1001938

COM
Oct 16 2020
J. Mah

CLERK'S STAMP
JUDICIAL CENTRE OF CALGARY
FILED
Oct 09, 2020
AC
by Email
CLERK OF THE COURT

COURT FILE NUMBER	2001-08972
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C C-36, AS AMENDED
	APPLICATION OF BJ SERVICES HOLDINGS CANADA, ULC
DOCUMENT	**BRIEF OF THE APPLICANT, BJ SERVICES HOLDINGS CANADA ULC**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500 Bankers Hall East 855-2nd Street SW Calgary, Alberta T2P 4K7 Attention: Kelsey Meyer / Keely Cameron Telephone No.: 403-298-3323 / 403-298-3324 Fax No.: 403-265-7219 Client File No.: 78081-9

Commercial List Application Scheduled for the 16th day of October, 2020
before The Honourable Mr. Justice D. R. Mah

TABLE OF CONTENTS

I. INTRODUCTION

1. On July 20, 2020, BJ Services Holdings Canada, ULC ("**BJ Canada**") and its affiliates, BJ Services, LLC ("**BJ Services**"), BJ Management Services, L.P. and BJ Services Management Holdings Corp. (collectively with BJ Canada, the "**Chapter 11 Debtors**") commenced voluntary proceedings (the "**Chapter 11 Proceedings**") in the United States Bankruptcy Court, Southern District of Texas, Houston Division (the "**U.S. Bankruptcy Court**") by each filing a voluntary petition for relief under title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "**U.S. Bankruptcy Code**"), Case No 20-33627. On July 21, 2020, the U.S. Bankruptcy Court granted an Order authorizing BJ Canada to act as foreign representative of the estate of BJ Canada for the purpose of the within proceedings ("**Foreign Representative Order**") and on August 10, 2020 the U.S. Bankruptcy Court granted an amended Foreign Representative Order authorizing BJ Canada to also act as foreign representative of the estate of BJ Services (the "**Amended Foreign Representative Order**").

- Affidavit of Warren Zemlak, sworn on July 22, 2020, paras. 3 and 21 and Exhibits "1", "10 and "11" ("**Zemlak Affidavit No. 1**").

- Affidavit No. 3 of Warren Zemlak, sworn on August 12, 2020, paras. 3 and 10 ("**Zemlak Affidavit No. 3**").

2. On July 28, 2020, this Honourable Court recognized the Chapter 11 Proceedings in respect of BJ Canada as foreign main proceedings and granted certain ancillary relief including recognition of certain orders granted in the Chapter 11 Proceedings, including but not limited to the Foreign Representative Order (the "**July 28 Order**").

- Zemlak Affidavit No. 3, para. 4.

- Order granted by the Honourable Madam Justice J. E. Topolniski on July 28, 2020.

3. On August 14, 2020, this Honourable Court recognized the Chapter 11 proceedings in respect of BJ Services as foreign main proceedings and granted certain ancillary relief including recognition of certain orders granted in the Chapter 11 Proceedings, including but

not limited to the Amended Foreign Representative Order, which approves BJ Canada as the foreign representative of BJ Services.

- Orders granted by the Honourable Madam Justice K. M. Horner on August 14, 2020.

4. This Bench Brief is filed in support of the application of BJ Canada in its capacity as foreign representative of its estate and the estate of BJ Services (the "**Foreign Representative**"), pursuant to Part IV of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for Orders:

(a) abridging the time for service of this application and the materials filed at this Court in support thereof, declaring service of this application and supporting materials to be good and sufficient, and dispensing with further service;

(b) recognizing and enforcing in Canada certain orders granted by the U.S. Bankruptcy Court; and

(c) approving the legal fees and disbursements incurred by BJ Canada as Foreign Representative in relation to these proceedings;

to ensure consistency, efficiency and cooperation between the Chapter 11 Proceedings and these proceedings.

II. STATEMENT OF FACTS

5. BJ Services is the parent company of all of the Chapter 11 Debtors. Collectively, the Chapter 11 Debtors are a leading provider of hydraulic fracturing and cementing services to upstream oil and gas companies engaged in the exploration and production ("**E&P**") of North American oil and natural gas resources.

- Affidavit of Warren Zemlak sworn July 22, 2020, para. 4 ("**Zemlak Affidavit**").

6. The Chapter 11 Debtors function as an integrated business and other than day-to-day operations, all decisions for BJ Canada and BJ Services, LLC, including in respect of the

corporate governance matters, are centralized at the Chapter 11 Debtors' corporate headquarters in Tomball, Texas. The Chapter 11 Debtors maintain their corporate headquarters in Tomball, Texas. The Chapter 11 Debtors manage their operations at their Tomball, Texas headquarters. All members of the Chapter 11 Debtors' senior management responsible for its corporate governance matters are located at the corporate headquarters in Tomball, Texas.

- Zemlak Affidavit, paras. 22-28.

7. This Honourable Court has granted Orders recognizing and giving force and effect in Canada to the following Orders (amongst others) granted by the U.S. Bankruptcy Court:

(a) the Interim Cash Collateral Order granted July 21, 2020, as defined in the July 28 Order;

(b) the Second Interim Cash Collateral Order granted August 3, 2020, as defined in an Order granted by the Honourable Madam Justice K. M. Horner on August 14, 2020;

(c) the Rejection – Assumption Procedures Order granted July 29, 2020, as defined in the Order granted by the Honourable Madam Justice K. M. Horner on August 14, 2020;

(d) the Third Interim Cash Collateral Order granted August 27, 2020, as defined in an Order granted by the Honourable Madam Justice J. H. Goss on September 2, 2020; and

(e) the Fourth Interim Cash Collateral Order granted September 2, 2020, as defined in an Order granted by the Honourable Mr. Justice D. B. Nixon on September 9, 2020.

- July 28 Order.
- Order granted by the Honourable Madam Justice K. M. Horner on August 14, 2020.
- Order granted by the Honourable Madam Justice J. H. Goss on September 2, 2020.

- Order granted by the Honourable Mr. Justice Nixon on September 9, 2020.

8. On September 10, 2020, the U.S. Bankruptcy Court granted the Fifth Interim Order (I) Authorizing the Debtors to use Cash Collateral Pursuant to Section 363(c) of the Bankruptcy Code; (II) Granting Adequate Protection to the Prepetition Secured Parties; (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(b); and (IV) Granting Related Relief (the "**Fifth Interim Cash Collateral Order**").

- Affidavit No. 2 of Anthony C. Schnur, sworn on October 9, 2020, para. 6, Exhibit "2". ("**Schnur Affidavit**")

9. On September 25, 2020, the U.S. Bankruptcy Court granted a Sixth Interim Order (I) Authorizing Debtors to Use Cash Collateral Pursuant to Section 363(c) of the Bankruptcy Code; (II) Granting Adequate Protection to the Prepetition Secured Parties; (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(b); and (IV) Granting Related Relief (the "**Sixth Interim Cash Collateral Order**").

- Schnur Affidavit, para. 7, Exhibit "3".

10. On October 2, 2020, the U.S. Bankruptcy Court granted an Agreed Order Granting Limited Relief From the Automatic Stay to Donlen Corporation, Donlen Trust, and Donlen Fleet Leasing Ltd. (the "**Donlen Order**").

- Schnur Affidavit, para. 8, Exhibit "4".

11. On October 9, 2020, the U.S. Bankruptcy Court granted a Seventh Interim Order (I) Authorizing Debtors to Use Cash Collateral Pursuant to Section 363(c) of the Bankruptcy Code; (II) Granting Adequate Protection to the Prepetition Secured Parties; (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(b); and (IV) Granting Related Relief (the "**Seventh Interim Cash Collateral Order**").

- Schnur Affidavit, para. 9, Exhibit "5".

12. BJ Canada, with the assistance of its legal counsel, has worked diligently in its position as Foreign Representative to keep this Court apprised of the Chapter 11 Proceedings and has

sought Canadian recognition of orders of the U.S. Bankruptcy Court where necessary or appropriate. Canadian legal counsel to BJ Canada has also assisted and provided legal advice with respect to the Donlen Order, the GACP Order, and other matters and issues that have arisen in the Chapter 11 Proceedings and these Canadian recognition proceedings.

- Schnur Affidavit, para. 23.

III. ISSUE

13. The issues on this Application are:

(a) whether the Court should grant recognition of the Fifth Interim Cash Collateral Order, the Sixth Interim Cash Collateral Order, the Seventh Interim Cash Collateral Order, the Donlen Order, and the GACP Order (collectively, the "**U.S. Orders**");

(b) whether the Court should approve the professional fees of the Foreign Representative.

IV. ANALYSIS

A. Jurisdiction of the Court to Recognize the Orders

14. The purpose of Part IV of the CCAA is to effect cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada. Orders under this part are intended, among other things, to promote cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions and to promote the fair and efficient administration of cross-border insolvencies which also protects the interests of debtors, creditors and other interested persons.

Horsehead Holding Corp., Re, 2016 ONSC 958 at para. 15 [***Tab 1***]

CCAA, *supra* at s. 44 [***Tab 2***]

15. In the context of Part IV of the CCAA, the Court is granted the authority to apply any legal or equitable rules necessary, provided that they are not inconsistent with the provisions of the CCAA.

CCAA, *supra,* at s. 61(1) [***Tab 2***]

16. Pursuant to section 49 of the CCAA, this Honourable Court can make any order that it considers appropriate as long as the Court is satisfied that these orders are necessary for the protection of the debtor company's property, or that the orders are in the interests of a creditor or creditors. Further, once an order recognizing a foreign proceeding is made, as was done in this matter with respect to BJ Canada and BJ Services, the Court is required to cooperate, to the maximum extent possible with the foreign representative and the foreign court, so long as the requested relief is not inconsistent with the CCAA or would raise concerns regarding public policy.

> ***CCAA***, *supra*, at ss. 49, 52(1) and 61(2) [***Tab 2***]

17. In cross-border insolvency, restructuring or liquidation proceedings, Canadian and U.S. Courts have made efforts to complement, coordinate and, where appropriate, accommodate the proceedings of the other. Comity and cooperation are increasingly important in the bankruptcy context as internationalization increases, as more parties have assets and carry on activities in several jurisdictions. Without some coordination, there would be multiple proceedings, inconsistent judgments and general uncertainty.

> ***Re Babcock & Wilcox Canada Ltd***. (2000), 18 CBR (4th) 157 (Ont SCJ) [***Babcock***] at paras. 9-10 citing *Taylor v Dow Corning Australia Pty. Ltd*. (December 19, 1997), Doc. 8438/95 (Australia Vic. Sup. Ct.) [***Tab 3***]
>
> ***Hollander Sleep Products, LLC (Re)***, [2019] O.J. No. 2817 at paras 43-48 [***Tab 4***]
>
> ***Minden Schipper & Associates Inc.***, 2006 MBQB 292, at paras 13-14 [***Tab 5***]

18. When a court considers whether it will recognize a foreign order, including orders granted in Chapter 11 proceedings, it considers the following factors:

(a) recognizing comity and cooperation between courts of various jurisdictions is to be encouraged;

(b) according respect to foreign bankruptcy and insolvency legislation unless in substance generally it is so different from the bankruptcy and insolvency laws

of Canada or the legal process that generates the foreign order diverges radically from the processes in Canada;

(c) treating stakeholders equitably, and to the extent reasonably possible, common or equally, regardless of the jurisdiction to which they reside;

(d) promoting plans that allow the enterprise to reorganize globally, especially where there is an established interdependence on a transnational basis. To the extent reasonably practical, one jurisdiction should take charge of the principal administration of the enterprise's reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of stakeholders and does not detract from the net benefits that may be available from alternative approaches;

(e) recognizing the appropriate level of court involvement, which depends to a significant degree upon the court's nexus to the enterprise. Where one jurisdiction has an ancillary role, the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments regarding the reorganizational efforts in the foreign jurisdiction and stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction; and

(f) ensuring that effective notice is given to all affected stakeholders, and affording opportunities to stakeholders to return to court to review the granted order.

Babcock, *supra* at para. 21 [***Tab 3***]

Re Xerium Technologies Inc., (2010), 71 CBR (5th) 300 (Ont SCJ) at paras. 26-27 citing ***Babcock*** [***Tab 6***]

B. Recognition of Foreign Orders

19. BJ Canada, in its capacity as Foreign Representative, seeks Orders:

(a) recognizing in Canada and enforcing the Fifth Interim Cash Collateral Order, the Sixth Interim Cash Collateral Order, the Seventh Interim Cash Collateral Order, the Donlen Order, and the GACP Order; and

(b) approving the legal fees and disbursements incurred by BJ Canada as Foreign Representative in relation to these proceedings.

1. The Fifth, Sixth and Seventh Interim Cash Collateral Orders

20. The Fifth, Sixth and Seventh Interim Cash Collateral Orders *inter alia*, (a) authorize the Chapter 11 Debtors to continue to use the cash collateral of the Prepetition ABL Secured Parties, CLMG Collateral of the CLMG Secured Parties and GACP Collateral of the GACP Secured Parties (as those terms are defined therein) in accordance with the terms and conditions set forth therein, (b) grant superpriority claims and automatically perfected liens, security interests and other adequate protection, as applicable, to the Prepetition ABL Secured Parties, CLMG Secured Parties and the GACP Secured Parties to the extent of any diminution in value of their interest in the Prepetition ABL Collateral, including Cash Collateral, in the CLMG Collateral, as applicable, or in the GACP Collateral, as applicable, under or in connection with the Prepetition ABL Loan Documents, the CLMG Term Loan Agreement, or the GACP Term Loan Agreement (as those terms are defined therein), (c) subject to certain challenge rights of certain parties in interest, approve certain stipulations by the Chapter 11 Debtors with respect to the Prepetition ABL Loan Documents, CLMG Term Loan Credit Agreement, and the liens and security interests arising therefrom; (d) vacate and modify the automatic stay imposed by section 362 of the U.S. Bankruptcy Code; (e) waive the Chapter 11 Debtors' right to assert with respect to the Prepetition ABL Collateral, the Cash Collateral or the Adequate Protection Collateral (as defined therein), any claims to surcharge pursuant to section 506(c) of the U.S. Bankruptcy Code, any "equities of the case" exception pursuant to section 552(b) of the U.S. Bankruptcy Code and the equitable doctrine of marshalling or any similar doctrine, (f) schedule pursuant to Bankruptcy Rule 4001(b) a final hearing to consider entry of the Final Order; (g) waive any applicable stay with respect to the effectiveness and enforceability of the Fifth Interim Cash Collateral Order, Sixth Interim Cash Collateral Order, Seventh Interim Cash Collateral Order and as later applicable, the Final Cash Collateral Order, and (h) grant related relief.

21. Considering that four previous Interim Cash Collateral Orders have been recognized by this Honourable Court and the Fifth and Sixth Interim Cash Collateral Orders continue to authorize the Chapter 11 Debtors to use the cash collateral of the Prepetition ABL Lenders, the CLMG Collateral of the CLMG Secured Parties and (with respect to the Chapter 11 Debtors other than BJ Canada), the GACP Collateral of the GACP Secured Parties, and grants other relief in relation to the Chapter 11 Debtors, BJ Canada seeks an Order recognizing and giving force and effect in Canada to the Fifth and Sixth Interim Cash Collateral Orders.

2. The Donlen Order

22. The Donlen Order, *inter alia*: (a) authorizes BJ Services, LLC to file certain rejection notices in accordance with the Rejection - Assumption Procedures Order granted by the U.S. Bankruptcy Court on July 29, 2020 and recognized by this Honourable Court by Order granted on August 14, 2020; (b) upon filing of the rejection notices, modifies the stay to permit Donlen to recover the Leased Vehicles pursuant to the Donlen Agreements as defined therein; (c) does not extinguish any claims by the Chapter 11 Debtors or Donlen; and (d) grants other relief.

23. This Honourable Court has previously recognized and given force and effect in Canada to the Rejection – Assumption Procedures Order, which sets out procedures for the rejection or assumption of contracts of the Chapter 11 Debtors. Considering that the Donlen Order contemplates the rejection of certain contracts between Donlen Fleet Leasing Ltd. and BJ Canada, as well as the rejection of certain contracts between Donlen Corporation or Donlen Trust with BJ Services, and the lifting of the stay of proceedings in the Chapter 11 Proceedings to authorize Donlen Corporation, Donlen Trust, and Donlen Fleet Leasing Ltd. (collectively, "**Donlen**") to exercise all of its rights and remedies under those contracts, including but not limited to recovery of Leased Vehicles as defined in the Donlen Order, BJ Canada seeks an Order recognizing and giving force and effect in Canada to the Donlen Order.

- Order granted by the Honourable Madam Justice K. M. Horner on August 14, 2020.

24. The Donlen Order itself (which was agreed upon by the Chapter 11 Debtors and Donlen) contemplates that the Chapter 11 Debtors shall file an application for Canadian recognition of the Donlen Order within a reasonable period of time.

- Schnur Affidavit, Exhibit "4", para. 6.

3. The GACP Order

25. The GACP Order, *inter alia*: (a) lifts the automatic stay with respect to the Stay Relief Collateral as defined therein; (b) authorizing the Agent as defined therein to exercise all of its rights under applicable non-bankruptcy law; (c) permits the Agent to use the Chapter 11 Debtors' name and logo for the limited purpose of facilitating sales of the Stay Relief Collateral; (d) subject to the Committee's (as defined in the GACP Order) rights, permits the Agent to retain the Net Sale Proceeds until the Obligations (as defined in the Equipment Term Loan Documents) until such time as all of the Obligations under the Equipment Term Loan Documents have been indefeasibly paid in full, in cash with any excess amounts being promptly remitted to the Chapter 11 Debtor's estates; and (e) grants other relief.

26. The GACP Order was agreed upon as between GACP Finance Co., LLC ("**GACP**" or the "**Agent**" (as defined in the GACP Order)) and the Chapter 11 Debtors. Considering that the GACP Order contemplates the lifting of the stay with respect to all of the Agent's collateral (the "**Collateral**") other than that portion of the collateral sold by the Chapter 11 Debtors pursuant to sales approved by the U.S. Bankruptcy Court subject to the Auction Order recognized by Order of this Court granted September 2, 2020 (the "**Excluded Collateral**") (the Collateral, minus the Excluded Collateral, is referred to hereafter as the "**Stay Relief Collateral**") and authorizes the Agent to exercise all of its rights under applicable non-bankruptcy law with respect to the Stay Relief Collateral, including but not limited to repossessing, marketing, and liquidating the Stay Relief Collateral, BJ Canada seeks an Order recognizing and giving force and effect in Canada to the GACP Order.

27. BJ Canada also seeks an Order directing that GACP as Agent be authorized to sell, convey, transfer, lease or assign the Stay Relief Collateral (as defined in the GACP Order) or any part or parts thereof, without the further approval of this Court, and that in each case notice under section 244(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the "**BIA**") and Part V of the *Personal Property Security Act*, RSA 2000, c. P-7 or any similar legislation in any other province or territory shall not be required, and in doing so, the Agent shall not be or deemed to be a Receiver in respect of the Debtors for purposes of Part XI of the BIA.

V. RELIEF SOUGHT

28. BJ Canada seeks Orders on the terms proposed in the draft form of Orders submitted with its application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 9th day of October, 2020.

BENNETT JONES LLP

Per: _____

Kelsey Meyer / Keely Cameron
Counsel for the Applicant,
BJ Services Holdings Canada, ULC

TAB 1

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

Horsehead Holding Corp., Re

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

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

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

Newbould J.

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

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

Subject: Insolvency

Headnote

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

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

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

***Newbould J.*:**

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

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

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

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

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

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

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

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

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

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

11 Zochem operates a cash management system whereby:

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

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

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

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

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

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

(a) Joint Administration Order;

(b) Foreign Representative Order;

(c) Interim Cash Management Order;

(d) Interim Wages and Benefits Order;

(e) Interim Shippers and Lien Claimants Order;

(f) Interim Utilities Order;

(g) Interim Insurance Order;

(h) Interim Prepetition Taxes Order;

(i) Interim Critical Vendors Order; and

(j) Interim Financing Order.

Analysis

15 The purpose of Part IV of the *CCAA* is to effect cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada. See my comments on the *BIA* version of the same provisions in *MtGox Co., Re* (2014), 20 C.B.R. (6th) 307 (Ont. S.C.J. [Commercial List]).

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

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

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

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

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

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

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

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

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

(1) the location is readily ascertainable by creditors,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> (a) approximately $18.5 million will be used to repay the Zochem Facility (including the $1 million forbearance fee payable to PNC);
>
> (b) approximately $4 million will be used to pay fees associated with the Proposed DIP Facility; and
>
> (c) approximately $15.6 million will be used to finance the debtors' operations and restructuring activities pursuant to an agreed upon budget, including payment of professional fees, utility deposits and certain critical materials and freight vendors.

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

the DIP facility, and as set out in *Crystallex International Corp., Re* (2012), 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]); aff'd (2012), 4 B.L.R. (5th) 1 (Ont. C.A.).

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

40 The directors of Zochem have fiduciary duties to Zochem. In *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), at 123; aff'd (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), at 122 Justice Farley stated clearly that the directors' duties are to the corporation of which they are directors and they cannot just be yes men for the controlling shareholders:

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

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

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

Application granted.

End of Document

TAB 2

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to June 6, 2016

Last amended on February 26, 2015

À jour au 6 juin 2016

Dernière modification le 26 février 2015

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

Miscellaneous

Certain sections of *Winding-up and Restructuring Act* do not apply

41 Sections 65 and 66 of the *Winding-up and Restructuring Act* do not apply to any compromise or arrangement to which this Act applies.

2005, c. 47, s. 131.

Act to be applied conjointly with other Acts

42 The provisions of this Act may be applied together with the provisions of any Act of Parliament, or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

2005, c. 47, s. 131.

Claims in foreign currency

43 If a compromise or an arrangement is proposed in respect of a debtor company, a claim for a debt that is payable in a currency other than Canadian currency is to be converted to Canadian currency as of the date of the initial application in respect of the company unless otherwise provided in the proposed compromise or arrangement.

2005, c. 47, s. 131.

Dispositions diverses

Inapplicabilité de certains articles de la *Loi sur les liquidations et les restructurations*

41 Les articles 65 et 66 de la *Loi sur les liquidations et les restructurations* ne s'appliquent à aucune transaction ni à aucun arrangement auxquels la présente loi est applicable.

2005, ch. 47, art. 131.

Application concurrente d'autres lois

42 Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

2005, ch. 47, art. 131.

Créances en monnaies étrangères

43 Dans le cas où une transaction ou un arrangement est proposé à l'égard d'une compagnie débitrice, la réclamation visant une créance en devises étrangères doit être convertie en monnaie canadienne au taux en vigueur à la date de la demande initiale, sauf disposition contraire de la transaction ou de l'arrangement.

2005, ch. 47, art. 131.

PART IV

Cross-border Insolvencies

Purpose

Purpose

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;

PARTIE IV

Insolvabilité en contexte international

Objet

Objet

44 La présente partie a pour objet d'offrir des moyens pour traiter des cas d'insolvabilité en contexte international et de promouvoir les objectifs suivants :

a) assurer la coopération entre les tribunaux et les autres autorités compétentes du Canada et ceux des ressorts étrangers intervenant dans de tels cas;

b) garantir une plus grande certitude juridique dans le commerce et les investissements;

c) administrer équitablement et efficacement les affaires d'insolvabilité en contexte international, de manière à protéger les intérêts des créanciers et des

(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.

2005, c. 47, s. 131.

d) protéger les biens des compagnies débitrices et en optimiser la valeur;

e) faciliter le redressement des entreprises en difficulté, de manière à protéger les investissements et préserver les emplois.

2005, ch. 47, art. 131.

Interpretation

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. (*tribunal étranger*)

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

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

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. (*instance étrangère*)

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. (*représentant étranger*)

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.

2005, c. 47, s. 131.

Définitions

Définitions

45 (1) Les définitions qui suivent s'appliquent à la présente partie.

instance étrangère Procédure judiciaire ou administrative, y compris la procédure provisoire, régie par une loi étrangère relative à la faillite ou à l'insolvabilité qui touche les droits de l'ensemble des créanciers et dans le cadre de laquelle les affaires financières et autres de la compagnie débitrice sont placées sous la responsabilité ou la surveillance d'un tribunal étranger aux fins de réorganisation. (*foreign proceeding*)

principale Qualifie l'instance étrangère qui a lieu dans le ressort où la compagnie débitrice a ses principales affaires. (*foreign main proceeding*)

représentant étranger Personne ou organe qui, même à titre provisoire, est autorisé dans le cadre d'une instance étrangère à surveiller les affaires financières ou autres de la compagnie débitrice aux fins de réorganisation, ou à agir en tant que représentant. (*foreign representative*)

secondaire Qualifie l'instance étrangère autre que l'instance étrangère principale. (*foreign non-main proceeding*)

tribunal étranger Autorité, judiciaire ou autre, compétente pour contrôler ou surveiller des instances étrangères. (*foreign court*)

Lieu des principales affaires

(2) Pour l'application de la présente partie, sauf preuve contraire, le siège social de la compagnie débitrice est présumé être le lieu où elle a ses principales affaires.

2005, ch. 47, art. 131.

Recognition of Foreign Proceeding

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.

Documents that must accompany application

(2) Subject to subsection (3), the application must be accompanied by

(a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;

(b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and

(c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

Documents may be considered as proof

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

Other evidence

(4) In the absence of the documents referred to in paragraphs (2)(a) and (b), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

Translation

(5) The court may require a translation of any document accompanying the application.

2005, c. 47, s. 131.

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.

Reconnaissance des instances étrangères

Demande de reconnaissance de l'instance étrangère

46 (1) Le représentant étranger peut demander au tribunal de reconnaître l'instance étrangère dans le cadre de laquelle il a qualité.

Documents accompagnant la demande de reconnaissance

(2) La demande de reconnaissance est accompagnée des documents suivants :

a) une copie certifiée conforme de l'acte — quelle qu'en soit la désignation — introductif de l'instance étrangère ou le certificat délivré par le tribunal étranger attestant l'introduction de celle-ci;

b) une copie certifiée conforme de l'acte — quelle qu'en soit la désignation — autorisant le représentant étranger à agir à ce titre ou le certificat délivré par le tribunal étranger attestant la qualité de celui-ci;

c) une déclaration faisant état de toutes les instances étrangères visant la compagnie débitrice qui sont connues du représentant étranger.

Documents acceptés comme preuve

(3) Le tribunal peut, sans preuve supplémentaire, accepter les documents visés aux alinéas (2)a) et b) comme preuve du fait qu'il s'agit d'une instance étrangère et que le demandeur est le représentant étranger dans le cadre de celle-ci.

Autre preuve

(4) En l'absence des documents visés aux alinéas (2)a) et b), il peut accepter toute autre preuve — qu'il estime indiquée — de l'introduction de l'instance étrangère et de la qualité du représentant étranger.

Traduction

(5) Il peut exiger la traduction des documents accompagnant la demande de reconnaissance.

2005, ch. 47, art. 131.

Ordonnance de reconnaissance

47 (1) S'il est convaincu que la demande de reconnaissance vise une instance étrangère et que le demandeur est un représentant étranger dans le cadre de celle-ci, le tribunal reconnaît, par ordonnance, l'instance étrangère en cause.

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.

2005, c. 47, s. 131.

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.

Scope of order

(2) The order made under subsection (1) must be consistent with any order that may be made under this Act.

When subsection (1) does not apply

(3) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.

Application of this and other Acts

(4) Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

2005, c. 47, s. 131.

Nature de l'instance

(2) Il précise dans l'ordonnance s'il s'agit d'une instance étrangère principale ou secondaire.

2005, ch. 47, art. 131.

Effets de la reconnaissance d'une instance étrangère principale

48 (1) Sous réserve des paragraphes (2) à (4), si l'ordonnance de reconnaissance précise qu'il s'agit d'une instance étrangère principale, le tribunal, par ordonnance, selon les modalités qu'il estime indiquées :

a) suspend, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoit, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdit, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie;

d) interdit à la compagnie de disposer, notamment par vente, des biens de son entreprise situés au Canada hors du cours ordinaire des affaires ou de ses autres biens situés au Canada.

Compatibilité

(2) L'ordonnance visée au paragraphe (1) doit être compatible avec les autres ordonnances rendues sous le régime de la présente loi.

Non-application du paragraphe (1)

(3) Le paragraphe (1) ne s'applique pas si au moment où l'ordonnance de reconnaissance est rendue une procédure a déjà été intentée sous le régime de la présente loi contre la compagnie débitrice.

Application de la présente loi et d'autres lois

(4) Le paragraphe (1) n'a pas pour effet d'empêcher la compagnie débitrice d'intenter ou de continuer une procédure sous le régime de la présente loi, de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*.

2005, ch. 47, art. 131.

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.

Restriction

(2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

Application of this and other Acts

(3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

2005, c. 47, s. 131.

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.

2005, c. 47, s. 131.

Commencement or continuation of proceedings

51 If an order is made recognizing a foreign proceeding, the foreign representative may commence and continue proceedings under this Act in respect of a debtor company as if the foreign representative were a creditor of the debtor company, or the debtor company, as the case may be.

2005, c. 47, s. 131.

Autre ordonnance

49 (1) Une fois l'ordonnance de reconnaissance rendue, le tribunal, sur demande présentée par le représentant étranger demandeur, peut, s'il est convaincu que la mesure est nécessaire pour protéger les biens de la compagnie débitrice ou les intérêts d'un ou plusieurs créanciers, rendre toute ordonnance qu'il estime indiquée, notamment pour :

a) s'il s'agit d'une instance étrangère secondaire, imposer les interdictions visées au paragraphe 48(1);

b) régir l'interrogatoire des témoins et la manière de recueillir des preuves ou fournir des renseignements concernant les biens, affaires financières et autres, dettes, obligations et engagements de la compagnie débitrice;

c) autoriser le représentant étranger à surveiller les affaires financières et autres de la compagnie débitrice qui se rapportent à ses opérations au Canada.

Restriction

(2) Si, au moment où l'ordonnance de reconnaissance est rendue, une procédure a déjà été intentée sous le régime de la présente loi contre la compagnie débitrice, l'ordonnance prévue au paragraphe (1) doit être compatible avec toute ordonnance qui peut être rendue dans le cadre de cette procédure.

Application de la présente loi et d'autres lois

(3) L'ordonnance rendue au titre de l'alinéa (1)a) n'a pas pour effet d'empêcher que soit intentée ou continuée, contre la compagnie débitrice, une procédure sous le régime de la présente loi, de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*.

2005, ch. 47, art. 131.

Conditions

50 Le tribunal peut assortir les ordonnances qu'il rend au titre de la présente partie des conditions qu'il estime indiquées dans les circonstances.

2005, ch. 47, art. 131.

Début et continuation de la procédure

51 Une fois l'ordonnance de reconnaissance rendue, le représentant étranger en cause peut intenter ou continuer la procédure visée par la présente loi comme s'il était créancier de la compagnie débitrice ou la compagnie débitrice elle-même, selon le cas.

2005, ch. 47, art. 131.

Obligations

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.

Cooperation — other authorities in Canada

(2) If any proceedings under this Act have been commenced in respect of a debtor company and an order recognizing a foreign proceeding is made in respect of the debtor company, every person who exercises powers or performs duties and functions under the proceedings under this Act shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Forms of cooperation

(3) For the purpose of this section, cooperation may be provided by any appropriate means, including

(a) the appointment of a person to act at the direction of the court;

(b) the communication of information by any means considered appropriate by the court;

(c) the coordination of the administration and supervision of the debtor company's assets and affairs;

(d) the approval or implementation by courts of agreements concerning the coordination of proceedings; and

(e) the coordination of concurrent proceedings regarding the same debtor company.

2005, c. 47, s. 131; 2007, c. 36, s. 80.

Obligations of foreign representative

53 If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall

(a) without delay, inform the court of

(i) any substantial change in the status of the recognized foreign proceeding,

(ii) any substantial change in the status of the foreign representative's authority to act in that capacity, and

(iii) any other foreign proceeding in respect of the same debtor company that becomes known to the foreign representative; and

Obligations

Collaboration — tribunal

52 (1) Une fois l'ordonnance de reconnaissance rendue, le tribunal collabore dans toute la mesure possible avec le représentant étranger et le tribunal étranger en cause dans le cadre de l'instance étrangère reconnue.

Collaboration — autres autorités compétentes

(2) Si une procédure a été intentée sous le régime de la présente loi contre une compagnie débitrice et qu'une ordonnance a été rendue reconnaissant une instance étrangère visant cette compagnie, toute personne exerçant des attributions dans le cadre de cette procédure collabore dans toute la mesure possible avec le représentant étranger et le tribunal étranger en cause.

Moyens d'assurer la collaboration

(3) Pour l'application du présent article, la collaboration peut être assurée par tout moyen approprié, notamment :

a) la nomination d'une personne chargée d'agir suivant les instructions du tribunal;

b) la communication de renseignements par tout moyen jugé approprié par celui-ci;

c) la coordination de l'administration et de la surveillance des biens et des affaires de la compagnie débitrice;

d) l'approbation ou l'application par les tribunaux des accords concernant la coordination des procédures;

e) la coordination de procédures concurrentes concernant la même compagnie débitrice.

2005, ch. 47, art. 131; 2007, ch. 36, art. 80.

Obligations du représentant étranger

53 Si l'ordonnance de reconnaissance est rendue, il incombe au représentant étranger demandeur :

a) d'informer sans délai le tribunal :

(i) de toute modification sensible du statut de l'instance étrangère reconnue,

(ii) de toute modification sensible de sa qualité,

(iii) de toute autre procédure étrangère visant la compagnie débitrice qui a été portée à sa connaissance;

order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph (1)(a) and the value referred to in paragraph (1)(b) is of that creditor's claim.

2005, c. 47, s. 131.

Court not prevented from applying certain rules

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.

Public policy exception

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

2005, c. 47, s. 131; 2007, c. 36, s. 81.

PART V

Administration

Regulations

62 The Governor in Council may make regulations for carrying out the purposes and provisions of this Act, including regulations

(a) specifying documents for the purpose of paragraph 23(1)(f); and

(b) prescribing anything that by this Act is to be prescribed.

2005, c. 47, s. 131; 2007, c. 36, s. 82.

Review of Act

63 (1) Within five years after the coming into force of this section, the Minister shall cause to be laid before both Houses of Parliament a report on the provisions and operation of this Act, including any recommendations for amendments to those provisions.

Reference to parliamentary committee

(2) The report stands referred to the committee of the Senate, the House of Commons or both Houses of Parliament that is designated or established for that purpose, which shall

que la sienne dans l'ordre de collocation prévu par la présente loi n'ont pas reçu un dividende dont le pourcentage d'acquittement est égal au pourcentage d'acquittement des éléments visés aux alinéas (1)a) et b).

2005, ch. 47, art. 131.

Application de règles étrangères

61 (1) La présente partie n'a pas pour effet d'empêcher le tribunal d'appliquer, sur demande faite par le représentant étranger ou tout autre intéressé, toute règle de droit ou d'equity relative à la reconnaissance des ordonnances étrangères en matière d'insolvabilité et à l'assistance à prêter au représentant étranger, dans la mesure où elle n'est pas incompatible avec les dispositions de la présente loi.

Exception relative à l'ordre public

(2) La présente partie n'a pas pour effet d'empêcher le tribunal de refuser de prendre une mesure contraire à l'ordre public.

2005, ch. 47, art. 131; 2007, ch. 36, art. 81.

PARTIE V

Administration

Règlements

62 Le gouverneur en conseil peut, par règlement, prendre toute mesure d'application de la présente loi, notamment :

a) préciser les documents pour l'application de l'alinéa 23(1)f);

b) prendre toute mesure d'ordre réglementaire prévue par la présente loi.

2005, ch. 47, art. 131; 2007, ch. 36, art. 82.

Rapport

63 (1) Dans les cinq ans suivant l'entrée en vigueur du présent article, le ministre présente au Sénat et à la Chambre des communes un rapport sur les dispositions de la présente loi et son application dans lequel il fait état des modifications qu'il juge souhaitables.

Examen parlementaire

(2) Le comité du Sénat, de la Chambre des communes, ou mixte, constitué ou désigné à cette fin, est saisi d'office du rapport et procède dans les meilleurs délais à l'étude de celui-ci et, dans l'année qui suit le dépôt du rapport ou le délai supérieur accordé par le Sénat, la

TAB 3

Ontario Supreme Court
Babcock & Wilcox Canada Ltd.,
Date: 2000-02-25

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

In the Matter of Babcock & Wilcox Canada Ltd.

Ontario Superior Court of Justice [Commercial List] Farley J.

Heard: February 25, 2000

Judgment: February 25, 2000

Docket: 00-CL-3667

Derrick Toy, for Babcock & Wilcox Canada Ltd.

Paul Macdonald, for Citibank North America Inc., Lenders under the Post-Petition Credit Agreement.

***Farley J.*:**

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

> (a) that the proceedings commenced by BW Canada's parent U.S. corporation and certain other U.S. related corporations (collectively "BWUS") for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with mass asbestos claims before the U.S. Bankruptcy Court be recognized as a "foreign proceeding" for the purposes of s. 18.6;
>
> (b) that BW Canada be declared a company which is entitled to avail itself of the provisions of s. 18.6;
>
> (c) that there be a stay against suits and enforcements until May 1, 2000 (or such later date as the Court may order) as to asbestos related proceedings against BW Canada, its property and its directors;

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

(e) and for other ancillary relief.

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

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

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

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

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

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

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

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

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

> Allow me to start off by stating that I agree with the analysis of MacPherson J. in *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.) when in discussing *Morguard Investments Ltd. v. De Savoye,* [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, 52 B.C.L.R. (2d) 160, 122 N.R. 81, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, he states at p.411:
>
> > The leading case dealing with the enforcement of "foreign" judgments is the decision of the Supreme Court of Canada in *Morguard Investments, supra.* The question in that case was whether, and the circumstances in which, the judgment of an Alberta court could be enforced in British Columbia. A unanimous court, speaking through La Forest J., held in favour of enforceability and, in so doing, discussed in some detail the doctrinal principles governing inter-jurisdictional

enforcement of orders. I think it fair to say that the overarching theme of La Forest J.'s reasons is the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure. He expressed this theme in these words, at p. 1095:

> Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem,* such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. *This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the slate where the judgment was given has power over the litigants, the judgments of its courts should be respected.* (emphasis added in original)

Morguard Investments was, as stated earlier, a case dealing with the enforcement of a court order across provincial boundaries. However, the historical analysis in La Forest J.'s judgment, of both the United Kingdom and Canadian jurisprudence, and the doctrinal principles enunciated by the court are equally applicable, in my view, in a situation where the judgment has been rendered by a court in a foreign jurisdiction. This should not be an absolute rule - there will be some foreign court orders that should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process. (my emphasis added)

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

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

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

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

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

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

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

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

Microbiz Corp. v. Classic Software Systems Inc. (1996), 45 C.B.R. (3d) 40 (Ont. Gen. Div.), at p. 4; *Tradewell Inc. v. American Sensors Electronics, Inc.,* 1997 WL 423075 (S.D.N.Y. 1997).

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

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

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

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

> Provisions in Bill C-5 attempt to actually codify, which has always been the practice in Canada. They include the Court recognition of foreign representatives; Court authority to

> make orders to facilitate and coordinate international insolvencies; provisions that would make it clear that foreign representatives are allowed to commence proceedings in Canada, as per Canadian rules – however, they clarify that foreign stays of proceedings are not applicable but a foreign representative can apply to a court for a stay in Canada; and Canadian creditors and assets are protected by the bankruptcy and insolvency rules.

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

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

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

[13] Thus it seems to me that this application by BW Canada should be reviewed in light of (i) the doctrine of comity as analyzed in *Morguard, Arrowmaster* and *ATL, supra,* in regard to

its international aspects; (ii) inherent jurisdiction; (iii) the aspect of the liberal interpretation of the CCAA generally; and (iv) the assistance and codification of the 1997 Amendments.

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

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

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

> s. 267 In this Part,
>
> > "debtor" means an *insolvent person* who has property in Canada, a *bankrupt* who has property in Canada or a *person who has the status of a bankrupt* under foreign law in a foreign proceeding and has property in Canada;… (emphasis added)

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

under the definition of s. 18.6. I therefore declare that those proceedings are to be recognized as a “foreign proceeding” for the purposes of s. 18.6 of the CCAA.

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

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

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

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

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

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

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

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

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

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

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

been increased by the financial assistance given by the BW Canada guarantee of BWUS' obligations.

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

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

> (a) The recognition of comity and cooperation between the courts of various jurisdictions are to be encouraged.
>
> (b) Respect should be accorded to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada.
>
> (c) All stakeholders are to be treated equitably, and to the extent reasonably possible, common or like stakeholders are to be treated equally, regardless of the jurisdiction in which they reside.
>
> (d) The enterprise is to be permitted to implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis

of the enterprise and to the extent reasonably practicable, one jurisdiction should take charge of the principal administration of the enterprise's reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of the stakeholders and does not inappropriately detract from the net benefits which may be available from alternative approaches.

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

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

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

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

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

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

(f) Where one jurisdiction has an ancillary role,

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

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

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

[22] Taking these factors into consideration, and with the determination that the Chapter 11 proceedings are a "foreign proceeding" within the meaning of s. 18.6 of the CCAA and that it is appropriate to declare that BW Canada is entitled to avail itself of the provisions of s. 18.6, I would also grant the following relief. There is to be a stay against suits and enforcement as

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

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

[24] Order to issue accordingly.

Application granted.

Appendix

Court File No. 00-CL-3667

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR. JUSTICE FARLEY

FRIDAY, THE 25TH DAY OF FEBRUARY, 2000

IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

INITIAL ORDER

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

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

SERVICE

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

RECOGNITION OF THE U.S. PROCEEDINGS

2. *THIS COURT ORDERS AND DECLARES* that the proceedings commenced by the Applicant's United States corporate parent and certain other related corporations in the United States for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with asbestos claims before the U.S. Bankruptcy Court (the "U.S. Proceedings") be and hereby is recognized as a "foreign proceeding" for purposes of

Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended, (the "CCAA").

APPLICATION

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

PROTECTION FROM ASBESTOS PROCEEDINGS

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

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

DIP FINANCING

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

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

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

(a) the execution, delivery, perfection or registration of the DIP Lender's Security shall not create or be deemed to constitute a breach by the Applicant of any agreement to which it is a party, and

(b) the DIP Lender shall have no liability to any person whatsoever as a result of any breach of any agreement caused by or resulting from the Applicant entering into the Credit Agreement, the DIP Lender's Security or other document delivered pursuant thereto.

REPORT AND EXTENSION OF STAY

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

(a) the Applicant shall appoint Victor J. Manica, or such other senior officer as it deems appropriate from time to time, as an information officer (the "Information Officer");

(b) the Information Officer shall deliver to the Court a report at least once every three months outlining the status of the U.S. Proceeding, the development of any process for dealing with asbestos claims and such other information as the Information Officer believes to be material (the "Information Reports"); and

(c) the Applicant and the Information Officer shall incur no liability or obligation as a result of the appointment of the Information Officer or the fulfilment of the duties of the Information Officer in carrying out the provisions of this Order and no action or other proceedings shall be commenced against the Applicant or Information Officer as an result of or relating in any way to the appointment of the Information Officer or the

fulfilment of the duties of the Information Officer, except with prior leave of this Court and upon further order securing the solicitor and his own client costs of the Information Officer and the Applicant in connection with any such action or proceeding.

SERVICE AND NOTICE

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

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

MISCELLANEOUS

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

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

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

15. *THIS COURT ORDERS AND REQUESTS* the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada (including the assistance of any court in Canada pursuant to Section 17 of the CCAA) and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any

province and any court or any judicial, regulatory or administrative body of the United States and the states or other subdivisions of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

Schedule “A”

NOTICE

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

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

PLEASE TAKE NOTICE that this notice is being published pursuant to an Order of the Superior Court of Justice of Ontario made February 25, 2000. The corporate parent of Babcock & Wilcox Canada Ltd. and certain other affiliated corporations in the United States have filed for protection in the United States under Chapter 11 of the Bankruptcy Code to seek, as the result of recent, sharp increases in the cost of settling asbestos claims which have seriously threatened the Babcock & Wilcox Enterprise’s long term health, protection from mass asbestos claims to which they are or may become subject. Babcock & Wilcox Canada Ltd. itself has not filed under Chapter 11 but has sought and obtained an interim order under Section 18.6 of the CCAA affording it a stay against asbestos claims in Canada. Further application may be made to the Court by Babcock & Wilcox Canada Ltd. to ensure fair and equal access for Canadians with asbestos claims against Babcock & Wilcox Canada Ltd. to the process established in the United States. Representations may also be made by parties who would prefer to pursue their remedies in Canada.

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

DATED this day of, 2000 at Toronto, Canada

Court File No. 00-CL-3667

IN THE MATTER OF S. 18.6 of THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST PROCEEDINGS

INITIAL ORDER

MEIGHEN DEMERS
Barristers & Solicitors
Suite 1100, Box 11
Merrill Lynch Canada Tower
Sun Life Centre
200 King Street West
Toronto, Ontario M5H 3T4

DERRICK C. TAY ORESTES PASPARAKIS
Tel: (416) 340-6000
Fax:(416)977-5239
Solicitors for the Applicant

TAB 4

Hollander Sleep Products, LLC (Re), [2019] O.J. No. 2817

Ontario Judgments

Ontario Superior Court of Justice

Commercial List

G.A. Hainey J.

Heard: May 23, 2019.

Judgment: May 30, 2019.

Court File No.: CV-19-620484-00CL

[2019] O.J. No. 2817 | 2019 ONSC 3238

RE: IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C. C-36, as Amended, and AND IN THE MATTER OF Hollander Sleep Products, LLC, Hollander Sleep Products Canada Limited, Dream II Holdings, LLC, Hollander Home Fashions Holdings, LLC, Pacific Coast Feather, LLC, Hollander Sleep Products Kentucky, LLC, and Pacific Coast Feather Cushion, LLC, Application of Hollander Sleep Products, LLC under Section 46 of the Companies' Creditors Arrangement Act, R.S.C. 1985, C. C-36, as Amended

(58 paras.)

Counsel

Shawn Irving and Marc Wasserman, for the Applicant.

Virginie Gauthier, for KSV Kofman Inc.

L. Joseph Latham, for Wells Fargo.

Milly Chow and Kelly Bourassa, for Barings Finance LLC.

ENDORSEMENT

G.A. HAINEY J.

BACKGROUND

1 On May 23, 2019 I granted the application brought by Hollander Sleep Products, LLC ("Hollander Sleep Products"), for orders pursuant to Section 46 through 49 of the *Companies' Creditors Arrangement Act*, *R.S.C. 1985, c. C-36* as amended ("***CCAA***"). I made the following orders:

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

b) Recognition of certain First Day Orders;

c) Appointment of KSV Kofman Inc. ("KSV") as Information Officer;

d) Granting of the DIP ABL Charge; and

e) Granting of the Administration Charge.

2 I indicated in my endorsement that written reasons would follow. These are my written reasons.

3 Hollander Sleep Products brings this application in its capacity as the foreign representative (the "Foreign Representative") of itself and Hollander Sleep Products Canada Limited ("Hollander Canada"), Dream II Holdings, LLC, Hollander Home Fashions Holdings, LLC, Pacific Coast Feather, LLC, Hollander Sleep Products Kentucky, LLC, and Pacific Coast Feather Cushion, LLC (collectively, the "Chapter 11 Debtors", and with their other non-debtor affiliates, "Hollander").

FACTS

4 Hollander is an industry leader in the bedding products market. Hollander manufactures bedding products including pillows, comforters and mattress pads for well-known licensed brands. Hollander also owns and manufactures bedding products under several of its own proprietary brands and also partners with major retailers and hotel chains.

5 Hollander's corporate headquarters is in Boca Raton, Florida. Hollander has 13 manufacturing facilities located across North America -- 11 in the United States and 2 in Canada -- and a primary show room in New York City. Most of Hollander's sales come from wholesale distribution.

Chapter 11 Cases

6 On May 19, 2019 (the "Petition Date") each of the Chapter 11 Debtors filed voluntary petitions for relief pursuant to Chapter 11 of the *U.S. Bankruptcy Code* (the "Chapter 11 Cases") with the United States Bankruptcy Court for the Southern District of New York (the "U.S. Court"). Certain first day motions (the "First Day Motions") were also filed on May 19, 2019. On May 21, 2019, the U.S. Court heard several of the First Day Motions, and on May 22 and 23, 2019 the court entered various interim or final orders in respect of these motions (the "First Day Orders").

Chapter 11 Debtors

7 The Chapter 11 Debtors operate on an integrated basis and are incorporated or established under the laws of the United States except for Hollander Canada, which is incorporated under the laws of British Columbia. Each of the Chapter 11 Debtors, including Hollander Canada, is a direct or indirect wholly-owned subsidiary of Dream II Holdings, LLC.

Hollander Canada

8 Hollander Canada is a fully integrated subsidiary of Hollander. Hollander Canada operates one manufacturing facility in Toronto, one manufacturing facility in Montreal, and maintains a sales office in Toronto.

9 Hollander Canada employs approximately 240 employees, all of whom are located in Canada. Hollander Canada's workforce is not unionized and it does not maintain any registered pension plans. Its primary stakeholders include employees, lenders, customers, landlords, creditors, and trade-suppliers.

10 On a standalone basis, Hollander Canada is not profitable. Its 2018 financial statement reflects a net loss of approximately $2.6 million after allocation of selling, general and administrative expenses, including royalties and procurement fees, incurred by the U.S. Chapter 11 Debtors and allocated across the manufacturing facilities for which it provides these and other shared services (the "U.S. Shared Services"). Losses have continued for the four-

month period ended April 30, 2019. Currently, approximately $7.2 million of Hollander Canada's $9 million of accounts payable is past due. If the amount owing to Hollander Canada from the U.S. Chapter 11 Debtors was written down to its realizable value and Hollander Canada's allocation of U.S. Shared Services was recorded for the four months ended April 30, 2019, Hollander Canada's shareholder equity would be entirely eroded.

11 Hollander Canada is entirely dependent on Hollander's U.S. head office for managerial, administrative, IT, strategic services and decisions, and it uses intellectual property almost wholly owned by U.S. Hollander entities. Hollander Canada is also entirely reliant on supply arrangements and relationships of the Hollander enterprise.

Principal Indebtedness

12 The Chapter 11 Debtors' principal pre-petition indebtedness consists of the following:

a) **Prepetition ABL Facility** -- a $125 million senior revolving asset-based credit facility (the "ABL Facility") under which all the Chapter 11 Debtors, including Hollander Canada, are obligors. Hollander Canada may borrow a maximum of $40 million from this facility. Hollander Canada is not jointly or severally liable for the obligations of the U.S. Chapter 11 Debtors under the ABL Facility; however, the U.S. Chapter 11 Debtors are liable for Hollander Canada's borrowings under the ABL Facility. As of the Petition Date, approximately $61 million remains outstanding against the ABL Facility, not including approximately $5 million in letters of credit (the "Prepetition ABL Obligations"). The Prepetition ABL Obligations include approximately $6 million of borrowings by Hollander Canada.

b) **Prepetition Term Loan** -- a $190 million senior secured term loan facility (the "Term Loan Facility"). Each Chapter 11 Debtor except Hollander Canada is an obligor under this facility. Hollander Canada is not a borrower or a guarantor of the Term Loan Facility. As of the Petition Date, approximately $166.5 million remains outstanding against the Term Loan Facility.

Recent Events and Proposed Restructuring

13 Recent substantial price increases on materials have significantly reduced Hollander's already low profit margins for many products. In addition, Hollander acquired one of its major competitors in June 2017. This necessitated the expenditure of additional capital. With approximately $233 million of outstanding indebtedness and limited access to credit, Hollander is facing severe liquidity constraints.

14 These circumstances necessitated comprehensive restructuring negotiations with the Chapter 11 Debtors' primary constituency groups. The Chapter 11 Debtors recently agreed with their secured lenders and their majority equity-holder, Sentinel, on a comprehensive restructuring process to ensure the viability of the business. The Chapter 11 Debtors, 100% of the Term Loan Lenders, and Sentinel entered into a restructuring support agreement dated May 19, 2019 (the "RSA"). The RSA contemplates, and the Chapter 11 Debtors have filed, a comprehensive Chapter 11 restructuring plan (the "Plan").

15 In connection with the RSA, Hollander's asset-based secured lenders have agreed to provide a $90 million debtor-in-possession asset-based loan facility (the "DIP ABL Facility") and certain Term Loan Lenders have agreed to provide an additional $28 million term loan facility (the "DIP Term Loan Facility" and together with the DIP ABL Facility, the "DIP Facilities") to fund the administration of the Chapter 11 Cases.

16 I am not, at this time, being asked to approve or grant any relief in connection with the Plan. However, the Chapter 11 Debtors have negotiated and incorporated certain protections into the Plan to mitigate against any prejudice to current creditors of Hollander Canada that might result incidentally from a global restructuring. I am satisfied that the Plan represents the Chapter 11 Debtors' best prospect of reorganizing their business operations and emerging as a healthy going-concern enterprise, maximizing recoveries for all stakeholders.

17 If the Chapter 11 Debtors do not obtain the relief requested on this application, including post-petition financing, they will be unable to restructure pursuant to the Plan. In such a case, a liquidation of the business and assets of the Chapter 11 Debtors, including Hollander Canada, will be the likely result. In a liquidation scenario, there will be a nominal recovery, if any, available for Hollander Canada's unsecured creditors.

Proposed Postpetition Financing

18 On May 21, 2019, the U.S. Court heard certain of the First Day Motions, including the DIP Motion. At the hearing, the U.S. Court requested certain changes to the DIP Order, which were subsequently made by the Chapter 11 Debtors in consultation with the DIP Lenders. Access to the DIP Facilities is vital to the preservation and maintenance of the going-concern value of Hollander and the Chapter 11 Debtors' successful reorganization.

19 The $90 million DIP ABL Facility is the critical facility from the perspective of Hollander Canada. Hollander Canada is neither a borrower nor a guarantor of the DIP Term Loan Facility. The DIP ABL Facility is a senior secured credit facility for which all the Chapter 11 Debtors, including Hollander Canada, are borrowers. The DIP ABL Facility provides for an initial "creeping (or gradual) roll-up" whereby the Chapter 11 Debtors will use receipts from the Chapter 11 Debtors' operations to pay down pre-filing obligations pending the issuance of the Final DIP Order, whereupon there will be a deemed draw on the DIP ABL Facility to satisfy the then outstanding prepetition debt, if any, under the ABL Facility. Hollander Canada is entitled to borrow up to $20 million under the DIP ABL Facility, less the amount of Hollander Canada's prepetition obligations under the ABL Facility that are to be rolled-up into the DIP ABL Facility.

20 With respect to prepetition debt under the ABL Facility, Hollander Canada is not jointly or severally liable for amounts drawn down by the U.S. Chapter 11 Debtors. However, Hollander Canada will be jointly and severally liable with the other Chapter 11 Debtors in respect of borrowings under the DIP ABL Facility, including borrowings to repay amounts drawn down under the prepetition ABL Facility by the U.S. Chapter 11 Debtors. The DIP ABL Lenders have indicated they are unwilling to enter into the DIP ABL Facility unless Hollander Canada is jointly and severally liable for all obligations under the DIP ABL Facility, including those incurred by the U.S. borrowers.

21 It is a condition of the DIP Facilities that the Chapter 11 Debtors obtain an order from this Court recognizing the DIP Order within three business days of when the DIP Order was issued by the U.S. Court. The DIP ABL Facility requires that the DIP Order be recognized by this Court before any borrowing by Hollander Canada will be permitted under the DIP ABL Facility.

22 I have concluded that the ability of the Chapter 11 Debtors, including Hollander Canada, to maintain business relationships with their vendors, suppliers and customers, to pay their employees and otherwise finance their operations requires the availability of working capital from the DIP Facilities. The Chapter 11 Debtors, including Hollander Canada on a standalone basis, do not have sufficient available sources of working capital and financing to operate their businesses without immediate access to the DIP Facilities.

ISSUES

23 I must decide the following issues:

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 in the Initial Recognition Order and Supplemental Order, including,

(i) Granting the Stay of Proceedings;

(ii) Recognition of the First Day Orders;

(iii) Granting the DIP ABL Charge;

(iv) Appointing KSV as Information Officer; and

(v) Granting the Administration Charge?

ANALYSIS

Are the Chapter 11 Cases Foreign Main Proceedings?

Are the Chapter 11 Cases Foreign Proceedings?

24 I must first determine if the Chapter 11 Cases are foreign proceedings. It is important to note that 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. Section 44 of the ***CCAA*** provides as follows:

> 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.

25 Pursuant to S. 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. Pursuant to S. 47 of the ***CCAA***, the two following requirements must be met for an order recognizing a foreign proceeding:

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

26 In the Chapter 11 Cases, an order was made appointing Hollander Sleep Products as foreign representative by the U.S. Court on May 23, 2019. (the "Foreign Representative Order").

27 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. Courts have consistently recognized proceedings under Chapter 11 of the United States Bankruptcy Code to be foreign proceedings for the purposes of the ***CCAA***.

28 Because Hollander Sleep Products has been appointed a "foreign representative" by the U.S. Court in the Chapter 11 Cases, I am satisfied that the Chapter 11 cases should be recognized as a "foreign proceeding" pursuant to S. 47(1) of the ***CCAA***.

Are the Chapter 11 Cases Foreign Main Proceedings?

29 Once I have determined that a proceeding is a "foreign proceeding", I am required, pursuant to Section 47(2) of the ***CCAA***, to specify in my order whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding." A "foreign main proceeding" is defined as a "foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests" ("COMI").

30 The ***CCAA*** does not provide a definition of COMI. Section 45(2) of the ***CCAA*** establishes a rebuttable presumption that, in the absence of proof to the contrary, the location of a debtor company's registered office is deemed to be its COMI. Evidence regarding the debtor company's operations can rebut this presumption. 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.

31 In this case the registered offices of all of the Chapter 11 Debtors except for Hollander Canada, are situated in the United States. Therefore, the presumption in s. 45(2) of the ***CCAA*** deems the COMI of each of those entities to be in the United States.

32 Hollander Canada's registered head office is in Vancouver. Where a Canadian entity is operating as part of a larger corporate group, several Canadian authorities have considered how COMI should be determined. In *Angiotech*[1], the Court considered 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;
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.

33 In ***Elephant*** *& Castle*[2] , Morawetz J. (as he then was) recognized the *Angiotech* factors listed above and identified what he considered to be the most significant factors as follows:

> 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.

34 The jurisprudence is clear that where a Canadian debtor company is the only Canadian entity among a number of other Chapter 11 debtors that are all incorporated in the United States, the COMI for the Canadian debtor company is the United States.

35 I have concluded for the following reasons that Hollander Canada's COMI is in the United States:

a) Hollander Canada's business is closely integrated into Hollander's business in the U.S. and its registered office is listed in Canada only for corporate purposes;
b) Managerial functions for Hollander Canada, including finance, buying, logistics, marketing, and strategic decisions, are provided from Hollander's U.S. head office by Hollander Sleep Products;

c) Hollander Canada is almost wholly dependent on Hollander's U.S. office for administrative functions such as overhead services, accounting, and IT, which are provided by Hollander Sleep Products in the U.S.;

d) Data for Hollander Canada's operations is housed within IT systems, located and operated out of the U.S.;

e) Hollander Canada is reliant on the purchasing power and supplier relationships of the Hollander enterprise, and on its own could not replicate the supply arrangements necessary for its continued functioning;

f) Hollander Canada's books and records are maintained at Hollander's head office in Boca Raton, Florida;

g) All of Hollander Canada's directors reside in the United States;

h) Canadian revenues make up only 10.7% of Hollander's revenues;

i) Hollander Canada is entirely dependent on the U.S. Chapter 11 Debtors for the majority of licensing agreements, design partnerships, and company-owned brands;

j) Substantially all of the trademarks and intellectual property relied on by Hollander Canada are owned by the U.S. Chapter 11 Debtors;

k) The Chapter 11 Debtors, including Hollander Canada, operate an integrated, centralized cash management system; and

l) Hollander Canada is dependent on the U.S. Chapter 11 Debtors for the establishment, maintenance, and administration of certain customer promotional programs involving Hollander Canada's key customers.

36 Since all the Chapter 11 Debtors except Hollander Canada have registered offices in the United States, and since a review of Hollander Canada's business indicates that its COMI is in the United States, The COMI of all the Chapter 11 Debtors is in the United States and therefore the Chapter 11 Cases should be recognized as "foreign main proceedings".

SHOULD THE INITIAL RECOGNITION ORDER AND SUPPLEMENTAL ORDER BE GRANTED?

Is a Stay of Proceedings Required and Appropriate?

37 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:

38 In addition to the automatic relief provided for in s. 48, s.49 of the ***CCAA*** grants me the broad discretion to make any appropriate order if I am satisfied that it is necessary for the protection of the debtor company's property or the interests of creditors.

39 Section 52(1) of the ***CCAA*** requires that if an order recognizing a foreign proceeding is made, the Court "shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding."

40 Because of the circumstances facing Hollander, Hollander Canada and the other Chapter 11 Debtors, I am satisfied that a stay of proceedings is necessary in order to implement the proposed restructuring.

Should the First Day Orders be Recognized?

41 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.

42 Canadian courts have emphasized the importance of comity and cooperation in cross-border insolvency proceedings to avoid 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 location.

43 I am satisfied that the First Day Orders should be recognized 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 in the United States or Canada;

c) Given the close connection between Hollander 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) The Chapter 11 Debtors must act quickly because of the expeditious timetable established under the Plan for their restructuring. It is imperative that there be a centralized 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 Hollander are highly integrated.

Should the DIP ABL Charge be Granted?

44 The Chapter 11 Debtors are facing a liquidity crisis and require DIP financing to fund their operations while they pursue a restructuring pursuant to the Plan or a sale in accordance with the marketing process to be conducted as part of the Chapter 11 proceeding. The ability of the Chapter 11 Debtors, including Hollander Canada, to maintain and finance their operations requires working capital from the DIP Facilities. If interim financing through the DIP Facilities is not obtained, neither the Chapter 11 Debtors as a whole, nor Hollander Canada on a standalone basis, have the funds to finance going-concern operations.

45 The DIP ABL Facility includes an initial creeping roll-up provision pursuant to which the Chapter 11 Debtors will use receipts from their operations to pay down pre-filing obligations pending the issuance of the Final DIP Order. The amount borrowed under the DIP ABL Facility is proposed to be secured by, among other things, a court-ordered charge on Hollander Canada's property and the property of the other Chapter 11 Debtors in Canada (the "DIP ABL Charge").

46 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***[3].

47 In *Hartford*, an application under Part IV of the ***CCAA***, this court recognized a DIP facility authorized by the U.S. Court that included a full roll-up, and emphasized the importance of comity in foreign recognition proceeding as follows:

> 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.

> 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.
>
> It is necessary, in my view, to emphasize that this is a motion to recognize an order made in the "foreign main proceeding"...
>
> 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.

48 For the same reasons I am satisfied that the DIP Order should be approved. The U.S. Court granted the DIP Order because it is necessary for the protection of Hollander's property and for the interests of creditors in Canada and the U.S.

49 The DIP ABL Facility provides that Hollander Canada is jointly and severally liable for the borrowings of other Chapter 11 Debtors under the DIP ABL Facility.

50 I have concluded that the following factors support recognizing Hollander Canada's joint and several liability under the DIP Order and the DIP ABL Charge:

a) The DIP ABL Charge furthers the objectives of the ***CCAA*** and is commercially reasonable as it allows the Chapter 11 Debtors to continue operations and pursue a restructuring or going-concern sale as outlined in the proposed Plan;

b) An estimated cash flow forecast extracted from the DIP budget reveals that Hollander Canada is projected to generate negative cash flow until at least July 1, 2019;

c) The Chapter 11 Debtors, including Hollander Canada, need immediate access to the DIP ABL Facility to ensure their continued operations during these proceedings;

d) The DIP ABL Lenders are unwilling to provide funding to the Chapter 11 Debtors without Hollander Canada's joint and several liability under the DIP ABL Facility;

e) The proposed DIP Facilities and Plan are supported by all secured creditors with an economic interest in Hollander Canada; and

f) If the DIP ABL Charge is not granted, the restructuring contemplated by the Plan will not be implemented, likely resulting in liquidation. In a liquidation scenario, Hollander Canada's creditors will likely obtain only nominal recoveries, if any.

51 To protect the interests of Hollander Canada and its creditors, the Chapter 11 Debtors negotiated certain protections to mitigate any prejudice to Hollander Canada's creditors. Specifically, the DIP Order includes a quasi-marshalling construct whereby the DIP ABL Agent is obligated to first look to proceeds of the Chapter 11 Debtors' U.S. collateral to satisfy any outstanding obligations of the U.S. Chapter 11 Debtors under the DIP ABL Facility, and to the proceeds of the Chapter 11 Debtors' Canadian collateral to satisfy any outstanding obligations of Hollander Canada under the DIP ABL Facility. Only once collateral in the U.S. has been exhausted can the DIP ABL Lenders look to the Canadian assets to satisfy any outstanding U.S. obligation.

52 The absence of prejudice to creditors of Hollander Canada, and the DIP ABL Lenders' consent to the quasi-marshalling construct, are key factors distinguishing this case from *Payless Holdings Inc. LLC, (Re)*. 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 DIP facility even though they would not receive advances from it. The DIP facility was opposed by the Canadian landlords who were uniquely prejudiced by its terms. The DIP facility in that case specifically precluded marshalling.

53 I have concluded that the Court's decision in *Payless* is distinguishable from this case for the following reasons

as set out in the applicant's factum:

a) In *Payless*, the Canadian Applicants were not insolvent, were not prepetition borrowers, had never granted security and were not borrowers under the DIP facility. In this case, Hollander Canada is insolvent, its assets are encumbered, and it is incapable of maintaining going concern operations without urgent funding support from the DIP ABL Facility. For instance, $7.2 million of Hollander Canada's accounts payable are currently past due; without support from the DIP ABL Facility, Hollander does not have sufficient liquidity to satisfy these obligations.

b) In *Payless*, there was evidence of material prejudice to Canadian creditors and certain Canadian creditor groups opposed the DIP order because they were disadvantaged. In this case, no such material prejudice or unequal treatment exists with respect to the creditors of Hollander Canada or the other Chapter 11 Debtors.

c) In *Payless*, the Court intimated that if marshalling had been permitted, the inequitable treatment of Canadian creditors would have been resolved. In this case, the DIP ABL Lenders have specifically agreed to a quasi marshalling concept to ensure that Canadian assets are used first to satisfy Canadian DIP ABL indebtedness, and not applied to satisfy U.S. DIP ABL indebtedness until all U.S. assets are first exhausted.

54 I have concluded that the DIP ABL Charge should be granted for these reasons.

SHOULD KSV BE APPOINTED INFORMATION OFFICER?

55 I am satisfied that an information officer should be appointed to assist with the cooperation between the Canadian foreign recognition proceeding and the foreign representative and the U.S. Court. Further, KSV, a licensed insolvency trustee, is appropriate to act in this capacity.

SHOULD AN ADMINISTRATIVE CHARGE BE APPROVED?

56 Finally, I am satisfied that an administration charge in the maximum amount of $200,000 is reasonable and appropriate.

CONCLUSION

57 For these reasons I have granted the Initial Recognition Order and the Supplemental Order.

58 I am grateful to the applicant's counsel for their helpful submission.

G.A. HAINEY J.

---

1 *Angiotech Pharmaceuticals Inc. (Re)*, 2011 BCSC 115 at para 7.

2 ***Massachusetts Elephant*** *& Castle Group Inc., (Re)*, 2011 ONSC 4201 (S.C.J. [Commercial List]).

3 *Hartford Computer Hardware Inc., (Re)*, 2012 ONSC 964 at paras. 18-19.

TAB 5

Date: 20061219
Docket: CI 05-01-45377
(Winnipeg Centre)
Indexed as: Minden Schipper & Associates Inc. et al v. Cancercare Manitoba et al
Cited as: 2006 MBQB 292

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

MINDEN SCHIPPER & ASSOCIATES INC. AND DAVID SCUSE,	)	No one appeared for the plaintiffs
plaintiffs,	)	W.C. Kushneryk, Q.C. for the defendant COH
- and -	)	Holdings (US) Inc.
CANCERCARE MANITOBA, COH HOLDINGS (US) INC., VARIAN MEDICAL SYSTEMS INC., AND VARIAN MEDICAL SYTSEMS, CANADA INC.	)	Erin Romeo for the defendants Varian Medical Systems, Inc. and Varian Medical Systems, Canada Inc.
defendants,	)	
- and -	)	
AMERISOURCE BERGEN CORPORATION,	)	No one appeared for the third party
third party.	)	JUDGMENT DELIVERED: DECEMBER 19, 2006

NURGITZ, J.

[1] The applicant in these proceedings, COH Holdings (US) Inc. ("COH"), seeks a stay of all of the claims asserted against it in these proceedings in Manitoba. In addition, COH seeks an order of the court recognizing the receivership process ongoing in the State of Colorado in the United States.

[2] The plaintiff issued a Statement of Claim in this court on December 15, 2005 seeking an accounting of software sales for the year 2004 and subsequent years. The applicant COH is a named defendant, as are responding parties Varian Medical Systems Inc. and Varian Medical Systems, Canada Inc. ("the Varian companies").

[3] The Varian companies filed a Statement of Defence to the main action and a crossclaim against COH on January 30, 2006. As well, an amended Statement of Defence and Crossclaim was filed on May 23, 2006 in which a crossclaim was made by the Varian companies against Cancercare Manitoba, one of the other named defendants. In addition to the filing of Statements of Defence and the making of crossclaims, there have also been third party claims against Amerisource Bergen Corporation ("ABC") on January 30, 2006.

[4] It is relevant to consider the status of proceedings in the State of Colorado. In the District Court (Denver County) in the State of Colorado, insolvency proceedings are moving ahead. On October 20, 2005, the District Court in Colorado appointed an interim receiver for COH and that appointment was made permanent on November 18, 2005.

[5] The Receiver has sought the approval of the Colorado court to establish a claims administration procedure, and as part of this process, the court in Colorado has imposed a cut-off date of January 5, 2007. This would require all claims against COH to be filed by that date, failing which the receiver will be proceeding and further claims will not be considered.

[6] It is clear that the parties involved in the Manitoba Court of Queen's Bench action are certainly free, and in fact invited, to participate in the claims administration procedure.

[7] The claim is made by COH. Most of its assets and undertakings are situate in the State of Colorado. Mr. Kushneryk, on behalf of COH, asserts in his brief that there is approximately $1,300,000.00 USD arising from the liquidation of assets. This pool of money will be the subject of claims being made against COH.

[8] It is asserted that recognition of the receivership proceedings in Colorado and the granting of a stay of proceedings against COH in the Manitoba action will assist in an orderly and efficient administration of the receivership estate in Colorado and that this would be a benefit to all creditors.

[9] Section 38 of ***The Court of Queen's Bench Act*** of Manitoba, C.C.S.M. c. C280 provides:

> **Stay of Proceedings**
>
> 38. The Court, on its own initiative or on motion by a person, whether or not a party, may stay a proceeding on such terms as are considered just.

[10] Manitoba Court of Queen's Bench Rules 17.06(1)(b) and 17.06(4) provide as follows:

> **Motion to Stay Proceedings**
>
> 17.06(1) A party who has been served with an originating process outside Manitoba may move, before filing or serving a defence
>
> b) for an Order staying the proceeding;

. . .

Submission to Jurisdiction

> 17.06(4) A party served outside Manitoba shall not be held to have submitted to the jurisdiction of the Court by serving a Notice of Motion pursuant to subrule (1) or by appearing on such a motion.

[11] The motion of COH requests the court to apply common law principles of comity which permit this court to recognize and enforce in Canada judicial acts of other competent jurisdictions in an appropriate case. The request further is for a recognition and accommodation and enforcement of the judicial acts and orders made by the District Court, Denver County, State of Colorado, as those acts and orders pertain to COH in the receivership proceedings in the State of Colorado.

[12] Paragraph 16 of the Colorado Receivership Order provides as follows:

> 16. All rights and remedies against COH, the Receiver, or affecting the Property, including, but not limited to, the exercise of any contractual rights, including but not limited to a right of setoff, are hereby stayed and suspended except with the written consent of the Receiver or order of this Court.

[13] Counsel for COH makes the point that with increased cross-border trade between Canada and the United States, it is likely desirable, if not advisable, for courts to attempt to cooperate in relation to cross-border insolvency and liquidation proceedings. This is more a matter of comity than of the finding of the proper forum. In ***Morguard Investments Ltd. v. De Savoye***, [1990] 3 S.C.R. 1077, LaForest, J., at p. 1096, dealt with the question of comity as follows:

> 'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard

> both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws ...

[14] In the decision of Mr. Justice Farley of the Ontario Superior Court of Justice in the ***Ravelston Corporation*** case rendered in July of 2005:

> [21] The principles underlying comity are respect for other national jurisdictions, necessity and convenience: see *Morguard* at p. 1078. Canadian courts generally and specifically this court has had a very long tradition of exercising comity generally and specifically in respect of decisions of courts of the United States. Similarly our courts have enjoyed the exercise of comity towards Canadian decisions by the courts of the United States.

[15] I note with interest the plaintiffs, through counsel, have filed a consent indicating their approval and consent to the application by COH. As well, court has heard that counsel for Cancercare Manitoba has advised that he takes no position on the motion and, further, that counsel for the third party Amerisource Bergen Corporation takes no position as well.

[16] Considering many factors, including the position (or lack thereof) of the various parties and as well the governing principles, I find that the application before me is requesting relief that is appropriate. Considering these various matters and the principles of comity, I will exercise my discretion and grant the order recognizing and enforcing the receivership proceedings against COH pursuant to the order of the District Court for the County and City of Colorado dated October 20, 2005 and confirmed on November 18, 2005.

[17] I would further order a stay of all proceedings and claims asserted against COH in this action.

[18] If counsel are unable to agree on the question of costs, they may seek an appointment with the trial coordinator.

Nurgitz, J.

TAB 6

2010 ONSC 3974
Ontario Superior Court of Justice [Commercial List]

Xerium Technologies Inc., Re

2010 CarswellOnt 7712, 2010 ONSC 3974, 193 A.C.W.S. (3d) 1066, 71 C.B.R. (5th) 300

IN THE MATTER OF the Companies' Creditors Arrangement ACT, R.S.C. 1985, c. C-36, AS AMENDED

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

C. Campbell J.

Heard: May 14, 2010
Judgment: September 28, 2010
Docket: 10-8652-00CL

Counsel: Derrick Tay, Randy Sutton for Applicants

Subject: Insolvency

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

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

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

Foreign Proceedings — Debtors commenced proceedings in U.S. under Chapter 11 of U.S. Bankruptcy Code ("U.S. Code") — Recognition order was granted in Canada recognizing Chapter 11 Proceedings as foreign main proceeding in respect of Debtors, pursuant to Pt. IV of Companies' Creditors Arrangements Act ("CCAA") — U.S. Bankruptcy Court made various orders in respect of Debtors' ongoing business operations ("Orders") and confirmed Debtors' Joint Plan of Reorganization ("Plan") under U.S. Code ("Confirmation Order") — Applicant company, Foreign Representative of Debtors, brought motion to have Orders, Confirmation Order and Plan recognized and given effect in Canada — Motion granted — Provisions of Plan were consistent with purposes set out in s. 61(1) of CCAA — Plan was critical to restructuring of Debtors as global corporate unit — Recognition of Confirmation Order was necessary to ensure fair and efficient administration of cross-border insolvency — U.S. Bankruptcy Court concluded Plan complied with U.S. Bankruptcy principles, and that Plan was made in

good faith; did not breach any applicable law; was in interests of Debtors' creditors and equity holders; and would not likely be followed by need for liquidation or further financial reorganization of Debtors — Such principles also underlay CCAA, and thus dictated in favour of Plan's recognition and implementation in Canada.

Table of Authorities

Cases considered by *C. Campbell J.*:

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

Statutes considered:

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

Chapter 11 — referred to

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

Pt. IV — referred to

s. 44 — considered

s. 53(b) — referred to

s. 61(1) — considered

MOTION by applicant for orders recognizing and giving effect to certain orders of U.S. Bankruptcy Court in Canada.

C. Campbell J.:

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

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

3 On April 1, 2010, this Court granted the Recognition Order sought by, *inter alia*, the Applicant, Xerium Technologies

Inc. ("Xerium") as the "Foreign Representative" of the Chapter 11 Debtors and recognizing the Chapter 11 Proceedings as a "foreign main proceeding" in respect of the Chapter 11 Debtors, pursuant to Part IV of the CCAA.

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

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

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

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

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

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

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

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

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

13 On March 31, 2010, the U.S. Bankruptcy Court entered the Order (I) Scheduling a Combined Hearing to Consider (a) Approval of the Disclosure Statement, (b) Approval of Solicitation Procedures and Forms of Ballots, and (c) Confirmation of the Plan; (II) Establishing a Deadline to Object to the Disclosure Statement and the Plan; and (III) Approving the Form and Manner of Notice Thereof (the "Scheduling Order.")

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

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

16 The Plan provides for a comprehensive financial restructuring of the Chapter 11 Debtors' institutional indebtedness and capital structure. According to its terms, only Secured Swap Termination Claims, claims on account of the Credit

Facility, Unsecured Swap Termination Claims, and Equity Interests in Xerium are "impaired" under the Plan. Holders of all other claims are unimpaired.

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

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

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

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

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

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

> (a) Recognition of the Chapter 11 Proceedings as a "foreign main proceeding" pursuant to Subsection 47(2) of the CCAA;
>
> (b) Recognition of the Applicant as the "foreign representative" in respect of the Chapter 11 Proceedings;
>
> (c) Recognition of and giving effect in Canada to the automatic stay imposed under Section 362 of the U.S. Bankruptcy Code in respect of the Chapter 11 Debtors;
>
> (d) Recognition of and giving effect in Canada to the U.S. First Day Orders in respect of the Chapter 11 Debtors;
>
> (e) A stay of all proceedings taken or that might be taken against the Chapter 11 Debtors under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (f) Restraint on further proceedings in any action, suit or proceeding against the Chapter 11 Debtors;
>
> (g) Prohibition of the commencement of any action, suit or proceeding against the Chapter 11 Debtors; and
>
> (h) Prohibition of the Chapter 11 Debtors from selling or otherwise disposing of, outside the ordinary course of its business, any of the Chapter 11 Debtors' property in Canada that relates to their business and prohibiting the Chapter 11 Debtors from selling or otherwise disposing of any of their other property in Canada, unless authorized to do so by the U.S. Bankruptcy Court.

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

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

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

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(d) the protection and the maximization of the value of debtor company's property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

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

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

26 In *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) at para. 21, this Court held that U.S. Chapter 11 proceedings are "foreign proceedings" for the purposes of the CCAA's cross-border insolvency provisions. The Court also set out a non exclusive or exhaustive list of factors that the Court should consider in applying those provisions.

27 The applicable factors from *Babcock & Wilcox Canada Ltd., Re* that dictate in favour of recognition of the U.S. Confirmation Order are set out in paragraph 45 of the Applicant's factum;

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

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

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

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

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

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

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

(a) it is made in good faith;

(b) it does not breach any applicable law;

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

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

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

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

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

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

Motion granted.

Footnotes

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