stay or the Canadian Stay to any particular proceeding, property, asset, activity or other matter, wherever pending or located.

I. Effectiveness and Modification of Protocol

21 This Protocol shall become effective only upon its approval by both the U.S. Court and the Canadian Court.

22 This Protocol may not be supplemented, modified, terminated or replaced in any manner except by the U.S. Court and the Canadian Court. Notice of any legal proceeding to supplement, modify, terminate or replace this Protocol shall be given in accordance with paragraph 17 above.

J. Procedure for Resolving Disputes Under the Protocol

23 Disputes relating to the terms, intent or application of this Protocol may be addressed by interested parties to either the U.S. Court, the Canadian Court or both Courts upon notice, in accordance with paragraph 17 above. Where an issue is addressed to only one Court, in rendering a determination in any such dispute, such Court: (a) shall consult with the other Court; and (b) may, in its sole and exclusive discretion, either (i) render a binding decision after such consultation, (ii) defer to the determination of the other Court by transferring the matter, in whole or in part, to the other Court or (iii) seek a joint hearing of both Courts. Notwithstanding the foregoing, each Court in making a determination shall have regard to the independence, comity or inherent jurisdiction of the other Court established under existing law.

K. Preservation of Rights

24 Neither the terms of this Protocol nor any actions taken under the terms of this Protocol shall prejudice or affect the powers, rights, claims and defences of the Matlack Companies and their estates, the Creditor's Committee, the U.S. Trustee or any of the creditors of the Matlack Companies under applicable law, including the U.S. Bankruptcy Code and the CCAA.

L. Guidelines

25 The Protocol shall adopt by reference the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the "Guidelines") developed by The American Law Institute for the Transnational Insolvency Project, a copy of which are attached hereto as Schedule "1". In the case of any conflict between the terms of this Protocol and the terms of the Guidelines, the terms of this Protocol shall govern.

Application granted.

Footnotes

- 1 A copy of this material may be obtained from the Executive Office, The American Law Institute, 4025 Chestnut Street, Philadelphia, PA, USA 19104-3099.


End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 9

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE) THURSDAY, THE 10TH DAY
)
JUSTICE MORAWETZ) OF OCTOBER, 2013

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

AND IN THE MATTER OF ALLIED SYSTEMS HOLDINGS, INC., ALLIED
SYSTEMS (CANADA) COMPANY, AXIS CANADA COMPANY AND THOSE OTHER
COMPANIES LISTED ON SCHEDULE "A" HERETO

APPLICATION OF ALLIED SYSTEMS HOLDINGS, INC. UNDER SECTION 46 OF
THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS
AMENDED

SALE APPROVAL RECOGNITION AND VESTING ORDER
(First Lien Agents' Transaction)

THIS MOTION, made by Allied Systems Holdings, Inc. ("**Allied US**") in its capacity as the foreign representative (the "**Foreign Representative**") of Allied US, Allied Systems (Canada) Company, Axis Canada Company (together with Allied Systems (Canada) Company, the "**Canadian Debtors**") and those other companies listed on Schedule "A" hereto (collectively with the Foreign Representative and the Canadian Debtors, the "**Chapter 11 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 at Tab 5 of the Motion Record, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the affidavit of Scott MacAulay sworn October 3, 2013 (the "**MacAulay Affidavit**"), the affidavit of Ava Kim sworn October 3, 2013 (the "**Kim**

Affidavit”) the Eighth report of Duff & Phelps Canada Restructuring Inc. (the “**Information Officer**”) dated October 8, 2013 (the “**Eighth Report**”), and on hearing the submissions of counsel for the Foreign Representative, counsel for the Information Officer, counsel for Yucaipa American Alliance Fund I, L.P.; Yucaipa American Alliance Fund II, L.P.; Yucaipa American Alliance (Parallel) Fund I, L.P.; Yucaipa American Alliance (Parallel) Fund II, L.P. (collectively “**Yucaipa**”), counsel for SBDRE LLC (the “**First Lien Purchaser**”) and for Black Diamond CLO 2005-1 Ltd., BDCM Opportunity Fund II, LP and Spectrum Investment Partners LP (collectively “**Black Diamond/Spectrum**”), counsel for the Canadian Auto Workers’ Union (“**CAW**”), counsel for the Unsecured Creditors’ Committee for the Chapter 11 Debtors (the “**UCC**”), and those other parties present, no one else appearing although duly served as appears from the affidavit of service of Ava Kim sworn October 4, 2013:

SERVICE

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

2. THIS COURT ORDERS that capitalized terms used herein and not other otherwise defined have the meaning given to them in the Asset Purchase Agreement dated as of October 9, 2013 by and among the First Lien Purchaser, Allied US and the subsidiaries of Allied US signatory thereto, an unsigned copy of which is attached as Exhibit E to the Kim Affidavit (the “**APA**”). For greater certainty, references to “**Purchased Assets**” and “**Assigned Contracts**” herein do not include the “**Purchased Assets**” and “**Assigned Contracts**” as those terms are defined and used in the Asset Purchase Agreement dated as of September 12, 2013 by and among Jack Cooper Holdings Corp., Allied US and the subsidiaries of Allied US signatory thereto, a copy of which is attached as Exhibit C to the Kim Affidavit.

RECOGNITION OF US SALE ORDER

3. THIS COURT ORDERS that the Order entered by the United States Bankruptcy Court for the District of Delaware (the “**US Bankruptcy Court**”) on September 30, 2013 in the

Chapter 11 Case authorizing and approving, *inter alia*, (i) a sale of assets free and clear of liens, claims, encumbrances and other interests to the First Lien Purchaser or its designees and (ii) the assumption and assignment of unexpired leases by the First Lien Purchaser or its designees, a copy of which is attached hereto as Schedule "B" (the "**US Sale Order**"), is hereby recognized and given full force and effect in all provinces and territories of Canada pursuant to section 49 of the CCAA.

VESTING OF CANADIAN FIRST LIEN PURCHASED ASSETS

4. THIS COURT ORDERS AND DECLARES that the sale pursuant to the APA of the Purchased Assets that are situated in Canada or in which the Canadian Debtors have a right, title or interest (the "**Canadian First Lien Purchased Assets**") to the First Lien Purchaser, SBDRE (Windsor) Holdings Company Ltd. (the "**First Lien Windsor Purchaser**") and/or SBDRE (London) Holdings Company Ltd. ("**First Lien London Purchaser**" and, together with First Lien Windsor Purchaser, the "**First Lien Canadian Purchasers**"), as applicable, or as otherwise designated by the First Lien Purchaser in accordance with the APA, is hereby approved. The Chapter 11 Debtors are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the sale of the Canadian First Lien Purchased Assets to the First Lien Purchaser and/or the First Lien Canadian Purchasers, as applicable, and for the conveyance of the Canadian First Lien Purchased Assets to the First Lien Purchaser and/or the First Lien Canadian Purchasers, as applicable.

5. THIS COURT ORDERS AND DECLARES that, upon the delivery of a certificate of the Information Officer to the First Lien Purchaser substantially in the form attached as Schedule "C" hereto (the "**Information Officer's Certificate**"), all of the Chapter 11 Debtors' right, title and interest in and to:

- (a) the real property identified in Schedule "F" as being located in Windsor, Ontario (the "**Windsor Real Property**") and all Canadian First Lien Purchased Assets that are primarily related to the Windsor Real Property shall vest absolutely in First Lien Windsor Purchaser;

- (b) the real property identified in Schedule "F" as being located in London, Ontario (the "**London Real Property**") and all Canadian First Lien Purchased Assets that are primarily related to the London Real Property shall vest absolutely in First Lien London Purchaser; and
- (c) any Canadian First Lien Purchased Assets that are not referred to in sub-paragraphs 5(a) or 5(b) above shall vest absolutely in the First Lien Purchaser,

in each case, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, Interests (as defined in the US Sale Order) or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by any Order of this Honourable Court in these proceedings; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system, including without limitation those listed on Exhibit H to the Kim Affidavit; and (iii) those Claims listed on Schedule "D" hereto (all of the items in sub-paragraphs (i), (ii) and (iii) being collectively referred to as the "**Encumbrances**", which term shall not include those registrations specifically identified in Section A of Schedule "E" hereto (with respect to the Windsor Real Property) or Section B of Schedule "E" hereto (with respect to the London Real Property)) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Canadian First Lien Purchased Assets are hereby released, expunged, extinguished and discharged as against the Canadian First Lien Purchased Assets.

6. THIS COURT ORDERS that upon the registration in the Land Registry Office for the Registry Division of Essex (No. 12) of (i) a Transfer/Deed of Land in the form prescribed by the *Land Registration Reform Act* (Ontario) duly executed by the applicable Chapter 11 Debtor(s) or (ii) an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario) and/or the *Land Registration Reform Act* (Ontario), the Land Registrar is hereby directed to and shall enter First Lien Windsor Purchaser as the owner of the Windsor Real Property in fee

simple, and is hereby directed to delete and expunge from title to the Windsor Real Property all of the Claims listed in Schedule "D" hereto that are applicable to the Windsor Real Property.

7. THIS COURT ORDERS that upon the registration in the Land Registry Office for the Registry Division of Middlesex (No. 33) of (i) a Transfer/Deed of Land in the form prescribed by the *Land Registration Reform Act* (Ontario) duly executed by the applicable Chapter 11 Debtor(s) or (ii) an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario) and/or the *Land Registration Reform Act* (Ontario), the Land Registrar is hereby directed to and shall enter First Lien London Purchaser as the owner of the London Real Property in fee simple, and is hereby directed to delete and expunge from title to the London Real Property all of the Claims listed in Schedule "D" hereto that are applicable to the London Real Property.

8. THIS COURT ORDERS AND DECLARES that, in accordance with the APA and the US Sale Order, the Chapter 11 Debtors are hereby authorized to assign to the First Lien Purchaser, First Lien Windsor Purchaser and/or First Lien London Purchaser, as applicable, all Assigned Contracts to which the Canadian Debtors are parties or that relate to contractual obligations of the Chapter 11 Debtors in Canada (the "**Canadian First Lien Assigned Contracts**") and, upon delivery of the Information Officer's Certificate to the First Lien Purchaser:

- (a) the Canadian First Lien Assigned Contracts primarily relating to the Windsor Real Estate shall be assigned to First Lien Windsor Purchaser;
- (b) the Canadian First Lien Assigned Contracts primarily relating to the London Real Estate shall be assigned to First Lien London Purchaser; and
- (c) any Canadian First Lien Assigned Contracts that are not referred to in subparagraphs 8(a) or 8(b) above shall be assigned to the First Lien Purchaser,

and such assignments of the Canadian First Lien Assigned Contracts are valid and binding on the applicable counterparties and shall occur automatically without any further steps or actions notwithstanding any restriction, condition or prohibition in any such Canadian First Lien

Assigned Contracts relating to the assignment thereof. Nothing in this paragraph 8 derogates from the obligations of the First Lien Purchaser, the First Lien Windsor Purchaser or the First Lien London Purchaser, as applicable, to perform their obligations under the Assigned Contracts to the extent required by the APA and the US Sale Order.

9. THIS COURT ORDERS AND DIRECTS the Information Officer to deliver an executed copy of the Information Officer's Certificate to the First Lien Purchaser forthwith after the Information Officer receives confirmation from Allied US (or its counsel) and the First Lien Purchaser (or its counsel) that: (a) the conditions to Closing as set out in the APA have been satisfied or waived by the Chapter 11 Debtors and the First Lien Purchaser, as applicable; and (b) subject only to the delivery of the Information Officer's Certificate, the transactions contemplated by the APA have been completed to the satisfaction of the Chapter 11 Debtors and the First Lien Purchaser. The Information Officer is hereby directed to file a copy of the Information Officer's Certificate with the Court forthwith after delivery thereof to the First Lien Purchaser.

10. THIS COURT ORDERS that, notwithstanding:

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

the vesting of the Canadian First Lien Purchased Assets in, and the assignment of the Canadian First Lien Assigned Contracts to, the First Lien Purchaser, the First Lien Canadian Purchasers and/or as otherwise directed by the First Lien Purchaser pursuant to this Order, as applicable, shall be binding on any trustee in bankruptcy that may be appointed in respect of the Chapter 11 Debtors and shall not be void or voidable by creditors of the Chapter 11 Debtors, nor shall they constitute nor be deemed to be ~~a settlement~~ fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and*

Insolvency Act (Canada) or any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

11. THIS COURT ORDERS AND DECLARES that the transactions contemplated in the APA are exempt from the application of the *Bulk Sales Act* (Ontario) and any equivalent or applicable legislation in any other province or territory in Canada, and each of the First Lien Purchaser, the First Lien Canadian Purchasers and any entity designated by the First Lien Purchaser to acquire Canadian First Lien Purchased Assets in accordance with the APA is discharged from any obligation under, and shall not incur any liability under, Section 6 of the *Retail Sales Tax Act* (Ontario) and/or any equivalent or applicable legislation of any other province or territory in Canada in respect of the Canadian First Lien Purchased Assets, the Canadian First Lien Assigned Contracts or the transactions contemplated in the APA.

GENERAL

12. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, or in any other foreign jurisdiction, 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. 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 or the Information Officer and their respective agents in carrying out the terms of this Order.

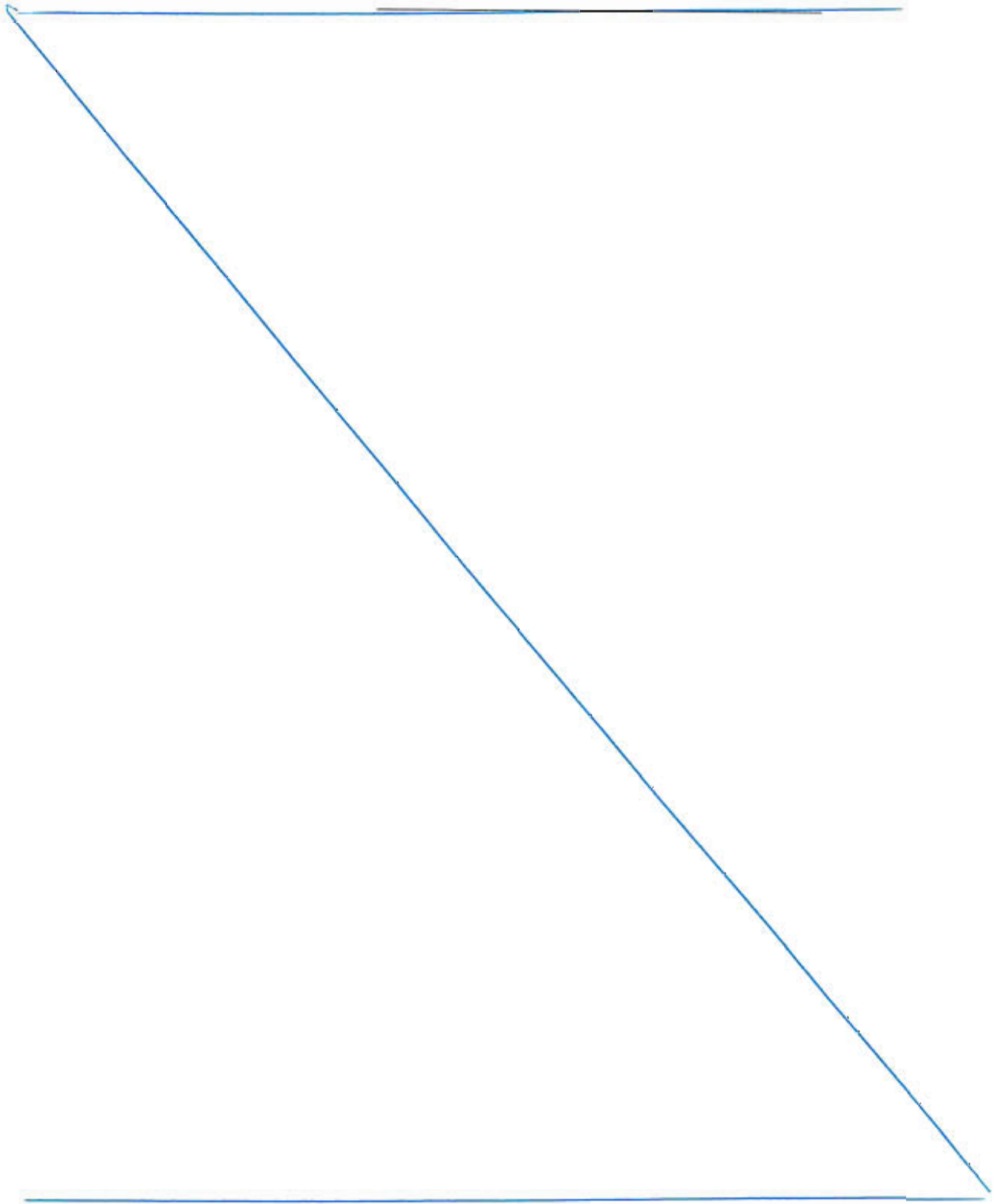
13. THIS COURT ORDERS that each of the Chapter 11 Debtors, the Foreign Representative and the Information Officer be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance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

ON / BOOK NO.
LE / DANS LE REGISTRE NO.



OCT 13 2013





SCHEDULE "A" – CHAPTER 11 DEBTORS

Allied Systems Holdings, Inc.

Allied Automotive Group, Inc.

Allied Freight Broker LLC

Allied Systems (Canada) Company

Allied Systems, Ltd. (L.P.)

Axis Areta, LLC

Axis Canada Company

Axis Group, Inc.

Commercial Carriers, Inc.

CT Services, Inc.

Cordin Transport LLC

F.J. Boutell Driveway LLC

GACS Incorporated

Logistic Systems, LLC

Logistic Technology, LLC

QAT, Inc.

RMX LLC

Transport Support LLC

Terminal Services LLC

SCHEDULE "B" – US SALE ORDER

IN THE MATTER OF APPLICATION OF AN APPLICATION BY TK HOLDINGS INC. AND
TAKATA CORPORATION UNDER SECTION 46 OF THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT

Court File No. CV-17-11857-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding Commenced at Toronto

**BRIEF OF AUTHORITIES
(re: Order Recognizing
Japanese Sale Approval)
(Returnable May 17, 2018)**

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Heather L. Meredith LSUC#: 48354R
Tel: 416-601-8342
Email: hmeredith@mccarthy.ca

Eric S. Block LSUC#: 47479K
Tel: 416-601-7792
Email: eblock@mccarthy.ca

Trevor Courtis LSUC#: 67715A
Tel: 416-601-7643
Email: tcourtis@mccarthy.ca

Lawyers for the Foreign Representatives
DOCS 17887178