Court File No.:

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 PAYLESS HOLDINGS LLC, PAYLESS SHOESOURCE CANADA INC., PAYLESS SHOESOURCE CANADA GP INC. AND THOSE OTHER ENTITIES 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

BOOK OF AUTHORITIES OF THE APPLICANT

April 6, 2017

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2008 ONCA 587
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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 AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO (Applicants / Respondents in Appeal) and METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO (Respondents / Respondents in Appeal) and AIR TRANSAT A.T. INC., TRANSAT TOURS CANADA INC., THE JEAN COUTU GROUP (PJC) INC., AÉROPORTS DE MONTRÉAL INC., AÉROPORTS DE MONTRÉAL CAPITAL INC., POMERLEAU ONTARIO INC., POMERLEAU INC., LABOPHARM INC., DOMTAR INC., DOMTAR PULP AND PAPER PRODUCTS INC., GIRO INC., VÊTEMENTS DE SPORTS R.G.R. INC., 131519 CANADA INC., AIR JAZZ LP, PETRIFOND FOUNDATION COMPANY LIMITED, PETRIFOND FOUNDATION MIDWEST LIMITED, SERVICES HYPOTHÉCAIRES LA PATRIMONIALE INC., TECSYS INC. SOCIÉTÉ GÉNÉRALE DE FINANCEMENT DU QUÉBEC, VIBROSYSTM INC., INTERQUISA CANADA L.P., REDCORP VENTURES LTD., JURA ENERGY CORPORATION, IVANHOE MINES LTD., WEBTECH WIRELESS INC., WYNN CAPITAL CORPORATION INC., HY BLOOM INC., CARDACIAN MORTGAGE SERVICES, INC., WEST ENERGY LTD., SABRE ENERTY LTD., PETROLIFERA PETROLEUM LTD., VAQUERO RESOURCES LTD. and STANDARD ENERGY INC. (Respondents / Appellants)

J.I. Laskin, E.A. Cronk, R.A. Blair JJ.A.

Heard: June 25-26, 2008
Judgment: August 18, 2008 *
Docket: CA C48969

Proceedings: affirming *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List])

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Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.ii Availability
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Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Releases — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — CCAA permits inclusion of third party releases in plan of compromise or arrangement to be sanctioned by court where those releases were reasonably connected to proposed restructuring — It is implicit in language of CCAA that court has authority to sanction plans incorporating third-party releases that are reasonably related to proposed restructuring — CCAA is supporting framework for resolution of corporate insolvencies in public interest — Parties are entitled to put anything in Plan that could lawfully be incorporated into any contract — Plan of compromise or arrangement may propose that creditors agree to compromise claims against debtor and to release third parties, just as any debtor and creditor might agree to such terms in contract between them — Once statutory mechanism regarding voter approval and court sanctioning has been complied with, plan becomes binding on all creditors.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Miscellaneous cases

Leave to appeal — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — Criteria for granting leave to appeal in CCAA proceedings was met — Proposed appeal raised issues of considerable importance to restructuring proceedings under CCAA Canada-wide — These were serious and arguable grounds of appeal and appeal would not unduly delay progress of proceedings.

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s. 6 — considered

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s. 92 — referred to

s. 92 ¶ 13 — referred to

Words and phrases considered:

arrangement

"Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor.

APPEAL by opponents of creditor-initiated plan from judgment reported at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 (Ont. S.C.J. [Commercial List]), granting application for approval of plan.

***R.A. Blair J.A.*:**

A. Introduction

1 In August 2007 a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

2 By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

3 Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to Appeal

4 Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument we encouraged counsel to combine their submissions on both matters.

5 The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and — given the expedited time-table — the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Cineplex Odeon Corp., Re* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.), and *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30 (Ont. C.A. [In Chambers]), are met. I would grant leave to appeal.

Appeal

6 For the reasons that follow, however, I would dismiss the appeal.

B. Facts

The Parties

7 The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer, and several holding companies and energy companies.

8 Each of the appellants has large sums invested in ABCP — in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants — slightly over $1 billion — represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

9 The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies, and some smaller holders of ABCP product. They participated in the market in a number of different ways.

The ABCP Market

10 Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment — usually 30 to 90 days — typically with a low interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

11 ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

12 The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

13 As I understand it, prior to August 2007 when it was frozen, the ABCP market worked as follows.

14 Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

15 The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

16 When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The Liquidity Crisis

17 The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

18 When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

19 The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes — partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

20 The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze — the result of a standstill arrangement

orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement — known as the Montréal Protocol — the parties committed to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

21 The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation, and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

22 Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

23 Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

The Plan

a) Plan Overview

24 Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution." The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper — which has been frozen and therefore effectively worthless for many months — into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

25 The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

26 Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

27 The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1-million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders, and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

b) The Releases

28 This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in Article 10.

29 The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants — in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" — from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

30 The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

31 The releases, in effect, are part of a *quid pro quo*. Generally speaking, they are designed to compensate various participants in the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

> a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;
>
> b) Sponsors — who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information — give up their existing contracts;
>
> c) The Canadian banks provide below-cost financing for the margin funding facility and,
>
> d) Other parties make other contributions under the Plan.

32 According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."

The CCAA Proceedings to Date

33 On March 17, 2008 the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25 th . The vote was overwhelmingly in support of the Plan — 96% of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the Monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan — 99% of those connected with the development of the Plan voted positively, as did 80% of those Noteholders who had not been involved in its formulation.

34 The vote thus provided the Plan with the "double majority" approval — a majority of creditors representing two-thirds in value of the claims — required under s. 6 of the CCAA.

35 Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to

sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

36 The result of this renegotiation was a "fraud carve-out" — an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

37 A second sanction hearing — this time involving the amended Plan (with the fraud carve-out) — was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

38 The appellants attack both of these determinations.

C. Law and Analysis

39 There are two principal questions for determination on this appeal:

> 1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?
>
> 2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

(1) Legal Authority for the Releases

40 The standard of review on this first issue — whether, as a matter of law, a CCAA plan may contain third-party releases — is correctness.

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

> a) on a proper interpretation, the CCAA does not permit such releases;
>
> b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
>
> c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;
>
> d) the releases are invalid under Quebec rules of public order; and because
>
> e) the prevailing jurisprudence supports these conclusions.

42 I would not give effect to any of these submissions.

Interpretation, "Gap Filling" and Inherent Jurisdiction

43 On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on *all* creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]). As Farley J. noted in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), at 111, "[t]he history of CCAA law has been an evolution of judicial interpretation."

45 Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"[2] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools — statutory interpretation, gap-filling, discretion and inherent jurisdiction — it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

47 The Supreme Court of Canada has affirmed generally — and in the insolvency context particularly — that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "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": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26.

48 More broadly, I believe that the proper approach to the judicial interpretation and application of statutes — particularly those like the CCAA that are skeletal in nature — is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation

> statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

49 I adopt these principles.

50 The remedial purpose of the CCAA — as its title affirms — is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 318, Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

> Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

51 The CCAA was enacted in 1933 and was necessary — as the then Secretary of State noted in introducing the Bill on First Reading — "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), *per* Doherty J.A. in dissent; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]).

52 In this respect, I agree with the following statement of Doherty J.A. in *Elan*, *supra*, at pp. 306-307:

> . . . [T]he Act was designed to serve a "broad constituency of investors, creditors and employees". [3] Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest*. [Emphasis added.]

Application of the Principles of Interpretation

53 An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

54 The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

55 This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP *Dealers*, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as *Asset Providers* and *Liquidity Providers*, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore — as the application judge found — in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and ... providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark at para. 50 that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

56 The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

57 I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The Statutory Wording

58 Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

> a) the skeletal nature of the CCAA;
>
> b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
>
> c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

59 Sections 4 and 6 of the CCAA state:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or Arrangement

60 While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N§10. It has been said to be "a very wide and indefinite [word]": *Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces*, [1935] A.C. 184 (Canada P.C.) at 197, affirming S.C.C. [1933] S.C.R. 616 (S.C.C.). See also, *Guardian Assurance Co., Re*, [1917] 1 Ch. 431 (Eng. C.A.) at 448, 450; *T&N Ltd., Re* (2006), [2007] 1 All E.R. 851 (Eng. Ch. Div.).

61 The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230 (S.C.C.) at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (Ont. C.A.) at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at 518.

63 There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan — including the provision for releases — becomes binding on all creditors (including the dissenting minority).

64 *T&N Ltd., Re*, *supra*, is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA — including the concepts of compromise or arrangement. [4]

65 T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence — cited earlier in these reasons — to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example. [5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party*. [Emphasis added.]

67 I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind *all* creditors by class to the terms of the plan, but to do so only where the proposal can gain

the support of the requisite "double majority" of votes[6] *and* obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

69 In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70 The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

71 In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;
>
> c) The Plan cannot succeed without the releases;
>
> d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72 Here, then — as was the case in *T&N* — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

73 I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The Jurisprudence

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201 (Alta. Q.B.), leave to appeal refused by (2000), 266 A.R. 131 (Alta. C.A. [In Chambers]), and (2001), 293 A.R. 351 (note) (S.C.C.). In *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Canadian Airlines Corp., Re*, however, the releases in those restructurings — including *Muscletech Research & Development Inc., Re* — were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

76 In *Canadian Airlines Corp., Re* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*,[7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument — dealt with later in these reasons — that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Steinberg Inc. c. Michaud*, *supra*; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C. S.C.); and *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg Inc.*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg Inc.* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines Ltd.*, Tysoe J. made the following comment at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

81 This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

82 The facts in *Pacific Coastal Airlines Ltd.* are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian — at a contractual level — may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

83 Nor is the decision of this Court in the *NBD Bank, Canada* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process — in short, he was personally protected by the CCAA release.

84 Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
>
> 54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

85 Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third party releases was not under consideration at all. What the Court was determining in *NBD Bank, Canada* was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in *NBD Bank, Canada* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank, Canada* the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release — as is the situation here. Thus, *NBD Bank, Canada* is of little assistance in determining whether the court has authority to sanction a plan that calls for third party releases.

86 The appellants also rely upon the decision of this Court in *Stelco I*. There, the Court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]

See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) at para. 7.

87 This Court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the Court were quite different from those raised on this appeal.

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Stelco Inc., Re* (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) ("*Stelco II*"). The Court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

> In [*Stelco I*] — the classification case — the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company ... [*H*]*owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process*. [Emphasis added.]

89 The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third party releases here are very closely connected to the ABCP restructuring process.

90 Some of the appellants — particularly those represented by Mr. Woods — rely heavily upon the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*, *supra*. They say that it is determinative of the release issue. In *Steinberg*, the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 — English translation):

> [42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> . . . . .
>
> [54] The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> . . . . .
>
> [58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

91 Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' *and Their Officers and Employees* Creditors Arrangement Act — an awful mess — and likely not attain its purpose, which is to enable the company to survive in the face of *its* creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

92 Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature — they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company — rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para. 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms *encompass all that should enable the person who has recourse to it to fully dispose of his debts*, both those that exist on the date when he has recourse to the statute and *those contingent on the insolvency in which he finds himself* ... [Emphasis added.]

93 The decision of the Court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself," however. On occasion such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg Inc.*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act — an approach inconsistent with the jurisprudence referred to above.

94 Finally, the majority in *Steinberg Inc.* seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this Court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases — as I have concluded it does — the provisions of the CCAA, as valid federal insolvency

legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

95 Accordingly, to the extent *Steinberg Inc.* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in *Steinberg Inc.* considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 Amendments

96 *Steinberg Inc.* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> **Exception**
>
> (2) A provision for the compromise of claims against directors may not include claims that
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> **Powers of court**
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
>
> **Resignation or removal of directors**
>
> (4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.
>
> 1997, c. 12, s. 122.

97 Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

98 The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted: [8]

> Far from being a rule, [the maxim *expressio unius*] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of

> the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg Inc.*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden & Morawetz, vol.1, *supra*, at 2-144, E§11A; *Royal Penfield Inc., Re*, [2003] R.J.Q. 2157 (C.S. Que.) at paras. 44-46.

100 Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The Deprivation of Proprietary Rights

101 Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights — including the right to bring an action — in the absence of a clear indication of legislative intention to that effect: *Halsbury's Laws of England*, 4th ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., *supra*, at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The Division of Powers and Paramountcy

102 Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act, 1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec*.

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.). As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Quebec (Attorney General) v. Bélanger (Trustee of)*, [1928] A.C. 187 (Canada P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature;

but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

104 That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action — normally a matter of provincial concern — or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion With Respect to Legal Authority

105 For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "Fair and Reasonable"

106 The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

107 Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Ravelston Corp., Re* (2007), 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]).

108 I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties — including leading Canadian financial institutions — that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

109 The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

110 The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

111 The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd* (1998), 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil

proceedings — the claims here all being untested allegations of fraud — and to include releases of such claims as part of that settlement.

112 The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

113 At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;
>
> d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
>
> f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
>
> g) The releases are fair and reasonable and not overly broad or offensive to public policy.

114 These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they — as individual creditors — make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

116 All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

117 In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they

are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

118 Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of *all* Noteholders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

119 The application judge noted at para. 126 that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

120 In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. Disposition

121 For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

***J.I. Laskin J.A.*:**

I agree.

***E.A. Cronk J.A.*:**

I agree.

Schedule A — Conduits

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

Schedule B — Applicants

ATB Financial

Caisse de dépôt et placement du Québec

Canaccord Capital Corporation

Canada Mortgage and Housing Corporation

Canada Post Corporation

Credit Union Central Alberta Limited

Credit Union Central of BC

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank of Canada/National Bank Financial Inc.

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

Schedule A — Counsel

1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee

2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.

3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG

4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.

5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals)

6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor

7) Mario J. Forte for Caisse de Dépôt et Placement du Québec

8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada

9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)

10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.

11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank

12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

13) Usman Sheikh for Coventree Capital Inc.

14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.

15) Neil C. Saxe for Dominion Bond Rating Service

16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP

17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.

18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Application granted; appeal dismissed.

Footnotes

* Leave to appeal refused at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.).

1 Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

2 Justice Georgina R. Jackson and Dr. Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Vancouver: Thomson Carswell, 2007).

3 Citing Gibbs J.A. in *Chef Ready Foods*, *supra*, at pp.319-320.

4 The Legislative Debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the *Companies Act 1985* (U.K.): see *House of Commons Debates (Hansard)*, *supra*.

5 See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 192; *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s. 182.

6 A majority in number representing two-thirds in value of the creditors (s. 6)

7 *Steinberg Inc.* was originally reported in French: *Steinberg Inc. c. Michaud*, [1993] R.J.Q. 1684 (C.A. Que.). All paragraph references to *Steinberg Inc.* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055 (C.A. Que.)

8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp.234-235, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

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Tab 2

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
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
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]).

8 The petitioners submit that the centre of main interest is British Columbia for a number of reasons. These are set out in their written submissions and in the affidavit of Mr. Bailey, the chief financial officer, sworn today.

9 At para. 66 of their written submissions, the petitioners state:

The Petitioners are part of a highly integrated international enterprise that is directed from Angiotech's head office in Vancouver, British Columbia. British Columbia is therefore the Petitioners' COMI [centre of main interest].

10 Mr. Bailey's affidavit deposes to the following at para. 234:

As noted previously, the Petitioners are part of an integrated business enterprise with primary operations in Canada and the United States. The Petitioners' COMI is British Columbia notwithstanding their substantial operations in the United States:

(a) all of the Petitioners have assets in Canada and each of the companies comprising Angiotech U.S. has a bank account at the Royal Bank of Canada in Vancouver containing $1,000 on deposit;

(b) the operations of the Petitioners are directed from Angiotech's head office in Canada;

(c) all of the Petitioners report to Angiotech;

(d) corporate governance for the Petitioners is directed from Canada;

(e) strategic and key operating decisions and key policy decisions for the Petitioners are made by Angiotech staff located in Vancouver;

(f) the Petitioners' tax, treasury and cash management functions are managed from Vancouver and local plant finance staff report to senior finance management in Vancouver;

(g) the Petitioners' human resources functions are administered from Vancouver and all local human resources staff report into Vancouver;

(h) primary research and development functions including new product conceptions and development, regulatory and clinical development, medical affairs and quality control are directed from and carried out in Vancouver;

(i) the Petitioners' information technology and systems are directed from Vancouver;

(j) plant management and senior staff of the Petitioners regularly attend meetings in Vancouver;

(k) all public company reporting and investor relations are directed from Vancouver; and

(l) Angiotech's chief executive officer (the "CEO") is based in Vancouver and in addition to the Senior Management referred above, all sales, manufacturing, operations and legal staff report to the CEO.

11 I have had an opportunity to read through the evidence contained in Mr. Bailey's affidavit filed in support of the application. I am satisfied on the evidence before me that the centre of main interest is British Columbia. I accept the petitioners' submissions.

12 Now I wish to address the point raised by Mr. Grieve concerning the monitor.

13 The monitor is an officer of the Court. The monitor owes its duties to the Court and does not represent the interests of the petitioners, any creditor, or any other interested party. I wish the monitor to be appointed as representative of any foreign main proceedings, instead of the petitioners (or anyone acting on their behalf) or any other party, in order to ensure that the U.S. creditors are as fairly treated as any of the other creditors in this case. I wish my request in that regard be put before the U.S. District Court in Delaware when the application concerning the foreign main proceeding is heard.

Application granted.

End of Document

Tab 3

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
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
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

Hunt v. T & N plc (1993), [1994] 1 W.W.R. 129, 21 C.P.C. (3d) 269, *(sub nom. Hunt v. Lac d'Amiante du Québec Ltée)* 37 B.C.A.C. 161, *(sub nom. Hunt v. Lac d'Amiante du Québec Ltée)* 60 W.A.C. 161, *(sub nom. Hunt v. T&N plc)* [1993] 4 S.C.R. 289, *(sub nom. Hunt v. T&N plc)* 109 D.L.R. (4th) 16, 85 B.C.L.R. (2d) 1, *(sub nom. Hunt v. Lac d'Amiante du Québec Ltée)* 161 N.R. 81 (S.C.C.) — referred to

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

Loewen Group Inc. v. Continental Insurance Co. of Canada (1997), 48 C.C.L.I. (2d) 119, 44 B.C.L.R. (3d) 387 (B.C. S.C.) — considered

Microbiz Corp. v. Classic Software Systems Inc. (1996), 45 C.B.R. (3d) 40 (Ont. Gen. Div.) — referred to

Morguard Investments Ltd. v. De Savoye (1990), 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, [1990] 3 S.C.R. 1077 (S.C.C.) — applied

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 20 C.B.R. (3d) 165 (Ont. Gen. Div.) — considered

Pacific National Lease Holding Corp. v. Sun Life Trust Co., 34 C.B.R. (3d) 4, 10 B.C.L.R. (3d) 62, [1995] 10 W.W.R. 714, *(sub nom. Pacific National Lease Holding Corp., Re)* 62 B.C.A.C. 151, *(sub nom. Pacific National Lease Holding Corp., Re)* 103 W.A.C. 151 (B.C. C.A.) — referred to

Roberts v. Picture Butte Municipal Hospital (1998), 64 Alta. L.R. (3d) 218, 23 C.P.C. (4th) 300, 227 A.R. 308, [1999] 4 W.W.R. 443 (Alta. Q.B.) — considered

Taylor v. Dow Corning Australia Pty. Ltd. (December 19, 1997), Doc. 8438/95 (Australia Vic. Sup. Ct.) — referred to

Tradewell Inc. v. American Sensors & Electronics Inc. (U.S. S.D. N.Y. 1997)

Westar Mining Ltd., Re, 70 B.C.L.R. (2d) 6, 14 C.B.R. (3d) 88, [1992] 6 W.W.R. 331 (B.C. S.C.) — referred to

Statutes considered:

Bankruptcy Amendment Code, (U.S.), 1994
Generally — considered

Bankruptcy Code, 11 U.S.C. 1982
Chapter 11 — considered

s. 524(g) — considered

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Pt XIII [en. 1997, c. 12, s. 118] — referred to

s. 267 "debtor" [en. 1997, c. 12, s. 118] — considered

ss. 267-275 [en. 1997, c. 12, s. 118] — referred to

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12
Generally — referred to

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
s. 2 "debtor company" — considered

s. 3 — considered

s. 4 — considered

s. 5 — considered

s. 17 — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — considered

s. 18.6(1) "foreign proceeding" [en. 1997, c. 12, s. 125] — considered

s. 18.6(2) [en. 1997, c. 12, s. 125] — considered

s. 18.6(3) [en. 1997, c. 12, s. 125] — considered

s. 18.6(4) [en. 1997, c. 12, s. 125] — considered

s. 18.6(8) [en. 1997, c. 12, s. 125] — considered

APPLICATION by solvent corporation for interim order under s. 18.6 of *Companies' Creditors Arrangement Act.*

***Farley J.*:**

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

(a) that the proceedings commenced by BW Canada's parent U.S. corporation and certain other U.S. related corporations (collectively "BWUS") for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with mass asbestos claims before the U.S. Bankruptcy Court be recognized as a "foreign proceeding" for the purposes of s. 18.6;

(b) that BW Canada be declared a company which is entitled to avail itself of the provisions of s. 18.6;

(c) that there be a stay against suits and enforcements until May 1, 2000 (or such later date as the Court may order) as to asbestos related proceedings against BW Canada, its property and its directors;

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

(e) and for other ancillary relief.

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

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

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

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

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

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

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

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

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

> Allow me to start off by stating that I agree with the analysis of MacPherson J. in *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.) when in discussing *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, 52 B.C.L.R. (2d) 160, 122 N.R. 81, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, he states at p.411:
>
> > The leading case dealing with the enforcement of "foreign" judgments is the decision of the Supreme Court of Canada in *Morguard Investments, supra*. The question in that case was whether, and the circumstances in which, the judgment of an Alberta court could be enforced in British Columbia. A unanimous court, speaking through La Forest J., held in favour of enforceability and, in so doing, discussed in some detail the doctrinal principles governing inter-jurisdictional enforcement of orders. I think it fair to say that the overarching theme of La Forest J.'s reasons is the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure. He expressed this theme in these words, at p. 1095:
> >
> > > Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem*, such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. *This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given has power over the litigants, the judgments of its courts should be respected.* (emphasis added in original)
> >
> > *Morguard Investments* was, as stated earlier, a case dealing with the enforcement of a court order across provincial boundaries. However, the historical analysis in La Forest J.'s judgment, of both the United Kingdom and Canadian jurisprudence, and the doctrinal principles enunciated by the court are equally applicable, in my view, in a situation where the judgment has been rendered by a court in a foreign jurisdiction. This should not be an absolute rule - there will be some foreign court orders that should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process. (my emphasis added)

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

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

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

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

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

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

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

9 In the context of cross-border insolvencies, Canadian and U.S. Courts have made efforts to complement, coordinate and where appropriate accommodate the proceedings of the other. Examples of this would include *Olympia & York Developments Ltd.*, *Ever fresh Beverages Inc.* and *Loewen Group Inc. v. Continental Insurance Co. of Canada* (1997), 48 C.C.L.I. (2d) 119 (B.C. S.C.). Other examples involve the situation where a multi-jurisdictional proceeding is specifically connected to one jurisdiction with that jurisdiction's court being allowed to exercise principal control over the insolvency process: see *Roberts v. Picture Butte Municipal Hospital* (1998), 23 C.P.C. (4th) 300 (Alta. Q.B.), at pp. 5-7 [[1998] A.J. No. 817]; *Microbiz Corp. v. Classic Software Systems Inc.* (1996), 45 C.B.R. (3d) 40 (Ont. Gen. Div.), at p. 4; *Tradewell Inc. v. American Sensors Electronics, Inc.*, 1997 WL 423075 (S.D.N.Y. 1997).

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

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

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

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

> Provisions in Bill C-5 attempt to actually codify, which has always been the practice in Canada. They include the Court recognition of foreign representatives; Court authority to make orders to facilitate and coordinate international insolvencies; provisions that would make it clear that foreign representatives are allowed to commence proceedings in Canada, as per Canadian rules - however, they clarify that foreign stays of proceedings are not applicable but a foreign representative can apply to a court for a stay in Canada; and Canadian creditors and assets are protected by the bankruptcy and insolvency rules.

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

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

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

13 Thus it seems to me that this application by BW Canada should be reviewed in light of (i) the doctrine of comity as analyzed in *Morguard, Arrowmaster* and *ATL, supra*, in regard to its international aspects; (ii) inherent jurisdiction; (iii) the aspect of the liberal interpretation of the CCAA generally; and (iv) the assistance and codification of the 1997 Amendments.

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

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

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

> s. 267 In this Part,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) The enterprise is to be permitted to implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis of the enterprise and to the extent reasonably practicable, one jurisdiction should take charge of the principal administration of the enterprise's

reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of the stakeholders and does not inappropriately detract from the net benefits which may be available from alternative approaches.

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

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

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

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

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

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

(f) Where one jurisdiction has an ancillary role,

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

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

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

22 Taking these factors into consideration, and with the determination that the Chapter 11 proceedings are a "foreign proceeding" within the meaning of s. 18.6 of the CCAA and that it is appropriate to declare that BW Canada is entitled to avail itself of the provisions of s. 18.6, I would also grant the following relief. There is to be a stay against suits and enforcement as requested; the initial time period would appear reasonable in the circumstances to allow BWUS to return to the U.S. Bankruptcy Court. Assuming the injunctive relief is continued there, this will provide some additional time to more fully prepare an initial draft approach with respect to ongoing matters. It should also be recognized that if such future relief is not granted in the U.S. Bankruptcy Court, any interested person could avail themselves of the "comeback" clause in the draft order presented to me and which I find reasonable in the circumstances. It appears appropriate, in the circumstances that BW Canada guarantee BWUS' obligations as aforesaid and to grant security in respect thereof, recognizing that same is permitted pursuant to the general corporate legislation affecting BW Canada, namely the *Business Corporations Act* (Ontario). I note that there is also a provision for an "Information Officer" who will give quarterly reports to this Court. Notices are to be published in the Globe & Mail (National Edition) and the National Post. In accordance with my suggestion at the hearing, the draft order notice has been revised to note that persons are alerted to the fact that they may become a participant in these Canadian proceedings and further that, if so, they may make representations as to pursuing their remedies regarding asbestos related claims in Canada as opposed to the U.S. As discussed above the draft order also includes an appropriate "comeback" clause. This Court (and I specifically) look forward to working in a cooperative judicial way with the U.S. Bankruptcy Court (and Judge Brown specifically).

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

24 Order to issue accordingly.

Application granted.

APPENDIX

Court File No. 00-CL-3667

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR. JUSTICE FARLEY	FRIDAY, THE 25{TH} DAY OF FEBRUARY, 2000

IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

INITIAL ORDER

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

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

SERVICE

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

RECOGNITION OF THE U.S. PROCEEDINGS

2. *THIS COURT ORDERS AND DECLARES* that the proceedings commenced by the Applicant's United States corporate parent and certain other related corporations in the United States for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with asbestos claims before the U.S. Bankruptcy Court (the "U.S. Proceedings") be and hereby is recognized as a "foreign proceeding" for purposes of Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended, (the "CCAA").

APPLICATION

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

PROTECTION FROM ASBESTOS PROCEEDINGS

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

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

DIP FINANCING

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

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

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

> (a) the execution, delivery, perfection or registration of the DIP Lender's Security shall not create or be deemed to constitute a breach by the Applicant of any agreement to which it is a party, and
>
> (b) the DIP Lender shall have no liability to any person whatsoever as a result of any breach of any agreement caused by or resulting from the Applicant entering into the Credit Agreement, the DIP Lender's Security or other document delivered pursuant thereto.

REPORT AND EXTENSION OF STAY

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

> (a) the Applicant shall appoint Victor J. Manica, or such other senior officer as it deems appropriate from time to time, as an information officer (the "Information Officer");
>
> (b) the Information Officer shall deliver to the Court a report at least once every three months outlining the status of the U.S. Proceeding, the development of any process for dealing with asbestos claims and such other information as the Information Officer believes to be material (the "Information Reports"); and
>
> (c) the Applicant and the Information Officer shall incur no liability or obligation as a result of the appointment of the Information Officer or the fulfilment of the duties of the Information Officer in carrying out the

provisions of this Order and no action or other proceedings shall be commenced against the Applicant or Information Officer as an result of or relating in any way to the appointment of the Information Officer or the fulfilment of the duties of the Information Officer, except with prior leave of this Court and upon further order securing the solicitor and his own client costs of the Information Officer and the Applicant in connection with any such action or proceeding.

SERVICE AND NOTICE

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

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

MISCELLANEOUS

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

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

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

15. *THIS COURT ORDERS AND REQUESTS* the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada (including the assistance of any court in Canada pursuant to Section 17 of the CCAA) and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province and any court or any judicial, regulatory or administrative body of the United States and the states or other subdivisions of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

Schedule "A"

NOTICE

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

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

PLEASE TAKE NOTICE that this notice is being published pursuant to an Order of the Superior Court of Justice of Ontario made February 25, 2000. The corporate parent of Babcock & Wilcox Canada Ltd. and certain other affiliated corporations in the United States have filed for protection in the United States under Chapter 11 of the Bankruptcy Code to seek, as the result of recent, sharp increases in the cost of settling asbestos claims which have seriously threatened the Babcock & Wilcox Enterprise's long term health, protection from mass asbestos claims to which they are or may become subject. Babcock & Wilcox Canada Ltd. itself has not filed under Chapter 11 but has sought and obtained an interim

order under Section 18.6 of the CCAA affording it a stay against asbestos claims in Canada. Further application may be made to the Court by Babcock & Wilcox Canada Ltd. to ensure fair and equal access for Canadians with asbestos claims against Babcock & Wilcox Canada Ltd. to the process established in the United States. Representations may also be made by parties who would prefer to pursue their remedies in Canada.

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

DATED this day of, 2000 at Toronto, Canada

Tab 4

COURT FILE NO.: CV-09-8241-OOCL
DATE: 20091013

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

BEFORE: PEPALL J.

COUNSEL: *Lyndon Barnes, Edward Sellers and Jeremy Dacks* for the Applicants
Alan Merskey for the Special Committee of the Board of Directors
David Byers and Maria Konyukhova for the Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett and Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for the Asper Family
Peter H. Griffin and Peter J. Osborne for the Management Directors and Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia,
Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

Relief Requested

[1] Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.*[1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by

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

the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

[2] The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

[3] No one appearing opposed the relief requested.

Backround Facts

[4] Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

[5] As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

[6] Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

[7] Canwest Global is a public company continued under the *Canada Business Corporations Act*[2]. It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

[8] The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

[9] Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

[10] In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six

[2] R.S.C. 1985, c.C.44.

occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

[11] Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

[12] The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

[13] On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

[14] On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

[15] Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

[16] The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to

fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

[17] In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

[18] Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

[19] The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual “pre-packaged” recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a

support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

[20] CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

[21] The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

[22] The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

[23] I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having

reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

[24] This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshhold Issues

[25] Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in *Re Stelco*[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

[3] R.S.C. 1985, c. B-3, as amended.
[4] (2004), 48 C.B.R. (4th) 299; leave to appeal refused 2004 CarswellOnt 2936 (C.A.).

[26] Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

[27] Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

[28] The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

[29] While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Re Lehndorff General Partners Ltd.*[5]; *Re Smurfit-Stone Container Canada Inc.*[6]; and *Re Calpine Canada Energy Ltd.*[7]. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

[5] (1993), 9 B.L.R. (2d) 275.
[6] [2009] O.J. No. 349.
[7] (2006), 19 C.B.R. (5th) 187.

[30] Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Re Cadillac Fairview*[8] and *Re Global Light Telecommunications Ltd.*[9]

(c) DIP Financing

[31] Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, 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.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[8] (1995), 30 C.B.R. (3d) 29.
[9] (2004), 33 B.C.L.R. (4th) 155.

> (3) 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.
>
> (4) 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.

[32] In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

[33] Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to

$100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

[34] Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

[35] Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge

is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

[36] For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

[37] While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

> (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.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[38] I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

[39] As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

[40] Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

[41] The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that

> the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[42] Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

[43] In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the

Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

[44] The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

[45] Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

[46] I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

[47] The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

[48] The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *Re General Publishing Co.*[10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor

believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

[49] Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

[50] Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Re Grant Forest*[11] have all been met and I am persuaded that the relief in this regard should be granted.

[51] The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing

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[10] (2003), 39 C.B.R. (4th) 216.

orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*[12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

[52] In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

[53] The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

[11] [2009] O.J. No. 3344. That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.
[12] [2002] 2 S.C.R. 522.

[54] CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

[55] The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

[56] Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

[57] Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

[58] This is a “pre-packaged” restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

[59] I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor’s report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

[60] Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

_____

Pepall J.

Released: October 13, 2009

Tab 5

Most Negative Treatment: Not followed
Most Recent Not followed: Philip's Manufacturing Ltd., Re | 1992 CarswellBC 542, 4 B.L.R. (2d) 142, 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 32 A.C.W.S. (3d) 932, [1992] B.C.W.L.D. 977 | (B.C. C.A., Mar 18, 1992)

1990 CarswellOnt 139
Ontario Court of Appeal

Nova Metal Products Inc. v. Comiskey (Trustee of)

1990 CarswellOnt 139, 1 C.B.R. (3d) 101, 1 O.R. (3d) 289, 23 A.C.W.S. (3d) 1192, 41 O.A.C. 282

ELAN CORPORATION et al. v. COMISKEY (TRUSTEE OF) et al.

Finlayson, Krever and Doherty JJ.A.

Heard: October 30 and 31, 1990
Judgment: November 2, 1990
Docket: Doc. Nos. CA 684/90 and CA 685/90

Counsel: *F.J.C. Newbould*, Q.C., and *G.B. Morawetz*, for appellant The Bank of Nova Scotia.
John Little, for respondents Elan Corporation and Nova Metal Products Inc.
Michael B. Rotsztain, for RoyNat Inc.
Kim Twohig and *Mel Olanow*, for Ontario Development Corp.
K.P. McElcheran, for monitor Ernst & Young.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act

Corporations — Arrangements and compromises — Court having discretion when ordering creditors' meeting under s. 5 of Companies' Creditors Arrangement Act to consider equities between debtor company and secured creditors and to consider possible success of plan of arrangement — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.

Corporations — Arrangements and compromises — Opposing commercial and legal interests requiring secured creditors to be in separate classes — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations — Arrangements and compromises — Where receiver-manager having been appointed, corporation not entitled to issue debentures and trust deeds or to bring application for relief under Companies' Creditors Arrangement Act — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 3.

The applicants were two related companies. The bank was the lender to the companies and was owed over $2,300,000. R Inc. was also a secured creditor of the companies, and was owed approximately $12 million. By agreement, the bank had a first registered charge on the companies' accounts receivable and inventory and a second registered charge on land, buildings and equipment, while R Inc. had a second registered charge on the accounts receivable and inventory and a first registered charge on the land, buildings and equipment. The security agreements with the bank prohibited the companies from encumbering their assets without the bank's consent. The bank also had s. 178 *Bank Act* security. The Ontario Development Corporation ("ODC") guaranteed part of the companies' debt to R. Inc. and held as security a debenture from one of the companies ranking third to the bank and R Inc. Two municipalities had first priority liens on the companies' lands for unpaid municipal taxes.

The bank demanded payment of its outstanding loans and on August 27, 1990, appointed a receiver-manager pursuant to the security agreements. When the companies refused to allow the receiver-manager access to the premises, the Court made an interim order authorizing the receiver-manager access to monitor the companies' business, and permitting the companies to remain in possession and carry on business in the ordinary course. The bank was restrained from selling the assets and from notifying account debtors to collect receivables, but could apply accounts receivable that were collected by the companies to the bank loans. On August 29, 1990, the companies each issued debentures to a friend and to the wife of the companies' principal, pursuant to trust deeds. The debentures conveyed personal property to a trustee as security. No consent was obtained from either the bank or the receiver-manager. It was conceded that the debentures were issued for the sole purpose of qualifying each company as a "debtor company" within the meaning of s. 3 of the *Companies' Creditors Arrangement Act*, ("CCAA").

The companies applied under s. 5 of the CCAA for an order directing the meeting of secured creditors to vote on a plan of arrangement. The plan of arrangement filed provided that the companies would carry on business for 3 months, the secured creditors would be paid and could take no action on their security for 3 months, and the accounts receivable assigned to the bank could be utilized by the companies for their day-to-day operations. No compromise was proposed. At the hearing of the application, orders were granted which set dates for presenting the plan to the secured creditors and for holding the meeting of the secured creditors. The companies were permitted, for 3 months, to spend the accounts receivable collected in accordance with cash flow projections. Proceedings by the bank, acting on its security or paying down the loan from the accounts receivable were stayed. An order was granted that created two classes of creditors for purposes of voting at the meeting of secured creditors. The classes were: (a) the bank, R Inc., ODC and the municipalities; and (b) the principal's wife and friend, who had acquired the debentures to enable the companies to apply under the CCAA. The bank appealed.

Held:

The appeal was allowed, Doherty J.A. dissenting in part; the application was dismissed.

Per Finlayson J.A. (Krever J.A. concurring): — Since the CCAA was intended to provide a structured environment for the negotiation of compromises between the debtor company and its creditors for the benefit of both, which could have significant benefits for the company, its shareholders and employees, debtor corporations were entitled to a broad and liberal interpretation of the jurisdiction of the Court under the CCAA. However, it did not follow that in exercising its discretion to order a meeting of creditors under s. 5 of the CCAA, a Court should not consider the equities as they related to the debtor company and to its secured creditors. Any discretion exercised by the Judge in this instance was not reflected in his reasons. Therefore, the appellate Court could examine the uncontested chronology of these proceedings and exercise its own discretion.

The significant date was August 27, 1990. The effect of the appointment of the receiver-manager was to disentitle the companies to issue the debentures and bring the application under the CCAA. Neither company had the power

to create further indebtedness, and thus to interfere with the ability of the receiver-manager to manage the two companies. The interim order granting the receiver-manager access to the premises restricted its powers, but did not divest the receiver-manager of all its managerial powers. The issue of the debentures to the friend and wife was outside the companies' jurisdiction to carry on business in the ordinary course. Rather, the residual power to take such initiatives to gain relief under the CCAA rested with the receiver-manager. The issuance and registration of the trust deeds required a court order.

The probability of the meeting of secured creditors achieving some measure of success was another relevant consideration. Had there been a proper classification of creditors, the meeting would not have been productive. It was improper to create one class of creditors comprised of all secured creditors except the debenture creditors. There was no true community of interest among the former. The bank should have been classified in its own class. The companies had clearly intended to avoid having the bank designated as a separate class, because the companies knew that no plan of arrangement would succeed without the approval of the bank. The bank and R Inc. had opposing interests. It was in the commercial interest of the bank to collect and retain the accounts receivable while it was in R Inc.'s commercial interest to preserve the cash flow of the businesses and sell the businesses as going concerns. To have placed the bank and R Inc. in the same class would have enabled R Inc. to vote with the ODC to defeat the bank's prior claim.

There was no reason why the bank's legal interest in the receivables should be overriden by R Inc. as the second security holder in the receivables.

For the foregoing reasons, the application under the CCAA should be dismissed.

Per Doherty J.A. (dissenting in part): — The debentures and "instant" trust deeds sufficed to bring the companies within the requirements of s. 3 of the CCAA even if, in issuing those debentures, the companies breached a prior agreement with the bank. Section 3 merely required that at the time of an application by the debtor company, an outstanding debenture or bond be issued under a trust deed. However, where a bond or debenture did not reflect a transaction which actually occurred and did not create a real debt owed by the company, such bond or debenture would not suffice for the purposes of s. 3. The statute should only be used for the purpose of attempting a legitimate reorganization. Where the application was brought for an improper purpose or the company acted in bad faith, the Court had means available to it, entirely apart from s. 3 of the CCAA, to prevent misuse of the Act. The contravention of the security agreement in creating the debentures without the bank's consent did not affect the status of the debentures for the purposes of s. 3, but could play a role in the Court's determination of what additional orders should be made under the statute.

The interim order regarding the receiver-manager effectively rendered the receiver-manager a monitor with rights of access but no further authority. Therefore, in light of the terms of the interim order, the existence of the receiver-manager installed by the bank did not preclude the application under s. 3 of the CCAA.

The Judge properly exercised his discretion in directing that a meeting of creditors should be held pursuant to s. 5 of the CCAA. Even though the chances of a successful reorganization were not good, the benefits flowing from the s. 5 order exceeded the risk inherent in the order. However, the bank and R Inc., as the two principal creditors, should not have been placed in the same class of secured creditors for the purposes of ss. 5 and 6 of the statute. Their interests were not only different, but opposed. The classification scheme created by the Judge effectively denied the bank any control over any plan of reorganization.

Table of Authorities

Cases considered:

Per Finlayson J.A. (Krever J.A. concurring)

Alberta Treasury Branches v. Hat Development Ltd. (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd (1989), 65 Alta. L.R. (2d) 374 (C.A.) — *applied*

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 166, 31 B.C.L.R. (2d) 35 (S.C.), aff'd (16 September 1988), Doc. No. Vancouver CA009772, Taggart, Lambert and Locke JJ.A. (B.C. C.A.) — *considered*

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (S.C.), aff'd 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.) — *referred to*

NsC Diesel Power Inc., Re (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.) — *considered*

Sovereign Life Assurance Co. v. Dodd, [1892] 2 Q.B. 573, [1891-4] All E.R. 246 (C.A.) — *applied*

Wellington Building Corp., Re, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626, [1934] O.W.N. 562 (S.C.) — *applied*

Per Doherty J.A. (dissenting in part)

Alberta Treasury Branches v. Hat Development Ltd. (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd (1989), 65 Alta. L.R. (2d) 374 (C.A.) — *considered*

Avery Construction Co., Re, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.) — *referred to*

Hongkong Bank of Canada v. Chef Ready Foods Ltd., [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84 (C.A.) — *considered*

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Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc. v. Nu-West Ltd., 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.) — *referred to*

Metals & Alloys Co., Re (16 February 1990), Houlden J.A. (Ont. C.A.) [unreported] — *considered*

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Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (S.C.), aff'd 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.) — *referred to*

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 47 B.C.L.R. (2d) 193 (S.C.) — *referred to*

Reference re Residential Tenancies Act (Ontario), [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 158 — *referred to*

Stephanie's Fashions Ltd., Re (1990), 1 C.B.R. (3d) 248 (B.C.S.C.) — *considered*

United Maritime Fishermen Co-op., Re (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.), varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.), rev'd (1988), 69 C.B.R. (N.S.) 161, 51 D.L.R. (4th) 618, 88 N.B.R. (2d) 253, 224 A.P.R. 253 (C.A.) — *considered*

Statutes considered:

Bank Act, R.S.C. 1985, c. B-1 —

s. 178, as am. R.S.C. 1985 (3d Supp.), c. 25, s. 26

Companies' Creditors Arrangement Act, S.C. 1932-33, c. 36 —

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

s. 3

s. 4

s. 5

s. 6

s. 6(a)

s. 11

s. 14(2)

Courts of Justice Act, 1984, S.O. 1984, c. 11 —

s. 144(1)

Interpretation Act, R.S.C. 1985, c. I-21 —

s. 12

Municipal Act, R.S.O. 1980, c. 302 —

s. 369

APPEAL from order of Hoolihan J. dated September 11, 1990, allowing application under *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

***FINLAYSON J.A. (KREVER J.A.* concurring) (orally):**

1 This is an appeal by the Bank of Nova Scotia (the "bank") from orders made by Mr. Justice Hoolihan [(11 September 1990), Doc. Nos. Toronto RE 1993/90 and RE 1994/90 (Ont. Gen. Div.)] as hereinafter described. The Bank of Nova Scotia was the lender to two related companies, namely, Elan Corporation ("Elan") and Nova Metal Products Inc. ("Nova"), which commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), for the purposes of having a plan of arrangement put to a meeting of secured creditors of those companies.

2 The orders appealed from are:

(i) An order of September 11, 1990, which directed a meeting of the secured creditors of Elan and Nova to consider the plan of arrangement filed, or other suitable plan. The order further provided that for 3 days until September 14, 1990, the bank be prevented from acting on any of its security or paying down any of its loans from accounts receivable collected by Elan and Nova, and that Elan and Nova could spend the accounts receivable assigned to the bank that would be received.

(ii) An order dated September 14, 1990, extending the terms of the order of September 11, 1990, to remain in effect until the plan of arrangement was presented to the Court no later than October 24, 1990. This order continued the stay against the bank and the power of Elan and Nova to spend the accounts receivable assigned to the bank. Further orders dated September 27, 1990, and October 18, 1990, have extended the stay, and the power of Elan and Nova to spend the accounts receivable that have been assigned to the bank. The date of the meetings of creditors has been extended to November 9, 1990. The application to sanction the plan of arrangement must be heard by November 14, 1990.

(iii) An order dated October 18, 1990, directing that there be two classes of secured creditors for the purposes of voting at the meeting of secured creditors. The first class is to be comprised of the bank, RoyNat Inc. ("RoyNat"), the Ontario Development Corporation ("O.D.C."), the city of Chatham and the village of Glencoe. The second class is to be comprised of persons related to Elan and Nova that acquired debentures to enable the companies to apply under the CCAA.

3 There is very little dispute about the facts in this matter, but the chronology of events is important and I am setting it out in some detail.

4 The bank has been the banker to Elan and Nova. At the time of the application in August 1990, it was owed approximately $1,900,000. With interest and costs, including receivers' fees, it is now owed in excess of $2,300,000. It has a first registered charge on the accounts receivable and inventory of Elan and Nova, and a second registered charge on the land, buildings and equipment. It also has security under s. 178 of the *Bank Act*, R.S.C. 1985, c. B-1, as am. R.S.C. 1985 (3rd Supp.), c. 25, s. 26. The terms of credit between the bank and Elan as set out in a commitment agreement provide that Elan and Nova may not encumber their assets without the consent of the bank.

5 RoyNat is also a secured creditor of Elan and Nova, and it is owed approximately $12 million. It holds a second registered charge on the accounts receivable and inventory of Elan and Nova, and a first registered charge on the land, buildings and equipment. The bank and RoyNat entered into a priority agreement to define with certainty the priority which each holds over the assets of Elan and Nova.

6 The O.D.C. guaranteed payment of $500,000 to RoyNat for that amount lent by RoyNat to Elan. The O.D.C. holds debenture security from Elan and secure the guarantee which it gave to RoyNat. That security ranks third to the bank and RoyNat. The O.D.C. has not been called upon by RoyNat to pay under its guarantee. O.D.C. has not lent any money directly to Elan or Nova.

7 Elan owes approximately $77,000 to the City of Chatham for unpaid municipal taxes. Nova owes approximately $18,000 to the Village of Glencoe for unpaid municipal taxes. Both municipalities have a lien on the real property of the respective companies in priority to every claim except the Crown under s. 369 of the *Municipal Act*, R.S.O. 1980, c. 302.

8 On May 8, 1990, the bank demanded payment of all outstanding loans owing by Elan and Nova to be made by June 1, 1990. Extensions of time were granted and negotiations directed to the settlement of the debt took place thereafter. On August 27, 1990, the bank appointed Coopers & Lybrand Limited as receiver and manager of the assets of Elan and Nova, and as agent under the bank's security to realize upon the security. Elan and Nova refused to allow the receiver

and manager to have access to their premises, on the basis that insufficient notice had been provided by the bank before demanding payment.

9 Later on August 27, 1990, the bank brought a motion in an action against Elan and Nova (Court File No. 54033/90) for an order granting possession of the premises of Elan and Nova to Coopers & Lybrand. On the evening of August 27, 1990, at approximately 9 p.m., Mr. Justice Saunders made an order adjourning the motion on certain conditions. The order authorized Coopers & Lybrand access to the premises to monitor Elan's business, and permitted Elan to remain in possession and carry on its business in the ordinary course. The bank was restrained in the order, until the motion could be heard, from selling inventory, land, equipment or buildings or from notifying account debtors to collect receivables, but was not restrained from applying accounts receivable that were collected against outstanding bank loans.

10 On Wednesday, August 29, 1990, Elan and Nova each issued a debenture for $10,000 to a friend of the principals of the companies, Joseph Comiskey, through his brother Michael Comiskey as trustee, pursuant to a trust deed executed the same day. The terms were not commercial and it does not appear that repayment was expected. It is conceded by counsel for Elan that the sole purpose of issuing the debentures was to qualify as a "debtor company" within the meaning of s. 3 of the CCAA. Section 3 reads as follows:

> 3. This Act does not apply in respect of a debtor company unless
>
> (a) the debtor company has outstanding an issue of secured or unsecured bonds of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee; and
>
> (b) the compromise or arrangement that is proposed under section 4 or 5 in respect of the debtor company includes a compromise or an arrangement between the debtor company and the holders of an issue referred to in paragraph (a).

11 The debentures conveyed the personal property of Elan and Nova as security to Michael Comiskey as trustee. No consent was obtained from the bank as required by the loan agreements, nor was any consent obtained from the receiver. Cheques for $10,000 each, representing the loans secured in the debentures, were given to Elan and Nova on Wednesday, August 29, 1990, but not deposited until 6 days later on September 4, 1990, after an interim order had been made by Mr. Justice Farley in favour of Elan and Nova staying the bank from taking proceedings.

12 On August 30, 1990 Elan and Nova applied under s. 5 of the CCAA for an order directing a meeting of secured creditors to vote on a plan of arrangement. Section 5 provides:

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

13 The application was heard by Farley J. on Friday, August 31, 1990, at 8 a.m. Farley J. dismissed the application on the grounds that the CCAA required that there be more than one debenture issued by each company. Later on the same say, August 31, 1990, Elan and Nova each issued two debentures for $500 to the wife of the principal of Elan through her sister as trustee. The debentures provided for payment of interest to commence on August 31, 1992. Cheques for $500 were delivered that day to the companies but not deposited in the bank account until September 4, 1990. These debentures conveyed the personal property in the assets of Elan and Nova to the trustee as security. Once again it is conceded that the debentures were issued for the sole purpose of meeting the requirements of s. 3 of the CCAA. No consent was obtained from the bank as required by the loan terms, nor was any consent obtained from the receiver.

14 On August 31, 1990, following the creation of the trust deeds and the issuance of the debentures, Elan and Nova commenced new applications under the CCAA which were heard late in the day by Farley J. He adjourned the

applications to September 10, 1990, on certain terms, including a stay preventing the bank from acting on its security and allowing Elan to spend up to $321,000 from accounts receivable collected by it.

15 The plan of arrangement filed with the application provided that Elan and Nova would carry on business for 3 months, that secured creditors would not be paid and could take no action on their security for 3 months, and that the accounts receivable of Elan and Nova assigned to the bank could be utilized by Elan and Nova for purposes of its day-to-day operations. No compromise of any sort was proposed.

16 On September 11, 1990, Hoolihan J. ordered that a meeting of the secured creditors of Elan and Nova be held no later than October 22, 1990, to consider the plan of arrangement that had been filed, or other suitable plan. He ordered that the plan of arrangement be presented to the secured creditors no later than September 27, 1990. He made further orders effective for 3 days until September 14, 1990, including orders:

(i) that the companies could spend the accounts receivable assigned to the bank that would be collected in accordance with a cash flow forecast filed with the Court providing for $1,387,000 to be spent by September 30, 1990; and

(ii) a stay of proceedings against the bank acting on any of its security or paying down any of its loans from accounts receivable collected by Elan and Nova.

17 On September 14, 1990, Hoolihan J. extended the terms of his order of September 11, 1990, to remain in effect until the plan of arrangement was presented to the Court no later than October 24, 1990 for final approval. This order continued the power of Elan and Nova to spend up to $1,387,000 of the accounts receivable assigned to the bank in accordance with the projected cash flow to September 30, 1990, and to spend a further amount to October 24, 1990, in accordance with a cash flow to be approved by Hoolihan J. prior to October 1, 1990. Further orders dated September 27 and October 18 have extended the power to spend the accounts receivable to November 14, 1990.

18 On September 14, 1990, the bank requested Hoolihan J. to restrict his order so that Elan and Nova could use the accounts receivable assigned to the bank only so long as they continued to operate within the borrowing guidelines contained in the terms of the loan agreements with the bank. These guidelines require a certain ratio to exist between bank loans and the book value of the accounts receivable and inventory assigned to the bank, and are designed in normal circumstances to ensure that there is sufficient value in the security assigned to the bank. Hoolihan J. refused to make the order.

19 On October 18, 1990, Hoolihan J. ordered that the composition of the classes of secured creditors for the purposes of voting at the meeting of secured creditors shall be as follows:

(a) The bank, RoyNat, O.D.C., the City of Chatham and the Village of Glencoe shall comprise one class.

(b) The parties related to the principal of Elan that acquired their debentures to enable the companies to apply under the CCAA shall comprise a second class.

20 On October 18, 1990, at the request of counsel for Elan and Nova, Hoolihan J. further ordered that the date for the meeting of creditors of Elan and Nova be extended to November 9, 1990, in order to allow a new plan of arrangement to be sent to all creditors, including unsecured creditors of those companies. Elan and Nova now plan to offer a plan of compromise or arrangement to the unsecured creditors of Elan and Nova as well as to the secured creditors.

21 There are five issues in this appeal.

(1) Are the debentures issued by Elan and Nova for the purpose of permitting the companies to qualify as applicants under the CCAA debentures within the meaning of s. 3 of the CCAA?

(2) Did the issue of the debentures contravene the provisions of the loan agreements between Elan and Nova and the bank? If so, what are the consequences for CCAA purposes?

(3) Did Elan and Nova have the power to issue the debentures and make application under the CCAA after the bank had appointed a receiver and after the order of Saunders J.?

(4) Did Hoolihan J. have the power under s. 11 of the CCAA to make the interim orders that he made with respect to the accounts receivable?

(5) Was Hoolihan J. correct in ordering that the bank vote on the proposed plan of arrangement in a class with RoyNat and the other secured creditors?

22 It is well established that the CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Such a resolution can have significant benefits for the company, its shareholders and employees. For this reason the debtor companies, Elan and Nova, are entitled to a broad and liberal interpretation of the jurisdiction of the Court under the CCAA. Having said that, it does not follow that in exercising its discretion to order a meeting of creditors under s. 5 of the CCAA that the Court should not consider the equities in this case as they relate to these companies and to one of its principal secured creditors, the bank.

23 The issues before Hoolihan J. and this Court were argued on a technical basis. Hoolihan J. did not give effect to the argument that the debentures described above were a "sham" and could not be used for the purposes of asserting jurisdiction. Unfortunately, he did not address any of the other arguments presented to him on the threshold issue of the availability of the CCAA. He appears to have acted on the premise that if the CCAA can be made available, it should be utilized.

24 If Hoolihan J. did exercise any discretion overall, it is not reflected in his reasons. I believe, therefore, that we are in a position to look at the uncontested chronology of these proceedings and exercise our own discretion. To me, the significant date is August 27, 1990 when the bank appointed Coopers & Lybrand Limited as receiver and manager of the undertaking, property and assets mortgaged and charged under the demand debenture and of the collateral under the general security agreement, both dated June 20, 1979. On the same date, it appointed the same company as receiver and manager for Nova under a general security agreement dated December 5, 1988. The effect of this appointment is to divest the companies and their boards of directors of their power to deal with the property comprised in the appointment: Raymond Walton, *Kerr on the Law and Practice as to Receivers*, 16th ed. (London: Sweet & Maxwell, 1983), p. 292. Neither Elan nor Nova had the power to create further indebtedness, and thus to interfere with the ability of the receiver to manage the two companies: *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd (1989), 65 Alta. L.R. (2d) 374 (C.A.).

25 Counsel for the debtor companies submitted that the management powers of the receiver were stripped from the receiver by Saunders J. in his interim order, when he allowed the receiver access to the companies' properties but would not permit it to realize on the security of the bank until further order. He pointed out that the order also provided that the companies were entitled to remain in possession and "to carry on business in the ordinary course" until further order.

26 I do not agree with counsel's submission covering the effect of the order. It certainly restricted what the receiver could do on an interim basis, but it imposed restrictions on the companies as well. The issue of these disputed debentures in support of an application for relief as insolvent companies under the CCAA does not comply with the order of Saunders J. This is not carrying on business in the ordinary course. The residual power to take all of these initiatives for relief under the CCAA remained with the receiver, and if trust deeds were to be issued, an order of the Court in Action 54033/90 was required permitting their issuance and registration.

27 There is another feature which, in my opinion, affects the exercise of discretion, and that is the probability of the meeting achieving some measure of success. Hoolihan J. considered the calling of the meeting at one hearing, as he was asked to do, and determined the respective classes of creditors at another. This latter classification is necessary because of the provisions of s. 6(a) of the CCAA, which reads as follows:

> 6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company.

28 If both matters had been considered at the same time, as in my view they should have been, and if what I regard as a proper classification of the creditors had taken place, I think it is obvious that the meeting would not be a productive one. It was improper, in my opinion, to create one class of creditors made up of all the secured creditors save the so-called "sham" creditors. There is no true community of interest among them, and the motivation of Elan and Nova in striving to create a single class is clearly designed to avoid the classification of the bank as a separate class.

29 It is apparent that the only secured creditors with a significant interest in the proceeding under the CCAA are the bank and RoyNat. The two municipalities have total claims for arrears of taxes of less than $100,000. They have first priority in the lands of the companies. They are in no jeopardy whatsoever. The O.D.C. has a potential liability in that it can be called upon by RoyNat under its guarantee to a maximum of $500,000, and this will trigger default under its debentures with the companies, but its interests lie with RoyNat.

30 As to RoyNat, it is the largest creditor with a debt of some $12 million. It will dominate any class it is in because, under s. 6 of the CCAA, the majority in a class must represent three-quarters in value of that class. It will always have a veto by reason of the size of its claim, but requires at least one creditor to vote for it to give it a majority in number (I am ignoring the municipalities). It needs the O.D.C.

31 I do not base my opinion solely on commercial self-interest, but also on the differences in legal interest. The bank has first priority on the receivables referred to as the "quick assets", and RoyNat ranks second in priority. RoyNat has first priority on the buildings and realty, the "fixed assets", and the bank has second priority.

32 It is in the commercial interests of the bank, with its smaller claim and more readily realizable assets, to collect and retain the accounts receivable. It is in the commercial interests of RoyNat to preserve the cash flow of the business and sell the enterprise as a going concern. It can only do that by overriding the prior claim of the bank to these receivables. If it can vote with the O.D.C. in the same class as the bank, it can achieve that goal and extinguish the prior claim of the bank to realize on the receivables. This it can do, despite having acknowledged its legal relationship to the bank in the priority agreement signed by the two. I can think of no reason why the legal interest of the bank as the holder of the first security on the receivables should be overridden by RoyNat as holder of the second security.

33 The classic statement on classes of creditors is that of Lord Esher M.R. in *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q.B. 573, [1891-4] All E.R. 246 (C.A.), at pp. 579-580 [Q.B.]:

> The Act [*Joint Stock Companies Arrangement Act, 1870*] says that the persons to be summoned to the meeting (all of whom, be it said in passing, are creditors) are persons who can be divided into different classes — classes which the Act of Parliament recognises, though it does not define them. This, therefore, must be done: they must be divided into different classes. What is the reason for such a course? It is because the creditors composing the different classes have different interests; and, therefore, if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.

34 The *Sovereign Life* case was quoted with approval by Kingstone J. in *Re Wellington Building Corp.*, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626, [1934] O.W.N. 562 (S.C.), at p. 659 [O.R.]. He also quoted another English authority at p. 658:

> In *In re Alabama, New Orleans, Texas and Pacific Junction Ry. Co.*, [1891] 1 Ch. 213, a scheme and arrangement under the Joint Stock Companies Arrangement Act (1870), was submitted to the Court for approval. Lord Justice Bowen, at p. 243, says:
>
> > Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation ... Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such.

35 Kingstone J. set aside a meeting where three classes of creditors were permitted to vote together. He said at p. 660:

> It is clear that Parliament intended to give the three-fourths majority of any class power to bind that class, but I do not think the Statute should be construed so as to permit holders of subsequent mortgages power to vote and thereby destroy the priority rights and security of a first mortgagee.

36 We have been referred to more modern cases, including two decisions of Trainor J. of the British Columbia Supreme Court, both entitled *Re Northland Properties Ltd.* One case is reported in (1988), 73 C.B.R. (N.S.) 166, 31 B.C.L.R. (2d) 35, and the other in the same volume at p. 175 [C.B.R.]. Trainor J. was upheld on appeal on both judgments. The first judgment of the British Columbia Court of Appeal is unreported (16 September, 1988) [Doc. No. Vancouver CA009772, Taggart, Lambert and Locke JJ.A.]. The judgment in the second appeal is reported at 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122.

37 In the first *Northland* case, Trainor J. held that the difference in the terms of parties to and priority of different bonds meant that they should be placed in separate classes. He relied upon *Re Wellington Building Corp.*, supra. In the second *Northland* case, he dealt with 15 mortgagees who were equal in priority but held different parcels of land as security. Trainor J. held that their relative security positions were the same, notwithstanding that the mortgages were for the most part secured by charges against separate properties. The nature of the debt was the same, the nature of the security was the same, the remedies for default were the same, and in all cases they were corporate loans by sophisticated lenders. In specifically accepting the reasoning of Trainor J., the Court of Appeal held that the concern of the various mortgagees as to the quality of their individual securities was "a variable cause arising not by any difference in legal interests, but rather as a consequence of bad lending, or market values, or both" (p. 203).

38 In *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.), the Court stressed that a class should be made up of persons "'whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest'" (p. 8 [of C.B.R.]).

39 My assessment of these secured creditors is that the bank should be in its own class. This being so, it is obvious that no plan of arrangement can succeed without its approval. There is no useful purpose to be served in putting a plan of arrangement to a meeting of creditors if it is known in advance that it cannot succeed. This is another cogent reason for the Court declining to exercise its discretion in favour of the debtor companies.

40 For all the reasons given above, the application under the CCAA should have been dismissed. I do not think that I have to give definitive answers to the individual issues numbered (1) and (2). They can be addressed in a later case, where the answers could be dispositive of an application under the CCAA. The answer to (3) is that the combined effect of the receivership and the order of Saunders J. disentitled the companies to issue the debentures and bring the application under the CCAA. It is not necessary to answer issue (4), and the answer to (5) is no.

41 Accordingly, I would allow the appeal, set aside the three orders of Hoolihan J., and, in their place, issue an order dismissing the application under the CCAA. The bank should receive its costs of this appeal, the applications for leave to appeal, and the proceedings before Farley and Hoolihan JJ., to be paid by Elan, Nova and RoyNat.

42 Ernst & Young were appointed monitor in the order of Hoolihan J. dated September 14, 1990, to monitor the operations of Elan and Nova and give effect to and supervise the terms and conditions of the stay of proceedings in accordance with Appendix "C" appended to the order. The monitor should be entitled to be paid for all services performed to date, including whatever is necessary to complete its reports for past work, as called for in Appendix "C".

DOHERTY J.A. **(dissenting in part):**

I Background

43 On November 2, 1990, this Court allowed the appeal brought by the Bank of Nova Scotia (the "bank") and vacated several orders made by Hoolihan J. Finlayson J.A. delivered oral reasons on behalf of the majority. At the same time, I delivered brief oral reasons dissenting in part from the conclusion reached by the majority and undertook to provide further written reasons. These are those reasons.

44 The events relevant to the disposition of this appeal are set out in some detail in the oral reasons of Finlayson J.A. I will not repeat that chronology, but will refer to certain additional background facts before turning to the legal issues.

45 Elan Corporation ("Elan") owns the shares of Nova Metal Products Inc. ("Nova Inc."). Both companies have been actively involved in the manufacture of automobile parts for a number of years. As of March 1990, the companies had total annual sales of about $30 million, and employed some 220 people in plants located in Chatham and Glencoe, Ontario. The operation of these companies no doubt plays a significant role in the economy of these two small communities.

46 In the 4 years prior to 1989, the companies had operated at a profit ranging from $287,000 (1987) to $1,500,000 (1986). In 1989, several factors, including large capital expenditures and a downturn in the market, combined to produce an operational loss of about $1,333,000. It is anticipated that the loss for the year ending June 30, 1990, will be about $2.3 million. As of August 1, 1990, the companies continued in full operation, and those in control anticipated that the financial picture would improve significantly later in 1990, when the companies would be busy filling several contracts which had been obtained earlier in 1990.

47 The bank has provided credit to the companies for several years. In January 1989, the bank extended an operating line of credit to the companies. The line of credit was by way of a demand loan that was secured in the manner described by Finlayson J.A. Beginning in May 1989, and from time to time after that, the companies were in default under the terms of the loan advanced by the bank. On each occasion, the bank and the companies managed to work out some agreement so that the bank continued as lender and the companies continued to operate their plants.

48 Late in 1989, the companies arranged for a $500,000 operating loan from RoyNat Inc. It was hoped that this loan, combined with the operating line of $2.5 million from the bank, would permit the company to weather its fiscal storm. In March 1990, the bank took the position that the companies were in breach of certain requirements under their loan agreements, and warned that if the difficulties were not rectified the bank would not continue as the company's lender. Mr. Patrick Johnson, the president of both companies, attempted to respond to these concerns in a detailed letter to the bank dated March 15, 1990. The response did not placate the bank. In May 1990, the bank called its loan and made a demand for immediate payment. Mr. Spencer, for the bank, wrote: "We consider your financial condition continues to be critical and we are not prepared to delay further making formal demand." He went on to indicate that, subject to further deterioration in the companies' fiscal position, the bank was prepared to delay acting on its security until June 1, 1990.

49 As of May 1990, Mr. Johnson, to the bank's knowledge, was actively seeking alternative funding to replace the bank. At the same time, he was trying to convince the union which represented the workers employed at both plants to assist in a co-operative effort to keep the plants operational during the hard times. The union had agreed to discuss amendment of the collective bargaining agreement to facilitate the continued operation of the companies.

50 The June 1, 1990 deadline set by the bank passed without incident. Mr. Johnson continued to search for new financing. A potential lender was introduced to Mr. Spencer of the bank on August 13, 1990, and it appeared that the bank, through Mr. Spencer, was favourably impressed with this potential lender. However, on August 27, 1990, the bank decided to take action to protect its position. Coopers & Lybrand was appointed by the bank as receiver-manager under the terms of the security agreements with the companies. The companies denied the receiver access to their plants. The bank then moved before the Honourable Mr. Justice E. Saunders for an order giving the receiver possession of the premises occupied by the companies. On August 27, 1990, after hearing argument from counsel for the bank and the companies, Mr. Justice Saunders refused to install the receivers and made the following interim order:

> 1. THIS COURT ORDERS that the receiver be allowed access to the property to monitor the operations of the defendants but shall not take steps to realize on the security of The Bank of Nova Scotia until further Order of the Court.
>
> 2. THIS COURT ORDERS that the defendants shall be entitled to remain in possession and to carry on business in the ordinary course until further Order of this Court.
>
> 3. THIS COURT ORDERS that until further order the Bank of Nova Scotia shall not take steps to notify account debtors of the defendants for the purpose of collecting outstanding accounts receivable. This Order does not restrict The Bank of Nova Scotia from dealing with accounts receivable of the defendants received by it.
>
> 4. THIS COURT ORDERS that the motion is otherwise adjourned to a date to be fixed.

51 The notice of motion placed before Saunders J. by the bank referred to "an intended action" by the bank. It does not appear that the bank took any further steps in connection with this "intended action."

52 Having resisted the bank's efforts to assume control of the affairs of the companies on August 27, 1990, and realizing that their operations could cease within a matter of days, the companies turned to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "Act"), in an effort to hold the bank at bay while attempting to reorganize their finances. Finlayson J.A. has described the companies' efforts to qualify under that Act, the two appearances before the Honourable Mr. Justice Farley on August 31, 1990, and the appearances before the Honourable Mr. Justice Hoolihan in September and October 1990, which resulted in the orders challenged on this appeal.

II The Issues

53 The dispute between the bank and the companies when this application came before Hoolihan J. was a straightforward one. The bank had determined that its best interests would be served by the immediate execution of the rights it had under its various agreements with the companies. The bank's best interest was not met by the continued operation of the companies as going concerns. The companies and their other two substantial secured creditors considered that their interests required that the companies continue to operate, at least for a period which would enable the companies to place a plan of reorganization before its creditors.

54 All parties were pursuing what they perceived to be their commercial interests. To the bank, these interests entailed the "death" of the companies as operating entities. To the companies, these interests required "life support" for the companies through the provisions of the Act to permit a "last ditch" effort to save the companies and keep them in operation.

55 The issues raised on this appeal can be summarized as follows:

(i) Did Hoolihan J. err in holding that the companies were entitled to invoke the Act?

(ii) Did Hoolihan J. err in exercising his discretion in directing that a meeting of creditors should be held under the Act?

(iii) Did Hoolihan J. err in directing that the bank and RoyNat Inc. should be placed in the same class of creditors for the purposes of the Act?

(iv) Did Hoolihan J. err in the terms of the interim orders he made pending the meeting of creditors and the submission to the court of a plan of reorganization?

III The Purpose and Scheme of the Act

56 Before turning to these issues, it is necessary to understand the purpose of the Act, and the scheme established by the Act for achieving that purpose. The Act first appeared in the midst of the Great Depression (S.C. 1932-33, c. 36). The Act was intended to provide a means whereby insolvent companies could avoid bankruptcy and continue as ongoing concerns through a reorganization of their financial obligations. The reorganization contemplated required the cooperation of the debtor companies' creditors and shareholders: *Re Avery Construction Co.*, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.); Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar Rev. 587, at pp. 592-593; David H. Goldman, "Reorganizations Under the Companies' Creditors Arrangement Act (Canada)" (1985) 55 C.B.R. (N.S.) 36, at pp. 37-39.

57 The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy- or creditor-initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

58 The purpose of the Act was artfully put by Gibbs J.A., speaking for the British Columbia Court of Appeal, in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, an unreported judgment released October 29, 1990 [Doc. No. Vancouver CA12944, Carrothers, Cumming and Gibbs JJ.A., now reported [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84], at pp. 11 and 6 [unreported, pp. 91 and 88 B.C.L.R.]. In referring to the purpose for which the Act was initially proclaimed, he said:

> Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A. ['the Act'], to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

59 In an earlier passage, His Lordship had said:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business.

60 Gibbs J.A. also observed (at p. 13) that the Act was designed to serve a "broad constituency of investors, creditors and employees." Because of that "broad constituency", the Court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest. That interest is generally, but not always, served by permitting an attempt at reorganization: see S.E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act," at p. 593.

61 The Act must be given a wide and liberal construction so as to enable it to effectively serve this remedial purpose: *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, supra, at p. 14 [unreported, p. 92 B.C.L.R.].

62 The Act is available to all insolvent companies, provided the requirements of s. 3 of the Act are met. That section provides:

> 3. This Act does not apply in respect of a debtor company unless
>
> (a) the debtor company has outstanding an issue of secured or unsecured bonds of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee; and
>
> (b) the compromise or arrangement that is proposed under section 4 or 5 in respect of the debtor company includes a compromise or an arrangement between the debtor company and the holders of an issue referred to in paragraph (a).

63 A debtor company, or a creditor of that company, invokes the Act by way of summary application to the Court under s. 4 or s. 5 of the Act. For present purposes, s. 5 is the relevant section:

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

64 Section 5 does not require that the Court direct a meeting of creditors to consider a proposed plan. The Court's power to do so is discretionary. There will no doubt be cases where no order will be made, even though the debtor company qualifies under s. 3 of the Act.

65 If the Court determines that a meeting should be called, the creditors must be placed into classes for the purpose of that meeting. The significance of this classification process is made apparent by s. 6 of the Act:

> 6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy Act* or is in the course of being wound up under the *Winding-up Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

66 If the plan of reorganization is approved by the creditors as required by s. 6, it must then be presented to the Court. Once again, the Court must exercise a discretion, and determine whether it will ap prove the plan of reorganization. In exercising that discretion, the Court is concerned not only with whether the appropriate majority has approved the plan at a meeting held in accordance with the Act and the order of the Court, but also with whether the plan is a fair and reasonable one: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 at 182-185 (S.C.), aff'd 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.).

67 If the Court chooses to exercise its discretion in favour of calling a meeting of creditors for the purpose of considering a plan of reorganization, the Act provides that the rights and remedies available to creditors, the debtor company, and others during the period between the making of the initial order and the consideration of the proposed plan may be suspended or otherwise controlled by the Court.

68 Section 11 gives a court wide powers to make any interim orders:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

69 Viewed in its totality, the Act gives the Court control over the initial decision to put the reorganization plan before the creditors, the classification of creditors for the purpose of considering the plan, conduct affecting the debtor company pending consideration of that plan, and the ultimate acceptability of any plan agreed upon by the creditors. The Act envisions that the rights and remedies of individual creditors, the debtor company and others may be sacrificed, at least temporarily, in an effort to serve the greater good by arriving at some acceptable reorganization which allows the debtor company to continue in operation: *Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce* (1989), 102 A.R. 161 at p. 165 (Q.B.).

IV Did Hoolihan J. Err in Holding that the Debtor Companies were Entitled to Invoke the Act?

70 The appellant advances three arguments in support of its contention that Elan and Nova Inc. were not entitled to seek relief under the Act. It argues first that the debentures issued by the companies after August 27, 1990, were "shams" and did not fulfil the requirements of s. 3 of the Act. The appellant next contends that the issuing of the debentures by the companies contravened their agreements with the bank, in which they undertook not to further encumber the assets of the companies without the consent of the bank. Lastly, the appellant maintains that once the bank had appointed a receiver-manager over the affairs of the companies on August 27, 1990, the companies had no power to create further indebtedness by way of debentures or to bring an application on behalf of the companies under the Act.

(i) Section 3 and "Instant" Trust Deeds

71 The debentures issued in August 1990, after the bank had moved to install a receiver-manager, were issued solely and expressly for the purpose of meeting the requirements of s. 3 of the Act. Indeed, it took the companies two attempts to meet those requirements. The debentures had no commercial purpose. The transactions did, however, involve true loans in the sense that moneys were advanced and debt was created. Appropriate and valid trust deeds were also issued.

72 In my view, it is inappropriate to refer to these transactions as "shams." They are neither false nor counterfeit, but rather are exactly what they appear to be, transactions made to meet jurisdictional requirements of the Act so as to permit an application for reorganization under the Act. Such transactions are apparently well known to the commercial Bar: B. O'Leary, "A Review of the Companies' Creditors Arrangement Act" (1987) 4 Nat. Insolvency Rev. 38, at p. 39; C. Ham, " 'Instant' Trust Deeds Under the C.C.A.A." (1988) 2 Commercial Insolvency Reporter 25; G.B. Morawetz, "Emerging Trends in the Use of the Companies' Creditors Arrangement Act" (1990) Proceedings, First Annual General Meeting and Conference of the Insolvency Institute of Canada.

73 Mr. Ham writes, at pp. 25 and 30:

> Consequently, some companies have recently sought to bring themselves within the ambit of the C.C.A.A. by creating 'in stant' trust deeds, i.e., trust deeds which are created solely for the purpose of enabling them to take advantage of the C.C.A.A.

74 Applications under the Act involving the use of "instant" trust deeds have been before the Courts on a number of occasions. In no case has any court held that a company cannot gain access to the Act by creating a debt which meets the requirements of s. 3 for the express purpose of qualifying under the Act. In most cases, the use of these "instant" trust deeds has been acknowledged without comment.

75 The decision of Chief Justice Richard in *Re United Maritime Fishermen Co-op.* (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.), varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.), at 55-56 [67 C.B.R.], speaks directly to the use of "instant" trust deeds. The Chief Justice refused to read any words into s. 3 of the Act which would limit the availability of the Act depending on the point at which, or the purpose for which, the debenture or bond and accompanying trust deed were created. He accepted [at p. 56 C.B.R.] the debtor company's argument that the Act:

> does not impose any time restraints on the creation of the conditions as set out in s. 3 of the Act, nor does it contain any prohibition against the creation of the conditions set out in s. 3 for the purpose of obtaining jurisdiction.

76 It should, however, be noted that in *Re United Maritime Fishermen Co-op.*, supra, the debt itself was not created for the purpose of qualifying under the Act. The bond and the trust deed, however, were created for that purpose. The case is therefore factually distinguishable from the case at Bar.

77 The Court of Appeal reversed the ruling of the Chief Justice ((1988), 69 C.B.R. (N.S.) 161, 51 D.L.R. (4th) 618, 88 N.B.R. (2d) 253, 224 A.P.R. 253) on the basis that the bonds required by s. 3 of the Act had not been issued when the application was made, so that on a precise reading of the words of s. 3 the company did not qualify. The Court did not go on to consider whether, had the bonds been properly issued, the company would have been entitled to invoke the Act. Hoyt J.A., for the majority, did, however, observe without comment that the trust deeds had been created specifically for the purpose of bringing an application under the Act.

78 The judgment of MacKinnon J. in *Re Stephanie's Fashions Ltd.*, unreported, Doc. No. Vancouver A893427, released January 24, 1990 (B.C. S.C.) [now reported 1 C.B.R. (3d) 248], is factually on all fours with the present case. In that case, as in this one, it was acknowledged that the sole purpose for creating the debt was to effect compliance with s. 3 of the Act. After considering the judgment of Chief Justice Richard in *Re United Maritime Fishermen Co-op.*, supra, MacKinnon J. held, at p. 251:

> The reason for creating the trust deed is not for the usual purposes of securing a debt but, when one reads it, on its face, it does that. I find that it is a genuine trust deed and not a fraud, and that the petitioners have complied with s. 3 of the statute.

79 *Re Metals & Alloys Co.* (16 February 1990) is a recent example of a case in this jurisdiction in which "instant" trust deeds were successfully used to bring a company within the Act. The company issued debentures for the purpose of permitting the company to qualify under the Act, so as to provide it with an opportunity to prepare and submit a reorganization plan. The company then applied for an order, seeking, inter alia, a declaration that the debtor company was a corporation within the meaning of the Act. Houlden J.A., hearing the matter at first instance, granted the declaration request in an order dated February 16, 1990. No reasons were given. It does not appear that the company's qualifications were challenged before Houlden J.A.; however, the nature of the debentures issued and the purpose for their issue was fully disclosed in the material before him. The requirements of s. 3 of the Act are jurisdictional in nature, and the consent of the parties cannot vest a court with jurisdiction it does not have. One must conclude that Houlden J.A. was satisfied that "instant" trust deeds suffice for the purposes of s. 3 of the Act.

80 A similar conclusion is implicit in the reasons of the British Columbia Court of Appeal in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*. In that case, a debt of $50, with an accompanying debenture and trust deed, was created specifically to enable the company to make application under the Act. The Court noted that the debt was created solely for that purpose in an effort to forestall an attempt by the bank to liquidate the assets of the debtor company. The Court went on to deal with the merits, and to dismiss an appeal from an order granting a stay pending a reorganization meeting. The Court could not have reached the merits without first concluding that the $50 debt created by the company met the requirements of s. 3 of the Act.

81 The weight of authority is against the appellant. Counsel for the appellant attempts to counter that authority by reference to the remarks of the Minister of Justice when s. 3 was introduced as an amendment to the Act in the 1952-53 sittings of Parliament (House of Commons Debates, 1-2 Eliz. II (1952-53), vol. II, pp. 1268-1269). The interpretation of words found in a statute, by reference to speeches made in Parliament at the time legislation is introduced, has never found favour in our Courts: *Reference Re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 138, at 721 [S.C.R.], 561 [D.L.R.]. Nor, with respect to Mr. Newbould's able argument, do I find the words of the Minister of Justice at the time the present s. 3 was introduced to be particularly illuminating. He indicated that the amendment to the Act left companies with complex financial structures free to resort to the Act, but that it excluded companies which had only unsecured mercantile creditors. The Minister does not comment on the intended effect of the amendment on the myriad situations between those two extremes. This case is one such situation. These debtor companies had complex secured debt structures, but those debts were not, prior to the issuing of the debentures in August 1990, in the form contemplated by s. 3 of the Act. Like Richard C.J.Q.B. in *Re United Maritime Fishermen Co-op.*, supra, at pp. 52-53, I am not persuaded that the comments of the Minister of Justice assist in interpreting s. 3 of the Act in this situation.

82 The words of s. 3 are straightforward. They require that the debtor company have, at the time an application is made, an outstanding debenture or bond issued under a trust deed. No more is needed. Attempts to qualify those words are not only contrary to the wide reading the Act deserves, but can raise intractable problems as to what qualifications or modifications should be read into the Act. Where there is a legitimate debt which fits the criteria set out in s. 3, I see no purpose in denying a debtor company resort to the Act because the debt and the accompanying documentation was created for the specific purpose of bringing the application. It must be remembered that qualification under s. 3 entitles the debtor company to nothing more than consideration under the Act. Qualification under s. 3 does not mean that relief under the Act will be granted. The circumstances surrounding the creation of the debt needed to meet the s. 3 requirement may well have a bearing on how a court exercises its discretion at various stages of the application, but they do not alone interdict resort to the Act.

83 In holding that "instant" trust deeds can satisfy the requirements of s. 3 of the Act, I should not be taken as concluding that debentures or bonds which are truly shams, in that they do not reflect a transaction which actually occurred and do not create a real debt owed by the company, will suffice. Clearly, they will not. I do not, however, equate the two. One is a tactical device used to gain the potential advantages of the Act. The other is a fraud.

84 Nor does my conclusion that "instant" trust deeds can bring a debtor company within the Act exclude considerations of the good faith of the debtor company in seeking the protection of the Act. A debtor company should not be allowed to use the Act for any purpose other than to attempt a legitimate reorganization. If the purpose of the application is to advantage one creditor over another, to defeat the legitimate interests of creditors, to delay the inevitable failure of the debtor company, or for some other improper purpose, the Court has the means available to it, apart entirely from s. 3 of the Act, to prevent misuse of the Act. In cases where the debtor company acts in bad faith, the Court may refuse to order a meeting of creditors, it may deny interim protection, it may vary interim protection initially given when the bad faith is shown, or it may refuse to sanction any plan which emanates from the meeting of the creditors: see Lawrence J. Crozier, "Good Faith and the Companies' Creditors Arrangement Act" (1989) 15 Can. Bus. L.J. 89.

(ii) Section 3 and the Prior Agreement with the Bank Limiting Creation of New Debt

85 The appellant also argues that the debentures did not meet the requirements of s. 3 of the Act because they were issued in contravention of a security agreement made between the companies and the bank. Assuming that the debentures were issued in contravention of that agreement, I do not understand how that contravention affects the status of the debentures for the purposes of s. 3 of the Act. The bank may well have an action against the debtor company for issuing the debentures, and it may have remedies against the holders of the debentures if they attempted to collect on their debt or enforce their security. Neither possibility, however, negates the existence of the debentures and the related trust deeds. Section 3 does not contemplate an inquiry into the effectiveness or enforceability of the s. 3 debentures, as against other creditors, as a condition precedent to qualification under the Act. Such inquiries may play a role in a judge's determination as to what orders, if any, should be made under the Act.

(iii) Section 3 and the Appointment of a Receiver-Manager

86 The third argument made by the bank relies on its installation of a receiver-manager in both companies prior to the issue of the debentures. I agree with Finlayson J.A. that the placement of a receiver, either by operation of the terms of an agreement or by court order, effectively removes those formerly in control of the company from that position, and vests that control in the receiver-manager: *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd without deciding this point (1989), 65 Alta. L.R. (2d) 374 (C.A.). I cannot, however, agree with his interpretation of the order of Saunders J. I read that order as effectively turning the receiver into a monitor with rights of access, but with no authority beyond that. The operation of the business is specifically returned to the companies. The situation created by the order of Saunders J. can usefully be compared to that which existed when the application was made in *Hat Development Ltd.* Forsyth J., at p. 268 C.B.R., states:

> The receiver-manager in this case and indeed in almost all cases is charged by the court with the responsibility of managing the affairs of a corporation. It is true that it is appointed pursuant, in this case, to the existence of secured indebtedness and at the behest of a secured creditor to realize on its security and retire the indebtedness. Nonetheless, this receiver-manager was court-appointed and not by virtue of an instrument. As a court-appointed receiver it owed the obligation and the duty to the court to account from time to time and to come before the court for the purposes of having some of its decisions ratified or for receiving advice and direction. *It is empowered by the court to manage the affairs of the company and it is completely inconsistent with that function to suggest that some residual power lies in the hands of the directors of the company to create further indebtedness of the company and thus interfere, however slightly, with the receiver-manager's ability to manage*.

[Emphasis added.]

87 After the order of Saunders J., the receiver-manager in this case was not obligated to manage the companies. Indeed, it was forbidden from doing so. The creation of the "instant" trust deeds and the application under the Act did not interfere in any way with any power or authority the receiver-manager had after the order of Saunders J. was made.

88 I also find it somewhat artificial to suggest that the presence of a receiver-manager served to vitiate the orders of Hoolihan J. Unlike many applications under s. 5 of the Act, the proceedings before Hoolihan J. were not ex parte and he was fully aware of the existence of the receiver-manager, the order of Saunders J., and the arguments based on the presence of the receiver-manager. Clearly, Hoolihan J. considered it appropriate to proceed with a plan of reorganization despite the presence of the receiver-manager and the order of Saunders J. Indeed, in his initial order he provided that the order of Saunders J. "remains extant." Hoolihan J. did not, as I do not, see that order as an impediment to the application or the granting of relief under the Act. Had he considered that the receiver-manager was in control of the affairs of the company, he could have varied the order of Saunders J. to permit the applications under the Act to be made by the companies: *Hat Development Ltd.*, at pp. 268-269 C.B.R. It is clear to me that he would have done so had he felt it necessary. If the installation of the receiver-manager is to be viewed as a bar to an application under this Act, and if the orders of Hoolihan J. were otherwise appropriate, I would order that the order of Saunders J. should be varied to permit

the creation of the debentures and the trust deeds and the bringing of this application by the companies. I take this power to exist by the combined effect of s. 14(2) of the Act and s. 144(1) of the *Courts of Justice Act*, 1984, S.O. 1984, c. 11.

89 In my opinion, the debentures and "instant" trust deeds created in August 1990 sufficed to bring the company within the requirements of s. 3 of the Act, even if in issuing those debentures the companies breached a prior agreement with the bank. I am also satisfied that, given the terms of the order of Saunders J., the existence of a receiver-manager installed by the bank did not preclude the application under s. 3 of the Act.

V Did Hoolihan J. Err in Exercising his Discretion in Favour of Directing that a Creditors' Meeting be Held to Consider the Proposed Plan of Reorganization?

90 As indicated earlier, the Act provides a number of points at which the Court must exercise its discretion. I am concerned with the initial exercise of discretion contemplated by s. 5 of the Act, by which the Court may order a meeting of creditors for purposes of considering a plan of reorganization. Hoolihan J. exercised that discretion in favour of the debtor companies. The factors relevant to the exercise of that discretion are as variable as the fact situations which may give rise to the application. Finlayson J.A. has concentrated on one such factor, the chance that the plan, if put before a properly constituted meeting of the creditors, could gain the required approval. I agree that the feasibility of the plan is a relevant and significant factor to be considered in determining whether to order a meeting of creditors: S.E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act," at pp. 594-595. I would not, however, impose a heavy burden on the debtor company to establish the likelihood of ultimate success from the outset. As the Act will often be the last refuge for failing companies, it is to be expected that many of the proposed plans of reorganization will involve variables and contingencies which will make the plan's ultimate acceptability to the creditors and the Court very uncertain at the time the initial application is made.

91 On the facts before Hoolihan J., there were several factors which supported the exercise of his discretion in favour of directing a meeting of the creditors. These included the apparent support of two of the three substantial secured creditors, the companies' continued operation, and the prospect (disputed by the bank) that the companies' fortunes would take a turn for the better in the near future, the companies' ongoing efforts — that eventually met with some success — to find alternate financing, and the number of people depending on the operation of the company for their livelihood. There were also a number of factors pointing in the other direction, the most significant of which was the likelihood that a plan of reorganization acceptable to the bank could not be developed.

92 I see the situation which presented itself to Hoolihan J. as capable of a relatively straightforward risk-benefit analysis. If the s. 5 order had been refused by Hoolihan J., it was virtually certain that the operation of the companies would have ceased immediately. There would have been immediate economic and social damage to those who worked at the plants, and those who depended on those who worked at the plants for their well-being. This kind of damage cannot be ignored, especially when it occurs in small communities like those in which these plants are located. A refusal to grant the application would also have put the investments of the various creditors, with the exception of the bank, at substantial risk. Finally, there would have been obvious financial damage to the owner of the companies. Balanced against these costs inherent in refusing the order would be the benefit to the bank, which would then have been in a position to realize on its security in accordance with its agreements with the companies.

93 The granting of the s. 5 order was not without its costs. It has denied the bank the rights it had bargained for as part of its agreement to lend substantial amounts of money to the companies. Further, according to the bank, the order has put the bank at risk of having its loans become undersecured because of the diminishing value of the accounts receivable and inventory which it holds as security and because of the ever-increasing size of the companies' debt to the bank. These costs must be measured against the potential benefit to all concerned if a successful plan of reorganization could be developed and implemented.

94 As I see it, the key to this analysis rests in the measurement of the risk to the bank inherent in the granting of the s. 5 order. If there was a real risk that the loan made by the bank would become undersecured during the operative

period of the s. 5 order, I would be inclined to hold that the bank should not have that risk forced on it by the Court. However, I am unable to see that the bank is in any real jeopardy. The value of the security held by the bank appears to be well in excess of the size of its loan on the initial application. In his affidavit, Mr. Gibbons of Coopers & Lybrand asserted that the companies had overstated their cash flow projections, that the value of the inventory could diminish if customers of the companies looked to alternate sources for their product, and that the value of the accounts receivable could decrease if customers began to claim set-offs against those receivables. On the record before me, these appear to be no more than speculative possibilities. The bank has had access to all of the companies' financial data on an ongoing basis since the order of Hoolihan J. was made almost 2 months ago. Nothing was placed before this Court to suggest that any of the possibilities described above had come to pass.

95 Even allowing for some overestimation by the companies of the value of the security held by the bank, it would appear that the bank holds security valued at approximately $4 million for a loan that was, as of the hearing of this appeal, about $2.3 million. The order of Hoolihan J. was to terminate no later than November 14, 1990. I am not satisfied that the bank ran any real risk of having the amount of the loan exceed the value of the security by that date. It is also worth noting that the order under appeal provided that any party could apply to terminate the order at any point prior to November 14. This provision provided further protection for the bank in the event that it wished to make the case that its loan was at risk because of the deteriorating value of its security.

96 Even though the chances of a successful reorganization were not good, I am satisfied that the benefits flowing from the making of the s. 5 order exceeded the risk inherent in that order. In my view, Hoolihan J. properly exercised his discretion in directing that a meeting of creditors should be held pursuant to s. 5 of the Act.

VI Did Hoolihan J. Err in Directing that the Bank and RoyNat Inc. Should be Placed in the Same Class for the Purposes of the Act?

97 I agree with Finlayson J.A. that the bank and RoyNat Inc., the two principal creditors, should not have been placed in the same class of secured creditors for the purposes of ss. 5 and 6 of the Act. Their interests are not only different, they are opposed. The classification scheme created by Hoolihan J. effectively denied the bank any control over any plan of reorganization.

98 To accord with the principles found in the cases cited by Finlayson J.A., the secured creditors should have been grouped as follows:

— Class 1 — The City of Chatham and the Village of Glencoe

— Class 2 — The Bank of Nova Scotia

— Class 3 — RoyNat Inc., Ontario Development Corporation, and those holding debentures issued by the company on August 29 and 31, 1990.

VII Did Hoolihan J. Err in Making the Interim Orders He Made?

99 Hoolihan J. made a number of orders designed to control the conduct of all of the parties, pending the creditors' meeting and the placing of a plan of reorganization before the Court. The first order was made on September 11, 1990, and was to expire on or before October 24, 1990. Subsequent orders varied the terms of the initial order somewhat, and extended its effective date until November 14, 1990.

100 These orders imposed the following conditions pending the meeting:

(a) all proceedings with respect to the debtor companies should be stayed, including any action by the bank to realize on its security;

(b) the bank could not reduce its loan by applying incoming receipts to those debts;

(c) the bank was to be the sole banker for the companies;

(d) the companies could carry on business in the normal course, subject to certain very specific restrictions;

(e) a licensed trustee was to be appointed to monitor the business operations of the companies and to report to the creditors on a regular basis; and

(f) any party could apply to terminate the interim orders, and the orders would be terminated automatically if the companies defaulted on any of the obligations imposed on them by the interim orders.

101 The orders placed significant restrictions on the bank for a 2-month period, but balanced those restrictions with provisions limiting the debtor companies' activities, and giving the bank ongoing access to up-to-date financial information concerning the companies. The bank was also at liberty to return to the Court to request any variation in the interim orders which changes in financial circumstances might merit.

102 These orders were made under the wide authority granted to the court by s. 11 of the Act. L.W. Houlden and C.H. Morawetz, in *Bankruptcy Law of Canada*, 3d ed. (Toronto: Carswell, 1989), at pp. 2-102 to 2-103, describe the purpose of the section:

> The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and it creditors. This aim is facilitated by s. 11 of the Act, which enables the court to restrain further proceedings in any action, suit or proceeding against the company upon such terms as the court sees fit.

103 A similar sentiment appears in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*. Gibbs J.A., in discussing the scope of s. 11, said at p. 7 [unreported, pp. 88-89 B.C.L.R.]:

> When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

104 Similar views of the scope of the power to make interim orders covering the period when reorganization is being attempted are found in *Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc. v. Nu-West Ltd.*, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.) at 114-118 [C.B.R.]; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) at 12-15 [C.B.R.]; *Quintette Coal Ltd. v. Nippon Steel Corp.*, an unreported judgment of Thackray J., released June 18, 1990 [since reported (1990), 47 B.C.L.R. (2d) 193 (S.C.)], at pp. 5-9 [pp. 196-198 B.C.L.R.]; and B. O'Leary, "A Review of the Companies' Creditors Arrangement Act," at p. 41.

105 The interim orders made by Hoolihan J. are all within the wide authority created by s. 11 of the Act. The orders were crafted to give the company the opportunity to continue in operation, pending its attempt to reorganize, while at the same time providing safeguards to the creditors, including the bank, during that same period. I find no error in the interim relief granted by Hoolihan J.

VIII Conclusion

106 In the result, I would allow the appeal in part, vacate the order of Hoolihan J. of October 18, 1990, insofar as it purports to settle the class of creditors for the purpose of the Act, and I would substitute an order establishing the three classes referred to in Part VI of these reasons. I would not disturb any of the other orders made by Hoolihan J.

Appeal allowed.

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Tab 6

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
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
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.

16 In making this determination, I have also taken into account the provisions of s. 61(2) of the *CCAA* which is the public policy exception. This section reads: "Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy".

17 The public policy exception has its origins in the UNCITRAL Model Law on Cross-Border Insolvency. Article 6 of the Model Law provides: "Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State". It is also important to note that the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (paragraphs 86-89) makes specific reference to the fact that the public policy exceptions should be interpreted restrictively.

18 I am in agreement with the commentary in the Guide to Enactment to the effect that s. 61(2) should be interpreted restrictively. The Final DIP Facility Order does not, in my view, raise any public policies issues.

19 I am satisfied that it is appropriate to grant the requested relief. The motion is granted and an order has been signed in the form requested to give effect to the foregoing.

Motion granted.

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Tab 7

2009 CarswellOnt 1998
Ontario Superior Court of Justice [Commercial List]

Indalex Ltd., Re

2009 CarswellOnt 1998, 176 A.C.W.S. (3d) 930, 52 C.B.R. (5th) 61

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

And In the Matter of a Plan of Compromise or Arrangement of Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canadian Inc. and Novar Inc. (Applicants)

Morawetz J.

Heard: April 8, 2009
Judgment: April 8, 2009
Docket: CV-09-8122-00CL

Counsel: Linc Rogers, Katherine McEachern for Applicants
Wael Rostom for JPMorgan Chase Bank (N.A.) as Pre-petition Agent, DIP Agent for Proposed DIP Lenders
Ashley Taylor for FTI Consulting Canada ULC, Monitor

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
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 --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

I Ltd. was involved in Companies' Creditors Arrangement Act proceedings — I Ltd. brought motion for approval of Debtor-In-Possession ("DIP") financing, pursuant to credit agreement with its US parent and its affiliates, and for post-filing guarantee — Motion granted — DIP financing was required — Structure of DIP credit agreement was reasonable — Modifications proposed were appropriate.

Table of Authorities

Cases considered by *Morawetz J.*:

A & M Cookie Co. Canada, Re (2008), 49 C.B.R. (5th) 188, 2008 CarswellOnt 7136 (Ont. S.C.J. [Commercial List]) — followed

InterTAN Canada Ltd., Re (2008), 49 C.B.R. (5th) 248, 2008 CarswellOnt 8040 (Ont. S.C.J. [Commercial List]) — followed

Intertan Canada Ltd., Re (2009), 49 C.B.R. (5th) 232, 2009 CarswellOnt 324 (Ont. S.C.J. [Commercial List]) — referred to

Pliant Corp. of Canada Ltd., Re (March 24, 2009), Doc. 09-CL-8007 (Ont. S.C.J.) — followed

Smurfit-Stone Container Inc., Re (2009), 50 C.B.R. (5th) 71, 2009 CarswellOnt 391 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

MOTION by company involved in Companies' Creditors Arrangement Act proceedings for approval of debtor-in-possession financing and for post-filing guarantee.

***Morawetz J.* (Orally):**

1 On April 8, 2009, the record was endorsed as follows: "Order granted in the form presented, as amended. Brief reasons will follow." These are those reasons.

2 The Applicants brought this motion for:

> (i) the approval of debtor-in-possession financing ("DIP Financing") pursuant to a Credit Agreement (the "DIP Credit Agreement") among the Applicants, their U.S. parent and its affiliates (collectively, ("Indalex U.S.") and together with the Applicants, (collectively, the "Indalex Group")) and JPMorgan Chase Bank (N.A.) ("JPMorgan"), in its capacity as Administrative Agent for the Lenders (collectively, the "DIP Lenders") and
>
> (ii) the approval of a secured guarantee granted by the Applicants in favour of the DIP Lenders, guaranteeing the obligations of Indalex U.S. under the DIP Credit Agreement (the "Post-Filing Guarantee").

3 Counsel to the Applicants submits that the purpose of these CCAA proceedings is to preserve value for a broad cross-section of stakeholders of the Applicants including their employees, customers, business partners, suppliers and secured and other creditors and that in order to accomplish this goal, the Applicants need stable and reliable access to DIP Financing. Counsel further submits that one of the pre-conditions to obtaining such financing is that the Applicants provide a guarantee (the "Post-Filing Guarantee") of the obligations of Indalex U.S. Indalex U.S. is currently subject to Chapter 11 proceedings.

4 Counsel to the Applicants further submits that the authorization of DIP Financing and the Post-Filing Guarantee is reasonable, appropriate and justified in the circumstances and that DIP Financing is necessary to preserve the opportunity to seek a viable growing concern solution and that sufficient safeguards are in place to protect the pre-filing collateral position of the Applicants' unsecured creditors and any potential prejudice in connection with the granting of the Post-Filing Guarantee is substantially outweighed by the potential benefit to stakeholders, derived from the DIP Financing.

5 The relevant facts, in support of the requested relief, are set out at paragraph 4 of the factum submitted by counsel to the Applicants.

6 The record has established, in my view, that DIP financing is required. However, prior to approving the DIP Financing pursuant to the DIP Credit Agreement, it is necessary to consider a number of factors which include the benefit the Applicants will receive from the DIP Facility and the collateral that is charged to secure the DIP Facility. See *Intertan Canada Ltd., Re* (2009), 49 C.B.R. (5th) 232 (Ont. S.C.J. [Commercial List]). In this case, the proposed collateral being provided to the DIP Lenders includes a secured guarantee of the Applicants in favour of the DIP Lenders, guaranteeing the obligations of Indalex U.S. under the DIP Credit Agreement.

7 The situation in which proposed DIP financing has been conditional on a guarantee by the Canadian debtor of the U.S. debtors' obligations has recently been considered by this court in *A & M Cookie Co. Canada, Re* (2008), 49 C.B.R. (5th) 188 (Ont. S.C.J. [Commercial List]), *InterTAN Canada Ltd., Re* (2008), 49 C.B.R. (5th) 248 (Ont. S.C.J. [Commercial List]), *Smurfit-Stone Container Inc., Re*, (January 27, 2009, CV-09-7966-00CL), [2009 CarswellOnt 391 (Ont. S.C.J. [Commercial List])] and *Pliant Corp. of Canada Ltd., Re* (March 24, 2009), Doc. 09-CL-8007 (Ont. S.C.J.).

8 These cases have established that the following factors are relevant in determining the appropriateness of authorizing a guarantee in connection with a DIP facility:

> (a) the need for additional financing by the Canadian debtor to support a going concern restructuring;
>
> (b) the benefit of the breathing space afforded by CCAA protection;
>
> (c) the availability (or lack thereof) of any financing alternatives, including the availability of alternative terms to those proposed by the DIP lender;
>
> (d) the practicality of establishing a stand-alone solution for the Canadian debtors;
>
> (e) the contingent nature of the liability of the proposed guarantee and the likelihood that it will be called on;
>
> (f) any potential prejudice to the creditors of the entity if the request is approved, including whether unsecured creditors are put in any worse position by the provision of a cross-guarantee of a foreign affiliate than as existed prior to the filing, apart from the impact of the super-priority status of new advances to the debtor under the DIP financing;
>
> (g) the benefits that may accrue to the stakeholders if the request is approved and the prejudice to those stakeholders if the request is denied; and
>
> (h) a balancing of the benefits accruing to stakeholders generally against any potential prejudice to creditors.

9 In this case, I am satisfied that the Applicants have established the following:

> (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;
>
> (b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;
>
> (c) there is no other alternative available to the Applicants for a going concern solution;
>
> (d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;
>
> (e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;

(f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;

(g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order (see [10] and [11] below); and

(h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing.

10 The Monitor also filed a report in respect of the motion. The Monitor indicated that it was concerned that any DIP structure securing the Canadian Pre-Filing Guarantee via court-ordered charge could potentially prejudice Canadian stakeholders by pre-determining the issue of the validity and enforceability of the Canadian Pre-Filing Guarantee. As a result of the concerns raised by the Monitor, the Applicants and the Senior Secured Creditors addressed the situation, the details of which are set out at paragraph 25 of the Monitor's First Report.

11 As stated at paragraph 26 of the Monitor's Report, the intent of the structure is for the Senior Secured Lenders to obtain the benefit of Court-ordered charges securing the DIP Financing and the cross-guarantees of the U.S. Additional Advances and the Canadian Additional Advances while maintaining the *status quo* vis-à-vis the Canadian Pre-Filing Guarantee.

12 The Monitor's Report also summarizes the DIP Credit Agreement. The DIP Credit Agreement provides a maximum facility of up to $84.6 million and the Applicants may draw up to $24.36 million, and the U.S. Debtors are able to borrow the balance, in each case subject to margin availability under borrowing-based calculations for the Applicants and the U.S. Debtors.

13 Counsel to the Monitor has reviewed the security of the Senior Secured Lenders, other than the Canadian Pre-Filing Guarantee and has provided an opinion to the Monitor which states that, subject to the assumptions and qualifications contained therein, the Senior Secured Lenders' security is valid and enforceable and ranks in priority to other claims with respect to accounts and inventory.

14 The Monitor has also referenced that maintaining business operations is in the interests of all stakeholders as it will afford the Applicants the opportunity to develop a viable restructuring plan designed to maximize recoveries for all stakeholders and furthermore, maintaining operations continues the employment of approximately 750 people as well as providing ongoing business for suppliers and customers. The Monitor has also reported that if the Applicants' request for approval of the DIP Agreement was to be denied, the Applicants would be unable to continue operations, both likely resulting in the forced liquidation of the assets to the detriment of creditors, employees, suppliers and customers.

15 The Monitor also considered the potential prejudice to creditors and reports that the likelihood of a call on the Applicants' guarantee of the U.S. Additional Advances is unlikely and that the approval of the DIP Agreement and the proposed structuring of the DIP Charge provide appropriate protection for the DIP Lenders and appropriately balances the benefits to stakeholders that will accrue from such approval with the need to protect the interests of the Canadian creditors against any potential prejudice.

16 The Monitor concludes its Report by noting that it is of the view that approval of the DIP Agreement is in the best interests of the Applicants and their stakeholders and recommends approval of the DIP Agreement and the granting of the DIP Charge.

17 I am satisfied that the Applicants have established that the granting of DIP Financing is necessary and that the structure of the DIP Credit Agreement is reasonable in the circumstances. DIP Financing pursuant to DIP Credit Agreement is accordingly approved.

18 The proposed Amended and Restated Order also provides for certain restructuring powers and an agreed upon priority as between the Directors' Charge, the Administrative Charge and the DIP Lenders' Charge. In my view, these modifications are appropriate and are approved.

19 An order shall issue in the form presented, as amended, which order I have signed.

Motion granted.

Tab 8

2008 CarswellOnt 8040
Ontario Superior Court of Justice [Commercial List]

InterTAN Canada Ltd., Re

2008 CarswellOnt 8040, 49 C.B.R. (5th) 248

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 and Arrangement of InterTAN Canada Ltd. and Tourmalet Corporation

Morawetz J.

Heard: November 26, 2008
Oral reasons: November 26, 2008 *
Docket: Toronto CV-0800007841-00 CL

Proceedings: additional reasons at *InterTan Canada Ltd., Re* (2009), 2009 CarswellOnt 687 (Ont. S.C.J. [Commercial List])

Counsel: E. Sellers, J. Dacks, J. MacDonald for Applicants
M. Forte for Bank of America, N.A.
J. Carfagnini, L.J. Latham for Alvarez and Marsal Canada Inc.

Subject: Insolvency; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

I was speciality retailer of consumer electronics and was operating Canadian subsidiary of major United States based electronics retailer — T was affiliated non-operating holding company whose sole asset was preferred stock of I — I's sole credit facility stemmed from US parent company — US parent company filed for bankruptcy protection under Chapter 11 of United States Bankruptcy Code — Secured credit facility was terminated and parties entered in debtor-in-possession loan facility ("DIP facility") — Monitor was of view that liquidation and wind down of I would eliminate over 3,000 jobs and would detrimentally affect dealers, joint-venture partners and other stakeholders — Monitor was supportive of I's efforts to obtain interim financing so as to avoid liquidation and to facilitate restructuring or going concern sale under Companies' Creditors Arrangement Act ("CCAA") — I and T brought application for protection under CCAA — Application granted — I was qualifying debtor corporation and T was qualifying affiliated debtor company within meaning of CCAA — Both I and T had obligations in excess of $5 million qualifying limit and as result of default in secured credit facility, both were insolvent — Jurisdiction of court to receive application was established.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Approval of DIP facility — I was speciality retailer of consumer electronics and was operating Canadian subsidiary of major United States based electronics retailer — T was affiliated non-operating holding company whose sole asset was preferred stock of I — I's sole credit facility stemmed from US parent company — US parent company filed for bankruptcy protection under Chapter 11 of United States Bankruptcy Code — Secured credit facility was terminated and parties entered in debtor-in-possession loan facility ("DIP facility") — DIP facility would only extend credit to I if it was borrower under DIP facility and order was obtained that provided for super priority

charge on all assets and property of I as security for DIP facility — DIP facility provided that credit would only be advanced to US parent company on condition that I became joint and several borrower for all advances and became guarantor for entire facility and that I's assets were pledged as security for obligations — I and T brought application for protection under CCAA — Application granted — Issue arose as to requirement for approval of DIP facility — DIP facility was approved — Approval of DIP facility was considered in light of alternatives — Onus was on applicant to establish that extraordinary relief should be granted — Potential upside of going concern operation was preferable to liquidation notwithstanding provisions of DIP facility which effectively transferred assets from I to another member of enterprise group — It was appropriate to approve DIP facility given prospects of going concern operation, continued employment of over 3,000 individuals and benefits of continued operation for third party stakeholders — Fact that certain creditor groups would be largely unaffected by CCAA proceeding and creation of unsecured creditors charge provided degree of protection to those creditors was also taken into account.

Table of Authorities

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — referred to

s. 11(2) — referred to

APPLICATION by debtor company and affiliated holding company for protection under *Companies' Creditor Arrangement Act*.

***Morawetz J.*:**

1 The applicants, InterTAN Canada Ltd., ("InterTAN"), and Tourmalet Corporation, ("Tourmalet"), brought this application on November 10, 2008. At the conclusion of argument, an order was granted providing the applicants with protection under the Companies' Creditors Arrangement Act, ("CCAA"), with reasons to follow. The following are those reasons.

2 InterTAN is incorporated under the laws of the Province of Ontario. It is a leading speciality retailer of consumer electronics in Canada and is the operating Canadian subsidiary of the major United States based electronics retailer, Circuit City Stores, Inc., ("Circuit City").

3 InterTAN is a privately held Ontario corporation and sole direct subsidiary of InterTAN Inc., which is owned by the Delaware corporation Ventoux International Inc., and Tourmalet, a Nova Scotia unlimited liability company. Tourmalet is in turn wholly owned by Ventoux, which is wholly owned by Circuit City. As such, InterTAN is an indirect wholly-owned subsidiary of Circuit City. Tourmalet is an affiliated non-operating, holding company whose sole asset is the preferred stock of InterTAN, Inc. which has sought insolvency protection.

4 InterTAN operates retail stores and licences dealer-operated stores selling brand name and private label consumer electronics throughout Canada under the trade name, "The Source by Circuit City", ("The Source").

5 InterTAN currently has 772 retail stores in Canada and employs approximately 3,130 people.

6 InterTAN's sole credit facility is through an agreement between Circuit City, certain U.S. affiliates, InterTAN and Bank of America N.A. as agent, together with other loan parties, (the "Secured Credit Facility"). InterTAN has historically relied on the Secured Credit Facility to maintain a consistent cash flow for its operations.

7 Circuit City and certain of its affiliates filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Virginia on November 10, 2008.

8 As a result of the Chapter 11 proceedings, the Secured Credit Facility was terminated and the parties to that loan agreement entered into a Debtor-in-Possession loan facility, (the "DIP Facility"), that replaced the Secured Credit Facility.

9 Counsel to InterTAN advised that the lenders providing the DIP Facility would only extend credit to InterTAN if it was a borrower under the DIP Facility and an initial order was obtained from this court, in the CCAA proceedings, providing for a super priority charge on all of the assets and property of InterTAN (subject only to certain court ordered charges) as security for the DIP Facility.

10 Counsel for InterTAN also advised that witout the DIP Facility, InterTAN was insolvent as it was not able to:

(a) access operating credit;

(b) operate as a going concern; or

(c) satisfy all of its ongoing obligations to its employees, dealers, landlords, suppliers and other stakeholders.

11 Counsel submitted that the applicants required a stay of proceedings and other relief sought in order to permit InterTAN to continue operating as it pursues restructuring options, which include the potential sale of the business, in order to maximize enterprise value. The applicants took the position that it was necessary and in the best interests of the applicants and their stakeholders, and in light of the Chapter 11 proceedings, that the applicants be afforded the protection provided by the CCAA as they attempt to restructure their affairs.

12 Counsel also submitted given the current economic situation, it was not practical for InterTAN to find a replacement to the Secured Credit Facility.

13 The applicants proposed Alvarez & Marsal Canada ULC, ("A & M"), as the Monitor in these proceedings and a consent to act was filed by A & M.

14 The application was supported by the affidavit of Mark J. Wong, Vice President, General Counsel and Secretary of InterTAN as well as a report filed by A & M in its capacity as proposed Monitor, (the "Report").

15 The purpose of the Report was to provide the court with information concerning:

(a) background on InterTAN's business;

(b) the financial position of InterTAN;

(c) the current Secured Credit Facility in place for InterTAN;

(d) recent action by InterTAN's trade creditors that have impacted its cash flow;

(e) the proposed restructuring of InterTAN and the proposed restructuring alternatives;

(f) the terms of the proposed DIP Facility;

(g) the implications of the DIP Facility for InterTAN's Canadian creditors; and

(h) A & M's summary comments.

16 A & M was retained by InterTAN on October 31, 2008, as the proposed Monitor. In the ten days prior to the bringing of this application, A & M has been reviewing InterTAN's available financial information in an attempt to gain knowledge of the business and financial affairs of InterTAN and has been preparing for this anticipated CCAA application.

17 A & M commented on the Secured Credit Facility which consists of a U.S. $1.25 billion commitment to Circuit City and certain of its affiliates, (the "U.S. Debtors"), and a U.S. $50 million commitment to InterTAN.

18 InterTAN has not guaranteed and is not liable for the borrowings of the U.S. Debtor under the Secured Credit Facility. Tourmalet is not a party to the Secured Credit Facility but it has guaranteed InterTAN's obligations thereunder. A & M is of the understanding that this guarantee is unsecured.

19 As a result of the commencement of the Chapter 11 proceedings, the Secured Credit Facility was terminated and the parties to that loan agreement entered into the DIP Facility. A & M is of the understanding that, unlike the Secured Credit Facility, the DIP Facility provides that credit would only be advanced to Circuit City on the condition that InterTAN agreed to become a joint and several borrower for all advances and a guarantor for the entire facility, including existing advances to the U.S. Debtors and to have all of InterTAN's assets pledged as security for those obligations. Further, A & M was of the understanding that the lenders providing the DIP Facility would only extend credit to InterTAN if the Dip Facility was approved by an order of this court with a charge over all of the assets and property of InterTAN.

20 As of September 30, 2008, InterTAN had total assets of approximately $370 million. According to its internal, unaudited financial statements as at September 30, 2008, InterTAN's current assets represented in excess of $218 million of it total assets, including $148 million of inventory, nearly $50 million of current accounts and notes receivable and $5.8 million in cash. Non-current assets were comprised primarily of property, plant and equipment of $45 million, notes receivable of $91 million (representing promissory notes from InterTAN, Inc, and Tourmalet) and goodwill of $8.7 million.

21 As at September 30, 2008, InterTAN's total liabilities were approximately $110 million which consisted of current liabilities of approximately $90 million, miscellaneous long-term liabilities of approximately $20 million and a small inter-company payable of $250,000. Current liabilities as at September 30, 2008 included nearly $50 million of trade accounts payable, accrued expenses of $22.2 million, deferred service contract revenue of $9.8 million and short-term bank borrowings of $7.5 million.

22 In preparation for this application, a 17-week Cash Flow Forecast, (the "Cash Flow Forecast"), was prepared by InterTAN, with the assistance of its financial advisor, FTI Consulting. A & M reviewed the Cash Flow Forecast and noted that InterTAN's borrowings under the Secured Credit Facility were projected to be approximately $43.3 million through November 9, 2008. The Cash Flow Forecast projects that InterTAN will require further incremental funding during the cash flow period of up to $19.8 million, such that cumulative credit requirements to fund its operations are projected to peak at approximately $63 million during the week ending November 30, 2008, $43.3 million of borrowings under the Secured Credit Facility plus approximately $19.8 million of incremental borrowings under the DIP Facility.

23 As a result of the seasonal nature of InterTAN's business, cash requirements decrease as a result of Christmas sales such that the expected borrowings under the DIP Facility are projected to be reduced to approximately $1 million by January 4, 2009. From that time forward, the Cash Flow Forecast indicates that borrowings under the DIP Facility will range from approximately $600,000 to $8.6 million through the week ending March 1, 2009.

24 A & M is of the understanding that the portion of the DIP Facility available to InterTAN will remain fully drawn, with the funds not needed to fund InterTAN's operations being advanced by InterTAN to the U.S. Debtors. A & M notes

that there is presently no mechanism to ensure repayment of the amounts advanced by InterTAN to the U.S. Debtors and no mechanism to ensure that sufficient funds would be repaid to service InterTAN's liquidity needs.

25 The Secured Credit Facility is in default as a result of the Chapter 11 proceedings. The result of this default is the termination of the Secured Credit Facility, which causes all obligations under the Canadian Facility to become automatically due and payable. As of November 9, 2008, InterTAN had outstanding borrowings under the Secured Credit Facility of approximately $43.3 million.

26 A & M specifally points out that InterTAN's obligations under the credit agreement are limited to the amounts borrowed by InterTAN. As security for the obligations, InterTAN executed both a general security agreement and a deed of hypothec on moveable property in favour of the secured lenders.

27 A & M has received a preliminary opinion from its independent counsel that Bank of America holds valid and perfected security in Ontario over the inventory, receivables and intangible assets of InterTAN described in the security documents.

28 Over the past few months, as a result of public reports concerning potential liquidity concerns at Circuit City, several of InterTAN's significant suppliers have shortened their credit terms, requiring cash in advance or on delivery, which has had the effect of increasing the exposure of the secured lenders and decreasing trade payable. A & M is of the view that it is essential that InterTAN's suppliers continue to supply InterTAN throughout the crucial holiday sales period and while InterTAN has access to sufficient credit to obtain holiday season levels of inventory.

29 In order to ensure the continuity of InterTAN's supply chain from outside North America where the stay of proceedings will not apply, InterTAN is proposing to continue to pay foreign trade creditors and suppliers in the ordinary course both before and after the date of filing.

30 With respect to North American suppliers, InterTAN proposes to freeze all pre-filing trade claims until further order of the court, subject to the Monitor having discretion

> (i) to authorize critical supplier payments for pre-filing amounts not to exceed $2 million (subject to further order of the court); and
>
> (ii) to authorize the payment of any other costs and expenses that are deemed necessary for the preservation of InterTAN's property and business.

31 InterTAN has also advised A & M that it has agreed to enter into a Key Employee Retention Plan, the ("KERP"), with certain of its key management employees. A & M is of the understanding that the maximum amount payable under the KERP will not exceed $838,000.

32 It is clear that the financing of InterTAN's Canadian operations are intertwined with the financing of Circuit City's U.S. operations as the Canadian and U.S. entities are parties to the same credit agreement. The result of the commencement of the Chapter 11 proceedings is that InterTAN no longer has access to financing under the Secured Credit Facility and would be unable to purchase inventory and discharge its obligations in the ordinary course.

33 A & M has acknowledged that it has not been a party to the negotiations between InterTAN and the secured lenders. A & M is of the understanding that the secured lenders have advised InterTAN that they are only willing to continue to extend credit to InterTAN under the DIP Facility as part of the CCAA filing co-ordinated with the Chapter 11 proceedings. The total amount of the DIP Facility will be U.S. $1.1 billion including a maximum Canadian commitment of U.S. $50 million for InterTAN, which could, in certain circumstances, escalate to U.S. $60 million.

34 The borrowers, including InterTAN, will be jointly and severally liable for the amounts outstanding under the DIP Facility, meaning that the obligations under the DIP Facility will be cross-guaranteed and cross-collateralized and

that InterTAN and Tourmalet will be liable for the amounts drawn under the DIP Facility by the U.S. Debtors and will pledge their assets as security for the U.S. Debtor's obligations.

35 The applicants will grant the DIP lenders security, evidenced by a court ordered charge on the applicants' assets and property, (the "DIP Charge"), such that the security over the applicants' property and assets will rank as follows:

(i) the administrative charge in the amount of $2 million;

(ii) the directors' charge in the amount of $19.3 million;

(iii) the KERP charge in the amount of $838,000.

(iv) the DIP Charge to the maximum amount borrowed by InterTAN under the DIP Facility;

(v) a $25 milllion charge, (the "Unsecured Creditors Charge"), to secure payment of the claims of Canadian pre-filing unsecured creditors;

(vi) the remainder of the DIP Charge pertaining to the guaranteed liabilities of the applicants to the DIP lenders over and above the amount borrowed by InterTAN under the DIP Facility.

36 InterTAN has advised A & M that the proposed DIP Facility, while not perfect, represents the only alternative available to the company, emphasizing that the Dip Facility will ensure the continuation of operations and employment for all of the current employees. In addition, because the approval of the DIP Facility is a condition precedent to all lending, the entire enterprise and all business and jobs in the North America operations would be at risk if the DIP Facility was not approved.

37 Pursuant to the proposed initial order, InterTAN is entitled, but not required to pay certain expenses payable on or after the date of the initial order, as well as amounts owing for certain goods and services supplied prior to the date of the initial order. These expenses and obligations include employee claims, amounts due to logistics or supply-chain providers and certain customs brokers, trade vendors and suppliers outside of North America and amounts related to servicing warranties and honouring gift cards and reward and loyalty programmes. As such, a significant portion of InterTAN's liabilities will not be affected by the CCAA stay of proceedings.

38 It is estimated that liabilities of approximately $26.8 million, made up of $22.5 million of trade accounts payable, net of estimated potential set-offs, and $4.3 million of joint venture partner deposits and other smaller accrued liabilities, would be stayed by the initial order. In addition, management estimates that there will be $5 million of outstanding cheques that may also be stayed. Therefore, the estimated total trade creditors that may be stayed by the initial order are in the magnitude of between $26.8 and $31.8 million net of estimated potential set-offs.

39 A & M has also been provided with an extract of a report prepared on behalf of the secured lenders to estimate the net orderly liquidation value of InterTAN's inventory. This extract has been filed with the court but due to the sensitive information contained therein, it is the subject of a sealing order.

40 In addition to inventory assets addressed in the report extract, InterTAN also has accounts receivable, and property, plant and equipment. These assets have a combined net book value of approximately $80 million.

41 A & M has not conducted a detailed review of the realizable value of the assets but, the view of A & M, when considered together with the net orderly liquidation value of the inventory, the value of InterTAN's combined assets in an orderly wind down of the business far exceeds the current borrowing under the Secured Credit Facility.

42 Prior to the cross-collateralization in enhanced security provided for under the DIP Facility, A & M is of the view that it is likely that the trade creditor claims of $26.8 million to $31.8 million discussed above, would receive a meaningful recovery in an orderly wind down of the business.

43 InterTAN had reported EBITDA of $33.1 million for the fiscal year ended February 28, 2008 and, depending on the outcome of the critical holiday sales period, it is expecting EBITDA for fiscal 2009 to be approximately $26 million. Although A & M has not conducted any type of enterprise valuation of InterTAN and has not had the opportunity to engage in any discussions with the investment banking advisors, InterTAN's projected EBITDA results would ordinarily auger well for a potential going concern solution.

44 In summary, A & M is of the view that:

(i) the liquidation and wind down of InterTAN would eliminate over 3,000 jobs; and

(ii) would detrimentally affect dealers, joint-venture partners and other stakeholders.

45 In these circumstances, A & M is supportive of InterTAN's efforts to obtain interim financing, so as to avoid a liquidation, and to facilitate a restructuring or a going concern sale under the CCAA.

46 A & M also points out that the DIP lenders have agreed to the creation of the $25 million Unsecured Creditors Charge for the payment of pre-filing unsecured creditors. This charge provides some measure of protection for the unsecured creditors during a going concern restructuring of InterTAN. It is acknowledged that, if InterTAN achieves a going concern sale and provided that InterTAN or a buyer pays or honours certain other pre-filing claims as contemplated by the initial order, the result of the Unsecured Creditors Charge would appear to be positive. However, if no going concern outcome is achieved and there is a wind down after the initial order, those unsecured creditors may well receive a less meaningful recovery than they might receive in an immediate liquidation of InterTAN.

47 Having reviewed the record and having heard submissions, I am satisfied that InterTAN is a qualifying debtor corporation and Tourmalet is a qualifying affiliated debtor company within the meaning of the CCAA.

48 Both have obligations in excess of the $5 million qualifying limit and as a result of default in the Secured Credit Facility, the applicants are insolvent.

49 The jurisdiction of this court to receive the CCAA application has been established.

50 The applicants sought an initial order under s.11 of the CCAA. The required statement of projected cash flow and other financial documents required under ss. 11(2) have been filed. The application was not opposed by any party appearing.

51 The only real significant issue on the initial application was the requirement for approval of the DIP Facility.

52 It is clear that the DIP Facility results in a substantial change to the status quo. The use of the assets of InterTAN as a basis for obtaining finance for Circuit City raises a number of questions, especially when the approval of the DIP Facility could very well affect InterTAN's ability to honor its current obligations.

53 The parties come to court, having negotiated the DIP Facility. They insist that this court make an immediate order, which approves the DIP Facility. If the DIP facility did not receive such approval, InterTAN indicated that there would be no credit facilities available and the enterprise would collapse.

54 It is recognized that in order to maintain its business activities InterTAN must have access to funds to enable it to continue to pay for inventory as well as all other costs associated with the running of the business. If there are no credit facilities, there is very little prospect of reorganizing or restructuring InterTAN.

55 The issue is whether it is appropriate in the circumstances for InterTAN to provide support for its indirect parent, Circuit City.

56 On a motion such as this, it is necessary for the court to consider the approval of the DIP Facility in light of the alternatives. In this case, InterTAN says there are no alternatives and no further time to consider alternatives. However, the parties who could be detrimentally affected by the implementation of the DIP Facility, namely North American trade creditors, are not before the court, and it is open to speculate as to what this group would have to say on the issue. On the one hand, they could view the proposal favourably, as it could result in the continuation of InterTAN's business and thereby provide an outlet for ongoing sales. On the other hand, they could very well take the position that in a liquidation, they would get paid, and that this would be the preferred economic alternative, as opposed to the risk associated with the impaired ability of InterTAN to pay its obligations if the DIP Facility is approved.

57 This application was essentially brought on an ex-parte basis. The only other parties attending in court were the secured lenders and the proposed monitor. Timing was dictated to a degree by the applicant and the secured lenders. They had negotiated their financing and had applied for Chapter 11 protection. The relief being sought on this initial application was unusual, and I have no doubt that this was recognized by all parties.

58 In my view, the court has the jurisdiction to grant the requested relief. However, in situations such as this, it is up to the applicant to convince the court that it should exercise its discretion to grant this extraordinary relief. In this case, and as a general principle, it is up to the applicants to present sufficient evidence that would enable the court to conclude that such an order is appropriate, not only on factual grounds but also on the basis of the broad remedial purpose of and the flexibility inherent in the CCAA and the broad power of the court to stay proceedings under section 11 of the CCAA.

59 It must be recognized that if debtors and secured lenders are going to continue with the practice of requesting such extreme relief on an initial application, with little or no notice, the quid pro quo is that the applicant must establish the evidentiary basis for the requested relief. In the absence of such evidence, parties should have no expectation that the court will grant such extraordinary relief. The alternatives open to the court are clear. In certain circumstances, the motion could be adjourned until such time as the matter could be considered on a full record, or, alternatively, motions could be dismissed. Evidence can be provided by a representative of the applicants, as well as other sources such as the secured lenders or the proposed monitor or in some cases, representatives of key creditor groups.

60 This is not the first time that an issue like this has come before the court in recent weeks. No doubt the situation has been exacerbated by the current economic situation and the accompanying liquidity crisis. The record in this case indicates that there is a liquidity crisis.

61 By way of example, the CCAA proceedings of A & M Cookie Company Canada, came before this court on Friday, October 10, 2008 with a request to approve a ratification agreement under which it was conceivable that U.S. $5 million of assets of the debtor would not be available to the current creditors of the debtor. I deferred consideration of that matter until the following Tuesday so that the parties could provide additional evidence to support the request. The debtor did file additional material and an order was made approving the ratification agreement.

62 In my reasons, I noted the following: "Counsel to the proposed monitor advise that the monitor had not been in a position to comment on the liquidation analysis and was not in a position to provide any meaningful report on the potential impact of the ratification agreement. It would have been helpful if the monitor had been involved in the process at an earlier stage. The court certainly would have benefitted from an analysis of this situation."

63 In this case, the proposed monitor did become involved some 10 days before the application. A & M was in a position to provide a report which I found to be of great assistance. In fact, in the absence of such a report, it is questionable as to whether the court would have been in a position to consider whether it was appropriate to approve the DIP Facility.

64 However, it seems to me that the A & M report could have been more comprehensive. I do not intend this statement to be in any way critical of A & M. On the contreary, under the circumstances, I commend them for their outstanding effort. A & M was retained 10 days before the application, and they did not have the time nor the mandate to review the affairs of InterTAN in great detail. A & M was not party to the negotiations between InterTAN and the secured lenders.

The effectiveness of A & M was to some degree compromised by a lack of information. For example, A & M did not see documentation relating to the DIP Facility until the day before the application.

65 Had Circuit City and InterTAN provided the proposed monitor with relevant and verifiable information pertaining to the initial application on a timely basis, I have no doubt that a more comprehensive report could have been issued.

66 A party, who is being nominated as a court officer can, in the circumstances, play a pivotal role on an initial application. Generally speaking, the process can be enhanced if the debtor applicants take timely steps to involve the proposed monitor in the events leading up to an initial application.

67 It is recognized that debtor companies in distress face certain practical realities. They may be required to keep their status and intentions confidential, but if such debtors and their secured lenders have expectations and/or requirements of wide sweeping relief on initial applications, it is incumbent upon the applicants to present the evidentiary case for such relief. In doing so, such applicants have to take into consideration the benefits of having supporting evidence filed by a proposed court officer, who can be looked to by the court to provide a degree of objectivity to the proceedings.

68 The benefits of having such evidence coming from the proposed monitor cannot be underestimated, especially in circumstances where the volume of documentation that is being relied upon by the parties at the initial application is such that it creates additional practical difficulties for the judge to read and digest the information in an extremely short period of time.

69 In this case, however, I concluded, having considered and balanced the alternatives, that the DIP Facility should be approved. In my view, the potential upside of a going concern operation was preferable to a liquidation, notwithstanding the provisions of the DIP Facility which effectively transfers assets from InterTAN to another member of the enterprise group. It was in my view, appropriate to approve the DIP Facility, taking into account the prospects of a continued going concern operation, the continued employment of over 3000 individuals and the benefits of a continued operation for other third party stakeholders. I also took into account that certain creditor groups would be largely unaffected by the CCAA proceeding and that the creation of the Unsecured Creditors Charge provides in theory, a degree of protection to this group of creditors, who could otherwise be detrimentally affected by the DIP Facility.

70 My endorsement of November 10, 2008 provided that an order was to issue in the form submitted, as amended, which order granted initial protection under the CCAA to the applicants, and it also approved the DIP Facility. I understand that this order has been issued and entered.

Application granted.

Footnotes

* Additional reasons at *InterTan Canada Ltd., Re* (2009), 2009 CarswellOnt 687, 49 C.B.R. (5th) XXX (Ont. S.C.J. [Commercial List]).

Tab 9

2009 CarswellOnt 4232
Ontario Superior Court of Justice [Commercial List]

Lear Canada, Re

2009 CarswellOnt 4232, 179 A.C.W.S. (3d) 45, 55 C.B.R. (5th) 57

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

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

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

Pepall J.

Judgment: July 14, 2009
Docket: CV-09-00008269-00CL

Counsel: K. McElcheran, R. Stabile for Applicants
E. Lamek for Proposed Information Officer
A. Cobb for J.P. Morgan Chase Bank, N. A.

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
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

Insolvent debtor American company had Canadian subsidiary — Debtor was unable to meet obligations and began restructuring process in United States — Subsidiary and company brought application for recognition of foreign order — Application granted — Stay of proceedings in Canada granted — Subsidiary was entitled to apply for order as interested person under s. 18.6(4) of Companies' Creditors Arrangement Act and as debtor within s. 18.6(1) — While Companies' Creditors Arrangement Act does not define person, Bankruptcy and Insolvency Act extends definition to partnership — Real and substantial connection existed to American proceedings — Canadian operations were inextricably linked with business in foreign jurisdiction — Restructuring process required to occur internationally — Multiplicity of proceedings should be avoided.

Table of Authorities

Cases considered by *Pepall J.*:

Babcock & Wilcox Canada Ltd., Re (2000), 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157, 2000 CarswellOnt 704 (Ont. S.C.J. [Commercial List]) — considered

Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of) (2001), 2001 SCC 90, 2001 CarswellNat 2816, 2001 CarswellNat 2817, [2001] 3 S.C.R. 907, 30 C.B.R. (4th) 6, 280 N.R. 1, 207 D.L.R. (4th) 577 (S.C.C.) — referred to

Magna Entertainment Corp., Re (2009), 2009 CarswellOnt 1267, 51 C.B.R. (5th) 82 (Ont. S.C.J.) — referred to

Matlack Inc., Re (2001), [2001] O.T.C. 382, 26 C.B.R. (4th) 45, 2001 CarswellOnt 1830 (Ont. S.C.J. [Commercial List]) — considered

United Air Lines Inc., Re (2003), 43 C.B.R. (4th) 284, 2003 CarswellOnt 2786 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.
Generally — referred to

Chapter 11 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 2 "debtor company" — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — considered

s. 18.6(1) "foreign proceeding" [en. 1997, c. 12, s. 125] — considered

s. 18.6(2) [en. 1997, c. 12, s. 125] — considered

s. 18.6(3) [en. 1997, c. 12, s. 125] — referred to

s. 18.6(4) [en. 1997, c. 12, s. 125] — considered

APPLICATION by subsidiary of debtor and debtor for recognition of foreign order in bankruptcy proceedings.

***Pepall J.*:**

Relief Requested

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

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

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

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

Backround Facts

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

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

4 Lear conducts its North American business on a fully integrated basis. All management functions are based at the corporate headquarters in Southfield, Michigan and all customer relationships are maintained on a North American basis. The U.S. headquarters' operational support for the Canadian locations includes, but is not limited to, primary customer interface and support, product design and engineering, manufacturing and engineering, prototyping, launch support, programme management, purchasing and supplier qualification, testing and validation, and quality assurance. In addition, other support is provided for human resources, finance, information technology and other administrative functions.

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

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

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

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

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

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

Applicable Law

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

12 Section 18.6(1) provides that "foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally. It is well recognized that proceedings under Chapter 11 of the U.S. Bankruptcy Code fall within that definition and that, while not identical, the substance and procedures of the U.S. Bankruptcy Code are similar to those found in the Canadian bankruptcy regime: *United Air Lines Inc., Re*[1]

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

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

15 I must then consider whether the order requested should be granted. In exercising discretion under section 18.6, it has been repeatedly held that in the context of an insolvency, the Court should consider whether a real and substantial connection exists between a matter and the foreign jurisdiction: *Matlack Inc., Re*[5] and *Magna Entertainment Corp., Re*[6] Where the operations of debtors are most closely connected to a foreign jurisdiction and the Canadian operations are inextricably linked with the business located in that foreign jurisdiction, it is appropriate for the Court in the foreign

jurisdiction to exercise principal control over the insolvency process in accordance with the principles of comity and to avoid a multiplicity of proceedings: *Matlack, Re* [7] . As noted in that case, it is in the interests of creditors and stakeholders that a reorganization proceed in a coordinated fashion. This provides for stability and certainty. "The objective of such coordination is to ensure that creditors are treated as equitably and fairly as possible, wherever they are located." [8]

16 I am satisfied that an order recognizing the U.S. proceeding as a foreign proceeding within the meaning of section 18.6(1) should be granted and that a real and substantial connection has been established. The Applicants including Lear Canada are part of an integrated multi-national corporate enterprise with operations in 36 countries, one of which is Canada. Lear conducts its North American business on a fully integrated basis. As mentioned, all management functions are based at the U.S. corporate headquarters and all customer relationships are maintained on a North American basis. As such, the managerial and operational support for the Canadian locations is situate in the United States. In addition, Lear's Canadian operations are linked to the U.S. operations through the Lear's supply chain. As evidence of same, a note to Lear Canada's December 31, 2008 unaudited financial statement states that Lear Corporation provides Lear Canada with "significant operating support, including the negotiation of substantially all of its sales contracts. Such support is significant to the success of the Partnership's future operations and its ability to realize the carrying value of its assets."

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

18 That said, increasingly with the downturn in the global economy, this Court is entertaining requests for concurrent or ancillary orders relating to multi-group enterprises typically with a significant cross-border element. Frequently, relative to the whole enterprise, the Canadian component is small. From the viewpoint of efficiency and speed, both of which are important features of a restructuring, an applicant may be of the view that the Canadian operations do not merit a CCAA filing other than a section 18.6 request. In addressing whether to grant relief pursuant to section 18.6, the Court should, amongst other things, consider the interests of stakeholders in this country and the impact, if any, that may result from the relief requested. This would include benefits and prejudice such as any juridical advantage that may be compromised. [9] These issues should be addressed by an applicant in its materials. Assuming there are benefits, the existence of prejudice does not necessarily mean that the order will be refused but it is important that these facts at least be considered, and if appropriate, certain protections should be incorporated into the order granted.

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

20 In the additional evidence filed, the Applicants indicated that they had not yet sought approval of DIP financing arrangements but that under the proposed arrangement, the Canadian Applicants would not be borrowers or guarantors. In addition, the term sheet agreed to between the Applicants and the senior credit facility lenders provided that the Canadian Applicants had agreed to pay all general unsecured claims in full as they become due. Additionally, the Applicants had obtained an order in the U.S. proceedings authorizing them to pay and honour certain pre-petition

claims for wages, salaries, bonuses and other compensation and it is the intention of the Applicants to continue to pay all wages and compensation due and to be due to Canadian employees. The Applicants are up to date on all current and special payments associated with the Canadian pension plans and will continue to make these payments going forward. Provisions reflecting this evidence were incorporated into the Court order.

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

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

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

Application granted.

Footnotes

1 (2003), 43 C.B.R. (4th) 284 (Ont. S.C.J. [Commercial List]), at 285.

2 (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]).

3 See for example, Professor J.S. Ziegel's article "Corporate Groups and Canada-U.S. Cross-Border Insolvencies: Contrasting Judicial Visions", (2001) 35 C.B.L.J. 459.

4 It should be noted that a voluntary filing under Chapter 11 does not require an applicant to be insolvent and a partnership is eligible to apply for relief as well.

5 (2001), 26 C.B.R. (4th) 45 (Ont. S.C.J. [Commercial List]).

6 (2009), 51 C.B.R. (5th) 82 (Ont. S.C.J.).

7 Supra, note 5 at para. 8.

8 Ibid, at para. 3.

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

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

End of Document

Tab 10

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
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
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
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Pt. IV — referred to

ss. 44-49 — referred to

s. 45 — pursuant to

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

s. 45(2) — considered

s. 46(1) — considered

s. 47(1) — considered

s. 47(2) — considered

s. 48(1) — considered

s. 49 — pursuant to

s. 49(1) — considered

s. 50 — considered

MOTION by proposed foreign representative for various forms of relief pursuant to *Companies' Creditors Arrangement Act*.

***Morawetz J.*:**

1 On May 14, 2012, Lightsquared LP ("LSLP" or the "Applicant") and various of its affiliates (collectively, the "Chapter 11 Debtors") commenced voluntary reorganization proceedings (the "Chapter 11 Proceedings") in the United States Bankruptcy Court for the Southern District of New York (the "U.S. Court") by each filing a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> (a) SkyTerra Canada: this entity was created to hold certain regulated assets which, by law, are required to be held by Canadian corporations. SkyTerra Canada holds primarily three categories of assets: (i) the MSAT — 1 satellite; (ii) certain Industry Canada licences; (iii) contracts with the Applicant's affiliates and third parties. SkyTerra Canada has no third party customers or employees at the present time and is wholly dependent on the Applicant for the funding of its operations;
>
> (b) SkyTerra Holdings: this entity has no employees or operational functions. Its sole function is to hold shares of SkyTerra Canada; and
>
> (c) LC: this entity was created for the purposes of providing mobile satellite services to customers located in Canada based on products and services that were developed by the Chapter 11 Debtors for the United States market. LC holds certain Industry Canada licences and authorizations as well as certain ground-related assets. LC employs approximately 43 non-union employees out of its offices in Ottawa, Ontario. LC is wholly dependent on the Applicant for all or substantially all of the funding of its operations.

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

> (a) corporate and other major decision-making occurs from the consolidated offices in New York, New York and Ruston, Virginia;
>
> (b) all of the senior executives of the Chapter 11 Debtors, including the Canadian Debtors, are residents of the United States;
>
> (c) the majority of the management of the Chapter 11 Debtors, including the Canadian Debtors, is shared;
>
> (d) the majority of employee administration, human resource functions, marketing and communication decisions are made, and related functions taken, on behalf of all of the Chapter 11 Debtors, including the Canadian Debtors, in the United States;
>
> (e) the Chapter 11 Debtors, including the Canadian Debtors, also share a cash-management system that is overseen by employees of the United States-based Chapter 11 Debtors and located primarily in the United States; and

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

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

14 Further, the Canadian Debtors have guaranteed the credit facilities which were extended to LSLP as borrower and such guarantee is allegedly secured by a priority interest on the assets of the Canadian Debtors. As such, counsel submits that the majority of the creditors of the Chapter 11 Debtors are also common.

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

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

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

18 Court proceedings under Chapter 11 of the Bankruptcy Code have consistently been found to be "foreign proceedings" for the purposes of the CCAA. In this respect, see *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.

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

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

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

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

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

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

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

37 Additionally, I am satisfied that the appointment of A&M as Information Officer will help to facilitate these proceedings and the dissemination of information concerning the Chapter 11 Proceedings and this relief is appropriate

on the terms set forth in the draft order. The proposed order also provides that the Information Officer be entitled to the benefit of an Administration Charge, which charge shall not exceed an aggregate amount of $200,000, as security for their professional fees and disbursements. I am satisfied that the inclusion of this Administration Charge in the draft order is appropriate.

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

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

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

Motion granted.

Tab 11

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
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
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

Babcock & Wilcox Canada Ltd., Re (2000), 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157, 2000 CarswellOnt 704 (Ont. S.C.J. [Commercial List]) — referred to

Lear Canada, Re (2009), 2009 CarswellOnt 4232, 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) — referred to

Magna Entertainment Corp., Re (2009), 2009 CarswellOnt 1267, 51 C.B.R. (5th) 82 (Ont. S.C.J.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.
Chapter 11 — referred to

ss. 1101-1174 — referred to

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Pt. IV — referred to

s. 44 — considered

s. 45 — considered

s. 45(1) — considered

s. 45(2) — considered

s. 46 — considered

s. 46(1) — considered

s. 46(2) — referred to

ss. 46-49 — referred to

s. 47(1) — considered

s. 47(2) — considered

s. 48 — considered

s. 48(1) — considered

s. 49 — considered

s. 50 — considered

s. 61 — considered

s. 61(2) — considered

APPLICATION for order recognizing U.S. Chapter 11 Proceeding as foreign main proceeding under *Companies' Creditors Arrangement Act*, and other relief.

***Morawetz J.*:**

1 Massachusetts Elephant & Castle Group, Inc. ("MECG" or the "Applicant") brings this application under Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*"). MECG seeks orders pursuant to sections 46 — 49 of the *CCAA* providing for:

(a) an Initial Recognition Order declaring that:

(i) MECG is a foreign representative pursuant to s. 45 of the *CCAA* and is entitled to bring its application pursuant s. 46 of the *CCAA*;

(ii) the Chapter 11 Proceeding (as defined below) in respect of the Chapter 11 Debtors (as set out in Schedule "A") is a "foreign main proceeding" for the purposes of the *CCAA*; and

(iii) any claims, rights, liens or proceedings against or in respect of the Chapter 11 Debtors, the directors and officers of the Chapter 11 Debtors and the Chapter 11 Debtors' property are stayed; and

(b) a Supplemental Order:

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

(ii) granting a super-priority change over the Chapter 11 Debtors' property in respect of administrative fees and expenses; and

(iii) appointing BDO Canada Limited ("BDO") as Information Officer in respect of these proceedings (the "Information Officer").

2 On June 28, 2011, the Chapter 11 Debtors commenced proceedings (the "Chapter 11 Proceeding") in the United States Bankruptcy Court for the District of Massachusetts Eastern Division (the "U.S. Court"), pursuant to Chapter 11 of the *United States Bankruptcy Code*, 11 U.S.C. § 1101-1174 ("*U.S. Bankruptcy Code*").

3 On June 30, 2011, the U.S. Court made certain orders at the first-day hearing held in the Chapter 11 Proceeding, including an order appointing the Applicant as foreign representative in respect of the Chapter 11 Proceeding.

4 The Chapter 11 Debtors operate and franchise authentic, full-service British-style restaurant pubs in the United States and Canada.

5 MECG is the lead debtor in the Chapter 11 Proceeding and is incorporated in Massachusetts. All of the Chapter 11 Debtors, with the exception of Repechage Investments Limited ("Repechage"), Elephant & Castle Group Inc. ("E&C Group Ltd.") and Elephant & Castle Canada Inc. ("E&C Canada") (collectively, the "Canadian Debtors") are incorporated in various jurisdictions in the United States.

6 Repechage is incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ("*CBCA*") with its registered office in Toronto, Ontario. E&C Group Ltd. is also incorporated under the *CBCA* with a registered office located in Halifax, Nova Scotia. E&C Canada Inc. is incorporated under the *Business Corporations Act*, R.S.O. 1990, c. B. 16, and its registered office is in Toronto. The mailing office for E&C Canada Inc. is in Boston, Massachusetts at the location of the corporate head offices for all of the debtors, including Repechage and E&C Group Ltd.

7 In order to comply with s. 46(2) of the *CCAA*, MECG filed the affidavit of Ms. Wilson to which was attached certified copies of the applicable Chapter 11 orders.

8 MECG also included in its materials the declaration of Mr. David Dobbin filed in support of the first-day motions in the Chapter 11 Proceeding. Mr. Dobbin, at paragraph 19 of the declaration outlined the sale efforts being entered into by MECG. Mr. Dobbin also outlined the purpose of the Chapter 11 Proceeding, namely, to sell the Chapter 11 Debtors' businesses as a going concern on the most favourable terms possible under the circumstances and keep the Chapter 11 Debtors' business intact to the greatest extent possible during the sales process.

9 The issues for consideration are whether this court should grant the application for orders pursuant to ss. 46 — 49 of the *CCAA* and recognize the Chapter 11 Proceeding as a foreign main proceeding.

10 The purpose of Part IV of the *CCAA* is set out in s. 44:

> 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.

11 Section 46(1) of the *CCAA* provides that "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."

12 Section 47(1) of the *CCAA* provides that there are two requirements 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 proceeding.

13 Canadian courts have consistently recognized proceedings under Chapter 11 of the *U.S. Bankruptcy Code* to be foreign proceedings for the purposes of the *CCAA*. In this respect, see: *Babcock & Wilcox Canada Ltd., Re* (2000), 5 B.L.R. (3d) 75 (Ont. S.C.J. [Commercial List]); *Magna Entertainment Corp., Re* (2009), 51 C.B.R. (5th) 82 (Ont. S.C.J.); *Lear Canada, Re* (2009), 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]).

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

15 By order of the U.S. Court dated June 30, 2011, the Applicant has been appointed as a foreign representative of the Chapter 11 Debtors.

16 In my view, the Applicant has satisfied the requirements of s. 47(1) of the CCAA. Accordingly, it is appropriate that this court recognize the foreign proceeding.

17 Section 47(2) of the *CCAA* requires the court to specify in its order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

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*:

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.

34 The relief provided for in s. 48 is contained in the Initial Recognition Order.

35 In addition to the mandatory relief provided for in s. 48, pursuant to s. 49 of the *CCAA*, further discretionary relief can be granted 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. Section 49 provides:

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.

36 In this case, the Applicant applies for orders to recognize and give effect to a number of orders of the U.S. Court in the Chapter 11 Proceeding (collectively, the "Chapter 11 Orders") which are comprised of the following:

(a) the Foreign Representative Order;

(b) the U.S. Cash Collateral Order;

(c) the U.S. Prepetition Wages Order;

(d) the U.S. Prepetition Taxes Order;

(e) the U.S. Utilities Order;

(f) the U.S. Cash Management Order;

(g) the U.S. Customer Obligations Order; and

(h) the U.S. Joint Administration Order.

37 In addition, the requested relief also provides for the appointment of BDO as an Information Officer; the granting of an Administration Charge not to exceed an aggregate amount of $75,000 and other ancillary relief.

38 In considering whether it is appropriate to grant such relief, portions of s. 49, s. 50 and 61 of the *CCAA* are relevant:

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

. . . . .

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.

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

39 Counsel to the Applicant advised that he is not aware of any provision of any of the U.S. Orders for which recognition is sought that would be inconsistent with the provisions of the CCAA or which would raise the public policy exception as referenced in s. 61(2). Having reviewed the record and having heard submissions, I am satisfied that the supplementary relief, relating to, among other things, the recognition of Chapter 11 Orders, the appointment of BDO and the quantum of the Administrative charge, all as set out in the Supplemental Order, is appropriate in the circumstances and is granted.

40 The requested relief is granted. The Initial Recognition Order and the Supplemental Order have been signed in the form presented.

Schedule "A"

1. Massachusetts Elephant & Castle Group Inc.
2. Repechage Investments Limited
3. Elephant & Castle Group Inc.
4. The Elephant and Castle Canada Inc.
5. Elephant & Castle, Inc. (a Texas Corporation)
6. Elephant & Castle Inc. (a Washington Corporation)
7. Elephant & Castle International, Inc.
8. Elephant & Castle of Pennsylvania, Inc.
9. E & C Pub, Inc.
10. Elephant & Castle East Huron, LLC
11. Elephant & Castle Illinois Corporation
12. E&C Eye Street, LLC
13. E & C Capital, LLC
14. Elephant & Castle (Chicago) Corporation

Application granted.

Tab 12

2001 CarswellOnt 1830
Ontario Superior Court of Justice [Commercial List]

Matlack Inc., Re

2001 CarswellOnt 1830, [2001] O.J. No. 6121, [2001] O.T.C. 382, 26 C.B.R. (4th) 45

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

In the Matter of an Application of Matlack, Inc. and the Other Parties Set Out in Schedule "A" Ancillary to Proceedings Under Chapter 11 of the United States Bankruptcy Code

Matlack, Inc. and the Other Parties Set Out in Schedule "A", Applicant

Farley J.

Heard: April 19, 2001
Judgment: April 19, 2001
Docket: 01-CL-4109

Counsel: *E. Bruce Leonard*, *Shahana Kar*, for Applicant, Matlack Inc.

Subject: Insolvency; International; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
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

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.e Jurisdiction
XIX.1.e.i Court

Business associations

III Specific matters of corporate organization
III.5 Foreign and extra-provincial corporations
III.5.c Carrying on business
III.5.c.i Comity of nations (common law)
III.5.c.i.B Miscellaneous

Headnote

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

Foreign bankrupt was carrier based in Pennsylvania and operated leased facility in Ontario — Bankrupt obtained relief pursuant to Chapter 11 of United States Bankruptcy Code which precluded creditors from commencing or continuing proceedings against bankrupt — Canadian creditor seized and intended to sell bankrupt's assets to satisfy bankrupt's obligations — Bankrupt brought application for order for recognition of proceedings commenced pursuant to Chapter 11 to be recognized as "foreign proceeding" for purpose of Companies' Creditors Arrangement Act, for stay of proceedings commence by creditor and for ancillary relief — Application granted — Coordinated reorganization of bankrupt was in interest of all creditors as would ensure that all creditors were treated equitably and fairly — Based on principles of comity court had jurisdiction to stay proceedings commenced against bankrupt — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — Bankruptcy Code, 11 U.S.C. 1982, Chapter 11.

Corporations --- Foreign and extra-provincial corporations — Carrying on business — Comity of nations (common law) — General principles

Foreign bankrupt was carrier based in Pennsylvania and operated leased facility in Ontario — Bankrupt obtained relief pursuant to Chapter 11 of United States Bankruptcy Code which precluded creditors from commencing or continuing proceedings against bankrupt — Canadian creditor seized and intended to sell bankrupt's assets to satisfy bankrupt's obligations — Bankrupt brought application for order for recognition of proceedings commenced pursuant to Chapter 11 to be recognized as "foreign proceeding" for purpose of Companies' Creditors Arrangement Act, for stay of proceedings commence by creditor and for ancillary relief — Application granted — Coordinated reorganization of bankrupt was in interest of all creditors as would ensure that all creditors were treated equitably and fairly — Based on principles of comity court had jurisdiction to stay proceedings commenced against bankrupt — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — Bankruptcy Code, 11 U.S.C. 1982, Chapter 11.

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

Foreign bankrupt was carrier based in Pennsylvania and operated leased facility in Ontario — Bankrupt obtained relief pursuant to Chapter 11 of United States Bankruptcy Code which precluded creditors from commencing or continuing proceedings against bankrupt — Canadian creditor seized and intended to sell bankrupt's assets to satisfy bankrupt's obligations — Bankrupt brought application for order for recognition of proceedings commenced pursuant to Chapter 11 to be recognized as "foreign proceeding" for purpose of Companies' Creditors Arrangement Act, for stay of proceedings commence by creditor and for ancillary relief — Application granted — Coordinated reorganization of bankrupt was in interest of all creditors as would ensure that all creditors were treated equitably and fairly — Based on principles of comity court had jurisdiction to stay proceedings commenced against bankrupt — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — Bankruptcy Code, 11 U.S.C. 1982, Chapter 11.

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.) — considered

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

Babcock & Wilcox Canada Ltd., Re (2000), 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) — considered

Borden & Elliot v. Winston Industries Inc. (November 1, 1983), Doc. 352/83 (Ont. H.C.) — considered

Grace Canada Inc., Re (April 4, 2001), Farley J. (Ont. S.C.)

GST Telecommunications Inc., Re (May 18, 2000), Ground J. (Ont. S.C.) — considered

Hunt v. T & N plc (1993), [1994] 1 W.W.R. 129, 21 C.P.C. (3d) 269, *(*sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 37 B.C.A.C. 161, *(*sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 60 W.A.C. 161, *(*sub nom. *Hunt v. T&N plc)* [1993] 4 S.C.R. 289, *(*sub nom. *Hunt v. T&N plc)* 109 D.L.R. (4th) 16, 85 B.C.L.R. (2d) 1, *(*sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 161 N.R. 81 (S.C.C.) — applied

Microbiz Corp. v. Classic Software Systems Inc. (1996), 45 C.B.R. (3d) 40, 1996 CarswellOnt 4988, [1996] O.J. No. 5094 (Ont. Gen. Div.) — considered

Morguard Investments Ltd. v. De Savoye (1990), 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, [1990] 3 S.C.R. 1077, 1990 CarswellBC 283, 1990 CarswellBC 767 (S.C.C.) — considered

Roberts v. Picture Butte Municipal Hospital (1998), 64 Alta. L.R. (3d) 218, 23 C.P.C. (4th) 300, 227 A.R. 308, [1999] 4 W.W.R. 443, 1998 CarswellAlta 646, [1998] A.J. No. 817 (Alta. Q.B.) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Chapter 11 — referred to

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

s. 18.6 [en. 1997, c. 12, s. 125] — pursuant to

s. 18.6(1) "foreign proceeding" [en. 1997, c. 12, s. 125] — considered

s. 18.6(4) [en. 1997, c. 12, s. 125] — considered

s. 18.6(5) [en. 1997, c. 12, s. 125] — considered

APPLICATION by foreign bankrupt for recognition of proceedings commenced pursuant to Chapter 11 of United States *Bankruptcy Code* to be recognized as "foreign proceeding" for purpose of *Companies' Creditors Arrangement Act*, for stay of proceedings commenced by creditor and for ancillary relief.

Endorsement. *Farley J.*:

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

2 The one applicant Matlack, Inc. ("Matlack") is a Pennsylvania corporation which is in the business of transporting chemical products throughout the United States, Mexico and Canada. It has developed a substantial Canadian business

over the past 20 years and it currently operates a large leased facility in Ontario from which its Canadian licensed fleet services customers throughout Ontario and Quebec. Matlack's Canadian operations are fully integrated into Matlack's North American enterprise from both an operational and financial standpoint.

3 On March 29, 2001, Matlack and its affiliated applicants filed for relief under Chapter 11 and obtained relief precluding creditors subject to the U.S. Bankruptcy Court from commencing or continuing proceedings against the applicants. It is in the interests of all creditors and stakeholders of Matlack that its reorganization proceed in a coordinated and integrated fashion. The objective of such coordination is to ensure that creditors are treated as equitably and fairly as possible, *wherever they are located*. Harmonization of proceedings in the U.S. and in Canada will create the most stable conditions under which a successful reorganization can be achieved and will allow for judicial supervision of all of Matlack's assets and enterprise throughout the two jurisdictions. I note that a Canadian creditor of Matlack has recently seized some of Matlack's assets and intends to sell same in satisfaction of Matlack's obligations to it. It would seem to me that in the context of the proceedings, such a seizure would be of a preferential nature and thus unfair and prejudicial to the interests of Matlack's creditors generally.

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

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

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

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

7 Based on principles of comity, where appropriate this Court has the jurisdiction to stay proceedings commenced against a party that has filed for bankruptcy protection in the U.S. An Ontario Court can accept the jurisdiction of a U.S. Bankruptcy Court over moveable property in Ontario of an American company which has become subject to a Chapter 11 order. See *Roberts*, *supra*; *Borden & Elliot v. Winston Industries Inc.* (November 1, 1983), Doc. 352/83 (Ont. H.C.).

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

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

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

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

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

11 It would also seem to me that the relief requested is appropriate and in accordance with the principles set down in the Transnational Insolvency Project of the American Law Institute ("ALI"). This Project involved jurists, practitioners and academics from the NAFTA countries — the U.S., Mexico and Canada — and was completed as to the Restatement of the Law in 2000 after six years of analysis. [1] As a disclaimer, I should note that it was my privilege to tag along on this Project with the other participants who are recognized as outstanding in their fields.

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

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

14 Order to issue accordingly.

The American Law Institute

TRANSNATIONAL INSOLVENCY PROJECT

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

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

The Executive Office

THE AMERICAN LAW INSTITUTE

4025 Chestnut Street

Philadelphia, Pa. 19104-3099

Amended — February 12, 2001

Appendix 2

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

Introduction:

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

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

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

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

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

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

Guideline 1

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

Guideline 2

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

Guideline 3

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

Guideline 4

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

Guideline 5

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

Guideline 6

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

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

(b) Directing counsel or a foreign or domestic Insolvency Administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the Court to the other Court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;

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

Guideline 7

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

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

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

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

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

Guideline 8

In the event of communications between the Court and an authorized Representative of the foreign Court or a foreign Insolvency Administrator in accordance with Guidelines 3 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by the Court:

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

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

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

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

Guideline 9

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

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

(b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court to made available electronically in a publicly accessible system in

advance of the hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.

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

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

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

Guideline 10

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

Guideline 11

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

Guideline 12

The Court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a Service List which may include parties that are entitled to receive notice of proceedings before the Court in the other jurisdiction ("Non-Resident Parties"). All notices, applications, motions, and other materials served for purposes of the proceedings before the Court may be ordered to also be provided to or served on the Non-Resident Parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the Court in accordance with the procedures applicable in the Court.

Guideline 13

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

Guideline 14

The Court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the Court, not apply to applications or motions brought by such parties before the other Court or that relief be granted to permit such parties to bring such applications or motions before the other Court on such terms and conditions as it

considers appropriate. Court-to-Court communications in accordance with Guidelines 6 and 7 hereof may take place if an application of motion brought before the Court affects or might affect issues or proceedings in the Court in the other jurisdiction.

Guideline 15

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

Guideline 16

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

Guideline 17

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

— UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

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

ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)

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

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

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

Chapter 11

Case No. 01-01114 (MFW)

Jointly Administered

CROSS-BORDER INSOLVENCY PROTOCOL

RE MATLACK, INC. AND AFFILIATES

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

A. Background

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

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

3 One of the Matlack Companies, Matlack, Inc. (for ease of reference, "Matlack Canada"), a United States affiliate of MSI, has assets and carries on business in Canada. The Matlack Companies have commenced proceedings (collectively, the "Canadian Case") under section 18.6 of the *Companies' Creditors Arrangement Act* (the "CCAA") in the Ontario Superior Court of Justice (the "Canadian Court"). The Matlack Companies have sought an Order of the Canadian Court (as initially made under the CCAA and as subsequently amended or modified, the "CCAA Order") under which (a) the U.S. Cases have been determined to be "foreign proceedings" for the purposes of section 18.6 of the CCAA; and (b) a stay was granted against actions, enforcements, extra-judicial proceedings or other proceeding until and including August 15, 2001 against the Matlack Companies and their property.

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

B. Purpose and Goals

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

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

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

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

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

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

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

C. Comity and Independence of the Courts

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

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

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

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

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

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

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

9 The Matlack Companies, the Creditor's Committee, the Estate Representatives and their respective employees, members, agents and professionals shall respect and comply with the duties imposed upon them by the U.S. Bankruptcy Code, the CCAA, the CCAA Order and any other applicable laws.

D. Cooperation

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

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

where both Courts consider such joint hearings to be necessary or advisable and, in particular, to facilitate or coordinate with the proper and efficient conduct of the U.S. Cases and the Canadian Case.

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

E. Retention and Compensation of Professionals

13 Except as provided in paragraph 16 below, any estate representatives appointed in the U.S. Cases, including any examiners or trustees appointed in accordance with section 1104 of the U.S. Bankruptcy Code and any Canadian professionals retained by the Estate Representatives (collectively, the "Estate Representatives"), shall be subject to the exclusive jurisdiction of the U.S. Court with respect to (a) the Estate Representatives' tenure in office; (b) the retention and compensation of the Estate Representatives; (c) the Estate Representatives' liability, if any, to any person or entity, including the Matlack Companies and any third parties, in connection with the U.S. Case; and (d) the hearing and determination of any other matters relating to the Estate Representatives arising in the U.S. Cases under the U.S. Bankruptcy Code or other applicable laws of the United States. The Estate Representatives and their U.S. counsel and other U.S. professionals shall not be required to seek approval of their retention in the Canadian Court. Additionally, the Estate Representatives and their U.S. counsel and other U.S. professionals (a) shall be compensated for their services in accordance with the U.S. Bankruptcy Code and other applicable laws of the United States or orders of the U.S. Bankruptcy Court, and (b) shall not be required to seek approval of their compensation in the Canadian Court.

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

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

F. Rights to Appear and Be Heard

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

G. Notice

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

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

18 In recognition of the importance of the stay of proceedings and actions against the Matlack Companies and their assets under section 18.6 of the CCAA and the CCAA Order (the "Canadian Stay") on the successful completion of the Insolvency Proceedings for the benefit of the Matlack Companies and their respective estates and stakeholders, to the extent necessary and appropriate, the U.S. Bankruptcy Court shall extend and enforce the Canadian Stay in the United States (to the same extent such stay of proceedings and actions is applicable in Canada) to prevent adverse actions against the assets, rights and holdings of the Matlack Companies. In implementing the terms of this paragraph, the U.S. Bankruptcy Court may consult with the Canadian Court regarding (a) the interpretation and application of the Canadian Stay and any orders of the Canadian Court modifying or granting relief from the Canadian Stay, and (b) the enforcement in the United States of the Canadian Stay.

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

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

I. Effectiveness and Modification of Protocol

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

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

J. Procedure for Resolving Disputes Under the Protocol

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

K. Preservation of Rights

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

L. Guidelines

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

Application granted.

Footnotes

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

Tab 13

1998 CarswellOnt 5922
Ontario Court of Justice, General Division (Commercial List)

Skydome Corp., Re

1998 CarswellOnt 5922, 16 C.B.R. (4th) 118

In the Matter of Skydome Corporation, Skydome Food Services Corporation and SAI Subco Inc.

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, R.S.O. 1990, c. B.16, as Amended

In the Matter of a Proposed Plan of Compromise or Arrangement of Skydome Corporation, Skydome Food Services Corporation and SAI Subco Inc.

Blair J.

Judgment: November 27, 1998
Docket: 98-CL-3179

Counsel: *David E. Baird*, *Michael B. Rotsztain* and *Richard A. Conway*, for Applicants.
R.G. Marantz, Q.C., and *Andrew Diamond*, for Respondents Province of Ontario and Stadium Corporation.
Derrick Tay and *John Porter*, for Trustee for Bondholders and Bondholder.
James Dube and *Craig Thornburn*, for Respondents The Toronto Blue Jays Baseball Club.
Alex Ilchenko, for Respondent Ticketmaster Canada Ltd.
Ronald Slaght, for Respondent McDonald's Restaurants.

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Three related corporations were involved in operation of sporting and entertainment facility — Corporations became insolvent because of changes in sporting, entertainment and economic environment, non-payment of disputed municipal taxes, competition from other facilities, heavy debt load, and costly negotiations with sports team that was facility's primary user — Corporations brought application for protection under Companies' Creditors Arrangement Act — Corporations sought as part of declaration court's approval of interim lease, and authorization of super priority loan from sports team in order to finance necessary operating expenses and essential capital expenditures — Corporations also sought authorization to withdraw sum from capital reserve account that was held as part of security arrangements regarding outstanding indebtedness to group of bondholders —

Application granted — Facility held large number of functions that drew millions of people to city throughout year and employed large number of employees — Substantial economic and financial effects would result to city, merchants, suppliers, entertainers and employees in tourist industry if facility were shut down — Broader public dimension was required to be considered in determining application — Authority existed in case law for granting of super priority — Proposed interim lease and super priority were so closely integrated that one could not be approved without other — Interim lease was key to ability of corporations to pursue attempt to put forward plan that would be acceptable to creditors — Importance of stability in situation in connection with presence of sports team and ability to attract other functions outweighed other concerns that could arise in relation to negotiation and execution of interim lease — Corporations proposed to make appropriate use of withdrawn reserve funds, and bondholders would not be prejudiced as many of proposed expenditures were for matters that had priority over bondholders — It is acceptable under Act for creditor's security to be weakened as part of balancing of prejudices between parties — Circumstances existed to make initial order under Act appropriate, and it was fair and reasonable to grant order requested — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Blair J*:

Anvil Range Mining Corp., Re (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]) — applied

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

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re*) 12 O.R. (3d) 500 (Ont. Gen. Div.) — referred to

Westar Mining Ltd., Re, 70 B.C.L.R. (2d) 6, 14 C.B.R. (3d) 88, [1992] 6 W.W.R. 331 (B.C. S.C.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 8 — considered

s. 11 [rep. & sub. 1997, c. 12, s. 124] — referred to

s. 11(6) [en. 1997, c. 12, s. 124] — considered

APPLICATION by related corporations for protection under *Companies' Creditors Arrangement Act*.

Endorsement. *Blair J*:

1 Skydome Corporation, Skydome Food Services and SAI Subco Inc. — all related and presently insolvent companies — apply for the protection of the Court available in appropriate circumstances under the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

2 Once considered to be the Crown Jewel of the sports and entertainment facility world the Skydome, it seems, has developed a few financial fissures. It has insufficient funds or sources of funds to meet all of its ongoing liabilities as they become due. The same is true for all 3 Applicants, which I shall refer to generically in this endorsement as "The Skydome"

unless the context requires otherwise. Various reasons are put forward for this in the materials, but in summary they are the following:

1. Changes in the sporting, entertainment and economic environment in recent years have place financial strains on the operations of the facility. These changes include, but are not limited to, declining revenues as a result of a significant downturn in attendance at Blue Jays games since the halcyon World Series days of the early 1990's, and the cost of competing for entertainment providers in an environment where the entertainers must be paid in U.S. dollars but the revenue is received in weakened Canadian dollars.

2. Non-payment of Municipal taxes of approximately $3.6 million (Skydome contests its liability for such taxes in the sense that it has been engaged in a lengthy battle with the taxing authorities over the proper assessment base for its municipal taxes);

3. The Skydome now faces competition from other entertainment facilities in this City and elsewhere.

4. The Applicants carry a very heavy debt load, which is the legacy of the construction of the domed stadium and the initial development and marketing of the Skydome.

5. In connection with the latter, there are various outstanding executory contracts which provide benefits to those who were involved in supporting the initial Sydome venture, in continuing consideration of that support, but which as a result reduce the benefits provided by revenues that can be generated by the Skydome now.

6. Because renters of Skyboxes were called upon to pay first and last years rent in advance, there are no revenues coming in for the last year of the 10 year leases which are now about to expire; and,

7. The Skydome faces a major negotiating battle with its primary source of financial life, the Blue Jays, over the Blue Jays sub-lease (or, more accurately, license) of the premises.

3 This latter problem has been resolved, subject to approval and granting of CCAA protection, through the execution of an Interim Licensing Agreement (which I will call the Interim Lease, since everyone else does), under which the Blue Jays will remain in the Skydome for a further one year period (subject to a right to renew for a further one year period) on the same terms as those contained in the present lease which expires at the end of this year. There is also an agreement *in principal only* between Skydome and the Baseball Club with respect to a long-term 10 year arrangement; but this arrangement has not yet been finalized and, indeed, its negotiation and acceptance is proposed to be made the subject of the Plan of Arrangement which the Applicants are hoping to be able to put forward.

4 The Applicants seek the usual declaratory relief that is sought on these applications; namely, an order declaring that they are corporations to which the Act applies; and a broad stay order which, although there are quibbles with certain provisions in it, is more or less of the sort generally sought and granted when Initial Orders are made under s. 11 of the CCAA. They also ask for the appointment of PricewaterhouseCoopers Inc. as monitor. In addition, however, and as part of the package, the Applicants ask the Court to approve the Interim Lease and authorize the parties to enter into it, and they ask the Court to authorize a "Super Priority" loan of up to $3.5 million from the Blue Jays in order to finance their necessary operating expenses, and certain capital expenditures which they say are essential, and as well the costs of restructuring. Finally, they seek additional authorization to withdraw the sum of $1,260,000 from a capital reserve account with Montreal Trust Company of Canada — which reserve fund is held as part of the security arrangements regarding $58 million of outstanding indebtedness to a group of Skydome Bondholders. The withdrawal would be for the purpose of making necessary capital expenditures with respect to YK2 compliance enhancements, improvements to the Skydome sound system and renovation regarding the Skydome Hotel.

5 No one seriously submits that it is in anyone's interests for the Skydome to be shut down or, indeed, for the Blue Jays not to continue to play ball from that facility. It would be folly to suggest otherwise, at least for the moment. The Skydome is a popular facility which draws about 4 million people to its various functions throughout the year

— there have been 270 such events in 1998. It has 160 full-time employees and 1100 part-time employees who work there during the baseball season. Without going into to them in detail, there are very substantial economic and financial ripple effects for merchants, suppliers, entertainers, people working and employed in the tourist industry in Toronto, and Governments in the form of tax revenues of various sorts from the continued operation of the Skydome. It is said, for instance, that Skydome related activities generate $326 million in revenues for the economy of the GTA and $45 million in sales taxes for the Province of Ontario.

6 Thus there is a broader public dimension which must be considered and weighed in the balance on this Application as well as the interests of those most directly affected: see *Re Anvil Range Mining Corp.*, unreported decision of Ontario Court of Justice General Division August 20, 1998 [reported at(1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List])]. As was stated in that case:

> The Court in its supervisory capacity has a broader mandate. In a receivership such as this one which works well into the social and economic fabric of a territory, that mandate must encompass having an eye for the social consequences of the receivership too. These interests cannot override the lawful interests of secured creditors ultimately, but they can and must be weighed in the balance as the process works its way through.

7 The Anvil Range case concerned a CCAA proceeding which had been turned into a receivership, but the same principles apply in my view to a case such as this. While it may be engaging a trifle in hyperbole to raise the interests of Blue Jays fans to the level of "the social and economic fabric" of the region, they too can't be ignored altogether and the true economic ramifications of a failed Skydome are surely something that must be considered.

8 The two issues that raised the most concern were those dealing with the "Super Priority" loan and with the use of the capital reserve fund for the purposes requested. What is at stake here is protection of the Bondholders (who say their outstanding loan, with default ramifications taken into account is about $70 million) and the Province of Ontario (which has secured loans behind that of the Bondholders totalling about $24 million) with regard to a potential $3.5 million loan and the reduction of the Bondholders' security by less than $1.3 million. While these numbers are large numbers to the ordinary person they are really not very significant numbers relevant to the overall numbers involved.

9 There is ample authority in previous decisions of the Court for the granting of a Super Priority in CCAA situations — even to shareholders who are advancing funds — and I see no reason in principle why such a Super Priority should not be approved here. Although the Bondholders oppose the Interim Lease — indeed it is really at the heart of their objections — the Province does not. The two are so closely integrated in the proposal being put forward by the Applicants that I do not see how one can be approved (the Interim Lease) and the other (the Super Priority Loan) not.

10 The Interim Lease is key to the ability of the Skydome to pursue its attempt to put forward a Plan that will be acceptable to its creditors, including the Bondholders who will have the opportunity to vote and to approve or reject that Plan. The proposed Plan, as I have indicated, will include a Long-Term Lease component. The Bondholders main complaint, it seems to me, is that they have been excluded from the negotiation process — as they see it — to this point, and that their consent was not sought with respect to the Interim Lease. Mr. Tay did not say what the response would have been had the consent been sought. The Bondholders are also suspicious that the object of this exercise is to solidify the position of the major shareholders of the Skydome — Labatts and the CIBC — who are also part owners of the Blue Jays, by putting in place an Interim Lease that will be binding for up to two years regardless of whether the CCAA proceedings succeed or not, and which will in any event put them under subtle pressures to approve a final Plan with a final lease that they might otherwise have been able to resist.

11 There is no evidence to support such a suggestion. Whether there is anything in it or not I do not know, but one of the characteristics of a CCAA restructuring is that by nature, it leaves the debtor company in possession and in charge of the show while it attempts to work out an acceptable arrangement with its creditors. If there are underlying business agenda in that process, they are not precluded; whether they ultimately succeed or fail will depend upon the dynamics of the negotiating game that will follow.

12 In weighing all of these factors, I am satisfied that the importance of stability in the situation at the Skydome for the next year or two in connection with not only the Blue Jays presence but also the ability to attract other revenue generating functions, outweighs other concerns that may arise in relation to the negotiation and execution of the Interim Lease.

13 As to the use of the funds in the capital reserve held by Montreal Trust, it makes sense in my view for them to be used for the purposes suggested by the Applicants. The Capital reserve fund withdrawal will be used for the YK2 enhancements, the improvements in the sound system, and the Hotel renovation — all of which will preserve the overall security. A significant portion of the total funds to be advanced, including the super-priority loan — which were deposited in the first place in order to — will be used to pay Municipal taxes and Rent which are matters that have priority over the Bondholders in any event. Thus there is little overall prejudice in that regard. I am satisfied that the Court has the authority either under s. 8 of the CCAA or under its broad discretionary powers in such proceedings, to make such an order. This is not a situation where someone is being compelled to advance further credit. What is happening is that the creditor's security is being weakened to the extent of its reduction in value. It is not the first time in restructuring proceedings where secured creditors — in the exercise of balancing the prejudices between the parties which is inherent in these situations — have been asked to make such a sacrifice. Cases such as *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.) are examples of the flexibility which courts bring to situations such as this. See also *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.).

14 What subsection 11(6) of the CCAA requires for purposes of an Initial Order is that the applicant satisfy the court "that circumstances exist that make such an order appropriate". I am satisfied that such circumstances exist here and that it is fair and reasonable to grant the Order requested, although the detailed terms of the Order may require further clarification which the lateness of the day precludes for the present.

15 Mr. Tay raised a substantial issue when he pointed out that the Order as presently drafted, when read in conjunction with the Term Sheet reflecting the agreement between the Skydome and the Blue Jays for the Super Priority loan, could lead to a situation where, if the CCAA proceeding fails, the Blue Jays (called in that context "the CCAA Lender") could move to put in a receiver and to realize upon their security without further court order. I would not have approved such a provision in the circumstances, but it is not necessary to make such a determination because Mr. Dube undertook to the Court on behalf of the Blue Jays that they would not seek to do so without approval of the Court.

16 Mr. Slaght argued on behalf of Macdonalds that the super priority should not extend to his client's lease regarding the food outlets. While I agree that the position of Macdonalds is somewhat different than that of other secured creditors — because Macdonalds must continue to pay a percentage of revenue as rent, and thus pour new monies in — I don't think that that circumstance is in itself sufficient to make distinctions from the position of other secured creditors.

17 As to other matters respecting the form of the Order, I will make the change suggested by Mr. Marantz and accepted by Mr. Baird regarding the necessity of consent of all secured creditors to any out of ordinary course disposition by the Skydome during the CCAA period. Other details I leave to counsel to agree to and to come back for a variation of the Order at a later date.

18 Accordingly, an Initial Order is granted as sought, subject to the foregoing.

Application granted.

Tab 14

2010 QCCS 1176
Cour supérieure du Québec

White Birch Paper Holding Co., Re

2010 CarswellQue 2675, 2010 QCCS 1176, [2010] Q.J. No. 1723,
190 A.C.W.S. (3d) 354, 76 C.B.R. (5th) 215, EYB 2010-171694

In the matter of plan of arrangement and compromise of : White Birch Paper Holding Company, White Birch Paper Company, Stadacona General Partner Inc., Black Spruce Paper Inc., F.F. Soucy General Partner Inc., 3120772 Nova Scotia Company, Arrimage de gros Cacouna inc. and Papier Masson ltée (Debtors) v. Ernst & Young Inc. (Monitor) and Dune Capital LP, Dune Capital International Ltd and WTA Dune Limited (Petitioners)

Robert Mongeon, J.C.S.

Heard: March 18, 2010
Judgment: March 25, 2010
Docket: C.S. Montréal 500-11-038474-108

Counsel: Me Sylvain Rigaud for the Monitor
Me Jean Fontaine, Me Matthew Liben for Debtors
Me Denis Ferland, Me Christian Lachance, Me Marie-Paule Jeansonne for Petitioner Dune Capital
Me Marc Duchesne, Me Mathieu Lévesque for the Petitioners
Me Martin Desrosiers for the Interim Finance Parties

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.iii Prejudice to creditors

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.e Proceedings subject to stay
XIX.2.e.ii Contractual rights

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 — Grant of stay — Prejudice to creditors

Debtor companies were experiencing financial difficulties and sought protection under Companies' Creditors Arrangement Act — Initial order provided interim financing charge ranking ahead of secured creditors, including majority lenders — Meanwhile, administrative agent resigned and majority lenders were left out of restructuring process — Majority lenders claimed, among other things, that they were not notified of debtor companies' initial application and that interim financing should be rescinded — Majority lenders brought motion to revise initial order, obtain payment of their fees and disbursements incurred both before and after issuance of initial order, and appoint new administrative agent — Motion dismissed — List of criteria provided in Act is neither mandatory nor limitative — Court found that majority lenders were likely to be affected by interim financing charge — However, Court also found that interim financing and corresponding charge were required to allow debtor companies to operate their business while they underwent restructuring process and enhanced prospects of viable compromise — Adverse effects of process on majority lenders was outweighed by positive effects of financing on total business of debtor companies and their employees — Therefore, there was no reason to vary or change initial order.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Contractual rights

Debtor companies were experiencing financial difficulties and sought protection under Companies' Creditors Arrangement Act — Initial order provided interim financing charge ranking ahead of secured creditors, including majority lenders — Meanwhile, administrative agent resigned and majority lenders were left out of restructuring process — Majority lenders claimed, among other things, that they were not notified of debtor companies' initial application and that interim financing should be rescinded — Majority lenders brought motion to revise initial order, obtain payment of their fees and disbursements incurred both before and after issuance of initial order, and appoint new administrative agent — Motion dismissed — During hearing, Court questioned legal basis upon which majority lenders relied to seek payment of fees and disbursements but found none, nor was it presented with one — Inasmuch as stay order suspended debtor companies' obligation to pay principal and interest under loan agreement, it followed that incidental costs due by debtor companies under same agreement were also suspended — Therefore, majority lenders' request could not be granted.

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

Debtor companies were experiencing financial difficulties and sought protection under Companies' Creditors Arrangement Act — Initial order provided interim financing charge ranking ahead of secured creditors, including majority lenders — Meanwhile, administrative agent resigned and majority lenders were left out of restructuring process — Majority lenders claimed, among other things, that they were not notified of debtor companies' initial application and that interim financing should be rescinded — Majority lenders brought motion to revise initial order, obtain payment of their fees and disbursements incurred both before and after issuance of initial order, and appoint new administrative agent — Motion dismissed — Majority lenders' request to appoint new administrative agent could not be granted unless all concerned parties agreed, which was not case here — Corporation submitted by majority lenders as potential administrative agent was not lender and, according to loan agreement, its appointment was impossible in absence of proper consent of all parties concerned.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Demande initiale — Suspension des recours — Préjudice causé aux créditeurs

Compagnies débitrices éprouvaient des difficultés financières et se sont mises sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Ordonnance initiale prévoyait une sûreté pour le financement intérimaire prenant rang devant les créanciers garantis, y compris les prêteurs principaux — Entre-temps, le mandataire administratif s'est retiré et les prêteurs principaux n'ont pas été impliqués dans le processus de

restructuration — Prêteurs principaux ont prétendu, entre autres choses, qu'ils n'avaient pas été avertis de la demande initiale des compagnies débitrices et que le financement intérimaire devrait être annulé — Prêteurs principaux ont déposé une requête pour revoir l'ordonnance initiale, obtenir le paiement de leurs frais et débours encourus avant et après l'émission de l'ordonnance, et nommer un nouveau mandataire administratif — Requête rejetée — Liste des critères prévus dans la Loi n'est ni obligatoire ni exhaustive — Tribunal a conclu que les prêteurs principaux étaient susceptibles de subir les conséquences de la sûreté accordée pour le financement intérimaire — Toutefois, le Tribunal a aussi conclu que le financement intérimaire et la sûreté qui en découlait étaient nécessaires pour que les compagnies débitrices puissent poursuivre leurs affaires pendant qu'elles se soumettaient à un processus de restructuration et amélioraient leur chance d'en arriver à un compromis acceptable — Effets positifs du financement sur l'ensemble de l'entreprise des compagnies débitrices et leurs employés l'emportaient sur les effets négatifs du processus subis par les prêteurs principaux — Par conséquent, il n'y avait aucune raison de modifier l'ordonnance initiale.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Demande initiale — Procédures assujetties à la suspension — Droits contractuels

Compagnies débitrices éprouvaient des difficultés financières et se sont mises sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Ordonnance initiale prévoyait une sûreté pour le financement intérimaire prenant rang devant les créanciers garantis, y compris les prêteurs principaux — Entre-temps, le mandataire administratif s'est retiré et les prêteurs principaux n'ont pas été impliqués dans le processus de restructuration — Prêteurs principaux ont prétendu, entre autres choses, qu'ils n'avaient pas été avertis de la demande initiale des compagnies débitrices et que le financement intérimaire devrait être annulé — Prêteurs principaux ont déposé une requête pour revoir l'ordonnance initiale, obtenir le paiement de leurs frais et débours encourus avant et après l'émission de l'ordonnance, et nommer un nouveau mandataire administratif — Requête rejetée — Pendant l'audition, le Tribunal s'est demandé sur quelle règle juridique se fondaient les prêteurs principaux pour demander le paiement des frais et débours mais n'en a trouvé aucune pas plus qu'on ne lui en a suggéré une — Dans la mesure où l'ordonnance suspendait l'obligation des compagnies débitrices d'acquitter le principal et l'intérêt dus en vertu du contrat de prêt, il s'ensuivait que l'obligation d'acquitter les frais accessoires dus par celles-ci en vertu du même contrat était également suspendue — Par conséquent, la demande des prêteurs principaux ne pouvait pas être accordée.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Demande initiale — Divers

Compagnies débitrices éprouvaient des difficultés financières et se sont mises sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Ordonnance initiale prévoyait une sûreté pour le financement intérimaire prenant rang devant les créanciers garantis, y compris les prêteurs principaux — Entre-temps, le mandataire administratif s'est retiré et les prêteurs principaux n'ont pas été impliqués dans le processus de restructuration — Prêteurs principaux ont prétendu, entre autres choses, qu'ils n'avaient pas été avertis de la demande initiale des compagnies débitrices et que le financement intérimaire devrait être annulé — Prêteurs principaux ont déposé une requête pour revoir l'ordonnance initiale, obtenir le paiement de leurs frais et débours encourus avant et après l'émission de l'ordonnance, et nommer un nouveau mandataire administratif — Requête rejetée — Demande formulée par les prêteurs principaux en vue de nommer un nouveau mandataire administratif ne pouvait pas être accordée à moins que toutes les parties concernées y consentent, ce qui n'était pas le cas en l'espèce — Société qui a été suggérée par les prêteurs principaux à titre de mandataire administratif potentiel n'était pas une institution de prêts et, en vertu du contrat de prêt, elle ne pouvait être nommée que si toutes les parties concernées y consentaient de façon conforme.

Table of Authorities

Cases considered by *Mongeon J.C.S.*:

Boutiques San Francisco Incorporées, Re (2003), 2003 CarswellQue 13882 (C.S. Que.) — considered

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

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 11 et seq. — referred to

s. 11.01 [en. 2005, c. 47, s. 128] — considered

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

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

MOTION by majority lenders to revise initial order, obtain payment of their fees and disbursements incurred both before and after issuance of initial order, and appoint new administrative agent.

***Mongeon J.C.S.*:**

1 Dune Capital LP, Dune Capital International Ltd and WTA Dune Limited (collectively « Dune ») are lenders under that certain Second Amended and Restated Second Term Loan Credit Agreement among White Birch Paper Holding company, White Birch Paper Company (two of the Debtors herein) as borrowers, and several lenders from time to time parties thereto. Credit Suisse Securities (USA) LLC is the Sole Lead Arranger, sole Bookrunner, Syndication Agent and Documentation Agent, while Credit Suisse Cayman Islands Branch is the US collateral Agent and Administrative Agent. [1] Crédit Suisse Toronto Branch (C.S. Toronto) is the Canadian Collateral Agent and Administrative Agent. This Second Lien Term Loan is dated April 8, 2005 and was amended and restated on January 27, 2006 and on May 2007.

2 This loan is for a total amount of US100 000 000,00$

3 Dune is a « Majority Lender » under the said Second Lien Term Loan, to the extent of US$61.5 million.

4 Dune is therefore an important secured creditor of the Debtors.

5 On February 24, 2010, I granted the Debtors' Motion for the Issuance of an Initial Order pursuant to Sections 11 and following of the Companies' Creditors Arrangement Act (the « CCAA »).

6 The Initial Order provides for the usual terms and conditions, as well as Interim financing in the amount of US $140 million together with the usual Interim Financing Charge, ranking immediately after the Administration Charge the D&O Charge, but ahead of all other mortgages, hypothecs and other secured debts of the Debtors, including any secured debts under the Second Lien Term Loan.

7 Dune's first contention is that its position as a secured lender of US$61.5 million is most definitely affected by the Initial Order and Interim Financing Charge.

8 Dune alleges that it was not notified of the Originating Motion and claims that the Debtors did not respect both the letter and spirit of section 11.2(1) CCAA which reads as follows:

> **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.**
>
> **(emphasis added)**

9 This is a serious allegation. The whole substance of the CCAA is based upon the principle of having and maintaining a « level playing field' among the various stakeholders involved in a restructuring process, especially when the restructuring will seriously affect the rights of lenders, suppliers and other creditors of a company seeking the protection of the CCAA. As a result, Dune takes the position that the Interim Financing Agreement should be rescinded or, alternatively limited to US$115 million. Conclusions [D], [E], [F] and [G] of its Amended Motion dated march 18, 2010 read as follows:

> . . .
>
> [D] **RESCIND (1) the interim financing agreement provided in the Initial Order, (ii) paragraphs 28 to 36 of the Initial Order and (iii) all references to the Interim Financing, DIP, Interim Financing Documents, Interim Lenders Expenses and Interim Financing Charge in the Initial Order;**
>
> **ALTERNATIVELY, but without prejudice to the foregoing:**
>
> **AMEND para 28 of the Initial Order as follows:**
>
> **ORDERS that, notwithstanding any other provision of this Order but subject to paragraph 38, the Petitioners and the Partnership be and are hereby authorized to borrow from the interim Lenders such amounts from time to time as the Petitioners and Partnerships may consider necessary or desirable, up to a maximum combined principal amount of USD$[. . .]115 million, on the terms and conditions set forth in the Interim Financing Credit Agreement, attached hereto in draft form as Exhibit P-3 (subject to such amendments and modifications as the parties may agree with, provided such amendments or modifications are approved by the Monitor and do not conflict with the provisions of this Order) and in the Interim Financing Documents (as defined hereinafter), to fund firstly, full repayment of all amounts outstanding under the Revolving ABL Financing and thereafter, the ongoing expenditures of the Petitioners and Partnerships and to pay such other amounts as are permitted by the terms of this Order, the Interim Financing Credit Agreement and the Interim Financing Documents (as defined hereinafter).**
>
> [E] **ORDER a further hearing on or before April 23, 2010 as to the appropriateness to authorize further credit on the Interim Financing;**
>
> [F] **REDUCE the Interim Financing Charge to the aggregate amount of $115 million and AMEND paragraph 32 of the Initial Order accordingly;**
>
> [G] **ORDER the payment of the interests under the Interim Financing Agreement on the same basis than the First Lien Agreement;**

10 Dune seeks this conclusion not only because it allegedly did not get proper prior notice and was deprived from its right to make representations prior to the issuance of the Initial Order and DIP Loan but also because, over the last several months, it has allegedly been denied access to important information which, as a result, has allegedly deprived it from the possibility of entering into forbearance and/or waiver agreements with the Debtors, with respect to the latter's

obligations. Furthermore, Dune complains that throughout the period of September 2009 until February 2010, the Second Lien Lenders have been left out of restructuring discussions between the First Lien Lenders and the Debtors to a point where the proposed restructuring will be detrimental to Dune's position. In other words, Dune was not given the opportunity to adequately protect its position in the current process.

11 For a better understanding of Dune's position and to avoid any risk of misinterpreting its representation of the facts, I reproduce below the most important excerpts of Dune's Amended Motion:

. . .

> 19. **On September 22, 2009, for the first time, WB requested a comprehensive forbearance of its obligations to pay interest due on September, 30, 2009 under the Second Lien Agreement. WB also requested that such forbearance be executed by no later than September 29, 2009.**
>
> 20. **On September 25, 2009, the Majority Lenders (i.e. Dune) called CS Toronto (i.e. Crédit Suisse Toronto), in its capacity as Administrative Agent under the Second Lien Agreement, to obtain a copy of the Register of the lenders, as defined at Section 10.5(d) of the Second Lien Agreement (the "Register"), in order to organize the Second Lien Agreement lenders in connection with the Debtors' request for a forbearance. CS Toronto then requested a written request prior to providing any information, including the Register.**
>
> 21. **The Majority Lenders' US counsel then sent to CS Toronto a written request to obtain the Register, the whole as appears from a copy of a letter dated September 25, 2009 communicated in support hereof as Exhibit R-1.**
>
> 22. **As appears from Exhibit R-1, the Majority Lenders' US counsel also emphasized, given the deadline of September 29, 2009 imposed by the Debtors to conclude a forbearance, that "[a]*ny delay on the part of the Administrative Agent in producing the Register could seriously prejudice the Second Lien Lenders' ability to consider the Borrower's proposal and further compromise the Second Lien Lenders' substantial rights under the Agreement*".**
>
> 23. **On September 29, 2009, the day of the deadline imposed by the Debtors to execute the forbearance, the Majority Lenders' US counsel wrote to WB, WB Holding and CS Toronto's US counsel to advise them that despite several requests to obtain the Register, it never obtained it, the whole as appears from a copy of a letter dated September 29, 2009 communicated in support hereof as Exhibit R-2.**
>
> 24. **In Exhibit R-2, the Majority Lenders' US counsel also noted the following :**
>
> > **As a result of the Agent's refusal to comply with this simple request, the Second Lien Lenders have been deprived of any meaningful opportunity to consider the Borrower's last-minute request for a comprehensive waiver/forbearance of its interest payment obligations. In contrast, we understand that the Agent has been in substantial contact with the first Lien Lenders for weeks (including an organized lender call last week) regarding the Borrower's proposed restructuring - a consideration yet to be extended to the Second Lien Lenders - and that the First Lien Lenders have already retained counsel and financial advisors in connection therewith. Given that the First Lien Lenders have hired both counsel and financial advisors, the Second Lien Lenders anticipate having to do so as well. While the First Lien Lenders have been actively involved in discussions concerning the proposed restructuring, the Second Lien Lenders have been deliberately excluded from any such discussions and denied even the most fundamental information necessary for the Second Lien Lenders to confer with one another. Engaging with the First Lien Lenders while stonewalling the Second Lien Lenders is not only improper but wholly inconsistent with a party acting in good faith to exact considerable concessions from the Second Lien Lenders in an effort to avoid an Event of Default.**
> >
> > **We hereby again request a copy of the Register immediately. Any further delay on the part of the Borrower or Agent may further and substantially prejudice the Second Lien Lenders' substantial rights under the**

Agreement. Any and all rights the Second Lien Lenders may have in connection with the Borrower's or Agent's actions or inactions to date or in the future are hereby expressly reserved.

[our emphasis]

25. **On September 30, 2009, the Majority Lenders' US counsel wrote to CS Toronto's US counsel the following :**

On our call yesterday afternoon, we learned for the first time that your client, Credit Suisse (i.e., the Second Lien Lenders' Agent in connection with the above-referenced Agreement), has withheld from the Second Lien Lenders potentially material information regarding the Borrower or the Borrower's proposed restructuring discussions with the First Lien Lenders. During our call, we requested all material information provided to the First Lien Lenders that is relevant to the Borrower's current financial condition and proposed restructuring. In response, you proposed to put us in touch with Borrower's counsel so that we can seek such information directly from them. While we appreciate your assistance (albeit belatedly) in putting us in touch with counsel for the Borrower, we remind you that your client remains the Agent for the Second Lien Lenders. Accordingly, the Second Lien Lenders reiterate their demand that the Agent turn over all relevant information relating to the Borrower's current financial condition and proposed restructuring. We further request that the Agent provide us with a detailed description of the actions it has taken - if any - in the last 90 days to protect the rights of the Second Lien Lenders and provide us with proposals for how to maximize Second Lien Lenders' recovery going forward.

[our emphasis]

the whole as appears from a copy of a letter dated September 30, 2009 communicated in support hereof as Exhibit R-3.

26. **On the same day, but after the Majority Lenders' US counsel sent Exhibit R-3, CS Toronto and CS Cayman advised the Second Lien Agreement lenders that they immediately respectively resigned as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the Second Lien Agreement, the whole as appears from a copy of a letter dated September 30, 2009 communicated in support hereof as Exhibit R-4.**

27. **In Exhibit R-4, CS Toronto and CS Cayman also specified that they had already advised WB of their resignation.**

28. **However, CS Toronto and CS Cayman did not resign as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the First Lien Agreement.**

29. **On October 1, 2009, CS Toronto and CS Cayman's US counsel advised the Majority Lenders' US counsel that its clients resigned as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the Second Lien Agreement, the whole as appears from a copy of a letter dated October 1, 2009 communicated in support hereof as Exhibit R-5.**

30. **On the same day, the Majority Lenders' US counsel advised CS Toronto and CS Cayman's counsel that they could not resign immediately as Administrative Agent, Canadian Collateral Agent and US Collateral Agent given that the Second Lien Agreement provides, at Section 9.9, that the agent must give a "30 days' notice to the Lenders and the Borrower" (our emphasis) of its resignation, the whole as appears from a copy of a letter dated October 1, 2009 communicated in support hereof as Exhibit R-6.**

31. **On October 7, 2009, the Majority Lenders' US counsel with the support of two other lenders under the Second Lien Agreement, namely Caspian Capital Partners, L.P. and Caspian Select Credit Master Fund, Ltd., sent to CS USA and CS Toronto a notice of default dealing with WB's failure to make the**

interest payment due on September 30, 2009 under the Second Lien Agreement, the whole as appears from a copy of a letter dated October 7, 2009 communicated in support hereof as Exhibit R-7.

32. **On October 8, 2009, CS Toronto notified WB and WB Holding of (i) its resignation as Administrative Agent and Canadian Collateral Agent under the Second Lien Agreement and (ii) the resignation of CS Cayman as US Collateral Agent under the Second Lien Agreement as follows:**

> **As you are aware, we have notified you pursuant to that certain letter dated as of September 30, 2009 of our resignation as Administrative Agent and as Canadian Collateral Agent under the Second Lien Credit Agreement, and of the resignation of Credit Suisse, Cayman Islands Branch, as US Collateral Agent under the Second Lien Credit Agreement, which resignations will be effective on October 30, 2009.**
>
> **[our emphasis]**

the whole as appears from a copy of a letter dated October 8, 2009 communicated in support hereof as Exhibit R-8.

33. **Afterwards the Majority Lenders, through their US counsel, for some time tried to conclude a forbearance agreement with the Debtors. However, such agreement never materialized given that the Debtors systematically refused to assume (i) the fees of Wells as Administrative Agent under the Second Lien Agreement and (ii) the Majority Lenders' legal fees. In a nutshell, the Debtors wanted the Majority Lenders to agree to forbear certain defaults, but were not ready to grant any consideration whatsoever to the Second Lien Agreement lenders.**

34. **During the last week of December 2009, the Majority Lenders reached out to CS Toronto on two occasions via phone so as to confirm the contact information for audit confirmations. The Majority Lenders did not get any response from CS Toronto.**

35. **On January 5, 2010, the Majority Lenders spoke with a representative of CS Toronto, namely Edith Chan, who informed them that CS Toronto was no longer the Administrative Agent under the Second Lien Agreement and that it could not comment or help out with any of the Majority Lenders' requests.**

36. **On January 26, 2010, the Majority Lenders contacted a representative from WB, namely Ed Sherrick, to confirm their year-end position, but were told that he could not help them.**

37. **On February 24, 2010, the Debtors served and presented their Petition for an Initial Order. As appears from the Notice of Presentation to said petition (the "Notice of Presentation"), neither the Majority Lenders nor any lenders under the Second Lien Agreement were served. However, as appears from, *inter alia*, paras. 23 and 32 herein and Exhibits R-2 and R-8, the Debtors clearly knew (i) that the Majority Lenders were represented by counsel and (ii) that CS Toronto and CS Cayman had resigned as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the Second Lien Agreement as of October 30, 2009.**

38. **Although Credit Suisse, CS USA and CS Toronto received the Notice of Presentation, they never, verbally or otherwise, notified the Majority Lenders of the presentation of the Petition for an Initial Order.**

39. **On February 24, 2010, this Court issued the Initial Order which provided for an Interim Financing of up to a maximum combined principal amount of USD$140 million (para. 28 of the Initial Order). The Administrative Agent and Canadian Collateral Agent under the Interim Financing Agreement is also CS Toronto as mentioned above, the whole as appears from a copy of said Interim Financing Credit Agreement communicated in support hereof as Exhibit R-9.**

40. **After midday on February 24, 2010, the Majority Lenders learned, through the newswires, that the Debtors filed their Petition for an Initial Order. The Majority Lenders learned the Initial Order had been entered when it was posted by the proposed Monitor several hours later.**

41. **On March 4, 2010, the Majority Lenders' Canadian counsel wrote to the Debtors' Canadian counsel to advise it that the Majority Lenders never received proper notice of the Petition for an Initial Order, the whole as appears from a copy of a letter dated March 4, 2010 communicated in support hereof as Exhibit R-10.**

42. **In Exhibit R-10, the Majority Lenders' Canadian counsel also requested, *inter alia*, the following:**

(i) **a copy of the Register or other confirmation of each of the Lenders' loan position as of year-end 2009;**

(ii) **an unconditional undertaking from the Debtors to pay for the legal fees that the Majority Lenders will incur to intervene in the *CCAA* Proceedings and the relevant proceedings in the United States, as required to protect their position, the whole as provided for, *inter alia*, at Section 10.4(b) of the Second Lien Agreement; and**

(iii) **the acceptance by the Debtors to the appointment of Wells or any of its affiliates, branches or subsidiaries as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the Second Lien Agreement, as well as an undertaking that the Debtors will do everything that is required to render effective such appointment.**

43. **On March 5, 2010, the Debtors' Canadian counsel answered to the Majority Lenders' Canadian counsel. In a nutshell, the position of the Debtors' Canadian counsel was that:**

(i) **the Majority Lenders received proper notice given that CS Toronto, the Administrative Agent under the Second Lien Agreement, received notice, despite CS Toronto's resignation, given that the latter would still act as a *de facto* agent;**

(ii) **the Majority Lenders did not need to obtain notice of the Interim Financing given that only the "*secured creditors who are likely to be affected by the security*" need notification and the Majority Lenders are not such creditors;**

(iii) **it would not disclose the Register or other confirmation of each of the lenders' loan position and that the Majority Lenders should seek such information from other parties;**

(iv) **the Debtors will not pay for the legal fees that the Majority Lenders will incur to intervene in the *CCAA* Proceedings and the relevant proceedings in the United States; and**

(v) **the Debtors would not contest the appointment of Wells as Administrative Agent, Canadian Collateral Agent and US Collateral Agent, but will not pay the fees and costs of Wells;**

the whole as appears from a copy of a letter dated March 5, 2010 communicated in support hereof as Exhibit R-11.

44. **On March 11, the Majority Lenders' Canadian counsel wrote to the Debtors' Canadian counsel to respond to the latter's letter, the whole as appears from a copy of a letter dated March 11, 2010 communicated in support hereof as Exhibit R-12. In said letter, the Majority Lenders expressed their disagreement with the position expressed by the Debtors in the March 5 letter. In addition, the Majority Lenders advised the Debtors of the conclusion they would be seeking in the present Motion.**

12 In summary, the foregoing raises the following issues:

- the refusal to furnish copy of the Register to Dune;

• the consequences of not including Dune in the restructuring discussions in September/October 2009;

• the consequences of the resignation of CS Toronto as Canadian Administrative Agent and its replacement by Wells Fargo Inc;

• the payment of fees, disbursements and other charges including fees of legal advisors for both Dune and Wells Fargo Inc.;

• the lack of Notice of presentation of the Motion of Issuance of the Initial Order;

• Access to certain financial information.

13 These facts give rise to the following additional conclusions:

> [H] **ORDER the Debtors to pay for the legal fees of the Majority Lenders, both before and after the issuance of the Initial Order, to intervene in the *CCAA* Proceedings and the relevant proceedings in the United States, as is required to protect their position, the whole as provided for, *inter alia*, at Section 10.4(b) of the Second Lien Agreement;**
>
> [I] **APPOINT Wells or any sub-agent of its choosing as Administrative Agent, Canadian Collateral Agent and US collateral agent under the Second Lien Agreement;**
>
> [J] **ORDER the Debtors to pay all the fees and disbursements, both before and after the issuance of the Initial Order, including legal fees, of Wells as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the Second Lien Agreement as provided for in said agreement;**
>
> [K] **AMEND para. 51 of the Initial Order as follows**:
>
> **DECLARE that, as security for the reasonable fees, charges and disbursements incurred both before and after the making of this Order in respect of these proceedings, the Plan and the Restructuring, the Petitioners' and Partnerships' legal and financial advisors, the Monitor, [. . .]the Monitor's legal counsel, Wells Fargo, the Majority Lenders' (namely Dune Capital LP, Dune Capital International Ltd. and WTA Dune Limited) legal counsel and Wells Fargo's legal counsel be entitled to the benefit of and are hereby granted a hypothec on, mortgage of, lien on, and security interest in the Property to the extent of the aggregate amount of $3,000,000 (the "Administration Charge") having the priority established by paragraphs 52 and 53 hereof.**
>
> [L] **ORDER the Debtors to provide the following financial information by no later than 5:00 p.m. on March 23, 2010**
>
> (i) **the Debtors' financial statements for the fourth quarter of 2009;**
>
> (ii) **the Debtors' annual financial statements for the 2009 fiscal year;**
>
> (iii) **financial statements for each of WB and WB Holding subsidiaries (quarterly and annual for the past 5 yrs);**
>
> (iv) **the Debtors' company budget for 2010;**
>
> (v) **all of the sources and uses of the Interim Financing;**
>
> (vi) **fees paid to-date to advisors and lawyers, broken down between the Debtors, [. . .] First Lien Agreement lenders, agents, Interim Lenders and others;**

(vii) **unpaid fees, if any, to advisors and lawyers, broken down between the Debtors and First Lien Agreement lenders;**

(viii) **weekly report, on an ongoing basis, of fees paid or to be paid to advisors and lawyers, broken down between the Debtors and First Lien Agreement lenders;**

(ix) **the Debtors' most current working capital balances;**

(x) **weekly update of the Debtors' 13-week Cash Flow forecasts;**

(xi) **an accounting of all of the management fees paid by the Debtors to Brant Paper, Inc. for the last five years and weekly updates, on an ongoing basis, of same; [...]**

(xii) **the quarterly and annual financial statements for SP Newsprint Co. for the last five (5) years;**

(xiii) **all information provided to Interim Lenders, as and when such information is provided, whether verbally, in writing, by electronic access, by Intralink or otherwise; and**

(xiv) **all drawing notices by the Debtors under the Interim Financing Ageement.**

[M] **THE WHOLE with costs against any contesting party.**

14 I shall deal, firstly with Dune's request to rescind and/or amend the DIP Financing and DIP Financing Charge.

15 Confronted with Dune's allegation that it was not advised of, nor served with the Motion, the Debtors strongly object.

16 The Debtors take the position that Crédit Suisse Toronto, as Canadian Administrative Agent, continues to act as « *de facto* » Agent for the Second Lien Lenders until they are replaced as per the terms of the Second Lien Loan Agreement (CS-1). As a result, by effecting service upon C.S. Toronto, service of the Originating Motion was completed in accordance with the Law. The Debtors further add that the name of Crédit Suisse Toronto still appears as the holder of the security resulting from the publication of the Second Lien Term Loan Agreement. Consequently, inasmuch as the name of the holder of the security remains unchanged at the Registre des droits personnels et réels mobiliers (see Exhibit I), service upon Crédit Suisse Toronto remains valid.

17 The Debtors further add that in any event, neither Dune nor any other Second Lien Lender had to be served, because the DIP loan and DIP charge were not likely to affect their security by reason of the other prior ranking charges affecting the fixed assets upon which Dune's security is granted.

18 As for C.S. Toronto, although this entity was represented by counsel at both hearings (February 24 and March 18, 2010) before me, it had no explanation to offer either on the question of service of the Originating Motion, or on the question of what it did (or did not do) with the notice, once it was received. What seems to be clear, however, is that C.S. Toronto did not see appropriate to forward the notice of Originating Motion to its former principals, the Second Lien Lenders in general and Dune in particular. Such behaviour is surprising, given the serious consequences.

19 Dune submits that the DIP should not have been granted without proper notice and representations on its part. Dune adds that if, nonetheless, the granting of a DIP was in order, it should have been limited to an amount necessary to « keep the lights on », as stated by Blair J. in Re: *Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) and by Gascon J. in *Boutiques San Francisco Incorporées, Re* (C.S. Que.).

20 However, Dune does not raise any additional argument to rescind the DIP, save the fact that it did not get notice. Dune adds, however, that the Debtors' argument suggesting that notice was in any event not called for because of the fact that Dune's security had no value and, consequently, that Dune's rights were unaffected by the DIP, is ill-founded.

21 Dune further argues that it is currently not in a position to assess the appropriateness of the DIP nor is it in a position to determine the value of its security without the financial information which, as at March 18, 2010 was still unavailable to it. During the hearing of Dune's Motion on March 18, I was informed that Dune had reached an agreement in principle with the Debtors with respect to the financial information to be furnished. This agreement will be ratified once it is reduced to writing and forwarded to me.

22 It appears, therefore, that Dune does not wish to see a DIP charge of US$140 million rank ahead of its own security but having been deprived of financial information, it cannot really assess the Debtors' financial position. In other words, Dune is still in the process of analysing the financial situation of the Debtors.

23 For the foregoing facts, I draw the following conclusions:

a) the Debtors did not give notice to Dune, a « secured creditor likely to be affected by the security or charge « contemplated » in section 11.2(1) CCAA.

b) Notice to Crédit Suisse Toronto was insufficient within the context of this particular matter, in that the Debtors knew that the latter had resigned and, by virtue of section 9.9[2] of the Second Lien Term Loan Agreement, one of the Lenders (if appointed by Dune as Successor Administrating Agent) or all the Lenders were successor(s) to C.S. Toronto.

c) Crédit Suisse Toronto, although it had resigned its function as Administrative Agent, should, if not legally obliged to do so but at least as a basic courtesy, have forwarded the said Notice to the lenders instead of ignoring it. In so doing, CS Toronto should have realized that it was putting its former principals in a delicate situation.

d) Dune did not take any steps to ensure that the Second Lien Lenders would be adequately represented, following the resignation of Crédit Suisse Toronto. Dune had an obligation to cause a successor agent to be appointed among the Second Lien Lenders and if it was unable to find one willing to accept the function, it should have appointed itself. Dune's inaction most certainly did not help establishing a proper channel of communications between the Debtors and the Second Lien Lenders. Moreover, by insisting upon an undertaking of the Debtors to pay its fees and disbursements as well as those of Wells before any successor agent was appointed, given the precarious financial position of the Debtors already in default of paying interest under the First and Second Lien Loans, was a sure way to cause severe disruptions in communications.

24 Finally, I cannot avoid mentioning that both counsel for the Debtors and counsel for the DIP Lender and CS Toronto should have informed me of the problem at the hearing of February 24. Instead, they chose to ask the Court for a declaration that proper and sufficient notice had been given to all interested stakeholders although both knew that service had been effected upon the Second Lien Lenders through an Agent which had resigned and without ensuring that such agent was taking or, alternatively, had not taken steps to forward the notice to the said Lenders. As for the argument that there was in any event no need to serve notice to the Second Lien Lenders because they were supposedly not affected by the DIP loan and charge, this is rather specious in the absence of a complete and thorough evaluation of all the assets and liabilities of the Debtors. To rely strictly upon the calculation of fixed assets calculated on the basis of cost less accumulated depreciation is, to say the least, not the most sophisticated way to determine a *value* of said assets. In other words, I am far from being convinced that the rights of the Second Lien Lenders are not likely to be affected by the DIP Loan.

25 Once, as I am convinced, it appears evident that the Second Lien Lenders, in general and Dune in particular, have not been notified as they had a right to be, what should be done to try to correct the situation?

26 Dune argues that it should be allowed to attend a new hearing where the whole issue of the opportunity of granting a DIP loan and corresponding super-priority should be debated « *de novo* ». Given the above-noted facts, I agree with Dune's submission.

27 In order to ensure the protection of the rights of all concerned, this debate took place on March 18, 2010. The Monitor was examined and cross-examined on the contents of his two Reports [3]. A representative of the Debtors, Mr Jay Epstein also testified and was cross-examined. Finally, a representative of Dune, Mr. Andrew M. Cohen was cross-examined on the contents of his Affidavit of March 12, 2010.

28 I am now in a position to re-consider the whole question of whether a DIP Loan and corresponding super-priority should be varied, modified, rescinded or maintained on the same basis as it was authorized on February 24, 2010.

29 Firstly, the CCAA now clearly identifies the principal criteria to be considered by this Court when a DIP Loan and Corresponding charge are required. Section 11.2(4) CCAA reads as follows:

> **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.**

30 After hearing the Monitor and the representative of the Debtors, I am satisfied that a DIP Loan and corresponding charge are required to ensure that the business enterprise of the Debtors will continue to operate as a going concern while it undergoes restructuring.

31 I am also satisfied that the Debtors are likely to be subject to proceedings under the CCAA for several months and the Court's duty is to ensure that the Debtors will enjoy enough cash flow to go through with the restructuring.

32 I also believe that the DIP Loan will not only enhance the prospects of a viable compromise but I also believe that without this loan, the Debtors will not be able to survive.

33 Even if certain creditors will be materially affected by the DIP loan, -and that may include the Petitioners herein -, I have to look at the broader picture as it is presented to me by the Monitor, and conclude that the compromise which Dune may have to accept is outweighed by the positive effects of the DIP Loan on the total business enterprise of the Debtors.

34 The only discordant note is that of the Petitioners herein, who suggest that they might do better with the recuperation of their investment if the Debtors go bankrupt.

35 The above cited criteria appear to have been taken into account by the Monitor in its first two reports. It should be added that the Court need not consider all of the said criteria nor is it compelled to read an affirmative conclusion on all seven criteria. This list is neither mandatory nor limitative. One thing is sure: the Monitor has adequately demonstrated that the Debtors need the US$140 million in Interim Financing and without this money, there is a strong likelyhood that the Debtors would not survive for long, jeopardizing the livelyhood of more than a thousand employees.

36 In addition, although the amount of US$140 million is mentioned in terms of the total DIP Loan, a substantial portion, thereof, does not seriously affect the financial position of Dune.

37 The Monitor has clearly outlined the projected use and allocation of the US$140 million in its Report dated March 17, 2000 [4]:

> 20. **The process used to seek out a lender for the Interim Financing, the negotiations thereof, the financing needs and the significant terms of the credit negotiated with the Black Diamond Group are all described in the report of the Monitor, dated February 23, 2010. The contents of this report, as regards these issues, are still relevant.**
>
> 21. **As indicated earlier in this Report, the Interim Financing was authorized by the Initial Order, and by a provisional order made in the U.S. Court (Appendix B). The credit agreement and related guarantees, security and pledge agreements necessary to document the Interim Financing were executed on March 1, 2010.**
>
> 22. **Contemporaneously with the execution of these documents, WB Group received a first draw against the delayed draw term loan, of US$86.5 million. The proceeds from this first draw were used to repay the indebtedness to General Electric Capital Corporation (US$51.2 million), to pay interest accrued on the GE indebtedness (US $330,000) and to pay the fees provided for in the agreement that were payable at closing [5] (US$7.1 million). The balance of the funds, or US$27.8 million, was retained to enhance the cash on hand in anticipation of having to fund negative cash flow, as provided in the WB Group's cash flow projections.**
>
> 23. **An additional draw of US$6.5 million was made on March 8, 2010, and these funds were retained to enhance the cash on hand in anticipation of having to fund negative cash flow. The two draws made to date represent total borrowings under the Interim Financing of US$93 million.**

38 The Monitor further adds the following to justify the balance of unused funds (as at March 18, 2010):

> 27. **In view of the favourable variance in results as compared with the projections prepared by WB Group concurrently with the inception of the restructuring process (Appendix D), and the fact that to date, two draws were made, a portion of which was used to enhance the cash position in anticipation of having to fund negative cash flow, WB Group's cash on hand currently stands at approximately US$61.4 million, as at March 12, 2010.**
>
> 28. **We consider that the amount of cash reserves is reasonable in the circumstances, for the following reasons:**
>
> > 28.1 **As indicated in paragraph Erreur ! Source du renvoi introuvable. above, we consider that the favourable variance between the projected and actual cash flow, to date, is attributable in large part to timing differences. The reversal of these timing differences, when they occur, could cause a substantial drawdown of US$39.5 million in the cash reserves.**
> >
> > 28.2 **The activities of WB Group are subject to large variations in the cash balances, from one day to the next, due to the size of the transactions with some of the customers and suppliers. For example, over a two day period in the week ended March 5, 2010, the cash position decreased by approximately $13.5 million.**
> >
> > 28.3 **There are restrictions in the Interim Financing credit agreement, regarding the amounts that can be borrowed, and the advance notice period to effect a draw. Under the Interim Financing credit agreement, WB Group must notify the lender 10 days in advance, when it intends to draw funds under the Interim Financing credit facility. In view of the long delay and the need to have cash immediately available to pay for goods and services or to provide deposits to suppliers, WB Group must retain a large cash reserve, to enable it to continue making payments if there is a temporary slowdown in cash receipts from customers. Based on WB Group's cash flow projections (Appendix D), 10 days' worth of disbursements could represent between US $15 million and US$43 million, and average US$28 million.**
> >
> > 28.4 The Interim Financing credit facility is structured as a term loan, while the funding needs of the WB Group are periodic or temporary. Since the funds cannot be drawn again if there is a repayment under the

term loan, the excess funds have to be retained as a cash reserve, if the excess fund situation is expected to be temporary. In the present case, the majority of the funds were drawn very early on in the process, before management of WB Group could ascertain that favourable variances would occur as compared with the projections. This led to the excess funds situation, and the excess funds cannot be returned as management of WB Group expects that the excess funds situation is only temporary.

29. **Management provided us with an updated cash flow projection for WB Group, for the 13 weeks ending June 4, 2010, and these cash flow projections are attached to this report as Appendix F [6]. The opening cash position, on these cash flow projections, represents the actual cash on hand as of March 5, 2010, and the projection for the week of March 6-12, 2010 reflects the actual draw of $6.5 million against the credit facility. The remainder of the amounts presented for the week of March 12, 2010 represent a projection, as the projections have not yet been updated to reflect the actual results for the week ended March 12, 2010. The actual results for that week will still present a favourable variance, since the projection reflects cash on hand of US$53.5 million, while the actual cash on hand was US$61.4 million. As indicated earlier herein, we consider these variances are, for the most part, a timing difference.**

30. **These projections (Appendix F) suggest that WB Group will need to make further draws against the credit facility in the near future, in order to maintain cash reserves sufficient to support the on-going operations. The projections (Appendix F) suggest that notwithstanding the fact that WB Group currently has a large cash balance, additional funds will be required as early as late March 2010, and that the term loan will be fully drawn (i.e. borrowings of $122 million, taking into consideration the reserves and carved out amounts) by the end of April 2010. The projections (Appendix F) indicate that based on the expected receipts and disbursements activity, the cash reserves of WB Group would be completely depleted at the end of April 2010 without additional drawings under the Interim Financing credit facility and that even with the additional borrowings, the cash reserves will decrease to US$18.5 million by June 4, 2010.**

31. **The projections (Appendix F) suggest that during the projection period, the gross carrying value of accounts receivable and inventories is expected to vary from US$155.9 million (as at March 5, 2010) to US$169.2 million as at June 4, 2010. As such, the projections (Appendix F) suggest that some of the cash flow is necessary to finance an increase in accounts receivable and inventories, of approximately US$13.3 million.**

32. **In view of the above comments, the Monitor still believes that the Interim Financing is warranted and required, in an amount and on terms consistent with that described in the Monitor's report dated February 23, 2010.**

39 In contrast, Dune is not really concerned with the viability of the Debtors. It has only one interest: its own, as it is reflected in a comment outlined by the Monitor at paragraph 8 of his Report of March 17, 2010:

8. On March 15, 2010, a statement was filed by the Dune Group in the proceedings under the Code in respect of Bear Island, in view of the hearing scheduled to take place on March 22, 2010. The statement filed in the context of the proceedings in the U.S. Court in this respect is attached as Appendix C. In the said statement, at paragraph 11 thereof, the Dune Group states that:

The Majority Second Lien Lenders do not oppose the Debtor's request to use cash collateral or obtain the DIP Loan. Moreover, the Majority Second Lien Lenders do not object to this Court's grant of adequate protection to the First Lien Lenders. The Majority Second Lien Lenders simply demand additional adequate protection for their own interests.

In essence, the statement seeks the disclosure of additional information, an increased level of "adequate protection" and/or the payment of fees and expenses incurred and to be incurred by the lenders under the Second Term Loan, and in consequence seeking modifications to the interim financing credit agreement.

40 On balance and having reconsidered the whole question of the DIP financing and DIP Charge as requested by Dune, I conclude that there is no reason to vary or change the Initial Order of February 24, 2010 on this issue.

41 Accordingly, conclusions [D], [E], [F] and [G] of Dune's Motion must be dismissed.

42 Dune also seeks the payment of its professional fees, costs and expenses during the Stay period.

43 During the hearing of March 18, 2010, I questioned the legal basis upon which Dune relies to seek these reliefs. In my opinion and with respect for the contrary view, I must say that I found none, nor was I presented with one.

44 Dune argues that theses fees, costs and expenses are due under the terms and conditions of the Second Lien Term Loan. That may be so but inasmuch as the Stay Order of February 24, 2010, suspends the Debtors' obligation to pay principal and interest under the said Loan Agreement, it follows that incidental additional costs due by the Debtors under the same Agreement are also suspended.

45 Otherwise, there would be little or no interest in seeking and obtaining protection under the CCAA. [7]

46 Sections 11, 11.01 and 11.02 CCAA are quite clear. The only exception to this general rule is the protection of rights of suppliers under Section 11.02 when payment for goods and services provided after the Stay Order, or requiring the further advance of money or credit. Clearly, the fees, costs and expenses of Dune do not fall within this exception. Dune does not ask for payment for goods and/or services sold, delivered or rendered after the Initial Order. It is asking for the payment of a pre-filing obligation, i.e. to pay for certain expenses incurred or to be incurred by Dune for its own benefit and advantage, including but without limitation, the costs of acting against the interests of the Debtors and for the sole interests of Dune.

47 These requests of Dune simply cannot be granted.

48 In addition, Dune is seeking an Order appointing Wells Fargo (« Wells ») as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the Second Lien Loan Agreement, together with an Order for the payment of the professional fees costs and expenses of Wells.

49 This demand cannot be granted unless all of the parties thereto consent.

50 At this point, the consent of all concerned is not available. Some of the Second Lien Lenders are not before me. In addition, the Debtors, although they have no objection to the appointment of Wells, are not prepared to consent to all of the conditions of said proposed appointment, namely the payment of costs fees and expenses of Wells. Furthermore, the Second Lien Loan Agreement contains specific provisions governing the appointment of a successor to Crédit Suisse Toronto, which provisions must, and shall, govern such appointment in the absence of proper consent. These provisions read as follows (page 106 of Exhibit CS-1):

> 9.9 **Successor Agents. (a) The Administrative Agent, the US Collateral Agent and the Canadian Collateral Agent may resign as Administrative Agent, US collateral Agent or Canadian collateral Agent, respectively, upon 30 days' notice to the Lenders and the Borrower. If the Administrative Agent, US Collateral Agent or Canadian Collateral Agent shall resign as Administrative Agent, US Collateral Agent or Canadian Collateral Agent, as applicable, under this Agreement and the other Loan Documents, then the Majority Lenders shall appoint from among the Lenders a successor agent for the Lenders, which successor agent shall (unless an Event of Default shall have occurred and be continuing) be subject to approval by the Borrower (which approval shall not be unreasonably withheld or delayed), whereupon such successor agent shall succeed to the rights, powers and duties of the Administrative Agent, the US Collateral Agent or the Canadian collateral Agent, as applicable, and the term « Administrative Agent », « US Collateral Agent » or « Canadian Collateral Agent », as applicable, shall mean such successor agent effective upon such appointment and approval, and the former Agent's rights powers**

> **and duties as Administrative Agent, US Collateral Agent or Canadian collateral Agent, as applicable, shall be terminated, without any other or further act or deed on the part of such former Agent or any of the parties to this Agreement or nay holders of the Loans. If no successor agent has accepted appointment as Administrative Agent, US a Agent or Canadian Collateral Agent, as applicable, by the date that is 30 days following a retiring Agent's notice of resignation, the retiring Agent's resignation shall nevertheless thereupon become effective, and the Lenders shall assume and perform all of the duties of the Administrative Agent, US collateral Agent or Canadian collateral Agent, as applicable, hereunder until such time, if any, as the Majority Lenders appoint a successor agent as provided for above. (emphasis added)**

51 My understanding of the above citation is that in the event of resignation of the Administrative Agent, such resignation must be preceded by a 30-day notice and then, the « Majority Lenders » under the said Second Lien Loan Agreement, namely Dune, shall appoint a successor *from among the Lenders* a successor agent. Wells is not a Lender and cannot be so appointed unless *all parties consent, including all Lenders.* If the majority Lenders (i.e. Dune) does not appoint either itself or another Lender, then all of the Lenders, acting together are obliged to perform all the duties of the Administrative Agent.

52 In the context of CCAA proceedings and once again, in the absence of a consent of *all parties concerned*, I have no reason to substitute my decision to the clear and unambiguous contractual dispositions cited above. It is up to Dune as a « Majority Lender » to act and not for me to impose Wells to parties who are not prepared to agree to all the terms and conditions of its appointment.

53 As for the payment of fees, expenses and costs of the Administrative Agent, its successor and/or replacement, be it Wells, Dune, another Lender or anyone else, my comments are the same as those expressed previously on the same issue.

54 In the end result, this Motion is dismissed, but without costs, except for the ratification of the forthcoming agreement of the parties with respect to the production of documents and financial information.

Motion dismissed.

Footnotes

1 See Exhibit CS-1

2 This section is cited in part below. It provides for the replacement of the Administrative Agent, once the latter resigns. The procedure is clearly outlined and there is no apparent reason not to follow it.

3 A first pre-filing preliminary Report was filed at the hearing of February 24, 2010 and a second Report was filed in the context of the hearing of the present Motion

4 Report of the Monitor - March 17, 2010. This is, in fact, the second Report filed. A first Report identified as a preliminary pre-filing Report was filed at the hearing of February 24, 2010.

5 These are the fees described in the Monitor's report dated February 23, 2010, as the arranger's fee of 2.5% of the committed funds, the initial fee of 2.5% of the committed funds and the administrative fee of US$100,000 payable at closing. These fees are described in paragraphs 41.4.2, 41.4.3 and 41.4.7 of the said report.

6 Management has also provided us with an updated cash flow projection for WB Canada, for the 13 week period ending June 4, 2010, extracted from the above-mentioned projection for the WB Group, and prepared on the same basis. This cash flow projection is attached as Appendix G.

7 See Janis Sarra, .Rescue! The Companies' Creditors Arrangement Act, Thorson Carswell 2007, pages 33 and 34.

> A Stay Order . . . . Allow[s] the debtor respite from litigation and enforcement of various contractual obligations during the proceeding . . . . Furthermore, a Stay Order . . . [has] the ability to suspend actions against the Debtor while discussions towards a restructuring.are continuing, to avoid a race of the swiftest creditors that would deplete the debtors' assets. , . . .

End of Document

Tab 15

Court File No. CV-11-9514-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	WEDNESDAY, THE 21ST
	)	
JUSTICE MORAWETZ	)	DAY OF DECEMBER, 2011

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 HARTFORD COMPUTER HARDWARE, INC., NEXICORE SERVICES, LLC, HARTFORD COMPUTER GROUP, INC. AND HARTFORD COMPUTER GOVERNMENT, INC. (COLLECTIVELY, THE "CHAPTER 11 CHAPTER 11 DEBTORS")

SUPPLEMENTAL ORDER
(FOREIGN MAIN PROCEEDING)

THIS APPLICATION, made by Hartford Computer Hardware, Inc. (the "**Applicant**"), in its capacity as the foreign representative (the "**Foreign Representative**") of the Chapter 11 Debtors in the proceedings commenced on December 12, 2011, in the United States Bankruptcy Court for the Northern District of Illinois Eastern Division (the "**U.S. Court**") under Chapter 11 of Title 11 of the United States Code (the "**Chapter 11 Proceeding**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C.-36, as amended (the "**CCAA**") for

an Order substantially in the form enclosed in the Application Record of the Applicant was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Application dated December 13, 2011, the affidavit of Brian Mittman sworn December 12, 2011, the affidavits of Alana Shepherd sworn December 13, 16 and 19, 2011 (collectively, the "**Shepherd Affidavits**"), the preliminary report of FTI Consulting Canada Inc. ("**FTI**"), in its capacity as proposed Information Officer (the "**Proposed Information Officer**") dated December 12, 2011, and the Consent of FTI to act as the Information Officer, each filed;

AND ON BEING ADVISED that the secured creditors who are likely to be affected by the charges created herein were given notice;

AND UPON HEARING the submissions of counsel for the Foreign Representative, counsel for the Proposed Information Officer, and counsel for Avnet International (Canada) Ltd. and Avnet, Inc., no one appearing for Delaware Street Capital Master Fund, L.P. (the "**DIP Lender**") or for any other person on the Service List although duly served as appears from the affidavits of service of Bobbie-Jo Brinkman sworn December 13 and 19, 2011,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

INITIAL RECOGNITION ORDER

2. **THIS COURT ORDERS** that any capitalized terms not otherwise defined herein shall have the meanings given to such terms in the Initial Recognition Order dated December 21, 2011 (the "**Recognition Order**").

3. **THIS COURT ORDERS** that the provisions of this Supplemental Order shall be interpreted in a manner complementary to the provisions of the Recognition Order, and that in the event of a conflict between the provisions of this Supplemental Order and the provisions of the Recognition Order, the provisions of the Recognition Order shall govern.

RECOGNITION OF FOREIGN ORDERS

4. **THIS COURT ORDERS** that the following orders (collectively, the "**Foreign Orders**") of the U.S. Court made in the Foreign Proceeding attached to this Order as Schedules "A" through "K" are hereby recognized and given full force and effect in all provinces and territories of Canada pursuant to Section 49 of the CCAA:

(a) the Foreign Representative Order;

(b) the Joint Administration Order;

(c) the Prepetition Wages Order;

(d) the Customer Obligations Order;

(e) the Prepetition Shipping Order;

(f) the Insurance Order;

(g) the Prepetition Taxes Order;

(h) the Utilities Order;

(i) the Cash Management Order;

(j) the Claims Agent Order; and

(k) the Interim DIP Facility Order,

(each as defined in the Shepherd Affidavits),

provided, however, that in the event of any conflict between the terms of the Foreign Orders and the Orders of this Court made in the within proceedings, the Orders of this Court shall govern with respect to the Property in Canada.

APPOINTMENT OF INFORMATION OFFICER

5. **THIS COURT ORDERS** that FTI (the "**Information Officer**") is hereby appointed as an officer of this Court, with the powers and duties set out herein.

ADDITIONAL PROTECTIONS FOR CHAPTER 11 DEBTORS ETC.

6. **THIS COURT ORDERS** that, in addition to the stay of proceedings and the other protections afforded the Chapter 11 Debtors, the Property and the Business in the Recognition Order, the following protections and stay of proceedings shall continue until further Order of this Court:

(a) during the Stay Period, all Persons having oral or written agreements with the Chapter 11 Debtors or statutory or regulatory mandates for the supply of goods and/or services in Canada, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services provided in respect of the Property or Business of the Chapter 11 Debtors, are hereby

restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Chapter 11 Debtors, and that the Chapter 11 Debtors shall be entitled to the continued use in Canada of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Chapter 11 Debtors in accordance with normal payment practices of the Chapter 11 Debtors or such other practices as may be (i) agreed upon by the supplier or service provider and the relevant Chapter 11 Debtor(s), on notice to the Information Officer and the Foreign Representative, or (ii) ordered by this Court; and

(b) except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Chapter 11 Debtors with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Chapter 11 Debtors whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations.

7. **THIS COURT ORDERS** that no Proceeding shall be commenced or continued against or in respect of the Information Officer, except with leave of this Court. In addition to the rights and protections afforded the Information Officer herein, or as an officer of this Court, the Information Officer shall have the benefit of all of the rights and protections afforded to a Monitor under the CCAA, and shall incur no liability or obligation as a result of its appointment

or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part.

OTHER PROVISIONS RELATING TO THE INFORMATION OFFICER

8. **THIS COURT ORDERS** that the Information Officer:

(a) is hereby authorized to provide such assistance to the Foreign Representative in the performance of its duties as the Foreign Representative may reasonably request;

(b) shall report to this Court at least once every three months with respect to the status of these proceedings and the status of the Foreign Proceedings, which reports may include information relating to the Property, the Business, or such other matters as may be relevant to the proceedings herein;

(c) in addition to the periodic reports referred to in paragraph 8(b) above, the Information Officer may report to this Court at such other times and intervals as the Information Officer may deem appropriate with respect to any of the matters referred to in paragraph 8(b) above;

(d) shall have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Chapter 11 Debtors, to the extent that is necessary to perform its duties arising under this Order; and

(e) shall be at liberty to engage independent legal counsel or such other persons as the Information Officer deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order.

9. **THIS COURT ORDERS** that the Chapter 11 Debtors and the Foreign Representative shall (i) advise the Information Officer of all material steps taken by the Chapter 11 Debtors or the Foreign Representative in these proceedings or in the Foreign Proceedings, (ii) co-operate fully with the Information Officer in the exercise of its powers and discharge of its obligations, and (iii) provide the Information Officer with the assistance that is necessary to enable the Information Officer to adequately carry out its functions.

10. **THIS COURT ORDERS** that the Information Officer shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

11. **THIS COURT ORDERS** that the Information Officer may provide any creditor of a Chapter 11 Debtor with information provided by the Chapter 11 Debtors in response to reasonable requests for information made in writing by such creditor addressed to the Information Officer. The Information Officer shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Information Officer has been advised by the Chapter 11 Debtors is privileged or confidential, the Information Officer shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Information Officer, the Foreign Representative and the relevant Chapter 11 Debtor(s) may agree.

12. **THIS COURT ORDERS** that the Information Officer and counsel to the Information Officer shall be paid by the Chapter 11 Debtors their reasonable fees and disbursements incurred in respect of these proceedings both before and after the making of this Order subject to the

Budget (as defined in the Interim DIP Facility Order), in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts. The Chapter 11 Debtors are hereby authorized and directed to pay the accounts of the Information Officer and counsel for the Information Officer on a weekly basis and, in addition, the Chapter 11 Debtors are hereby authorized to pay to the Information Officer and counsel to the Information Officer, collectively, a retainer in the amount of U.S.$40,000, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

13. **THIS COURT ORDERS** that the Information Officer and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Information Officer and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice, and the accounts of the Information Officer and its counsel shall not be subject to approval in the Foreign Proceeding.

14. **THIS COURT ORDERS** that the Information Officer and counsel to the Information Officer, if any, shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property in Canada, which charge shall not exceed an aggregate amount of $50,000.00, as security for their professional fees and disbursements incurred in respect of these proceedings, both before and after the making of this Order. The Administration Charge shall have the priority set out in paragraphs 16 and 18 hereof.

INTERIM FINANCING

15. **THIS COURT ORDERS** that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lender's Charge**") on the Property in Canada, which DIP Lender's Charge shall be consistent with the liens and charges created by the Interim DIP

Facility Order, provided however that the DIP Lender's Charge (i) shall not secure an obligation that exists before this Order is made, and (ii) with respect to the Property in Canada, shall have the priority set out in paragraphs 16 and 18 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

16. **THIS COURT ORDERS** that the priorities of the Administration Charge and the DIP Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $50,000); and

Second – DIP Lender's Charge.

17. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge or the DIP Lender's Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

18. **THIS COURT ORDERS** that each of the Administration Charge and the DIP Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property in Canada and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

19. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Chapter 11 Debtors shall not grant any Encumbrances over any Property in Canada that rank in priority to, or *pari passu* with, the Administration Charge or

the DIP Lender's Charge, unless the Chapter 11 Debtors also obtains the prior written consent of the Information Officer and the DIP Lender, or further Order of this Court.

20. **THIS COURT ORDERS** that the Administration Charge and the DIP Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., 1985 c. B-3, as amended (the "**BIA**"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds any Chapter 11 Debtor, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges shall not create or be deemed to constitute a breach by any Chapter 11 Debtor of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(c) the payments made by the Chapter 11 Debtors to the Chargees pursuant to this Order, and the granting of the Charges, do not and will not constitute preferences,

fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

21. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the applicable Chapter 11 Debtor's interest in such real property leases.

SERVICE AND NOTICE

22. **THIS COURT ORDERS** that the Chapter 11 Debtors, the Foreign Representative and the Information Officer each be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Chapter 11 Debtors' creditors or other interested parties at their respective addresses as last shown on the records of the Debtors and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

23. **THIS COURT ORDERS** that the Chapter 11 Debtors, the Foreign Representative and the Information Officer, and any party who has filed a Notice of Appearance, may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time.

24. **THIS COURT ORDERS** that within seven (7) days from the date of this Order, or as soon as practicable thereafter, the Information Officer shall cause to be published a notice substantially in the form attached to this Order as Schedule "L", once a week for two consecutive weeks, in the Globe and Mail.

25. **THIS COURT ORDERS** that the Information Officer (i) shall post on its website all Orders of this Court made in these proceedings, all reports of the Information Officer filed herein, and such other materials as this Court may order from time to time, and (ii) may post on its website any other materials that the Information Officer deems appropriate.

GENERAL

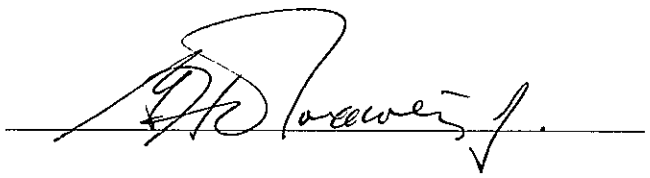
26. **THIS COURT ORDERS** that the Information Officer may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

27. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Chapter 11 Debtors, the Foreign Representative, the Information Officer, and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Chapter 11 Debtors, the Foreign Representative, and the Information Officer, the latter as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Chapter 11 Debtors, the Foreign Representative, and the Information Officer and their respective agents in carrying out the terms of this Order.

28. **THIS COURT ORDERS** that each of the Chapter 11 Debtors, the Foreign Representative and the Information Officer be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

29. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order or seek other relief on not less than seven (7) days notice to the Chapter 11 Debtors, the Foreign Representative, the Information Officer and their respective counsel, and to any other party or parties likely to be affected by the order sought, or upon such other notice, if any, as this Court may order.

30. **THIS COURT ORDERS** that this Order shall be effective as of 12:01 a.m. on the date of this Order.



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MB

SCHEDULE "A"

Foreign Representative Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
HARTFORD COMPUTER HARDWARE, INC., *et al.*,[1]	)	Case No. 11-49744 (PSH)
	)	(Joint Administration Pending)
	)	
Debtors.	)	Hon. Pamela S. Hollis

ORDER AUTHORIZING HARTFORD COMPUTER HARDWARE, INC. TO ACT AS THE FOREIGN REPRESENTATIVE OF THE DEBTORS

This matter coming before the Court on the Motion of the Debtors for an pursuant to section 1505 of title 11 of the United States Code (the "Bankruptcy Code"), for authorization for Hartford Computer Hardware, Inc. to act as the foreign representative of the Debtors in Canada in order to seek recognition of the Chapter 11 Cases on behalf of the Debtors, and to request that the Ontario Superior Court of Justice (Commercial List) (the "Ontario Court") lend assistance to this Court in protecting the Debtors' property, and to seek any other appropriate relief from the Ontario Court that the Ontario Court deems just and proper (the "Motion")[2]; the Court having reviewed the Motion and the Declaration in Support of First Day Relief; the Court having found that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) venue is proper in this district pursuant to 28 U.S.C. § 1408 and 1409, (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (d) notice of the Motion having been sufficient under the circumstances; and the Court having determined that the legal and factual basis set forth in the Motion establish just cause for the relief granted herein;

IT IS HEREBY ORDERED as follows:

---

[1] The Debtors are Hartford Computer Hardware, Inc. (FEIN 27-4297525), Nexicore Services, LLC (FEIN 03-0489686), Hartford Computer Group, Inc. (FEIN 36-2973523), and Hartford Computer Government, Inc (FEIN 20-0845960).

[2] Capitalized terms not defined herein shall have the meaning given to them in the Motion.

1. The Motion is GRANTED.

2. All objections to the Motion or the relief requested therein that have not been made, withdrawn, waived, or settled, and all reservations of rights included therein, hereby are overruled on the merits.

3. Notice of the Motion was proper, timely, adequate and sufficient under the particular circumstances.

4. Debtor Hartford Computer Hardware, Inc. is hereby authorized (a) to act as the foreign representative of the Debtors in Canada, as such term is defined in the CCAA, (b) to seek recognition by the Ontario Court of the Chapter 11 Cases and of certain orders made by the Court in the Chapter 11 Cases from time to time, (c) to request that the Ontario Court lend assistance to this Court, and (d) to seek any other appropriate relief from the Ontario Court that the Debtors deem just and proper.

5. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

4. This Court shall retain jurisdiction to interpret and enforce this Order.

Dated: DEC 15 2011, 2011

UNITED STATES BANKRUPTCY JUDGE

SCHEDULE "B"

Joint Administration Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: HARTFORD COMPUTER HARDWARE, INC., Debtor.	Chapter 11 Case No. 11-49744 Hon. Pamela S. Hollis
In re: NEXICORE SERVICES, LLC, Debtor.	Chapter 11 Case No. 11-49754 Hon. Pamela S. Hollis
In re: HARTFORD COMPUTER GROUP, INC., Debtor.	Chapter 11 Case No. 11-49750 Hon. Pamela S. Hollis
In re: HARTFORD COMPUTER GOVERNMENT, INC., Debtor.	Chapter 11 Case No. 11-49752 Hon. Pamela S. Hollis

ORDER DIRECTING JOINT ADMINISTRATION
OF THE DEBTORS' CHAPTER 11 CASES

This matter coming before the Court on the Motion of the Debtors for an Order Pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure Directing the Joint Administration of Their Chapter 11 Cases (the "Motion")[1]; the Court having reviewed the Motion and the Declaration in Support of First Day Relief; the Court having found that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) venue is proper in this

[1] Capitalized terms not defined herein shall have the meaning given to them in the Motion.

district pursuant to 28 U.S.C. § 1408 and 1409, (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (d) notice of the Motion having been sufficient under the circumstances; and the Court having determined that the legal and factual basis set forth in the Motion establish just cause for the relief granted herein;

IT IS HEREBY ORDERED as follows:

1. The Motion is GRANTED.

2. All objections to the Motion or the relief requested therein that have not been made, withdrawn, waived, or settled, and all reservations of rights included therein, hereby are overruled on the merits.

3. Notice of the Motion was proper, timely, adequate and sufficient under the particular circumstances.

4. In accordance with Bankruptcy Rule 1015(b), the above-captioned chapter 11 cases are hereby consolidated, for procedural purposes only, and shall be jointly administered by this Court.

5. The caption of the jointly administered chapter 11 cases shall be as follows (footnote included):

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
HARTFORD COMPUTER HARDWARE, INC., *et al.*,[2]	)	Case No. 11-49744 (PSH)
	)	(Jointly Administered)
	)	
Debtors.	)	Hon. Pamela S. Hollis

[2] The Debtors are Hartford Computer Hardware, Inc., Nexicore Services, LLC, Hartford Computer Group, Inc., and Hartford Computer Government, Inc.

6. No party shall be required to list any further information beyond that set forth above in pleadings filed in these chapter 11 cases.

7. All original docket entries shall be made in the case Hartford Computer Hardware, Inc., *et al.*, Case No. 11-49744 (PSH), and the Clerk of this Court is directed to forthwith make a separate docket entry in each of the cases of Nexicore Services, LLC, Hartford Computer Group, Inc., and Hartford Computer Government, Inc., substantially as follows:

> An order has been entered in accordance with Rule 1015(b) of the Federal Rules of Bankruptcy Procedure directing the procedural consolidation and joint administration of the chapter 11 cases commenced by Hartford Computer Hardware, Inc. and its affiliates. The docket in Case No. 11-49744 (PSH) should be consulted for all matters affecting the chapter 11 case of this debtor.

8. Nothing contained in the Motion or in this order shall be construed to cause substantive consolidation of these chapter 11 cases.

9. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this order.

10. The terms and conditions of this order shall be immediately effective and enforceable upon its entry.

11. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this order.

Dated: DEC 15 2011, 2011

UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: HARTFORD COMPUTER HARDWARE, INC., Debtor.	)	Chapter 11 Case No. 11-49744 Hon. Pamela S. Hollis
In re: NEXICORE SERVICES, LLC, Debtor.	)	Chapter 11 Case No. 11-49754 Hon. Pamela S. Hollis
In re: HARTFORD COMPUTER GROUP, INC., Debtor.	)	Chapter 11 Case No. 11-49750 Hon. Pamela S. Hollis
In re: HARTFORD COMPUTER GOVERNMENT, INC., Debtor.	)	Chapter 11 Case No. 11-49752 Hon. Pamela S. Hollis

ORDER DIRECTING JOINT ADMINISTRATION
OF THE DEBTORS' CHAPTER 11 CASES

This matter coming before the Court on the Motion of the Debtors for an Order Pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure Directing the Joint Administration of Their Chapter 11 Cases (the "Motion")[1]; the Court having reviewed the Motion and the Declaration in Support of First Day Relief; the Court having found that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) venue is proper in this

[1] Capitalized terms not defined herein shall have the meaning given to them in the Motion.

district pursuant to 28 U.S.C. § 1408 and 1409, (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (d) notice of the Motion having been sufficient under the circumstances; and the Court having determined that the legal and factual basis set forth in the Motion establish just cause for the relief granted herein;

IT IS HEREBY ORDERED as follows:

1. The Motion is GRANTED.

2. All objections to the Motion or the relief requested therein that have not been made, withdrawn, waived, or settled, and all reservations of rights included therein, hereby are overruled on the merits.

3. Notice of the Motion was proper, timely, adequate and sufficient under the particular circumstances.

4. In accordance with Bankruptcy Rule 1015(b), the above-captioned chapter 11 cases are hereby consolidated, for procedural purposes only, and shall be jointly administered by this Court.

5. The caption of the jointly administered chapter 11 cases shall be as follows (footnote included):

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
HARTFORD COMPUTER HARDWARE, INC., *et al.*,[2]	)	Case No. 11-49744 (PSH)
	)	(Jointly Administered)
	)	
Debtors.	)	Hon. Pamela S. Hollis

[2] The Debtors are Hartford Computer Hardware, Inc., Nexicore Services, LLC, Hartford Computer Group, Inc., and Hartford Computer Government, Inc.

6. No party shall be required to list any further information beyond that set forth above in pleadings filed in these chapter 11 cases.

7. All original docket entries shall be made in the case Hartford Computer Hardware, Inc., *et al.*, Case No. 11-49744 (PSH), and the Clerk of this Court is directed to forthwith make a separate docket entry in each of the cases of Nexicore Services, LLC, Hartford Computer Group, Inc., and Hartford Computer Government, Inc., substantially as follows:

> An order has been entered in accordance with Rule 1015(b) of the Federal Rules of Bankruptcy Procedure directing the procedural consolidation and joint administration of the chapter 11 cases commenced by Hartford Computer Hardware, Inc. and its affiliates. The docket in Case No. 11-49744 (PSH) should be consulted for all matters affecting the chapter 11 case of this debtor.

8. Nothing contained in the Motion or in this order shall be construed to cause substantive consolidation of these chapter 11 cases.

9. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this order.

10. The terms and conditions of this order shall be immediately effective and enforceable upon its entry.

11. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this order.

Dated: DEC 15 2011, 2011

UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: HARTFORD COMPUTER HARDWARE, INC., Debtor.	)	Chapter 11 Case No. 11-49744 Hon. Pamela S. Hollis
In re: NEXICORE SERVICES, LLC, Debtor.	)	Chapter 11 Case No. 11-49754 Hon. Pamela S. Hollis
In re: HARTFORD COMPUTER GROUP, INC., Debtor.	)	Chapter 11 Case No. 11-49750 Hon. Pamela S. Hollis
In re: HARTFORD COMPUTER GOVERNMENT, INC., Debtor.	)	Chapter 11 Case No. 11-49752 Hon. Pamela S. Hollis

ORDER DIRECTING JOINT ADMINISTRATION
OF THE DEBTORS' CHAPTER 11 CASES

This matter coming before the Court on the Motion of the Debtors for an Order Pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure Directing the Joint Administration of Their Chapter 11 Cases (the "Motion")[1]; the Court having reviewed the Motion and the Declaration in Support of First Day Relief; the Court having found that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) venue is proper in this

[1] Capitalized terms not defined herein shall have the meaning given to them in the Motion.

district pursuant to 28 U.S.C. § 1408 and 1409, (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (d) notice of the Motion having been sufficient under the circumstances; and the Court having determined that the legal and factual basis set forth in the Motion establish just cause for the relief granted herein;

IT IS HEREBY ORDERED as follows:

1. The Motion is GRANTED.

2. All objections to the Motion or the relief requested therein that have not been made, withdrawn, waived, or settled, and all reservations of rights included therein, hereby are overruled on the merits.

3. Notice of the Motion was proper, timely, adequate and sufficient under the particular circumstances.

4. In accordance with Bankruptcy Rule 1015(b), the above-captioned chapter 11 cases are hereby consolidated, for procedural purposes only, and shall be jointly administered by this Court.

5. The caption of the jointly administered chapter 11 cases shall be as follows (footnote included):

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
HARTFORD COMPUTER HARDWARE, INC., *et al.*,[2]	)	Case No. 11-49744 (PSH)
	)	(Jointly Administered)
	)	
Debtors.	)	Hon. Pamela S. Hollis

[2] The Debtors are Hartford Computer Hardware, Inc., Nexicore Services, LLC, Hartford Computer Group, Inc., and Hartford Computer Government, Inc.

6. No party shall be required to list any further information beyond that set forth above in pleadings filed in these chapter 11 cases.

7. All original docket entries shall be made in the case Hartford Computer Hardware, Inc., *et al.*, Case No. 11-49744 (PSH), and the Clerk of this Court is directed to forthwith make a separate docket entry in each of the cases of Nexicore Services, LLC, Hartford Computer Group, Inc., and Hartford Computer Government, Inc., substantially as follows:

> An order has been entered in accordance with Rule 1015(b) of the Federal Rules of Bankruptcy Procedure directing the procedural consolidation and joint administration of the chapter 11 cases commenced by Hartford Computer Hardware, Inc. and its affiliates. The docket in Case No. 11-49744 (PSH) should be consulted for all matters affecting the chapter 11 case of this debtor.

8. Nothing contained in the Motion or in this order shall be construed to cause substantive consolidation of these chapter 11 cases.

9. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this order.

10. The terms and conditions of this order shall be immediately effective and enforceable upon its entry.

11. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this order.

Dated: DEC 15 2011, 2011

UNITED STATES BANKRUPTCY JUDGE

60926-179

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: HARTFORD COMPUTER HARDWARE, INC., Debtor.	Chapter 11 Case No. 11-49744 Hon. Pamela S. Hollis
In re: NEXICORE SERVICES, LLC, Debtor.	Chapter 11 Case No. 11-49754 Hon. Pamela S. Hollis
In re: HARTFORD COMPUTER GROUP, INC., Debtor.	Chapter 11 Case No. 11-49750 Hon. Pamela S. Hollis
In re: HARTFORD COMPUTER GOVERNMENT, INC., Debtor.	Chapter 11 Case No. 11-49752 Hon. Pamela S. Hollis

ORDER DIRECTING JOINT ADMINISTRATION
OF THE DEBTORS' CHAPTER 11 CASES

This matter coming before the Court on the Motion of the Debtors for an Order Pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure Directing the Joint Administration of Their Chapter 11 Cases (the "Motion")[1]; the Court having reviewed the Motion and the Declaration in Support of First Day Relief; the Court having found that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) venue is proper in this

[1] Capitalized terms not defined herein shall have the meaning given to them in the Motion.

district pursuant to 28 U.S.C. § 1408 and 1409, (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (d) notice of the Motion having been sufficient under the circumstances; and the Court having determined that the legal and factual basis set forth in the Motion establish just cause for the relief granted herein;

IT IS HEREBY ORDERED as follows:

1. The Motion is GRANTED.

2. All objections to the Motion or the relief requested therein that have not been made, withdrawn, waived, or settled, and all reservations of rights included therein, hereby are overruled on the merits.

3. Notice of the Motion was proper, timely, adequate and sufficient under the particular circumstances.

4. In accordance with Bankruptcy Rule 1015(b), the above-captioned chapter 11 cases are hereby consolidated, for procedural purposes only, and shall be jointly administered by this Court.

5. The caption of the jointly administered chapter 11 cases shall be as follows (footnote included):

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
HARTFORD COMPUTER HARDWARE, INC., *et al.*,[2]	)	Case No. 11-49744 (PSH)
	)	(Jointly Administered)
	)	
Debtors.	)	Hon. Pamela S. Hollis

[2] The Debtors are Hartford Computer Hardware, Inc., Nexicore Services, LLC, Hartford Computer Group, Inc., and Hartford Computer Government, Inc.

6. No party shall be required to list any further information beyond that set forth above in pleadings filed in these chapter 11 cases.

7. All original docket entries shall be made in the case Hartford Computer Hardware, Inc., *et al.*, Case No. 11-49744 (PSH), and the Clerk of this Court is directed to forthwith make a separate docket entry in each of the cases of Nexicore Services, LLC, Hartford Computer Group, Inc., and Hartford Computer Government, Inc., substantially as follows:

> An order has been entered in accordance with Rule 1015(b) of the Federal Rules of Bankruptcy Procedure directing the procedural consolidation and joint administration of the chapter 11 cases commenced by Hartford Computer Hardware, Inc. and its affiliates. The docket in Case No. 11-49744 (PSH) should be consulted for all matters affecting the chapter 11 case of this debtor.

8. Nothing contained in the Motion or in this order shall be construed to cause substantive consolidation of these chapter 11 cases.

9. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this order.

10. The terms and conditions of this order shall be immediately effective and enforceable upon its entry.

11. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this order.

Dated: DEC 15 2011, 2011

UNITED STATES BANKRUPTCY JUDGE

SCHEDULE "C"

Prepetition Wages Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
HARTFORD COMPUTER HARDWARE, INC., *et al.*[1]	)	Case No. 11-49744 (PSH)
	)	(Joint Administration Pending)
	)	
Debtors.	)	Hon. Pamela S. Hollis

ORDER (I) AUTHORIZING PAYMENT OF PREPETITION EMPLOYEE OBLIGATIONS AND RELATED WITHHOLDING TAXES; (II) AUTHORIZING THE PREPETITION EMPLOYEE BENEFITS AND CONTINUATION OF EMPLOYEE BENEFIT PLANS; AND (III) DIRECTING ALL BANKS TO HONOR PREPETITION CHECKS FOR PAYMENT OF PREPETITION EMPLOYEE OBLIGATIONS

This matter having come before the Court on the motion, dated [date] (the "Motion"),[2] of the above-captioned debtors and debtors-in-possession (the "Debtors"), for entry of an order under 11 U.S.C. §§ 105(a), 363(b), 507(a)(4) and 541, (I) authorizing the Debtors to pay to (a) their employees unpaid wages, salaries, bonuses and commissions (including commissions earned by independent sales representatives) and related obligations that accrued prior to the commencement of these cases (the "Employee Obligations"), and (b) the appropriate federal, state and local taxing authorities and other governmental agencies (the "Taxing Authorities") the state, local, and federal employment and withholding taxes, wage garnishments and other court ordered deductions with respect to the Employee Obligations (the "Employment and Withholding Taxes"); (II) authorizing the continuation of employee benefit plans on a postpetition basis and the payment of certain prepetition obligations with respect to such programs (the "Employee Benefits"); and (III) directing all banks to honor prepetition checks or

[1] The Debtors are Hartford Computer Hardware, Inc. (FEIN 27-4297525), Nexicore Services, LLC (FEIN 03-0489686), Hartford Computer Group, Inc. (FEIN 36-2973523), and Hartford Computer Government, Inc. (FEIN 20-0845960).

[2] Unless otherwise defined herein, capitalized terms used herein shall have the meanings ascribed to them in the Motion.

wire transfers with respect to payments authorized by the Motion; and the Court having reviewed the Motion and the Declaration in Support of First Day Relief; and the Court having determined that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors and other parties-in-interest; and it appearing that notice of the Motion was good and sufficient under the particular circumstances and that no other or further notice need be given; and upon the record herein; and after due deliberation thereon; and good and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion is GRANTED.

2. The Debtors are authorized, but not directed, to pay or otherwise honor (including to any third parties that provide or aid in the monitoring, processing or administration of the Employee Obligations) the Employee Obligations and Employee Benefits in the ordinary course of business.

3. The Debtors are authorized, but not directed, to continue to provide the Employee Benefits, including all benefits relating to, without limitation, the Medical and Dental Benefits, workers' compensation, life and disability insurance, the Debtors' 401(k) plan, in effect immediately prior to the filing of these cases.

4. The Debtors are authorized to continue to honor their obligations, including any prepetition obligations, to Employees and applicable third-parties for Reimbursable Expenses, including those owed through corporate credit cards.

5. As applicable, all of the Debtors' banks are hereby authorized and directed, when requested by the Debtors, to receive, process, honor, and pay any and all checks drawn on the Debtors' accounts to pay the prepetition obligations authorized by this Order, whether those

checks were presented prior to or after the Petition Date, provided that sufficient funds are available in the applicable accounts to make the payments. The Debtors' banks are hereby prohibited from placing any holds on, or attempting to reverse, any automatic transfers to any account of an Employee or other party for prepetition Employee Obligations. The Debtors are authorized to issue new postpetition checks or effect new postpetition fund transfers on account of the prepetition Employee Obligations to replace any prepetition checks or fund transfer requests that may be dishonored or rejected.

6. The Debtors may pay any and all Employee Deductions, including social security, FICA, federal and state income taxes, garnishments, health care payments, 401(k) Deductions and other types of withholding, whether these relate to the period prior to the date of the Debtors' chapter 11 filings or subsequent thereto.

7. Notwithstanding any other term herein, no prepetition wages shall be paid to Brian Mittman, without further order of court,) pay

8. Nothing in the Motion or this Order or the relief granted (including any actions taken or payments made by the Debtors pursuant to the relief) shall (a) be construed as a request for authority to assume any executory contract under 11 U.S.C. § 365; (b) waive, affect or impair any of the Debtors' rights, claims or defenses, including, but not limited to, those arising from Bankruptcy Code section 365, other applicable law and any agreement; (c) grant third-party beneficiary status or bestow any additional rights on any third party; or (d) be otherwise enforceable by any third party.

9. Authorizations given to the Debtors in this Order empower but do not direct the Debtors to effectuate the payments specified herein.

10. Notwithstanding Bankruptcy Rule 6004(h), this Order shall be effective and enforceable immediately upon entry hereof.

11. This Court shall retain jurisdiction over any and all issues arising from or related to the implementation and interpretation of this Order.

Dated:
Chicago, Illinois
DEC 15 2011

United States Bankruptcy Judge

SCHEDULE "D"

Customer Obligations Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
HARTFORD COMPUTER HARDWARE, INC., *et al.*,[1]	)	Case No. 11-49744 (PSH)
	)	(Joint Administration Pending)
	)	
Debtors.	)	Hon. Pamela S. Hollis

ORDER AUTHORIZING THE DEBTORS TO (A) HONOR CERTAIN PREPETITION OBLIGATIONS TO CUSTOMERS AND (B) CONTINUE THEIR CUSTOMER PROGRAMS AND PRACTICES IN THE ORDINARY COURSE OF BUSINESS

This matter coming before the Court on the Motion of the Debtors for entry of an order authorizing the Debtors to (a) honor certain prepetition obligations to customers and sales agents and (b) continue their customer programs and practices in the ordinary course of business (the "Motion")[2]; the Court having reviewed the Motion and the Declaration in Support of First Day Relief; the Court having found that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) venue is proper in this district pursuant to 28 U.S.C. § 1408 and 1409, (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (d) notice of the Motion having been sufficient under the circumstances; and the Court having determined that the legal and factual basis set forth in the Motion establish just cause for the relief granted herein;

IT IS HEREBY ORDERED as follows:

1. The Motion is GRANTED.

[1] The Debtors are Hartford Computer Hardware, Inc. (FEIN 27-4297525), Nexicore Services, LLC (FEIN 03-0489686), Hartford Computer Group, Inc. (FEIN 36-2973523), and Hartford Computer Government, Inc (FEIN 20-0845960).

[2] Capitalized terms not defined herein shall have the meaning given to them in the Motion.

2. All objections to the Motion or the relief requested therein that have not been made, withdrawn, waived, or settled, and all reservations of rights included therein, hereby are overruled on the merits.

3. Notice of the Motion was proper, timely, adequate and sufficient under the particular circumstances.

4. The Debtors are authorized, but not directed, to continue to perform under the Customer Programs.

5. Nothing herein shall be deemed to convert any prepetition claim into an administrative expense claim against the Debtors or their estates.

6. The Debtors are authorized, but not directed, to continue, renew, replace, implement new, and/or terminate their Customer Programs, in the ordinary course of business, without further application to the Court.

7. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.

8. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied by the contents of the Motion or otherwise deemed waived.

9. The terms and conditions of this order shall be immediately effective and enforceable upon its entry.

10. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this order.

Dated: DEC 15 2011, 2011

UNITED STATES BANKRUPTCY JUDGE

SCHEDULE "E"

Prepetition Shipping Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
HARTFORD COMPUTER HARDWARE, INC., *et al.*,[1]	)	Case No. 11-49744
	)	(Joint Administration Pending)
	)	
Debtors.	)	Hon. Pamela S. Hollis

ORDER (I) AUTHORIZING THE PAYMENT OF CERTAIN PREPETITION SHIPPING CHARGES AND (II) GRANTING CERTAIN RELATED RELIEF

This matter coming before the Court on the Motion of the Debtors for entry of an order (I) Authorizing the Payment of Certain Pre-Petition Shipping Charges and (II) Granting Certain Related Relief (the "Motion")[2]; the Court having reviewed the Motion and the Declaration in Support of First Day Relief; the Court having found that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) venue is proper in this district pursuant to 28 U.S.C. § 1408 and 1409, (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (d) notice of the Motion having been sufficient under the circumstances; and the Court having determined that the legal and factual basis set forth in the Motion establish just cause for the relief granted herein;

IT IS HEREBY ORDERED as follows:

1. The Motion is GRANTED.

2. All objections to the Motion or the relief requested therein that have not been made, withdrawn, waived, or settled, and all reservations of rights included therein, hereby are overruled on the merits.

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[1] The Debtors are Hartford Computer Hardware, Inc. (FEIN 27-4297525), Nexicore Services, LLC (FEIN 03-0489686), Hartford Computer Group, Inc. (FEIN 36-2973523), and Hartford Computer Government, Inc (FEIN 20-0845960).

[2] Capitalized terms not defined herein shall have the meaning given to them in the Motion.

3. Notice of the Motion was proper, timely, adequate and sufficient under the particular circumstances.

4. The Debtors are authorized in their sole discretion, to pay the prepetition claims of the Shippers.

5. The Debtors' banks are authorized and directed to receive, process, honor and pay all checks presented for payment of, and to honor all fund transfer requests made by the Debtors pursuant to this order, regardless of whether such checks were presented or fund transfer requests were submitted prior to or after the Petition Date; provided, however, that (a) funds are available in the Debtors' accounts to cover such checks and fund transfer requests and (b) the Debtors' banks are authorized to rely on the Debtors' designation of any particular check or fund transfer as approved by this Order.

6. Nothing in this order, nor the Debtors' payment of claims pursuant to this order, shall be construed as (a) an admission as to the validity of any claim against the Debtors; (b) a wavier of the Debtors' rights to dispute any claim by the Shippers on any ground; (c) a promise to pay any claim; or (d) a request or authorization to assume any agreement or contract pursuant to section 365 of the Bankruptcy Code or otherwise.

7. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied by the contents of the Motion or otherwise deemed waived.

8. The terms and conditions of this order shall be immediately effective and enforceable upon its entry.

9. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this order.

[Continued on Following Page]

Dated: DEC 15 2011

UNITED STATES BANKRUPTCY JUDGE

60927081

SCHEDULE "F"

Insurance Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
HARTFORD COMPUTER HARDWARE, INC., *et al.*,[1]	)	Case No. 11-49744 (PSH)
	)	(Joint Administration Pending)
	)	
Debtors.	)	Hon. Pamela S. Hollis

ORDER PURSUANT TO SECTIONS 105(A) AND 363 OF THE BANKRUPTCY CODE (I) AUTHORIZING DEBTORS TO HONOR PREPETITION INSURANCE POLICIES AND RENEW SUCH POLICIES IN THE ORDINARY COURSE OF BUSINESS AND (II) GRANTING RELATED RELIEF

This matter coming before the Court on the Motion of the Debtors for an order authorizing the Debtors to (i) honor prepetition insurance policies in the ordinary course of business or enter into new insurance arrangements, as may be required as the terms of existing arrangements expire without need for further authority or approval from the Court; and (ii) the Debtors' banks or financial institutions to honor and process checks and transfers related to such insurance policies and the obligations thereunder (the "Motion")[2]; the Court having reviewed the Motion and the Declaration in Support of First Day Relief; the Court having found that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) venue is proper in this district pursuant to 28 U.S.C. § 1408 and 1409, (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (d) notice of the Motion having been sufficient under the circumstances; and the Court having determined that the legal and factual basis set forth in the Motion establish just cause for the relief granted herein;

IT IS HEREBY ORDERED as follows:

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[1] The Debtors are Hartford Computer Hardware, Inc. (FEIN 27-4297525), Nexicore Services, LLC (FEIN 03-0489686), Hartford Computer Group, Inc. (FEIN 36-2973523), and Hartford Computer Government, Inc (FEIN 20-0845960).

[2] Capitalized terms not defined herein shall have the meaning given to them in the Motion.

1. The Motion is GRANTED.

2. All objections to the Motion or the relief requested therein that have not been made, withdrawn, waived, or settled, and all reservations of rights included therein, hereby are overruled on the merits.

3. Notice of the Motion was proper, timely, adequate and sufficient under the particular circumstances.

4. The Debtors are authorized, but not required, to honor the terms of the Insurance Policies and to renew the Insurance Policies in the ordinary course of business as set forth in the Motion; provided, however, that such payments are made in accordance with the court approved debtor-in-possession financing/cash collateral order and corresponding budget.

5. Nothing in this order nor any action taken by the Debtors in furtherance of the implementation hereof shall be deemed an approval of the assumption or rejection of any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code.

6. Nothing in this order shall impair the ability of the Debtors or appropriate party-in-interest to contest any claim of any creditor pursuant to applicable law or otherwise dispute, contest, setoff, or recoup any claim, or assert any rights, claims or defenses related thereto.

7. All applicable banks or financial institutions are authorized, when requested by the Debtors, in the Debtors' sole discretion, to receive, process, honor and pay all checks drawn on or direct deposit and funds transfer instructions relating to the Debtors' accounts and any other transfers that are related to the premium obligations and the costs and expenses related thereto; provided, that sufficient funds are available in the accounts to make such payments; provided further, that any such bank or financial institution may reply on the representations of the Debtors regarding which checks that were drawn or instructions that were issued by the

Debtors before the Petition Date should be honored post-petition pursuant to an order of this Court and that any such bank or financial institution shall not have any liability to any party for relying on the representations of the Debtors as provided herein.

8. Bankruptcy Rule 6004(b) has been satisfied because the relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtors.

9. The terms and conditions of this order shall be immediately effective and enforceable upon its entry.

10. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this order.

Dated: DEC 15 2011, 2011

UNITED STATES BANKRUPTCY JUDGE

SCHEDULE "G"

Prepetition Taxes Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
HARTFORD COMPUTER HARDWARE, INC., *et al.*,[1]	)	Case No. 11-49744 (PSH)
	)	(Joint Administration Pending)
	)	
Debtors.	)	Hon. Pamela S. Hollis

ORDER AUTHORIZING THE DEBTORS TO PAY PREPETITION SALES, USE, AND OTHER TAX OBLIGATIONS PURSUANT TO 11 U.S.C. §§ 105(a), 507(a)(8) AND 541

This matter coming before the Court on the Motion of the Debtors for entry of an order, pursuant to 11 U.S.C. §§ 105(a), 507(a)(8) and 541, to pay certain unpaid prepetition taxes and fees, including, but not limited to, sales and use taxes (the "Taxes") to the respective federal, state, and local taxing authorities (the "Taxing Authorities") in the ordinary course of the Debtors' businesses (the "Motion")[2]; the Court having reviewed the Motion and the Declaration in Support of First Day Relief; the Court having found that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) venue is proper in this district pursuant to 28 U.S.C. § 1408 and 1409, (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (d) notice of the Motion having been sufficient under the circumstances; and the Court having determined that the legal and factual basis set forth in the Motion establish just cause for the relief granted herein;

IT IS HEREBY ORDERED as follows:

1. The Motion is GRANTED.

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[1] The Debtors are Hartford Computer Hardware, Inc. (FEIN 27-4297525), Nexicore Services, LLC (FEIN 03-0489686), Hartford Computer Group, Inc. (FEIN 36-2973523), and Hartford Computer Government, Inc (FEIN 20-0845960).

[2] Capitalized terms not defined herein shall have the meaning given to them in the Motion.

2. All objections to the Motion or the relief requested therein that have not been made, withdrawn, waived, or settled, and all reservations of rights included therein, hereby are overruled on the merits.

3. Notice of the Motion was proper, timely, adequate and sufficient under the particular circumstances.

4. The Debtors are authorized, but not directed to, in the reasonable exercise of their business judgment, pay only those Taxes that constitute trust fund or withholding taxes, including Taxes subsequently determined upon audit to be owed for periods prior to the Petition Date, to the Taxing Authorities.

5. As applicable, all of the Debtors' banks are hereby authorized, when requested by the Debtors in their sole discretion, to receive, process, honor, and pay any and all checks drawn on the Debtors' accounts to pay the Taxes, whether those checks were presented prior to or after the Petition Date, provided that sufficient funds are available in the applicable accounts to make the payments.

6. Nothing contained in the Motion or this Order shall, or shall be deemed to, limit, abridge, or otherwise impair the Debtors' rights to contest, on any grounds, the validity or amount of any Taxes that the Taxing Authorities allege to be due.

7. The terms and conditions of this order shall be immediately effective and enforceable upon its entry.

8. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this order.

Dated: DEC 15 2011, 2011

UNITED STATES BANKRUPTCY JUDGE

60926609

SCHEDULE "H"

Utilities Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
HARTFORD COMPUTER HARDWARE, INC., *et al.*,[1]	)	Case No. 11-49744 (PSH)
	)	(Joint Administration Pending)
Debtors.	)	
	)	Hon. Pamela S. Hollis

INTERIM AND PROPOSED FINAL ORDER(I) PROHIBITING UTILITIES FROM ALTERING, REFUSING, OR DISCONTINUING SERVICES TO, OR DISCRIMINATING AGAINST, THE DEBTORS; (II) DETERMINING THAT THE UTILITIES ARE ADEQUATELY ASSURED OF FUTURE PAYMENT; (III) ESTABLISHING PROCEDURES FOR DETERMINING REQUESTS FOR ADDITIONAL ASSURANCE; AND (IV) PERMITTING UTILITY COMPANIES TO OPT OUT OF THE PROCEDURES ESTABLISHED HEREIN

This matter coming before the Court on the Motion of the Debtors for Interim and Final Orders: (I) Prohibiting Utilities from Altering, Refusing or Discontinuing Services to, or Discriminating Against the Debtors; (II) Determining That the Utilities are Adequately Assured of Future Payment; (III) Establishing Procedures for Determining Requests for Additional Assurance; and (IV) Permitting Utility Companies to Opt Out of the Procedures Established Herein (the "Motion")[2]; the Court having reviewed the Motion and the Declaration in Support of First Day Relief; the Court having found that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) venue is proper in this district pursuant to 28 U.S.C. § 1408 and 1409, (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (d) notice of the Motion having been sufficient under the circumstances; and the Court having determined that the legal and factual basis set forth in the Motion establish just cause for the relief granted herein;

[1] The Debtors are Hartford Computer Hardware, Inc. (FEIN 27-4297525), Nexicore Services, LLC (FEIN 03-0489686), Hartford Computer Group, Inc. (FEIN 36-2973523), and Hartford Computer Government, Inc (FEIN 20-0845960).

[2] Capitalized terms not defined herein shall have the meaning given to them in the Motion.

IT IS HEREBY ORDERED as follows:

1. The Motion is GRANTED.

2. All objections to the Motion or the relief requested therein that have not been made, withdrawn, waived, or settled, and all reservations of rights included therein, hereby are overruled on the merits.

3. Notice of the Motion was proper, timely, adequate and sufficient under the particular circumstances.

4. Subject to the procedures described below, no Utility Company may (a) alter, refuse, terminate, or discontinue utility services to, and/or discriminate against, the Debtors on the basis of the commencement of these chapter 11 cases or on account of outstanding prepetition invoices or (b) require additional assurance of payment, other than the Proposed Adequate Assurance, as a condition to the Debtors receiving such utility services pending the entry of a Final Order or this Order becoming a Final Order as set forth below.

5. Utility Companies (excluding De Minimis Providers) shall be entitled to an Adequate Assurance Deposit in the amount set forth on Exhibit A to the Motion, within twenty days of the first day hearing (the "First Day Hearing"), provided that such Utility Company is not currently paid in advance for its services or holding a deposit (after taking into account any valid offsets of the Debtors' prepetition debts against such deposit under applicable law) equal to or greater than the Adequate Assurance Deposit (which remaining deposit shall be deemed to be the Adequate Assurance Deposit for purposes of this Order).

6. As a condition of accepting an Adequate Assurance Deposit, the accepting Utility Company shall be deemed to have stipulated that the Adequate Assurance Deposit constitutes adequate assurance of future payment to such Utility Company within the meaning of section

366 of the Bankruptcy Code, and shall further be deemed to have waived any right to seek additional adequate assurance during the Debtors' bankruptcy cases, unless the Utility Company makes an additional adequate assurance request (each, an "Additional Assurance Request") at least five days prior to the final hearing date (the "Final Hearing Date") on the Motion as set by the Court (the "Request Deadline").

7. Any Adequate Assurance Deposit requested by, and provided to, any Utility Company pursuant to the procedures described herein shall be returned to the Debtors at the conclusion of these chapter 11 cases, if not returned or applied earlier.

8. The following Adequate Assurance Procedures are approved in all respects:

a. Any Utility Company desiring assurance of future payment for utility service beyond the Proposed Adequate Assurance must serve an Additional Assurance Request so that it is received by the Debtors' counsel by the Request Deadline at the following address: Katten Muchin Rosenman LLP, 525 W. Monroe Street, Chicago, Illinois 60661 (Attn: John P. Sieger, Esq.).

b. Any Additional Assurance Request must (i) be made in writing, (ii) set forth the location(s) for which utility services are provided and the relevant account number(s), (iii) describe any deposits, prepayments or other security currently held by the requesting Utility Company, (iv) describe any payment delinquency or irregularity by the Debtors for the postpetition period, and (v) specify the amount and nature of assurance of payment that would be satisfactory to the Utility Company. Any Additional Assurance Request that fails to meet these requirements shall be deemed an invalid request for adequate assurance.

c. Upon the Debtors' receipt of an Additional Assurance Request at the addresses set forth above, the Debtors shall have the greater of (i) 14 days from the receipt of such Additional Assurance Request or (ii) 30 days from the Petition Date (collectively, the "Resolution Period") to negotiate with the requesting Utility Company to resolve its Additional Assurance Request. The Resolution Period may be extended by agreement of the Debtors and the applicable Utility Company.

d. The Debtors, in their discretion, may resolve any Additional Assurance Request by mutual agreement with the requesting Utility Company and without further order of the Court, and may, in connection with any such

resolution, in their discretion, provide the requesting Utility Company with additional assurance of future payment in a form satisfactory to the Utility Company, including, but not limited to, cash deposits, prepayments and/or other forms of security, if the Debtors believe such additional assurance is reasonable.

e. If the Debtors determine that an Additional Assurance Request is not reasonable, and are not able to resolve such request during the Resolution Period, the Debtors, during or immediately after the Resolution Period, will request a hearing before this Court to determine the adequacy of assurances of payment made to the requesting Utility Company (the "Determination Hearing"), pursuant to section 366(c)(3)(A) of the Bankruptcy Code.

f. Pending the resolution of the Additional Assurance Request at a Determination Hearing, the Utility Company making such request shall be restrained from discontinuing, altering or refusing service to the Debtors on account of unpaid charges for prepetition services or on account of any objections to the Proposed Adequate Assurance.

g. Other than through the Opt-Out Procedures, any Utility Company that does not comply with the Adequate Assurance Procedures is deemed to find the Proposed Adequate Assurance satisfactory to it and is forbidden from discontinuing, altering or refusing service on account of any unpaid prepetition charges, or requiring additional assurance of payment (other than the Proposed Adequate Assurance).

9. The following Opt-Out Procedures are approved in all respects:

a. A Utility Company that desires to opt-opt of the Determination Procedures must file an objection (a "Procedures Objection") with the Court and serve such Procedures Objection so that it is *actually received* within 15 days of entry of this Order by the Debtors at the following address: Katten Muchin Rosenman LLP, 525 W. Monroe Street, Chicago, Illinois 60661 (Attn: John P. Sieger, Esq.).

b. Any Procedures Objection must (i) be made in writing; (ii) set forth the location(s) for which utility services are provided and the relevant account number(s); (iii) describe any deposits, prepayments or other security currently held by the objecting Utility Company; (iv) explain why the objecting Utility Company believes the Proposed Adequate Assurance is not sufficient adequate assurance of future payment; and (v) identify, and explain the basis of, the Utility Company's proposed adequate assurance requirement under section 366(c)(2) of the Bankruptcy Code.

c. The Debtors, in their discretion, may resolve any Procedures Objection by mutual agreement with the objecting Utility Company and without further order of the Court, and may, in connection with any such resolution and in its discretion, provide a Utility Company with assurance of future payment, including, but not limited to, cash deposits, prepayments or other forms of security, if the Debtors believe such assurance of payment is reasonable.

d. If the Debtors determine that a Procedures Objection is not reasonable and is not able to reach a prompt alternative resolution with the objecting Utility Company, the Procedures Objection will be heard at the Final Hearing.

e. Any Utility Company that does not timely file a Procedures Objection is deemed to consent to, and shall be bound by, the Adequate Assurance Procedures.

10. The Debtors are authorized, as necessary, to provide notice and a copy of the Interim Order (which, for purposes of this paragraph, shall be the Final Order after entry of such Final Order) to the Utility Companies not listed on the Utility Service List (collectively, the "Additional Utility Companies"), as such Utility Companies are identified. The Interim Order, including the Adequate Assurance Procedures, shall apply to any Additional Utility Companies; provided, however, that (a) the Opt-Out Procedures shall apply only to the extent that a Procedures Objection made by an Additional Utility Company is filed with the Court and submitted to the Debtors' counsel no later than 4:00 p.m. (CST) on the date that is the earlier of (i) five business days before the Final Hearing or (ii) 10 days after service of the Interim Order on such Additional Utility Company and (b) the deadline for an Additional Utility Company to submit an Additional Assurance Request under the Adequate Assurance Procedures will be 25 days after the date the Interim Order is served upon such Additional Utility Company.

11. A Final Hearing to resolve any Procedures Objections shall be conducted on JAN 26, 2012 at 10:30 a.m., Central Time.

12. A Utility Company shall be deemed to have adequate assurance of payment under section 366 of the Bankruptcy Code unless and until: (a) the Debtors, in their discretion, agree to (i) an Additional Assurance Request or (ii) an alternative assurance of payment with the Utility Company during the Resolution Period; or (b) this Court enters an order at the Final Hearing or any Determination Hearing requiring that additional adequate assurance of payment be provided.

13. Nothing herein constitutes a finding that any entity is or is not a Utility Company hereunder or under section 366 of the Bankruptcy Code, whether or not such entity is listed on the Utility Service List.

14. The Debtors shall serve a copy of this Order on each Utility Company listed on the Utility Service List within two business days of the date this Order is entered.

15. The terms and conditions of this Order shall be effective and enforceable immediately upon its entry. This Order shall be deemed to be the Final Order with respect to any Utility Company that does not file a timely Procedures Objection as described herein.

16. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this order.

Dated: DEC 15 2011, 2011

UNITED STATES BANKRUPTCY JUDGE

SCHEDULE "I"

Cash Management Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
HARTFORD COMPUTER HARDWARE, INC., *et al.*[1]	)	Case No. 11-49744 (PSH)
	)	(Joint Administration Pending)
	)	
Debtors.	)	Hon. Pamela S. Hollis

ORDER (I) APPROVING CONTINUED USE OF EXISTING BANK ACCOUNTS, BUSINESS FORMS, AND CASH MANAGEMENT SYSTEM, AND (II) TO OBTAIN LIMITED WAIVER THE REQUIREMENTS OF 11 U.S.C. § 345(b)

This matter coming before the Court on the Debtors' Motion for An Order (i) Approving Continued Use of Existing Bank Accounts, Business Forms, and Cash Management System, and (ii) to Obtain Limited Waiver the Requirements of 11 U.S.C. § 345(B) (the "Motion");[2] the Court having reviewed the Motion and the First Day Declaration; the Court having found that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) venue is proper in this district pursuant to 28 U.S.C. § 1408 and 1409, (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (d) notice of the Motion having been sufficient under the circumstances; and the Court having determined that the legal and factual basis set forth in the Motion establish just cause for the relief granted herein;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.

2. The Debtors are authorized to: (a) maintain the Cash Management System

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[1] The Debtors are Hartford Computer Hardware, Inc. (FEIN 27-4297525), Nexicore Services, LLC (FEIN 03-0489686), Hartford Computer Group, Inc. (FEIN 36-2973523), and Hartford Computer Government, Inc (FEIN 20-0845960).

[2] Capitalized terms not defined herein shall have the meaning given to them in the Motion.

in the ordinary course of their business, in substantially the same form as the Cash Management System described in the Motion except as set forth herein; (b) implement ordinary course changes to its Cash Management System; and (c) open and close bank accounts and continue to use their Bank Accounts in the names and with the account numbers existing immediately prior to the commencement of the above captioned bankruptcy case.

3. On a daily basis, funds deposited in the Debtors' RBS account from account debtors located in Canada, shall be swept to the Debtors' BMO account.

4. The Debtors are authorized to continue to use their Business Forms substantially in the forms existing immediately before the Petition Date. The Debtor is authorized to utilize its current business forms without reference to its status as debtor in possession.

5. The Banks are authorized to continue to follow the instructions of all parties authorized to issue instruction with respect to the Bank Accounts and to accept and honor all representations from the Debtors as to which checks, drafts, wires, or ACH transfers should be honored or dishonored consistent with any order(s) of this Court and governing law, whether such checks, drafts, wires, or ACH transfers are dated prior to, on or subsequent to the Petition Date. The Banks shall not be liable to any party on account of (a) following the Debtors' instructions or representations as to any order of this Court, (b) the honoring of any prepetition check or item in a good faith belief that the Court has authorized such prepetition check or item to be honored or (c) an innocent mistake made despite implementation of reasonable item handling procedures.

6. The Banks are authorized to charge and the Debtors are authorized to pay or honor, in their sole discretion, the Bank Fees. The Banks also are authorized to charge back

returned items, whether such items are dated prior to, on or subsequent to the Petition Date, to the Bank Accounts in the normal course of business.

7. Sufficient cause existing under section 345(b) of the Bankruptcy Code and there being more than 200 creditors of the Debtor, the Debtors are authorized to invest and deposit the estates' money in accordance with the Debtors' existing investment practices or commercially comparable practices, notwithstanding that such practices may not strictly comply in all instances with the requirements of section 345 of the Bankruptcy Code or the U.S. Trustee's Guidelines.

8. Notwithstanding the possible applicability of Bankruptcy Rule 6004(h), this Order shall be immediately effective and enforceable upon its entry.

9. The Debtor is authorized and empowered to take such actions as may be necessary and appropriate to implement the terms of this Order.

Dated: DEC 15 2011, 2011

UNITED STATES BANKRUPTCY JUDGE

SCHEDULE "J"

Claims Agent Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
HARTFORD COMPUTER HARDWARE, INC., *et al.*,[1]	)	Case No. 11-49744 (PSH)
	)	(Joint Administration Pending)
	)	
Debtors.	)	Hon. Pamela S. Hollis

ORDER APPOINTING KURTZMAN CARSON CONSULTANTS LLC AS THE OFFICIAL CLAIMS AND NOTICING AGENT AND TO PROVIDE OTHER ESSENTIAL SERVICES TO THE ESTATES

This matter coming before the Court on the Motion of the Debtors for an Order appointing Kurtzman Carson Consultants LLC ("KCC") as the official claims and noticing agent and to provide other essential services, all as more fully set forth in the Motion (the "Motion")[2]; the Court having reviewed the Motion, the Declaration in Support of First Day Relief and the Kass Declaration filed in support of the Motion; the Court having found that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) venue is proper in this district pursuant to 28 U.S.C. § 1408 and 1409, (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (d) notice of the Motion having been sufficient under the circumstances; and the Court having determined that the legal and factual basis set forth in the Motion establish just cause for the relief granted herein;

IT IS HEREBY ORDERED as follows:

1. The Motion is GRANTED.

[1] The Debtors are Hartford Computer Hardware, Inc. (FEIN 27-4297525), Nexicore Services, LLC (FEIN 03-0489686), Hartford Computer Group, Inc. (FEIN 36-2973523), and Hartford Computer Government, Inc (FEIN 20-0845960).

[2] Capitalized terms not defined herein shall have the meaning given to them in the Motion.

2. All objections to the Motion or the relief requested therein that have not been made, withdrawn, waived, or settled, and all reservations of rights included therein, hereby are overruled on the merits.

3. Notice of the Motion was proper, timely, adequate and sufficient under the particular circumstances.

4. The Debtors are authorized to retain KCC under the terms of the Service Agreement, effective as of the petition date, to perform the noticing and other services set forth in the Application and to receive, maintain, record, and otherwise administer the proofs of claim filed in this chapter 11 case.

5. KCC is appointed as Claims Agent and, as such, is the custodian of court records and designated as the authorized repository for all proofs of claim filed in this chapter 11 case and is authorized and directed to maintain the official claims register for the Debtors and to provide the Clerk with a certified duplicate thereof upon the request of the Clerk.

6. At the request of the Debtors or the office of the Clerk of the Court (the "Clerk's Office"), KCC is authorized to provide the following services (the "Services") as the Claims Agent:

A. Prepare and serve notices in these chapter 11 cases at the request of the Debtors or the Court, including:

1. notice of commencement of these chapter 11 cases;

2. notice of claims bar dates (and to the extent supplemental notice is necessary or appropriate);

3. notice of objections to claims, and any applicable response deadlines;

4. notice of any hearings on a motion for the sale of the Debtors' assets;

5. notice of any hearings on a disclosure statement and confirmation of a chapter 11 plan; and

6. other miscellaneous notices to any entities, as the Debtors or the Court deem necessary or appropriate for an orderly administration of these chapter 11 cases.

B. Within ~~seven~~ 4 days after the mailing of particular notice, file with the Clerk's Office a certificate or affidavit of service that includes a copy of notice involved, an alphabetical list of persons to whom the notice was mailed, and the date of mailing;

C. Efficiently and effectively notice, docket and maintain proofs of claim and proofs of interest, including:

1. At any time, upon request, satisfying the Court that it has the capability to efficiently and effectively notice, docket and maintain proofs of claim and proofs of interest;

2. Maintaining copies of all proofs of claim and proofs of interest filed;

3. Maintaining official claims registers by docketing all proofs of claim and proofs of interest on claims registers, including the following information: (a) the name and address of the claimant and any agent thereof, if an agent filed the proof of claim or proof of interest; (b) the date received; (c) the claim number assigned; and (d) the asserted amount and classification of the claim;

4. Implementing necessary security measures to ensure the completeness and integrity of the claims register;

5. Maintaining all original proofs of claim in correct claim number order, in an environmentally secure area and protect the integrity of such original documents from theft and/or alteration;

6. Transmitting to the Clerk's office a copy of the claims register on a regular basis;

7. Maintaining an up-to-date mailing list for all entities that have filed a proof of claim or proof of interest, which list shall be available upon request of a party in interest or the Clerk's office;

8. Providing access to the public for examination of copies of the proofs of claim or interest during regular business hours;

9. Recording all transfers of claims pursuant to Bankruptcy Rule 3002(e) and providing notice of such transfers as required by Bankruptcy Rule 3001(e); and

10. Promptly complying with such further conditions and requirements as the Clerk's Office or the Court may at any time prescribe;

D. Providing such other claims processing, noticing, and administrative services as may be requested from time to time by the Debtors;

7. In addition to the foregoing, KCC may assist with, among other things: (A) maintaining and updating the master mailing lists of creditors; (B) tracking and administration of claims; and (C) performing other administrative tasks pertaining to the administration of the chapter 11 cases, as may be requested by the Debtors or the Clerk's Office. KCC will follow the notice and claim procedures that conform to the guidelines promulgated by the Clerk of the Court and the Judicial Conference of the United States and as may be entered by the Court's order.

8. KCC is authorized to take such other action to comply with all duties set forth in the Motion.

9. The Debtors are authorized to pay KCC's fees and expenses as set forth in the Services Agreement in the ordinary course of business without the necessity of KCC filing fee applications with this Court.

10. Without further order of this Court, the fees and expenses of KCC incurred in performance of the above services are to be treated as an administrative expense priority claim against the Debtors' estates and shall be paid by the Debtors in accordance with the terms of the Services Agreement within 10 days after receiving the invoice, unless KCC is advised within that ten-day period that the Debtors have objected to the invoice, in which case the Debtors will schedule a hearing before the Court to consider the disputed invoice. In such case, the Debtors

shall remit to KCC only the undisputed portion of the invoice and, if applicable, shall pay the remainder to KCC upon the resolution of the disputed portion, as mandated by this Court.

11. Notwithstanding the foregoing, the Debtors may be required to prepay for certain services in accordance with the terms of the Services Agreement.

12. KCC will comply with all requests of the Clerk's Office and the guidelines promulgated by the Judicial Conference of the United States for the implementation of 28 U.S.C. § 156(c).

13. The terms and conditions of this order shall be immediately effective and enforceable upon its entry.

14. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this order.

DEC 15 2011

Dated: _____, 2011

UNITED STATES BANKRUPTCY JUDGE

SCHEDULE "K"

Interim DIP Facility Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
HARTFORD COMPUTER HARDWARE, INC., *et al.*,[1]	)	Case No. 11-49744 (PSH)
	)	(Joint Administration Pending)
	)	
Debtors.	)	Hon. Pamela S. Hollis

INTERIM ORDER (I) AUTHORIZING THE DEBTORS TO OBTAIN POST-PETITION FINANCING PURSUANT TO 11 U.S.C. § 364, (II) AUTHORIZING THE USE OF CASH COLLATERAL PURSUANT TO 11 U.S.C. § 363, (III) GRANTING ADEQUATE PROTECTION TO THE PREPETITION SECURED LENDER PURSUANT TO 11 U.S.C. §§ 361 AND 363, AND (IV) SCHEDULING A FINAL HEARING PURSUANT TO BANKRUPTCY RULE 4001

Upon the motion of Hartford Computer Group, Inc., Nexicore Services, LLC, Hartford Computer Hardware, Inc., and Hartford Computer Government, Inc., the debtors and debtors in possession (the "Debtors") in the above-captioned chapter 11 cases (the "Chapter 11 Cases"), dated December 12, 2011 (the "Motion") [Docket No. 13], (a) seeking the entry of an interim order (the "Order") and a final order (the "Final Order"): (i) authorizing the Debtors to enter into a senior secured post-petition loan agreement (the "DIP Facility"), pursuant to section 364 of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the "Bankruptcy Code"), with Delaware Street Capital Master Fund, L.P. ("Delaware Street" or the "DIP Lender"), in substantially the form attached hereto as Exhibit A (as the same may be amended, restated, supplemented or otherwise modified from time to time, the "DIP Credit Agreement"), pursuant to the terms of this Order, the DIP Credit Agreement, and any related documents required to be delivered by or in connection with the DIP Credit Agreement, including, without limitation, any security agreements, pledge agreements, UCC financing statements, and other collateral documents (collectively with the DIP Credit Agreement, the "DIP Credit

[1] The Debtors are Hartford Computer Hardware, Inc. (FEIN 27-4297525), Nexicore Services, LLC (FEIN 03-0489686), Hartford Computer Group, Inc. (FEIN 36-2973523), and Hartford Computer Government, Inc (FEIN 20-0845960).

Documents") and to perform such other and further acts as may be required in connection with the DIP Credit Documents; (ii) granting security interests, liens, and superpriority claims (including a superpriority administrative claim pursuant to section 364(c)(1) of the Bankruptcy Code, liens pursuant to sections 364(c)(2) and 364(c)(3) of the Bankruptcy Code, and priming liens pursuant to section 364(d) of the Bankruptcy Code) to the DIP Lender to secure all obligations of the Debtors under and with respect to the DIP Facility; (iii) authorizing Debtors' use of the Cash Collateral (as hereinafter defined) solely on the terms and conditions set forth in this Order and in the DIP Credit Agreement; and (iv) granting adequate protection to Delaware Street in its capacity as the Prepetition Secured Lender (as hereinafter defined); (b) requesting, pursuant to Rule 4001 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), that an emergency interim hearing (the "Interim Hearing") on the Motion be held for the Court to consider entry of this Order; and (c) requesting, pursuant to Bankruptcy Rules 4001(b)(2) and 4001(c)(2), that the Court (i) schedule a final hearing (the "Final Hearing") on the Motion within thirty (30) days of the Petition Date (as hereinafter defined) to consider entry of the Final Order attached hereto as Exhibit B, and (ii) approve certain notice procedures with respect thereto; and the Interim Hearing having been held by this Court on December 15, 2011; and the Court having considered the Motion and all pleadings related thereto, including the record made by the Debtors at the Interim Hearing; and after due deliberation and consideration, and good and sufficient cause appearing therefor:

THE COURT HEREBY FINDS AND CONCLUDES AS FOLLOWS:

A. On December 12, 2011 (the "Petition Date"), the Debtors filed with this Court voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors are continuing to operate their businesses and are managing their respective properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request has been made for the appointment of a trustee or examiner and no official committee of unsecured creditors has been appointed in these Chapter 11 Cases.

B. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(b) and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

C. The Debtors have provided notice of the Motion and the Interim Hearing by facsimile, electronic mail, or overnight mail to: (i) the Office of the United States Trustee (the "U.S. Trustee"); (ii) the thirty (30) largest unsecured creditors of the Debtors; (iii) counsel to the DIP Lender; (iv) counsel to the Prepetition Secured Lender; (v) all known parties with liens of record on assets of the Debtors as of the Petition Date; (vi) all financial institutions at which the Debtors maintain deposit accounts; (vii) the landlords for all non-residential real properties occupied by the Debtors as of the Petition Date; (viii) the Internal Revenue Service; and (ix) all other parties requesting notice pursuant to Bankruptcy Rule 2002. The Court concludes that the foregoing notice was sufficient and adequate under the circumstances and complies with Bankruptcy Rule 4001 in all respects.

D. Without prejudice to the rights of any other party, but subject to the limitations thereon set forth in paragraph 29 below, the Debtors admit, stipulate and agree that:

(1) Pursuant to that certain Loan and Security Agreement dated as of December 17, 2004 (as amended, supplemented or otherwise modified prior to the date hereof, the "Prepetition Credit Agreement"), by and among, on the one hand, Hartford Computer Group, Inc., and Nexicore Services, LLC, as the borrowers, and by Hartford Computer Hardware, Inc., and Hartford Computer Government, Inc., as the guarantors, and, on the other hand, Delaware Street as the lender (the "Prepetition Secured Lender"), the Prepetition Secured Lender made certain loans and other financial accommodations to or for the benefit of the Debtors. In connection with the Prepetition Credit Agreement, the Debtors entered into certain collateral and ancillary documentation with the Prepetition Secured Lender (such collateral and ancillary documentation collectively with the Prepetition Credit Agreement, the "Prepetition Credit Documents"). All

obligations of the Debtors arising under the Prepetition Credit Documents, including all loans, advances, debts, liabilities, principal, interest, fees, swap exposure, charges, expenses, indemnities, and obligations for the performance of covenants, tasks or duties, or for the payment of monetary amounts owing to the Prepetition Secured Lender by the Debtors, of any kind or nature, whether or not evidenced by any note, agreement or other instrument, shall hereinafter be referred to as the "Prepetition Obligations."

(2) As of December 1, 2011, the Debtors were truly and justly indebted to the Prepetition Secured Lender pursuant to the Prepetition Credit Documents, without defense, counterclaim or offset of any kind, in the following aggregate amounts in respect of loans and other financial accommodations made by the Prepetition Secured Lender pursuant to and in accordance with the terms of the Prepetition Credit Documents, not including (i) interest accruing after December 1, 2011 and (ii) fees: (a) Revolver Loan: $9,076,302 (the "Prepetition Revolving Debt"); (b) Term Loan A: $27,482,409; Term Loan B: $12,660,490; Term Loan C: $5,748,432; Term Loan D: $6,965,575; Term Loan E: $8,640,407 (Term Loan A, B, C, D, and E, collectively, the "Prepetition Term Debt").

(3) In addition as of the Petition Date, the Debtors were further truly and justly indebted to the Prepetition Secured Lender pursuant to the Prepetition Credit Documents, without defense or setoff of any kind, in the aggregate amounts of (i) all other accrued or hereafter accruing and unpaid interest on the Prepetition Revolving Debt and the Prepetition Term Debt, (ii) all unpaid fees and expenses (including the fees and expenses of attorneys and financial advisors for the Prepetition Secured Lender) now or hereafter due under the Prepetition Credit Documents, and (iii) any other obligations of the Debtors under the Prepetition Credit Documents.

(4) Pursuant to the Prepetition Credit Documents, the Prepetition Obligations are secured by valid, duly perfected first priority security interests in and continuing liens on substantially all of the assets and property of the Debtors, including, but not limited to, all personal

and fixture property of every kind and nature, including without limitation, all goods (including inventory, equipment, and any accessions thereto), instruments, documents, accounts receivable, chattel paper (including electronic chattel paper), the Debtors' lockbox and cash concentration account, letter of credit rights, commercial tort claims, securities and all other investment property, insurance claims and proceeds, intellectual property, and all general intangibles, and all proceeds, products, accessions, rents and profits of or in respect of any of the foregoing, in each case wherever located, whether then owned or existing or thereafter acquired or arising. All collateral granted or pledged by the Debtors to the Prepetition Secured Lender pursuant to the Prepetition Credit Documents shall collectively be referred to herein as the "Prepetition Collateral."

(4) Substantially all of the Debtors' cash, including, without limitation, all cash and other amounts on deposit or maintained in the Debtors' lockbox and cash concentration account by the Debtors and any amounts generated by collection of the Debtors' accounts receivable, the sale of the Debtors' inventory, or any other disposition of the Prepetition Collateral constitutes proceeds of the Prepetition Collateral and therefore constitutes cash collateral of the Prepetition Secured Lender within the meaning of section 363(a) of the Bankruptcy Code (the "Cash Collateral").

(5) All Prepetition Credit Documents executed and delivered by the Debtors to the Prepetition Secured Lender are valid and enforceable by the Prepetition Secured Lender against the Debtors. The Prepetition Secured Lender duly perfected its liens upon and security interests in the Prepetition Collateral in accordance with applicable law. The liens and security interests of the Prepetition Secured Lender in the Prepetition Collateral, as security for the Prepetition Obligations, constitute valid, binding, enforceable and perfected first priority liens and security interests and are not subject to avoidance, disallowance, subordination or re-characterization pursuant to the Bankruptcy Code or applicable non-bankruptcy law (except insofar as such liens are subordinated to the DIP Liens, and the Carve-Out (as each term is

hereinafter defined) in accordance with this Order).

(6) The Prepetition Obligations constitute legal, valid and binding obligations of the Debtors, no offsets, defenses or counterclaims to the Prepetition Obligations exist, and no portion of the Prepetition Obligations is subject to avoidance, disallowance, reduction, subordination or re-characterization pursuant to the Bankruptcy Code or applicable non-bankruptcy law. The Debtors have no valid claims (as such term is defined in section 101(5) of the Bankruptcy Code) or causes of action against the Prepetition Secured Lender with respect to the Prepetition Credit Documents or otherwise, whether arising at law or at equity, including, without limitation, any re-characterization, subordination, avoidance or other claims arising under or pursuant to sections 105, 510 or 542 through 553, inclusive, of the Bankruptcy Code. The Debtors irrevocably waive any right to (i) challenge or contest the liens or security interests of the Prepetition Secured Lender in the Prepetition Collateral, (ii) challenge or contest the validity of the Prepetition Obligations, or (iii) assert any claims or causes of action against the Prepetition Secured Lender or any of its affiliates, agents, attorneys, financial advisors, officers, managers, directors or employees under the Bankruptcy Code or applicable non-bankruptcy law.

E. The Debtors have an immediate and critical need to obtain post-petition financing under the DIP Facility in order to operate their businesses as Debtors in Possession and comply with their obligations as Debtors in Possession.

F. The Debtors also have an immediate and critical need to use Cash Collateral pursuant to the terms of this Order to, among other things, finance the ordinary costs of their operations, maintain business relationships with vendors, suppliers and customers, make payroll, and satisfy other working capital and operational needs. The Debtors' access to sufficient working capital and liquidity through the use of Cash Collateral pursuant this Order is vital to the preservation and maintenance of the going concern value of the Debtors' estates. Consequently, without the continued use of Cash Collateral by the

Debtors, to the extent authorized pursuant to this Order, the Debtors and their estates would suffer immediate and irreparable harm.

G. The Debtors are unable to obtain (i) adequate unsecured credit allowable either under (a) sections 364(b) and 503(b)(1) of the Bankruptcy Code or (b) section 364(c)(1) of the Bankruptcy Code, (ii) adequate credit secured either by (x) a senior lien on unencumbered assets of their estates under section 364(c)(2) of the Bankruptcy Code or (y) a junior lien on encumbered assets of their estates under section 364(c)(3) of the Bankruptcy Code, or (iii) secured credit under section 364(d)(1) of the Bankruptcy Code from sources other than the DIP Lender on terms more favorable than the terms of the DIP Facility. The only funding available to the Debtors is the DIP Facility.

H. The DIP Lender has represented to the Court that it is willing to provide the Debtors with certain financing commitments but solely on the terms and conditions set forth in this Order and the DIP Credit Documents. After considering all of their alternatives, the Debtors have concluded, in an exercise of their sound business judgment, that the financing to be provided by the DIP Lender pursuant to the terms of this Order and the DIP Credit Documents represents the best post-petition financing presently available to the Debtors.

I. The Prepetition Secured Lender has represented to the Court that it is prepared to consent to: (i) the imposition of certain liens under section 364(d)(1) of the Bankruptcy Code in favor of the DIP Lender, but solely on the terms and conditions set forth in this Order and in the DIP Credit Documents, which liens will prime the Primed Liens (as hereinafter defined), and (ii) the Debtors' use of the Prepetition Collateral (including the Cash Collateral), provided that the Court authorizes the Debtors, pursuant to sections 361, 363 and 364 of the Bankruptcy Code, to grant to the Prepetition Secured Lender, as adequate protection for the Adequate Protection Obligations (as hereinafter defined), but subject to the Carve-Out (a) replacement security interests in and liens and mortgages upon (collectively, the "Adequate Protection Liens") all of the DIP

Collateral (as hereinafter defined), and (b) a superpriority administrative expense claim under section 507(b) of the Bankruptcy Code (the "Adequate Protection Priority Claim"), which Adequate Protection Priority Claim shall be subordinate in priority only to the Carve-Out, and the superpriority claim under section 364(c)(1) of the Bankruptcy Code in favor of the DIP Lender. The Adequate Protection Liens and the Adequate Protection Priority Claim shall secure the payment of the Prepetition Obligations in an amount equal to any diminution in the value of the Prepetition Secured Lender's interests in the Prepetition Collateral, including the Cash Collateral from and after the Petition Date (the aggregate amount of such diminution, the "Adequate Protection Obligations") including, without limitation, any diminution resulting from: (i) the Debtors' use of the Prepetition Collateral, (ii) the imposition of the DIP Liens, which will prime the Primed Liens, and (iii) the imposition of the automatic stay pursuant to section 362(a) of the Bankruptcy Code or any comparable provision under Canadian Law. The Adequate Protection Liens shall be junior to the Carve-Out, the DIP Liens, and the Permitted Liens (as hereinafter defined) with respect to the collateral encumbered by any Permitted Liens to the extent such Permitted Liens are senior to the liens securing the Prepetition Obligations.

J. The consent of the Prepetition Secured Lender to the priming of its liens by the DIP Liens is limited to the DIP Facility presently before the Court, with Delaware Street as the DIP Lender, and shall not extend to any other post-petition financing or to any modified version of such DIP Facility. Furthermore, the consent of the Prepetition Secured Lender to the priming of its liens by the DIP Liens does not constitute, and shall not be construed as constituting, an acknowledgment or stipulation by the Prepetition Secured Lender that its interests in the Prepetition Collateral are adequately protected pursuant to this Order or otherwise. The Prepetition Secured Lender does not consent to the Debtors' use of the Prepetition Collateral, including the Debtors' use of the Cash Collateral, except on the terms of this Order.

K. The security interests and liens granted pursuant to this Order to the DIP Lender are appropriate under section 364(d) of the Bankruptcy Code because, among other things: (i) such security interests and liens do not impair the interests of any holder of a valid, perfected, and non-avoidable prepetition security interest in or lien upon the property of the Debtors' estates, or (ii) the holders of such valid, perfected, prepetition security interests and liens have consented to the security interests and priming liens granted pursuant to this Order to the DIP Lender.

L. Good cause has been shown for immediate entry of this Order pursuant to Bankruptcy Rules 4001(b)(2) and (c)(2). In particular, the authorization granted herein for Debtors to continue using Cash Collateral and for the Debtors to execute the DIP Credit Documents and obtain interim financing in an amount not to exceed $2,750,000, including on a priming lien basis, is necessary to avoid immediate and irreparable harm to the Debtors and their estates. Entry of this Order is in the best interest of the Debtors, their estates and creditors. The terms of the DIP Credit Documents and the terms of the Debtors' continued use of Cash Collateral pursuant to this Order are fair and reasonable under the circumstances, reflect the Debtors' exercise of prudent business judgment consistent with their fiduciary duties, and are supported by reasonably equivalent value and fair consideration.

M. The Debtors, the DIP Lender, and the Prepetition Secured Lender have negotiated the terms and conditions of the DIP Credit Documents and this Order (including the Debtors' use of Cash Collateral pursuant hereto) in good faith and at arm's-length, and any credit extended and loans made to the Debtors pursuant to this Order and the DIP Credit Documents shall be, and hereby are, deemed to have been extended, issued or made, as the case may be, in "good faith" within the meaning of section 364(e) of the Bankruptcy Code.

N. Based on the foregoing, and upon the record made before this Court at the Interim Hearing, and good and sufficient cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion is approved on the terms and conditions set forth in this Order. Any objections to the Motion that have not previously been withdrawn or resolved are hereby overruled on the merits. This Order shall become effective and binding upon all parties in interest immediately upon its entry. To the extent the terms of the DIP Credit Documents differ in any material respect from the terms of this Order, this Order shall control and all references terms or provisions of the DIP Credit Agreement and the DIP Credit Documents in this Order are qualified to the extent that they are ineffective to the extent inconsistent with any express term of this Order. Without limiting the generality of the foregoing, the Debtors shall have no obligation to pay any fees or expenses of the DIP Lender, and shall have no indemnification obligations to the DIP Lender, prior to entry of the Final Order.

2. The Debtors are hereby authorized to execute the DIP Credit Documents, including the DIP Credit Agreement and such additional documents, instruments, and agreements as may be reasonably required by the DIP Lender to implement the terms or effectuate the purposes of this Order.

3. The Debtors are hereby authorized to use the Cash Collateral and to incur DIP Obligations (as hereinafter defined) solely in accordance with the Budget (as hereinafter defined) and the other terms and conditions set forth in the DIP Credit Agreement and in this Order; *provided, however*, that the Debtors authority to incur DIP Obligations under the DIP Credit Documents and this Order shall be limited to $2,750,000 (the "Interim Borrowing Limit") pending the entry of a Final Order; *and provided further*, that $750,000 of the Interim Borrowing Limit may be used to post cash collateral backing a letter of credit for Sony Corporation (the "Sony LC") so long as: (a) the terms of the Sony LC provide that it may only be drawn to pay post-petition obligations of the Debtors to Sony Corporation; (b) the terms of the Sony LC are substantially similar to the terms of the letter of credit posted by the Debtors for Sony Corporation prior to the Petition Date, and (c) the terms of the Sony LC are acceptable to the

DIP Lender in its reasonable discretion.

4. [Intentionally Omitted.]

5. Upon execution and delivery of the DIP Credit Documents, the DIP Credit Documents shall constitute valid and binding obligations of the Debtors and shall be enforceable against the Debtors in accordance with the terms thereof. No obligation, payment, transfer or grant of security under the DIP Credit Documents or this Order shall be stayed, restrained, voided, voidable, or recoverable under the Bankruptcy Code or under any applicable non-bankruptcy law, or subject to any defense, reduction, setoff, recoupment or counterclaim.

6. [Intentionally Omitted.]

7. All draws made on the DIP Facility and all interest thereon owing by the Debtors to the DIP Lender or any other parties under the DIP Credit Documents and this Order shall hereinafter be referred to as the "DIP Obligations." The DIP Obligations shall: (a) be evidenced by the books and records of the DIP Lender; (b) bear interest and be subject to fees payable at the rates and in the amounts set forth in the DIP Credit Agreement; (c) be secured in the manner set forth in paragraphs 13 and 14 below; (d) be payable in accordance with the terms of the DIP Credit Documents; and (e) comply with and otherwise be governed by the terms of this Order and the terms of the DIP Credit Documents.

8. Subject to the terms and conditions set forth in this Order and in the DIP Credit Documents (including the Budget), the Debtors may use the Cash Collateral to: (a) pay interest, fees and expenses associated with the DIP Facility, as provided in the DIP Credit Documents, and (b) fund its general corporate and working capital requirements (including, without limitation, certain administrative expenses in the Chapter 11 Cases), in each case in accordance with the Budget and the terms of this Order.

9. Attached hereto as Exhibit C is a budget (the "Budget") for the period

commencing on the Petition Date and ending on May 2012. The Budget reflects on a line-item basis the Debtors' anticipated cumulative cash receipts and expenditures on a monthly basis and all necessary and required cumulative expenses which the Debtors expect to incur during each month of the Budget. Subject to the variances permitted under § 14.1 of the DIP Credit Agreement, the Debtors shall not make any payments or other disbursements other than as set forth in the Budget, without the prior written consent of the DIP Lender and the Prepetition Secured Lender. Failure by the Debtors to comply with the Budget variance provisions set forth in this paragraph 9 and in § 14.1 of the DIP Credit Agreement shall constitute an Event of Default under the DIP Credit Agreement and this Order. The Budget shall not be modified without the prior written consent of the DIP Lender and the Prepetition Secured Lender. The Debtors shall comply with all reporting requirements set forth in the DIP Credit Documents and shall provide the Prepetition Secured Lender with such additional financial reports as the Prepetition Secured Lender may reasonably request from time to time.

10. On the earliest to occur of: (a) January 26, 2012 (unless a Final Order, in form and substance acceptable to the DIP Lender, shall have been entered on or before such date); (b) the occurrence of the effective date under any plan of reorganization or liquidation for the Debtors; (c) the closing of the sale or any other disposition by the Debtors of all or any material portion of the Debtors' assets; and (d) the occurrence and continuation of an Event of Default under this Order or the DIP Credit Agreement, the Debtors shall be required to repay the DIP Lender in full and in cash all outstanding DIP Obligations.

11. The Debtors' authority to use Cash Collateral in accordance with this Order and the Budget shall terminate on the earliest to occur (the "Cash Collateral Termination Event") of: (a) January 26, 2012 (unless a Final Order, in form and substance acceptable to the DIP Lender, shall have been entered on or before such date); (b) the occurrence of the effective date under any plan of reorganization or liquidation for the Debtors; (c) the closing of the sale or any other

disposition by the Debtors of all or any material portion of the Debtors' assets; and (d) the occurrence and continuation of an Event of Default under this Order or the DIP Credit Agreement and a determination by the Prepetition Secured Lender, by written notice delivered by hand-delivery, overnight mail, facsimile, or email to counsel for the Debtors, to terminate the Debtors' use of Cash Collateral pursuant to the terms of this Order.

12. The occurrence of any of the events set forth in clauses (a) through (n) below shall constitute an immediate Event of Default under this Order and the DIP Credit Agreement: (a) failure by the Debtors to make any payment to the DIP Lender; (b) failure by the Debtors to comply with any provision of this Order or the DIP Credit Agreement including, without limitation, the Budget variance provisions set forth in § 14.1 of the DIP Credit Agreement and paragraph 9 hereof, and any other affirmative or negative covenants set forth in this Order or the DIP Credit Documents, or any other "Event of Default" shall have occurred and be continuing under and as defined in the DIP Credit Documents; (c) the Debtors shall take any material action in the Chapter 11 Cases that is adverse to the Prepetition Secured Lender or its interests in the Prepetition Collateral; (d) failure by the Debtors to obtain an order of this Court, in form and substance satisfactory to the DIP Lender and the Prepetition Secured Lender, approving the motion for approval of bidding and sale procedures for the sale of all or substantially all of the Debtors' assets by January 15, 2012; (e) any of the Chapter 11 Cases are dismissed or converted to a chapter 7 case, or a chapter 11 trustee, a responsible officer, or an examiner with enlarged powers relating to the operation of the Debtors' business is appointed in any of the Chapter 11 Cases; (f) this Court enters an order granting relief from the automatic stay to the holder or holders of any security interest to permit an exercise of remedies with respect to any of the Debtors' assets; (g) an order is entered reversing, amending, supplementing, staying, vacating or otherwise modifying this Order without the consent of the Prepetition Secured Lender and the DIP Lender; (h) the Debtors create, incur or

suffer to exist any post-petition liens or security interests other than: (A) those granted pursuant to this Order, and (B) any other junior liens or security interests that the Debtors are permitted to incur under the Prepetition Credit Agreement or under the DIP Credit Documents; (i) the filing by the Debtors of any motion, application or adversary proceeding challenging the validity, enforceability, perfection or priority of the liens securing the Prepetition Obligations or asserting any claim or cause of action against and/or with respect to the Prepetition Obligations, the liens securing the Prepetition Obligations, or the Prepetition Secured Lender or any of its affiliates, agents, attorneys, financial advisors, officers, managers, directors or employees (or if the Debtors support any such motion, application or adversary proceeding commenced by any third party); (j) this Court enters an order terminating the Debtors' exclusive period to file a plan of reorganization; (k) the Debtors file, or support the filing of, any plan of reorganization or liquidation that is not acceptable to the DIP Lender and the Prepetition Secured Lender; (l) Brian Mittman ceases to be the Chief Executive Officer of the Debtors; (m) any misrepresentation of a material fact made after the Petition Date by the Debtors or any of their agents to the Prepetition Secured Lender about (A) the financial condition of the Debtors, (B) the nature, extent, location or quality of any Prepetition Collateral, or (iii) the disposition or use of any Prepetition Collateral, including the Cash Collateral; or (n) without the consent of the Prepetition Secured Lender and the DIP Lender, the Debtors file, or support the filing of, a motion seeking the authority for the Debtors to abandon any of the Prepetition Collateral pursuant to section 554 of the Bankruptcy Code or otherwise.

13. As security for the full and timely payment of the DIP Obligations, the DIP Lender is hereby granted, pursuant to sections 364(c)(2), 364(c)(3) and 364(d)(1) of the Bankruptcy Code, valid, enforceable, unavoidable, and fully perfected security interests in and liens and mortgages (collectively, the "DIP Liens") upon all prepetition and post-petition real and personal property of the Debtors (including, without limitation, all right, title and interest in all now owned and hereafter acquired accounts, chattel paper, deposit accounts, cash collateral, cash, money, cash

equivalents, rights with respect to letters of credit, documents, equipment, motor vehicles, fixtures, general intangibles, instruments, inventory, investment property, commercial tort claims, intellectual property, intercompany advances, leasehold interests and fee simple interests in real property and licenses and easements with respect to real property, and all products, accessions and proceeds with respect to any of the foregoing), whether now existing or hereafter acquired or arising and of any nature whatsoever, including, without limitation, (a) all Prepetition Collateral, and (b) all assets of the Debtors that do not constitute Prepetition Collateral and the proceeds thereof ((a) and (b) collectively, the "DIP Collateral").

14. The DIP Liens shall be subject and subordinate to the Carve-Out and shall: (a) pursuant to section 364(c)(2) of the Bankruptcy Code, constitute first priority security interests in and liens upon all DIP Collateral that is not otherwise subject to any valid, perfected, enforceable and non-avoidable lien in existence as of the Petition Date; (b) pursuant to section 364(d)(1) of the Bankruptcy Code, be senior to and prime (i) those liens on the Prepetition Collateral in favor of the Prepetition Secured Lender with respect to the Prepetition Obligations, (ii) any and all valid, perfected, enforceable and non-avoidable liens on the Prepetition Collateral that are junior in priority to the liens of the Prepetition Secured Lender, and (iii) the Adequate Protection Liens ((i), (ii) and (iii) above, collectively, the "Primed Liens"); and (c) pursuant to section 364(c)(3) of the Bankruptcy Code, be immediately junior in priority to any and all valid, properly perfected, enforceable and non-avoidable liens other than the Primed Liens on assets of the Debtors in existence as of the Petition Date, but only to the extent such liens are senior in priority to the Primed Liens (collectively, the "Permitted Liens").

15. The DIP Liens and the Adequate Protection Liens shall not be subject to challenge and shall attach and become valid, perfected, enforceable, non-avoidable and effective by operation of law as of the Petition Date without any further action by the Debtors, the DIP Lender or the Prepetition Secured Lender, and without the necessity of execution by the Debtors, or the

filing or recordation, of any financing statements, security agreements, vehicle lien applications, mortgages, fixture filings, filings with the U.S. Patent and Trademark Office, or other documents. All DIP Collateral shall be free and clear of other liens, claims and encumbrances, except the Primed Liens, the Permitted Liens, the Carve-Out, and other permitted liens and encumbrances as provided in the DIP Credit Documents. If the DIP Lender hereafter requests that the Debtors execute and deliver to the DIP Lender any financing statements, security agreements, collateral assignments, mortgages, fixture filings, or other instruments and documents considered by the DIP Lender to be reasonably necessary or desirable to further evidence the perfection of the DIP Liens, the Debtors are hereby authorized and directed to execute and deliver such financing statements, security agreements, mortgages, fixture filings, collateral assignments, instruments, and documents, and the DIP Lender is hereby authorized to file or record such documents in its discretion, in which event all such documents shall be deemed to have been filed or recorded at the time and on the date of entry of this Order.

16. In addition to the priming liens and security interests granted to the DIP Lender pursuant to this Order, pursuant to section 364(c)(1) of the Bankruptcy Code, all DIP Obligations shall constitute allowed superpriority administrative expense claims (the "Superpriority Claims") with the priority accorded under 364(c)(1), which Superpriority Claims shall, subject to the Carve-Out, be payable from and have recourse to all pre- and post-petition property of the Debtors and all proceeds thereof (except, pending entry of the Final Order, all avoidance actions of the Debtors' estates arising under chapter 5 of the Bankruptcy Code (the "Avoidance Actions") and the proceeds thereof).

17. Upon the occurrence and during the continuation of a Cash Collateral Termination Event, to the extent unencumbered funds are not available to pay administrative expenses in full, the DIP Liens, the Superpriority Claims, and the Primed Liens shall be subject to the payment of the Carve-Out. For purposes of this Order, the "Carve-Out" shall mean,

collectively: (a) all statutory fees payable by the Debtors pursuant to 28 U.S.C. 1930(a)(6) and (b) the sum of (i) any unpaid professional fees and expenses specified in the Budget that were incurred but not paid as of the date of such Cash Collateral Termination Event (provided that such unpaid professional fees and expenses together with all previously paid professional fees and expenses shall not exceed the aggregate amount of professional fees and expenses set forth in the Budget for the period prior to such Cash Collateral Termination Event) of the professionals retained by the Debtors, and any official committee of unsecured creditors (if one is appointed in the Chapter 11 Cases) that are subsequently allowed by order of this Court, in each case only to the extent not subsequently paid, and (ii) any fees and expenses incurred after such Cash Collateral Termination Event by the professionals retained by the Debtors in an aggregate amount not to exceed $150,000. Notwithstanding any other provision of this Order or the DIP Credit Documents, all liens, claims and interests of the DIP Lender and the Prepetition Secured Lender shall be subject and subordinate to the Carve-Out.

18. No portion of the DIP Facility, the DIP Collateral, the Prepetition Collateral, the Cash Collateral, or the Carve-Out, and no disbursements set forth in the Budget, shall be used for the payment of professional fees, disbursements, costs or expenses incurred in connection with asserting any claims or causes of action against the Prepetition Secured Lender or the DIP Lender, or any of their respective affiliates, agents, attorneys, financial advisors, officers, managers, directors or employees, including, without limitation, any action challenging or raising any defenses to the Prepetition Obligations or the DIP Obligations, the liens of the Prepetition Secured Lender or the DIP Lender, or the validity or enforceability of the DIP Credit Documents or the Prepetition Credit Documents; provided, however, that no more than $20,000 of the proceeds of the DIP Collateral may be used by the official committee of unsecured creditors (if one is appointed in the Chapter 11 Cases) to investigate the prepetition liens and claims of the Prepetition Secured Lender.

19. As adequate protection for the payment of the Adequate Protection Obligations and subject to the Carve-Out, the Prepetition Secured Lender shall be granted the Adequate Protection Liens (as defined in paragraph I above) and the Adequate Protection Priority Claim (as defined in paragraph I above). The Adequate Protection Liens shall be junior in priority to the Carve-Out, the DIP Liens, and the Permitted Liens with respect to the collateral encumbered by any such Permitted Liens to the extent such Permitted Liens were senior to the liens of the Prepetition Secured Lender securing the Prepetition Obligations as of the Petition Date, and senior to any other liens. The Adequate Protection Priority Claim shall be junior in priority to the Carve-Out, and the Superpriority Claims and senior to all other administrative claims. As additional adequate protection, (a) except for the DIP Facility and the DIP Liens granted to the DIP Lender pursuant to this Order, the Debtors shall be prohibited from incurring additional indebtedness having priority claims or liens equal to or senior in priority to the Prepetition Obligations or the liens securing such obligations, and (b) the Prepetition Secured Lender shall be entitled to receive all reporting due to the DIP Lender under the DIP Credit Agreement. Without the prior written consent of the DIP Lender and the Prepetition Secured Lender, no portion of the DIP Collateral or the Prepetition Collateral (including any Cash Collateral) shall except as expressly permitted under the terms of the Budget, be used by the Debtors to satisfy chapter 11 administrative expenses.

20. Nothing herein shall preclude the Prepetition Secured Lender from (i) seeking additional adequate protection from the Debtors at any time, (ii) seeking to terminate the Debtors' use of Cash Collateral, or (iii) seeking the payment of all interest accruing under the Prepetition Credit Agreement from and after the Petition Date. Furthermore, nothing herein shall be construed as an acknowledgment or stipulation by the Prepetition Secured Lender that its interests in the Prepetition Collateral are adequately protected.

21. [Intentionally omitted.]

22. [Intentionally omitted.]

23. None of the DIP Liens, the Superpriority Claims, the Adequate Protection Liens, the Adequate Protection Priority Claims or the Carve-Out shall be (a) subject or subordinated to, or made *pari passu* with, any lien that is avoided and preserved for the benefit of the Debtors' estates under section 551 of the Bankruptcy Code, or (b) subject or subordinated to, or made, *pari passu* with, any other lien or security interest, whether under sections 363 or 364 of the Bankruptcy Code or otherwise. The Adequate Protection Liens granted pursuant to this Order shall constitute valid, enforceable and duly perfected security interests and liens upon entry of this Order and the Prepetition Secured Lender shall not be required to file or serve financing statements, notices of lien or similar instruments which otherwise may be required under federal or state law in any jurisdiction, or take any action, including taking possession, to validate and perfect such security interests and liens. Failure by the Debtors to execute any documentation relating to the Adequate Protection Liens shall in no way affect the validity, enforceability, perfection or priority of such Adequate Protection Liens.

24. [Intentionally omitted.]

25. The provisions of this Order shall be binding upon and inure to the benefit of the DIP Lender, the Prepetition Secured Lender, the Debtors, and their respective successors and assigns. The provisions of this Order and any actions taken pursuant thereto (a) shall survive the entry of any order: (i) confirming any plan of reorganization in these Chapter 11 Cases; (ii) converting the Chapter 11 Cases to cases under chapter 7 of the Bankruptcy Code; or (iii) dismissing the Chapter 11 Cases; and (b) shall continue in full force and effect notwithstanding the entry of any such order, and the claims, liens, and security interests granted pursuant to this Order shall maintain their priority as provided by this Order until all of the DIP Obligations and Adequate Protection Obligations are indefeasibly paid in full and discharged in accordance with the terms of the DIP Credit Agreement and this Order.

26. If any or all of the provisions of this Order are hereafter reversed, modified, vacated or stayed, such reversal, modification, vacatur or stay shall not affect (a) the validity of any DIP Obligations or Adequate Protection Obligations incurred prior to the actual receipt by the DIP Lender or the Prepetition Secured Lender, as applicable, of written notice of the effective date of such reversal, modification, vacatur or stay, or (b) the validity or enforceability of any claim, lien, security interest or priority authorized or created hereby or pursuant to the DIP Credit Documents with respect to any DIP Obligations or Adequate Protection Obligations. Notwithstanding any such reversal, modification, vacatur or stay, any use of Cash Collateral or the incurrence of DIP Obligations or Adequate Protection Obligations by the Debtors prior to the actual receipt by the DIP Lender of written notice of the effective date of such reversal, modification, vacatur or stay, shall be governed in all respects by the provisions of this Order, and the DIP Lender and the Prepetition Secured Lender shall be entitled to all of the rights, remedies, protections and benefits granted under section 364(e) of the Bankruptcy Code, this Order, and the DIP Credit Documents with respect to all uses of Cash Collateral and the incurrence of the DIP Obligations and Adequate Protection Obligations by the Debtors.

27. Notwithstanding anything else herein to the contrary, the DIP Lender and the Prepetition Secured Lender may, upon the occurrence and during the continuation of any Event of Default (under the DIP Credit Documents or this Order), (a) immediately terminate the Debtors' use of Cash Collateral; (b) immediately declare all DIP Obligations to be due and payable; and (c) immediately terminate the lending commitments under the DIP Credit Agreement and, (d) subject to automatic stay, exercise all rights and remedies provided in the DIP Credit Documents and applicable law. The rights and remedies of the DIP Lender and the Prepetition Secured Lender specified herein are cumulative and not exclusive of any rights or remedies that the DIP Lender and the Prepetition Secured Lender may have under the DIP Credit Documents, the Prepetition Credit Documents, or otherwise.

28. The Debtors are hereby authorized, without further order of this Court, to enter into agreements with the DIP Lender providing for any non-material modifications to any DIP Credit Document or the Budget, or for any other modifications to any DIP Credit Document necessary to conform such DIP Credit Document to this Order.

29. The stipulations and admissions contained in this Order, including, without limitation, in recital paragraphs D(l) through D(6) of this Order, shall (a) be binding on the Debtors under all circumstances and (b) subject to and upon entry of the Final Order, be binding upon all other parties in interest unless, and solely to the extent that, (i) no later than the earlier of (A) seventy-five (75) days from the Petition Date and (B) sixty (60) days after the date of appointment of an official committee of unsecured creditors (if one is appointed in the Chapter 11 Cases), a party in interest with requisite standing has timely filed an adversary proceeding or contested matter in this Court (subject to the limitations set forth in paragraph 18 hereof) challenging the amount, validity, or enforceability of the Prepetition Obligations, or the perfection or priority of the Prepetition Secured Lender's liens on and security interests in the Prepetition Collateral, or otherwise asserting any Avoidance Actions or any other claims or causes of action on behalf of the Debtors' estates against the Prepetition Secured Lender or any of its affiliates, agents, attorneys, financial advisors, officers, managers, directors or employees under the Bankruptcy Code or non-bankruptcy law, and (ii) the Court enters a final order in favor of the plaintiff in any such timely filed adversary proceeding or contested matter. If no such adversary proceeding or contested matter is timely filed in respect of the Prepetition Obligations, (x) the Prepetition Obligations shall constitute allowed claims, not subject to counterclaim, setoff, subordination, re-characterization, defense or avoidance, for all purposes in the Chapter 11 Cases and any subsequent chapter 7 case, (y) the liens on the Prepetition Collateral securing the Prepetition Obligations shall be deemed to have been, as of the Petition Date, and to be, legal, valid, binding, and perfected first priority liens not subject to defense, counterclaim, re-characterization, subordination or avoidance, and (z) the

Prepetition Obligations and the liens on the Prepetition Collateral granted to secure the Prepetition Obligations shall not be subject to any other or further challenge by any party-in-interest, and all such parties-in-interest shall be enjoined from seeking to exercise the rights of the Debtors' estates, including without limitation, any successor thereto (including, without limitation, any estate representative or trustee appointed or elected for any of the Debtors' estates). If any such adversary proceeding or contested matter is timely filed, the stipulations and admissions contained herein shall nonetheless remain binding and preclusive (as provided in the second sentence of this paragraph) on all parties-in-interest, except as to any such findings and admissions that were successfully challenged in such adversary proceeding or contested matter.

30. Nothing in this Order shall in any way be construed or interpreted to impose or allow the imposition upon the DIP Lender or the Prepetition Secured Lender any liability for any claims arising from the prepetition or post-petition activities of the Debtors or any of their affiliates.

31. The Final Hearing is scheduled for 10:30 a.m. (prevailing Central Time) on January 26, 2012 before this Court. The Debtors shall promptly serve a notice of entry of this Order and the Final Hearing, together with a copy of this Order, by first class mail, postage prepaid, upon: (i) counsel to the U.S. Trustee; (ii) the twenty (30) largest unsecured creditors of each Debtor; (iii) counsel to the DIP Lender; (iv) counsel to the Prepetition Secured Lender; (v) all known parties with liens of record on assets of the Debtors as of the Petition Date; (vi) all financial institutions at which the Debtors maintain deposit accounts; (vii) the landlords for all non-residential real properties occupied by the Debtors as of the Petition Date; (viii) the Internal Revenue Service; and (ix) all other parties requesting notice pursuant to Bankruptcy Rule 2002. The notice of the entry of this Order and the Final Hearing shall state that objections to the entry of the Final Order shall be filed with the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, by no later than 4:00 p.m. (prevailing

Central Time) on January 20, 2012 (the "Objection Deadline"), which objections shall be served so that the same are actually received before the Objection Deadline by (a) counsel to the Debtors, (b) counsel to the DIP Lender and the Prepetition Secured Lender, and (c) counsel to the U.S. Trustee. Any objections by creditors or other parties-in-interest to any provisions of this Order shall be deemed waived unless timely filed and served in accordance with the foregoing terms.

Dated: DEC 15 2011 ~~December 16, 2011~~

UNITED STATES BANKRUPTCY JUDGE

IN THE MATTER OF the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended

Court File No:

AND IN THE MATTER OF PAYLESS HOLDINGS LLC, PAYLESS SHOESOURCE CANADA INC., PAYLESS SHOESOURCE CANADA GP INC. AND THOSE OTHER ENTITIES 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

Applicant

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE APPLICANT

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