COURT FILE NUMBER	2501 13561
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PROCEEDINGS	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, c B-3, AS AMENDED AND IN THE MATTER OF SUNWOLD FARMS, INC., SUNTERRA FARMS IOWA, INC., and LARIAGRA FARMS SOUTH, INC.
APPLICANT	PVC MANAGEMENT II, LLC d/b/a PIPESTONE MANAGEMENT

Clerk's Stamp

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Book of Authorities to
Brief of Law of the Foreign Representative

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LIST OF AUTHORITIES

TAB	DESCRIPTION
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2.	*Babcock & Wilcox Canada Ltd. Re.*, 2000 CanLII 22482 (ON SC)
3.	*R. J. Zayed of Carlson, Caspers, Vandenburgh & Lindquist v. Cook*, 2009 CanLII 72038 (ON SC)
4.	*MtGox Co., Ltd (Re)*, *)*, 2014 ONSC 5811
5.	*Hollander Sleep Products, LLC (Re)*, 2019 ONSC 3238
6.	*Proposition de Brunswick Health Group Inc.*, 2023 QCCS 3224
7.	*Re Canwest Publishing Inc. / Publications Canwest Inc.*, 2010 ONSC 222

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to August 11, 2025

Last amended on December 12, 2024

À jour au 11 août 2025

Dernière modification le 12 décembre 2024

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to August 11, 2025. The last amendments came into force on December 12, 2024. Any amendments that were not in force as of August 11, 2025 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 11 août 2025. Les dernières modifications sont entrées en vigueur le 12 décembre 2024. Toutes modifications qui n'étaient pas en vigueur au 11 août 2025 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Late claims

265 A customer may prove a claim after the distribution of cash and securities in the customer pool fund and is entitled to receive cash and securities in the hands of the trustee at the time the claim is proven up to the appropriate portion of the customer's net equity before further distribution is made to other customers, but no such claim shall affect the previous distribution of the customer pool fund or the general fund.

1997, c. 12, s. 118.

Accounting of Trustee

Statement of trustee required

266 In addition to any other statement or report required to be prepared under this Act, a trustee shall prepare

(a) a statement indicating

(i) the distribution of property in the customer pool fund among customers who have proved their claims, and

(ii) the disposal of customer name securities; or

(b) such other report relating to that distribution or disposal as the court may direct.

1997, c. 12, s. 118.

Réclamation après la distribution

265 Un client peut prouver sa réclamation après la distribution de sommes d'argent ou de valeurs mobilières du fonds des clients et a droit de recevoir, avant qu'une distribution ultérieure ne soit effectuée au profit des autres clients, de tels biens du fonds se trouvant entre les mains du syndic au moment où sa réclamation est prouvée et ce à concurrence de ses capitaux nets; toutefois, sa réclamation ne peut porter atteinte aux distributions antérieures des biens du fonds des clients et du fonds général.

1997, ch. 12, art. 118.

État des recettes et débours

État et relevé

266 Outre les autres relevés, états et rapports qu'il doit préparer au titre de la présente loi, le syndic prépare :

a) un relevé, d'une part, de la distribution des biens du fonds des clients aux clients qui ont prouvé leur réclamation et, d'autre part, de l'aliénation des valeurs mobilières immatriculées;

b) tout autre rapport sur la distribution ou l'aliénation que le tribunal ordonne.

1997, ch. 12, art. 118.

PART XIII

Cross-border Insolvencies

Purpose

Purpose

267 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 debtors;

PARTIE XIII

Insolvabilité en contexte international

Objet

Objet

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

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

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

c) administrer équitablement et efficacement les instances d'insolvabilité en contexte international, de

(d) the protection and the maximization of the value of debtors' property; and

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

1997, c. 12, s. 118; 2005, c. 47, s. 122.

manière à protéger les intérêts des créanciers et des autres parties intéressées, y compris les débiteurs;

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

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

1997, ch. 12, art. 118; 2005, ch. 47, art. 122.

Interpretation

Definitions

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

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

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

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

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

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

(a) administer the debtor's property or affairs for the purpose of reorganization or liquidation; or

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

Centre of debtor's main interests

(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor's registered office and, in the case of a debtor who is an individual, the debtor's ordinary place of residence are deemed to be the centre of the debtor's main interests.

1997, c. 12, s. 118; 2004, c. 25, s. 102; 2005, c. 47, s. 122.

Définitions

Définitions

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

instances étrangères Toute procédure judiciaire ou administrative, y compris la procédure provisoire, régie par une loi étrangère relative à la faillite ou à l'insolvabilité qui touche les droits de l'ensemble des créanciers et dans le cadre de laquelle les biens et les affaires du débiteur sont placés sous la responsabilité ou la surveillance d'un tribunal étranger aux fins de réorganisation ou de liquidation. (*foreign proceeding*)

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

représentant étranger Personne ou organisme qui, même à titre provisoire, est autorisé dans le cadre d'une instance étrangère à administrer les biens ou les affaires du débiteur aux fins de réorganisation ou de liquidation, ou à y agir en tant que représentant. (*foreign representative*)

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

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

Lieu des principales affaires

(2) Pour l'application de la présente partie, sauf preuve contraire, le siège social du débiteur ou, s'agissant d'une personne physique, le lieu de sa résidence habituelle est présumé être celui où il a ses principales affaires.

1997, ch. 12, art. 118; 2004, ch. 25, art. 102; 2005, ch. 47, art. 122.

Recognition of Foreign Proceeding

Application for recognition of a foreign proceeding

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

Documents that must accompany application

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

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

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

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

Documents may be considered as proof

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

Other evidence

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

Translation

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

1997, c. 12, s. 118; 2005, c. 47, s. 122.

Order recognizing foreign proceeding

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

Reconnaissance des instances étrangères

Demande de reconnaissance des instances étrangères

269 (1) Le représentant étranger peut demander au tribunal de reconnaître l'instance étrangère pour laquelle il a qualité.

Documents accompagnant la demande de reconnaissance

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

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

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

c) une déclaration faisant état de toutes les instances étrangères visant le débiteur qui sont connues du représentant étranger.

Documents acceptés comme preuve

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

Autres documents

(4) En l'absence de ces documents, il peut accepter toute autre preuve — qu'il estime indiquée — de l'introduction de l'instance étrangère et de la qualité du représentant étranger.

Traduction

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

1997, ch. 12, art. 118; 2005, ch. 47, art. 122.

Ordonnance de reconnaissance

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

Nature of foreign proceeding to be specified

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

1997, c. 12, s. 118; 2005, c. 47, s. 122.

Effects of recognition of a foreign main proceeding

271 (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,

(a) no person shall commence or continue any action, execution or other proceedings concerning the debtor's property, debts, liabilities or obligations;

(b) if the debtor carries on a business, the debtor shall not, outside the ordinary course of the business, sell or otherwise dispose of any of the debtor's property in Canada that relates to the business and shall not sell or otherwise dispose of any other property of the debtor in Canada; and

(c) if the debtor is an individual, the debtor shall not sell or otherwise dispose of any property of the debtor in Canada.

When subsection (1) does not apply

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

Exceptions

(3) The prohibitions in paragraphs (1)(a) and (b) are subject to the exceptions specified by the court in the order recognizing the foreign proceeding that would apply in Canada had the foreign proceeding taken place in Canada under this Act.

Application of this and other Acts

(4) Nothing in subsection (1) precludes the commencement or the continuation of proceedings under this Act, the *Companies' Creditors Arrangement Act* or the *Winding-up and Restructuring Act* in respect of the debtor.

1997, c. 12, s. 118; 2005, c. 47, s. 122.

Orders

272 (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's

Nature de l'instance étrangère

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

1997, ch. 12, art. 118; 2005, ch. 47, art. 122.

Effets de la reconnaissance d'une instance étrangère principale

271 (1) Sous réserve des paragraphes (2) à (4), dès le prononcé de l'ordonnance de reconnaissance qui précise qu'il s'agit d'une instance étrangère principale :

a) il est interdit d'intenter ou de continuer une action, mesure d'exécution ou autre procédure visant les biens, dettes, obligations ou engagements du débiteur en cause;

b) si le débiteur exploite une entreprise, il ne peut disposer, notamment par vente, des biens de l'entreprise situés au Canada hors du cours ordinaire des affaires ou de ses autres biens situés au Canada;

c) s'il est une personne physique, il ne peut disposer, notamment par vente, de ses biens au Canada.

Non-application du paragraphe (1)

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

Exceptions

(3) Les interdictions visées aux alinéas (1)a) et b) sont subordonnées aux exceptions que le tribunal précise dans l'ordonnance de reconnaissance et qui auraient existé au Canada si l'instance étrangère avait été intentée sous le régime de la présente loi.

Application de la présente loi et d'autres lois

(4) Le paragraphe (1) n'a pas pour effet d'empêcher que soit intentée ou continuée, contre le débiteur, une procédure sous le régime de la présente loi, de la *Loi sur les liquidations et les restructurations* ou de la *Loi sur les arrangements avec les créanciers des compagnies*.

1997, ch. 12, art. 118; 2005, ch. 47, art. 122.

Mesures disponibles après la reconnaissance d'une instance étrangère

272 (1) Si l'ordonnance de reconnaissance a été rendue, le tribunal, sur demande présentée par le représentant étranger demandeur, peut, s'il est convaincu que la mesure est nécessaire pour protéger les biens du débiteur ou

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, imposing the prohibitions referred to in paragraphs 271(1)(a) to (c) and specifying the exceptions to those prohibitions, taking subsection 271(3) into account;

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

(c) entrusting the administration or realization of all or part of the debtor's property located in Canada to the foreign representative or to any other person designated by the court; and

(d) appointing a trustee as receiver of all or any part of the debtor's property in Canada, for any term that the court considers appropriate and directing the receiver to do all or any of the following, namely,

(i) to take possession of all or part of the debtor's property specified in the appointment and to exercise the control over the property and over the debtor's business that the court considers appropriate, and

(ii) to take any other action that the court considers appropriate.

les intérêts d'un ou de plusieurs créanciers, rendre toute ordonnance qu'il estime indiquée, notamment pour :

a) s'il s'agit d'une instance étrangère secondaire, imposer les interdictions visées aux alinéas 271(1)a) à c) et préciser, le cas échéant, à quelles exceptions elles sont subordonnées, par l'effet du paragraphe 271(3);

b) régir l'interrogatoire des témoins et la manière de recueillir les preuves et de fournir des renseignements concernant les biens, affaires, dettes, obligations et engagements du débiteur;

c) confier l'administration ou la réalisation de tout ou partie des biens du débiteur situés au Canada au représentant étranger ou à toute autre personne;

d) nommer, pour la période qu'il estime indiquée, un syndic comme séquestre à tout ou partie des biens du débiteur situés au Canada et ordonner à celui-ci :

(i) de prendre possession de tout ou partie des biens du débiteur mentionnés dans la nomination et d'exercer sur ces biens ainsi que sur les affaires du débiteur le degré d'emprise que le tribunal estime indiqué,

(ii) de prendre toute autre mesure que le tribunal estime indiquée.

Restriction

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

Application of this and other Acts

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

1997, c. 12, s. 118; 2005, c. 47, s. 122.

Restriction

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

Application de la présente loi et d'autres lois

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

1997, ch. 12, art. 118; 2005, ch. 47, art. 122.

Terms and conditions of orders

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

1997, c. 12, s. 118; 2005, c. 47, s. 122.

Conditions

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

1997, ch. 12, art. 118; 2005, ch. 47, art. 122.

Commencement or continuation of proceedings

274 If an order recognizing a foreign proceeding is made, the foreign representative may commence or continue any proceedings under sections 43, 46 to 47.1 and 49 and subsections 50(1) and 50.4(1) in respect of a debtor as if the foreign representative were a creditor of the debtor, or the debtor, as the case may be.

1997, c. 12, s. 118; 2004, c. 25, s. 103; 2005, c. 47, s. 122.

Obligations

Cooperation — court

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

Cooperation — other authorities in Canada

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

Forms of cooperation

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

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

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

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

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

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

1997, c. 12, s. 118; 2005, c. 47, s. 122; 2007, c. 36, s. 59.

Obligations of foreign representative

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

(a) without delay, inform the court of

Début et continuation des procédures

274 Si l'ordonnance de reconnaissance est rendue, le représentant étranger en cause peut intenter ou continuer toute procédure visée aux articles 43, 46 à 47.1 et 49 et aux paragraphes 50(1) et 50.4(1) comme s'il était créancier du débiteur, ou le débiteur, selon le cas.

1997, ch. 12, art. 118; 2004, ch. 25, art. 103; 2005, ch. 47, art. 122.

Obligations

Collaboration — tribunal

275 (1) Si l'ordonnance de reconnaissance a été rendue, le tribunal collabore dans toute la mesure possible avec le représentant étranger et le tribunal étranger en cause dans l'instance étrangère reconnue.

Collaboration — autres autorités compétentes

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

Moyens d'assurer la collaboration

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

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

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

c) la coordination de l'administration et de la surveillance des biens et des affaires du débiteur;

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

e) la coordination de procédures concurrentes concernant le même débiteur.

1997, ch. 12, art. 118; 2005, ch. 47, art. 122; 2007, ch. 36, art. 59.

Obligations du représentant étranger

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

a) d'informer sans délai le tribunal :

RELATED PROVISIONS

— R.S., 1985, c. 27 (2nd Supp.), s. 11

Transitional: proceedings

11 Proceedings to which any of the provisions amended by the schedule apply that were commenced before the coming into force of section 10 shall be continued in accordance with those amended provisions without any further formality.

— 1990, c. 17, s. 45(1)

Transitional: proceedings

45 (1) Every proceeding commenced before the coming into force of this subsection and in respect of which any provision amended by this Act applies shall be taken up and continued under and in conformity with that amended provision without any further formality.

— 1992, c. 27, ss. 9(2), (3)

(2) Where, before the coming into force of this section, the Superintendent had communicated in writing to a licensee the Superintendent's intention to make a report to the Minister in respect of that licensee under section 7 of the *Bankruptcy Act*, as that section read immediately before the coming into force of section 6 of this Act, then

(a) the following provisions of the *Bankruptcy Act* continue to apply, in so far as they relate to the investigation of that licensee pursuant to section 7 of that Act:

(i) sections 7 and 8, as those sections read immediately before the coming into force of section 6 of this Act, and

(ii) subsections 14(2) and (3), as those subsections read immediately before the coming into force of this section; and

(b) to the extent that the provisions of the *Bankruptcy Act* referred to in paragraph (a) continue to apply, sections 14.01 to 14.03 of the *Bankruptcy and Insolvency Act*, as enacted by subsection (1) of this section, do not apply.

— 1992, c. 27, ss. 9(2), (3)

(3) Where

(a) by virtue of subsection (2), subsection 14(2) of the *Bankruptcy Act* continues to apply, and

DISPOSITIONS CONNEXES

— L.R. (1985), ch. 27 (2e suppl.), art. 11

Disposition transitoire : procédure

11 Les procédures intentées en vertu des dispositions modifiées en annexe avant l'entrée en vigueur de l'article 10 se poursuivent en conformité avec les nouvelles dispositions sans autres formalités.

— 1990, ch. 17, par. 45(1)

Disposition transitoire : procédures

45 (1) Les procédures intentées avant l'entrée en vigueur du présent paragraphe et auxquelles s'appliquent des dispositions visées par la présente loi se poursuivent sans autres formalités en conformité avec ces dispositions dans leur forme modifiée.

— 1992, ch. 27, par. 9(2) et (3)

(2) Lorsque, avant l'entrée en vigueur du présent article, le surintendant a, par écrit, fait part à un titulaire de licence de son intention de soumettre à son sujet un rapport au ministre aux termes de l'article 7 de la *Loi sur la faillite*, dans sa version antérieure à l'entrée en vigueur de l'article 6 de la présente loi :

a) les dispositions suivantes de la *Loi sur la faillite* continuent de s'appliquer, dans la mesure où elles ont trait à l'investigation effectuée relativement à ce titulaire de licence et visée à l'article 7 de cette loi :

(i) les articles 7 et 8, dans leur version antérieure à l'entrée en vigueur de l'article 6 de la présente loi,

(ii) les paragraphes 14(2) et (3), dans leur version antérieure à l'entrée en vigueur du présent article;

b) les articles 14.01 à 14.03 de la *Loi sur la faillite et l'insolvabilité*, édictés par le paragraphe (1) du présent article, ne s'appliquent pas dans la mesure où les dispositions de la *Loi sur la faillite* visées à l'alinéa a) continuent de s'appliquer.

— 1992, ch. 27, par. 9(2) et (3)

(3) Lorsque, aux termes du paragraphe (2), le paragraphe 14(2) de la *Loi sur la faillite* continue de s'appliquer et que l'audition à laquelle le titulaire de licence a droit aux termes du paragraphe 14(2) n'a pas commencé avant l'entrée en vigueur du présent article, le ministre

(b) the hearing to which the licensee is entitled under subsection 14(2) had not begun at the coming into force of this section,

the Minister may delegate the Minister's powers, duties and functions under subsection 14(2) to any person other than the Superintendent, by written instrument, on such terms and conditions as are therein specified.

peut, par écrit et aux conditions qu'il précise dans cet écrit, déléguer les attributions que lui confère le paragraphe 14(2) à toute personne autre que le surintendant.

— 1992, c. 27, ss. 16(2), (3)

— 1992, ch. 27, par. 16(2) et (3)

(2) Section 47 of the *Bankruptcy Act*, as that section read immediately before the coming into force of subsection (1), continues to apply in relation to proposals filed before the coming into force of that subsection.

(2) L'article 47 de la *Loi sur la faillite*, dans sa version antérieure à l'entrée en vigueur du paragraphe (1), continue de s'appliquer aux propositions concordataires déposées avant l'entrée en vigueur de ce paragraphe.

— 1992, c. 27, ss. 16(2), (3)

— 1992, ch. 27, par. 16(2) et (3)

(3) Sections 47 to 47.2 of the *Bankruptcy and Insolvency Act*, as enacted by subsection (1), do not apply to interim receivers appointed before the coming into force of those sections.

(3) Les articles 47 à 47.2 de la *Loi sur la faillite et l'insolvabilité*, édictés par le paragraphe (1), ne s'appliquent pas aux séquestres intérimaires nommés avant l'entrée en vigueur de ces articles.

— 1992, c. 27, s. 32(2)

— 1992, ch. 27, par. 32(2)

Application

(2) Part III of the *Bankruptcy Act*, as that Part read immediately before the coming into force of this subsection, continues to apply in relation to proposals filed before the coming into force of this subsection.

Application

(2) La partie III de la *Loi sur la faillite*, dans sa version antérieure à l'entrée en vigueur du présent paragraphe, continue de s'appliquer aux propositions concordataires déposées avant l'entrée en vigueur de celui-ci.

— 1992, c. 27, s. 35(2)

— 1992, ch. 27, par. 35(2)

(2) Section 68.1 of the *Bankruptcy and Insolvency Act*, as enacted by subsection (1), only applies to debtors who become bankrupt after the coming into force of that section.

(2) L'article 68.1 de la *Loi sur la faillite et l'insolvabilité*, édicté par le paragraphe (1), ne s'applique qu'au débiteur qui devient un failli après l'entrée en vigueur de cet article.

— 1992, c. 27, s. 36(2)

— 1992, ch. 27, par. 36(2)

(2) Section 69 of the *Bankruptcy Act*, as that section read immediately before the coming into force of this subsection, continues to apply in relation to proposals filed, or bankruptcies occurring, before the coming into force of this subsection.

(2) L'article 69 de la *Loi sur la faillite*, dans sa version antérieure à l'entrée en vigueur du présent paragraphe continue de s'appliquer aux propositions concordataires déposées avant l'entrée en vigueur du présent paragraphe, ainsi qu'aux faillites survenues avant cette date.

— 1992, c. 27, s. 38(2)

— 1992, ch. 27, par. 38(2)

(2) Sections 81.1 and 81.2 of the *Bankruptcy and Insolvency Act*, as enacted by subsection (1), apply only in relation to goods and products delivered after the coming into force of those sections.

(2) Les articles 81.1 et 81.2 de la *Loi sur la faillite et l'insolvabilité*, édictés par le paragraphe (1), ne s'appliquent qu'aux marchandises livrées après l'entrée en vigueur de ces articles.

— 1992, c. 27, s. 42(2)

(2) Section 101.2 of the *Bankruptcy and Insolvency Act*, as enacted by subsection (1), only applies to debtors who become bankrupt after the coming into force of that section.

— 1992, c. 27, s. 50(2)

(2) Subsection 121(1) of the *Bankruptcy and Insolvency Act*, as enacted by subsection (1), only applies to bankrupts who become bankrupt after the coming into force of that subsection.

— 1992, c. 27, s. 54(3)

(3) Paragraph 136(1)(d) of the *Bankruptcy Act*, as that paragraph read immediately before the coming into force of subsection (1) of this section, continues to apply in relation to bankruptcies occurring before the coming into force of that subsection.

— 1992, c. 27, ss. 61(2), (3)

(2) Section 168.1 of the *Bankruptcy and Insolvency Act*, as enacted by subsection (1), applies to an individual who became bankrupt before the coming into force of that section only in a case where no application for a discharge hearing was made under subsection 169(2) or (3) before the coming into force of section 168.1.

— 1992, c. 27, ss. 61(2), (3)

(3) Where, by virtue of subsection (2), section 168.1 of the *Bankruptcy and Insolvency Act* applies to an individual who became bankrupt more than seven months before the coming into force of that section, then

(a) the words "eight month period immediately following the date on which a receiving order is made against, or an assignment is made by, the individual bankrupt" in paragraph 168.1(1)(a) shall be read as "one month period immediately following the coming into force of this section";

(b) the words "nine month period immediately following the bankruptcy" in paragraphs 168.1(1)(b), (c), (d) and (f) shall be read as "two month period immediately following the coming into force of this section";

(c) the word "nine" in subparagraphs 168.1(1)(f)(i) and (ii) shall be read as "two"; and

(d) the words "nine month period immediately following the bankruptcy" in subsection 168.1(2) shall be

— 1992, ch. 27, par. 42(2)

(2) L'article 101.2 de la *Loi sur la faillite et l'insolvabilité* ne s'applique qu'au débiteur qui devient un failli après l'entrée en vigueur de cet article.

— 1992, ch. 27, par. 50(2)

(2) Le paragraphe 121(1) de la même loi, édicté par le paragraphe (1), ne s'applique qu'au failli qui est devenu un failli après l'entrée en vigueur de ce paragraphe.

— 1992, ch. 27, par. 54(3)

(3) L'alinéa 136(1)d) de la *Loi sur la faillite*, dans sa version à l'entrée en vigueur du paragraphe (1), continue à s'appliquer aux faillites survenues avant l'entrée en vigueur de ce paragraphe.

— 1992, ch. 27, par. 61(2) et (3)

(2) L'article 168.1 de la *Loi sur la faillite et l'insolvabilité*, édicté par le paragraphe (1), s'applique au particulier qui fait faillite avant l'entrée en vigueur de cet article si aucune demande d'audition n'a été présentée en application des paragraphes 169(2) ou (3) de cette loi avant cette entrée en vigueur.

— 1992, ch. 27, par. 61(2) et (3)

(3) Si, par application du paragraphe (2), l'article 168.1 de la même loi s'applique au particulier qui a fait faillite plus de sept mois avant l'entrée en vigueur de cet article, alors :

a) à l'alinéa 168.1(1)a), la mention de « dans les huit mois suivant la date à laquelle une ordonnance de séquestre est rendue ou une cession est faite par le particulier » vaut mention de « dans le mois suivant la date d'entrée en vigueur du présent article »;

b) aux alinéas 168.1(1)b) à d), la mention de « dans les neuf mois suivant la faillite », et, dans le passage de l'alinéa f) qui précède le sous-alinéa (i), la mention de « dans les neuf mois suivant la date de la faillite » valent mention de « dans les deux mois suivant l'entrée en vigueur du présent article »;

c) aux sous-alinéas 168.1(1)f)(i) et (ii), la mention de « neuf » vaut mention de « deux »;

read as "two month period immediately following the coming into force of this section".

d) au paragraphe 168.1(2), la mention de « neuf mois suivant la faillite » vaut mention de « deux mois suivant l'entrée en vigueur du présent article ».

— 1992, c. 27, s. 89(2)

— 1992, ch. 27, par. 89(2)

(2) Part XI of the *Bankruptcy and Insolvency Act*, as enacted by subsection (1), applies only in relation to persons who become receivers after the coming into force of this subsection.

(2) La partie XI de la *Loi sur la faillite et l'insolvabilité*, édictée par le paragraphe (1), ne s'applique qu'aux personnes qui sont devenues séquestres après l'entrée en vigueur du présent paragraphe.

— 1992, c. 27, s. 92

— 1992, ch. 27, art. 92

Review

92 After the expiration of three years after this section comes into force, this Act shall stand referred to such committee of the House of Commons, of the Senate or of both Houses of Parliament as may be designated or established for that purpose and the committee shall, as soon as practicable thereafter, undertake a comprehensive review of the provisions and operation of this Act and shall, within one year after the review is undertaken or within such further time as the House of Commons may authorize, submit a report to Parliament thereon.

Réexamen

92 Trois ans révolus après l'entrée en vigueur du présent article, le comité de la Chambre des communes, du Sénat ou des deux chambres désigné ou constitué à cette fin se saisit de la présente loi. Le comité examine à fond, dès que possible, cette loi ainsi que les conséquences de son application en vue de la présentation, dans un délai d'un an à compter du début de l'examen ou tel délai plus long autorisé par la Chambre des communes, d'un rapport au Parlement.

— 1997, c. 12, s. 15(2)

— 1997, ch. 12, par. 15(2)

Application

(2) Subsection (1) applies to bankruptcies, proposals or receiverships in respect of which proceedings are commenced after that subsection comes into force.

Application

(2) Le paragraphe (1) s'applique aux faillites, aux propositions et aux mises sous séquestre visées par des procédures intentées après son entrée en vigueur.

— 1997, c. 12, s. 59(2)

— 1997, ch. 12, par. 59(2)

Application

(2) Subsection (1) applies to bankruptcies in respect of which proceedings are commenced after that subsection comes into force.

Application

(2) Le paragraphe (1) s'applique aux faillites visées par des procédures intentées après son entrée en vigueur.

— 1997, c. 12, s. 60(2)

— 1997, ch. 12, par. 60(2)

Application

(2) Subsection (1) applies to bankruptcies in respect of which proceedings are commenced after that subsection comes into force.

Application

(2) Le paragraphe (1) s'applique aux faillites visées par des procédures intentées après son entrée en vigueur.

— 1997, c. 12, s. 61(2)

— 1997, ch. 12, par. 61(2)

Application

(2) Subsection (1) applies to bankruptcies in respect of which proceedings are commenced after that subsection comes into force.

Application

(2) Le paragraphe (1) s'applique aux faillites visées par des procédures intentées après son entrée en vigueur.

— 1997, c. 12, s. 62(2)

Application

(2) Subsection (1) applies to proceedings under Part III that are commenced after that subsection comes into force.

— 1997, c. 12, s. 63(3)

Application

(3) Subsection (1) or (2) applies to proposals in respect of which proceedings are commenced after that subsection comes into force.

— 1997, c. 12, s. 64(2)

Application

(2) Subsection (1) applies to proposals in respect of which proceedings are commenced after that subsection comes into force.

— 1997, c. 12, s. 65(2)

Application

(2) Subsection (1) applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force.

— 1997, c. 12, s. 73(2)

Application

(2) Subsection (1) applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force.

— 1997, c. 12, s. 74(3)

Application

(3) Subsection (1) applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force.

— 1997, c. 12, s. 78(3)

Application

(3) Subsection (2) applies to bankruptcies in respect of which proceedings are commenced after that subsection comes into force.

— 1997, ch. 12, par. 62(2)

Application

(2) Le paragraphe (1) s'applique aux procédures visées à la partie III qui sont intentées après son entrée en vigueur.

— 1997, ch. 12, par. 63(3)

Application

(3) Les paragraphes (1) ou (2) s'appliquent aux propositions visées par des procédures intentées après l'entrée en vigueur du paragraphe en cause.

— 1997, ch. 12, par. 64(2)

Application

(2) Le paragraphe (1) s'applique aux propositions visées par des procédures intentées après son entrée en vigueur.

— 1997, ch. 12, par. 65(2)

Application

(2) Le paragraphe (1) s'applique aux faillites et aux propositions visées par des procédures intentées après son entrée en vigueur.

— 1997, ch. 12, par. 73(2)

Application

(2) Le paragraphe (1) s'applique aux faillites et aux propositions visées par des procédures intentées après son entrée en vigueur.

— 1997, ch. 12, par. 74(3)

Application

(3) Le paragraphe (1) s'applique aux faillites et aux propositions visées par des procédures intentées après son entrée en vigueur.

— 1997, ch. 12, par. 78(3)

Application

(3) Le paragraphe (2) s'applique aux faillites visées par des procédures intentées après son entrée en vigueur.

— 1997, c. 12, s. 82(3)

Application

(3) Subsection (1) or (2) applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force.

— 1997, ch. 12, par. 82(3)

Application

(3) Les paragraphes (1) ou (2) s'appliquent aux faillites et aux propositions visées par des procédures intentées après l'entrée en vigueur du paragraphe en cause.

— 1997, c. 12, s. 84(3)

Application

(3) Subsection (1) or (2) applies to bankruptcies in respect of which proceedings are commenced after that subsection comes into force.

— 1997, ch. 12, par. 84(3)

Application

(3) Les paragraphes (1) ou (2) s'appliquent aux faillites visées par des procédures intentées après l'entrée en vigueur du paragraphe en cause.

— 1997, c. 12, s. 87(3)

Application

(3) Subsection (1) or (2) applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force.

— 1997, ch. 12, par. 87(3)

Application

(3) Les paragraphes (1) ou (2) s'appliquent aux faillites et aux propositions visées par des procédures intentées après l'entrée en vigueur du paragraphe en cause.

— 1997, c. 12, s. 89(3)

Application

(3) Subsection (1) or (2) applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force.

— 1997, ch. 12, par. 89(3)

Application

(3) Les paragraphes (1) ou (2) s'appliquent aux faillites et aux propositions visées par des procédures intentées après l'entrée en vigueur du paragraphe en cause.

— 1997, c. 12, s. 90(5)

Application

(5) Subsection (2) applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force.

— 1997, ch. 12, par. 90(5)

Application

(5) Le paragraphe (2) s'applique aux faillites et aux propositions visées par des procédures intentées après son entrée en vigueur.

— 1997, c. 12, s. 92(3)

Application

(3) Subsection (1) applies to bankruptcies in respect of which proceedings are commenced after that subsection comes into force.

— 1997, ch. 12, par. 92(3)

Application

(3) Le paragraphe (1) s'applique aux faillites visées par des procédures intentées après son entrée en vigueur.

— 1997, c. 12, s. 101(2)

Application

(2) Subsection (1) applies to bankruptcies in respect of which proceedings are commenced after that subsection comes into force.

— 1997, ch. 12, par. 101(2)

Application

(2) Le paragraphe (1) s'applique aux faillites visées par des procédures intentées après son entrée en vigueur.

— 1997, c. 12, s. 103(2)

Application

(2) Paragraph 173(1)(m) or (n) of the Act, as enacted by subsection (1), applies to bankruptcies in respect of which proceedings are commenced after that paragraph comes into force.

— 1997, c. 12, s. 105(4)

Application

(4) Subsection (1), (2) or (3) applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force.

— 1997, c. 12, s. 118(2)

Application

(2) Part XII of the Act, as enacted by subsection (1), applies to bankruptcies in respect of which proceedings are commenced after that subsection comes into force.

— 1997, c. 12, s. 119

Application

119 Sections 30 to 58 apply to proceedings commenced under the *Bankruptcy and Insolvency Act* after this section comes into force.

— 1998, c. 19, s. 250(2)

(2) Subsection (1) is deemed to have come into force on June 15, 1994 except that, in the application after June 14, 1994 and before June 30, 1996 of subsection 67(3) of the Act, as enacted by subsection (1), the reference to "subsections 86(2) or (2.1) of the *Employment Insurance Act*" shall be read as a reference to "subsections 57(2) or (3) of the *Unemployment Insurance Act*".

— 1998, c. 21, ss. 103(3), (4)

Application

(3) Subsection (1) applies to debts and obligations regardless of whether they were incurred before or after this section comes into force.

— 1998, c. 21, ss. 103(3), (4)

Application

(4) Subsections (1) and (2) apply only in respect of bankruptcies and proposals in respect of which proceedings are commenced after this section comes into force.

— 1997, ch. 12, par. 103(2)

Application

(2) Les alinéas 173(1)m) ou n) de la même loi, édictés par le paragraphe (1), s'appliquent aux faillites visées par des procédures intentées après l'entrée en vigueur de l'alinéa en cause.

— 1997, ch. 12, par. 105(4)

Application

(4) Les paragraphes (1), (2) ou (3) s'appliquent aux faillites et aux propositions visées par des procédures intentées après l'entrée en vigueur du paragraphe en cause.

— 1997, ch. 12, par. 118(2)

Application

(2) La partie XII de la même loi, édictée par le paragraphe (1), s'applique aux faillites visées par des procédures intentées après l'entrée en vigueur de celui-ci.

— 1997, ch. 12, art. 119

Application

119 Les articles 30 à 58 s'appliquent aux procédures intentées au titre de la *Loi sur la faillite et l'insolvabilité* après l'entrée en vigueur du présent article.

— 1998, ch. 19, par. 250(2)

(2) Le paragraphe (1) est réputé entré en vigueur le 15 juin 1994. Toutefois, pour l'application du paragraphe 67(3) de la même loi, édicté par le paragraphe (1), après le 14 juin 1994 et avant le 30 juin 1996, le renvoi aux paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* est remplacé par un renvoi aux paragraphes 57(2) ou (3) de la *Loi sur l'assurance-chômage*.

— 1998, ch. 21, par. 103(3) et (4)

Application

(3) Le paragraphe (1) s'applique aux dettes et obligations sans égard au fait qu'elles surviennent avant ou après l'entrée en vigueur du présent article.

— 1998, ch. 21, par. 103(3) et (4)

Application

(4) Les paragraphes (1) et (2) s'appliquent aux faillites et aux propositions visées par des procédures intentées après l'entrée en vigueur du présent article.

— 1998, c. 30, s. 10

Transitional — proceedings

10 Every proceeding commenced before the coming into force of this section and in respect of which any provision amended by sections 12 to 16 applies shall be taken up and continued under and in conformity with that amended provision without any further formality.

— 2000, c. 12, s. 21

Application of amendments

*[*]**21** Sections 8 to 20 apply only to bankruptcies, proposals and receiverships in respect of which proceedings are commenced after the coming into force of this section.

[*] [Note: Section 21 in force July 31, 2000, *see* SI/2000-76.]

— 2000, c. 30, s. 143(2)

(2) Subsection (1) is deemed to have come into force on November 30, 1992, except that before June 30, 1996 the references in paragraph 54(2.1)(b) of the Act, as enacted by subsection (1), to the *Employment Insurance Act* shall be read as references to the *Unemployment Insurance Act*.

— 2000, c. 30, s. 144(2)

(2) Subsection (1) is deemed to have come into force on November 30, 1992, except that before June 30, 1996 the references in paragraph 60(1.1)(b) of the Act, as enacted by subsection (1), to the *Employment Insurance Act* shall be read as references to the *Unemployment Insurance Act*.

— 2000, c. 30, s. 145(3)

(3) Subsections (1) and (2) are deemed to have come into force on November 30, 1992 except that, before June 30, 1996, the references in subparagraphs 69(1)(c)(ii) and (3)(a)(ii) and (b)(ii) of the Act, as enacted by subsections (1) and (2), to the *Employment Insurance Act* shall be read as references to the *Unemployment Insurance Act*.

— 2000, c. 30, ss. 146(4), (5)

(4) Subsection (1) applies to proposals in respect of which proceedings are commenced under the Act after September 29, 1997.

— 1998, ch. 30, art. 10

Procédures

10 Les procédures intentées avant l'entrée en vigueur du présent article et auxquelles s'appliquent des dispositions visées par les articles 12 à 16 se poursuivent sans autres formalités en conformité avec ces dispositions dans leur forme modifiée.

— 2000, ch. 12, art. 21

Application

*[*]**21** Les articles 8 à 20 ne s'appliquent qu'aux faillites, aux propositions et aux mises sous séquestre visées par des procédures intentées après l'entrée en vigueur du présent article.

[*] [Note : Article 21 en vigueur le 31 juillet 2000, *voir* TR/2000-76.]

— 2000, ch. 30, par. 143(2)

(2) Le paragraphe (1) est réputé être entré en vigueur le 30 novembre 1992. Toutefois, avant le 30 juin 1996, les renvois à la *Loi sur l'assurance-emploi* à l'alinéa 54(2.1)b) de la *Loi sur la faillite et l'insolvabilité*, édicté par le paragraphe (1), sont remplacés par des renvois à la *Loi sur l'assurance-chômage*.

— 2000, ch. 30, par. 144(2)

(2) Le paragraphe (1) est réputé être entré en vigueur le 30 novembre 1992. Toutefois, avant le 30 juin 1996, les renvois à la *Loi sur l'assurance-emploi* à l'alinéa 60(1.1)b) de la *Loi sur la faillite et l'insolvabilité*, édicté par le paragraphe (1), sont remplacés par des renvois à la *Loi sur l'assurance-chômage*.

— 2000, ch. 30, par. 145(3)

(3) Les paragraphes (1) et (2) sont réputés être entrés en vigueur le 30 novembre 1992. Toutefois, avant le 30 juin 1996, les renvois à la *Loi sur l'assurance-emploi* au sous-alinéa 69(1)c)(ii) de la *Loi sur la faillite et l'insolvabilité*, édicté par le paragraphe (1), et aux sous-alinéas 69(3)a)(ii) et b)(ii) de la même loi, édictés par le paragraphe (2), sont remplacés par des renvois à la *Loi sur l'assurance-chômage*.

— 2000, ch. 30, par. 146(4) et (5)

(4) Le paragraphe (1) s'applique aux propositions visées par des procédures intentées en vertu de la même loi après le 29 septembre 1997.

— 2000, c. 30, ss. 146(4), (5)

(5) Subsections (2) and (3) are deemed to have come into force on November 30, 1992, except that before June 30, 1996 the references in subparagraphs 69.1(3)(a)(ii) and (b)(ii) of the Act, as enacted by subsection (2), to the *Employment Insurance Act* shall be read as references to the *Unemployment Insurance Act*.

— 2000, c. 30, s. 148(2)

(2) Subsection (1) is deemed to have come into force on November 30, 1992, except that before June 30, 1996 the references in paragraph 86(3)(b) of the Act, as enacted by subsection (1), to the *Employment Insurance Act* shall be read as references to the *Unemployment Insurance Act*.

— 2001, c. 4, s. 177

Bankruptcy and Insolvency Act* — *secured creditor

177 (1) The definition *secured creditor* in subsection 2(1) of the *Bankruptcy and Insolvency Act*, as enacted by section 25 of this Act, applies only to bankruptcies or proposals in respect of which proceedings are commenced after the coming into force of that section, but nothing in this subsection shall be construed as changing the status of any person who was a secured creditor in respect of a bankruptcy or a proposal in respect of which proceedings were commenced before the coming into force of that section.

***Bankruptcy and Insolvency Act* — par. 136(1)(e)**

(2) Paragraph 136(1)(e) of the *Bankruptcy and Insolvency Act*, as enacted by section 31 of this Act, applies only to bankruptcies or proposals in respect of which proceedings are commenced after the coming into force of that section, but nothing in this subsection shall be construed as changing the status of any person who was a secured creditor in respect of a bankruptcy or a proposal in respect of which proceedings were commenced before the coming into force of that section.

***Bankruptcy and Insolvency Act* — par. 178(1)(d)**

(3) Paragraph 178(1)(d) of the *Bankruptcy and Insolvency Act*, as enacted by section 32 of this Act, applies only to bankruptcies in respect of which proceedings are commenced after the coming into force of that section.

— 2000, ch. 30, par. 146(4) et (5)

(5) Les paragraphes (2) et (3) sont réputés être entrés en vigueur le 30 novembre 1992. Toutefois, avant le 30 juin 1996, les renvois à la *Loi sur l'assurance-emploi* aux sous-alinéas 69.1(3)a)(ii) et b)(ii) de la *Loi sur la faillite et l'insolvabilité*, édictés par le paragraphe (2), sont remplacés par des renvois à la *Loi sur l'assurance-chômage*.

— 2000, ch. 30, par. 148(2)

(2) Le paragraphe (1) est réputé être entré en vigueur le 30 novembre 1992. Toutefois, avant le 30 juin 1996, les renvois à la *Loi sur l'assurance-emploi* à l'alinéa 86(3)b) de la *Loi sur la faillite et l'insolvabilité*, édicté par le paragraphe (1), sont remplacés par des renvois à la *Loi sur l'assurance-chômage*.

— 2001, ch. 4, art. 177

Faillite et insolvabilité — créancier garanti

177 (1) La définition de *créancier garanti*, au paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité*, dans sa version édictée par l'article 25 de la présente loi, ne s'applique qu'aux faillites et aux propositions visées par des procédures intentées après l'entrée en vigueur de cet article. Le présent paragraphe n'a toutefois pas pour effet de modifier la situation de toute personne qui était un créancier garanti dans le cadre d'une faillite ou d'une proposition visée par des procédures intentées avant l'entrée en vigueur de cet article.

Faillite et insolvabilité — al. 136(1)e)

(2) L'alinéa 136(1)e) de la *Loi sur la faillite et l'insolvabilité*, dans sa version édictée par l'article 31 de la présente loi, ne s'applique qu'aux faillites et aux propositions visées par des procédures intentées après l'entrée en vigueur de cet article. Le présent paragraphe n'a toutefois pas pour effet de modifier la situation de toute personne qui était un créancier garanti dans le cadre d'une faillite ou d'une proposition visée par des procédures intentées avant l'entrée en vigueur de cet article.

Faillite et insolvabilité — al. 178(1)d)

(3) L'alinéa 178(1)d) de la *Loi sur la faillite et l'insolvabilité*, dans sa version édictée par l'article 32 de la présente loi, ne s'applique qu'aux faillites visées par des procédures intentées après l'entrée en vigueur de cet article.

— 2005, c. 47, s. 133, as amended by 2007, c. 36, s. 107

Bankruptcy and Insolvency Act

133 (1) An amendment to the *Bankruptcy and Insolvency Act* that is enacted by any of sections 2 to 5 and 7 to 106, subsection 107(1) and sections 108 to 123 of this Act applies only to a person who, on or after the day on which the amendment comes into force, is described in one of the following paragraphs:

(a) the person becomes bankrupt;

(b) the person files a notice of intention;

(c) the person files a proposal without having filed a notice of intention;

(d) a proposal is made in respect of the person without the person having filed a notice of intention;

(e) an interim receiver is appointed in respect of the person's property and all or part of the person's property comes into the possession or under the control of the interim receiver; or

(f) all or part of the person's property comes into the possession or under the control of a receiver.

Subsection 107(2)

(2) The amendment to the *Bankruptcy and Insolvency Act* that is enacted by subsection 107(2) of this Act applies only to a person who is an undischarged bankrupt on the day on which it comes into force or who becomes bankrupt on or after the day on which it comes into force.

— 2005, c. 47, s. 135

Transitional

135 The person who holds office as Superintendent of Bankruptcy immediately before the day on which subsection 5(1) of the *Bankruptcy and Insolvency Act*, as enacted by subsection 6(1), comes into force continues to hold office for the remainder of the person's term as though the person had been appointed under that subsection 5(1).

— 2005, ch. 47, art. 133, modifié par 2007, ch. 36, art. 107

Loi sur la faillite et l'insolvabilité

133 (1) Toute modification à la *Loi sur la faillite et l'insolvabilité* édictée par l'un des articles 2 à 5 ou 7 à 106, le paragraphe 107(1) ou l'un des articles 108 à 123 de la présente loi ne s'applique qu'à l'égard des personnes suivantes :

a) celles qui deviennent faillis à la date d'entrée en vigueur de la modification ou par la suite;

b) celles qui déposent un avis d'intention à la date d'entrée en vigueur de la modification ou par la suite;

c) celles qui déposent une proposition à la date d'entrée en vigueur de la modification ou par la suite alors qu'elles n'avaient pas déposé d'avis d'intention;

d) celles à l'égard desquelles une proposition est déposée à la date d'entrée en vigueur de la modification ou par la suite alors qu'elles n'avaient pas déposé d'avis d'intention;

e) celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre intérimaire nommé à la date d'entrée en vigueur de la modification ou par la suite;

f) celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre à la date d'entrée en vigueur de la modification ou par la suite.

Paragraphe 107(2)

(2) La modification à la *Loi sur la faillite et l'insolvabilité* édictée par le paragraphe 107(2) de la présente loi ne s'applique qu'à l'égard des personnes qui, à la date de son entrée en vigueur, sont des faillis non libérés et de celles qui deviennent des faillis à cette date ou par la suite.

— 2005, ch. 47, art. 135

Disposition transitoire

135 Le surintendant des faillites qui est en fonctions à l'entrée en vigueur du paragraphe 5(1) de la *Loi sur la faillite et l'insolvabilité*, édicté par le paragraphe 6(1), continue d'exercer sa charge jusqu'à l'expiration de son mandat comme s'il avait été nommé en vertu de ce paragraphe 5(1).

— 2007, c. 29, s. 117

Bankruptcy and Insolvency Act

117 An amendment to the *Bankruptcy and Insolvency Act* made by any of sections 91, 92, 94 to 96 and 99 to 101 of this Act applies only to a person who, on or after the day on which the amendment comes into force, is described in one of the following paragraphs:

(a) the person becomes bankrupt;

(b) the person files a notice of intention;

(c) the person files a proposal without having filed a notice of intention; or

(d) a proposal is made in respect of the person without the person having filed a notice of intention.

— 2007, c. 36, s. 110

Bankruptcy and Insolvency Act

110 An amendment to the *Bankruptcy and Insolvency Act* that is enacted by any of subsections 1(1) and (5) to (7), sections 3 and 6, subsection 9(3), sections 12 and 13, subsections 14(2) and (3), 15(2) and (3), 16(2) and (3) and 17(2), sections 19 to 22, 25, 31, 34, 35, 37, 42, 44, 46 to 48 and 50, subsection 51(1), sections 55 to 57 and subsection 58(2) of this Act applies only to a person who, on or after the day on which the amendment comes into force, is described in one of the following paragraphs:

(a) the person becomes bankrupt;

(b) the person files a notice of intention;

(c) the person files a proposal without having filed a notice of intention;

(d) a proposal is made in respect of the person without the person having filed a notice of intention;

(e) an interim receiver is appointed in respect of the person's property and all or part of the person's property comes into the possession or under the control of the interim receiver; or

(f) all or part of the person's property comes into the possession or under the control of a receiver.

— 2007, ch. 29, art. 117

Loi sur la faillite et l'insolvabilité

117 La modification apportée à la *Loi sur la faillite et l'insolvabilité* par l'un des articles 91, 92, 94 à 96 et 99 à 101 de la présente loi ne s'applique qu'aux personnes qui, à la date d'entrée en vigueur de la modification ou par la suite :

a) soit deviennent faillis;

b) soit déposent un avis d'intention;

c) soit déposent une proposition alors qu'elles n'avaient pas déposé d'avis d'intention;

d) soit sont visées par une proposition déposée alors qu'elles n'avaient pas déposé d'avis d'intention.

— 2007, ch. 36, art. 110

Loi sur la faillite et l'insolvabilité

110 Toute modification à la *Loi sur la faillite et l'insolvabilité* édictée par l'un des paragraphes 1(1) et (5) à (7), les articles 3 ou 6, le paragraphe 9(3), les articles 12 ou 13, les paragraphes 14(2) ou (3), 15(2) ou (3), 16(2) ou (3) ou 17(2), l'un des articles 19 à 22, 25, 31, 34, 35, 37, 42, 44, 46 à 48 et 50, le paragraphe 51(1), l'un des articles 55 à 57 ou le paragraphe 58(2) de la présente loi ne s'applique qu'à l'égard des personnes suivantes :

a) celles qui deviennent faillis à la date d'entrée en vigueur de la modification ou par la suite;

b) celles qui déposent un avis d'intention à la date d'entrée en vigueur de la modification ou par la suite;

c) celles qui déposent une proposition à la date d'entrée en vigueur de la modification ou par la suite alors qu'elles n'avaient pas déposé d'avis d'intention;

d) celles à l'égard desquelles une proposition est déposée à la date d'entrée en vigueur de la modification ou par la suite alors qu'elles n'avaient pas déposé d'avis d'intention;

e) celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre intérimaire nommé à la date d'entrée en vigueur de la modification ou par la suite;

f) celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre à la date d'entrée en vigueur de la modification ou par la suite.

— 2009, c. 31, s. 66

66 Sections 84.1 and 84.2 of the *Bankruptcy and Insolvency Act*, as enacted by section 64, and section 88 of that Act, as enacted by section 65, apply to proceedings commenced under that Act on or after the day on which this Act receives royal assent.

— 2011, c. 24, s. 164

Transitional

164 The *Wage Earner Protection Program Act*, as amended by section 163, applies

(a) in respect of wages owing to an individual by an employer who becomes bankrupt after June 5, 2011; and

(b) in respect of wages owing to an individual by an employer any of whose property comes under the possession or control of a receiver as defined in subsection 243(2) of the *Bankruptcy and Insolvency Act*, after June 5, 2011.

— 2018, c. 27, s. 270

Bankruptcy and Insolvency Act

270 Subsections 65.11(7) and 65.13(9) and sections 72.1 and 246.1 of the *Bankruptcy and Insolvency Act*, as enacted by sections 265 to 268, apply only in respect of proceedings that are commenced under that Act on or after the day on which this section comes into force.

— 2019, c. 29, s. 149

149 Section 4.2, paragraph 67(1)(b.3) and subsections 101(1), (2.01), (2.1), (3.1) and (5.1) of the *Bankruptcy and Insolvency Act*, as enacted by sections 133 to 135, apply only in respect of proceedings that are commenced under that Act on or after the day on which that section, subsection or paragraph, as the case may be, comes into force.

— 2023, c. 6, s. 7(1)

Exception — employers

7 (1) Sections 2 to 4 do not apply in respect of a person who is an employer and who, on the day before the day on which those sections come into force, participated in a prescribed pension plan for the benefit of the person's employees until the fourth anniversary of the day on which this Act comes into force.

— 2009, ch. 31, art. 66

66 Les articles 84.1 et 84.2 de la *Loi sur la faillite et l'insolvabilité*, édictés par l'article 64, et l'article 88 de cette loi, édicté par l'article 65, s'appliquent aux procédures intentées au titre de cette loi à compter de la date de sanction de la présente loi.

— 2011, ch. 24, art. 164

Disposition transitoire

164 La *Loi sur le Programme de protection des salariés*, dans sa version modifiée par l'article 163, s'applique :

a) au salaire dû à une personne physique par un employeur qui a fait faillite après le 5 juin 2011;

b) au salaire dû à une personne physique par un employeur dont tout bien est mis en possession ou sous la responsabilité d'un séquestre, au sens du paragraphe 243(2) de la *Loi sur la faillite et l'insolvabilité*, après le 5 juin 2011.

— 2018, ch. 27, art. 270

Loi sur la faillite et l'insolvabilité

270 Les paragraphes 65.11(7) et 65.13(9) et les articles 72.1 et 246.1 de la *Loi sur la faillite et l'insolvabilité*, édictés par les articles 265 à 268, ne s'appliquent qu'à l'égard des procédures intentées sous le régime de cette loi à la date d'entrée en vigueur du présent article ou par la suite.

— 2019, ch. 29, art. 149

149 L'article 4.2, l'alinéa 67(1)b.3) et les paragraphes 101(1), (2.01), (2.1), (3.1) et (5.1) de la *Loi sur la faillite et l'insolvabilité*, édictés par les articles 133 à 135, ne s'appliquent qu'à l'égard des procédures intentées sous le régime de cette loi à la date d'entrée en vigueur de l'article, de l'alinéa ou du paragraphe, selon le cas, ou par la suite.

— 2023, ch. 6, par. 7(1)

Exception — employeurs

7 (1) Les articles 2 à 4 ne s'appliquent pas à la personne qui est un employeur et qui, la veille de leur entrée en vigueur, participait à un régime de pension prescrit institué pour ses employés, et ce, jusqu'au quatrième anniversaire de l'entrée en vigueur de la présente loi.

— 2024, c. 15, s. 275

Bankruptcy and Insolvency Act

275 The definition ***corporation*** in section 2 of the *Bankruptcy and Insolvency Act*, as enacted by section 273, applies only in respect of proceedings that are commenced under that Act on or after the day on which that section 273 comes into force.

— 2024, ch. 15, art. 275

Loi sur la faillite et l'insolvabilité

275 La définition de *personne morale*, à l'article 2 de la *Loi sur la faillite et l'insolvabilité*, édictée par l'article 273, ne s'applique qu'à l'égard des procédures intentées sous le régime de cette loi à la date d'entrée en vigueur de cet article 273 ou après cette date.

AMENDMENTS NOT IN FORCE

— 2024, c. 15, s. 273

273 The definition *corporation* in section 2 of the *Bankruptcy and Insolvency Act* is replaced by the following:

corporation means a company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, insurance companies, trust companies, loan companies or prescribed public post-secondary educational institutions; (*personne morale*)

MODIFICATIONS NON EN VIGUEUR

— 2024, ch. 15, art. 273

273 La définition de *personne morale*, à l'article 2 de la *Loi sur la faillite et l'insolvabilité*, est remplacée par ce qui suit :

personne morale Personne morale qui est autorisée à exercer des activités au Canada ou qui y a un établissement ou y possède des biens, ainsi que toute fiducie de revenu. Sont toutefois exclues les banques, banques étrangères autorisées au sens de l'article 2 de la *Loi sur les banques*, compagnies d'assurance, sociétés de fiducie ou sociétés de prêt constituées en personnes morales ou établissements publics d'enseignement postsecondaire prescrits. (*corporation*)

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

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

In the Matter of Babcock & Wilcox Canada Ltd.

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

Heard: February 25, 2000

Judgment: February 25, 2000

Docket: 00-CL-3667

Derrick Toy, for Babcock & Wilcox Canada Ltd.

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

***Farley J.*:**

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

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

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

(e) and for other ancillary relief.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(f) Where one jurisdiction has an ancillary role,

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

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

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

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

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

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

[24] Order to issue accordingly.

Application granted.

Appendix

Court File No. 00-CL-3667

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR. JUSTICE FARLEY

FRIDAY, THE 25TH DAY OF FEBRUARY, 2000

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

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

INITIAL ORDER

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

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

SERVICE

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

RECOGNITION OF THE U.S. PROCEEDINGS

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

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

APPLICATION

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

PROTECTION FROM ASBESTOS PROCEEDINGS

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

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

DIP FINANCING

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

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

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

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

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

REPORT AND EXTENSION OF STAY

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

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

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

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

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

SERVICE AND NOTICE

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

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

MISCELLANEOUS

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

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

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

15. *THIS COURT ORDERS AND REQUESTS* the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada (including the assistance of any court in Canada pursuant to Section 17 of the CCAA) and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any

province and any court or any judicial, regulatory or administrative body of the United States and the states or other subdivisions of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

Schedule “A”

NOTICE

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

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

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

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

DATED this day of, 2000 at Toronto, Canada

Court File No. 00-CL-3667

IN THE MATTER OF S. 18.6 of THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST PROCEEDINGS

INITIAL ORDER

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Solicitors for the Applicant

COURT FILE NO.: 09-8512-CL
DATE: 20091223

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **R. J. ZAYED OF CARLSON, CASPERS, VANDENBURGH & LINDQUIST (Applicant) v. TREVOR G. COOK, PATRICK J. KILEY, CROWN FOREX, LLC, UNIVERSAL BROKERAGE FX AND UNIVERSAL BROKERAGE FX DIVERSIFIED, OXFORD GLOBAL PARTNERS, LLC., OXFORD GLOBAL ADVISORS, LLC, UBS DIVERSIFIED FX ADVISORS, LLC, UNIVERSAL BROKERAGE FX GROWTH L.P., UBS DIVERSIFIED FX GROWTH L.P., UNIVERSAL BROKERAGE FX MANAGEMENT, LLC, UBS DIVERSIFIED FX MANAGEMENT, LLC AND UBS DIVERSIFIED GROWTH LLC., BASEL GROUP, LLC., MARKET SHOT, LLC., PFG COIN AND BULLION OXFORD FX GROWTH L.P., OXFORD DEVELOPERS, S.A., OXFORD GLOBAL MANAGED FUTURES FUND, L.P., OXFORD GLOBAL FX, LLC., CLIFFORD BERG AND ELLEN BERG (Respondents)**

BEFORE: **CUMMING J.**

COUNSEL: **John J. Chapman, for the Applicant**

No one appearing for the Respondents, the Application being *ex parte*

HEARD: **DECEMBER 21, 2009**

E N D O R S E M E N T

[1] The Applicant R.J. Zayed (the "U.S. Receiver") seeks an *ex parte* order recognizing as a "foreign proceeding" the action in the United States District Court for the District of Minnesota, 09-SC-333 and the Receivership Order in that proceeding and recognizing the appointment of R. J. Zayed as a foreign representative in that proceeding under ss. 269 and 270 of the *Bankruptcy and Insolvency Act* (*"BIA"*)

[2] In November, 2009 the Untied States Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC") brought proceedings in Minnesota alleging that the Defendants Cook and Kiley (Respondents in this proceeding), through various

corporate entities, had engaged in a massive ponzi scheme raising more than $190 million from primarily American investors..

[3] The U.S.Court on an *ex parte* motion froze the assets of the Respondents and through two essentially identical receivership orders appointed the Applicant as the U.S. Receiver over all the assets of the Respondents.

[4] The U.S. Receiver seeks the assistance of the Canadian courts as there are believed to be assets of the Respondents located in Canada. The U.S. Receiver seeks to take possession and preserve those assets for the benefit of creditor investors through an eventual liquidation of assets and distribution to creditors.

[5] There is an obvious interest in the courts of both the U.S. and Canada in giving recognition and assistance to receivers appointed by courts at the request of securities regulatory and enforcement bodies in alleged mass investor frauds.

[6] Sections 269 and 270 of the *Bankruptcy and Insolvency Act* (“*BIA”*) provide for an application for recognition of a foreign proceeding and an order extending that recognition. Section 268 (1) defines “foreign proceeding” to mean

> A judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditor’s collective interests generally under any law relating to bankruptcy or insolvency in which a debtor’s property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

[7] The filed materials comply with the requirements of ss. 269 and 270. The only query raised by the Applicant as a possible issue is whether a receivership which arises out of an application related to U. S. securities violations can be considered as a “foreign proceeding “ within the meaning of s. 268 (1) of the *BIA.*

[8] In *Stanford International Bank Limited* No.500-11-036045-090 in the Quebec Superior Court (Commercial Chamber), September 11, 2009, the U. S. receiver had no explicit power to liquidate and distribute assets amongst creditors. However, Auclair, J.S.C. in oral reasons held that the receiver had control over the assets of the Stanford corporate group and his powers were of the nature of those exercised by a trustee in bankruptcy or liquidator in insolvency, interim receivership or restructuring. As such, the proceedings were held to be proceedings initiated abroad which conform to the definition of “foreign proceeding” provided in s. 268(1) of the *BIA.*

[9] However, Lewison J. of the English High Court of Justice (Chancery Division Companies Court) in *Re: Stanford International* Case Nos. 13338 and 13959, July 3, 2009 at para.84 (iv) held that the U.S. proceeding under consideration was not a “foreign proceeding” within the meaning of U.K. legislation which provided a definition of “foreign proceeding” similar to that seen in s. 268(1) of the *BIA*, on the basis, *inter alia*, that the powers conferred on and duties imposed on the Receiver “were duties to gather in and preserve assets, not to liquidate or distribute them.”

[10] Although the initial focus of the receivership in the situation at hand is on asset preservation this is simply the first stage of a process that will eventually lead to liquidation for the benefit of creditors. Under the U.S. Receivership Order there is a stay of proceedings and the Receiver has the right to file under Chapter 11 and to become the debtor in possession. Although the Receivership Order on its face does not provide for a liquidation, as a practical matter as receiverships unfold in ponzi schemes and assets are recovered, distribution schemes will be put forward by the receiver so as to return funds to the investors, with court approval. It is in the nature of a ponzi scheme that the fraudster is massively insolvent because he has made promises to investors that cannot possibly be honoured. The Receivership Order is simply the first step to maximize creditor recovery which will ultimately encompass a liquidation of the debtor's assets and a distribution to creditors.

[11] In my view, and I so find, giving a purposive interpretation to the definition of "foreign proceeding" in s. 268 (1) of the *BIA*, an Order recognizing the U.S. proceeding in the matter at hand as a "foreign proceeding", and that the Applicant is a foreign representative in respect of that foreign proceeding, is properly to be given under ss. 269 and 270 of the *BIA*.

[12] Recognition of the foreign proceeding obviates the need for parallel receivership proceedings at additional expense with an Ontario receiver being appointed under the provisions of the *Courts of Justice Act.*

[13] I have signed the requisite Order that accords with the reasons in this Endorsement.

CUMMING J.

DATE: December 23, 2009

In the Matter of MtGox Co., Ltd.
[Indexed as: MtGox Co., Ltd. (Re)]

Ontario Reports

Ontario Superior Court of Justice,

Newbould J.

October 6, 2014

122 O.R. (3d) 465 | 2014 ONSC 5811

Case Summary

Bankruptcy and insolvency — Foreign proceedings — Japanese company with registered head office in Japan operating online exchange for purchase and sale of bitcoins — Bankruptcy proceedings in respect of company commenced in Japan following loss of large number of bitcoins — Bankruptcy trustee applying under s. 269 of Bankruptcy and Insolvency Act ("BIA") for recognition of foreign bankruptcy proceedings as a foreign main proceeding — Application allowed — Trustee entitled under s. 271 of BIA to automatic stay of actions or proceedings against company in Canada — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 269, 271.

M Ltd., a Japanese company with a registered head office in Japan, operated an online exchange for the purchase and sale of bitcoins. It suspended trading after discovering that approximately 850,000 bitcoins were missing. Bankruptcy proceedings in respect of M Ltd. were commenced in Japan. The bankruptcy trustee brought an application under the *Bankruptcy and Insolvency Act* ("*BIA*") for a declaration that the Japanese bankruptcy proceedings were a "foreign main proceeding" for the purposes of the *BIA* and for related relief.

Held, the application should be allowed.

A "foreign main proceeding" is defined in s. 268(1) of the *BIA* as a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests. Section 268(2) provides that, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests. The evidence established that M Ltd. had the centre of its main interests in Japan. The Japanese bankruptcy proceeding was a foreign main proceeding. The trustee was entitled under s. 271(1) of the *BIA* to an automatic stay of actions or proceedings against M Ltd. in Canada.

Cases referred to

Babcock & Wilcox Canada Ltd. (Re), [2000] O.J. No. 786, [2000] O.T.C. 135, 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157, 95 A.C.W.S. (3d) 608 (S.C.J.); *Braycon International Inc. v. Everest & Jennings Canadian Ltd.*, [2001] O.J. No. 511, 26 C.B.R. (4th) 154, 103 A.C.W.S. (3d) 56 (S.C.J.); *Lear Canada (Re)*, [2009] O.J. No. 3030, 55 C.B.R. (5th) 57, 179 A.C.W.S. (3d) 46

(S.C.J.); *Lightsquared LLP (Re)*, [2012] O.J. No. 3184, 2012 ONSC 2994, 92 C.B.R. (5th) 321 (S.C.J.); *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, J.E. 91-123, 52 B.C.L.R. (2d) 160, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1

Statutes referred to

Bankruptcy Act of Japan, Act No. 75 of June 2, 2004

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2, Part XIII [as am.], ss. 267-284 [as am.], 268(1), (2), 269 [as am.], (1), 270 [as am.], (1), 271(1), (*a*)

Bankruptcy Code, 11 U.S. Code, c. 11, 15

Civil Rehabilitation Act (Japan), arts. 21(1), 25(iii)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [as am.] [page466]

Authorities referred to

Sarra, Janis, "Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings", 44 Tex. Intl. L.J. 547

UNCITRAL Model Law on Cross Border Insolvency

APPLICATION for an initial recognition order under Part XIII of the *Bankruptcy and Insolvency Act*.

Margaret R. Sims, for applicant.

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[1] **NEWBOULD J.**: — Nobuaki Kobayashi, in his capacity as the bankruptcy trustee of MtGox Co., Ltd., applied on October 3, 2014 for an initial recognition order pursuant to Part XIII (ss. 267 to 284) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 2, as amended ("*BIA*"):

(a) declaring and recognizing the bankruptcy proceedings commenced in respect of MtGox pursuant to the *Bankruptcy Act of Japan*, Act No. 75 of June 2, 2004 before the Tokyo District Court, Twentieth Civil Division as a foreign main proceeding for the purposes of s. 270 of the *BIA*;

(b) declaring that the trustee is a foreign representative pursuant to s. 268(1) of the *BIA*, and is entitled to bring this application pursuant to s. 269 of the *BIA*; and

(c) staying and enjoining any claims, rights, liens or proceedings against or in respect of MtGox and the property of MtGox.

[2] I concluded at the hearing that the relief sought should be granted, for reasons to follow. These are my reasons.

[3] MtGox is a Japanese corporation formed in 2011. It is, and always has been, located and headquartered in Tokyo, Japan. From April 2012 to February 2014, its business was the operation of an online exchange for the purchase and sale of bitcoins through its website located at <http://www.mtgox.com>. Bitcoins are a form of digital currency. At one time, the MtGox exchange was reported to be the largest online bitcoin exchange in the world.

[4] On or about February 10, 2014, MtGox halted all bitcoin withdrawals by its customers after it was subject to what appears to have been a massive theft or disappearance of bitcoins held by it. MtGox suspended all trading on or about February 24, 2014, after it was discovered that approximately 850,000 bitcoins were missing. These events caused, among [page467] other things, MtGox to become insolvent and ultimately led to the Japan bankruptcy proceeding.

[5] On February 28, 2014, MtGox filed a petition for the commencement of a civil rehabilitation proceeding in the Tokyo Court pursuant to art. 21(1) of the Japanese *Civil Rehabilitation Act* ("*JCRA*"), reporting that it had lost almost 850,000 bitcoins. A civil rehabilitation proceeding under the *JCRA* is analogous to a restructuring proceeding in Canada pursuant to the *BIA* or the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

[6] Following the filing of the Japan civil rehabilitation petition, MtGox commenced an investigation with regard to the circumstances that led to the Japan civil rehabilitation. However, by mid-April 2014, the Tokyo Court decided to dismiss the Japan civil rehabilitation petition pursuant to art. 25(iii) of the *JCRA*, recognizing that under the circumstances it would be very difficult for MtGox to successfully prepare and obtain approval of a rehabilitation plan or otherwise successfully carry out the Japan civil rehabilitation.

[7] On April 24, 2014, the Tokyo Court entered the Japan bankruptcy order, formally commencing MtGox's Japan bankruptcy proceeding and appointing the applicant as bankruptcy trustee.

[8] MtGox has approximately 120,000 customers who had a bitcoin or fiat currency balance in their accounts as of the date of the Japan petition. The customers live in approximately 175 countries around the world.

[9] MtGox has been named as a defendant in a pending class action filed in the Ontario Superior Court of Justice. The notice of action and statement of claim were provided to the trustee under the Hague Convention on August 29, 2014.

Applicable Law

[10] Various theories as to how multinational bankruptcies should be dealt with have long existed. Historically, many countries adopted a territorialism approach under which insolvency proceedings had an exclusively national or territorial focus that allowed each country to distribute the assets located in that country to local creditors in accordance with its local laws. Universalism is a theory that posits that the bankruptcy law to be applied should be that of the debtor's home jurisdiction, that all of the assets of the insolvent corporation, in whichever country they are situated, should be pooled together and administered by the court of the home country. Local courts in other countries would be expected, under universalism, to recognize

and enforce [page468] the judgment of the home country's court. This theory of universalism has not taken hold.

[11] There is increasingly a move towards what has been called modified universalism. The notion of modified universalism is court recognition of main proceedings in one jurisdiction and non-main proceedings in other jurisdictions, representing some compromise of state sovereignty under domestic proceedings to advance international comity and co-operation. It has been advanced by the United Nations Commission on International Trade Law ("UNCITRAL") *UNCITRAL Model Law on Cross Border Insolvency* (the "Model Law"), which Canada largely adopted by 2009 amendments to the *CCAA* and the *BIA*.[1] Before this amendment, Canada had gone far down the road in acting on comity principles in international insolvency. See *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786, 18 C.B.R. (4th) 157 (S.C.J.) and *Lear Canada (Re)*, [2009] O.J. No. 3030, 55 C.B.R. (5th) 57 (S.C.J.).

[12] In the *BIA*, the Model Law was introduced by the enactment of Part XIII. Section 267 sets out the policy objectives of Part XIII as follows:

> 267. 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 debtors;
>
> (d) the protection and the maximization of the value of debtors' property; and
>
> (e) the rescue of financially troubled businesses to protect investment and preserve employment.
>
> (f) *Recognition of foreign proceeding*

[13] Section 269(1) of the *BIA* provides for the application by a foreign representative to recognize a foreign proceeding. Pursuant to s. 270(1) of the *BIA*, the court shall make an order recognizing the foreign proceeding if (i) the proceeding is a foreign [page469] proceeding and (ii) the applicant is a foreign representative of that proceeding.

[14] A foreign proceeding is broadly defined in s. 268(1) to mean a judicial or an administrative proceeding in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

[15] The Japan bankruptcy proceeding is a judicial proceeding dealing with creditors' collective interests generally under the *Bankruptcy Act of Japan*, which is a law relating to bankruptcy and insolvency, in which MtGox's property is subject to supervision by the Tokyo District Court, Twentieth Civil Division. As such, the Japan bankruptcy proceeding is a foreign proceeding pursuant to s. 268(1) of the *BIA*.

[16] Section 268(1) of the *BIA* defines a foreign representative as a person or body who is authorized in a foreign proceeding in respect of a debtor company to (a) administer the debtor's property or affairs for the purpose of reorganization or liquidation or (b) act as a representative in respect of the foreign proceeding.

[17] The trustee has authority, pursuant to the Japan Bankruptcy Act and the bankruptcy order made by the Tokyo District Court in the Japan bankruptcy proceeding, to administer MtGox's property and affairs for the purpose of liquidation and to act as a foreign representative. Thus, the trustee is a foreign representative pursuant to s. 268(1) of the *BIA*.

[18] In the circumstances, it is appropriate to recognize the Japan bankruptcy proceeding as a foreign proceeding.

(b) *Foreign main proceeding*

[19] A foreign proceeding can be a foreign main proceeding or a foreign non-main proceeding. If the foreign proceeding is recognized as a main proceeding, there is an automatic stay provided in s. 271(1) against lawsuits concerning the debtor's property, debts, liabilities or obligations, and prohibitions against selling or disposing of property in Canada. If the foreign proceeding is recognized as a non-main proceeding, there is no such automatic stay and prohibition and it is necessary for an application to be made to obtain such relief. For that reason, it is advantageous for a foreign representative to seek an order recognizing the foreign proceeding as a main proceeding. The trustee in this case has made such a request.

[20] A foreign main proceeding is defined in s. 268(1) as a foreign proceeding in a jurisdiction where the debtor company has [page470] the centre of its main interests ("COMI"). Section 268(2) provides that in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

[21] In considering whether the registered office presumption has been rebutted, a court should consider the following factors in determining COMI: (i) the location is readily ascertainable by creditors; (ii) the location is one in which the debtor's principal assets and operations are found; and (iii) the location is where the management of the debtor takes place. See *Lightsquared LLP* (*Re)*, [2012] O.J. No. 3184, 92 C.B.R. (5th) 321 (S.C.J.).

[22] The trustee relies on the following facts in support of his position that the COMI of MtGox is in Japan and not in Canada:

(1) MtGox has no offices in Canada, there are no Canadian subsidiaries and no assets in located in Canada;

(2) MtGox is and has always been organized under the laws of Japan;

(3) MtGox's registered office and corporate headquarters are, and have always been, located in Japan, and its books and records are located at its head office in Japan;

(4) the debtor's sole director and representative director, Mr. Karpeles, resides, and at all relevant times has resided, in Japan;

(5) most of the MtGox's bank accounts are located in Japan, including the primary account for operating its business;

(6) MtGox's parent company, Tibanne, provided operational and administrative services to it, including the provision of its primary workforce, in Japan;

(7) MtGox's website clearly disclosed to customers and other third parties that it is a Japanese corporation that is located in Japan;

(8) upon the filing of the Japan petition, MtGox commenced an investigation in Japan with regard to the circumstances that led to the Japan civil rehabilitation, which investigation was subject to the oversight of the Tokyo Court.

[23] Taking into account this evidence, I am satisfied that the COMI of MtGox is its registered head office in Japan and that the Japan bankruptcy proceeding is a foreign main proceeding. [page471]

Stay of Proceedings

[24] The effect of recognition of a foreign main proceeding is an automatic grant of the relief set out under s. 271(1) of the *BIA*:

> 271(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,
>
> *(a)* no person shall commence or continue any action, execution or other proceedings concerning the debtor's property, debts, liabilities or obligations;
>
> *(b)* if the debtor carries on a business, the debtor shall not, outside the ordinary course of the business, sell or otherwise dispose of any of the debtor's property in Canada that relates to the business and shall not sell or otherwise dispose of any other property of the debtor in Canada; and
>
> *(c)* if the debtor is an individual, the debtor shall not sell or otherwise dispose of any property of the debtor in Canada.

[25] The trustee seeks recognition of the Japan bankruptcy proceeding in an effort to maximize recoveries to, and provide for an equitable distribution of value among, all creditors. In particular, the trustee believes that the enjoining of the ongoing litigation against MtGox in Canada, in conjunction with the protections afforded by the Japan bankruptcy proceeding, is essential to this effort.

[26] In *Braycon International Inc. v. Everest & Jennings Canadian Ltd.*, [2001] O.J. No. 511, 26 C.B.R. (4th) 154 (S.C.J.), prior to the adoption of the Model Law in Canada, a stay of an action in Ontario against a United States corporation subject to bankruptcy proceedings in the U.S. under c. 11 of the U.S. *Bankruptcy Code*, 11 U.S. Code, c. 15, in which there was a stay of all proceedings against it was ordered pursuant to the comity principles recognized in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135.

[27] The Model Law, which was adopted in Japan in 2000, provides a transparent regime for the right of foreign creditors to commence or participate in an insolvency proceeding in another state. See Dr. Janis Sarra, *supra*, at footnote 1. Section 271(1)(*a*) of the *BIA* provides for an automatic stay in furtherance of that objective. As the Japanese foreign proceeding is a foreign

main proceeding, the trustee is entitled to that automatic stay. The Tokyo Court has order ordered a process for claims to be made with a filing date of no later than May 29, 2015.

[28] There have been two class actions commenced against MtGox in the U.S. The trustee has obtained recognition of the Japan bankruptcy proceedings in the U.S. under c. 15 of the [page472] U.S. *Bankruptcy Code* as a foreign main proceeding, resulting in an automatic stay of the U.S. litigation. The trustee is entitled to the same relief in Canada relating to the class action filed in Ontario.

[29] At the conclusion of the hearing on October 3, 2014, I signed an order reflecting these reasons.

Application allowed.

Notes

1 See Dr. Janis Sarra, "Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings", 44 Tex. Intl. L.J. 547.

CITATION: Hollander Sleep Products, LLC et al., Re, 2019 ONSC 3238
COURT FILE NO.: CV-19-620484-00CL
DATE: 2019/05/30

SUPERIOR COURT OF JUSTICE – ONTARIO

- COMMERCIAL LIST

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

AND:

AND IN THE MATTER OF HOLLANDER SLEEP PRODUCTS, LLC, HOLLANDER SLEEP PRODUCTS CANADA LIMITED, DREAM II HOLDINGS, LLC, HOLLANDER HOME FASHIONS HOLDINGS, LLC, PACIFIC COAST FEATHER, LLC, HOLLANDER SLEEP PRODUCTS KENTUCKY, LLC, AND PACIFIC COAST FEATHER CUSHION, LLC

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

BEFORE: HAINEY J.

COUNSEL: *Shawn Irving and Marc Wasserman,* for the Applicant

Virginie Gauthier, for KSV Kofman Inc.

L. Joseph Latham, for Wells Fargo

Milly Chow and Kelly Bourassa, for Barings Finance LLC

HEARD: May 23, 2019

ENDORSEMENT

BACKGROUND

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

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

b) Recognition of certain First Day Orders;

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

d) Granting of the DIP ABL Charge; and

e) Granting of the Administration Charge.

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

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

FACTS

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

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

Chapter 11 Cases

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

Chapter 11 Debtors

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

Hollander Canada

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

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

[10] On a standalone basis, Hollander Canada is not profitable. Its 2018 financial statement reflects a net loss of approximately $2.6 million after allocation of selling, general and administrative expenses, including royalties and procurement fees, incurred by the U.S. Chapter 11 Debtors and allocated across the manufacturing facilities for which it provides these and other shared services (the "U.S. Shared Services"). Losses have continued for the four-month period ended April 30, 2019. Currently, approximately $7.2 million of Hollander Canada's $9 million of accounts payable is past due. If the amount owing to Hollander Canada from the U.S. Chapter 11 Debtors was written down to its realizable value and Hollander Canada's allocation of U.S. Shared Services was recorded for the four months ended April 30, 2019, Hollander Canada's shareholder equity would be entirely eroded.

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

Principal Indebtedness

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

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

b) **Prepetition Term Loan** – a $190 million senior secured term loan facility (the "Term Loan Facility"). Each Chapter 11 Debtor except Hollander Canada is an obligor under this facility. Hollander Canada is not a borrower or a guarantor of

the Term Loan Facility. As of the Petition Date, approximately $166.5 million remains outstanding against the Term Loan Facility.

Recent Events and Proposed Restructuring

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

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

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

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

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

Proposed Postpetition Financing

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

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

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

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

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

ISSUES

[23] I must decide the following issues:

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

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

(i) Granting the Stay of Proceedings;

(ii) Recognition of the First Day Orders;

(iii) Granting the DIP ABL Charge;

(iv) Appointing KSV as Information Officer; and

(v) Granting the Administration Charge?

ANALYSIS

Are the Chapter 11 Cases Foreign Main Proceedings?

Are the Chapter 11 Cases Foreign Proceedings?

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

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

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

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

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

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

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

have consistently recognized proceedings under Chapter 11 of the United States Bankruptcy Code to be foreign proceedings for the purposes of the CCAA.

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

Are the Chapter 11 Cases Foreign Main Proceedings?

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

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

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

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

a) the location where corporate decisions are made;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a) Hollander Canada's business is closely integrated into Hollander's business in the U.S. and its registered office is listed in Canada only for corporate purposes;

b) Managerial functions for Hollander Canada, including finance, buying, logistics, marketing, and strategic decisions, are provided from Hollander's U.S. head office by Hollander Sleep Products;

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

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

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

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

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

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

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

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

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

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

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

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

SHOULD THE INITIAL RECOGNITION ORDER AND SUPPLEMENTAL ORDER BE GRANTED?

Is a Stay of Proceedings Required and Appropriate?

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

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

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

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

Should the First Day Orders be Recognized?

[41] The central principle governing Part IV of the CCAA is comity, which mandates that Canadian courts should recognize and enforce the judicial acts of other jurisdictions, provided that those other jurisdictions have assumed jurisdiction on a basis consistent with principles of order, predictability and fairness.

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

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

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

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

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

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

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

Should the DIP ABL Charge be Granted?

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

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

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

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

> The Information Officer and Chapter 11 Debtors recognize that in CCAA proceedings, a partial "roll up" provision would not be permissible as a result of s.11.2 of the CCAA, which expressly provides that a DIP charge may not secure an obligation that exists before the Initial Order is made.
>
> Section 49 of the CCAA provides that, in recognizing an order of a foreign court, the court may make any order that it considers appropriate, provided the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of the creditor or creditors.
>
> It is necessary, in my view, to emphasize that this is a motion to recognize an order made in the "foreign main proceeding"....
>
> A significant factor to take into account is that the Final DIP Facility Order was granted by the U.S. Court. In these circumstances, I see no basis for this court to second guess the decision of the U.S. Court.

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

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

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

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

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

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

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

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

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

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

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

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

[53] I have concluded that the Court's decision in *Payless* is distinguishable from this case for the following reasons as set out in the applicant's factum:

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

b) In *Payless*, there was evidence of material prejudice to Canadian creditors and certain Canadian creditor groups opposed the DIP order because they were

disadvantaged. In this case, no such material prejudice or unequal treatment exists with respect to the creditors of Hollander Canada or the other Chapter 11 Debtors.

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

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

SHOULD KSV BE APPOINTED INFORMATION OFFICER?

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

SHOULD AN ADMINISTRATIVE CHARGE BE APPROVED?

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

CONCLUSION

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

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

HAINEY J.

Date: May 30, 2019

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-062636-234

DATE: August 28, 2023

BY THE HONOURABLE CHRISTIAN IMMER, J.S.C.

In the Matter of the Notice of Intention to Make a Proposal Under the *Bankruptcy And Insolvency Act*, RSC 1985, c B-3 of :

BRUNSWICK HEALTH GROUP INC.
BRUNSWICK MEDICAL CENTER INC.
DMSC REAL ESTATE INC.
THE CHILDREN'S CLINIC @ POINTE-CLAIRE INC.
SANOMED SOLUTIONS INC.
BRUNSWICK MEDICAL CENTRE @ GLEN INC.
BRUNSWICK RESEARCH INC.
BRUNSWICK MINOR SURGERY CENTER INC.
BRUNSWICK ENDOSCOPY INC.
6892094 CANADA INC.
8981515 CANADA INC.

Debtors / Applicants

CORRECTED JUDGMENT (ART. 338 CCP)

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[1] **CONSIDERING** that the Court issued orders on August 17, 2023 and provided its written reasons on August 18, 2023;

[2] **CONSIDERING** that the reasons contain errors in writing at paragraphs 35, 37 and 47 which must be corrected, so as to reflect that the Administrative Charge is in the amount of $150,000 and that the Representative Counsel Charge ranks in third priority;

[3] **CONSIDERING** art. 338 CCP;

FOR THESE REASONS, THE COURT:

[4] **CORRECTS** its reasons dated August 18, 2023 so that the paragraphs 35, 37 and 47 read as follows:

> [35] The Group asked the Court to authorize it to pay fees and disbursements of any agent or counsel retained or employed by the Debtors in respect of these proceedings and to approve a $150,000 charge to guarantee payment.
>
> [37] Given the important amount of work to be carried out on a continuing basis, the $150,000 amount of the charge is reasonable.
>
> [47] Finally, the Court also found it appropriate for the Group to pay the Representative Counsel's reasonable and documented fees and disbursements incurred after the date of the order in connection with the Cycle 28 Payment and the Physicians' billings during the NOI Proceedings up to a maximum amount of $35,000 and to secure payment of same by a charge which would rank in priority to other secured obligations, but in third rank of priority. As for the other charges, with respect to any deemed trust or withholding tax owed by the Group to a taxing authority, the question of priority will, if necessary, be determined by the Court at a later date.

[5] **THE WHOLE** without costs.

_____
CHRISTIAN IMMER, J.S.C.

Me François Alexandre Toupin
Me Pierre-Gabriel Grégoire
McCarthy Tétrault
For the Debtors

Me Martin Jutras
Kaufman Avocats LLP
For the Toronto-Dominion Bank

Me Rim Afegrouch
Attorney General of Canada

Me Marc Duchesne
Border Ladner Gervais LLP
For the Business Development Bank of Canada

Me François Gagnon
Borden Ladner Gervais LLP
For the MUHC

Me Neil Stein
Me Nicholas Chine
Stein & Stein Lawyers inc.
For a group of 25 physicians and as prospective representative counsel

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-062636-234

DATE: AUGUST 18, 2023

BY THE HONOURABLE CHRISTIAN IMMER, J.S.C.

In the Matter of the Notice of Intention to Make a Proposal Under the *Bankruptcy And Insolvency Act*, RSC 1985, c B-3 of :

BRUNSWICK HEALTH GROUP INC.
BRUNSWICK MEDICAL CENTER INC.
DMSC REAL ESTATE INC.
THE CHILDREN'S CLINIC @ POINTE-CLAIRE INC.
SANOMED SOLUTIONS INC.
BRUNSWICK MEDICAL CENTRE @ GLEN INC.
BRUNSWICK RESEARCH INC.
BRUNSWICK MINOR SURGERY CENTER INC.
BRUNSWICK ENDOSCOPY INC.
6892094 CANADA INC.
8981515 CANADA INC.

Debtors / Applicants

JUDGMENT
Reasons for order rendered
on August 17, 2023
(Sections 50.4, 50.6, 64.2 and 183 of the *BIA*)

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[1] The Applicants constitute the Brunswick Health Group (the "Group"). They all filed notices of intention to make a proposal ("NOI") under the *Bankruptcy and Insolvency Act* ("*BIA*") on July 14, 2023.[1]

[2] On August 17, 2023, they appeared before the Court praying it to render the following orders:

> 1. Extending the ongoing stay of proceedings and the time to file a proposal until and including October 2, 2023;
>
> 2. Authorizing the Applicants to pay certain pre-filing amounts owed to the Physicians
>
> 3. Approving an interim financing facility in the amount of $1,000,000 (the "Interim Financing Facility") to be provided by TD Bank and BDC and granting a $1,250,000 charge to secure the obligations under this facility;
>
> 4. Granting an administration charge in the amount of $150,000 (the "Administration Charge") to secure the payment of the professional fees and disbursements of the Applicant's legal counsel, the NOI Trustee and the Interim Receiver incurred in relation to these proceedings both before and after the date of the Order;
>
> 5. Granting a financial advisor charge in the amount of $350,000 (the "Financial Advisor Charge") over the Property to secure the payment of PwC's compensation.
>
> 6. Appointing Stein & Stein Inc. as representative counsel (the "Proposed Representative Counsel") to represent the interests of all of the physicians affiliated to Brunswick Group (the Physicians) and granting a charge in the amount of $35,000 (the Representative Counsel Charge);
>
> 7. Appointing C.S Adjami Inc. as interim receiver ("Interim Receiver") for the sole purpose of exercising control over the payment of the billings to certain Physicians during the NOI Proceedings.

[3] On August 17, 2023, the Court did indeed issue all such orders. These are the reasons why it did so.

CONTEXT

[4] The Group is presently constituted of the parent company, Brunswick Health Group inc. ("BHG"), and ten wholly owned subsidiaries. BHG's shares are held in equal proportion by seven shareholders. One of them, Vince Trevisonno, BHG's president and

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[1] RSC 1985, c. B-3.

general manager testified before the Court in support of this Application. The Court also reviewed the two reports filed by the trustee and heard his testimony.

[5] The Group operates out of rented premisses at the McGill University Health Center ("MUHC") and in a building in Pointe-Claire (the "PC Building") which is owned by one of the group's subsidiaries, DMSC Real Estate Inc. The 170 physicians associated with the Group provide health care to 300,000 patients. Approximately 150 persons are employed by the Group.

[6] Its operations are financed primarily by two secured lenders (the "Primary Lenders"): The Toronto-Dominion Bank ("TD") and the Business Development Bank of Canada ("BDC"). They hold security interest on most of the assets of the Group on a *pari passu basis* (except for some specific equipment that solely relates to a BDC loan). These assets are comprised of the operating assets of the Group's medical activities and the PC Building. In addition, the Bank of Nova Scotia has provided an overdraft facility to Brunswick Minor Surgery inc. and has registered security over its moveable property.

[7] In 2020, because of the cumulated effect of an aggressive expansion strategy which included building out its Pointe Claire premises and of the chilling effect of the Covid pandemic on patient traffic, the Group drifted into tumultuous waters. Also, the Group admits that due to its rapid expansion, it did not put in place strong governance practices to manage its operational issues. As a result, the Group ran important operational deficits and was faced with a liquidity crisis.

[8] Strategies were deployed to carry out asset divestures or receive cash injections from its shareholders. The Group has been assisted since April 2022 by the now trustee, C. S. Adjami Inc.

[9] A first transaction was closed on January 31, 2023 for the Brunswick Medical Center @ Glen inc. which provided some financial relief.

[10] On January 26, 2023, the Group retained PricewaterhouseCoopers Corporate Finance Inc. ("PwC") to assist it in completing a divestiture transaction of two lots: the medical activities and the PC Building.[2] Forbearance agreements were signed by the primary lenders. PwC began work in earnest in March 2023.

[11] As is explained by the Trustee in his two reports, PwC received several letters of intention and expressions of interest. It was determined that the value attributed in these LOIs and IOIs for the PC Building was not reflective of a going concern situation and that the Group would therefore direct its efforts first towards securing a transaction for the medical activities.

[12] The financial situation remained challenging. At the Group's financial year end on October 31, 2022, the consolidated book value of its assets was $40,073,935.

[2] See P-11.

Immediately prior to filing its NOI, the Group's total liabilities on a consolidated basis amounted to $46,348,300. Drawn in broad strokes, the Group's financial portrait as regards the Primary Lenders are owed the following sums which are secured as follows:

12.1. TD: it is estimated that as of June 30, 2023, Brunswick Health Group, DMSC, SanoMed, BMC Glen and 8981515 Canada inc. are indebted to the TD Bank to the tune of $18million. The TD Bank holds security on all their moveable property, save for BMC Glen which it discharged, as well as on the PC Building.

12.2. BDC: as of July 5, 2023, the Brunswick Health Group and DMSC were indebted towards BDC for an amount of approximately $20million to be perfected while Brunswick Endoscopy was indebted towards BDC for an amount of approximately $1.07 million, to be perfected, for a total of approximately $21.2 million. BDC holds security on all movable property for each of the Group's entities and on the PC Building.

12.3. BMO: Brunswick Minor Surgery owes $150,000 to the Bank of Montreal which holds security on its movable property.

12.4. Property taxes: as of July 10, 2023, DMSC owes approximately $1.42 million in unpaid property taxes.

[13] On June 30, 2023, the Primary Lenders did not extend the forbearance agreements and filed notices under s. 244 *BIA* to enforce their security. Consequently, the Group concluded that absent the ability to restructure its operations and financial affairs, it would be unable to continue its operations in the very short term. Hence, a NOI was filed on July 14, 2023. This would allow the Group to continue operations in the short term, while implementing its restructuring plan. It has the Primary Lenders' support in doing so.

ANALYSIS

[14] As explained by the Supreme Court in *Century Services*, the "contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the extent possible"[3]. The purpose of a proposal to creditors under the *BIA*, just like under the CCAA, "is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets".[4] As the Supreme Court stated in *Callidus*, where reorganization is not a possibility, "a liquidation that preserves

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3 *Century Services Inc*. v. *Canada (Attorney General),* 2010 SCC 60, [2010] 3 S.C.R. 379, par. 24 ["Century Services"].

4 *Idem,* par. 15é

the going concern value and the ongoing business operations of the pre-filing company may become the predominant focus".[5]

[15] The medical activities are human resource driven. Aside from the secured and unsecured creditors, the stakes of these proceedings could not be higher for 300,000 patients, 170 physicians and 150 employees. Given the destabilizing effect of the group's financial distress, ensuring that the Group carries on business as a going concern and sustaining the stakeholders' confidence is of paramount concern. Nevertheless, it must be kept in mind that the Court's powers are drawn from the *BIA*, which provides for a "rules-based mechanism that offers less flexibility" than the *CCAA*'s provisions. [6]

[16] Since the filing of the NOI, the Group has received a Letter of Intent (the "LOI") which it has accepted on July 26, 2023, thereby granting exclusivity to a potential purchaser to negotiate a transaction in respect of the medical activities.

1. STAY EXTENSION

[17] The Group asked that the time in which to file a proposal and the corresponding stay of proceedings be extended to October 2, 2023. The Court acceded to this request for the following reasons.

[18] Subsection 50.4(9) *BIA* states that the Court may make such an order, provided that three conditions are met.

[19] First the Group must have acted and is acting in good faith and with due diligence. The Trustee's report demonstrates that this is so. The third quarter's results show a net improvement in the Group's finances. The Group continues to work in earnest toward finalizing a transaction as contemplated in the LOI. Management is providing its support. Significant communications are maintained with stakeholders to the point that they require channelling.

[20] Secondly, the Court must determine if the Group will be likely to make a viable proposal if the extension is granted. The reprieve which is provided by the stay is allowing for the negotiations regarding the medical activities at the PC Building to be carried out in an orderly fashion. This in turn will allow for maximization of their realization value and will eventually enhance the PC Building's commercial value. Whether this will ultimately lead to a viable proposal remains to be seen, but for the moment this condition is also met.

[21] Finally, no creditor is prejudiced as a transaction would allow for the business' continuation on a going concern which is to the advantage of all stakeholders. The TD and BDC have given their support. No creditor has objected. Not maintaining the Group

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5 *9354-9186 Québec inc.* v.*Callidus Capital Corp*., 2020 SCC 10, [2020] 1 S.C.R. 521,

6 *Century Services*, par. 15.

as a going concern will have disastrous effects on its value, on its patients, its employees and the associated physicians.

[22] That being said, the MUHC has made its concerns known that at present, the trustee and the Group are not paying post-filing rents. It has indicated that it may petition the Court to seek relief under s. 65.1 *BIA*. This will be dealt with in due course, if and when such a request is made. For the moment, the MUHC is not opposing the stay.

2. THE PAYMENT OF THE CYCLE 28 PAYMENTS TO THE PHYSICIANS

[23] For most of the physicians of the Group – approximately 150 out of 170 doctors – it is the Group which submits their bills to the RAMQ and collects revenues which it remits, approximately ten days later, to these physicians by cheques after deducting the management fees.

[24] Immediately prior to the filing of the NOI, the Group had received payments from the RAMQ for an approximate total of $700,000 for the Cycle 28 Payment. It was in the process of allocating expenses and management fees for purposes of deduction. Cheques were then to be cut and handed to the physicians on July 20, 2023. The NOI intervened in the middle of this process. The payment of $700,000 was not made and is arguably a pre-filing obligation.

[25] Also, somewhat surprisingly, cheques were not necessarily cashed for previous cycles upon receipt by the physicians. Subject to further confirmation, cheques totalling approximately $630,000 have not been cashed by some physicians.

[26] In light of this situation, the Group sought the Court's authorization to make the Cycle 28 payment in the aggregate amount of $700,000. No order was sought for the $630,000 component. The Court granted the authorization and did so order. This is why.

[27] The physicians are the cornerstone of the Group's operations. If the physicians lose confidence in the Group's ability to pay them, they will seek alternate arrangements at other clinics. The Group's market value will disintegrate. Paying the Cycle 28 payment is key to ensuring retention and to operating medical activities on a going concern.

[28] Under the *CCAA*, courts have authorized payment of pre-filing obligations for critical suppliers.

[29] There is no express rule in the *BIA* allowing a Court to do so. Nevertheless, the Ontario Court of Appeal has stated in *Re 1732427 Ontario inc*. that it would "undermine the first stage of the BIA process that serves to encourage a debtor's successful reorganization as a going concern" if the debtor could not enter into an agreement for the payment of past debts to ensure future supply. As the purpose of the BIA's provisions is to provide "breathing room to reorganize", "legitimate agreements with key suppliers also

form a vital part of that process".[7] This has led commentators to posit that the message form the Court of Appeal is clear: "the BIA does not prevent a debtor company from entering into an agreement to pay a greater proportion of an unsecured supplier creditor's pre-filing debt, compared with other unsecured creditors, if that supplier is sufficiently important to the debtor's business that the business would be imperilled without the supplier's support."[8]

[30] That being so, the Court can certainly order payment of the Cycle 28 payment to the physicians as they are inescapably critical to the Group's ability to earn revenue.

3. THE INTERIM FINANCING FACILITY AND THE ASSOCIATED CHARGE

[31] Section 50.6 of the *BIA* expressly confers on this Court the power to grant a security or charge to secure interim financing advanced to a debtor, provided that the secured creditors who are likely affected by the charge are notified. It may also order that the security rank in priority over the claim of any secured creditor.

[32] The Primary Lenders have agreed to extend to the Borrower a debtor-in-possession non-revolving interim loan facility for an aggregate amount of $1 million.

[33] The cash flow provided by the Trustee eloquently demonstrates the need for interim financing to bridge the delay until the transaction related to medical activities closes. In particular, it will enable the Group to pay the Cycle 28 $700,000 payment.

[34] The Trustee has examined the term sheet's conditions and finds them commercially sound. The Court therefore approved the interim financing facility and in order to guarantee this loan, it found that its was appropriate to impose a charge that will have a first ranking priority. However, with respect to any deemed trust or withholding tax owed by the Group to a taxing authority, the question of priority will, if necessary, be determined by the Court at a later date.

4. THE ADMINISTRATION CHARGE

[35] The Group asked the Court to authorize it to pay fees and disbursements of any agent or counsel retained or employed by the Debtors in respect of these proceedings and to approve a $500,00 charge to guarantee payment.

[36] Paragraphs 64.2(1) and (2) *BIA* expressly provide for the granting of such charges and they are indeed routinely granted by courts. The purpose of the *BIA* would be frustrated if the Group could not resort to professionals. There is no doubt that the professionals would not be willing to act if payment of their fees is not secured.

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7 *1732427 Ontario Inc*. v. *1787930 Ontario Inc*., 2019 ONCA 947, par. 13.

8 Miranda Spence, Karen Kimel and Anastasia Jones, *More Flexible Than You Think: An Exploration of Creative Uses of the BIA Proposal Regime for Corporate Restructuring*, 2022 20th Annual Review of Insolvency Law, 2022 CanLIIDocs 4305.

[37] Given the important amount of work to be carried out on a continuing basis, the $500,000 amount of the charge is reasonable.

[38] All creditors agree that the administration charge's priority should come in second rank. Given the crucial contribution of these professionals, this is reasonable. Once again, with respect to any deemed trust or withholding tax owed by the Group to a taxing authority, the question of priority will, if necessary, be determined by the Court at a later date.

5. THE FINANCIAL ADVISOR CHARGE

[39] PwC has been since January 2023 played a key role in securing the LOI and continues to act in earnest towards ensuring the closing of the transaction.

[40] After some discussion during the hearing, the Group modified its request with regard to the financial advisor charge. It asked for the Court to authorize the Group to pay PwC a fee equal to the percentage provided for the sale of the Medical and Corporate Segment, as specified in the January 25, 2023 engagement letter, on the Total Enterprise Value with respect to the Transaction and subject to the Interim Financing Conditions up to a maximum amount of $350,000, but only in the event that a transaction outlined in the Letter of Intent dated July 25, 2023 was accepted by the Group and was closed no later than September 30, 2023.

[41] The Primary Lenders and the Trustee all agree that the commercial terms of this fee are sound.

[42] The Court granted a charge, hypothec and security in the proceeds of the Transaction to cover the fees related to the Transaction only, in the amount of $350,000.

6. THE REPRESENTATIVE COUNSEL CHARGE

[43] Providing information to the Group of 170 physicians has proven to be challenging. Understandably, they are very worried as to what will come of the payment of outstanding sums as well as future billings. They are therefore very justifiably asking pointed questions. There is a great interest to streamline communications through one channel.

[44] 25 physicians have already hired Me Neil Stein to advise them and guide them through this situation. The Court was therefore asked to order that Me Stein be named Representative Counsel for all physicians, that he be paid a maximum of $35,000 and that payment be guaranteed by a charge. The Court did accede to this request for the following reasons.

[45] In CCAA proceedings, courts have relied routinely on section 11 over the years to appoint representative counsel on behalf of a diverse number of stakeholder groups in complex restructuring proceedings.

[46] Given the Court's general jurisdiction under s. 183 *BIA* and the overarching principle that *BIA* and *CCAA* processes be harmonized, but always being mindful that the *BIA* proceedings are rule based and less flexible, the Court finds that, it has the power to order the appointment of a representative counsel. It draws support in this regard from the reasoning set out in ***Roman Catholic Episcopal Corporation of St John's (Re)***[9]. In this decision, Justice Garrett A. Handrigan sets out a number of criteria drawn from Justice Sarah Pepall's reasons in *Canwest Publishing Inc.* [10]. Applied to the present case, they all militate for the nomination of representative counsel as:

46.1. The physicians are a vulnerable Group: the financial and legal matters raised by these proceedings are complex.

46.2. The Group will benefit from this at it will streamline information and allow the Group and the trustee to focus on completing transactions.

46.3. Society more generally will benefit from this as the physicians may again focus on health care and not be burdened by financial and legal issues.

46.4. It will avoid multiplicity of retainers of counsel representing the physicians.

46.5. Given the economies of scale and the relatively limited expense, it is fair to creditors.

46.6. Me Stein has already been appointed by 25 physicians.

46.7. The Primary Lenders do not object.

[47] Finally, the Court also found it appropriate for the Group to pay the Representative Counsel's reasonable and documented fees and disbursements incurred after the date of the order in connection with the Cycle 28 Payment and the Physicians' billings during the NOI Proceedings up to a maximum amount of $35,000 and to secure payment of same by a charge which would in priority to other secured obligations, but in fourth rank of priority. As for the other charges, with respect to any deemed trust or withholding tax owed by the Group to a taxing authority, the question of priority will, if necessary, be determined by the Court at a later date.

[48] The Court has however insisted that any physician can opt out of representation by representative counsel and deal directly with the Group with counsel of his or her choice and that the appointment of the representative counsel does in no way preclude his or her hiring of counsel.

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9 *Roman Catholic Episcopal Corporation of St. John's (Re)*, 2022 NLSC 22

10 *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 1328.

7. THE INTERIM RECEIVER

[49] The physicians also fear that the Cycle 28 payment situation may occur again. Hence, the Group is seeking the appointment of the Interim Receiver (C.S. Adjami Inc.) for the sole purpose of exercising control over the payment of the billings for certain physicians during the NOI Proceedings. The Court so ordered as this will serve to greatly alleviate the physicians' concerns and will also serve to ensure that the Group continue to collect administrative fees.

[50] Subparagraph 47.1(1)(a) of the *BIA* provides that this Court may, at any time after the filing, appoint as interim receiver of any part of the debtor's property the NOI Trustee.

[51] This arrangement is to the advantage of all involved. The Group will continue to perform billing on behalf of the Physicians for those having selected Option 1. Once collected, the billings for the physicians will be remitted by the Group to the Interim Receiver and held in a trust account from which the Interim Receiver will carry out the net payment to Physicians after deduction of the Group's administrative fees via direct deposit.

[52] It is for all these reasons therefore that the Court signed its Order on August 17, 2023.

_____
CHRISTIAN IMMER, J.S.C.

Me François Alexandre Toupin
Pierre-Gabriel Grégoire
McCarthy Tétrault
For the Debtors

Me Martin Jutras
Kaufman Avocats LLP
For the Toronto-Dominion Bank

Me Rim Afegrouch
Attorney General of Canada

Me Marc Duchesne
Border Ladner Gervais LLP
For the Business Development Bank of Canada

Me François Gagnon
Borden Ladner Gervais LLP
For the MUHC

Me Neil Stein
Me Nicholas Chine
Stein & Stein Lawyers inc.
For a group of 25 physicians and as prospective representative counsel

Hearing date: August 17, 2023

CITATION: Canwest Publishing Inc., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

COUNSEL: *Lyndon Barnes, Alex Cobb and Duncan Ault* for the Applicant LP Entities
Mario Forte for the Special Committee of the Board of Directors
Andrew Kent and Hilary Clarke for the Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for the Management Directors
Robin B. Schwill and Natalie Renner for the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers and Maria Konyukhova for the proposed Monitor, FTI Consulting Canada Inc.

PEPALL J.

REASONS FOR DECISION

Introduction

[1] Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a

Companies' Creditors Arrangement Act[1] ("CCAA") proceeding on October 6, 2009.[2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

[2] All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

[3] I granted the order requested with reasons to follow. These are my reasons.

[4] I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily

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[1] R.S.C. 1985, c. C. 36, as amended.

[2] On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

[5] Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

[6] Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

[7] The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

[8] On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make

principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

[9] The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

[10] On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

[11] The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

[12] The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year

ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

[13] The indebtedness under the credit facilities of the LP Entities consists of the following.

(a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.[3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest.[4]

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75

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[3] Subject to certain assumptions and qualifications.

[4] Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

[14] The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

[15] The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

[16] The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as

Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

[17] Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

[18] An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

[19] In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

[20] Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

[21] As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

[22] Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

[23] The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement.

LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

[24] The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

[25] In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

[26] Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

[27] The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

[28] It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

[29] As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the

proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc.*[5]. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

[30] The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

[31] As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

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[5] 2006 CarswellOnt 264 (S.C.J.).

(a) Threshold Issues

[32] The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

[33] The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Re Canwest Global Communications Corp*[6]and *Re Lehndorff General Partners Ltd*[7].

[34] In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In

[6] 2009 CarswellOnt 6184 at para. 29 (S.C.J.).

[7] (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.).

addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

[35] The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

[36] The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

> s.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 or 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, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or 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.

[37] Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Re Philip Services Corp.*[8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to

[8] 1999 CarswellOnt 4673 (S.C.J.).

secured creditors or to unsecured creditors or to both groups."[9] Similarly, in *Re Anvil Range Mining Corp.*[10], the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."[11]

[38] Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Re Anvil Range Mining Corp.*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

[39] In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

[40] In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

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[9] Ibid at para. 16.

[10] (2002),34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003).

[11] Ibid at para. 34.

(d) DIP Financing

[41] The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

[42] Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Re Canwest*[12], I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

[43] Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

[44] Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a

[12] Supra, note 7 at paras. 31-35.

consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

[45] Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

[46] Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

[47] The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

[48] Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[49] Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

[50] Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

[51] The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based on-line service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

[52] The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and

counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.[13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

[53] In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

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

[13] This exception also applies to the other charges granted.

> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[54] I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

[55] There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum

of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

[56] The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Re Canwest*[14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

[57] Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the

[14] Supra note 7 at paras. 44-48.

restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

[58] The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

[59] The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Re Canwest*[15], I approved the KERP requested on the basis of the factors enumerated in *Re Grant Forrest*[16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

[60] The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business

[15] Supra note 7.

[16] [2009] O.J. No. 3344 (S.C.J.).

during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

[61] In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

[62] In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

[63] The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*[17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

[64] The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v Canada (Minister of Finance)*[18]. In that case, Iacobucci J. stated that an

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[17] R.S.O. 1990, c. C.43, as amended.

[18] [2002] 2 S.C.R. 522.

order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[65] In *Re Canwest*[19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Re Canwest* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh

[19] Supra, note 7 at para. 52.

any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

[66] For all of these reasons, I was prepared to grant the order requested.

Pepall J.

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DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

REASONS FOR DECISION

Pepall J.

Released: January 18, 2010