

- (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or
- (b) act as a representative in respect of the foreign proceeding.

15 By order of the U.S. Court dated June 30, 2011, the Applicant has been appointed as a foreign representative of the Chapter 11 Debtors.

16 In my view, the Applicant has satisfied the requirements of s. 47(1) of the CCAA. Accordingly, it is appropriate that this court recognize the foreign proceeding.

17 Section 47(2) of the CCAA requires the court to specify in its order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

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

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

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

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

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

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

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

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

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

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

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

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

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

29 For example:

- (a) the location from which financing was organized or authorized or the location of the debtor's primary bank would only be important where the bank had a degree of control over the debtor;
- (b) the location of employees might be important, on the basis that employees could be future creditors, or less important, on the basis that protection of employees is more an issue of protecting the rights of interested parties and therefore is not relevant to the COMI analysis;
- (c) the jurisdiction whose law would apply to most disputes may not be an important factor if the jurisdiction was unrelated to the place from which the debtor was managed or conducted its business.

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

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

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

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

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

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

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

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

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

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

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

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

34 The relief provided for in s. 48 is contained in the Initial Recognition Order.

35 In addition to the mandatory relief provided for in s. 48, pursuant to s. 49 of the *CCAA*, further discretionary relief can be granted if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors. Section 49 provides:

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

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

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

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

36 In this case, the Applicant applies for orders to recognize and give effect to a number of orders of the U.S. Court in the Chapter 11 Proceeding (collectively, the "Chapter 11 Orders") which are comprised of the following:

- (a) the Foreign Representative Order;
- (b) the U.S. Cash Collateral Order;
- (c) the U.S. Prepetition Wages Order;
- (d) the U.S. Prepetition Taxes Order;
- (e) the U.S. Utilities Order;
- (f) the U.S. Cash Management Order;
- (g) the U.S. Customer Obligations Order; and
- (h) the U.S. Joint Administration Order.

37 In addition, the requested relief also provides for the appointment of BDO as an Information Officer; the granting of an Administration Charge not to exceed an aggregate amount of \$75,000 and other ancillary relief.

38 In considering whether it is appropriate to grant such relief, portions of s. 49, s. 50 and 61 of the *CCAA* are relevant:

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

61. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

39 Counsel to the Applicant advised that he is not aware of any provision of any of the U.S. Orders for which recognition is sought that would be inconsistent with the provisions of the *CCAA* or which would raise the public policy exception as referenced in s. 61(2). Having reviewed the record and having heard submissions, I am satisfied that the supplementary relief, relating to, among other things, the recognition of Chapter 11 Orders, the appointment of BDO and the quantum of the Administrative charge, all as set out in the Supplemental Order, is appropriate in the circumstances and is granted.

40 The requested relief is granted. The Initial Recognition Order and the Supplemental Order have been signed in the form presented.

Schedule "A"

1. Massachusetts Elephant & Castle Group Inc.
2. Repechage Investments Limited
3. Elephant & Castle Group Inc.
4. The Elephant and Castle Canada Inc.

5. Elephant & Castle, Inc. (a Texas Corporation)
6. Elephant & Castle Inc. (a Washington Corporation)
7. Elephant & Castle International, Inc.
8. Elephant & Castle of Pennsylvania, Inc.
9. E & C Pub, Inc.
10. Elephant & Castle East Huron, LLC
11. Elephant & Castle Illinois Corporation
12. E&C Eye Street, LLC
13. E & C Capital, LLC
14. Elephant & Castle (Chicago) Corporation

Application granted.

TAB 7

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)



THE HONOURABLE MR.
JUSTICE MORAWETZ

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WEDNESDAY, THE 21ST
DAY OF DECEMBER, 2011

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

APPLICATION OF HARTFORD COMPUTER HARDWARE, INC.
UNDER SECTION 46 OF THE
COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C 36, AS AMENDED

AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN
THE UNITED STATES BANKRUPTCY COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION WITH
RESPECT TO HARTFORD COMPUTER HARDWARE, INC.,
NEXICORE SERVICES, LLC, HARTFORD COMPUTER GROUP,
INC. AND HARTFORD COMPUTER GOVERNMENT, INC.
(COLLECTIVELY, THE "CHAPTER 11 CHAPTER 11 DEBTORS")

SUPPLEMENTAL ORDER
(FOREIGN MAIN PROCEEDING)

THIS APPLICATION, made by Hartford Computer Hardware, Inc. (the "Applicant"), in its capacity as the foreign representative (the "Foreign Representative") of the Chapter 11 Debtors in the proceedings commenced on December 12, 2011, in the United States Bankruptcy Court for the Northern District of Illinois Eastern Division (the "U.S. Court") under Chapter 11 of Title 11 of the United States Code (the "Chapter 11 Proceeding"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") for

an Order substantially in the form enclosed in the Application Record of the Applicant was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Application dated December 13, 2011, the affidavit of Brian Mittman sworn December 12, 2011, the affidavits of Alana Shepherd sworn December 13, 16 and 19, 2011 (collectively, the "**Shepherd Affidavits**"), the preliminary report of FTI Consulting Canada Inc. ("**FTI**"), in its capacity as proposed Information Officer (the "**Proposed Information Officer**") dated December 12, 2011, and the Consent of FTI to act as the Information Officer, each filed;

AND ON BEING ADVISED that the secured creditors who are likely to be affected by the charges created herein were given notice;

AND UPON HEARING the submissions of counsel for the Foreign Representative, counsel for the Proposed Information Officer, and counsel for Avnet International (Canada) Ltd. and Avnet, Inc., no one appearing for Delaware Street Capital Master Fund, L.P. (the "**DIP Lender**") or for any other person on the Service List although duly served as appears from the affidavits of service of Bobbie-Jo Brinkman sworn December 13 and 19, 2011,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

INITIAL RECOGNITION ORDER

2. **THIS COURT ORDERS** that any capitalized terms not otherwise defined herein shall have the meanings given to such terms in the Initial Recognition Order dated December 21, 2011 (the "Recognition Order").

3. **THIS COURT ORDERS** that the provisions of this Supplemental Order shall be interpreted in a manner complementary to the provisions of the Recognition Order, and that in the event of a conflict between the provisions of this Supplemental Order and the provisions of the Recognition Order, the provisions of the Recognition Order shall govern.

RECOGNITION OF FOREIGN ORDERS

4. **THIS COURT ORDERS** that the following orders (collectively, the "Foreign Orders") of the U.S. Court made in the Foreign Proceeding attached to this Order as Schedules "A" through "K" are hereby recognized and given full force and effect in all provinces and territories of Canada pursuant to Section 49 of the CCAA:

- (a) the Foreign Representative Order;
- (b) the Joint Administration Order;
- (c) the Prepetition Wages Order;
- (d) the Customer Obligations Order;
- (e) the Prepetition Shipping Order;
- (f) the Insurance Order;
- (g) the Prepetition Taxes Order;
- (h) the Utilities Order;

- (i) the Cash Management Order;
- (j) the Claims Agent Order; and
- (k) the Interim DIP Facility Order,

(each as defined in the Shepherd Affidavits),

provided, however, that in the event of any conflict between the terms of the Foreign Orders and the Orders of this Court made in the within proceedings, the Orders of this Court shall govern with respect to the Property in Canada.

APPOINTMENT OF INFORMATION OFFICER

5. **THIS COURT ORDERS** that FTI (the “**Information Officer**”) is hereby appointed as an officer of this Court, with the powers and duties set out herein.

ADDITIONAL PROTECTIONS FOR CHAPTER 11 DEBTORS ETC.

6. **THIS COURT ORDERS** that, in addition to the stay of proceedings and the other protections afforded the Chapter 11 Debtors, the Property and the Business in the Recognition Order, the following protections and stay of proceedings shall continue until further Order of this Court:

- (a) during the Stay Period, all Persons having oral or written agreements with the Chapter 11 Debtors or statutory or regulatory mandates for the supply of goods and/or services in Canada, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services provided in respect of the Property or Business of the Chapter 11 Debtors, are hereby

restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Chapter 11 Debtors, and that the Chapter 11 Debtors shall be entitled to the continued use in Canada of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Chapter 11 Debtors in accordance with normal payment practices of the Chapter 11 Debtors or such other practices as may be (i) agreed upon by the supplier or service provider and the relevant Chapter 11 Debtor(s), on notice to the Information Officer and the Foreign Representative, or (ii) ordered by this Court; and

- (b) except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Chapter 11 Debtors with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Chapter 11 Debtors whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations.

7. **THIS COURT ORDERS** that no Proceeding shall be commenced or continued against or in respect of the Information Officer, except with leave of this Court. In addition to the rights and protections afforded the Information Officer herein, or as an officer of this Court, the Information Officer shall have the benefit of all of the rights and protections afforded to a Monitor under the CCAA, and shall incur no liability or obligation as a result of its appointment

or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part.

OTHER PROVISIONS RELATING TO THE INFORMATION OFFICER

8. **THIS COURT ORDERS** that the Information Officer:

- (a) is hereby authorized to provide such assistance to the Foreign Representative in the performance of its duties as the Foreign Representative may reasonably request;
- (b) shall report to this Court at least once every three months with respect to the status of these proceedings and the status of the Foreign Proceedings, which reports may include information relating to the Property, the Business, or such other matters as may be relevant to the proceedings herein;
- (c) in addition to the periodic reports referred to in paragraph 8(b) above, the Information Officer may report to this Court at such other times and intervals as the Information Officer may deem appropriate with respect to any of the matters referred to in paragraph 8(b) above;
- (d) shall have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Chapter 11 Debtors, to the extent that is necessary to perform its duties arising under this Order; and
- (e) shall be at liberty to engage independent legal counsel or such other persons as the Information Officer deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order.

9. **THIS COURT ORDERS** that the Chapter 11 Debtors and the Foreign Representative shall (i) advise the Information Officer of all material steps taken by the Chapter 11 Debtors or the Foreign Representative in these proceedings or in the Foreign Proceedings, (ii) co-operate fully with the Information Officer in the exercise of its powers and discharge of its obligations, and (iii) provide the Information Officer with the assistance that is necessary to enable the Information Officer to adequately carry out its functions.

10. **THIS COURT ORDERS** that the Information Officer shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

11. **THIS COURT ORDERS** that the Information Officer may provide any creditor of a Chapter 11 Debtor with information provided by the Chapter 11 Debtors in response to reasonable requests for information made in writing by such creditor addressed to the Information Officer. The Information Officer shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Information Officer has been advised by the Chapter 11 Debtors is privileged or confidential, the Information Officer shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Information Officer, the Foreign Representative and the relevant Chapter 11 Debtor(s) may agree.

12. **THIS COURT ORDERS** that the Information Officer and counsel to the Information Officer shall be paid by the Chapter 11 Debtors their reasonable fees and disbursements incurred in respect of these proceedings both before and after the making of this Order subject to the

Budget (as defined in the Interim DIP Facility Order), in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts. The Chapter 11 Debtors are hereby authorized and directed to pay the accounts of the Information Officer and counsel for the Information Officer on a weekly basis and, in addition, the Chapter 11 Debtors are hereby authorized to pay to the Information Officer and counsel to the Information Officer, collectively, a retainer in the amount of U.S.\$40,000, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

13. **THIS COURT ORDERS** that the Information Officer and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Information Officer and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice, and the accounts of the Information Officer and its counsel shall not be subject to approval in the Foreign Proceeding.

14. **THIS COURT ORDERS** that the Information Officer and counsel to the Information Officer, if any, shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Property in Canada, which charge shall not exceed an aggregate amount of \$50,000.00, as security for their professional fees and disbursements incurred in respect of these proceedings, both before and after the making of this Order. The Administration Charge shall have the priority set out in paragraphs 16 and 18 hereof.

INTERIM FINANCING

15. **THIS COURT ORDERS** that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "DIP Lender's Charge") on the Property in Canada, which DIP Lender's Charge shall be consistent with the liens and charges created by the Interim DIP

Facility Order, provided however that the DIP Lender's Charge (i) shall not secure an obligation that exists before this Order is made, and (ii) with respect to the Property in Canada, shall have the priority set out in paragraphs 16 and 18 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

16. **THIS COURT ORDERS** that the priorities of the Administration Charge and the DIP Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of \$50,000); and

Second – DIP Lender's Charge.

17. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge or the DIP Lender's Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

18. **THIS COURT ORDERS** that each of the Administration Charge and the DIP Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property in Canada and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

19. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Chapter 11 Debtors shall not grant any Encumbrances over any Property in Canada that rank in priority to, or *pari passu* with, the Administration Charge or

the DIP Lender's Charge, unless the Chapter 11 Debtors also obtains the prior written consent of the Information Officer and the DIP Lender, or further Order of this Court.

20. **THIS COURT ORDERS** that the Administration Charge and the DIP Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "Chargees") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., 1985 c. B-3, as amended (the "BIA"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds any Chapter 11 Debtor, and notwithstanding any provision to the contrary in any Agreement:

- (a) the creation of the Charges shall not create or be deemed to constitute a breach by any Chapter 11 Debtor of any Agreement to which it is a party;
- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and
- (c) the payments made by the Chapter 11 Debtors to the Chargees pursuant to this Order, and the granting of the Charges, do not and will not constitute preferences,

fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

21. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the applicable Chapter 11 Debtor's interest in such real property leases.

SERVICE AND NOTICE

22. **THIS COURT ORDERS** that the Chapter 11 Debtors, the Foreign Representative and the Information Officer each be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Chapter 11 Debtors' creditors or other interested parties at their respective addresses as last shown on the records of the Debtors and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

23. **THIS COURT ORDERS** that the Chapter 11 Debtors, the Foreign Representative and the Information Officer, and any party who has filed a Notice of Appearance, may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time.

24. **THIS COURT ORDERS** that within seven (7) days from the date of this Order, or as soon as practicable thereafter, the Information Officer shall cause to be published a notice substantially in the form attached to this Order as Schedule "L", once a week for two consecutive weeks, in the Globe and Mail.

25. **THIS COURT ORDERS** that the Information Officer (i) shall post on its website all Orders of this Court made in these proceedings, all reports of the Information Officer filed herein, and such other materials as this Court may order from time to time, and (ii) may post on its website any other materials that the Information Officer deems appropriate.

GENERAL

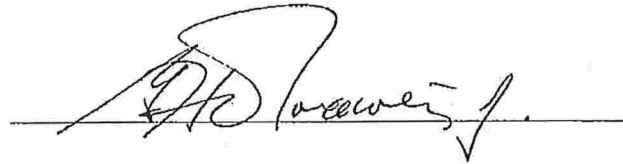
26. **THIS COURT ORDERS** that the Information Officer may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

27. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Chapter 11 Debtors, the Foreign Representative, the Information Officer, and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Chapter 11 Debtors, the Foreign Representative, and the Information Officer, the latter as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Chapter 11 Debtors, the Foreign Representative, and the Information Officer and their respective agents in carrying out the terms of this Order.

28. **THIS COURT ORDERS** that each of the Chapter 11 Debtors, the Foreign Representative and the Information Officer be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

29. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order or seek other relief on not less than seven (7) days notice to the Chapter 11 Debtors, the Foreign Representative, the Information Officer and their respective counsel, and to any other party or parties likely to be affected by the order sought, or upon such other notice, if any, as this Court may order.

30. **THIS COURT ORDERS** that this Order shall be effective as of 12:01 a.m. on the date of this Order.



A handwritten signature in black ink, appearing to read "D. H. Powers", is written over a horizontal line.

CLERK OF COURT
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEC 21 2011

RECEIVED



Handwritten initials "MB" in black ink.

TAB 8



Court File No: CV-11-9279-00CL

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

THE HONOURABLE MR.
JUSTICE MORAWETZ

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MONDAY, THE 4TH DAY
OF JULY, 2011

**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")**

**APPLICATION OF
MASSACHUSETTS ELEPHANT & CASTLE GROUP, INC.**

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

SUPPLEMENTAL ORDER

THIS APPLICATION, made by Massachusetts Elephant & Castle Group, Inc. (the "Applicant") in its capacity as the foreign representative (the "Foreign Representative") of the Chapter 11 Debtors in the proceedings commenced on June 28, 2011, in the United States Bankruptcy Court District of Massachusetts Eastern Division (the "U.S. Court"), under Chapter 11 of Title 11 of the United States Code (the "Chapter 11 Proceeding") for an Order substantially in the form enclosed in the Application Record of the Applicant was heard on this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Application, filed, the Affidavit of Keith Radford sworn June 28, 2011 (the "Radford Affidavit"), filed, the Preliminary Report of BDO Canada Limited ("BDO"), in its capacity as proposed information officer (the "Information Officer"), dated June 28, 2011, filed, the consent of BDO to act as Information Officer, filed, the Affidavit of Sara-Ann Wilson sworn June 30, 2011 (the "Wilson Affidavit"), and upon being provided with copies of the documents required by Section 46 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), and the related orders of the U.S. Court dated June 30, 2011 in respect of the Chapter 11 Proceeding for each of the Foreign Representative and the other Chapter 11 Debtors, including the order of the U.S. Court authorizing the Applicant to act in the capacity of a Foreign Representative on behalf of the Chapter 11 Debtors (the "Foreign Representative Order"), and upon hearing the submissions of counsel for the Foreign Representative, ~~counsel for the proposed Information Officer,~~ and counsel for GE Canada Equipment Financing G.P., no one appearing for any other person on the service list, although properly served as appears from the Affidavits of Ingrid Rowe, sworn June 29, 2011 and June 30, 2011, filed, and upon being advised that no other persons were served with the Notice of Application:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that any capitalized terms not otherwise defined herein shall have the meaning given to such terms in the Initial Recognition Order dated July 4, 2011, made by this Honourable Court in these proceedings (the "IRO").
3. **THIS COURT ORDERS AND DECLARES** that ^{subject to paragraph 4 of} the terms of this Supplemental Order shall not amend the IRO or in any way limit the force and effect of the IRO.

RECOGNITION OF THE CHAPTER 11 ORDERS

4. **THIS COURT ORDERS AND DECLARES** that the following orders of the U.S. Court in the Chapter 11 Proceeding, attached as Schedules "B" to "I" hereto (collectively, the "**Chapter 11 Orders**"), be and are hereby recognized and given full force and effect in all provinces and territories of Canada pursuant to Section 49 of the CCAA:

- (a) the Foreign Representative Order;
- (b) the U.S. Cash Collateral Order;
- (c) the U.S. Prepetition Wages Order;
- (d) the U.S. Prepetition Taxes Order;
- (e) the U.S. Utilities Order;
- (f) the U.S. Cash Management Order;
- (g) the U.S. Customer Obligations Order; and
- (h) the List of Creditors Order;

(each, as defined in the Wilson Affidavit),

provided, however, that in the event of any inconsistency between the terms of the Chapter 11 Orders and the IRO and this Order, the terms of the IRO and this Order shall govern with respect to the Property, *except the provisions of the U.S.*

INFORMATION OFFICER

5. **THIS COURT ORDERS** that:

- (a) BDO be and is hereby appointed as Information Officer (in such capacity, the "**Information Officer**"), as an officer of this Court;
- (b) The Information Officer be and is hereby authorized and empowered, but not obligated, to provide such assistance to the Foreign

(B) Cash Collateral Order which shall prevail over the terms of the IRO and this Order

contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation, or rehabilitation of the environment or relating to the disposal of waste or other contamination, including, but not limited to, the *Canadian Environmental Protection Act* or similar other federal or provincial legislation (collectively, the "Environmental Legislation"); provided, however, that nothing herein shall exempt the Information Officer from any duty to report or make disclosure imposed by applicable Environmental Legislation.

8. **THIS COURT ORDERS** that the appointment of the Information Officer shall not constitute the Information Officer to be an employer or a successor employer or payor within the meaning of any legislation governing employment or labour standards or pension benefits or health and safety or any other statute, regulation or rule of law or equity for any purpose whatsoever and, further, that the Information Officer shall be deemed not to be an owner or in possession, care, control, or management of the Property or Business whether pursuant to Environmental Legislation, or any other statute, regulation or rule of law or equity under any federal, provincial or other jurisdiction for any purpose whatsoever.

9. **THIS COURT ORDERS** that the Information Officer and counsel to the Information Officer shall each be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Foreign Representative as part of the costs of these proceedings. The Foreign Representative is authorized to pay the accounts of the Information Officer and counsel for the Information Officer on a bi-weekly basis or such other period as the Foreign Representative and the Information Officer and its counsel may agree, and the fees and expenses of the Information Officer and its counsel shall be subject to the passing of accounts by this Court, and the Information Officer and its counsel shall not be required to pass their accounts in the Chapter 11 Proceeding, or in any other foreign proceeding. Any payments made to the Information Officer and its counsel in respect of their accounts shall not be subject to approval in the Chapter 11 Proceeding, or in any other foreign proceeding. In addition, the Foreign Representative is authorized to pay the Information Officer a retainer of \$50,000 to be held by the Information Officer as security for payment of its fees and disbursements outstanding from time to time and to pay to the Information Officer's counsel a retainer of \$25,000, to be held by the Information Officer's counsel as security for payment of their respective fees and

disbursements outstanding from time to time.

10. **THIS COURT ORDERS** that the Information Officer and its counsel, as security for the professional fees and disbursements incurred in respect of the within proceedings both before and after the granting of this Order, shall be entitled to the benefit of and are hereby granted a first-ranking charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of \$75,000.

11. **THIS COURT ORDERS** that the Information Officer shall have the benefit of all of the rights and protections afforded to a Monitor under the CCAA, or as an officer of this Court, and the Information Officer shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or willful misconduct on its part as determined by final order of this Court.

12. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against the Foreign Representative, the other Chapter 11 Debtors, or the Information Officer in any court or other tribunal as a result of or relating in any way to the appointment of the Information Officer, the fulfillment of the duties of the Information Officer or the carrying out of this or any other orders of this Court, unless the leave of this Court is first obtained on motion on at least seven (7) days' prior notice to the Information Officer, the Foreign Representative, the Chapter 11 Debtors, and the parties on the service list.

VALIDITY AND PRIORITY OF CHARGES

13. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge in Canada shall not be required, and that the Administration Charge is and shall be valid and enforceable against the Property for all purposes in Canada and shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including, but without limitation, any and all deemed trusts whether existing as of the date hereof or arising in the future and any and all claims in respect of breaches of fiduciary duties (collectively, "**Encumbrances**").

14. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be ordered by this Court, the Chapter 11 Debtors shall not grant any Encumbrances

over any Property that rank in priority to, or *pari passu* with the Administration Charge, unless the Chapter 11 Debtors also obtain the prior written consent of the chargees entitled to the benefit of the Administration Charge (collectively, the "**Chargees**") or further Order of this Court.

15. **THIS COURT ORDERS** that the Administration Charge shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not be limited or impaired in any way by: (a) the pendency of these proceedings and any declarations of insolvency made in these proceedings; (b) any application(s) for bankruptcy order(s) issued pursuant to the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), or any bankruptcy orders made pursuant to such application(s); (c) any proceeding taken or that might be taken against the Chapter 11 Debtors under the BIA or the *Winding-Up and Restructuring Act*, R.S.C. 1985, c. W-11, as amended; (d) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (e) the provisions of any federal or provincial statutes; or (f) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of any Encumbrances contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Chapter 11 Debtors.

16. **THIS COURT ORDERS** that notwithstanding any provision to the contrary in any such Agreement or otherwise:

(i) the creation of the Administration Charge shall not create or be deemed to constitute a breach by the Chapter 11 Debtors of any Agreement to which they are party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Administration Charge; and

(iii) the payments made by the Chapter 11 Debtors pursuant to this Order and the granting of the Administration Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive

conduct, or other challengeable or voidable transactions under any applicable law.

17. **THIS COURT ORDERS** that the Administration Charge shall attach to the Property (including, without limitation, any lease, sub-lease, offer to lease, license, permit or other contract), notwithstanding any requirement for the consent of the lessor or other party to any such lease, license, permit or contract or any other person or the failure to comply with any other condition precedent.

18. **THIS COURT ORDERS** that the Administration Charge created by this Order over leases of real property in Canada shall only attach to the Chapter 11 Debtors' interest in such real property leases

AID AND ASSISTANCE OF OTHER COURTS

19. **THIS COURT HEREBY ORDERS AND REQUESTS** the aid and recognition of any court, tribunal, regulatory, governmental or administrative body having jurisdiction in Canada, the United States or elsewhere, to give effect to this Order and to assist the Foreign Representatives, the Chapter 11 Debtors, the Information Officer and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory, governmental and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Chapter 11 Debtors, the Foreign Representative, the Information Officer and their respective agents, as may be necessary or desirable to give effect to this Order or to assist the Chapter 11 Debtors, the Foreign Representative, the Information Officer and their respective agents in carrying out the terms of this Order.

NOTICE OF PROCEEDINGS

20. **THIS COURT ORDERS** that within 3 business days from the date of this Order, or as soon as practicable thereafter, the Information Officer shall publish a notice as required by subsection 53(b) of the CCAA substantially in the form attached to this Order as Schedule "J" in The Globe and Mail (National Edition) or the National Post for one (1) day in two (2) consecutive weeks without delay following the issuance of this Order.

GENERAL PROVISIONS

21. **THIS COURT ORDERS** that the Information Officer or the Foreign Representative may, from time to time, apply to this Court for advice, directions, or for such further or other relief as they may advise in connection with the proper execution of this Order or the IRO, the discharge or variation of their respective powers and duties under this Order, and the recognition in Canada of subsequent orders of the U.S. Court made in the Chapter 11 Proceeding.

22. **THIS COURT ORDERS** that nothing in this Order shall prevent the Information Officer from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Chapter 11 Debtors, or in respect of the Business or the Property, upon further order of the Court.

23. **THIS COURT ORDERS** that each of the Foreign Representative, the Chapter 11 Debtors and the Information Officer be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order or the IRO.

24. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order, and except with respect to paragraph 4 of this Order, any interested person may apply to this Court to vary or rescind this Order or seek other relief upon seven (7) days notice to the Foreign Representative, the Chapter 11 Debtors and their counsel, the Information Officer and its counsel 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.



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

JUL 04 2011

PER/PAR: 

TAB 9

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

Hartford Computer Hardware Inc., Re

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

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

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

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

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

Morawetz J.

Heard: February 1, 2012

Judgment: February 1, 2012

Written reasons: February 15, 2012

Docket: CV-11-9514-00CL

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

Subject: Civil Practice and Procedure; Insolvency; Corporate and Commercial; International

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Orders — Miscellaneous

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

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

Recognition of orders made in U.S. Chapter 11 proceedings — Chapter 11 proceedings were commenced in U.S. Court by Chapter 11 debtors — Chapter 11 proceeding was recognized as foreign main proceeding under

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

Table of Authorities

Statutes considered:

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

Generally — referred to

Pt. IV — referred to

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

s. 49 — pursuant to

s. 61(2) — considered

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

Morawetz J.:

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

- (i) the Final Utilities Order;
 - (ii) the Bidding Procedures Order;
 - (iii) the Final DIP Facility Order.
- (collectively, the U.S. Orders")

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

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

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

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

(iv) granted a stay of proceedings;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Motion granted.

TAB 10

2015 ONSC 2692
Ontario Superior Court of Justice [Commercial List]

Xinergy Ltd., Re

2015 CarswellOnt 20848, 2015 ONSC 2692, 267 A.C.W.S. (3d) 517, 37 C.B.R. (6th) 331

**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 Xinergy Ltd.

Newbould J.

Heard: April 23, 2015
Judgment: April 24, 2015
Docket: CV-15-10936-00CL

Counsel: Jane Dietrich, Natalie Levine for Applicant
Aubrey E. Kauffman for Whitebox Advisors LLC, Highbridge Capital Management LLC and other DIP Lenders
Sean Sweig for Proposed Information Officer, Deloitte Restructuring Inc.
James H. Grant for Shareholder of the Applicant, Jon Nix

Subject: Insolvency; International

Headnote

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

Recognizing American proceedings — Debtor Ontario corporation and its US subsidiaries commenced voluntary reorganization proceedings in US Bankruptcy Court — Debtor brought application pursuant to Companies' Creditors Arrangement Act (CCAA) for order recognizing US proceedings as foreign main proceedings and for orders recognizing certain orders made by US court — Application granted — Proceedings in US were foreign main proceedings and order was granted under s. 48(1) of CCAA staying all proceedings against debtor — Although debtor's registered office was in Ontario, it had no operations or employees in Canada and majority of debtor's functions were shared with its US subsidiaries in US — Order was made recognizing interim DIP Facility Order granted by US court as there was no material prejudice to Canadian creditors — Other interim orders made by US court were recognized — Appointment of Information Officer with super-priority charge for its fees was approved.

Conflict of laws --- Bankruptcy — Miscellaneous

Recognizing American proceedings — Debtor Ontario corporation and its US subsidiaries commenced voluntary reorganization proceedings in US Bankruptcy Court — Debtor brought application pursuant to Companies' Creditors Arrangement Act (CCAA) for order recognizing US proceedings as foreign main proceedings and for orders recognizing certain orders made by US court — Application granted — Proceedings in US were foreign main proceedings and order was granted under s. 48(1) of CCAA staying all proceedings against debtor — Although debtor's registered office was in Ontario, it had no operations or employees in Canada and majority of debtor's functions were shared with its US subsidiaries in US — Order was made recognizing interim DIP Facility Order granted by US court as there was no material prejudice to Canadian creditors — Other interim orders made by US court were recognized — Appointment of Information Officer with super-priority charge for its fees was approved.

Table of Authorities

Cases considered by *Newbould J.*:

Hartford Computer Hardware Inc., Re (2012), 2012 ONSC 964, 2012 CarswellOnt 2143, 94 C.B.R. (5th) 20 (Ont. S.C.J. [Commercial List]) — considered

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

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

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]) — referred to

Statutes considered:

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

Generally — referred to

Pt. IV — referred to

s. 44 — considered

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

s. 45(2) — considered

s. 46(1) — considered

s. 47(1) — considered

s. 47(2) — considered

s. 48(1) — considered

s. 49 — considered

APPLICATION by debtor corporation for order recognizing American bankruptcy proceedings as foreign main proceedings and for orders recognizing certain orders made by American court.

Newbould J.:

1 On April 6, 2015, Xinergy Ltd. ("Xinergy"), an Ontario corporation, commenced a voluntary reorganization proceeding in the United States Bankruptcy Court for the Western District of Virginia (the "U.S. Court") under chapter 11 of the United States Bankruptcy Code. On the same date, 25 of Xinergy's U.S. subsidiaries also filed voluntary petitions under chapter 11 of the Bankruptcy Code with the U.S. Court.

2 On April 6 and 7, 2015 the chapter 11 Debtors filed 17 First Day Motions with the U.S. Court and on April 7 and 8, 2015, the U.S. Court entered the orders requested.

3 Xinergy has now brought an application before this Court pursuant to Part IV of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended for an order recognizing the U.S. proceedings as foreign main proceedings and for orders recognizing some of the first day orders made by the U.S. Court. At the conclusion of the hearing I granted the orders requested for short reasons to follow. These are my reasons.

Business of the applicant

4 Xinergy is a publicly traded company on the TSX under the ticker symbol XRG. As at September 30, 2014, the date of Xinergy's most recent public filing, there were approximately 58.3 million voting common shares issued and outstanding, and 7.5 million common non-voting shares issued and outstanding, totalling approximately 65.8 million common shares.

5 The Chapter 11 Debtors are a U.S.-based producer of metallurgical and thermal coal with mineral reserves, mining operations and coal properties located in the Central Appalachian regions of West Virginia and Virginia. The Chapter 11 Debtors' principal operations include two active mining complexes known as South Fork and Raven Crest located in Greenbrier and Boone Counties, West Virginia. The Chapter 11 Debtors also lease or own the mineral rights to properties located in Fayette, Nicholas and Greenbrier Counties, West Virginia and Wise County, Virginia. Collectively, the Chapter 11 Debtors lease or own mineral rights to approximately 72,000 acres with proven and probable coal reserves of approximately 77 million tons and additional estimated reserves of 40 million tons.

6 The Chapter 11 Debtors currently produce and ship coal from the South Fork mid-volatile metallurgical mine and the Raven Crest thermal operations. The Chapter 11 Debtors' primary customers for metallurgical coal — used in a chemical process that yields coke for the manufacture of steel — are steel producers, commodities brokers and industrial customers throughout North America, Europe and South America. Electric utilities and industrial companies in the southeastern United States and Europe are the principal customers for the Chapter 11 Debtors' thermal coal.

7 Recently, U.S. demand for thermal coal has fallen sharply in large part due to (i) increasingly attractive alternative sources of energy, such as natural gas, and (ii) burdensome environmental and governmental regulations impacting end users. Simultaneously, the increasingly stringent regulatory environment in which coal companies operate has driven up the *cost of* mining and processing coal. Continued weakness in the market for metallurgical and thermal coal, combined with an extremely cold and snowy winter that impacted the mining and shipment of coal, has continued to erode Xinergy's cash position. Prior to approval by the U.S. Court of the post-petition DIP financing, Xinergy lacked the liquidity needed to maintain operations in the near term and to sustain its current capital structure. The confluence of these factors and Xinergy's substantial debt burden has taken Xinergy to the point of unsustainability absent the relief provided by the Chapter 11 proceeding.

8 Xinergy has issued US\$200 million in 9.25% Senior Secured Notes (the "Second Lien Notes"), of which approximately US\$195 million (principal amount) is outstanding. As of the April 6, 2015, Xinergy was also obligated under two term loans totalling US\$20 million in principal amount (the "First Lien Loans").

Requests for relief

9 Xinergy seeks recognition of four of the orders granted by the U.S. Court. The U.S. Court orders are:

- (a) Order Authorizing Xinergy Ltd. to Act as a Foreign Representative (the "Foreign Representative Order");
- (b) Interim Order (I) Authorizing Debtors (a) to Obtain Post-petition Financing and (b) to Utilize Cash Collateral; (II) Granting Adequate Protection to Prepetition Secured Parties; and (III) Scheduling Final Hearing (the "Interim DIP Order");
- (c) Interim Trading Order Establishing Notification Procedures and Approving Restrictions on Certain Transfers of Equity Interests in the Debtors' Estates (the "Interim Trading Order"); and

(d) Interim Order (I) Authorizing Debtors to Maintain Existing Bank Accounts and Business Forms and Continue to Use Existing Cash Management System; (II) Granting Administrative Expense Status for Intercompany Claims; and (III) Waiving the Requirements of Section 345(b) of the Bankruptcy Code (the "Interim Cash Management Order")

Recognition of foreign main proceeding

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

11 A "foreign representative" for the purpose of subsection 46(1) of the CCAA is defined by subsection 45(1) of the CCAA, which provides:

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

- (a) monitor the debtor company's business and financial affairs or the purpose of reorganization; or
- (b) act as a representative in respect of the foreign proceeding.

12 In the Chapter 11 proceedings, the Chapter 11 Debtors sought the appointment of Xinergy as the foreign representative of the Chapter 11 Debtors, within the meaning of subsection 45(1) of the CCAA. The Foreign Representative Order was granted by the U.S. Court on April 7, 2015.

13 Subsection 47(1) of the CCAA provides that the Court shall grant an order recognizing the foreign proceeding if (i) the proceeding is a foreign proceeding; and (ii) the applicant is a foreign representative in respect of that proceeding. There is no question but that the Chapter 11 proceedings are foreign proceedings and should be recognized under the CCAA.

14 Subsection 47(2) of the CCAA requires that the Court specify whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding." I am satisfied that the Chapter 11 proceedings are foreign main proceedings.

15 Subsection 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 interests, or COMI. The registered office of Xinergy is in Toronto at its counsel's office. In considering whether the registered office presumption has been rebutted a court should consider the following factors in determining COMI (i) the location is readily ascertainable by creditors (ii) the location is one in which the debtor's principal assets and operations are found and (iii) the location is where the management of the debtor takes place. See *Lightsquared LP, Re* (2012), 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List]); *MtGox Co., Re* (2014), 20 C.B.R. (6th) 307 (Ont. S.C.J. [Commercial List]).

16 Although Xinergy's registered office is in Ontario, it has no operations in Canada. Additionally, Xinergy has no employees in Canada and no offices in Canada other than its registered office. The Chapter 11 Debtors operate on an integrated basis, with corporate and other major decision-making occurring from the consolidated offices in Knoxville, Tennessee. In particular:

- (a) Corporate and other major decision-making occurs from the consolidated offices in Knoxville, Tennessee, although administrative employees frequently work remotely or from the Chapter 11 Debtors' mines in the United States;
- (b) All of the senior executives of the Chapter 11 Debtors, including Xinergy, are residents of the United States;

(c) In order to fulfil the Canadian residency requirements of Ontario corporations, Xinergy has two Canadian directors;

(d) The majority of the management of the Chapter 11 Debtors, including Xinergy, is shared;

(e) Employee administration, human resource functions, marketing and communications decisions are made, and related actions taken, on behalf of all of the Chapter 11 Debtors, including Xinergy, in the United States;

(f) The Chapter 11 Debtors, including Xinergy, share a cash management system that is largely funded by the U.S. Subsidiaries, overseen by employees of the United States-based Chapter 11 Debtors and located primarily in the United States;

(g) Other functions shared between the Chapter 11 Debtors, including Xinergy, are managed from the United States including: pricing decisions, business development decisions, accounts payable, accounts receivable and treasury functions;

(h) While Xinergy maintains a bank account with The Toronto Dominion Bank in Ontario, the Chapter 11 Debtors use this account to make Canadian denominated deposits and to pay for Canadian services. When additional funds are required, a transfer is made from the U.S. operating account at Xinergy Corp. Xinergy is dependent on the U.S. subsidiaries for substantially all of its funding requirements; and

(i) Other functions shared between the Chapter 11 Debtors, including Xinergy, are managed from the United States including: pricing decisions, business development decisions, accounts payable, accounts receivable and treasury functions.

17 As the Chapter 11 proceedings are foreign main proceedings, an order is to go under subsection 48(1) of the CCAA staying all proceedings against Xinergy.

Interim DIP Order

18 The Interim DIP Facility Order, inter alia:

(a) authorizes Xinergy Corp. to obtain post-petition financing pursuant to the DIP Facility up to an aggregate principal amount of \$40 million;

(b) authorizes Xinergy and the other Chapter 11 Debtors to unconditionally guarantee all obligations arising under the DIP Facility;

(c) authorizes the Chapter 11 Debtors to use proceeds of the DIP Facility to pay in full the First Lien Loans (the holders of the First Lien Notes are the DIP lenders); and

(d) grants first priority super priority claims in connection with the DIP Facility.

19 The authorization by the U.S. Court to use the proceeds of the DIP Facility to pay out the First Lien Loans, called a "rollup" provision, is not something that can be ordered in a CCAA proceeding as subsection 11.2(1) of the CCAA provides that DIP security may not secure an obligation that existed prior to an Initial Order. However, the issue is whether our Court should recognize the U.S. Court order authorizing that DIP facility under the principles of comity recognized in section 44 of Part IV of the CCAA.

20 Such a provision has been recognized in *Hartford Computer Hardware Inc., Re* (2012), 94 C.B.R. (5th) 20 (Ont. S.C.J. [Commercial List]) by Morawetz J. (as he then was) under section 49 of the CCAA which permits an order to be made if the Court is satisfied that it is necessary to protect the debtor's property or is in the interests of its creditors.

21 It was obviously seen by the U.S. Court to be in the interests of Xinergy and the other Chapter 11 Debtors to make DIP order that it did. One question to consider is whether there would be any material adverse interest to any Canadian interests in recognizing the "rollup" features of the DIP facility. If there were such material adverse interest, it would put in play a consideration of that adverse interest vis-à-vis the principles of comity that speak to the recognition of an order made in a foreign main proceeding.

22 In this case, there are four unsecured creditors of Xinergy in Canada being (i) a director owed approximately \$1,674, (ii) TMX Equity Transfer Services owed approximately \$4,000, (iii) TMX owed \$16,492, and (iv) the solicitors for Xinergy (who consent to the rollup DIP facility). The bank account in Canada had approximately \$48,415 in it on April 6, 2015. The Canadian unsecured creditors, however, had no economic interest in that bank account as it was secured to the holders of the First Lien Notes. The DIP facility has not changed that, Deloitte, the proposed Information Officer, is of the view that there will be no material prejudice to the Canadian creditors if the Interim Dip Facility order is recognized in these proceedings, and I accept that view.

23 I am satisfied that the Interim DIP Facility Order should be recognized.

Other orders

24 The interim trading order made by the U.S. Court ordered on an interim basis certain restrictions on the trading of Xinergy stock. In light of the rules under the Internal Revenue Code in the United States, transfers of the stock may, through no fault of the Chapter 11 Debtors, deprive the Chapter 11 Debtors of important tax benefits. The Interim Trading order was made to protect against this potential harm to debtors in chapter 11 proceedings. It is appropriate to recognize it in this CCAA proceeding.

25 The relief granted by the U.S. Court in the Interim Cash Management Order will permit Xinergy and the other Chapter 11 Debtors to continue to operate in ordinary course, thereby preserving value for creditors. It is appropriate to recognize it in this CCAA proceeding.

26 Xinergy has requested an order appointing Deloitte as Information Officer and granting a super-priority charge up to a maximum of \$100,000 for its fees and those of its counsel. It is appropriate to make such an order. The DIP lenders consent to the charge. The appointment of Deloitte will help facilitate these proceedings and the dissemination of information concerning the Chapter 11 proceeding. The Information Officer will: (i) act as a resource to the foreign representative in the performance of its duties; (ii) *act as an officer to the Court*, reporting to the Court on the proceedings, as required by the Court; and (iii) provide stakeholders of Xinergy with material information on the Chapter 11 proceeding. See *Lear Canada, Re* (2009), 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) at para. 23 per Pepall J. (as she then was).

27 For these reasons, I signed the orders as requested at the conclusion of the hearing.

Application granted.

TAB 11

CITATION: Re: Performance Sports Group Ltd., 2016 ONSC 6800
COURT FILE NO.: CV-16-11582-00CL
DATE: 20161101

**SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF PERFORMANCE SPORTS GROUP LTD., BAUER HOCKEY CORP., BAUER HOCKEY
RETAIL CORP., BAUER PERFORMANCE SPORTS UNIFORMS CORP., BPS CANADA
INTERMEDIATE CORP., BPS DIAMOND SPORTS CORP., EASTON BASEBALL/SOFTBALL
CORP., KBAU HOLDINGS CANADA, INC., PERFORMANCE LACROSSE GROUP CORP.,
PSG INNOVATION CORP., BAUER HOCKEY RETAIL INC., BAUER HOCKEY, INC., BAUER
PERFORMANCE SPORTS UNIFORMS INC., BPS DIAMOND SPORTS INC., BPS US
HOLDINGS INC., EASTON BASEBALL/SOFTBALL INC., PERFORMANCE LACROSSE
GROUP INC., PSG INNOVATION INC.

(Applicants)

BEFORE: Newbould J.

COUNSEL: *Peter Howard and Kathryn Esaw*, for the Applicants

Robert I. Thornton and Rachel Bengino, for the Proposed Monitor Ernst & Young
Inc.

Bernard Boucher and John Tuzyk, for Sagard Capital Partners, L.P

David Bish and Adam Slavens, for Fairfax Financial Holdings Limited

Robert Staley, for the board of directors of Performance Sports Group Ltd.

Joseph Latham and Ryan Baulke, for the Ad Hoc Committee of certain term
lenders

Tony Reyes and Evan Cobb, for Bank of America, the ABL DIP lender

HEARD: October 31, 2016

ENDORSEMENT

[1] On October 31, 2016 Performance Sports Group Ltd. (“PSG”) and the other Applicants (collectively, the “Applicants” or the “PSG Entities”) applied for and were granted protection under the CCAA and an Initial Order was signed, for reasons to follow. These are my reasons.

[2] PSG, a public company incorporated under British Columbia law and traded publicly on the Toronto and New York stock exchanges, is the ultimate parent of the other PSG Entities, as well as certain entities in Europe which are not applicants in the this proceeding.

[3] The PSG Entities are leading designers, developers and manufacturers of high performance sports equipment and related apparel. Historically focused on hockey, the PSG Entities expanded their business to include equipment and apparel in the baseball/softball and lacrosse markets. The hockey business operates under the BAUER, MISSION and EASTON brands; the baseball/softball business operates under the EASTON and COMBAT brands, and the lacrosse business operates under the MAVERIK and CASCADE brands.

[4] The hockey and baseball/softball markets are the PSG Entities’ largest business focus, generating approximately 60% and 30% of the Applicants’ sales in fiscal 2015, respectively, with remaining sales derived from the lacrosse and apparel businesses. The PSG Entities have a diverse customer base, including over 4,000 retailers across the globe and more than 60 distributors. In fiscal 2015, approximately 58% of the PSG Entities’ total sales were in the U.S., approximately 24% were in Canada, and approximately 18% were in the rest of the world.

[5] The PSG Entities are generally structured so that there is a Canadian and U.S. subsidiary for each major business line. Some of the entities also perform specific functions such as risk management, accounting etc. for the benefit of the other PSG Entities. The Applicants have commenced parallel proceedings in the U.S. under Chapter 11 of the US Bankruptcy Code in the Bankruptcy Court for the District of Delaware.

Employees and benefits

[6] As of September 30, 2016, the Applicants had 728 employees globally, with 224 employees in Canada, 430 in the U.S., 23 in Asia and 51 in Europe.

[7] The majority of the PSG Entities' workforce is non-unionized. Canada is the only location with unionized employees, who are employed by Bauer Canada in Blainville, Quebec. 33 of 119 full-time Blainville situated employees are members of the United Steelworkers' Union of America Local 967 and are subject to a five-year collective bargaining agreement expiring on November 30, 2017.

[8] Under the collective bargaining agreement with the unionized employees in Blainville, Quebec, Bauer Canada maintains a simplified defined contribution pension plan registered with Retraite Quebec. Under the plan, Bauer Canada matches employee contributions up to C\$0.35/per hour worked by the employee up to a maximum of 80 hours bi-weekly.

[9] Bauer Canada provides a supplemental pension plan (the "Canadian SERP") for nine former executives which is not a registered pension plan and does not accept new participants. There is no funding obligation under these plans. As at May 31, 2016, the Canadian SERP had an accrued benefit obligation of approximately C\$4.53 million. The PSG Entities do not intend to continue paying the Canadian SERP obligations during the CCAA proceedings.

[10] The PSG Entities provide a post-retirement life insurance plan to most Canadian employees. The life insurance plan is not funded and as at May 31, 2016 had an accrued benefit obligation of C\$614,000. In February, 2016, the PSG Entities closed a distribution facility in Mississauga, Ontario. Approximately 51 employees belonging to the Glass, Molders, Pottery, Plastics and Allied Workers International Union were terminated in January and February 2016 because of the closure.

[11] Due to the consolidation of the COMBAT operations with the EASTON operations, the PSG Entities terminated the employment of an additional 85 individuals between July and October, 2016, of whom approximately 77% were employees located in Canada and 23% were

employees located in the U.S. The workforce reductions, primarily related to consolidation of the COMBAT operations, have resulted in the number of the PSG Entities' employees falling by approximately 15% since the end of fiscal 2016 and approximately 19% since the end of calendar 2015.

Assets and liabilities

[12] As at September 30, 2016, the Applicants had assets with a book value of approximately \$594 million and liabilities with a book value of approximately \$608 million.

[13] The majority of the Applicants' assets are comprised of accounts receivable, inventory and intangible assets. The Applicants' intellectual property and brand assets are a significant part of their businesses. The PSG Entities' patent portfolio includes hundreds of issued and pending patent applications covering a number of essential business lines. In addition to their patent portfolio, the PSG Entities have a number of registered trademarks to protect their brands.

[14] The major liabilities of the PSG Entities are obligations under:

(a) a term loan facility (the "Term Loan Facility"): PSG is the borrower with a syndicate of lenders (the "Term Lenders") participating in the Term Loan Facility. The Term Loan Facility is governed by the term loan credit agreement dated as of April 15, 2014 (the "Term Loan Agreement"). As at October 28, 2016, approximately \$330.5 million plus \$1.4 million accrued interest was outstanding under the Term Loan Facility.

(b) an Asset-based revolving facility (the "ABL Facility" and together with the Term Loan Facility, the "Facilities"): a number of the PSG Entities are borrowers and BOA is the agent for a syndicate of lenders (the "ABL Lenders" and, together with the Term Lenders, the "Secured Lenders") participating in the ABL Facility. The ABL Facility is governed by the revolving ABL credit agreement dated as of April 15, 2014 (the "ABL Agreement"). As at October 28, 2016, approximately \$159 million was outstanding under the ABL Facility.

Problems leading to the CCAA filing

[15] A number of industry-wide and company-specific events have caused significant financial difficulties for the Applicants in the past 18 months:

- a. Several key customers, retailers of sports equipment and apparel and sporting goods stores, abruptly filed for bankruptcy in late 2015 and 2016, resulting in substantial write-offs of accounts receivable and reduced purchase orders.
- b. A marked and unexpected underperformance in the two most significant of the PSG Entities' business lines, being the Bauer Business and the Easton Business, has had an extremely negative effect on the PSG Entities' overall profitability.
- c. The PSG Entities' financial results have been negatively affected by currency fluctuations.
- d. The PSG Entities reduced their earnings guidance for FY2016 in response to their recent financial difficulties, which triggered a sharp decline in their common share price. Due that fall in share prices, the PSG Entities incurred considerable professional fees defending a recent class action and responding to inquiries by U.S. and Canadian regulators as to their continuous disclosure record.
- e. The PSG Entities have triggered an event of default under their Facilities as a result of their failure to file certain reporting materials required under U.S. and Canadian securities law. The PSG Entities have been operating under the forbearance of their secured lenders since August 29, 2016, but that forbearance expired on October 28, 2016, leaving the PSG Entities in default under their Facilities.

Anticipated stalking horse bid sales process

[16] The Applicants, in response to the myriad of issues leading to the current liquidity crisis and in particular in response to their failure to timely file the reporting materials, engaged in a thorough review of the PSG Entities' strategic alternatives. The PSG Entities concluded that

negotiating a going-concern sale of their businesses was the optimal course to maximize value, and structured a process by which do so.

[17] As part of that process, the PSG Entities have entered into an asset purchase agreement (the “Stalking Horse Agreement”) for the sale of substantially all of their assets to a group of investors led by Sagard Capital Partners, L.P., the holder of approximately 17% of the shares of PSG, and Fairfax Financial Holdings Limited for a purchase price of \$575 million. The Stalking Horse Agreement contemplates that the Applicants will continue as a going concern under new ownership, their secured debt will be fully repaid and payment of trade creditors. It further contemplates the preservation of a significant number of jobs in Canada and the U.S. The bid contemplated under the Stalking Horse Agreement will, subject to Court approval, serve as the stalking horse bid in a CCAA/Chapter 11 sales process to take place over the next 60 days of the proceedings and which is expected to conclude early in 2017. Approval of the sales process will be sought on the come-back motion later in November.

Analysis

[18] I am quite satisfied that each of the PSG Entities are debtor companies within the meaning of the CCAA and that they are insolvent with liabilities individually and as a whole over the threshold of \$5 million.

[19] There are two DIP loans for which approval is sought, being an ABL DIP and a Term Loan DIP, as follows:

- (a) A group comprised of members of the ABL Lenders (“ABL DIP Lenders”), will provide an operating loan facility of \$200 million (the “ABL DIP Facility”) pursuant to an ABL DIP Credit Agreement (the “ABL DIP Credit Agreement”). The advances are expected to be made progressively and on an as-needed basis. All receipts of the Applicants will be applied to progressively replace the existing indebtedness under the ABL Credit Agreement, which is in the amount of \$160 million. Accordingly, the facility provided by the ABL DIP Lenders is estimated provide up an additional \$25 million of liquidity as compared to what is currently provided under the ABL Facility.

(b) The Sagard Group (the “Term Loan DIP Lenders” and together with the ABL DIP Lenders, the “DIP Lenders”), will provide a term loan facility (the “Term Loan DIP Facility” and together with the ABL DIP Facility, the “DIP Facilities”) in the amount of \$361.3 million pursuant to a Term Loan DIP Credit Agreement (the “Term Loan DIP Credit Agreement” and together with the ABL DIP Credit Agreement, the “DIP Agreements”). The advances are expected to be made progressively as the funds are needed. The Term Loan DIP Facility will be applied to refinance the existing indebtedness under the Term Loan Credit Agreement, in the amount of approximately \$331.3 million, to finance operations and to pay expenditures pertaining to the restructuring process. Accordingly, the Term Loan DIP Facility will provide approximately \$30 million in new liquidity to fund ongoing operating and capital expenses during the restructuring proceedings.

[20] The DIP Facilities were negotiated after the Applicants retained Centerview Partners LLC to assist in putting the required interim financing in place. The Applicants, with the assistance of Centerview, determined that obtaining interim financing from a third party would be extremely challenging, unless such facility was provided either junior to the ABL Facility and Term Loan Facility, on an unsecured basis, or paired with a refinancing of the existing indebtedness. The time was tight and in view of the existing charges against the assets and the very limited availability of unencumbered assets, it was thought that there would be little or no interest for third parties to act as interim financing providers. Accordingly, the Applicants decided to focus their efforts on negotiating DIP financing with its current lenders and stakeholders.

[21] I am satisfied that the DIP Facilities should be approved, taking into account the factors in section 11.2(4) of the CCAA. Without DIP financing, the PSG Entities do not have sufficient cash on hand or generate sufficient receipts to continue operating their business and pursue a post-filing sales process. The management of the PSG Entities’ business throughout the CCAA process will be overseen by the Monitor, who will supervise spending under the ABL DIP

Facility. The Monitor¹ is supportive of the DIP Facilities in light of the fact that the Applicants are facing a looming liquidity crisis in the very short term and the Applicants, Centerview and the CRO have determined that there is little alternative other than to enter into the proposed DIP Agreements.

[22] Section 11.2(1) of the CCAA provides that security for a DIP facility may not secure an obligation that existed before the order authorizing the security was made. The effect of this provision is that advances under a DIP facility may not be used to repay pre-filing obligations. In this case, the ABL DIP Facility is a revolving facility. Under its terms, receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility. The applicants submit that in this case, the ABL DIP Facility preserves the pre-filing status quo by upholding the relative pre-stay priority position of each secured creditor. By requiring that the PSG Entities only use post-filing cash receipts to pay down the accrued balance under the revolving credit facility, the ABL DIP Lenders are in no better position with respect to the priority of their pre-filing debt relative to other creditors. I accept that no advances under the ABL DIP Facility will be used to pay pre-filing obligations and there has been inserted in the Initial Order a provision that expressly prevents that. The provision that receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility is approved.

[23] The PSG Entities seek authorization to pay pre-filing amounts owing to the following suppliers, so long as these payments are approved by the Monitor:

- (a) Foreign suppliers located throughout Asia to which the PSG Entities predominantly source their manufacturing operations;
- (b) Domestic suppliers located in the U.S. and Canada which supply critical goods and services;

¹ Ernst & Young has filed a Report as the Proposed Monitor. For ease of reference I refer to Ernst & Young in this decision as the Monitor.

- (c) Suppliers in the Applicants' extensive global shipping, warehousing and distribution network, which move raw materials to and from the Applicants' global manufacturing centers and to move finished products to the Applicants' customers;
- (d) Those suppliers who delivered goods to the PSG Entities in the twenty days before October 31, 2016 - all of whom are entitled to be paid for their services under U.S. bankruptcy law; and
- (e) Third parties such as contractors, builders and repairs, who may potentially assert liens under applicable law against the PSG Entities.

[24] There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. The recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern. See *Re Canwest Global Communications Corp.* (2009), 59 C.B.R. (5th) 72 at para. 43.

[25] I am satisfied that an order should be made permitting the payments as requested. Any interruption of supply or service by the critical suppliers could have an immediate materially adverse impact on the PSG Entities' business, operations and cash flow, and could thereby seriously jeopardize their ability to restructure and continue as a going concern. Certain of the critical suppliers may not be able to continue to operate if not paid for pre-filing goods and services. The PSG Entities do not have any readily available means to replace these suppliers or, alternatively, to compel them to supply goods and services. There is a substantial risk that certain of the critical suppliers, including foreign suppliers, will interrupt supply if the pre-filing arrears that they are owed are not paid, all of which would risk unanticipated delays, interruptions and shutdowns. Payment of amounts in excess of \$10,000 will require Monitor approval.

[26] The PSG Entities seek approval to continue the use of their current Transfer Pricing Model to operate their business in the ordinary course. The Transfer Pricing Model is intended to ensure that each individual PSG Entity is compensated for the value of their contribution to the PSG Entities' overall business. The Applicants say that to ensure that the PSG Entities' intercompany transfers are not inhibited and stakeholder value is not eroded with regard to any particular entity, the Court should approve use of the Transfer Pricing Model. No doubt section 11 of the CCAA gives the Court jurisdiction to make the order sought and to continue the business as it has been operated prior to the CCAA and in this case it is desirable in light of the intention to sell the business as a going concern. I approve the continued use of the Transfer Pricing Model. In doing so, I am not to be taken as making any judgment as to the validity of the Transfer Pricing Model, i.e. whether it would pass muster with the relevant taxing authorities.

[27] The PSG Entities seek an administrative charge in the amount of \$7.5 million, and it is supported by the Monitor. The charge is to cover the fees and disbursements of the Monitor, U.S. and Canadian counsel to the Monitor, U.S. and Canadian counsel to the Applicants and counsel to the directors of the Applicants, and as defined in the APL DIP Agreement, and is to cover the fees and disbursements incurred both before and after the making of the Initial Order.

[28] I realize that the model order provides for an administration charge to protect fees and disbursements incurred both before and after the order is made by of the Monitor, counsel to the Monitor and the Applicant's counsel. In this case, I raised a concern that past fees for a broad number of lawyers, including defence class action counsel in the U.S., could be paid from cash whereas it appeared from the material that there may be unpaid severance or other payments owing to employees in Canada that would not be paid.

[29] Normally it is not an issue what an administration charge covers, with professionals taking care when advising companies in financial trouble and contemplating CCAA proceedings that they remain current with their billings. The CCAA does not expressly state whether an administration charge can or cannot cover past outstanding fees or disbursements, but the language would appear to imply that it is to cover only current fees and disbursement. Section 11.52(1) provides:

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

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

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

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

[30] Regarding (a), a Monitor is appointed in the Initial Order and its duties are performed during the CCAA proceeding, not before. Regarding (b), the language “for the purpose of proceedings under this Act” would appear to relate to proceedings, and not some other work such as a lawyer for the debtor defending litigation against the debtor. The same can be said regarding the language in (c) “effective participation in proceedings under this Act”.

[31] In response to my concerns about the Canadian employees being protected against past unpaid obligations, I was advised that it is the intention of the applicants to bring a motion on the come-back hearing to permit all past outstanding amounts to be paid to the Canadian employees. No counsel appearing for any of the other parties voiced any concern with that. In the circumstances I permitted the administration charge to be granted. If no such motion is brought on the come-back hearing or it is not granted, the administration charge should be revisited.

[32] It appears clear, however, that an administration charge under section 52.11(1) can only be granted to cover work done in connection with a CCAA proceeding. Thus it is not possible for such a charge to protect fees of lawyers in other jurisdictions who may be engaged by the debtor either in foreign insolvency proceedings or other litigation. In the circumstances, the administration charge in this case shall not be used to cover the fees and disbursements of any of the applicants' lawyers in the U.S. chapter 11 proceedings or in any class action or other suit brought against any of the applicants. It may be that in the future, thought should be given as to

whether it is appropriate at all to provide for an administration charge to cover pre-filing expenses.

[33] The Canadian PSG Entities are expected to have positive net cash flows during the CCAA proceeding. Part of that money will be used to fund the deficit expected to be experienced by the US PSG Entities during the same period. At this time of year, due to hockey sales, the Canadian PSG Entities fund the US PSG Entities. The Applicants seek authorization to effect intercompany advances, secured by an intercompany charge. It is said that as PSG Entities' business is highly integrated and depends on intercompany transfers, the intercompany charge will preserve the status quo between PSG Entities.

[34] Intercompany charges to protect intercompany advances have been approved before in CCAA proceedings under the general power in section 11 to make such order as the court considers appropriate. See *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107 and *Fraser Papers Inc. (Re)*, 2009 CanLII 32698.

[35] In this case, I also raised the issue about cash leaving Canada during the CCAA process while unpaid amounts owing to employees in Canada were outstanding. Apart from the comfort of the anticipated motion on the come-back hearing to pay these unpaid amounts, the Monitor is of the view that the intercompany charge is the best way to protect the Canadian creditors. The Monitor states that while it is difficult at this juncture to ascertain whether the intercompany charge is sufficient to protect the interest of each individual estate, considering that the Stalking Horse bid contemplates that there should be substantial funds available after the payment of the secured creditors' claims, the intercompany charge appears to offer some measure of protection to the individual estates. In view of the foregoing, the Proposed Monitor considers that the intercompany charge is reasonable in the circumstances. I approve the intercompany charge.

[36] A standard directors' charge for \$7.5 million is supported by the Monitor and it is approved, as is the request that Brian J. Fox of Alvarez & Marsal North America, LLC be appointed as the Chief Restructuring Officer of the PSG Entities. Given the anticipated complexity of their insolvency proceedings, which include plenary proceedings in Canada and the United States, the PSG Entities will benefit from a CRO.

Newbould J.

Date: November 1, 2016

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

ONTARIO

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

PROCEEDINGS COMMENCED AT TORONTO

BOOK OF AUTHORITIES

**OF THE APPLICANT, MODULAR SPACE CORPORATION
(December 23, 2016)**

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