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

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 (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 OF THE U.S. FOREIGN REPRESENTATIVE
(Re: Recognition of Chapter 11 Plan and Related Orders)
(Returnable March 14, 2018)

March 9, 2018

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TO: THE SERVICE LIST

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10.	*Homburg Invest Inc., Re*, 2014 QCCS 3135
11.	*In re Nortel Networks Inc.,* Order (Recognition of U.S. Chapter 11 Plan Confirmation order and U.S. Settlement and Plans Support Agreement Approval Order), Court File No. 09-Cl-7951, February 7, 2017
12.	*Pacific Exploration & Production Corp., Re*, 2016 ONSC 5429
13.	*Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587

Tab 1

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.

End of Document

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.

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

End of Document

Tab 3

2011 ONSC 4201
Ontario Superior Court of Justice

Massachusetts Elephant & Castle Group Inc., Re

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

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

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

MASSACHUSETTS ELEPHANT & CASTLE GROUP, INC. (Applicant)

Morawetz J.

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

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

Subject: Insolvency; Corporate and Commercial

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

Morawetz J.:

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

(a) an Initial Recognition Order declaring that:

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

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

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

(b) a Supplemental Order:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) greater legal certainty for trade and investment;

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

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

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

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

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

(a) the proceeding is a foreign proceeding, and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) the location where corporate decisions are made;

(b) the location of employee administrations, including human resource functions;

(c) the location of the debtor's marketing and communication functions;

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

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

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

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

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

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

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

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

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

29 For example:

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

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

> (a) the location of the debtor's headquarters or head office functions or nerve centre;
>
> (b) the location of the debtor's management; and
>
> (c) the location which significant creditors recognize as being the centre of the company's operations.

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

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

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

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

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

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

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

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

(a) the Foreign Representative Order;

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

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

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

(e) the U.S. Utilities Order;

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

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

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

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

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

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

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

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

Schedule "A"

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

Application granted.

End of Document

Tab 4

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 ENTITES 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 5

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) The enterprise is to be permitted to implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis of the enterprise and to the extent reasonably practicable, one jurisdiction should take charge of the principal administration of the enterprise's reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of the stakeholders and does not inappropriately detract from the net benefits which may be available from alternative approaches.

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

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

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

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

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

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

(f) Where one jurisdiction has an ancillary role,

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

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

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

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

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

24 Order to issue accordingly.

Application granted.

APPENDIX

Court File No. 00-CL-3667

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

INITIAL ORDER

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

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

SERVICE

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

RECOGNITION OF THE U.S. PROCEEDINGS

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

APPLICATION

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

PROTECTION FROM ASBESTOS PROCEEDINGS

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

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

DIP FINANCING

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

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

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

> (a) the execution, delivery, perfection or registration of the DIP Lender's Security shall not create or be deemed to constitute a breach by the Applicant of any agreement to which it is a party, and
>
> (b) the DIP Lender shall have no liability to any person whatsoever as a result of any breach of any agreement caused by or resulting from the Applicant entering into the Credit Agreement, the DIP Lender's Security or other document delivered pursuant thereto.

REPORT AND EXTENSION OF STAY

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

> (a) the Applicant shall appoint Victor J. Manica, or such other senior officer as it deems appropriate from time to time, as an information officer (the "Information Officer");
>
> (b) the Information Officer shall deliver to the Court a report at least once every three months outlining the status of the U.S. Proceeding, the development of any process for dealing with asbestos claims and such other information as the Information Officer believes to be material (the "Information Reports"); and
>
> (c) the Applicant and the Information Officer shall incur no liability or obligation as a result of the appointment of the Information Officer or the fulfilment of the duties of the Information Officer in carrying out the provisions of this Order and no action or other proceedings shall be commenced against the Applicant or Information Officer as an result of or relating in any way to the appointment of the Information Officer or the fulfilment of the duties of the Information Officer, except with prior leave of this Court and upon further order securing the solicitor and his own client costs of the Information Officer and the Applicant in connection with any such action or proceeding.

SERVICE AND NOTICE

10. *THIS COURT ORDERS* that the Applicant shall, within fifteen (15) business days of the date of entry of this Order, publish a notice of this Order in substantially the form attached as Schedule "A" hereto on two separate days in the Globe & Mail (National Edition) and the National Post.

11. *THIS COURT ORDERS* that the Applicant be at liberty to serve this Order, any other orders in these proceedings, all other proceedings, notices and documents by prepaid ordinary mail, courier, personal delivery or electronic transmission to any interested party at their addresses as last shown on the records of the Applicant and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

MISCELLANEOUS

12. *THIS COURT ORDERS* that notwithstanding anything else contained herein, the Applicant may, by written consent of its counsel of record herein, agree to waive any of the protections provided to it herein.

13. *THIS COURT ORDERS* that the Applicant may, from time to time, apply to this Court for directions in the discharge of its powers and duties hereunder or in respect of the proper execution of this Order.

14. *THIS COURT ORDERS* that, notwithstanding any other provision of this Order, any interested person may apply to this Court to vary or rescind this order or seek other relief upon 10 days' notice to the Applicant and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

15. *THIS COURT ORDERS AND REQUESTS* the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada (including the assistance of any court in Canada pursuant to Section 17 of the CCAA) and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province and any court or any judicial, regulatory or administrative body of the United States and the states or other subdivisions of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

Schedule "A"

NOTICE

RE: IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED (the "CCAA")

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

PLEASE TAKE NOTICE that this notice is being published pursuant to an Order of the Superior Court of Justice of Ontario made February 25, 2000. The corporate parent of Babcock & Wilcox Canada Ltd. and certain other affiliated corporations in the United States have filed for protection in the United States under Chapter 11 of the Bankruptcy Code to seek, as the result of recent, sharp increases in the cost of settling asbestos claims which have seriously threatened the Babcock & Wilcox Enterprise's long term health, protection from mass asbestos claims to which they are or may become subject. Babcock & Wilcox Canada Ltd. itself has not filed under Chapter 11 but has sought and obtained an interim order under Section 18.6 of the CCAA affording it a stay against asbestos claims in Canada. Further application may be made to the Court by Babcock & Wilcox Canada Ltd. to ensure fair and equal access for Canadians with asbestos claims against Babcock & Wilcox Canada Ltd. to the process established in the United States. Representations may also be made by parties who would prefer to pursue their remedies in Canada.

Persons who wish to be a party to the Canadian proceedings or to receive a copy of the order or any further information should contact counsel for Babcock & Wilcox Canada Ltd., Derrick C. Tay at Meighen Demers (Telephone (416) 340-6032 and Fax (416) 977-5239).

DATED this day of, 2000 at Toronto, Canada

Tab 6

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

Xerium Technologies Inc., Re

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

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

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

C. Campbell J.

Heard: May 14, 2010
Judgment: September 28, 2010
Docket: 10-8652-00CL

Counsel: Derrick Tay, Randy Sutton for Applicants

Subject: Insolvency

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.

End of Document

Tab 7

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. DeSavoye* (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 administrating authorities of the countries involved. Because of the importance of the courts in insolvency and reorganization

proceedings, it is even more essential that the supervising courts be able to coordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises.

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

The Guidelines at this time contemplate application only between Canada and the United States, because of the very different rules governing communications with 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 parries 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.

Tab 8

CITATION: Lightsquared Inc. (Re), 2015 ONSC 2309
COURT FILE NO.: CV12-9719-00CL
DATE: 2015-04-10

SUPERIOR COURT OF JUSTICE - ONTARIO

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

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

AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT WITH RESPECT TO LIGHTSQUARED INC., LIGHTSQUARED INVESTORS HOLDINGS INC., ONE DOT FOUR CORP., ONE DOT SIX CORP., SKYTERRA ROLLUP LLC, SKYTERRA ROLLUP SUB LLC, SKYTERRA INVESTORS LLC, TMI COMMUNICATIONS DELAWARE, LIMITED PARTNERSHIP, LIGHTSQUARED GP INC., LIGHTSQUARED LP, ATC TECHNOLOGIES, LLC, LIGHTSQUARED CORP., LIGHTSQUARED FINANCE CO., LIGHTSQUARED NETWORK LLC, LIGHTSQUARED INC. OF VIRGINIA, LIGHTSQUARED SUBSIDIARY LLC, LIGHTSQUARED BERMUDA LTD., SKYTERRA HOLDINGS (CANADA) INC., SKYTERRA (CANADA) INC. AND ONE DOT SIX TVCC CORP. (COLLECTIVELY, THE "CHAPTER 11 DEBTORS")

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *John Salmas and Sara-Ann Van Allen*, for the Foreign Representative and Canadian Counsel to the Chapter 11 Debtors

Brian Empey, for the Information Officer Alvarez & Marsal Canada Inc.

Sean Zweig, for certain Secured Lenders and DIP Lenders

HEARD and RELEASED: April 9, 2015

ENDORSEMENT

[1] The Foreign Representative seeks, among other things, the recognition in Canada of the following orders of the United States Bankruptcy Court for the Southern District of New York (the `U.S. Bankruptcy Court") entered or sought in the cases commenced by the Chapter 11 Debtors in the U.S. Bankruptcy Court under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Chapter 11 Cases") (collectively, the "Foreign Orders"):

(a) Order Confirming Modified Second Amended Joint Plan Pursuant To Chapter 11 Of Bankruptcy Code [U.S. Bankruptcy Court Docket No. 2276] (the "Confirmation Order");

(b) Order, Pursuant to 11 U.S.C. § 105(A) and 363, Authorizing LightSquared to (A) Enter into and Perform Under Letters Related to $1,515,000,000 Second Lien Exit Financing Arrangements, (B) Pay Fees and Expenses in Connection Therewith, and (C) Provide Related Indemnities [U.S. Bankruptcy Court Docket No. 2273] (the "Jefferies Exit Financing Order");

(c) Order Authorizing Payment of Alternative Transaction Fee in Connection with Proposed Plan of Reorganization [U.S. Bankruptcy Court Docket No. 2275] (the "Alternative Transaction Fee Order");

(d) Order (A) Authorizing Use of Cash Collateral, if any, Through Plan Effective Date, (B) Establishing that Prepetition Secured Parties are Adequately Protected and (C) Modifying Automatic Stay [to be entered by the 'U.S. Bankruptcy Court]; and

(e) Order Amending Final Order (A) Authorizing DIP Obligors To Obtain Eighth Replacement Superpriority Senior Secured Priming Postpetition Financing, (B) Granting Superpriority Liens and Providing Superpriority Administrative Expense Status, (C) Granting Adequate Protection, and (D) Modifying Automatic *Stay* [U.S. Bankruptcy Court Docket No. 2300] (the "Amended Eighth Replacement DIP Order").

[2] The motion was not opposed.

[3] On December 18, 2014, the Chapter 11 Debtors filed initial versions of the (i) *Joint Plan Pursuant to Chapter 11 of Bankruptcy Code* (as amended, modified or supplemented, the "Joint Plan"), and (ii) *Specific Disclosure Statement for Joint Plan Pursuant to Chapter 11 of Bankruptcy Code* (the "Specific Disclosure Statement").

[4] The confirmation hearing in respect of the Joint Plan (the "Confirmation Hearing") commenced at 10:00 am on March 9, 2015 before the U.S. Bankruptcy Court.

[5] At the time of commencement of the Confirmation Hearing, numerous stakeholders had filed objections to the Joint Plan.

[6] The ongoing negotiations and resolution of objections resulted in various modifications to the Joint Plan and, on March 26, 2015, the Chapter 11 Debtors filed the Modified Second Amended Plan.

[7] On March 26, 2015, Her Honor Judge Chapman of the U.S. Bankruptcy Court issued a decision which, among other things, confirmed the Modified Second Amended Plan.

[8] On April 7, 2015, the U.S. Bankruptcy Court entered the Amended Eighth Replacement DIP Order.

[9] Section 49(1) of the CCAA provides that, if an order recognizing a foreign proceeding is made, the court may, if it is satisfied that it is necessary for the protection of the debtor company's property or the interests of the creditor or creditors, make any order that it considers appropriate.

[10] Section 50 of the CCAA provides that an order under Part IV may be made on any terms and conditions that the court considers appropriate in the circumstances.

[11] The Chapter 11 Cases were described by Judge Chapman in her bench decision as a "bankruptcy battle [of] biblical proportions.

[12] In my view, the recognition of the Foreign Orders is consistent with the purpose of the CCAA and Part IV in particular. It promotes the fair and efficient administration of the Chapter 11 Debtors' cross-border proceedings.

[13] The Record establishes that the Modified Second Amended Plan provides for the payment in full, including postpetition interest, of all general unsecured creditors, including Canadian unsecured creditors. In the absence of the Modified Second Amended Plan, it is expected that there would be no distributions to such creditors.

[14] The Record also establishes that the unsecured creditors are expected to receive no recoveries in the event of the liquidation of the Chapter 11 Debtors pursuant to Chapter 7 of the U.S. Bankruptcy Code. As such, but for the contributions contemplated by the Modified Second Amended Plan, those creditors senior to the unsecured creditors would not be paid anywhere near in full and there would be no value flowing to any of the unsecured creditors, including the Canadian unsecured creditors.

[15] The Record further establishes that the Eighth Replacement DIP Facility is a necessary and integral component of the Modified Second Amended Plan, which provides for the payment in full, including postpetition interest, of all general unsecured creditors, including Canadian unsecured creditors. In the absence of the Modified Second Amended Plan, and the corresponding amended Eighth Replacement DIP Facility, it is expected that there would be no distributions to such creditors.

[16] I am satisfied that there will be no material prejudice to Canadian creditors if the Amended Eighth Replacement DIP Order is recognized by this Court. In my view, the

amendments to the Eighth Replacement DIP Order do not increase the amount of the DIP obligations that rank ahead of such unsecured claims (see: *Hartford Computer Hardware, Inc. (Re)*, 2012 ONSC 964, para 13, [Hartford]). In making this determination, I have taken into account that the Information Officer does not believe that the relief sought is contrary to Canadian public policy.

[17] The Foreign Representative submits that the recognition of the Foreign Orders by the Canadian Court is in the best interests of the Canadian estates of the Chapter 11 Debtors. The Information Officer recommends that the relief be granted.

[18] I accept these statements and have concluded it is appropriate to recognize the Foreign Orders.

[19] The Information Officer also sought approval of its Twenty-Third and Twenty-Fourth Reports, together with its Supplemental Report to the Twenty-Fourth Report. The relief was not opposed. The Reports are, accordingly, approved.

[20] In the result, the requested relief is granted and the Order has been signed in the form presented.

Regional Senior Justice G.B. Morawetz

Date: April 10, 2015

Tab 9

Court File No. CV-16-11271-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	MONDAY, THE 12TH
	)	
JUSTICE NEWBOULD	)	DAY OF SEPTEMBER, 2016

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 WITH RESPECT TO HORSEHEAD HOLDING CORP., HORSEHEAD CORPORATION, HORSEHEAD METAL PRODUCTS, LLC, THE INTERNATIONAL METALS RECLAMATION COMPANY, LLC AND ZOCHEM INC. (collectively, the "Debtors")

APPLICATION OF ZOCHEM INC.
UNDER SECTION 46 OF THE
COMPANIES' CREDITORS ARRANGEMENT ACT

RECOGNITION AND DISCHARGE ORDER

THIS MOTION, made by Zochem Inc. ("**Zochem**") in its capacity as the foreign representative (the "**Foreign Representative**") of the Debtors, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form enclosed in the Motion Record, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the affidavit of Aaron Collins sworn September 9, 2016 and the Fourth Report of Richter Advisory Group Inc. ("**Richter**") in its capacity as information officer (the "**Information Officer**") dated September 9, 2016 (the "**Fourth Report**") and on hearing the submissions of counsel for the Foreign Representative, counsel to the Information Officer, counsel to the Ad Hoc Group of Senior Secured Noteholders and post-petition lenders (the "**DIP Lenders**") and Cantor Fitzgerald Securities, as administrative

counsel to the Zochem independent director

agent, and no one else appearing although duly served as appears from the affidavits of service of Jacqueline Goslett sworn September 9, 2016, filed:

SERVICE

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

INFORMATION OFFICER'S REPORT

2. **THIS COURT ORDERS** that the Fourth Report and the activities of the Information Officer described therein be and are hereby approved.

RECOGNITION

3. **THIS COURT ORDERS** that the following orders (the "**Foreign Orders**") of the United States Bankruptcy Court for the District of Delaware made in the proceedings commenced by the Debtors in the U.S. Court for the District of Delaware under chapter 11 of title 11 of the United States Code are hereby recognized and given full force and effect in all provinces and territories of Canada pursuant to Section 49 of the CCAA:

(a) Findings of Fact, Conclusions of Law, and Order Confirming Debtors' Second Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code entered September 9, 2016 (the "**Confirmation Order**"), attached as **Schedule "A"** to this Order; and

(b) Order (I) Approving the Unit Purchase and Support Agreement and Authorizing the Debtors to Honor their Obligations Thereunder; and (II) Granting Related Relief entered September 9, 2016, attached as **Schedule "B"** to this Order,

provided, however, that in the event of any conflict between the terms of the Foreign Orders and the Orders of this Court made in the within proceedings, the Orders of this Court shall govern with respect to the Debtors' current and future assets, undertakings and properties of every nature and kind whatsoever, where situate in Canada, including all proceeds thereof.

4. **THIS COURT ORDERS** that that the Debtors are authorized, directed and permitted to take all such steps and actions, and do all things necessary or appropriate to implement their Second Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code (the "**Plan**") and the transactions contemplated thereby in accordance with and subject to the terms of the Plan, and to enter into, execute, deliver, implement and consummate all the steps, transactions and agreements contemplated by the Plan.

5. **THIS COURT ORDERS** that that the Debtors are authorized and directed to execute, deliver, and implement the Unit Purchase and Support Agreement (attached to Schedule "B") (the "**UPA**"), as may be amended from time to time in accordance with the terms thereof and the Debtors are authorized and directed to take any and all actions necessary to perform their obligations thereunder. The UPA is binding and enforceable against the Debtors and the Plan Sponsors (as defined in the UPA) in accordance with its terms.

6. **THIS COURT ORDERS** that, as of the Effective Date (as such term is defined in the Plan), each creditor of the Debtor shall be deemed to have consented and agreed to all of the provisions of the Plan in their entirety and, in particular, each creditor shall be deemed:

(a) to have executed and delivered to the Debtors all consents, releases or agreements required to implement and carry out the Amended Plan in its entirety; and

(b) to have agreed that if there is any conflict between, (i) the provisions, express or implied, of any agreement or other arrangement, written or oral, existing between such creditors and the Debtors as of the Effective Date, and (ii) the provisions of the Plan and/or the Confirmation Order, the provisions of the Plan or the Confirmation Order, as applicable, take precedence and priority and the provisions of such agreement or other arrangement shall be deemed to be amended accordingly.

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

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy, receivership or other order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"), the CCAA or otherwise in respect of any of the Debtors and any bankruptcy, receivership or other order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made or deemed to be made in respect of any of the Debtors;

the transactions contemplated by the Plan shall be binding on any trustee in bankruptcy, receiver or monitor that may be appointed in respect of the Debtors and shall not be void or voidable by creditors of the Debtors, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the BIA, the CCAA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

8. **THIS COURT ORDERS** that, without limiting anything in this Order, the releases, third-party releases, exculpations and injunctions set forth in the Confirmation Order and set out in Article VIII of the Plan shall be effective in Canada immediately or on the Effective Date, as applicable, in accordance with the Confirmation Order and the Amended Plan, without further act or order.

DISCHARGE AND RELEASE OF INFORMATION OFFICER

9. **THIS COURT ORDERS** that promptly upon (a) receipt of the notice from Zochem described in paragraph 11 of this Order and (b) payment of all amounts owing to the Information Officer and its counsel, the Information Officer shall deliver to the Debtors a certificate (the "**Information Officer's Certificate**") in substantially the form attached as **Schedule "C"** to this Order and shall file a copy of such Information Officer's Certificate with the Court as soon as practicable thereafter.

10. **THIS COURT ORDERS** that, upon the delivery by the Information Officer of the Information Officer's Certificate to the Debtors as contemplated in paragraph 9:, (a) the Stay Period as defined in the Supplemental Order made February 5, 2016 in these proceedings (the

"**Supplemental Order**") shall terminate; (b) the Administrative Charge established in the Supplemental Order shall be discharged; and (c) these proceedings shall be terminated.

11. **THIS COURT ORDERS** that Zochem shall provide written notice of the occurrence of the Effective Date to the Information Officer forthwith upon the occurrence of the Effective Dated.. The Information Officer may rely on written notice from Zochem that the Effective Date has occurred 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.

12. **THIS COURT ORDERS** that, upon delivery of the Information Officer's Certificate to the Debtors as contemplated in paragraph 9, Richter shall be discharged as Information Officer of the Debtors and all duties associated therewith. Notwithstanding its discharge herein, (a) Richter shall remain Information Officer for the performance of such incidental duties as may be required to complete the administration of these proceedings and (b) the Information Officer shall continue to have the benefit of the provisions of all Orders made in these proceedings, including all approvals, and protections and stays of proceeding in favour of Richter in its capacity as Information Officer.

13. **THIS COURT ORDERS** that, upon delivery of the Information Officer's Certificate to the Debtors as contemplated in paragraph 9, Richter be and is hereby released and discharged from any and all liability that Richter now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of Richter while acting in its capacity as Information Officer herein, save and except for any gross negligence or wilful misconduct on the Information Officer's part. Without limiting the generality of the foregoing, upon filing of the Information Officer's Certificate, Richter is hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the within proceeding, save and except for any gross negligence or wilful misconduct on the Information Officer's part.

14. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against the Information Officer in any way arising from or related to its capacity or conduct as Information Officer except with prior leave of this Court on not less than fifteen (15) days prior written notice to the Information Officer.

15. **THIS COURT ORDERS** that the Information Officer be at liberty to bring a motion to this Court, on notice to the service list, seeking approval of its accounts and that of its counsel prior to the Effective Date (such hearing date, the "**Fee Approval Hearing Date**").

16. **THIS COURT ORDERS** that a further hearing shall be held on the Fee Approval Hearing Date, at which time any party in interest may seek to vary the provisions of paragraphs 13 and 14 of this Order. Materials of any party in interest seeking to vary such provisions shall be served on the service list not later than five (5) days prior to the Fee Approval Hearing Date.

AID AND ASSISTANCE

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

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

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

SEP 12 2016

PER / PAR:

SCHEDULE "A"

[attached]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
HORSEHEAD HOLDING CORP., et al.,[1]	)	Case No. 16-10287 (CSS)
Debtors.	)	Jointly Administered

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER CONFIRMING DEBTORS' SECOND AMENDED JOINT PLAN OF REORGANIZATION PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

The above-captioned debtors and debtors in possession (collectively, the "Debtors"), having:[2]

a. commenced, on February 2, 2016 (the "Petition Date"), these cases (these "Chapter 11 Cases") by filing voluntary petitions in the United States Bankruptcy Court for the District of Delaware (this "Court") for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") and, on February 5, 2016, obtained an order of the Ontario Superior Court of Justice (Commercial List) recognizing the Chapter 11 Cases as foreign main proceedings under Part IV of the Companies' Creditors Arrangement Act;

b. continued to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code;

c. filed, on April 13, 2016, the *Debtors' Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 604] (the "April 13 Plan"), and, on April 14, 2016, the *Disclosure Statement for the Debtors' Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 605] (the "April 14 Disclosure Statement"), which April 13 Plan, April 14 Disclosure Statement, and related documents were subsequently revised or supplemented;

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1 The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Horsehead Holding Corp. (7377); Horsehead Corporation (7346); Horsehead Metal Products, LLC (6504); The International Metals Reclamation Company, LLC (8892); and Zochem Inc. (4475). The Debtors' principal offices are located at 4955 Steubenville Pike, Suite 405, Pittsburgh, Pennsylvania 15205.

2 Unless otherwise noted herein, capitalized terms not defined in these findings of fact, conclusions of law, and order (collectively, this "Confirmation Order") shall have the meaning(s) ascribed to them, as applicable, in the Disclosure Statement (as defined herein) or the *Debtors' Second Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code (with Technical Modifications)* (Docket Nos. 1566, 1583), dated August 26, 2016, attached hereto as **Exhibit A** (the "Plan"). The rules of interpretation set forth in Article I.B of the Plan shall apply to this Confirmation Order.

reorganization of the Reorganized Debtors or any successor to the Reorganized Debtors under the Plan, except as provided in the Plan; and (e) establishes that the Reorganized Debtors will have sufficient funds available to meet their obligations under the Plan.

12. Section 1129(a)(12)—Payment of Bankruptcy Fees.

71. The Plan satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code. Article XII.C of the Plan provides for the payment of all fees payable by the Debtors, or the Reorganized Debtors, as applicable, under section 1930(a) of the Judicial Code.

13. Section 1129(a)(13)—Retiree Benefits.

72. The Debtors have not obligated themselves to provide retiree benefits and therefore the requirements under section 1129(a)(13) of the Bankruptcy Code are inapplicable. The Debtors do not have any remaining obligations to pay retiree benefits (as defined in section 1114 of the Bankruptcy Code). Therefore, section 1129(a)(13) of the Bankruptcy Code does not apply to these Chapter 11 Cases.

14. Section 1129(b)—Confirmation of Plan Over Nonacceptance of Impaired Classes.

73. The Plan satisfies the requirements of section 1129(b) of the Bankruptcy Code. Notwithstanding that [Class 6, and] the Deemed Rejecting Class have not accepted the Plan, the Plan may be confirmed because: (a) each other Voting Class voted to accept the Plan; (b) the Plan satisfies all requirements of section 1129(a) of the Bankruptcy Code other than section 1129(a)(8); and (c) the Plan does not violate the absolute priority rule, does not discriminate unfairly, and is fair and equitable with respect to Class 6 and the Deemed Rejecting Classes because there is no Class of equal priority receiving more favorable treatment than Class 6 or the Deemed Rejecting Classes and no Class that is junior to Class 6, or the Deemed Rejecting Classes is receiving or retaining any property on account of their Claims or Interests

and the holders of Claims against the Debtors that are senior to Class 6, and the Deemed Rejecting Classes are receiving distributions, the value of which is less than 100% of the Allowed amount of their Claims. The Plan may therefore be confirmed even though not all Impaired Classes have voted to accept the Plan.

15. Section 1129(c)—Only One Plan.

74. The Plan satisfies the requirements of section 1129(c) of the Bankruptcy Code. The Plan (including previous versions thereof) is the only chapter 11 plan filed in these Chapter 11 Cases.

16. Section 1129(d)—Principal Purpose of the Plan.

75. The Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code. The principal purpose of the Plan is not the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act.

S. Satisfaction of Confirmation Requirements.

76. Based upon the foregoing, the Plan satisfies the requirements for plan confirmation set forth in section 1129 of the Bankruptcy Code.

T. Good Faith.

77. The Debtors have proposed the Plan in good faith, with the legitimate and honest purposes of reorganizing the Debtors' ongoing business and maximizing the value of the Debtors' Estates for the benefit of their stakeholders. The Plan gives effect to many of the Debtors' restructuring initiatives, including debt reduction and a comprehensive operational fix. Accordingly, the Debtors and all of their respective members, officers, directors, agents, financial advisers, attorneys, employees, partners, affiliates, and representatives have been, are, and will continue to act in good faith if they proceed to: (a) consummate the Plan, and the agreements, settlements, transactions, and transfers contemplated thereby (including, without

Tab 10

2014 QCCS 3135, 2014 CarswellQue 6520, J.E. 2014-1270, EYB 2014-239196

2014 QCCS 3135
Cour supérieure du Québec

Homburg Invest Inc., Re

2014 CarswellQue 6520, 2014 QCCS 3135, J.E. 2014-1270, EYB 2014-239196

In the Matter of the Plan of Compromise or Arrangement of : Homburg Invest Inc., Homburg Shareco Inc., Churchill Estates Development Ltd., Inverness Estates Development Ltd., CP Development Ltd. and North Calgary Land Ltd., Debtors-Petitioners, c. Homco Realty Fund (52) Limited Partnership, Homco Realty Fund (88) Limited Partnership, Homco Realty Fund (89) Limited Partnership, Homco Realty Fund (92) Limited Partnership, Homco Realty Fund (94) Limited Partnership, Homco Realty Fund (96) Limited Partnership, Homco Realty Fund (105) Limited Partnership, Homco Realty Fund (121) Limited Partnership, Homco Realty Fund (122) Limited Partnership, Homco Realty Fund (142) Limited Partnership, Homco Realty Fund (190) Limited Partnership, Homco Realty Fund (191) Limited Partnership and Homco Realty Fund (199) Limited Partnership, Mises en cause, et Stichting Homburg Bonds, Mise en cause, et Taberna Preferred Fundind VI, Ltd., Taberna Preferred Fundind VIII, Ltd., Taberna Europe CDO I P.L.C. and Taberna Europe CDO II P.L.C., Mises en cause, et Samson Bélair/Deloitte & Touche Inc., Monitor

Schrager J.C.S.

Audience: 10 juin 2014 - 12 juin 2014
Jugement: 30 juin 2014
Dossier: C.S. Qué. Montréal 500-11-041305-117

Avocat: *Me Martin Desrosiers*, for the Debtors / Petitioners
Me Guy P. Martel, Me Danny Vu, Me Mathew De Angelis, for Stichting Homburg Bonds
Me Mason Poplaw, Me Jocelyn Perreault, for Samson Bélair/Deloitte & Touche Inc.
Me Sylvain Rigaud, Me Chrystal Ashby, for mis-en-cause entities

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

***Schrager J.C.S.*:**

1 The Debtors/Petitioners (« Debtors ») were subject to an initial stay order issued on September 9, 2011 pursuant to the *Companies' Creditors Arrangement Act* [1] (« CCAA ») by the Honourable Justice Louis Gouin. The latter has been charged with the management of the case but due to a conflict of interest with the attorneys the four (4) Taberna entities mises-en-cause in the instant proceedings (« Taberna »), the undersigned presided over the present matter.

2 After a number of extensions of the CCAA stay order, the Debtors filed an arrangement which was accepted by the statutory majority of creditors under the CCAA and subsequently sanctioned by the Court on June 5, 2013. Implementation of this plan, including payments thereunder, has begun.

3 The undersigned is called upon to adjudicate on the Debtor's Re-Amended Motion for Directions which was originally filed on January 25, 2013. The motion seeks resolution of issues regarding the rank *inter se* of, in essence, two

series of debentures one held or administered by the mise-en-cause Stichting Homburg Bonds (« Stichting ») referred to above and the other by Taberna.

4 In May 2006, Homburg Invest Inc. (« HII »), one of the Co-Petitioners/ Debtors, entered into a trust indenture with Stichting as trustee providing, *inter alia*, for the issuance of bonds. In 2002, Homburg Shareco Inc. (« Shareco ») another Co-Petitioner Debtor entered into an indenture also with Stichting providing for the issuance of additional bonds. The face-amount of the outstanding bonds as at the CCAA filing aggregated in excess of 400 Million Euros (or approximately 500 Million dollars) and constituted the largest single bloc of debt of the Debtor of approximately 1.8 Billion dollars.

5 In July 2006, HII entered into a « junior subordinate indenture » with Wells Fargo Bank, N.A. (« Wells Fargo ») providing for the issuance of 20 Million US dollar notes. A second indenture was signed at the same time providing for the issuance of 25 Million euro notes (hereinafter together, the 2006 Taberna Indentures).

6 Both of the 2006 Taberna Indentures contained the following clauses:

> **SECTION 12.1. Securities Subordinate to Senior Debt.**
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> The Company covenants and agrees, and each Holder of a Security, by its acceptance thereof, likewise covenants and agrees, that, to the extent and in the manner hereinafter set forth in this Article XII, the payment of the principal of and any premium and interest (including any Additional Interest) on each and all of the Securities are hereby expressly made subordinate and subject in right of payment to the prior payment in full of all Senior Debt.
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> **SECTION 12.2. No Payment When Senior Debt in Default; Payment Over of ProceedsUpon Dissolution, Etc.**
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> (a) In the event and during the continuation of any default by the Company in the payment of any principal of or any premium or interest on any Senior Debt (following any grace period, if applicable) when the same becomes due and payable, whether at maturity or at a date fixed for prepayment or by declaration of acceleration or otherwise, then, upon written notice of such default to the Company by the holders of such Senior Debt or any trustee therefor, unless and until such default shall have been cured or waived or shall have ceased to exist, no direct or indirect payment (in cash, property, securities, by set-off or otherwise) shall be made or agreed to be made on account of the principal of or any premium or interest (including any Additional Interest) on any of the Securities, or in respect of any redemption, repayment, retirement, purchase or other acquisition of any of the Securities.
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> (b) In the event of a bankruptcy, insolvency or other proceeding described in clause (d) or (e) of the definition of Event of Default (each such event, if any, herein sometimes referred to as a "Proceeding"), all Senior Debt (including any interest thereon accruing after the commencement of any such proceedings) shall first be paid in full before any payment or distribution, whether in cash, securities or other property, shall be made to any Holder of any of the Securities on account thereof. Any payment or distribution, whether in cash, securities or other property (other than securities of the Company or any other entity provided for by a plan of reorganization or readjustment the payment of which is subordinate, at least to the extent provided in these subordination provisions with respect to the indebtedness evidenced by the Securities, to the payment of all Senior Debt at the time outstanding and to any securities issued in respect thereof under any such plan of reorganization or readjustment), which would otherwise (but for these subordination provisions) be payable or deliverable in respect of the Securities shall be paid or delivered directly to the holders of Senior Debt in accordance with the priorities then existing among such holders until all Senior Debt (including any interest thereon accruing after the commencement of any Proceeding) shall have been paid in full.
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> (c) In the event of any Proceeding, after payment in full of all sums owing with respect to Senior Debt, the Holders of the Securities, together with the holders of any obligations of the Company ranking on a parity with the Securities, shall be entitled to be paid from the remaining assets of the Company the amounts at the time due and owing on account of unpaid principal of and any premium and interest (including any Additional

> Interest) on the Securities and such other obligations before any payment or other distribution, whether in cash, property or otherwise, shall be made on account of any Equity Interests or any obligations of the Company ranking junior to the Securities and such other obligations. If, notwithstanding the foregoing, any payment or distribution of any character on any security, whether in cash, securities or other property (other than securities of the Company or any other entity provided for by a plan of reorganization or readjustment the payment of which is subordinate, at least to the extent provided in these subordination provisions with respect to the indebtedness evidenced by the Securities, to the payment of all Senior Debt at the time outstanding and to any securities issued in respect thereof under any such plan of reorganization or readjustment) shall be received by the Trustee or any Holder in contravention of any of the terms hereof and before all Senior Debt shall have been paid in full, such payment or distribution or security shall be received in trust the benefit of, and shall be paid over or delivered and transferred to, the relevant holders of the Senior Debt at the time outstanding in accordance with the priorities then existing among such holders for application to the payment of all Senior Debt remaining unpaid, to the extent necessary to pay all such Senior Debt (including any interest thereon accruing after the commencement of any Proceeding) in full. In the event of the failure of the Trustee or any Holder to endorse or assign any such payment, distribution or security, each holder of Senior Debt is hereby irrevocably authorized to endorse or assign the same.

(Underlined by the Court)

7 Senior Debt is broadly defined in the 2006 Taberna Indentures and it is not contested that it includes the debt existing under and pursuant to the Stichting bonds.

8 Thus, the 2006 Taberna notes were subordinate to the Stichting debt, in that once a payment of capital or interest on the Stichting debt was in default, no payment on account of the 2006 Taberna Indentures was permitted by HII.

9 The 2006 Taberna Indentures further provided that they are governed by the laws of the State of New York.

10 In 2011, HII was in default in virtue of certain financial covenants provided in the 2006 Taberna Indentures. Negotiations ensued between the business people followed by exchanges between the lawyers culminating in the signature of an Exchange Agreement on February 28, 2011 providing for the issuance of new indentures and new notes thereunder, to replace the 2006 Taberna Indentures and notes.

11 Accordingly, and also on February 28, 2011, two new indentures and notes were issued to replace the Dollar and Euro 2006 Taberna Indentures (the « 2011 Taberna Indentures »). These notes remain outstanding.

12 Sections 12.1 and 12.2 referred to above were altered in that the pertinent portions of the said Sections 12.1 and 12.2 now read as follows:

> **SECTION 12.1. Securities Subordinate to Senior Debt.**
>
> The Company covenants and agrees, and each Holder of a Security, by its acceptance thereof, likewise covenants and agrees, that, to the extent and in the manner hereinafter set forth in this Article XII, the payment of the principal of and any premium and interest (including any Additional Interest) on each and all of the Securities are hereby expressly made subordinate to the Senior Debt. Notwithstanding anything to the contrary contained herein, the securities issued pursuant to those certain Junior Subordinated Indentures, each dated as of the date hereof, between the Company and the Trustee shall not be Senior Debt or otherwise entitled to the subordination provisions of this Article XII and the Securities shall rank pari passu in right of payment to such securities.
>
> **SECTION 12.2. No Payment When Senior Debt in Default.**
>
> (a) In the event and during the continuation of any default by the Company in the payment of any principal of or any premium or interest on any Senior Debt (following any grace period, if applicable) when the same becomes due and

payable, whether at maturity or at a date fixed for prepayment or by declaration of acceleration or otherwise, then, upon written notice of such default to the Company by the holders of such Senior Debt or any trustee therefore, unless and until such default shall have been cured or waived or shall have ceased to exist, no direct or indirect payment (in cash, property, securities, by set-off or otherwise) shall be made or agreed to be made on account of the principal of or any premium or interest (including any Additional Interest) on any of the Securities, or in respect of any redemption, repayment, retirement, purchase or other acquisition of any of the Securities. »

(Underlined by the Court)

13 Of most significance and pertinent to these presents is the fact that Section 12(b) and (c) of the 2006 Taberna Indentures were deleted. Section 12.2(b) provided for full payment of the « Senior Debt » (in this case, Stichting) in priority to the Junior Debt (i.e. Taberna) in the event of a bankruptcy or insolvency of HII. Section 12.2(c) provided that in the event of payment received by Wells Fargo as trustee under the Taberna Indentures, in contravention of Section 12.2(b), then such proceeds would be remitted or turned over to Senior Debt holders. Such a clause is commonly referred to as a « turnover provision ».

14 The definition of « Senior Debt » and the New York choice of law have not been modified.

15 The effect of the foregoing modifications in the context of the CCAA arrangement of the Debtors is the gravaman of this litigation.

16 According to Taberna, the effect of the drafting changes taken with other factors to be discussed hereinbelow, is that the claim of Taberna notes is no longer subordinate to the Stichting claim and should be paid *pari passu* with Stichting under the plan of arrangement approved by the Court.

17 As stated above, the Debtors' plan of arrangement was sanctioned by the Court on June 5, 2013, in other words after the Motion for Directions was filed but before the present matter was set down for hearing.

18 Under the plan of arrangement, all ordinary creditors including holders of Stichting bonds and Taberna notes were grouped in one and the same class. The intention of the Debtors supported by the Monitor was to pay nothing on account of the Taberna claim given the provisions of the subordination clauses referred to above and the fact that Stichting would not, under the plan, be paid in full. This was and is not acceptable to Taberna. However, in order to allow the HII plan to be confirmed and allow HII to move forward with its reorganization, the following was provided in the plan:

9.6 b) Notwithstanding any other provision in the Plan, HII and the Monitor shall comply with the Taberna Order in making any distributions on account of the Taberna Claim under the Plan, using the reserves created under the HII/Shareco Plan, as applicable. To the extent that the Taberna Order directs that the distribution entitlement under the Plan in respect of the Taberna Claim shall be remitted to any Person or Persons other than the holders of the Taberna Claim, any Newco Common Shares Cash-Out Election made by any holders of the Taberna claim shall be null.

Taberna order » means a Final Order of the Court addressing the distribution entitlement of the holders of the Taberna Claim under the Plan in respect of the Taberna Claim and authorizing and directing HII and the Monitor to rely on such Order in connection with the Plan;

19 The present judgment is the Taberna order.

20 By voting for the plan, the statutory majority agreed with HII that the issue of subordination between Stichting and Taberna would be resolved after the plan was sanctioned. Even though Taberna voted against the plan, it did not oppose this manner of proceeding or insist that HII's Motion for Directions be heard prior to the Court sanction of the plan.

21 For purposes of the proof and hearing herein, the parties relied on the affidavit in support of the Motion for Directions as well as the exhibits filed by consent and admissions filed in the Court record. Only the expert witnesses testifying on the content and effect of New York law were heard *viva voce*.

SUMMARY OF THE PARTIES' POSITION

Position of Taberna

22 Taberna submits that it should receive the same treatment as the Stichting bondholders under the plan of arrangement, or in other words be paid on a *pari passu* basis.

23 Taberna contends that the subordination contained in Section 12 of the 2011 Taberna Indentures no longer has effect because the bankruptcy language and the turnover provisions found in the 2006 Taberna Indentures were deleted so that in a bankruptcy or insolvency, Taberna debt is no longer subordinate and Taberna no longer has the obligation to turnover any entitlements to Stichting.

24 Taberna continues that the deletion of the language was a result of a negotiation between the business people followed by exchanges between the attorneys after HII's covenant default which led to the Exchange Agreement and the 2011 Taberna Indentures. It was part of the consideration for forbearing the covenant defaults. According to Taberna, the parties involved in the negotiation intended the result that Taberna no longer be subordinate in the event of a bankruptcy or insolvency.

25 Moreover, the fact that Taberna was placed in the same class for purposes of the plan of arrangement as Stichting (and indeed the same class as all of the unsecured creditors) dictates that Taberna should receive the same treatment as the other unsecured creditors, or in other words not be treated in a subordinate fashion.

Position of the Debtor, Stichting and the Monitor

26 The other parties contend that the drafting changes left the basic subordination language intact, so that the fundamental legal position of the Taberna debt remains unchanged - i.e. it is subordinate to Stichting and other HII creditors.

27 The wording of the 2011 Taberna Indentures is clear that Taberna is subordinate and the Court should not and indeed is not permitted by New York law, to look beyond the clear terms of the agreement between the parties. Under the parole evidence rule of New York law, evidence extrinsic to the document should not be considered unless there is an ambiguity on the face of the document. In such regard, no comparison should be made between the 2011 Taberna Indentures and the wording of the 2006 Taberna Indentures, to draw any inference (or ambiguity) from the deletion of the portions of Section 12.2. Equally the Exchange Agreement should not be considered in reading or interpreting the 2011 Taberna Indentures.

28 The parties other than Taberna add that there is no legal impediment under the CCAA to placing two (2) creditors in the same class for voting purposes though they may not under the plan of arrangement receive equal treatment on distribution or payment of dividends.

29 It is underlined that Stichting was a third-party beneficiary of the 2006 Taberna Indentures (as well as the 2011 Taberna Indentures), such that its rights could not be altered without its consent. Thus, the subordination from which it benefited under the 2006 Taberna Indentures could not be modified without its consent. Stichting was not a party to the Exchange Agreement nor to any of the negotiations leading up to the Exchange Agreement. Its consent was not obtained, nor even sought.

30 Moreover, Section 12.6 of the 2011 Taberna Indentures (section 12.7 in the 2006 Taberna Indentures) provides that a waiver of the subordination may not be presumed so that the fact that the Debtor may have placed Stichting in

the same class as Taberna under the plan of arrangement (and Stichting not protesting) cannot be interpreted against Stichting as a waiver of the subordination from which it benefits under the 2011 Taberna Indentures.

DISCUSSION

31 In virtue of the choice of law clause in both the 2011 Taberna Indentures and the 2006 Taberna Indentures, the law of the State of New York applies. Though New York law applies to the interpretation and the validity of the contract, it is local law that applies to the insolvency estate established pursuant to the CCAA [2] so that issues of distribution in the insolvency or questions of priority of payment are decided by application of the *lex fori* [3] . In Québec private international law, insolvency laws are characterized as procedural, so that the conflict rule indicates that the law of the forum applies [4] .

32 Since New York law is taken as a fact to be proved by expert testimony, each of Taberna, Stichting and the Monitor called expert witnesses who also, in accordance with Article 402.1 C.C.P., had filed reports.

33 Mr. Howard E. Levine, a practicing attorney and a former New York Court of Appeal Judge opined for Stichting that under New York law a clear and unambiguous contract is deemed « the definitive expression of the contracting parties' intent and must be enforced according to its terms, without reference to extrinsic evidence » (i.e. evidence other than the language used in the contract itself). Such extrinsic evidence may only be invoked where the language of the contract is ambiguous. Extrinsic evidence cannot be relied upon to create an ambiguity in the text of the contract. Since the subordination language used in the 2011 Taberna Indentures is clear and unambiguous, then, under New York law, extrinsic evidence would not be admitted. The lack of a turnover provision does not change the subordinated status of the Taberna notes. Mr. Levine was adamant that the New York courts strictly apply this parole evidence rule but he conceded that interrelated contracts executed contemporaneously may be read together.

34 Mr. Jeffrey D. Saferstein, a New York insolvency attorney, was called as an expert by the Monitor and echoed Mr. Levine's opinion on contract law and added an insolvency dimension.

35 Mr. Saferstein agreed that the subordination language in the 2011 Taberna Indentures was clear and unambiguous so that given the default, « Senior Debt » (i.e. the Stichting claims) must be paid in full before any monies can be received by Taberna noteholders. Turnover provisions are usually found in New York subordination agreements, but the absence of such a clause does not dilute the effect of the remaining subordination language. The turnover language reinforces the subordination, but its absence does not fundamentally alter the subordinated rights. In a New York insolvency, the US Bankruptcy Court would look at New York state law as the law of the contract and based on the parole evidence rule would exclude extrinsic evidence and give effect to the clear terms of the subordination of the 2011 Taberna Indentures, according to Mr. Saferstein.

36 Mr. Peter S. Partee, Taberna's expert, is also a New York insolvency lawyer. His quality as an expert was challenged since he is a partner in the law firm representing Taberna and it was argued that he did not have sufficient independence to be qualified as an expert. The undersigned dismissed the objection at the hearing, considering that the issue would go to probative value of the testimony rather than the qualification of Mr. Partee as an expert. This is particularly so because the principal concept of foreign law dealt with by the experts (i.e. the exclusion of extrinsic evidence when the terms of the parties' contract are clear and unambiguous) is not really that « foreign » at all. Québec law shares similar rules of evidence and interpretation.

37 Mr. Partee finds in the fact of the deletion of the turnover provisions from the 2006 Tarberna Indentures and in the extrinsic evidence, proof of the parties' intent that the subordination of the Taberna debt cease to have effect in an insolvency filing. The presence of a turnover provision is common and the fact of its deletion is significant and does not constitute parole evidence, so that the deletion would be considered by a New York court in the opinion of Mr. Partee. Absent the turnover, a court would not impose such an obligation on Tarberna - i.e. to turnover any entitlement to or funds received in an insolvency. Mr. Partee analyzed the turnover clause in the context of US bankruptcy proceedings where turnover provisions allow senior and subordinated debts to be classified together in a plan (for voting purposes)

but not to receive the same financial treatment since the subordinated creditor will be obliged to turnover what it receives pursuant to its contractual obligations.

38 Mr. Partee also underlined in his testimony that the recitals of the 2011 Taberna Indentures refer explicitly to the concurrent Exchange Agreement which in turn refers to the 2006 Taberna Indentures. Thus, he argues, those documents are not extrinsic to the 2011 Taberna Indentures and may be considered in the interpretation exercise.

39 Counsel for Taberna went further, arguing that certain drafting inconsistencies brought about ambiguity so that the negotiations and email exchanges between the business people and counsel of the Debtors and Taberna leading up to the signing of the 2011 Taberna Indentures should be considered by this Court.

40 The undersigned does not believe that this Court must choose one expert's opinion over the other. The resolution of the differing expert's opinions does not change the outcome. The subordination clause clearly establishes the principal. The extrinsic evidence adduced by Taberna is not convincing of any intention to change the principal of subordination that existed under the 2006 Taberna Indentures. Canadian insolvency law (with Québec civil law as suppletive) provides that the effect of that subordination in the insolvency of the Debtor is that the Taberna debt is to be treated as subordinate and not paid unless and until full payment has been made to the Senior Debt (including Stichting) .

41 The undersigned has considered the Exchange Agreement as a concurrent document and thus has considered it not to be extrinsic evidence. Since the Exchange Agreement specifically refers to the 2006 Taberna Indentures, the undersigned has considered the previous subordination drafting.

42 It is accepted in Canadian insolvency law that in proposals under the *Bankruptcy and Insolvency Act* [5] (« BIA"") to which CCAA arrangements are fundamentally similar, the rights of the debtor vis-à-vis its creditors is altered under the proposal but not the rights of the creditors *inter se* [6] .

43 Subordination clauses are fully enforceable in a bankruptcy or insolvency context [7] . Giving effect to a subordination clause as HII proposed does not make a plan unfair or unreasonable [8] as the fair and reasonable criterion for court sanction of a CCAA plan of arrangement does not require equal treatment of all creditors [9] .

44 Subordination clauses not containing express language addressing the effect of the subordination in a bankruptcy are given effect in a bankruptcy, nonetheless [10] .

45 Subordinate creditors have been ordered to turnover to senior creditors monies received in an insolvency based on general subordination language - i.e. absent a turnover clause [11] .

46 Significantly, in *Stelco* [12] , the Ontario Court of Appeal confirmed Farley, J. that a debtor may group subordinate with senior debt in classification. The creditors are classified according to their rights vis-à-vis the debtor [13] . Both Stichting and Taberna are unsecured note or debenture debt. It is their rights *inter se* which differ.

47 It is noteworthy that on the facts of the *Stelco* case, there was a turnover clause which was characterized as reinforcing the subordination [14] , which in turn reinforces Mr. Safestein's testimony before the undersigned that the general language is sufficient.

48 The Ontario Court of Appeal has stated that classification that would jeopardize plans of arrangement should not be favoured [15] . In *Stelco* as here, junior debt was grouped with senior debt since the junior debt was « out of the money » and accordingly would vote against the plan, as did Taberna in the present case. If placed in their own class, the Taberna noteholders could either defeat the plan, or not be bound by the plan so that the Debtor would be unable

to arrange all of its debts. The debt of all the other creditors, senior to Taberna would be arranged but that of Taberna would not be arranged since they would not be bound by the plan.

49 Mr. Partee and Mr. Saferstein explained that in US bankruptcy law, the cram down provisions of the US Bankruptcy Code could allow the Court to sanction a plan and bind a creditor in a separate class who had voted against the plan. However, this possibility does not exist under the CCAA so that the « cram down » must exist at the voting level by grouping subordinate debt with senior debt. Otherwise, junior debt would have a veto or an option of not being bound which is what Farley, J. characterized as the « tyranny of the minority » [16] .

50 In the second round of *Stelco* litigation, the Ontario Court of Appeal again confirmed the trial judge (this time, Wilton-Siegel, J.) in giving effect to the subordination (*albeit* containing a turnover) but emphasizing the principle applicable here that a plan vote and implementation do not alter the rights of creditors *inter se.*

51 Accordingly, applying principles of Canadian insolvency law to the subordination in the present cause, Taberna remains subordinate in the insolvency and this absent the specific bankruptcy language and a turnover clause.

52 Unfortunately for Taberna, the extrinsic evidence adduced is not helpful to its case.

53 The testimony of Mr. Miles, the officer of HII involved in the business negotiation of the 2011 Taberna Indentures, at best, might support an argument that the new language was intended to eliminate subordination in the event that HII went into a bankruptcy liquidation [17] . However, the present regime is that of a plan of arrangement under the CCAA. There is no proof that there was a meeting of the minds that subordination ended within an insolvency filing.

54 The email exchanges of draft wording between the attorneys charged with preparing the 2011 Taberna Indentures are not proof of any meeting of the minds either. Initially, a draft was sent by Taberna's lawyer eliminating the whole subordination section from the 2006 Taberna Indentures. HII counsel replied with a request that the omitted subordination language be reinserted into the document. The end-result was the present wording. After HII consulted Dutch and Canadian counsel, the present wording was accepted. Taberna's counsel at trial invokes this exchange as part of its argument that it was agreed that there would be no turnover obligation in the event of an insolvency. However, the position of Canadian and Dutch counsel is equally consistent with the position of the Canadian case law summarized above that the general subordination language was sufficient to continue the status of Taberna debt as fully subordinated notwithstanding an insolvency filing and notwithstanding the absence of specific turnover language. Taberna counsel may have sought an advantage for Taberna in the drafting but no meeting of the minds to change the basic subordination concept has been demonstrated.

55 Taberna counsel's argument that the modification to the subordination was the consideration for Taberna forbearing the HII covenant default is not supported by the evidence. It is axiomatic that unsecured creditors generally benefit from their debtor continuing in business and avoiding forced liquidation. Particularly in this case, Taberna received letters of credit aggregating approximately $2 Million. Payment under the letters of credit was not subordinated. Taberna also received fee compensation in the six figures as additional consideration for entering into the Exchange Agreement and the 2011 Taberna Indentures. Payment to Taberna under the letters of credit is explicitly stated in the 2011 Taberna Indentures not to be subject to the subordination. Clearly, if the bargain had been that subordination would cease on bankruptcy or insolvency filing, then the parties could have easily so stated as they did for the payment under the letters of credit.

56 Most significantly, and in itself fatal to Taberna's position is the fact that Stichting was not a party to the negotiations leading up to the 2011 Taberna Indentures nor to the documents themselves.

57 Section 1.10 of both the 2006 and 2011 Taberna Indentures provides as follows:

SECTION 1.10 ***Benefits of Indenture***

> Nothing in this Indenture or in the Securities, express or implied, shall give to any Person, other than the parties hereto and their successors and assigns, the holders of Senior Debt and the Holders of the Securities any benefit or any legal or equitable right, remedy or claim under this Indenture.

58 Accordingly, and in virtue of Section 1.10, Stichting can rely on the terms of the Taberna Indentures and claim the benefit thereof.

59 Moreover, Section 12.7 of the 2006 Indentures (equivalent to Section 12.6 in the 2011 Taberna Indentures) provides as follows:

> **SECTION 12.7** ***No Waiver of Subordination Provisions***
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> (a) No right of any present or future holder of any Senior Debt to enforce subordination as herein provided shall at any time in any way be prejudiced or impaired by any act or failure to act on the part of the Company or by any act or failure to act, in good faith, by any such holder, or by any noncompliance by the Company with the terms, provisions and covenants of this Indenture, regardless of any knowledge thereof that any such holder may have or be otherwise charged with.
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> (b) Without in any way limiting the generality of paragraph (a) of this Section 12.7, the holders of Senior Debt may, at any time and from to time, without the consent of or notice to the Trustee or the Holders of the Securities, without incurring responsibility to such Holders of the Securities and without impairing or releasing the subordination provided in this Article XII or the obligations hereunder of such Holders of the Securities to the holders of Senior Debt, do any one or more of the following: (i) change the manner, place or terms of payment or extend the time of payment of, or renew or alter, Senior Debt, or otherwise amend or supplement in any manner Senior Debt or any instrument evidencing the same or any agreement under which Senior Debt is outstanding, (ii) sell, exchange, release or otherwise deal with any property pledged, mortgaged or otherwise securing Senior Debt, (iii) release any Person liable in any manner for the payment of Senior Debt and (iv) exercise or refrain from exercising any rights against the Company and any other Person.

60 Accordingly, Stichting senior rights existing at the time of the 2011 Taberna Indentures could not be waived or altered by HII dealing with Taberna alone, the whole in virute of the 2006 Taberna Indentures. Stichting's agreement was necessary.

61 This is clear on the basis of the afore-mentioned provisions and is underscored by the application of the principles of the Québec Civil Code dealing with the stipulation in favour of a third-party beneficiary to a contract (see Article 1444 and following of the Québec Civil Code).

62 There is no evidence of any revocation of the stipulation in favour of Senior Debt agreed to by Stichting. Indeed, the stipulations in their favour (Article 1.10) are reiterated in the 2011 Taberna Indentures.

63 In view of all of the foregoing, any debt under the 2011 Taberna Indentures is subordinate to the Stichting debt and based on the clear terms of the 2011 Taberna Indentures cannot receive payment unless and until Senior Debt including Stichting debt is paid in full.

64 Taberna's argument that the plan implementation changed the foregoing, is simply not correct. As stated above, the plan of arrangement does not alter the rights of creditors *inter se* [18]. Moreover, the process undertaken of seeking a judgment on the matter and writing into the plan that Taberna's claim would be dealt with on the basis of the Court order to be issued pursuant to such legal proceedings was not only a valid manner of dealing with the issue, but was a commercially practical manner of allowing the plan to move forward for the benefit of HII and all of the creditors and other stakeholders. Such an approach attains the policy objectives of the CCAA and was lauded by the Ontario Court of Appeal in *Stelco* [19], in similar circumstance to this case.

65 Equally, neither Stichting nor the Monitor can validly argue that Taberna renounced its position or waived any right by not contesting the classification. The Motion for Directions was tabled prior to the plan. Everyone involved knew what the issue was. Taberna voted against the plan and awaited its day in court on the Motion to learn how its claim would ultimately be treated. It bought into the same commercially reasonable approach as the other parties in resolving the issue while allowing the plan to move forward. There was no waiver or renunciation by Taberna of its rights.

66 The Monitor aggressively supported Stichting's position. Mr. Saferstein, the expert produced by the Monitor, provided useful evidence since he brought a bankruptcy perspective into the evidence of US or New York law. There was however an inevitable overlap with Stichting's expert evidence made through Mr. Levine who did not deal with the the bankruptcy law effects of the subordination but solely the effect as between the parties. Accordingly, Stichting will be awarded costs including those of Mr. Levine fixed at US$76,413.00 according to the evidence filed at the hearing. Since no proof was made of the applicable exchange rate, this will be subject to taxation. The Monitor will be awarded one half of its expert's costs which will be subject to taxation since invoices were not filed at the hearing. Also, the Monitor did not testify nor file a report as is customary in order to bring the Court up to date on the state of the CCAA file. In view of the foregoing, no judicial costs of the Monitor will be awarded other than half of its expert fees.

67 Since HII's position was essentially represented by Stichting and the Monitor, no costs will be awarded to HII.

68 HII's counsel amended the conclusions of the Motion for Directions at the request of the undersigned to avoid reference to terms defined outside of the conclusions. The other parties did not contest the wording so that the conclusions in this judgment will follow such wording.

FOR ALL OF THE FOREGOING REASONS, THE COURT:

69 *GRANTS* the Petitioners' *Re-amended Motion for Directions* (the "Motion");

70 *DECLARES* that the payment of any and all amounts owing under and pursuant to:

> 70.1. Taberna Preferred Funding VI, Ltd.'s US $12 million interest pursuant to a Junior Subordinated Indenture dated as of July 26, 2006 (the "2006 USD Indenture") by and between Homburg Invest Inc. ("HII") and Wells Fargo Bank, N.A. ("Wells Fargo") for the issuance of US $20 million junior subordinated notes due 2036 (the "Original Taberna VI Note");
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> 70.2. The note issued to Taberna Preferred Funding VIII, Ltd. ("Taberna VIII") pursuant to a Junior Subordinated Indenture dated as of February 28, 2011 (the "2011 Taberna VIII Indenture") by and between HII and Wells Fargo (the "2011 Taberna VIII Note"); and
>
> 70.3. The notes issued to Taberna Europe CDO I P.L.C. and Taberna Europe CDO II P.L.C. on February 28, 2011 witnessing their respective interest of €20 million and €5 million pursuant to a Junior Subordinated Indenture dated as of February 28, 2011 (collectively with the 2006 USD Indenture and the 2011 Taberna VIII Indenture, the "Taberna Indentures") by and between HII and Wells Fargo for the issuance of €25 million junior subordinated notes due 2036 (the "2011 Taberna Europe Notes");
>
> (the Original Taberna VI Note, the 2011 Taberna VIII Note and the 2011 Taberna Europe Notes are collectively referred to as the "Current Taberna Notes") is subordinated to the full and complete payment of any and all amounts owing in respect of the principal of and any premium and interest on all debt of HII (excluding trade accounts payable or liabilities arising in the ordinary course of business), whether incurred on or prior to the date of the Indentures or thereafter incurred, unless it is expressly provided in the instrument creating or evidencing the same that such obligations are not superior in right of payment to the Current Taberna Notes (the "Senior Debt"), including without limitation Stichting Homburg Bonds' claims against HII pursuant to a Trust Indenture dated as of December 15, 2002, and any related supplemental indentures thereto, and a Trust

Indenture dated as of May 31, 2006 as guaranteed by HII pursuant to a Guarantee Agreement dated as of December 15, 2002 (the "Bonds"), unless and until the Senior Debt is fully satisfied;

71 *ORDERS* that for the purpose of any distribution to occur under the Fourth Joint Amended and Restated Plan of Compromise and Reorganization of HII and Homburg Shareco Inc. dated as of March 27, 2014 (the "Plan"), any distribution to the holders of the Current Taberna Notes by virtue of their status as unsecured creditors and holders of the Current Taberna Notes shall be remitted to the holders of the Senior Debt on a pro-rata basis, including without limitation the Bonds, unless and until the Senior Debt is fully satisfied;

72 *CONDEMNS* the mis-en-cause Taberna entities to judicial costs in favour of the mis-en-cause Stichting Homburg Bonds including experts' fees of US$76,413.00 subject to taxation but only for conversion to Canadian dollars, and to one half the expert costs of the Monitor regarding the report and testimony of Mr. Jeffrey Saferstein subject to taxation.

Notes de bas de page

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

2 DICEY AND MORRIS, The Conflict of Laws, 2000, par. 31-040).

3 *Todd Shipyards Corporation vs Ioannis Daskalelis, The*, [1974] S.C.R. 1248; DICEY, op.cit., par. 7-032.

4 C. EMANUELLI, Droit International Privé Québecois, 3e ed., 2011 para. 582; J. WALKER, CASTEL & WALKER, Canadian Conflict of Laws, 6th ed., pp. 6-7 and 29-7.

5 R.S.C., c. B-3.

6 *Merisel Canada Inc. vs 2862565 Canada Inc.,* , 2002 R.J.Q. 671 (QCCA)..

7 Re *Maxwell Communications Corp,* [1994] 1 AII.E.R. 737 (Ch.D.) pp. 13-14, 21; *Bank of Montréal vs Dynex*; (1997) 145 D.L.R. 4th 499 (Alta Q.B.) confirmed on other grounds 182 D.L.R. 4th 640 (Alta C.A.) and [2002] 1 S.C.R. 146.

8 *Bank of Montréal vs. Dynex*, ibid.

9 *Air Canada*, (2004) 2 C.B.R. (5th) 4 at para 2. and 11 (Farley, J.).

10 *Air Canada*, ibid.

11 *Merisel Canada Inc. vs. 2862565 Canada Inc.,* op.cit.

12 *Re Stelco*, (2005) 15 C.B.R. (5th) 297 (Ont S.C.); affirmed (2005) 15 C.B.R. (5th) 307 (Ont. C.A.).

13 See s. 22 CCAA concerning criteria for classification.

14 Re *Stelco*, 2007 ONCA 483; , para.483; para. 41-45.

15 Re *Stelco*, (2005), C.A.,op.cit. para. 36.

16 Re *Stelco*, (2005), op.cit., para. 15.

17 Deposition of James Miles, February 21, 2013, pp. 29 to 30, and page 34.

18 Re *Stelco,* 2007, op.cit, para. 41-45.

19 Re *Stelco*, op.cit. no 2, para. 43

Fin du document

Tab 11

Court File No.: 09-CL-7951

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	TUESDAY, THE 7TH DAY
	)	
JUSTICE NEWBOULD	)	OF FEBRUARY, 2017

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

AND IN THE MATTER OF NORTEL NETWORKS INC. AND THE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO WITH RESPECT TO CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

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

ORDER
(Recognition of U.S. Chapter 11 Plan Confirmation Order and U.S. Settlement and Plans Support Agreement Approval Order)

THIS MOTION, made by Nortel Networks Inc. ("NNI") and the other companies listed on Schedule "A" hereto (collectively, the "U.S. Debtors") for an order substantially in the form enclosed in the Motion Record of the U.S. Debtors was heard on this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, filed, the Affidavit of Shalom Cumbo-Steinmetz, sworn February 3, 2017 (the "Cumbo-Steinmetz Affidavit"), filed, the U.S. Chapter 11 Plan Confirmation Order and the U.S. Settlement and Plans Support Agreement Approval Order (each, as defined in the Cumbo-Steinmetz Affidavit), and upon hearing submissions of counsel for the U.S. Debtors and those other parties present, no one appearing for any other person on the service list, although properly served as appears from the Affidavit of Cathy Pellegrini, sworn February 3, 2017, filed, and upon being advised that no other persons were served with the

aforementioned materials:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Motion Record be and it is hereby abridged, if necessary, so that the motion is properly returnable today, and that further service thereof be and it is hereby dispensed with, and that service of the aforementioned materials be and it is hereby validated in all respects.

RECOGNITION

2. **THIS COURT ORDERS** that the U.S. Chapter 11 Plan Confirmation Order, a copy of which is attached as Schedule "B" hereto, be and it is hereby recognized and it shall be implemented and it shall be given full force and effect in all provinces and territories in Canada, pursuant to section 18.6 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

3. **THIS COURT ORDERS** that the U.S. Settlement and Plans Support Agreement Approval Order, a copy of which is attached as Schedule "C" hereto, be and it is hereby recognized and it shall be implemented and it shall be given full force and effect in all provinces and territories in Canada, pursuant to section 18.6 of the CCAA.

MISCELLANEOUS

4. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada against all persons, firms, corporations, governmental, municipal and regulatory authorities against whom it may be enforceable.

5. **THIS COURT HEREBY ORDERS AND REQUESTS** the aid and recognition of any court, tribunal, regulatory, governmental or administrative body having jurisdiction in Canada, the United States, the United Kingdom or elsewhere, to give effect to this Order and to assist the U.S. Debtors and their respective agents in carrying out the terms of this Order. All courts,

tribunals, regulatory, governmental and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the U.S. Debtors and their respective agents, as may be necessary or desirable to give effect to this Order or to assist the U.S. Debtors and their respective agents in carrying out the terms of this Order.

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

FEB 07 2017

PER / PAR:

SCHEDULE "A"

Nortel Networks Capital Corporation
Nortel Altsystems Inc. (previously "Alteon Websystems, Inc.")
Nortel Altsystems International Inc. (previously "Alteon Websystems International, Inc.")
XROS, Inc.
Sonoma Systems
QTERA Corp.
CoreTek, Inc.
Nortel Networks Applications Management Solutions Inc.
Nortel Networks Optical Components Inc.
Nortel Networks HPOCS Inc.
Architel Systems (U.S.) Corp.
Nortel Networks International Inc.
Nortel Telecom International Inc.
Nortel Networks Cable Solutions Inc.
Nortel Networks (CALA) Inc.
Nortel Networks India International Inc.

SCHEDULE "B"

U.S. Chapter 11 Plan Confirmation Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
Nortel Networks Inc., *et al.*,	:	Case No. 09-10138 (KG)
Debtors.[1]	:	Jointly Administered
	:	**RE: D.I. 17501, 17763**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER CONFIRMING FIRST AMENDED JOINT CHAPTER 11 PLAN NORTEL NETWORKS, INC. AND CERTAIN OF ITS AFFILIATED DEBTORS

Nortel Networks, Inc. and certain of its affiliated debtors and debtors-in-possession in the above-captioned cases (collectively, the "Debtors") having, in each case on the terms and to the extent set forth in the applicable pleadings and orders:

i. filed voluntary petitions for relief (the "Chapter 11 Cases") under chapter 11 of the Bankruptcy Code on January 14, 2009 [D.I. 1] for Debtors other than Nortel Networks (CALA) Inc. ("NNCALA"), and on July 14, 2009 for NNCALA (such date for each Debtor in their own case, the "Petition Date");

ii. continued to operate their businesses and manage their properties and assets as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, and no trustee or examiner having been appointed in the Chapter 11 Cases;

iii. sold various assets of the Debtors in a series of Court-approved sales (collectively, the "Sales") [D.I. 539, 1205, 1514, 1760, 2065, 2070, 2632, 3048, 4054, and 5935];

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's tax identification number, are: Nortel Networks Inc. (6332), Nortel Networks Capital Corporation (9620), Nortel Altsystems Inc. (9769), Nortel Altsystems International Inc. (5596), Xros, Inc. (4181), Sonoma Systems (2073), Qtera Corporation (0251), CoreTek, Inc. (5722), Nortel Networks Applications Management Solutions Inc. (2846), Nortel Networks Optical Components Inc. (3545), Nortel Networks HPOCS Inc. (3546), Architel Systems (U.S.) Corporation (3826), Nortel Networks International Inc. (0358), Northern Telecom International Inc. (6286), Nortel Networks Cable Solutions Inc. (0567), Nortel Networks (CALA) Inc. (4226) and Nortel Networks India International, Inc. (8667). The First Amended Joint Chapter 11 Plan of Nortel Networks Inc. and Certain of its Affiliated Debtors does not include a Chapter 11 Plan for Nortel Networks India International Inc. Contact information for the Debtors and their petitions are available at http://dm.epiq11.com/nortel.

dismissed or closed, whichever occurs first. The Plan, therefore, satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code

u. Section 1129(a)(13)—Retiree Benefits

41. The Debtors have no continuing obligation to provide "retiree benefits," as defined in section 1114(a) of the Bankruptcy Code, because all such obligations were terminated and settled or otherwise resolved pursuant to prior orders of the Court. Accordingly, section 1129(a)(13) of the Bankruptcy Code does not apply to the Chapter 11 Cases.

v. Section 1129(a)(14), 1129(a)(15) or 1129(a)(16)

42. The Debtors do not owe any domestic support obligations, are not individuals, and are not nonprofit corporations. Therefore, none of sections 1129(a)(14), 1129(a)(15) or 1129(a)(16) of the Bankruptcy Code apply to the Chapter 11 Cases.

w. Section 1129(b)—Classification of Claims and Interests and Confirmation of Plan Over Rejecting Classes

43. The classification and treatment of Claims and Interests in the Plan meets all of the applicable requirements of section 1129(a) of the Bankruptcy Code other than paragraph (8) and satisfies section 1129(b), even had class A-3A rejected the Plan. Although the Plan separately classifies Claims in Class A-3A and Claims in Class A-3B, which have the same priority, such classification complies with the Bankruptcy Code and Applicable Law, it treats such Claims on a *pari passu* basis and does not unfairly discriminate against any non-accepting and impaired Class of Claims or Interests. Class A-3C also has accepted the Plan. The Plan is fair and equitable with respect to each Class of Claims or Interests that is impaired under, and has not accepted, the Plan, because it provides that the holder of any Claim or Interest that is junior to the Claims of such Class will not receive or retain any property on account of such junior Claim or Interest unless the creditors in such impaired Class receive payment equal to the

full Allowed amount of their claim. Therefore, the Plan meets the requirements of section 1129(b)(1) of the Bankruptcy Code.

x. Section 1129(c)—Only One Plan

44. Other than the Plan (including previous versions thereof), no other plan has been filed for the Debtors in the Chapter 11 Cases. The Plan, therefore, satisfies the requirements of section 1129(c) of the Bankruptcy Code.

y. Section 1129(d)—Principal Purpose of Plan is Not Avoidance of Taxes

45. The principal purpose of the Plan is not the avoidance of taxes or the avoidance of the application of Section 5 of the Securities Act (15 U.S.C. § 77e). The Plan, therefore, satisfies the requirements of section 1129(d) of the Bankruptcy Code.

Q. Satisfaction of Confirmation Requirements

46. Based upon the foregoing, the Plan satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code.

R. Good Faith Solicitation

47. Based upon the record before the Court in the Chapter 11 Cases, including all testimony and evidence proffered or adduced at or prior to the Confirmation Hearing, the Debtors, the Creditors' Committee, the Bondholder Group, The Bank of New York Mellon as indenture trustee, Delaware Trust Company as indenture trustee, Law Debenture Trust Company of New York as indenture trustee, the other parties to the SPSA and the respective affiliates, agents, directors, members, partners, officers, employees, advisors, attorneys and other professionals retained by all of the foregoing Persons, have acted in good faith (including, without limitation, within the meaning of sections 1125(e) and 1126(e) of the Bankruptcy Code), in respect of the Plan itself and the arm's-length negotiations among the parties with respect to the formulation thereof and will continue to act in good faith if they proceed to: (a) consummate

Tab 12

2016 ONSC 5429
Ontario Superior Court of Justice [Commercial List]

Pacific Exploration & Production Corp., Re

2016 CarswellOnt 13733, 2016 ONSC 5429, 270 A.C.W.S. (3d) 243, 40 C.B.R. (6th) 64

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PACIFIC EXPLORATION & PRODUCTION CORPORATION, PACIFIC E&P HOLDINGS CORP., META PETROLEUM CORP., PACIFIC STRATUS INTERNATIONAL ENERGY LTD., PACIFIC STRATUS ENERGY COLOMBIA CORP., PACIFIC STRATUS ENERGY S.A., PACIFIC OFF SHORE PERU S.R.L., PACIIFC RUBIALES GUATEMALA S.A., PACIFIC GUATEMALA ENERGY CORP., PRE-PSIE COÖPERATIF U.A., PETROMINERALES COLOMBIA CORP., and GRUPO C&C ENERGIA (BARBADOS) LTD. (Applicants)

Hainey J.

Heard: August 23, 2016
Judgment: August 29, 2016
Docket: CV-16-11363-00CL

Counsel: Tony Reyes, Virginie Gauthier, Alexander Schmitt, Orestes Pasparakis, for Applicants
John Finnigan, Rebecca Kennedy, for Monitor, PricewaterhouseCoopers Inc.
Scott Bomhof, Lily Coodin, for Bank of America (Agent), for certain Bank Lenders
Brendan O'Neill, Celia Rhea, Ryan Baulke, for Ad Hoc Committee
Timothy Pinos, Joseph Bellissimo, for Shareholder Consortium
Jennifer Whincup, for BNY Mellon
Michael Rotsztain, for Wilmington Trust, N.A. & Bank Syndicate
Caitlin Fell, Andy Kent, for Plan Sponsor, Catalyst Capital Group Inc.
Mark Gelowitz, for Independent Committee
John Salmas, for Blackhill Advisors, CRO George Michailopoulos, unrepresented shareholder

Subject: Civil Practice and Procedure; Insolvency

MOTION by corporate debtors for order sanctioning plan of compromise and arrangement and order extending stay period.

***Hainey J.*:**

Background

1 The applicants seek an order (the "Plan Sanction Order") [1] :

(a) sanctioning the applicants' Plan of Compromise and Arrangement dated June 27, 2016, as amended to August 17, 2016 (the "Plan") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "*CCAA*"); and

(b) extending the Stay Period to and including October 31, 2016.

2 According to the applicants, the Plan and the restructuring of Pacific Exploration & Production Corporation ("Pacific") and its subsidiaries ("Pacific Group") to be implemented thereby (the "Restructuring Transaction") results from significant efforts by the applicants to achieve a resolution of their financial condition. If implemented, the Restructuring Transaction will reduce Pacific's indebtedness by approximately US $5.1 billion, reduce its annual interest expense by approximately US $258 million and leave the US $250 million of Exit Notes as the only long-term debt in Pacific's capital structure other than facilities to support letters of credit or oil and gas hedging. The Plan will maintain Pacific Group as a going concern for the benefit of all stakeholders, preserving employment and economic activity in the many communities in which it operates.

3 The applicants and their boards of directors believe that the Restructuring Transaction achieves the best possible outcome for the Pacific Group and its stakeholders in the circumstances and achieves results that are not attainable under any other scenario.

4 The Plan is supported by the Catalyst Capital Group Inc., the Plan Sponsor, the Ad Hoc Committee, the Consenting Lenders, the other parties to the Support Agreement (who together with the Ad Hoc Committee and supporting Bank Lenders, hold approximately 84% by value of all Bank Claims and Noteholder Claims) and the Monitor.

5 At a creditors' meeting held on August 17, 2016, the Plan was approved by 98.4% (by number) and 97.2% (by dollar value) of Affected Creditors voting in person or by proxy at the meeting.

6 The Monitor supports the sanctioning of the Plan and believes it is fair and reasonable and that it represents the best option available to the Pacific Group and the Affected Creditors.

7 For these reasons the applicants submit that the Plan should be sanctioned pursuant to s. 6 of the *CCAA*.

Adjournment Request

8 On August 16, 2016, one week before the scheduled hearing of this motion, a group of stakeholders (the "Shareholder Consortium") put forward a recapitalization and refinancing proposal (the "Alternative Proposal") which the Shareholder Consortium submits provides the applicants and its stakeholders with a superior alternative to the Plan sought to be sanctioned on this motion.

9 The applicants disagree that the Alternative Proposal is superior to the Plan and have formally rejected it.

10 The Shareholder Consortium requested that I adjourn the motion to permit further consideration of the Alternative Proposal.

11 The applicants and all other interested parties and stakeholders appearing on the motion strongly opposed the adjournment request and characterized it as a "last minute effort to de-rail the Restructuring Transaction".

12 I agree with this characterization of the Alternative Proposal. There was a process in place to obtain proposals that contained a clear timetable for the submission of proposals which the Shareholder Consortium was well aware of. This last minute Alternative Proposal ignores the timelines that have been in place for many months. Further, the Alternative Proposal has been considered and rejected by the applicants. The adjournment request is denied because I am satisfied that the Plan, which results from extraordinary efforts by the applicants and the other interested parties to arrive at the best result for the Pacific Group and its stakeholders, should not be de-railed at this late stage of the process by the Shareholder Consortium's Alternative Proposal.

Issues

13 I must decide the following issues:

a) Should the Plan be sanctioned?

b) Should the third party releases be approved?

c) Should there be a stay of proceedings in favour of the other Non-Applicant parties?

d) Should the Stay Period be extended to October 31, 2016?

Should the Plan be sanctioned?

14 Section 6 of the *CCAA* provides that a compromise or arrangement is binding on a debtor company and all of its creditors if a majority in number, representing two-thirds in value of the creditors present and voting at a meeting of creditors, approve the compromise or arrangement and the compromise or arrangement has been sanctioned by the court.

15 Pacific's Affected Creditors, in both number and value, voted in favour of the Plan thereby satisfying the first requirement of s. 6 of the *CCAA*. The Monitor has confirmed that 98.4% in number and 97.2% in value of the Affected Creditors voted in favour of the Plan.

16 As the voting requirement under s. 6 of the *CCAA* has been satisfied, I must determine whether to approve and sanction the Plan.

17 The criteria I must consider in determining whether to sanction a *CCAA* plan are as follows:

a) There must be strict compliance with all statutory requirements;

b) All materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the *CCAA*; and

c) The plan must be fair and reasonable.

18 I am satisfied on the record before me that there has been strict compliance with the statutory requirements of the *CCAA*.

19 I am also satisfied that throughout the course of these proceedings the applicants have acted in good faith and with due diligence and they have strictly complied with the requirements of the *CCAA* and the orders of this Court. This is confirmed in the reports of the Monitor.

20 I have concluded that the Plan is fair and reasonable because it represents a reasonable and fair balancing of the interests of all parties in light of the other commercial alternatives available. In assessing the Plan's fairness and reasonableness I am guided by the objectives of the *CCAA* which are "to enable compromises to be made for the common benefit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators". Reorganization, if commercially feasible, is in most cases preferable to liquidation.

21 The factors that I have considered in concluding that the Plan is fair and reasonable include the following:

a) The claims were properly classified pursuant to s. 22 of the *CCAA*;

b) The Plan received overwhelming support from the applicants' creditors;

c) The Monitor is of the view that the applicants' creditors would be worse off if the Plan is not sanctioned;

d) The Plan appears to be the best alternative available under the current circumstances;

e) There is no oppression of the rights of the applicants' creditors under the Plan;

f) Since the applicants' creditors are not being paid in full there is no unfairness to the applicants' shareholders. Their treatment is consistent with the provisions of the *CCAA*;

g) The Plan is in the public interest as it continues the Pacific Group as a going-concern thereby preserving employment for thousands of people and generating economic activity in the many local communities in which it operates.

22 For all of these reasons I am satisfied that the Plan should be sanctioned.

Should the third party releases be approved?

23 It is well established that courts have jurisdiction to sanction plans pursuant to the *CCAA* that contain releases in favour of third parties. Courts will generally approve third party releases in the context of plans of arrangement where the releases are rationally tied to the resolution of the debtor's claims and will benefit creditors generally. I am satisfied in this case that the third party releases should be approved. In arriving at this conclusion I have considered the following factors:

a) Whether the parties to be released from claims are necessary to the Restructuring Transaction;

b) Whether the claims released are rationally connected to the purpose of the Plan and necessary for it to succeed;

c) Whether the Plan would fail without the releases;

d) Whether the third parties being released contributed in a tangible and realistic way to the Plan;

e) Whether the releases benefit the debtors as well as the creditors generally;

f) Whether the creditors who voted on the Plan had knowledge of the nature and effect of the releases; and

g) Whether the releases are fair and reasonable and not overly broad.

24 The releases were negotiated as part of the overall framework of the compromises contained in the Plan. They facilitate the successful completion of the Plan and the Restructuring Transaction. The releases are a significant part of the various compromises that were required to achieve the Plan and are a necessary element of the global consensual restructuring of the applicants. The releases are therefore rationally related to the purpose of the Plan and are necessary for the successful restructuring of the applicants. They were also well-publicized and there does not appear to be any objections to them.

25 For these reasons the third party releases are approved.

Should there be a stay of proceedings of the other Non-Applicant parties?

26 Section 11 of the *CCAA* provides the court with authority to impose a stay of proceedings with respect to non-applicant parties. In determining whether to grant the Non-Applicant Stay requested I must be satisfied that it is fair and reasonable in the circumstances. I am satisfied that I should grant the Non-Applicant Stay for the following reasons:

a) A significant portion of the value of the Pacific Group is held in the Non-Applicants and their business and operations are significantly intertwined and integrated with those of the applicants.

b) The exercise of the rights stayed by the Non-Applicant Stay which arise out of the applicants' insolvency or the implementation of the Plan would have a negative impact on the applicants' ability to restructure, potentially jeopardizing the success of the Plan and the continuance of the Pacific Group;

c) The granting of the Non-Applicant Stay is a condition of the Plan. If the applicants are prevented from concluding a successful restructuring with their creditors, the economic harm would be far-reaching and significant;

d) Failure of the Plan would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the Non-Applicant Stay; and

e) If the Plan is approved, the applicants will continue to operate for the benefit of all of their stakeholders, and their stakeholders will retain all of their remedies in the event of future breaches by the applicants or breaches that are not related to the released claims.

27 For these reasons the Non-Applicant Stay is granted.

Should the stay period be extended to October 31, 2016?

28 The applicants have requested an extension of the stay period until and including October 31, 2016. The applicants anticipate that this extension will give them sufficient time to complete all of the transactions, documents and steps required to implement the Plan and to emerge successfully from these *CCAA* proceedings.

29 I am satisfied that under the circumstances the stay extension requested is appropriate. I am prepared to grant the requested stay extension for the following reasons:

a) The applicants have made substantial progress towards completion of the Restructuring Transaction;

b) The applicants require the ongoing benefit of the stay proceedings in order to complete the *CCAA* proceedings including the implementation of the Plan;

c) The applicants intend to implement the Plan as expeditiously as possible;

d) The requested extension is not overly lengthy and avoids the additional time and expense that would be incurred if the applicants are required to return to court in the interim;

e) The applicants' cash flow forecast projects that they will have access to all necessary financing during the extended stay period;

f) The applicants have acted in good faith and with due diligence towards the completion of the Restructuring Transaction and the implementation of the Plan; and

g) The Monitor, the Ad Hoc Committee, the steering committee of Bank Lenders and the Plan Sponsor all support the requested stay extension.

30 A stay is therefore granted up to and including October 31, 2016.

Conclusion

31 For the reasons outlined above the applicants' motion is granted.

32 It should be noted that the parties to the Restructuring Support Agreement reserve whatever rights they may have under that agreement following the sanction of the Plan. Nothing contained in the orders granted today, or s. 6.3 (a) of the Indemnity Agreement approved thereby, is a determination of what those rights may be.

Motion granted.

Footnotes

1 I have used the same defined terms in my reasons for judgment as are contained in the applicants' factum.

End of Document

Tab 13

2008 ONCA 587
Ontario Court of Appeal

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

2008 CarswellOnt 4811, 2008 ONCA 587, [2008] O.J. No. 3164, 168 A.C.W.S. (3d) 698, 240 O.A.C. 245, 296 D.L.R. (4th) 135, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 92 O.R. (3d) 513

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO (Applicants / Respondents in Appeal) and METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO (Respondents / Respondents in Appeal) and AIR TRANSAT A.T. INC., TRANSAT TOURS CANADA INC., THE JEAN COUTU GROUP (PJC) INC., AÉROPORTS DE MONTRÉAL INC., AÉROPORTS DE MONTRÉAL CAPITAL INC., POMERLEAU ONTARIO INC., POMERLEAU INC., LABOPHARM INC., DOMTAR INC., DOMTAR PULP AND PAPER PRODUCTS INC., GIRO INC., VÊTEMENTS DE SPORTS R.G.R. INC., 131519 CANADA INC., AIR JAZZ LP, PETRIFOND FOUNDATION COMPANY LIMITED, PETRIFOND FOUNDATION MIDWEST LIMITED, SERVICES HYPOTHÉCAIRES LA PATRIMONIALE INC., TECSYS INC. SOCIÉTÉ GÉNÉRALE DE FINANCEMENT DU QUÉBEC, VIBROSYSTM INC., INTERQUISA CANADA L.P., REDCORP VENTURES LTD., JURA ENERGY CORPORATION, IVANHOE MINES LTD., WEBTECH WIRELESS INC., WYNN CAPITAL CORPORATION INC., HY BLOOM INC., CARDACIAN MORTGAGE SERVICES, INC., WEST ENERGY LTD., SABRE ENERTY LTD., PETROLIFERA PETROLEUM LTD., VAQUERO RESOURCES LTD. and STANDARD ENERGY INC. (Respondents / Appellants)

J.I. Laskin, E.A. Cronk, R.A. Blair JJ.A.

Heard: June 25-26, 2008
Judgment: August 18, 2008 *
Docket: CA C48969

Proceedings: affirming *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List])

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Subject: Insolvency; Civil Practice and Procedure

APPEAL by opponents of creditor-initiated plan from judgment reported at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 (Ont. S.C.J. [Commercial List]), granting application for approval of plan.

***R.A. Blair J.A.*:**

A. Introduction

1 In August 2007 a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

2 By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

3 Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the *Companies' Creditors Arrangement*

Act, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to Appeal

4 Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument we encouraged counsel to combine their submissions on both matters.

5 The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and — given the expedited time-table — the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Cineplex Odeon Corp., Re* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.), and *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30 (Ont. C.A. [In Chambers]), are met. I would grant leave to appeal.

Appeal

6 For the reasons that follow, however, I would dismiss the appeal.

B. Facts

The Parties

7 The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer, and several holding companies and energy companies.

8 Each of the appellants has large sums invested in ABCP — in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants — slightly over $1 billion — represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

9 The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies, and some smaller holders of ABCP product. They participated in the market in a number of different ways.

The ABCP Market

10 Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment — usually 30 to 90 days — typically with a low interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

11 ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

12 The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates

to approximately $32 billion of non-bank sponsored ABCP the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

13 As I understand it, prior to August 2007 when it was frozen, the ABCP market worked as follows.

14 Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

15 The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

16 When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The Liquidity Crisis

17 The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

18 When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

19 The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes — partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

20 The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze — the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement — known as the Montréal Protocol — the parties committed to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

21 The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation, and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

22 Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

23 Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

The Plan

a) Plan Overview

24 Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution." The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper — which has been frozen and therefore effectively worthless for many months — into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

25 The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

26 Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

27 The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1-million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders, and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

b) The Releases

28 This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in Article 10.

29 The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants — in Mr. Crawford's words, "virtually all participants in the Canadian ABCP

market" — from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

30 The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

31 The releases, in effect, are part of a *quid pro quo*. Generally speaking, they are designed to compensate various participants in the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

> a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;
>
> b) Sponsors — who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information — give up their existing contracts;
>
> c) The Canadian banks provide below-cost financing for the margin funding facility and,
>
> d) Other parties make other contributions under the Plan.

32 According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."

The CCAA Proceedings to Date

33 On March 17, 2008 the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25 th . The vote was overwhelmingly in support of the Plan — 96% of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the Monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan — 99% of those connected with the development of the Plan voted positively, as did 80% of those Noteholders who had not been involved in its formulation.

34 The vote thus provided the Plan with the "double majority" approval — a majority of creditors representing two-thirds in value of the claims — required under s. 6 of the CCAA.

35 Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

36 The result of this renegotiation was a "fraud carve-out" — an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

37 A second sanction hearing — this time involving the amended Plan (with the fraud carve-out) — was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

38 The appellants attack both of these determinations.

C. Law and Analysis

39 There are two principal questions for determination on this appeal:

> 1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?
>
> 2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

(1) Legal Authority for the Releases

40 The standard of review on this first issue — whether, as a matter of law, a CCAA plan may contain third-party releases — is correctness.

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

> a) on a proper interpretation, the CCAA does not permit such releases;
>
> b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
>
> c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;
>
> d) the releases are invalid under Quebec rules of public order; and because
>
> e) the prevailing jurisprudence supports these conclusions.

42 I would not give effect to any of these submissions.

Interpretation, "Gap Filling" and Inherent Jurisdiction

43 On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed

restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on *all* creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]). As Farley J. noted in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), at 111, "[t]he history of CCAA law has been an evolution of judicial interpretation."

45 Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"[2] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools — statutory interpretation, gap-filling, discretion and inherent jurisdiction — it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

47 The Supreme Court of Canada has affirmed generally — and in the insolvency context particularly — that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26.

48 More broadly, I believe that the proper approach to the judicial interpretation and application of statutes — particularly those like the CCAA that are skeletal in nature — is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context,

> in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

49 I adopt these principles.

50 The remedial purpose of the CCAA — as its title affirms — is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 318, Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

> Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

51 The CCAA was enacted in 1933 and was necessary — as the then Secretary of State noted in introducing the Bill on First Reading — "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), *per* Doherty J.A. in dissent; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]).

52 In this respect, I agree with the following statement of Doherty J.A. in *Elan*, *supra*, at pp. 306-307:

> . . . [T]he Act was designed to serve a "broad constituency of investors, creditors and employees". [3] Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest*. [Emphasis added.]

Application of the Principles of Interpretation

53 An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

54 The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

55 This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP *Dealers*, the releasee financial institutions

are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as *Asset Providers* and *Liquidity Providers*, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore — as the application judge found — in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and ... providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark at para. 50 that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

56 The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

57 I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The Statutory Wording

58 Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

> a) the skeletal nature of the CCAA;
>
> b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
>
> c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

59 Sections 4 and 6 of the CCAA state:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of

the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or Arrangement

60 While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N§10. It has been said to be "a very wide and indefinite [word]": *Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces*, [1935] A.C. 184 (Canada P.C.) at 197, affirming S.C.C. [1933] S.C.R. 616 (S.C.C.). See also, *Guardian Assurance Co., Re*, [1917] 1 Ch. 431 (Eng. C.A.) at 448, 450; *T&N Ltd., Re* (2006), [2007] 1 All E.R. 851 (Eng. Ch. Div.).

61 The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230 (S.C.C.) at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (Ont. C.A.) at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at 518.

63 There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan — including the provision for releases — becomes binding on all creditors (including the dissenting minority).

64 *T&N Ltd., Re*, *supra*, is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies

applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA — including the concepts of compromise or arrangement. [4]

65 T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence — cited earlier in these reasons — to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example. [5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party*. [Emphasis added.]

67 I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind *all* creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes [6] *and* obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

69 In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70 The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

71 In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;
>
> c) The Plan cannot succeed without the releases;
>
> d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72 Here, then — as was the case in *T&N* — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

73 I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The Jurisprudence

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201 (Alta. Q.B.), leave to appeal refused by

(2000), 266 A.R. 131 (Alta. C.A. [In Chambers]), and (2001), 293 A.R. 351 (note) (S.C.C.). In *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Canadian Airlines Corp., Re*, however, the releases in those restructurings — including *Muscletech Research & Development Inc., Re* — were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

76 In *Canadian Airlines Corp., Re* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*,[7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument — dealt with later in these reasons — that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Steinberg Inc. c. Michaud*, *supra*; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C. S.C.); and *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg Inc.*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg Inc.* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines Ltd.*, Tysoe J. made the following comment at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

81 This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to

certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

82 The facts in *Pacific Coastal Airlines Ltd.* are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian — at a contractual level — may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

83 Nor is the decision of this Court in the *NBD Bank, Canada* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process — in short, he was personally protected by the CCAA release.

84 Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
>
> 54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

85 Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third party releases was not under consideration at all. What the Court was determining in *NBD Bank, Canada* was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little

factual similarity in *NBD Bank, Canada* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank, Canada* the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release — as is the situation here. Thus, *NBD Bank, Canada* is of little assistance in determining whether the court has authority to sanction a plan that calls for third party releases.

86 The appellants also rely upon the decision of this Court in *Stelco I*. There, the Court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]

See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) at para. 7.

87 This Court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the Court were quite different from those raised on this appeal.

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Stelco Inc., Re* (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) ("*Stelco II*"). The Court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

> In [*Stelco I*] — the classification case — the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company ... [*H*]*owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process*. [Emphasis added.]

89 The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third party releases here are very closely connected to the ABCP restructuring process.

90 Some of the appellants — particularly those represented by Mr. Woods — rely heavily upon the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*, *supra*. They say that it is determinative of the release issue. In *Steinberg*, the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 — English translation):

> [42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> . . . . .

> [54] The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> . . . . .
>
> [58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

91 Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' *and Their Officers and Employees* Creditors Arrangement Act — an awful mess — and likely not attain its purpose, which is to enable the company to survive in the face of *its* creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

92 Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature — they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company — rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para. 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms *encompass all that should enable the person who has recourse to it to fully dispose of his debts*, both those that exist on the date when he has recourse to the statute and *those contingent on the insolvency in which he finds himself* ... [Emphasis added.]

93 The decision of the Court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself," however. On occasion such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg Inc.*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act — an approach inconsistent with the jurisprudence referred to above.

94 Finally, the majority in *Steinberg Inc.* seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this Court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases — as I have concluded it does — the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

95 Accordingly, to the extent *Steinberg Inc.* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises

and arrangements. Had the majority in *Steinberg Inc.* considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 Amendments

96 *Steinberg Inc.* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> **Exception**
>
> (2) A provision for the compromise of claims against directors may not include claims that
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> **Powers of court**
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
>
> **Resignation or removal of directors**
>
> (4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.
>
> 1997, c. 12, s. 122.

97 Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

98 The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted: [8]

> Far from being a rule, [the maxim *expressio unius*] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg Inc.*. A similar

amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden & Morawetz, vol.1, *supra*, at 2-144, E§11A; *Royal Penfield Inc., Re*, [2003] R.J.Q. 2157 (C.S. Que.) at paras. 44-46.

100 Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The Deprivation of Proprietary Rights

101 Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights — including the right to bring an action — in the absence of a clear indication of legislative intention to that effect: *Halsbury's Laws of England*, 4th ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., *supra*, at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The Division of Powers and Paramountcy

102 Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act, 1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec*.

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.). As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Quebec (Attorney General) v. Bélanger (Trustee of)*, [1928] A.C. 187 (Canada P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

104 That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action — normally a matter of provincial concern — or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs.

To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion With Respect to Legal Authority

105 For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "Fair and Reasonable"

106 The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

107 Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Ravelston Corp., Re* (2007), 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]).

108 I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties — including leading Canadian financial institutions — that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

109 The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

110 The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

111 The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd* (1998), 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings — the claims here all being untested allegations of fraud — and to include releases of such claims as part of that settlement.

112 The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

113 At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;
>
> d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
>
> f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
>
> g) The releases are fair and reasonable and not overly broad or offensive to public policy.

114 These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they — as individual creditors — make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

116 All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

117 In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

118 Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial

system in Canada. He was required to consider and balance the interests of *all* Noteholders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

119 The application judge noted at para. 126 that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

120 In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. Disposition

121 For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

***J.I. Laskin J.A.*:**

I agree.

***E.A. Cronk J.A.*:**

I agree.

Schedule A — Conduits

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

Schedule B — Applicants

ATB Financial

Caisse de dépôt et placement du Québec

Canaccord Capital Corporation

Canada Mortgage and Housing Corporation

Canada Post Corporation

Credit Union Central Alberta Limited

Credit Union Central of BC

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank of Canada/National Bank Financial Inc.

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

Schedule A — Counsel

1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee

2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.

3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC

Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG

4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.

5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals)

6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor

7) Mario J. Forte for Caisse de Dépôt et Placement du Québec

8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada

9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)

10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.

11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank

12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

13) Usman Sheikh for Coventree Capital Inc.

14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.

15) Neil C. Saxe for Dominion Bond Rating Service

16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP

17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.

18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Application granted; appeal dismissed.

Footnotes

* Leave to appeal refused at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.).

1 Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

2 Justice Georgina R. Jackson and Dr. Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Vancouver: Thomson Carswell, 2007).

3 Citing Gibbs J.A. in *Chef Ready Foods*, *supra*, at pp.319-320.

4 The Legislative Debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the *Companies Act 1985* (U.K.): see *House of Commons Debates (Hansard)*, *supra*.

5 See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 192; *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s. 182.

6 A majority in number representing two-thirds in value of the creditors (s. 6)

7 *Steinberg Inc.* was originally reported in French: *Steinberg Inc. c. Michaud*, [1993] R.J.Q. 1684 (C.A. Que.). All paragraph references to *Steinberg Inc.* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055 (C.A. Que.)

8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp.234-235, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

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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 OF THE U.S. FOREIGN REPRESENTATIVE (Re: Recognition of Chapter 11 Plan and Related Orders) (Returnable March 14, 2018)

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