

Court File No.: 12- CV-\_\_\_\_\_

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

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

**AND IN THE MATTER OF ALLIED SYSTEMS HOLDINGS, INC., ALLIED SYSTEMS  
(CANADA) COMPANY,  
AXIS CANADA COMPANY AND THOSE OTHER COMPANIES LISTED ON  
SCHEDULE "A" HERETO**

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

**FACTUM OF THE APPLICANT**

**(Application returnable June 12, 2012)**

June 11, 2012

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**FACTUM OF THE APPLICANT**

**(Application returnable June 12, 2012)**

**PART I – NATURE OF THE MOTION**

1. This factum is filed in support of an Application brought by Allied Systems Holdings, Inc. ("**Allied Systems US**" or the "**Applicant**"), in its capacity as foreign representative (the "**Foreign Representative**") of Allied Systems US, Allied Systems (Canada) Company ("**Allied Systems Canada**"), Axis Canada Company ("**Axis Canada**") and those other companies listed on Schedule "A" hereto (collectively, "**Allied**", the "**Allied Group**", or the "**Chapter 11 Debtors**") for Orders pursuant to sections 46 through 49 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for, *inter alia*:



- (a) an Initial Recognition Order declaring that: (i) the Applicant is a “foreign representative” of the Chapter 11 Debtors pursuant to section 45 of the CCAA and is entitled to bring this Application pursuant to Section 46 of the CCAA; (ii) the Chapter 11 Cases, as defined below, are a “foreign main proceeding” pursuant to section 45 of the CCAA and recognizing the Chapter 11 Cases as a “foreign main proceeding” for the purposes of sections 47 through 48 of the CCAA; (iii) any proceedings against or in respect of the Chapter 11 Debtors be stayed; (iv) the Chapter 11 Debtors be prohibited from selling or disposing of their property in Canada without leave of the court; and
  - (b) a Supplemental Order: (i) recognizing and enforcing in Canada certain orders of the U.S. Court made in the Chapter 11 Cases, including a Financing Order; (ii) appointing Duff & Phelps Canada Restructuring Inc. as the Information Officer in respect of this proceeding (in such capacity, the “**Information Officer**”); and (iii) granting an Administration Charge and DIP Lender’s Charge over the Chapter 11 Debtors’ property in Canada .
2. Capitalized terms used herein and not otherwise defined have the meaning given to them in the Macaulay Affidavit (defined below).

## **PART II – THE FACTS**

### **The Parties**

3. Allied Systems Canada and Axis Canada (together, the “**Canadian Companies**”) are unlimited liability companies incorporated pursuant to the laws of Nova Scotia. The corporate headquarters of the Canadian Companies is in Hamilton, Ontario.

Affidavit of Scott Macaulay, sworn June 11, 2012, Application Record , tab 2, para. 13 [the “**Macaulay Affidavit**”]

4. Allied Systems US, the ultimate parent of the other Chapter 11 Debtors, is a privately held Delaware corporation headquartered in Atlanta, Georgia. The registered head office of Allied Systems US is 2302 Parklake Drive, Suite 600, Atlanta, Georgia, United States of America. Allied Systems US is one of the Chapter 11 Debtors.

**Macaulay Affidavit at para. 11**

5. The Chapter 11 Debtors consist of Allied Systems US and its direct and indirect US and Canadian subsidiaries. All of the directors and officers (other than one officer of Allied Systems Canada) as well as all members of senior management of the Chapter 11 Debtors, other than one vice-president of Allied Systems Canada and Axis Canada, are located in the United States.

**Macaulay Affidavit at paras. 12, 15**

6. Allied's major line of business is carried out by Allied Automotive Group, Inc. through its operating subsidiary, Allied Systems, Ltd. (L.P.) ("**ASL**"), which provides the short-haul vehicle delivery services that are Allied's main business operations. Another Allied subsidiary that is also a Chapter 11 Debtor, Axis Group, Inc. ("**Axis US**" and together with its direct and indirect subsidiaries, the "**Axis Group**"), which provides support services with respect to vehicle distribution and transportation services.

**Macaulay Affidavit at paras. 17, 19**

7. The Chapter 11 Debtors are composed of Allied Systems US and its direct and indirect subsidiaries located in Canada and the United States.

**Macaulay Affidavit at para. 16**

**The Chapter 11 Cases**

8. On June 10, 2012, Allied Systems US and Allied Systems Ltd. (L.P.) each consented to the petition (the "**Involuntary Petitions**") for relief filed against each of them pursuant to Chapter 11 of Title 11 ("**Chapter 11**") of the United States Code (the "**Bankruptcy Code**") with the United States Bankruptcy Court for the District of Delaware (the "**US Court**"). On the same day, the balance of the Chapter 11 Debtors each filed voluntary petitions for relief (together with the Involuntary Petitions, the "**Petitions**") pursuant to Chapter 11 of the Bankruptcy Code with the US Court. The cases commenced or consented to by the Chapter 11 Debtors in the US Court shall be referred to herein as the "**Chapter 11 Cases**".

**Macaulay Affidavit at paras. 4, 5**

9. The Chapter 11 Debtors intend to seek certain first day orders on June 12, 2012 in the US Court (the “**First Day Orders**”), including the following:
- (a) Foreign Representative Order;
  - (b) Cash Management Order;
  - (c) Financing Order;
  - (d) Pre-petition Wages Order;
  - (e) Insurance Program & Insurance Premium Financing Order;
  - (f) Pre-petition Customers, Warehouseman, Common Carriers and Cargo Claims Order;
  - (g) Pre-Petition Sales & Use Tax Order;
  - (h) Critical Vendor Order; and
  - (i) Utilities Service Order.

**Macaulay Affidavit at para. 7**

**Business in Canada**

10. The Allied Group’s hauling and logistics business is carried out in Canada through the Canadian Companies, Allied Systems Canada and Axis Canada. The primary business in Canada is the Hauling Business through Allied Systems Canada. Axis Canada accounts for less than 2% of the overall revenues in Canada.

**Macaulay Affidavit at paras. 26, 29**

11. The nature of Allied’s business in Canada is primarily focused on transport, and very few administrative tasks are carried out in Canada. All marketing functions are carried out by ASL in the United States, and Canadian personnel report directly to individuals in the United States. The business of the Canadian Companies is therefore highly integrated with the Allied Group operating in the United States.

**Macaulay Affidavit at paras. 28, 30**

12. The Canadian Companies are entirely reliant upon Allied's US companies for all or almost all managerial functions and all overhead including, for example, IT services, human resources (including processing of payroll), marketing and strategic direction. The Canadian and US arms have an integrated financial reporting system, and funds are moved around between the Canadian Companies and other members of the Allied Group to address cash flow needs. Allied Systems Canada has significant intercompany debt owing to ASL which, as at April 30, 2012 was approximately \$145 million consisting primarily of unpaid managerial fees.

**Macaulay Affidavit at para. 30**

13. Further, the Canadian Companies have provided guarantees under the Allied Group's current First Lien Credit Facility and Second Lien Credit Facility. In connection with the guarantees provided, the Canadian Companies have granted general security over all of their real and personal property.

**Macaulay Affidavit at para. 34**

**The Need for Canadian Proceedings**

14. The Chapter 11 Debtors, including the Canadian Companies, are insolvent. Without the Interim Financing, the Chapter 11 Debtors will be unable to meet their obligations generally as they become due.

**Macaulay Affidavit at para. 35**

15. The Chapter 11 Debtors have secured interim financing from Yucaipa American Alliance Fund I, L.P. and Yucaipa Alliance (Parallel) Fund I L.P. (together "**Yucaipa**"), subject to court approval, providing for a debtor-in-possession loan facility of \$20 million (the "**Interim Financing**"). Yucaipa is a significant holder of loans under the First Lien Credit Facility and the Second Lien Credit Facility.

**Macaulay Affidavit at paras. 43, 66**

16. The proposed priority of the DIP Charge as of the initial hearing in Canada is to provide the DIP Charge (as defined below) on the Canadian Collateral (as defined below) with priority over the security held for obligations under the First Lien Credit Facility and the Second Lien Credit Facility. The terms of those facilities permit the Requisite Lender to consent to a subordination of its security. Yucaipa, as the Requisite Lender under those facilities has consented to such subordination.

**Macaulay Affidavit at para. 69**

17. In connection with the Interim Financing to be provided by the DIP Lender, the Foreign Representative is seeking recognition of the Financing Order as well as an order granting a charge (the “**DIP Charge**”) charging the collateral located in Canada (the “**Canadian Collateral**”) of the Chapter 11 Debtors.

**Macaulay Affidavit at para. 68**

18. The proposed DIP Charge will not secure any prior obligations of the Chapter 11 Debtors owing to the DIP Lender.

**Macaulay Affidavit at para. 70**

19. The Canadian Companies are proposed guarantors under the DIP Facility and, under its terms, will grant security on the Canadian Property. The DIP Lender has advised that the granting of this security is a condition to the DIP Lender providing the Interim Financing.

**Macaulay Affidavit at para. 71**

20. The Canadian Companies will receive a direct benefit from the Interim Financing due to the fact that they are entirely reliant on the US operations for all overhead and senior management services.

**Macaulay Affidavit at para. 72**

21. A Canadian recognition order and stay under the CCAA will provide the Chapter 11 Debtors with the opportunity to conclude a plan within an orderly process and will permit

them to come to satisfactory arrangements with their creditors. This process will benefit not only Allied's creditors, but also its customers, suppliers and employees.

**Macaulay Affidavit at para. 73**

**PART III – THE ISSUES**

22. The issues on this motion are:

- (a) Are the Chapter 11 Cases a “foreign main proceeding” pursuant to Part IV of the CCAA?
- (b) If so, are the Chapter 11 Debtors entitled to the Initial Recognition Order and Supplemental Order pursuant to sections 46 through 49 of the CCAA?
- (c) Are the Chapter 11 Debtors entitled to a Financing Order and a DIP Charge?
- (d) Are the Canadian Companies permitted to guarantee the Interim Financing of the Chapter 11 Debtors?

**PART IV – THE LAW**

**(a) The Chapter 11 Cases are a Foreign Main Proceeding**

23. The purpose of Part IV of the CCAA is to effect cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada. Section 44 of the CCAA provides as follows:

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

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

(b) greater legal certainty for trade and investment;

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

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

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

***Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, Section 44 ["CCAA"]***

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

**CCAA, Section 46(1)**

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

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

**CCAA, Section 47**

26. Section 45(1) of the CCAA defines a "foreign representative" as one 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.

**CCAA, Section 45(1)**

27. Allied Systems US is seeking to be appointed as the foreign representative of the Chapter 11 Debtors pursuant to the Foreign Representative Order.

**Macaulay Affidavit at para. 7**

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

**CCAA, Section 45(1)**

29. The courts have consistently recognized proceedings under Chapter 11 of the Bankruptcy Code to be foreign proceedings for the purposes of the CCAA.

*Babcock & Wilcox Canada Ltd., Re*, 2000 CarswellOnt 704 (S.C.J. [Commercial List]), para. 13, Brief of Authorities of the Applicant, Tab 1(A) [“*Babcock*”]

*Lear Canada, Re*, 2009 CarswellOnt 4232, para. 12 (S.C.J. [Commercial List]), para. 12, Brief of Authorities of the Applicant, Tab 1(B) [“*Lear*”]

30. Once it has determined that a proceeding is a “foreign proceeding”, the Court is required, pursuant to Section 47(2) of the CCAA, to specify in its order whether the foreign proceeding is a “foreign main proceeding” or a “foreign non-main proceeding”.

**CCAA, Section 47(2)**

31. A “foreign main proceeding” is defined as a “foreign proceeding in a jurisdiction whether the debtor company has the centre of its main interests” (“COMI”).

**CCAA, Section 45(1)**

32. The CCAA does not provide a definition for COMI, but Section 45(2) of the CCAA provides that, in the absence of proof to the contrary, a debtor company’s registered office is deemed to be the centre of its COMI. In order to rebut this presumption, sufficient evidence is required.



**CCAA, Section 45(2)**

***Massachusetts Elephant & Castle Group, Inc. (Re)*, 2011 ONSC 4201 (S.C.J. [Commercial List]) at para. 22, Brief of Authorities of the Applicant, Tab 1(C) [Elephant & Castle]**

33. Most of the Chapter 11 Debtors are incorporated in the United States and have their registered offices in the United States. The Canadian Companies are incorporated pursuant to the laws of Nova Scotia and do not have registered head offices in the United States, but for the reasons discussed below, that presumption should be rebutted in this instance.

**Macaulay Affidavit at paras. 11-16**

34. The Courts have considered a number of factors as being relevant and providing guidance in determining the COMI of a debtor company:
- (a) The location where the 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.

***Angiotech Pharmaceuticals Ltd.*, 2011 CarswellBC 124 (S.C.) at para. 7, Brief of Authorities of the Applicant, Tab 1(D)**

***Elephant & Castle* at para. 26, Brief of Authorities of the Applicant, Tab 1(C)**

- 35. The registered office and corporate headquarters of Allied Systems US, the parent company of the Chapter 11 Debtors, is located in Atlanta, Georgia in the United States. The Canadian subsidiaries of Allied Systems US, Allied Systems Canada and Axis Canada are incorporated pursuant to the *Nova Scotia Companies Act*, with registered head offices in Hamilton, Ontario. However, all of the directors and officers and all members of senior management of the Chapter 11 Debtors, including the Canadian Companies, are located in the United States. The operational, managerial, marketing, and strategic decisions of the Chapter 11 Debtors are all made in the United States, and all personnel of the Canadian Companies report directly to Allied's United States office.

**Macaulay Affidavit at paras. 11-16**

- 36. In determining the COMI of a debtor company, the Court need not consider all of the above-listed factors, and some factors may be considered to be more important than others. Nevertheless, no one factor is determinative and all may be considered, depending on the facts of the specific case.
- 37. However, the Court has determined that the following factors are usually significant in determining COMI, and all other factors should generally be considered of secondary importance and only to the extent that they relate to the following:
  - (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.

***Elephant & Castle at paras. 30-31, Brief of Authorities of the Applicant, Tab 1(C)***

38. The Chapter 11 Debtors (other than the Canadian Companies) have their registered offices in the United States. The Chapter 11 Debtors have their COMI in the United States for the following reasons:
- (a) All corporate decisions for the Allied Group are made in Atlanta;
  - (b) All human resource functions (other than one administrative individual in Canada) including the processing of payroll are located in Atlanta;
  - (c) All information technology systems are located in Atlanta;
  - (d) All of the directors and officers of the Chapter 11 Debtors are located in Atlanta other than one vice-president of Allied Systems Canada who is located in Hamilton, Ontario;
  - (e) Other than sales, all marketing and communications functions are located in Atlanta;
  - (f) All of management of the Chapter 11 Debtors is located in Atlanta other than one vice-president of Allied Systems Canada who is located in Hamilton, Ontario;
  - (g) The Canadian vice-president of Allied Systems Canada reports directly to the Chief Executive Officer in Atlanta;
  - (h) All cash management and accounting functions are located in Atlanta;
  - (i) All pricing decisions and business development is directed out of Atlanta; and
  - (j) Allied's most significant creditors are all based in the United States.

***Macauley Affidavit at para. 56***

39. The Applicant therefore submits that the COMI of the Chapter 11 Debtors is the United States and that the Chapter 11 Cases should therefore be recognized as a "foreign main proceeding" in Canada pursuant to the CCAA.

***(b) The Chapter 11 Debtors are entitled to the Initial Recognition Order and the Supplemental Order***

40. Section 48 (1) provides that once the Court has found that a foreign proceeding is a foreign main proceeding, it is required to grant certain mandatory relief as follows,

subject to any terms and conditions it considers appropriate, including a stay of proceedings:

**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.

**CCAA, Section 48(1)**

41. In addition to the automatic relief provided for in Section 48, Section 49 of the CCAA provides that the Court may, in its discretion, make any order that it considers appropriate if it is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors.

**CCAA, Section 49(1)**

42. Furthermore, Section 50 of the CCAA provides that an Order under Part IV "may be made on any terms and conditions that the court considers appropriate in the circumstances."

**CCAA, Section 50**

43. The central principle governing Part IV of the CCAA is comity, which mandates that Canadian courts should recognize and enforce the judicial acts of other jurisdictions, provided that those other jurisdictions have assumed jurisdiction on a basis consistent with principles of order, predictability and fairness. In particular, courts in Canada and the United States have made efforts to complement, coordinate and accommodate each other's proceedings.

***Babcock*, paras. 4-13, Brief of Authorities of the Applicant, Tab 1(A)**

***Matlack Inc., Re*, 2001 CarswellOnt 1830 (S.C.J. [Commercial List]) at para. 9, Brief of Authorities of the Applicant, Tab 1(E) [*Matlack*]**

***Lear*, para. 12, Brief of Authorities of the Applicant, Tab 1(B)**

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

***Roberts v. Picture Butte Municipal Hospital*, 1998 CarswellAlta 646 (Q.B.).at para. 20 (Q.B.), Brief of Authorities of the Applicant, Tab 1(F)**

***Matlack*, at para. 3, Brief of Authorities of the Applicant, Tab 1(E)**

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

***Matlack*, at para. 8, Brief of Authorities of the Applicant, Tab 1(E)**

***Babcock*, para. 19, Brief of Authorities of the Applicant, Tab 1(A)**

46. The Applicant is seeking an order recognizing and giving effect to the following orders of the U.S. Court in the Chapter 11 Cases (collectively, the "**First Day Orders**"):

(a) Foreign Representative Order;

- (b) Cash Management Order;
  - (c) Financing Order;
  - (d) Pre-petition Wages Order;
  - (e) Insurance Program & Insurance Premium Financing Order;
  - (f) Pre-petition Customers, Warehouseman, Common Carriers and Cargo Claims Order;
  - (g) Pre-Petition Sales & Use Tax Order;
  - (h) Critical Vendor Order; and
  - (i) Utilities Service Order.
47. The Applicant submits that the recognition of the First Day Orders is necessary for the protection of the property of the Chapter 11 Debtors and is in the best interests of their creditors. The recognition of the First Day Orders is consistent with the principles of comity and cooperation adopted by the courts in Canada and the United States in respect of insolvency proceedings and should be granted.

***Grant Forest Products Inc., Re, 2010 CarswellOnt 2445 (S.C.J. [Commercial List]) at para. 76, Brief of Authorities of the Applicant, Tab 1(G)***

48. The granting of the Initial Recognition Order and the Supplemental Order is appropriate for the following reasons:
- (a) The U.S. Bankruptcy Court has appropriately taken jurisdiction over the Chapter 11 Cases, so comity will be furthered by this Court's recognition of and support for the Chapter 11 Cases already under way in the United States.
  - (b) Coordination of proceedings in the two jurisdictions will ensure equal and fair treatment of all stakeholders. Stakeholders of the Allied Group are located both in Canada and the United States. The granting of the orders requested herein will avoid the potential anomaly and unfairness of stakeholders being treated differently because they are located in different jurisdictions.

(c) Given the close connection between the Allied Group and the U.S., it is reasonable and sensible for the U.S. Court to have principal control over the insolvency process. This will produce the most efficient restructuring for the benefit of all stakeholders.

(d) The Canadian and U.S. operations of the Allied Group are highly integrated.

**(c) The Chapter 11 Debtors are entitled to a Financing Order and a DIP Charge**

49. The Chapter 11 Debtors have secured Interim Financing from Yucaipa, as set out above. The U.S. Court in the Chapter 11 Cases has approved the Financing Order as well as a related DIP Charge, charging the collateral located in Canada in respect of the debtors (the “**DIP Charge**”).

**Macaulay Affidavit at para. 66**

50. In connection with the Interim Financing to be provided by the DIP Lender, the Foreign Representative is seeking recognition of the Financing Order as well as an order granting the DIP Charge charging the collateral located in Canada, (the “**Canadian Collateral**”) of the Chapter 11 Debtors.

**Macaulay Affidavit at para. 68**

51. Until the comeback date, the proposed priority of the DIP Charge is to provide the DIP Charge with priority over the security held for obligations under the First Lien Credit Facility and the Second Lien Credit Facility, as defined above. The terms of those facilities permit the requisite lender to consent to a subordination of its security. Yucaipa, as the requisite lender, has consented to such subordination.

**Macaulay Affidavit at para. 69**

52. The Canadian Companies are proposed guarantors under the DIP Facility and, under its terms, will grant security on all of their assets. The granting of this security is a condition to the interim financing.

**Macauley Affidavit at para. 71**

53. Section 11.2 of the CCAA provides the court with express jurisdiction to grant a debtor-in-possession financing charge:

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

54. Section 11.2(4) sets out the factors to be considered by the court in determining whether to grant a DIP Charge:

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;



(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

55. The court is to have particular regard to the following factors in determining whether the criteria in section 11.2(1) has been met:

- (a) whether notice has been given to secured creditors likely to be affected by the security charge or charge;
- (b) whether the amount to be granted under the DIP Facility is appropriate and required having regard to the debtor's cash-flow statement; and
- (c) whether the DIP Charge secures an obligation that existed before the order was made (which it should not)

***Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5<sup>th</sup>) 72 (S.C.J. [Commercial List]) at para. 32, Brief of Authorities of the Applicant, Tab 1(H)**

56. In determining whether to grant a DIP Charge to the DIP lender, this Court has emphasized that such a charge, in light of all other circumstances, furthers the objectives of the CCAA and is commercially reasonable as it allows an insolvent company to continue operations. Not granting a DIP Charge and allowing a company to fall into bankruptcy proceedings would not only defeat the underlying purpose of the CCAA, but would also prejudice stakeholders.

***Timminco Ltd, Re.*, [2012] ONSC 948 (S.C.J. [Commercial List]) at paras. 46-49, Brief of Authorities of the Applicant, Tab 1(I)**

57. The Applicant submits that similar considerations should be given where a DIP Charge is being sought within a proceeding commenced under Part IV of the CCAA.

58. The DIP Financing is essential to the continued operation of the Allied Group. The Canadian Companies receive a direct benefit from the continued operation of the U.S. Companies, which can continue only with the Interim Financing.

59. The DIP Charge is reasonable in the circumstances given:

- (a) The Chapter 11 Debtors' financial advisor, Rothschilds, attempted to obtain debtor-in-possession financing from other sources on better terms and was unsuccessful;
- (b) The urgency placed on the Chapter 11 Debtors the filing of the Involuntary Petitions; and
- (c) In the case of the Canadian Companies, given their dependence on the US operations, the guarantee of the existing credit facilities and intercompany indebtedness, and the fact that there is little or no chance of a stand alone solution.

**(d) Are the Canadian Companies permitted to guarantee the Interim Financing of the Chapter 11 Debtors?**

60. The Canadian Companies are guarantors under the DIP Agreement and, under its terms, will grant security on the Canadian Collateral, to secure the obligations under the guarantees. The DIP Lender has advised that the granting of this security is a condition to the DIP Lender providing the Interim Financing.

**Macaulay Affidavit at para. 71**

61. This Court has found that the following factors are relevant in determining the appropriateness of a guarantee in connection with a debtor-in-possession loan facility:

- (a) the need for additional financing by the Canadian debtor to support a going concern restructuring;
- (b) the benefit of the breathing space afforded by CCAA protection;
- (c) the availability (or lack thereof) of any financing alternatives, including the availability of alternative terms to those proposed by the DIP lender;
- (d) the practicality of establishing a stand-alone solution for the Canadian debtors;
- (e) the contingent nature of the liability of the proposed guarantee and the likelihood that it will be called on;
- (f) any potential prejudice to the creditors of the entity if the request is approved, including whether unsecured creditors are put in any worse position by the provision of a cross-guarantee of a foreign affiliate than as existed prior to the

filing, apart from the impact of the super-priority status of new advances to the debtor under the DIP financing;

- (g) the benefits that may accrue to the stakeholders if the request is approved and the prejudice to those stakeholders if the request is denied; and
- (h) a balancing of the benefits accruing to stakeholders generally against any potential prejudice to creditors.

***Indalex Ltd. (Re)*, 2009 CarswellOnt 1998 (S.C.J. [Commercial List])  
at para 8, Brief of Authorities of the Applicant, Tab 1(K)**

62. The Interim Financing during the proposed restructuring period is required to fund the Chapter 11 Debtors' ongoing operations during that period, including the operations of the Canadian Business.

**Macauley Affidavit at para. 67**

63. The Canadian Companies rely on their Allied counterparts operating in the United States to provide essential overhead services for their operations. If those services were to cease because the US companies did not have adequate cash flow, the Canadian Companies would not be able to function.

**Macauley Affidavit at para. 56**

64. Furthermore, both of the Canadian companies are already existing guarantors under the First lien Credit Facility and the Second Lien Credit Facility. As such, it is in the best interest of the Canadian Companies to provide the guarantees and security under the DIP Facility. Such guarantees will not result in any material prejudice to Canadian stakeholders.

**Macauley Affidavit at para. 73**

65. The DIP Charge will not likely cause prejudice to the Chapter 11 Debtors' stakeholders, but rather will allow the Chapter 11 Debtors to have ongoing cash flow in order to continue operations.

***Hartford Computer Hardware, Inc. (Re)*, 2012 ONSC 964 (S.C.J. [Commercial List]).at para. 15, Brief of Authorities of the Applicant, Tab 1(J)**

66. As set out above, given the level of integration of the Canadian Companies with the US business as well as the existing encumbrances, there is no viable stand-alone financing or restructuring option for the Canadian Companies. As such, it is in the best interests of the Canadian Companies to provide such guarantees and security and will not result in any material prejudice to Canadian stakeholders.

**Macaulay Affidavit at para. 73**

**PART V – RELIEF REQUESTED**

67. The Applicant requests that this Honourable Court grant the Initial Recognition Order and the Supplemental Order, each substantially in the form of the draft Orders contained at tabs 4 and 6 of the Application Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 11<sup>th</sup> day of June, 2012.

June 11, 2012



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**SCHEDULE "A"**

**CHAPTER 11 DEBTORS**

Allied Systems Holdings, Inc.

Allied Automotive Group, Inc.

Allied Freight Broker LLC

Allied Systems (Canada) Company

Allied Systems, Ltd. (L.P.)

Axis Areta, LLC

Axis Canada Company

Axis Group, Inc.

Commercial Carriers, Inc.

CT Services, Inc.

Cordin Transport LLC

F.J. Boutell Driveway LLC

GACS Incorporated

Logistic Systems, LLC

Logistic Technology, LLC

QAT, Inc.

RMX LLC

Transport Support LLC

Terminal Services LLC

**SCHEDULE “B”**  
**LIST OF AUTHORITIES**

*Babcock & Wilcox Canada Ltd., Re*, 2000 CarswellOnt 704 (S.C.J. [Commercial List]).

*Lear Canada, Re*, 2009 CarswellOnt 4232, para. 12 (S.C.J. [Commercial List]).

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

*Angiotech Pharmaceuticals Ltd.*, 2011 CarswellBC 124 (S.C.).

*Matlack Inc., Re*, 2001 CarswellOnt 1830 (S.C.J. [Commercial List]).

*Roberts v. Picture Butte Municipal Hospital*, 1998 CarswellAlta 646 (Q.B.).

*Grant Forest Products Inc., Re*, 2010 CarswellOnt 2445 (S.C.J. [Commercial List]).

*Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5<sup>th</sup>) 72 (S.C.J. [Commercial List]).

*Timminco Ltd, Re.*, [2012] ONSC 948 (S.C.J. [Commercial List]).

*Hartford Computer Hardware, Inc. (Re)*, 2012 ONSC 964 (S.C.J. [Commercial List]).

*Indalex Ltd. (Re)*, 2009 CarswellOnt 1998 (Ontario Superior Court of Justice [Commercial List]).

## SCHEDULE “C”

### RELEVANT STATUTES

#### **Interim financing**

**11.2** (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company’s property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company’s business and financial affairs are to be managed during the proceedings;

(c) whether the company’s management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company’s property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor’s report referred to in paragraph 23(1)(b), if any.

## Purpose

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

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

(b) greater legal certainty for trade and investment;

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

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

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

## Definitions

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

“foreign court”

« *tribunal étranger* »

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

“foreign main proceeding”

« *principale* »

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

“foreign non-main proceeding”

« *secondaire* »

“foreign non-main proceeding” means a foreign proceeding, other than a foreign main proceeding.

“foreign proceeding”

« *instance étrangère* »

“foreign proceeding” means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally



under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

“foreign representative”

« *représentant étranger* »

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

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

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

Centre of debtor company's main interests

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

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

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

Documents that must accompany application

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

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

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

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

Documents may be considered as proof

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

Other evidence

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

#### Translation

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

### **Order recognizing foreign proceeding**

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

#### Nature of foreign proceeding to be specified

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

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

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

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

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

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

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

#### Scope of order

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

When subsection (1) does not apply

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

Application of this and other Acts

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

### **Other orders**

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

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

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

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

Restriction

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

Application of this and other Acts

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

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

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

AND IN THE MATTER OF ALLIED SYSTEMS (CANADA) COMPANY AND AXIS CANADA COMPANY

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

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT**

**(Application returnable June 12, 2012)**

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