Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

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

BRIEF OF AUTHORITIES OF THE APPLICANT
(Application returnable on December 21, 2011)

December 16, 2011

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Babcock & Wilcox Canada Ltd., Re

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

Counsel: *Derrick Tay*, for Babcock & Wilcox Canada Ltd.

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

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Solvent corporation applied for interim order under s. 18.6 of Companies' Creditors Arrangement Act for stay of actions and enforcements against corporation in respect of asbestos tort claims — Application granted — Application was to be reviewed in light of doctrine of comity, inherent jurisdiction, and aspect of liberal interpretation of Act generally — Proceedings commenced by corporation's parent corporation in United States and other United States related corporations for protection under c. 11 of United States Bankruptcy Code in connection with mass asbestos tort claims constituted foreign proceeding for purposes of s. 18.6 of Act — Insolvency of debtor in foreign proceeding was not condition precedent for proceeding to be foreign proceeding under definition of s. 18.6 of Act — Corporation was entitled to avail itself of provisions of s. 18.6 of Act — Relief requested was not of nature contrary to provisions of Act — Recourse may be had to s. 18.6 of Act in case of solvent debtor — Chapter 11 proceedings in United States were intended to resolve mass asbestos-related tort claims that seriously threatened long-term viability of corporation's parent — Corporation was significant participant in overall international operation and interdependence existed between corporation and its parent as to facilities and services — Bankruptcy Code, 11 U.S.C. 1982, c. 11 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.6.

Cases considered by *Farley J.*:

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Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) — referred to

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

Farley J.:

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

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

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

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

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

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

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

4 In 1997, ss. 267-275 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("BIA") and s. 18.6 of the CCAA were enacted to address the rising number of international insolvencies ("1997 Amendments"). The 1997 Amendments

were introduced after a lengthy consultation process with the insolvency profession and others. Previous to the 1997 Amendments, Canadian courts essentially would rely on the evolving common law principles of comity which permitted the Canadian court to recognize and enforce in Canada the judicial acts of other jurisdictions.

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

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

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

> Allow me to start off by stating that I agree with the analysis of MacPherson J. in *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.) when in discussing *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, 52 B.C.L.R. (2d) 160, 122 N.R. 81, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, he states at p.411:
>
> > The leading case dealing with the enforcement of "foreign" judgments is the decision of the Supreme Court of Canada in *Morguard Investments, supra.* The question in that case was whether, and the circumstances in which, the judgment of an Alberta court could be enforced in British Columbia. A unanimous court, speaking through La Forest J., held in favour of enforceability and, in so doing, discussed in some detail the doctrinal principles governing inter-jurisdictional enforcement of orders. I think it fair to say that the overarching theme of La Forest J.'s reasons is the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure. He expressed this theme in these words, at p. 1095:
> >
> > > Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem*, such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. *This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given has power over the litigants, the judgments of its courts should be respected.* (emphasis added in original)
> >
> > *Morguard Investments* was, as stated earlier, a case dealing with the enforcement of a court order across provincial boundaries. However, the historical analysis in La Forest J.'s judgment, of both the United Kingdom and Canadian jurisprudence, and the doctrinal principles enunciated by the court are equally applicable, in my view, in a situation where the judgment has been rendered by a court in a foreign jurisdiction. This should not be an absolute rule - there will be some foreign court orders that should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process. (my emphasis added)

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

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

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

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

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

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

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

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

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

> Comity and cooperation are increasingly important in the bankruptcy context. *As internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination there would be multiple proceedings, inconsistent judgments and general uncertainty.*
>
> . . . *I find that common sense dictates that these matters would be best dealt with by one court, and in the interest of promoting international comity it seems the forum for this case is in the U.S. Bankruptcy Court.* Thus, in either case, whether there has been an attornment or not, I conclude it is appropriate for me to exercise my discretion and apply the

> principles of comity and grant the Defendant's stay application. I reach this conclusion based on all the circumstances, including the clear wording of the U.S. Bankruptcy Code provision, the similar philosophies and procedures in Canada and the U.S., the Plaintiff's attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding . . . (emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> (a) The recognition of comity and cooperation between the courts of various jurisdictions are to be encouraged.
>
> (b) Respect should be accorded to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada.

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

(d) The enterprise is to be permitted to implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis of the enterprise and to the extent reasonably practicable, one jurisdiction should take charge of the principal administration of the enterprise's reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of the stakeholders and does not inappropriately detract from the net benefits which may be available from alternative approaches.

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

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

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

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

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

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

(f) Where one jurisdiction has an ancillary role,

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

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

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

22 Taking these factors into consideration, and with the determination that the Chapter 11 proceedings are a "foreign proceeding" within the meaning of s. 18.6 of the CCAA and that it is appropriate to declare that BW Canada is entitled to avail itself of the provisions of s. 18.6, I would also grant the following relief. There is to be a stay against suits and enforcement as requested; the initial time period would appear reasonable in the circumstances to allow BWUS to return to the U.S. Bankruptcy Court. Assuming the injunctive relief is continued there, this will provide some additional time to more fully prepare an initial draft approach with respect to ongoing matters. It should also be recognized that if such future relief is not granted in the U.S. Bankruptcy Court, any interested person could avail themselves of the "comeback" clause in the draft order presented to me and which I find reasonable in the circumstances. It appears appropriate, in the circumstances that BW Canada guarantee BWUS' obligations as aforesaid and to grant security in respect thereof, recognizing that same is permitted pursuant to the general corporate legislation affecting BW Canada, namely the *Business Corporations Act* (Ontario). I note that there is also a provision for an "Information Officer" who will give quarterly reports to this Court. Notices are to be published in the Globe &

Mail (National Edition) and the National Post. In accordance with my suggestion at the hearing, the draft order notice has been revised to note that persons are alerted to the fact that they may become a participant in these Canadian proceedings and further that, if so, they may make representations as to pursuing their remedies regarding asbestos related claims in Canada as opposed to the U.S. As discussed above the draft order also includes an appropriate "comeback" clause. This Court (and I specifically) look forward to working in a cooperative judicial way with the U.S. Bankruptcy Court (and Judge Brown specifically).

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

24 Order to issue accordingly.

Application granted.

Appendix

Court File No. 00-CL-3667

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

INITIAL ORDER

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

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

SERVICE

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

RECOGNITION OF THE U.S. PROCEEDINGS

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

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

APPLICATION

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

PROTECTION FROM ASBESTOS PROCEEDINGS

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

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

DIP FINANCING

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

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

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

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

REPORT AND EXTENSION OF STAY

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

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

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

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

SERVICE AND NOTICE

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

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

MISCELLANEOUS

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

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

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

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

Schedule "A"

2000 CarswellOnt 704, 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157

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

Tabular or graphic material set at this point is not displayable.

END OF DOCUMENT

TAB 2

2009 CarswellOnt 4232, 55 C.B.R. (5th) 57

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2009 CarswellOnt 4232, 55 C.B.R. (5th) 57

Lear Canada, Re

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

AND IN THE MATTER OF **LEAR CANADA, LEAR CANADA** INVESTMENTS LTD., **LEAR** CORPORATION **CANADA** LTD. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICATION UNDER SECTION 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: July 14, 2009
Docket: CV-09-00008269-00CL

Counsel: K. McElcheran, R. Stabile for Applicants

E. Lamek for Proposed Information Officer

A. Cobb for J.P. Morgan Chase Bank, N. A.

Subject: Insolvency

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Jurisdiction of courts — Jurisdiction of Bankruptcy Court — Territorial jurisdiction — Foreign bankruptcies

Insolvent debtor American company had Canadian subsidiary — Debtor was unable to meet obligations and began restructuring process in United States — Subsidiary and company brought application for recognition of foreign order — Application granted — Stay of proceedings in Canada granted — Subsidiary was entitled to apply for order as interested person under s. 18.6(4) of Companies' Creditors Arrangement Act and as debtor within s. 18.6(1) — While Companies' Creditors Arrangement Act does not define person, Bankruptcy and Insolvency Act extends definition to partnership — Real and substantial connection existed to American proceedings — Canadian operations were inextricably linked with business in foreign jurisdiction — Restructuring process required to occur internationally — Multiplicity of proceedings should be avoided.

Cases considered by *Pepall J.*:

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

Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of) (2001), 2001 SCC 90, 2001 CarswellNat 2816, 2001 CarswellNat 2817, [2001] 3 S.C.R. 907, 30 C.B.R. (4th) 6, 280 N.R. 1, 207 D.L.R. (4th) 577 (S.C.C.) — referred to

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

Matlack Inc., Re (2001), [2001] O.T.C. 382, 26 C.B.R. (4th) 45, 2001 CarswellOnt 1830 (Ont. S.C.J. [Commercial List]) — considered

United Air Lines Inc., Re (2003), 43 C.B.R. (4th) 284, 2003 CarswellOnt 2786 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Generally — referred to

Chapter 11 — referred to

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

Generally — referred to

s. 2 "debtor company" — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — considered

s. 18.6(1) "foreign proceeding" [en. 1997, c. 12, s. 125] — considered

s. 18.6(2) [en. 1997, c. 12, s. 125] — considered

s. 18.6(3) [en. 1997, c. 12, s. 125] — referred to

s. 18.6(4) [en. 1997, c. 12, s. 125] — considered

APPLICATION by subsidiary of debtor and debtor for recognition of foreign order in bankruptcy proceedings.

***Pepall J.*:**

Relief Requested

1 Lear Canada, Lear Canada Investments Inc., Lear Corporation Canada Ltd. (the "Canadian Applicants") and

other Applicants listed on Schedule "A" to the notice of motion request:

1. an order pursuant to section 18.6 of the CCAA recognizing and declaring that the Chapter 11 proceedings in the U.S. Bankruptcy Court for the Southern District of New York constitute "foreign proceedings";

2. a stay of proceedings against any of the Applicants or their property; and

3. an order appointing RSM Richter Inc. as information officer to report to this Court on the status of the U.S proceedings.

Background Facts

2 Lear Corporation is a corporation organized under the laws of the State of Delaware with headquarters in Southfield, Michigan. Its shares are listed on the New York Stock Exchange. It conducts its operations through approximately 210 facilities in 36 countries and is the ultimate parent company of about 125 directly and indirectly wholly-owned subsidiaries (collectively, "Lear"). Lear Canada Investments Ltd. and Lear Corporation Canada are both wholly-owned indirect subsidiaries of Lear Corporation. They are incorporated pursuant to the laws of Alberta. Lear Canada is a partnership owned 99.9% by Lear Corporation Canada Ltd. and 0.1% by Lear Canada Investments Ltd. and is the only operating entity of Lear in Canada.

3 Lear is a leading global supplier of automotive seating systems, electrical distribution systems, and electronic products. It has established itself as a Tier 1 global supplier of these parts to every major original equipment manufacturer ("OEM"). Lear has world wide manufacturing and production facilities, four of which are in Canada, namely Ajax, Kitchener, St. Thomas, and Whitby, Ontario. A fifth facility in Windsor, Ontario was closed in May of this year. Lear employs approximately 7,200 employees world wide of which 1,720 are employed by the Canadian operations. 1,600 are paid on an hourly basis and 120 are paid salary. 1,600 are members of the CAW and are covered by 5 separate collective bargaining agreements. Lear maintains a qualified defined contribution component of the Canadian salaried pension plan and 8 Canadian qualified defined benefit plans.

4 Lear conducts its North American business on a fully integrated basis. All management functions are based at the corporate headquarters in Southfield, Michigan and all customer relationships are maintained on a North American basis. The U.S. headquarters' operational support for the Canadian locations includes, but is not limited to, primary customer interface and support, product design and engineering, manufacturing and engineering, prototyping, launch support, programme management, purchasing and supplier qualification, testing and validation, and quality assurance. In addition, other support is provided for human resources, finance, information technology and other administrative functions.

5 Lear's Canadian operations are also linked to its U.S. operations through the companies' supply chain. Lear's facilities in Whitby, Ajax, and St. Thomas supply complete seat systems on a just-in-time basis to automotive assembly operations of the U.S. based OEMs, General Motors and Ford in Ontario. Lear's Kitchener facility manufactures seat metal components which are supplied primarily to several Lear assembly locations in the U.S., Canada and Mexico.

6 Lear Corporation, Lear Canada and others entered into a credit agreement with a syndicate of institutions led by J.P. Morgan Chase Bank, N.A. acting as general administrative agent and the Bank of Nova Scotia acting as the Canadian administrative agent. It provides for aggregate commitments of $2.289US billion. Although Lear Canada is a borrower under this senior secured credit facility, it is only liable for borrowings made in Canada and no funds have been advanced in this country.

7 Additionally, Lear Corporation has outstanding approximately $1.29US billion of senior unsecured notes. The

Canadian Applicants are not issuers or guarantors of any of them.

8 Over the past several years, Lear has worked on restructuring its business. As part of this initiative, it closed or initiated the closure of 28 manufacturing facilities and 10 administrative/engineering facilities by the end of 2008. This included the Windsor facility for which statutory severance amounts owing to all employees have been paid.

9 Despite its efforts, Lear was faced with turmoil in the automotive industry. Decreased consumer confidence, limited credit availability and decreased demand for new vehicles all led to decreased production. As a result of these conditions, Lear defaulted under its senior secured credit facility in late 2008. In early 2009, Lear engaged in discussions with senior secured facility lenders and unsecured noteholders. It reached an agreement with the majority of them wherein they agreed to support a Chapter 11 plan.

10 On July 7, 2009, Lear filed voluntary petitions for relief under Chapter 11 of the US Bankruptcy Code and sought "first day" orders in those proceedings in the United States Bankruptcy Court for the Southern District of New York. The Applicants now seek recognition of those proceedings and the orders. Lear expects to emerge from the Chapter 11 proceedings and any associated proceedings in other jurisdictions as a substantially de-leveraged enterprise with competitive going forward operations, and to do so in a timely basis.

Applicable Law

11 Section 18.6 of the CCAA was introduced in 1997 to address the rising number of international insolvencies. Courts have recognized that in the context of cross-border insolvencies, comity is to be encouraged. Efforts are made to complement, coordinate, and where appropriate, accommodate insolvency proceedings commenced in foreign jurisdictions.

12 Section 18.6(1) provides that "foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally. It is well recognized that proceedings under Chapter 11 of the U.S. Bankruptcy Code fall within that definition and that, while not identical, the substance and procedures of the U.S. Bankruptcy Code are similar to those found in the Canadian bankruptcy regime: *United Air Lines Inc., Re*[FN1]

13 *Babcock & Wilcox Canada Ltd., Re*[FN2] provided an early interpretation of section 18.6, and while not without some controversy[FN3], the practice in Canadian insolvency proceedings has evolved accordingly. In that case, Farley J. distinguished between section 18.6(2) of the Act, which deals with concurrent filings by a debtor company under the CCAA in Canada and corresponding bankruptcy or insolvency legislation in a foreign jurisdiction, and section 18.6(4) which may deal with ancillary proceedings such as this one. As with section 2 of the Act, section 18.6(2) is in respect of a debtor company whereas section 18.6 (4) permits any interested person to apply for recognition. As such, he held that the applicant before him was not required to meet the Act's definition of "debtor company" which required the company to be insolvent.[FN4] In addition, he noted that section 18.6(3) provides that an order of the Court under section 18.6 may be made on such terms and conditions as the Court considers appropriate in the circumstances.

14 Applying those legal principles, the Applicants are entitled to apply for an order pursuant to section 18.6 of the CCAA. They are debtors within the definition of section 18.6(1) and interested persons falling within section 18.6(4). In this regard, while the CCAA does not define the term "person", the BIA definition extends to include a partnership. In the absence of a definition in the CCAA, by analogy it is reasonable to interpret the term "person" as including a partnership.

15 I must then consider whether the order requested should be granted. In exercising discretion under section 18.6, it has been repeatedly held that in the context of an insolvency, the Court should consider whether a real and sub-

stantial connection exists between a matter and the foreign jurisdiction: *Matlack Inc., Re*[FN5] and *Magna Entertainment Corp., Re*[FN6] Where the operations of debtors are most closely connected to a foreign jurisdiction and the Canadian operations are inextricably linked with the business located in that foreign jurisdiction, it is appropriate for the Court in the foreign jurisdiction to exercise principal control over the insolvency process in accordance with the principles of comity and to avoid a multiplicity of proceedings: *Matlack, Re*[FN7]. As noted in that case, it is in the interests of creditors and stakeholders that a reorganization proceed in a coordinated fashion. This provides for stability and certainty. "The objective of such coordination is to ensure that creditors are treated as equitably and fairly as possible, wherever they are located."[FN8]

16 I am satisfied that an order recognizing the U.S. proceeding as a foreign proceeding within the meaning of section 18.6(1) should be granted and that a real and substantial connection has been established. The Applicants including Lear Canada are part of an integrated multi-national corporate enterprise with operations in 36 countries, one of which is Canada. Lear conducts its North American business on a fully integrated basis. As mentioned, all management functions are based at the U.S. corporate headquarters and all customer relationships are maintained on a North American basis. As such, the managerial and operational support for the Canadian locations is situate in the United States. In addition, Lear's Canadian operations are linked to the U.S. operations through the Lear's supply chain. As evidence of same, a note to Lear Canada's December 31, 2008 unaudited financial statement states that Lear Corporation provides Lear Canada with "significant operating support, including the negotiation of substantially all of its sales contracts. Such support is significant to the success of the Partnership's future operations and its ability to realize the carrying value of its assets."

17 I am also of the view that it is both necessary and desirable that the restructuring of this international enterprise be coordinated and that a multiplicity of proceedings in two different jurisdictions should be avoided. Granting relief will enable the Applicants to continue to operate in the ordinary course and preserve value and customer relationships. Coordination will also provide stability. The U.S. Court will be the primary court overseeing the restructuring proceedings of Lear. I also note that in its report filed with the Court, the proposed Information Officer, RSM Richter Inc., expressed its support for the relief requested by the Applicants.

18 That said, increasingly with the downturn in the global economy, this Court is entertaining requests for concurrent or ancillary orders relating to multi-group enterprises typically with a significant cross-border element. Frequently, relative to the whole enterprise, the Canadian component is small. From the viewpoint of efficiency and speed, both of which are important features of a restructuring, an applicant may be of the view that the Canadian operations do not merit a CCAA filing other than a section 18.6 request. In addressing whether to grant relief pursuant to section 18.6, the Court should, amongst other things, consider the interests of stakeholders in this country and the impact, if any, that may result from the relief requested. This would include benefits and prejudice such as any juridical advantage that may be compromised.[FN9] These issues should be addressed by an applicant in its materials. Assuming there are benefits, the existence of prejudice does not necessarily mean that the order will be refused but it is important that these facts at least be considered, and if appropriate, certain protections should be incorporated into the order granted.

19 By way of example, in this case, the Court raised certain issues with the Applicants and they readily and appropriately in my view, filed additional affidavit evidence and included other provisions in the proposed order. The Court was concerned with the treatment that might be afforded Canadian unsecured creditors and particularly employees and trade creditors. Lear Canada had total current assets of approximately $60US million as at May 31, 2009 which included approximately $20US million in cash. Its total assets amounted to approximately $115US million. Total current liabilities as at the same time period amounted to about $75US million. In addition, pension and other post-retirement benefit obligations were stated to amount to about $170US million. There were also intercompany accounts of approximately $190US million in favour of Lear Canada for total liabilities of about $55US million. Counsel for the Applicants advised that significant pre-petition payments had been made to suppliers and that the intention is for Lear Canada to continue to carry on business.

20 In the additional evidence filed, the Applicants indicated that they had not yet sought approval of DIP financing arrangements but that under the proposed arrangement, the Canadian Applicants would not be borrowers or guarantors. In addition, the term sheet agreed to between the Applicants and the senior credit facility lenders provided that the Canadian Applicants had agreed to pay all general unsecured claims in full as they become due. Additionally, the Applicants had obtained an order in the U.S. proceedings authorizing them to pay and honour certain pre-petition claims for wages, salaries, bonuses and other compensation and it is the intention of the Applicants to continue to pay all wages and compensation due and to be due to Canadian employees. The Applicants are up to date on all current and special payments associated with the Canadian pension plans and will continue to make these payments going forward. Provisions reflecting this evidence were incorporated into the Court order.

21 The Canadian Applicants were not to make any advances or transfers of funds except to pay for goods and services in the ordinary course of business and in accordance with existing practices and similarly were not to grant security over or encumber or release their property. They also were to pay current service and special payments with respect to the Canadian pensions. The order further provided that in the event of inconsistencies between it and the terms of the Chapter 11 orders, the provisions of my order were to govern.

22 The order includes a stay of proceedings against the Applicants and their property, a recognition of various orders and an administration charge and a directors' charge. The order also includes the usual come back provision in which any person affected may move to rescind or vary the order on at least 7 days' notice.

23 Where one jurisdiction has an ancillary role, the Court in the ancillary jurisdiction should be provided with information on an on going basis and be kept apprised of developments in respect of the debtors' reorganization efforts in the foreign jurisdiction. In addition, stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.[FN10] In this case, RSM Richter Inc. as Information Officer intends to be a watchdog and monitor developments in the U.S. proceedings and keep this Court informed. This Court supports its request to be added to the service list in the Chapter 11 proceeding and any request for standing before the U.S. Bankruptcy Court for the Southern District of New York that the Information Officer may make. In this regard, this Court seeks the aid and assistance of that Court.

Application granted.

FN1 (2003), 43 C.B.R. (4th) 284 (Ont. S.C.J. [Commercial List]), at 285.

FN2 (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]).

FN3 See for example, Professor J.S. Ziegel's article "Corporate Groups and Canada-U.S. Cross-Border Insolvencies: Contrasting Judicial Visions", (2001) 35 C.B.L.J. 459.

FN4 It should be noted that a voluntary filing under Chapter 11 does not require an applicant to be insolvent and a partnership is eligible to apply for relief as well.

FN5 (2001), 26 C.B.R. (4th) 45 (Ont. S.C.J. [Commercial List]).

FN6 (2009), 51 C.B.R. (5th) 82 (Ont. S.C.J.).

FN7 Supra, note 5 at para. 8.

FN8 Ibid, at para. 3.

FN9 See *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907 (S.C.C.).

FN10 See *Babcock & Wilcox Canada Ltd., Re*, supra, note 2 at para. 21.

END OF DOCUMENT

TAB 3

2011 CarswellBC 124, 2011 BCSC 115, [2011] B.C.W.L.D. 2461, 76 C.B.R. (5th) 317

C

2011 CarswellBC 124, 2011 BCSC 115, [2011] B.C.W.L.D. 2461, 76 C.B.R. (5th) 317

Angiotech Pharmaceuticals Inc., Re

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

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

British Columbia Supreme Court [In Chambers]

P. Walker J.

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

Counsel: J. Dacks, M. Wasserman, R. Morse for Angiotech Pharmaceuticals

J. Grieve for Alvarez & Marsal Canada Inc.

R. Chadwick, L. Willis for Consenting Noteholders

B. Kaplan, P. Rubin for Wells Fargo

Subject: Insolvency

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

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

Cases considered by *P. Walker J.*:

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

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

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 15 — referred to

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

Generally — referred to

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

***P. Walker J.*:**

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

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

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

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

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

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

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

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

(a) the location where corporate decisions are made;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> As noted previously, the Petitioners are part of an integrated business enterprise with primary operations in Canada and the United States. The Petitioners' COMI is British Columbia notwithstanding their substantial operations in the United States:
>
> (a) all of the Petitioners have assets in Canada and each of the companies comprising Angiotech U.S. has a bank account at the Royal Bank of Canada in Vancouver containing $1,000 on deposit;
>
> (b) the operations of the Petitioners are directed from Angiotech's head office in Canada;
>
> (c) all of the Petitioners report to Angiotech;
>
> (d) corporate governance for the Petitioners is directed from Canada;

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

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

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

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

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

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

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

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

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

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

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

Application granted.

END OF DOCUMENT

TAB 4

2011 CarswellOnt 6610, 2011 ONSC 4201, 81 C.B.R. (5th) 102

C

2011 CarswellOnt 6610, 2011 ONSC 4201, 81 C.B.R. (5th) 102

Massachusetts Elephant & Castle Group Inc., Re

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

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

MASSACHUSETTS ELEPHANT & CASTLE GROUP, INC. (Applicant)

Ontario Superior Court of Justice

Morawetz J.

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

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

Heather Meredith for GE Canada Equipment Financing GP

Subject: Insolvency; Corporate and Commercial

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

Recognition of foreign main proceeding — Debtor companies were integrated business involving locations in U.S. and Canada — Each of debtors, including debtor companies with registered offices in Canada (Canadian Debtors), were managed centrally from U.S. — Debtors brought proceedings in U.S. pursuant to Chapter 11 of United States Bankruptcy Code — U.S Court appointed applicant as foreign representative of Chapter 11 Debtors — Applicant applied to have U.S. Chapter 11 proceedings recognized as foreign main proceeding in Canada under Companies' Creditors Arrangements Act (Act) — Application granted — It was appropriate to recognize foreign proceeding — Foreign proceeding in present case was foreign main proceeding — "Foreign main proceeding" is defined in s. 45(1) of Act as foreign proceeding in jurisdiction where debtor company has centre of its main interest (COMI) — There was sufficient evidence to rebut presumption in s. 45(2) of Act that COMI is registered office of debtor company — For purposes of application, each entity making up Chapter 11 Debtors, including Canadian Debtors, had their COMI

in U.S. — Location of debtors' headquarters or head office functions or nerve centre was in U.S. — Debtor's management was located in U.S. — Significant creditor did not oppose relief sought — Mandatory stay ordered under s. 48(1) of Act — Discretionary relief recognizing various orders of U.S. Court, appointing information officer, and limiting quantum of administrative charge, was appropriate and was granted.

Cases considered by *Morawetz J.*:

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

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

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

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

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 11 — referred to

ss. 1101-1174 — referred to

Business Corporations Act, R.S.O. 1990, c. B.16

Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

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

Generally — referred to

Pt. IV — referred to

s. 44 — considered

s. 45 — considered

s. 45(1) — considered

s. 45(2) — considered

s. 46 — considered

s. 46(1) — considered

s. 46(2) — referred to

ss. 46-49 — referred to

s. 47(1) — considered

s. 47(2) — considered

s. 48 — considered

s. 48(1) — considered

s. 49 — considered

s. 50 — considered

s. 61 — considered

s. 61(2) — considered

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

Morawetz J.:

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

(a) an Initial Recognition Order declaring that:

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

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

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

(b) a Supplemental Order:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) greater legal certainty for trade and investment;

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

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

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

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

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

(a) the proceeding is a foreign proceeding, and

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

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

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

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

(a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or

(b) act as a representative in respect of the foreign proceeding.

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

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

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

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

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

20 Section 45(2) of the *CCAA* provides that, in the absence of proof to the contrary, the debtor company's regis-

tered office is deemed to be the COMI. As such, the determination of COMI is made on an entity basis, as opposed to a corporate group basis.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

29 For example:

(a) the location from which financing was organized or authorized or the location of the debtor's primary bank would only be important where the bank had a degree of control over the debtor;

(b) the location of employees might be important, on the basis that employees could be future creditors, or less important, on the basis that protection of employees is more an issue of protecting the rights of interested parties and therefore is not relevant to the COMI analysis;

(c) the jurisdiction whose law would apply to most disputes may not be an important factor if the jurisdiction was unrelated to the place from which the debtor was managed or conducted its business.

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

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

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

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

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

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

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

> 48. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
>
> (d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

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

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

> 49. (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order
>
> (a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);
>
> (b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and
>
> (c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

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

(a) the Foreign Representative Order;

(b) the U.S. Cash Collateral Order;

(c) the U.S. Prepetition Wages Order;

(d) the U.S. Prepetition Taxes Order;

(e) the U.S. Utilities Order;

(f) the U.S. Cash Management Order;

(g) the U.S. Customer Obligations Order; and

(h) the U.S. Joint Administration Order.

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

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

> 50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.
>
> . . . . .
>
> 61. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.
>
> (2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

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

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

Schedule "A"

1. Massachusetts Elephant & Castle Group Inc.

2. Repechage Investments Limited

3. Elephant & Castle Group Inc.

4. The Elephant and Castle Canada Inc.

5. Elephant & Castle, Inc. (a Texas Corporation)

6. Elephant & Castle Inc. (a Washington Corporation)

7. Elephant & Castle International, Inc.

8. Elephant & Castle of Pennsylvania, Inc.

9. E & C Pub, Inc.

10. Elephant & Castle East Huron, LLC

11. Elephant & Castle Illinois Corporation

12. E&C Eye Street, LLC

13. E & C Capital, LLC

14. Elephant & Castle (Chicago) Corporation

Application granted.

END OF DOCUMENT

TAB 5

1998 CarswellAlta 646, 64 Alta. L.R. (3d) 218, 23 C.P.C. (4th) 300, 227 A.R. 308, [1999] 4 W.W.R. 443, [1998] A.J. No. 817

1998 CarswellAlta 646, 64 Alta. L.R. (3d) 218, 23 C.P.C. (4th) 300, 227 A.R. 308, [1999] 4 W.W.R. 443, [1998] A.J. No. 817

Roberts v. **Picture Butte Municipal Hospital**

Wanda Mae **Roberts**, a.k.a. Wanda Mae Lichuk, and Alan **Roberts**, Plaintiffs and **Picture Butte Municipal Hospital**, St. Michael's General **Hospital**, Dr. Tom Melling, McGhan Medical Corporation and Dow Corning Corporation, Defendants

Alberta Court of Queen's Bench

Forsyth J.

Judgment: July 10, 1998
Docket: Calgary 8901-12679

Counsel: *G.J. Bigg*, for Plaintiffs.

K.M. Eidsvik, for Defendant, McGhan Medical Corporation.

F. Foran, Q.C., for Defendant, Dow Corning Corporation.

J. Shriar, for Defendants, Picture Butte Municipal Hospital and St. Michael's General Hospital.

P. Leveque, for Defendant, Dr. Tom Melling.

Subject: Insolvency; Civil Practice and Procedure

Practice --- Disposition without trial — Stay or dismissal of action — Grounds — Another proceeding pending — General

Plaintiffs brought action against manufacturer arising out of failure of its silicone gel implants — Class action had been commenced by other litigants in United States arising out of failure of implants — Manufacturer sought and received protection under United States Bankruptcy Code — Under s. 362 of Code all actions or proceedings against manufacturer to recover claims that arose before claims bar date were automatically stayed — Manufacturer applied for permanent stay of plaintiffs' action against it on grounds that Alberta court should recognize jurisdiction of United States Bankruptcy Court — Application granted — Plaintiffs had attorned to jurisdiction of U.S. Bankruptcy Court by filing proof of claim — Even if there had been no attornment, U.S. Bankruptcy Court was best forum for case in interest of promoting international comity — Clear wording of Code, similar philosophies and procedures in Canada

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and U.S., number of claims outstanding and fact that Plan of Reorganization filed with U.S. Bankruptcy Court had been accepted in Ontario and Quebec, favoured recognition of U.S. proceedings — United States Bankruptcy Code, 11 U.S.C. 1982, s. 362.

Cases considered by *Forsyth J.*:

Amchem Products Inc. v. British Columbia (Workers' Compensation Board), [1993] 3 W.W.R. 441, 14 C.P.C. (3d) 1, [1993] 1 S.C.R. 897, 150 N.R. 321, 23 B.C.A.C. 1, 39 W.A.C. 1, 102 D.L.R. (4th) 96, 77 B.C.L.R. (2d) 62 (S.C.C.) — applied

Antwerp Bulkcarriers N.V., Re (1996), 48 C.B.R (3d) 109, 43 C.B.R. (3d) 284 (Que. S.C.) — referred to

Microbiz Corp. v. Classic Software Systems Inc. (1996), 45 C.B.R. (3d) 40 (Ont. Gen. Div.) — applied

Morguard Investments Ltd. v. De Savoye (1990), 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, [1990] 3 S.C.R. 1077 (S.C.C.) — applied

Neese, Re (1981), 12 B.R. 968 (U.S. Bankr. W.D. Va.) — applied

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 20 C.B.R. (3d) 165 (Ont. Gen. Div.) — referred to

Pitts v. Hill & Hill Truck Line Inc. (1987), 53 Alta. L.R. (2d) 219, 66 C.B.R. (N.S.) 273, 84 A.R. 333 (Alta. Master) — applied

Taylor v. Dow Corning Australia Pty. Ltd. (December 19, 1997), Doc. 8438/95 (Australia Vic. Sup. Ct.) — applied

Tradewell Inc. v. American Sensors & Electronics Inc., 1997 WL 423075 (U.S. S.D. N.Y.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 2(1) "property" — considered

s. 69(1)(a) [rep. & sub. 1992, c. 27, s. 36(1)] — considered

Bankruptcy Code, 11 U.S.C. 1982 (U.S.)

Generally — considered

s. 362 — considered

s. 362(a)(1) — considered

s. 362(a)(3) — considered

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s. 541 — considered

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

Generally — referred to

APPLICATION by manufacturer for permanent stay of plaintiffs' action for damages arising from faulty product.

Forsyth J.:

Application

1 This is an application by the Defendant Dow Corning Corporation ("DCC") for a permanent stay of proceedings against it. DCC is now the only remaining Defendant in this action, as the actions against the other four Defendants were dismissed on the basis of having been commenced outside of the applicable limitation periods. DCC applies for a permanent stay of these proceedings on the grounds that this Court should recognize the jurisdiction of the United States Bankruptcy Court for the Eastern District of Michigan, Northern Division. The Plaintiffs, Wanda and Alan Roberts, argue that a stay is inappropriate.

Background

2 The female Plaintiff underwent surgery in 1981 for bilateral fibrocystic disease and mammary dysplasia in both breasts. Also in 1981, she received silicone gel breast implants manufactured by McGhan Medical Corporation ("McGhan"), a former Defendant. After problems with those implants, they were replaced in June 1983 with silicone gel implants manufactured by DCC. Soon after, one implant was found to have ruptured, necessitating surgery to clean up as much silicone as possible from her system.

3 Since that time, the female Plaintiff alleges widespread pain and problems, which she blames on the silicone gel released into her body. For this application, it is not necessary nor appropriate for me to comment on her symptoms or their cause.

4 The Plaintiffs started this action on August 31, 1989. There was also class action litigation in the U.S which coordinated all claims arising out of the failure of both McGhan and DCC implants. That class action collapsed when DCC sought bankruptcy protection on May 15, 1995 under Chapter 11 of the *United States Bankruptcy Code* (the "*U.S. Bankruptcy Code*"). Section 362 of the *U.S. Bankruptcy Code* imposes an automatic stay on all actions or proceedings against DCC to recover claims that arose before the claims bar date.

5 The U.S. Bankruptcy Court set February 14, 1997 as the foreign claims bar date (the deadline for filing claims in the bankruptcy proceedings). The Plaintiffs filed proofs of claim in that U.S. proceeding on January 17, 1997. More than 700,000 proofs of claim were filed from many countries, including more than 30,000 by Canadian residents.

Legislation

6 DCC is asking that this Court recognize the proceedings in the U.S. Bankruptcy Court. The *U.S. Bankruptcy Code* provides for an automatic stay once bankruptcy proceedings are commenced in the U.S.:

> 362 (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of -

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> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> . . . . .
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

Section 541 provides that "property of the estate" is comprised of various types of property "wherever located and by whomever held".

7 Therefore, the stay purports to be extra-territorial, applying, for example, in Alberta. It is then up to this Court to decide whether the principles of comity favour upholding the stay in this jurisdiction. As the Plaintiffs emphasize, comity is a discretionary matter. I am not bound by the stay imposed by the *U.S. Bankruptcy Act*.

8 I note that the Canadian legislation has a similar provision (*Bankruptcy and Insolvency Act ("BIA")*, R.S.C. 1985, c. B-3):

> 69(1) Subject to subsections (2) and (3) and sections 69.4 and 69.5 on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

Under s. 2(1) "property" of the *BIA*:

> "property" includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, ...

9 The Plaintiffs accept that the *U.S. Bankruptcy Code* governs DCC's estate, and that the Plaintiffs are creditors under the jurisdiction of the U.S. Bankruptcy Court.

Plan or Reorganization

10 DCC filed a Plan of Reorganization (the "Plan") with the Bankruptcy Court on August 25, 1997. The Bankruptcy Court rejected this Plan, and an amended plan was presented on February 17, 1998. The Bankruptcy Court approved that Plan, which now has to be voted upon by the various classes of creditors. DCC's proposed Plan would allow it to pay most creditors and continue operating. To manage product liability claims, DCC would establish and fund two trusts with up to $2.4 billion U.S. DCC would separately pay approximately $1 billion to commercial creditors over seven years.

11 Breast implant claimants would have four settlement paths, based on their history, symptoms and past and proposed treatment. Any claims not settled by agreement under the Plan process would go to common issue trials. Any claims remaining after common issue trials would undergo individual claims review and mediation. The last resort would be individual litigation. These individual trials would be held in the U.S., dismissed in favour of litigation in the

claimant's home jurisdiction, or held in the U.S. using the law of the claimant's home jurisdiction. The Plan is designed to solve as many claims as possible in an orderly and expeditious manner.

12 The U.S. procedure provides that once the Bankruptcy Court approves a Plan, it is sent to the creditors for a vote. The creditors vote by class. All of the Canadian breast implant claimants are in the foreign claimants' class of creditors. If more than two-thirds of those voting in a class approve, the Plan is considered approved by the class. After the vote, the Bankruptcy Court holds a confirmation hearing. It may confirm the Plan if it meets the *U.S. Bankruptcy Code* requirements. In DCC's words, the Bankruptcy Court must conclude:

> (i) that the Plan was proposed in good faith;
>
> (ii) that each class of creditors that does not vote to accept the Plan will receive at least as great a recovery as such creditors would have received had the debtor been liquidated under the liquidation procedures provided in Chapter 7 of the *Bankruptcy Code*; and
>
> (iii) that the Plan does not discriminate unfairly against any class of creditors that does not vote to accept the Plan.

Therefore, the Bankruptcy Court may approve a Plan even if all classes of creditors do not vote to accept it, as long as that Court finds the Plan does not discriminate unfairly against the rejecting class.

13 The originally proposed Plan did not make it to the creditor review stage. The Bankruptcy Court apparently had a number of concerns, one of which was the treatment of the foreign claimants. The Plaintiffs raise that concern in this Court also. The proposed settlement payments for foreign claimants would range from 35 to 60 per cent of those offered to U.S. claimants, on the theory that product liability litigation yields lower damage awards in non-U.S. jurisdictions. The proposed settlement for Canadian claimants is 60 per cent of the payments offered to U.S. claimants. According to DCC's affidavit (by Craig J. Litherland, dated December 12, 1997), some of the differing factors among U.S. and foreign jurisdictions are:

> a. the absence of contingency fee arrangements;
>
> b. the responsibility of judges rather than juries to asses [sic] liability and damages;
>
> c. the award of costs to prevailing litigants;
>
> d. limitations on theories of liability and recovery;
>
> e. limited pretrial procedures;
>
> f. the absence of the 'deep pocket expectation' prevalent in the United States resulting in lower damage awards;
>
> g. lower damage awards for pain and suffering;
>
> h. less or no punitive damages; and
>
> i. nationalized health care insurance and other benefits that are either directly deducted from an award or operate to reduce the likelihood of a large damage award.

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Of course, not all of these factors would apply in any one non-U.S. jurisdiction.

14 The Plaintiffs claim the foreign discount is discriminatory and inequitable. Not all of the factors are applicable in Alberta. Moreover, some simply try to shift the burden from DCC to other entities (such as the Canadian medicare system). In addition, the Plaintiffs claim that taking 40 per cent away from foreign claimants leaves that much more for U.S. claimants. DCC argues that the procedure is fair, not necessarily equal. It also emphasizes that the foreign discount only applies to settlements. Any claims that proceed to individual trials would not be discounted.

15 The amended Plan will be put to the creditors. It may be that the Plan will be confirmed, even if the foreign claimants' class rejects it.

Analysis

General Principles

16 Where an appropriate forum must be chosen, the Courts may grant a stay of proceedings. In the words of the Supreme Court of Canada: "This enables the court of the forum selected by the Plaintiffs (the domestic forum) to stay the action at the request of the Defendant if persuaded that the case should be tried elsewhere." (*Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (S.C.C.), at 912). This decision is completely discretionary. I am not bound to defer to the U.S. bankruptcy proceedings.

17 *Amchem* also discusses the vital principle of comity (at 913-14, citing *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.), at 1096):

> '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. ...

18 After cautioning against abusing the power to enjoin foreign litigation, the S.C.C. in *Amchem* outlined the test for restraining foreign proceedings. Although a case on anti-suit injunctions, the first part of the test also relates to stays. The Court must determine if there is a forum other than the domestic forum which is "clearly more appropriate" (at 931). If not, the domestic forum should refuse to stay the domestic proceedings. At 931-32, the S.C.C. continued:

> In this step of the analysis, the domestic court as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to *forum non conveniens* outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed. When there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions. In most cases it will appear from the decision of the foreign court whether it acted on principles similar to those that obtain here, but, if not, then the domestic court must consider whether the result is consistent with those principles.

19 As La Forest J. stated in *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256 (S.C.C.) at 268, modern states "cannot live in splendid isolation". They must follow comity, which is "the deference and respect due by other states to the actions of a state legitimately taken within its own territory."

20 Comity and cooperation are increasingly important in the bankruptcy context. As internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination, there would be multiple proceedings, inconsistent judgments and general uncertainty. See, for example, comments in

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 20 C.B.R. (3d) 165 (Ont. Gen. Div.); *Antwerp Bulkcarriers N.V., Re* (1996), 43 C.B.R. (3d) 284 (Que. S.C.); and J.D. Honsberger, "*Canadian Recognition of Foreign Judicially Supervised Arrangements*" (1989), 76 D.B.R. (N.S.) 86.

21 I also note that U.S. Courts have shown themselves willing to grant comity in similar circumstances. For example, a Bankruptcy Court granted comity in *Tradewell Inc. v. American Sensors & Electronics Inc.*, 1997 WL 423075 (U.S. S.D. N.Y. 1997). In that case, all proceedings against the Defendant Canadian corporation were stayed under the *Companies' Creditors Arrangement Act*. The Defendant successfully applied to the U.S. Bankruptcy Court for a stay in the U.S. based on comity. That Court stated that U.S. public policy should recognize the foreign proceedings, thus facilitating the "orderly and systematic distribution" of the debtor's assets. This was especially true for Canada, which has similar procedures and procedural safeguards.

Discussion

22 The *U.S. Bankruptcy Code* provision imposing a stay once bankruptcy proceedings have begun is comparable to Canada's *BIA* provision. They also both have the same underlying philosophy - to ensure a fair distribution of assets among all creditors, not just those who happen to have begun proceedings prior to the initiation of bankruptcy. In a situation such as DCC's, there is another motive - if all matters can be stayed, there is a better chance that the DCC will be able to restructure successfully.

23 The number of claims is significant. The U.S. Bankruptcy Court has decided that it is impractical and unfair to have thousands of individual claims going through the adversarial court system. Instead, it agrees with DCC's proposal to settle as many as possible, hold common issue trials as appropriate, then have as many individual trials as still necessary. This appears logical and in the interests of all creditors as a group.

24 An additional consideration is that the Plaintiffs have filed proofs of claim in the U.S. bankruptcy proceedings. The Plaintiffs have, therefore, attorned to the jurisdiction of the U.S. Bankruptcy Court. As stated in *Neese, Re*, 12 B.R. 968 (U.S. Bankr. W.D. Va. 1981) at 971:

> ... [the] defendants voluntarily availed themselves of the jurisdiction of this Court when they filed, by counsel, proofs of claim in the underlying title 11 bankruptcy case. ... Having filed their proofs of claim in the underlying bankruptcy case, the defendants cannot now deny this Court's personal jurisdiction over them in a proceeding directly related to that case.

The same principles apply in Canada - see, for example, *Microbiz Corp. v. Classic Software Systems Inc.* (1996), 45 C.B.R. (3d) 40 (Ont. Gen. Div.); and *Pitts v. Hill & Hill Truck Line Inc.* (1987), 66 C.B.R. (N.S.) 273 (Alta. Master).

25 The Plaintiffs argue that foreign claimants are not treated fairly by the proposed Plan because their settlement package would be at a discount from that given to U.S. claimants. However, there are several safeguards to prevent unfairness. First, the Plaintiffs, along with the rest of the class, have the opportunity to vote against the Plan. If, as a class, they vote against it, the U.S. Bankruptcy Court can only confirm the Plan if it feels the Plan does not "discriminate unfairly" against classes which rejected it. I understand this to mean that treatment can be fair across classes without being equal, as long as there is equality within the class itself. Second, the Plaintiffs are not obliged to settle under the Plan. They may proceed to trial. Third, this Plan actually protects creditors. If there were no stay and no Plan, only the first to trial and judgment would receive any compensation at all, and trials could potentially drag on for many years. Under the Plan, each creditor will receive something and will receive it much sooner.

26 I do not comment on the factors used to assess the discount rate for foreign claimants, except to say that they were not all intended to relate to each foreign jurisdiction. If these factors are accepted by the U.S. Bankruptcy Court in the exercise of its jurisdiction, a jurisdiction to which it is appropriate for me to grant comity and to which the

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Plaintiffs have attorned, then it is not for me to decide if I would have accepted the factors.

27 The Plaintiffs also argue that the recent Australian case *Taylor v. Dow Corning Australia Pty. Ltd.* (December 19, 1997), Doc. 8438/95 (Australia Vic. Sup. Ct.) should persuade me to dismiss this stay application. There, the Australian Court denied Dow Corning Australia's ("DCA's") application for a stay of proceedings in an action by an Australian plaintiff against DCA. While not binding on me in any event, the reasons in *Taylor* are clearly distinguishable.

28 DCA is a solvent subsidiary of DCC. DCC was initially a defendant, but that plaintiff discontinued against DCC. The Court ruled that any judgment against DCA would not disadvantage creditors of DCC. Further, the plaintiff was entitled to be treated as a creditor of DCA, not DCC.

29 In addition, that plaintiff did not file a proof of claim in the U.S. bankruptcy proceedings. This is extremely significant. In the present case, the Plaintiffs deliberately attorned to the U.S. jurisdiction by filing proofs of claim. In *Taylor*, the plaintiff deliberately did not. There is obiter in *Taylor*, as the Court held attornment was not relevant where a solvent subsidiary, not the insolvent parent, asks for the stay.

30 Finally, the Plaintiffs argue that I should not grant a stay when the U.S. Bankruptcy Court has not been asked to grant an injunction against non-U.S. proceedings such as this. For example, the Australian Court in *Taylor* queried why DCC had not requested such an injunction and concluded one would have been denied in any event. In the present case, however, an injunction is not necessary. The *U.S. Bankruptcy Code* itself provides for a stay of all proceedings against DCC. This is not comparable to *Taylor*, where the defendant was DCA, not DCC itself.

Order

31 In the circumstances of this case, the U.S. Bankruptcy Court has apparently decided that fairness among creditors is achieved without having complete equality across all classes of creditors. The Plaintiffs attorned to that jurisdiction. However, even had there been no attornment, 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. Lastly, while not determinative, I found it significant that there has been acceptance of the Plan in Ontario and Quebec. This not only suggests that the Plan proposes a reasonable offer, but it also suggests that the parties affected in these provinces have accepted the principle that international comity should be recognized in these proceedings.

Application granted.

END OF DOCUMENT

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

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

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

Court File No.:

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at **Toronto**

BRIEF OF AUTHORITIES OF THE APPLICANT
(Application returnable on December 21, 2011)

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