Court File No.: CV-16-11656-00CL

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 MODULAR SPACE INTERMEDIATE HOLDINGS, INC., MODULAR SPACE CORPORATION, RESUN MODSPACE, INC., MODSPACE GOVERNMENT FINANCIAL SERVICES, INC., MODSPACE FINANCIAL SERVICES CANADA, LTD., RESUN CHIPPEWA, LLC AND MODULAR SPACE HOLDINGS, INC. (THE "DEBTORS")

APPLICATION OF MODULAR SPACE CORPORATION UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BOOK OF AUTHORITIES

OF THE APPLICANT, MODULAR SPACE CORPORATION

(December 23, 2016)

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

In the Matter of Babcock & Wilcox Canada Ltd.

Farley J.

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

Counsel: *Derrick Tay*, for Babcock & Wilcox Canada Ltd.
Paul Macdonald, for Citibank North America Inc., Lenders under the Post-Petition Credit Agreement.

Subject: Corporate and Commercial; Insolvency

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

***Farley J.*:**

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

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

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

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

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

(e) and for other ancillary relief.

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

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

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

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

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

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

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

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

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

Allow me to start off by stating that I agree with the analysis of MacPherson J. in *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.) when in discussing *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, 52 B.C.L.R. (2d) 160, 122 N.R. 81, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, he states at p.411:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> s. 267 In this Part,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(f) Where one jurisdiction has an ancillary role,

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

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

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

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

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

24 Order to issue accordingly.

Application granted.

APPENDIX

Court File No. 00-CL-3667

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

INITIAL ORDER

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

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

SERVICE

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

RECOGNITION OF THE U.S. PROCEEDINGS

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

APPLICATION

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

PROTECTION FROM ASBESTOS PROCEEDINGS

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

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

DIP FINANCING

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

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

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

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

REPORT AND EXTENSION OF STAY

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

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

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

SERVICE AND NOTICE

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

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

MISCELLANEOUS

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

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

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

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

Schedule "A"

NOTICE

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

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

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

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

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

DATED this day of, 2000 at Toronto, Canada

TAB 2

2012 BCSC 1565
British Columbia Supreme Court [In Chambers]

Digital Domain Media Group Inc., Re

2012 CarswellBC 3210, 2012 BCSC 1565, [2013] B.C.W.L.D. 919, 223 A.C.W.S. (3d) 16, 95 C.B.R. (5th) 318

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 Delaware with respect to the companies listed on Schedule "A" hereto, (the "Debtors") Application of Digital Domain Media Group, Inc. under Part IV of the Companies' Creditors Arrangement Act (Cross-Border Insolvencies), Petitioner

Fitzpatrick J.

Heard: September 18, 2012
Judgment: September 18, 2012
Docket: Vancouver S126501

Counsel: D. Grieve, D. Ward, E. Morris for Petitioner
D. Grassgreen, J. Rosell (United States Counsel) for Petitioner
P. Rubin for Tenor Opportunity Master Fund, Ltd., others
C. Brousson for Comvest Capital II, LP
C. Ramsay, J. Dietrich for Searchlight Capital LP/VFX Holdings LLC
M. Buttery for Third Party, Proposal Information Officer, Alvarez & Marsal Canada Inc.

Subject: Insolvency

Headnote

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

Recognition of foreign proceeding — Petitioner American debtor was parent company of Canadian company and thirteen American companies (together, "corporate group") — Corporate group filed under Chapter 11 of United States Bankruptcy Code and obtained foreign representation order and interim financing orders detailing debtor-in-possession (DIP) financing facility — Debtor brought petition for order recognizing Chapter 11 proceedings and for ancillary relief — Petition granted — Chapter 11 proceeding was "foreign proceeding" as defined in s. 45(1) of Companies' Creditors Arrangement Act ("CCAA") — Debtor was "foreign representative" for purposes of CCAA — Chapter 11 proceedings were "foreign main proceeding" in accordance with CCAA — Centre of main interest of entire corporate group, including Canadian company, was United States of America ("USA") — Debtor was highly-integrated corporate group centrally managed out of USA — Ancillary orders were granted, as they were appropriate to make — Coordinated approach was appropriate in these circumstances.

Table of Authorities

Cases considered by *Fitzpatrick J.*:

Allied Systems Holdings Inc., Re (2012), 2012 ONSC 4343 (Ont. S.C.J. [Commercial List]) — referred to

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

Lightsquared LP, Re (2012), 2012 ONSC 2994, 2012 CarswellOnt 8614, 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List]) — considered

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

Statutes considered:

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

Chapter 11 — referred to

s. 1505 — referred to

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

Pt. IV — referred to

s. 44 — referred to

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

s. 45(2) — considered

s. 47(1) — referred to

s. 47(2) — considered

s. 48(1)(a)-48(1)(d) — referred to

s. 49 — considered

s. 52(1) — considered

s. 52(3) — considered

PETITION by parent company debtor for order recognizing bankruptcy proceedings in United States of America, and ancillary relief.

***Fitzpatrick J.*:**

I. Introduction

1 The petitioner, Digital Domain Media Group, Inc. ("Digital Domain"), brings this proceeding under Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") seeking an order recognizing certain proceedings underway in the United States in respect of Digital Domain and several of its subsidiaries. Other ancillary relief is also sought.

2 Digital Domain is the parent company of an extensive corporate group consisting of fourteen companies. The corporate group specializes in computer-generated imagery, animation and visual effects for major motion picture

studios and advertisers. Thirteen members of the group are American corporations which are incorporated in either Florida, California or Delaware. All of those corporations conduct business in the United States.

3 The British Columbia connection to this group is the fourteenth corporation, Digital Domain Productions (Vancouver) Ltd. ("Digital Vancouver"). Digital Vancouver's operations are an integral part of the overall business of the corporate group. As I understand it, a substantial portion of the corporate group's operations are conducted through Digital Vancouver, presumably because of the tax advantages that are available in this jurisdiction.

4 The corporate group as a whole has approximately 765 employees. That number arises even after a substantial reduction in the number of employees after certain recent downsizing of operations. Digital Vancouver operates from leased premises in the Vancouver area and now has approximately 260 employees.

5 There are various secured creditors of the corporate group. Firstly, a syndicate of first secured note holders is owed approximately US$75 million. Secondly, Comvest Capital II, LP is a subordinated secured creditor who is owed approximately US$8 million.

6 The evidence as to the background of this matter is contained in the affidavit of Michael Katzenstein, the current Chief Restructuring Officer of the corporate group. In late August 2012, he was appointed as Interim Chief Operating Officer of the Debtors. Mr. Katzenstein sets out in detail the difficult circumstances in which the Digital Domain group finds itself. Essentially, cash flow appears to have recently dried up, which in turn has led to defaults under various lending agreements.

7 The exigent financial circumstances of the Digital Domain group led to a filing under Chapter 11 of the United States *Bankruptcy Code* on September 11, 2012 in the United States Bankruptcy Court for the District of Delaware. The following day, the Honourable Brendan Shannon granted relief pursuant to Chapter 11, and in particular, he granted various First Day Orders, the details of which I will outline below.

II. Background

8 This matter is quite urgent. The reasons for the urgency are, for the most part, set out in paragraph 70 of Mr. Katzenstein's affidavit. In summary, it appears that the movie studios which use the services of the Digital Domain group have expressed significant concern about the financial circumstances of the corporate group and accordingly, the corporate group's ability to deliver the goods and services that are to be provided to the studios in respect of ongoing productions. The movie studios have made repeated demands for immediate assurances that the corporate group can make the required deliveries. There was considerable concern under those circumstances that if action was not taken very quickly, the lifeblood or the core business of the Digital Domain group would disappear, leaving no enterprise value whatsoever.

9 Accordingly, the Digital Domain group has moved very quickly to seek relief, and Judge Shannon recently did grant the various First Day Orders. Those First Day Orders include a Foreign Representative Order appointing the parent company, Digital Domain, as a foreign representative with the authorization to seek recognition of the Chapter 11 proceedings, to request that the Canadian court lend assistance in protecting the property of the corporate group, and to seek any other appropriate relief.

10 Other First Day Orders include: a Cash Management Order to permit the management of the cash within the group, and allow intercompany advances; an Interim Pre-Petition Wages Order to allow for the payment of wages to employees so as to ensure they continue working, thereby preserving the value of their work; an Insurance Order to allow payment of ongoing insurance; and a Critical Vendor Order to allow payments to certain critical vendors.

11 Interim Financing Orders were also granted. Those orders detail a debtor-in-possession ("DIP") financing facility, as approved by Judge Shannon. Following some initial orders in relation to the DIP facility, the third order authorizes a DIP facility up to a maximum of US$20 million, although only approximately US$11.8 million has been made available

on an interim basis. Only approximately US$6 million has been advanced by the DIP lenders on an interim basis until things are more certain in respect of both the Chapter 11 proceedings and these proceedings. The Interim Financing Orders provide for a charge on the United States assets in respect of the DIP financing.

12 The final First Day Order for which recognition is now sought is a Bid Procedures Order. This order speaks to the urgency with which the United States proceedings were brought, and also presumably to the basis upon which this application is brought. By this order, an asset purchase agreement dated September 11, 2012 between the corporate group and a stalking-horse bidder, VFX Holdings LLC, was approved. It is intended that a sale of the corporate group's assets be completed in an extremely quick manner.

13 So that it is apparent just how urgent these matters are, I will review the intended procedures in some detail. That there is urgency in completing a sale has been accepted by the American court. There is to be a hearing by September 20, 2012 that is intended to confirm the bid procedures and allow for any creditor to object to those bid procedures. I am advised by counsel for the proposed Information Officer, Alvarez & Marsal Canada Inc., that there appears to be one party who wishes to weigh in on that procedure, although it is not clear if it will object to the proposed process. An auction is also intended to be held on September 21, 2012 to consider the bids. Finally, it is intended that there will be an application on September 24, 2012 before the United States Bankruptcy Court to consider approval of a sale. Assuming that approval is granted, it is intended that the sale will close that very day on September 24. As I already stated, the rapidity with which this is intended to happen is illustrative of the fact that the various stakeholders here are extremely concerned about the relationship between the corporate group and the movie studios, and that the business of the group may disappear unless things are regularized very quickly.

14 A further hearing within the United States proceedings is scheduled for October 1, 2012, at which date the court will consider confirming certain matters relating to the DIP financing. That will obviously be driven to some extent by whether a sale completes on September 24. I am advised, however, that even if a sale closes, the DIP financing will be required in order to deal with the remaining assets in the corporate group.

III. Discussion

A. Order recognizing the U.S. proceeding

(i) Is the U.S. proceeding a "foreign proceeding"?

15 The first issue relates to the recognition order being sought under Part IV of the *CCAA*. The first question is whether this is a "foreign proceeding". Chapter 11 proceedings under the United States *Bankruptcy Code* are well known to this Court and other Canadian courts. There is no mystery in that respect, and I think it is well taken that a Chapter 11 proceeding is a "foreign proceeding" as defined in s. 45(1) of the *CCAA*.

(ii) Is Digital Domain a "foreign representative"?

16 The second issue is whether Digital Domain is a "foreign representative". "Foreign representative" is also a defined term under s. 45(1) of the *CCAA*. In that respect, the petitioner's counsel has referred me to the order authorizing Digital Domain to act as foreign representative pursuant to s. 1505 of the United States *Bankruptcy Code*. As earlier stated, Judge Shannon's order dated September 12, 2012 specifically authorizes Digital Domain to act as a "foreign representative" for the purposes that I earlier stated.

17 Accordingly, I am satisfied that Digital Domain is a "foreign representative" for the purposes of the *CCAA*.

(iii) Is the U.S. proceeding a "foreign main proceeding"?

18 If the court is satisfied that this is a foreign proceeding and that the applicant is a foreign representative, it is then required to make an order recognizing the foreign proceeding under s. 47(1). Section 47(2) provides that the court must specify in the order whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding".

Both of those are defined terms, again found in s. 45(1) of the *CCAA*. In addition, s. 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 main interest.

19 The registered offices of all thirteen American members of the corporate group are situated in the United States. Therefore, the presumption in s. 45(2) of the *CCAA* would deem their centres of main interest ("COMI") to be in the United States, which would in turn dictate a finding, subject to any other evidence, that it is a "foreign main proceeding". I am satisfied that the COMI of each of the thirteen American corporate group members is located in the United States.

20 The more difficult issue relates to Digital Vancouver, which I am advised has its registered office in British Columbia. Subsection 45(2) of *CCAA* deems its COMI to be Canada, subject to that presumption being rebutted by other evidence.

21 A number of Canadian authorities have addressed this issue. In *Angiotech Pharmaceuticals Inc., Re*, 2011 BCSC 115 (B.C. S.C. [In Chambers]) at para. 7, Mr. Justice Walker outlined various factors that are to be considered:

> [7] The factors considered by the courts in Canada that are relevant to the centre of main interest issue are:
>
> (a) the location where corporate decisions are made;
>
> (b) the location of employee administrations, including human resource functions;
>
> (c) the location of the company's marketing and communication functions;
>
> (d) whether the enterprise is managed on a consolidated basis;
>
> (e) the extent of integration of an enterprise's international operations;
>
> (f) the centre of an enterprise's corporate, banking, strategic and management functions;
>
> (g) the existence of shared management within entities and in an organization;
>
> (h) the location where cash management and accounting functions are overseen;
>
> (i) the location where pricing decisions and new business development initiatives are created; and
>
> (j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

22 In *Massachusetts Elephant & Castle Group Inc., Re*, 2011 ONSC 4201 (Ont. S.C.J.), Mr. Justice Morawetz, at para. 26, recognized the *Angiotech* factors as above, and also identified what he considered to be the most significant factors:

> [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.

23 Mr. Justice Morawetz had further opportunity to revisit the issue on two other occasions. In *Lightsquared LP, Re*, 2012 ONSC 2994 (Ont. S.C.J. [Commercial List]), he indicated 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:

> [25] In circumstances where it is necessary to go beyond the s. 45 (2) registered office presumption, in my view, the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor's centre of main interests. The factors are:

(i) the location is readily ascertainable by creditors;

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

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

See also *Allied Systems Holdings Inc., Re*, 2012 ONSC 4343 (Ont. S.C.J. [Commercial List]) at para. 7.

24 Clearly, a determination of this issue will depend on the particular circumstances and facts of each case.

25 Counsel for Digital Domain identified a variety of factors which he says support a finding that the COMI for not only the United States Debtors, but also Digital Vancouver, is in the United States. I will summarize those briefly:

(1) The corporate group is a very integrated group, and the nerve centre of the group's digital production business is in California, which is a location readily ascertainable by creditors.

(2) The principal assets of the group are the movie projects that produce 90% of the revenue for the group. These projects emanate from and are managed and operated from the United States It appears to be the case that a significant portion of the work on those movie projects is conducted in Vancouver.

(3) The management of the entire group takes place in the United States. All operational, strategic and legal decision-making, marketing, communications, cash-management functions, bidding, sales and pricing, payroll, and accounting oversight of the business are conducted from the group's California headquarters.

(4) All of the directors and officers and all members of senior management of the Debtors are located and reside in the United States. I am advised that Mr. Katzenstein, the CRO, is from New York and is now the sole director of Digital Vancouver here in British Columbia.

(5) General counsel for all of the Debtors are situated in the U.S.

(6) Digital Vancouver personnel, including production crews and support staff, are required to report directly to senior management in California. A number of managerial or executive-level employees of Digital Domain Productions, Inc. ("Digital Productions") in the United States provide temporary production and/or administrative services on behalf of Digital Vancouver.

(7) Digital Vancouver's accounts receivable and collections efforts are managed in California.

(8) All proprietary technology, systems and processes used by Digital Vancouver are owned by and fully integrated with Digital Productions.

(9) All of Digital Vancouver's production projects are developed and documented by employees in California. Digital Vancouver has no authorization or infrastructure to engage in any marketing or sales, or to solicit, create or submit bids.

26 In summary, this highly-integrated corporate group is centrally managed out of the United States. The main connection to this jurisdiction is that Digital Vancouver's registered office is in Vancouver. There are also assets, of course, in Vancouver. There are some cash accounts that are owned and managed in Vancouver by Digital Vancouver. In addition, there are other assets, such as desks and chairs and technology equipment. As a member of the corporate group, however, Digital Vancouver has guaranteed the secured debt that I have earlier outlined in these reasons. Accordingly, those assets are tied into the financing which is done on a group-wide basis, and which is coordinated with the assets in the United States.

27 I would also add that the proposed Information Officer has commented on the COMI issue in its first report dated September 17, 2012. It identifies the same factors as did Digital Domain in support of a finding that the COMI of the entire corporate group is in the United States.

28 In the above circumstances, I conclude that the COMI of the entire corporate group, including Digital Vancouver, is in the United States. The fact that Vancouver is the location of Digital Vancouver's registered office is not conclusive, particularly in light of the other factors which point to the United States: its management functions take place in the United States; its operations are, to a large extent, conducted in the United States; and any creditor dealing with Digital Vancouver would, I think, gravitate to the United States connections.

29 I find that the United States Chapter 11 proceedings are a "foreign main proceeding" in accordance with the *CCAA*. Having made that determination, s. 48 of the *CCAA* dictates that I shall make certain orders staying proceedings as are set out in subparagraphs (a) through (d) of that section. Accordingly, the first order sought is granted.

B. Order for ancillary relief

30 The petitioner also seeks a second order for various ancillary relief. Section 49 of the *CCAA* provides that if a recognition order is made, the court may make any order that it considers appropriate if it is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors.

31 The ancillary relief sought by Digital Domain includes: an order appointing Alvarez & Marsal Canada Inc. as the Information Officer, and providing the powers and duties flowing from that appointment; an order granting a broader stay of proceedings; an order recognizing the various First Day Orders granted by Judge Shannon which I have earlier outlined in these reasons; and finally, an order granting a charge in favour of the DIP lenders over the property and assets in Canada to secure the obligations of the Debtors under what has been called the Interim Financing Orders. These are, of course, the same DIP lenders approved in the Chapter 11 proceedings.

32 With respect to the proposed Information Officer, counsel for Digital Domain refers to ss. 52(1) and (3) of the *CCAA*, which provide that the court shall cooperate with the foreign representative and foreign court. That cooperation may be by means of the appointment of such a person. The proposed role of Alvarez & Marsal Canada Inc. is to provide information to not only this court, but to other creditors and stakeholders as may be appropriate. To some extent, this role is similar to the role of a monitor in *CCAA* proceedings.

33 In this case, I am satisfied that the appointment of Alvarez & Marsal Canada Inc. as the Information Officer is appropriate, and that the accompanying provisions relating to the Information Officer in the proposed draft order are also appropriate.

34 The order sought also includes a broader stay of proceedings, and there are various provisions in this draft order which are not dissimilar to what might be found in a typical initial order granted in *CCAA* proceedings. Counsel have taken me through those provisions, and they appear to essentially track the wording found in the British Columbia model initial order that has been published by our court for the purpose of *CCAA* proceedings. I am satisfied that those provisions are appropriate in this case.

35 The other aspect of the ancillary relief sought is an order recognizing the First Day Orders. I have already found that the COMI for the entire corporate group, since it is highly integrated, is in the United States. It is clear that the parties need to move and — more to the point — move quickly. It is in the interest of all stakeholders that there be a coordinated approach in terms of dealing with this matter so as to preserve value for the stakeholders. Accordingly, having reviewed Mr. Katzenstein's affidavit in detail in terms of the various orders that were granted and the reasons for those orders, I am satisfied that recognition of those First Day Orders is appropriate.

36 The fourth and final ancillary relief sought is an order recognizing the charge in favour of the DIP lenders and also allowing that charge over the assets in Canada. It is clear, and not unusually so, that the DIP lending in this case is an integral part of these proceedings. The charge has been granted by the United States court, and the DIP financing and charge was seen as an essential factor so as to allow these proceedings to move very quickly and with the confidence of the creditors. The financing has provided, and will provide, sufficient cash flow to allow continued operations, which again is critical in maintaining enterprise value by allaying the concerns expressed by the movie studios.

37 I am satisfied that a coordinated approach is appropriate in these circumstances. I would also note that a significant portion of the funding is required by Digital Vancouver, who, as I said, represents a significant portion of the overall operations of the Digital Domain group.

38 As mentioned earlier in these reasons, the Canadian assets are in play in these proceedings, given the guarantee of the existing secured debt by Digital Vancouver and the charge over those assets in support of that guarantee.

39 Accordingly, I am satisfied that the DIP charge as proposed in the order is appropriate at this time.

IV. Disposition

40 I am satisfied that both orders sought today are appropriate and are consistent with the stated purpose of Part IV of the *CCAA*, as set out in s. 44, in terms of promoting cooperation between the courts in cross-border insolvencies, preserving value for all stakeholders, wherever located, and providing for a fair and efficient administration of these estates.

Schedule "A"

Debtors

Digital Domain Media Group, Inc.

Digital Domain

DDH Land Holdings, LLC

Digital Domain Institute, Inc.

Digital Domain Stereo Group, Inc.

DDH Land Holdings II, LLC

Digital Domain International, Inc.

Tradition Studios, Inc.

Digital Domain Tactical, Inc.

Digital Domain Productions, Inc.

Mothership Media, Inc.

D2 Software, Inc.

Digital Domain Productions (Vancouver) Ltd.

Tembo Productions, Inc.

Petition granted.

End of Document

TAB 3

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

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

Lightsquared LP, Re

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

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C 36, as Amended Application of Lightsquared LP under Section 46 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C 36, as Amended

In the Matter of Certain Proceedings Taken in the United States Bankruptcy Court with Respect to Lightsquared Inc., Lightsquared Investors Holdings Inc., One Dot Four Corp., One Dot Six Corp. Skyterra Rollup LLC, Skyterra Rollup Sub LLC, Skyterra Investors LLC, Tmi Communications Delaware, Limited Partnership, Lightsquared GP Inc., Lightsquared LP, ATC Technologies LLC, Lightsquared Corp., Lightsquared Finance Co., Lightsquared Network LLC, Lightsquared Inc., of Virginia, Lightsquared Subsidiary LLC, Lightsquared Bermuda Ltd., Skyterra Holdings (Canada) Inc., Skyterra (Canada) Inc. and One Dot Six TVCC Corp. (Collectively, the "Chapter 11 Debtors") (Applicants)

Morawetz J.

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

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

Subject: Insolvency; International

Headnote

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

Recognition of foreign proceedings — Related companies with some assets in Ontario entered bankruptcy protection in United States of America — Interim order was granted in Ontario putting stay of proceedings in place — Proposed foreign representative brought motion for various forms of relief including recognition of U.S. proceedings as foreign main proceedings — Motion granted — Foreign proceedings were considered foreign main proceedings, and required relief granted under Companies Creditors' Arrangement Act as set out in interim order — Foreign representative recognized as such, however, if matter were altered in American proceedings review could be necessary — When presumption in 45(2) of Companies' Creditors Arrangement Act is not operative, factors to consider in determining debtor's centre of interest should be that location is ascertainable to creditors, is where principle actors can be found, and is where management of debtor takes place — Certain orders granted by U.S. court recognized — Proposed information officer appointed.

Table of Authorities

Cases considered by *Morawetz J.*:

Lear Canada, Re (2009), 2009 CarswellOnt 4232, 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) — referred to

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

Statutes considered:

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

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

Pt. IV — referred to

ss. 44-49 — referred to

s. 45 — pursuant to

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

s. 45(2) — considered

s. 46(1) — considered

s. 47(1) — considered

s. 47(2) — considered

s. 48(1) — considered

s. 49 — pursuant to

s. 49(1) — considered

s. 50 — considered

MOTION by proposed foreign representative for various forms of relief pursuant to *Companies' Creditors Arrangement Act*.

***Morawetz J.*:**

1 On May 14, 2012, Lightsquared LP ("LSLP" or the "Applicant") and various of its affiliates (collectively, the "Chapter 11 Debtors") commenced voluntary reorganization proceedings (the "Chapter 11 Proceedings") in the United States Bankruptcy Court for the Southern District of New York (the "U.S. Court") by each filing a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

2 The Chapter 11 Debtors have certain material assets in other jurisdictions, including Ontario and indicated at an interim hearing held on May 15, 2012 that they would be seeking an order from the U.S. Court authorizing LSLP to act as the Foreign Representative of the Chapter 11 Debtors, in any judicial or other proceeding, including these proceedings (the "Foreign Representative Order").

3 At the conclusion of the interim hearing of May 15, 2012, I granted the Interim Initial Order to provide for a stay of proceedings and other ancillary relief. A full hearing was scheduled for May 18, 2012.

4 At the hearing on May 18, 2012, the record demonstrated that LSLP had been authorized to act as Foreign Representative by order of The Honorable Shelley C. Chapman dated May 15, 2012. This authority was granted on an interim basis pending a final hearing scheduled for June 11, 2012.

5 LSLP brought this application pursuant to ss. 44-49 of the *Companies' Creditors Arrangement Act* ("CCAA"), seeking the following orders:

(a) an Initial Recognition Order, *inter alia*:

(i) declaring that LSLP is a "foreign representative" pursuant to s. 45 of the CCAA;

(ii) declaring that the Chapter 11 Proceeding is recognized as a "foreign main proceeding" under the CCAA; and

(iii) granting a stay of proceedings against the Chapter 11 Debtors; and

(b) a "Supplemental Order" pursuant to s. 49 of the CCAA, *inter alia*:

(i) recognizing in Canada and enforcing certain orders of the U.S. Court made in the Chapter 11 Proceedings;

(ii) appointing Alvarez and Marsal Canada Inc. ("A&M") as the Information Officer in respect of this proceeding (in such capacity, the "Information Officer");

(iii) staying any claims against or in respect of the Chapter 11 Debtors, the business and property of the Chapter 11 Debtors and the Directors and Officers of the Chapter 11 Debtors;

(iv) restraining the right of any person or entity to, among other things, discontinue or terminate any supply of products or services to Chapter 11 Debtors;

(v) granting a super priority charge up to the maximum amount of $200,000, over the Chapter 11 Debtors' property, in favour of the Information Officer and its counsel, as security for their professional fees and disbursements incurred in respect of these proceedings (the "Administration Charge").

6 Counsel to LSLP submitted that this relief was required in order to:

(i) alleviate any potential harm to the Chapter 11 Debtors or their Canadian assets during the interim period;

(ii) ensure the protection of the Chapter 11 Debtors' Canadian assets during the course of the Chapter 11 Proceedings; and

(iii) ensure that this court and the Canadian stakeholders are kept properly informed of the Chapter 11 Proceedings.

7 The Chapter 11 Debtors are in the process of building a fourth generation long-term evolution open wireless broadband network that incorporates satellite coverage throughout North America and offers users, wherever they may be located, the speed, value and reliability of universal connectivity.

8 The Chapter 11 Debtors consist of approximately 20 entities. All but four of these entities have their head office or headquarter location in the United States.

9 Two of the Chapter 11 Debtors are incorporated pursuant to the laws of Ontario, being SkyTerra Holdings (Canada) Inc. ("SkyTerra Holdings") and SkyTerra (Canada) Inc. ("SkyTerra Canada"). One of the Chapter 11 Debtors

is incorporated pursuant to the laws of Nova Scotia, being Lightsquared Corp. "LC" and together with SkyTerra Holdings and SkyTerra Canada, the "Canadian Debtors"). Each of the Canadian Debtors is a wholly-owned subsidiary, directly or indirectly, of the Applicant.

10 Other than the Canadian Debtors and Lightsquared Bermuda Ltd., all of the Chapter 11 Debtors are incorporated pursuant to the laws of the United States.

11 The operations of the Canadian Debtors were summarized by LSLP as follows:

> (a) SkyTerra Canada: this entity was created to hold certain regulated assets which, by law, are required to be held by Canadian corporations. SkyTerra Canada holds primarily three categories of assets: (i) the MSAT — 1 satellite; (ii) certain Industry Canada licences; (iii) contracts with the Applicant's affiliates and third parties. SkyTerra Canada has no third party customers or employees at the present time and is wholly dependent on the Applicant for the funding of its operations;
>
> (b) SkyTerra Holdings: this entity has no employees or operational functions. Its sole function is to hold shares of SkyTerra Canada; and
>
> (c) LC: this entity was created for the purposes of providing mobile satellite services to customers located in Canada based on products and services that were developed by the Chapter 11 Debtors for the United States market. LC holds certain Industry Canada licences and authorizations as well as certain ground-related assets. LC employs approximately 43 non-union employees out of its offices in Ottawa, Ontario. LC is wholly dependent on the Applicant for all or substantially all of the funding of its operations.

12 Counsel to LSLP also submitted that the Chapter 11 Debtors, including the Canadian Debtors, are managed in the United States as an integrated group from a corporate, strategic and management perspective. In particular:

> (a) corporate and other major decision-making occurs from the consolidated offices in New York, New York and Ruston, Virginia;
>
> (b) all of the senior executives of the Chapter 11 Debtors, including the Canadian Debtors, are residents of the United States;
>
> (c) the majority of the management of the Chapter 11 Debtors, including the Canadian Debtors, is shared;
>
> (d) the majority of employee administration, human resource functions, marketing and communication decisions are made, and related functions taken, on behalf of all of the Chapter 11 Debtors, including the Canadian Debtors, in the United States;
>
> (e) the Chapter 11 Debtors, including the Canadian Debtors, also share a cash-management system that is overseen by employees of the United States-based Chapter 11 Debtors and located primarily in the United States; and
>
> (f) other functions shared between the Chapter 11 Debtors, including the Canadian Debtors, and primarily managed from the United States include, pricing decisions, business development decisions, accounts payable, accounts receivable and treasury functions.

13 Counsel further submits that the Canadian Debtors are wholly dependent on the Applicant and other members of the Chapter 11 Debtors located in the United States for all or substantially all of their funding requirements.

14 Further, the Canadian Debtors have guaranteed the credit facilities which were extended to LSLP as borrower and such guarantee is allegedly secured by a priority interest on the assets of the Canadian Debtors. As such, counsel submits that the majority of the creditors of the Chapter 11 Debtors are also common.

15 The Interim Initial Order granted on May 15, 2012, reflected an exercise of both statutory jurisdiction and the court's inherent juridical discretion. In arriving at the decision to grant interim relief, I was satisfied that it was appropriate to provide such relief in order to alleviate any potential harm to the Chapter 11 Debtors or their Canadian assets during the interim period.

16 The issue for consideration on this motion is whether the court should recognize the Chapter 11 Proceedings as a "foreign main proceeding" pursuant to the CCAA and grant the Initial Recognition Order sought by the Applicant and, if so, whether the court should also grant the Supplemental Order under s. 49 of the CCAA to (i) recognize and enforce in Canada certain orders of the U.S. Court made in the Chapter 11 Proceedings; (ii) appoint A&M as Information Officer in respect of these proceedings; and (iii) grant an Administration Charge over the Chapter 11 Debtors' property.

17 Section 46 (1) of the CCAA provides that a "foreign representative" may apply to the court for recognition of a "foreign proceeding" in respect of which he or she is a "foreign representative".

18 Court proceedings under Chapter 11 of the Bankruptcy Code have consistently been found to be "foreign proceedings" for the purposes of the CCAA. In this respect, see *Massachusetts Elephant & Castle Group Inc., Re* (2011), 81 C.B.R. (5th) 102 (Ont. S.C.J.) and *Lear Canada, Re* (2009), 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]).

19 I accept that the Chapter 11 Proceedings are "foreign proceedings" for the purposes of the CCAA and that LSLP is a "foreign representative".

20 However, it is noted that the status of LSLP as a foreign representative is subject to further consideration by the U.S. Court on June 11, 2012. If, for whatever reason, the status of LSLP is altered by the U.S. Court, it follows that this issue will have to be reviewed by this court.

21 LSLP submits that the Chapter 11 Proceedings should be declared a "foreign main proceeding". Under s. 47 (1) of the CCAA, it is necessary under s. 47 (2) to determine whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding".

22 Section 45 (1) of the CCAA defines a "foreign main proceeding" as a "foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests".

23 Section 45 (2) of the CCAA provides that for the purposes of Part IV of the CCAA, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests ("COMI").

24 In this case, the registered offices of the Canadian Debtors are in Canada. Counsel to the Applicant submits, however, that the COMI of the Canadian Debtors is not in the location of the registered offices.

25 In circumstances where it is necessary to go beyond the s. 45 (2) registered office presumption, in my view, the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor's centre of main interests. The factors are:

(i) the location is readily ascertainable by creditors;

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

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

26 In most cases, these factors will all point to a single jurisdiction as the centre of main interests. In some cases, there may be conflicts among the factors, requiring a more careful review of the facts. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. In all cases, however, the review is designed to determine that the location of the proceeding, in fact, corresponds to where the debtor's true seat

or principal place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings.

27 When the court determines that there is proof contrary to the presumption in s. 45 (2), the court should, in my view, consider these factors in determining the location of the debtor's centre of main interests.

28 The above analysis is consistent with preliminary commentary in the Report of UNCITRAL Working Group V (Insolvency Law) of its 41 st Session (New York, 30 April — 4 May, 2012) (Working Paper AICN.9/742, paragraph 52. In my view, this approach provides an appropriate framework for the COMI analysis and is intended to be a refinement of the views I previously expressed in *Massachusetts Elephant & Castle Group Inc., Re, supra.*

29 Part IV of the CCAA does not specifically take into account corporate groups. It is therefore necessary to consider the COMI issue on an entity-by-entity basis.

30 In this case, the foreign proceeding was filed in the United States and based on the facts summarized at [11] — [14], LSLP submits that the COMI of each of the Canadian Debtors is in the United States.

31 After considering these facts and the factors set out in [25] and [26], I am persuaded that the COMI of the Canadian Debtors is in the United States. It follows, therefore, that in this case, the "foreign proceeding" is a "foreign main proceeding".

32 Having recognized the "foreign proceeding" as a "foreign main proceeding", subsection 48 (1) of the CCAA requires the court to grant certain enumerated relief subject to any terms and conditions it considers appropriate. This relief is set out in the Initial Recognition Order, which relief is granted in the form submitted.

33 Additionally, s. 50 of the CCAA provides the court with the jurisdiction to make any order under Part IV of the CCAA on the terms and conditions it considers appropriate in the circumstances.

34 The final issue to consider is whether the court should grant the Supplemental Order sought by the Applicant under s. 49 of the CCAA and (i) recognize and enforce in Canada certain orders of the U.S. Court made in the Chapter 11 Proceedings; (ii) appoint A&M as Information Officer in respect of these proceedings; and (iii) grant an Administration Charge over the Chapter 11 Debtors' property.

35 If an order recognizing the "foreign proceedings" has been made (foreign main or foreign non-main), subsection 49 (1) of the CCAA provides the authority for the court, if it is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, to make any order that it considers appropriate.

36 In this case, the Applicant is requesting recognition of the first day orders granted in the U.S. Court. Based on the record, I am satisfied that it is appropriate to recognize these orders.

37 Additionally, I am satisfied that the appointment of A&M as Information Officer will help to facilitate these proceedings and the dissemination of information concerning the Chapter 11 Proceedings and this relief is appropriate on the terms set forth in the draft order. The proposed order also provides that the Information Officer be entitled to the benefit of an Administration Charge, which charge shall not exceed an aggregate amount of $200,000, as security for their professional fees and disbursements. I am satisfied that the inclusion of this Administration Charge in the draft order is appropriate.

38 The ancillary relief requested in the draft order is also appropriate in the circumstances.

39 Accordingly, the Supplemental Order is granted in the form presented. The Supplemental Order contains copies of the first day orders granted in the U.S. Court.

40 Finally, on an ongoing basis, it would be appreciated if counsel would, in addition to filing the required paper record, also file an electronic copy by way of a USB key directly with the Commercial List Office.

Motion granted.

End of Document

TAB 4

2011 BCSC 115
British Columbia Supreme Court [In Chambers]

Angiotech Pharmaceuticals Inc., Re

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

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

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

P. Walker J.

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

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

Subject: Insolvency

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

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Headnote

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

Centre of interest — Parties were involved in proceedings under Companies' Creditors Arrangement Act, with proceedings to begin in Delaware as well — Petitioners brought application for initial order — Application granted — Order would give petitioners reasonable time to organize affairs and operate as going concern — Centre of main interest in proceedings was British Columbia — Petitioners had assets in Canada — Operations of petitioners directed from head office in Canada — Chief executive officer to whom senior management reported to was based in Vancouver — Company reporting directed from Vancouver — Research and development done in Vancouver — Plant management meetings were held in Vancouver — Monitor to be representative in any main proceedings, rather than petitioners.

Table of Authorities

Cases considered by *P. Walker J.*:

Fraser Papers Inc., Re (2009), 2009 CarswellOnt 3658, 56 C.B.R. (5th) 194 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 50 C.B.R. (5th) 77, 2009 CarswellOnt 146 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Chapter 15 — referred to

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

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

P. Walker J.:

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

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

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

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

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

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

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

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

(a) the location where corporate decisions are made;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) all of the Petitioners report to Angiotech;

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

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

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

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

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

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

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

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

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

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

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

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

Application granted.

End of Document

TAB 5

2016 ONSC 958
Ontario Superior Court of Justice [Commercial List]

Horsehead Holding Corp., Re

2016 CarswellOnt 1748, 2016 ONSC 958, 263 A.C.W.S. (3d) 21, 33 C.B.R. (6th) 276

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

In the Matter of Certain Proceedings Taken in the United States Bankruptcy Court with Respect to Horsehead Holding Corp., Horsehead Corporation, Horsehead Metal Products, LLC, the International Metals Reclamation Company, LLC and Zochem Inc. (collectively, the "Debtors")

Newbould J.

Heard: February 5, 2016
Judgment: February 8, 2016
Docket: CV-16-11271-00CL

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

Subject: Insolvency

Headnote

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

Debtors operated in zinc and nickel-bearing waste industries — They held market-leading position in zinc production in United States, zinc oxide production in North America, EAF dust recycling in North America, and were leading environmental service provider to U.S. steel industry — Debtor Z Inc. was Canadian corporation and was foreign representative of debtors — Other debtors were U.S. corporations — Z Inc. and U.S. debtors maintained highly integrated business — Debtors reached agreement for senior secured super-priority debtor-in-possession (DIP) credit facility in amount of US $90 million to allow Z Inc. to pay off obligations to U.S. bank and to finance debtors' operations and chapter 11 proceedings — Condition of advance under DIP facility was granting of super-priority charge over assets of debtors in Canada in favour of DIP lender — Debtors brought application for orders recognizing First Day Orders made by U.S. Bankruptcy Court in chapter 11 proceedings brought by debtors under U.S. Bankruptcy Code — Application granted — Purpose of Part IV of Corporations' Creditors Arrangement Act was to effect cross-border insolvencies and create system under which foreign insolvency proceedings could be recognized in Canada — There was no question but that chapter 11 proceeding was foreign proceeding and that Z Inc. was foreign representative — Debtors established that foreign proceeding was foreign main proceeding — Order was granted recognizing U.S. interim financing order, and granting security requested for DIP.

Table of Authorities

Cases considered by *Newbould J.*:

Crystallex International Corp., Re (2012), 2012 ONSC 2125, 2012 CarswellOnt 4577, 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — followed

Crystallex International Corp., Re (2012), 2012 ONCA 404, 2012 CarswellOnt 7329, 91 C.B.R. (5th) 207, 293 O.A.C. 102, 4 B.L.R. (5th) 1 (Ont. C.A.) — referred to

Indalex Ltd., Re (2009), 2009 CarswellOnt 1998, 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List]) — followed

Lightsquared LP, Re (2012), 2012 ONSC 2994, 2012 CarswellOnt 8614, 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List]) — considered

MtGox Co., Re (2014), 2014 ONSC 5811, 2014 CarswellOnt 13871, 122 O.R. (3d) 465, 20 C.B.R. (6th) 307 (Ont. S.C.J. [Commercial List]) — considered

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

Statutes considered:

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

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 224 — considered

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

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

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

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

s. 45(2) — considered

ss. 46-49 — referred to

s. 46(1) — considered

s. 47 — considered

s. 47(2) — considered

APPLICATION for orders recognizing First Day Orders made by U.S. Bankruptcy Court in chapter 11 proceedings brought by debtors under U.S. *Bankruptcy Code*.

Newbould J.:

1 On February 5, 2016 an application was brought by Zochem Inc. ("Zochem"), in its capacity as foreign representative of itself as well as Horsehead Holding Corp., Horsehead Corporation, Horsehead Metal Products, LLC ("Horsehead Metals"), and The International Metals Reclamation Company, LLC ("INMETCO") for orders pursuant to sections 46 through 49 of the *CCAA* recognizing First Day Orders made by Judge Mary Walrath of the U.S. Bankruptcy Court for the District of Delaware in chapter 11 proceedings brought by the debtors under the U.S. Bankruptcy Code.

2 At the conclusion of the hearing I made the orders sought with reasons to follow. These are my reasons for making the orders.

3 The debtors operate in the zinc and nickel-bearing waste industries through three business units: Horsehead Corporation and its subsidiaries (collectively, "Horsehead"), Zochem, and INMETCO. Horsehead is a prominent recycler of electric arc furnace ("EAF") dust, a zinc-containing waste generated by North American steel "mini-mills", and in turn uses the recycled EAF dust to produce specialty zinc and zinc-based products. Zochem is a producer of zinc oxide. INMETCO is a recycler of nickel-bearing wastes and nickel-cadmium batteries, and a producer of nickel-chromium-molybdenum-iron remelt alloy for the stainless steel and specialty steel industries. Collectively, the debtors hold a market-leading position in zinc production in the United States, zinc oxide production in North America, EAF dust recycling in North America, and are a leading environmental service provider to the U.S. steel industry.

4 Zochem is a Canada Business Corporations Act corporation with its head office in Pittsburgh, Pennsylvania and its operations located in owned premises at 1 Tilbury Court, Brampton, Ontario. Zochem's registered office address is the Ontario premises.

5 Zochem is one of the largest single-site producers of zinc oxide in North America. Zinc oxide is used as an additive in various materials and products, including plastics, ceramics, glass, rubbers, cement, lubricants, pigments, sealants, ointments, fire retardants, and batteries. The debtors sell zinc oxide to over 250 producers of tire and rubber products, chemicals, paints, plastics, and pharmaceuticals, and have supplied zinc oxide to the majority of their largest customers for over ten years.

6 As of December 31, 2015, Zochem had 19 salaried personnel and 25 hourly personnel. Approximately 25 of these employees are organized under Unifor and its Local 591-G-850, whose collective labour agreement is set to expire on June 30, 2016.

7 Zochem maintains separate pension plans for its salaried and hourly personnel, which have been closed to new members since July 1, 2012. Newer employees have joined Zochem's group RRSP. According to a report prepared by Corporate Benefit Analysis, Inc., the pensions were, collectively, overfunded as at December 31, 2015, though the salaried plan had a small unfunded projected benefit obligation in the amount of $181,499, which is to be paid next week. Neither plan has been wound up.

8 On April 29, 2014, Zochem, as borrower, and Horsehead Holding, as guarantor, entered into a U.S. $20 million secured revolving credit facility (the "Zochem Facility") with PNC Bank, National Association ("PNC"), as agent and lender. The Zochem Facility is secured by a first priority lien (subject to certain permitted liens) on substantially all of Zochem's tangible and intangible personal property, and a charge on the Brampton, Ontario premises of Zochem. Zochem's obligations to PNC are guaranteed by its parent, Horsehead Holding. On January 27, 2016, PNC assigned its position as lender under the Zochem Facility to an arm's length party. PNC remains the agent under Zochem Facility.

9 Three out of four of Zochem's officers and three out of four of its directors are residents of Pennsylvania. Most of Zochem's officers are also officers of each of the other debtors. Zochem's statutorily required one Canadian director (representing 25% of the board) is a partner at the law firm Aird & Berlis LLP, the debtors' Canadian counsel. The only Zochem officer resident in Canada is the plant's general manager, who formerly was resident in Pennsylvania and employed by the U.S. debtors. Otherwise, all local functions associated with managing and operating the Zochem facility are performed from the debtors' Pittsburgh, Pennsylvania headquarters in the United States.

10 Zochem and the U.S. debtors maintain a highly integrated business. Zochem's communications decisions, pricing decisions, and business development decisions are made in Pittsburgh. Zochem's accounts receivable, accounts payable and treasury departments are also located in Pittsburgh.

11 Zochem operates a cash management system whereby:

a. all receipts flow into a collection account at PNC in the United States, in part via a lockbox maintained at PNC;

b. funds from the PNC collection account are transferred daily into an operating account at PNC in the United States; and

c. funds are then transferred, as the debtors' treasury department (in Pittsburgh) determines is required, to a U.S. dollar operating account and a Canadian dollar operating account at Scotiabank in Canada to pay vendors and payroll, as applicable.

12 The debtors in the United States have had limited access to liquidity since January 5, 2016 when their lender, Macquarie Bank Limited ("Macquarie"), issued a notice of default and froze certain of their bank accounts, including their main operating account. On January 6, 2016, Zochem's lender, PNC, also asserted an event of default. On January 13, 2016, PNC froze certain of the debtors' bank accounts associated with their Zochem operations, and demanded immediate payment of all outstanding obligations. PNC's demand was accompanied by a notice of intention to enforce security under section 244 of the *BIA*. Although the debtors entered into forbearance agreements with Macquarie and PNC, the term of those agreements expired on February 1, 2016.

13 With the assistance of Lazard Middle Market LLC, the debtors reached agreement for a senior secured super priority debtor-in-possession credit facility in the amount of U.S. $90 million from a group of Horsehead Holding secured noteholders. The DIP facility is intended to pay off the Zochem's obligations to PNC and to finance the debtors' operations and the chapter 11 proceedings. A condition of advance under the DIP facility is the granting of a super-priority charge over the assets of the debtors in Canada in favour of the DIP lender.

14 On February 3, 2016 Judge Walrath of the U.S. Bankruptcy Court granted the following First Day Orders:

(a) Joint Administration Order;

(b) Foreign Representative Order;

(c) Interim Cash Management Order;

(d) Interim Wages and Benefits Order;

(e) Interim Shippers and Lien Claimants Order;

(f) Interim Utilities Order;

(g) Interim Insurance Order;

(h) Interim Prepetition Taxes Order;

(i) Interim Critical Vendors Order; and

(j) Interim Financing Order.

Analysis

15 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. See my comments on the *BIA* version of the same provisions in *MtGox Co., Re* (2014), 20 C.B.R. (6th) 307 (Ont. S.C.J. [Commercial List]).

16 Pursuant to section 46(1) of the *CCAA*, a foreign representative may apply to the court for recognition of a foreign proceeding in respect of which he or she is a foreign representative.

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

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

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

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

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

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

21 Once it has determined that a proceeding is a foreign proceeding, a court is required, pursuant to section 47(2) of the *CCAA*, to specify in its order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

22 Section 45(1) of the *CCAA* defines a foreign main proceeding as a "foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests" ("COMI"). Section 45(2) of the *CCAA* provides that, in the absence of proof to the contrary, a debtor company's registered office is deemed to be its COMI. In circumstances where it is necessary to go beyond the s. 45 (2) registered office presumption, the following principal factors, considered as a whole, will indicate whether the location in which the proceeding has been filed is the debtor's centre of main interests:

(1) the location is readily ascertainable by creditors,

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

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

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

> 26. In most cases, these factors will all point to a single jurisdiction as the centre of main interests. In some cases, there may be conflicts among the factors, requiring a more careful review of the facts. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. In all cases, however, the review is designed to determine that the location of the proceeding, in fact, corresponds to where the debtor's true

seat or principal place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings.

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

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

(i) all the debtors other than Zochem, comprising Zochem's corporate family, are incorporated, and have their registered head office, in the United States;

(ii) all the debtors, including, Zochem are managed from Pittsburgh, Pennsylvania;

(iii) all three of Zochem's "inside" directors (comprising 75% of the board) are residents of Pennsylvania;

(iv) all of Zochem's officers are Pennsylvania residents, with the one exception of its general manager who is a former Pennsylvania resident and employee of the other debtors;

(v) most of Zochem's officers are also officers of each of the other debtors;

(vi) Zochem is operational in its focus and all local functions associated with managing and operating the Zochem facility are performed from the debtors' Pittsburgh headquarters;

(vii) Zochem's communications decisions, pricing decisions, and business development decisions are made in Pittsburgh;

(viii) Zochem's accounts receivable, accounts payable and treasury departments are located in Pittsburgh;

(ix) Zochem's cash management system is centred in the United States;

(x) Zochem's existing credit facilities are with a bank in Pittsburgh; and

(xi) the debtors are all managed in the United States as an integrated group from a corporate, strategic, financial and management perspective.

26 In this case it is perhaps an academic exercise to decide if the foreign proceeding is a main or non-main proceeding because it is appropriate for a stay to be ordered in either event. However, I am satisfied that for our purposes the applicants have established that the foreign proceeding is a foreign main proceeding.

27 The only matter that is somewhat contentious is the recognition of the interim financing order (interim DIP order) made by Judge Walrath and the request for an order providing for a charge for the benefit of the DIP lender.

28 Counsel for the Union went on the record as opposing the granting of a charge because although there will be no underfunding of the pension plans upon the granting of the DIP facility, it is possible in the future that there may be underfunding. The pension plans are not being wound up and there is no evidence at the moment that there is a risk of future underfunding or in what amount. In the circumstances I do not see the position of the Union as an impediment to the granting of the relief requested.

29 When recognizing a financing order granted by a foreign court, consideration should be given as to whether there would be any material adverse interest to any Canadian interests. See *Re Xinergy Ltd.*, 2015 ONSC 2692 (Ont. S.C.J. [Commercial List]), at para 20.

30 It was such a concern that led Judge Walrath to require changes to the interim DIP order that was applied for.

31 The debtors sought interim approval from the U.S. Court of a senior secured super priority DIP credit facility in the amount of $90 million offered by the DIP lenders. The Proposed DIP Facility contemplated that the liens granted in connection with the DIP Facility would be first-priority liens over a portion of the debtors' assets (including all of the assets of Zochem and the assets of the debtors subject to a first-priority lien in respect of the Senior Secured Notes), and second-priority liens with respect to the assets of the U.S. debtors that are presently subject to a first-priority lien in favour of Macquarie.

32 Under the Proposed DIP Facility, the maximum amount permitted to be advanced on an interim basis was $40 million, and it was contemplated that all of the debtors would be jointly and severally liable for all advances made. The contemplated uses of the initial $40 million DIP advance were approximately $18.5 million to pay out the Zochem Facility (including a $1 million forbearance fee), with the balance of the advances being used to fund the operations and restructuring activities of the Debtors during the interim period until a final order approving the Proposed DIP Facility is sought from the U.S. Court in late February.

33 At the hearing on February 3, 2016, Judge Walrath raised concerns about the position of Zochem, including her concern that no independent counsel for Zochem considered whether the DIP facility was in the best interest of Zochem as there was a conflict of interest in the three U.S. directors of Zochem approving Zochem to be jointly and severally liable for the entire DIP loan. Judge Walrath stated that she would consider a DIP facility that obligates Zochem only to the extent there is a direct benefit to Zochem, i.e. payment of its debt or a loan which they use in their operations for working capital.

34 After an adjournment, the debtors and the DIP lenders agreed to certain interim amendments to the Proposed DIP Facility including a provision that the maximum liability of Zochem pursuant to the Proposed DIP Facility in the interim period would be capped at $25 million (reduced from the prior contemplated maximum amount of $40 million). Counsel for the debtors advised Judge Walrath that the $25 million would reflect both the payoff of the PNC loan and reflect the fact that Zochem continues to have a funding need. The debtors also proffered testimony that

> 1. Zochem is approximately break-even on a cash flow basis, and was projected to be approximately $1 million dollars cash flow positive over the following four week period, not accounting for any disruption in its business, including, for example, a notice that the debtors received from one of the largest vendors saying that they will reprice their business with the debtors, and that they will demand that the debtors pay one month in advance.
>
> 2. The break-even cash position did not take into account any bankruptcy related costs, all of which are allocated to Horsehead.
>
> 3. The debtors, in their business judgement, determined that it would not be prudent to operate the business on a break-even basis given business pressures, and liquidity from the Proposed DIP Facility would be available to Zochem to provide a liquidity cushion for the first four weeks of the case.

35 What essentially Judge Walrath was told in answer to her concerns was that the difference between the approximately $18.5 million needed to pay Zochem's loan facility with PNC and the $25 million limit of Zochem's liability was to be used as a cushion for Zochem's cash flow needs. In the circumstances, and taken the proffered testimony that Zochem required a cushion, I suggested to the parties that a term of my order recognizing the U.S. interim financing order should be that the difference between the $18.5 million and the $25 million was in the interim to be used only for Zochem working capital requirements.

36 After a break to permit the parties to discuss this situation, counsel for the DIP lenders said they were not prepared to lend on that basis and that they wished to adjourn the matter until the following Monday. The problem with this request was two-fold. The first was that it was a requirement of the DIP that an order be made by this Court by the date of the hearing on February 5, 2016, and without an order the debtors had no right to the DIP facility. The second was that the interim advance under the DIP was required to meet the payroll that day.

37 The proposed Information Officer pointed out that it is estimated by the debtors that up to $38.5 million will be drawn under the Proposed DIP Facility in the interim period to be used as follows:

(a) approximately $18.5 million will be used to repay the Zochem Facility (including the $1 million forbearance fee payable to PNC);

(b) approximately $4 million will be used to pay fees associated with the Proposed DIP Facility; and

(c) approximately $15.6 million will be used to finance the debtors' operations and restructuring activities pursuant to an agreed upon budget, including payment of professional fees, utility deposits and certain critical materials and freight vendors.

38 In the circumstances I made the order recognizing the U.S. interim financing order, and granting the security requested for the DIP, which in my view met the tests as enunciated in the authorities, including the factors set out in *Indalex Ltd., Re* (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List]) for the guarantee of a Canadian debtor of its U.S. parent's obligations under the DIP facility, and as set out in *Crystallex International Corp., Re* (2012), 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]); aff'd (2012), 4 B.L.R. (5th) 1 (Ont. C.A.).

39 However I stated at the hearing, and reiterate, that if in the interim period a request is made for further funding for working capital requirements of Zochem because not enough available cash was kept for that purpose, I would be extremely loathe to grant any such further relief.

40 The directors of Zochem have fiduciary duties to Zochem. In *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) 113 (Ont. Div. Ct.), at 122 Justice Farley stated clearly that the directors' duties are to the corporation of which they are directors and they cannot just be yes men for the controlling shareholders:

> It may well be that the corporate life of a nominee director who votes against the interest of his "appointing" shareholder will be neither happy nor long. However, the role that any director must play (whether or not a nominee director) is that he must act in the best interests of the corporation. If the interests of the corporation (and indirectly the interests of the shareholders as a whole) require that the director vote in a certain way, it must be the way that he conscientiously believes after a reasonable review is the best for the corporation. The nominee director's obligation to his "appointing" shareholder would seem to me to include the duty to tell the appointer that his requested course of action is wrong if the director in fact feels this way. Such advice, although likely initially unwelcome, may well be valuable to the appointer in the long run. The nominee director cannot be a "Yes man"; he must be an analytical person who can say "Yes" or "No" as the occasion requires (or to put it another way, as the corporation requires).

41 I trust the directors of Zochem will keep these principles in mind. I direct that they be given a copy of these reasons for judgment.

42 I also recognized all of the other First Day Orders made by Judge Walrath. They were appropriate and no opposition to their recognition was voiced.

Application granted.

TAB 6

2011 ONSC 4201
Ontario Superior Court of Justice

Massachusetts Elephant & Castle Group Inc., Re

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

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

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

MASSACHUSETTS ELEPHANT & CASTLE GROUP, INC. (Applicant)

Morawetz J.

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

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

Subject: Insolvency; Corporate and Commercial

Headnote

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

Recognition of foreign main proceeding — Debtor companies were integrated business involving locations in U.S. and Canada — Each of debtors, including debtor companies with registered offices in Canada (Canadian Debtors), were managed centrally from U.S. — Debtors brought proceedings in U.S. pursuant to Chapter 11 of United States Bankruptcy Code — U.S Court appointed applicant as foreign representative of Chapter 11 Debtors — Applicant applied to have U.S. Chapter 11 proceedings recognized as foreign main proceeding in Canada under Companies' Creditors Arrangements Act (Act) — Application granted — It was appropriate to recognize foreign proceeding — Foreign proceeding in present case was foreign main proceeding — "Foreign main proceeding" is defined in s. 45(1) of Act as foreign proceeding in jurisdiction where debtor company has centre of its main interest (COMI) — There was sufficient evidence to rebut presumption in s. 45(2) of Act that COMI is registered office of debtor company — For purposes of application, each entity making up Chapter 11 Debtors, including Canadian Debtors, had their COMI in U.S. — Location of debtors' headquarters or head office functions or nerve centre was in U.S. — Debtor's management was located in U.S. — Significant creditor did not oppose relief sought — Mandatory stay ordered under s. 48(1) of Act — Discretionary relief recognizing various orders of U.S. Court, appointing information officer, and limiting quantum of administrative charge, was appropriate and was granted.

Table of Authorities

Cases considered by *Morawetz J.*:

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

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

Lear Canada, Re (2009), 2009 CarswellOnt 4232, 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) — referred to

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

Statutes considered:

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

ss. 1101-1174 — referred to

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

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

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

Pt. IV — referred to

s. 44 — considered

s. 45 — considered

s. 45(1) — considered

s. 45(2) — considered

s. 46 — considered

s. 46(1) — considered

s. 46(2) — referred to

ss. 46-49 — referred to

s. 47(1) — considered

s. 47(2) — considered

s. 48 — considered

s. 48(1) — considered

s. 49 — considered

s. 50 — considered

s. 61 — considered

s. 61(2) — considered

APPLICATION for order recognizing U.S. Chapter 11 Proceeding as foreign main proceeding under *Companies' Creditors Arrangement Act*, and other relief.

Morawetz J.:

1 Massachusetts Elephant & Castle Group, Inc. ("MECG" or the "Applicant") brings this application under Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*"). MECG seeks orders pursuant to sections 46 — 49 of the *CCAA* providing for:

(a) an Initial Recognition Order declaring that:

(i) MECG is a foreign representative pursuant to s. 45 of the *CCAA* and is entitled to bring its application pursuant s. 46 of the *CCAA*;

(ii) the Chapter 11 Proceeding (as defined below) in respect of the Chapter 11 Debtors (as set out in Schedule "A") is a "foreign main proceeding" for the purposes of the *CCAA*; and

(iii) any claims, rights, liens or proceedings against or in respect of the Chapter 11 Debtors, the directors and officers of the Chapter 11 Debtors and the Chapter 11 Debtors' property are stayed; and

(b) a Supplemental Order:

(i) recognizing in Canada and enforcing certain orders of the U.S. Court (as defined below) made in the Chapter 11 Proceeding (as defined below);

(ii) granting a super-priority change over the Chapter 11 Debtors' property in respect of administrative fees and expenses; and

(iii) appointing BDO Canada Limited ("BDO") as Information Officer in respect of these proceedings (the "Information Officer").

2 On June 28, 2011, the Chapter 11 Debtors commenced proceedings (the "Chapter 11 Proceeding") in the United States Bankruptcy Court for the District of Massachusetts Eastern Division (the "U.S. Court"), pursuant to Chapter 11 of the *United States Bankruptcy Code*, 11 U.S.C. § 1101-1174 ("*U.S. Bankruptcy Code*").

3 On June 30, 2011, the U.S. Court made certain orders at the first-day hearing held in the Chapter 11 Proceeding, including an order appointing the Applicant as foreign representative in respect of the Chapter 11 Proceeding.

4 The Chapter 11 Debtors operate and franchise authentic, full-service British-style restaurant pubs in the United States and Canada.

5 MECG is the lead debtor in the Chapter 11 Proceeding and is incorporated in Massachusetts. All of the Chapter 11 Debtors, with the exception of Repechage Investments Limited ("Repechage"), Elephant & Castle Group Inc. ("E&C Group Ltd.") and Elephant & Castle Canada Inc. ("E&C Canada") (collectively, the "Canadian Debtors") are incorporated in various jurisdictions in the United States.

6 Repechage is incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ("*CBCA*") with its registered office in Toronto, Ontario. E&C Group Ltd. is also incorporated under the *CBCA* with a registered office located in Halifax, Nova Scotia. E&C Canada Inc. is incorporated under the *Business Corporations Act*, R.S.O. 1990, c. B. 16, and its registered office is in Toronto. The mailing office for E&C Canada Inc. is in Boston, Massachusetts at the location of the corporate head offices for all of the debtors, including Repechage and E&C Group Ltd.

7 In order to comply with s. 46(2) of the *CCAA*, MECG filed the affidavit of Ms. Wilson to which was attached certified copies of the applicable Chapter 11 orders.

8 MECG also included in its materials the declaration of Mr. David Dobbin filed in support of the first-day motions in the Chapter 11 Proceeding. Mr. Dobbin, at paragraph 19 of the declaration outlined the sale efforts being entered into by MECG. Mr. Dobbin also outlined the purpose of the Chapter 11 Proceeding, namely, to sell the Chapter 11 Debtors' businesses as a going concern on the most favourable terms possible under the circumstances and keep the Chapter 11 Debtors' business intact to the greatest extent possible during the sales process.

9 The issues for consideration are whether this court should grant the application for orders pursuant to ss. 46 — 49 of the *CCAA* and recognize the Chapter 11 Proceeding as a foreign main proceeding.

10 The purpose of Part IV of the *CCAA* is set out in s. 44:

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

11 Section 46(1) of the *CCAA* provides that "a foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative."

12 Section 47(1) of the *CCAA* provides that there are two requirements for an order recognizing a foreign proceeding:

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

13 Canadian courts have consistently recognized proceedings under Chapter 11 of the *U.S. Bankruptcy Code* to be foreign proceedings for the purposes of the *CCAA*. In this respect, see: *Babcock & Wilcox Canada Ltd., Re* (2000), 5 B.L.R. (3d) 75 (Ont. S.C.J. [Commercial List]); *Magna Entertainment Corp., Re* (2009), 51 C.B.R. (5th) 82 (Ont. S.C.J.); *Lear Canada, Re* (2009), 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]).

14 Section 45(1) of the *CCAA* defines a foreign representative as:

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

