

**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 SUNGARD AVAILABILITY SERVICES
(CANADA) LTD./SUNGARD, SERVICES DE CONTINUITE DES
AFFAIRES (CANADA) LTEE

APPLICATION OF SUNGARD AVAILABILITY SERVICES (CANADA)
LTD./SUNGARD, SERVICES DE CONTINUITE DES AFFAIRES
(CANADA) LTEE UNDER SECTION 46 OF THE *COMPANIES'
CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS
AMENDED

Applicant

**FACTUM OF THE APPLICANT
(Application for Recognition of Foreign Main Proceeding
initially returnable April 11, 2022)**

April 11, 2022

Cassels Brock & Blackwell LLP
40 King St. W., Suite 2100
Scotia Plaza
Toronto, ON M5H 3C2

Ryan Jacobs LSO #: 59510J
Tel: 416.860.6465
Email: rjacobs@cassels.com

Jane Dietrich LSO #: 49302U
Tel: 416.860.5223
Email: jdietrich@cassels.com

Natalie E. Levine LSO #: 64908K
Tel: 416.860.6568
Email: nlevine@cassels.com

Lawyers for the Proposed Foreign
Representative

TO: SERVICE LIST

TABLE OF CONTENTS

PART I – NATURE OF THE APPLICATION	1
PART II – FACTS	3
A. The Chapter 11 Cases	3
B. The Company’s Business	3
C. Financial Difficulties and the Restructuring Transactions	5
D. Sungard AS Canada	7
E. Integration of Canadian Operations with U.S.	8
PART III – THE ISSUES	9
PART IV – THE LAW.....	10
A. An Interim Stay Should Be Granted	10
B. The Chapter 11 Cases are Foreign Main Proceedings.....	13
(a) The Chapter 11 Cases are a Foreign Proceeding	14
(b) Sungard AS Canada’s Chapter 11 Case is a Foreign Main Proceeding	15
C. The Initial Recognition Order and Supplemental Order should be granted.....	18
(a) Stay of Proceedings in the Initial Recognition Order is required and appropriate.....	18
(b) The Supplemental Order is appropriate in the circumstances	18
PART V – RELIEF REQUESTED	25
 <u>SCHEDULES</u>	
SCHEDULE A LIST OF AUTHORITIES	26
SCHEDULE B TEXT OF STATUTES, REGULATIONS & BY-LAWS.....	28

PART I – NATURE OF THE APPLICATION

1. This factum is filed in support of an application by Sungard Availability Services (Canada) Ltd./Sungard, Services De Continuite Des Affaires (Canada) Ltee (“**Sungard AS Canada**”) as the proposed foreign representative (in such capacity, the “**Proposed Foreign Representative**”) of itself and the other Debtors.¹ Sungard AS Canada is a member of a broader group of companies (Sungard AS Canada together with the other entities within Sungard AS Canada’s global corporate group, the “**Company**”). On April 11, 2022, the Company’s parent, Sungard AS New Holdings, LLC, together with 10 United States (“**U.S.**”) based subsidiaries and Sungard AS Canada commenced cases (the “**Chapter 11 Cases**”) by filing voluntary petitions for relief pursuant to chapter 11 of title 11 of the United States Code (the “**U.S. Bankruptcy Code**”) with the United States Bankruptcy Court for the Southern District of Texas (the “**U.S. Bankruptcy Court**”).²

2. The application by the Proposed Foreign Representative seeks Orders pursuant to sections 46 to 49 of the *Companies’ Creditors Arrangement Act*, RSC 1985, c. C-36, as amended (the “**CCAA**”) for, among other things, the following relief:

- (a) an interim order staying proceedings (the “**Interim Stay**”) against Sungard AS Canada as well as against two affiliates of Sungard AS Canada, Sungard AS New Holdings III, LLC and Sungard Availability Services LP, as guarantors of certain lease obligations of Sungard AS Canada (the “**Guarantor Debtors**”)³, pending the determination of the relief set out below (the “**Interim Order**”);

¹ Terms not defined in this Factum have the meanings set out in the Affidavit of Michael K. Robinson sworn April 11, 2022 (the “**Robinson Affidavit**”).

² Robinson Affidavit at para 5.

³ The Guarantor Debtors do not own any assets in Canada other than certain registered intellectual property rights.

- (b) an order: (i) finding that Sungard AS Canada is the foreign representative of the Debtors; (ii) finding that the centre of main interests for Sungard AS Canada is the U.S.; and (iii) recognizing the Chapter 11 Case commenced by Sungard AS Canada in the U.S. Bankruptcy Court as a foreign main proceeding under Part IV of the CCAA (the foregoing relief, the **“Initial Recognition Order”**); and
- (c) an order: (i) recognizing certain orders of the U.S. Bankruptcy Court, if made in the Chapter 11 Cases (the **“U.S. Orders”**); (ii) appointing Alvarez & Marsal Canada Inc. (**“A&M”**) as information officer in respect of this proceeding (in such capacity, the **“Information Officer”**); and (iii) granting the Administration Charge and the DIP Agents’ Charges (as those terms are defined below) (the foregoing relief, the **“Supplemental Order”**).

3. Sungard AS Canada will be seeking the above relief in stages. Although Sungard AS Canada has already filed a petition with the U.S. Bankruptcy Court commencing its Chapter 11 Case, and thereby obtained an automatic stay in the U.S., certain of the U.S. Orders (including the order appointing Sungard AS Canada as the foreign representative (the **“Foreign Representative Order”**)) are not scheduled to be heard by the U.S. Bankruptcy Court until the “first day” hearing anticipated to be scheduled early in the day on April 12, 2022. To protect the assets and business of Sungard AS Canada, in Canada, during this intervening period, Sungard AS Canada will seek the Interim Stay from this Court pending the hearing on the Initial Recognition Order and Supplemental Order. When and if the Foreign Representative Order and other “first day” relief orders have been granted and formally issued by the U.S. Bankruptcy Court, Sungard AS Canada will return expeditiously to this Court to seek the Initial Recognition Order and the Supplemental Order.⁴

⁴ Robinson Affidavit at paras 4 and 61-63.

PART II – FACTS

A. The Chapter 11 Cases

4. On April 11, 2022 (the “**Petition Date**”), the Debtors filed voluntary petitions for relief (the “**Petitions**”) pursuant to the U.S. Bankruptcy Code with the U.S. Bankruptcy Court. At the same time, the Debtors filed pleadings in the Chapter 11 Cases to seek, among other things, authority to continue to operate their business in the ordinary course, authority to enter into and borrow under the DIP Facilities (defined below), and entry of the Foreign Representative Order.

5. Sungard AS Canada believes that the recognition in Canada of its Chapter 11 Case and the additional relief sought from this Court, including a stay of proceedings with respect to Sungard AS Canada and the Guarantor Debtors, is necessary to protect its assets and business in Canada and will appropriately support the Chapter 11 Cases. Sungard AS Canada is not seeking recognition of the Chapters 11 Cases of the Guarantor Debtors or any of the other Debtors, but reserves the right to do so if it deems necessary or appropriate in the future.⁵

6. There are no foreign insolvency proceedings involving Sungard AS Canada other than the Chapter 11 Cases. However, certain non-Debtor affiliates of the Debtors are in an administration proceeding in the United Kingdom (“**U.K.**”).⁶

B. The Company’s Business

7. For approximately 40 years, the Company has provided information technology (“**IT**”) services to ensure its thousands of customers worldwide have uninterrupted access to their mission-critical data and IT systems through high availability, cloud-connected infrastructure services in the event of an unplanned business disruption (e.g., cyberattacks, power outages, telecommunication disruptions, acts of terrorism, floods, hurricanes and earthquakes). The

⁵ Robinson Affidavit at para 49.

⁶ Robinson Affidavit at paras 6 and 13.

Company works with its customers to tailor and seamlessly integrate infrastructure solutions to meet its customers' application requirements and to optimize its customers' business IT outcomes.⁷

8. The Company's main operations and product offerings can be grouped into four general business units: (i) Colocation & Network Services; (ii) Cloud & Managed Services; (iii) Recovery Services; and (iv) Workplace Recovery. These services are described in detail in the Robinson Affidavit and U.S. First Day Declaration (as defined in the Robinson Affidavit).⁸

9. The Debtors are headquartered in Wayne, Pennsylvania and collectively employ 585 individuals in the U.S. and Canada. The Company operates 55 facilities (comprised of 24 data centers and 31 workplace recovery centers, all but one of which is leased) and provides services to over 2,000 customers in nine countries—the U.S., the U.K., Canada, Ireland, France, India, Belgium, Luxembourg and Poland.⁹

10. Sungard AS Canada is a relatively small part of the Company. Sungard AS Canada employs only approximately 35 individuals and has only six locations. During fiscal 2021, Sungard AS Canada represented approximately only 6% of the Company's consolidated revenue. Sungard AS Canada is also entirely reliant on the Company's U.S. operations for administrative, back office and strategic purposes. The Company operates as a consolidated business whereby all executive and senior level decisions for the Company, including for Sungard AS Canada, are centralized in Wayne, Pennsylvania.¹⁰

11. Sungard AS Canada is a borrower or a guarantor on three of the Debtors' credit facilities and other funded debt obligations (collectively, the "**Prepetition Secured Credit Agreements**"),

⁷ Robinson Affidavit at paras 9-10.

⁸ Robinson Affidavit at para 21.

⁹ Robinson Affidavit at para 10.

¹⁰ Robinson Affidavit at paras 11 and 26.

being the Revolving Credit Agreement, the Prepetition 1L Term Loan Credit Agreement and the Prepetition New 2L Credit Agreement (each as defined in the Robinson Affidavit), with principal amounts outstanding under those obligations in excess of USD\$400 million. Sungard AS Canada has granted security over substantially all of its assets to the lenders or agents for the lenders as security for those loans.¹¹

C. Financial Difficulties and the Restructuring Transactions

12. The Company recently went through a chapter 11 restructuring in 2019 to address its funded debt.¹² However, operational liabilities, including meaningfully uneconomical leases, were not addressed in those proceedings, and continue to weigh on the Company's performance and its ability to implement its reorganized business plan and to execute on growth opportunities. The COVID-19 pandemic, geopolitical conditions, including the war in Ukraine, and faster than expected declines in demand for the Company's legacy products (and increased competition for more current, cloud-based products) also added to the Company's financial challenges.

13. The pandemic caused certain changes in usage of the Company's workplace recovery centers as customers realized their employees could work from home. In addition, many of the Company's customers delayed spending decisions or reduced their IT costs, leading to further customer attrition through decisions not to renew contracts. Current geopolitical conditions have led to elevated energy prices, which are devastating for the Company, particularly for its operations in the United Kingdom. As a result, the directors of the Company's U.K. subsidiary, Sungard Availability Services (UK) Limited ("**Sungard AS UK**"), determined that it was necessary to and did commence an administration proceeding under U.K. insolvency law on March 25, 2022.¹³

¹¹ Robinson Affidavit at paras 11, 28 and 39-44.

¹² Sungard AS Canada was not a debtor in the prior chapter 11 process.

¹³ Robinson Affidavit at paras 12-13.

14. Given the speed of Sungard AS UK's decline and the continuing challenges faced by the rest of the Company, the Company's need to pursue a more comprehensive restructuring transaction was accelerated. The Company, with the assistance of its advisors, engaged in expedited arm's length negotiations with an ad hoc group of term loan lenders (the "**Ad Hoc Group**") over the terms of a potential chapter 11 restructuring, and an agreement has been memorialized in a restructuring support agreement (the "**RSA**"). The Ad Hoc Group includes holders of over 80% of term loans under the Prepetition 1L Term Loan Credit Agreement and over 80% of the term loans under the Prepetition New 2L Credit Agreement.¹⁴

15. The RSA provides a flexible structure to facilitate the parties exploring the most value-maximizing restructuring alternative available, whether through the sale of all, substantially all or one or more subsets of the Debtors' assets or an equitization of the Debtors' prepetition funded debt through a plan of reorganization. To fund the Chapter 11 Cases, the proposed recognition proceedings, and the processes contemplated by the RSA, the Company secured access to debtor in possession ("**DIP**") financing facilities in the aggregate amount of USD\$335.9 million comprising (i) a USD\$50 million senior secured revolving credit facility (the "**ABL DIP Facility**") and (ii) a USD\$285.9 million senior secured multi-draw term loan facility, consisting of up to USD\$95.3 million in new money loans and up to USD\$190.6 million in "rolled up" prepetition obligations (the "**Term Loan DIP Facility**" and together with the ABL DIP Facility, the "**DIP Facilities**").¹⁵

16. Recognition of Sungard AS Canada's Chapter 11 Case as a foreign main proceeding pursuant to section 48(1) of the CCAA will provide the Company the opportunity to complete a comprehensive sale or restructuring of its North American business, including the Canadian business, in an efficient manner, thereby maximizing value for stakeholders.

¹⁴ Robinson Affidavit at para 14 and 16.

¹⁵ Robinson Affidavit at paras 16-17.

D. **Sungard AS Canada**

17. Sungard AS Canada is an Ontario corporation formed by amalgamation on October 1, 2002. Its registered office is a law firm in Toronto, Ontario that maintains its minute books. Sungard AS Canada is also extra-provincially registered in Alberta, British Columbia, Manitoba and Quebec. Sungard AS Canada is a wholly-owned subsidiary of Debtor Sungard Availability Services Holdings (Canada), Inc. ("**Sungard AS Canada Parent**"), a Delaware corporation.¹⁶

18. Sungard AS Canada provides its customers access to the Company's product offerings through its local employees and its data centers and workplace recovery centers. Sungard AS Canada has six leased locations – four in Ontario and two in Quebec. Two of the Ontario locations are data centers providing colocation and network services. The other two Ontario locations and both Quebec locations are workplace recovery sites. Sungard AS Canada's customer base includes businesses in financial services, healthcare, manufacturing and logistics.¹⁷ Sungard AS Canada employs approximately 35 people in sales, technical operations, colocation services, recovery services, data center operations, and consulting.¹⁸

19. The Canadian business of the Company is primarily conducted through the six real properties leased by Sungard AS Canada pursuant to five leases (the "**Sungard AS Canada Leases**"). Sungard AS New Holdings III, LLC is a guarantor under one of the leases and Sungard Availability Services LP is an indemnitor or guarantor under two other leases. Sungard AS New Holdings III, LLC is an indirect parent (several levels removed) of Sungard AS Canada and Sungard LP is a minority shareholder in Sungard AS Canada Parent.¹⁹

¹⁶ Robinson Affidavit at paras 23-24.

¹⁷ Robinson Affidavit at paras 25 and 63.

¹⁸ Robinson Affidavit at para 25.

¹⁹ Robinson Affidavit at paras 24 and 48.

20. Sungard AS Canada estimates that as of the Petition Date it has unpaid rent under the Sungard AS Canada Leases in the approximate aggregate amount of CAD\$1,438,550. The unpaid rent amount includes CAD\$453,522 with respect to unpaid Harmonized Sales Tax (“HST”) that was recently invoiced by a landlord, but excludes certain amounts accruing in respect of real property taxes which Sungard AS Canada is obligated to pay under certain of the leases.²⁰

21. Because of Sungard AS Canada’s current financial position, including its approximately USD\$400 million of indebtedness under the Prepetition Secured Credit Agreements, and Sungard AS Canada’s complete reliance on the Company’s U.S. entities for operational support and executive level decision making, among other things, there is no viable path for Sungard AS Canada to independently obtain financing separate from the Company’s broader corporate group.²¹

E. Integration of Canadian Operations with U.S.

22. Sungard AS Canada is administratively reliant on the other Debtors. Sungard AS Canada has no back-office employees of its own and the directing minds of Sungard AS Canada are located in the U.S. Sungard AS Canada has a country manager who is an officer and also serves as the company’s resident director in Ontario, but the remaining director and four officers are all located in the U.S.²²

23. Sungard AS Canada solely depends upon the Company’s management team in the U.S. to fulfil all key management functions for the Canadian business including accounting, invoicing, technical support, customer care, human resources, legal, and other executive-level functions,

²⁰ Robinson Affidavit at para 50.

²¹ Robinson Affidavit at para 11, 47 and 64.

²² Robinson Affidavit at para 26 and 64.

including leasing. These services are provided by other Company entities to Sungard AS Canada pursuant to the terms of a Shared Services Agreement.²³

24. Sungard AS Canada's integration with the broader Company group is further evidenced as follows:

- (a) Sungard AS Canada does not have separate audited financial statements;
- (b) all authorized signatories for Sungard AS Canada's two bank accounts reside in the U.S.;
- (c) the addresses for notice to Sungard AS Canada under the Sungard AS Canada Leases are exclusively U.S. addresses, save for one lease which includes both a Canadian and U.S. address, making it clear to landlords that leasing issues are addressed by decision-makers outside of Canada; and
- (d) other than certain corporate records maintained at a law firm office in Canada, most books and records of Sungard AS Canada are situated and maintained in the U.S.²⁴

25. As such, Sungard AS Canada is substantially intertwined with the Company and is wholly dependent upon the other Debtors for all of its key functions (without which it cannot operate independently).

PART III – THE ISSUES

26. The issues to be determined in this motion are:

²³ Robinson Affidavit at para 47.

²⁴ Robinson Affidavit at paras 23, 29, 31 and 64(h).

- (a) should the Interim Stay be granted in favour of Sungard AS Canada and the Guarantor Debtors pending the hearing with respect to the Initial Recognition Order and the Supplemental Order?
- (b) are the Chapter 11 Cases a “foreign main proceeding” pursuant to Part IV of the CCAA?
- (c) if so, is Sungard AS Canada entitled to the relief sought, including,
 - (i) the stay of proceedings in respect of Sungard AS Canada and the Guarantor Debtors;
 - (ii) recognition of certain of the U.S. Orders;
 - (iii) appointment of A&M as Information Officer; and
 - (iv) granting of the Administration Charge and the DIP Agents’ Charges.

27. The Proposed Foreign Representative submits that each of the questions above should be answered affirmatively and that it is appropriate to grant the requested relief for the reasons set forth herein.

PART IV – THE LAW

A. An Interim Stay Should Be Granted

28. The Debtors commenced the Chapter 11 Cases in the U.S. Bankruptcy Court by filing the Petitions. However, the formal order recognizing Sungard AS Canada as the foreign representative of the Debtors is not anticipated to be issued by the U.S. Bankruptcy Court until, some time on April 12, 2022 at the earliest. It follows that there will be a period of time from the commencement of the Chapter 11 Cases (and the corresponding automatic stay in the U.S.) to

the time when the evidence under section 46(2) of the CCAA required for recognition in Canada of a foreign proceeding is available.

29. Pursuant to section 46(2) of the CCAA, when a foreign representative seeks recognition of a foreign proceeding, its application must include, among other things, certified copies of the instruments commencing the foreign proceeding and authorizing the foreign representative to act in that capacity.²⁵ Ancillary relief in the Chapter 11 Cases, such as the relief required to be evidenced under section 46(2) of the CCAA, will not be granted until an attendance can be made before the U.S. Bankruptcy Court. Since the U.S. Bankruptcy Court has not yet heard the motion to appoint a foreign representative, interim relief will provide a short stay of proceedings pending the filing and certification of the evidence required by section 46(2) of the CCAA. Without interim relief, Sungard AS Canada and the Guarantor Debtors will not have the protection of a stay in Canada in the period of time between the commencement of the Chapter 11 Cases and the receipt of the formal order of the U.S. Bankruptcy Court, and prejudice to the coordinated cross-border proceedings may result.

30. For that reason, and consistent with this Court's practice in other similar situations involving Chapter 11 proceedings, the Applicant is seeking the Interim Stay until the order has been issued in the Chapter 11 Cases authorizing it to act as a foreign representative. Sungard AS Canada has unpaid rent and other obligations in Canada, and, in light of the Chapter 11 Cases, is currently in default under certain of the Prepetition Secured Credit Agreements. Moreover, the Sungard AS Canada Leases contain standard "ipso facto" provisions for default upon an insolvency filing. Sungard AS Canada's customers could potentially suffer irreparable harm if any of its landlords were to take enforcement steps that caused a disruption to customers'

²⁵ CCAA, s. 46(2). Under section 46(4), this Court may accept other evidence if certified copies are not available. In light of the time required to obtain original copies from the U.S. Bankruptcy Court, Sungard AS Canada intends to rely on a copy of the signed order, when available.

access to safe and reliable data services.²⁶ Accordingly, a stay of proceedings is necessary to safeguard the assets of and protect the customers of Sungard AS Canada and the Guarantor Debtors in this interim period, and preserve their ability to implement a coordinated cross-border restructuring through the Chapter 11 Cases.

31. This Court has recognized the need for an interim stay in the context of recognition proceedings where a delay in obtaining a formal order in the U.S. “*could prejudice the Canadian applicants in respect of whom no stay would otherwise arise*”.²⁷ Such an interim stay is particularly appropriate where the applicant’s other option is to commence a formal proceeding under Part I of the CCAA, which is “*necessarily costly and complex in circumstances where the Canadian proceeding would appear to be secondary to the American proceeding*.”²⁸ In circumstances closely paralleling these proceedings, Justice Cavanagh, relying on the *Courts of Justice Act* and the Court’s inherent jurisdiction, granted an interim stay in the *Knotel* CCAA Part IV proceedings on the basis that the debtor would be prejudiced if its landlords could exercise remedies in Canada before the foreign representative order was granted by the foreign court.²⁹

32. Similarly, in the context of a recognition proceeding, this Court has determined that it has jurisdiction under section 49 of the CCAA to grant a third party stay where 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”” and where it is fair and reasonable.³⁰

²⁶ Robinson Affidavit at para 63.

²⁷ [Endorsement of Koehnen J dated June 24, 2020](#), *GNC Holdings Inc., et al.*, Court File CV-20-00642970-00CL at paras 3 and 4 [*GNC Interim Stay*]; see also, [Lightsquared LP \(Re\)](#), 2012 ONSC 2994 at paras 1-3 and the [Interim Initial Order dated October 19, 2010](#) granted by Morawetz J. in *TerreStar Networks Inc.*, Court File No. CV-10-8944-00CL.

²⁸ *GNC Interim Stay*, *supra* note 28, at para 4.

²⁹ [Endorsement of Cavanagh, J. dated March 9, 2021](#), in *Knotel, Inc. and Knotel Canada, Inc.*, Court File No. CV-21-00658434-00CL.

³⁰ [Purdue Pharma L.P. \(Re\)](#), 2019 ONSC 7042 (Commercial List) at para 22. See also [Grace Canada Inc. \(Re\)](#), [2005] 17 CBR (5th) 275 (Ont Sup Ct J (Commercial List)) at para 12; [Endorsement of Hainey, J. dated February 24, 2021](#), *Re Mallinckrodt Canada ULC et al.*, Court File No. CV-20-00649441 at paras 10-15; [Pacific Exploration & Production Corp. \(Re\)](#), 2016 ONSC 5429 at para 26; and [JTI-Macdonald Corp. \(Re\)](#), 2019 ONSC 1625 at paras 14-17.

33. The proposed stay of proceedings against the Guarantor Debtors is intended to support the equal and fair treatment of creditors. Any potential claims against the Guarantor Debtors in Canada would be inseparably linked to Sungard AS Canada and the Chapter 11 Cases. Any exercise of rights against the Guarantor Debtors that would otherwise be stayed if the Interim Order is granted, would undermine the Chapter 11 Cases in respect of the Guarantor Debtors and negatively impact the ability of all the Debtors to restructure. The granting of a stay in respect of the Guarantor Debtors is consistent with the long-standing principles of cooperation and comity between this Court and U.S. bankruptcy courts, and is fair and reasonable in the circumstances.

B. The Chapter 11 Cases are Foreign Main Proceedings

34. 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.³¹ Justice Hainey recently summarized the principles underlying such proceedings in *Hollander Sleep Products, LLC et al.*:³²

[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.

35. For the following reasons, Sungard AS Canada submits that it would be appropriate for this Court to recognize its Chapter 11 Case as a foreign main proceeding.

³¹ CCAA, s. 44.

³² [*Hollander Sleep Products, LLC \(Re\)*](#), 2019 ONSC 3238 at para 41 [*Hollander*].

(a) The Chapter 11 Cases are a Foreign Proceeding

36. 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.³³

37. Section 47 of the CCAA provides that the Court shall make an order recognizing a foreign insolvency proceeding if it is satisfied 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.³⁴

38. 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.”³⁵ Proceedings under the U.S. Bankruptcy Code and the supervision of a U.S. bankruptcy court are largely considered by Canadian courts to satisfy these criteria. Insolvency proceedings commenced under the U.S. Bankruptcy Code are accordingly consistently recognized by Canadian Courts to be a “foreign proceeding” under the CCAA.³⁶

39. The second requirement under section 47 of the CCAA is that the applicant is a “foreign representative” in respect of the foreign proceeding. A “foreign representative” is a person who is

³³ CCAA, s. 46(1).

³⁴ CCAA, s. 47.

³⁵ CCAA, s. 45(1).

³⁶ [*Hollander*](#), *supra*, note 33 at para 27; [*Payless Holdings LLC, \(Re\)*](#), 2017 ONSC 2242 at para 22; [*Zochem Inc. \(Re\)*](#), 2016 ONSC 958 at para 20 [*Zochem*].

authorized 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.³⁷

40. The Proposed Foreign Representative is seeking an order from the U.S. Bankruptcy Court declaring Sungard AS Canada as the foreign representative for purposes of the Chapter 11 Cases. Once issued, the requirements for recognition of Sungard AS Canada's Chapter 11 Case as a "foreign proceeding" pursuant to section 47 of the CCAA will be satisfied and the Chapter 11 Case should be recognized as a foreign proceeding.

(b) *Sungard AS Canada's Chapter 11 Case is a Foreign Main Proceeding*

41. Sungard AS Canada's Chapter 11 Case is a foreign main proceeding as Sungard AS Canada's centre of main interest ("**COMI**") is in the U.S.

42. Pursuant to section 47(2) of the CCAA, if the Court grants an order under section 47(1) it is required to specify whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding."³⁸ If the Court recognizes a foreign proceeding as a "foreign main proceeding", section 48(1) of the CCAA provides for an automatic stay against the debtor in Canada.³⁹

43. Section 45(1) of the CCAA provides that a "foreign main proceeding" is a foreign proceeding in a jurisdiction where the debtor company has its COMI.

44. While the CCAA does not define what constitutes a debtor's COMI, section 45(2) provides that, absent evidence to the contrary, a debtor's COMI is deemed to be the location of its registered office. However, the determination of COMI is substantive, rather than technical.⁴⁰

³⁷ CCAA, s. 45(1).

³⁸ CCAA, s. 47(2).

³⁹ CCAA, s. 48(1).

⁴⁰ [*CHC Group Ltd. \(Re\)*](#), 2016 BCSC 2623 at para 9.

45. Where it is necessary to go beyond the presumption under section 45(2) to designate a debtor's COMI, Courts have found COMI to be where (i) the location is readily ascertainable by creditors, (ii) the location of the debtor's principal assets or operations and (iii) the location is where the management of the debtor takes place.⁴¹

46. In addition to those primary considerations, Canadian courts have also considered:

- (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 location of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.⁴²

⁴¹ [Zochem](#), *supra*, note 37 at para 22.

⁴² [Massachusetts Elephant & Castle Group, Inc. \(Re\)](#), 2011 ONSC 4201 at paras 26-31.

47. Notwithstanding that Sungard AS Canada's registered office is at a law firm in Ontario, all executive and management level decision making for the company is made by Company management located in the United States. Similarly, with the exception of one Canadian employee who serves as a resident director and officer, all other directors and officers of Sungard AS Canada are employees of the Debtors and reside in the U.S. Sungard AS Canada has no Canadian head office and relies entirely on essential back-office service support provided by Company entities in the U.S. Sungard AS Canada is not able to operate independently of that support. In addition, oversight of cash management and accounting functions, the seat of the treasury management, human resources, legal and corporate development functions all take place in the U.S.⁴³ All of Sungard AS Canada's leases contain U.S. addresses for notice, meaning that the landlord creditors are aware that decisions are made in the U.S.

48. Accordingly, the Proposed Foreign Representative submits that Sungard AS Canada's COMI is the U.S. The granting of an order recognizing the Chapter 11 Cases as a foreign main proceeding under section 47(2) of the CCAA is therefore appropriate for the following reasons:⁴⁴

- (a) the U.S. Bankruptcy Court has assumed jurisdiction over the Chapter 11 Cases. This Court's recognition and support of those proceedings is consistent with the principles of comity and cooperation underlying Part IV of the CCAA;
- (b) given the deep interconnectedness between Sungard AS Canada and the operations of the Company in the U.S., it is most practical for the U.S. Bankruptcy Court to primarily control of the Debtors' insolvency process; and
- (c) coordination of the insolvency proceedings in the U.S. and Canada supports the equal and fair treatment of stakeholders.

⁴³ Robinson Affidavit at paras 26, 47 and 64.

⁴⁴ CCAA, s. 47(2).

C. The Initial Recognition Order and Supplemental Order should be granted

(a) *Stay of Proceedings in the Initial Recognition Order is required and appropriate*

49. Section 48(1) of the CCAA provides that on making an order recognizing a foreign proceeding specified by the court as a “foreign main proceeding”, the Court is required to grant certain mandatory relief, including a limited stay of proceedings.⁴⁵

50. The Initial Recognition Order sought by the Proposed Foreign Representative provides for all the relief required under section 48 and is consistent with the Court’s Model CCAA Initial Recognition Order (Foreign Main Proceeding).

(b) *The Supplemental Order is appropriate in the circumstances*

51. In addition to the required relief under section 48 of the CCAA, if an order recognizing a foreign proceeding is made, section 49 of the CCAA provides this Court broad discretion to make any order it considers appropriate where it is satisfied that the order is necessary for the protection of the debtor company’s property or the interests of creditors.⁴⁶ The Court may make such orders on any terms and conditions it considers appropriate in the circumstances.

52. If an order recognizing a foreign proceeding is made, Section 52(1) of the CCAA requires that the Court “cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.”⁴⁷

53. Considering that requirement and the circumstances facing Sungard AS Canada and the Guarantor Debtors, the relief requested in the proposed Supplemental Order, including recognition of the U.S. Orders and appointment of A&M as Information Officer in respect of

⁴⁵ CCAA, s. 48(1).

⁴⁶ CCAA, s. 49(1).

⁴⁷ CCAA, s. 52(1).

Sungard AS Canada's CCAA recognition proceedings, is appropriate since it will facilitate the advancement of the Chapter 11 Cases (as further described below).

(i) Recognition of the U.S. Orders is appropriate

54. The Proposed Foreign Representative is seeking an order recognizing and giving effect in Canada to certain U.S. Orders.

55. The list of U.S. Orders that are sought to be recognized is set out in the Robinson Affidavit at paragraph 80. The relief includes, authorizing Sungard AS Canada in its capacity as Foreign Representative to seek recognition of the Chapter 11 Cases in Canada and, among other things, (a) authorization to pay pre-filing workforce obligations; (b) authorization to pay certain pre-filing amounts related to the Debtors' continuing business and operations; (c) authorization to continue certain insurance policies and satisfy pre-filing obligations in respect thereof, as well as authorization to effect new insurance coverage as needed; (d) approving and authorizing the Debtors' cash management arrangements including performing intercompany transactions; and (e) approving the DIP Facilities (the "**DIP Motion**"). The relief sought to be recognized is substantially similar to relief that would be sought upon the commencement of proceedings in Canada under Part I of the CCAA.

56. As described above, the principles of comity, cooperation and accommodation with foreign courts guide the CCAA court in the exercise of its discretion in cross-border insolvency cases.⁴⁸ Canadian courts should recognize and enforce the judicial acts of other jurisdictions, provided those other jurisdictions operate consistent with principles of order, predictability and fairness.⁴⁹

57. Courts have held that "where a cross-border insolvency is most closely connected to one jurisdiction, it is appropriate for the court in that jurisdiction to exercise principal control over the

⁴⁸ CCAA s. 52(1).

⁴⁹ [*Hollander*](#), *supra*, note 33, at para 41.

insolvency process in light of the principles of comity and in order to avoid a multiplicity of proceedings.”⁵⁰

58. It is appropriate for this Court to grant an order recognizing and giving effect to the U.S. Orders for the following reasons:

- (a) the U.S. Bankruptcy Court has properly assumed jurisdiction over the Chapter 11 Cases – comity will be furthered by this Court’s recognition and support for same;
- (b) coordination of proceedings in Canada and the U.S. will ensure equal and fair treatment of all stakeholders regardless of their location;
- (c) given the close connection between Sungard AS Canada and the U.S., it is reasonable and sensible for the U.S. Bankruptcy Court to have principal control over Sungard AS Canada’s insolvency process; and
- (d) the U.S. Orders are being sought by the Debtors to minimize the adverse effects of the Chapter 11 Cases on their overall businesses and to preserve value for the benefit of claimants.

59. Recognition of the U.S. Orders is important to ensure the equitable treatment of Canadian stakeholders, that the proceedings are coordinated with the Chapter 11 Cases and that creditors are not prejudiced because of their location.

(ii) A&M should be appointed Information Officer

60. A&M has consented to act as Information Officer and has advised that it is not conflicted from acting in such capacity.⁵¹

⁵⁰ [*Magna Entertainment Corp. \(Re\)*](#), [2009] 51 CBR (5th) 82 (Ont Sup Ct J (Commercial List)) at para 9; see also, [Endorsement of Hailey J dated October 16, 2020](#) in *Mallinckrodt Canada ULC et al.*, Court File No. CV-20-00649441-00CL at paras 1 and 4-6.

⁵¹ Robinson Affidavit at para 68.

61. Although the CCAA does not require that an information officer be appointed, it has become common practice in proceedings under Part IV of the CCAA for the Court to appoint an information officer, pursuant to the Court's discretionary powers.⁵² The information officer's role is to help effect cooperation between the Canadian proceeding, the foreign representative and foreign court, including to keep the Court apprised of the status of the foreign proceedings.⁵³

62. The Proposed Foreign Representative seeks to appoint A&M as the Information Officer in this proceeding. The appointment of A&M as Information Officer will keep affected creditors, stakeholders and the Court updated on developments in the Chapter 11 Cases and will be a point of contact to respond to inquiries from interested parties in Canada.

63. A&M's proposed role as Information Officer is based on the terms of the Model Order dealing with the appointment of an information officer and is consistent with the terms of orders granted in other recent recognition proceedings under the CCAA in Ontario.⁵⁴

(iii) The Administration Charge should be granted

64. Sungard AS Canada is requesting that the Court grant to the proposed Information Officer, its legal counsel (Bennett Jones LLP) and Sungard AS Canada's legal counsel (Cassels Brock & Blackwell LLP), an administration charge with respect to their fees and disbursements in the maximum amount of CAD\$500,000 (the "**Administration Charge**") on Sungard AS Canada's property in Canada and have paid retainers of CAD\$75,000 each to the proposed Information Officer and its counsel.

⁵² CCAA, ss. 49 and 50.

⁵³ CCAA, s. 52(1).

⁵⁴ [Supplemental Order \(Foreign Main Proceeding\) dated March 12, 2021](#), granted by Cavanagh, J. in *Knotel, Inc. and Knotel Canada, Inc.*, Court File No. CV-21-00658434-00CL at paras 5 and on [*Knotel*].

65. Section 11.52 of the CCAA expressly provides that the Court has jurisdiction to grant an administration charge. This section is permissive and does not contain any specific criteria for a court to consider in granting such a charge.

66. In *Canwest Publishing*, the Court provided a non-exhaustive list of factors to be considered in approving an administration charge, including: (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.⁵⁵ An administration charge and the approval of retention of professionals is appropriate in Part IV proceedings because the work performed is supervised by this Court, not the foreign court.⁵⁶

67. The Proposed Foreign Representative submits that the amount of the charge is reasonable in the circumstances, having regard to the size and complexity of these proceedings and the roles that will be required of the Proposed Foreign Representative's legal counsel, the proposed Information Officer and its legal counsel. In addition, the only registered secured creditors of Sungard AS Canada are the collateral agents in respect of certain of the Debtors' Prepetition Secured Credit Agreements who have consented to these proceedings. The Administration Charge is consistent with the material agreements the Debtors have entered into in connection with the Chapter 11 Cases.⁵⁷

(iv) The DIP Agents' Charges should be granted

⁵⁵ [Canwest Publishing Inc.](#), 2010 ONSC 222 at para 54.

⁵⁶ [Supplemental Order \(Foreign Main Proceeding\) dated August 9, 2019](#), granted by Hainey J. in *Jack Cooper Ventures Inc. et al.*, Court File No. CV-19-625200-00CL at paras 17-18; [Knotel](#), *supra* note 55, at para 19.

⁵⁷ Robinson Affidavit at para 69.

68. The Debtors are seeking approval from the U.S. Bankruptcy Court approval for two DIP financing facilities—the Term Loan DIP Facility and the ABL DIP Facility. The relief in respect of the DIP Facilities is being sought in two stages. First, the Debtors are seeking an interim order (the “**Interim DIP Order**”) to approve certain emergency funding. Second, the Debtors will later seek a final order (the “**Final DIP Order**”) to approve additional funding and certain protections for the applicable lenders.

69. More specifically, the proposed Interim DIP Order if granted would authorize the Debtors to, among other things and subject to the terms of the Interim DIP Order, use cash collateral on hand to repay certain pre-filing obligations under the Revolving Credit Agreement⁵⁸ and to use the initial proceeds of the DIP Facility to (i) repay in full, in cash the Bridge Financing⁵⁹ (as defined in the Robinson Affidavit) and (ii) provide up to USD\$41.15 million in new money financial support. The proposed Interim DIP Order if granted would provide superpriority liens and claims to the DIP Facilities.

70. The proposed Final DIP Order if granted would authorize the Debtors to, among other things and subject to the terms thereof, (a) roll up the balance owing of the Revolving Credit Agreement, (b) obtain up to USD\$54.15 million in additional new money loans, (c) roll up certain obligations under the First lien Credit Agreement on the basis of two dollars of obligations under the Prepetition 1L Term Loan Credit Agreement being rolled up for each dollar of new money advanced under the Term Loan DIP Facility and (d) roll up certain obligations under the Prepetition New 2L Credit Agreement on similar terms to (c) above. Recognition of the Final DIP

⁵⁸ This type of provision, where a debtor pays off its pre-filing debt with funds obtained from prepetition collateral proceeds in exchange for a priority DIP claim, thereby effectively extending the super priority DIP charge to certain of the debtor’s pre-filing obligations, is commonly referred to as a creeping roll up.

⁵⁹ This type of provision, where a debtor pays off its pre-filing debt with funds advanced under the terms of a DIP facility, thereby effectively extending the super priority DIP charge to certain of the debtor’s pre-filing obligations, is commonly referred to as a regular or full roll up.

Order will be sought only when and if granted by the U.S. Bankruptcy Court and therefore is not at issue at this time.

71. The Debtors require the liquidity provided for under the DIP Facilities to preserve their ability to operate. The DIP Facilities will provide the Company the stability needed to provide comfort to customers and employees that the Company will be able to meet its commitments during the Chapter 11 Cases. Without the financing provided through the DIP Facilities, the Debtors would not be able to continue to operate in the ordinary course.⁶⁰

72. The Debtors have determined that the terms of the DIP Facilities are the only terms the Debtors could achieve on which the lenders under the DIP Facilities will extend the necessary postpetition financing.⁶¹

73. Sungard AS Canada is seeking recognition of the Interim DIP Order and two charges (collectively the **“DIP Agents’ Charges”**) with respect to interim financing over the property of Sungard AS Canada in Canada – one in respect of the ABL DIP Facility (the **“ABL DIP Agent’s Charge”**) and one in respect of the Term Loan DIP Facility (**“Term DIP Agent’s Charge”**).

74. This Court has, in numerous cases, granted approval of DIP facilities containing rollup provisions in the context of foreign recognition proceedings.⁶² In doing so, this Court has emphasized the importance of comity.⁶³ In *Xinergy*, Justice Newbould held that in recognizing a roll up approved in a foreign proceeding, the Court should consider “whether there would be any material adverse interest to any Canadian interests in recognizing the “roll up” features of the DIP facility.”⁶⁴ Considering the security granted in favour of the secured lenders and the limited assets

⁶⁰ Robinson Affidavit at para 78.

⁶¹ Robinson Affidavit at para 14.

⁶² [Endorsement of Conway J, dated June 29, 2020](#) in *GNC Holdings, Inc. et al*, Court File No. CV-20-00642970-00CL at paras 20-22 [*GNC Recognition*]; [Hartford Computer Hardware, Inc. \(Re\)](#), 2012 ONSC 964 at paras 10-14, 18-19 [*Hartford*].

⁶³ [Hollander](#), *supra* note 33, at paras 46-47; [Hartford](#), *supra* note 64 at paras 10-14 and 18-19; [GNC Recognition](#), *supra* note 64, at paras 20-22.

⁶⁴ [Xinergy Ltd. \(Re\)](#), 2015 ONSC 2692 at paras 21-22.

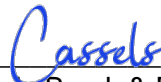
available in Canada in that case, Justice Newbould found that there was no material prejudice to Canadian creditors.

75. In these circumstances, the granting of the DIP Agents' Charges is consistent with the principles of comity and there would be no material prejudice to uniquely Canadian creditors given the existing security granted in favour of the secured lenders. The Proposed Foreign Representative is seeking that the Chapter 11 Cases be recognized as a foreign main proceeding, and the U.S. Bankruptcy Court is expected to grant the Interim DIP Order. Provided that happens, the DIP Agents' Charges is necessary for the protection of the Debtors' property and the interests of stakeholders.

PART V – RELIEF REQUESTED

76. The Proposed Foreign Representative requests that the Court grant the Interim Order, the Initial Recognition Order and the Supplemental Order, substantially in the forms attached to the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of April, 2022.



Cassels Brock & Blackwell LLP
Lawyers for the Proposed Foreign
Representative

Ryan Jacobs LSO #: 59510J
Tel: 416.860.6465
Email: rjacobs@cassels.com

Jane Dietrich LSO #: 49302U
Tel: 416.860.5223
Email: jdietrich@cassels.com

Natalie E. Levine LSO #: 64908K
Tel: 416.860.6568
Email: nlevine@cassels.com

**SCHEDULE A
LIST OF AUTHORITIES**

	Authority	Pinpoints
1.	Endorsement of Koehnen J dated June 24, 2020 in <i>GNC Holdings et al.</i> , Court File CV-20-00642970-00CL	3, 4
2.	Lightsquared LP (Re) , 2012 ONSC 2994	1-3, 25-26
3.	Interim Initial Order dated October 19, 2010 granted by Morawetz J. in <i>TerreStar Networks Inc.</i> , Court File No. CV-10-8944-00CL	
4.	Endorsement of Cavanagh, J. dated March 9, 2021 in <i>Knotel, Inc. and Knotel Canada, Inc.</i> , Court File No. CV-21-00658434-00CL	
5.	Purdue Pharma L.P. (Re) , 2019 ONSC 7042	22
6.	Grace Canada Inc. (Re) , [2005] 17 CBR (5th) 275 (Ont Sup Ct J (Commercial List))	12
7.	Endorsement of Hainey, J. dated February 24, 2021 , in <i>Re Mallinckrodt Canada ULC et al.</i> , Court File No. CV-20-00649441	10-15
8.	Pacific Exploration & Production Corp. (Re) , 2016 ONSC 5429	26
9.	JTI-Macdonald Corp. (Re) , 2019 ONSC 1625	14-17
10.	Hollander Sleep Products, LLC et al. (Re) , 2019 ONSC 3238	27, 41, 46-47
11.	Payless Holdings LLC, (Re) , 2017 ONSC 2242	22
12.	Zochem Inc. (Re) , 2016 ONSC 958	20, 22
13.	CHC Group Ltd. (Re) , 2016 BCSC 2623	9
14.	Massachusetts Elephant & Castle Group, Inc. (Re) , 2011 ONSC 4201	26-31
15.	Magna Entertainment Corp. (Re) , [2009] 51 CBR (5th) 82 (Ont Sup Ct J (Commercial List))	9
16.	Endorsement of Hainey J dated October 16, 2020 in <i>Mallinckrodt Canada ULC et al.</i> , Court File No. CV-20-00649441-00CL.	1, 4-6
17.	Supplemental Order (Foreign Main Proceeding) dated March 12, 2021 , granted by Cavanagh, J. in <i>Knotel, Inc. and Knotel Canada, Inc.</i> , Court File No. CV-21-00658434-00CL	5 and on, 19
18.	Canwest Publishing Inc. , 2010 ONSC 222	54

	Authority	Pinpoints
19.	Supplemental Order (Foreign Main Proceeding) dated August 9, 2019 , granted by Hailey J. in <i>Jack Cooper Ventures Inc. et al.</i> , Court File No. CV-19-625200-00CL	17-18
20.	Endorsement of Conway J, dated June 29, 2020 , in <i>GNC Holdings, Inc. et al</i> , Court File No. CV-20-00642970-00CL	20-22
21.	Hartford Computer Hardware, Inc. (Re) , 2012 ONSC 964	10-14, 18-19
22.	Xinergy Ltd. (Re) , 2015 ONSC 2692	21-22

SCHEDULE B
TEXT OF STATUTES, REGULATIONS & BY-LAWS

Companies' Creditors Arrangement Act, RSC 1985, c. C-36, as amended

PART II – JURISDICTION OF COURTS

Stays, etc. — Initial Application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the 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 company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Court May Order Security or Charge to Cover Certain Costs

11.52 (1) 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.

PART IV – CROSS-BORDER INSOLVENCIES

PURPOSE

Purpose

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.

INTERPRETATION

Definitions

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

[...]

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

[...]

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)

Centre of Debtor Company's Main Interests

(2) 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.

RECOGNITION OF FOREIGN PROCEEDING

Application for Recognition of a Foreign Proceeding

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

Documents that must Accompany Application

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

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

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

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

Documents May Be Considered as Proof

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

Order Recognizing Foreign Proceeding

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

Nature of Foreign Proceeding to Be Specified

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

Order Relating to Recognition of a Foreign Main Proceeding

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

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and

(d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

Other Orders

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

(a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

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

(c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

Restriction

(2) 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.

Application of this and Other Acts

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

Terms and Conditions of Orders

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

OBLIGATIONS

Cooperation — Court

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.

Cooperation — Other Authorities in Canada

(2) 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.

Forms of Cooperation

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

- (a) the appointment of a person to act at the direction of the court;
- (b) the communication of information by any means considered appropriate by the court;
- (c) the coordination of the administration and supervision of the debtor 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.

Obligations of foreign representative

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

- (a) without delay, inform the court of
 - (i) any substantial change in the status of the recognized foreign proceeding,

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

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

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

Courts of Justice Act, RSO 1990, c. C.43

INTERLOCUTORY ORDERS

Stay of proceedings

106 A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF SUNGARD AVAILABILITY SERVICES (CANADA) LTD./ SUNGARD, SERVICES DE CONTINUITE DES AFFAIRES (CANADA) LTEE
APPLICATION OF SUNGARD AVAILABILITY SERVICES (CANADA) LTD./ SUNGARD, SERVICES DE CONTINUITE DES AFFAIRES (CANADA) LTEE
UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE APPLICANT
(Application for Recognition of Foreign Main
Proceeding
initially returnable April 11, 2022)**

CASSELS BROCK & BLACKWELL LLP

Scotia Plaza, Suite 2100
40 King Street West
Toronto, Ontario M5H 3C2

Ryan Jacobs

Tel: 416.860.6465
rjacobs@cassels.com

Jane Dietrich

Tel: 416.860.5223
jdietrich@cassels.com

Natalie E. Levine

Tel: 416.860.6568
nlevine@cassels.com

Lawyers for the Proposed Foreign Representative