Court File No: CV-17-011758-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF 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

July 26, 2017

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TO: **SERVICE LIST**

TABLE OF CONTENTS

Table of Contents

TAB 1

2004 CarswellOnt 469
Ontario Superior Court of Justice [Commercial List]

Air Canada, Re

2004 CarswellOnt 469, [2004] O.J. No. 303, 128 A.C.W.S. (3d) 1067, 47 C.B.R. (4th) 169

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

AND IN THE MATTER OF SECTION 191 OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF AIR CANADA AND THOSE SUBSIDIARIES LISTED ON SCHEDULE "A"

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

Farley J.

Heard: January 16, 2004
Judgment: January 16, 2004
Docket: 03-CL-4932

Counsel: Sean F. Dunphy, Ashley John Taylor for Air Canada
Peter J. Osborne, Peter H. Griffin for Monitor
Howard Gorman for Ad Hoc Unsecured Creditors Committee
Aubrey Kauffman for Ad Hoc Committee of Various Creditors
Jay Swartz for Deutsche Bank
Mark Gelowitz for Trinity Time Investments
Robert Thornton, Gregory Azeff for GE Capital Aviation Services Inc.
J. Porter for Cerberus
Kevin McElcheran for CIBC
Murray Gold for CUPE
Ian Dick for AG Canada
James Tory for Air Canada Board
Joseph J. Bellissimo for Aircraft Lessor/Lender Group
Terri Hilborn for Unionized Retiree Committee
William Sasso, Sharon Strosberg for Mizuho International, PLC
Jim Dube for Deutsche Lufthansa A.G.

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications
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

Bankruptcy and insolvency — Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Debtor applied for approval of indemnity, amendments to equity plan, and global restructuring agreements — Application granted — Indemnity was customary and not opposed — Amendments were recommended by monitor and opposed by only one interested party — Board, in exercising its fiduciary duties, properly considered alternative proposal before choosing equity programme sponsor — Restructuring agreement was fair and reasonable and on balance beneficial to debtor and interested parties generally — Court must look at interests of creditors generally and objecting creditors specifically — Rights may be compromised but not confiscated in attempt to balance interests — Agreement had to be either taken as package or rejected — Delay and uncertainty resulting from rejection of agreement would likely be devastating for debtor.

Table of Authorities

Cases considered by *Farley J.*:

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 72 O.T.C. 99, 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) — referred to

Northland Properties Ltd., Re (1989), (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*) 34 B.C.L.R. (2d) 122, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*) 73 C.B.R. (N.S.) 195, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*) [1989] 3 W.W.R. 363, 1989 CarswellBC 334 (B.C. C.A.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to

Sammi Atlas Inc., Re (1998), 1998 CarswellOnt 1145, 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) — followed

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 123, 1991 CarswellOnt 142 (Ont. Gen. Div.) — referred to

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113, 1991 CarswellOnt 141 (Ont. Div. Ct.) — referred to

Statutes considered:

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

APPLICATION for approval of various agreements under *Companies' Creditors Arrangement Act*.

***Farley J.*:**

1 These reasons deal with three matters which the court was asked to approve Air Canada (AC) entering into various agreements; simply put they were as follows:

(1) the Merrill Lynch (ML) indemnity;

(2) the entering into the amendments to the Trinity Agreement; and

(3) the Global Restructuring Agreements (GRA).

ML Indemnity

2 There was no opposition to this. The court was advised that such an indemnity was customarily given and that the terms of this particular one were such as is normally given. I therefore approve AC granting such an indemnity to ML.

Trinity Amendments

3 As I understood the submissions this morning, Mizuho a member of the Unsecured Creditors Committee (UCC) was the only interested party which spoke out against the Trinity amendments. It continues to be dissatisfied with the process by which Trinity was selected as the equity plan sponsor. I merely point out, once again, that this process was not of the Court's choosing but rather one which AC commenced on notice to the service list and as to which there were no objections before Trinity was selected on November 8, 2003 (together with the "fiduciary out" provision contained in its proposal). Aside from the court approvals envisaged by that process, the court only became involved when it was appreciated that there were some difficulties with the practical implementation of the process.

4 I further understand that the Ad Hoc Committee of Various Creditors (CVC) withdrew its opposition yesterday along with its cross motion. The UCC (one assumes on some majority basis) supported the Trinity Amendments but indicated that, as a sounding board, it wished to continue sounding that it still had concerns about aspects of corporate governance and management incentives.

5 I have no doubt, if adjustments in any particular area make sense between the signatories (AC and Trinity) and to the extent that any beneficiaries are involved, that such adjustments will be made for everyone's overall benefit (everyone in the sense of AC including all of its stakeholders including creditors, labour, management, pensioners, etc.) not only for the short term interests but the long term interests of AC emerging from these CCAA proceedings as an ongoing viable enterprise on into the future, well able to serve the public (both Canadian and foreign). A harmonious relationship with trust and respect flowing in all directions amongst the stakeholders will be to everyone's long term advantage. With respect to corporate governance though, I am able to make a more direct observation. A director, no matter who nominates that person, owes duties and obligations to the corporation, not the nominator: see *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), at 123, aff'd (1991), 3 B.L.R. (2d) 123 (Ont. Gen. Div.).

6 There was no evidence to show that the Board of AC in exercising its fiduciary duties did not properly consider on a quantitative and qualitative basis the factors (on a pro and con basis) relating to whether Cerberus had provided a Superior Proposal (as that was defined in section 9 of the Trinity Agreement approved earlier by this Court). Indeed there was no complaint from Cerberus in this respect. The Board's letter to me of December 22, 2003 carefully reviewed the considerations which the Board (with the assistance of Seabury and ML, together with the general oversight and views of the Monitor) gave in their deliberations with their ultimate decision that the Cerberus December 10, 2003 proposal was not a Superior Proposal with the result that the Board has selected Trinity to be the equity program sponsor in accordance with the Trinity amended deal. I approve AC executing the Trinity amended deal and implementing same, with the recognition and proviso that there may be further amendments/adjustments which may be entered into subject to the guidelines of my discussion above. I note in particular that the UCC helpfully pointed out that section 7.3 still needs to be modified, and that is being worked on. The Air Canada Pilots Association observed that there still needed to be some fine-tuning at para. 22 of its factum noting that: "These matters of the detailed implementation of the Amended Trinity Investment Agreement can all be resolved by good faith negotiations between Air Canada, Trinity and affected stakeholders, with the assistance and support of the Monitor"; I did not have the benefit of any submissions in this

regard (para.22) nor was any expected to either be given or taken as the parties all appreciated that this was not to be an exercise in "nitpicking".

7 At paragraph 71 of its 19th report, the Monitor stated:

> 71. The Monitor is of the continuing view that the Equity Solicitation Process must be completed as soon as possible. The restructuring process and many other restructuring initiatives have been delayed by approximately two months as a result of the continued uncertainty concerning the selection of the equity plan sponsor. The equity solicitation process must be concluded so that the balance of the restructuring process can be completed before the expiry on April 30, 2004 of the financing commitments from each of Trinity, GECC and DB pursuant to the Standby Agreement. The Monitor recommends that this Honourable Court approve the Company's motion seeking approval of the Amended Trinity Investment Agreement.

8 I would therefore approve the Trinity amendments so that AC can proceed to enter into and implement the Amended Trinity Investment Agreement. I note that this approval is not intended to determine any rights which third parties may have.

GRA

9 As with the previous approvals, I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally: see *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), at 201. In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), Blair J. at p. 316 adopted the principles in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) as an appropriate guideline for determining when an agreement or transaction should be approved during a CCAA restructuring but prior to the actual plan of reorganization being in place. In *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), I observed at p. 173 that in considering what is fair and reasonable treatment, one must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to the confiscation of rights. I think that philosophy should be applicable to the circumstances here involving the various stakeholders. As I noted immediately above in *Sammi Atlas Inc.*, equitable treatment is not necessarily equal treatment.

10 The Monitor's 19th report at paragraphs 20-21 indicates that:

> 20. The GRA provides the following benefits for Air Canada:
>
> • The retention of a significant portion of its fleet of core aircraft, spare engines and flight simulators, which are critical to its ongoing operations;
>
> • The restructuring of obligations with respect to 106 of 107 Air Canada and Jazz air operating, parked and undelivered aircraft (effective immediately for 12 GECC-managed aircraft and upon exit from CCAA for the remaining 94 GECC-owned aircraft, except as indicated below), including lease rate reductions on 51 aircraft (of which 3 aircraft have been returned as of the current date), cash flow relief for 29 aircraft, termination of the Applicants' obligations with respect to 20 parked aircraft (effective immediately), the cancellation of 4 future aircraft lease commitments and the restructuring of the overall obligations with respect to 2 aircraft. Obligations with respect to the last remaining aircraft remain unaffected as it is management's view that this lease was already at market;
>
> • Exit financing of approximately US$585 million (the "Exit Facility") to be provided by GECC upon the Company's emergence from CCAA;

• Aircraft financing up to a maximum of US$950 million (the "RJ Aircraft Financing") to be provided by GECC and to be used by Air Canada to finance the future purchase of approximately 43 regional jet aircraft; and

• The surrender of any distribution on account of any deficiency claims under the CCAA Plan with respect to GECC-owned aircraft only, without in any way affecting GECC's right to vote on the Plan in respect of any deficiency claim.

21. In return for these restructuring and financing commitments, the GRA provides for the following:

• Payment of all current aircraft rent by Air Canada to GECC, during the interim period until emergence from CCAA proceedings, at contractual lease rates for GECC-owned aircraft and at revised lease rates for GECC-managed aircraft;

• The delivery of notes refinancing existing obligations to GECC in connection with 2 B747-400 cross-collateralized leases (the "B747 Restructuring) including one note convertible into equity of the restructured Air Canada at GECC's option;

• The delivery of stock purchase warrants (the "Warrants") for the purchase of an additional 4% of the common stock of the Company at a strike price equal to the price paid by any equity plan sponsor; and

• The cross-collateralization of all GECC and affiliate obligations (the "Interfacility Collateralization Agreement") on Air Canada's emergence from CCAA proceedings for a certain period of time.

The Monitor concluded at paragraph 70:

70. The Monitor notes that, if considered on their own, the lease concessions provided to Air Canada by GECC pursuant to the GRA differ substantially from those being provided by other aircraft lessors. In addition, the Monitor notes that GECC has benefitted from the cross collateralization on 22 aircraft pursuant to the CCAA Credit Facility and Interfacility Collateralization Agreement, particularly as it relates to the settlement of Air Canada's obligations to GECC under the B747 Restructuring. However, the Monitor also notes that the substantial benefits provided to Air Canada under the GRA including the availability of US $585 million of exit financing and US$950 million of regional jet aircraft financing are significant and critical to the Company's emergence from CCAA proceedings in an expedited manner. In the Monitor's view the financial benefits provided to Air Canada under the GRA outweigh the costs to the Applicants' estate arising as a result of the cross collateralization benefit provided to GECC under the CCAA Credit Facility and Interfacility Collateralization Agreement. Accordingly, the Monitor recommends to this Honourable Court that the GRA be approved.

11 The GRA was opposed by the UCC (again apparently on some majority basis as one of its members, Cara, was indicated as being in favour and I also understand that Lufthansa was also supportive); the UCC's position was supplemented by separate submissions by another of its members, CIBC. I agree with the position of the UCC that the concern of the court is not with respect to the past elements of the DIP financing by GE and the cross-collateralization of 22 aircraft that agreement provided for. I also note the position of the UCC that it recognizes that the GRA is a package deal which cannot be cherry picked by any stakeholder nor modified by the Court; the UCC accepts that the GRA must be either taken as a package deal or rejected. It suggested that GE, if the court rejects the GRA as advocated by the UCC, will not abandon the field but rather it will stay and negotiate terms which the UCC feels would be more appropriate. That may be true but I would observe that in my view the delay and uncertainty involved would likely be devastating for AC. Would AC be able to meet the April 30, 2004 deadline for the Trinity deal which requires that the GRA be in place? What would the effect be upon the booking public?

12 I note that the UCC complains that other creditors are not being given equal treatment. However, counsel for another large group of aircraft lessors and financiers indicated that they had no difficulty with the GRA. Indeed, it seems

to me that GE is in a somewhat significantly different position than the other creditors given the aforesaid commitment to provide an Exit Facility and an RJ facility. Trinity and Deutsche Bank (DB) with respect to their proposed inflow of $1 billion in equity would be subordinate to GE; this new money (as opposed to sunk old money of the UCC and as well as that of the other creditors) supports the GRA. I note as well although it is "past history" that GE has compromised a significant portion of its $2 billion claim for existing commitments down to $1.4 billion, while at the same time committing to funding of large amounts for future purposes, all at a time when the airline industry generally does not have ready access to such.

13 With respect to the two 747 LILOs (lease in, lease out), there is the concession that AC will enjoy any upside potential in an after marketing while being shielded from any further downside. GE has also provided AC with some liquidity funding assistance by deferring some of its charges to a latter period post emergence. Further it has been calculated that as to post filing arrears, there will be a true up on emergence and assuming that would be March 31, 2004, it is expected that there would be a wash as between AC and GE, with a slight "advantage" to AC if emergence were later. I pause to note here that emergence sooner rather than later is in my view in everyone's best interests - and that everyone should focus on that and give every reasonable assistance and cooperation.

14 With respect to the snapback rights, I note that AC would be able to eliminate same by repaying the LILO notes and the Tranche Loans and AC would be legally permitted to eliminate this concern 180 days post emergence. I recognize that AC would be in a much stronger functional and psychological bargaining position to obtain replacement funding post emergence than it is now able to do while in CCAA protection proceedings. I would assume that such a project would be a financial priority for AC post emergence and that timing should not prevent AC from starting to explore that possibility in the near future (even before emergence). I also note that GE anticipates that the snapback rights would not likely come into play, given, I take it, its analysis of the present and future condition of AC and its experience and expertise in the field. I take it *as a side note* that GE from this observation by it will not have a quick trigger finger notwithstanding the specific elements in the definition of Events of Default; that of course may only be commercial reality - and that could of course change, but one would think that GE would have to be concerned about its ongoing business reputation and thus have to justify such action. Snapback rights only come into existence upon emergence, not on the entry into the GRA.

15 I conclude that on balance the GRA is beneficial to AC and its stakeholders; in my view it is fair and reasonable and in the best interests of AC. It will permit AC to get on with the remaining and significant steps its needs to accomplish before it can emerge. The same goes for the Trinity deal. I therefore approve AC's entering into and implementing the GRA, subject to the same considerations as to completing the documentation and making amendments/adjustments as I discussed above in *Trinity Amendments*.

16 Orders accordingly.

Application granted.

TAB 2

2011 QCCS 6030
Cour supérieure du Québec

Boutique Jacob inc., Re

2011 CarswellQue 12499, 2011 CarswellQue 16112, 2011 QCCS 6030, 210 A.C.W.S. (3d) 304, EYB 2011-198295

In the matter of the plan of compromise or arrangement of: Boutique Jacob inc., 9101-2096 Québec inc. and 9192-4126 Québec inc. (Petitioners) et Pricewaterhousecoopers inc. (Monitor)

Castonguay J.C.S

Judgment: September 20, 2011
Docket: C.S. Montréal 500-11-039940-107

Counsel: Mtre Guy Martel, Mtre Joseph Reynaud, Mtre Danny Duy Vu, for Boutique Jacob inc.
Mtre Simon Seida, for CIBC
Mtre Marc Duchesne, for Pricewaterhousecoopers inc.

Subject: Corporate and Commercial; Insolvency

Castonguay J.C.S:

1 *CONSIDERING* the Petitioners' *Motion for an Order Sanctioning the Plan of Reorganization and Compromise and Other Relief* (the "*Motion*"), pursuant to Sections 6, 9 and 10 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") and Section 411 of the Quebec *Business Corporations Act*, R.S.Q., c. S-31.1 (the "*QBCA*") and other legislation set forth in the restructuring transactions notice provided in the CCAA Plan Supplement 1 — Restructuring Transactions, dated September 12, 2011 and annexed hereto as *Appendix A* (as may be further modified, amended or supplemented, the "*Restructuring Transactions Notice*"), the affidavit of Joseph Basmaji in support thereof, the Monitor's Fourteenth (14 th) Report dated September 16, 2011, the plan of reorganization and compromise (as modified, amended, or supplemented from time to time, the "*CCAA Plan*") and the submissions of respective counsel for the Petitioners and the Monitor, and other interested parties;

2 *GIVEN* the provisions of the Initial Order granted by this Court in this matter on November 18, 2010, as subsequently amended and restated, the Claims Procedure Order granted by this Court on February 10, 2011, and the Creditors' Meeting Order granted by this Court on August 11, 2011;

3 *GIVEN* the provisions of the CCAA and the QBCA;

4 *WHEREFORE, THE COURT:*

1. **GRANTS** the Motion.

Definitions

2. Any capitalized terms not otherwise defined in this Order shall have the meaning ascribed thereto in the CCAA Plan and the Creditors' Meeting Order, as the case may be.

Service and Meeting

3. **DECLARES** that the notices given of the presentation of the Motion are proper and sufficient, and in accordance with the Creditors' Meeting Order.

4. **DECLARES** that there has been proper and sufficient service and notice of the Meeting Materials, including the CCAA Plan, the Resolution for the approval of the CCAA Plan and the Notice to Creditors sent in connection with the Creditors' Meeting, to all Affected Creditors, and that the Creditors' Meeting was duly convened, held and conducted in conformity with the CCAA, the Creditors' Meeting Order and all other applicable orders of the Court.

CCAA Plan Sanction

5. **DECLARES** that:

a) the CCAA Plan and its implementation (including the implementation of the Restructuring Transactions) have been approved by the Required Majorities of the Affected Creditors Class in conformity with the CCAA;

b) the Petitioners and Basco have complied with the provisions of the CCAA and all of the orders made by this Court in the context of these CCAA Proceedings in all respects;

c) the Court is satisfied that the Petitioners, New Boutique Jacob (as such term is defined in the Restructuring Transactions Notice) and Basco have not done or purported to do anything that is not authorized by the CCAA; and

d) the CCAA Plan (and its implementation, including the implementation of the Restructuring Transactions) is fair and reasonable, and in the best interests of the Petitioners, Basco, the Affected Creditors, the other stakeholders of the Petitioners and all other Persons stipulated in the CCAA Plan.

6. **ORDERS** that the CCAA Plan and its implementation, including the implementation of the Restructuring Transactions, are sanctioned and approved pursuant to Section 6 of the CCAA and Section 411 of the QBCA and that, as at the date on which all conditions precedent to the implementation of the CCAA Plan, as set out in Section 8.1 of the CCAA Plan, have occurred or been satisfied or waived, the whole as confirmed pursuant to the Monitor's Certificate (the "Plan Implementation Date"), will be effective and will enure to the benefit of and be binding upon the Petitioners, New Boutique Jacob, Basco, the Affected Creditors, the other stakeholders of the Petitioners and all other Persons stipulated in the CCAA Plan.

7. **ACKNOWLEDGES** the intervention of Groupe Jacob Inc. as mis-en-cause to these proceedings.

CCAA Plan Implementation

8. **DECLARES** that the Petitioners, New Boutique Jacob, Basco and the Monitor, as the case may be, are authorized and directed to take all steps and actions necessary or appropriate, as determined by the Petitioners, New Boutique Jacob and Basco in accordance with and subject to the terms of the CCAA Plan, to implement and effect the CCAA Plan, including the Restructuring Transactions, in the manner and the sequence as set forth in the CCAA Plan, the Restructuring Transactions Notice and this Order, and such steps and actions are hereby approved.

9. **ORDERS** that on the Plan Implementation Date, in the sequence as set forth in the Restructuring Transactions Notice, the appropriate directors and officers of the Petitioners, Basco and New Boutique Jacob shall be authorized and directed to issue, execute and deliver any and all agreements, documents, securities and instruments contemplated by the CCAA Plan, and to perform their respective obligations under such agreements, documents, securities and instruments as may be necessary or desirable to implement and effect the CCAA Plan, including the Restructuring Transactions, and to take any further actions required in connection therewith.

10. **ORDERS** that all matters provided in the CCAA Plan, including the Restructuring Transactions, shall be effected and shall be deemed to have timely occurred, in the manner and the sequence as set forth in the Restructuring Transactions Notice, the terms of which may be amended, supplemented or otherwise modified from time to time, with the approval of the Monitor and in accordance with the CCAA Plan and the applicable Law, and shall be effective without any requirement or further action by the creditors, security holders, directors, officers, managers or partners of any of the Petitioners, Basco or New Boutique Jacob.

11. **DECLARES** that the Petitioners, Basco and New Boutique Jacob shall be entitled to request one or more order(s) from this Court, including vesting order(s) under the CCAA, which shall provide for the transfer and assignment of assets to the Petitioners, Basco, New Boutique Jacob or other entities referred to in the Restructuring Transactions Notice, free and clear of any Financial Charges (as defined in paragraph 19 of this Order), as necessary or desirable to implement and effect the Restructuring Transactions as set forth in the Restructuring Transactions Notice.

12. **ORDERS** that, from and after the Plan Implementation Date, all Persons shall be deemed to have waived any and all defaults of each of the Petitioners and Basco, then existing or previously committed by any of the Petitioners or Basco or caused by any of the Petitioners or Basco, directly or indirectly, or non-compliance with any covenant, undertaking, positive or negative pledge, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, credit document, agreement for sale, lease, deed, instrument, license, permit, or other agreement of whatever nature, written or oral, and any and all amendments or supplements thereto (individually, an "Instrument"), existing between such Person and any of the Petitioners or Basco, arising directly or indirectly from (i) the filing by the Petitioners under the CCAA, (ii) the implementation of the CCAA Plan (including the Restructuring Transactions), (iii) the borrowing of funds or receipt of proceeds, as the case may be, under the Exit Loan Facilities, and (iv) the execution and delivery of, and the performance by New Boutique Jacob of its obligations under the Exit Loan Facilities, including the granting of Financial Charges, and any and all notices of default and demands for payment under any Instrument, including any guarantee arising from such default, shall be deemed to have been rescinded and shall be of no further force or effect.

13. **DECLARE** that, pursuant to section 411 of the QBCA and in accordance with the Restructuring Transactions Notice, the paid-up capital of each of Boutique, 9101-2096 Québec Inc. and 9192-4126 Québec Inc. is reduced to $1.00 for no consideration.

14. **DECLARES** that any entities listed in the Restructuring Transactions Notice to be liquidated and to be dissolved pursuant to the Restructuring Transactions shall be deemed liquidated and dissolved for all purposes without the necessity for any other or further action by or on behalf of any Person, including the Petitioners or Basco or their respective security holders, directors, officers, managers or partners or for any payments to be made in connection therewith, provided, however, that the Petitioners and Basco shall cause to be filed with the appropriate Governmental Authority articles, agreements or other documents of dissolution for the dissolved entities listed in the Restructuring Transactions Notice to the extent required by applicable Law.

15. **DECLARES** that, subject to the performance by the Petitioners and Basco of their obligations under the CCAA Plan, and in accordance with Section 8.1(2)(f) of the CCAA Plan, any and all contracts, leases, agreements or other arrangements (the "Agreements") to which the Petitioners or Basco are a party and that have not been terminated including as part of the Restructuring Transactions, or repudiated in accordance with the terms of the Initial Order, will be and remain in full force and effect, unamended, as at the Plan Implementation Date, and no Person who is a party to any such Agreements may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of dilution or other remedy) or make any demand under or in respect of any such Agreements and no automatic termination will have any validity or effect by reason of:

a. any event that occurred on or prior to the Plan Implementation Date and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults, events of default, or termination events arising as a result of the insolvency of the Petitioners and of Basco);

b. the insolvency of the Petitioners, Basco or any affiliate thereof or the fact that the Petitioners, Basco or any affiliate thereof sought or obtained relief under the CCAA or the QBCA or any other applicable legislation;

c. any of the terms of the CCAA Plan or any action contemplated therein, including any transfer or such other transaction or step contemplated under the Restructuring Transactions Notice;

d. any settlements, compromises or arrangements effected pursuant to the CCAA Plan or any action taken or transaction effected pursuant to the CCAA Plan; or

e. any change in the control, transfer of equity interest or transfer of assets of the Petitioners, Basco or any affiliate thereof, or of any entity in which any of the Petitioners and Basco held an equity interest arising from the implementation of the CCAA Plan (including the Restructuring Transactions Notice) or the transfer of any asset as part of or in connection with the Restructuring Transactions Notice.

16. **DECLARES** that the determination of Proven Claims in accordance with the Claims Procedure Order and the Creditors' Meeting Order shall be final and binding on the Petitioners, Basco and all Affected Creditors.

Releases and Discharges

17. **CONFIRMS** the releases contemplated by Section 6.3 of the CCAA Plan.

18. **ORDERS** that, without limitation to the Claims Procedure Order, any Holder of a Claim, including any Affected Creditor and any Holder of a Secured Claim who did not file a Proof of Claim Form in accordance with the provisions of the Claims Procedure Order, shall be and is hereby forever barred from making any Affected Claim against the Petitioners, Basco and New Boutique Jacob and any of their respective successors and assigns, and shall not be entitled to any distribution under the CCAA Plan, and that such Affected Claim is forever extinguished.

19. **ORDERS** that all Affected Creditors having an Affected Claim of any nature against the Petitioners, Basco or New Boutique Jacob shall, at the request of the Petitioners, Basco or New Boutique Jacob, from and after the Plan Implementation Date, without delay, execute and deliver to the Petitioners, Basco or New Boutique Jacob such releases, discharges, authorizations and directions, instruments, notices and other documents as the Petitioners, Basco or New Boutique Jacob may reasonably request for the purpose of evidencing and/or registering the release and discharge of any and all Financial Charges (as defined hereunder) with respect to such Affected Claims of any nature against the Petitioners, Basco or New Boutique Jacob, the whole at the expense of the Petitioners, Basco and New Boutique Jacob, as the case may be.

For the purpose of this Order, "Financial Charge" means any and all legal causes of preference (as such term is defined in Article 2647 of the *Civil Code of Québec*), any instrument, document or statutory entitlement that evidences, constitutes or secures an obligation of the Petitioners, Basco or New Boutique Jacob or a Claim against the Petitioners, Basco or New Boutique Jacob for the payment of money or the performance of any other obligation of any whatsoever, whether or not such obligation or Claim has been proven in accordance with the Claims Procedure Order and the Creditors' Meeting Order, including any mortgage, charge, priority, security interest, lien, pledge, construction lien, statutory lien (whether for taxes or otherwise), claim for lien, construction lien or statutory lien (whether for taxes or otherwise), claim for royalty, judgment, execution or writ of execution and order of this Court creating a charge, lien or encumbrance on the assets of the Petitioners and Basco.

20. **ORDERS** that, upon payment in full in cash of the DIP Claims in accordance with the CCAA Plan, CIBC, shall at the request of the Petitioners, without delay, execute and deliver to the Petitioners such releases, discharges,

authorizations and directions, instruments, notices and other documents as the Petitioners may reasonably request for the purpose of evidencing and/or registering the release and discharge of any and all Financial Charge with respect to the DIP Claims, the whole at the expense of the Petitioners.

21. **PRECLUDES** the prosecution against the Petitioners, Basco, New Boutique Jacob and any other successor in interest, whether directly, derivatively or otherwise, of any claim, obligation, suit, judgment, damage, demand, debit, right, cause of action, liability or interest released, discharged or terminated pursuant to the CCAA Plan.

Accounts with Financial Institutions

22. **ORDERS** that Mr. Joseph Basmaji, President of Boutique, or any other person appointed by Mr. Joseph Basmaji, is empowered to take all required acts with any and all financial institutions with which the Petitioners or Basco have or will have accounts (the "Accounts") to affect the transfer of, or changes to, the Accounts in order to facilitate the implementation of the CCAA Plan and the transactions contemplated thereby, including the Restructuring Transactions.

Effect of failure to implement CCAA Plan

23. **ORDERS** that, in the event that the Plan Implementation Date does not occur, Affected Creditors shall not be bound to the valuation, settlement or compromise of their Affected Claims at the amount of their Proven Claims in accordance with the CCAA Plan, the Claims Procedure Order or the Creditors' Meeting Order. For greater certainty, nothing in the CCAA Plan, the Claims Procedure Orders, the Creditors' Meeting Order or in any settlement, compromise, agreement, document or instrument made or entered into in connection therewith or in contemplation thereof shall, in any way, prejudice, quantify, adjudicate, modify, release, waive or otherwise affect the validity, enforceability or quantum of any Claim against the Petitioners or Basco, including in the CCAA Proceedings or any other proceeding or process, in the event that the Plan Implementation Date does not occur.

Charges created in the CCAA Proceedings

24. **ORDERS** that, upon the Plan Implementation Date, all CCAA Charges against the Petitioners or Basco or their property created by the CCAA Initial Order or any subsequent orders shall be determined, discharged and released.

Fees and Disbursements

25. **ORDERS AND DECLARES** that, on and after the Plan Implementation Date, the obligation to pay the reasonable fees and disbursements of the Monitor, counsel to the Monitor and counsel to the Petitioners and Basco, in each case at their standard rates and charges and including any amounts outstanding as of the Plan Implementation Date, in respect of the CCAA Plan, including the implementation of the Restructuring Transactions, shall become obligations of New Boutique Jacob.

Exit Financing

26. **ORDERS** that the Petitioners are authorized and empowered to execute, deliver and perform any credit agreements, instruments of indebtedness, guarantees, security documents, deeds, and other documents required in connection with the Exit Loan Facilities and the term loan to be provided by 9182-6065 Québec Inc. (the "RealCo Loan") to New Boutique Jacob (collectively, the "Exit Loan and Security Documents"), and New Boutique Jacob is authorized to perform all of their respective obligations under and in connection with the Exit Loan and Security Documents.

Stay Extension

27. **EXTENDS** the Stay Period in respect of the Petitioners and Basco until the Plan Implementation Date.

28. **ORDERS** that all orders made in the CCAA Proceedings shall continue in full force and effect in accordance with their respective terms, except to the extent that such Orders are varied by, or inconsistent with, this Order, the Creditors' Meeting Order, or any further Order of this Court.

Monitor

29. **ORDERS** that all Monitor's reports filed with this Court (the "Monitor's Reports") be an are hereby approved, that all actions and conduct of the Monitor in connection with the Claims, the CCAA Charges, the CCAA Plan and the CCAA Proceedings, including the actions and conduct of the Monitor disclosed in the Monitor's Reports, are hereby approved, and that the Monitor has satisfied all of its obligations up to and including the date of this Order.

30. **APPROVES** all conduct of the Monitor in relation to the Petitioners and Basco and bars all Claims against the Monitor arising from or relating to the services provided to the Petitioners or Basco prior to the date of this Order, save and except any liability or obligation arising from a breach of its duties to act honestly, in good faith and with due diligence.

31. **ORDERS** that no proceedings shall be commenced against the Monitor in any way arising from or related to its capacity or conduct as Monitor except with prior leave of this Court, on notice to the Monitor and upon further order securing, as security for costs, the solicitor and his own client costs of the Monitor in connection with the proposed action or proceeding.

32. **DECLARES** that the protections afforded to PricewaterhouseCoopers Inc., as Monitor and as officer of this Court pursuant to the terms of the Initial Order and the other Orders made in the CCAA Proceedings shall not expire or terminate on the Plan Implementation Date and, subject to the terms hereof, shall remain effective and in full force and effect.

33. **ORDERS** that the Monitor shall be discharged of its duties and obligations pursuant to the CCAA Plan, this Order and all other Orders made in the CCAA Proceedings, upon the filing with this Court of a certificate of the Monitor certifying that all of its duties in relation to the claims procedure and all matters relating thereto as set out in the Claims Procedure Order and all other matters for which it is responsible under the CCAA Plan or pursuant to the Orders of this Court made in the CCAA Proceedings, are completed to the best of the Monitor's knowledge.

34. **ORDERS AND DECLARES** that any distributions under the CCAA Plan and this Order shall not constitute a "distribution" and the Monitor shall not constitute a "legal representative" or "representative" of the Petitioners for the purposes of section 159 of the *Income Tax Act* (Canada), section 270 of the *Excise Tax Act* (Canada), section 14 of the *Act Respecting the Ministère du Revenu* (Québec), section 107 of the *Corporations Tax Act* (Ontario), section 22 of the *Retail Sales Tax Act* (Ontario), section 117 of the *Taxation Act, 2007* (Ontario) or any other similar federal, provincial or territorial tax legislation (collectively the "Tax Statutes") given that the Monitor is only a disbursing agent under the CCAA Plan, and the Monitor in making such payments is not "distributing", nor shall be considered to "distribute" nor to have "distributed", such funds for the purpose of the Tax Statutes, and the Monitor shall not incur any liability under the Tax Statutes in respect of it making any payments ordered or permitted hereunder, and is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of payments made under the CCAA Plan and this Order and any claims of this nature are hereby forever barred.

35. **ORDERS AND DECLARES** that the Monitor, the Petitioners, New Boutique Jacob and Basco, as necessary, are authorized to take any and all actions as may be necessary or appropriate to comply with applicable Tax withholding and reporting requirements. All amounts withheld on account of Taxes shall be treated for all purposes as having been paid to the Affected Creditors in respect of which such withholding was made, provided such withheld amounts are remitted to the appropriate Governmental Authority.

Claims Officers

36. **DECLARES** that, in accordance with paragraph **27** hereof, any claims officer appointed in accordance with the Claims Procedure Orders shall continue to have the authority conferred upon, and to the benefit from all protections afforded to, claims officers pursuant to Orders in the CCAA Proceedings.

General

37. **DECLARES** that any of the Petitioners or Basco or the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of this Order on notice to the service list.

38. **DECLARES** that this Order shall have full force and effect in all provinces and territories in Canada.

39. **REQUESTS** the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order, including the registration of this Order in any office of public record by any such court or administrative body or by any Person affected by the Order.

Provisional Execution

40. **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

5 *THE WHOLE*, without costs.

Appendix A

[UNOFFICIAL ENGLISH TRANSLATION]

Court File No. 500-11-039940-107

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 REORGANIZATION AND COMPROMISE OF BOUTIQUE JACOB INC., 9101-2096 QUÉBEC INC. and 9192-4126 QUÉBEC INC. AMENDED AND RESTATED PLAN SUPPLEMENT 1 RESTRUCTURING TRANSACTIONS [1]

September 19, 2011

Amended and Restated Plan Supplement and Restructuring Transactions Notice Under the CCAA Plan

Reference is made to the plan of reorganization and compromise of Boutique Jacob Inc., 9101-2096 Québec Inc. and 9192-4126 Québec Inc. (collectively, the "*Petitioners*") pursuant to the *Companies' Creditors Arrangement Act* (Canada) (as such plan may be amended, varied or supplemented from time to time in accordance with its terms and the terms of the creditors' meeting order rendered by the Québec Superior Court of Justice, Commercial Division, in connection with the creditors' meetings, the "*Plan*"). Unless otherwise specified herein, all capitalized terms used herein shall have the meanings ascribed to them in the Plan.

Section 6.2 of the Plan provides that the Petitioners and Basco I.P. L.P ("*Basco*") shall take any actions as may be necessary or appropriate to effect any transactions deemed appropriate or desirable by the Petitioners, after consultations with the Monitor, including all of the transactions necessary or appropriate to simplify the Petitioners and Basco's

structure and to effect a combination of their respective businesses. The transactions contemplated in Section 6.2 of the Plan are known, collectively, as the "*Restructuring Transactions*".

The Restructuring Transactions generally are intended to simplify the existing corporate and organizational structure for the Petitioners and Basco and combine their respective businesses in a more tax efficient corporate structure. They will include combination of duplicative entities and businesses under Canadian law.

The form of each Restructuring Transaction shall, where applicable, be determined by each of the Petitioners, Basco and their successors party to any Restructuring Transaction, and shall be approved by the Monitor, provided, however, that the Petitioners and Basco reserve the right not to effect one or more of the Restructuring Transactions or to undertake transactions in lieu of or in addition to such Restructuring Transactions as the Petitioners and Basco may deem necessary or appropriate under the circumstances and as approved by the Monitor.

This notice specifies the proposed timing for each Restructuring Transaction. Except as otherwise specified, the steps outlined herein are intended to occur in a sequential order. Therefore, except as set forth in the Sanction Order or as otherwise noted herein or in a Plan supplement, each Restructuring Transaction shall be conditional upon completion of the Restructuring Transaction set forth in the immediately preceding step. All actions as may be necessary or appropriate to effect the Restructuring Transactions as set forth herein shall be in place prior to the Plan Implementation Date, with the appropriate documents, agreements and funding necessary to implement all such transactions in escrow until their release in the manner and sequence set forth below.

The structure of each Restructuring Transaction and, where applicable, the form of documentation concerning such transaction shall be determined by each of the Petitioners, Basco and their successors party to such Restructuring Transaction with the approval of the Monitor.

The liquidation of an entity shall, except as otherwise indicated below, result in all of the property of such liquidating entity being assigned, conveyed and transferred to the entity into which it is liquidated (the "*Parent Entity*") except for amounts receivable from the Parent Entity and the Parent Entity becoming liable for the full amount of all of the liabilities of such liquidating entity except amounts payable to the Parent Entity to the complete release, discharge and exoneration of such liquidating entity and such, without novation of the obligations and, as soon as practicable following each liquidation, the liquidating entity shall be dissolved.

I. STEPS WHICH SHALL OCCUR SEQUENTIALLY ON THE PLAN IMPLEMENTATION DATE

1. Joseph Basmaji transfers the class B shares he holds in the capital of 9192-4126 Québec Inc. ("General") to Groupe Jacob Inc. ("Groupe") in exchange for shares in the capital of Groupe.

2. Groupe transfers all of its assets and certain liabilities, except for the shares it holds in the capital of each of Boutique Jacob Inc. ("Boutique"), 9101-2088 Québec Inc. ("Retail Holdco"), 9101-2096 Québec Inc. ("IPCo") and General and for inter-company receivables from and inter-company payables to, if any, Jacob USA Inc., Retail Holdco, IPCo, General, Jacob Canada Inc. ("Jacob Canada"), Jacob, Inc. and Basco, to 3092-7271 Québec Inc. ("Joco") or such other entity as determined by the Petitioners for fair market value consideration.

3. Each of Basco and IPCo transfers to 9182-6065 Québec Inc. ("Realco") its excess cash on hand each in exchange for an inter-company receivable from Realco.

4. The paid-up capital of each class of shares in the capital of each of Jacob Canada, Boutique, Retail Holdco, IPCo and General is reduced to $1.00 for no consideration.

5. Jacob Canada is liquidated into Retail Holdco.

6. Any portion of inter-company receivables and payables between Basco and Boutique are settled by offset and any residual inter-company receivables of Basco from Boutique is cancelled for nil consideration. Immediately after, Basco

is liquidated into each of IPCo and General where each of IPCo and General receives an undivided interest in each of the properties of Basco and assumes all liabilites based on their respective ownership interest in Basco.

7. Boutique, Retail Holdco, IPCo and General are each liquidated into Groupe in sequential order.

8. After completion of step 7, Groupe transfers its inter-company receivables from Realco and certain liabilities to Joco or such other entity as determined by the Petitioners for fair market value consideration.

9. Boutique amends its certificate of incorporation to change its name to a numbered company.

10. Groupe amends its certificate of incorporation to change its name to Boutique Jacob Inc. ("New Boutique Jacob").

11. Any portion of inter-company receivables and payables between New Boutique Jacob and Joco are settled by offset and any residual inter-company receivables of Joco from New Boutique Jacob remains outstanding and is secured by a third ranking security interest on the assets of New Boutique Jacob.

12. Realco lends an amount of $3 million to New Boutique Jacob under a subordinated loan agreement with a second ranking security interest on the assets of New Boutique Jacob.

13. New Boutique Jacob grants a third ranking security interest on its assets to secure its subordinated debt to Joseph Basmaji, if any.

14. New Boutique Jacob borrows funds under the Exit Loan Facilities.

II. STEPS WHICH SHALL OCCUR ON OR AFTER THE PLAN IMPLEMENTATION DATE BUT AFTER STEP 14 ABOVE

15. Affected Claims are settled, compromised and released upon payment by New Boutique Jacob of (i) the first installment on the First Installment Date in respect of Affected Claims paid in full at such time in accordance with the Plan, and (ii) the second installment on the Second Installment Date in respect of all other Affected Claims.

. . . . .

Footnotes

1 The Petitioners have expressly reserved the right, at any time on or prior to the Plan Implementation Date, to supplement, modify or amend this Plan Supplement 1.

End of Document

TAB 3

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

SUPERIOR COURT OF JUSTICE - ONTARIO

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

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

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

BEFORE: Regional Senior Justice G.B. Morawetz

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

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

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

ENDORSEMENT

INTRODUCTION AND FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[18] Windsor Casino Limited ("WCL") is a wholly-owned subsidiary of CEWL. WCL employs the approximately 2,800 employees who work at the Windsor Casino. Certain of the WCL employees are unionized members of Unifor Local 444 (the "Union"). Neither CEWL nor WCL administers a defined benefit pension plan although WCL does administer a defined contribution pension plan. WCL is not a Chapter 11 Debtor and as such is not a subject of this Application.

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

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

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

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

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

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

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

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

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

ISSUES

[22] The issues on this Application are:

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

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

ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

a. the location is readily ascertainable by creditors;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISPOSITION

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

RSJ G.B. Morawetz

Date: January 30, 2015

TAB 4

COURT OF APPEAL FOR ONTARIO

CITATION: Crystallex (Re), 2012 ONCA 404
DATE: 20120613
DOCKET: C55434 & C55435

O'Connor A.C.J.O., Blair and Hoy JJ.A.

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 Crystallex International Corporation

Richard B. Swan, S. Richard Orzy, Derek J. Bell and Emrys Davis, for the appellant Computershare Trust Company of Canada

Andrew J.F. Kent, Markus Koehnen and Jeffrey Levine, for the respondent Crystallex International Corporation

Barbara L. Grossman, for Tenor Capital Management Company, L.P. and Affiliates

Robert Frank, for Forbes & Manhattan Inc. and Aberdeen International Inc.

David Byers, for the Monitor Ernst & Young Inc.

Heard: May 11, 2012

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice dated January 20, 2012, with reasons reported at 2012 ONSC 538, and from the orders of Justice Frank J.C. Newbould of the Superior Court of Justice dated April 16, 2012, with reasons reported at 2012 ONSC 2125.

Hoy J.A.:

I. OVERVIEW

[1] The primary issue in these appeals is the scope of financing the supervising judge can or should approve, without the sanction of creditors, while

a company is under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

[2] The respondent Crystallex International Corporation ("Crystallex") is a Canadian mining company. Its principal asset was the right to develop Las Cristinas in Venezuela, which is one of the largest undeveloped gold deposits in the world. Crystallex obtained this right through a contract with the Corporacion Venezolana de Guayana (the "CVG"), a state-owned Venezuelan corporation. On February 3, 2011, after Crystallex spent over $500 million on developing Las Cristinas, the CVG sent Crystallex a letter to "unilaterally rescind" the contract for reasons of "expediency and convenience". There is no suggestion in these proceedings that the rescission was due to any mismanagement by Crystallex.

[3] As a result of the cancellation of the contract, Crystallex was unable to pay its $100 million in senior 9.375 per cent notes due December 23, 2011 (the "Notes"). It sought and, on December 23, 2011 obtained, protection under the CCAA.

[4] At present, Crystallex's only asset of significance is an arbitration claim for US $3.4 billion against the government of Venezuela in relation to the cancellation of the contract. The arbitration claim is the "pot of gold" in the CCAA proceeding.

[5] The appellant Computershare Trust Company of Canada, in its capacity as Trustee for the holders of the Notes (the "Noteholders"), appeals, with leave, three orders made by the supervising judge in the CCAA proceeding: (i) the January 20, 2012 CCAA Bridge Financing Order (with reasons released January 25, 2012 and reported at 2012 ONSC 538 (the "Bridge Financing Reasons")) authorizing Crystallex to obtain bridge financing of $3.125 million (the "Bridge Loan") from the respondent Tenor Special Situations Fund, L.P. ("Tenor L.P."); (ii) the April 16, 2012 CCAA Financing Order authorizing Crystallex to obtain $36 million of what the supervising judge characterized as Debtor in Possession ("DIP") financing from Tenor Special Situation Fund I, LLC ("Tenor") (the "Tenor DIP Loan"); and (iii) the April 16, 2012 Management Incentive Plan Approval Order approving a Management Incentive Plan ("MIP") designed to ensure the retention of key executives until the arbitration is completed. The supervising judge's reasons for the CCAA Financing Order and Management Incentive Plan Approval Order are reported at 2012 ONSC 2125 (the "DIP Financing Reasons").

[6] Among other conditions, the Tenor DIP Loan, due December 31, 2016, entitles Tenor to 35 per cent of the net proceeds of the arbitration in addition to interest, provides governance rights that may continue after Crystallex exits from CCAA protection, and requires Tenor's approval to a range of options that might customarily be offered to unsecured creditors in seeking to negotiate a plan of compromise or arrangement.

[7] Substantially all of the creditors opposed the approval of the Bridge Loan, the Tenor DIP Loan and the MIP. Crystallex represents that it hopes to negotiate a plan of arrangement or compromise with the Noteholders and other creditors before the current stay until July 30, 2012 expires.

[8] The bulk of the $36 million Tenor DIP Loan comprises financing to pursue the arbitration claim, which may continue after the period of CCAA protection.

II. THE LEGISLATIVE FRAMEWORK

[9] The CCAA was amended effective September 18, 2009 to add the following provisions regarding the grant of a charge to secure financing required by the debtor:

> Interim financing
>
> 11.2 (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.
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> ...
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> Factors to be considered
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> (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.[1]

Prior to the enactment of these provisions, the court relied on its general authority under the CCAA to approve DIP financing: see Lloyd W. Houlden, Geoffey B. Morawetz & Janis P. Sarra, *The 2012 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2011), at p. 1175.

III. THE BACKGROUND

A. Events Prior to the CCAA Filings

[10] Crystallex has filed a Request for Arbitration pursuant to the Canada-Venezuela Bilateral Investment Treaty, claiming $3.4 billion plus interest for the loss of its investment in Las Cristinas. The hearing of the arbitration is scheduled for November 11, 2013.

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[1] Paragraph 23(1)(b) provides that the monitor shall "review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings".

[11] Crystallex's most significant liability is its debt to the Noteholders. In addition to amounts owed to the Noteholders, Crystallex has other liabilities of approximately CAD $1.2 million and approximately US $8 million.

[12] The current Noteholders are hedge funds, some of whom purchased Notes after Venezuela announced its intention to expropriate Las Cristinas at prices as low as 25 cents on the dollar.

[13] The relationship between Crystallex and the current Noteholders is hostile. Crystallex and the Noteholders have been in litigation since 2008. Prior to the maturity date of the Notes, the Noteholders twice, unsuccessfully, brought court proceedings against Crystallex alleging that an event had occurred which accelerated Crystallex's obligation to pay the Notes. Those proceedings were also heard by the supervising judge: see *Computershare Trust Co. of Canada v. Crystallex International Corp.* (2009), 65 B.L.R. (4th) 281 (S.C.), aff'd 2010 ONCA 364, 263 O.A.C. 137; and *Computershare v. Crystallex*, 2011 ONSC 5748.

B. Commencement of Proceedings under the CCAA and Chapter 15

[14] On December 22, 2011, one day prior to the maturity of the Notes, Crystallex and the Noteholders filed competing CCAA applications. The Noteholders' application contemplated that all existing common shares would be cancelled, an equity offering would be undertaken, and if, or to the extent, the

equity proceeds were insufficient to pay out the Noteholders, the Notes would be converted to equity.

[15] Crystallex sought authority to file a plan of compromise and arrangement, the authority to continue to pursue the arbitration in Venezuela, and the authority to pursue all avenues of interim financing or a refinancing of its business and to conduct an auction to raise financing. In his supporting affidavit sworn December 22, 2011, Robert Fung, Crystallex's Chairman and Chief Executive Officer, indicated that Crystallex wished to have all claims stayed against it until the arbitration settled or Crystallex realized the arbitration award. Crystallex had already received an unsolicited offer of financing from Tenor Capital Management.

[16] It was (and is) expected that, if the arbitration is successful and the award is collected, there will be more than enough to pay the creditors and a significant amount will be available to shareholders.

[17] On December 23, 2011, the supervising judge made an order granting Crystallex's CCAA application (the "Initial Order"). In his reasons released December 28, 2011, he explained that the Noteholders' proposal was not a fair balancing of the interests of all stakeholders: *Re Crystallex International Corporation*, 2011 ONSC 7701, at para. 26. The Noteholders did not appeal the Initial Order.

[18] Crystallex obtained an order under chapter 15 of the United States Bankruptcy Code from the United States Bankruptcy Court for the District of Delaware, among other things giving effect to the Initial Order in the United States as the main proceeding.

C. Crystallex Develops a DIP Auction Process

[19] Paragraph 12 of the Initial Order authorized Crystallex to pursue all avenues of interim financing or a refinancing of its business or property, subject to the requirements of the CCAA and court approval, to permit it to proceed with an orderly restructuring. It further provided:

> Without limiting the foregoing, the Applicant may conduct an auction to raise interim or DIP financing pursuant to procedures approved by the Monitor and using such professional assistance as the Applicant may determine with the consent of the Monitor. If such approved procedures are followed to the satisfaction of the Monitor then the best offer as determined by the Applicant pursuant to the approved procedures shall be afforded the protection of the *Soundair* principles so that it will be too late to make topping offers thereafter and such offers will not be considered by this Court.

[20] Crystallex hired an independent financial advisory firm, Skatoff & Company, LLC, and developed a set of procedures to govern the solicitation of bids to provide financing to Crystallex. The Monitor, Ernst & Young Inc., approved the bid procedures. The bid procedures indicated that Crystallex's objective was to obtain financing of not less than $35 million, net of costs, that, on completion of the CCAA and U.S. Chapter 15 reorganization proceedings,

would roll into financing maturing not sooner than December 31, 2014. The bid deadline was February 1, 2012.

D. The Bridge Loan

[21] On January 20, 2012, the supervising judge considered competing proposals from Tenor L.P. and the Noteholders to provide bridge financing. Tenor L.P. offered $3.125 million with interest at 10 per cent per annum. The Noteholders offered $3 million with interest at 1 per cent per annum.

[22] The board of Crystallex, taking into account advice received from Mr. Skatoff, recommended the Tenor L.P. offer. Mr. Skatoff was concerned that the Noteholders' objective may have been to defeat the larger DIP financing process so that they could ultimately impose financing terms on Crystallex. It was also his view that Crystallex should avoid entering into an important financial relationship with a hostile party.

[23] The supervising judge approved Tenor L.P.'s offer.

E. The Noteholders Object to the DIP Auction Process

[24] On January 20, 2012, the Noteholders brought a cross-motion to modify the DIP auction process then underway, which they severely criticized. They objected to the amount sought, the term, and the lender back-end entitlement a successful DIP lender could acquire. In their view, Crystallex was inappropriately seeking financing in excess of amounts required until a compromise or plan of

arrangement could be arrived at between Crystallex and its creditors. Given their existing position in Crystallex, the Noteholders also objected to being required to sign a non-disclosure agreement containing a standstill provision in order to be a qualified bidder.

[25] The supervising judge held that if the Noteholders wished to be considered as a qualified bidder, they would have to sign a non-disclosure agreement: Bridge Financing Reasons, at para. 27. As to their other concerns, he wrote, at para. 29:

> In my view these objections are premature and it is not necessary for me to consider their strength at this stage. The time for filing bids from qualified bidders has not yet expired and what bids will be received is unknown. It is when a successful bidder has been chosen and the DIP facility is before the court for approval that these issues raised by the Noteholders would be more appropriately dealt with. Until then, there is no factual foundation for judgment to be passed on the bid procedures for the DIP facility for which Crystallex will seek approval.

F. Competing DIP Financing Offers: The Tenor DIP Loan and the Noteholders' Offer

[26] The bidders who responded to the request for DIP financing included three hedge funds that hold approximately 77 per cent of the Notes and Tenor.

[27] Those hedgefund Noteholders proposed a loan of $10 million with a simple interest rate of 1 per cent repayable on October 15, 2012.

[28] The supervising judge described Tenor's proposed terms in the DIP Financing Reasons:

> [23] The Tenor DIP facility contains the following material financial terms:
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> (a) Tenor will advance $36 million to Crystallex due and payable on December 31, 2016. This period for the loan is based on Crystallex's arbitration counsel's assessment of the likely timing of a decision from the arbitral tribunal and collection of the award.
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> (b) The advances will be in four tranches, being $9 million upon execution of the loan documentation and approval of the facility by court order in Ontario, the second being $12 million upon any appeal of the Ontario court order approving the facility being dismissed and upon a U.S court order approving the facility, the third being $10 million when Crystallex has less than $2.5 million in cash and the fourth being $5 million when Crystallex again has less than $2.5 million in cash.
>
> (c) The loans are to be used to (i) repay an interim bridge loan of $3.25 million advanced by Tenor with court approval of January 20, 2012 and payable on April 16, 2012, (ii) fees and expenses in connection with the facility, (iii) general corporate expenses of Crystallex including expenses of the restructuring proceedings and of the arbitration in accordance with cash flow statements and budgets of Crystallex approved by Tenor from time to time.
>
> (d) Crystallex will pay Tenor a $1 million commitment fee.

(e) $35 million of the loan amount will bear PIK interest (payment in kind, meaning it is capitalized and payable only upon maturity of the loan or upon receipt of the proceeds of the arbitration) at the rate of 10% per annum compounded semi-annually.

(f) Tenor will receive additional compensation equal to 35% of the net proceeds of any arbitral award or settlement, conditional upon the second tranche of the loan being advanced. Net proceeds of the award or settlement is defined as the amount remaining after payment of principal and interest on the DIP loan, taxes and proven and allowed unsecured claims against Crystallex, including the noteholders, the latter of which will have a special charge for the unsecured amounts owing. Alternatively, Tenor can convert the right to additional compensation to 35% of the common shares of Crystallex. This conversion right is apparently driven by tax considerations.

[24] The Tenor DIP facility also provides for the governance of Crystallex to be changed to give Tenor a substantial say in the governance of Crystallex. More particularly:

(a) Crystallex shall have a reduced five person board of directors, being two current Crystallex directors, two nominees of Tenor and an independent director selected by agreement of Crystallex and Tenor.

(b) The independent director shall be chair of the board of directors and shall not have a second-casting or tie-breaking vote.

(c) The independent director shall be appointed a special managing director and shall have all the powers of the board of

> directors to (i) the conduct of the reorganization proceedings in Canada and in the U.S. and the efforts of Crystallex to reorganize the pre-filing claims of the unsecured creditors, (ii) any matters relating to the rights of Crystallex and Tenor as against the other under the facility, (iii) the administration of the MIP to the extent not otherwise delegated to the bonus pool committee under the MIP, and (iv) to retain any advisor in respect of these matters. The special manager shall first consult with a non-board advisory panel, consisting of the three Crystallex directors who will step down from the board, and consider in good faith their recommendations.
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> (d) With respect to matters that may not at law be delegable to the special managing director, he will be required to obtain board approval. If the Tenor nominees use their votes to block that approval, Tenor will forfeit its 35% additional compensation.

> [25] The Tenor DIP facility contains proscribed rights of Tenor in the event of default. Tenor may seize and sell assets other than the arbitration proceeding (i.e. any cash and unsold mining equipment). It may not sell the arbitration claim. If there is a default before any arbitration award, Tenor would have the right to apply to court to have the Monitor or a Canadian receiver and manager appointed to take control of the arbitration proceedings. If such application were not granted, Tenor would be entitled to exercise the rights and remedies of a secured creditor pursuant to an order, the loan documentation or otherwise at law.

[29] Mr. Skatoff recommended, and the board of Crystallex agreed, to accept the Tenor DIP Loan. Mr. Skatoff indicated, in an affidavit sworn March 20, 2012,

that he had recommended that the board reject the Noteholders' offer of a $10 million loan for 6 months because Crystallex could not be assured that it could borrow the balance of the required funds at the expiry of that period on the same terms as the Tenor DIP Loan.

G. The Noteholders' Further, Competing Offer to Allay Mr. Skatoff's Concerns

[30] In his affidavit on behalf of the Noteholders, sworn March 27, 2012, Mr. Mattoni responded to Mr. Skatoff's concern by committing that the Noteholders would be prepared to,

> ... provide financing to Crystallex on the same terms as the [Tenor DIP Loan], in the event that prior to October 1, 2012, the Court orders that such long-term financing is appropriate and necessary. The Noteholders would reserve their complete and unfettered ability as creditors to continue to oppose stay extensions or attempts to secure such long-term financing outside of a Plan of compromise (including, specifically, financing to the extent contemplated by the Proposed Loan), but they will provide it if it is ordered by the Court on the same basis as currently proposed with Tenor...

H. The Noteholders' Proposed Plan

[31] Prior to the April 5, 2012 hearing, the Noteholders proposed a plan to indicate a good faith intention to bargain. They did not seek approval of this proposed plan at the April 5, 2012 hearing.

[32] The plan's terms included that the Noteholders would provide a $10 million loan on the terms described above; exchange their debt for approximately 58 per cent of the equity; provide $35 million to Crystallex in exchange for 22.9 per cent of the equity; and provide incentives to management at a lesser level than the MIP. Their proposed plan left approximately 14 per cent of the equity for the existing shareholders.

I. The Management Incentive Plan

[33] The Noteholders had criticized the independent directors of Crystallex as not being sufficiently independent. As a result, the independent directors of Crystallex comprising the compensation committee retained Jay Swartz, a partner of Davies Phillips Vineberg, to determine, from the perspective of an independent director, what an appropriate MIP would be. He in turn retained an independent national executive compensation consulting firm to provide expert advice. Mr. Swartz opined that the overall compensation proposal for the establishment of the bonus pool for the benefit of Crystallex's management was reasonable in the circumstances. The independent directors of Crystallex comprising the compensation committee approved the MIP.

[34] At para. 102 of the DIP Financing Reasons, the supervising judge described the MIP:

> In sum, a pool of money, consisting of up to 10% of the net proceeds of the arbitration up to $700 million and

> 2% of any further net proceeds, after all costs and charges, including the amounts owing to noteholders, is to be set aside and money in this pool may be paid to the beneficiaries of the MIP, depending on the determination of an independent committee. The amounts to be allocated to participants by the compensation committee are discretionary and could be nil. No one will be entitled to any particular amount. Members of the compensation committee will not be eligible for any payments.

[35] The MIP sets out a number of factors to be considered by the compensation committee in exercising its discretion. They include the amount and speed of recovery, the amount of time and energy expended by the individual, and the opportunity cost to the individual in staying with Crystallex.

[36] In the view of the Noteholders, the MIP is too generous. They proposed that management receive 5 per cent through an equity participation in any after tax award. They also took issue with the range of persons eligible under the MIP.

J. The April 5, 2012 motion

[37] On April 5, 2012, Crystallex sought orders approving, among other things, the Tenor DIP Loan and the MIP. The Noteholders as well as Forbes & Manhattan Inc. and Aberdeen International Inc., creditors owed approximately $2.5 million by Crystallex, opposed both the Tenor DIP Loan and the MIP. The one shareholder who attended opposed the MIP.

[38] The supervising judge approved the Tenor DIP Loan and the MIP.[2] He also extended the stay until July 30, 2012.

K. Events since April 5, 2012

[39] Tenor made the first, $9 million advance under the Tenor DIP Loan. The Bridge Loan was repaid out of the first advance.

[40] At the hearing of this appeal, the Monitor advised that Crystallex would require further funds before the anticipated release of this court's decision. Crystallex accepted Tenor's offer to advance a further $4 million to Crystallex, on the same terms as the first, $9 million tranche of the Tenor DIP Loan. Accordingly, this further advance does not entitle Tenor to participate in any arbitration proceeds, or trigger any change in the governance of Crystallex. If the Noteholders' appeal succeeds, the additional amounts advanced by Tenor are, like the first tranche, to be immediately repaid with interest at the rate of 1 per cent per annum, and the Noteholders shall fund the repayment. No commitment fee is payable in respect of this additional advance.

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[2] The MIP was approved subject to an amendment (agreed to by Crystallex) to provide that the value of any stock options ultimately realized by participants of the MIP would be deducted from the amount of any bonus awarded under the MIP on a tax neutral basis.

IV. THE SUPERVISING JUDGE'S REASONS

A. The Bridge Loan

[41] The supervising judge noted, at para. 5 of the Bridge Financing Reasons, that Tenor L.P.'s bridge financing proposal was "really short-term DIP financing". With respect to the boards' recommendation – based on Mr. Skatoff's advice – that Tenor L.P.'s proposal be approved, he wrote, at para. 12:

> This was a business judgment protected by the business judgment rule so long as it was a considered and informed judgment made honestly and in good faith with a view to the best interests of Crystallex. See *Re Stelco Inc.* (200[5]), 9 C.B.R. (5th) 135 (Ont. C.A.) regarding the rule and its application to CCAA proceedings. I see no grounds for concluding that the decision of Crystallex to prefer the Tenor bridge financing proposal is not protected by the business judgment rule or that I should not give it appropriate deference. [Citation corrected.]

[42] The supervising judge noted, at para. 13, that "the Monitor has no basis to say that the business judgment exercised by the Crystallex board of directors was unreasonable". The supervising judge accordingly approved the Bridge Loan.

[43] Mr. Skatoff expressed concern that the Noteholders' objective in offering bridge financing on such advantageous terms (interest at the rate of 1 per cent, as opposed to the 10 per cent in the Tenor L.P. offer) was to undermine the DIP auction process. The supervising judge observed, at para. 14:

> Whether Mr. Skatoff is correct in his concerns, it seems to me that the relatively minor extra cost involving the Tenor proposed bridge financing for at most a few months must be weighed against the risk of harm to the longer-term DIP financing auction process, and that for the sake of that process, it is preferable not to run the risks that Mr. Skatoff is concerned about.

B. The Tenor DIP Loan

[44] The substance of the supervising judge's reasons for approving the Tenor DIP Loan – as set out in the DIP Financing Reasons – may be summarized as follows.

i. The exercise of business judgment by the board of directors of Crystallex in approving the Tenor DIP Loan is a factor that can be taken into account by the court in considering whether to make an order under s. 11.2(1) of the CCAA (at para. 35).

ii. The Tenor DIP Loan did not amount to a plan of arrangement or compromise. Notably, it did not take away the rights of the Noteholders as unsecured creditors to apply for a bankruptcy order or to vote on a plan of compromise or arrangement. A vote of the creditors was therefore not required (at para. 50). In coming to this conclusion, the supervising judge relied on *Re Calpine Canada Energy Limited*, 2007 ABQB 504, 415 A.R. 196, leave to appeal refused, 2007 ABCA 266, 417 A.R. 25.

iii. Crystallex intended to negotiate a plan of compromise or arrangement with the Noteholders during the stay extension until July 30, 2012 (paras. 48, 126). The Tenor DIP Loan is therefore distinguishable from the financing rejected by the court in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577, because in that case the debtor did not have an intention to propose an arrangement or compromise to its creditors.

iv. Because the Tenor DIP Loan involves the grant of a financial interest in part of the assets of Crystallex, it is appropriate to consider the *Soundair* factors in deciding whether to approve it (at para. 59). Crystallex conducted a robust competitive bidding process (at para. 39).

v. Mr. Skatoff's evidence was that the Noteholders' proposed six month facility "would seriously erode the chances of Crystallex obtaining third party financing in October" (at para. 90). Counsel for Computershare had said during argument on the motion that the Noteholders "were not prepared to agree to such a $35 million facility at this time but only at some future time as the $10 million facility they now proposed became due" (at para. 27). While it would have been preferable if the Noteholders had been willing to lend on the basis of the terms of the Tenor DIP facility, "it was made clear during argument that the noteholders were not prepared at this time to do so" (at para. 91).

vi. As to the enumerated factors in s. 11.2(4):

(a) Given that Crystallex intends, if possible, to negotiate an acceptable plan of arrangement or compromise, the length of time during which Crystallex is expected to be subject to the CCAA proceedings is not a determinative factor. The financing will be required to pursue the arbitration (at para. 62) and, as the supervising judge noted, "the only way any of the creditors will receive any substantial cash payment is from the proceeds of the arbitration" (at para. 47);

(b) The management of the business and affairs of Crystallex "are a reasonable compromise between Crystallex and Tenor designed to protect the interests of the stakeholders, including the noteholders" (at para. 73). The fact that Tenor is given substantial governance rights does not in itself mean that the DIP Tenor Loan should not be approved. Tenor does not have the right to conduct the reorganization proceedings or the arbitration proceeding. Moreover, under s. 11.5(1) of the CCAA, the court may remove a director whom it is satisfied is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made. Arguably, a court could remove a Tenor nominee under this section without triggering an event of default under the Tenor DIP Loan (at paras. 63-71);

(c) While the Noteholders expressed "extreme displeasure" at Crystallex's management's delay in commencing arbitration proceedings,

they do not oppose management having a continuing role in the arbitration (at para. 72);

(d) The Noteholders' argument that the terms of the Tenor DIP Loan – in particular, the fact that the refusal of the court to grant a stay or a bankruptcy are events of default, the grant of a 35 per cent interest in the arbitration proceeds, and the limits on the type of restructuring that can be concluded without the approval of Tenor – will effectively prevent any plan of arrangement was rejected (at paras. 74-82). While, as the Monitor points out, the introduction of a third party, Tenor, with consent rights to certain actions will add complexity to the negotiation of a CCAA plan (at para. 93), the Tenor DIP Loan would enhance the prospects of a viable compromise or arrangement (at para. 83):

> ... Crystallex requires additional financing to pay its expenses and continue the arbitration. A DIP loan allows the company to have the arbitration financed, which if it were not at this stage would impair the arbitration and perhaps the attitude of Venezuela towards the arbitration claim, and as such enhances the viability of a CCAA plan. I have not accepted the argument of the noteholders that the loan would prevent a plan of arrangement.

(e) The supervising judge noted that Crystallex's principal asset is its US $3.4 billion arbitration claim against Venezuela (at para. 12); and

(f) In considering the Noteholders' complaints of prejudice in the context of what the market is demanding for a DIP loan and in all the circumstances,

the creditors have not been materially prejudiced by the Tenor DIP Loan (at para. 84).

C. The Management Incentive Plan

[45] The supervising judge considered the Noteholders' objections to the quantum and method for providing an incentive to management, the inclusion of certain persons in the MIP, and the approval of the MIP before the negotiation of a plan.

[46] In the DIP Financing Reasons, the supervising judge observed, at para. 109, that whether employee retention provisions should be ordered in a CCAA proceeding was a matter of discretion. He noted that the provisions of the MIP had been approved by an independent committee of the board of directors with impressive qualifications, relying on the opinion of Mr. Swartz. In providing that opinion, Mr. Swartz indicated that the absolute amount of the bonus pool could be very substantial and, in allocating it, the compensation committee "may have to carefully consider the absolute amounts to be paid to each member of the Management Group in order to satisfy its fiduciary duties": see DIP Financing Reasons, at para. 108. The supervising judge also noted that Mr. Swartz had retained an independent national executive compensation consulting firm to provide expert advice.

[47] Citing *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.) and *Timminco Ltd. (Re)*, 2012 ONSC 948, the supervising judge wrote, at para. 112 of the DIP Financing Reasons, "I see no reason why the business judgment rule is not applicable, particularly when the provisions of the MIP have been approved by an independent committee of the board." He further noted, at para. 115, what appears to be the practice of approving employee retention plans before any plan has been negotiated and, at para.105, that the Tenor DIP Loan was conditional on the approval of a MIP acceptable to Crystallex and Tenor.

[48] As to who should be eligible to participate in the MIP, at para. 117, the supervising judge noted that the independent committee had exercised its business judgment on the matter and that the participants were known to Mr. Swartz . Having reviewed the evidence, the supervising judge could not "say that any of the persons included in the MIP should not be there".

V. THE PARTIES' SUBMISSIONS

A. The Noteholders' Submissions

[49] The Noteholders frame their opposition to the Tenor DIP Loan on a number of bases.

[50] They argue that s. 11.2, titled "Interim financing", only permits a supervising judge to approve financing to meet the debtor's needs while it is developing a plan to present to its creditors.

[51] The Noteholders also argue that the supervising judge's finding that the Tenor DIP Loan would enhance the prospects of a viable compromise or arrangement was unreasonable because it resulted from an error of principle, namely an improper focus on the fact that it provided financing for the arbitration.

[52] The Noteholders submit that the supervising judge misapprehended the evidence in finding that the Noteholders were not willing to match the Tenor DIP Loan, and this error affected the outcome of the motion.

[53] They argue that the supervising judge erred in deferring to the business judgment of the directors of Crystallex in approving both the Bridge Loan and the Tenor DIP Loan. They argue that directors always make a recommendation and, if Parliament had thought this was a relevant factor, it would have specifically enumerated it in s. 11.2(4) of the CCAA.

[54] They argue that the supervising judge erred in principle in focusing on what was the most expedient way to fund the arbitration (as opposed to Crystallex's needs while negotiating a plan with the Noteholders) and, in doing so, committed the same error as the motion judge in *Cliffs Over Maple Bay*.

[55] The Noteholders' position is that the Tenor DIP Loan is effectively an arrangement, in the guise of a financing, and Crystallex is misusing the CCAA to impose a restructuring without the requisite creditor approval.

[56] The Noteholders submit that this court should order Crystallex to accept the Noteholders' "matching" DIP loan offer.

[57] They also renew their objections to the MIP.

B. Crystallex's Submissions

[58] Crystallex argues that the Noteholders' appeal with respect to the Bridge Loan is moot because the loan has been advanced, spent and repaid.

[59] As to the Tenor DIP Loan, it argues that approving it was within the discretion of the supervising judge, the supervising judge exercised his discretion on a wide variety of findings of fact, capable of evidentiary support in the record, and there is no basis for this court to intervene. It relies on *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, which recently addressed the broad discretionary jurisdiction of a supervising judge under the CCAA. Crystallex also points to *Air Canada (Re)* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.), as an instance where exit financing was approved before a plan had been approved by creditors.

C. Tenor's Submissions

[60] Tenor argues that "interim financing" in the heading to s. 11.2 of the CCAA does not mean "short term", but rather refers to the interval between two points or events, and s. 11.2 does not contain anything that would fetter the discretion of the supervising judge to select an "end point" beyond the expected conclusion

of a plan. It argues that the duration of the Tenor DIP Loan is tailored to Crystallex's unique circumstance: all stakeholders acknowledge that the arbitration must be pursued in order for there to be meaningful recovery. In any event, it argues, marginal notes, such as the heading "interim financing" in s. 11.2, are not part of the statute, and their value is limited when a court must address a serious problem of statutory interpretation, citing the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 14, and *Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada*, 2006 SCC 46, [2006] 2 S.C.R. 447, at para. 57.

[61] Moreover, Tenor submits, the supervising judge was in the best position to perform the careful balancing of interests required to facilitate a successful restructuring.

VI. ANALYSIS

A. The Appeal from the Bridge Financing Order

[62] The Noteholders did not strongly pursue their appeal of the Bridge Financing Order. The relief sought at the conclusion of the hearing related to the Tenor DIP Loan and not the Bridge Loan. The Bridge Loan was disbursed, spent and repaid. I agree with the respondents that the Noteholders' appeal with respect to the Bridge Loan is moot. I will therefore confine my analysis to the Tenor DIP Loan and the MIP.

B. The Appeal from the Tenor DIP Financing Order

(1) *Century Services Inc. v. Canada (Attorney General)*

[63] The Supreme Court of Canada had occasion to interpret the CCAA for the first time in *Century Services*. It used that opportunity to make clear that the CCAA gives the courts broad discretionary powers. Those powers must, however, be exercised in furtherance of the CCAA's purposes: para. 59. Section 11, in particular, was drafted in broad language which provides that a supervising judge "may, subject to the restrictions set out in this Act … make any order that it considers appropriate in the circumstances".[3] For the majority in *Century Services*, Deschamps J. wrote:

> [69] The *CCAA* also explicitly provides for certain orders…
>
> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* – avoiding the social and economic losses resulting from liquidation of an

[3] The full text of section 11 is as follows:

> 11. Despite anything in the *Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act,* if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

> insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[64] It is with the Supreme Court's interpretation of the scope of judicial discretion under the CCAA in mind that I turn to s. 11.2 and the question of whether it permits a supervising judge to approve financing that may continue for a significant period after CCAA protection ends, without the approval of creditors.

(2) Section 11.2 of the CCAA

[65] Section 11.2 is headed "Interim Financing". Headings may be used as an aid in interpreting the meaning of a statute: R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008), at p. 394, "Interim" generally means temporary or provisional: *Canadian Oxford Dictionary*, 2d ed. The weight to be given to a heading depends on the circumstances.

[66] I agree with the Noteholders that s. 11.2 contemplates the grant of a charge, the primary purpose of which is to secure financing required by the debtor while it is expected to be subject to proceedings under the CCAA. A further purpose, however, is to enhance the prospects of a plan of compromise or arrangement that will lead to a continuation of the company, albeit in restructured form, after plan approval.

[67] Section 11.2(4)(a) directs the court to consider the period during which the debtor is expected to be subject to proceedings under the CCAA. It stops short of confining the financing to the period that the debtor is subject to the CCAA. Section 11.2(4)(d) directs the court to consider if the financing would enhance the prospects of a viable compromise or arrangement.

[68] Having regard to the broad remedial purpose of the CCAA and the broad residual authority of a supervising judge described in *Century Services*, in my view section 11.2 does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection. Indeed, although in very different circumstances, financing to be available on the debtor's emergence from CCAA protection (sometimes called "exit financing") was approved before a plan was approved in *Air Canada*.[4] Both *Century Services* and section 11.2, however, in my view, signal that it would be unusual for a court to approve exit financing where opposed by substantially all of the creditors. Exit or post-plan financing is often a key element, or a pre-requisite, of the plan voted on by creditors.

[4] In *Air Canada,* Farley J. approved a "global restructuring agreement" which included a commitment of an existing creditor to provide exit financing of approximately US $585 million on the company's emergence from CCAA. DIP financing was in place; the financing at issue was clearly recognized as exit financing. The restructuring agreement was not opposed by substantially all of the creditors. Nor was it argued that it adversely affected the ability of the creditors and the debtor to negotiate a compromise or arrangement.

[69] The question becomes whether the unique facts of this case permitted the supervising judge to approve "interim financing" that was of such duration and structure that it could well outlast the CCAA protection period. This court should not substitute its decision for that of the supervising judge. I must ask this question through the lens of the applicable standard of review.

(3) Standard of review

[70] Appellate review of a discretionary order under the CCAA is limited. Intervention is justified only for an error in principle or the unreasonable exercise of discretion: *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (C.A.), at para. 71. An appellate court should not interfere with an exercise of discretion "where the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion": *New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 26.

(4) The supervising judge did not err in principle or unreasonably exercise his discretion

[71] As detailed below, I conclude that there is no basis for interfering with the supervising judge's exercise of discretion in approving the Tenor DIP Loan.

[72] Most significantly, in this case, the supervising judge found there could be no meaningful recovery, and therefore no successful restructuring, without the

financing of the arbitration. Although the Noteholders characterized the Tenor DIP Loan as "exit financing", it furthered the remedial purpose of the CCAA. To that extent, it is appropriate in the first sense used by Deschamps J. in *Century Services*, even though it may well outlast the period of CCAA protection. The supervising judge's focus on the fact that the Tenor DIP Loan provided financing for the arbitration was not, in the circumstances, an error of principle.

[73] In my view, the Noteholders' real argument is that the *means* by which the Tenor DIP Loan was approved were not appropriate. Ideally, a CCAA supervising judge is able to assist creditors and debtors in coming to a compromise. The creditors and Crystallex have not "achieved common ground" on a very significant matter. Effectively, the Noteholders argue that the creditors have not been treated as advantageously and fairly as the circumstances permit. They are the senior creditors and their offer to provide DIP financing on terms they argue matched those of the Tenor DIP Loan was not accepted. With sufficient financing in place to fund the arbitration, their leverage in negotiating a share of the arbitration proceeds has been reduced. Moreover, the Noteholders argue, the supervising judge erred in applying the business judgment rule, and, contrary to *Cliffs Over Maple Bay*, involuntarily stayed their rights during what they characterize as a restructuring. I consider each of these arguments below.

a. The Noteholders' competing DIP loan offer

[74] The Noteholders point to their affidavit on the April motion indicating they would submit to an order to advance funds on the same terms as the Tenor DIP Loan "in the event that prior to October 1, 2012, the Court orders that such long-term financing is appropriate and necessary". The supervising judge wrote that it would have been a preferable outcome if the Noteholders had been prepared to lend at the time of the April motion on the terms of the Tenor DIP facility: DIP Financing Reasons, at para. 91. The Noteholders argue that: they were prepared to advance funds on the terms of the Tenor DIP Loan, if so ordered; the supervising judge misapprehended the evidence; and, given the supervising judge's comment that it would have been preferable if the Noteholders had been prepared to lend, that misapprehension affected the outcome of the motion.

[75] The supervising judge's comment at para. 91 of the DIP Financing Reasons makes his real concern clear. There, he stated that "at this time" the Noteholders were not prepared to lend on the terms of the Tenor DIP Loan. The Noteholders' view as of April 5, 2012 was that such long-term financing was <u>not</u> necessary, as the $10 million they offered to advance at that time met Crystallex's then cash requirements. The Noteholders reserved their rights to continue to oppose the approval of long term financing before they had come to an agreement with Crystallex about their entitlement, as creditors. Further hearings, and further arguments, were required. The supervising judge found, at

para. 83 of the DIP Financing Reasons, that not putting sufficient financing in place to finance the arbitration "at this stage" would impair the arbitration. There was no suggestion from counsel for the Noteholders that on April 5, 2012 the Noteholders were prepared to waive the condition permitting them to continue to oppose the approval of long term financing. I am not satisfied that the supervising judge clearly misapprehended the evidence.

b. Loss of leverage

[76] In Crystallex's view, a reduction of the Noteholders' leverage was desirable. It points to the Noteholders' competing CCAA application, seeking to cancel all of the shareholders' equity, which the supervising judge rejected as not fairly balancing the interests of all stakeholders. The Noteholders' plan, subsequently proposed, would entitle them to 46 per cent of the equity in return for giving up their Notes, which Crystallex also views as excessive.[5]

[77] Crystallex argues that the Noteholders are not contractually entitled to convert their Notes to equity, and should therefore not be entitled to do so. Moreover, they argue, in the event of bankruptcy, the Noteholders would only be entitled to recover their principal and interest at the statutory rate of 5 per cent under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and, if the

[5] The Noteholders proposed that they receive 22.9 per cent of the equity for the $36 million needed for the arbitration and 58 per cent of the equity in return for giving up their Notes, for a total of approximately 81 per cent of the equity. Assuming that the Noteholders sought a maximum total entitlement of 81 per cent, if they advanced the $36 million on the terms of the Tenor DIP Loan, as they now seek to do, the amount of equity on conversion of their notes would be 46 per cent. See the DIP Financing Reasons, at para. 77.

arbitration is realized, they will be entitled to the higher rate of interest they are contractually entitled to under the Notes. As Deschamps J. noted at para. 77 of *Century Services*, participants in a reorganization "measure the impact of a reorganization against the position they would enjoy in liquidation".

[78] The Noteholders counter that, contractually, they were entitled to be repaid on December 23, 2011 and, since they were not, and Crystallex proposes to defer repayment for several years and repay the Notes only if the arbitration is successful, the long delay entitles them to some equity participation. Moreover, contractually, Crystallex is restricted from incurring the Tenor DIP Loan, which will be senior to the Notes.

[79] Crystallex points to the terms of the Initial Order, affording the "best offer" the protection of the *Soundair* principles, and providing that "topping offers" would not be considered by the court. Crystallex points out that the Noteholders did not appeal the Initial Order and argues that accepting the Noteholders' matching offer would offend the *Soundair* principles. In Crystallex's view, the Noteholders were treated fairly.

[80] In turn, the Noteholders argue that the Initial Order authorized Crystallex to conduct an auction to raise *interim or DIP financing* pursuant to procedures approved by the Monitor. Since the outset, the Noteholders maintained their objection that the auction process sought more than interim or true DIP financing.

The supervising judge deferred consideration of their objections until the DIP facility was before the court for approval.

[81] The Noteholders are sophisticated parties. They pursued a strategy. It ultimately proved less successful than hoped. It appears that the supervising judge would have been prepared to approve the advance of funds to Crystallex by the Noteholders, on the terms of the Tenor DIP Loan, notwithstanding the *Soundair* principles, had the Noteholders agreed to do so, without condition, on April 5, 2012.

[82] The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.

c. The business judgment rule

[83] The supervising judge held that in addition to the factors in s. 11.2(4) of the CCAA, he could take into account the exercise or lack thereof of business judgment by the board of directors of a debtor corporation in considering DIP

financing: DIP Financing Reasons, at paras. 32-35. He cited *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), as authority for this proposition.[6]

[84] The fact that a debtor's board of directors recommends interim financing is not a determinative factor, and in some cases may not be a material factor, in considering whether to make an order under s. 11.2. It would be unusual if the board did not recommend the financing for which the debtor seeks approval.

[85] *Stelco* should not be read as authority for the principle that the recommendation of the directors of a debtor under CCAA protection is entitled to deference in evaluating whether financing should be approved under s. 11.2 of the CCAA where the factors outlined in s. 11.2(4) have not been complied with. In *Stelco,* the debtor did not seek court approval of a recommendation of the board. In the case of interim financing, the court must make an independent determination, and arrive at an appropriate order, having regard to the factors in s. 11.2(4). It may consider, but not defer to, and is not fettered by, the recommendation of the board.

[86] The weight given by the supervising judge to the business judgment of the board of directors of Crystallex in recommending the Tenor DIP Loan is not, however, a basis for this court to interfere with his decision: *New Skeena Forest Products*, at para. 26.

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[6] An incorrect citation for *Stelco* was given in the DIP Financing Reasons, at para. 33.

d. *Cliffs Over Maple Bay* is distinguishable

[87] In *Cliffs Over Maple Bay*, the debtor was the developer of a 300 acre site intended to include residential units, a golf course and a hotel. The debtor obtained protection under the CCAA and sought approval of financing that would permit it to complete material parts of the development. It believed that the proceeds generated from the sale of units thus completed would be sufficient to fund the remaining portions of the development and that, if the development were completed, there would be sufficient sale proceeds to satisfy all of the debtor's obligations.

[88] The motion judge approved the financing; the mortgagees of the development appealed. The British Columbia Court of Appeal noted, at para. 35, that it was not suggested that the debtor intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. The court allowed the appeal, writing:

> [37] ... DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors ...
>
> [38] ... What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The CCAA was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a

> restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

[89] I agree with the supervising judge that this case can be distinguished from *Cliffs Over Maple Bay*, which turned on the court's finding that the debtor did not intend to negotiate a plan with its creditors.

[90] While Mr. Fung initially indicated that Crystallex's plan was to stay creditors' claims until the arbitration was settled or realized, his more recent evidence was that approval of the Tenor DIP Loan does not preclude further discussions about a plan with the creditors. In submissions before the supervising judge, and again before this court, counsel for Crystallex reiterated that Crystallex intended to exit from CCAA protection as soon as a plan was negotiated with the creditors and approved, and that Crystallex intended to negotiate a plan by the expiry of the stay on July 30, 2012. The supervising judge found that Crystallex intended to negotiate a plan with its creditors. There is some basis in the record for such a conclusion.

(5) The Tenor DIP Loan is not an arrangement

[91] An arrangement or compromise cannot be imposed on creditors unless it has been approved by a majority in number representing two thirds in value of the creditors: see s. 6(1) of the CCAA.

[92] The supervising judge rejected the argument that the Tenor DIP Loan was a plan of arrangement or compromise and therefore required the approval of the creditors. He held, at para. 50 of the DIP Financing Reasons:

> A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

[93] I agree. While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. In this case it was within the discretion of the supervising judge to approve the Tenor DIP Loan.

C. The Appeal from the Management Incentive Plan Approval Order

[94] In my view, the supervising judge did not err in principle or unreasonably exercise his discretion in approving the MIP. I see no basis for this court to intervene.

[95] As the supervising judge noted, employee retention provisions are frequently authorized before a plan is negotiated. The supervising judge was alive to the exceptionally large amounts that might be paid to beneficiaries of the MIP (including Mr. Fung) in this case. The supervising judge took specific note of the issues that the Noteholders had raised in the past regarding the extent to which the independent committee of the board that recommended the MIP was truly independent, and the steps taken by that committee to address those concerns.

[96] The recommendation of an independent committee of the board that has obtained expert advice is entitled to more weight in the consideration of a MIP than is the recommendation of the board in the consideration of whether financing should be approved under s. 11.2 of the CCAA. The CCAA does not list specific factors to be considered by the court in the case of a MIP. Moreover, the board would have the best sense of which employees were essential to the success of its restructuring efforts.

[97] In addition to considering the recommendation of the independent committee of the board and Mr. Swartz, the supervising judge also reviewed the evidence to consider whether any persons had been included in the MIP who should not have been. He did not rely solely on the board's recommendation.

VII. DISPOSITION

[98] Accordingly, I would dismiss the appeals of the CCAA Bridge Financing Order, the CCAA Financing Order, and the Management Incentive Plan Approval Order.

VIII. COSTS

[99] If the parties cannot agree, I would order that Crystallex and Tenor provide their submissions on the issue of costs within 14 days, and that the Noteholders, if so advised, provide their submissions in response within 10 days thereafter. No reply submissions are to be provided without leave.

Released: June 13, 2012
"DOC"

"Alexandra Hoy J.A."
"I agree D. O'Connor A.C.J.O."
"I agree R.A. Blair J.A."

TAB 5

CITATION: Hartford Computer Hardware, Inc. (Re), 2012 ONSC 964
COURT FILE NO.: CV-11-9514-00CL
DATE: 20120215

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

APPLICATION OF 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**

BEFORE: **MORAWETZ J.**

COUNSEL: **Kyla Mahar and John Porter, for the Chapter 11 Debtors**

Adrienne Glen, for FTI Consulting Canada, Inc., Information Officer

Jane Dietrich, for Avnet Inc.

HEARD & ENDORSED: **February 1, 2012**

REASONS RELEASED: **February 15, 2012**

ENDORSEMENT

[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.

MORAWETZ J.

Date: February 15, 2012

TAB 6

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
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 7

CITATION: Lightsquared Inc. (Re), 2015 ONSC 2309
COURT FILE NO.: CV12-9719-00CL
DATE: 2015-04-10

SUPERIOR COURT OF JUSTICE - ONTARIO

Re: **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

AND 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")

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *John Salmas and Sara-Ann Van Allen*, for the Foreign Representative and Canadian Counsel to the Chapter 11 Debtors

Brian Empey, for the Information Officer Alvarez & Marsal Canada Inc.

Sean Zweig, for certain Secured Lenders and DIP Lenders

HEARD and RELEASED: April 9, 2015

ENDORSEMENT

[1] The Foreign Representative seeks, among other things, the recognition in Canada of the following orders of the United States Bankruptcy Court for the Southern District of New York (the `U.S. Bankruptcy Court") entered or sought in the cases commenced by the Chapter 11 Debtors in the U.S. Bankruptcy Court under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Chapter 11 Cases") (collectively, the "Foreign Orders"):

(a) Order Confirming Modified Second Amended Joint Plan Pursuant To Chapter 11 Of Bankruptcy Code [U.S. Bankruptcy Court Docket No. 2276] (the "Confirmation Order");

(b) Order, Pursuant to 11 U.S.C. § 105(A) and 363, Authorizing LightSquared to (A) Enter into and Perform Under Letters Related to $1,515,000,000 Second Lien Exit Financing Arrangements, (B) Pay Fees and Expenses in Connection Therewith, and (C) Provide Related Indemnities [U.S. Bankruptcy Court Docket No. 2273] (the "Jefferies Exit Financing Order");

(c) Order Authorizing Payment of Alternative Transaction Fee in Connection with Proposed Plan of Reorganization [U.S. Bankruptcy Court Docket No. 2275] (the "Alternative Transaction Fee Order");

(d) Order (A) Authorizing Use of Cash Collateral, if any, Through Plan Effective Date, (B) Establishing that Prepetition Secured Parties are Adequately Protected and (C) Modifying Automatic Stay [to be entered by the 'U.S. Bankruptcy Court]; and

(e) Order Amending Final Order (A) Authorizing DIP Obligors To Obtain Eighth Replacement Superpriority Senior Secured Priming Postpetition Financing, (B) Granting Superpriority Liens and Providing Superpriority Administrative Expense Status, (C) Granting Adequate Protection, and (D) Modifying Automatic *Stay* [U.S. Bankruptcy Court Docket No. 2300] (the "Amended Eighth Replacement DIP Order").

[2] The motion was not opposed.

[3] On December 18, 2014, the Chapter 11 Debtors filed initial versions of the (i) *Joint Plan Pursuant to Chapter 11 of Bankruptcy Code* (as amended, modified or supplemented, the "Joint Plan"), and (ii) *Specific Disclosure Statement for Joint Plan Pursuant to Chapter 11 of Bankruptcy Code* (the "Specific Disclosure Statement").

[4] The confirmation hearing in respect of the Joint Plan (the "Confirmation Hearing") commenced at 10:00 am on March 9, 2015 before the U.S. Bankruptcy Court.

[5] At the time of commencement of the Confirmation Hearing, numerous stakeholders had filed objections to the Joint Plan.

[6] The ongoing negotiations and resolution of objections resulted in various modifications to the Joint Plan and, on March 26, 2015, the Chapter 11 Debtors filed the Modified Second Amended Plan.

[7] On March 26, 2015, Her Honor Judge Chapman of the U.S. Bankruptcy Court issued a decision which, among other things, confirmed the Modified Second Amended Plan.

[8] On April 7, 2015, the U.S. Bankruptcy Court entered the Amended Eighth Replacement DIP Order.

[9] Section 49(1) of the CCAA provides that, if an order recognizing a foreign proceeding is made, the court may, if it is satisfied that it is necessary for the protection of the debtor company's property or the interests of the creditor or creditors, make any order that it considers appropriate.

[10] Section 50 of the CCAA provides that an order under Part IV may be made on any terms and conditions that the court considers appropriate in the circumstances.

[11] The Chapter 11 Cases were described by Judge Chapman in her bench decision as a "bankruptcy battle [of] biblical proportions.

[12] In my view, the recognition of the Foreign Orders is consistent with the purpose of the CCAA and Part IV in particular. It promotes the fair and efficient administration of the Chapter 11 Debtors' cross-border proceedings.

[13] The Record establishes that the Modified Second Amended Plan provides for the payment in full, including postpetition interest, of all general unsecured creditors, including Canadian unsecured creditors. In the absence of the Modified Second Amended Plan, it is expected that there would be no distributions to such creditors.

[14] The Record also establishes that the unsecured creditors are expected to receive no recoveries in the event of the liquidation of the Chapter 11 Debtors pursuant to Chapter 7 of the U.S. Bankruptcy Code. As such, but for the contributions contemplated by the Modified Second Amended Plan, those creditors senior to the unsecured creditors would not be paid anywhere near in full and there would be no value flowing to any of the unsecured creditors, including the Canadian unsecured creditors.

[15] The Record further establishes that the Eighth Replacement DIP Facility is a necessary and integral component of the Modified Second Amended Plan, which provides for the payment in full, including postpetition interest, of all general unsecured creditors, including Canadian unsecured creditors. In the absence of the Modified Second Amended Plan, and the corresponding amended Eighth Replacement DIP Facility, it is expected that there would be no distributions to such creditors.

[16] I am satisfied that there will be no material prejudice to Canadian creditors if the Amended Eighth Replacement DIP Order is recognized by this Court. In my view, the

amendments to the Eighth Replacement DIP Order do not increase the amount of the DIP obligations that rank ahead of such unsecured claims (see: *Hartford Computer Hardware, Inc. (Re)*, 2012 ONSC 964, para 13, [Hartford]). In making this determination, I have taken into account that the Information Officer does not believe that the relief sought is contrary to Canadian public policy.

[17] The Foreign Representative submits that the recognition of the Foreign Orders by the Canadian Court is in the best interests of the Canadian estates of the Chapter 11 Debtors. The Information Officer recommends that the relief be granted.

[18] I accept these statements and have concluded it is appropriate to recognize the Foreign Orders.

[19] The Information Officer also sought approval of its Twenty-Third and Twenty-Fourth Reports, together with its Supplemental Report to the Twenty-Fourth Report. The relief was not opposed. The Reports are, accordingly, approved.

[20] In the result, the requested relief is granted and the Order has been signed in the form presented.

Regional Senior Justice G.B. Morawetz

Date: April 10, 2015

TAB 8

Court File No. CV-12-9719-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	THURSDAY, THE 9th
REGIONAL SENIOR	)	
JUSTICE MORAWETZ	)	DAY OF APRIL, 2015

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

AND 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")

Applicant

ORDER
(PLAN CONFIRMATION)

THIS MOTION, made by LightSquared LP in its capacity as the foreign representative (the "**Foreign Representative**") of the Chapter 11 Debtors, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for an order recognizing and approving orders granted by the Honourable Judge Shelley C. Chapman of the

United States Bankruptcy Court for the Southern District of New York (the "**U.S. Bankruptcy Court**") which, among other things, confirm the Debtors' *Modified Second Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code*, dated March 26, 2015 (as may be further amended, supplemented, or modified pursuant to the terms thereof, the "**Plan**"), in the cases commenced by the Chapter 11 Debtors under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "**Chapter 11 Cases**"), and for certain other relief, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Amended Notice of Motion, dated April 6, 2015, the Affidavit of Elizabeth Creary sworn April 2, 2015, the Supplemental Affidavit of Elizabeth Creary, sworn April 6, 2015, the Affidavit of Sara-Ann Van Allen, sworn April 8, 2015, the Twenty-Fourth Report of Alvarez & Marsal Canada Inc., in its capacity as court-appointed information officer of the Chapter 11 Debtors (the "**Information Officer**"), dated April 6, 2015 (the "**Twenty-Fourth Report**"), the Supplemental Report to the Twenty-Fourth Report of the Information Officer, dated April 8, 2015 (the "**Supplemental Report**"), the Factum and Book of Authorities of the Foreign Representative, dated April 8, 2015, and on hearing the submissions of counsel for the Foreign Representative, counsel for the Information Officer, and counsel to certain lenders of the Chapter 11 Debtors, no one else appearing although duly served as appears from the affidavits of service of Joanna Lewandowska, sworn April 6, 2015 and April 8, 2015, filed, and the affidavit of service of Sara-Ann Van Allen, sworn April 6, 2015, filed,

DEFINITIONS

1. **THIS COURT ORDERS** that any capitalized terms not otherwise defined in this Order shall have the meanings ascribed to such terms in the Plan or Confirmation Order (as defined below).

SERVICE

2. **THIS COURT ORDERS** that the timing and method of service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today.

RECOGNITION OF FOREIGN ORDERS

3. **THIS COURT ORDERS** that the following orders (collectively, the "**Foreign Orders**") of the U.S. Bankruptcy Court made in the Chapter 11 Cases are hereby recognized and given full force and effect in all provinces and territories of Canada pursuant to Section 49 of the CCAA:

(a) *Order Confirming Modified Second Amended Joint Plan Pursuant To Chapter 11 Of Bankruptcy Code* (the "**Confirmation Order**") [U.S. Bankruptcy Court Docket No. 2276];

(b) *Order, Pursuant to 11 U.S.C. §§ 105(A) and 363, Authorizing LightSquared to (A) Enter into and Perform Under Letters Related to $1,515,000,000 Second Lien Exit Financing Arrangements, (B) Pay Fees and Expenses in Connection Therewith, and (C) Provide Related Indemnities* [U.S. Bankruptcy Court Docket No. 2273];

(c) *Order Authorizing Payment of Alternative Transaction Fee in Connection with Proposed Plan of Reorganization* [U.S. Bankruptcy Court Docket No. 2275];

(d) *Order (A) Authorizing Use of Cash Collateral, if any, Through Plan Effective Date, (B) Establishing that Prepetition Secured Parties are Adequately Protected and (C) Modifying Automatic Stay* [U.S. Bankruptcy Court Docket No. 2304]; and

(e) *Order Amending Final Order (A) Authorizing DIP Obligors To Obtain Eighth Replacement Superpriority Senior Secured Priming Postpetition Financing, (B) Granting Superpriority Liens and Providing Superpriority Administrative Expense Status, (C) Granting Adequate Protection, and (D) Modifying Automatic Stay* [U.S. Bankruptcy Court Docket No. 2300];

attached hereto as Schedules "A-E" 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 Chapter 11 Debtors' current and future assets, undertakings, and properties of every nature and kind whatsoever in Canada.

IMPLEMENTATION OF PLAN

4. **THIS COURT ORDERS** that the Chapter 11 Debtors are authorized, directed and permitted to take all such steps and actions, and do all things necessary or appropriate to implement the Plan and the transactions contemplated thereby in accordance with and subject to the terms of the Plan, and to enter into, execute, deliver, implement and consummate all the steps, transactions and agreements contemplated by the Plan.

5. **THIS COURT ORDERS AND DECLARES** that, upon the occurrence of the Effective Date, the terms of the Plan and Plan Supplement shall be immediately effective and enforceable and deemed binding upon the Chapter 11 Debtors, the Reorganized Debtors, any and all Holders of Claims or Equity Interests, all Entities that are parties or subject to the settlements, compromises, releases, discharges and injunctions described in the Plan, each Entity acquiring or receiving property under the Plan, and any and all non-Chapter 11 Debtor parties to Executory Contracts or Unexpired Leases with the Chapter 11 Debtors.

6. **THIS COURT ORDERS** that, subject to the terms of the Plan, and effective on the Effective Date, all Executory Contracts and Unexpired Leases listed on the Schedule of Assumed Agreements shall be and remain in full force and effect, unamended, as at the Effective Date, and be enforceable by the Reorganized Debtors, as applicable, in accordance with their terms notwithstanding any provision in such Executory Contract that purports to prohibit, restrict, or condition such assumption and no person shall, following the Effective Date, accelerate, terminate, rescind, refuse to perform or otherwise repudiate their obligations under, or enforce or exercise any right (including any right of set-off, dilution or other remedy) or make any demand under or in respect of any such Executory Contract or Unexpired Lease, by reason of:

(a) any event that occurred on or prior to the Effective Date that would have entitled any person thereto to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of the Chapter 11 Debtors);

(b) the fact that the Chapter 11 Debtors have: (i) sought or obtained relief under the CCAA or the Chapter 11 Cases, or (ii) commenced or completed this proceeding or the Chapter 11 Cases;

(c) the implementation of the Plan, or the completion of any of the steps, transactions or things contemplated by the Plan; or

(d) any compromises, arrangements, transactions, releases or discharges effected pursuant to the Plan.

7. **THIS COURT ORDERS** that, to the extent, (a) all Plan Transactions have occurred or have been consummated prior to or on the Effective Date, and (b) provided by the Confirmation Order and the Plan, from and after the Effective Date, all persons shall be deemed to have waived, (i) any and all defaults then existing or previously committed by the Chapter 11 Debtors, or caused by the Chapter 11 Debtors, and (ii) non-compliance by the Chapter 11 Debtors with any covenant, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, instrument, credit document, guarantee, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto (each, an "**Agreement**"), existing between such person and the Chapter 11 Debtors or any other person, and any and all notices of default and demands for payment under any Agreement shall be deemed to be of no further force or effect; provided that nothing in this paragraph shall excuse or be deemed to excuse the Chapter 11 Debtors from performing any of their obligations subsequent to the date of this proceeding, including, without limitation, obligations under the Plan.

8. **THIS COURT ORDERS** that, as of the Effective Date, to the extent all Plan Transactions have occurred or have been consummated prior to or on the Effective Date, each creditor of the Chapter 11 Debtors shall be deemed to have consented and agreed to all of the provisions of the Plan in their entirety and, in particular, each creditor shall be deemed:

(a) to have executed and delivered to the Chapter 11 Debtors all consents, releases or agreements required to implement and carry out the Plan in its entirety; and

(b) to have agreed that if there is any conflict between, (i) the provisions, express or implied, of any agreement or other arrangement, written or oral, existing between such creditors and the Chapter 11 Debtors as of the Effective Date, and (ii) the provisions of the Plan and Confirmation Order, the provisions of the Plan

Confirmation Order take precedence and priority and the provisions of such agreement or other arrangement shall be deemed to be amended accordingly.

RELEASES AND INJUNCTIONS

9. **THIS COURT ORDERS** that, without limiting anything in this Order, the releases, exculpations and injunctions set forth in the Confirmation Order and set out in Article VIII of the Plan be, and the same are, hereby approved and shall be effective in Canada immediately or on the Effective Date, as applicable, in accordance with the Confirmation Order and the Plan, without further act or order.

STAY OF PROCEEDINGS

10. **THIS COURT ORDERS** that the Stay Period (as defined in the Initial Recognition Order, dated May 18, 2012 (the "**Initial Recognition Order**") and the Supplemental Recognition Order, dated May 18, 2012 (the "**Supplemental Recognition Order**")) be and is terminated as of the Effective Date.

INITIAL RECOGNITION ORDER AND SUPPLEMENTAL RECOGNITION ORDER

11. **THIS COURT ORDERS** that, except to the extent that the Initial Recognition Order or the Supplemental Recognition Order has been varied by or is inconsistent with this Order or any further Order of this Court, the provisions of the Initial Recognition Order and the Supplemental Recognition Order shall remain in full force and effect until the Effective Date, provided that the protections granted in favour of the Information Officer pursuant to the Initial Recognition Order and the Supplemental Recognition Order shall continue in full force and effect after the Effective Date.

12. **THIS COURT ORDERS** that, despite anything to the contrary herein, nothing in this Order, the Plan, or any order confirmed or made herein prevents a person from seeking or obtaining benefits under a government-mandated workers' compensation system, or a government agency or insurance company from seeking or obtaining reimbursement, contribution, subrogation, or indemnity as a result of payments made to or for the benefit of such

person under such a system or for fees and expenses incurred under any insurance policies, laws, or regulations covering workers' compensation claims.

INFORMATION OFFICER REPORTS

13. **THIS COURT ORDERS** that the Twenty-Third Report of the Information Officer, dated January 30, 2015, the Twenty-Fourth Report, and the Supplemental Report, and the activities of the Information Officer described therein, be and are hereby approved.

AID AND ASSISTANCE

14. **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 of America, to give effect to this Order and to assist the Chapter 11 Debtors, the Foreign Representative, the Information Officer, and their respective agents and advisors 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.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

APR 9 - 2015

TAB 9

CITATION: Massachusetts Elephant & Castle Group, Inc. (Re), 2011 ONSC 4201
COURT FILE NO.: CV-11-9279-00CL
DATE: 20110711

SUPERIOR COURT OF JUSTICE - ONTARIO

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

RE: **MASSACHUSETTS ELEPHANT & CASTLE GROUP, INC., Applicant**

BEFORE: MORAWETZ J.

COUNSEL: Kenneth D. Kraft, Sara-Ann Wilson, for the Applicant

Heather Meredith, for the GE Canada Equipment Financing GP

HEARD &
ENDORSED: July 4, 2011
REASONS: July 11, 2011

ENDORSEMENT

[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.); *Re Magna Entertainment Corp.* (2009), 51 C.B.R. (5th) 82 (Ont. S.C.); *Lear Canada (Re)* (2009), 55 C.B.R. (5th) 57 (Ont. S.C.).

[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 *Re Angiotech Pharmaceuticals Limited*, 2011 CarswellBC 124 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.

MORAWETZ J.

Date: July 11, 2011

TAB 10

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

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 11

CITATION: Payless Holdings LLC (Re), 2017 ONSC 2242
COURT FILE NO.: CV-17-11758-00CL
DATE: 2017-04-20

SUPERIOR COURT OF JUSTICE - ONTARIO

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

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

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

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *John MacDonald* and *Patrick Reisterer*, for the Applicant

Clifton Prophet and *Mark Crane* for Ivanhoe Cambridge Inc.

Ashley Taylor and *Lee Nicholson*, for Alvarez & Marsal Inc., Proposed Information Officer

David Bish, for the Cadillac Fairview Corporation Ltd.

Tony Reyes, for Wells Fargo, ABL DIP Lender (Agent)

Linda Galessiere, for 20 Vic; Morguard; SmartREIT, Oxford; RioCan; Triovest; Springwood; Crombie REIT; Blackwood; Southridge Mall

HEARD and ENDORSED: Friday, April 7, 2017
REASONS: April 20, 2017

ENDORSEMENT

[1] At the conclusion of the hearing, the record was endorsed:

> The requested relief for an Interim Recognition Order proceeded on an unopposed basis. Initial Recognition Order granted, with the exception of paragraph 6 of the Draft Order. Paragraphs 6-10 and 12 of the Supplemental Order also granted. The remaining issues – in particular the remaining requested relief in the form of the Supplemental Order - are adjourned to Monday, April 10, 2017 at 2:15 p.m. Reasons with respect to Initial Recognition Order will follow.

[2] These are the reasons.

[3] Payless Holdings LLC (the "Applicant"), in its capacity as foreign representative (the "Foreign Representative") of itself, as well as those entities listed in Schedule "A" that filed the voluntary petitions for relief pursuant to Chapter 11 of the U.S. Bankruptcy Code (collectively, with the Applicant, the "Chapter 11 Debtors", and with their non-debtor affiliated companies "Payless"), applied for Orders pursuant to sections 46 through 49 of the *Companies' Creditors Arrangement Act* ("CCAA"), *inter alia*:

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

(b) recognizing certain First Day Orders;

(c) appointing Alvarez & Marsal Canada Inc. ("A&M") as Information Officer in this proceeding; and

(d) granting the DIP ABL Lenders' Charge, Canadian Unsecured Creditors' Charge, and Administration Charge.

[4] The matter proceeded on an unopposed basis. At the conclusion of the hearing, I granted the Initial Recognition Order, save and except for the portion of the draft order that related to the Information Officer. The appointment of the Information Officer was deferred. I also granted certain stay provisions which were contained in the draft Supplemental Order. The remaining issues, including recognition of certain First Day Orders, the granting of the DIP ABL Lenders' Charge, Canadian Unsecured Creditors' Charge, and Administration Charge were all adjourned to be addressed at a subsequent hearing scheduled for April 10, 2017.

[5] Payless is an American footwear retailer, founded in 1956 in Topeka, Kansas, where it is still headquartered today. Payless markets its brand through retail locations and e-commerce internet sites. There are nearly 4,400 Payless stores in more than 30 countries and Payless employs nearly 22,000 people. Payless global sourcing networks include more than 90 manufacturing partners that produce over 110 million pairs of shoes annually. Payless's integrated supply chain, together with the remainder of the buying and logistics functions, are managed out of Payless's head office in Kansas.

[6] On April 4, 2017, each of the Chapter 11 Debtors filed voluntary petitions for relief (the "Petitions") pursuant to Chapter 11 of the U.S. Bankruptcy Code with the United States Bankruptcy Court for the Eastern District of Missouri (the "U.S. Court").

[7] The Chapter 11 Debtors filed several motions with the U.S. Court and on April 5, 2017 the U.S. Court heard motions (the "First Day Motions") for various interim or final orders (collectively, the "First Day Orders") including:

(a) Joint Administration Motion;

(b) Cash Management Motion;

(c) Critical Vendors and Shippers Motion;

(d) Customer Programs Motion;

(e) DIP Motion;

(f) Employee Wages Motion;

(g) Foreign Representative Motion;

(h) Insurance Motion;

(i) Surety Bond Motion; and

(j) Tax Motion.

[8] The Chapter 11 Debtors operate on an integrated basis. The Applicant is the ultimate parent of the Chapter 11 Debtors. The Chapter 11 Debtors consist of:

(a) The Applicant and 25 of its wholly-owned subsidiaries that are incorporated under the laws of the United States;

(b) Two (2) wholly-owned subsidiary entities incorporated under the laws of Canada – Payless ShoeSource Canada Inc. and Payless ShoeSource GP Inc.; and

(c) One (1) limited partnership established under the laws of Ontario – Payless ShoeSource Canada LP.

[9] The three Canadian entities are collectively referred to as the "Payless Canada Group".

[10] For the fiscal year 2016, Payless generated approximately $2.28 billion in net revenues on a consolidated basis. Canadian sales accounted for approximately 7% of those net revenues; U.S. sales amounted to almost 75%.

[11] The Applicant takes the position that the Payless Canada Group's operations are fully integrated with Payless US operations. The affidavit of Michael Schwindle, Senior Vice-President and CFO of the Applicant, establishes that all corporate and other major decision-making occurs in the U.S., and the Payless Canada Group is entirely reliant on U.S. managerial functions for all overhead services including accounting and finance, buying, logistics, marketing, strategic direction, IT and other functions.

[12] Payless Canada Group employs approximately 2100 employees, all of whom work in the stores except for five who work at the regional office in Toronto, and another 15 who work in field management functions throughout Canada. There is no union representation for the Canadian employees.

[13] Payless currently operates 258 leased stores in Canada, with almost half of them in Ontario. Approximately 56 leases are subject to an indemnity with cross default provisions such that an event of default under the lease will occur if the "Indemnifier" becomes bankrupt or

insolvent, or takes the benefit of any statute for bankrupt or insolvent debtors. The "Indemnifier" of those leases is Payless ShoeSource, Inc. (incorporated under the laws of Missouri), which is a Chapter 11 Debtor.

[14] Mr. Schwindle also states that Payless Canada Group's assets consists principally of merchandise, much of which is stored at Payless stores in Canada and other warehouses and distribution facilities across Canada. The Payless Canada Group does not independently design or source its own merchandise. Mr. Schwindle also states that the Payless Canada Group relies entirely on the buying power and sourcing relationships of the entire Payless enterprise.

[15] Payless Canada Group estimates that, as of March 27, 2017, arms'-length trade creditors are owed approximately $2.6 million. The largest arms-length trade creditor Kuehne & Nagel Ltd. ("K&N"), which provides logistics and freight operation, is owed approximately $1.2 million. It is anticipated that K&N will be paid in the ordinary course as the Chapter 11 Debtors intend to pay all pre-petition amounts owing to K&N through a Critical Vendors Order.

[16] Mr. Schwindle states that since early 2015, Payless has experienced a top-line sales decline, driven primarily by:

(a) a set of significant and detrimental non-recurring events;

(b) foreign exchange rate volatility; and

(c) challenging retail market conditions.

[17] Mr. Schwindle also states that these pressures led to the Chapter 11 Debtors' inability to both service their pre-petition security indebtedness and remain current with their trade obligations.

[18] Mr. Schwindle also states that the Chapter 11 Debtors have worked with a steering committee of the secured term loan lenders to develop a comprehensive financing restructuring and recapitalized plan that will be implemented through the Chapter 11 Cases.

[19] The Applicant takes the position that it requires protection and coordinated relief in Canada to facilitate an effective and efficient restructuring. The Applicant takes the position that a coordinated approach provides for the best potential outcome and that a Canadian Recognition Order and Stay under the CCAA will allow the Chapter 11 Debtors to implement the pre-arranged restructuring and allow the Payless Canada Group to continue as a going concern, thereby maximizing value for all stakeholders of Payless Canada Group and the rest of the Chapter 11 Debtors.

[20] The issues on this motion are:

(a) Are the Chapter 11 cases a "foreign main proceeding" under Part IV of the CCAA?

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

i. Granting the Stay of Proceedings;

ii. Recognizing certain First Day Orders;

iii. Appointing A&M as Information Officer;

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

v. Granting the Administration Charge.

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

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

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

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

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

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

[25] Of the Chapter 11 Debtors:

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

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

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

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

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

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

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

(see: *Lightsquared LP* (Re) (2012) ONSC 2994 and *Massachusetts Elephant & Castle Group, Inc. (Re),* 2011 ONSC 4201).

[28] A review of the foregoing factors 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.

[29] In my view, the following factors support a finding that the COMI of the entities in the Payless Canada Group is in the United States and that the Chapter 11 cases should be recognized as a "foreign main proceeding" in Canada:

(a) the Payless Canada Group's operations are fully integrated with Payless U.S. operations;

(b) only one of the senior executives, and only one of the directors, of the entities in the Payless Canada Group reside in Canada;

(c) all corporate, strategic, financial, inventory sourcing and other major decision-making occurs in the U.S.;

(d) the Payless Canada Group is entirely reliant on U.S. managerial functions; and

(e) Payless Canada Group is entirely dependent on the other Chapter 11 Debtors for all of their licencing agreements, design partnerships, and company owned lands.

[30] I therefore find that the COMI of each entity the Payless Canada Group is in the United States.

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

[32] The relief requested in the Initial Recognition Order is granted, with the exception of paragraph 6 of the Draft Order which relates to certain directions to be provided to the Information Officer.

[33] The Applicant also sought a Supplemental Order, in accordance with the provisions of section 49 of the CCAA, which provides that the court may, at its discretion, make any order that it considers appropriate if it is satisfied that it is necessary for the protection of the debtor's property or the interest of one or more creditors. Section 50 provides that the Order under Part IV may be made on any terms and conditions that the court considers appropriate in the circumstances.

[34] Section 52(1) provides that if an order recognizing a foreign proceeding is made, the court "shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceedings".

[35] In the context of cross-border insolvencies, Canadian courts have consistently encouraged comity and cooperation between courts in various jurisdictions in order to enable enterprises to restructure on a cross-border basis (see: *Lear Canada* (2009), 55 CBR (5^{th}) 57 (Ont. SCJ.) (Commercial List) at paras. 11 and 11; *Re Babcock and Wilcox Canada Ltd.* (2000), 18 CBR (4^{th}) 157 (Ont. SCJ) (Commercial List) at para. 9.)

[36] Counsel to the Applicant submits that, in light of the events leading up to the Chapter 11 cases and this application, it is both necessary and appropriate for the court to grant a stay of proceedings sought by the Applicant. Without the stay, the objective of the Chapter 11 cases, mainly the emergence of Payless as a going concern, cannot be achieved.

[37] Counsel also submits that the CCAA expressly applied, by its terms, to debtor companies, but not partnerships. However, where the partnership's operations are integral and closely related to the debtor companies' operations, the court has jurisdiction to extend the protection of the stay of proceedings and related relief to those partnerships in order to ensure that the purpose of the CCAA can be achieved (see: *Canwest Global Communications Corp. (Re),* 2009 CanLII 55114 at paras. 28-29). Counsel submits that it is appropriate to extend relief to the partnership, which carries on operations that are integral to the business of the Payless Canada Group.

[38] I accept these submissions and order the requested relief in paras. 6 – "No proceedings against the Chapter 11 Debtors or the Property", 7 – "No exercise of rights or remedies", 8 – "No interference with rights", 9, 10 and 12 – "Additional protections".

[39] The remaining issues set out in the draft Supplemental Order are adjourned to April 10, 2017.

Regional Senior Justice G.B. Morawetz

Date: April 20, 2017

TAB 12

SUPREME COURT OF YUKON

Citation: *Ultra Petroleum Corp.*, 2017 YKSC 23

Date: 20170327
S.C. No. 16-A0023
Registry: Whitehorse

ULTRA PETROLEUM CORP.

Petitioner

Before Mr. Justice L.F. Gower

Appearance:
Paul W. Lackowicz — Counsel for the Petitioner

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by Ultra Petroleum Corp. ("Ultra Petroleum") in its capacity as a foreign representative of itself pursuant to Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "*CCAA*"), for an order recognizing and giving full force and effect to: (1) a Claims Bar Order granted by the United States Bankruptcy Court, Southern District of Texas, Houston Division (the "US Bankruptcy Court") on May 3, 2016, *nunc pro tunc*; and (2) a Confirmation Order granted by the US Bankruptcy Court on March 14, 2017 (the "Confirmation Order").

[2] Ultra petroleum is a Yukon corporation incorporated pursuant to the laws of the Yukon Territory, with a registered office located in Whitehorse, Yukon. Through its direct and indirect wholly owned subsidiaries it owns oil and gas properties in Wyoming, Utah and Pennsylvania, in the United States.

[3] On April 29, 2016, Ultra Petroleum and a number of its subsidiaries (the "Chapter 11 debtors") commenced voluntary reorganization proceedings in the US Bankruptcy Court by each filing a voluntary petition for relief under Chapter 11 of Title 11 of the *United States Code*. Notice of the Chapter 11 proceedings was served upon over 6000 creditors or potential creditors of the Chapter 11 debtors. Three of those potential creditors are in Canada: Emera Energy Services Inc., Mowbrey Gil LLP and Enerplus Resources (USA) Corporation. None has filed proofs of claim in the Chapter 11 proceedings.

[4] On May 3, 2016, the US Bankruptcy Court granted a number of orders, including an order authorizing Ultra Petroleum to act as a foreign representative of itself for the purposes of the application made to this Court on May 13, 2016.

[5] On May 17, 2016, Veale J. of this Court granted an order which, among other things:

a) appointed Ultra Petroleum as foreign representative of itself pursuant to s. 45 of the *CCAA* in respect of the Chapter 11 proceedings;

b) recognized the Chapter 11 proceedings;

c) granted a stay of proceedings against Ultra Petroleum;

d) restrained persons with agreements with Ultra Petroleum for the supply of goods and services from discontinuing, altering or terminating the supply of such goods and services during the stay of proceedings; and

e) granted a stay of proceedings against the former, current and future officers and directors of Ultra Petroleum.

ISSUES

[6] There are two issues in this application:

1) Should the Claims Bar Order be recognized and given full force and effect in Canada by this Court, *nunc pro tunc*?

2) Should the Confirmation Order be recognized and given full force and effect in Canada by this Court?

ANALYSIS

1. The Claims Bar Order

[7] The purpose of Part IV of the *CCAA* is to effect cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada. Orders under this Part are intended, among other things, to promote cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions and to promote the fair and efficient administration of cross-border insolvencies. This also protects the interests of debtors, creditors and other interested persons. See: *Zochem Inc. (Re)*, 2016 ONSC 958, at para. 15; and s. 44 of the *CCAA*.

[8] In cross-border insolvencies, Canadian and US courts have made efforts to complement, coordinate and, where appropriate, accommodate the proceedings of the other in order to enable cross-border enterprises to restructure. 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. See *Babcock & Wilcox Canada Ltd. (Re),* [2000] O.J. No. 786 (S.C.), at paras. 9 and 10.

[9] When a court considers whether it will recognize a foreign order, including Chapter 11 proceeding orders, it considers the following factors:

a) The recognition of comity and cooperation between courts of various jurisdictions is 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 sufficiently 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) Plans that allow the enterprise to reorganize globally, especially where there is an established interdependence on a transnational basis, should be promoted. To the extent reasonably practicable, one jurisdiction should take charge of the principle administration of the enterprises organization, were such principal type approach will facilitate a potential reorganization and will respect the claims of stakeholders and does not detract from the net benefits that may be available from alternative approaches.

e) The recognition that the appropriate level of court involvement depends to a significant degree upon the court's nexus to the enterprise. Where one

jurisdiction has an ancillary role, the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments regarding the re-organizational efforts in the foreign jurisdiction. Further, stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.

f) Notice as effective as is reasonably possible should be given to all affected stakeholders, with an opportunity for such stakeholders to come back into court to review the granted order and seek its variation.

See: *Babcock,* cited above, at para. 21; and *Xerium Technologies, Inc.*, 2010 ONSC 3974, at paras. 26 and 27.

[10] The second affidavit of Garland Shaw confirms that the Claims Bar Order has been fully complied with by the Chapter 11 debtors, including Ultra Petroleum.

[11] Further, as stated above, the three potential creditors of Ultra Petroleum that have addresses in Canada, have been given notice of this application.

[12] As such, it is appropriate that the Claims Bar Order be recognized by this Court, notwithstanding that the recognition is *nunc pro tunc*. This recognition will ensure certainty with regard to the effect of the Claims Bar Order in Canada, with respect to creditors of Ultra Petroleum. Such recognition will also foster comity and cooperation between this Court and the US Bankruptcy Court, as well as supporting the global reorganization of the Chapter 11 debtors.

[13] I note that the Court of Queen's Bench of Alberta also recently recognized, *nunc pro tunc,* a claims bar order granted by the US Bankruptcy Court in an application by C&J Energy Production Services-Canada Ltd., Court File No. 1601-08740.

2. The Confirmation Order

[14] The Confirmation Order in this application satisfies the numerous factors set out in the case authorities just cited. The Order was made in good faith and in the interests of the Chapter 11 debtors, as well as the creditors and equity holders. It does not breach any applicable Canadian law. It will not likely be followed by a need for liquidation or further financial reorganization of the Chapter 11 debtors. The plan complies with US bankruptcy principles, as the US bankruptcy Court has confirmed. All holders of claims and interests in the Chapter 11 debtors, including holders of claims and interests in Ultra Petroleum who were entitled to vote on the Plan of Reorganization, have been given notice of, and the opportunity to vote on and object to, the Plan. These holders have voted overwhelmingly in support of accepting the Plan (98.84 % of the Class 3 votes and 99.89 % of the Class 8 votes).

[15] Accordingly, it is appropriate that this Court should recognize the Confirmation Order, to ensure that the purposes of the *CCAA* are satisfied and that the Chapter 11 debtors have the best opportunity to restructure their affairs. In this regard, the comments of Campbell J. in *Xerium*, cited above, at para. 29, are appropriate:

> In granting the recognition order sought, I am satisfied that the implementation of the Plan in Canada not only helps to ensure the orderly completion of the Chapter 11 Debtors' restructuring process, but avoids what otherwise might have been a time-consuming and costly process were the Canadian part of the Applicant itself to make a separate restructuring application under the CCAA in Canada.

[16] In order to give force and effect to the Confirmation Order, the proposed Articles of Reorganization attached as Schedule "C" to the form of the order sought on this application are approved as the form of the Articles of Reorganization to be filed with the Registrar of Corporations, pursuant to s. 194(4) of the Yukon *Business Corporations Act*, R.S.Y. 2002, c. 20.

GOWER J.

TAB 13

Citation: Re Xerium Technologies Inc., 2010 ONSC 3974
Court File No. 10-8652-00CL
Date: 20100928

SUPERIOR COURT OF JUSTICE
ONTARIO
(Commercial List)

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

XERIUM TECHNOLOGIES, INC., IN ITS CAPACITY AS THE FOREIGN REPRESENTATIVE OF XERIUM TECHNOLOGIES, INC., HUYCK LICENSCO INC., STOWE WOODWARD LICENSCO LLC, STOWE WOODWARD LLC, WANGNER ITELPA I LLC, WANGNER ITELPA II LLC, WEAVEXX, LLC, XERIUM ASIA, LLC, XERIUM III (US) LIMITED, XERIUM IV (US) LIMITED, XERIUM V (US) LIMITED, XTI LLC, XERIUM CANADA INC., HUYCK.WANGNER AUSTRIA GMBH, XERIUM GERMANY HOLDING GMBH, AND XERIUM ITALIA S.P.A.
(collectively, the "Chapter 11 Debtors")

Applicants

BEFORE: C. CAMPBELL J.

COUNSEL: *Derrick Tay, Randy Sutton* for the Applicants

HEARD: May 14, 2010

ENDORSEMENT

[1] The Recognition Orders sought in this matter exhibit the innovative and efficient employment of the provisions of Part IV of the *Companies Creditors Arrangement Act,* R.S.C. 1985, c. C.36, as amended (the "CCAA") to cross border insolvencies.

[2] Each of the "Chapter 11 Debtors" commenced proceedings on March 30, 2010 in the United States under Chapter 11 of Title 11 of the United States Bankruptcy Code (the "U.S. Bankruptcy Code") in the U.S. Bankruptcy Court for the District of Delaware (the "Chapter 11 Proceedings.")

[3] On April 1, 2010, this Court granted the Recognition Order sought by, *inter alia*, the Applicant, Xerium Technologies Inc. ("Xerium") as the "Foreign Representative" of the Chapter 11 Debtors and recognizing the Chapter 11 Proceedings as a "foreign main proceeding" in respect of the Chapter 11 Debtors, pursuant to Part IV of the CCAA.

[4] On various dates in April 2010, Judge Kevin J. Carey of the U.S. Bankruptcy Court made certain orders in respect of the Chapter 11 Debtors' ongoing business operations.

[5] On May 12, 2010, Judge Carey confirmed the Chapter 11 Debtors' amended Joint Prepackaged Plan of Reorganization dated March 30, 2010 as supplemented (the "Plan")[1] pursuant to the U.S. Bankruptcy Code (the "U.S. Confirmation Order.")

[6] Xerium sought in this motion to have certain orders made by the U.S. Bankruptcy Court in April 2010, the U.S Confirmation Order and the Plan recognized and given effect to in Canada.

[7] The Applicant together with its direct and indirect subsidiaries (collectively, the "Company") are a leading global manufacturer and supplier of products used in the production of paper products.

[8] Both Xerium, a Delaware limited liability company, Xerium Canada Inc. ("Xerium Canada"), a Canadian company, together with other entities forming part of the Chapter 11 Debtors are parties to an Amended and Restated Credit and Guarantee Agreement dated as of May 30, 2008 as borrowers, with various financial institutions and other persons as lenders. The Credit Facility is governed by the laws of the State of New York.

[9] Due to a drop in global demand for paper products and in light of financial difficulties encountered by the Company due to the drop in demand in its products and is difficulty raising funds, the Company anticipated that it would not be in compliance with certain financial covenants under the Credit Facility for the period ended September 30, 2009. The Chapter 11 Debtors, their lenders under the Credit Facility, the Administrative Agent and the Secured Lender Ad Hoc Working Group entered into discussions exploring possible restructuring scenarios. The negotiations progressed smoothly and the parties worked toward various consensual restructuring scenarios.

[10] The Plan was developed between the Applicant, its direct and indirect subsidiaries together with the Administrative Agent and the Secured Lender Ad Hoc Working Group.

[11] Pursuant to the Plan, on March 2, 2010, the Chapter 11 Debtors commenced the solicitation of votes on the Plan and delivered copies of the Plan, the Disclosure Statement and the appropriate ballots to all holders of claims as of February 23, 2010 in the classes entitled to vote on the Plan.

[12] The Disclosure Statement established 4:00 p.m. (prevailing Eastern time) on March 22, 2010 as the deadline for the receipt of ballots to accept or reject the Plan, subject to the Chapter 11 Debtors' right to extend the solicitation period. The Chapter 11 Debtors exercised their right to extend the solicitation period to 6:00 p.m. (prevailing Eastern time) on March 26, 2010. The Plan was overwhelmingly accepted by the two classes of creditors entitled to vote on the Plan.

[13] On March 31, 2010, the U.S. Bankruptcy Court entered the Order (I) Scheduling a Combined Hearing to Consider (a) Approval of the Disclosure Statement, (b) Approval of

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[1] Capitalized terms used herein not otherwise defined shall have the meanings ascribed to them in the Plan. Unless otherwise stated, all monetary amounts contained herein are expressed in U.S. Dollars.

Solicitation Procedures and Forms of Ballots, and (c) Confirmation of the Plan; (II) Establishing a Deadline to Object to the Disclosure Statement and the Plan; and (III) Approving the Form and Manner of Notice Thereof (the "Scheduling Order.")

[14] Various orders were made by the U.S. Bankruptcy Court in April 2010, which orders were recognized by this Court.

[15] On May 12, 2010, at the Combined Hearing, the U.S. Bankruptcy Court confirmed the Plan, and made a number of findings, *inter alia,* regarding the content of the Plan and the procedures underlying its consideration and approval by interested parties. These included the appropriateness of notice, the content of the Disclosure Statement, the voting process, all of which were found to meet the requirements of the U.S. Bankruptcy Code and fairly considered the interests of those affected.

[16] The Plan provides for a comprehensive financial restructuring of the Chapter 11 Debtors' institutional indebtedness and capital structure. According to its terms, only Secured Swap Termination Claims, claims on account of the Credit Facility, Unsecured Swap Termination Claims, and Equity Interests in Xerium are "impaired" under the Plan. Holders of all other claims are unimpaired.

[17] Under the Plan, the notional value of the Chapter 11 Debtors' outstanding indebtedness will be reduced from approximately U.S.$640 million to a notional value of approximately U.S.$480 million, and the Chapter 11 Debtors will have improved liquidity as a result of the extension of maturity dates under the Credit Facility and access to an U.S. $80 million Exit Facility.

[18] The Plan provides substantial recoveries in the form of cash, new debt and equity to its secured lenders and swap counterparties and provides existing equity holders with more than $41.5 million in value.

[19] Xerium has been unable to restructure its secured debt in any other manner than by its secured lenders voluntarily accepting equity and the package of additional consideration proposed to be provided to the secured lenders under the Plan.

[20] The Plan benefits all of the Chapter 11 Debtors' stakeholders. It reflects a global settlement of the competing claims and interests of these parties, the implementation of which will serve to maximize the value of the Debtors' estates for the benefit of all parties in interest.

[21] I conclude that the Plan is not likely to be followed by the liquidation or the need for further financial reorganization of the Chapter 11 Debtors.

[22] On April 1, 2010, the Recognition Order granted by this Court provided, among other things:

(a) Recognition of the Chapter 11 Proceedings as a "foreign main proceeding" pursuant to Subsection 47(2) of the CCAA;

(b) Recognition of the Applicant as the "foreign representative" in respect of the Chapter 11 Proceedings;

(c) Recognition of and giving effect in Canada to the automatic stay imposed under Section 362 of the U.S. Bankruptcy Code in respect of the Chapter 11 Debtors;

(d) Recognition of and giving effect in Canada to the U.S. First Day Orders in respect of the Chapter 11 Debtors;

(e) A stay of all proceedings taken or that might be taken against the Chapter 11 Debtors under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(f) Restraint on further proceedings in any action, suit or proceeding against the Chapter 11 Debtors;

(g) Prohibition of the commencement of any action, suit or proceeding against the Chapter 11 Debtors; and

(h) Prohibition of the Chapter 11 Debtors from selling or otherwise disposing of, outside the ordinary course of its business, any of the Chapter 11 Debtors' property in Canada that relates to their business and prohibiting the Chapter 11 Debtors from selling or otherwise disposing of any of their other property in Canada, unless authorized to do so by the U.S. Bankruptcy Court.

[23] I am satisfied that this Court does have the authority and indeed obligation to grant the recognition sought under Part IV of the CCAA. The recognition sought is precisely the kind of comity in international insolvency contemplated by Part IV of the CCAA.

[24] Section 44 identifies the purpose of Part IV of the CCAA. It states

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

[25] I am satisfied that the provisions of the Plan are consistent with the purposes set out in s. 61(1) of the CCAA, which states:

> 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.

[26] In *Re Babcock & Wilcox Canada Ltd.*, 18 C.B.R. (4th) 157 at para. 21, this Court held that U.S. Chapter 11 proceedings are "foreign proceedings" for the purposes of the CCAA's cross-border insolvency provisions. The Court also set out a non exclusive or exhaustive list of factors that the Court should consider in applying those provisions.

[27] The applicable factors from *Re Babcock and Wilcox* that dictate in favour of recognition of the U.S. Confirmation Order are set out in paragraph 45 of the Applicant's factum:

(a) The Plan is critical to the restructuring of the Chapter 11 Debtors as a global corporate unit;

(b) The Company is a highly integrated business and is managed centrally from the United States. The Credit Facility which is being restructured is governed by the laws of the State of New York. Each of the Chapter 11 Debtors is a borrower or guarantor, or both, under the Credit Facility;

(c) Confirmation of the Plan in the U.S. Court occurred in accordance with standard and wel established procedures and practices, including Court approval of the Disclosure Statement and the process for the solicitation and tabulation of votes on the Plan;

(d) By granting the Initial Order in which the Chapter 11 Proceedings were recognized as Foreign Main Proceedings, this Honourable Court already acknowledged Canada as an ancillary jurisdiction in the reorganization of the Chapter 11 Debtors;

(e) The Applicant carries on business in Canada through a Canadian subsidiary, Xerium Canada, which is one of Chapter 11 Debtors and has had the same access and participation in the Chapter 11 Proceedings as the other Chapter 11 Debtors;

(f) Recognition of the U.S. Confirmation Order is necessary for ensuring the fair and efficient administration of this cross-border insolvency, whereby all stakeholders who hold an interest in the Chapter 11 Debtors are treated equitably.

[28] Additionally, the Plan is consistent with the purpose of the CCAA. By confirming the Plan, the U.S. Bankruptcy Court has concluded that the Plan complies with applicable U.S. Bankruptcy principles and that, *inter alia*:

(a) it is made in good faith;

(b) it does not breach any applicable law;

(c) it is in the interests of the Chapter 11 Debtors' creditors and equity holders; and

(d) it will not likely be followed by the need for liquidation or further financial reorganization of the Chapter 11 Debtors.

These are principles which also underlie the CCAA, and thus dictate in favour of the Plan's recognition and implementation in Canada.

[29] In granting the recognition order sought, I am satisfied that the implementation of the Plan in Canada not only helps to ensure the orderly completion to the Chapter 11 Debtors' restructuring process, but avoids what otherwise might have been a time-consuming and costly process were the Canadian part of the Applicant itself to make a separate restructuring application under the CCAA in Canada.

[30] The Order proposed relieved the Applicant from the publication provisions of s. 53(b) of the CCAA. Based on the positive impact for creditors in Canada of the Plan as set out in paragraph 27 above, I was satisfied that given the cost involved in publication, the cost was neither necessary nor warranted.

[31] The requested Order is to issue in the form signed.

C. CAMPBELL J.

Released:

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

Court File No: CV-017-11758-00CL

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

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