

Clerk's stamp:

COURT FILE NUMBER:	2301-07385
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c C-36, as amended
	AND IN THE MATTER OF CYXTERA TECHNOLOGIES, INC., CYXTERA CANADA, LLC, CYXTERA COMMUNICATIONS CANADA, ULC and CYXTERA CANADA TRS, ULC
APPLICANT	CYXTERA TECHNOLOGIES, INC., CYXTERA CANADA, LLC, CYXTERA COMMUNICATIONS CANADA, ULC and CYXTERA CANADA TRS, ULC
DOCUMENT	<u>BOOK OF AUTHORITIES OF THE FOREIGN REPRESENTATIVE</u>
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Gowling WLG (Canada) LLP 421 7 Ave SW Suite 1600 Calgary, AB T2P 4K9 Telephone: (403) 298-1946 Email: tom.cumming@gowlingwlg.com / sam.gabor@gowlingwlg.com / stephen.kroeger@gowlingwlg.com File No.: A170537 Attn: Tom Cumming/Sam Gabor/Stephen Kroeger

**APPLICATION BEFORE THE HONOURABLE JUSTICE D. B. NIXON
SEPTEMBER 6, 2023 AT 9:00 a.m. ON THE COMMERCIAL LIST**

TABLE OF AUTHORITIES

TAB	AUTHORITY
1.	<i>Companies' Creditors Arrangement Act, R.S.C. 1985</i>
2.	<i>Babcock & Wilcox Canada Ltd., Re</i> , 2000 CanLII 22482 (ON SC)
3.	<i>MtGox Co., Ltd (Re)</i> , 2014 ONSC 5811
4.	<i>Hollander Sleep Products, LLC (Re)</i> , 2019 ONSC 3238
5.	<i>Purdue Pharma L.P., Re</i> , 2019 ONSC 7042
6.	<i>Nortel Networks Corp. (Re)</i> , 2017 ONSC 673

TAB 1

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

R.S.C. 1985, c. C-36, s. 11.2

s 11.2

Currency

11.2

11.2(1) Interim financing

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

11.2(2) Priority — secured creditors

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.2(3) Priority — other orders

The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

11.2(4) Factors to be considered

In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in [paragraph 23\(1\)\(b\)](#), if any.

11.2(5) Additional factor — initial application

When an application is made under subsection (1) at the same time as an initial application referred to in [subsection 11.02\(1\)](#) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Amendment History

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65; 2019, c. 29, s. 138

Currency

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Canada Federal Statutes

Companies' Creditors Arrangement Act

Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]

Purpose [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 44

s 44. Purpose

Currency

44.Purpose

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

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

Amendment History

2005, c. 47, s. 131

Currency

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Canada Federal Statutes

Companies' Creditors Arrangement Act

Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]

Interpretation [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 45

s 45.

Currency

45.

45(1) Definitions

The following definitions apply in this Part.

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

"foreign main proceeding" means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests. ("*principale*")

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

"foreign proceeding" means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with 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. ("*instance étrangère*")

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

- (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or
- (b) act as a representative in respect of the foreign proceeding.

("représentant étranger")

45(2) Centre of debtor company's main interests

For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

Amendment History

2005, c. 47, s. 131

Currency

Federal English Statutes reflect amendments current to May 24, 2023

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Canada Federal Statutes

Companies' Creditors Arrangement Act

Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]

Recognition of Foreign Proceeding [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 46

s 46.

Currency

46.

46(1) Application for recognition of a foreign proceeding

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

46(2) Documents that must accompany application

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

- (a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;
- (b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and
- (c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

46(3) Documents may be considered as proof

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

46(4) Other evidence

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

46(5) Translation

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

Amendment History

2005, c. 47, s. 131

Currency

Federal English Statutes reflect amendments current to May 24, 2023

Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

Canada Federal Statutes

Companies' Creditors Arrangement Act

Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]

Recognition of Foreign Proceeding [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 47

s 47.

Currency

47.

47(1) Order recognizing foreign proceeding

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.

47(2) Nature of foreign proceeding to be specified

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

Amendment History

2005, c. 47, s. 131

Currency

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Canada Federal Statutes

Companies' Creditors Arrangement Act

Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]

Recognition of Foreign Proceeding [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 48

s 48.

Currency

48.

48(1) Order relating to recognition of a foreign main proceeding

Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
- (d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

48(2) Scope of order

The order made under subsection (1) must be consistent with any order that may be made under this Act.

48(3) When subsection (1) does not apply

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

48(4) Application of this and other Acts

Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

Amendment History

2005, c. 47, s. 131

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Canada Federal Statutes

Companies' Creditors Arrangement Act

Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]

Recognition of Foreign Proceeding [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 49

s 49.

Currency

49.

49(1)Other orders

If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

- (a) if the foreign proceeding is a foreign non-main proceeding, referred to in [subsection 48\(1\)](#);
- (b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and
- (c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

49(2)Restriction

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

49(3)Application of this and other Acts

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

Amendment History

2005, c. 47, s. 131

Currency

Federal English Statutes reflect amendments current to May 24, 2023

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Canada Federal Statutes

Companies' Creditors Arrangement Act

Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]

Recognition of Foreign Proceeding [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 50

s 50. Terms and conditions of orders

Currency

50. Terms and conditions of orders

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

Amendment History

2005, c. 47, s. 131

Currency

Federal English Statutes reflect amendments current to May 24, 2023

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Canada Federal Statutes

Companies' Creditors Arrangement Act

Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]

Recognition of Foreign Proceeding [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 51

s 51. Commencement or continuation of proceedings

Currency

51. Commencement or continuation of proceedings

If an order is made recognizing a foreign proceeding, the foreign representative may commence and continue proceedings under this Act in respect of a debtor company as if the foreign representative were a creditor of the debtor company, or the debtor company, as the case may be.

Amendment History

2005, c. 47, s. 131

Currency

Federal English Statutes reflect amendments current to May 24, 2023

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Canada Federal Statutes

Companies' Creditors Arrangement Act

Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]

Obligations [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 52

s 52.

Currency

52.

52(1) Cooperation — court

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

52(2) Cooperation — other authorities in Canada

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

52(3) Forms of cooperation

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

- (a) the appointment of a person to act at the direction of the court;
- (b) the communication of information by any means considered appropriate by the court;
- (c) the coordination of the administration and supervision of the debtor company's assets and affairs;
- (d) the approval or implementation by courts of agreements concerning the coordination of proceedings; and
- (e) the coordination of concurrent proceedings regarding the same debtor company.

Amendment History

2005, c. 47, s. 131; 2007, c. 36, s. 80

Currency

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Canada Federal Statutes

Companies' Creditors Arrangement Act

Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]

Obligations [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 53

s 53. Obligations of foreign representative

Currency

53.Obligations of foreign representative

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

(a) without delay, inform the court of

(i) any substantial change in the status of the recognized foreign proceeding,

(ii) any substantial change in the status of the foreign representative's authority to act in that capacity, and

(iii) any other foreign proceeding in respect of the same debtor company that becomes known to the foreign representative; and

(b) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.

Amendment History

2005, c. 47, s. 131

Currency

Federal English Statutes reflect amendments current to May 24, 2023

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Canada Federal Statutes

Companies' Creditors Arrangement Act

Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]

Multiple Proceedings [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 54

s 54. Concurrent proceedings

Currency

54. Concurrent proceedings

If any proceedings under this Act in respect of a debtor company are commenced at any time after an order recognizing the foreign proceeding is made, the court shall review any order made under [section 49](#) and, if it determines that the order is inconsistent with any orders made in the proceedings under this Act, the court shall amend or revoke the order.

Amendment History

2005, c. 47, s. 131

Currency

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Companies' Creditors Arrangement Act

Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]

Multiple Proceedings [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 55

s 55.

Currency

55.

55(1)Multiple foreign proceedings

If, at any time after an order is made in respect of a foreign non-main proceeding in respect of a debtor company, an order recognizing a foreign main proceeding is made in respect of the debtor company, the court shall review any order made under [section 49](#) in respect of the foreign non-main proceeding and, if it determines that the order is inconsistent with any orders made under that section in respect of the foreign main proceedings, the court shall amend or revoke the order.

55(2)Multiple foreign proceedings

If, at any time after an order is made in respect of a foreign non-main proceeding in respect of the debtor company, an order recognizing another foreign non-main proceeding is made in respect of the debtor company, the court shall, for the purpose of facilitating the coordination of the foreign non-main proceedings, review any order made under [section 49](#) in respect of the first recognized proceeding and amend or revoke the order if it considers it appropriate.

Amendment History

2005, c. 47, s. 131

Currency

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Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]

Miscellaneous Provisions [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 56

s 56. Authorization to act as representative of proceeding under this Act

Currency

56. Authorization to act as representative of proceeding under this Act

The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

Amendment History

2005, c. 47, s. 131

Currency

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Companies' Creditors Arrangement Act

Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]

Miscellaneous Provisions [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 57

s 57. Foreign representative status

Currency

57.Foreign representative status

An application by a foreign representative for any order under this Part does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this Part conditional on the compliance by the foreign representative with any other order of the court.

Amendment History

2005, c. 47, s. 131

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Canada Federal Statutes

Companies' Creditors Arrangement Act

Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]

Miscellaneous Provisions [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 58

s 58. Foreign proceeding appeal

Currency

58.Foreign proceeding appeal

A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.

Amendment History

2005, c. 47, s. 131

Currency

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Companies' Creditors Arrangement Act

Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]

Miscellaneous Provisions [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 59

s 59. Presumption of insolvency

Currency

59.Presumption of insolvency

For the purposes of this Part, if an insolvency or a reorganization or a similar order has been made in respect of a debtor company in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, proof that the debtor company is insolvent and proof of the appointment of the foreign representative made by the order.

Amendment History

2005, c. 47, s. 131

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Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]

Miscellaneous Provisions [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 60

s 60.

Currency

60.

60(1)Credit for recovery in other jurisdictions

In making a compromise or an arrangement of a debtor company, the following shall be taken into account in the distribution of dividends to the company's creditors in Canada as if they were a part of that distribution:

- (a) the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the company; and
- (b) the value of any property of the company that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires outside Canada by way of a transfer that, if it were subject to this Act, would be a preference over other creditors or a transfer at undervalue.

60(2)Restriction

Despite subsection (1), the creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank in the order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph (1)(a) and the value referred to in paragraph (1)(b) is of that creditor's claim.

Amendment History

2005, c. 47, s. 131

Currency

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Companies' Creditors Arrangement Act

Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]

Miscellaneous Provisions [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 61

s 61.

Currency

61.

61(1) Court not prevented from applying certain rules

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

61(2) Public policy exception

Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

Amendment History

2005, c. 47, s. 131; 2007, c. 36, s. 81

Currency

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TAB 2

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

Babcock & Wilcox Canada Ltd., Re

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

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

In the Matter of Babcock & Wilcox Canada Ltd.

Farley J.

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

Counsel: *Derrick Tay*, for Babcock & Wilcox Canada Ltd.

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

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.1 General principles](#)

[XIX.1.c Application of Act](#)

[XIX.1.c.iv Miscellaneous](#)

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Solvent corporation applied for interim order under [s. 18.6 of Companies' Creditors Arrangement Act](#) for stay of actions and enforcements against corporation in respect of asbestos tort claims — Application granted — Application was to be reviewed in light of doctrine of comity, inherent jurisdiction, and aspect of liberal interpretation of Act generally — Proceedings commenced by corporation's parent corporation in United States and other United States related corporations for protection under c. 11 of United States Bankruptcy Code in connection with mass asbestos tort claims constituted foreign proceeding for purposes of s. 18.6 of Act — Insolvency of debtor in foreign proceeding was not condition precedent for proceeding to be foreign proceeding under definition of s. 18.6 of Act — Corporation was entitled to avail itself of provisions of s. 18.6 of Act — Relief requested was not of nature contrary to provisions of Act — Recourse may be had to s. 18.6 of Act in case of solvent debtor — Chapter 11 proceedings in United States were intended to resolve mass asbestos-related tort claims that seriously threatened long-term viability of corporation's parent — Corporation was significant participant in overall international operation and interdependence existed between corporation and its parent as to facilities and services — Bankruptcy Code, 11 U.S.C. 1982, c. 11 — [Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.6](#).

Table of Authorities

Cases considered by *Farley J.*:

Arrowmaster Inc. v. Unique Forming Ltd. (1993), 17 O.R. (3d) 407, 29 C.P.C. (3d) 65 (Ont. Gen. Div.) — applied

ATL Industries Inc. v. Han Eol Ind. Co. (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div. [Commercial List]) — applied

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*) [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

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

TAB 3

2014 ONSC 5811

Ontario Superior Court of Justice [Commercial List]

MtGox Co., Re

2014 CarswellOnt 13871, 2014 ONSC 5811, 122 O.R. (3d) 465, 20 C.B.R. (6th) 307, 245 A.C.W.S. (3d) 280

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1992, C. 27, S.2, as Amended

In the Matter of MtGox Co., Ltd., the Bankrupt in a Proceeding under Japan's
Bankruptcy Act before the Tokyo District Court Twentieth Civil Division

Application of Nobuaki Kobayashi, in his capacity as the bankruptcy Trustee of MtGox Co., Ltd. Pursuant to
Japan's Bankruptcy Act Under Part XIII of The Bankruptcy and Insolvency Act (Cross-Border Insolvencies)

Newbould J.

Heard: October 3, 2014

Judgment: October 6, 2014

Docket: CV-14-10709-00CL

Counsel: Margaret R. Sims for Applicant

Subject: Insolvency; International

Related Abridgment Classifications

Bankruptcy and insolvency

I Bankruptcy and insolvency jurisdiction

I.2 Jurisdiction of courts

I.2.a Jurisdiction of Bankruptcy Court

I.2.a.iv Territorial jurisdiction

I.2.a.iv.A Foreign bankruptcies

Headnote

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Jurisdiction of courts — Jurisdiction of Bankruptcy Court — Territorial jurisdiction — Foreign bankruptcies

M Co. was Japanese corporation that operated online exchange for purchase and sale of bitcoins, a form of digital currency — M Co. was located and headquartered in Tokyo, Japan — In February 2014, M Co. halted all bitcoin withdrawals by its customers after it was subject to a massive theft — These events caused M Co. to become insolvent, and eventually led to bankruptcy proceeding in Japan — M Co. was subsequently named as defendant in pending class action filed in Ontario Superior Court of Justice (Ontario Court) — Trustee of M Co. applied to Ontario Court for initial recognition order recognizing bankruptcy proceeding commenced in Japan, declaring trustee as foreign representative, and staying all proceedings against M Co. — Application granted — Japan bankruptcy proceeding was judicial proceeding dealing with creditors' collective interests generally under Japan Bankruptcy Act (JPA), in which M Co.'s property was subject to supervision by Tokyo District Court — Trustee had authority pursuant to JPA and order of Tokyo District Court to administer M Co.'s property and affairs and to act as foreign representative — Accordingly, Japan bankruptcy proceeding constituted "foreign proceeding" and trustee constituted "foreign representative" under [s. 268\(1\) of Bankruptcy and Insolvency Act \(BIA\)](#) — M Co.'s centre of its main interests was its registered head office in Japan — Accordingly, Japan bankruptcy proceeding was foreign main proceeding, entitling M Co. to automatic stay under [s. 271\(1\) of BIA](#).

Table of Authorities

Cases considered by *Newbould J.*:

1 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 (section 267 to 284) of the Bankruptcy and Insolvency Act, R.S.C. 1992, c. 27, 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 [section 270 of the BIA](#);

(b) declaring that the Trustee is a foreign representative pursuant to [section 268\(1\) of the BIA](#), and is entitled to bring this application pursuant to [section 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 Article 21(1) of the Japan 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 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 Article 25(3) 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 multi-national 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 cooperation. It has been advanced by the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross Border Insolvency, 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), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) and *Lear Canada, Re* (2009), 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]).

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:

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 section 270(1) of the BIA, the court shall make an order recognizing the foreign proceeding if (i) the proceeding is a foreign proceeding and (ii) the applicant is a foreign representative of that proceeding.

14 A foreign proceeding is broadly defined in section 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 Japan Bankruptcy Act, 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 section 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 section 268(1) of the BIA.

TAB 4

2019 ONSC 3238

Ontario Superior Court of Justice [Commercial List]

Hollander Sleep Products, LLC et al., Re

2019 CarswellOnt 8720, 2019 ONSC 3238, 307 A.C.W.S. (3d) 462, 72 C.B.R. (6th) 140

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

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

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

Hainey J.

Heard: May 23, 2019

Judgment: May 30, 2019

Docket: CV-19-620484-00CL

Counsel: Shawn Irving, Marc Wasserman, for Applicant

Virginie Gauthier, for KSV Kofman Inc.

L. Joseph Latham, for Wells Fargo

Milly Chow, Kelly Bourassa, for Barings Finance LLC

Subject: Civil Practice and Procedure; Insolvency; International

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.2 Initial application](#)

[XIX.2.b Grant of stay](#)

[XIX.2.b.viii Miscellaneous](#)

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous
Company manufactured bedding products — Company had US and Canadian offices, with registered head office in Vancouver
— Canadian branch was not profitable — Company sought restructuring as due to outstanding indebtedness and limited access
to credit, it was facing severe liquidity constraints — Company brought application for several orders pursuant to [Companies'
Creditors Arrangement Act](#) including Ch. 11 cases — Ruling was made — Chapter 11 cases, pursuant to US Bankruptcy Code
was foreign proceedings for Canadian purposes — Company was appointed foreign representative by US courts in Ch. 11 cases
— Company's centre of main interests (COMI) was in United States, which meant that COMI of all Ch. 11 debtors was in
United States — Therefore Ch. 11 cases were recognized as foreign main proceedings — Stay of proceedings was necessary
in order to implement proposed restructuring — First day order were recognized as Canadian and US operations of company
were highly integrated — DIP order was approved.

Table of Authorities

Cases considered by *Hainey J.*:

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

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

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

Payless Holdings Inc. LLC, Re (2017), 2017 ONSC 2321, 2017 CarswellOnt 5925, 47 C.B.R. (6th) 117 (Ont. S.C.J.) — distinguished

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 11 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Pt. IV — referred to

s. 44 — considered

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

s. 45(2) — considered

ss. 46-49 — referred to

s. 46(1) — considered

s. 47 — considered

s. 47(1) — considered

s. 47(2) — considered

s. 48 — considered

s. 48(1) — considered

s. 49 — considered

s. 52(1) — considered

RULING with respect to procedure under creditors' restructuring legislation including proceedings commenced under US bankruptcy laws.

Hainey J.:

BACKGROUND

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

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

b) Recognition of certain First Day Orders;

- e) Hollander Canada is reliant on the purchasing power and supplier relationships of the Hollander enterprise, and on its own could not replicate the supply arrangements necessary for its continued functioning;
- f) Hollander Canada's books and records are maintained at Hollander's head office in Boca Raton, Florida;
- g) All of Hollander Canada's directors reside in the United States;
- h) Canadian revenues make up only 10.7% of Hollander's revenues;
- i) Hollander Canada is entirely dependent on the U.S. Chapter 11 Debtors for the majority of licensing agreements, design partnerships, and company-owned brands;
- j) Substantially all of the trademarks and intellectual property relied on by Hollander Canada are owned by the U.S. Chapter 11 Debtors;
- k) The Chapter 11 Debtors, including Hollander Canada, operate an integrated, centralized cash management system; and
- l) Hollander Canada is dependent on the U.S. Chapter 11 Debtors for the establishment, maintenance, and administration of certain customer promotional programs involving Hollander Canada's key customers.

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

SHOULD THE INITIAL RECOGNITION ORDER AND SUPPLEMENTAL ORDER BE GRANTED?

Is a Stay of Proceedings Required and Appropriate?

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

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

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

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

Should the First Day Orders be Recognized?

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

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

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

TAB 5

2019 ONSC 7042

Ontario Superior Court of Justice [Commercial List]

Purdue Pharma L.P., Re.

2019 CarswellOnt 21242, 2019 ONSC 7042, 313 A.C.W.S. (3d) 467, 76 C.B.R. (6th) 308

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

AND IN THE MATTER OF A PLAN OF AND IN THE MATTER OF PURDUE PHARMA L.P., PURDUE PHARMA INC., RHODES ASSOCIATES L.P., PAUL LAND INC., RHODES TECHNOLOGIES, RHODES PHARMACEUTICALS L.P., UDF LP, SVC PHARMA INC., BUTTON LAND L.P., SVC PHARMA LP, QUIDNICK LAND L.P., SEVEN SEAS HILL CORP., OPHIR GREEN CORP., PURDUE PHARMA OF PUERTO RICO, AVRIO HEALTH L.P., PURDUE TRANSDERMAL TECHNOLOGIES L.P., PURDUE PHARMACEUTICALS L.P., PURDUE PHARMA MANUFACTURING L.P., ALDON THERAPEUTICS L.P., IMBRIUM THERAPEUTICS L.P., GREENFIELD BIOVENTURES L.P., NAYATT COVE LIFESCIENCE INC., PURDUE NEUROSCIENCE COMPANY, PURDUE PHARMACEUTICALS PRODUCTS L.P.

Hainey J.

Heard: November 28, 2019

Judgment: December 30, 2019

Docket: CV-19-00627656-00CL

Counsel: David Byers, Ashley Taylor, Lee Nicholson, for Foreign Representative

Grant Moffat, Reidar Mogerman, for Province of British Columbia

Alex MacFarlane, Cindy Clark, for Purdue Pharma Inc., as the General Partner of Purdue Pharma Limited Partnership (Ontario) and Purdue Pharma Limited Partnership (Ontario)

David Bish, for Ernst & Young, Information Officer

Raymond Slattery, for Directors and Officers

Natalie Renner, for McKesson Canada Corporation and McKesson Corporation

Mark Meland, Avram Fishman, Tina Silverstein, for Quebec Class Action Plaintiff, Riccardo Camarda

Jonathan Lisus, Nadia Campion, for Sackler Family

Subject: Civil Practice and Procedure; Insolvency; International

Related Abridgment Classifications

Bankruptcy and insolvency

[XVII Practice and procedure in courts](#)

[XVII.4 Stay of proceedings](#)

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

P Inc., in its capacity as foreign representative of itself, and 23 other debtors in possession, moved for order recognizing and enforcing U.S. Preliminary Injunction Order in Canada, and granting stay of proceedings in favour of certain related parties in Canada — Motion granted — At this early stage in proceedings, court should not allow single stakeholder to frustrate collective process that may benefit much larger group of stakeholders — Excluding Quebec Plaintiff from Related Party Stay Order would do just that.

Table of Authorities

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Representative argues that I should respect that intent. Further, none of the other parties in Canada oppose this motion except the Quebec Plaintiff. The Foreign Representative further submits that I should not allow the Quebec Opioid Class Action to proceed because this would result in a single stakeholder frustrating a collective process that may benefit a much larger number of stakeholders.

18 The Quebec Plaintiff submits that I should not stay the Quebec Opioid Class Action because it is the only one of the Pending Actions in Canada that does not assert a claim against any of the Chapter 11 Debtors or the Chapter 11 Debtors' Related Parties. It is, therefore, the "only action which is totally outside of the parameters of any order made by the U.S. Bankruptcy Court" and should be excluded on the basis that it is unique in comparison to the other Pending Actions in Canada. According to the Quebec Plaintiff, to grant a stay of proceedings of the Quebec Opioid Class Action in these recognition proceedings under the *CCAA* would be "a bridge too far" because the Quebec proceeding is unrelated to the Chapter 11 Proceedings. The Quebec Plaintiff submits that the Quebec Opioid Class Action should be permitted to proceed to a certification hearing in the Quebec Superior Court without any interference by the unrelated Chapter 11 Proceedings.

Analysis

19 The motion seeking the Related Party Stay Order is unopposed by all parties in Canada except the Quebec Plaintiff. I am satisfied that I should grant the order with respect to the other actions in Canada to support the Bankruptcy Court's primary goal of achieving a global resolution of all of the opioid-related claims. The only issue that I must decide is whether I should exclude the Quebec Plaintiff from the order.

20 Despite counsel for the Quebec Plaintiff's able argument, I have concluded that I should grant the Related Party Stay Order sought by the Foreign Representative and not exclude the Quebec Opioid Class Action from that order for the following reasons.

21 The principles of comity, cooperation and accommodation with foreign courts guide *CCAA* courts in cross-border insolvency cases. Section 52(1) of the *CCAA* provides as follows:

52(1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

22 Section 49(1) of the *CCAA* clearly provides me with jurisdiction to make the Related Party Stay Order if I am satisfied that it is necessary for the "protection of the debtor company's property or the interests of a creditor or creditors". I am satisfied that the order is necessary for this reason.

23 It is clear to me that the Bankruptcy Court intended to pause all of the opioid-related litigation against Purdue, the Chapter 11 Debtors and the Related Parties so that they could pursue a global resolution of all claims in the interests of all stakeholders. Following a full day hearing the Bankruptcy Court concluded that the Chapter 11 Debtors had satisfied the "extraordinary burden" for a stay of proceedings against the Related Parties in the United States. In granting the stay of proceedings the Bankruptcy Court stated as follows:

But again, this is a limited preliminary injunction. I believe that while I certainly respect the objecting states' interest in laying out the facts and in ultimate determination and in information sharing, I believe that interest here is outweighed on a preliminary basis by the benefits to all the parties to this case who are creditors in pursuing an overall reorganization that I would hope would include reasonable and lasting and binding, as I believe only a bankruptcy plan can bind the parties to, means to use the resources of these Debtors for the maximum benefit to the states, communities and individuals who the Debtors acknowledge have suffered from the opioid crisis.

24 The Related Party Stay Order sought by the Foreign Representative is intended to accomplish the same purpose as the Preliminary Injunction granted by the Bankruptcy Court in the U.S. The stay of proceedings against the Related Parties in Canada will temporarily pause the existing litigation here to allow stakeholders to focus on a global resolution. If I do not grant the stay of proceedings in Canada, Canadian creditors will have an advantage over U.S. creditors by continuing to pursue their actions against Related Parties here while U.S. claimants are at a standstill. This will result in an uneven playing field among

TAB 6

2017 ONSC 673

Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2017 CarswellOnt 1122, 2017 ONSC 673, 275 A.C.W.S. (3d) 696, 44 C.B.R. (6th) 289

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS
CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL
NETWORKS INTERNATIONAL CORPORATION and NORTEL NETWORKS TECHNOLOGY CORPORATION

Newbould J.

Heard: January 12, 2017

Judgment: January 27, 2017

Docket: 09-CL-7950

Counsel: Jessica A. Kimmel for Monitor

Susan Philpott for Former Nortel employees

Lily Harmer for Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund

Byron Shaw for Administrator of the Nortel Networks Managerial and NonNegotiated Pension Plan and Nortel Networks
Negotiated Pension Plan

Thomas McRae for Nortel Canadian continuing employees

Michael E. Barrack, D.J Miller for Nortel Networks UK Pension Trust Limited and Board of the Pension Protection Fund

Adam Slavens for Nortel Networks Inc.

Michael Wunder for Unsecured Creditors Committee

Gavin H. Finlayson, Amanda C. McLachlan for Ad Hoc Group of Bondholders

Matthew-Milne Smith for EMEA Debtors

John Salmas for Indenture Trustee, Wilmington Trust, N.A.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.2 Initial application](#)

[XIX.2.g Monitor](#)

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Monitor

Passing accounts — Telecommunications company N, which had over 140 corporate entities in 60 jurisdictions, became insolvent — Canadian N debtors filed for [Companies' Creditors Arrangement Act \(CCAA\)](#) protection in 2009 — Monitor was twice granted extraordinary expanded powers, resulting in Monitor and its counsel undertaking significantly greater scope of work than in typical [CCAA](#) case — In 2017, Monitor of Canadian debtors brought motion for order passing its accounts in amount of CA\$122,972,821.96, accounts of its Canadian legal counsel in amount of CA\$99,994,744.85, and accounts of its U.S. legal counsel in amount of \$31,352,136.73, incurred between 2009 to 2016 — Motion granted — Accounts approved — Monitor's duties were far more complex than normal due to matrix way in which N's business was operated — Extensive joint discovery process to resolve claims played large role in costs getting out of hand, and was not fault of Monitor — Monitor and counsel tried to be as efficient as possible in difficult circumstances and overall achieved very favourable outcomes for Canadian

creditors — Proceedings were unprecedented in terms of size, complexity, international aspects and vast number of competing interests — Nature, extent and value of assets realized for creditors was significant — Billings over relevant period comprised combined total of 384,652.6 professional hours — Monitor and counsel's professional rates and disbursements were reasonable.

Table of Authorities

Cases considered by Newbould J.:

Bank of Nova Scotia v. Diemer (2014), 2014 ONSC 365, 2014 CarswellOnt 666 (Ont. S.C.J.) — followed
Bank of Nova Scotia v. Diemer (2014), 2014 ONCA 851, 2014 CarswellOnt 16721, 20 C.B.R. (6th) 292, 327 O.A.C. 376 (Ont. C.A.) — followed
Belyea v. Federal Business Development Bank (1983), 46 C.B.R. (N.S.) 244, 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27 (N.B. C.A.) — followed
Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 36 C.B.R. (4th) 200, 164 O.A.C. 84, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — referred to
Nortel Networks Corp., Re (2014), 2014 ONSC 6973, 2014 CarswellOnt 17291, 20 C.B.R. (6th) 171, 17 C.C.P.B. (2nd) 10 (Ont. S.C.J. [Commercial List]) — referred to
Nortel Networks Corp., Re (2015), 2015 ONSC 2987, 2015 CarswellOnt 7072, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) — referred to
Tepper Holdings Inc., Re (2011), 2011 NBQB 311, 2011 CarswellNB 592, 82 C.B.R. (5th) 293, 984 A.P.R. 1, 381 N.B.R. (2d) 1, 2011 CarswellNB 849, 2011 NBBR 311 (N.B. T.D.) — referred to
Triton Tubular Components Corp., Re (2006), 2006 CarswellOnt 2120, 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) — referred to
Winalta Inc., Re (2011), 2011 ABQB 399, 2011 CarswellAlta 2237, 84 C.B.R. (5th) 157, 521 A.R. 1 (Alta. Q.B.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
 Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
 Generally — referred to
Pensions Act, 1995, c. 26
 s. 75 — considered
Pensions Act 2004, 2004, c. 35
 Generally — referred to

MOTION by monitor of insolvent company for passing of accounts of monitor and its counsel incurred during *Companies' Creditors Arrangement Act* proceedings.

Newbould J.:

Introduction

1 Ernst & Young Inc. in its capacity as Monitor of Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks Technology Corporation, Nortel Networks International Corporation, Nortel Networks Global Corporation, Nortel Communications Inc., Architel Systems Corporation and Northern Telecom Canada Limited (collectively, the "Canadian Debtors"), moves for an order passing the accounts of the Monitor and of its counsel incurred during the period January 14, 2009, the date these CCAA proceedings were commenced, through to and including May 31, 2016.

2 The background to this sorry saga has been described in a number of decisions.¹

3 At the time of the filing under the CCAA, Nortel consisted of more than 140 separate corporate entities located in 60 separate sovereign jurisdictions including Canada, the United States and the EMEA² region, as well as the Caribbean and

10 Most of the core parties in the insolvency proceedings do not object to the accounts as proposed by the Monitor being passed. This is due to the final settlement reached by them. The Canadian allocation decision became final after the Court of Appeal refused leave to appeal the decision of this Court. However appeals were brought in the U.S. from the allocation decision of Judge Gross. These appeals and the allocation of the \$7.3 billion sale escrow proceeds were finally settled after mediation by a Settlement Agreement on October 12, 2016. It was a term of the Settlement Agreement that no party to it could contest the fees and disbursements of any other party to it.

11 The UKPC at one point in a pre-hearing conference took the position that the Monitor's motion to approve its fees and disbursements should be adjourned until after January 24, 2017, the date on which motions seeking an order sanctioning the Plan of Compromise and Arrangement proposed by the Canadian Debtors and seeking confirmation of the First Amended Joint Chapter 11 Plan of Arrangement proposed by the US Debtors would be heard in a joint hearing by this Court and by Judge Gross of the US Bankruptcy Court. The UKPC said that if the Plans were sanctioned and the Settlement Agreement became effective, it would take no position on the Monitor's fee approval motion. I declined to adjourn the Monitor's motion. At the hearing of the motion, counsel for the UKPC said that no adjournment request was now being made. Thus there is no opposition to the Monitor's motion by the UKPC.

12 The only opposition to the passing of the accounts of the Monitor was by The Bank of New York Mellon, as Indenture Trustee to some of the bonds issued by Nortel.³ It took the position that it is not possible based on the material filed by the Monitor to do an analysis required on a passing of accounts and offered a suggestion that a practical solution is to refer the matter to a Master, to an Assessment Officer or to an outside expert. Such person could do due diligence on staffing, hours and rates, and provide the Court with a Report organized around the major activity blocks and identifying any potential issues or matters for consideration by the Court. Counsel for the Indenture Trustee later advised that it was not taking a position on the substance of the motion and did not appear at the hearing of the motion. For reasons that will follow, I do not think such a reference is necessary, nor would it be a practical solution.

Considerations on a passing of a Monitor's accounts

13 There are few cases dealing with the factors to consider on a passing of the accounts of a monitor. Most deal with a receiver's accounts. However I agree with Justice Topolniski in *Winalta Inc., Re* (2011), 84 C.B.R. (5th) 157 (Alta. Q.B.) that there should be no difference in dealing with a monitor's accounts and that the onus is on a monitor to make out its case. She stated:

30 In my view, the appropriate focus on an application to approve a CCAA monitor's fees is no different than that in a receivership or bankruptcy. The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the CCAA process. As with any inquiry, the evidence proffered will be important in making those determinations.

32 I am not aware of any reported authority supporting the proposition that there is a presumption of regularity that applies to a monitor's fees. This application is no different than any other. The applicant, here the Monitor, bears the onus of making out its case. A bald assertion by the Monitor that the Fee is reasonable does not necessarily make it so. The Monitor must provide the court with cogent evidence on which the court can base its assessment of whether the Fee is fair and reasonable in all of the circumstances.

14 So far as the test for reviewing a receiver's fees is concerned, the New Brunswick Court of Appeal in *Belyea v. Federal Business Development Bank* (1983), 44 N.B.R. (2d) 248 (N.B. C.A.) referred to a number of factors to be considered. These factors have been accepted in Ontario as being a useful guideline but not an exhaustive list as other factors may be material in any particular case. See *Confectionately Yours Inc., Re* (2002), 36 C.B.R. (4th) 200 (Ont. C.A.) at para. 51 ("*Bakemates*") and *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365 (Ont. S.C.J.) at para. 5, aff'd, (2014), 20 C.B.R. (6th) 292 (Ont. C.A.). In *Diemer*, Pepall J.A. listed the factors as follows:

33 The court endorsed the factors applicable to receiver's compensation described by the New Brunswick Court of Appeal in *Belyea: Bakemates*, at para. 51. In *Belyea*, at para. 9, Stratton J.A. listed the following factors:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- the time spent;
- the receiver's knowledge, experience and skill;
- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the results of the receiver's efforts; and
- the cost of comparable services when performed in a prudent and economical manner.

These factors constitute a useful guideline but are not exhaustive: *Bakemates*, at para. 51.

15 Justice Pepall further stated:

45 ... That said, in proceedings supervised by the court and particularly where the court is asked to give its imprimatur to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable. In making this assessment, all the *Belyea* factors, including time spent, should be considered. However, value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting assumption. Thus, the factors identified in *Belyea* require a consideration of the overall value contributed by the receiver's counsel. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. Of course, the measurement of accomplishment may include consideration of complications and difficulties encountered in the receivership.

16 As stated, The Bank of New York Mellon, as Indenture Trustee took the position that it is not possible based on the material filed by the Monitor to do an analysis required on a passing of accounts. It offered a suggestion that a practical solution is to refer the matter to a Master, an Assessment Officer or an outside expert. I do not agree with this suggestion. In my view there is sufficient evidence to undertake a proper consideration of the accounts of the Monitor taking into account the factors to be considered in arriving at a fair and reasonable result.

17 The time and expense of referring the accounts to someone else would be very time consuming, create further expense and delay completion of this matter that has gone on far too long. The Initial Order directed the accounts to be passed by this Court. That makes sense, particularly as no other person has the familiarity of what has gone on in the Nortel insolvency as the Court has. These considerations have led other courts to decline to send the accounts out for review by others. See *Tepper Holdings Inc., Re* (2011), 381 N.B.R. (2d) 1 (N.B. T.D.) at para. 3; *Triton Tubular Components Corp., Re* (2006), 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) at para. 83.

18 The Superintendent of Financial Services as administrator of the Pension Benefits Guarantee Fund has been involved in these proceedings from the outset in January, 2009 and has been a member of the Canadian Only Creditors Committee (the "CCC"). The Superintendent supports the motion for an order passing the accounts of the Monitor and opposes the appointment of a special fee examiner to review the Monitor's accounts. It takes the position that his would create unnecessary and unwarranted additional expense and potential delay by virtue of the need to educate the examiner with respect to these hugely complex proceedings, particularly if the examiner was independent of the court with additional professional costs. The

Superintendent further states that it is satisfied with a high level assessment of the Monitor's accounts in this case by this Court, given this Court's familiarity with many of the complexities of the proceedings, and by reference to the significantly higher costs incurred by the other Estates.

19 Morneau Shepell Ltd., was appointed the Administrator of the Nortel Networks Managerial and Non-Negotiated Pension Plan and the Nortel Networks Negotiated Pension Plan in October 2010 and has been actively involved in the CCAA restructuring process. It is one of the largest creditors of the Canadian Debtors. It takes the same position as the Superintendent regarding any attempt to have the accounts of the Monitor examined by some other party. It states that more litigation or court process in relation to the Monitor's accounts should be strongly discouraged and avoided. Far too much time and too much of the Canadian estate's resources have been consumed with seemingly endless litigation. More court process only delays, and may diminish, the distribution of assets available to creditors.

20 Michel E. Campbell is a former engineer employed by Nortel. Since the January 2009 CCAA filing, he has been heavily involved in the proceedings as a court-appointed representative of approximately 21,000 Nortel former employees, as an active member of the Nortel Retirees and Former Employees Protection Canada ("NRPC"), and as a claimant against the Nortel estate for the loss of severance and termination pay. He estimates that he has spent over 4,000 hours on issues in the proceedings relating to employee issues. As one of the former employees and as a court-appointed Representative, he has a financial stake in these proceedings. He too supports the passing of the Monitor's accounts and does not think a referral of the accounts to some third party is desirable. He states in his affidavit:

44. Moreover, given the volume and nature of the information provided in the Monitor's materials filed for this motion, and the fact that the fees as disclosed are subject to this Court's approval, I see no reason for another third party review or assessment. In any event, such a third party review would create more expense and delay in these proceedings, and would likely further postpone approval of the Plan of Arrangement and distributions on claims, which is far from desirable. The Former Employees have been waiting now for almost eight years to receive some payment for their losses. Further, it would be difficult for a third party who lacks background knowledge of this case to conduct a reliable, meaningful or accurate assessment of the Monitor's fees without the expenditure of considerable additional time and resources of the Monitor to provide information to the third party reviewer. This Court is by far the more appropriate arbiter of the Monitor's fees.

21 This case requires an overall assessment of the work done and a consideration of the results achieved. A line by line particularization of each particular job and each particular invoice would involve no doubt hundreds of thousands of dollars, taken the amount of activity and time involved in various matters. As well, in this case it is by no means the case that each task was discrete and could easily be separated out. As was stated by Justice Pepall, the value provided should pre-dominate the consideration of what a fair and reasonable amount is appropriate. A detailed assessment in this case would not be practical or serve that purpose.

Consideration of the Monitor's accounts

22 The Monitor engaged Goodmans LLP ("Goodmans") as its Canadian legal counsel, Allen & Overy LLP ("A&O") as its U.S. legal counsel and Buchanan Ingersoll & Rooney PC ("BIR") as its Delaware local legal counsel. A large number of professionals from the Monitor's firm E & Y, from Goodmans and from A&O were involved throughout these proceedings. The accounts from each of those firms are included in the passing of accounts with affidavits supporting the accounts.

23 The Monitor seeks approval of its accounts in the amount of CA\$122,972,821.96, inclusive of applicable taxes. This amount includes billings for 200,065.4 professional hours at an average hourly rate of CA\$540.

24 The Monitor also seeks to pass the accounts of Goodmans in the amount of CA\$99,994,744.85, inclusive of applicable taxes. This amount includes billings for 134,562.4 professional hours at an average hourly rate of CA\$643.

25 The Monitor also seeks to pass the accounts of A&O in the amount of \$31,352,136.73, inclusive of applicable taxes. This amount includes billings for 46,448.4 professional hours at an average hourly rate of \$639.