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COURT FILE NUMBER	
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
APPLICANTS	CYXTERA TECHNOLOGIES, INC., CYXTERA CANADA, LLC, CYXTERA COMMUNICATIONS CANADA, ULC and CYXTERA CANADA TRS, ULC
DOCUMENT	**BRIEF OF LAW OF THE FOREIGN REPRESENTATIVE**
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**

I. Introduction

1. On June 4, 2023 Cyxtera Technologies, Inc. ("**CTI**"), Cyxtera Communications Canada, ULC ("**Communications ULC**"), Cyxtera Canada, LLC ("**Cyxtera LLC**") and Cyxtera Canada TRS, ULC ("**TRS ULC**" and with Communications ULC are "**Cyxtera Canada**", and together with Cyxtera LLC, the "**Debtors**") and several other of their affiliates (collectively the "**Chapter 11 Debtors**") each commenced proceedings pursuant to Chapter 11 of Title 11 of the United States Code (the "**Chapter 11 Proceedings**") in the United States Bankruptcy Court for the District of New Jersey (the "**US Bankruptcy Court**").

2. CTI is a United States corporation incorporated pursuant to the laws of the State of Delaware with its head office in Coral Gables, Florida and its registered office in Wilmington, Delaware. CTI is the ultimate parent corporation of a group of companies operating under the tradename "Cyxtera" that are incorporated in the United States, Canada, United Kingdom, Germany, Australia, Japan, the Netherlands, Hong Kong, Singapore and the Cayman Islands, including the Debtors (collectively the "**Cyxtera**" or the "**Cyxtera Group**").

3. As part of the relief sought in the US Bankruptcy Court, CTI filed a motion seeking authorization to act as the foreign representative (in such capacity, the "**Foreign Representative**") of the Debtors in the US Bankruptcy Court in order to, among other things, bring this application pursuant to Part IV of the *Companies' Creditors Arrangement Act*, R.S.C., c. C.1985 (the "**CCAA**").

4. This Bench Brief is submitted on behalf of CTI as the Foreign Representative in support of an application (the "**Recognition Application**") for an order recognizing the Chapter 11 Proceedings of the Debtors as foreign main proceedings (the "**Initial Recognition Order**") and a supplemental recognition order (the "**Supplemental Recognition Order**", and together with the Initial Recognition Order, the "**Recognition Orders**") as more particularly set out in the draft Recognition Orders appended to the Originating Application filed concurrently with this Bench Brief.

5. The Foreign Representative's application for the Recognition Orders is supported by the Affidavit of Eric Koza sworn June 6, 2023 (the "**Koza Affidavit**"). The facts in support of this application are more particularly set out in the Koza Affidavit.

6. Capitalized terms not defined herein have the meanings given to them in the Koza Affidavit.

7. All references to monetary amounts referenced herein are in United States dollars, unless otherwise stated.

II. LAW AND ARGUMENT

8. The issues to be determined on this application are:

   (a) Are the Chapter 11 Proceedings a "foreign main proceeding" pursuant to Part IV of the CCAA?

   (b) If so, is the Foreign Representative entitled to the relief sought, including:

      (i) the recognition of the First Day Orders;

      (ii) the stay of proceedings and other mandatory orders in respect of the Debtors pursuant to section 48(1) CCAA;

      (iii) the appointment of A&M as Information Officer;

      (iv) the granting of the Administration Charge; and

      (v) the recognition of the DIP Financing Order and the granting of the Lenders' Charge.

Part IV of the CCAA

9. Part IV of the CCAA establishes the applicable process for addressing the administration of cross-border insolvencies to promote cooperation and coordination with foreign courts.

CCAA, Part IV **[Tab 1]**

10. The foundational principles are comity and cooperation between courts of various jurisdictions. Section 44 of the CCAA states that the purpose of Part IV is to provide mechanisms for dealing with cases of cross border insolvencies and to promote cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in such insolvencies, the fair and efficient administration of such insolvencies that protects the interests of creditors, other interested persons and the debtor companies, protects and maximizes the value of the debtor company's property, and permits the rescue of financially troubled businesses to protect investment and preserves employment.

CCAA, s. 44 **[Tab 1]**

11. Canadian courts will respect "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."

Babcock & Wilcox Canada Ltd., Re, 2000 CanLII 22482 (ON SC), at para 21 **[Tab 3]**

12. Cooperation between courts under Part IV promotes the "fair and efficient administration of cross-border insolvencies" and the "protection and maximization of the value of the debtors' property." 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.

MtGox Co., Ltd (Re), 2014 ONSC 5811, at paras 10-12 **[Tab 13]**; *Hollander Sleep Products, LLC (Re)*, 2019 ONSC 3238, at paras 41 & 42 **[Tab 7]**

The Chapter 11 Proceedings are a Foreign Proceeding

13. Pursuant to Section 46(1) of the CCAA, a foreign representative may apply to the court for recognition of a foreign proceeding in respect of which that person is a foreign representative.

CCAA, s. 46(1) **[Tab 1]**

14. Section 47(1) of the CCAA provides that the Court shall make an order recognizing a foreign insolvency proceeding if the following two requirements are met:

    (a) the application for recognition of a foreign proceeding relates to a "foreign proceeding" within the meaning of the CCAA; and

    (b) the applicant is a "foreign representative" within the meaning of the CCAA in respect of that foreign proceeding.

CCAA, s.47 **[Tab 1]**

15. Section 45(1) of the CCAA defines a "foreign proceeding" as any judicial proceeding in a jurisdiction outside of Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization. Canadian courts have generally considered it self-evident that chapter 11 proceedings under the supervision of a US Bankruptcy Court satisfy these criteria. Canadian courts have consistently recognized such proceedings as "foreign proceedings" for the purposes of the CCAA.

Hollander Sleep Products, LLC et al., Re, 2019 ONSC 3238, at para 27 **[Tab 7]**;
Payless Holdings LLC (Re), 2017 ONSC 2242, at para 22 **[Tab 14]**;
Zochem Inc. (Re), 2016 ONSC 958, at para 20 **[Tab 18]**

16. Under section 2(1) of the CCAA, the term "debtor company" is defined as a company that is, among other things, insolvent. The term "company" is defined in that section as "any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated".

CCAA, s.2(1) definition of "company" and "debtor company" **[Tab 1]**

17. Under section 59 of the CCAA, 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. Certified copies of the First Day Orders will be filed with this Honourable Court prior to the hearing of this application, including the Order of the US Bankruptcy Court appointing CTI as Foreign Representative, and there is no evidence on the record that the Debtors are not insolvent. Hence, this Honourable Court is able to rely on such Orders to presume that the Debtors are insolvent.

CCAA, s.59 **[Tab 1]**

18. In any event, neither Cyxtera Canada nor Cyxtera LLC, which is ultimately liable for the indebtedness of Cyxtera Canada because they are unlimited liability corporations, has sufficient funds to repay the indebtedness of Cyxtera Canada under the Bridge Facility. While that indebtedness is not currently due and owing, courts have determined that the term "insolvent" should be given an expanded meaning under the CCAA in order to give effect to the rehabilitative goal of the CCAA, and that it would defeat the purpose of the CCAA to limit or prevent an application until the financial difficulties of the applicant are so advanced that the applicant would not have sufficient financial resources to successfully complete a restructuring. A court should determine whether a looming liquidity crisis will result in the applicant running out of money to pay its debts as they generally become due without the benefit of a stay and ancillary protection. Given that the Debtors and the majority of the other entities making up the Cyxtera Group have filed petitions commencing the Chapter 11 Proceedings in the United States, it is a reasonable presumption that the Debtors are insolvent.

Stelco Inc. (2004), 48 CBR (4th) 299 (Ont SCJ [Commercial List]), at para 40 **[Tab 17];** *Re Lemare Holdings Ltd.*, 2012 CarswellBC 3294, 96 CBR (5th) 35 (BC SC), at paras 55, 56 and 59 **[Tab 8]**

19. This Recognition Application seeks the recognition of the Chapter 11 Proceedings of the Debtors in the US Bankruptcy Court, and accordingly, the first part of the test under section 47(1) of the CCAA is met.

CTI is a Foreign Representative

20. The second requirement under section 47(1) of the CCAA is that the applicant is a "foreign representative" in respect of the foreign proceeding.

CCAA, s. 47(1) **[Tab 1]**

21. Section 45(1) of the CCAA defines a "foreign representative" as:

> "… a person or body, including one appointed on an interim basis, who is authorized in a foreign proceeding in respect of a debtor company, to (a) monitor the debtor's business and financial affairs for the purpose of a reorganization, or (b) act as a representative in respect of the foreign proceeding."[28]

CCAA, s. 45(1) **[Tab 1]**

22. A foreign representative includes an entity that is authorized to act as such in the foreign proceeding. On June 6, 2023, the US Bankruptcy Court is expected to enter the Foreign Representative Order, which will authorize CTI to act as the foreign representative of the Debtors for purposes of the Chapter 11 Proceedings. Once entered, CTI will meet the CCAA definition of a "foreign representative" in respect of the Chapter 11 Proceedings and the second requirement of Section 47(1) of the CCAA will be met. The proposed Foreign Representative Order will authorize and empower CTI to act in any way permitted by Canadian law including seeking recognition of the Chapter 11 Proceedings in the Recognition Proceeding, request that this Honourable Court lend assistance to the US Bankruptcy Court in protecting the Chapter 11 Debtors' properties, and seek any other appropriate relief from this Honourable Court that CTI determines just and proper in furtherance of the protection of the Chapter 11 Debtors' estates. The Foreign Representative Order further contains a request by the US Bankrutpcy Court for the aid and assistance of this Honourable Court to recognize the Chapter 11 Proceedings of the Chapter 11 Debtors as a "foreign main proceeding" and CTI as a "foreign representative" pursuant to the CCAA, and to recognize and give full force and effect in all provinces and territories of Canada to that order.

Koza Affidavit, at paras 85 to 87; Exhibit "P"

23. Once this Honourable Court is satisfied that the application for recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, section 47(1) of the CCAA states that "the court shall make an order recognizing the foreign proceeding."

CCAA, s..47(1) **[Tab 1]**

The Chapter 11 Proceedings are Foreign Main Proceedings

24. Section 47(2) of the CCAA requires that the court specify whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding. If the court determines that the proceeding is a foreign main proceeding, section 48(1) of the CCAA sets ourt the mandatory relief that that is to be provided in the Recognition Order.

CCAA, sections 47(2) and 48(1) **[Tab 1]**

25. Under Section 49(1)(a) of the CCAA, the Court also has the permissive ability to make the orders contemplated by Section 48(1) of the CCAA if the Chapter 11 Proceedings are a "foreign non-main proceeding".

CCAA s. 49(1)(a) **[Tab 1]**

26. Under section 45(1) of the CCAA, the determination of whether or not the Chapter 11 Proceedings of a Debtor is a "foreign main proceeding" or "foreign non-main proceeding" depends upon where the "centre of main interest" of that Debtor is located ("**COMI**").

CCAA s. 45(1) **[Tab 1]**

27. The CCAA does not include a definition of COMI. Section 45(2) states that, absent evidence to the contrary, the debtor's registered office is deemed to be its COMI. COMI is presumed to be the location of its registered office. However, the presumption is rebuttable; COMI is a substantive, not technical, determination.

CHC Group Ltd. (Re), 2016 BCSC 2623 at para 9 **[Tab 5]***; Lightsquared LP (Re)*, 2012 ONSC 2994 at para 26 **[Tab 9]**

28. A determination of a debtor's COMI will necessarily depend upon the particular facts and circumstances of each case. Canadian courts have accepted the following test for determining whether the statutory presumption of a debtor company's COMI has been rebutted:

> "In circumstances where it is necessary to go beyond the s. 45(2) registered office presumption [...] 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 interest. 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."

Lightsquared LP (Re), 2012 ONSC 2994 at para 25 **[Tab 9]**; *Zochem Inc. (Re)*, 2016 ONSC 958 at para 22 **[Tab 18]**

29. In addition to the above "principal" factors, Canadian courts have made reference to the following additional factors in conducting the COMI analysis:

(a) the location where corporate decisions are made;

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

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

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

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

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

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

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

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

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

Massachusetts Elephant & Castle Group, Inc. (Re), 2011 ONSC 4201 at paras 26-31 **[Tab 10]**;
Angiotech Pharmaceuticals Ltd. (Re), 2011 BCSC 115 at para 7 **[Tab 2]**

30. Cyxtera LLC's registered office is in Delaware and thus its COMI is deemed to be the U.S. Since its only activity is holding shares in Communications ULC, the presumption in section 45(1) of the CCAA is an appropriate basis for determining the COMI of Cyxtera LLC.

Koza Affidavit, paras 7 and 8, Exhibit "A" to "C"

31. The Cyxtera Canada entities have their registered office in Calgary, Alberta and thus there COMI is deemed to be Canada. However, there is significant evidence to rebut the presumption. The Cyxtera Group's directorship, senior management, corporate, banking, strategic, management, human resources, and functions are all in Coral Gables, Florida. Similarly, oversight of cash management and accounting functions, the seat of treasury management functions, and decision-making around pricing decisions and new business development initiatives all happen in the U.S.

Koza Affidavit, paras 9, 10, 25 and 80, Exhibits "D" and "E"

32. In addition to the above facts, the centres of main interest for the Debtors is in the U.S., as among other things:

(a) based on Cyxtera's communication with its primary senior secured creditors, those creditors recognize the United States as the Debtors primary country of business;

(b) the United States is the location in which Cyxtera's principal assets and operations are found and the Debtors form a part of the Cyxtera Group;

(c) Communications ULC operates four (4) of sixty (60) worldwide Cyxtera data centres in Vancouver, Ontario and Montreal, with the majority of its data centres located in the U.S.;

(d) Cyxtera LLC is the sole shareholder of Communications ULC and does not carry on business in Canada or have any operations in Canada;

(e) Communications ULC employs seventeen (17) individuals in a global workforce of over 600 people. None of the Canadian employees have management positions. The titles of the Canadian employee are Site Manager, Operations Lead, Electrical Lead, Mechanical Lead, Operations Tech;

(f) Coral Gables, Florida, United States is where the management of the Debtors takes place;

(g) no management decisions for the Debtors are made in Canada;

(h) Coral Gables, Florida, United States is where corporate decisions of the Debtors takes place;

(i) the Debtors' books and records are located in Coral Gables, Florida;

(j) Cyxtera's management centres are all in the United States, including for the Debtors;

(k) Cyxtera's employee administration, including human resource functions occur in Coral Gables, Florida, including for Communications ULC;

(l) Cyxtera's marketing and communication functions occur in Coral Gables, Florida, including for the Debtors;

(m) the Cyxtera Group is managed on a consolidated basis from its office in Coral Gables, Florida;

(n) the Cyxtera Group's corporate, banking, strategic and management functions occurs in Coral Gables, Florida;

(o) Cyxtera's treasury and accounting departments are located in Coral Gables, Florida, including for the Debtors;

(p) Cyxtera LLC and Cyxtera Canada share the same directors and officers as the United States Cyxtera entities; and

(q) the Debtors' bank accounts are overseen by Cyxtera's treasury department in Coral Gables, Florida.

Koza Affidavit, paras 25 and 80

33. Based on the foregoing, the Foreign Representative submits that the Debtors' COMI is the U.S. and the Chapter 11 Proceedings are a "foreign main proceeding" under section 47(2) of the CCAA.

34. The granting of an order recognizing the Chapter 11 Proceedings as a foreign main proceeding is also appropriate because:

(a) given the close connection between Cyxtera Canada and the U.S., it is reasonable for the US Bankruptcy Court to have principal control over the insolvency process; and

(b) coordination of proceedings in the two jurisdictions will better ensure equal and fair treatment of all stakeholders.

Koza Affidavit, paras 86 and 87

The Initial Recognition Order should be granted

35. As discussed above, Section 48(1) of the CCAA provides that on the making of an order recognizing a foreign proceeding that is specified by the Court 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.

CCAA, s. 48(1) **[Tab 1]**

36. Furthermore, 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."

CCAA, s. 52(1) **[Tab 1]**

37. Upon the filing of the voluntary petitions with the US Bankruptcy Court to commence the Chapter 11 Proceedings, the Debtors received an automatic stay of proceedings under the Bankruptcy Code which is stated to operate on a world-wide basis. An Order of this Honourable Court, however, staying proceedings and providing the other relief contemplated by section 48(1) of the CCAA is essential to protect the Debtors and their business and property and protect the efforts of the Debtors to proceed with the Chapter 11 Proceedings and emerge from the reorganization process.

38. The Initial Recognition Order sought by the Foreign Representative is based on the Ontario Court's Model CCAA Initial Recognition Order (Foreign Main Proceeding) and provides for all of the relief required by section 48(1) of the CCAA and which may be granted under s. 49(1) of the CCAA. As a result of the Debtors meeting factual the requirements under section 48(1) and the exigencies of the circumstances facing the

Debtors, the Debtors should be granted the stay of proceedings and other mandatory relief identified in the Initial Recognition Order.

The Supplemental Recognition Order should be granted

39. In addition to the mandatory relief provided for in section 48(1), section 49(1) of the CCAA grants this Honourable Court broad discretion to make any order that it considers appropriate, if it is satisfied that the order is necessary for the protection of the debtor's property or the interests of creditors. Section 50 of the CCAA further provides that an order made under Part IV of the CCAA, including pursuant to section 49, may be made on any terms and conditions that the court considers appropriate.

CCAA, sections 48(1), 49 and 50 **[Tab 1]**

40. The Supplemental Recognition Order includes the broader stay of proceedings and protections to restructuring debtors typically granted in Part IV and other CCAA proceedings. The stay of proceedings being sought by the Debtors, and namely a stay during entirety of the Chapter 11 Proceedings, is appropriate in order to preserve the *status quo* while the Debtors and the other Chapter 11 Debtors attempt to effect a global resolution and restructuring for the benefit of themselves, their creditors and other stakeholders.

CCAA, sections 48(1), 49 and 50 **[Tab 1]**

Recognition of the First Day Orders is appropriate

41. Section 49 gives this Honourable Court the authority to grant recognition orders of first day orders granted by the US Bankruptcy Court in the Chapter 11 Proceedings ("**First Day Orders**"). Section 52 of the CCAA provides 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. The limits to this cooperation are set out in section 61 of the CCAA, which provides as follows:

"Court not prevented from applying certain rules

> 61 (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.
>
> Public policy exception
>
> (2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy."

CCAA, sections 52 and 61 **[Tab 1]**

42. Hence, once an order recognizing a foreign proceeding is made by this Court, the Court is required to cooperate, to the maximum extent possible, with the foreign representative and the foreign court, so long as the requested relief is not inconsistent with the CCAA and does not raise concerns regarding public policy.

CCAA, sections 49 and 50 **[Tab 1]**; *Purdue Pharma L.P., Re*, 2019 ONSC 7042 at para 22 **[Tab 15]**

43. When a Canadian court considers whether it should recognize a foreign order made in foreign proceedings, the following considerations should be taken into account:

(a) the principles of comity and the need to encourage cooperation between courts of various jurisdictions;

(b) the need to accord respect to foreign bankruptcy and insolvency legislation unless in substance generally it is so different from the bankruptcy and insolvency laws of Canada or diverges radically from the processes in Canada;

(c) whether stakeholders will be treated equitably, and in particular whether recognition will ensure that, to the extent reasonably possible, stakeholders are treated equally, regardless of the jurisdiction to which they reside;

(d) the importance of promoting plans that allow the enterprises to reorganize globally, especially where there is an established interdependence on a

transnational basis. To the extent reasonably practical, one jurisdiction should take "charge" of the principal administration of the enterprise's reorganization, where this approach will facilitate a potential reorganization and which will respect the claims of stakeholders in all jurisdictions and does not detract from the net benefits that may be available from alternative approaches;

(e) the appropriate level of court involvement depends to a significant degree upon the court's nexus to the enterprise;

(f) where one jurisdiction is to have an ancillary role, the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments regarding the reorganizational efforts in the foreign principal jurisdiction and stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction; and

(g) all affected stakeholders should receive effective notice as is reasonably practicable in the circumstances.

Babcock & Wilcox Canada Ltd., Re, 2000 CanLII 22482 at para 21 **[Tab 3]**

44. The Foreign Representative seeks recognition orders in respect of the following First Day Orders as they are expected to be entered by the Bankruptcy Court on June 6, 2023:

(a) an order (i) restating and enforcing the worldwide automatic stay, anti-discrimination provisions, and *ipso facto* protections of the Bankruptcy Code; (ii) approving the form and manner of notice, and (iii) granting related relief;

Koza Affidavit, paras 92(a)(i), 94-96, Exhibit "R"

(b) an order authorizing the joint administration of the estates of the Chapter 11 Debtors and the Chapter 11 Proceedings;

Koza Affidavit, paras 92(a)(ii), 97-99 and 102, Exhibit "S"

(c) an order (i) establishing certain notice, case management, and administrative procedures; and (ii) granting related relief;

Koza Affidavit, paras 92(a)(iii), 100 and 102, Exhibit "T"

(d) an order (i) authorizing the appointment of Kurtzman Carson Consultants LLC as claims and noticing agent effective as of the Petition Date; and (ii) granting related relief;

Koza Affidavit, paras 92(a)(iv), 101 and 102, Exhibit "U"

(e) an order (i) authorizing the Cyxtera Group to (A) file a consolidated list of Cyxtera's thirty largest unsecured creditors, (B) file a consolidated list of creditors *in lieu* of submitting a separate mailing matrix for each debtor, and (C) redact certain personally identifiable information; (ii) waiving the requirement to file a list of equity holders and provide notices directly to equity security holders; and (iii) granting related relief;

Koza Affidavit, paras 92(a)(v), 104 and 105, Exhibit "V"

(f) an order extending time to (i) file schedules of assets and liabilities, schedules of executory contracts and unexpired leases, and statements of financial affairs and (ii) granting related relief;

Koza Affidavit, paras 92(a)(vi), 106, and107, Exhibit "W"

(g) an order (i) approving notification and hearing procedures for certain transfers of and declarations of worthlessness with respect to common stock; and (ii) granting related relief (the "**Share Transfer Order**");

Koza Affidavit, paras 92(a)(x) and 108, Exhibit "X"

(h) an order (i) authorizing the Chapter 11 Debtors to (A) continue to perform under existing hedging contracts, (B) enter into new hedging contracts, (C) grant super priority claims, provide other credit support, and honor obligations under hedging contracts; and (ii) granting related relief;

Koza Affidavit, paras 92(b)(i) and 114 to 116, Exhibit "Y"

(i) an order (i) authorizing the Cyxtera Group to (A) continue using the cash management system, (B) honor certain prepetition obligations related thereto, (C)

maintain existing Debtor bank accounts, business forms, and books and records, and (D) continue intercompany transactions; and (ii) granting related relief;

Koza Affidavit, paras 92(b)(ii) and 109 to 113, Exhibit "Z"

(j) an order (i) approving the Cyxtera Group's proposed adequate assurance for future utility services; (ii) prohibiting utility companies from altering, refusing, or discontinuing services; (iii) approving the Cyxtera Group's proposed procedures for resolving adequate assurance requests; and (iv) granting related relief;

Koza Affidavit, paras 92(b)(iii), 117 and 118, Exhibit "AA"

(k) an order (i) authorizing the Cyxtera Group to pay prepetition claims of certain critical vendors, foreign vendors, 503(b)(9) claimants, and lien claimants, (ii) granting administrative expense priority to all undisputed obligations on account of outstanding orders; and (iii) granting related relief;

Koza Affidavit, paras 92(b)(iv) and 119 to 122, Exhibit "BB"

(l) an order (i) authorizing the Chapter 11 Debtors to (A) maintain and administer their customer and partner programs, and (B) honor certain prepetition obligations related thereto; and (ii) granting related relief;

Koza Affidavit, paras 92(b)(v) and 123 to 125, Exhibit "CC"

(m) an order (i) authorizing the Cyxtera Group to (A) pay prepetition wages, salaries, other compensation, and reimbursable expenses, and (B) continue employee benefits programs; and (ii) granting related relief;

Koza Affidavit, paras 92(b)(vi) and 126 to 128, Exhibit "DD"

(n) an order (i) authorizing the Cyxtera Group to (A) maintain insurance and surety coverage entered into prepetition and pay related prepetition obligations, and (B) renew, supplement, modify, or purchase insurance and surety coverage; and (ii) granting related relief;

Koza Affidavit, paras 92(b)(vii) and 129-131, Exhibit "EE"

(o) an order (i) authorizing the payment of certain taxes and fees; and (ii) granting related relief;

Koza Affidavit, paras 92(b)(viii) and 132 to 137, Exhibit "FF"

(p) an order (i) authorizing the Chapter 11 Debtors to obtain post-petition financing; (ii) authorizing the debtors to use cash collateral; (iii) granting liens and providing super priority administrative expense claims; (iv) granting adequate protection, (v) modifying the automatic stay; (vi) scheduling a final hearing; and (vii) granting related relief (the "**DIP Financing Order**") (discussed in detail below).

Koza Affidavit, paras 92(c)(i) and 143, Exhibit "GG"

45. The orders in respect of which recognition by this Honourable Court is being sought fall into three broad categories:

(a) The First Day Orders referred to in paragraphs 38(a) to (f) are based on the complexity and scale of the Chapter 11 Debtors, their deeply interconnect managerial, operational and financial integration, their carrying on essentially one "business", and the inherent complexity of their Chapter 11 Proceedings as a result of the multiple jurisdictions and the significant number of parties in interest, including the Chapter 11 Debtors, the creditors and other stakeholders in interest. Hence, these orders provide for an order restating the worldwide automatic stay, anti-discrimination provisions and *ipso facto* protections and for the joint administration and procedural consolidation of the estates. The joint administration, the case management and administrative procedures, the provision for electronic notification, the appointment of a professional and experienced Claims Agent to administer the notification process for creditors and claims process, and the amendments to the timing and type of filings that must be made are intended to provide for administrative and procedural efficiencies for these highly complex Chapter 11 Proceedings and mitigate some of the costs arising from that complexity.

Koza Affidavit, paras 94 to 107

(b) The Share Transfer Order (referred to in paragraph 38(g)) provides a level of protection to the estates of the Chapter 11 Debtors from the loss of their Tax Attributes in the as a result of certain transfers of shares in CTI over which the Chapter 11 Debtors would otherwise have no control, as those Tax Attributes potentially have value for those estates and the stakeholders therein.

Koza Affidavit, para 108

(c) The First Day Orders contemplated by paragraphs 38(h) to (o) are critical to permitting the Chapter 11 Debtors to continue operating in the ordinary course without disrupting their operations through such measures as terminating their hedges, terminating their current cash management system, changing all of their business forms, terminating their customer incentive programs, or terminating or putting at risk their insurance portfolio. These First Day Orders authorize the Chapter 11 Debtors to pay obligations that accrued prior to the Petition Date to certain parties whose relationships with the Chapter 11 Debtors are critical to their ability to continue operating during and successfully restructure in the Chapter 11 Proceedings. Such parties include employees, banks running the bank accounts and money management systems, insurance providers and brokers, critical domestic and foreign vendors, utilities providers and hedge counterparties. Without the relief provided by these First Day Orders, the Chapter 11 Debtors' business, the value of their estates, and their prospects for being successfully reorganized would be severely and negatively impacted. The deep integration of the Debtors in the Cyxtera Group makes recognition of these First Day Orders appropriate in the circumstances.

Koza Affidavit, paras 109 to 137

(d) The DIP Financing Order, which is discussed in more detail below, provides critical liquidity during the Chapter 11 Proceedings to all of the Chapter 11 Debtors, including the Debtors.

46. 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.

Hollander Sleep Products, LLC et al., Re, 2019 ONSC 3238 at para 41 **[Tab 7]**

47. In furtherance of the principle of comity, Canadian courts should allow a foreign court to exercise principal control over the insolvency process if that other jurisdiction has the closest connection to the proceeding. As noted above, the CCAA requires the Court to cooperate to the maximum extent possible with the foreign proceeding.

48. The granting of an order recognizing and giving effect to the First Day Orders is appropriate for the following reasons:

(a) the US Bankruptcy Court has appropriately taken jurisdiction over the Chapter 11 Proceedings and comity will be furthered by this Court's recognition of and support for the Chapter 11 Proceedings already under way in the US;

(b) coordination of proceedings in the two jurisdictions will allow the courts to ensure equal and fair treatment of all stakeholders irrespective of where they are located;

(c) given the close connection between the US and Cyxtera Canada it is reasonable and sensible for the US Bankruptcy Court to have principal control over the insolvency process; and

(d) the First Day Orders were obtained by the Debtors to minimize the adverse effects of the Chapter 11 Proceedings on their business in order to preserve value of the Debtors' assets for the benefit of their stakeholders.

Koza Affidavit, para 83

49. Recognition of the First Day Orders, which orders are similar to the relief that would be granted by an initial order under Part I of the CCAA, is important to ensure the equal treatment of Canadian stakeholders, that the proceedings are coordinated with the Chapter 11 Proceedings and that Canadian trade creditors and suppliers (if any) receive the benefit of the First Day Orders. Accordingly, CTI requests that the Court recognize the First Day Orders.

Koza Affidavit, see for example, paras 96 and 116

A&M should be appointed Information Officer

50. It has become common in proceedings under Part IV of the CCAA for the Court to appoint an information officer, pursuant to the court's broad discretion under section 49. The Ontario Model Supplemental Order includes for the appointment of the information officer. An information officer helps effect cooperation between the Canadian proceeding, the foreign representative and foreign court, as required by section 52(1) of the CCAA.

CCAA, s. 52 **[Tab 1]**

51. In this case, the Foreign Representative requests the appointment of the Information Officer to ensure that this Court is kept apprised of the status of the Chapter 11 Proceedings by an independent third-party licensed insolvency professional and to assist in providing information to and responding to inquiries from interested parties in Canada. In this case, the Foreign Representative requests the appointment of the Information Officer to ensure that this Court is kept apprised of the status of the Chapter 11 Case by an independent third-party licensed insolvency professional and to assist in providing information to and responding to inquiries from interested parties in Canada.

Koza Affidavit, paras 88 to 90

52. The Foreign Representative seeks to appoint A&M as the Information Officer in this proceeding on terms consistent with the Ontario Model Order and the terms on which information officers have been appointed in recent Part IV proceedings. The proposed

role of A&M as Information Officer is based on the Model Order and is consistent with the terms of appointment of information officers in other recent recognition proceedings under the CCAA in Canada.

53. A&M is an independent third-party licensed insolvency professional with the necessary expertise to assist CTI in monitoring the Debtors' business and financial affairs, to report to this Honourable Court from time to time and to carry out such other powers and responsibilities provided for in the CCAA and any Order of this Honourable Court. A&M has consented to act as Information Officer.

Koza Affidavit, paras 88 to 91, Exhibit "Q"

The Administration Charge is Appropriate

54. The Debtors seek an Administration Charge of CDN$400,000 to secure the collective fees and disbursements incurred both before and after the commencement of these proceedings of legal counsel for CTI and the Debtors, the proposed Information Officer, and legal counsel to the proposed Information Officer.

Koza Affidavit, para 138

55. Section 11.52 of the CCAA expressly provides this Court with the power to grant a charge in respect of professional fees and disbursements.

56. In determining whether to grant an administration charge, Canadian courts have considered, among other things, the following factors:

(a) the size and the complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of any secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

Mountain Equipment Co-Operative (Re), 2020 BCSC 2037 at para 58 **[Tab 12]**; *Canwest Publishing, Inc.*, 2010 ONSC 222 at para 54 **[Tab 4]**

57. The proposed Information Officer, counsel for the Information Officer, and CTI and the Debtors' counsel will be essential to the Debtors' restructuring efforts. The Canadian recognition proceedings form an important part of Cyxtera's overall restructuring. The granting and quantum of the Administration Charge is acknowledged in the DIP Agreement (as defined below) as having priority over the DIP Facility. The Debtors' other senior lenders are supportive of the DIP Facility.

Koza Affidavit, para 139

58. An administration charge and the approval of retention of professionals is appropriate in proceedings under Part IV of the CCAA because the work performed is supervised by this Court, not the foreign court.

59. The proposed quantum of the Administration Charge sought is reasonable and appropriate in the circumstances having regard to the size and complexity of these proceedings and the roles that will be required of Canadian counsel to the Debtors and the proposed Information Officer and its counsel. Accordingly, CTI submits that the granting of the proposed Administration Charge is appropriate in the circumstances.

DIP Financing Order and Lenders' Charge

60. Cyxtera is seeking a super priority lenders charge in the Chapter 11 Proceedings over the assets of Cyxtera (the "**Lenders Charge**"). The Debtors are seeking recognition of the DIP Financing Order sought from the US Bankruptcy Court and an order in the Recognition Proceedings granting the same Lenders Charge in Canada with respect to the Debtors' assets in Canada.

61. Under a senior secured superpriority debtor-in-possession credit agreement dated as of June 6, 2023 (the "**DIP Credit Agreement**") among Cyxtera DC Parent Holdings Inc., Cyxtera DC Holdings, Inc. as borrower (the "**Borrower**"), the consenting lenders party

thereto (the "**DIP Lenders**"), and Wilmington Savings Fund Society, FSB as administrative agent and collateral agent, Cyxtera has arranged a debtor-in-possession $200 million super priority secured debtor in possession facility (the "**DIP Facility**") to fund its operations and restructuring within the Chapter 11 Proceedings. Pursuant to the First Day Motion for the DIP Financing Order, the Chapter 11 Debtors seek approval in the Chapter 11 Proceedings of the DIP Facility, which consists of:

(a) $150 million in new money: (i) $40 million of which will be made available upon entry of the interim DIP order in the US Bankruptcy Court, and up to (ii) $110 million of which will be made available upon entry of the final DIP order in the US Bankruptcy Court; and

(b) a "roll up" of any outstanding principal and accrued interest under the Bridge Facility as of the Petition Date, pursuant to a First Lien Priority Credit Agreement dated May 4, 2023 (the "**Bridge Credit Agreement**") which was $36,000,000 upon original advancement (the "**Bridge Amount**").

Koza Affidavit, para 143, Exhibit "HH"

62. The availability of advances under DIP Facility is subject to certain conditions precedent set out in section 4.01 of the DIP Credit Agreement, including in section 4.01(m) thereof that the US Bankruptcy Court shall have issued the DIP Financing Order under which a super priority charge is granted securing obligations under the DIP Facility, and this Honourable Court makes an Order recognizing the DIP Financing Order requiring Cyxtera Canada and Cyxtera LLC to execute guarantees of the obligations of the Borrower under the DIP Facility. Cxytera Canada and Cyxtera LLC are both guarantors to the Bridge Facility.

Koza Affidavit, para 144, Exhibit "II"

63. The provision of interim financing is essential to a successful restructuring of the Cyxtera Group, including the Debtors. Given the current financial situation of the Debtors, including their cash position, the proposed debtor-in-possession DIP Facility embodied in

the DIP Facility is the only feasible alternative available to the Debtors and is on terms that are fair, reasonable and adequate.

Koza Affidavit, para 149

64. The DIP Facility is the culmination of extensive prepetition negotiations between the Debtors, on the one hand, the DIP Lender and Cyxtera's senior secured lenders, on the other hand, and are by far the best proposal that the Debtors received. The Bridge Amount was advanced by the DIP Lenders in good faith on that basis and without the DIP Facility Cyxtera would not be able to restructure in the Chapter 11 Proceedings. The DIP Facility is fair and appropriate under the circumstances, and in the best interest of the Debtors' estates.

Koza Affidavit, para 151

65. Section 11.2 of the CCAA vests the Court with the jurisdiction to grant an interim financing charge over the assets of the debtor in priority to the claim of any secured creditor of the debtor, on notice to the secured creditors who are likely to be affected by such security or charge. 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 charge; and

(g) the report of the proposed Information Officer.

Re Canwest Publishing Inc., 2010 ONSC 222 at para 54 **[Tab 4]**; CCAA section 11.2 **[Tab 1]**

66. The Chapter 11 Proceedings are currently estimated to last 120 days. Cyxtera will continue to manage the Debtors business and financial affairs throughout the restructuring as debtor-in-possession entities and Cyxtera's management has the confidence of its senior secured lenders. No creditor will be materially prejudiced by the granting of the Lenders Charge. In fact, Cyxtera's stakeholders, including its senior secured lenders, will be materially prejudiced if the Lenders Charge is not granted as the Chapter 11 Debtors would not have the operating funds available to continue operating during the Chapter 11 Proceedings and these Recognition Proceedings.

Koza Affidavit, paras 152 and 153

67. Access to availability under the DIP Facility, including approval of the Lenders Charge in the Chapter 11 Proceedings and these Recognition Proceedings, is crucial to enable the Debtors to proceed with a successful restructuring.

Miniso International Hong Kong Limited v. Migu Investments Inc., 2019 BCSC 1234 at paras 46, 57 **[Tab 11]**

Bridge Amount Roll Up

68. As stated above, the DIP Facility includes a "roll-up" for the Bridge Amount whereby the Bridge Amount becomes part of the total amount extended under the DIP Facility.

69. Granting a "regular roll-up" is not automatic and there is competing case law that indicates that a "regular roll-up" violates section 11.2(1) of the CCAA which provides that a DIP charge "may not secure an obligation that exists before the order is made." However, in the context of cross-border recognition cases, Courts have relaxed their application of section 11.2(1) of the CCAA on the basis of comity.

70. In *Hollander Sleep Products, LLC et. al.,* a cross border recognition proceeding, Justice Hainey of the Ontario Superior Court of Justice granted an order approving a "regular roll-up" DIP financing noting that the same violated section 11.2(1) of the CCAA;

however, in emphasizing the importance of comity and cooperation in cross-border insolvency proceedings Justice Hainey approved the DIP financing for the following reasons:

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

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

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

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

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

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

Hollander Sleep Products, LLC et al., Re, 2019 ONSC 3238 at paras 47-51 **[Tab 7]**

71. Section 49 of the CCAA provides additional support in allowing a regular roll up in that, in recognizing an order of a foreign court, the court may make any order that it considers appropriate, provided the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of the creditor or creditors. This is particularly relevant when the order is made in a “foreign main proceeding” and where there will be no material prejudice to Canadian creditors if the foreign order is recognized in Canada.

Hartford Computer Hardware Inc., Re, 2012 ONSC 964 at paras 11-15 **[Tab 6]**

72. Comity supports the granting of the regular roll up in this case, for the following reasons:

(a) the Lenders Charge benefits the objectives of the CCAA and is commercially reasonable as it will allow Cyxtera, including the Debtors, to continue operations and pursue their restructuring plan;

(b) Cyxtera, including the Debtors need immediate access to the DIP Facility to ensure their continued operations during these proceedings;

(c) the DIP Lenders are unwilling to provide funding to the Chapter 11 Debtors unless Cxytera Canada guarantees the Borrower's liability under the DIP Facility;

(d) the proposed DIP Facility is supported by all secured creditors with an economic interest in Cyxtera Canada;

(e) if the Lenders Charge is not granted, the restructuring contemplated by Cyxtera will not be implemented, most likely resulting in catastrophic consequences for Cyxtera and its stakeholders; and

(f) there is no material prejudice to any of Cyxtera's creditors, and Cyxtera's stakeholders will be materially prejudiced if the DIP Facility is not available to Cyxtera as part of its restructuring efforts.

73. Canadian Courts have also authorized roll ups under s.11.2 of the CCAA where: (i) the CCAA Monitor obtained an independent legal opinion that pre-filing security is not primed by court-ordered DIP security; (ii) the DIP funds replaced existing secured collateral; and (iii) the court-ordered charge was not being used to improve the security position of pre-filing DIP lenders or to fill in gaps in their security coverage.

Re TOYS "R" US (Canada) Ltd., 2017 ONSC 5571 at para 10 **[Tab 16]**

74. In this case, the Bridge amount being rolled up into the DIP Facility is not aged pre-filing debt. The aggregate principal amount of the loans under the Bridge Facility were extended to Cyxtera in early May, 2023 solely to enable Cyxtera to reach the Chapter 11

Proceedings Petition Date and be able to file for the Chapter 11 Proceedings. The Bridge Amount is an essential element of the overall DIP Facility and its inclusion into DIP Facility, and its protection via the Lenders Charge, should be approved because the DIP Lender would not have otherwise agreed to provide the DIP Facility. $36,000,000 of the DIP Facility merely replaces the Bridge Amount and the Lenders Charge has being sought with the approval of Cyxtera's senior secured lenders who have agreed to the granting of the super priority Lenders Charge.

Koza Affidavit, paras 143 and 152

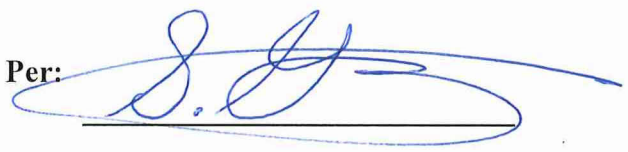
75. It is submitted that the DIP Facility and the proposed Lenders Charge, and the related grant of super priority security interests, are fair and reasonable in the circumstances, are necessary, and in the best interest of all of the Debtors' stakeholders. As such, the Debtors seek recognition of the U.S. order approving the DIP Facility in these Recognition Proceedings and seek a supplemental order granting the Lenders Charge in these Recognition Proceedings.

III. CONCLUSION AND RELIEF SOUGHT

76. CTI seeks the granting of the Recognition Orders under the CCAA substantially in the form as attached to the Originating Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of June, 2023.

GOWLING WLG (CANADA) LLP

Per: 

Clerk's stamp:

COURT FILE NUMBER:	
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.
DOCUMENT	**BOOK OF AUTHORITIES**
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 **Attn: Tom Cumming/Sam Gabor/and Stephen Kroeger** Ph. 1 403 298 1946 File No.: A171290

APPLICATION BEFORE THE HONOURABLE JUSTICE D. B. NIXON
JUNE 7TH, 2023 AT 2:00 PM. ON THE COMMERCIAL LIST

TABLE OF AUTHORITIES

R.S.C. 1985, c. C-36, s. 2

s 2.

Currency

2.
2(1)Definitions
In this Act,

"aircraft objects" [Repealed 2012, c. 31, s. 419.]

"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a company; *("agent négociateur")*

"bond" includes a debenture, debenture stock or other evidences of indebtedness; *("obligation")*

"cash-flow statement", in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; *("état de l'évolution de l'encaisse")*

"claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; *("réclamation")*

"collective agreement", in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; *("convention collective")*

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; *("compagnie")*

"court" means

(a) in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,

(a.1) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench, and

(c.1) in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice;

("tribunal")

"debtor company" means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of thecompany have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy 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;

("compagnie débitrice")

"director" means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever named called; *("administrateur")*

"eligible financial contract" means an agreement of a prescribed kind; *("contrat financier admissible")*

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

("réclamation relative à des capitaux propres")

"equity interest" means

(a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

("intérêt relatif à des capitaux propres")

"financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account;

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
Federal English Statutes reflect amendments current to April 26, 2023
Federal English Regulations Current to Gazette Vol. 157:7 (March 29, 2023)

End of Document

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

R.S.C. 1985, c. C-36, s. 11.52

s 11.52

Currency

11.52

11.52(1)Court may order security or charge to cover certain costs

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52(2)Priority

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

Amendment History

2005, c. 47, s. 128; 2007, c. 36, s. 66

Currency

Federal English Statutes reflect amendments current to April 26, 2023
Federal English Regulations Current to Gazette Vol. 157:7 (March 29, 2023)

End of Document

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
Federal English Statutes reflect amendments current to April 26, 2023
Federal English Regulations Current to Gazette Vol. 157:7 (March 29, 2023)

End of Document

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 April 26, 2023
Federal English Regulations Current to Gazette Vol. 157:7 (March 29, 2023)

End of Document

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 April 26, 2023
Federal English Regulations Current to Gazette Vol. 157:7 (March 29, 2023)

End of Document

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

Federal English Statutes reflect amendments current to April 26, 2023
Federal English Regulations Current to Gazette Vol. 157:7 (March 29, 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. 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

Currency

Federal English Statutes reflect amendments current to April 26, 2023
Federal English Regulations Current to Gazette Vol. 157:7 (March 29, 2023)

End of Document

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 April 26, 2023
Federal English Regulations Current to Gazette Vol. 157:7 (March 29, 2023)

End of Document

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 April 26, 2023
Federal English Regulations Current to Gazette Vol. 157:7 (March 29, 2023)

End of Document

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 April 26, 2023
Federal English Regulations Current to Gazette Vol. 157:7 (March 29, 2023)

End of Document

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

Federal English Statutes reflect amendments current to April 26, 2023
Federal English Regulations Current to Gazette Vol. 157:7 (March 29, 2023)

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. 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

Currency

Federal English Statutes reflect amendments current to April 26, 2023
Federal English Regulations Current to Gazette Vol. 157:7 (March 29, 2023)

End of Document

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. 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

Federal English Statutes reflect amendments current to April 26, 2023
Federal English Regulations Current to Gazette Vol. 157:7 (March 29, 2023)

End of Document

2011 BCSC 115
British Columbia Supreme Court [In Chambers]

Angiotech Pharmaceuticals Inc., Re

2011 CarswellBC 124, 2011 BCSC 115, [2011] B.C.W.L.D. 2461, 197 A.C.W.S. (3d) 635, 76 C.B.R. (5th) 317

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

And In the Matter of a Plan of Compromise or Arrangement of Angiotech Pharmaceuticals, Inc. and the other Petitioners Listed on Schedule "A" (Petitioners)

P. Walker J.

Heard: January 28, 2011
Oral reasons: January 28, 2011
Docket: Vancouver S110587

Counsel: J. Dacks, M. Wasserman, R. Morse for Angiotech Pharmaceuticals
J. Grieve for Alvarez & Marsal Canada Inc.
R. Chadwick, L. Willis for Consenting Noteholders
B. Kaplan, P. Rubin for Wells Fargo

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
Centre of interest — Parties were involved in proceedings under Companies' Creditors Arrangement Act, with proceedings to begin in Delaware as well — Petitioners brought application for initial order — Application granted — Order would give petitioners reasonable time to organize affairs and operate as going concern — Centre of main interest in proceedings was British Columbia — Petitioners had assets in Canada — Operations of petitioners directed from head office in Canada — Chief executive officer to whom senior management reported to was based in Vancouver — Company reporting directed from Vancouver — Research and development done in Vancouver — Plant management meetings were held in Vancouver — Monitor to be representative in any main proceedings, rather than petitioners.
Table of Authorities
Cases considered by *P. Walker J.*:
Fraser Papers Inc., Re (2009), 2009 CarswellOnt 3658, 56 C.B.R. (5th) 194 (Ont. S.C.J. [Commercial List]) — referred to
Nortel Networks Corp., Re (2009), 50 C.B.R. (5th) 77, 2009 CarswellOnt 146 (Ont. S.C.J. [Commercial List]) — referred to
Statutes considered:
Bankruptcy Code, 11 U.S.C. 1982
Chapter 15 — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

PETITION for initial order in proceedings under *Companies' Creditors Arrangement Act.*

***P. Walker J.*:**

1 I am satisfied that the initial *CCAA* order should be granted. I am also satisfied that the order will permit the petitioners a reasonable time to reorganize their affairs in order to allow them to operate as going concerns.

2 The plan contemplated by the petitioners is aggressive in terms of time frame. The petitioners are to be complimented on their efforts to seek the Court's assistance in a very timely way, for taking an expedited approach in the face of failed efforts to avoid invoking protection under the *CCAA* regime.

3 The proposed timetable appears to reflect the petitioners' efforts to provide protection to their creditors, to maintain their employment contracts with their employees, and to continue to provide their valuable medical and pharmaceutical products to the global public.

4 I am satisfied that I have the jurisdiction to make the order, and I will grant the initial *CCAA* order.

5 I have been asked by counsel to speak to the issue of the "centre of main interest" because I am told that an application is to be made to the U.S. District Court, in Delaware, which will be filed this Sunday, January 30, 2011, and brought on Monday, January 31, 2011.

6 The petitioners' intention in that regard is reflected in the evidence. It is well described at para. 65 of their written submissions:

> Although the Petitioners intend that this Court be the main forum for overseeing their financial and operational restructuring, the Petitioners also intend to file petitions under Chapter 15 of the *United States Bankruptcy Code* seeking recognition of this proceeding as a "Foreign Main Proceeding". The Petitioners would file such petitions on the basis that British Columbia is their "centre of main interest" ("COMI"). The Petitioners intend that A&M, as proposed Monitor, would be the foreign representative in the Chapter 15 proceedings[.]

7 The factors considered by the courts in Canada that are relevant to the centre of main interest issue are:

> (a) the location where corporate decisions are made;
>
> (b) the location of employee administrations, including human resource functions;
>
> (c) the location of the company's marketing and communication functions;
>
> (d) whether the enterprise is managed on a consolidated basis;
>
> (e) the extent of integration of an enterprise's international operations;
>
> (f) the centre of an enterprise's corporate, banking, strategic and management functions;
>
> (g) the existence of shared management within entities and in an organization;
>
> (h) the location where cash management and accounting functions are overseen;
>
> (i) the location where pricing decisions and new business development initiatives are created; and
>
> (j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

See *Nortel Networks Corp., Re* (2009), 50 C.B.R. (5th) 77, [2009] O.J. No. 154 (Ont. S.C.J. [Commercial List]); and *Fraser Papers Inc., Re* (2009), 56 C.B.R. (5th) 194, [2009] O.J. No. 2648 (Ont. S.C.J. [Commercial List]).

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

2010 ONSC 222
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc. / Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J. No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Pepall J.

Judgment: January 18, 2010
Docket: CV-10-8533-00CL

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

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by creditors
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by creditors
CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI

would have been required to pay approximately $1.45 billion and would have been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

Table of Authorities

Cases considered by *Pepall J.*:

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

Anvil Range Mining Corp., Re (2003), 310 N.R. 200 (note), 2003 CarswellOnt 730, 2003 CarswellOnt 731, 180 O.A.C. 399 (note) (S.C.C.) — referred to

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — followed

Philip Services Corp., Re (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Statutes considered:

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

Generally — referred to

s. 4 — considered

s. 5 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — considered

s. 11.4(2) [en. 1997, c. 12, s. 124] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 137(2) — considered

APPLICATION by entity of company already protected under Companies' Creditors Arrangement Act for similar protection.

***Pepall J.*:**

services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *CHC Group Ltd. (Re),*
2016 BCSC 2623

Date: 20161013
Docket: S169079
Registry: Vancouver

In Bankruptcy and Insolvency

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

And in the Matter of Certain Proceedings taken in the United States Bankruptcy Court for the Northern District of Texas with respect to the Companies listed on Schedule "A" hereto

Application of CHC Group Ltd. under section 46 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C 36, as amended

Before: The Honourable Mr. Justice D.M. Masuhara

Oral Reasons for Judgment

Counsel for the Petitioner:	W.C. Kaplan, Q.C. P. Bychawski
Counsel for the Debtor U.S.A. Branch - CHC Group Ltd. appearing by teleconference:	K. DiBlasi
Counsel for the Landlord 0921528 BC Ltd.:	M.C. Verbrugge R.M. Laity
Counsel for the Ad Hoc Group of Noteholders:	M. Nied N.E. Levine (via teleconference)
Counsel for the Official Committee of Unsecured Creditors:	B. Richdale J.L. Lewis
Counsel for HSBC Bank PLC, as Administrative Agent for the Revolving Credit Facility Secured Lenders, appearing by teleconference:	H. Gorman
Place and Date of Trial/Hearing:	Vancouver, B.C. October 11, 2016
Place and Date of Judgment:	Vancouver, B.C. October 13, 2016

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

[8] Morawetz J. further stated, at para. 26, that:

> [i]n 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.

[9] Though Morawetz J. stated there is no express statement in Part IV of the *CCAA* that corporate groups are to be taken into account, the cases indicate that the question is not a technical one, but substantive. Integration of a specific debtor with the larger enterprise is, on my reading of the cases, a significant factor.

[10] This would be consistent with the stated purposes of Part IV, as set out in s. 44(c), of promoting "the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies". Canadian courts haven taken a purposive approach to the COMI analysis when addressing corporate groups: Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act,* 2d ed (Toronto: Thomson Reuters, 2013) at 703.

[11] In *Angiotech Pharmaceuticals Inc. (Re),* 2011 BCSC 115 at para. 7, Walker J. set out the following factors:

(a) the location where corporate decisions are made;

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

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

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

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

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

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

2012 ONSC 964
Ontario Superior Court of Justice [Commercial List]

Hartford Computer Hardware Inc., Re

2012 CarswellOnt 2143, 2012 ONSC 964, 212 A.C.W.S. (3d) 315, 94 C.B.R. (5th) 20

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

Application of Hartford Computer Hardware, Inc. Under Section 46 of the
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C 36, as Amended

And In the Matter of Certain Proceedings Taken in the United States Bankruptcy
Court for the Northern District of Illinois Eastern Division with Respect to

Re: Hartford Computer Hardware, Inc., Nexicore Services, LLC, Hartford Computer Group, Inc.
and Hartford Computer Government, Inc., (Collectively, the "Chapter 11 Debtors"), Applicants

Morawetz J.

Heard: February 1, 2012
Judgment: February 1, 2012
Written reasons: February 15, 2012
Docket: CV-11-9514-00CL

Counsel: Kyla Mahar, John Porter for Chapter 11 Debtors
Adrienne Glen for FTI Consulting Canada, Inc., Information Officer
Jane Dietrich for Avnet Inc.

Subject: Civil Practice and Procedure; Insolvency; Corporate and Commercial; International
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.5 Orders
XVII.5.c Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Orders — Miscellaneous
Chapter 11 proceedings were commenced in U.S. Court by Chapter 11 debtors — Chapter 11 proceeding was recognized as foreign main proceeding under Companies' Creditors Arrangement Act — U.S. Court made various orders, including final DIP facility order which contained partial "roll up" provision wherein all cash collateral in possession or control of Chapter 11 debtors on or after petition date was deemed to have been remitted to pre-petition secured lender for application to and repayment of pre-petition revolving debt facility with corresponding borrowing under DIP facility — Foreign representative of Chapter 11 debtors brought motion under s. 49 of Act for recognition and implementation in Canada of final utilities order, bidding procedures order, and final DIP facility order — Motion granted — Utilities order and bidding procedures order were routine, and it was appropriate to recognize them — Recognition of final DIP facility order was necessary for protection of debtor company's property and for interests of creditors — Final DIP facility order was granted by U.S. Court — In circumstances, there was no basis for present court to second guess decision of U.S. Court — Final DIP facility order did not raise any public policy issues.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Recognition of orders made in U.S. Chapter 11 proceedings — Chapter 11 proceedings were commenced in U.S. Court by Chapter 11 debtors — Chapter 11 proceeding was recognized as foreign main proceeding under Companies' Creditors Arrangement Act — U.S. Court made various orders, including final DIP facility order which contained partial "roll up" provision wherein all cash collateral in possession or control of Chapter 11 debtors on or after petition date was deemed to have been remitted to pre-petition secured lender for application to and repayment of pre-petition revolving debt facility with corresponding borrowing under DIP facility — Foreign representative of Chapter 11 debtors brought motion under s. 49 of Act for recognition and implementation in Canada of final utilities order, bidding procedures order, and final DIP facility order — Motion granted — Utilities order and bidding procedures order were routine, and it was appropriate to recognize them — Recognition of final DIP facility order was necessary for protection of debtor company's property and for interests of creditors — Final DIP facility order was granted by U.S. Court — In circumstances, there was no basis for present court to second guess decision of U.S. Court — Final DIP facility order did not raise any public policy issues.

Table of Authorities

Statutes considered:

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

Generally — referred to

Pt. IV — referred to

s. 11.2 [en. 1997, c. 12, s. 124] — referred to

s. 49 — pursuant to

s. 61(2) — considered

MOTION by foreign representative for recognition and implementation in Canada of orders of U.S. Bankruptcy Court made in Chapter 11 proceedings.

***Morawetz J.*:**

1 Hartford Computer Hardware, Inc. ("Hartford"), on its own behalf and in its capacity as foreign representative of Chapter 11 Debtors (the "Foreign Representative") brought a motion under s. 49 of the *Companies' Creditors Arrangement Act* (the "*CCAA*") for recognition and implementing in Canada the following Orders of the United States Bankruptcy Court for the Northern District of Illinois Eastern Division (the "U.S. Court") made in the proceedings commenced by the Chapter 11 Debtors:

(i) the Final Utilities Order;

(ii) the Bidding Procedures Order;

(iii) the Final DIP Facility Order.

(collectively, the U.S. Orders")

2 On December 12, 2011, the Chapter 11 Debtors commenced the Chapter 11 proceeding. The following day, I made an order granting certain interim relief to the Chapter 11 Debtors, including a stay of proceedings. On December 15, 2011, the U.S. Court made an order authorizing Hartford to act as the Foreign Representative of the Chapter 11 Debtors. On December 21, 2011, I made two orders, an Initial Recognition Order and a Supplemental Order that, among other things:

(i) declared the Chapter 11 proceedings to be a "foreign main proceeding" pursuant to Part IV of the *CCAA*;

(ii) recognized Hartford as the Foreign Representative of the Chapter 11 Debtors;

(iii) appointed FTI as Information Officer in these proceedings;

(iv) granted a stay of proceedings;

(v) recognized and made effective in Canada certain "First Day Orders" of the U.S. Court including an Interim Utilities Order and Interim DIP Facility Order.

3 On January 26, 2012, the U.S. Court made the U.S. Orders.

4 The Foreign Representative is of the view that recognition of the U.S. Orders is necessary for the protection of the Chapter 11 Debtors' property and the interest of their creditors.

5 The affidavit of Mr. Mittman and First Report of the Information Officer provide details with respect to the hearings in the U.S. Court on January 26, 2012 which resulted in the U. S. Court granting the U.S. Orders. The Utilities Order and the Bidding Procedures Order are relatively routine in nature and it is, in my view, appropriate to recognize and give effect to these orders.

6 With respect to the Final DIP Facility Order, it is noted that paragraph 6 of this Order contains a partial "roll up" provision wherein all Cash Collateral in the possession or control of Chapter 11 Debtors on December 12, 2011 (the "Petition Date") or coming into their possession after the Petition Date is deemed to have been remitted to the Pre-petition Secured Lender for application to and repayment of the Pre-petition revolving debt facility with a corresponding borrowing under the DIP Facility.

7 In making the Final DIP Facility Order, the Information Officer reports that the U.S. Court found that good cause had been shown for entry of the Final DIP Facility Order, as the Chapter 11 Debtors' ability to continue to use Cash Collateral was necessary to avoid immediate and irreparable harm to the Chapter 11 Debtors and their estates.

8 The granting of the Final DIP Facility Order was supported by the Unsecured Creditors' Committee. Certain objections were filed but the Order was granted after the U.S. Court heard the objections.

9 The Information Officer reports that Canadian unsecured creditors will be treated no less favourably than U.S. unsecured creditors. Further, since a number of Canadian unsecured creditors are employees of the Chapter 11 Debtors, these creditors benefit from certain priority claims which they would not be entitled to under Canadian insolvency proceedings.

10 The Information Officer and Chapter 11 Debtors recognize that in *CCAA* proceedings, a partial "roll up" provision would not be permissible as a result of s. 11.2 of the *CCAA*, which expressly provides that a DIP charge may not secure an obligation that exists before the Initial Order is made.

11 Section 49 of the *CCAA* provides that, in recognizing an order of a foreign court, the court may make any order that it considers appropriate, provided the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of the creditor or creditors.

12 It is necessary, in my view, to emphasize that this is a motion to recognize an order made in the "foreign main proceeding". The Final DIP Facility Order was granted after a hearing in the U.S. Court. Further, it appears from the affidavit of Mr. Mittman that, as of the end of December 2011, the Chapter 11 Debtors had borrowed $1 million under the Interim DIP Facility. The Cash Collateral on hand as of the Petition Date was effectively spent in the Chapter 11 Debtors' operations and replaced with advances under the Interim DIP Facility in December 2011 such that all cash in the Chapter 11 Debtors' accounts as of the date of the Final DIP Facility Order were proceeds from the Interim DIP Facility.

13 The Information Officer has reported that, in the circumstances, there will be no material prejudice to Canadian creditors if this court recognizes the Final DIP Facility, and that nothing is being done that is contrary to the applicable provisions of the *CCAA*. The Information Officer is of the view that recognition of the Final DIP Facility Order is appropriate in the circumstances.

14 A significant factor to take into account is that the Final DIP Facility Order was granted by the U.S. Court. In these circumstances, I see no basis for this court to second guess the decision of the U.S. Court.

15 Based on the foregoing, I have concluded that recognition of the Final DIP Facility Order is necessary for the protection of the debtor company's property and for the interests of the creditors.

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.*:

Are the Chapter 11 Cases Foreign Main Proceedings?

Are the Chapter 11 Cases Foreign Proceedings?

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

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

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

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

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

27 Section 45(1) of the CCAA defines a "foreign proceeding" as any judicial proceeding in a jurisdiction outside of Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization. Courts have consistently recognized proceedings under Chapter 11 of the United States Bankruptcy Code to be foreign proceedings for the purposes of the CCAA.

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

Are the Chapter 11 Cases Foreign Main Proceedings?

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

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

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:

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

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

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

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

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

Should the DIP ABL Charge be Granted?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

52 The absence of prejudice to creditors of Hollander Canada, and the DIP ABL Lenders' consent to the quasi-marshalling construct, are key factors distinguishing this case from *Payless Holdings Inc. LLC, Re* [2017 CarswellOnt 5925 (Ont. S.C.J.)]. In *Payless*, also a proceeding under Part IV of the CCAA, this court declined to approve a DIP order and lenders' charge that would have required the solvent Canadian applicants to guarantee borrowings from the DIP facility even though they would not receive advances from it. The DIP facility was opposed by the Canadian landlords who were uniquely prejudiced by its terms. The DIP facility in that case specifically precluded marshalling.

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

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

b) In *Payless*, there was evidence of material prejudice to Canadian creditors and certain Canadian creditor groups opposed the DIP order because they were disadvantaged. In this case, no such material prejudice or unequal treatment exists with respect to the creditors of Hollander Canada or the other Chapter 11 Debtors.

2012 BCSC 1591
British Columbia Supreme Court

Lemare Holdings Ltd., Re

2012 CarswellBC 3294, 2012 BCSC 1591, [2013] B.C.W.L.D. 914, [2013] B.C.W.L.D. 915, [2013] B.C.W.L.D. 916, [2013] B.C.W.L.D. 917, [2013] B.C.W.L.D. 918, 223 A.C.W.S. (3d) 307, 96 C.B.R. (5th) 35

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

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57, As Amended

In the Matter of a Plan of Compromise or Arrangement of Lemare Holdings Ltd., Lemare Lake Logging Ltd., Lone Tree Logging Ltd., C.&E. Roadbuilders Ltd., Coast Dryland Services Ltd., Dominion Log Sort Ltd., and Central Coast Industries Ltd. (Petitioners)

Grauer J.

Heard: October 16, 18, 19, 2012
Judgment: October 26, 2012
Docket: Vancouver S124409

Counsel: K. Denhoff, D. Dahlke for Petitioners October 16, 2012
M. Buttery, L. Williams for Petitioners October 18, 19, 2012
R. Payne, M. Weintraub for Her Majesty The Queen in Right of the Province of British Columbia on October 16, 2012
D. Hatter, S. Davis for Her Majesty The Queen in Right of the Province of British Columbia on October 18, 19, 2012
R. Morse for Toronto-Dominion Bank, TD Equipment Finance Canada Inc.
M. Verbrugge for Monitor

Subject: Insolvency; Civil Practice and Procedure; Natural Resources
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.e Jurisdiction
XIX.1.e.i Court
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Procedure
XIX.2.a.iv Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.f Lifting of stay

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.h Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court

Petitioner company obtained initial order pursuant to Companies' Creditors Arrangement Act (CCAA), including stay of proceedings until comeback hearing — Province provided proposal letters to company respecting stumpage and penalty owing, but did not obtain lien over unsecured creditors because it did not issue assessment due to stay of proceedings — Company brought application for extension of stay and for claims process order (CPO) — Province brought application to set aside initial order or to terminate stay — Company's application granted; province's application dismissed — Court had jurisdiction to make initial order — Company was "debtor company" because it was insolvent, according to totality of evidence — There was looming liquidity crisis that would deprive company of ability to pay its debts as they became due without benefit of stay — Province's proposed assessed stumpage and penalties totalling over $12 million qualified as contingent claims — In addition, company had $10 million liability for trust loan — Court should not have declined to exercise jurisdiction to make initial order — Province's assessment and penalties could be dealt with by compromise or arrangement under s. 19(1) of CCAA.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay

Petitioner company obtained initial order pursuant to Companies' Creditors Arrangement Act (CCAA), including stay of proceedings until comeback hearing — Province provided proposal letters to company respecting stumpage and penalty owing, but did not obtain lien over unsecured creditors because it did not issue assessment due to stay of proceedings — Company brought application for extension of stay and for claims process order (CPO) — Province brought application to set aside initial order or to terminate stay — Company's application granted; province's application dismissed — Court had jurisdiction to make initial order — Company was "debtor company" because it was insolvent, according to totality of evidence — There was looming liquidity crisis that would deprive company of ability to pay its debts as they became due without benefit of stay — Province's proposed assessed stumpage and penalties totalling over $12 million qualified as contingent claims — In addition, company had $10 million liability for trust loan — Court should not have declined to exercise jurisdiction to make initial order — Province's assessment and penalties could be dealt with by compromise or arrangement under s. 19(1) of CCAA.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

Petitioner company obtained initial order pursuant to Companies' Creditors Arrangement Act (CCAA), including stay of proceedings until comeback hearing — Province provided proposal letters to company respecting stumpage and penalty owing, but did not obtain lien over unsecured creditors because it did not issue assessment due to stay of proceedings — Company brought application for extension of stay and for claims process order (CPO) — Application granted — CPO was granted, subject to certain modification — Stay was extended — All that province would lose in CPO was time-consuming step of appeal by company to Minister of of Forests, Lands and Natural Resource Operations, which did not amount to prejudice to province — Fairness did not require modification of stay to permit province to proceed to assessment — Appropriate provision could be made to facilitate crystallization in claims process that preserved to province ability to take full advantage of onus and proof provisions that it would have under Forest Act process.

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

Claims process order — Petitioner company obtained initial order pursuant to Companies' Creditors Arrangement Act (CCAA), including stay of proceedings until comeback hearing — Province provided proposal letters to company respecting stumpage and penalty owing, but did not obtain lien over unsecured creditors because it did not issue assessment due to stay of proceedings — Company brought application for extension of stay and for claims process order (CPO) — Application granted — CPO was granted, subject to certain modification — Stay was extended — All that province would lose in CPO was time-consuming step of appeal by company to Minister of Forests, Lands and Natural Resource Operations, which did not amount to prejudice to province — Fairness did not require modification of stay to permit province to proceed to assessment — Appropriate provision could be made to facilitate crystallization in claims process that preserved to province ability to take full advantage of onus and proof provisions that it would have under Forest Act process.

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

Evidence — Petitioner company obtained initial order pursuant to Companies' Creditors Arrangement Act, including stay of proceedings until comeback hearing — Company brought application for extension of stay and for claims process order (CPO) — Province brought application to set aside initial order or to terminate stay — Company brought application to exclude evidence within province's application — Application for extension of stay and CPO was granted; application for exclusion of evidence was granted in part; province's application was dismissed — Objectionable evidence consisted of province's affidavit that stated that company refused to comply with province's demand to inspect certain materials — Province had returned materials pursuant to court order quashing province's warrants, but attempted immediately to seize them again by relying on information it obtained unlawfully — Two lines of affidavit were struck out that referred to company's refusal to permit inspection of returned materials.

Table of Authorities

Cases considered by *Grauer J.*:

AbitibiBowater Inc., Re (2010), 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, 2010 QCCS 1261, 2010 CarswellQue 2812 (C.S. Que.) — referred to

Air Canada, Re (2006), 2006 CarswellOnt 8175, 28 C.B.R. (5th) 317 (Ont. S.C.J. [Commercial List]) — referred to

British Columbia v. Lemare Lake Logging Ltd. (2012), 2012 BCSC 193, 2012 CarswellBC 345 (B.C. S.C.) — referred to

Harvey, Re (2004), (sub nom. *Harvey (Bankrupt), Re)* 373 A.R. 373, 2004 ABQB 773, 2004 CarswellAlta 1424, 6 C.B.R. (5th) 23 (Alta. Q.B.) — referred to

Lemare Lake Logging Ltd. v. British Columbia (Minister of Forests & Range) (2009), 2009 BCSC 909, 2009 CarswellBC 1800 (B.C. S.C. [In Chambers]) — referred to

Lemare Lake Logging Ltd. v. British Columbia (Minister of Forests & Range) (2009), 2009 BCSC 902, 2009 CarswellBC 1791 (B.C. S.C.) — referred to

Lemare Lake Logging Ltd. v. British Columbia (Minister of Forests & Range) (2011), 2011 BCSC 903, 2011 CarswellBC 1781 (B.C. S.C.) — referred to

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — considered

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

Thow, Re (2009), 2009 BCSC 1176, 2009 CarswellBC 2293, 57 C.B.R. (5th) 222 (B.C. S.C.) — distinguished

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

s. 2 "debtor company" — referred to

s. 3(1) — considered

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 11.1(2) [en. 1997, c. 12, s. 124] — considered

s. 11.1(3) [en. 1997, c. 12, s. 124] — considered

s. 19(1) — considered

s. 19(2) — considered

conclusions drawn. All that was necessary to complete the evolution from proposal to assessment was the formality of issuing it — see, for instance, *Harvey, Re*, 2004 ABQB 773 (Alta. Q.B.), and note also *Air Canada, Re* (2006), 28 C.B.R. (5th) 317 (Ont. S.C.J. [Commercial List]). Although it is true that Lemare had an opportunity to respond to the proposal, the Province had already heard everything Lemare had to say, and was singularly unimpressed.

54 Accordingly, I am satisfied that both the proposed assessed stumpage and the proposed penalties qualify as contingent claims.

55 The question remains as to whether the existence of these contingent claims renders Lemare insolvent. The Province submits that the petitioners do not meet the definition of "insolvent person" in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA), because at the time of the initial order they were not unable to meet their obligations as they generally became due, and it could not be said that their property if fairly disposed of would not be sufficient to enable payment of all obligations due and accruing due.

56 Although courts have generally had regard to the BIA definition of "insolvent person" when dealing with insolvency under the CCAA, the modern trend is to take into account the different objectives of the CCAA. These address the interests of a broader group of stakeholders, and include a more comprehensive process to preserve the debtor company as a going concern.

57 Thus in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) at para. 21, the Supreme Court of Canada described the CCAA regime as a flexible, judicially supervised reorganization process that allows for creative and effective decisions. It noted that with reorganizations becoming increasingly complex:

> [61] ...*CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*.
>
> . . .
>
> [70] ... Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company.

58 In *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal refused: 2004 CarswellOnt 2936 (Ont. C.A.), the Court dealt with a submission, like the Province's here, that the Initial Order should be reversed on the ground that Stelco was not a "debtor company" because it was not "insolvent" as defined by the BIA.

59 Mr. Justice Farley, whose views in this area do not bind me but are entitled to the highest respect, made the following observations, which I have taken the liberty of paraphrasing:

- *On timing*: the usual problem is leaving the application for an Initial Order too late. CCAA should be implemented at a stage prior to the company's death spiral. Thus objections in the reported cases have been based not on an absence of insolvency, but on the proposed plan being doomed to failure as coming too late. [Paras. 13-15]

- *On stakeholders*: these include not only the company and its creditors, but also its employees and their interest in a viable enterprise. Thus there is an emphasis on operational restructuring so that the emerging company will have the benefit of a long-term viable fix, to the advantage of all stakeholders. [Paras. 17-20]

- *On the test for insolvency*: given the time and steps involved in a reorganization, the condition of insolvency perforce requires an expanded meaning under the CCAA. What the debtor must do is meet the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in the context and within the purpose of that legislation. The BIA definition of insolvent person is acceptable with the caveat that under the first branch (unable to meet obligations as they generally become due), 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. Considering the notion of 'insolvent' contextually and purposively, the question is whether, at the time of filing, there is a reasonably foreseeable 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 stay and ancillary protection and procedure by Court authorization pursuant to a CCAA order. [Paras. 26 and 40]

60 There is, of course, no precise and invariable formula. This is not a "cookie cutter" exercise. As Farley J. pointed out, the matter must be decided on the basis of credible evidence and common sense, employing a principled, purposive and contextual approach.

61 The Province argues that the *Stelco Inc., Re* case is wrongly decided, or in the alternative, that it must be confined to its particular facts which are distinguishable from those before me. I consider it, with respect, to be correctly decided. While the facts are quite different, the principles are not.

62 As I see this case, given the context of Lemare's operations, including the admittedly highly contingent liability for the RCA trust loan, the Province's proposal letters setting forth a fully articulated and documented claim for over $12,000,000 that would, once formalized, lead to statutory lien rights, gave rise to a reasonably foreseeable expectation of a looming liquidity crisis that would deprive Lemare of the ability to pay its debts as they generally became due without the benefit of a stay. Thus this Court had jurisdiction. Having regard to the interests of the stakeholders, including the Province, other unsecured creditors, Lemare, its employees, and the North Island economy to which Lemare is such a contributor, the situation cries out for the protection of the CCAA. To delay action until Lemare had been fatally wounded would have served the interests of no one.

2. Discretion

63 The careful reader may discern from the preceding paragraph that I do not agree with the Province's alternative submission that if this Court has CCAA jurisdiction it should decline to exercise it.

64 The Province argued first that I should not accept as credible Lemare's plea of insolvency due to the proposed assessments when Lemare has vigorously contested them. Having found that the assessment of stumpage and penalties in the amount proposed was a near certainty, and given the single-mindedness with which the Province has pursued its claims against Lemare, I do not find this argument persuasive. Lemare is entitled to dispute claims, which is one of the reasons that a CCAA Court normally provides for a claims process.

65 The Province then argues that there is no pressing need for Lemare to restructure. I disagree, as indicated above. As counsel for TD points out, the prospect of Lemare obtaining financing to deal with its liability is vanishingly small. Moreover, that the *Forest Act* provides Lemare with appeal rights likely to occupy a good deal of time, first to the Minister and then to this Court, does not relieve the pressure, particularly when those appeals do not stay the claims.

66 The Province submits that its response cannot be known. It may well reduce the claims, or voluntarily stay its claims during the appeal process, or come to some agreement with Lemare about repayment that would relieve these pressures. I do not doubt the sincerity of counsel, but given the history of acrimony between the parties, this is at best speculation. It would be unfair either to expect such accommodation from the Province, or to require Lemare to order its affairs as if it were forthcoming. If the Province should indeed decide to alter its position in a manner that significantly changes Lemare's financial prospects, then that can be taken into account through subsequent applications. The process is a flexible one.

67 The Province next asserts that since its claim is in connection with the harvesting of Crown timber, a public resource, it would be an injustice and contrary to the public interest to thwart the statutory scheme, particularly the commissioner's entitlement to rely on assumptions and place the onus of proof on Lemare.

68 The public interest, I think, cuts both ways. The public certainly has an interest in the Crown recovering stumpage and penalties owed to it. The public also has an interest in seeing enterprises such as these, being major employers and economic contributors, continue in business. I agree with the Province, particularly in view of past dealings between the parties, that in

2012 ONSC 2994
Ontario Superior Court of Justice [Commercial List]

Lightsquared LP, Re

2012 CarswellOnt 8614, 2012 ONSC 2994, 219 A.C.W.S. (3d) 23, 92 C.B.R. (5th) 321

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

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)

Morawetz J.

Heard: May 18, 2012
Judgment: May 18, 2012
Docket: CV-12-9719-00CL

Counsel: Shayne Kukulowicz, Jane Dietrich for Lightsquared LP
Brian Empey for Proposed Information Officer, Alvarez and Marsal Inc.

Subject: Insolvency; International
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Recognition of foreign proceedings — Related companies with some assets in Ontario entered bankruptcy protection in United States of America — Interim order was granted in Ontario putting stay of proceedings in place — Proposed foreign representative brought motion for various forms of relief including recognition of U.S. proceedings as foreign main proceedings — Motion granted — Foreign proceedings were considered foreign main proceedings, and required relief granted under Companies Creditors' Arrangement Act as set out in interim order — Foreign representative recognized as such, however, if matter were altered in American proceedings review could be necessary — When presumption in 45(2) of Companies' Creditors Arrangement Act is not operative, factors to consider in determining debtor's centre of interest should be that location is ascertainable to creditors, is where principle actors can be found, and is where management of debtor takes place — Certain orders granted by U.S. court recognized — Proposed information officer appointed.
Table of Authorities
Cases considered by *Morawetz J.*:
Lear Canada, Re (2009), 2009 CarswellOnt 4232, 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) — referred to
Massachusetts Elephant & Castle Group Inc., Re (2011), 81 C.B.R. (5th) 102, 2011 CarswellOnt 6610, 2011 ONSC 4201 (Ont. S.C.J.) — considered
Statutes considered:
Bankruptcy Code, 11 U.S.C. 1982

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 *Massachusetts Elephant & Castle Group Inc., Re* (2011), 81 C.B.R. (5th) 102 (Ont. S.C.J.) and *Lear Canada, Re* (2009), 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]).

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 41 st 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 *Massachusetts Elephant & Castle Group Inc., Re*, *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.

2011 ONSC 4201
Ontario Superior Court of Justice

Massachusetts Elephant & Castle Group Inc., Re

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

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

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

MASSACHUSETTS ELEPHANT & CASTLE GROUP, INC. (Applicant)

Morawetz J.

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

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

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Recognition of foreign main proceeding — Debtor companies were integrated business involving locations in U.S. and Canada — Each of debtors, including debtor companies with registered offices in Canada (Canadian Debtors), were managed centrally from U.S. — Debtors brought proceedings in U.S. pursuant to Chapter 11 of United States Bankruptcy Code — U.S Court appointed applicant as foreign representative of Chapter 11 Debtors — Applicant applied to have U.S. Chapter 11 proceedings recognized as foreign main proceeding in Canada under Companies' Creditors Arrangements Act (Act) — Application granted — It was appropriate to recognize foreign proceeding — Foreign proceeding in present case was foreign main proceeding — "Foreign main proceeding" is defined in s. 45(1) of Act as foreign proceeding in jurisdiction where debtor company has centre of its main interest (COMI) — There was sufficient evidence to rebut presumption in s. 45(2) of Act that COMI is registered office of debtor company — For purposes of application, each entity making up Chapter 11 Debtors, including Canadian Debtors, had their COMI in U.S. — Location of debtors' headquarters or head office functions or nerve centre was in U.S. — Debtor's management was located in U.S. — Significant creditor did not oppose relief sought — Mandatory stay ordered under s. 48(1) of Act — Discretionary relief recognizing various orders of U.S. Court, appointing information officer, and limiting quantum of administrative charge, was appropriate and was granted.
Table of Authorities
Cases considered by *Morawetz J.*:
Angiotech Pharmaceuticals Inc., Re (2011), 2011 BCSC 115, 2011 CarswellBC 124, 76 C.B.R. (5th) 317 (B.C. S.C. [In Chambers]) — considered

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

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

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

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

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

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

> (a) the location of the corporate head offices for all of the Chapter 11 Debtors, including the Canadian Debtors, is in Boston, Massachusetts;
>
> (b) the Chapter 11 Debtors including the Canadian Debtors function as an integrated North American business and all decisions for the corporate group, including in respect to the operations of the Canadian Debtors, is centralized at the Chapter 11 Debtors head office in Boston;
>
> (c) all members of the Chapter 11 Debtors' management are located in Boston;
>
> (d) virtually all human resources, accounting/finance, and other administrative functions associated with the Chapter 11 Debtors are located in the Boston offices;
>
> (e) all information technology functions of the Chapter 11 Debtors, with the exception of certain clerical functions which are outsourced, are provided out of the United States; and
>
> (f) Repechage is also the parent company of a group of restaurants that operate under the "Piccadilly" brand which operates only in the U.S.

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

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

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

> (a) the location where corporate decisions are made;
>
> (b) the location of employee administrations, including human resource functions;
>
> (c) the location of the debtor's marketing and communication functions;

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

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

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

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

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

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

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

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

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

29 For example:

(a) the location from which financing was organized or authorized or the location of the debtor's primary bank would only be important where the bank had a degree of control over the debtor;

(b) the location of employees might be important, on the basis that employees could be future creditors, or less important, on the basis that protection of employees is more an issue of protecting the rights of interested parties and therefore is not relevant to the COMI analysis;

(c) the jurisdiction whose law would apply to most disputes may not be an important factor if the jurisdiction was unrelated to the place from which the debtor was managed or conducted its business.

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

(a) the location of the debtor's headquarters or head office functions or nerve centre;

(b) the location of the debtor's management; and

(c) the location which significant creditors recognize as being the centre of the company's operations.

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

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

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

2019 BCSC 1234
British Columbia Supreme Court

Miniso International Hong Kong Limited v. Migu Investments Inc.

2019 CarswellBC 2208, 2019 BCSC 1234, 308 A.C.W.S. (3d) 465, 71 C.B.R. (6th) 250

MINISO INTERNATIONAL HONG KONG LIMITED, MINISO INTERNATIONAL (GUANGZHOU) CO. LIMITED, MINISO LIFESTYLE CANADA INC., MIHK MANAGEMENT INC., MINISO TRADING CANADA INC., MINISO CORPORATION and GUANGDONG SAIMAN INVESTMENT CO. LIMITED (Petitioners) and MIGU INVESTMENTS INC., MINISO CANADA INVESTMENTS INC., MINISO (CANADA) STORE INC., MINISO (CANADA) STORE ONE INC., MINISO (CANADA) STORE TWO INC., MINISO (CANADA) STORE THREE INC., MINISO (CANADA) STORE FOUR INC., MINISO (CANADA) STORE FIVE INC., MINISO (CANADA) STORE SIX INC., MINISO (CANADA) STORE SEVEN INC., MINISO (CANADA) STORE EIGHT INC., MINISO (CANADA) STORE NINE INC., MINISO (CANADA) STORE TEN INC., MINISO (CANADA) STORE ELEVEN INC., MINISO (CANADA) STORE TWELVE INC., MINISO (CANADA) STORE THIRTEEN INC., MINISO (CANADA) STORE FOURTEEN INC., MINISO (CANADA) STORE FIFTEEN INC., MINISO (CANADA) STORE SIXTEEN INC., MINISO (CANADA) STORE SEVENTEEN INC., MINISO (CANADA) STORE EIGHTEEN INC., MINISO (CANADA) STORE NINETEEN INC., MINISO (CANADA) STORE TWENTY INC., MINISO (CANADA) STORE TWENTY-ONE INC. and MINISO (CANADA) STORE TWENTY-TWO INC. (Respondents)

Fitzpatrick J.

Heard: July 12, 2019
Judgment: July 12, 2019
Written reasons: July 29, 2019
Docket: Vancouver S197744

Counsel: K.M. Jackson, G.P. Nesbitt, for Petitioners
V.L. Tickle, D.R. Shouldice, for Respondents

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.h Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous
Petitioners, secured creditors, were owners of "M" Japanese lifestyle product brand — Respondent debtor companies were Canadian owners and operators who has licensed to use of M brand in Canada, and they also purchased products from creditors for resale in Canada — Creditors advanced US$2.4 million demand loan to debtors, and debtors received substantial amount of M products valued at approximately $17.5 million which were not paid for — Creditors demanded payment of amounts owing under demand loan, earlier account receivable and amounts owing for further supply of M products — Total indebtedness owing by debtors to creditors was approximately $35.5 million, creditors terminated debtors' right to sell and market M brand in Canada and it would not deliver further products — Creditors brought proceedings pursuant to Companies' Creditors Arrangement Act (CCAA) — Petition granted — Debtor companies were each "company" existing under laws of Canada or province, claims

against them exceeded $5 million, and debtors were unable to meet their liabilities as they came due and were insolvent and "debtor company" within meaning of CCAA — CCAA expressly granted standing to creditors to commence proceedings in respect of debtor company — Debtors could not proceed with their business operations without ongoing support of creditors — Stakeholders required relief sought in initial order on urgent basis in order to allow debtors to continue operating their business, and initial order was best option toward preserving debtors' enterprise value for benefit of stakeholders — It was appropriate to grant stay that temporarily enjoyed debtors' creditors from proceeding with claims against them — Proposed monitor was appropriate and was appointed — Factors set out in s. 11.2(4) of CCAA supported approval of $2 million interim financing and granting of charge to secure amounts advanced — Intention was to develop and prepare restructuring transaction, and it was clear that financing was required to continue operations which would allow debtors to maintain value of enterprise while they pursued restructuring — Interim financing would be used only by debtors in accordance with direct supervision of monitor — Restructuring charges including maximum $1 million administration charge and maximum $1 million directors' and officers' charge were necessary, appropriate, fair and reasonable — Restructuring charges were ranked in priority with administration charge first, interim financing charge second, and directors' and officers' charge last Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 11.2.

Table of Authorities

Cases considered by *Fitzpatrick J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 2652, 42 C.B.R. (5th) 90, 45 B.L.R. (4th) 201 (Ont. S.C.J. [Commercial List]) — referred to

Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) — considered

Cinram International Inc., Re (2012), 2012 ONSC 3767, 2012 CarswellOnt 8413, 91 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]) — considered

Citibank Canada v. Chase Manhattan Bank of Canada (1991), 5 C.B.R. (3d) 165, 2 P.P.S.A.C. (2d) 21, 4 B.L.R. (2d) 147, 1991 CarswellOnt 182 (Ont. Gen. Div.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — referred to

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314, 96 O.T.C. 272 (Ont. Gen. Div. [Commercial List]) — considered

Stelco Inc., Re (2004), 2004 CarswellOnt 1211, 48 C.B.R. (4th) 299, [2004] O.T.C. 284 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Stelco Inc., Re (2004), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201, 338 N.R. 196 (note) (S.C.C.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, *(*sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, *(*sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — considered

Timminco Ltd., Re (2012), 2012 ONSC 506, 2012 CarswellOnt 1263, 95 C.C.P.B. 48, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 2 "debtor" — considered

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

Generally — referred to

s. 2(1) "debtor company" — considered

34 The Migu Group is current in respect of its obligations to pay employee wages and related remittances. However, it is possible that some or all employees are owed accrued and unused vacation pay. The Migu Group does not have a pension plan for their employees.

35 It is uncertain if the Migu Group's provincial sales tax remittances are current.

36 As noted, all of the premises from which the Migu Group operates across Canada are leased. The Migu Group currently remits monthly rents of approximately $1.79 million. Some of the July rental payments (for 20 stores) have been paid; however, rent for the remainder of the premises, totalling approximately $1.16 million, has not been paid.

37 The Migu Group owes approximately $2 million in other accrued and unpaid unsecured liabilities, including to suppliers and service providers. It is anticipated that the Migu Group will honour outstanding gift card and credit notes during these *CCAA* proceedings and honour existing warranty and return policies.

38 The Migu Group's consolidated assets, as at May 31, 2019, had a book value of approximately $53.3 million.

39 The Migu Group's value is almost entirely derived from their ability to sell and market Miniso Products under the Miniso Brand in Canada through the various agreements with the Miniso Group and importantly, their licence agreements with the Miniso Group. As of this date, the Miniso Group has terminated the Migu Group's right to sell and market the Miniso Brand in Canada and the Miniso Group will not deliver further product, save on terms acceptable to the Miniso Group. As such, the Migu Group is no longer able to market and sell the Miniso Brand. In addition, the Miniso Product in the possession of the Migu Group is the property of the Miniso Group until it is paid for.

40 The result is obvious - the Migu Group cannot operate their business and generate revenue without the cooperation and support of the Miniso Group.

CCAA ISSUES

41 I will briefly discuss the various issues that arose on this application for the Initial Order.

Statutory Requirements

42 The *CCAA* applies in respect of a "debtor company" or "affiliated debtor companies" where the total amount of claims against the debtor or its affiliates exceeds $5 million: CCAA, s. 3(1). "Debtor company" is defined in s. 2 of the CCAA to include any company that is bankrupt or insolvent.

43 I am satisfied that each of the companies within the Migu Group is a "company" existing under the laws of Canada or one of the provinces and that the claims against them exceed $5 million.

44 Further, I am satisfied that the Migu Group, either individually or collectively, are unable to meet their liabilities as they come due and are therefore insolvent, and thus each is a "debtor company" within the meaning of the *CCAA*: see Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 2; *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]) at paras. 21-22; leave to appeal ref'd, [2004] O.J. No. 1903 (Ont. C.A.); leave to appeal to S.C.C. ref'd [2004] S.C.C.A. No. 336 (S.C.C.).

45 The *CCAA* expressly grants standing to creditors, such as the Miniso Group, to commence proceedings in respect of a debtor company: CCAA, ss. 4-5; *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 1818 (Ont. S.C.J. [Commercial List]) at para. 34.

Objectives of the CCAA

46 In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), the Court provided a detailed analysis of the purpose and policy behind the *CCAA*. Of particular note were the Court's comments that:

a) the purpose of the *CCAA* is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets (para. 15); and

b) the *CCAA*'s distinguishing feature is a grant of broad and flexible authority to the supervising court to use its discretion to make the order necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The courts have used its *CCAA* jurisdiction in increasingly creative and flexible ways (para. 19).

47 The commencement of *CCAA* proceedings is a proper exercise of creditors' rights where, ideally, the *CCAA* will preserve the going-concern value of the business and allow it to continue for the benefit of the "whole economic community", including the many stakeholders here. This is intended to allow stakeholders to avoid losses that would be suffered in an enforcement and liquidation scenario: *Citibank Canada v. Chase Manhattan Bank of Canada*, [1991] O.J. No. 944 (Ont. Gen. Div.) at para. 49; *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]) at paras. 33 and 40.

48 The imperatives facing both the Miniso Group and the Migu Group here are stark.

49 Without the cooperation of the Miniso Group, including access to immediate interim financing from the Miniso Group, the Migu Group will be unable to meet their liabilities as they become due and it will not be able to continue their operations and preserve their assets. The Migu Group is facing numerous claims from creditors other than the Miniso Group.

50 In addition, the Migu Group's ability to repay the indebtedness owed to the Miniso Group will be severely compromised in the event of a receivership and liquidation.

51 Simply put, the Migu Group cannot proceed with its business operations without the ongoing support of the Miniso Group.

52 There is no doubt that the Miniso Group has dictated the course forward, for the most part. The Miniso Group holds first ranking security over all of the Migu Group's assets. The Miniso Group has determined that a *CCAA* process is the best means to ensure the preservation and sale of the Migu Group's business as a going concern and maintain enterprise value for the benefit of all stakeholders, including the Miniso Group. In addition, as discussed below, the Miniso Group has agreed to provide interim financing during the course of the restructuring in order to allow that process to unfold.

53 I have no doubt that the Migu Group has asserted its wishes and wants within the context of the past and ongoing negotiations between the two Groups. However, the Migu Group now grudgingly accepted its fate and did not oppose the relief sought here.

54 In addition, I was satisfied that the stakeholders require the relief sought in the Initial Order on an urgent basis in order to allow the Migu Group to continue operating their business. The need for cash was immediate and without access to interim financing and the stay of proceedings, the Migu Group was not be able to preserve the value of their business or even ensure the coordinated realization of their assets. As such, the Initial Order was the best option toward preserving the Migu Group's enterprise value for the benefit of their stakeholders.

55 After considering all of the circumstances, I am satisfied that these *CCAA* proceedings can assist in preserving value for the stakeholders, until a longer term solution is found.

The Stay of Proceedings

56 In addressing the granting of a stay of proceeding in an initial order under the *CCAA*, Justice Farley in *Lehndorff General Partner Ltd., Re*, [1993] O.J. No. 14 (Ont. Gen. Div. [Commercial List]) stated:

> [5] ... a judge has the discretion under the CCAA to make [an] order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. ...

> [6] ... It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain the approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed ...
>
> 7 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 ...

57 I was satisfied that it was appropriate to exercise my discretion under s. 11.02(1) of the CCAA to grant a stay that temporarily enjoins the Migu Group's creditors from proceeding with claims against the debtor companies. This stay of proceedings will prevent any creditor from gaining any advantage that might otherwise be obtained. It will also facilitate the ongoing operations of the Migu Group's business to preserve value and provide the Group with the necessary breathing room to carry out a restructuring or organized sales process.

58 The Miniso Group sought a stay not only against the Migu Group, but also with respect to other entities that are not parties to this proceeding, namely the JV Store Affiliates. The JV Store Affiliates are the general partner companies or partnerships formed to operate the Outlet Stores.

59 The Court has broad jurisdiction under s. 11.02(1) of the CCAA to impose stays of proceedings where it is just and reasonable to do so, including with respect to third party non-applicants.

60 In *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]), the court discussed circumstances that could justify extending the stay to third party non-applicants:

> [64] The Courts have found it just and reasonable to grant a stay of proceedings against third party non-applicants in a number of circumstances, including:
>
> a. where it is important to the reorganization process;
>
> b. where the business operations of the Applicants and the third party non-applicants are intertwined and the third parties are not subject to the jurisdiction of the CCAA (such as partnerships that are not "companies" under the CCAA);
>
> c. against non-applicant subsidiaries of a debtor company where such subsidiaries were guarantors under the note indentures issued by the debtor company; and
>
> d. against non-applicant subsidiaries relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the debtor companies.

61 As noted in *Cinram International Inc.*, there is specific authority to grant a stay of proceedings against entities within a limited partnership context, where the business operations of the debtor companies are intertwined within that corporate/partnership structure: *Lehndorff General Partner Ltd.* at paras. 12, 16-21; *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) at paras. 33-34.

62 I found that it was just and appropriate to extend the stay in these proceedings to include the JV Store Affiliates in the circumstances. The business operations of the Outlet Stores are intertwined with the JV Store Affiliates. There is also some intertwining of the financial obligations of the Migu Group and that of the JV Store Affiliates.

63 The draft Initial Order sought a stay for 10 days until July 22, 2019. It appears that the length of the stay was set at 10 days in light of the uncertainty with respect to amendments proposed to the *CCAA* by the Budget Implementation Act, 2019, No. 1 Part 4 ("Bill C-97") tabled in Parliament in March 2019.

2020 BCSC 2037
British Columbia Supreme Court

Mountain Equipment Co-Operative (Re)

2020 CarswellBC 3324, 2020 BCSC 2037, 326 A.C.W.S. (3d) 368, 86 C.B.R. (6th) 140

In the Matter of the COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, as amended

In the Matter of 1077 HOLDINGS CO-OPERATIVE and 1314625 ONTARIO LIMITED (Petitioners)

Fitzpatrick J.

Heard: November 24, 27, 2020
Judgment: December 21, 2020
Docket: Vancouver S209201

Counsel: H. Gorman, Q.C., S. Boucher, for Petitioners, 1077 Holdings Co-Operative and 1314625 Ontario Limited
M.I.A. Buttery, Q.C., H.L. Williams, for Monitor, Alvarez & Marsal Canada Inc.
C. Gusikowski, for Lorne Hoover, himself and former MEC employees

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.9 Miscellaneous
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous
Moving party was former employee of bankrupt company — Company filed for bankruptcy, with sale of assets made to purchaser — Employee had been terminated just before sale of assets were made — Employee was one of group of former employees, who intended to advance claim against company — This claim would be under Companies' Creditors Arrangement Act (CCAA) — Employee claimed that law firm should be appointed as representative counsel for CCAA claim — Employee also sought court-ordered charge in amount of $85,000 against assets of company — Employee moved for above-noted relief — Motion dismissed — Request for representative counsel was premature, at best — Claims process was not underway — It was unknown how former employees would respond, so that any common issues would arise — Interests of former employees had to be balanced with those of stakeholders — Interests could be balanced by monitor, without need for representative counsel at this time — Charge against property was unnecessary, given that representative counsel was not required — Even had counsel been appointed, charge against property was unnecessary.
Table of Authorities
Cases considered by *Fitzpatrick J.*:
Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) — followed
Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 1328, 2010 CarswellOnt 1344, 65 C.B.R. (5th) 152 (Ont. S.C.J. [Commercial List]) — followed
Ernst & Young Inc. v. Essar Global Fund Limited (2017), 2017 ONCA 1014, 2017 CarswellOnt 20162, 54 C.B.R. (6th) 173, 139 O.R. (3d) 1, 420 D.L.R. (4th) 23, 76 B.L.R. (5th) 171 (Ont. C.A.) — considered
Fraser Papers Inc., Re (2009), 2009 CarswellOnt 6169 (Ont. S.C.J. [Commercial List]) — referred to
Fraser Papers Inc., Re (2009), 2009 CarswellOnt 7125 (Ont. S.C.J. [Commercial List]) — considered
Homburg Invest Inc., Re (2014), 2014 QCCS 980, 2014 CarswellQue 2155 (Que. Bktcy.) — referred to

> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> . . .
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

57 The Court must be satisfied that the charge is necessary for the effective participation of representative counsel in the proceedings: *Urbancorp* at para. 14.

58 Factors to consider in approving an administrative charge include those set out in *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) at para. 54, as adopted by this Court in *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107 (B.C. S.C.) at para. 42:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwanted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and,
>
> (f) the position of the Monitor.

59 MEC's business was large and complex, but that was in the past. Having now sold the business, MEC's interests are simply to administer a sum of money for distribution to its creditors under the Claims Process, now a role assumed by the Monitor.

60 The Claims Process has been designed to provide as streamlined a process as possible for the former employees. The process is not complex or difficult.

61 Mr. Hoover argues that, while the Monitor is a representative of the Court and has an obligation to all stakeholders, it does not have the time or resources to properly advise the former employees. I disagree and would respond that this is not a correct characterization of the Monitor's role in the Claims Process.

62 The Monitor will have an impartial and important role in that process, and it is to be expected that the Monitor will provide assistance to all claimants, as necessary and appropriate. In that sense, I am of the view that the Monitor's comments about this relief being redundant and unnecessary have some merit given present circumstances: *Homburg Invest Inc., Re*, 2014 QCCS 980 (Que. Bktcy.) at para. 100 (see factors a and b).

63 In addition, MEC argues that the proposed charge for the former employees is unnecessary and would adversely affect MEC's other stakeholders, including its landlords, suppliers and vendors, and other unsecured creditors. Just as the Monitor has in this case, the monitor in *Urbancorp* argued that the court would be wrong to allow funding that was solely in the interest of one group of stakeholders (para. 18). This argument was accepted by Justice Newbould, who noted:

> [24] Estate funds should be spent for the benefit of the estate as a whole, not for the benefit of one group whose interests are contrary to the interests of the estate as a whole....

64 No other unsecured creditor or creditor group has sought funding from MEC's estate for their participation in the Claims Process. While certainly some of them will have more substantial resources than the former employees individually, certainly some of them will not.

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 bankrupcty 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.

2017 ONSC 2242
Ontario Superior Court of Justice

Payless Holdings Inc. LLC, Re

2017 CarswellOnt 5926, 2017 ONSC 2242, 278 A.C.W.S. (3d) 234, 47 C.B.R. (6th) 106

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

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

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

G.B. Morawetz R.S.J.

Heard: April 7, 2017
Judgment: April 7, 2017 *
Docket: CV-17-11758-00CL

Proceedings: reasons in full *Payless Holdings Inc. LLC, Re* (2017), 2017 ONSC 2321, 2017 CarswellOnt 5925, G.B. Morawetz R.S.J. (Ont. S.C.J.)

Counsel: John MacDonald, Patrick Reisterer, for Applicant
Clifton Prophet, Mark Crane, for Ivanhoe Cambridge Inc.
Ashley Taylor, Lee Nicholson, for Alvarez & Marsal Inc., Proposed Information Officer
David Bish, for Cadillac Fairview Corporation Ltd.
Tony Reyes, for Wells Fargo, ABL DIP Lender (Agent)
Linda Galessiere, for 20 Vic, Morguard, SmartREIT, Oxford, RioCan, Triovest, Springwood, Crombie REIT, Blackwood, Southridge Mall

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Debtor was American shoe retailer with related entities in Canada — Debtor entered into reorganization proceedings in America — Debtor brought application for declaration that American proceedings were foreign main proceedings under Companies' Creditors Arrangement Act, stay, and related relief — Application granted — Canadian operations were integrated into American operations — Only one director and one senior executive of Canadian operations resided in Canada — Canadian operations were dependent on American operations and all relevant decisions were made in America — That some partnerships were involved in structure of business did not affect order — Stay of proceedings was necessary and appropriate.
Table of Authorities
Cases considered by *G.B. Morawetz R.S.J.*:
Babcock & Wilcox Canada Ltd., Re (2000), 2000 CarswellOnt 704, 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) — referred to

(b) Are the Chapter 11 Debtors entitled to the relief sought in the Initial Recognition Order, and Supplemental Order pursuant to sections 46 through 50 of the CCAA, including:

i. Granting the Stay of Proceedings;

ii. Recognizing certain First Day Orders;

iii. Appointing A&M as Information Officer;

iv. Granting the DIP ABL Lenders' Charge and Canadian Unsecured Creditors' Charge; and

v. Granting the Administration Charge.

21 Section 47 of the CCAA states that two requirements must be met for an order recognizing a foreign proceeding:

1. The proceeding must be a "foreign proceeding"; and

2. The applicant must be a "foreign representative" in respect of that foreign proceeding.

22 This court has consistently recognized proceedings under the U.S. Bankruptcy Code to be foreign proceedings for the purposes of the CCAA. The Applicant has been declared a "foreign representative" in the Chapter 11 case by the U.S. Court, and I am satisfied that the Chapter 11 Cases should be recognized as a "foreign proceeding" within the meaning of subsection 47(1) of the CCAA.

23 Having determined that the proceeding is a "foreign proceeding", section 47(2) requires the Court to specify whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding". A "foreign main proceeding" is defined as a "foreign proceeding in a jurisdiction where the debtor company has the centre of its main interest" ("COMI").

24 Section 45(2) of the CCAA provides that, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its COMI. To rebut this presumption, sufficient evidence is required. Further, because Part IV of the CCAA does not take into account corporate groups, it is necessary to conduct the COMI analysis on an entity by entity basis.

25 Of the Chapter 11 Debtors:

(a) Twenty-six are incorporated or established in the U.S. and have registered assets within the U.S. The section 45(2) presumption deems the COMI of each of those entities to be in the U.S.

(b) The three entities in the Payless Canada Group are established under the laws of Canada, with their registered head office in Etobicoke, Ontario.

26 The Applicant takes the position that the COMI of each of the Payless Canada Group entities is in the U.S.

27 In determining the COMI for Canadian entities that are part of a larger corporate group, the relevant factors to consider include, among others:

(a) the location of the debtor's headquarters, head office functions, or nerve centre;

(b) the location of the debtor's management; and

(c) the location that significant creditors recognize as being the centre of the company's operations

(see: *Lightsquared LP, Re*, 2012 ONSC 2994 (Ont. S.C.J. [Commercial List]) and *Massachusetts Elephant & Castle Group Inc., Re*, 2011 ONSC 4201 (Ont. S.C.J.)).

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

2017 ONSC 5571
Ontario Superior Court of Justice [Commercial List]

Re TOYS "R" US (CANADA) LTD.

2017 CarswellOnt 14645, 2017 ONSC 5571, 283 A.C.W.S. (3d) 471

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 TOYS "R" US (CANADA) LTD. TOYS "R" US (CANADA) LTEE

F.L. Myers J.

Heard: September 19, 2017
Judgment: September 20, 2017
Docket: CV-17-00582960-00CL

Counsel: Brian F. Empey, Melaney Wagner, Christopher Armstrong, for Applicant
R. Shayne Kukulowicz, Jane Dietrich, for Proposed Monitor, Grant Thornton Limited
Tony Reyes, for pre-filing ABL lenders
Alexander Cobb, for B4 lenders
Linc Rogers, Chris Burr, for JPMorgan Chase Bank, NA, the lead lender on behalf of the proposed DIP lenders

Subject: Insolvency
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
US parent company of toy and baby product retailer filed for US bankruptcy protection — Both parent company and Canadian subsidiary (T Inc.) defaulted under asset-based lender (ABL) facilities provided to it and parent company — T Inc. brought initial application under Companies' Creditors Arrangement Act (CCAA) and for approval of debtor in possession (DIP) lending facility to repay ABL lender and to fund cash flow needs and restructuring — Application granted in part — T Inc. met definition of debtor company for purposes of initial hearing under CCAA and it was appropriate to grant stay under s. 11.02, but DIP lenders were not granted enhanced enforcement rights — Court-ordered charge was not being used to improve security of pre-filing ABL lenders or to fill gaps in their security coverage — DIP terms were generally limited to standard lending terms — Stay provisions generally prevented creditors from enforcing claims without leave so DIP lenders were well protected without extraordinary power to enforce claims without court scrutiny — Terms of DIP documents limiting T Inc.'s entitlement to oppose DIP lenders could create complex and ambiguous situation — DIP lenders were replacing first secured lenders and did not need special priority when they were likely entitled to step into their priority position under doctrine of equitable subrogation — DIP lenders would be entitled to take minimal steps to give notice of default and to withhold further advances while parties come to court.
Table of Authorities
Cases considered by *F.L. Myers J.*:

against the applicant during the period of the restructuring. All creditors and claimants are held at bay, together, to maintain a level playing field. At the same time, the stay protects the applicant's business in order to: create conditions under which a lender will advance fresh funds to the applicant to carry it through its restructuring efforts; help prevent suppliers from ceasing or tightening credit terms just prior to the vital holiday selling season; to prevent enforcement efforts by creditors that would deflect the company from its efforts to find a win-win restructuring for the general body of its creditors; and to enable the applicant to continue to operate on a "business as usual" basis to protect the value of its business and brand for all. I am satisfied that this is an appropriate case in which to grant a stay as sought under s. 11.02 of the *CCAA*.

8 The applicant expresses concern that it might be required to pay some pre-filing claims to critical suppliers and others despite the general goal of a bankruptcy proceeding to freeze all claims at the filing date. For example, employees with wages accrued before today need to be paid in the ordinary course in order to keep the workforce engaged. Customers holding gift cards and similar pre-paid rights need to be able to enforce those pre-filing claims in order to protect the company's public customers. There is good reason to allow these types of claims to protect the goodwill of the business in the interests of all creditors even though most others are being prevented from enforcing their claims while these claims are recognized.

9 In addition, a small number of critical suppliers of goods and services may have the ability to avoid the stay order under the CCAA and the US automatic stay. Sometimes those suppliers will threaten to refuse to continue to supply a *CCAA* debtor unless they are paid their pre-filing claims in priority to others. In some circumstances this could imperil the applicant's business. Under s. 11.4 of the *CCAA*, the court may declare a person to be a "critical supplier." A critical supplier can be compelled to supply the applicant with goods and, in return, it can be provided with court-ordered security to protect its right to payment. That situation is quite different than the order sought in this case. Here, the applicant is not seeking to compel anyone to supply on credit against its will. The suppliers of concern in this case may claim to be beyond the reach of the court's orders. Rather, here, the applicant is recognizing that in some specific and limited cases, it may face an inordinate risk of interruption of its operations if it does not agree to pay to a supplier of goods or services the amounts of its claims that would otherwise be frozen at the filing date. Providing such a payment is a form of preference that is contrary to the goal of universal sharing among creditors of equal priority that is the underpinning of our bankruptcy system. Accordingly, circumstances where payment of pre-filing claims will be allowed to suppliers of goods and services will be few. They will be carefully scrutinized by the applicant and the Monitor. The initial order granted by the court in this proceeding empowers the Monitor to exercise discretion to approve a payment to a critical supplier on its pre-filing claims. The Monitor will do so only in truly critical situations. It will be guided by the factors set out in para. 55 of the applicant's factum as drawn from the discussion by Morawetz J. (as he then was) in *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]).

10 The applicant asks for the approval of a debtor in possession (DIP) lending facility to repay its pre-filing ABL indebtedness and to fund its cash flow needs as it bulks up its inventory for holiday sales and then throughout its restructuring. Section 11.2 of the *CCAA* provides for the court to grant security to DIP loans ahead of existing unsecured and secured claims upon a balancing of listed factors. Granting DIP security is a fairly standard and often necessary practice in *CCAA* cases. The section also makes it clear however, that security cannot be granted for pre-filing claims. Here, while it is proposed for DIP funding to be used to pay out pre-filing lenders (a "takeout DIP") all of the loans that will be secured are fresh advances by the DIP lenders. Moreover, the Monitor has obtained an independent legal opinion that the pre-filing ABL security is valid and prior to all claims that will be primed by the court-ordered DIP security. The DIP funds are replacing existing secured collateral. The court-ordered charge is not being used to improve the security of the pre-filing ABL lenders or to fill any gaps in their security coverage. In my view therefore, the takeout DIP is not prohibited by s. 11.2.

11 The DIP terms are lengthy and complex. The court has had limited time to scan and parse the documents and has relied heavily on the Monitor's and the applicant's assessments and submissions. Based on my review and the submissions made, I am satisfied that the DIP terms are generally limited to standard lending terms. With one exception discussed below, I was not drawn to any terms that might be thought to create unusual powers in the DIP lenders to control the applicant or the process. There do not appear to be any terms that provide incentives for the DIP lenders to try to execute loan-to-own or other strategies to somehow extract more value than is made available in fees and interest on the face of the DIP loan documents. Scrutinizing complicated, lengthy DIP terms on an urgent initial hearing is a dangerous pursuit. The court relies on the integrity of the parties

2004 CarswellOnt 1211
Ontario Superior Court of Justice [Commercial List]

Stelco Inc., Re

2004 CarswellOnt 1211, [2004] O.J. No. 1257, [2004] O.T.C. 284, 129 A.C.W.S. (3d) 1065, 48 C.B.R. (4th) 299

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

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

Farley J.

Heard: March 5, 2004
Judgment: March 22, 2004
Docket: 04-CL-5306

Counsel: Michael E. Barrack, James D. Gage, Geoff R. Hall for Applicants
David Jacobs, Michael McCreary for Locals, 1005, 5328, 8782 of the United Steel Workers of America
Ken Rosenberg, Lily Harmer, Rob Centa for United Steelworkers of America
Bob Thornton, Kyla Mahar for Ernst & Young Inc., Monitor of the Applicants
Kevin J. Zych for Informal Committee of Stelco Bondholders
David R. Byers for CIT
Kevin McElcheran for GE
Murray Gold, 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.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.b Qualifying company

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Application of Act

Steel company S Inc. applied for protection under Companies' Creditors Arrangement Act ("CCAA") on January 29, 2004 — Union locals moved to rescind initial order and dismiss initial application of S Inc. and its subsidiaries on ground S Inc. was not "debtor company" as defined in s. 2 of CCAA because S Inc. was not insolvent — Motion dismissed — Given time and steps involved in reorganization, condition of insolvency perforce required expanded meaning under CCAA — Union affiant stated that S Inc. will run out of funding by November 2004 — Given that November was ten months away from date of filing, S Inc. had liquidity problem — S Inc. realistically cannot expect any increase in its credit line with its lenders or access to further

outside funding — S Inc. had negative equity of $647 million — On balance of probabilities, S Inc. was insolvent and therefore was "debtor company" as at date of filing and entitled to apply for CCAA protection.

Table of Authorities

Cases considered by *Farley J.*:

A Debtor (No. 64 of 1992), Re (1993), [1993] 1 W.L.R. 264 (Eng. Ch. Div.) — considered

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

Bank of Montreal v. I.M. Krisp Foods Ltd. (1996), [1997] 1 W.W.R. 209, 140 D.L.R. (4th) 33, 148 Sask. R. 135, 134 W.A.C. 135, 6 C.P.C. (4th) 90, 1996 CarswellSask 581 (Sask. C.A.) — considered

Barsi v. Farcas (1923), [1924] 1 W.W.R. 707, 2 C.B.R. 299, 18 Sask. L.R. 158, [1924] 1 D.L.R. 1154, 1923 CarswellSask 227 (Sask. C.A.) — referred to

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

Challmie, Re (1976), 22 C.B.R. (N.S.) 78, 1976 CarswellBC 63 (B.C. S.C.) — considered

Clarkson v. Sterling (1887), 14 O.R. 460 (Ont. C.P.) — considered

Consolidated Seed Exports Ltd., Re (1986), 69 B.C.L.R. 273, 62 C.B.R. (N.S.) 156, 1986 CarswellBC 481 (B.C. S.C.) — considered

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered

Davidson v. Douglas (1868), 15 Gr. 347, 1868 CarswellOnt 167 (Ont. Ch.) — considered

Diemaster Tool Inc. v. Skvortsoff (Trustee of) (1991), 3 C.B.R. (3d) 133, 1991 CarswellOnt 168 (Ont. Gen. Div.) — referred to

Enterprise Capital Management Inc. v. Semi-Tech Corp. (1999), 1999 CarswellOnt 2213, 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) — considered

Gagnier, Re (1950), 30 C.B.R. 74, 1950 CarswellOnt 101 (Ont. S.C.) — considered

Gardner v. Newton (1916), 10 W.W.R. 51, 26 Man. R. 251, 29 D.L.R. 276, 1916 CarswellMan 83 (Man. K.B.) — considered

Inducon Development Corp., Re (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.) — considered

Kenwood Hills Development Inc., Re (1995), 30 C.B.R. (3d) 44, 1995 CarswellOnt 38 (Ont. Bktcy.) — considered

King Petroleum Ltd., Re (1978), 29 C.B.R. (N.S.) 76, 1978 CarswellOnt 197 (Ont. S.C.) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd. (1989), 92 N.S.R. (2d) 283, 75 C.B.R. (N.S.) 317, 45 B.L.R. 14, 237 A.P.R. 283, 1989 CarswellNS 27 (N.S. T.D.) — considered

Montreal Trust Co. of Canada v. Timber Lodge Ltd. (1992), 15 C.B.R. (3d) 14, (sub nom. *Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 1))* 101 Nfld. & P.E.I.R. 73, (sub nom. *Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 1))* 321 A.P.R. 73, 1992 CarswellPEI 13 (P.E.I. C.A.) — referred to

MTM Electric Co., Re (1982), 42 C.B.R. (N.S.) 29, 1982 CarswellOnt 170 (Ont. Bktcy.) — considered

New Quebec Raglan Mines Ltd. v. Blok-Andersen (1993), 9 B.L.R. (2d) 93, 1993 CarswellOnt 173 (Ont. Gen. Div. [Commercial List]) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) — considered

Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp. (2001), 2001 CarswellOnt 2954, 16 B.L.R. (3d) 74, 28 C.B.R. (4th) 294 (Ont. S.C.J. [Commercial List]) — considered

Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp. (2003), 2003 CarswellOnt 5210, 46 C.B.R. (4th) 313, (sub nom. *Olympia & York Developments Ltd. (Bankrupt) v. Olympia & York Realty Corp.)* 180 O.A.C. 158 (Ont. C.A.) — considered

Optical Recording Laboratories Inc., Re (1990), 2 C.B.R. (3d) 64, 75 D.L.R. (4th) 747, 42 O.A.C. 321, (sub nom. *Optical Recording Laboratories Inc. v. Digital Recording Corp.)* 1 O.R. (3d) 131, 1990 CarswellOnt 143 (Ont. C.A.) — referred to

Pacific Mobile Corp., Re (1979), 32 C.B.R. (N.S.) 209, 1979 CarswellQue 76 (C.S. Que.) — referred to

PWA Corp. v. Gemini Group Automated Distribution Systems Inc. (1993), 103 D.L.R. (4th) 609, 49 C.P.R. (3d) 456, 64 O.A.C. 274, 15 O.R. (3d) 730, 10 B.L.R. (2d) 109, 1993 CarswellOnt 149 (Ont. C.A.) — considered

PWA Corp. v. Gemini Group Automated Distribution Systems Inc. (1993), 49 C.P.R. (3d) ix, 10 B.L.R. (2d) 244 (note), 104 D.L.R. (4th) vii, 68 O.A.C. 21 (note), 164 N.R. 78 (note), 16 O.R. (3d) xvi (S.C.C.) — referred to

R. v. Proulx (2000), [2000] 4 W.W.R. 21, 2000 SCC 5, 2000 CarswellMan 32, 2000 CarswellMan 33, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 182 D.L.R. (4th) 1, 249 N.R. 201, 49 M.V.R. (3d) 163, [2000] 1 S.C.R. 61, 142 Man. R. (2d) 161, 212 W.A.C. 161 (S.C.C.) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621, 1991 CarswellOnt 220 (Ont. Gen. Div.) — considered

Standard Trustco Ltd. (Trustee of) v. Standard Trust Co. (1993), 13 O.R. (3d) 7, 21 C.B.R. (3d) 25, 1993 CarswellOnt 219 (Ont. Gen. Div.) — considered

TDM Software Systems Inc., Re (1986), 60 C.B.R. (N.S.) 92, 1986 CarswellOnt 203 (Ont. S.C.) — referred to

Viteway Natural Foods Ltd., Re (1986), 63 C.B.R. (N.S.) 157, 1986 CarswellBC 499 (B.C. S.C.) — referred to

Webb v. Stenton (1883), 11 Q.B.D. 518 (Eng. C.A.) — referred to

633746 Ontario Inc. (Trustee of) v. Salvati (1990), 79 C.B.R. (N.S.) 72, 73 O.R. (2d) 774, 1990 CarswellOnt 181 (Ont. S.C.) — considered

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3

Generally — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 2(1) "insolvent person" — referred to

s. 2(1) "insolvent person" (a) — considered

s. 2(1) "insolvent person" (b) — considered

s. 2(1) "insolvent person" (c) — considered

s. 43(7) — referred to

s. 121(1) — referred to

s. 121(2) — referred to

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

Generally — referred to

s. 2 "debtor company" — referred to

s. 2 "debtor company" (a) — considered

s. 2 "debtor company" (b) — considered

s. 2 "debtor company" (c) — considered

s. 2 "debtor company" (d) — considered

s. 12 — referred to

s. 12(1) "claim" — referred to

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

Words and phrases considered:

debtor company

It seems to me that the [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36] test of insolvency . . . which I have determined is a proper interpretation is that the [*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] definition of [s. 2(1)] (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.

MOTION by union that steel company was not "debtor company" as defined in *Companies' Creditors Arrangement Act*.

***Farley J.*:**

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 *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bktcy.) 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 *MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29 (Ont. Bktcy.) 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 *TDM Software Systems Inc., Re* (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 *Inducon Development Corp., Re* (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 *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]), 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) 289 (Ont. 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. [Commercial List]) 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 *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) 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 *Anvil Range Mining Corp., Re* (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-Peppler 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 Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) 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 [(1993), 49 C.P.R. (3d) ix (S.C.C.)] 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 *Optical Recording Laboratories Inc., Re* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Viteway Natural Foods Ltd., Re* (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 (S.C.C.) 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 *King Petroleum Ltd., Re* (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 Petroleum Ltd.* 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 *Pacific Mobile Corp., Re* (1979), 32 C.B.R. (N.S.) 209 (C.S. Que.) 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 Range Mining Corp.*, *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 (Ont. 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 Petroleum Ltd.* 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 Raglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Ont. Gen. Div. [Commercial List]) 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 (Ont. S.C.J. [Commercial List]) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (Ont. 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 (Ont. Ch.) 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 (Ont. C.P.) 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 (Sask. 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* (1923), [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stenton* (1883), 11 Q.B.D. 518 (Eng. C.A.) 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 Ontario 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 Petroleum Ltd.*, *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 *Gardner 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 *A Debtor (No. 64 of 1992), Re*, [1993] 1 W.L.R. 264 (Eng. Ch. Div.) 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 *Gagnier, Re* (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 Petroleum Ltd.*, *supra* p. 81; *Salvati*, *supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S. T.D.) at p. 29; *Challmie, Re* (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 Foods Inc. (Trustee of)*, 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 Management Inc.*, *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 Natural Foods Ltd.* 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 Recording Laboratories Inc. supra* at pp. 756-7; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at pp. 164-63-4; *Consolidated Seed Exports Ltd., Re* (1986), 62 C.B.R. (N.S.) 156 (B.C. S.C.) at p. 163. In *Consolidated Seed Exports Ltd.*, 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 Exports Ltd.* 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.

Motion dismissed.

APPENDIX

CITATION: Zochem Inc. (Re), 2016 ONSC 958
COURT FILE NO.: CV-16-11271-00CL
DATE: 20160208

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 CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT WITH RESPECT TO HORSEHEAD HOLDING CORP., HORSEHEAD CORPORATION, HORSEHEAD METAL PRODUCTS, LLC, THE INTERNATIONAL METALS RECLAMATION COMPANY, LLC AND ZOCHEM INC. (collectively, the "Debtors")

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

HEARD: February 5, 2016

COUNSEL:
Sam Babe, Martin E. Kovnats, Jeffrey Merk and J. Nemers, for the Applicant
Ryan Jacobs, Jane Dietrich and Natalie Levine, for the DIP lenders
Christopher G. Armstrong, Sydney Young and Caroline Descours, for Richter Advisory Group as proposed Information Officer
Linc A. Rogers and Christopher Burr, for PNC Bank, National Association
Denis Ellickson, for UNIFOR Local 591G

Newbould J.

[1] On February 5, 2016 an application was brought by Zochem Inc. ("Zochem"), in its capacity as foreign representative of itself as well as Horsehead Holding Corp., Horsehead Corporation, Horsehead Metal Products, LLC ("Horsehead Metals"), and The International

[16] Pursuant to section 46(1) of the *CCAA*, 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.

[17] Pursuant to section 47 of the *CCAA*, two requirements must be met for an order recognizing a foreign proceeding:

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

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

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

[19] Section 45(1) of the *CCAA* defines a "foreign representative" to include one who is authorized in a foreign proceeding in respect of a debtor company to act as a representative in respect of the foreign proceeding. In the chapter 11 proceeding, the debtors applied to have Horsehead Holding Corp. named as the foreign representative. Judge Walrath for reasons I will discuss had concerns regarding the position of Zochem and directed that Zochem be named as the foreign representative.

[20] There is no question but that the chapter 11 proceeding is a foreign proceeding and that Zochem is a foreign representative. Thus it has been established that the chapter 11 proceeding should be recognized in this Court as a foreign proceeding.

[21] Once it has determined that a proceeding is a foreign proceeding, a court is required, pursuant to section 47(2) of the *CCAA*, to specify in its order 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" ("COMI"). Section 45(2) of the *CCAA* provides that, in the absence of proof to the contrary, a debtor company's registered office is deemed to be its COMI. In circumstances where it is necessary to go beyond the s. 45 (2) registered office presumption, the following principal factors, considered as a whole, will indicate whether the location in which the proceeding has been filed is the debtor's centre of main interests:

(1) the location is readily ascertainable by creditors,

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

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

[23] See *Lightsquared LP, Re*, (2012), 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List]. In *Lightsquared*, Justice Morawetz further stated:

> 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.

[24] In this case, all of the factors do not point to a single jurisdiction as the COMI as Zochem's operations are located in Brampton, Ontario.

[25] In the present case, the applicants, supported by the proposed Information Officer, contend that Zochem's COMI is in the United States because: