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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

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

BRIEF OF AUTHORITIES OF THE FOREIGN REPRESENTATIVES

(Re: Recognition of Japanese Proceedings and Court Orders)
(Returnable September 1, 2017)

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TO: THE SERVICE LIST

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Tab 1

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 FRIDAY, THE 25TH DAY OF

MR. JUSTICE FARLEY FEBRUARY, 2000

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

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

INITIAL ORDER

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

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

SERVICE

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

RECOGNITION OF THE U.S. PROCEEDINGS

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

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

APPLICATION

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

PROTECTION FROM ASBESTOS PROCEEDINGS

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

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

DIP FINANCING

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

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

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

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

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

REPORT AND EXTENSION OF STAY

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

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

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

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

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

SERVICE AND NOTICE

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

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

MISCELLANEOUS

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

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

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

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

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

Schedule “A”

NOTICE

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

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

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

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

DATED this day of, 2000 at Toronto, Canada

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

MEIGHEN DEMERS
Barristers & Solicitors
Suite 1100, Box 11
Merrill Lynch Canada Tower
Sun Life Centre
200 King Street West
Toronto, Ontario M5H 3T4

DERRICK C. TAY ORESTES PASPARAKIS
Tel: (416) 340-6000
Fax:(416)977-5239
Solicitors for the Applicant

Tab 2

Ontario Supreme Court
Matlack Inc., Re
Date: 2001-04-19

Heard: April 19, 2001

Judgment: April 19, 2001

Docket: 01-CL-4109

E. Bruce Leonard, Shahana Kar, for Applicant, Matlack Inc.

Endorsement. *Farley J.*:

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

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

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

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

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

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

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

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

7 Based on principles of comity, where appropriate this Court has the jurisdiction to stay proceedings commenced against a party that has filed for bankruptcy protection in the U.S. An Ontario Court can accept the jurisdiction of a U.S. Bankruptcy Court over moveable

property in Ontario of an American company which has become subject to a Chapter 11 order. See *Roberts, supra; Borden & Elliot v. Winston Industries Inc.* (November 1, 1983), Doc. 352/83 (Ont. H.C.).

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

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

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

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

10 As I indicated in *Babcock, supra,* at p. 166: "Section 18.6(4) may be utilized to deal with situations where, notwithstanding that a full filing is not being made under the CCAA, ancillary relief is required in connection with a foreign proceeding". Accordingly, it is appropriate for Matlack to be granted ancillary relief in recognizing the Chapter 11 proceedings and in enforcing the stay of proceedings resulting therefrom. In addition this Court can also grant relief pursuant to section 18.6(5). A stay in Canada would promote a stable atmosphere with a view to the reorganization of Matlack and its affiliates while allowing creditors, *wherever situate,* to be treated as equitably as possible. The stay would also assist with respect to claimants in Canada attempting to seize assets so as to get a leg up on the other creditors. See *Babcock, supra,* at pp. 165-6. Aside from the *Babcock* case, see also *Re GST Telecommunications Inc.* (May 18, 2000), Ground J. and *Re Grace Canada Inc.* (April 4, 2001), Farley J.

11 It would also seem to me that the relief requested is appropriate and in accordance with the principles set down in the Transnational Insolvency Project of the American Law Institute ("ALI"). This Project involved jurists, practitioners and academics from the NAFTA countries—the U.S., Mexico and Canada—and was completed as to the Restatement of the Law in 2000

after six years of analysis.[1] As a disclaimer, I should note that it was my privilege to tag along on this Project with the other participants who are recognized as outstanding in their fields.

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

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

14 Order to issue accordingly.

Application granted.

The American Law Institute

TRANSNATIONAL INSOLVENCY PROJECT

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

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

The Executive Office

THE AMERICAN LAW INSTITUTE

4025 Chestnut Street

Philadelphia, Pa. 19104-3099

Amended—February 12, 2001

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

Appendix 2

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

Introduction:

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

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

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

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

The Guidelines should be adopted following such notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances. If communication with other courts is urgently needed, the local procedures, including notice requirements, that are used in urgent or emergency situations should be employed, including, if appropriate, an initial period of effectiveness, followed by further consideration of the Guidelines at a later time. Questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing) are governed by the Rules of Procedure in each jurisdiction and are not addressed in the Guidelines.

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

Guideline 1

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

Guideline 2

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

Guideline 3

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

Guideline 4

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

Guideline 5

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

Guideline 6

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

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

(b) Directing counsel or a foreign or domestic Insolvency Administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed

or to be filed with the Court to the other Court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;

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

Guideline 7

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

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

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

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

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

Guideline 8

In the event of communications between the Court and an authorized Representative of the foreign Court or a foreign Insolvency Administrator in accordance with Guidelines 3 and 5 by

means of telephone or video conference call or other electronic means, unless otherwise directed by the Court:

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

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

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

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

Guideline 9

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

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

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

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

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

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

Guideline 10

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

Guideline 11

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

Guideline 12

The Court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a Service List which may include parties that are entitled to receive notice of

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

Guideline 13

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

Guideline 14

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

Guideline 15

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

Guideline 16

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

Guideline 17

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

UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF DELAWARE

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

ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)

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

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

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

Chapter 11

Case No. 01-01114 (MFW)

Jointly Administered

CROSS-BORDER INSOLVENCY PROTOCOL

RE MATLACK, INC. AND AFFILIATES

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

A. Background

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

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

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

proceeding until and including August 15, 2001 against the Matlack Companies and their property.

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

B. Purpose and Goals

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

• harmonize and coordinate activities in the Insolvency Proceedings before the U.S. Court and the Canadian Court;

• promote the orderly and efficient administration of the Insolvency Proceedings to, among other things, maximize the efficiency of the Insolvency Proceedings, reduce the costs associated therewith and avoid duplication of effort;

• honor the independence and integrity of the Courts and other courts and tribunals of the United States and Canada;

• promote international cooperation and respect for comity among the Courts, the parties to the Insolvency Proceedings and the creditors of the Matlack Companies and other parties interested in or affected by the Insolvency Proceedings;

• facilitate the fair, open and efficient administration of the Insolvency Proceedings for the benefit of all of the Debtors, creditors and other interested parties, wherever located; and

• implement a framework of general principles to address basic administrative issues arising out of the cross-border nature of the Insolvency Proceedings.

C. Comity and Independence of the Courts

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

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

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

• increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the U.S. Court, the Canadian Court or any other court or tribunal in the United States or Canada, including the ability of any such court or tribunal to provide appropriate relief under applicable law on an *ex parte* or "limited notice" basis;

• require the Matlack Companies or any Creditor's Committee or Estate Representatives to take any action or refrain from taking, any action that would result in a breach of any duty imposed on them by any applicable law;

• authorize any action that requires the specific approval of one or both of the Courts under the U.S. Bankruptcy Code or the CCAA after appropriate notice and a hearing (except to the extent that such action is specifically described in this Protocol); or

• preclude any creditor or other interested party from asserting such party's substantive rights under the applicable laws of the United States, Canada or any other jurisdiction including, without limitation, the rights of interested parties or affected persons to appeal from the decisions taken by one or both of the Courts.

9 The Matlack Companies, the Creditor's Committee, the Estate Representatives and their respective employees, members, agents and professionals shall respect and comply with the

duties imposed upon them by the U.S. Bankruptcy Code, the CCAA, the CCAA Order and any other applicable laws.

D. Cooperation

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

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

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

E. Retention and Compensation of Professionals

13 Except as provided in paragraph 16 below, any estate representatives appointed in the U.S. Cases, including any examiners or trustees appointed in accordance with section 1104 of the U.S. Bankruptcy Code and any Canadian professionals retained by the Estate Representatives (collectively, the "Estate Representatives"), shall be subject to the exclusive

jurisdiction of the U.S. Court with respect to (a) the Estate Representatives' tenure in office; (b) the retention and compensation of the Estate Representatives; (c) the Estate Representatives' liability, if any, to any person or entity, including the Matlack Companies and any third parties, in connection with the U.S. Case; and (d) the hearing and determination of any other matters relating to the Estate Representatives arising in the U.S. Cases under the U.S. Bankruptcy Code or other applicable laws of the United States. The Estate Representatives and their U.S. counsel and other U.S. professionals shall not be required to seek approval of their retention in the Canadian Court. Additionally, the Estate Representatives and their U.S. counsel and other U.S. professionals (a) shall be compensated for their services in accordance with the U.S. Bankruptcy Code and other applicable laws of the United States or orders of the U.S. Bankruptcy Court, and (b) shall not be required to seek approval of their compensation in the Canadian Court.

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

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

F. Rights to Appear and Be Heard

16 The Matlack Companies, their creditors and other interested parties in the Insolvency Proceedings, including the Creditor's Committee and the U.S. Trustee, shall have the right and standing to (a) appear and be heard in either the U.S. Court or the Canadian Court in the

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

G. Notice

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

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

18 In recognition of the importance of the stay of proceedings and actions against the Matlack Companies and their assets under section 18.6 of the CCAA and the CCAA Order (the "Canadian Stay") on the successful completion of the Insolvency Proceedings for the benefit of the Matlack Companies and their respective estates and stakeholders, to the extent necessary and appropriate, the U.S. Bankruptcy Court shall extend and enforce the Canadian Stay in the United States (to the same extent such stay of proceedings and actions is

applicable in Canada) to prevent adverse actions against the assets, rights and holdings of the Matlack Companies. In implementing the terms of this paragraph, the U.S. Bankruptcy Court may consult with the Canadian Court regarding (a) the interpretation and application of the Canadian Stay and any orders of the Canadian Court modifying or granting relief from the Canadian Stay, and (b) the enforcement in the United States of the Canadian Stay.

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

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

I. Effectiveness and Modification of Protocol

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

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

J. Procedure for Resolving Disputes Under the Protocol

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

K. Preservation of Rights

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

L. Guidelines

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

Tab 3

COURT FILE NO:CV- 09-00008269-00CL
DATE: 20090714

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF LEAR CANADA, LEAR CANADA INVESTMENTS LTD., LEAR CORPORATION CANADA LTD. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICATION UNDER SECTION 18.6 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: Pepall J.

COUNSEL: *K. McElcheran and R. Stabile* for the Applicants

E. Lamek for the Proposed Information Officer

A. Cobb for J.P. Morgen Chase Bank, N. A.

ENDORSEMENT

Relief Requested

[1] Lear Canada, Lear Canada Investments Inc., Lear Corporation Canada Ltd. (the "Canadian Applicants") and other Applicants listed on Schedule "A" to the notice of motion request:

1. an order pursuant to section 18.6 of the CCAA recognizing and declaring that the Chapter 11 proceedings in the U.S. Bankruptcy Court for the Southern District of New York constitute "foreign proceedings";

2. a stay of proceedings against any of the Applicants or their property; and

3. an order appointing RSM Richter Inc. as information officer to report to this Court on the status of the U.S proceedings.

Backround Facts

[2] Lear Corporation is a corporation organized under the laws of the State of Delaware with headquarters in Southfield, Michigan. Its shares are listed on the New York Stock Exchange. It conducts its operations through approximately 210 facilities in 36 countries and is the ultimate parent company of about 125 directly and indirectly wholly-owned subsidiaries (collectively, "Lear"). Lear Canada Investments Ltd. and Lear Corporation Canada are both wholly-owned indirect subsidiaries of Lear Corporation. They are incorporated pursuant to the laws of Alberta. Lear Canada is a partnership owned 99.9% by Lear Corporation Canada Ltd. and 0.1% by Lear Canada Investments Ltd. and is the only operating entity of Lear in Canada.

[3] Lear is a leading global supplier of automotive seating systems, electrical distribution systems, and electronic products. It has established itself as a Tier 1 global supplier of these parts to every major original equipment manufacturer (“OEM”). Lear has world wide manufacturing and production facilities, four of which are in Canada, namely Ajax, Kitchener, St. Thomas, and Whitby, Ontario. A fifth facility in Windsor, Ontario was closed in May of this year. Lear employs approximately 7,200 employees world wide of which 1,720 are employed by the Canadian operations. 1,600 are paid on an hourly basis and 120 are paid salary. 1,600 are members of the CAW and are covered by 5 separate collective bargaining agreements. Lear maintains a qualified defined contribution component of the Canadian salaried pension plan and 8 Canadian qualified defined benefit plans.

[4] Lear conducts its North American business on a fully integrated basis. All management functions are based at the corporate headquarters in Southfield, Michigan and all customer relationships are maintained on a North American basis. The U.S. headquarters’ operational support for the Canadian locations includes, but is not limited to, primary customer interface and support, product design and engineering, manufacturing and engineering, prototyping, launch support, programme management, purchasing and supplier qualification, testing and validation,

and quality assurance. In addition, other support is provided for human resources, finance, information technology and other administrative functions.

[5] Lear's Canadian operations are also linked to its U.S. operations through the companies' supply chain. Lear's facilities in Whitby, Ajax, and St. Thomas supply complete seat systems on a just-in-time basis to automotive assembly operations of the U.S. based OEMs, General Motors and Ford in Ontario. Lear's Kitchener facility manufactures seat metal components which are supplied primarily to several Lear assembly locations in the U.S., Canada and Mexico.

[6] Lear Corporation, Lear Canada and others entered into a credit agreement with a syndicate of institutions led by J.P. Morgan Chase Bank, N.A. acting as general administrative agent and the Bank of Nova Scotia acting as the Canadian administrative agent. It provides for aggregate commitments of $2.289US billion. Although Lear Canada is a borrower under this senior secured credit facility, it is only liable for borrowings made in Canada and no funds have been advanced in this country.

[7] Additionally, Lear Corporation has outstanding approximately $1.29US billion of senior unsecured notes. The Canadian Applicants are not issuers or guarantors of any of them.

[8] Over the past several years, Lear has worked on restructuring its business. As part of this initiative, it closed or initiated the closure of 28 manufacturing facilities and 10 administrative/engineering facilities by the end of 2008. This included the Windsor facility for which statutory severance amounts owing to all employees have been paid.

[9] Despite its efforts, Lear was faced with turmoil in the automotive industry. Decreased consumer confidence, limited credit availability and decreased demand for new vehicles all led to decreased production. As a result of these conditions, Lear defaulted under its senior secured credit facility in late 2008. In early 2009, Lear engaged in discussions with senior secured facility lenders and unsecured noteholders. It reached an agreement with the majority of them wherein they agreed to support a Chapter 11 plan.

[10] On July 7, 2009, Lear filed voluntary petitions for relief under Chapter 11 of the US Bankruptcy Code and sought "first day" orders in those proceedings in the United States Bankruptcy Court for the Southern District of New York. The Applicants now seek recognition of those proceedings and the orders. Lear expects to emerge from the Chapter 11 proceedings and any associated proceedings in other jurisdictions as a substantially de-leveraged enterprise with competitive going forward operations, and to do so in a timely basis.

Applicable Law

[11] Section 18.6 of the CCAA was introduced in 1997 to address the rising number of international insolvencies. Courts have recognized that in the context of cross-border insolvencies, comity is to be encouraged. Efforts are made to complement, coordinate, and where appropriate, accommodate insolvency proceedings commenced in foreign jurisdictions.

[12] Section 18.6(1) provides that "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. It is well recognized that proceedings under Chapter 11 of the U.S. Bankruptcy Code fall within that definition and that, while not identical, the substance and procedures of the U.S. Bankruptcy Code are similar to those found in the Canadian bankruptcy regime: *Re United Airlines Inc.*[1]

[13] *Re Babcock & Wilcox Canada Ltd.*[2] provided an early interpretation of section 18.6, and while not without some controversy[3], the practice in Canadian insolvency proceedings has evolved accordingly. In that case, Farley J. distinguished between section 18.6(2) of the Act, which deals with concurrent filings by a debtor company under the CCAA in Canada and corresponding bankruptcy or insolvency legislation in a foreign jurisdiction, and section 18.6(4) which may deal with ancillary proceedings such as this one. As with section 2 of the Act, section 18.6(2) is in respect of a debtor company whereas section 18.6 (4) permits any interested person to apply for recognition. As such, he held that the applicant before him was not required

[1] (2003), 43 C.B.R. (4th) 284 at 285.
[2] (2000), 18 C.B.R. (4th) 157.
[3] See for example, Professor J.S. Ziegel's article "Corporate Groups and Canada-U.S. Cross-Border Insolvencies: Contrasting Judicial Visions", (2001) 35 C.B.L.J. 459.

to meet the Act's definition of "debtor company" which required the company to be insolvent.[4] In addition, he noted that section 18.6(3) provides that an order of the Court under section 18.6 may be made on such terms and conditions as the Court considers appropriate in the circumstances.

[14] Applying those legal principles, the Applicants are entitled to apply for an order pursuant to section 18.6 of the CCAA. They are debtors within the definition of section 18.6(1) and interested persons falling within section 18.6(4). In this regard, while the CCAA does not define the term "person", the BIA definition extends to include a partnership. In the absence of a definition in the CCAA, by analogy it is reasonable to interpret the term "person" as including a partnership.

[15] I must then consider whether the order requested should be granted. In exercising discretion under section 18.6, it has been repeatedly held that in the context of an insolvency, the Court should consider whether a real and substantial connection exists between a matter and the foreign jurisdiction: *Re Matlack Inc.*[5] and *Re Magna Entertainment Corp.*[6] Where the operations of debtors are most closely connected to a foreign jurisdiction and the Canadian operations are inextricably linked with the business located in that foreign jurisdiction, it is appropriate for the Court in the foreign jurisdiction to exercise principal control over the insolvency process in accordance with the principles of comity and to avoid a multiplicity of proceedings: *Re Matlack*[7]. As noted in that case, it is in the interests of creditors and stakeholders that a reorganization proceed in a coordinated fashion. This provides for stability and certainty. "The objective of such coordination is to ensure that creditors are treated as equitably and fairly as possible, wherever they are located."[8]

[16] I am satisfied that an order recognizing the U.S. proceeding as a foreign proceeding within the meaning of section 18.6(1) should be granted and that a real and substantial

[4] It should be noted that a voluntary filing under Chapter 11 does not require an applicant to be insolvent and a partnership is eligible to apply for relief as well.
[5] (2001), 26 C.B.R. (4th) 45.
[6] (2009), 51 C.B.R. (5th) 82.
[7] Supra, note 5 at para. 8.
[8] Ibid, at para. 3.

connection has been established. The Applicants including Lear Canada are part of an integrated multi-national corporate enterprise with operations in 36 countries, one of which is Canada. Lear conducts its North American business on a fully integrated basis. As mentioned, all management functions are based at the U.S. corporate headquarters and all customer relationships are maintained on a North American basis. As such, the managerial and operational support for the Canadian locations is situate in the United States. In addition, Lear's Canadian operations are linked to the U.S. operations through the Lear's supply chain. As evidence of same, a note to Lear Canada's December 31, 2008 unaudited financial statement states that Lear Corporation provides Lear Canada with "significant operating support, including the negotiation of substantially all of its sales contracts. Such support is significant to the success of the Partnership's future operations and its ability to realize the carrying value of its assets."

[17] I am also of the view that it is both necessary and desirable that the restructuring of this international enterprise be coordinated and that a multiplicity of proceedings in two different jurisdictions should be avoided. Granting relief will enable the Applicants to continue to operate in the ordinary course and preserve value and customer relationships. Coordination will also provide stability. The U.S. Court will be the primary court overseeing the restructuring proceedings of Lear. I also note that in its report filed with the Court, the proposed Information Officer, RSM Richter Inc., expressed its support for the relief requested by the Applicants.

[18] That said, increasingly with the downturn in the global economy, this Court is entertaining requests for concurrent or ancillary orders relating to multi-group enterprises typically with a significant cross-border element. Frequently, relative to the whole enterprise, the Canadian component is small. From the viewpoint of efficiency and speed, both of which are important features of a restructuring, an applicant may be of the view that the Canadian operations do not merit a CCAA filing other than a section 18.6 request. In addressing whether to grant relief pursuant to section 18.6, the Court should, amongst other things, consider the interests of stakeholders in this country and the impact, if any, that may result from the relief requested. This would include benefits and prejudice such as any juridical advantage that may

be compromised.[9] These issues should be addressed by an applicant in its materials. Assuming there are benefits, the existence of prejudice does not necessarily mean that the order will be refused but it is important that these facts at least be considered, and if appropriate, certain protections should be incorporated into the order granted.

[19] By way of example, in this case, the Court raised certain issues with the Applicants and they readily and appropriately in my view, filed additional affidavit evidence and included other provisions in the proposed order. The Court was concerned with the treatment that might be afforded Canadian unsecured creditors and particularly employees and trade creditors. Lear Canada had total current assets of approximately $60US million as at May 31, 2009 which included approximately $20US million in cash. Its total assets amounted to approximately $115US million. Total current liabilities as at the same time period amounted to about $75US million. In addition, pension and other post-retirement benefit obligations were stated to amount to about $170US million. There were also intercompany accounts of approximately $190US million in favour of Lear Canada for total liabilities of about $55US million. Counsel for the Applicants advised that significant pre-petition payments had been made to suppliers and that the intention is for Lear Canada to continue to carry on business.

[20] In the additional evidence filed, the Applicants indicated that they had not yet sought approval of DIP financing arrangements but that under the proposed arrangement, the Canadian Applicants would not be borrowers or guarantors. In addition, the term sheet agreed to between the Applicants and the senior credit facility lenders provided that the Canadian Applicants had agreed to pay all general unsecured claims in full as they become due. Additionally, the Applicants had obtained an order in the U.S. proceedings authorizing them to pay and honour certain pre-petition claims for wages, salaries, bonuses and other compensation and it is the intention of the Applicants to continue to pay all wages and compensation due and to be due to Canadian employees. The Applicants are up to date on all current and special payments associated with the Canadian pension plans and will continue to make these payments going forward. Provisions reflecting this evidence were incorporated into the Court order.

[9] See *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)* [2001] 3 S.C.R. 907.

[21] The Canadian Applicants were not to make any advances or transfers of funds except to pay for goods and services in the ordinary course of business and in accordance with existing practices and similarly were not to grant security over or encumber or release their property. They also were to pay current service and special payments with respect to the Canadian pensions. The order further provided that in the event of inconsistencies between it and the terms of the Chapter 11 orders, the provisions of my order were to govern.

[22] The order includes a stay of proceedings against the Applicants and their property, a recognition of various orders and an administration charge and a directors' charge. The order also includes the usual come back provision in which any person affected may move to rescind or vary the order on at least 7 days' notice.

[23] Where one jurisdiction has an ancillary role, the Court in the ancillary jurisdiction should be provided with information on an on going basis and be kept apprised of developments in respect of the debtors' reorganization efforts in the foreign jurisdiction. In addition, stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.[10] In this case, RSM Richter Inc. as Information Officer intends to be a watchdog and monitor developments in the U.S. proceedings and keep this Court informed. This Court supports its request to be added to the service list in the Chapter 11 proceeding and any request for standing before the U.S. Bankruptcy Court for the Southern District of New York that the Information Officer may make. In this regard, this Court seeks the aid and assistance of that Court.

Pepall, J.

[10] See *Re Babcock & Wilcox Canada Ltd.*, supra, note 2 at para. 21.

Released: July 14, 2009

Tab 4

Case Name:

Global Light Telecommunications Ltd. (Re)

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
AND IN THE MATTER OF The Yukon Business Corporations Act, R.S.Y. 1986, c. 15
AND IN THE MATTER OF Global Light Telecommunications Inc., Un Limited and Brightstar Limited, petitioner

[2004] B.C.J. No. 1153

2004 BCSC 745

33 B.C.L.R. (4th) 155

2 C.B.R. (5th) 210

131 A.C.W.S. (3d) 650

2004 CarswellBC 1249

Vancouver Registry No. L021991

British Columbia Supreme Court
Vancouver, British Columbia

Pitfield J.

Heard: April 26, 2004.
Judgment: June 4, 2004.

(24 paras.)

Corporations and associations law -- Corporations -- Fundamental changes -- Arrangement -- Creditors & debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act.

Application by Global Light Telecommunications, Un Limited and Brightstar for an order sanctioning a consolidated Plan of Arrangement. The consolidated Plan of Arrangement was

approved by 83 per cent of creditors in number and 86 per cent of creditors in dollar value. York Capital Management and others opposed the application on the ground that Brightstar and Un Limited, both Bermuda corporations, were not debtor companies. Brightstar and Un Limited opened bank accounts with nominal deposits to establish assets in Canada to meet the requirements of the Companies' Creditors Arrangement Act.

HELD: Application allowed. The bank accounts opened by Un Limited and Brightstar met the requirements under the Act for them to qualify as creditors. The plan qualified with the requirements of the Companies' Creditors Arrangement Act. The plan was fair and reasonable to the creditors.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, s. 2.

Yukon Business Corporations Act.

Counsel:

Counsel for the Petitioners: Scott A. Turner and David E. Gruber

Counsel for the Respondents UBS Capital Americas II, LLC and Canven V (Barbados) Limited: Gordon D. Phillips

Counsel for York Capital Management LP: Douglas B. Hyndman

Counsel for Credit Suisse First Boston: Alan B. Brown

Counsel for the Monitor: PricewaterhouseCoopers Inc.: Heather M. Ferris

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[Editor's note: A corrigendum was released by the Court June 23, 2004; the corrections have been made to the text and the corrigendum is appended to this document.]

1 **PITFIELD J.**:-- Global Light Telecommunications Inc., Un Limited and Brightstar Limited apply for an order under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-25 sanctioning a consolidated Plan of Arrangement approved by creditors in the manner contemplated by the Act.

2 If approved, the Plan would permit distribution of cash on hand in the approximate amount of US $658,000 to the petitioners' creditors on a rateable basis in the calculation of which the claims of creditors owed more than $100,000 would be capped at $100,000. Creditors with claims in excess of $100,000 would receive shares in a corporation to be incorporated for the purpose of acquiring

Global's interest in Bestel, S.A., a Mexican company that operates a telecommunications network located primarily in Mexico. Share entitlement would be determined on a rateable basis by reference to the gross amount of each creditor's claim.

3 The Plan has been approved by the requisite majority of creditors. However, York Capital Management LP, York Offshore Investors Unit Trust and York Investment Limited oppose the application to sanction on the grounds that Brightstar and Un Limited are not debtor companies for CCAA purposes and cannot be included in the Plan; Brightstar and Un Limited should not have been added as petitioners in the proceeding and the order purporting to do so was a nullity; and the Plan is not fair and reasonable.

4 The relevant background is the following. Global is a Yukon corporation. It raised substantial amounts of capital by issuing shares and various debt instruments. The capital so acquired was used, in part, to capitalize Un Limited as a wholly owned subsidiary. In turn, Un Limited capitalized Brightstar. Both Un Limited and Brightstar are Bermuda corporations. Global also capitalized GST Mextel, Inc., a Delaware corporation, as a wholly owned subsidiary. Following capitalization by Global, Brightstar acquired a 49% interest in New World Network Holdings Ltd., and GST Mextel acquired a 49% interest in Bestel.

5 Global borrowed US $4 million from York pursuant to a series of loan agreements dated June 29, 2001. That sum compares to debts in excess of US $40 million owed to other debenture holders. By January 2002, Global was in default under the York loan agreements. York agreed to extend the loan repayment date to June 30, 2002, in consideration for, among other things, loan guarantees from Brightstar and Un Limited.

6 On June 28, 2002, Global was granted a stay of proceedings under the Act in order to allow it to construct a plan of Arrangement or Compromise for presentation to its creditors. On August 15, 2003, Global applied to add its subsidiary, Un Limited, and that company's subsidiary, Brightstar, as petitioners in the proceeding. The application to add clearly identified the fact that Brightstar and Un Limited had provided guarantees in relation to some of Global's debts. York appeared at the hearing of the application but took no position in relation to it.

7 On August 28, 2003, the court granted an order approving the sale of Brightstar's 49% equity interest in New World Network Holdings Ltd. on condition that the sale price of approximately US $658,000 be remitted to, and held by, the Monitor in trust for the benefit of the petitioners' creditors. York Capital appeared on that application but took no position.

8 On February 18, 2004, the court granted a procedural order authorizing the petitioners to seek creditor approval of the consolidated Plan of Arrangement in respect of which sanction is now sought. Counsel for York appeared on that application but took no position.

9 On March 23, 2004, the Plan was approved by 83% of creditors in number and 86% of creditors in dollar value. The percentages exceeded the minimum required by the Act. This application to sanction followed as a result.

10 At the hearing of this application, York claimed that it had recently learned that Brightstar and Un Limited had opened Canadian bank accounts with nominal deposits of US $100 immediately prior to applying to be added as petitioners. It claimed to have been informed that the accounts were closed immediately after the granting of the order adding them as petitioners. These statements of fact, not verified by affidavit at the time of the hearing, were not disputed by the petitioners. York relied on this information to support its claim that Brightstar and Un Limited, as Bermuda corporations, were not companies that could not benefit from a CCAA proposal because the bank accounts with nominal amount on deposit did not satisfy the CCAA requirement that the companies have assets in Canada before availing themselves of the protection afforded by the Act.

11 Following the hearing, I directed the petitioners to file affidavit evidence explaining the origin, operation, and current status of the bank accounts. The affidavits indicate that each of Un Limited and Brightstar opened an account with HSBC in Vancouver on July 24, 2003. The amount of US $100 was deposited to each account. The monitor deposes as follows in relation to the origin of the funds:

> The funds that were deposited to the Brightstar and Un Limited accounts were provided to Brightstar and Un Limited by Global Light. This was consistent with the dealings between Global Light, Un Limited and Brightstar throughout their existence. Whenever Brightstar or Un Limited required funds in the past, those funds were always provided by Global Light.

12 The affidavit evidence establishes that the accounts have remained open. No additional deposits have been made. The only debits to the accounts have been the bank's monthly minimum balance service charges. At March 31, 2004, the balance in each account was US $45.15.

13 I invited the parties to make additional submissions having regard for the additional evidence. None were forthcoming.

14 York does not challenge the efficacy of the transactions resulting in the creation of the accounts but says the "instant" Canadian bank accounts created shortly before the application to add Brightstar and Un Limited as petitioners do not qualify as assets sufficient to bring Brightstar within the definition of "company" as defined in s. 2 of the Act. In the alternative, York says that the Plan is unfair because Brightstar has no real connection to Canada and consolidation produces an inappropriate result by permitting creditors of a Canadian company to enjoy benefits that should accrue solely to York under the guarantees granted to it by Brightstar.

15 The petitioners submit that the Plan is fair and reasonable. They say that York failed to object to the procedural order that permitted the presentation of a consolidated plan to creditors and did not appeal the order or apply to have it set aside as a nullity.

16 In my opinion, York's claim that Brightstar does not qualify as a company for purposes of the Act must fail. Section 2 of the Act defines "company" as follows:

> ... "company" means any company, corporation or legal person incorporation by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated, except banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies; ...

17 The substance of York's claim is that the court must engage in a qualitative or quantitative analysis of the Canadian assets in order to decide whether a company that is not incorporated in Canada and is not doing business in Canada otherwise qualifies as one "having assets ... in Canada". In my opinion, the court must not engage in that kind of analysis. Certainty is required in so far as the availability of the Act is concerned. In my opinion, importing an element of discretion into the question of eligibility would diminish the effectiveness of the Act as a means of assisting in the evolution of plans of arrangement acceptable to companies and their creditors. It is for that reason, I suggest, that courts concerned with the application of the Act have acknowledged the efficacy of "instant assets": see, for example, Nova Metal Products Inc. v. Cominskey (Trustee of) (sub nom. Eland Corp. v. Cominskey) (1990), 1 O.R. (3d) 289 (C.A.); Cadillac Fairview Inc. (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]); Philips Manufacturing Ltd., Re (1991), 9 C.B.R. (3d) 1 (B.C.S.C.); and P.R.O. Holdings Ltd., Re (1998), 24 C.B.R. (3d) 1 (N.B.C.A.). If a de minimis standard is thought to be appropriate in determining whether a company has assets in Canada, it is for parliament to amend the Act accordingly.

18 I conclude that Brightstar qualified as a company at the time it applied to be added as a petitioner. It qualified as a company at the time of the application for the procedural order and at the time of the application to sanction the plan. It would not have qualified without opening the bank account. It would have ceased to qualify if the account balance had been reduced to nil, or if the bank account had been closed. The qualitative and quantitative analyses urged by York are only relevant in the assessment of the suitability of a consolidated plan of arrangement in any particular circumstances. In that regard, York expressed no opposition to a consolidated plan of arrangement when it was first proposed by the petitioners at the time of applying for the procedural order.

19 In considering whether to sanction the Plan, the court must have regard for three well-established principles, as set out in Northland Properties Ltd. v. Excelsior Life Ins. Co. of Can. (1989), 73 C.B.R. 195 (B.C.C.A.) at 201:

1. There must be strict compliance with all statutory requirements;
2. All material filed and procedures carried out must be examined to determine if anything has been done which is not authorized by the CCCA;
3. The plan must be fair and reasonable.

20 Brightstar qualifies as a company under the CCAA and has complied with the technical requirements. That which has been done to date is authorized by the Act. The only issue is whether

the consolidated Plan is fair and reasonable.

21 York says the Plan is not fair and reasonable because Brightstar has no real connection to this jurisdiction other than a hastily opened bank account of an insignificant amount. This objection amounts to a back door attempt to oppose the permission granted to the petitioners to submit a consolidated proposal to creditors.

22 York must have been aware that the consolidated Plan would deprive it of the right to seek to recover on its guarantees. It did not attempt to suggest in its submissions that the operating relationship among Global, Un Limited and Brightstar was such that consolidation was inappropriate. Indeed, York became involved as a lender to Global, as did other lenders, knowing that Global's capital would be directed to the capitalization of subsidiaries. York did not oppose the application to consolidate at the hearing of the application regarding the procedural order. It did not appeal that order. In the circumstances, York cannot now be heard to complain about adverse effects flowing from the consolidated Plan.

23 Is the Plan otherwise fair and reasonable? In addressing that question the court must not insist on perfection with respect to fairness and reasonableness. Rather, a fair and reasonable plan is meant to be an equitable arrangement in the nature of a compromise: Sammi Atlas Inc., Re (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) at 173. Each of the creditors will not necessarily be treated equally, but the Plan must satisfy the majority of creditors on the whole. This Plan has that effect. All creditors became involved with Global and its subsidiaries knowing they were dealing with Global as the parent. While one may query whether the guarantee in favour of York is valid given that it was granted when the group was seemingly insolvent, there is nothing in the evidence tendered by York that would suggest it accommodated the Global group in a manner that should result in it being potentially the sole beneficiary of the sale proceeds of a subsidiary's interest in a distant investment. The majority has voted in favour of the Plan. There is a heavy burden on parties seeking to oppose sanctioning: Central Guaranty Trustco Ltd., Re (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]). York has not discharged that burden.

24 In my view, the Plan is sufficiently fair and reasonable in the circumstances of this case. Accordingly, the application for an order sanctioning the Plan dated February 18, 2004 is granted.

PITFIELD J.

* * * * *

CORRIGENDUM

Released: June 23, 2004.

[1] This is a corrigenum to my reasons for judgment dated June 4, 2004. David E. Gruber should be added as counsel for the petitioners and Heather M. Ferris should be added as counsel for the

monitor, PricewaterhouseCoopers Inc..

PITFIELD J.

Tab 5

251 B.R. 31
United States Bankruptcy Court, D. Delaware.

In re GLOBAL OCEAN CARRIERS LIMITED, et al., Debtors.

No. 00–955(MFW) to 00–969(MFW).
|
July 5, 2000.

Chapter 11 debtors sought to confirm modified plan of reorganization, and also moved for substantive consolidation, and minority shareholder objected and asked that cases be dismissed. The Bankruptcy Court, Mary F. Walrath, J., held that: (1) Chapter 11 debtors each had property in the United States, and thus were eligible to file their bankruptcy petitions; (2) court could not conclude, based upon timing of debtors' modified plan alone, that creditor had been artificially impaired for purpose of procuring acceptance of plan by at least one impaired class; (3) debtors did not satisfy their burden of showing that their modified plan satisfied "best interests of creditors" test; (4) financing was not speculative or uncertain, and did not adversely affect feasibility of proposed plans; (5) absolute priority rule was violated; and (6) motion to substantively consolidate had to be made on notice to those adversely affected.

So ordered.

West Headnotes (20)

[1] **Bankruptcy**
Reorganization cases

Chapter 11 debtors each had property in the United States, and thus were eligible to file their bankruptcy petitions, to the extent that, before petitions were filed, retainers had been paid to bankruptcy counsel present in the United States on behalf of each debtor. Bankr.Code, 11 U.S.C.A. § 109(a).

2 Cases that cite this headnote

[2] **Bankruptcy**
Who May Be a Debtor

Determination as to whether party filing bankruptcy petition is an eligible debtor must be made as of date that petition is filed. Bankr.Code, 11 U.S.C.A. § 109(a).

3 Cases that cite this headnote

[3] **Bankruptcy**
Who May Be a Debtor

Separate determination must be made as to each debtor filing bankruptcy petition, on his/her eligibility for bankruptcy relief. Bankr.Code, 11 U.S.C.A. § 109(a).

2 Cases that cite this headnote

[4] **Bankruptcy**
Evidence and fact questions

Burden of establishing eligibility for bankruptcy relief is upon party filing the bankruptcy petition. Bankr.Code, 11 U.S.C.A. § 109(a).

2 Cases that cite this headnote

[5] **Bankruptcy**
Reorganization cases

Mere fact that Chapter 11 debtors did some business in the United States was not equivalent to having a "place of business" in the United States, within meaning of statute providing that "only a person that resides or has a domicile, a place of business or property in the United States" is eligible to be bankruptcy debtor. Bankr.Code, 11 U.S.C.A. § 109(a).

3 Cases that cite this headnote

[6] **Bankruptcy**
Who May Be a Debtor

It is insufficient, for purposes of establishing party's eligibility for bankruptcy relief, that party had property in the United States at some time in year immediately

preceding petition date; rather, party must have property in the United States when he/she actually files bankruptcy petition. Bankr.Code, 11 U.S.C.A. § 109(a).

1 Cases that cite this headnote

[7] Bankruptcy

Who May Be a Debtor

Relevant consideration, in deciding whether party has property in the United States so as to qualify as eligible debtor, is whether party has bank accounts in United States, not the amount of money deposited therein; it is irrelevant that there is only a relatively small amount in party's United States bank accounts. Bankr.Code, 11 U.S.C.A. § 109(a).

2 Cases that cite this headnote

[8] Bankruptcy

Acceptance

It was appropriate to extend time for creditor to vote on debtors' modified Chapter 11 plan, even after deadline established by court expired, where creditor was not impaired under debtor's initial plan and thus had no opportunity to vote thereon.

1 Cases that cite this headnote

[9] Bankruptcy

Eligibility to vote;impairment

Creditor voting to accept debtors' modified Chapter 11 plan was "impaired" thereunder, though plan required debtors to pay higher rate of interest on creditor's claim, to maintain higher value of collateral and to repay principal balance of loan more quickly, where plan granted debtors immediate access to more than $5.6 million in cash collateral.

1 Cases that cite this headnote

[10] Bankruptcy

Eligibility to vote;impairment

Estoppel

Claim inconsistent with previous claim or position in general

Chapter 11 debtors were not judicially estopped from asserting that creditor voting to accept debtors' modified Chapter 11 plan was "impaired" thereunder, even though treatment of creditor's claim under modified plan was in all respects identical to one of the alternate treatments provided in original plan, which had not treated creditor's claim as unimpaired, where original plan gave creditor the option of declining this alternate treatment and leaving its rights unaffected.

Cases that cite this headnote

[11] Bankruptcy

Eligibility to vote;impairment

While timing of debtors' modified Chapter 11 plan, which debtors proposed in response to concerns that original plan had not been accepted by at least one impaired class, was sufficient to raise concerns as to whether modified plan, under which debtors were allowed to use cash collateral of creditor that was unimpaired under debtors' original plan, had artificially created impaired class, court could not conclude, based upon timing alone, that creditor was artificially impaired and ineligible to vote on plan, where impairment, which involved over $5.6 million in cash collateral, was real and substantial, and where debtors had reasonable basis for such impairment, in order to obtain funds to meet distribution requirements of modified plan.

1 Cases that cite this headnote

[12] Bankruptcy

Confirmation;Objections

Chapter 11 debtors, as proponents of modified plan providing for release of debtors' directors and officers, and of ad hoc committee of noteholders, failed to satisfy burden of showing that releases were appropriate, given that plan had not been accepted by affected class.

Cases that cite this headnote

[13] **Bankruptcy**
Confirmation;Objections

Chapter 11 debtors did not satisfy their burden of showing that their modified plan satisfied "best interests of creditors" test, by providing impaired creditors with at least as much as they would receive in hypothetical Chapter 7 liquidation, where debtors' expert, in valuing debtors' assets, had relied on comparable sales that were two to four months old and had not adjusted his appraised values to reflect rising market since those sales, and where expert had also relied on information given to him by debtors which may not have been completely accurate. Bankr.Code, 11 U.S.C.A. § 1129(a)(7).

1 Cases that cite this headnote

[14] **Bankruptcy**
Confirmation;Objections

Burden of establishing compliance with "best interests of creditors" test is on proponent of Chapter 11 plan. Bankr.Code, 11 U.S.C.A. § 1129(a)(7).

2 Cases that cite this headnote

[15] **Bankruptcy**
Feasibility in general

Financing was not speculative or uncertain, and did not adversely affect feasibility of debtors' proposed Chapter 11 plans, where lenders had issued commitment letter and/or agreed to term sheets which were detailed and contingent only upon final documentation, upon confirmation of plan, and upon no materially adverse changes occurring. Bankr.Code, 11 U.S.C.A. § 1129(a)(11).

4 Cases that cite this headnote

[16] **Bankruptcy**
Feasibility in general

To the extent that debtors' asset valuations were accepted, for purpose of establishing that proposed Chapter 11 plan satisfied "best interests of creditors" test, debtors would not have collateral value necessary to obtain exit financing or to restructure secured debt, or would be in immediate default of credit facilities, and debtors' proposed plan could not be confirmed as failing feasibility requirement. Bankr.Code, 11 U.S.C.A. § 1129(a)(7, 11).

Cases that cite this headnote

[17] **Bankruptcy**
Preservation of priority

Retention of corporate structure among corporate Chapter 11 debtors, by permitting certain debtors to retain their stock in other debtors, would not cause debtors' proposed plan to violate absolute priority rule, to extent that debtors' motion for substantive consolidation was granted, such that each debtor's assets would be available for payment of all creditor claims. Bankr.Code, 11 U.S.C.A. § 1129(b)(2)(B).

Cases that cite this headnote

[18] **Bankruptcy**
Preservation of priority

Shareholder's right to designate directors on corporate debtor's board was right that it possessed, not as shareholder, but under its management contract with debtor, such that shareholder's retention of this right under debtor's proposed Chapter 11 plan did not cause plan to violate absolute priority rule. Bankr.Code, 11 U.S.C.A. § 1129(b)(2)(B).

Cases that cite this headnote

[19] **Bankruptcy**
Preservation of priority

Absolute priority rule was violated, and proposed Chapter 11 plan could not be confirmed, to extent that plan purported to authorize debtor's largest shareholder to

designate a company owned by his daughter as party to which debtor's stock would be sold, irrespective of whether daughter could be regarded as mere straw party for her father; plan violated absolute priority rule by giving debtor's largest shareholder the exclusive right to determine who would be the owner of reorganized entity, as well as price that would be paid for this ownership interest. Bankr.Code, 11 U.S.C.A. § 1129(b)(2)(B).

1 Cases that cite this headnote

[20] Bankruptcy

Other procedural issues

Motion to substantively consolidate Chapter 11 debtors had to be made only on notice to those adversely affected by motion, including noteholders.

Cases that cite this headnote

***34** *OPINION* [1]

MARY F. WALRATH, Bankruptcy Judge.

This case is before the Court on the request of Global Ocean Carriers Limited ("Global Ocean") and fifteen of its affiliates [2] (collectively "the Debtors") for confirmation of their Modified First Amended Plan of Reorganization ("the Modified Plan"). In connection with confirmation, the Debtors also request that their Motion for substantive consolidation be granted and that the ballot of Credit Lyonnais in favor of the Modified Plan be accepted (though filed beyond the voting deadline). The holders of approximately $92 million of the $126 million in outstanding notes ("the Ad Hoc Committee of Noteholders") supports the Debtors' requests. A small noteholder and minority shareholder, Arabella Holdings, Inc. ("Arabella") objects to the relief requested by the Debtors and asks that the cases be dismissed.

For the reasons given below, confirmation of the Modified Plan is denied. Substantive consolidation is also denied without prejudice to the Debtors renewing their motion on notice to all affected creditors. However, Arabella's motion to dismiss these cases is denied, since the Debtors are eligible to file the instant cases.

I. *FACTUAL BACKGROUND*

The Debtors are involved in the international shipping industry. Global Ocean and most of the other Debtors are headquartered in Athens, Greece. [3] The books ***35** and records of the Debtors are located in Athens, Greece. The Debtors are incorporated in Liberia, Cyprus or Singapore with the exception of Marine which is incorporated in the United States, in Delaware.

Global Ocean is the ultimate parent of all the Debtors; the other Debtors are direct or indirect subsidiaries of Global Ocean. Certain of the Debtors own ocean-going vessels. Each vessel is owned by a separate subsidiary for liability purposes. The Debtors collectively own 10 feeder container vessels and 2 Panamax dry bulk carriers.

The vessels are maintained and operated through a non-debtor, Sovereign Navigation Corporation ("Sovereign") [4], pursuant to a Management Agreement with Global Ocean. (Exhibit A–9.) Sovereign performs the general administrative tasks for the Debtors, maintains the books and records of all the Debtors, collects the revenues and deposits them to the bank accounts of Global Ocean, and supervises the chartering and maintenance of the vessels. The daily maintenance, provisioning and chartering of the vessels is done by Tsakos Shipping and Trading, S.A. ("Tsakos Shipping"), under a Technical Management Agreement with Sovereign. (Exhibit A–33.) Most of the vessels are under charter to other companies. Many of the charters are at market or above market rates and are due to expire relatively soon.

Global Ocean is a publicly traded company whose stock was registered on the American Stock Exchange until shortly before the bankruptcy filing. The Tsakos family controls more than 50% of the stock. (Exhibit D–5.) Global Ocean owes approximately $51 million to Credit Lyonnais, which is guaranteed by the Hanjin Debtors and is secured by a first preferred ship mortgage on each of the three Hanjin vessels. In 1997, Global Ocean issued $126 million in 10 1/4% Senior Notes due 2007 ("the Notes"). The Notes were guaranteed by all the other Debtors. The Notes, though unsecured and subordinated to certain senior secured debt, restricted the Debtors' ability to grant

security interests in their assets, including the vessels. (Exhibit A–20 at pp. 10, 11, 104.)

Over the past several years the global shipping industry has been in a recession, with vessel values dropping to a five year low in the summer of 1999. Because of deteriorating charter rates and long periods of unemployment of some of its vessels, the Debtors suffered a net loss of $13.5 million in 1998. Concerned about their ability to meet interest payments due on the Notes, the Debtors met in May, 1999, with representatives of the owners of a vast majority of the Notes for purposes of restructuring the Notes. (Exhibit A–16.) An Ad Hoc Committee of Noteholders was formed and negotiations resulted in an agreement to a restructuring in the fall of 1999. Certain of the Committee members executed a Lock-up Agreement. (Disclosure Statement at Exhibit B.)

At the insistence of the Ad Hoc Committee of Noteholders, the Debtors filed voluntary petitions under chapter 11 of the Bankruptcy Code on February 14, 2000. On that same date, the Debtors filed their initial joint Plan of Reorganization and Disclosure Statement. That Plan provided for payment in cash to Noteholders of 50% of their claims on the Effective Date. All other creditors were to be paid in full in accordance with their normal terms and shareholders of Global Ocean would be eliminated. All of the stock in Global Ocean would be issued to Marmaron Company Limited ("Marmaron"), which is owned by Maria Tsakos, in exchange for new capital up to $10 million. Maria Tsakos is the daughter of Captain Panagiotis ***36** Tsakos and the sister of Nikolas P. Tsakos, together the largest existing shareholders. Global Ocean would retain ownership of the other Debtors.

At the request of the Debtors and the Ad Hoc Committee of Noteholders, the plan process was scheduled on a relatively fast track, to assure that the restructuring was concluded by June 30, 2000. The Disclosure Statement was approved, over objections by Arabella, on March 24, 2000, after certain amendments were made to it and the Plan. Voting packages were required to be mailed by March 31, 2000, ballots were due on April 28, 2000, and the confirmation hearing was originally scheduled for May 8, 2000.

After voting on the Plan, however, the only impaired class (the Noteholders) rejected the Plan under the numerosity test. That is, although owners of over $98 million in amount of the outstanding Notes voted to accept the Plan (almost $6 million voted to reject), 321 of the 497 Noteholders voting on the Plan rejected it. Thus, the Plan has been rejected by the vast majority of the small Noteholders, but accepted by the large institutional Noteholders which own the largest amount of Notes.

Opposition to the Plan has been spearheaded by Arabella, an investment company owned by Mr. and Mrs. Katsamas. Mr. Katsamas has been in the shipping industry for twenty years. In December of 1999, Arabella purchased a small number of shares in Global Ocean for $10,000 and purchased $150,000 in face amount of Notes for $55,000. Mr. Katsamas testified that he did so based on his knowledge of the industry and the upward swing in values of vessels since the Summer of 1999. The valuation experts who testified on behalf of the Debtors confirmed that the industry has recovered since last year and that vessel values (and charter hire rates) continue to rise. Mr. Katsamas said he invested in Global Ocean with the expectation that its value would increase as the industry recovered.

After the Plan was rejected by the Noteholders, the Debtors filed the Modified Plan which changed the treatment of Credit Lyonnais in a manner which the Debtors assert impairs it. A ballot was filed by Credit Lyonnais accepting the Modified Plan. The Debtors also filed a Motion for substantive consolidation of the Debtors' cases. In a telephone conference on scheduling and discovery issues, the Debtors asked for expedited consideration of their substantive consolidation motion so that it could be heard at the confirmation hearing, which was rescheduled for June 5, 2000. We granted that request.

The confirmation hearing commenced on June 5 and continued on June 7, 15 and 23. At the conclusion of the testimony, we heard oral argument and held the matter under advisement.

II. *JURISDICTION*

This Court has jurisdiction over these matters, which are core proceedings pursuant to 28 U.S.C. § 1334 and § 157(b)(1), (b)(2)(A), (*L*) and (*O*).

III. *DISCUSSION*

The Debtors, Credit Lyonnais, and the Ad Hoc Committee of Noteholders all support confirmation of

the Modified Plan. To effectuate the Modified Plan, the Debtors ask us to grant their substantive consolidation motion and allow the ballot of Credit Lyonnais, though it was not filed within the original voting deadline.

Arabella objects to the Debtors' requested relief and also asks that we dismiss these chapter 11 cases asserting that the Debtors are not eligible to file under the Bankruptcy Code.

Because it bears on whether we can or should decide all the other issues, we address Arabella's motion to dismiss first.

A. *Motion to Dismiss*

[1] Arabella asserts that none of the Debtors are eligible to file a case under ***37** the Bankruptcy Code. Section 109(a) of the Code articulates who is eligible to file a petition in bankruptcy:

> Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business or property in the United States, or a municipality, may be a debtor under this title.

11 U.S.C. § 109(a).

[2] **[3]** **[4]** The test for eligibility is as of the date the bankruptcy petition is filed. *See, e.g., In re Axona International Credit & Commerce, Ltd.,* 88 B.R. 597, 614–15 (Bankr.S.D.N.Y.1988). The test must be applied to each debtor. *Bank of America v. World of English,* 23 B.R. 1015, 1019–20 (N.D.Ga.1982)(even where parent is eligible to file, subsidiary must be tested separately to see if it is eligible). The burden of establishing eligibility is on the party filing the bankruptcy petition, in this case the Debtors. *See, e.g., In re Secured Equipment Trust of Eastern Air Lines, Inc.,* 153 B.R. 409, 412 (Bankr.S.D.N.Y.1993) and cases cited therein.

In this case, only one of the Debtors, Marine, is incorporated in the United States. Marine was incorporated in Delaware in 1991. The others are incorporated in Cyprus, Singapore or Liberia. Most of the Debtors have their headquarters in Athens, Greece. The Debtors admit that none has a place of business in the United States, except Marine. (Exhibit A–31.)

Since Marine is incorporated in Delaware, the Debtors assert that its stock is located in Delaware. *See* Del. Gen. Corp. L. 169 ("the situs of the ownership of the capital stock of all corporations existing under the laws of this State ... shall be regarded as in this State"). Thus, we conclude that Global Ocean, the owner of the stock of Marine, has property in Delaware.

The Debtors also assert that they have other significant contacts with, and in, the United States. Global Ocean had an initial public offering of its stock in the United States in 1988 and its stock has traded on the American Stock Exchange until recently. In 1997, Global Ocean also issued the Notes in the United States, using American attorneys and investments bankers. All the Debtors, who guaranteed the Notes, submitted to the jurisdiction of the State of New York for all issues arising under the Notes and appointed Marine as their agent for service of process. (Indenture at § 11.14.) When the Debtors sought to renegotiate the terms of the Notes, they met with the Ad Hoc Committee of Noteholders in the United States and negotiated with them through American representatives.

[5] Further, the Debtors presented evidence that some of their vessels have visited ports in the United States on a regular basis. (Exhibit D–9.) However, the Debtors' Exhibit shows that only four of the Debtors' twelve vessels visited the United States for a total of 143 days in the fifteen months prior to the petition date. One of the vessels was in the United States only once (in November, 1999). We do not find this evidence persuasive. Having some business in the United States (and even being physically present in the United States for 30% of the year) is insufficient to constitute having a place of business in the United States.

[6] Further, none of the Debtors' vessels were in the United States on the day the petitions were filed, which is the dispositive date. *See, e.g., Axona,* 88 B.R. at 614. We hold that it is insufficient for purposes of establishing eligibility that the Debtors had property in the United States at some time in the prior year. The Debtors must have property in the United States at the time they actually file their bankruptcy petition. *Id.*

The Debtors assert, however, that they did have property in the United States on the petition date, specifically business documents and funds in bank accounts. The documents were produced by the Debtors to the Ad

Hoc Committee of Noteholders ***38** during the course of their negotiation of the Lock-up Agreement and the Plan. The Debtors assert that these documents are their property and thus sufficient to establish their eligibility to file bankruptcy in this country. *See, e.g., In re Spanish Cay Co., Ltd.,* 161 B.R. 715, 721 (Bankr.S.D.Fla.1993)(advertising and marketing material, together with office equipment and a bank account containing $100, was sufficient property in the United States to create eligibility to file bankruptcy).

However, in this case, the business documents in the hands of the Ad Hoc Committee of Noteholders are not original books and records of the Debtors; they are merely copies. It does not appear that the Debtors expect the return of those. We do not, therefore, find that those documents are property of the Debtors for purposes of establishing eligibility to file bankruptcy in the United States. [5]

The Debtors did have property in the United States on the petition date, however, namely funds in various bank accounts. *See, e.g., In re McTague,* 198 B.R. 428, 429 (Bankr.W.D.N.Y.1996)($194 in bank account was sufficient property for bankruptcy eligibility). One account was at The Bank of New York in New York City (an account in use since 1989) and another was at Chase Manhattan Bank in Delaware (opened shortly before the bankruptcy filing). Both these bank accounts are in the name of Global Ocean. The Debtors' deputy financial officer, Mr. Panagopoulis, testified that the funds in the bank accounts represent the revenues from the operations of all the vessels. Those revenues belong to the vessel owning subsidiaries and, through their ownership of the subsidiaries, the various other Debtors. Mr. Panagopoulis also testified that the funds of the various Debtors have always been commingled and deposited into the Global Ocean account and that none of the other Debtors even have bank accounts.

Arabella sought to discredit this testimony by cross-examining Mr. Panagopoulis about the New York bank account statement for July, 1999. (Exhibit A–21.) That statement showed that in July, 1999, the Debtors withdrew over $4 million from the New York bank account, reducing the funds therein to approximately $10,000. (It was in July, 1999, that the Debtors defaulted on an interest payment due to the Noteholders in the amount of approximately $6.5 million.) Since that time, the Debtors have admitted that that account has had minimal funds. Instead, the Debtors' vessel revenues have been deposited into the Royal Bank of Scotland account of Global Ocean located in Greece.

[7] It is not relevant, as Arabella suggests, that there is only a relatively small amount in the Debtors' bank accounts in the United States (less than $100,000 in both). As the Court in *McTague* concluded:

> Nonetheless, $194 in a bank account is clearly "property," and at least two courts have held that such an account is property "in" the district in which the deposit account is located, even though bank deposits may be viewed as being "in" the place of residence of the depositor for certain other purposes.
>
> Consequently, as applied to the case at bar, the statute does not appear to be vague or ambiguous, and it seems to have such a plain meaning as to leave the Court no discretion to consider whether it was the intent of Congress to permit someone to obtain a bankruptcy discharge solely on the basis of having a dollar, a dime or a peppercorn located in ***39** the United States. The Court will so rule.
>
> Therefore, the Court concludes that ... the language of § 109(a) is clear, and the Court does not have discretion to look behind the language and declare that the quantity of property in the United States will be decisive of eligibility to be a debtor under the Code.

198 B.R. at 431–32.

Thus, we conclude that the bank accounts constitute property in the United States for purposes of eligibility under section 109 of the Bankruptcy Code, regardless of how much money was actually in them on the petition date.

However, Arabella asserts that the Debtors' argument that the funds in the account represent property of all the Debtors is incorrect. On cross-examination, Mr. Panagopoulis admitted that the revenues from the Hanjin vessels were always deposited into Global Ocean's account at Credit Lyonnais in France, as required by the preferred ship mortgage on those vessels. Thus, Arabella asserts that none of the funds of the Hanjin Debtors were deposited into the New York bank account. [6]

The Debtors rely heavily on the *World of English* decision which held that claims by subsidiaries to funds in their parent's bank account located in the United States constituted sufficient property in the United States for eligibility purposes under section 109. 23 B.R. at 1023.

The Debtors also point to the existence of retainers paid by the Debtors to their bankruptcy counsel as evidence of the requisite property in the United States. Before the petitions were filed, retainers totaling $400,000 were paid to bankruptcy counsel, which still hold those funds. The Debtors assert that such retainers held in escrow by counsel for a debtor are property of the estate. *See, e.g., In re Prudhomme,* 43 F.3d 1000, 1003–04 (5th Cir.1995)(unearned portion of retainer is property of estate and court has equitable power to order disgorgement even of earned attorneys' fees); *In re Independent Engineering Co., Inc.,* 232 B.R. 529, 533 (1st Cir. BAP 1999) (retainer paid by third party to debtors' attorney was property of debtors' estate); *In re Tundra Corp.,* 243 B.R. 575, 582–83 (Bankr.D.Mass.2000).

The Debtors assert that they all have an interest in the escrow funds which were paid to counsel on all their behalf. We agree. The retainers were paid on behalf of all the Debtors and, therefore, all the Debtors have an interest in those funds. It is not relevant who paid the retainer, so long as the retainer is meant to cover the fees of the attorneys for all the Debtors, as it clearly was in these cases. *See, e.g., Independent Engineering,* 232 B.R. at 533. Thus, we conclude that the Debtors do have sufficient property in the United States to make them eligible to file bankruptcy petitions under section 109 of the Bankruptcy Code. Arabella's motion to dismiss is denied.

B. *Confirmation*

Several objections to confirmation were interposed by Arabella.

1. *No Impaired Class Has Accepted the Plan*

Under the original Plan, the Noteholders were the only class impaired and entitled to vote. When that class rejected the Plan, the Debtors modified the Plan on May 16, 2000, purporting to impair the claim of Credit Lyonnais. Credit Lyonnais then submitted a ballot (dated May 3, 2000) purporting to accept the Modified Plan. (Exhibit D–9.)[7] The Debtors, therefore, assert they have the minimal one ***40** impaired accepting class required by section 1129(a)(10).

Arabella disputes this contention for several reasons. First, the Credit Lyonnais ballot cannot be counted as it was received after the deadline fixed by the Court for voting on the Plan. Second, the Credit Lyonnais claim is not impaired by the Modified Plan because its treatment is actually enhanced by the changed terms. Third, even if it is impaired, the impairment has been manufactured solely for the purpose of gerrymandering the Plan voting.

a. *Timeliness of the Ballot*

[8] In the Order approving the Disclosure Statement dated March 24, 2000, the Court set April 28, 2000, as the deadline for voting on the Debtors' Plan. The Credit Lyonnais ballot is dated May 3, 2000.

Several courts have held that a late ballot cannot be counted unless the Court, on Motion and after finding excusable neglect, extends the time for voting. *See, e.g., Hanson v. First Bank of South Dakota, N.A.,* 828 F.2d 1310, 1314 (8th Cir.1987); *In re Richard Buick, Inc.,* 126 B.R. 840, 847–48 (Bankr.E.D.Pa.1991). Other courts, however, have been liberal in allowing late ballots. *See, e.g., In re Rhead,* 179 B.R. 169, 177 (Bankr.D.Ariz.1995)(deeming modified plan and oral argument of counsel to be the required motion to extend voting deadline and counting late ballot). Since Credit Lyonnais was not afforded an opportunity to vote on the original Plan, if the Modified Plan does impair its claim, an extension of time to permit it to vote on the Modified Plan is warranted.

b. *Impairment of the Claim*

[9] Arabella insists that the Credit Lyonnais claim is not impaired by the Modified Plan because the treatment of that claim is more onerous to the Debtors than simply reinstating the loan. Under the Modified Plan, the Debtors must (1) pay a higher interest rate to Credit Lyonnais, (2) maintain a higher value of collateral securing its loans (130% instead of 120% of the loan balance), and (3) repay the loan principal balance faster (by paying an extra $3 million by September 30, 2000, and an extra $500,000 semi-annually). (*Compare* Exhibit A–22 *with* Modified Plan at Exhibit A.) In addition, the Debtors must obtain the guarantee of the Credit Lyonnais debt by Captain Tsakos. (*Id.*)

The Debtors assert that it is irrelevant whether Credit Lyonnais' position is improved or not; they assert that *any* change is impairment. *See, e.g., In re L & J Anaheim Assoc.,* 995 F.2d 940 (9th Cir.1993); *Rhead,* 179 B.R. at 177 ("any change of a creditor's rights, whether for the better or for the worse, constitutes impairment and creates the possibility of a 'consenting impaired class'."). Despite their articulation of such a seemingly extreme position, however, both *Rhead* and *L & J Anaheim* dealt with adverse changes to the affected creditor's rights. In *L & J Anaheim,* the creditor lost its right to foreclose in the event of a default, 995 F.2d at 943, and in *Rhead,* the tax lienor was to be paid over three years, 179 B.R. at 176.

We are not required to decide whether improvement in a creditor's legal or contractual rights under a plan constitutes impairment, however, because we readily conclude that Credit Lyonnais' rights are negatively impacted by the Modified Plan. Arabella overlooks the significant impairment of one of Credit Lyonnais' greatest rights, its interest in the restricted cash account. (Exhibit A–22 at § 9.2(a).) Under the Modified Plan, the Debtors are given immediate access to the restricted account (which currently totals over $5.6 million) to make payments to other creditors under the Plan and for operating capital. (Modified Plan at Exhibit A, p. 2; Exhibit D–2.)

Unfettered use of a secured creditor's restricted cash is clearly impairment of that creditor's rights. *See, e.g.,* ***41** *In re Dwellco I Limited Partnership,* 219 B.R. 5 (Bankr.D.Conn.1998)(secured creditor was impaired under plan it proposed because plan provided for use of creditor's cash collateral to pay administrative, priority and unsecured creditors' claims).

Further, if the Debtors do not meet the collateral value requirements of the Modified Plan, it is not a default of the Credit Lyonnais facility, rather the amount of interest due just increases. (*Id.* at pp. 2, 4 and 9.) Such a change of Credit Lyonnais' rights clearly constitutes impairment. *See, e.g., L & J Anaheim,* 995 F.2d at 943 (removal of creditor's ability to foreclose on event of default constitutes impairment).

[10] Arabella argues that the Modified Plan treatment is no different from one of the alternative treatments in the original Plan, under which the Debtors claimed that Credit Lyonnais was not impaired. Arabella asserts, therefore, that the Debtors are judicially estopped from now arguing that Credit Lyonnais is impaired.

There is one significant difference, however. Under the prior Plan, Credit Lyonnais had the option of rejecting the Aida refinance and leaving its rights unimpaired. Thus, the Debtors are not judicially estopped from asserting that the Modified Plan does impair Credit Lyonnais because it does not give Credit Lyonnais the option of leaving its rights unaffected.

c. *Artificial Impairment*

[11] Arabella asserts, however, that because the Debtors have blatantly impaired Credit Lyonnais only for the purpose of obtaining the vote of an impaired class, the impairment should somehow be ignored. It cites to several cases which have condemned such "gerrymandering" of classes for voting purposes. *See, e.g., In re Willows Convalescent Centers, L.P.,* 151 B.R. 220, 222 (D.Minn.1991)("debtor may not manufacture impaired classes merely for the purpose of garnering votes of such classes in favor of its plan") and cases cited therein. Specifically, courts have condemned modifications which improve or only slightly impair a creditor's position for no justifiable reason as being "artificial" impairment, or a mere artifice. *See, e.g., In re Windsor on the River Associates, Ltd.,* 7 F.3d 127, 131 (8th Cir.1993); *In re W.C. Peeler Co., Inc.,* 182 B.R. 435, 437 (Bankr.D.S.C.1995); *In re Dean,* 166 B.R. 949, 954 (Bankr.D.N.M.1994); *In re Meadow Glen, Ltd.,* 87 B.R. 421, 427 (Bankr.W.D.Tex.1988).

In *In re Daly,* 167 B.R. 734 (Bankr.D.Mass.1994), the Court concluded that the debtor could not make a last minute amendment to a plan, solely to create an impaired accepting class. In that case, the Court found that:

> [T]he impairment of Rattey's claim in the most recent plan was plainly contrived and engineered solely to create an accepting impaired class. In earlier versions of the plan, Rattey's claim was *greater* than in the present plan but not impaired. The *timing* of the amendment is telling: the plan was amended to impair Rattey's claim only when it became clear to the Debtor that he could not rely on North Attleboro's priority tax claim to satisfy the requirement of an accepting impaired class. The *extent* of the impairment is also relevant. The impairment of Rattey's claim, though real, pales

> in comparison to the impairment of the unsecured claims....
>
> Thus the impairment of Rattey's claim has no reasonable basis other than the need to create an accepting impaired class. The cases are clear that this is impermissible. A Debtor may not satisfy § 1129(a)(10) by manufacturing an impaired class for the sole purpose of satisfying § 1129(a)(10) and thereby forcing the plan upon a truly impaired class that has voted to reject the plan....*This contrived and artificial impairment* can be viewed either as a violation of the requirement of an accepting impaired class, § 1129(a)(10), or as a violation of the requirement that the plan be proposed in good faith, ***42** § 1129(a)(3), or as both. Whichever way it is viewed, it prevents confirmation of the plan.

167 B.R. at 736–37 (emphasis added) (citations omitted).

While similar to *Daly,* we conclude that the facts of this case are sufficiently different to distinguish it. As noted above, there is a real impairment of the rights of Credit Lyonnais (relinquishing its right to hold onto the restricted cash and its foreclosure remedies); it is not illusory or artificial. Further, the impairment is substantial, affecting over $5.6 million in cash collateral (more than 10% of its outstanding loan balance). In addition, the Debtors have a reasonable basis for the impairment: the funds are necessary to meet the distribution requirements of the Modified Plan. While the timing does suggest that the modified treatment was proposed in order to meet the requirements of section 1129(a)(10), we are loathe to adopt a rule which chills the ability of a debtor to make last minute deals with creditors in order to achieve a consensual plan or otherwise reduce opposition to the plan. [8]

Thus, we conclude that Credit Lyonnais is impaired by the Modified Plan and entitled to vote.

2. *Releases*

[12] Arabella objected to certain release language contained in the Modified Plan. (Modified Plan at Article X.) That section provided for the release of the Debtors' directors and officers and of the Ad Hoc Committee of Noteholders by the Debtors. (*Id.* at Article X B.) In addition, any creditor who (i) accepted the Plan, (ii) was in a class which accepted or is deemed to have accepted the Plan, or (iii) is entitled to receive a distribution under the Plan shall be deemed to have released the Ad Hoc Committee of Noteholders and their representatives from any claims arising from their actions in connection with negotiating the Plan. (*Id.* at Article X C.) Finally, the Modified Plan provided that the Debtors, Reorganized Debtors, the officers and directors of the Debtors, the Indenture Trustee under the Notes, the Ad Hoc Committee of Noteholders and their respective professional advisors would have no liability to anyone for their actions in connection with formulating the Plan, except for gross negligence or wilful misconduct. (*Id.* at Article X E.) [9]

At the confirmation hearing the Debtors offered a proposed Confirmation Order which revised the Modified Plan to delete Article X C and delete any release in Article X E of any third party (thereby providing only for the discharge of the Debtors). This leaves only the release by the Debtors of their officers and directors and the Ad Hoc Committee of Noteholders. (*Id.* at Article X B.)

Arabella argues that this language is still violative of the Code. *See, e.g., In re Continental Airlines,* 203 F.3d 203 (3d Cir.2000). The Debtors have offered no evidence to support even the Debtors' release of any claims they (or any party acting derivatively through them) may have against their officers and directors or the Ad Hoc Committee of Noteholders. *Id.* at 214 (reversing order confirming plan of reorganization which contained releases of third party actions against directors and ***43** officers because record was devoid of evidence to support them). *Cf. In re Zenith Electronics Corp.,* 241 B.R. 92, 111 (Bankr.D.Del.1999), *citing Master Mortgage Inv. Fund, Inc.,* 168 B.R. 930 (Bankr.W.D.Mo.1994)(evidence presented that releasees had made substantial contribution to the plan, the releases were necessary since the releasees were continuing to serve the reorganized debtor, affected parties had voted overwhelmingly in support of the plan and the plan provided for a significant distribution to creditors).

On this record, the Debtors have not met their burden of establishing that the revised releases are appropriate, because of the failure of the affected class (the Noteholders) to support the Modified Plan. We conclude that the "overwhelming support" factor articulated in *Master Mortgage* requires that the affected class accept the plan by at least the percentages required by section 1126 of the Bankruptcy Code.

3. *Best Interests of Creditors*

[13] Arabella asserts that the Modified Plan fails to meet the requirements of section 1129(a)(7) that impaired creditors receive at least as much as they would if the Debtors were liquidated under chapter 7. Under the Modified Plan, the Noteholders are to receive 50% of their claims in cash on the Effective Date. [10] (Modified Plan at Article III B 4.) According to the Debtors' analysis, if they were liquidated under chapter 7, the Noteholders would receive only approximately 30% of their claims. (Disclosure Statement at Exhibit D.)

The Debtors presented testimony by two experts that in their opinion the Debtors' vessels had a total value of $96.7 million without charters and $104.7 million with charters. (Exhibits D–1, D–8.) On cross examination, Arabella sought to discredit that testimony and did an effective job. Both experts admitted that charter rates and vessel values have been increasing over the past year, at an accelerated pace. (Exhibit A–1.) They admitted that the industry had suffered a five year low in the summer of 1999 and that it was recovering. They admitted that the recovery was expected to continue but could not say for how long or if it would reach prior highs.

The Debtors' experts also acknowledged that the Debtors' charter hire agreements were generally at or above market value. [11] Although the Debtors assert that the charter hires are not assignable, and therefore must be ignored in determining the value of the vessels, Arabella disagrees. [12] It is not necessary for us to resolve this issue, because we do not believe that this factor is significant. Since the Debtors' charter hires are of short duration, and market rates are going up, the lack of a long term charter agreement in place may in fact enhance the value of the vessels (allowing a buyer to recharter at higher prices or use the vessel itself). The Debtors' experts ***44** at least acknowledged that the short charter terms did not affect the vessels' value significantly.

Arabella's counsel also pointed to recent sales (and prices at which vessels are currently listed for sale) of vessels comparable to the Debtors' which the experts had not considered. (Exhibits A–7 & A–28.) Counsel also identified numerous appraisals that the Debtors had had done of their vessels as far back as April, 1999, which showed higher values for the vessels, at a time when market values were at a five-year low. (Exhibits A–25 & A–26; Disclosure Statement at Exhibit G.) The Debtors' container ship expert acknowledged that an additional year of depreciation did not account for the difference in value, especially given the rising values of vessels as the industry recovers. The fact that the Debtors had numerous appraisals showing significantly higher values for the vessels at a time when the industry was at an all time low seriously undermines the validity of its evidence of value today.

In fact, the Debtors' Panamax carrier expert's report shows that the Debtors' vessels are today worth $100,000 more than a month ago, $700,000 more than 6 months ago, and at least $2.7 million more than a year ago. He further acknowledged that he relied on comparable sales that are 2 to 4 months old and did not adjust his appraised values to reflect the rising market since those sales.

In addition, it was disclosed on cross examination that the Debtors' container ship expert relied on information given him by the Debtors which might not have been accurate, namely the speed and fuel efficiency of the vessels. For example, the maximum speeds which the expert assumed the vessels could achieve were less than the speeds which the Debtors had represented in their charter agreements for those same vessels. The expert admitted that even one knot in increased speed capability would increase the value of vessels of this size.

Arabella also questioned the values attributed to the vessels by the Debtors because of the terms of the exit financing arranged by the Debtors and the terms of the restructured Credit Lyonnais debt. The exit financing, secured by all vessels except the Hanjin vessels, is in the amount of $45 million and requires that the Debtors maintain an initial value to loan ratio of 125%. (Exhibit A–15.) Thus, Arabella asserts that the Debtors' non-Hanjin vessels must have a current value of least $56 million. Further, the exit financing assumes that the Debtors, within six months, will sell the Tiger Island and Tiger Bay for at least net $3 million (as opposed to the Debtors' appraised value of $2.4 million for those vessels). After that sale (and paydown of the exit financing to $42 million), the Debtors must maintain a value to loan ratio of 143% or $60 million. Thus, Arabella asserts the Debtors' non-Hanjin vessels must be worth at least $56 to $63 million or the lenders would not have committed to making the loan. In fact, the lenders were provided with

an appraisal obtained by the Debtors in December, 1999, showing the non-Hanjin vessels to be worth $67 million. (Exhibit A–3.)

Similarly, the Credit Lyonnais loan of $48,875,000 (Exhibits D–2 & D–4) requires a value to loan ratio of 120% today and 130% by September 30, 2000. (Modified Plan at Exhibit A.) Therefore, to secure the Credit Lyonnais debt, the Hanjin vessels must be worth at least $58.65 to $59.63 million, or approximately $20 million per vessel. This is less than the current list price ($23 million) for sister ships built the same year and significantly less than the list price ($25 million) for comparable vessels, the Trade Maple and Trade Harvest. (Exhibit A–28.)

While we are cognizant that list prices are typically not indicative of market value, the Debtors' container ship expert used, as a comparable, the fact that the owners of the Trade Maple and Trade Harvest had received an offer of $20.9 ***45** million for each. [13] (Exhibit D–1.) On cross examination, it was revealed that that comparable "sale" had not occurred because the sellers rejected it. (Exhibit A–28.)

The Debtors' container ship expert also acknowledged the rising prices of vessels in this industry since 1999. (Exhibit D–1.) In fact, in an industry newsletter which he authors, he reported that the market was "robust." (Exhibit A–1.) This rising market is reflected in the fact that the Debtors' experts appraised the vessels at 5 to 14% higher in May/June, 2000, than the Debtors' estimate of value in its Disclosure Statement filed in March 2000. (Disclosure Statement at Exhibits D & G.)

While Arabella did not introduce expert testimony as to the value of the Debtors' vessels itself, it did bring into doubt the values attributed by the Debtors' experts. That, together with the loans being extended to the Debtors secured by those assets, convinces us that the vessels must have a higher value than the Debtors suggest.

Based on all the evidence presented, we conclude that the value of the Hanjin vessels is $60 million, or $20 million each. Similarly, we conclude that the other vessels must be worth at least $63 million which is the amount necessary to meet the covenants of the exit financing. [14]

In addition to the vessels, the Debtors own other assets with a value of at least $17 million ($15.4 million in cash and $1.7 million in insurance claims). (Exhibits D–2, A–35 to A–40.) Arabella asserts that the Debtors also have causes of action against Sovereign for avoidance of a fraudulent conveyance in the amount of approximately $3.6 million which was paid within the year prior to the bankruptcy filing. (Exhibit A–19.) However, testimony was adduced that that payment was an advance against the management agreement to assure that Sovereign, and Tsakos Shipping, had sufficient funds to pay the actual vessel expenses in case the creditors sought to foreclose or the company was required to file bankruptcy. Arabella also asserts that the fees paid to Sovereign are recoverable as fraudulent conveyances since it questions what services Sovereign actually performs for the Debtors for the $1.2 million fee paid to it each year. The Debtors presented testimony that Sovereign keeps the books and records of all of the Debtors and provides other accounting and administrative services. Based on the unrefuted evidence presented by the Debtors we are unable to attribute any value to those potential causes of action at this time. [15]

Arabella also contests the amount of liquidation expenses. The Debtors' analysis includes over $5.3 million for costs associated with taking the vessels out of charter, relocating, repairing and maintaining them until they could be sold. It also includes $1.2 million for repatriating the vessels' crews, which Arabella calculates is $4,600 per crew member, an expense that it asserts is high. We agree with Arabella that, since most of the vessels are under charter and earning revenues, it would make more sense for a chapter 7 trustee to sell the vessels (or the stock of the companies owning the vessels) in service. The Debtors' experts acknowledged that many sales are with charter. Further, while it is the policy of the United States Trustee in this District not to allow chapter 7 trustees to operate businesses, since the Debtors in this instance operate the vessels only through their contract with Sovereign and Tsakos Shipping (at a profit to the Debtors of approximately $2 million per month before ***46** debt service), a chapter 7 trustee should be able to do the same with minimal exposure. (Disclosure Statement at Exhibit E.) Thus, we conclude that the liquidation expenses are exaggerated and that they will not exceed the normal liquidation expenses which the Debtors estimate to be $650,000.

Based on our conclusion that the vessels have a total value of $123 million and the Debtors have other assets worth at least $17.1 million, their total assets exceed

$140 million. After payment of Credit Lyonnais' secured claim ($51.4 million) and chapter 7 and 11 administrative expenses ($1.5 million), there is available $87 million for distribution to Noteholders. Thus, we conclude that the Noteholders would receive more on liquidation than the 50% distribution ($63 million) they are to receive under the Modified Plan.

[14] The burden of establishing compliance with section 1129(a)(7) is on the proponent of the plan. *See, e.g., In re Trevarrow Lanes, Inc.,* 183 B.R. 475, 479 (Bankr.E.D.Mich.1995); *In re Zaleha,* 162 B.R. 309, 316 (Bankr.D.Idaho 1993); *In re Future Energy Corp.,* 83 B.R. 470, 489 (Bankr.S.D.Ohio 1988) We conclude that the Debtors have failed to meet their burden on this point.

4. *Feasibility*

Arabella also asserts that the Modified Plan is not feasible. Section 1129(a)(11) of the Bankruptcy Code requires that the plan proponent establish that "Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(1).

[15] Arabella asserts that the Debtors have failed to establish that the Modified Plan is feasible because they have not finalized the exit financing or the terms of the Credit Lyonnais restructuring. The Debtors admit that the exit financing is contingent on the lenders' agreement to the final documentation and that Credit Lyonnais, although it has accepted the Modified Plan, must also approve the terms of any documentation relating to its restructured debt. The Debtors also admit that the documentation is not yet complete for either. However, the Debtors presented testimony regarding the terms of both loans to which the parties have agreed in principle and their belief that the final documentation will be substantially similar to those terms. (Exhibit A–15; Modified Plan at Exhibit A.)

With respect to Arabella's assertion that the Plan is not feasible because there is not final documentation of the exit financing or the Credit Lyonnais loan, we reject that position. Both lenders have issued a commitment letter and/or agreed to term sheets which are detailed and contingent only upon final documentation, confirmation of the Modified Plan, and no materially adverse changes occurring. (*Id.*) These conditions are not unusual and certainly do not cause the financing to be speculative or uncertain.

[16] What causes the Debtors a feasibility problem is their assertion about the value of their vessels. As noted in Part 3 above, if the Debtors are correct that the vessels have a value of only $96 to $104 million, so that they meet the best interests of creditors' test under section 1129(a)(7), then the Debtors either (1) will not have the collateral value necessary to obtain the exit financing or restructure the Credit Lyonnais debt or (2) will be in immediate default of those facilities.

Specifically, Arabella argues that the Credit Lyonnais restructuring requires that the Debtors have collateral securing its position equal to 130% of the balance as of September 30, 2000 ($48.875 million) or $63.54 million. Based on the testimony of the Debtors' experts, the value of the Credit Lyonnais collateral (the Hanjin vessels) is only $45 to $51 million. Thus, by ***47** September 30, 2000, the Debtors will have a shortfall of $12.5 to $18.5 million in collateral pledged to Credit Lyonnais.

The Debtors respond that the Credit Lyonnais restructuring does require that the Debtors have collateral in that amount, but that if the Debtors fail to have that level of collateral they will only be required to pay additional interest to Credit Lyonnais. (Modified Plan at Exhibit A, p. 4.) They will not have to post additional collateral, will not have to pay cash to Credit Lyonnais for any deficiency in the collateral base, and will not be in default of the Credit Lyonnais facility. The Debtors note that their projections show that they will have sufficient cash to pay the additional interest penalty if their collateral is not sufficient. (Exhibit D–4.) Thus, rather than require additional financial restructuring in September, the Debtors assert that they have proven that they are reasonably able to comply with the terms of the Modified Plan, which is all that is necessary for confirmation. *See, e.g., In re Briscoe Enterprises, Ltd., II,* 994 F.2d 1160, 1165–66 (5th Cir.1993) (debtor need not guarantee success, only a reasonable assurance of viability is required).

Arabella makes a similar argument with respect to the exit financing. The exit financing requires that the Debtors have collateral equal to 125% of the $45 million loan or $56.25 million. (Exhibit A–15 at p. 6.) If the Debtors'

experts are correct, the collateral securing that loan (the non-Hanjin vessels) is worth only $51.7 to $53.7 million. Based on those collateral valuations, the Debtors will be in immediate default of the exit financing if the Modified Plan is confirmed. Further, the situation will only get worse. Under the exit financing, the Debtors must sell the Tiger Bay and Tiger Island within 6 months and pay the lender $3 million. (*Id.*) The Debtors assert those vessels are worth only $2.4 million for scrap metal. (Exhibit D–1.) Even if the Debtors are able to pay the shortfall from operating profits, they will still need a collateral base of 143% after the sale of the Tiger Island and Tiger Bay or $60 million. (Exhibit A–15.) Unlike the Credit Lyonnais loan, there is no evidence that this covenant of the exit financing is waivable or curable in any other fashion than collateral value.

Thus, we must conclude that, if the Debtors are correct about the value of their vessels, their Modified Plan is not feasible. *See, e.g., In re Preferred Door Co., Inc.,* 990 F.2d 547, 549 (10th Cir.1993)(plan was not feasible where debtor was unable to pay administrative claims on the effective date).

5. *Absolute Priority*

Arabella asserts that the Modified Plan also violates the absolute priority rule, embodied in section 1129(b)(2)(B), in three ways: First, the Debtors who are parents of the subsidiary Debtors are retaining their stock without payment in full of the creditors of the subsidiaries (including the Noteholders whose obligation was guaranteed by each of the non-Hanjin Debtors). Second, Sovereign, a current shareholder of Global Ocean, will continue to control three members of the Global Ocean board of directors. Thus, Arabella asserts that Sovereign is retaining something (the right to name directors of Global Ocean) on account of its equity interest. Finally, under the Modified Plan the stock of Global Ocean will be owned by Marmaron, a company owned by Maria Tsakos, the daughter of the current controlling shareholder of Global Ocean, Captain Tsakos.

[17] The Debtors assert that the retention of stock by some Debtors in the other Debtors is not really significant given the Debtors' request for substantive consolidation. If the Debtors' estates are consolidated, all assets of all Debtors will be available for repayment of creditors and the retention of the corporate stock by some Debtors will not affect any rights of creditors. The Debtors assert, in fact, that the corporate structure is advantageous to the Noteholders and other creditors since it isolates potential tort and ***48** catastrophic liabilities to one vessel-owning subsidiary. We agree with the Debtors' conclusion. If substantive consolidation is granted, for purposes of plan confirmation, all the assets of all Debtors will be considered for repayment of creditors. Thus, the retention of the corporate structure among the Debtors will not adversely affect any creditors and the only equity retention issue should be at the ultimate parent level for purposes of section 1129(b).

[18] With respect to the right of Sovereign to name directors to the Board of Global Ocean, the Debtors argue that Sovereign has that right, not as a shareholder [16], but pursuant to its contract with the Debtors. (Exhibit A–9.) The corporate charter of Global Ocean provides that the manager of its vessels is entitled to name three directors of its board. Thus, the Debtors argue that Sovereign has that right because of the assumption of its Management Agreement by the Debtors (Modified Plan at p. 19), and not because of Sovereign's rights as a 7% shareholder. (Exhibit D–5.)

We agree with the Debtors' conclusion. The corporate charter of Global Ocean gives the fleet manager, whoever that may be, the right to appoint directors to the board. The assumption of the Management Agreement confirms that Sovereign will have that right. Thus, we conclude that Sovereign is not retaining this right as a shareholder.

[19] With respect to the grant of the equity in Global Ocean to Marmaron, the Debtors assert that this does not violate the absolute priority rule because the equity is not being retained by any existing shareholder. Rather, the Debtors assert that the equity is being sold to a non-shareholder. The fact that the purchaser is a relative of the largest shareholder of Global Ocean is not relevant, the Debtors assert. As support for this position, they cite the case of *Beal Bank v. Waters Edge Limited Partnership,* 248 B.R. 668 (D.Mass.2000). In that case, the District Court upheld the decision of the Bankruptcy Court confirming a plan providing for the private sale of the debtor's equity to an insider, the son-in-law of the debtor's shareholder. 248 B.R. at 680. The Court concluded that the absolute priority rule did not prohibit a private sale of the equity in the debtor to anyone other than an existing shareholder. *Id.* The Court did note, however, that the absolute priority rule might prohibit such a sale if the buyer was acting

merely as a straw party for a shareholder. *Id.* It further acknowledged that sales to insiders were subject to special scrutiny in bankruptcy cases. *Id. See also, In re Abbotts Dairies, Inc.,* 788 F.2d 143 (3d Cir.1986).

While Arabella asserts that Maria Tsakos is clearly just a straw party for her father and brother, [17] we do not find it necessary to decide this issue because we disagree with the conclusion of the *Beal Bank* Court. We believe that the Supreme Court decision in *Bank of America v. 203 North LaSalle Street Partnership,* 526 U.S. 434, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999) cannot be read as narrowly as the *Beal Bank* Court suggests. In fact, among numerous predictions of plans which may avoid the result in *LaSalle,* we have found none to suggest that a plan which gives the equity to the largest ***49** shareholder's daughter can pass muster. [18] While a simple solution, we conclude that it is fundamentally flawed.

In the *LaSalle* decision, the Supreme Court concluded that the absolute priority rule was violated where the debtor's plan permitted only its shareholders to invest new capital to obtain all the equity in the company. The Court was particularly concerned by the fact that the debtor had retained the exclusive right to propose a plan, thereby precluding others (including the objecting creditor) from proposing a plan "selling" the equity to another. 526 U.S. at 456, 119 S.Ct. 1411. The Court stated: "Hence it is that the exclusiveness of the opportunity, with its protection against the market's scrutiny of the purchase price by means of competing bids or even competing plan proposals, renders the partners' right a property interest extended 'on account of' the old equity position and therefore subject to an unpaid senior creditor class's objection." *Id.* In *LaSalle,* the "opportunity" which the Supreme Court found was given to the existing shareholders was the *exclusive* right to bid on the equity in the debtor.

The situation in this case is not very different. Here, Captain Tsakos through his control of the Debtors, as the largest shareholder and part of the group controlling over 50% of the stock in Global Ocean, has retained his *exclusive* right, to *determine* who will be the owner of Global Ocean (as well as the price that she will pay for the ownership). This control of Global Ocean is a right which he holds "on account of" his current position as a controlling shareholder of Global Ocean.

Thus, we conclude that the Debtors' Modified Plan violates the absolute priority rule by allowing the existing controlling shareholder to determine, without the benefit of a public auction or competing plans, who will own the equity of Global Ocean and how much they will pay for the privilege. To avoid this result the Debtors must subject the "exclusive opportunity" to determine who will own Global Ocean to the market place test. [19] *LaSalle,* 526 U.S. at 457, 119 S.Ct. 1411. This can be achieved by either terminating exclusivity and allowing others to file a competing plan or allowing others to bid for the equity (or the right to designate who will own the equity) in the context of the Debtors' Plan. *Id.* at 458, 119 S.Ct. 1411 ("whether a market test would require an opportunity to offer competing plans or would be satisfied by a right to bid for the same interest sought by old equity, is a question we do not decide here.").

C. *Substantive Consolidation*

[20] Because it may be relevant to any future plans, we will address the issues raised by Arabella in opposition to the Debtors' Motion for substantive consolidation. Arabella asserts that the Motion should be denied for two reasons: first, notice was not provided to all Noteholders, ***50** whose rights are substantively affected by the Motion, and second, substantive consolidation is not appropriate because it adversely affects the rights of the Noteholders.

Although we did grant the Debtors' request to limit notice of the substantive consolidation Motion, it was as the result of the telephone conference on discovery and scheduling issues. At that time only the issue of reducing the time to answer was addressed. Had Arabella been aware of the request to limit notice (thereby not providing notice to all Noteholders) and raised it with the Court, we would not have granted the Debtors' request for limited notice because we conclude that substantive consolidation would have an effect on the rights of the Noteholders. For example, currently only Global Ocean and the Hanjin Debtors are liable for the Credit Lyonnais debt. Substantive consolidation would make the non-Hanjin Debtors liable for the Credit Lyonnais debt (which currently totals approximately $51 million). According to the Debtors' expert, the Hanjin vessels do not have sufficient value to cover the Credit Lyonnais debt. Thus, any Motion to substantively consolidate these Debtors

must be made on notice to those adversely affected by it, which includes the Noteholders. [20]

IV. *CONCLUSION*

For the reasons given above, we deny confirmation of the Plan and substantive consolidation until appropriate notice can be given. We also deny Arabella's motion to dismiss these cases, concluding that the Debtors are eligible to file the instant cases under section 109 of the Bankruptcy Code.

All Citations

251 B.R. 31

Footnotes

1 This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, made applicable to contested matters by Rule 9014.

2 Global Ocean owns 100% of the common stock of Debtors Mackenzie Shipping Corporation ("Mackenzie"), Zephaniah Pte Limited, Iphigenia Pte Limited and Marine Services Corporation ("Marine"). Mackenzie owns 100% of the common stock of Debtors Malandrino Maritime Company Limited, Selero Shipping Company Limited, Petra Maritime Company Limited, Tolmi Shipping Company Limited, Legrena Marine Company Limited, Iphigenia Pte Limited, Queensland Shipping Company Limited, Melitea Shipping Company Limited, Hedgestone Shipping Company Limited, Korinia Shipping Company Limited and Filiria Marine Company Limited. (The latter three are referred to collectively as "the Hanjin Debtors.") Both Global Ocean and MacKenzie own other subsidiaries that have not filed chapter 11 petitions. (Disclosure Statement at p. 4, n. 6.)

3 Two of the Debtors are headquartered in Singapore as required by its statutes.

4 Nikolas Tsakos owns 70% of Sovereign and owns 7.45% of the stock of Global Ocean. (Exhibit D–5.) An amended (and the latest) schedule 13D filed with the SEC on October 25, 1996, shows that his father, Captain Panagiotis Tsakos, is the largest shareholder (over 30%) of Global Ocean and leads a group controlling well over 50% of the shares of Global Ocean. (*Id.*)

5 To hold otherwise would be to expand bankruptcy eligibility beyond all bounds, by making any entity with a copy of any business record in the United States eligible. Since the eligibility test of section 109 is applicable to involuntary petitions, as well as voluntary petitions, this could result in the filing of bankruptcy petitions in instances where there was no legitimate expectation that the laws of the United States would apply. *See, e.g., Axona,* 88 B.R. at 604–06.

6 There was no evidence presented as to the source of the funds deposited into the Delaware account.

7 There is no evidence regarding when this ballot was received, nor is it even clear that it relates to the Modified Plan, which was not filed until 13 days after the date of the ballot.

8 Many of the courts which condemn artificial impairment are also confronting classification issues; that is, with no legitimate justification, the debtor has created a separate claim of favored creditors which are only slightly impaired to assure the class votes to accept the plan. *See, e.g., Windsor on the River,* 7 F.3d at 131. That issue is not raised here since Credit Lyonnais, as a secured creditor, is entitled to a separate class. *See, e.g., In re Commercial Western Finance Corp.,* 761 F.2d 1329, 1338 (9th Cir.1985)(secured creditors are entitled to be separately classified because their collateral is different).

9 The Amended Plan originally also provided for releases of the Debtors' directors and officers by all creditors entitled to receive a distribution under the Plan (as well as creditors who accepted, or those whose class accepted, the Plan). That language was deleted in the Modified Plan.

10 In addition, interest will be paid from May 1, 2000, until the Effective Date occurs.

11 For example, the Hanjin vessels are chartered at $20,000 per day while the current market rate is $16–17,000 per day. The Debtors' Panamax carrier expert testified that charter rates are now $10,000 compared to $6,000 a year ago and that the Debtors should have no problem finding charters for their Panamax vessels.

12 Arabella notes that the Debtors are assuming the contracts under the Modified Plan. (Modified Plan at p. 19.) Arabella asserts that if the agreements were not assignable under section 365, they could not even be assumed by the Debtors. *See, e.g., In re West Electronics, Inc.,* 852 F.2d 79 (3d Cir.1988) (holding that if contract is not assignable under applicable non-bankruptcy law, debtor cannot assume it under section 365). Thus, they assert that if the charters are assumable by the Debtors, they must be assignable. Further, they note that a chapter 7 trustee could avoid the entire problem of assignability of the charters by simply selling the stock of the vessel-owning subsidiaries. It is typical in this industry to

have a separate subsidiary own only one vessel and sales of stock of such subsidiaries is not unusual. In fact, the Debtors acquired the Hanjin vessels in the same manner.

13 Apparently, because there are so few container vessel sales (only 50 per year of a worldwide fleet of about 2500), the Debtors' container ship expert relied on information beyond reported sales. (Exhibit D–1.)

14 This figure is based on a value of $3 million for the Tiger Island and Tiger Bay and a value of the remaining vessels equal to 143% of the exit financing or $60 million.

15 This is, of course, without prejudice to any action that might be brought to recover such sums.

16 Sovereign is a small shareholder of Global Ocean, owning only about 300,000 of over 4 million shares outstanding. (Exhibit D–5.)

17 There is certainly evidence to support such a conclusion. Mr. Jolliffe was vague in his testimony regarding Maria Tsakos' financial condition and business acumen. In cross-examination of a representative of the exit lender, Mr. Crawley, Arabella established that the exit lender had insisted that the new owner of Global Ocean be the “Tsakos family” or a “Tsakos company,” meaning related to Captain Tsakos. It is significant to note that, while Captain Tsakos will no longer be the controlling shareholder of Global Ocean, he is personally guaranteeing the Credit Lyonnais loan ($51 million) and over $18 million of the exit financing for the Debtors. (Exhibit A–15 at p. 6; Modified Plan at Exhibit A.)

18 *See, generally,* George H. Singer, *Supreme Court Clarifies “New Value Exception” To Absolute Priority Rule—Or Does It?,* 18–AUG Am. Bankr.Inst. J. 1, 33 (1999)(“It would appear that any new value plan filed during the period of exclusivity afforded by § 1121 will now be patently unconfirmable ... unless a mechanism is in place that allows for competing bids ...”), Bruce W. White & William L. Medford, *Conducting Equity Auctions Under LaSalle—The Fog Thickens,* 18–OCT Am. Bankr.Inst. J. 20, 20 (1999)(“Perhaps future equity interest sales should modify the two-step auction offer—first to creditors and then to third parties—and simply treat the sale of equity interests as the sale of any property of the estate.”), Alexander F. Watson, *Left For Dead: The Supreme Court's Treatment Of The New Value Exception In Bank Of America National Trust & Savings Association v. 203 North LaSalle Street Partnership,* 78 N.C. L.Rev. 1190, 1206 (2000)(“Ensuring that the market is the mechanism that determines the value of the firm would help ... to maximize the property, as old shareholders would be forced to pay at least as high a price as anyone else would pay.”).

19 Although Mr. Jolliffe asserted that he talked to another unrelated party about investing in the Debtors, we do not believe that this limited “shopping” of the Debtors is sufficient.

20 This is especially appropriate since the Debtors' Disclosure Statement advised Noteholders that the Debtors were not seeking substantive consolidation of the estates.

Tab 6

COURT FILE NO.: 04-CL-5306
DATE: 20040322

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 IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: FARLEY J.

COUNSEL: *Michael E. Barrack, James D. Gage* and *Geoff R. Hall*, for the Applicants

David Jacobs and *Michael McCreary*, for Locals 1005, 5328 and 8782 of the United Steel Workers of America

Ken Rosenberg, Lily Harmer and *Rob Centa*, for United Steelworkers of America

Bob Thornton and *Kyla Mahar*, for Ernst & Young Inc., Monitor of the Applicants

Kevin J. Zych, for the Informal Committee of Stelco Bondholders

David R. Byers, for CIT

Kevin McElcheran, for GE

Murray Gold and *Andrew Hatnay*, for Retired Salaried Beneficiaries

Lewis Gottheil, for CAW Canada and its Local 523

Virginie Gauthier, for Fleet

H. Whiteley, for CIBC

Gail Rubenstein, for FSCO

Kenneth D. Kraft, for EDS Canada Inc.

HEARD: March 5, 2004

ENDORSEMENT

[1] As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

[2] Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

> 12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

[3] For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such a as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed – addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

[4] The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

[5] The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

[6] If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I.C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

[7] S. 2 of the CCAA defines "debtor company" as:

> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or
>
> (d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

[8] Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

[9] This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Re Kenwood Hills Development Inc.* (1995), 30 C.B.R. (3d) 44 (Ont. Gen. Div.) where at p. 45 I observed:

> The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

[10] Anderson J. in *Re MGM Electric Co. Ltd.* (1982), 42 C.B.R. (N.S.) 29 (Ont. S.C.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This

common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *Re TDM Software Systems Inc.* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

[11] The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring – which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

[12] It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

[13] There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Re Inducon Development Corp.* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

> Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

[14] It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Re Cumberland Trading Inc.* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div.), I went on to expand on this at p. 228:

> I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if “success” may have been available with earlier spade work.

[15] I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101; 1 O.R. (3d) 280 (C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J.) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

[16] In *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) I observed at p. 32:

> One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

[17] In *Re Anvil Range Mining Corp.* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

> The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

[18] Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

[19] I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least $5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of $5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

[20] Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Pepplar Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

> The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

[21] The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

> In interpreting "debtor company", reference must be had to the definition of “insolvent person” in s. 2(1) of the *Bankruptcy and Insolvency Act* …
>
> To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies’ Creditors Arrangement Act (Canada),* 16 C.B.R. 1 [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

[22] It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

s. 2(1)…

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

[23] Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of “debtor company” as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Limited Partnership* v. *Rex*, [2002] 2 S.C.R. 559 at p. 580:

> Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[24] I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy – and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt’s assets (not likely involving the business carried on – and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist,

albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

[25] It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on “rescues” as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

[26] Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union’s affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

[27] On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

[28] The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Re Optical Recording Laboratories Inc.* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Re Viteway Natural Foods Ltd.* (1986), 63 C.B.R. (N.S.) 157 (B.C.S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

[29] In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx,* [2000] 1 S.C.R. 61 at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *Re King Petroleum Ltd.* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

> With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past.* I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

[30] *King* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

[31] Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

> The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:
>
> (a) identification of the debtor's stakeholders and their interests;
>
> (b) arranging for a process of meaningful communication;
>
> (c) dealing with immediate relationship issues arising from a CCAA filing;
>
> (d) sharing information about the issues giving rise to the debtor's need to restructure;

(e) developing restructuring alternatives; and

(f) building a consensus around a plan of restructuring.

[32] I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to prefiling liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

> With respect to the Business Plan, the average spot market sales price per ton was $514, and the average contract business sales price per ton was $599. The Forecast reflects an average spot market sales price per ton of $575, and average contract business sales price per ton of $611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

[33] I note that $145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of $350 million had increased from $241 million on November 30, 2003 to $293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of $75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Re Pacific Mobile Corporation; Robitaille v. Les Industries l'Islet Inc. and Banque Canadienne Nationale* (1979), 32 C.B.R. (N.S.) 209 (Que. S.C.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of $80 million now to a projected loss of $192 million and cash has gone from a positive $209 million to a negative $114 million.

[34] Locker made the observation at paragraph 8 of his affidavit that:

> 8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

> 36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.
>
> 37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

[35] But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

[36] I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil*, *supra* at p. 162.

[37] The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Gen. Div.) where I stated as to the MacGirr affidavit:

> The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing $74 million investment. In stating his opinion MacGirr defined solvency as:

> (a) the ability to meet liabilities as they fall due; and
>
> (b) that assets exceed liabilities.
>
> On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

[38] As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run…eventually*" is not a finite time in the foreseeable future.

[39] I have not given any benefit to the $313 - $363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

[40] It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the say and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

[41] What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Reglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Gen. Div.) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may

be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (S.C.J.) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (C.A.). At paragraph 33, I observed in closing:

> 33…They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

[42] The Court of Appeal stated at paragraphs 24-25 as follows:

> 24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.
>
> 25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

[43] Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

> to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

[44] In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Div Ct.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

[45] The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I. M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (C.A.) where it is stated at paragraph 11:

> "11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and is text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385.)

[46] In *Barsi v. Farcas*, [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stanton* (1883), 11 Q.B.D. 518 that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

[47] Saunders J. noted in *633746 Ont. Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

[48] There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

[49] In *King, supra* at p. 81 Steele J. observed:

> To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

[50] To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

[51] S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

> S. 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

[52] *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

> The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

[53] In *Garden v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *In re A Debtor (No. 64 of 1992)*, [1993] 1 W.L.R. 264 (Ch. D) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Re Leo Gagnier* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store – in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

[54] It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

[55] I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

[56] All liabilities, contingent or unliquidated would have to be taken into account. See *King, supra* p. 81; *Salvati, supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Proviseuers Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S.S.C.) at p. 29; *Re Challmie* (1976), 22 C.B.R. (N.S.) 78 (B.C.S.C.) at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had guaranteed. It is interesting to note what was stated in *Maybank*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

> Mr. MacAdam argues also that the $4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

[57] With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital, supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

> It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.
>
> There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:
>
> > A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.
>
> Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due"

> for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re* 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

[58] There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

[59] It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway* below at pp. 163-4 – at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical supra* at pp. 756-7; *Re Viteway Natural Foods Ltd.* (1986), 63 C.B.R. (N.S.) 157 (B.C.S.C.) at pp. 164-63-4; *Re Consolidated Seed Exports Ltd.* (1986), 62 C.B.R. (N.S.) 156 (B.C.S.C.) at p. 163. In *Consolidated Seed,* Spencer J. at pp. 162-3 stated:

> In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its

> obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. …
>
> The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

[60] The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

[61] I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

> 70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged – the "Possible Reductions in Capital Assets."
>
> 71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over $600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

[62] Stelco went on at paragraphs 74-5 of its factum to submit:

> 74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.

> 75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

[63] Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

[64] As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as $804.2 million. From that, he deducted the loss for December 2003 – January 2004 of $17 million to arrive at an equity position of $787.2 million as at the date of filing.

[65] From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) $294 million of future income tax recourse which would need taxable income in the future to realize; (b) $57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the captialized deferred debt issue expense of $3.2 million which is being written off over time and therefore, truly is a "nothing". This totals $354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be $433 million.

[66] On a windup basis, there would be a pension deficiency of $1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of $656 million. If the $1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of $198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as $909.3 million but only $684 million has been accrued and booked on the financial statements so that there has to be an increased provision of $225.3 million. These off balance sheet adjustments total $1080 million.

[67] Taking that last adjustment into account would result in a *negative* equity of ($433 million minus $1080 million) or *negative* $647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E, I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

[68] In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible

assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the $773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that $773 million. Lastly, the Union indicated that there should be a $155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

[69] In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

[70] I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace – and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

J.M. Farley

Released: March 22, 20004

Tab 7

In the Matter of MtGox Co., Ltd.

[Indexed as: MtGox Co., Ltd. (Re)]

2014 ONSC 5811

Superior Court of Justice, Newbould J. October 6, 2014

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.]

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.

[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

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

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.

(a) *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

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

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

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.

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

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.

Stuart Budd & Sons Limited et al. v. IFS Vehicle Distributors ULC et al.

[Indexed as: Stuart Budd & Sons Ltd. v. IFS Vehicle Distributors ULC]

2014 ONCA 546

Court of Appeal for Ontario, Epstein J.A. (in Chambers)
July 14, 2014

Civil procedure — Appeal — Stay pending appeal — Appellants bringing motion challenging jurisdiction of Ontario court to hear action for damages under Arthur Wishart Act (Franchise Disclosure) and other remedies — Motion judge dismissing motion as abuse of process — Order stayed pending appeal — Appeal raising serious issues to be tried — Possibility of being found to have attorned to jurisdiction of Ontario court by taking further steps creating some risk of irreparable harm to appellants — Balance of convenience favouring appellants.

The plaintiffs brought an action for various forms of relief, including damages under the *Arthur Wishart Act (Franchise Disclosure), 2000*. The defendants brought a motion challenging the jurisdiction of the Ontario court to hear the action. The motion judge dismissed the motion as an abuse of process. The defendants brought a motion to stay the order pending the final disposition of their appeal from that order.

Held, the motion should be granted.

The proposed appeal raised several serious issues: the proper test to determine jurisdiction in claims involving franchise legislation with regard to the intersection of jurisdictional issues and joinder; the consequences of the fact that in his determination of the jurisdictional issue, the motion judge referred to only one of the defendants; and the consequences of certain comments by the motion judge that might suggest predetermination of the issues. The possibility of being found to have attorned to the Ontario jurisdiction by taking any further steps in the action created some risk of irreparable harm to the defendants. The balance of convenience favoured the defendants.

Cases referred to

BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust, [2011] O.J. No. 4279, 283 O.A.C. 321, 2011 ONCA 620; *Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674, [1997] O.J. No. 2081, 100 O.A.C. 221, 71

Tab 8

Ontario Supreme Court
Microbiz Corp. v. Classic Software Systems Inc.
Date: 1996-10-09

Microbiz Corp. (Plaintiff)

and

Classic Software Systems Inc. (Defendant)

Ontario Court of Justice (General Division) Lederman J.

Judgment – October 9, 1996.

Peter J. Lukasiewicz for Plaintiff Microbiz Corp.

(Doc. Toronto 95-CU-93753)

October 9, 1996. LEDERMAN J.: –

October 1, 1996

[1] Mr. Peter Lukasiewicz for MicroBiz, Ms. Julia Scatz for Haggerty, Ms. I. Sutherland (not a lawyer) for Classic, with leave of the court. Ms. Sutherland served yesterday with volumes of documents requested adjournment of this action and 95-CU-102723. On consent, both actions adjourned to October 9, 1996, a date set by the Registrar of Motions.

[2] Costs of today reserved to the Judge who disposes of these motions.

October 9, 1996

[3] MicroBiz is a New Jersey corporation with its headquarters in that State. It carries on business in the U.S. It carries on business in Ontario only through its distributor, Classic Software. MicroBiz has no assets in Ontario. When it filed for bankruptcy in the U.S. on March 12, 1996 pursuant to the *U.S. Bankruptcy Code,* an automatic stay of all proceedings against it went into effect (as is the case under Canadian bankruptcy laws). MicroBiz's plan of reorganization was confirmed by judgment of Justice Winfield of the U.S. Bankruptcy Court on September 3, 1996. The plan of reorganization provides for distribution to all creditors whose claims are accepted, after adjudication if necessary, of 17.5% of their claims. There is no doubt that under the principles laid down in the *Morguard Investments* case [*Morguard*

Investments Ltd. v. De Savoye (1990), 46 C.P.C. (2d) 1 (S.C.C.)] and *United States v. Ivey* [(1996), 27 B.L.R. (2d) 243 (Ont. C.A.)], that judgment of the U.S. Court should be recognized in Canada as there is a real and substantial connection between the U.S. Court's judgment and the subject matter of the proceeding. More importantly, both Classic Software and Haggerty have recognized the judgment and in fact have filed Proofs of Claim in the U.S. proceeding to take advantage of the mechanism provided therein for adjudication of their claims and recovery to the extent of 17.5% of their proven claims. To participate in the U.S. proceedings is beneficial in that it allows Classic and Haggerty to prove their claims and obtain collection in one proceeding rather than obtain judgment on their claims in Ontario and in a separate proceeding in New Jersey seek to effect recovery against the estate of MicroBiz. By filing their Proofs of Claim, Classic and Haggerty have thereby altorned to the jurisdiction of the U.S. Court in New Jersey.

[4] Multiplicity of proceedings in two different jurisdictions should be avoided.

[5] Accordingly, there must be an order staying both Haggerty action and the Classic action in Ontario until further order of the court.

[6] Costs of the motions are fixed at $750.00 payable by Classic and Haggerty forthwith.

Actions stayed.

Tab 9

COURT FILE NO.: 09-CL-8456-00CL
DATE: 20091112

ONTARIO

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

B E T W E E N:	)	
	)	
JAMES ROBERT TUCKER, RICHARD HEIS, AND ALLAN WATSON GRAHAM OF KPMG LLP AS JOINT ADMINISTRATORS	)	Orestes Pasparakis and Virginie Gauthier, for the Applicants
Applicants	)	
- and -	)	
AERO INVENTORY (UK) LIMITED and AERO INVENTORY PLC	)	
Respondents	)	
	)	**HEARD:** November 11, 2009

Newbould J.

[1] This application was made on November 11, 2009 under s. 47(1)[1] of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") for an order recognizing the administration proceedings (the "foreign proceedings") commenced in respect of each of Aero

[1] This section and the other sections dealing with cross-border insolvencies in part IV of the CCAA came into effect on September 18, 2009

Inventory (UK) Limited and Aero Inventory plc (the "foreign debtors") in the High Court of Justice of England and Wales as a "foreign main proceeding" for the purposes of section 47 of the CCAA, and for other consequential relief. At the conclusion of the hearing I made the order sought for reasons to follow. These are my reasons.

Factual background

[2] On November 11, 2009, the applicants were appointed by the High Court of Justice of England and Wales (Chancery Division, Companies Court) as administrators (the "Administrators") over Aero Inventory (UK) Limited ("Aero Inventory (UK)") and Aero Inventory plc ("Aero plc").

[3] Aero Inventory (UK) provides procurement and inventory management services in the aerospace industry. These services are provided with regard to consumable and expendable parts required for aerospace maintenance and related activities, such as nuts, bolts and gaskets. Aero plc is the corporate parent of Aero Inventory (UK) and has been listed on the Alternative Investment Market (AIM) of the London Stock Exchange since 2000.

[4] The foreign debtors are both located in New Barnet, Hertfordshire, United Kingdom. Their business operations are managed and administered in the United Kingdom. Aero Inventory (UK) has customers and/or supplies products from the following countries and regions: England, The Republic of Ireland, Australia, Bahrain, El Salvador, Canada, China, Hong Kong, Indonesia, Japan, Switzerland and the United States.

[5] Aero Inventory (UK) has conducted business in Canada since 2007. It provides inventory and procurement services to two Canadian customers, Air Canada and Aveos Fleet Performance Inc. ("Aveos").

[6] While it has a registered address in Quebec, Aero Inventory (UK) has no physical presence in Canada. The property at this address is in fact leased by the foreign debtors' Canadian affiliate, Aero Inventory (Canada) Inc. ("Aero (Canada)"). The foreign debtors have

no premises and no employees in Canada. The inventory of Aero Inventory (UK) is physically located at the premises of its customer.

[7] Aero (Canada) provides services in Canada to the foreign debtors pursuant to a management arrangement. Aero (Canada) has employees but no customers or inventory and no source of revenues other than through its management arrangement.

[8] In November 2007, Aero Inventory (UK) signed a 10-year sole supplier agreement for consumable aircraft parts with ACTS Technical Support & Services Inc., which was later renamed Aveos. This agreement covers the procurement and management of all parts required by Aveos for its operations in Canada and, through its subsidiary Aeroman, in El Salvador.

[9] The entire inventory owned by the foreign debtors in Canada, whether bound for Air Canada or for Aveos, is located at various warehouses across Canada operated by Aveos These warehouses are located in Ontario, Quebec, Manitoba and British Columbia. This inventory is not physically segregated from inventory owned by Aveos and is not within the foreign debtors' control. Further, inventory bound for Air Canada is not segregated from inventory bound for Aveos.

[10] According to the Aveos accounting systems, approximately Cdn. $130 million in inventory owned by the foreign debtors is currently held at Aveos sites across Canada. This represents a supply of over nine months worth of inventory based upon traditional turnover rates.

[11] As stated, on November 11, 2009, James Robert Tucker, Richard Heis and Allan Watson Graham of KPMG LLP were appointed Administrators of the foreign debtors by orders of the High Court of England and Wales. These orders were made pursuant to the *Insolvency Act 1986*. Pursuant to these orders, the Administrators are responsible for managing the affairs, business and property of the foreign debtors. They are required to perform their functions with the objective of: (a) rescuing the foreign debtors as a going concern or in the alternative, winding up or realizing upon the property of the foreign debtors in order to make a distribution to one or more secured or preferential creditors.

Recognition of the UK Proceeding

(a) Jurisdiction

[12] Pursuant to section 9(1) of the CCAA, where a company does not have a place of business in Canada it may file an application in any province in which it has assets. Neither of the foreign debtors appears to have a place of business in Canada. Given that the foreign debtors have assets located within Ontario, this Court has jurisdiction to deal with this application.

(b) Recognition

[13] Under s. 47 of the CCAA, a court shall make an order recognizing a foreign proceeding if it is satisfied that the application for such recognition "relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding." Section 47(1) states:

> 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. (Underlining added)

[14] Section 45(1) of the CCAA defines "foreign proceeding" as:

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

[15] As the Administrators were appointed by the English High Court pursuant to the *Insolvency Act 1986*, there can be no doubt that the foreign proceeding is a "foreign proceeding" within the meaning of s. 45(1) of the CCAA.

[16] It is to be noted that under s. 47(1), the order sought is mandatory if the conditions in that section are met. This is in keeping with the purpose of the new cross-border provisions of the CCAA as set out in s. 44 to promote cooperation with foreign jurisdictions in cases of cross-border insolvencies. This statutory recognition of comity follows the principles of international comity in insolvency situations recognized in such cases as *Olympia & York Developments Ltd. v. Royal Trust Co.*(1993), 20 C.B.R. (3d) 165, *Re United Air Lines Inc.* (2003), 43 CBR (4th) 284 and *Re Lear Canada* (2009), 55 C.BR. (5th) 57.

[17] In this case as the conditions of s. 47(1) have been met, an order recognizing the foreign proceedings shall go. It is to be noted that Lloyds TSB Commercial Finance Limited, which holds a debenture and is owed approximately $500 million, supports the appointment of the Administrators and this application in Canada. The only other party with a registered security interest in Canada is Air Canada, but nothing is owed by the foreign debtors to it. Rather, there is a receivable of approximately $9.6 million owed by Air Canada to Aero Inventory UK.

[18] Under s. 47(2) of the CCAA, a court making an order recognizing a foreign proceeding must specify whether such proceeding is the "foreign main proceeding" or the "foreign non-main proceeding". Under s. 45(1), a "foreign main proceeding" is a “foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests.” Section 45(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.

[19] Aero Inventory UK has a registered office in Quebec. Thus by virtue of section 45(2), in the absence of proof to the contrary, Quebec is deemed to be the centre of its main interest. However, the foreign debtors have business interests globally and their head office is in the United Kingdom from where they are managed and administered. Aero plc is publicly listed on the AIM of the London Stock Exchange. I am satisfied that this evidence is sufficient to conclude that the main interests of the foreign debtors are centred in the United Kingdom and thus the foreign proceeding should be specified as the "foreign main proceeding".

Other relief sought

(a) Appointment of an Information Officer

[20] The applicants have requested an order appointing KPMG Inc. as an information officer in respect of these proceedings. While the CCAA does not expressly provide for the appointment of an information officer, such an officer is sometimes appointed under the Court's general powers to make appropriate orders in the circumstances. In the case of an application such as this in connection with a cross-border insolvency, the Court is expressly given the power to make such order as it considers appropriate in section 49(1), so long as the order is consistent with any other order that may be made under the Act, and in section 50 which provides:

> 50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

[21] The order sought would authorize, but not require, the information officer to provide such assistance to the Foreign Representative as might be required, and authorize the information officer to respond to reasonable requests for information from stakeholders. The information officer would be required to report to the Court at least once every three months regarding the proceedings and other information the information officer believes material.

[22] In the circumstances of this case, in which the foreign debtors have no place of business or employees in Canada, it is particularly appropriate to have an information officer appointed who can deal with matters as they arise in Canada and who can also provide information and advice to the Foreign Representative as needed. The order sought shall go.

(b) Stay of Set-Off Rights

[23] In this case, because of the fact that the foreign debtors do not have physical control of their inventory in Canada as the inventory is in warehouses operated by Aveos, a concern has been raised that set-off could adversely impact the foreign proceeding and impact the recoveries available to creditors. Although Aveos is a purchaser from Aero Inventory (UK), it apparently is owed approximately $1 million and its contract with Aero Inventory (UK) contains a liquidated damage clause.

[24] As stated, a court on an application under the CCAA in cross-border insolvencies has the power under sections 49(1) and 50 to make an order considered appropriate in the circumstances.

[25] The provisions regarding set-off in section 21 must, however, be considered in the request for relief regarding a stay of set-off. Section 21 provides:

> 21. The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

[26] The applicants submit that while the provisions of section 21 of the CCAA may prevent a court from permanently barring all claims of set-off, it does not prevent a court from making an order in appropriate circumstances temporarily staying the determination and enforcement of a person's rights of set-off pending leave of the court. They rely on *Re Air Canada* (2003), 45 C.B.R. (4th) 13. In that case, Farley J. reviewed in some detail the law of set-off and struck from the Initial Order a provision that no person could set off any obligations of Air Canada to such person which arose prior to the Initial Order. Farley J. held that while the Initial Order should recognize the rights of set-off permitted under section 18.1 of the CCAA (now section 21), such rights could be temporarily stayed pending further order of the Court. In that case there was no opposition to such a temporal stay. He stated:

> With respect to the question of what I have described as a temporal stay, there does not appear to be any opposition by the Moving Creditors to the proposition that whatever their rights of set-off in substance are determined to be, that such determination and enforcement of such determined rights should await until a convenient time when AC has stabilized (or I suppose, alternatively cratered). It would seem to me that the likely time for this would be in conjunction with the formation of a reorganization plan of arrangement and compromise. However I leave that question open pending future submissions and further order of the court emanating as a result thereof.

[27] I accept that a court may temporarily stay the right of set-off protected in section 21 of the CCAA. How temporary that stay should be will obviously depend on the circumstances existing at the relevant time.

[28] In his witness statement provided to the High Court in England, Mr. Trupp, a director of the foreign debtors, discussed concerns relating to the fact that the inventory is out of their control. He stated:

> 19. The Companies are, in their current financial position, extremely distressed with the threat of creditor enforcement action in key countries.
>
> and
>
> 29. This matter is now urgent and there are a number of reasons for this urgency, including:
>
> (a) the supply of airline, parts is time critical and must continue uninterrupted;
>
> (c) there is a risk that if the stock is not secured quickly it will disappear or become very difficult to access, particularly as it is not in the physical control of the Companies. There is therefore a risk of significant loss to the secured creditors and creditors generally if there is any delay in getting the administration orders made. Customers have direct control of the stock and could seize it if concerned about the solvency of the Companies;

[29] The applicants submit that no party is unreasonably prejudiced by the proposed set-off relief which is intended to operate only to prevent fresh inventory of the foreign debtors from being appropriated by third parties without an ensuing payment. The proposed relief does not affect the position of the parties on the date of the recognition order but ensures that no further prejudice is caused to the foreign debtors' estate. If the foreign debtors' inventory were in their possession rather than in the possession of third parties, they could control and minimize such potential prejudice by obtaining assurances of payment ahead of providing new supplies.

[30] The applicants are concerned that as Aveos has physical control of the foreign debtors' inventory, any refusal to supply their inventory without assurances of payment might lead to the grounding of several airplanes, thereby causing prejudice to the foreign debtors' customers. They submit that in the circumstances, the better option to ensure continued supply to customers and payment for fresh inventory is by the granting of a temporal stay of any right of set-off

[31] It seems to me that at this stage the relief sought should be granted. The amount of inventory in Canada, $130 million, is substantial. The consolidated interim financial statements of the foreign debtors as at December 30, 2008 indicate that there are total inventories of U.S. $751 million, although Mr. Trupp believes these are inaccurate and may be overstated. It is apparent that the Canadian inventory comprises a substantial portion of the total inventory. That inventory should be properly protected to enable the foreign debtors to attempt to continue as a going concern.

[32] Taking into account the purposes of part IV if the CCAA relating to cross-border insolvencies, as set out in section 44, including co-operation between the courts of the jurisdictions involved and the maximization of the value of the debtor company's property, it is appropriate in this circumstances of this case to stay set-off rights pending further order of this Court. How long that stay should be is a matter of conjecture at this stage. The proceedings have just commenced and what the outcome will be is not possible to know. Thus the length of any stay of set-of rights is an unknown.

[33] The order contains a 4 days notice come-back clause and any person concerned with the order thus has the ability to make application to vary or rescind the order. .

[34] The application is granted in accordance with these reasons.

Newbould J.

Released: November 12, 2009

COURT FILE NO.: 09-CL-8456-00CL
DATE: 20091112

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JAMES ROBERT TUCKER, RICHARD HEIS, AND ALLAN WATSON GRAHAM OF KPMG LLP AS JOINT ADMINISTRATORS

Applicants

- and -

AERO INVENTORY (UK) LIMITED and AERO INVENTORY PLC

Respondents

Released: November 12, 2009

Tab 10

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	§	
	§	**CASE NO. 15-12650**
DAIICHI CHUO KISEN KAISHA,	§	
	§	**Chapter 15**
Debtor in a foreign proceeding.	§	

ORDER GRANTING RECOGNITION AND RELATED RELIEF

THIS MATTER was brought before the Court by Masakazu Yakushiji, in his capacity as foreign representative (the "Petitioner")[1] of Daiichi Chuo Kisen Kaisha ("DCKK"), a debtor in a civil rehabilitation proceeding under Japanese law (the "Japan Proceeding"), currently pending as Case No. Heisei 27 (2015) (Sai) 53 before the 20th Civil Division of the Tokyo District Court, Japan (the "Tokyo Court").

The Petitioner filed a Verified Petition (the "Petition") for Recognition as Foreign Main Proceeding Pursuant to Sections 1515 and 1517 of the United States Code (the "Bankruptcy Code") and Related Relief commencing this proceeding (the "Chapter 15 Case") under chapter 15 of title 11 of the Bankruptcy Code, seeking entry of an order recognizing the Japan Proceeding as a "foreign main proceeding" under section 1517 of the Bankruptcy Code.

Due and timely notice of the filing of the Petition and the hearing on the Petition was given by the Petitioner in accordance with this Court's order dated September 29, 2015, approving the form of notice and manner of service thereof, which service is deemed adequate for all purposes such that no other or further notice thereof need be given. The Court considered and reviewed the Petition and the other pleadings and exhibits submitted by the Petitioner in support thereof, and,

[1] Capitalized terms not otherwise defined herein shall have the meanings set forth in the *Verified Petition for Recognition as Foreign Main Proceeding Pursuant to Sections 1515 and 1517 of the United States Code and Related Relief* (the "Petition") [Dkt. No. 2].

given that no responses or objections were filed, determined that a hearing on the matter was unnecessary.

After due deliberation and sufficient cause appearing therefore, the Court finds and concludes as follows:

(A) This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and section 1501 of the Bankruptcy Code;

(B) This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P);

(C) Venue is proper in this District pursuant to 28 U.S.C. §§ 1410(1) and (3);

(D) The Petitioner is a "person" within the meaning of section 101(41) of the Bankruptcy Code and is the duly appointed "foreign representative" of DCKK within the meaning of section 101(24) of the Bankruptcy Code;

(E) The Chapter 15 Case was properly commenced pursuant to section 1504 and 1515 of the Bankruptcy Code;

(F) The Petition meets the requirements of section 1515 of the Bankruptcy Code;

(G) The Japan Proceeding is a "foreign proceeding" within the meaning of section 101(23) of the Bankruptcy Code;

(H) The Japan Proceeding is entitled to recognition by this Court pursuant to section 1517 of the Bankruptcy Code;

(I) The Japan Proceeding is pending in Tokyo, Japan, the location of the center of main interests for the Debtor, and as such constitutes a foreign main proceeding pursuant to section 1502(4) of the Bankruptcy Code and is entitled to recognition as a foreign main proceeding pursuant to section 1517(b)(1) of the Bankruptcy Code;

(J) The Petitioner, as a foreign representative, is entitled to all the relief afforded pursuant to section 1520 of the Bankruptcy Code;

(K) The relief granted herein is necessary and appropriate, in the interest of the public and international comity, consistent with the public policy of the United States, warranted pursuant to sections 1507, 1509, and 1521 of the Bankruptcy Code, and will not cause any hardship to any parties in interest that is not outweighed by the benefits of the relief granted.

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. The Petition is granted. The Japan Proceeding is recognized as a foreign main proceeding pursuant to section 1517(b)(1) of the Bankruptcy Code.

2. All provisions of section 1520 of the Bankruptcy Code apply as of right in this Chapter 15 Case throughout the duration of this Chapter 15 Case or until otherwise ordered by this Court, including, without limitation, application of section 362 of the Bankruptcy Code, which, among other things, stays and enjoys the taking or continuing of any act to obtain possession of, or exercise control over, any asset or property owned, chartered, leased, managed, or operated by the Debtor which such property is located in the territorial jurisdiction of the United States.

3. The Petitioner is entitled to certain further relief as authorized by section 1521 of the Bankruptcy Code, and accordingly the administration or realization of all or part of DCKK's assets within the territorial jurisdiction of the United States is entrusted to the Petitioner. This paragraph is without prejudice to the right of DCKK to seek additional relief pursuant to section 1521.

4. The Petition shall be available upon request at the offices of Norton Rose Fulbright US, LLP, 666 5th Avenue, New York, New York 10103-3198 to the attention of Melanie Kotler, (212) 318-3020, melanie.kotler@nortonrosefulbright.com.

5. Notwithstanding Bankruptcy Rule 7062, made applicable to this Chapter 15 Case by Bankruptcy Rule 1018, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry, and upon its entry, this Order shall become final and appealable.

Dated: New York, New York
November 12, 2015

s/Michael E. Wiles
UNITED STATES BANKRUPTCY JUDGE

Tab 11

CITATION: Caesars Entertainment Operating Company, Inc. (Re), 2015 ONSC 712
COURT FILE NO.: CV-15-10837
DATE: 2015-01-30

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF THE CAESARS ENTERTAINMENT OPERATING COMPANY, INC. AND THE DEBTORS LISTED ON SCHEDULE "A" (COLLECTIVELY, THE "CHAPTER 11 DEBTORS")

APPLICATION OF CAESARS ENTERTAINMENT WINDSOR LIMITED UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *Katherine McEachern* and *Matthew Kanter*, for Caesars Entertainment Operating Company, Inc. et al.

Robin B. Schwill, for the Ontario Lottery and Gaming Corporation

HEARD and ENDORSED: January 19, 2015
REASONS: January 30, 2015

ENDORSEMENT

INTRODUCTION AND FACTS

[1] On January 15, 2015, Caesars Entertainment Operating Company Inc. ("CEOC") and certain of its subsidiaries (collectively, the "Chapter 11 Debtors") commenced voluntary reorganization proceedings (the "Chapter 11 Proceeding") in the United States Bankruptcy Court for the Northern District of Illinois (the "Illinois Court") by each filing a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 – 1532 (the "Bankruptcy Code").

[2] Caesars Windsor Entertainment Limited ("CEWL" or the "Applicant"), an Ontario corporation, is an indirect subsidiary of CEOC. CEWL is a Chapter 11 Debtor.

[3] Pursuant to a written resolution (the "Foreign Representation Resolution") of its sole shareholder, Caesars World, Inc. ("Caesars World") CEWL has been authorized to act as the foreign representative of all of the Chapter 11 Debtors for the purposes of recognizing the Chapter 11 Proceeding in Canada, and has been authorized to commence this Application for

recognition of the Chapter 11 Proceeding as a foreign proceeding. CEOC has confirmed its authorization of CEWL to act as foreign representative on behalf of the Chapter 11 Debtors.

[4] CEWL manages Caesars Windsor Hotel and Casino in Windsor, Ontario (the "Windsor Casino"), for and on behalf of the Ontario Lottery and Gaming Corporation ("OLG").

[5] In order to (a) ensure the protection of the Chapter 11 Debtors' Canadian assets and (b) enable the Chapter 11 Debtors, including CEWL, to operate their businesses in the ordinary course during the Chapter 11 Proceeding, CEWL seeks the following orders pursuant to sections 44 and 49 of the *Companies' Creditors Arrangement Act*, R.S.C., 1985 c. C-36 (the "CCAA"):

a. an "Initial Recognition Order," *inter alia*: (i) declaring that CEWL is a "foreign representative" pursuant to section 45 of the CCAA; (ii) declaring that the Chapter 11 Proceeding is recognized as a "foreign main proceeding" under the CCAA; and (iii) granting a stay of proceedings against the Chapter 11 Debtors; and

b. a "Supplemental Order" pursuant to section 49 of the CCAA, *inter alia*: (i) recognizing in Canada and enforcing certain "first day" orders of the Illinois Court made in the Chapter 11 Proceeding (the "First Day Orders"); (ii) staying any claims, rights, liens or proceedings against or in respect of the Chapter 11 Debtors, the business and property of the Chapter 11 Debtors and the directors and officers of the Chapter 11 Debtors; and (iii) restraining the right of any person or entity to, among other things, discontinue or terminate any supply of products or services to the Chapter 11 Debtors.

[6] CEWL submits that the requested orders are necessary and appropriate in the circumstances of this case.

[7] On January 12, 2015, a competing involuntary petition in respect of CEOC was filed in the United States Bankruptcy Court for the District of Delaware (the "Delaware Court"). By order of the Delaware Court, the Chapter 11 Proceeding in the Illinois Court has been stayed pending a determination of the proper venue for the Chapter 11 case of CEOC and its subsidiaries (the "Delaware Stay Order"). However, as more fully detailed below, the Delaware Stay Order has permitted the Illinois Court to enter the First Day Orders. CEWL seeks recognition of these First Day Orders in order to ensure stability and the status quo pending the outcome of the venue dispute, and will return to this Court to advise of the outcome of that dispute and to seek any further orders as may be advisable or appropriate in the circumstances.

[8] The Chapter 11 Debtors are part of a geographically diversified casino-entertainment group of companies (collectively, "Caesars") headed by Caesars Entertainment Corporation ("CEC"), a U.S. publicly traded company that owns, operates or manages 50 casinos in five countries in three continents, with properties in the United States, Canada, the United Kingdom, South Africa, and Egypt. CEC is not a Chapter 11 Debtor.

[9] CEC is the majority shareholder of CEOC, a Chapter 11 Debtor. The remaining Chapter 11 Debtors, including CEWL, are direct and indirect subsidiaries of CEOC. The Chapter 11 Debtors are the primary operating units of the Caesars gaming enterprise.

[10] On January 12, 2015, certain petitioning creditors filed an involuntary petition against CEOC under Chapter 11 of the Bankruptcy Code (but not as against the other Chapter 11 Debtors, including CEWL). That involuntary petition has not been resolved.

[11] Meanwhile, the Chapter 11 Debtors commenced their own voluntary proceedings in the Illinois Court on January 15, 2015. Hearings were conducted in both the Delaware Court and the Illinois Court on January 15, 2015, which have culminated in the entering of the Delaware Stay Order, and the First Day Orders.

[12] Notwithstanding the stay, the Delaware Court has permitted CEOC to obtain the First Day Orders from the Illinois Court, which are currently in effect pending litigation over the appropriate venue for the Chapter 11 case of CEOC and its subsidiaries. As such, while any further steps in the Chapter 11 Proceeding in the Illinois Court beyond the First Day Orders are currently stayed, the Applicant submits it is necessary to obtain recognition of the First Day Orders in Canada pending further developments in the Delaware Court. CEWL will advise the Court of any further developments in respect of the venue litigation, and will seek such further orders as may be advisable in the circumstances.

[13] CEWL is the only one of the 173 Chapter 11 Debtors that is not incorporated in the United States. It is a wholly-owned indirect subsidiary of CEOC.

[14] The almost exclusive function of CEWL is to manage the Windsor Casino pursuant to an operating agreement dated as of December 14, 2006 (the "Operating Agreement") between Caesars Entertainment Windsor Holding, Inc. (now CEWL) and the Ontario Lottery and Gaming Corporation ("OLG").

[15] CEWL supplies the management services set out in the Operating Agreement to OLG, in consideration for an operating fee. CEWL does not have an ownership interest in the Windsor Casino.

[16] CEWL operates the Windsor Casino under Caesars' trademarks and branding. The trademarks have been licenced to OLG by Caesars World, a U.S.-based Chapter 11 Debtor and, in turn, sublicensed by OLG.

[17] CEWL's primary assets in Canada consist of (a) its rights under the Operating Agreement and (b) cash on deposit from time to time in its corporate bank accounts.

[18] Windsor Casino Limited ("WCL") is a wholly-owned subsidiary of CEWL. WCL employs the approximately 2,800 employees who work at the Windsor Casino. Certain of the WCL employees are unionized members of Unifor Local 444 (the "Union"). Neither CEWL nor WCL administers a defined benefit pension plan although WCL does administer a defined

contribution pension plan. WCL is not a Chapter 11 Debtor and as such is not a subject of this Application.

[19] CEWL intends to operate the Windsor Casino pursuant to the Operating Agreement in the normal course through the Chapter 11 Proceeding. It is not currently contemplated that the Chapter 11 Debtors will restructure any of the business or operations of CEWL or WCL, or compromise any of their obligations.

[20] The Record establishes that the Chapter 11 Debtors, including CEWL, are managed from the United States as an integrated group from a corporate, strategic, financial, and management perspective. In particular:

a. pursuant the USD, CEWL's corporate decision-making (including with respect to the Operating Agreement and the Chapter 11 Proceeding) is done by its sole shareholder, Caesars World, a Florida corporation;

b. the Chief Executive Officer and President of CEWL (who is resident in Windsor, Ontario), reports to the Chairman of the Board of CEWL (the "Chairman"). The Chairman, who is also an officer of CEOC, resides in the United States and works from the Caesars head office in Las Vegas, Nevada;

c. certain centralized services critical to CEWL's functioning, including the administration of the Caesars brand and intellectual property rights, services related to online hotel booking, and administration of the loyalty "Total Rewards" program for customers are administered and handled from the United States;

d. the majority of the strategic marketing and communications decisions regarding the brand and loyalty programs are made, and related functions taken, on behalf of all Chapter 11 Debtors, including CEWL, in the United States;

e. management fees earned by CEWL under the Operating Agreement may be paid by way of dividend from time to time to CEWL's U.S. corporate partners; and

f. strategic and directional decisions for CEWL are ultimately made in the United States.

[21] CEWL is party to a unanimous shareholder declaration (the "USD") that grants CEWL's sole shareholder, Caesar's World, all the rights, powers and liabilities of the directors of CEWL. The Foreign Representation Resolution authorized CEWL to file as a Chapter 11 Debtor and to act as the foreign representative of all of the Chapter 11 Debtors for the purposes of recognizing the Chapter 11 Proceeding in Canada. By letter dated January 16, 2015, CEOC confirmed CEWL's authorization to act as foreign representative for the Chapter 11 Debtors.

ISSUES

[22] The issues on this Application are:

a. Should this Court recognize the Chapter 11 Proceeding as a foreign main proceeding pursuant to sections 46 through 48 of the CCAA and grant the Initial Recognition Order sought by the Applicant?

b. Should this Court grant the Supplemental Order sought by the Applicant under section 49 of the CCAA?

ANALYSIS

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

[24] CEWL has been authorized to act as foreign representative of the Chapter 11 Debtors pursuant to the Foreign Representative Resolution executed by CEWL's sole shareholder. CEOC, for itself and on behalf of its subsidiaries, has written to CEWL confirming its authorization to act as foreign representative of the Chapter 11 Debtors. It is CEWL's position that this authorization is sufficient for purposes of subsection 45(1) of the CCAA.

[25] There is no language in Part IV of the CCAA that requires a foreign representative to be appointed by order of the court in the foreign proceeding.

[26] I accept that for the purposes of this application that CEWL is a "foreign representative".

[27] In response to an application brought by a foreign representative under subsection 46(1) of the CCAA, subsection 47(1) of the CCAA provides that the Court shall grant an order recognizing the foreign proceeding if the proceeding is a foreign proceeding and the applicant is a foreign representative in respect of that proceeding.

[28] Canadian courts have consistently held that court proceedings under chapter 11 of the Bankruptcy Code constitute "foreign proceedings" for the purposes of the CCAA (see: *Re Digital Domain Media Group Inc.*, 2012 BCSC 1565 (B.C.S.C. [In Chambers]) at para. 15; and *Re Lightsquared LP*, 2012 ONSC 2994, 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List]) at para. 18). I am satisfied that the Chapter 11 Proceeding is a "foreign proceeding".

[29] CEWL submits that it is appropriate for this Court to recognize the Chapter 11 Proceeding as a foreign main proceeding.

[30] If the foreign proceeding is recognized as a foreign main proceeding, there is an automatic stay provided in section 48(1) of the CCAA against proceedings concerning the debtor's property, debts, liabilities or obligations and prohibitions against selling or disposing of property in Canada.

[31] Subsection 45(1) of the CCAA provides that a "foreign main proceeding" is a foreign proceeding in the jurisdiction of the debtor company's centre of main interests ("COMI")."

[32] For the purposes of Part IV of the CCAA, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the COMI.

[33] In *Lightsquared*, the Court found that the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor's COMI:

a. the location is readily ascertainable by creditors;

b. the location is one in which the debtor's principal assets or operations are found; and

c. the locations where the management of the debtor takes place.

(see: *Re Lightsquared, supra* at para. 25; and *Re Mt.Gox Co.*, 2014 ONSC 5811, 245 A.C.W.S. (3d) 280 (Ont. S.C.J. [Commercial List]) at para. 21)

[34] While CEWL is incorporated in Ontario and has its registered head office in Ontario, the Applicant submits that Ontario is not its centre of main interests.

[35] I am satisfied that the COMI for the Chapter 11 Debtors is the United States. In arriving at this decision, I have taken into account that CEWL is the only Chapter 11 Debtor that is not incorporated in a U.S. jurisdiction. All of the other 172 Chapter 11 Debtors have their head office or headquarters located in the United States. In addition:

a. the Chapter 11 Debtors operate as an functionally integrated group from a corporate, strategic, financial and management perspective;

b. pursuant to the USD, CEWL's corporate decisions are made by its sole shareholder, Caesars World, a Florida corporation;

c. CEWL's Chief Executive Officer and President report to the Chairman, who resides in the United States and works from the Caesars head office in Las Vegas, Nevada;

d. centralized services critical to CEWL's operations, including the administration of the Caesars brand and intellectual property rights, services related to online hotel booking, the Windsor Casino website, and administration of the "Total Rewards" loyalty program are operated from the United States;

e. strategic and directional decisions for CEWL are ultimately made in the United States.

[36] In the result, I am satisfied that the Chapter 11 Proceeding should be recognized as a "foreign main proceeding".

[37] The relief requested in the Initial Recognition Order is granted.

[38] In the context of cross-border insolvencies, Canadian courts have consistently encouraged comity and cooperation between courts in various jurisdictions in order to enable enterprises to restructure on a cross-border basis (see: *Re Lear Canada* (2009), 55 C.B.R. (5th) 57, 2009 CarswellOnt 4232 (Ont. S.C.J. [Commercial List]) at paras. 11 and 17; and *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157, 2000 CarswellOnt 704 (Ont. S.C.J. [Commercial List]) at para. 9).

[39] Having reviewed the Record, I am satisfied, based on the facts in Mr. James Smith's affidavit and for the reasons set out in the Applicant's factum, that it is appropriate for the Court in this case to exercise its authority under sections 49(1) and 50 of the CCAA to grant the relief sought in the Supplemental Order, in order to maintain the status quo and protect the assets of the Chapter 11 Debtors, while permitting CEWL to continue operating its business as usual in Canada during the Chapter 11 Proceeding.

DISPOSITION

[40] In the result, the Application is granted. The Initial Recognition Order and the Supplemental Order have been signed, with the Supplemental Order having been modified to exclude a stay of actions against directors and officers of the Chapter 11 Debtors, as I consider such requested relief to be beyond the scope of appropriate relief in the Supplemental Order at this time.

RSJ G.B. Morawetz

Date: January 30, 2015

SCHEDULE "A"

LIST OF CHAPTER 11 DEBTORS

Legal Name	State of Formation
CZL Development Company, LLC	Delaware
Harrah's Iowa Arena Management, LLC	Delaware
PHW Manager, LLC	Nevada
190 Flamingo, LLC	Nevada
AJP Holdings, LLC	Delaware
AJP Parent, LLC	Delaware
B I Gaming Corporation	Nevada
Bally's Midwest Casino, Inc.	Delaware
Bally's Park Place, Inc.	New Jersey
Benco, Inc.	Nevada
Biloxi Hammond, LLC	Delaware
Biloxi Village Walk Development, LLC	Delaware
BL Development Corp.	Minnesota
Boardwalk Regency Corporation	New Jersey
Caesars Entertainment Canada Holding, Inc.	Nevada
Caesars Entertainment Finance Corp.	Nevada
Caesars Entertainment Golf, Inc.	Nevada
Caesars Entertainment Retail, Inc.	Nevada
Caesars India Sponsor Company, LLC	Nevada
Caesars Marketing Services Corporation (f/k/a Harrah's Marketing	Nevada

Services Corporation)	
Caesars New Jersey, Inc.	New Jersey
Caesars Palace Corporation	Delaware
Caesars Palace Realty Corporation	Nevada
Caesars Palace Sports Promotions, Inc.	Nevada
Caesars Riverboat Casino, LLC	Indiana
Caesars Trex, Inc.	Delaware
Caesars United Kingdom, Inc.	Nevada
Caesars World Marketing Corporation	New Jersey
Caesars World Merchandising, Inc.	Nevada
Caesars World, Inc.	Florida
California Clearing Corporation	California
Casino Computer Programming, Inc.	Indiana
Chester Facility Holding Company, LLC	Delaware
Consolidated Supplies, Services and Systems	Nevada
DCH Exchange, LLC	Nevada
DCH Lender, LLC	Nevada
Desert Palace, Inc.	Nevada
Durante Holdings, LLC	Nevada
East Beach Development Corporation	Mississippi
GCA Acquisition Subsidiary, Inc.	Minnesota
GNOC, Corp.	New Jersey
Grand Casinos of Biloxi, LLC (f/k/a Grand Casinos of Mississippi, Inc. - Biloxi)	Minnesota

Grand Casinos of Mississippi, LLC—Gulfport	Mississippi
Grand Casinos, Inc.	Minnesota
Grand Media Buying, Inc.	Minnesota
Harrah South Shore Corporation	California
Harrah's Arizona Corporation	Nevada
Harrah's Bossier City Investment Company, L.L.C.	Louisiana
Harrah's Bossier City Management Company, LLC	Nevada
Harrah's Chester Downs Investment Company, LLC	Delaware
Harrah's Chester Downs Management Company, LLC	Nevada
Harrah's Illinois Corporation	Nevada
Harrah's Interactive Investment Company	Nevada
Harrah's International Holding Company, Inc.	Delaware
Harrah's Investments, Inc. (f/k/a Harrah's Wheeling Corporation)	Nevada
Harrah's Management Company	Nevada
Harrah's MH Project, LLC	Delaware
Harrah's NC Casino Company, LLC	North Carolina
Harrah's North Kansas City LLC (f/k/a Harrah's North Kansas City Corporation)	Missouri
Harrah's Operating Company Memphis, LLC	Delaware
Harrah's Pittsburgh Management Company	Nevada
Harrah's Reno Holding Company, Inc.	Nevada
Harrah's Shreveport Investment Company, LLC	Nevada
Harrah's Shreveport Management Company, LLC	Nevada
Harrah's Shreveport/Bossier City Holding Company, LLC	Delaware

Harrah's Shreveport/Bossier City Investment Company, LLC	Delaware
Harrah's Southwest Michigan Casino Corporation	Nevada
Harrah's Travel, Inc.	Nevada
Harrah's West Warwick Gaming Company, LLC	Delaware
Harveys BR Management Company, Inc.	Nevada
Harveys C.C. Management Company, Inc.	Nevada
Harveys Iowa Management Company, Inc.	Nevada
Harveys Tahoe Management Company, Inc.	Nevada
H-BAY, LLC	Nevada
HBR Realty Company, Inc.	Nevada
HCAL, LLC	Nevada
HCR Services Company, Inc.	Nevada
HEI Holding Company One, Inc.	Nevada
HEI Holding Company Two, Inc.	Nevada
HHLV Management Company, LLC	Nevada
Hole in the Wall, LLC	Nevada
Horseshoe Entertainment	Louisiana
Horseshoe Gaming Holding, LLC	Delaware
Horseshoe GP, LLC	Nevada
Horseshoe Hammond, LLC	Indiana
Horseshoe Shreveport, L.L.C.	Louisiana
HTM Holding, Inc.	Nevada
Koval Holdings Company, LLC	Delaware

Koval Investment Company, LLC	Nevada
Las Vegas Golf Management, LLC	Nevada
Las Vegas Resort Development, Inc.	Nevada
Martial Development Corp.	New Jersey
Nevada Marketing, LLC	Nevada
New Gaming Capital Partnership	Nevada
Ocean Showboat, Inc.	New Jersey
Players Bluegrass Downs, Inc.	Kentucky
Players Development, Inc.	Nevada
Players Holding, LLC	Nevada
Players International, LLC	Nevada
Players LC, LLC	Nevada
Players Maryland Heights Nevada, LLC	Nevada
Players Resources, Inc.	Nevada
Players Riverboat II, LLC	Louisiana
Players Riverboat Management, LLC	Nevada
Players Riverboat, LLC	Nevada
Players Services, Inc.	New Jersey
Reno Crossroads LLC	Delaware
Reno Projects, Inc.	Nevada
Rio Development Company, Inc.	Nevada
Robinson Property Group Corp.	Mississippi
Roman Entertainment Corporation of Indiana	Indiana

Roman Holding Corporation of Indiana	Indiana
Showboat Atlantic City Mezz 1, LLC	Delaware
Showboat Atlantic City Mezz 2, LLC	Delaware
Showboat Atlantic City Mezz 3, LLC	Delaware
Showboat Atlantic City Mezz 4, LLC	Delaware
Showboat Atlantic City Mezz 5, LLC	Delaware
Showboat Atlantic City Mezz 6, LLC	Delaware
Showboat Atlantic City Mezz 7, LLC	Delaware
Showboat Atlantic City Mezz 8, LLC	Delaware
Showboat Atlantic City Mezz 9, LLC	Delaware
Showboat Atlantic City Operating Company, LLC	New Jersey
Showboat Atlantic City Propco, LLC	Delaware
Showboat Holding, Inc.	Nevada
Southern Illinois Riverboat/Casino Cruises, Inc.	Illinois
Tahoe Garage Propco, LLC	Delaware
TRB Flamingo, LLC	Nevada
Trigger Real Estate Corporation	Nevada
Tunica Roadhouse Corporation (f/k/a Sheraton Tunica Corporation)	Delaware
Village Walk Construction, LLC	Delaware
Winnick Holdings, LLC	Delaware
Winnick Parent, LLC	Delaware
3535 LV Corp. (f/k/a Harrah's Imperial Palace)	Nevada
Caesars License Company, LLC (f/k/a Harrah's License Company, LLC)	Nevada

FHR Corporation	Nevada
FHR Parent, LLC	Delaware
Flamingo-Laughlin Parent, LLC	Delaware
Flamingo-Laughlin, Inc. (f/k/a Flamingo Hilton-Laughlin, Inc.)	Nevada
Harrah's New Orleans Management Company	Nevada
LVH Corporation	Nevada
Parball Corporation	Nevada
Caesars Escrow Corporation (f/k/a Harrah's Escrow Corporation)	Delaware
Caesars Operating Escrow LLC (f/k/a Harrah's Operating Escrow LLC)	Delaware
Corner Investment Company Newco, LLC	Delaware
Harrah's Maryland Heights Operating Company	Nevada
BPP Providence Acquisition Company, LLC	Delaware
Caesars Air, LLC	Delaware
Caesars Baltimore Development Company, LLC	Delaware
Caesars Massachusetts Acquisition Company, LLC	Delaware
Caesars Massachusetts Development Company, LLC	Delaware
Caesars Massachusetts Investment Company, LLC	Delaware
Caesars Massachusetts Management Company, LLC	Delaware
CG Services, LLC	Delaware
Christian County Land Acquisition Company, LLC	Delaware
CZL Management Company, LLC	Delaware
HIE Holdings Topco, Inc.	Delaware
PH Employees Parent LLC	Delaware

PHW Investments, LLC	Delaware
Caesars Entertainment Operating Company, Inc. (f/k/a Harrah's Operating Company, Inc.)	Delaware
Caesars Entertainment Windsor Limited (f/k/a Caesars Entertainment Windsor Holding, Inc.)	Canada
Octavius Linq Holding Co., LLC	Delaware
Caesars Baltimore Acquisition Company, LLC	Delaware
Caesars Baltimore Management Company, LLC	Delaware
PHW Las Vegas, LLC	Nevada
3535 LV Parent, LLC	Delaware
Bally's Las Vegas Manager, LLC	Delaware
Cromwell Manager, LLC	Delaware
JCC Holding Company II Newco, LLC	Delaware
Laundry Parent, LLC	Delaware
LVH Parent, LLC	Delaware
Parball Parent, LLC	Delaware
The Quad Manager, LLC	Delaware
Des Plaines Development Limited Partnership	Delaware

Tab 12

CITATION: Lightsquared LP (Re), 2012 ONSC 2994
COURT FILE NO.: CV-12-9719-00CL
DATE: 20120706

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

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

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

BEFORE: **MORAWETZ J.**

COUNSEL: **Shayne Kukulowicz and Jane Dietrich, for Lightsquared LP**

Brian Empey, for Alvarez and Marsal Inc., Proposed Information Officer

HEARD & ENDORSED: **MAY 18, 2012**

REASONS: **JULY 6, 2012**

ENDORSEMENT

[1] On May 14, 2012, Lightsquared LP ("LSLP" or the "Applicant") and various of its affiliates (collectively, the "Chapter 11 Debtors") commenced voluntary reorganization

proceedings (the "Chapter 11 Proceedings") in the United States Bankruptcy Court for the Southern District of New York (the "U.S. Court") by each filing a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[9] Two of the Chapter 11 Debtors are incorporated pursuant to the laws of Ontario, being SkyTerra Holdings (Canada) Inc. ("SkyTerra Holdings") and SkyTerra (Canada) Inc. ("SkyTerra Canada"). One of the Chapter 11 Debtors is incorporated pursuant to the laws of Nova Scotia, being Lightsquared Corp. "LC" and together with SkyTerra Holdings and SkyTerra Canada, the "Canadian Debtors"). Each of the Canadian Debtors is a wholly-owned subsidiary, directly or indirectly, of the Applicant.

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

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

(a) SkyTerra Canada: this entity was created to hold certain regulated assets which, by law, are required to be held by Canadian corporations. SkyTerra Canada holds primarily three categories of assets: (i) the MSAT – 1 satellite; (ii) certain Industry Canada licences; (iii) contracts with the Applicant's affiliates and third parties.

SkyTerra Canada has no third party customers or employees at the present time and is wholly dependent on the Applicant for the funding of its operations;

(b) SkyTerra Holdings: this entity has no employees or operational functions. Its sole function is to hold shares of SkyTerra Canada; and

(c) LC: this entity was created for the purposes of providing mobile satellite services to customers located in Canada based on products and services that were developed by the Chapter 11 Debtors for the United States market. LC holds certain Industry Canada licences and authorizations as well as certain ground-related assets. LC employs approximately 43 non-union employees out of its offices in Ottawa, Ontario. LC is wholly dependent on the Applicant for all or substantially all of the funding of its operations.

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

(a) corporate and other major decision-making occurs from the consolidated offices in New York, New York and Ruston, Virginia;

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

(c) the majority of the management of the Chapter 11 Debtors, including the Canadian Debtors, is shared;

(d) the majority of employee administration, human resource functions, marketing and communication decisions are made, and related functions taken, on behalf of all of the Chapter 11 Debtors, including the Canadian Debtors, in the United States;

(e) the Chapter 11 Debtors, including the Canadian Debtors, also share a cash-management system that is overseen by employees of the United States-based Chapter 11 Debtors and located primarily in the United States; and

(f) other functions shared between the Chapter 11 Debtors, including the Canadian Debtors, and primarily managed from the United States include, pricing decisions, business development decisions, accounts payable, accounts receivable and treasury functions.

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

[14] Further, the Canadian Debtors have guaranteed the credit facilities which were extended to LSLP as borrower and such guarantee is allegedly secured by a priority interest on the assets

of the Canadian Debtors. As such, counsel submits that the majority of the creditors of the Chapter 11 Debtors are also common.

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

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

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

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

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

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

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

[22] Section 45 (1) of the CCAA defines a "foreign main proceeding" as a "foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests".

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

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

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

(i) the location is readily ascertainable by creditors;

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

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

[26] In most cases, these factors will all point to a single jurisdiction as the centre of main interests. In some cases, there may be conflicts among the factors, requiring a more careful review of the facts. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. In all cases, however, the review is designed to determine that the location of the proceeding, in fact, corresponds to where the debtor's true seat or principal place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MORAWETZ J.

Date: July 6, 2012

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

BRIEF OF AUTHORITIES OF THE FOREIGN REPRESENTATIVES (Re: Recognition of Japanese Proceedings and Court Orders) (Returnable September 1, 2017)

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