

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

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

AND IN THE MATTER OF JACK COOPER VENTURES, INC., JACK COOPER DIVERSIFIED, LLC, JACK COOPER ENTERPRISES, INC., JACK COOPER HOLDINGS CORP., JACK COOPER TRANSPORT COMPANY, INC., AUTO HANDLING CORPORATION, CTEMS, LLC, JACK COOPER LOGISTICS, LLC, AUTO & BOAT RELOCATION SERVICES, LLC, AXIS LOGISTIC SERVICES, INC., JACK COOPER CT SERVICES, INC., JACK COOPER RAIL AND SHUTTLE, INC., JACK COOPER INVESTMENTS, INC., NORTH AMERICAN AUTO TRANSPORTATION CORP., JACK COOPER TRANSPORT CANADA INC., JACK COOPER CANADA GP 1 INC., JACK COOPER CANADA GP 2 INC., JACK COOPER CANADA 1 LIMITED PARTNERSHIP, JACK COOPER CANADA 2 LIMITED PARTNERSHIP

APPLICATION OF JACK COOPER VENTURES, INC. UNDER SECTION 46  
OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985 c.  
C-36, AS AMENDED

Applicant

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**FACTUM OF THE APPLICANT**

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August 8, 2019

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**TO: THE SERVICE LIST**

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APPLICATION OF JACK COOPER VENTURES, INC. UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985 c. C-36, AS AMENDED

APPLICANT

**FACTUM OF THE APPLICANT**

**PART I - NATURE OF THE MOTION**

1. This factum is filed in support of a motion brought by Jack Cooper Ventures Inc. ("**JCV**") in its capacity as the foreign representative of JCV and the 18 other debtors in possession that recently filed voluntary petitions for relief pursuant to Chapter 11 of the U.S. Bankruptcy Code (collectively, the "**Chapter 11 Debtors**", and with their other non-debtor affiliates, the "**JC Group**").
2. This motion seeks Orders pursuant to sections 46 through 49 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for, among other things:

- (a) recognition of the Chapter 11 Cases (defined below) as foreign main proceedings pursuant to Part IV of the CCAA;
- (b) recognition of certain First Day Orders (defined below);
- (c) the appointment of Alvarez & Marsal Canada Inc. (“A&M”) as Information Officer (defined below) in these proceedings; and
- (d) the granting of the Administration Charge and the DIP Charges (all as defined below).

3. The Chapter 11 Debtors require this urgent relief to maintain operations going forward, enabling them to restructure their business. Immediate access to liquidity is critical to maximize the likelihood of a successful restructuring. Without relief from this Court, a restructuring cannot be effected and a liquidation of the Chapter 11 Debtors is the likely result – significantly diminishing recoveries for all stakeholders, including the JC Canada Group’s creditors.

4. If a restructuring is implemented, it is anticipated that the JC Group, including the JC Canada Group, will continue as a going concern, resulting in, among other things, the continued employment of approximately 181 Canadian employees and Owner/Operators. In addition, it is anticipated that trade creditors, customers, landlords and other third party stakeholders will benefit from the continued operation of the JC Canada Group’s business.<sup>1</sup>

## **PART II - THE FACTS**

5. The JC Group is a leading provider of finished vehicle logistics in North America for both new and used vehicles, as well as a provider of logistical services in select non-automotive markets. The JC Group is divided into two segments: a transport segment and a diversified asset-light logistics segment.<sup>2</sup>

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<sup>1</sup> Capitalized terms used herein and not otherwise defined shall have the meaning given to them in the Affidavit of Greg R. May, sworn August 8, 2019 (the “May Affidavit”), Application Record, Tab 2. All dollar references herein are in U.S. dollars unless otherwise specified.

<sup>2</sup> May Affidavit at para 12.

6. The JC Group's transport segment delivers finished vehicles from manufacturing plants, vehicle distribution centers, and seaports to new vehicle dealerships. The JC Group's customers in the transport segment are primarily major domestic and foreign original equipment manufacturers, including GM, Ford and Toyota. Under written contracts, the JC Groups has served GM since 1928, Toyota since 1979 and Ford since 1992. In 2018, the JC Group transported over 2.5 million finished vehicles and generated operating revenue of \$540.7 million relating to the transport segment. The JC Canada Group accounted for approximately \$30.41 of that gross revenue.<sup>3</sup>

7. The diversified asset-light logistics segment provides a wide range of asset-light services to the previously owned vehicle market, including vehicle inspections and other technical services. The logistics segment's customers include fleet ownership companies, remarketers, dealers, auctioneers, and relocation-management companies. For the year ended December 31, 2018, the logistics segment generated operating revenues of approximately \$55.9 million.<sup>4</sup>

#### **A. The Chapter 11 Cases**

8. On August 6, 2019 (the "**Petition Date**"), each of the Chapter 11 Debtors filed voluntary petitions for relief (the "**Petitions**") pursuant to Chapter 11 of the U.S. Bankruptcy Code with the United States Bankruptcy Court for the Northern District of Georgia (the "**U.S. Court**").<sup>5</sup> First day motions (the "**First Day Motions**") were also filed on August 6, 2019. On August 8, 2019, the U.S. Court heard the First Day Motions,<sup>6</sup> and on August 8, 2019 the U.S. entered interim or final

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<sup>3</sup> May Affidavit at paras 13, 14 & 16.

<sup>4</sup> May Affidavit at para 15.

<sup>5</sup> May Affidavit at para 5. Copies of the Petitions are attached to the affidavit of Waleed Malik, sworn August 8, 2019, Application Record, Tab 3 [Malik Affidavit]. The cases commenced by the Chapter 11 Debtors in the U.S. Court are referred to in this Factum as the "**Chapter 11 Cases**".

<sup>6</sup> May Affidavit at para 8. Copies of the First Day Motions are attached to the Malik Affidavit.

orders in respect of these First Day Motions as set out in the May Affidavit (collectively, the “**First Day Orders**”).<sup>7</sup>

**B. The Chapter 11 Debtors**

9. All of the Chapter 11 Debtors operate on an integrated basis and are incorporated or established under the laws of the United States with the exception of the JC Canada Group, which is comprised of Jack Cooper Transport Canada (“**JC Canada**”) and its subsidiaries, Jack Cooper Canada GP 1 Inc. (“**GP1**”), Jack Cooper Canada GP 2 Inc. (“**GP2**”), Jack Cooper Canada 1 Limited Partnership (“**LP1**”), and Jack Cooper Canada 2 Limited Partnership (“**LP2**”).<sup>8</sup>

**C. Non-Debtor Affiliates**

10. The Chapter 11 Debtors have several affiliates that are not part of the Chapter 11 Cases (the “**Non-Debtor Affiliates**”). None of the Non-Debtor Affiliates are liable for any of the Chapter 11 Debtors’ outstanding funded debt obligations.<sup>9</sup>

**D. JC Canada Group**

11. On a standalone basis, the JC Canada Group is not profitable. The JC Canada Group only remains cash flow positive because the U.S. Chapter 11 Debtors provide all back office and overhead services to the JC Canada Group. As at June 30, 2019, the JC Canada Group owed intercompany debts of almost \$17 million to its U.S. affiliates.<sup>10</sup>

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<sup>7</sup> May Affidavit at para 9. Copies of the First Day Orders are attached to the Malik Affidavit.

<sup>8</sup> May Affidavit at para 18.

<sup>9</sup> May Affidavit at paras 20-21.

<sup>10</sup> May Affidavit at para 23.

**(a) Assets and Liabilities**

12. As of June 30, 2019, the JC Canada Group had total assets of \$8,869,757 and total liabilities of \$19,103,505.<sup>11</sup>

**(b) Operations in Canada**

13. The JC Canada Group currently operates a total of 11 trucking terminals in Canada, providing transport segment services to customers of the JC Group throughout Canada such as Ford, GM, Kia and Hyundai. The JC Canada Group does not operate or provide any services in the JC Group's diversified asset-light logistics segment.<sup>12</sup>

**(c) Employees**

14. The JC Canada Group employs approximately 181 employees, all of whom are resident in Canada. Included in the approximately 181 employees of JC Canada Group are approximately 15 contractors (the "**Owners/Operators**") retained by GP1 in Western Canada to provide over-the-road logistical services to GP1 using vehicles owned and operated by the Owner/Operator.<sup>13</sup>

**(d) The JC Canada Group's Integrated Operations with U.S.**

15. The JC Canada Group is entirely dependent on and integrated with the U.S. operations. The JC Canada Group would not be able to function independently without the corporate functions performed by the Chapter 11 Debtors in the U.S.<sup>14</sup>

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<sup>11</sup> May Affidavit at para 25.

<sup>12</sup> May Affidavit at para 35-36 & 39-40.

<sup>13</sup> May Affidavit at paras 27-28.

<sup>14</sup> May Affidavit at para 81.

**E. Chapter 11 Debtors' Prepetition Capital Structure and Indebtedness**

16. The Chapter 11 Debtors' prepetition capital structure consists of outstanding funded-debt obligations in the aggregate principal amount of \$575.4 million, including:<sup>15</sup>

ABL Facility	An \$85 million senior secured revolving credit facility by and between Jack Cooper Holdings Corp. and certain of its subsidiaries, Wells Fargo Capital Finance, LLC as lead arranger, sole bookrunner and administrative agent and the lenders party thereto (the " <b>ABL Lenders</b> ").
Cerberus Senior Secured Term Loan	A \$196 million senior secured term loan due 2023 by and between Jack Cooper Ventures, Inc., Cerberus Business Finance Agency (" <b>Cerberus</b> "), LLC as agent for and on behalf of the lender parties thereto.
1.5 Lien Term Loan	A \$41 million junior secured term loan facility due 2024 by and between JCV and Wilmington Trust, National Association, as agent for and on behalf of the lenders party thereto (the " <b>1.5 Lien Term Loan Lender</b> ").
Second Lien Term Loan <sup>16</sup>	A \$261.1 million junior secured term loan facility due 2024 between JCV and Wilmington Trust, National Association, as agent for and on behalf of the lenders party thereto (the " <b>Second Lien Term Loan Lender</b> " and, together with the 1.5 Lien Term Loan Lender, the " <b>Junior Term Loan Lenders</b> ").

17. The ABL Facility includes a Canadian sub-facility that permits JC Canada, LP1 and LP2 (the "**Canadian Borrowers**") to borrow up to \$5 million. As of the Petition Date, there were no outstanding borrowings under the Canadian sub-facility. The Canadian Borrowers have not guaranteed or otherwise granted security for the obligations of the U.S. loan parties under the ABL

<sup>15</sup> May Affidavit at para 47.

<sup>16</sup> Together with the Cerberus Senior Secured Term Loan and the 1.5 Lien Term Loan, the "**Prepetition Term Loan Facilities**".



Facility. The JC Canada Group is not a borrower or guarantor under any of the prepetition term loan facilities.<sup>17</sup>

**(a) JC Canada Group Trade Debt**

18. Based on the JC Canada Group's books and records, as at the Filing Date, approximately \$850,000 is owed to unsecured trade creditors, including approximately \$400,000 owing to the Load Broker Parties and other critical vendors. The Chapter 11 Debtors are seeking relief to pay the Load Broker Parties and other critical vendors during these Chapter 11 Cases.<sup>18</sup>

**F. Recent Events**

19. The Chapter 11 Debtors' need to restructure is primarily driven by declining revenues over the past several years, unsustainable obligations related to legacy liabilities from certain multiemployer pension plans and collective bargaining agreements in the United States, and a capital structure that can no longer be sustained in the face of these challenges.<sup>19</sup>

**G. Restructuring Efforts and Path Forward**

20. With numerous existing defaults, debt service obligations under the ABL Facility and Prepetition Term Loan Facilities in excess of approximately \$13 million within the next six months, complete reliance on the ABL Facility to fund day-to-day operations, and no ability to obtain bridge financing or otherwise refinance the ABL Facility or the term loans, the Chapter 11 Debtors do not have the ability to continue operating as a going concern absent Chapter 11 relief.<sup>20</sup>

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<sup>17</sup> May Affidavit at paras 50-51 & 53.

<sup>18</sup> May Affidavit at para 58.

<sup>19</sup> May Affidavit at para 60.

<sup>20</sup> May Affidavit at para 69.

21. Accordingly, in April 2019, the Chapter 11 Debtors initially engaged Wells Fargo, Cerberus and the Junior Term Loan Lenders regarding the Chapter 11 Debtors' strategic alternatives and potential transaction structures. The Chapter 11 Debtors determined that building consensus to implement a pre-negotiated transaction would require the Junior Term Loan Lenders to equitize the Junior Term Loans through a credit bid for the Chapter 11 Debtors' assets.<sup>21</sup>

22. After extensive negotiations beginning in April 2019, Cerberus, Wells Fargo and the Junior Term Loan Lenders indicated that they would support a transaction involving a sale pursuant to section 363 of the U.S. Bankruptcy Code of all or substantially all of the Chapter 11 Debtors' assets to a newly formed entity to carry on the Chapter 11 Debtors' business. The Chapter 11 Debtors concurrently engaged in negotiations with various U.S. pension plans in which the Chapter 11 Debtors' participate, including the Central States, Southeast and Southwest Areas Pension Fund, to reach agreement on certain forms of pension relief and work rule modifications. The Chapter 11 Debtors also engaged with union leadership in the United States regarding proposed modifications to their collective bargaining agreements.<sup>22</sup>

23. The ongoing negotiations between the Chapter 11 Debtors, Cerberus, and the Junior Term Loan Lenders culminated in an agreement being reached to effect a transaction that would result in a going-concern sale of substantially all of the Chapter 11 Debtors' assets to a newly formed entity formed by or on behalf of an investment vehicle affiliated with the Junior Term Loan Lenders pursuant to a credit bid under section 363(b) of the Bankruptcy Code, subject to higher or better offers.<sup>23</sup>

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<sup>21</sup> May Affidavit at para 70.

<sup>22</sup> May Affidavit at para 73.

<sup>23</sup> May Affidavit at para 74.

### **PART III -THE ISSUES**

24. The issues to be determined on this motion are:

- (a) Are the Chapter 11 Cases "foreign main proceedings" pursuant to Part IV of the CCAA?
- (b) If so, are the Chapter 11 Debtors entitled to the relief sought, including,
  - (i) Granting the Stay of Proceedings;
  - (ii) Recognition of certain First Day Orders, including the Interim DIP Order;
  - (iii) Appointment of A&M as Information Officer; and
  - (iv) Granting of the Administration Charge and the DIP Charges?

### **PART IV - THE LAW**

#### **A. The Chapter 11 Cases are Foreign Main Proceedings**

##### **(a) The Chapter 11 Cases are Foreign Proceedings**

25. The purpose of Part IV of the CCAA is to facilitate the administration of cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada.<sup>24</sup>

26. Pursuant to Section 46(1) of the CCAA, a person who is a foreign representative may apply to the court for recognition of a foreign proceeding in respect of which that person is a foreign representative.<sup>25</sup> Pursuant to Section 47(1) of the CCAA, two requirements must be met for an order recognizing a foreign proceeding:

- (a) the proceeding is a "foreign proceeding"; and

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<sup>24</sup> CCAA s 44.

<sup>25</sup> CCAA s 46(1).

(b) the applicant is a "foreign representative" in respect of that foreign proceeding.<sup>26</sup>

27. In the Chapter 11 Cases, the Chapter 11 Debtors sought the appointment of JCV as the foreign representative of the Chapter 11 Debtors within the meaning of subsection 45(1) of the CCAA. An Order granting the Foreign Representative Motion (the "**Foreign Representative Order**") and appointing JCV as foreign representative was entered by the U.S. Court on August 8, 2019.<sup>27</sup>

28. Section 45(1) of the CCAA defines a "foreign proceeding" as any judicial proceeding in a jurisdiction outside of Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.<sup>28</sup> Courts have consistently recognized proceedings under Chapter 11 of the United States Bankruptcy Code to be foreign proceedings for the purposes of the CCAA.<sup>29</sup>

29. Pursuant to the foregoing, as JCV has been appointed a "foreign representative" in the Chapter 11 Cases by the U.S. Court, it is submitted that this Court should recognize the Chapter 11 Cases as "foreign proceedings" within the meaning of subsection 47(1) of the CCAA.

**(b) The Chapter 11 Cases are Foreign Main Proceedings**

30. Once it has been determined that a proceeding is a "foreign proceeding", the Court is required, pursuant to Section 47(2) of the CCAA, to specify in its Order whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding."<sup>30</sup> A "foreign main

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<sup>26</sup> CCAA s 47(1).

<sup>27</sup> Foreign Representative Order, Exhibit "GG" to the Malik Affidavit.

<sup>28</sup> CCAA s 45(1).

<sup>29</sup> *Hollander Sleep Products, LLC et al (Re)*, 2019 ONSC 3238 [*Hollander*] at para 27.

<sup>30</sup> CCAA s 47(2).

proceeding” is defined as a “foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests” (“COMI”).<sup>31</sup>

31. The CCAA does not provide a definition of COMI. Section 45(2) of the CCAA establishes that, in the absence of proof to the contrary, the location of a debtor company’s registered office is deemed to be its COMI.<sup>32</sup> Sufficient evidence regarding the debtor company’s operations, as outlined below, can rebut this presumption. Furthermore, Part IV of the CCAA does not specifically consider the circumstances facing corporate groups. It is therefore necessary to conduct the COMI analysis on an entity-by-entity basis.

32. The registered offices of all of the Chapter 11 Debtors, with the exception of the JC Canada Group, are situated in the United States.<sup>33</sup> Therefore, the presumption in s. 45(2) of the CCAA will deem the COMI of each of those entities to be in the United States.

33. The registered head offices of JC Canada, LP1 and LP2 are located in Toronto. Meanwhile, the registered head offices of GP1 and GP2 are in Rocky View County, Alberta and Levis, Quebec, respectively.<sup>34</sup>

34. Where a Canadian entity is operating as part of a larger corporate group, the Court has determined COMI in light of the following factors:

- (a) the location where corporate decisions are made;
- (b) the location of employee administrations, including human resource functions;
- (c) the location of the company's marketing and communication functions;
- (d) whether the enterprise is managed on a consolidated basis;

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<sup>31</sup> CCAA s 45(1).

<sup>32</sup> CCAA s 45(2).

<sup>33</sup> May Affidavit at para 86.

<sup>34</sup> May Affidavit at para 18.

- (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.<sup>35</sup>
35. Further, the Court has identified the most significant factors in interpreting COMI to be:
- (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.<sup>36</sup>
36. Based on the foregoing jurisprudence, the following factors support a finding that the COMI of each of the members of the JC Canada Group is in the United States:
- (a) The JC Canada Group is managed on a consolidated basis and its Canadian operations are dependent on and integrated with the U.S. operations.
  - (b) The Chapter 11 Debtors, including the JC Canada Group, operate an integrated, centralized cash management system.
  - (c) Financial reporting for the JC Group is done on a consolidated basis in Kansas City, Missouri by the JC Group's finance department, accounting department and management.
  - (d) The JC Canada Group is almost wholly reliant on U.S. managerial services at the JC Group's head office for overhead services, including accounting, finance, purchasing, logistics, marketing, human resources, IT and other functions.
  - (e) The entire JC Group shares a common operating platform which is located and operated in Kansas City, Missouri by the JC Group's IT department.

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<sup>35</sup> Hollander at para 32.

<sup>36</sup> Hollander at para 33.

- (f) Apart from one Vice-President who is resident in Ontario, all officers of JC Canada, GP1 and GP2 are residents of the United States and two of the three directors of JC Canada are residents of the United States.
- (g) All risk management, including the procurement of required corporate insurance policies for the JC Group, including the JC Canada Group, is managed in the United States at the JC Group's head office.
- (h) Corporate strategies for the entire JC Group are developed by the management team of the JC Group in the United States with input from the one Canadian-based Vice-President on issues and considerations unique to the JC Canada Group.
- (i) All customer relations, including the negotiation, execution and management of all customer contracts for the JC Group, are managed in the United States.
- (j) The JC Canada Group is entirely dependent on the U.S. Chapter 11 Debtors for all intellectual property licenses used and all patents, trademarks and copyrights used by the JC Group are owned by one or more of the JC Group's U.S. entities
- (k) All corporate purchasing of supplies is completed in the JC Group's purchasing department in Kansas City, Missouri.
- (l) Canadian revenues only make up approximately 5% of JC Group's revenues.<sup>37</sup>

37. Since all the Chapter 11 Debtors except the JC Canada Group have registered offices in the United States, and since a review of the JC Canada Group's business indicates that its COMI is in the United States, the Applicant submits that the COMI of all the Chapter 11 Debtors is in the United States and therefore the Chapter 11 Cases should be recognized as a "foreign main proceeding".

**B. The Initial Recognition Order and Supplemental Orders should be granted**

38. The Applicant is entitled to the Initial Recognition Order recognizing the Chapter 11 Cases as a foreign main proceeding. In addition, the Initial Recognition Order, as supplemented by the Supplemental Order, provides for additional post-recognition relief including a stay of proceedings against the Chapter 11 Debtors, recognition of certain First Day Orders, the appointment of an

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<sup>37</sup> May Affidavit at paras 16, 41-42 & 87.

Information Officer, and a grant of the Administration Charge and DIP Charges. The Chapter 11 Debtors submit that this Court should exercise its discretion to grant such relief.

**(a) Stay of proceedings is required and appropriate**

39. By operation of the U.S. Bankruptcy Code, the Chapter 11 Debtors obtained the benefit of a stay of proceedings upon filing the voluntary Petitions with the U.S. Court. A stay of proceedings in Canada is essential to protect the efforts of the Chapter 11 Debtors to proceed with the Chapter 11 Cases and to pursue the restructuring.<sup>38</sup>

40. Section 48(1) of the CCAA provides that once the Court has found that a foreign proceeding is a "foreign main proceeding", it is required to grant certain mandatory relief, including a stay of proceedings.

41. In addition to the automatic relief provided for in section 48, section 49 of the CCAA grants this Court broad discretion to make any order that it considers appropriate, if it is satisfied that the order is necessary for the protection of the debtor company's property or the interests of creditors.<sup>39</sup> The Court may make such orders on any terms and conditions that the Court considers appropriate in the circumstances.<sup>40</sup>

42. Finally, section 52(1) of the CCAA requires that if an order recognizing a foreign proceedings is made, the Court "shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding."<sup>41</sup>

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<sup>38</sup> May Affidavit at para 88.

<sup>39</sup> CCAA s 49(1).

<sup>40</sup> CCAA s 50.

<sup>41</sup> CCAA s 52(1).



43. In light of the requirements of the CCAA and the exigencies of the circumstances facing the JC Group, JC Canada and the other Chapter 11 Debtors require a stay of proceedings and recognition of the First Day Orders in order to implement the proposed restructuring.

**(b) Recognition of the First Day Orders is appropriate**

44. The Applicant is seeking an order recognizing and giving effect to certain First Day Orders.<sup>42</sup>

45. The central principle governing Part IV of the CCAA is comity, which mandates that Canadian courts should recognize and enforce the judicial acts of other jurisdictions, provided that those other jurisdictions have assumed jurisdiction on a basis consistent with principles of order, predictability and fairness.<sup>43</sup>

46. Canadian courts have emphasized the importance of comity and cooperation in cross-border insolvency proceedings for the purpose of avoiding multiple proceedings, inconsistent judgments and general uncertainty. Coordination of international insolvency proceedings is particularly critical in ensuring the equal and fair treatment of creditors regardless of their locations.<sup>44</sup>

47. In furtherance of the principle of comity, Canadian courts should allow a foreign court to exercise principal control over the insolvency process if that other jurisdiction has the closest connection to the proceeding. Where there is interdependence between operations of a company in the United States and Canada, the granting of relief under Part IV is particularly important.

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<sup>42</sup> May Affidavit at para 90.

<sup>43</sup> *Hollander* at para 41.

<sup>44</sup> *Hollander* at para 42.

48. The granting of an order recognizing and giving effect to the First Day Orders is appropriate for the following reasons:

- (a) The U.S. Court has appropriately taken jurisdiction over the Chapter 11 Cases, so comity will be furthered by this Court's recognition of and support for the Chapter 11 Cases already under way in the United States;
- (b) Coordination of proceedings in the two jurisdictions will ensure equal and fair treatment of all stakeholders, whether they are located in the United States or Canada;
- (c) Given the close connection between the JC Group and the United States, it is reasonable and sensible for the U.S. Court to have principal control over the insolvency process. This will produce the most efficient restructuring for the benefit of all stakeholders;
- (d) It is imperative that there be a centralised and co-ordinated process for these insolvency proceedings to maximize the prospect of a successful restructuring and preserve value for stakeholders; and
- (e) The Canadian and U.S. operations of the JC Group are highly integrated.

**(c) The DIP Charges should be granted**

49. Immediate access to incremental liquidity pursuant to the DIP Facilities is critical to preserving the value of the Chapter 11 Debtors' estate (including the JC Canada Group's estate) and maximizing the likelihood of a going-concern restructuring. The Chapter 11 Debtors do not have sufficient liquidity, including cash collateral, to operate their businesses in the ordinary course of business without the financing provided pursuant to the DIP Facilities. The Chapter 11 Debtors' ability to maintain business relationships with their vendors, suppliers, and customers, to pay their employees, pay certain fees and expenses as set forth herein, and to otherwise fund their operations is essential to the Chapter 11 Debtors' continued viability as the Chapter 11 Debtors seek to maximize the value of the assets of the estates for the benefit of all creditors. As discussed above, the ability of the JC Canada Group to sustain normal operations is entirely tied up with, and

dependant on, the ability of the U.S. Chapter 11 Debtors to continue operating.<sup>45</sup> A going concern restructuring, which is dependent on the DIP Order being recognized, will preserve over 2,800 jobs, including over 180 in Canada.<sup>46</sup>

50. Therefore, the Interim DIP Order authorizes the Chapter 11 Debtors to obtain postpetition financing via two separate DIP Facilities.

***DIP ABL Facility***

51. JCV as parent, Jack Cooper Holdings Corp., and certain subsidiaries as borrowers will enter into a senior secured super-priority asset-based revolving credit facility (the “**DIP ABL Facility**”) with Wells Fargo, as lead arranger, sole bookrunner and administrative agent, on behalf of the lender party thereto (the “**DIP ABL Lenders**”), in an aggregate principal amount of up to \$85 million.<sup>47</sup>

52. JC Canada, LP1 and LP2 will be borrowers under the DIP ABL Facility up to an amount of \$5 million. The JC Canada Group are jointly and severally liable for all the outstanding obligations under the DIP ABL Facility (including those incurred by the U.S. Chapter 11 Debtors).<sup>48</sup>

53. The DIP ABL Facility contains a full roll-up provision, such that upon the entry of the Interim DIP Order, the Borrowers shall borrow loans in an amount sufficient to repay all

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<sup>45</sup> May Affidavit at para 94.

<sup>46</sup> May Affidavit at paras 26, 77 & 83.

<sup>47</sup> May Affidavit at para 91(a)(i).

<sup>48</sup> May Affidavit at paras 91(a)(i), 92(a) & 95.

outstanding principal, accrued interest, accrued fees and expenses, and any other indebtedness and amounts owing the ABL Facility.<sup>49</sup>

### ***DIP Term Facility***

54. JCV will enter into a junior secured super-priority multi-draw term loan credit facility (the “**DIP Term Facility**” and together with the DIP ABL Facility, the “**DIP Facilities**”) with Wilmington Trust, National Association, as administrative agent, on behalf of the lenders party thereto (the “**DIP Term Lenders**” and together with the DIP ABL Lenders, the “**DIP Lenders**”) in an aggregate principal amount of up to \$15 million.<sup>50</sup>

55. The JC Canada Group will be a guarantor under the DIP Term Facility, but not a borrower.<sup>51</sup>

### ***Precondition to DIP Facilities***

56. It is a condition precedent to each of the DIP Facilities that the Interim DIP Order be recognized and given effect by this Court.<sup>52</sup> The DIP Lenders will not extend DIP financing to any of the Chapter 11 Debtors unless and until the Interim DIP Order is recognized by this Court.

### ***DIP Charges***

57. The amount actually borrowed by the Chapter 11 Debtors under the DIP ABL Facility and the DIP Term Facility is proposed to be secured by, among other things, Court-ordered charges on the JC Canada Group’s property (in respect of the DIP ABL Facility, the “**DIP ABL Charge**”, in

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<sup>49</sup> May Affidavit at para 92(a)(v).

<sup>50</sup> May Affidavit at para 91(a)(ii).

<sup>51</sup> May Affidavit at para 92(b)(vii).

<sup>52</sup> May Affidavit at para 82.

respect of the DIP Term Facility, the “**DIP Term Charge**”, and together, the “**DIP Charges**”), that rank in priority to all unsecured claims, but are subordinate to the proposed Administration Charge, with the DIP ABL Charge ranking in priority to the DIP Term Charge.<sup>53</sup>

***Part IV permits roll-ups***

58. As described above, the DIP ABL Facility includes a full roll-up provision wherein the proceeds from the DIP ABL Facility will be used to pay down the pre-filing ABL Facility. The DIP Term Facility does not have any type of roll-up provision.

59. This Court has concluded in previous proceedings that there is no impediment to granting approval of interim DIP financing including a full roll-up provision in foreign recognition proceedings under Part IV of the CCAA. In doing so, it has emphasized the importance of comity in foreign recognition proceedings.<sup>54</sup>

60. A similar analysis applies to the present situation. The Applicant is seeking that the Chapter 11 Cases be recognized as a foreign main proceeding, and the U.S. Court has granted the Interim DIP Order. Consistent with the findings of the U.S. Court, the relief requested is necessary for the protection of the JC Group’s property and for the interests of creditors in Canada and the U.S.<sup>55</sup>

***Canadian economic support for the DIP ABL Facility and DIP Term Facility is appropriate***

61. The JC Canada Group will be jointly and severally liable for all the outstanding obligations under the DIP ABL Facility (including those incurred by the U.S. Chapter 11 Debtors).

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<sup>53</sup> May Affidavit at para 93.

<sup>54</sup> *Hollander* at paras 46-47; *Hartford Computer Hardware Inc. (Re)*, 2012 ONSC 964 at paras 10-14 & 18-19; *Xinergy Ltd, (Re)*, 2015 ONSC 2692 at paras 18 & 21-22.

<sup>55</sup> May Affidavit at para 96.

62. The JC Canada Group will also guarantee all outstanding obligations under the DIP Term Facility (including those incurred by all U.S. Chapter 11 Debtors).

63. Joint and several liability is essentially akin to a guarantee. This Court has found that the following factors are relevant to determining the appropriateness of a Canadian guarantee in connection with a cross-border DIP financing facility:

- (a) the need for additional financing by the Canadian debtor to support a going concern restructuring;
- (b) the benefit of the breathing space afforded by CCAA protection;
- (c) the availability (or lack thereof) of any financing alternatives, including the availability of alternative terms to those proposed by the DIP lender;
- (d) the practicality of establishing a stand-alone solution for the Canadian debtors;
- (e) the contingent nature of the liability of the proposed guarantee and the likelihood that it will be called on;
- (f) any potential prejudice to the creditors of the entity if the request is approved, including whether unsecured creditors are put in any worse position by the provision of a cross-guarantee of a foreign affiliate than as existed prior to the filing, apart from the impact of the super-priority status of new advances to the debtor under the DIP financing;
- (g) the benefits that may accrue to the stakeholders if the request is approved and the prejudice to those stakeholders if the request is denied; and
- (h) a balancing of the benefits accruing to stakeholders generally against any potential prejudice to creditors.<sup>56</sup>

64. Much like in *Hollander*,<sup>57</sup> the following factors support recognizing the JC Canada Group's joint and several liability under the DIP ABL Facility and the JC Canada Group's guarantee under the DIP Term Facility:

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<sup>56</sup> *Indalex Ltd. (Re)*, 2009 CarswellOnt 1998 (S.C.J. [Commercial List]) [*Indalex*] at para 8.

<sup>57</sup> *Hollander* at para 50.

- (a) The DIP Facilities further the objectives of the CCAA and are commercially reasonable as they allow the Chapter 11 Debtors to continue operations and pursue a restructuring;<sup>58</sup>
- (b) The Chapter 11 Debtors need immediate access to the DIP Facilities to ensure their continued operations during these proceedings;<sup>59</sup>
- (c) The ability of the JC Canada Group to sustain normal operations is entirely tied up with, and dependent on, the ability of the U.S. Chapter 11 Debtors to continue operating;<sup>60</sup>
- (d) The DIP Lenders have advised that they are unwilling to provide funding to the Chapter 11 Debtors unless the JC Canada Group is jointly and severally liable for all of the outstanding obligations under the DIP ABL Facility and guarantees all outstanding obligations under the DIP Term Facility (including those incurred by all U.S. Chapter 11 Debtors);<sup>61</sup>
- (e) The proposed DIP Facilities are supported by the ABL Lenders, the existing main secured creditor with an economic interest in the JC Canada Group;<sup>62</sup> and
- (f) If the Interim DIP Order is not recognized then the restructuring will not be implemented, likely resulting in a liquidation of the business and assets of the Chapter 11 Debtors, including the JC Canada Group. In a liquidation scenario, the JC Canada Group's unsecured creditors are likely to suffer a substantial shortfall in the recoveries on their claims.<sup>63</sup>

65. Moreover, this Court has emphasized the importance of considering the integration of the U.S. and Canadian debtors in determining the appropriateness of a Canadian guarantee in connection with a cross-border DIP financing facility. Where the debtors and their restructuring are “inextricably intertwined” (as here), this Court has been willing to approve of such a guarantee.<sup>64</sup>

66. The DIP Term Facility ensures that additional liquidity will be available to JCV. It is not being used to roll up prepetition funds, but rather acts as new money available to fund JCV's

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<sup>58</sup> May Affidavit at para 96.

<sup>59</sup> May Affidavit at para 80.

<sup>60</sup> May Affidavit at para 81.

<sup>61</sup> May Affidavit at para 95.

<sup>62</sup> May Affidavit at para 85.

<sup>63</sup> May Affidavit at para 84.

<sup>64</sup> *Smurfit-Stone Container Canada Inc. (Re)*, 2009 CarswellOnt 391 (S.C.J. [Commercial List]) at para 18.

operations. As discussed, the JC Canada Group is entirely dependent on and integrated with the U.S. operations. Therefore, the JC Canada Group will derive significant benefits from the DIP Term Facility and it is appropriate for the JC Canada Group to guarantee the obligations of the DIP Term Facility.

67. In addition, in order to mitigate against any material prejudice to the creditors of the JC Canada Group with respect to the security and guarantees provided by the JC Canada Group pursuant to the DIP Facilities, the Interim DIP Order provides that, subject to applicable priorities, the respective DIP Obligations shall be satisfied from the proceeds of DIP Collateral constituting property of those Debtors located in the United States before looking to the Canadian collateral; provided, however, that the foregoing shall not apply to the Canadian DIP Sub-Facility or the Prepetition ABL Canadian Sub-Facility.<sup>65</sup> This quasi-marshalling construct minimizes the possible prejudice to unsecured creditors of the JC Canada Group as much as was possible in the circumstances.

68. Again, similar to *Hollander*,<sup>66</sup> the minimal prejudice to creditors of the JC Canada Group, and the DIP Lenders' consent to the quasi-marshalling construct, are key factors distinguishing this case from *Payless Holdings Inc. LLC, (Re)*.<sup>67</sup> In *Payless*, also a proceeding under Part IV of the CCAA, this Court declined to approve a DIP order and lenders' charge that would have required the solvent Canadian Applicants to guarantee borrowings from the proposed DIP facility even though they would not receive advances from it.<sup>68</sup> The DIP facility was opposed by Canadian

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<sup>65</sup> May Affidavit at para 95.

<sup>66</sup> *Hollander* at paras 52-53.

<sup>67</sup> *Payless Holdings Inc. LLC, Re*, 2017 ONSC 2321 [*Payless*].

<sup>68</sup> *Payless* at para 18.



landlords who were uniquely prejudiced by the terms. The DIP facility in that case specifically precluded marshalling.<sup>69</sup>

69. The Court's decision in *Payless* is distinguishable in these circumstances. Specifically, in *Payless*, the Canadian Applicants were not insolvent, were not prepetition borrowers, had never granted security, and were not borrowers under the DIP facility.<sup>70</sup> In this case, the JC Canada Group is insolvent, its assets are encumbered, and it is incapable of maintaining going concern operations without the continued operation of the U.S. Chapter 11 Debtors.<sup>71</sup> Without support from the DIP Facilities, the U.S. Chapter 11 Debtors do not have sufficient liquidity to pay their obligations and continue to operate.<sup>72</sup>

70. Moreover, in *Payless*, the Court intimated that if marshalling had been permitted, the inequitable treatment of Canadian creditors would have been resolved.<sup>73</sup> In this case, the Interim DIP Order includes a quasi-marshalling concept that, subject to applicable priorities, the respective DIP Obligations shall be satisfied from the proceeds of DIP Collateral constituting property of those Debtors located in the United States before looking to the Canadian collateral. Thus any prejudice with regard to creditors of the JC Canada Group has been minimized.<sup>74</sup>

71. A going concern outcome is in the best interests of JC Canada Group and all of its stakeholders. It is only available if the relief sought is granted. The Applicant submits that the circumstances of this case support recognizing the Interim DIP Order.

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<sup>69</sup> *Payless* at paras 39-40.

<sup>70</sup> *Payless* at para 36.

<sup>71</sup> May Affidavit at para 81.

<sup>72</sup> May Affidavit at para 80.

<sup>73</sup> *Payless* at paras 39-40.

<sup>74</sup> May Affidavit at para 95.

**(d) A&M should be appointed Information Officer**

72. It has become common for a court to appoint an information officer in proceedings under Part IV of the CCAA, pursuant to the court's broad discretion under section 49.<sup>75</sup> An information officer helps effect cooperation between the Canadian foreign recognition proceeding and the foreign representative and foreign court, as required by section 52(1) of the CCAA.<sup>76</sup> An information officer also provides information to the court, creditors, and stakeholders as necessary in a complex cross-border restructuring.<sup>77</sup>

73. The Applicant seeks to appoint A&M as the information officer (the "**Information Officer**") in this proceeding. A&M is a licensed insolvency trustee in Canada and its principals have acted as an information officer in several previous ancillary proceedings (both under Part IV of the CCAA as well as the former section 18.6 of the CCAA).<sup>78</sup>

**(e) The Administration Charge should be granted**

74. The Chapter 11 Debtors seek authorization to grant counsel to the Canadian Chapter 11 Debtors, the proposed Information Officer and its legal counsel an administration charge with respect to their fees and disbursements in the maximum amount of Cdn\$500,000 (the "**Administration Charge**") on the JC Canada Group's property in Canada. The U.S. Chapter 11 Debtors do not have any assets in Canada apart from trucks and trailers leased to the JC Canada Group.<sup>79</sup>

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<sup>75</sup> CCAA s. 49(1).

<sup>76</sup> *Digital Domain Media Group Inc, (Re)*, 2012 BCSC 1565 [*Digital Domain*] at para 31; CCAA s. 52(1).

<sup>77</sup> *Digital Domain* at para 32.

<sup>78</sup> May Affidavit at para 98. A&M has consented to act as Information Officer in this proceeding.

<sup>79</sup> May Affidavit at para 100.

75. The Applicant submits that the amount of the charge is reasonable in the circumstances, having regard to the size and complexity of these proceedings and the roles that will be required of the proposed Information Officer and its legal counsel.

**PART V - RELIEF REQUESTED**

76. For the foregoing reasons, the Applicant requests that this Honourable Court grant the Initial Recognition Order and the Supplemental Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 8<sup>th</sup> day of August, 2019.

*Waleed Malik*

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## SCHEDULE A - LIST OF AUTHORITIES

### ~~Case Law~~

1. *Digital Domain Media Group Inc, (Re)*, 2012 BCSC 1565
2. *Hartford Computer Hardware Inc, (Re)*, 2012 ONSC 964
3. *Hollander Sleep Products, LLC et al (Re)*, 2019 ONSC 3238
4. *Indalex Ltd. (Re)*, 2009 CarswellOnt 1998 (S.C.J. [Commercial List])
5. *Payless Holdings Inc. LLC, (Re)*, 2017 ONSC 2321
6. *Smurfit-Stone Container Canada Inc (Re)*, 2009 CarswellOnt 391 (S.C.J. [Commercial List])
7. *Xinergy Ltd, (Re)*, 2015 ONSC 2692

## SCHEDULE B -STATUTES

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

44. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

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

### Definitions

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

*foreign court* means a judicial or other authority competent to control or supervise a foreign proceeding.

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

*foreign non-main proceeding* means a foreign proceeding, other than a foreign main proceeding.

*foreign proceeding* means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

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

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

### **Centre of debtor company's main interests**

(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

### **Application for recognition of a foreign proceeding**

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

[...]

### **Order recognizing foreign proceeding**

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

### **Nature of foreign proceeding to be specified**

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

### **Order relating to recognition of a foreign main proceeding**

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

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

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

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

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

[...]

### **Other orders**

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

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

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

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

[...]

### **Terms and conditions of orders**

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

[...]

### **Cooperation — court**

**52 (1)** If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

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

Court File No: CV-19-625200-00CL

AND IN THE MATTER OF JACK COOPER VENTURES, INC., JACK COOPER DIVERSIFIED, LLC, JACK COOPER ENTERPRISES, INC., JACK COOPER HOLDINGS CORP., JACK COOPER TRANSPORT COMPANY, INC., AUTO HANDLING CORPORATION, CTEMS, LLC, JACK COOPER LOGISTICS, LLC, AUTO & BOAT RELOCATION SERVICES, LLC, AXIS LOGISTIC SERVICES, INC., JACK COOPER CT SERVICES, INC., JACK COOPER RAIL AND SHUTTLE, INC., JACK COOPER INVESTMENTS, INC., NORTH AMERICAN AUTO TRANSPORTATION CORP., JACK COOPER TRANSPORT CANADA INC., JACK COOPER CANADA GP 1 INC., JACK COOPER CANADA GP 2 INC., JACK COOPER CANADA 1 LIMITED PARTNERSHIP, JACK COOPER CANADA 2 LIMITED PARTNERSHIP

APPLICATION OF JACK COOPER VENTURES, INC. UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985 c. C-36, AS AMENDED

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding Commenced at Toronto

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