

**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

(Motion returnable July 16, 2012)

July 13, 2012

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TO: THE SERVICE LIST

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(as at July 11, 2012)**

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FACTUM OF THE APPLICANT

(Motion returnable July 16, 2012)

PART I – NATURE OF THE MOTION

1. On June 10, 2012 (the "**Petition Date**"), Allied Systems Holdings, Inc. ("**Allied US**" or the "**Applicant**") and Allied Systems, Ltd. (L.P.) ("**ASL**") 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, all of the Applicant's Canadian and US subsidiaries each filed voluntary petitions for relief (together with the Involuntary Petitions, the "**Petitions**") pursuant to Chapter 11 of the United States 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**".

2. The Chapter 11 Debtors commenced proceedings (the “**Proceedings**”) pursuant to Part IV of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) pursuant to the Initial Recognition Order of the Ontario Superior Court of Justice (the “**Canadian Court**”) dated June 12, 2012 (the “**Initial Recognition Order**”). On June 13, 2012, the Canadian Court granted the Supplemental Order (the “**Supplemental Order**”, collectively with the Initial Order, the “**Orders**”). Pursuant to the Orders, *inter alia*: (a) the Chapter 11 Cases were recognized as a “foreign main proceeding” for the purposes of section 47 and 48 of the CCAA; (b) Allied US was appointed as the foreign representative of the Chapter 11 Debtors; (c) certain orders made in the US Court dated June 12, 2012 (the “**First Day Orders**”) were recognized; and (d) Duff & Phelps Canada Restructuring Inc. was appointed as the information officer (the “**Information Officer**”).

3. This factum is filed in support of a Motion brought by the Applicant, in its capacity as foreign representative (the “**Foreign Representative**”) of Allied US, Allied Systems (Canada) Company (“**Allied Canada**”), Axis Canada Company (“**Axis Canada**”, collectively with Allied Canada, the “**Canadian Debtors**”) and those other companies listed on Schedule “A” hereto (collectively, “**Allied**”, the “**Allied Group**”, or the “**Chapter 11 Debtors**”) for an Order substantially in the form enclosed in the Motion Record:
 - (a) recognizing the Final Foreign Orders (defined below) and the Amended Sales and Use Taxes Order (defined below);
 - (b) granting the cash management relief; and
 - (c) granting priority to the Administration Charge and the DIP Lender’s Charge (as these terms are defined below).

PART II – THE FACTS

4. The facts with respect to this application are more fully set out in the affidavit of Scott Macaulay sworn July 11, 2012 (the “**Macaulay Affidavit**”). Capitalized terms used

herein but not otherwise defined have the meanings ascribed to them in the Macaulay Affidavit.

Macaulay Affidavit, Motion Record, tab 2

A. Recognition of the Final Foreign Orders and the Amended Sales and Use Taxes Order

5. Certain First Day Orders were granted on an “interim” basis pursuant to the Supplemental Order. The following final orders were granted by the US Court on July 10, 2012 (unless otherwise noted below) (the “**Final Foreign Orders**”):

- (a) Final Wages Order (as defined in the Macaulay Affidavit);
- (b) Final Insurance Order (as defined in the Macaulay Affidavit);
- (c) Final Critical Vendor Order (as defined in the Macaulay Affidavit);
- (d) Final Customers, Warehouseman, Common Carriers and Cargo Claims Order (as defined in the Macaulay Affidavit);
- (d) Final Utilities Service Order (as defined in the Macaulay Affidavit); and
- (e) final financing order granted by the US Court on July 12, 2012 (the “**Final Financing Order**”).

Macaulay Affidavit at para. 9, Motion Record, tab 2

Supplemental Affidavit of Ava Kim sworn July 13, 2012 (“Ava Kim Affidavit”) at para. 2

6. One of the First Day Orders, the sales and use taxes order granted by the US Court on June 12, 2012 (the “**Sales and Use Taxes Order**”) was granted on a final basis and was thereafter recognized by this Court pursuant to the Supplemental Order. Since then, the Sales and Use Taxes Order was amended by an order of the US Court granted on July 9, 2012 (the “**Amended Sales and Use Taxes Order**”).

Ava Kim Affidavit at para. 3

B. Cash Management Order

7. Allied Canada and Axis Canada maintain certain bank accounts with The Bank of Nova Scotia (“**BNS**”) (the “**Canadian Cash Management System**”). Allied Canada and Axis Canada have agreed to indemnify BNS from any liability it may incur as a result of providing its services with respect to the Canadian Cash Management System and that such indemnification will not be impaired without the consent of BNS.

Macaulay Affidavit at para. 21, Motion Record, tab 2

C. The Priority of Charges

8. The Supplemental Order granted a series of charges (the “**Priority Charges**”) on the current and future assets, undertakings and properties of every nature and kind whatsoever, including all proceeds thereof, of the Chapter 11 Debtors located in Canada (the “**Property**”), in the following order of Priority:

- (a) a charge in the aggregate amount of \$600,000 to secure the professional fees and disbursements incurred by the Information Officer and counsel to the Information Officer in respect of the Proceedings (the “**Administration Charge**”);

- (b) a charge to secure all amounts advanced to the Chapter 11 Debtors by the DIP Lenders pursuant to the DIP Financing Agreement (the “**DIP Lender’s Charge**”).

Macaulay Affidavit at para 23, Motion Record, tab 2

9. The Supplemental Order provides that the Priority Charges rank in priority to security interests created pursuant to the First Lien Credit Facility and the Second Lien Credit Facility (each as defined in the Affidavit of Scott Macaulay sworn on June 11, 2012 (“**June 11 Macaulay Affidavit**”)) and behind all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, the “**Encumbrances**”).

Macaulay Affidavit at para. 23, Motion Record, tab 2

10. The Applicant proposes that the Priority Charges will rank ahead of all of the Encumbrances, other than: (i) the Encumbrances (if any) in favour of any Persons that are valid, perfected (by registration or possession), non-avoidable and senior to the Encumbrances securing the First Lien Credit Facility (as defined in the June 11 Macaulay Affidavit) as of the date of the Final Financing Order; and (ii) the Carve-Out (as defined in the Final Financing Order).

PART III – THE ISSUES

11. The issues on this motion are:
- (a) Does this Court have the jurisdiction to: (i) recognize the Final Foreign Orders and the Amended Sales and Use Taxes Order; and (ii) grant certain relief to The Bank of Nova Scotia as the provider of the Canadian Cash Management System?
 - (b) If so, should this Court exercise its discretion to grant the relief requested?
 - (c) Should this Court grant increased priority to the Priority Charges?

PART IV – THE LAW

A. *This Court has the Jurisdiction to: (i) Recognize the Final Foreign Orders and (ii) Grant Certain Relief to The Bank of Nova Scotia for providing the Canadian Cash Management System and should exercise its discretion to do so.*

12. 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)

13. Section 50 of the CCAA further provides that the Court may make an order under Part IV of the CCAA on any terms and conditions that it considers appropriate in the circumstances.

CCAA, Section 50

14. 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 stability, 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 & Wilcox Canada Ltd., Re*, [2000] O.J. No. 786, paras. 4-13, Brief of Authorities of the Applicant [BOA], Tab A**

***Matlack Inc., Re*, [2001] O.J. No. 6121(S.C.J. [Commercial List]) at para. 4, BOA, Tab B [*Matlack*]**

***Lear Canada, Re*, 2009 [2009] O.J. No. 3030 para. 17, BOA, Tab C**

15. In a cross-border insolvency proceeding, it is appropriate for the jurisdiction with the closest connection to the proceeding to exercise principal control over the insolvency process in order to avoid multiple proceedings. In this context, Part IV of the CCAA may be utilized to address the need for ancillary relief in connection with a foreign proceeding with a view to creating a stable atmosphere in which the debtors can reorganize while allowing creditors to be treated fairly, notwithstanding their location.

Matlack at para. 8-10, Brief of Authorities of the Applicant, Tab B

- (i) Recognition of Final Foreign Orders and the Amended Sales and Use Taxes Order

16. The Applicant is seeking an order recognizing and giving effect to the Final Foreign Orders and the Amended Sales and Use Taxes Order and submits that the recognition of the Final Foreign Orders and the Amended Sales and Use Taxes Order 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 Final Foreign Orders and the Amended Sales and Use Taxes Order 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] O.J. No. 1684 at para. 76, BOA, Tab D**

(ii) Canadian Cash Management System

17. The Applicant is seeking an order for relief from this court that the indemnification provided to BNS by the Canadian Debtors will be upheld and that such indemnification will not be impaired without the consent of BNS. The Applicant submits that the continued operation of the Canadian Cash Management System is imperative to the continued operation of the day to day business activities of Allied Canada and Axis Canada and is therefore necessary for the protection of the property of the Chapter 11 Debtors as it will allow the Chapter 11 Debtors to restructure their business operations in a stable environment.

B. Should this Court grant increased priority to the Priority Charges?

(i) The Court Has Jurisdiction to Order Priority

18. The CCAA provides statutory jurisdiction to grant each of the Priority Charges and to provide priority to the Priority Charges over the claim of any secured creditor of the debtor company on notice to such secured creditors.

CCAA, s. 11.2, 11.52

19. The Supplemental Order granted the Priority Charges and provided limited priority ahead of certain first and second lien lenders, but behind the other Encumbrances. The Applicant is seeking an order increasing the priority of the Priority Charges to rank ahead of all Encumbrances including any deemed trusts created under Provincial pension legislation, other than: (i) the Encumbrances (if any) in favour of any Persons that are valid, perfected (by registration or possession), non-avoidable and senior to the Encumbrances securing the First Lien Credit Facility (as defined in the June 11 Macaulay Affidavit) as of the date of the Final Financing Order (as defined in the Order of this Court on July 16, 2012); and (ii) the Carve-Out (as defined in the Final Financing Order). Granting the super-priority means the Priority Charges will rank ahead of, *inter alia*, any deemed trusts created by the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P-8 (the “PBA”).

Macaulay Affidavit at para. 23, Motion Record, tab 2

20. In granting priority to a charge over a debtor's property in a CCAA proceeding, Courts will consider whether notice has been given to the secured creditors who are likely to be affected by the security or charge.

***Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 at paras. 32 and 38 (Ont. S.C.J.), BOA, Tab E**

21. The Applicant does not believe there is anyone who currently has an encumbrance which is likely to be materially affected and has given notice of this motion to the following:

- (a) all personal property security registrants (“**PPSA Registrants**”) or counsel;
- (b) Allied's Canadian pension plans¹, the Financial Services Commissioner of Ontario and the Superintendents of Pensions in each of British Columbia, Alberta and Quebec; and
- (c) various Federal and Provincial taxing and environmental authorities.

Macaulay Affidavit at paras. 25-28, Motion Record, tab 2

22. Although the Applicant has provided notice to the foregoing parties, it has done so primarily out of an abundance of caution. In fact, it is not anticipated that other than with respect to a small lien relating to unpaid truck repair services, there are any arrears or obligations owing to the parties on notice. In particular:

- (a) with respect to the PPSA registrants, there are no liabilities owing other than one small lien relating to unpaid truck repair services and to the extent that it has priority over the First Lien Credit Facility (as defined in the June 11 Macaulay Affidavit), it will not be primed;
- (b) Allied Canada has no registered pension plans for which it is liable for a deficiency and it is current on its contributions;
- (c) remittance of taxes are current; and
- (d) there are no known outstanding environmental issues.

Macaulay Affidavit at para. 27, Motion Record, tab 2

¹ The Canadian bargaining pension plans consist of: (i) Eckler Ltd. (Canadian Auto Carriers & Logistics Pension Plan); (ii) Teamsters Canadian Pension Plan Local 106; (iii) Teamsters Canadian Pension Plan Local 213; and (iv) Prairie Teamsters Pension Plan

(ii) Priority for the Charges

23. In the context of a proceeding under Part IV of the CCAA, the Court has the jurisdiction to grant the Priority Charges under section 49.

CCAA, s. 49

24. Each of the proposed beneficiaries will play a critical role in the Chapter 11 Debtors' restructuring and it is unlikely that such beneficiaries will participate in the proceedings unless the Administration Charge is granted to secure their fees and disbursements. As such, the Applicant submits that this is an appropriate case in which to grant priority to the Administration Charge.

Macaulay Affidavit at para. 24, Motion Record, tab 2

25. The Chapter 11 Debtors were provided with a DIP facility by Yucaipa American Alliance Fund II, LLC, as agent, and certain other lenders, as lenders (collectively, the "**DIP Lenders**"), pursuant to the Senior Secured Super-Priority Debtor in Possession Credit and Guaranty Agreement dated June 12, 2012 (the "**DIP Agreement**"). The DIP Agreement provides that the priority of the DIP Lenders' charge shall be as set forth in the US interim and final financing orders, the Canadian Supplemental Order and the Canadian Comeback Order.

June 11 Macaulay Affidavit

26. The Supplemental Order recognized and approved the financing order granted by the US Court on June 12, 2012, which provided the Chapter 11 Debtors with DIP financing on an interim basis and provided the DIP Lenders with a charge ranking ahead of the First Lien Credit Facility and the Second Lien Credit Facility (as these terms are defined in the June 11 Macaulay Affidavit) but behind all other Encumbrances. The Applicant is seeking approval of a financing order on a final basis which, *inter alia*, provides the DIP Lenders with a charge ranking ahead of all Encumbrances, except : (i) the Encumbrances (if any) in favour of any Persons that are valid, perfected (by registration or possession), non-avoidable and senior to the Encumbrances securing the First Lien Credit Facility (as defined in the June 11 Macaulay Affidavit) as of the date of the Final Financing Order (as

defined in the Order of this Court on July 16, 2012); and (ii) the Carve-Out (as defined in the Final Financing Order).

Macaulay Affidavit at para. 23, Motion Record, tab 2

27. Without the priority charge, the Chapter 11 Debtors may not have access to the financing provided by the DIP Lenders under the DIP Agreement which is necessary for a successful restructuring of the Chapter 11 Debtors.

Macaulay Affidavit at para. 24, Motion Record, tab 2

- (iv) Absent the Priority Charges in priority to the Encumbrances, the Chapter 11 Debtors will likely be deprived of the services being provided by the beneficiaries of the Priority Charges to the detriment of the Chapter 11 Debtors' stakeholders. The Chapter 11 Debtors require the participation of the beneficiaries of the Priority Charges in the Proceedings in order to continue operating with a view to completing a successful restructuring and is therefore necessary to achieve the objective of the CCAA.

Macaulay Affidavit at para. 24, Motion Record, tab 2

PART V – RELIEF REQUESTED

28. The Applicant requests that this Honourable Court grant the Order, substantially in the form of the draft Order contained at tab 3 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of July, 2012.

July 13, 2012



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Lawyers for the Applicant

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] O.J. No. 786 (S.C.J. [Commercial List]).

Matlack Inc., Re, [2001] O.J. No. 6121 (S.C.J. [Commercial List]).

Lear Canada, Re, [2009] O.J. No. 3030 (S.C.J. [Commercial List]).

Grant Forest Products Inc., Re, [2010] O.J. No. 1684 (S.C.J. [Commercial List]).

Canwest Global Communications Corp. (Re) (2009), 59 C.B.R. (5th) 72 (S.C.J. [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.

Administration Charge

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

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

- (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the 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
(Motion returnable July 16, 2012)**

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