

Court File No.: 12- CV-9757-00CL

**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**

BRIEF OF AUTHORITIES OF THE APPLICANT

(Motion returnable July 16, 2012)

July 13, 2012

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TAB

Jurisprudence

1

Babcock & Wilcox Canada Ltd., Re, [2000] O.J. No. 786 (S.C.J. [Commercial List]). A

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

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

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

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

Relevant Statutes

2

TAB 1

TAB A

Indexed as:

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
AND IN THE MATTER OF **Babcock & Wilcox Canada Ltd.****

[2000] O.J. No. 786

[2000] O.T.C. 135

5 B.L.R. (3d) 75

18 C.B.R. (4th) 157

95 A.C.W.S. (3d) 608

Court File No. 00-CL-3667

Ontario Superior Court of Justice
Commercial List

Farley J.

Heard: February 25, 2000.
Judgment: February 25, 2000.

(24 paras.)

*Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation
-- Purpose of -- Stay of proceedings against debtor.*

Application by Babcock & Wilcox Canada for an interim order for a stay of proceedings under section 18.6 of the Companies' Creditors Arrangement Act. Babcock's parent corporation in the United States had applied for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with mass asbestos claims. The U.S. Bankruptcy Court issued a temporary restraining order against plaintiffs in the asbestos litigation, preventing them from bringing actions against non-debtor affiliates of the parent company, which would include Babcock. Babcock argued that this constituted a foreign proceeding which could be recognized in Canada.

HELD: Application allowed. The Act was to be given a liberal interpretation in order to facilitate its objectives. The Act did not require that a company be insolvent in order to seek the protection of section 18.6. The U.S. proceedings constituted foreign proceedings under the Act. There was an interdependence between Babcock and the parent company such that a stay was merited to allow the companies to work out a global solution within the context of the proceedings in the United States. The principles of comity and cooperation between jurisdictions were applicable.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 267, 268, 269, 270, 271, 272, 273, 274, 275.

Business Corporations Act (Ontario).

Companies' Creditors Arrangement Act, ss. 2, 3, 4, 5, 18.6, 18.6(1), 18.6(2), 18.6(3), 18.6(4), 18.6(8).

U.S. Bankruptcy Code, s. 524(g).

Counsel:

Derrick Tay, for Babcock & Wilcox Canada Ltd.

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

1 FARLEY J.:-- 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 LaForest J. in *Morguard Investments Limited 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 con-

venience, 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 Inc. Co.* (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div.) 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 LaForest 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.

LaForest 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* and *ATL* respectively. Indeed the analysis by LaForest 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.*, *Everfresh Beverages Inc.* and *The Loewen Group Inc.* Other examples involve the situation where a multi-jurisdictional proceeding is specifically connected to one jurisdiction with that jurisdiction's court being allowed to exercise principal control over the insolvency process: see *Roberts v. Picture Butte Municipal Hospital*, [1998] A.J. No. 817 (Q.B.) at pp. 5-7; *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 W.L. 423075 (S.D.N.Y.).

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 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 *Re Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at p. 320; *Re Lehndorff General Partners Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.).

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 Limited 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 dis-

putes 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 co-operate 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 co-operation 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 *Re 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 facili-

tating 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 drafters 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 *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C.S.C.) at pp. 93-4; *Pacific National Leaseholding Corp. v. Sun Life Trust Co.* (1995), 34 C.B.R. (3d) 4 (B.C.C.A.) at p. 2; *Lehndorff* 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 [Quicklaw note: See [2000] O.J. No. 787] 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.

FARLEY J.

cp/d/qlrme/qlkra

TAB B

Case Name:

Matlack Inc.(Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, Section 18.6 as amended AND IN THE MATTER OF an Application of **Matlack Inc. and the other parties set out in Schedule "A" Ancillary to Proceedings Under Chapter 11 of the United States Bankruptcy Code; **Matlack Inc.** and the other parties set out in Schedule "A" (applicant)**

[2001] O.J. No. 6121

[2001] O.T.C. 382

26 C.B.R. (4th) 45

Court File No. 01-CL-4109

Ontario Superior Court of Justice
Commercial List

Farley J.

April 19, 2001.

(14 paras.)

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- United States proceedings recognized and Ontario proceedings stayed.

Insolvency law -- Practice -- Proceedings in bankruptcy -- Jurisdiction of courts -- Stay of other proceedings -- United States proceedings recognized and Ontario proceedings stayed.

International law and conflict of laws -- Bankruptcy -- United States proceedings recognized and Ontario proceedings stayed.

International law -- Jurisdiction -- United States proceedings recognized and Ontario proceedings stayed.

United States bankrupt's substantial Canadian business fully integrated into North American enterprise from operational and financial perspective -- Application for recognition of proceedings commenced in United States Bankruptcy Court under Chapter 11 of United States Bankruptcy Code for purposes of Companies' Creditors Arrangement Act, and to have Ontario court issue stay of proceedings allowed -- In interests of all creditors and stakeholders of bankrupt to have its reorganization proceed in coordinated and integrated fashion -- Also necessary to ensure creditors treated as equitably and fairly as possible, regardless of where located -- Principle of comity required Ontario court to defer to jurisdiction courts of United States, where bankrupt's activities most closely associated -- Allowing Canadian creditors to pursue claims in Ontario courts would have aided them in obtaining unfair advantage -- Seizure bankrupt's goods by Canadian creditor could have been preferential and thus unfair and prejudicial to bankrupt's creditors generally.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, s. 18.6, s. 18.6(1)

United States Bankruptcy Code, Chapter 11

Counsel:

E. Bruce Leonard and Shahana Kar, for the applicant, Matlack Inc.

ENDORSEMENT

1 FARLEY J.:-- This was an application pursuant to section 18.6 of the Companies' Creditors Arrangement Act ("CCAA") for recognition of the proceedings commenced by the applicants in the U.S. Bankruptcy Court for the District of Delaware for relief under Chapter 11 of the United States Bankruptcy Code be recognized as a "foreign proceeding" for the purposes of the CCAA and to have this Court issue a stay of proceedings compatible with the Chapter 11 stay and for ancillary relief. That Order is granted with the usual comeback clause and subject to its expiry being May 11, 2001 unless otherwise extended.

2 The one applicant Matlack, Inc. ("Matlack") is a Pennsylvania corporation which is in the business of transporting chemical products throughout the United States, Mexico and Canada. It has developed a substantial Canadian business over the past 20 years and it currently operates a large leased facility in Ontario from which its Canadian licensed fleet services customers throughout Ontario and Quebec. Matlack's Canadian operations are fully integrated into Matlack's North American enterprise from both an operational and financial standpoint.

3 On March 29, 2001, Matlack and its affiliated applicants filed for relief under Chapter 11 and obtained relief precluding creditors subject to the U.S. Bankruptcy Court from commencing or continuing proceedings against the applicants. It is in the interests of all creditors and stakeholders of Matlack that its reorganization proceed in a coordinated and integrated fashion. The objective of such coordination is to ensure that creditors are treated as equitably and fairly as possible, wherever they are located. Harmonization of proceedings in the U.S. and in Canada will create the most stable conditions under which a successful reorganization can be achieved and will allow for judicial su-

pervision of all of Matlack's assets and enterprise throughout the two jurisdictions. I note that a Canadian creditor of Matlack has recently seized some of Matlack's assets and intends to sell same in satisfaction of Matlack's obligations to it. It would seem to me that in the context of the proceedings, such a seizure would be of a preferential nature and thus unfair and prejudicial to the interests of Matlack's creditors generally.

4 Canadian courts have consistently recognized and applied the principles of comity. See *Morguard Investments Limited v. DeSavoye* (1990), 76 D.L.R. (4th) 256 (S.C.C.); *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.); *ATL Industries Inc. v. Han Eol Inc. Co.* (1995), 36 C.P.C. (3d) 288 (Ont. Gen.Div.); *Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.), at pp. 160-2.

5 In an increasingly commercially integrated world, countries cannot live in isolation and refuse to recognize foreign judgments and orders. The Court's recognition of a foreign proceeding should depend on whether there is a real and substantial connection between the matter and the jurisdiction. The determination of whether a sufficient connection exists between a jurisdiction and a matter should be based on considerations of order, predictability and fairness rather than on a mechanical analysis of connections between the matter and the jurisdiction. See *Morguard supra*; *Hunt v. T&N plc* (1993), 109 D.L.R. (4th) 16 (S.C.C.).

6 I concur with what Forsyth J. stated in *Roberts v. Picture Butte Municipal Hospital*, [1999] 4 W.W.R. 443, (1998) 64 Alta. L.R. (3d) 218, [1998] A.J. No. 817 (Q.B.) at pp. 5-7 (A.J.):

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 the U.S. Bankruptcy Court. Thus, in either case, whether there has been attornment or not, I conclude it is appropriate for me to exercise my discretion and apply the principles of comity and grant the Defendant's stay application. I reach this conclusion based on all the circumstances, including the clear wording of the U.S. Bankruptcy Code provision, the similar philosophies and procedures in Canada and the U.S., the Plaintiffs' attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding ... (emphasis added)

7 Based on principles of comity, where appropriate this Court has the jurisdiction to stay proceedings commenced against a party that has filed for bankruptcy protection in the U.S. An Ontario Court can accept the jurisdiction of a U.S. Bankruptcy Court over moveable property in Ontario of an American company which has become subject to a Chapter 11 order. See *Roberts, supra*; *Borden & Elliot v. Winston Industries Inc.*, [1983] O.J. No. 970 (H.C.J.).

8 Where a cross-border insolvency proceeding is most closely connected to one jurisdiction, it is appropriate for the Court in that jurisdiction to exercise principal control over the insolvency process in light of the principles of comity and in order to avoid a multiplicity of proceedings. See *Microbiz Corp v. Classic Software Systems Inc.*, [1996] O.J. No. 5094 (Gen. Div.).

9 Section 18.6(1) of the CCAA provides the following definition:

"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;

The U.S. Bankruptcy Code's Chapter 11 proceedings would be such a foreign proceeding.

10 As I indicated in Babcock, supra, at p. 166: "Section 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". Accordingly, it is appropriate for Matlack to be granted ancillary relief in recognizing the Chapter 11 proceedings and in enforcing the stay of proceedings resulting therefrom. In addition this Court can also grant relief pursuant to section 18.6(5). A stay in Canada would promote a stable atmosphere with a view to the reorganization of Matlack and its affiliates while allowing creditors, wherever situate, to be treated as equitably as possible. The stay would also assist with respect to claimants in Canada attempting to seize assets so as to get a leg up on the other creditors. See Babcock, supra, at pp. 165-6. Aside from the Babcock case, see also Re GST Telecommunications, Inc. (Ground J., Ont. S.C.) released May 18, 2000 and Re Grace Canada, Inc. (Farley J., Ont. S.C.) released April 4, 2001.

11 It would also seem to me that the relief requested is appropriate and in accordance with the principles set down in the Transnational Insolvency Project of the American Law Institute ("ALI"). This Project involved jurists, practitioners and academics from the NAFTA countries - the U.S., Mexico and Canada - and was completed as to the Restatement of the Law in 2000 after six years of analysis. As a disclaimer, I should note that it was my privilege to tag along on this Project with the other participants who are recognized as outstanding in their fields.

12 The Project continues with the development of implementation and practical aids. Most recently this consists of the Guidelines Applicable to Court-to-Court Communications on Cross-Border Cases. I understand that Judge Mary Walrath is handling the Chapter 11 case. It will be my pleasure to work in coordination with her on this cross-border proceeding. To assist further with the handling of these matters, I would approve the proposed Protocol from the Canadian side, including what I understand may be the first opportunity to incorporate the Communication Guidelines, such to be effective if, as and when Judge Walrath is satisfied with same from the U.S. side.

13 A copy of the ALI Guidelines and the Matlack Protocol are annexed to these reasons for the benefit of other counsel involved in anything similar.

14 Order to issue accordingly.

* * * * *

APPENDIX

The American Law Institute

TRANSNATIONAL INSOLVENCY PROJECT

PRINCIPLES OF COOPERATION IN TRANSNATIONAL INSOLVENCY CASES AMONG
THE MEMBERS OF THE NORTH AMERICAN FREE TRADE AGREEMENT

Appendix 2: Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases
Submitted by the Council to the Members of The American Law Institute for Discussion at the
Seventy-Seventh Annual Meeting on May 15, 16, 17, and 18, 2000

The Executive Office

THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, Pa. 19104-3099

Amended--February 12, 2001

Appendix 2

Guidelines

Applicable to Court-to-Court Communications in Cross-Border Cases

Introduction:

One of the most essential elements of cooperation in cross-border cases is communication among the administering authorities of the countries involved. Because of the importance of the courts in insolvency and reorganization proceedings, it is even more essential that the supervising courts be able to coordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises.

These Guidelines are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communications by judges directly with judges or administrators in a foreign country, however, raise issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the process is transparent and clearly fair. Thus, communication among courts in cross-border cases is both more important and more sensitive than in domestic cases. These Guidelines encourage such communications while channelling them through transparent procedures. The Guidelines are meant to permit rapid cooperation in a developing insolvency case while ensuring due process to all concerned.

The Guidelines at this time contemplate application only between Canada and the United States, because of the very different rules governing communications with Principles of Cooperation courts and among courts in Mexico. Nonetheless, a Mexican Court might choose to adopt some or all of these Guidelines for communications by a *sindico* with foreign administrators or courts.

A Court intending to employ the Guidelines - in whole or part, with or without modifications - should adopt them formally before applying them. A Court may wish to make its adoption of the Guidelines contingent upon, or temporary until, their adoption by other courts concerned in the matter. The adopting Court may want to make adoption or continuance conditional upon adoption of the Guidelines by the other Court in a substantially similar form, to ensure that judges, counsel, and parties are not subject to different standards of conduct.

The Guidelines should be adopted following such notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances. If communication with other courts is urgently needed, the local procedures, including notice requirements, that are used in urgent or emergency situations should be employed, including,

if appropriate, an initial period of effectiveness, followed by further consideration of the Guidelines at a later time. Questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing) are governed by the Rules of Procedure in each jurisdiction and are not addressed in the Guidelines.

The Guidelines are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases and to change and evolve as the international insolvency community gains experience from working with them. They are to apply only in a manner that is consistent with local procedures and local ethical requirements. They do not address the details of notice and procedure that depend upon the law and practice in each jurisdiction. However, the Guidelines represent approaches that are likely to be highly useful in achieving efficient and just resolutions of cross-border insolvency issues. Their use, with such modifications and under such circumstances as may be appropriate in a particular case, is therefore recommended.

Guideline 1

Except in circumstances of urgency, prior to a communication with another Court, the Court should be satisfied that such a communication is consistent with all applicable Rules of Procedure in its country. Where a Court intends to apply these Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted before they are applied. Coordination of Guidelines between courts is desirable and officials of both courts may communicate in accordance with Guideline 8(d) with regard to the application and implementation of the Guidelines.

Guideline 2

A Court may communicate with another Court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdiction.

Guideline 3

A Court may communicate with an Insolvency Administrator in another jurisdiction or an authorized Representative of the Court in that jurisdiction in connection with the coordination and harmonization of the proceedings before it with the proceedings in the other jurisdiction.

Guideline 4

A Court may permit a duly authorized Insolvency Administrator to communicate with a foreign Court directly, subject to the approval of the foreign Court, or through an Insolvency Administrator in the other jurisdiction or through an authorized Representative of the foreign Court on such terms as the Court considers appropriate.

Guideline 5

A Court may receive communications from a foreign Court or from an authorized Representative of the foreign Court or from a foreign Insolvency Administrator and should respond directly if the communication is from a foreign Court (subject to Guideline 7 in the case of two-way communications) and may respond directly or through an authorized Representative of the Court or through a duly authorized Insolvency Administrator if the communication is from a foreign Insolvency Administrator, subject to local rules concerning ex parte communications.

Guideline 6

Communications from a Court to another Court may take place by or through the Court:

- (a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other Court and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;
- (b) Directing counsel or a foreign or domestic Insolvency Administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the Court to the other Court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;
- (c) Participating in two-way communications with the other Court by telephone or video conference call or other electronic means in which case Guideline 7 shall apply.

Guideline 7

In the event of communications between the Courts in accordance with Guidelines 2 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two Courts:

- (a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;
- (b) The communication between the Courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of both Courts, should be treated as an official transcript of the communication;
- (c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of either Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Courts may consider appropriate.
- (d) The time and place for communications between the Courts should be to the satisfaction of both Courts. Personnel other than Judges in each Court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the Courts.

Guideline 8

In the event of communications between the Court and an authorized Representative of the foreign Court or a foreign Insolvency Administrator in accordance with Guidelines 3 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by the Court:

- (a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;
- (b) The communication should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of the Court, can be treated as an official transcript of the communication;
- (c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of the Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to the other Court and to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Court may consider appropriate;
- (d) The time and place for the communication should be to the satisfaction of the Court. Personnel of the Court other than Judges may communicate fully with the authorized Representative of the foreign Court or the foreign Insolvency Administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the Court.

Guideline 9

A Court may conduct a joint hearing with another Court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:

- (a) Each Court should be able to simultaneously hear the proceedings in the other Court.
- (b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court or made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.
- (c) Submissions or applications by the representative of any party should be made only to the Court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other Court to make submissions to it.
- (d) Subject to Guideline 7(b), the Court should be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.
- (e) Subject to Guideline 7(b), the Court, subsequent to the joint hearing, should be entitled to communicate with the other Court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both Courts and to coordinate and resolve any procedural or nonsubstantive matters relating to the joint hearing.

Guideline 10

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof or exemplification thereof.

Guideline 11

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that Orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such Orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the Court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such Orders.

Guideline 12

The Court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a Service List which may include parties that are entitled to receive notice of proceedings before the Court in the other jurisdiction ("Non-Resident Parties"). All notices, applications, motions, and other materials served for purposes of the proceedings before the Court may be ordered to also be provided to or served on the Non-Resident Parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the Court in accordance with the procedures applicable in the Court.

Guideline 13

The Court may issue an Order or issue Directions permitting the foreign Insolvency Administrator or a representative of creditors in the proceedings in the other jurisdiction or an authorized Representative of the Court in the other jurisdiction to appear and be heard by the Court without thereby becoming subject to the jurisdiction of the Court.

Guideline 14

The Court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the Court, not apply to applications or motions brought by such parties before the other Court or that relief be granted to permit such parties to bring such applications or motions before the other Court on such terms and conditions as it considers appropriate. Court-to-Court communications in accordance with Guidelines 6 and 7 hereof may take place if an application or motion brought before the Court affects or might affect issues or proceedings in the Court in the other jurisdiction.

Guideline 15

A Court may communicate with a Court in another jurisdiction or with an authorized Representative of such Court in the manner prescribed by these Guidelines for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other Court wherever there is commonality among the issues and/or the parties in the proceedings. The Court should, absent compelling reasons to the contrary, so communicate with the Court in the other jurisdiction where the interests of justice so require.

Guideline 16

Directions issued by the Court under these Guidelines are subject to such amendments, modifications, and extensions as may be considered appropriate by the Court for the purposes described above and to reflect the changes and developments from time to time in the proceedings before it and before the other Court. Any Directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both Courts. If either Court intends to supplement, change, or abrogate Directions issued under these Guidelines in the absence of joint approval by both Courts, the Court should give the other Courts involved reasonable notice of its intention to do so.

Guideline 17

Arrangements contemplated under these Guidelines do not constitute a compromise or waiver by the Court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the Court or before the other Court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the Orders made by the Court or the other Court.

CROSS-BORDER INSOLVENCY PROTOCOL

RE MATLACK, INC. AND AFFILIATES

This Cross-Border Insolvency Protocol (the "Protocol") shall govern the conduct of all parties in interest in a proceeding brought by Matlack, Inc. and certain other parties in the Ontario Superior Court of Justice and a proceeding brought by Matlack Systems, Inc. and certain other parties in the United States Bankruptcy Court for the District of Delaware as Case No. 01-01114.

A. Background

1. Matlack Systems, Inc., a Delaware corporation ("MSI"), is the parent company of a multinational transportation business that operates, through its various affiliates, in the United States, Canada and Mexico.
2. MSI and certain of its affiliates (collectively, the "Matlack Companies") have commenced reorganization cases (collectively, the "U.S. Cases") under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "U.S. Bankruptcy Court"). The Matlack Companies are continuing in possession of their respective properties and are operating and managing their businesses, as debtors in possession, pursuant to sections 1107 and 1108 of the U.S. Bankruptcy Code. An Official Committee of Unsecured Creditors has been appointed in the U.S. Cases (the "Creditor's Committee").
3. One of the Matlack Companies, Matlack, Inc. (for ease of reference, "Matlack Canada"), a United States affiliate of MSI, has assets and carries on business in Canada. The Matlack Companies have commenced proceedings (collectively, the "Canadian Case") under section 18.6 of the Companies' Creditors Arrangement Act (the "CCAA") in the Ontario Superior Court of Justice (the "Canadian Court"). The Matlack Companies have sought an Order of the Canadian Court (as initially made under the CCAA and as subsequently amended or modified, the "CCAA Order") under which (a) the U.S. Cases have been determined to be "foreign proceedings" for the purposes of section 18.6 of the CCAA; and (b) a stay was granted against actions, enforcements, ex-

tra-judicial proceedings or other proceeding until and including August 15, 2001 against the Matlack Companies and their property.

4. The Matlack Companies are parties to both the Canadian Case and the U.S. Cases. For convenience, the U.S. Cases and the Canadian Case are referred to herein collectively as the "Insolvency Proceedings" and the U.S. Bankruptcy Court and the Canadian Court are referred to herein collectively as the "Courts".

B. Purpose and Goals

5. While the Insolvency Proceedings are pending in the United States and Canada for the Matlack Companies, the implementation of basic administrative procedures is necessary to coordinate certain activities in the Insolvency Proceedings, to protect the rights of parties thereto, the creditors of the Matlack Companies and to ensure the maintenance of the Courts' independent jurisdiction and comity. Accordingly, this Protocol has been developed to promote the following mutually desirable goals and objectives in both the U.S. Cases and the Canadian Case:

- * harmonize and coordinate activities in the Insolvency Proceedings before the U.S. Court and the Canadian Court;

- * promote the orderly and efficient administration of the Insolvency Proceedings to, among other things, maximize the efficiency of the Insolvency Proceedings, reduce the costs associated therewith and avoid duplication of effort;

- * honor the independence and integrity of the Courts and other courts and tribunals of the United States and Canada;

- * promote international cooperation and respect for comity among the Courts, the parties to the Insolvency Proceedings and the creditors of the Matlack Companies and other parties interested in or affected by the Insolvency Proceedings;

- * facilitate the fair, open and efficient administration of the Insolvency Proceedings for the benefit of all of the Debtors, creditors and other interested parties, wherever located; and

- * implement a framework of general principles to address basic administrative issues arising out of the cross-border nature of the Insolvency Proceedings.

C. Comity and Independence of the Courts

6. The approval and implementation of this Protocol shall not divest or diminish the U.S. Court's and the Canadian Court's independent jurisdiction over the subject matter of the U.S. Cases and the Canadian Case, respectively. By approving and implementing this Protocol, neither the U.S. Court, the Canadian Court, the Matlack Companies nor any creditors or interested parties shall be deemed to have approved or engaged in any infringement on the sovereignty of the United States or Canada.

7. The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct and hearing of the U.S. Cases. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct and hearing of the Canadian Cases.
8. In accordance with the principles of comity and independence established in Paragraphs 6 and 7 above, nothing contained herein shall be construed to:
 - * increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the U.S. Court, the Canadian Court or any other court or tribunal in the United States or Canada, including the ability of any such court or tribunal to provide appropriate relief under applicable law on an ex parte or "limited notice" basis;
 - * require the Matlack Companies or any Creditor's Committee or Estate Representatives to take any action or refrain from taking, any action that would result in a breach of any duty imposed on them by any applicable law;
 - * authorize any action that requires the specific approval of one or both of the Courts under the U.S. Bankruptcy Code or the CCAA after appropriate notice and a hearing (except to the extent that such action is specifically described in this Protocol); or
 - * preclude any creditor or other interested party from asserting such party's substantive rights under the applicable laws of the United States, Canada or any other jurisdiction including, without limitation, the rights of interested parties or affected persons to appeal from the decisions taken by one or both of the Courts.
9. The Matlack Companies, the Creditor's Committee, the Estate Representatives and their respective employees, members, agents and professionals shall respect and comply with the duties imposed upon them by the U.S. Bankruptcy Code, the CCAA, the CCAA Order and any other applicable laws.

D. Cooperation

10. To assist in the efficient administration of the Insolvency Proceedings, the Matlack Companies, the Creditor's Committee and the Estate Representatives shall (a) cooperate with each other in connection with actions taken in both the U.S. Bankruptcy Court and the Canadian Court, and (b) take any other appropriate steps to coordinate the administration of the U.S. Cases and the Canadian Case for the benefit of the Matlack Companies' respective estates and stakeholders.
11. To harmonize and coordinate the administration of the Insolvency Proceedings, the U.S. Bankruptcy Court and the Canadian Court each shall use its best efforts to coordinate activities with and defer to the judgment of the other Court, where appropriate and feasible. The U.S. Bankruptcy Court and the Canadian Court may communicate with one another in accordance with the Guidelines for Court-to-Court Communication in Cross-Border Cases developed by the American Law Institute and attached as Schedule "1" to this Protocol with respect to any matter relating to the Insolvency Proceedings and may conduct joint hearings with respect to any matter relating to the conduct, ad-

ministration, determination or disposition of any aspect of the U.S. Cases and the Canadian Case, in circumstances where both Courts consider such joint hearings to be necessary or advisable and, in particular, to facilitate or coordinate with the proper and efficient conduct of the U.S. Cases and the Canadian Case.

12. Notwithstanding the terms of paragraph 11 above, this Protocol recognizes that the U.S. Bankruptcy Court and the Canadian Court are independent Courts and, accordingly, although the Courts will seek to cooperate and coordinate with each other in good faith, each of the Courts shall at all times exercise its independent jurisdiction and authority with respect to (a) matters presented to such Court and (b) the conduct of the parties appearing in such matters.

E. Retention and Compensation of Professionals

13. Except as provided in paragraphs 16 below, any estate representatives appointed in the U.S. Cases, including any examiners or trustees appointed in accordance with section 1104 of the U.S. Bankruptcy Code and any Canadian professionals retained by the Estate Representatives (collectively, the "Estate Representatives"), shall be subject to the exclusive jurisdiction of the U.S. Court with respect to (a) the Estate Representatives' tenure in office; (b) the retention and compensation of the Estate Representatives; (c) the Estate Representatives' liability, if any, to any person or entity, including the Matlack Companies and any third parties, in connection with the U.S. Case; and (d) the hearing and determination of any other matters relating to the Estate Representatives arising in the U.S. Cases under the U.S. Bankruptcy Code or other applicable laws of the United States. The Estate Representatives and their U.S. counsel and other U.S. professionals shall not be required to seek approval of their retention in the Canadian Court. Additionally, the Estate Representatives and their U.S. counsel and other U.S. professionals (a) shall be compensated for their services in accordance with the U.S. Bankruptcy Code and other applicable laws of the United States or orders of the U.S. Bankruptcy Court, and (b) shall not be required to seek approval of their compensation in the Canadian Court.
14. Any Canadian professionals retained by or with the approval of the Matlack Companies for purposes of the Canadian Case, including Canadian professionals retained by the Creditor's Committee (collectively, the "Canadian Professionals"), shall be subject to the exclusive jurisdiction of the Canadian Court. Accordingly, the Canadian Professionals (a) shall be subject to the procedures and standards for retention and compensation applicable in Canada, and (b) shall not be required to seek approval of their retention or compensation in the U.S. Court.
15. Any United States professionals retained by the Matlack Companies and any United States professionals retained by the Creditor's Committee (collectively, the "U.S. Professionals") shall be subject to the exclusive jurisdiction of the U.S. Bankruptcy Court. Accordingly, the U.S. Professionals (a) shall be subject to the procedures and standards for retention and compensation applicable in the U.S. Bankruptcy Court under the U.S. Bankruptcy Code and any other applicable laws of the United States or orders of the U.S. Bankruptcy Court, and (b) shall not be required to seek approval of their retention or compensation in the Canadian Court.

F. Rights to Appear and Be Heard

16. The Matlack Companies, their creditors and other interested parties in the Insolvency Proceedings, including the Creditor's Committee and the U.S. Trustee, shall have the right and standing to (a) appear and be heard in either the U.S. Court or the Canadian Court in the Insolvency Proceedings to the same extent as creditors and other interested parties domiciled in the forum country, subject to any local rules or regulations generally applicable to all parties appearing in the forum, and (b) file notices of appearance or other processes with the Clerk of the U.S. Bankruptcy Court or the Canadian Court in the Insolvency Proceedings; provided, however, that any appearance or filing may subject a creditor or an interested party to the jurisdiction of the Court in which the appearance or filing occurs; provided further, that appearance by the Creditor's Committee in the Canadian Case shall not form a basis for personal jurisdiction in Canada over the members of the Creditor's Committee. Notwithstanding the foregoing, and in accordance with paragraph 13 above, the Canadian Court shall have jurisdiction over the Estate Representatives and the U.S. Trustee with respect to the particular matters as to which the Estate Representatives or the U.S. Trustee appear before the Canadian Court.

G. Notice

17. Notice of any motion, application or other pleading or paper filed in one or both of the Insolvency Proceedings and notice of any related hearings or other proceedings mandated by applicable law in connection with the Insolvency Proceedings, or this Protocol shall be given by appropriate means (including, where circumstances warrant, by courier, telecopier or other electronic forms of communication) to the following: (a) all creditors, including the Creditor's Committee, and other interested parties in accordance with the practice of the jurisdiction where the papers are filed or the proceedings are to occur; and (b) to the extent not otherwise entitled to receive notice under clause (a) above, the U.S. Trustee, the Office of the United States Trustee, and such other parties as may be designated by either of the Courts from time to time.

H. Joint Recognition of Stays of Proceedings Under the U.S. Bankruptcy Code and the CCAA

18. In recognition of the importance of the stay of proceedings and actions against the Matlack Companies and their assets under section 18.6 of the CCAA and the CCAA Order (the "Canadian Stay") on the successful completion of the Insolvency Proceedings for the benefit of the Matlack Companies and their respective estates and stakeholders, to the extent necessary and appropriate, the U.S. Bankruptcy Court shall extend and enforce the Canadian Stay in the United States (to the same extent such stay of proceedings and actions is applicable in Canada) to prevent adverse actions against the assets, rights and holdings of the Matlack Companies. In implementing the terms of this paragraph, the U.S. Bankruptcy Court may consult with the Canadian Court regarding (a) the interpretation and application of the Canadian Stay and any orders of the Canadian Court modifying or granting relief from the Canadian Stay, and (b) the enforcement in the United States of the Canadian Stay.
19. In recognition of the importance of the stay of proceedings and actions against the Matlack Companies and their assets under section 362 of the U.S. Bankruptcy Code (the "U.S. Stay") to the successful completion of the Insolvency Proceedings for the

benefit of the Matlack Companies and their respective estates and stakeholders, to the extent necessary and appropriate, the Canadian Court shall extend and enforce the U.S. Stay in Canada (to the same extent such stay of proceedings and action is applicable in the United States) to prevent adverse actions against the assets, rights and holdings, of the Matlack Companies in Canada. In implementing the terms of this paragraph, the Canadian Court may consult with the U.S. Court regarding (a) the interpretation and application of the U.S. Stay and any order of the U.S. Court modifying or granting relief from the U.S. Stay, and (b) the enforcement in Canada of the U.S. Stay.

20. Nothing contained herein shall affect or limit the Matlack Companies' or other parties' rights to assert the applicability or non-applicability of the U.S. Stay or the Canadian Stay to any particular proceeding, property, asset, activity or other matter, wherever pending or located.

I. Effectiveness and Modification of Protocol

21. This Protocol shall become effective only upon its approval by both the U.S. Court and the Canadian Court.
22. This Protocol may not be supplemented, modified, terminated or replaced in any manner except by the U.S. Court and the Canadian Court. Notice of any legal proceeding to supplement, modify, terminate or replace this Protocol shall be given in accordance with paragraph 17 above.

J. Procedure for Resolving Disputes Under the Protocol

23. Disputes relating to the terms, intent or application of this Protocol may be addressed by interested parties to either the U.S. Court, the Canadian Court or both Courts upon notice, in accordance with paragraph 17 above. Where an issue is addressed to only one Court, in rendering a determination in any such dispute, such Court: (a) shall consult with the other Court; and (b) may, in its sole and exclusive discretion, either (i) render a binding decision after such consultation, (ii) defer to the determination of the other Court by transferring the matter, in whole or in part, to the other Court or (iii) seek a joint hearing of both Courts. Notwithstanding the foregoing, each Court in making a determination shall have regard to the independence, comity or inherent jurisdiction of the other Court established under existing law.

K. Preservation of Rights

24. Neither the terms of this Protocol nor any actions taken under the terms of this Protocol shall prejudice or affect the powers, rights, claims and defences of the Matlack Companies and their estates, the Creditor's Committee, the U.S. Trustee or any of the creditors of the Matlack Companies under applicable law, including the U.S. Bankruptcy Code and the CCAA.

L. Guidelines

25. The Protocol shall adopt by reference the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the "Guidelines") developed by The American Law Institute for the Transnational Insolvency Project, a copy of which are at-

tached hereto as Schedule "1". In the case of any conflict between the terms of this Protocol and the terms of the Guidelines, the terms of this Protocol shall govern.

cp/e/nc/qlafr/qlkjg

TAB C

Case Name:

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**

[2009] O.J. No. 3030

55 C.B.R. (5th) 57

2009 CarswellOnt 4232

179 A.C.W.S. (3d) 46

Court File No. CV-09-00008269-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

July 14, 2009.

(23 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act(CCAAA) matters -- Application of Act -- Affiliated debtor companies -- International insolvencies -- Application by the Canadian components of Lear Corporation, a US corporation, for an order that the Chapter 11 proceedings in the US Bankruptcy Court constituted foreign proceedings and for a stay of proceedings against the applicants allowed -- Applicants part of integrated multi-national corporate enterprise -- Lear conducted its North American business on a fully integrated basis -- Lear sought relief under Chapter 11 in US -- A real and substantial connection had been established -- Necessary and desirable that the restructuring of Lear be coordinated and that a multiplicity of proceedings in two different jurisdictions should be avoided.

Application by the Canadian components of Lear Corporation, a US corporation, for an order that the Chapter 11 proceedings in the US Bankruptcy Court constituted foreign proceedings and for a stay of proceedings against the applicants. Lear was a leading global supplier of automotive seating systems, electrical distribution systems, and electronic products. The applicants were part of an integrated multi-national corporate enterprise with operations in 36 countries, one of which was Canada. Lear conducted its North American business on a fully integrated basis. In 2008, Lear defaulted under its senior secured credit facility and made a petition under Chapter 11 in the US in 2009. Lear expected 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.

HELD: Application allowed. A real and substantial connection had been established. It was 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 the relief sought would enable the applicants to continue to operate in the ordinary course and preserve value and customer relationships.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.6, s. 18.6(1), s. 18.6(2), s. 18.6(4)

Counsel:

K. McElcheran and R. Stabile, for the Applicants.

E. Lamek, for the Proposed Information Officer.

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

ENDORSEMENT

S.E. 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: *Re United Airlines Inc.*¹

13 *Re Babcock & Wilcox Canada Ltd.*² provided an early interpretation of section 18.6, and while not without some controversy³, 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.⁴ 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 substantial connection exists between a matter and the foreign jurisdiction: *Re Matlack Inc.*⁵ and *Re Magna Entertainment Corp.*⁶ 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: *Re Matlack*⁷. 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."⁸

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 situated 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.⁹ These issues should be addressed by an applicant in its materials. Assuming there are benefits, the existence of prejudice does not necessar-

ily 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.¹⁰ 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.

S.E. PEPALL J.

cp/e/qllxr/qljxr/qlmxb/qlaxw/qlaxr/qlcal

1 (2003), 43 C.B.R. (4th) 284 at 285.

2 (2000), 18 C.B.R. (4th) 157.

3 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.

4 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.

5 (2001), 26 C.B.R. (4th) 45.

6 (2009), 51 C.B.R. (5th) 82.

7 Supra, note 5 at para. 8.

8 Ibid, at para. 3.

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

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

TAB D

Case Name:

Grant Forest Products 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
Grant Forest Products Inc., Grant Alberta Inc., Grant Forest
Products Sales Inc. and Grant U.S. Holdings GP, Applicants**

[2010] O.J. No. 1684

2010 ONSC 1846

67 C.B.R. (5th) 258

2010 CarswellOnt 2445

Court File No. CV-09-8247-00CL

Ontario Superior Court of Justice
Commercial List

C.L. Campbell J.

Heard: February 1 and 8, 2010.

Judgment: March 30, 2010.

(83 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- International insolvencies -- Application for approval of a sale transaction and a Vesting Order to complete the transfer of the control of the business of Grant Forest Products Inc. allowed -- The Second Lien Lenders opposed approval on the basis the Court did not have jurisdiction to convey real property assets located in the United States -- The Court had jurisdiction and it was appropriate to approve the complicated transaction -- The relief requested was the product of a marketing process approved by the Court that was not objected to by any party when it was initiated.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Courts -- Jurisdiction -- CCAA matters -- International insolvencies -- Application for approval of a sale transaction and a Vesting Order to complete the transfer of the control of the business of Grant Forest Products Inc.

allowed -- The Second Lien Lenders opposed approval on the basis the Court did not have jurisdiction to convey real property assets located in the United States -- The Court had jurisdiction and it was appropriate to approve the complicated transaction -- The relief requested was the product of a marketing process approved by the Court that was not objected to by any party when it was initiated.

Application for approval of a sale transaction and a Vesting Order, to complete the transfer of the control of the business of Grant Forest Products Inc. (GFP) to the purchaser Georgia-Pacific. GFP was an Ontario company that had mills located in Ontario, Alberta and South Carolina. The transaction was the culmination of a Companies' Creditors Arrangement Act process authorized by an order of the Court. The applicants had two levels of primary secured debt. The transaction called for the transfer of Canadian Assets to a Canadian subsidiary of the purchaser and the transfer of assets of a U.S. partnership to a U.S. partnership, newly created by the purchaser. The transaction required security previously granted in favour of the First Lien Lenders and Second Lien Lenders, and additional indebtedness and liability to them, be released and discharged upon closing of the transaction. The evidence before the Court was that on completion of the transaction there would be a shortfall to the First Lien and likely no recovery by the Second Lien Lenders. The position of the First Lien Lenders was that the only way the transaction could be accomplished was with a structure that included the transfer of the interest in the U.S. partnership as partnership interests, rather than as a direct transfer of the assets of the partnership. Approval of the transaction was opposed by the Second Lien Lenders, on the basis the Court did not have jurisdiction to convey real property assets located in the United States. The Second Lien Lenders took the position that the relief sought was overly broad, inappropriate and would have the effect of mandatory orders against U.S. parties which would extinguish U.S. security over U.S. realty and personalty. A clause in the Inter-Creditor Agreement provided it would be governed by the laws of the state of New York.

HELD: Application allowed. The Court had jurisdiction and it was appropriate to approve the complicated transaction. The Court had the jurisdiction to provide the relief requested, which was the product of a marketing process that was approved by the Court and not objected to by any party when it was initiated. The issues raised by the Second Lien Lenders were inextricably linked to the restructuring of the Applicants and the completion of the transaction, and as such were appropriate for consideration by the Court. A process put in place by Court Order for the sale of assets of a failing business should be honoured, excepting extraordinary circumstances. Numerous parties participated over a number of months in a complex process designed to achieve maximum value of the assets of the business and to ensure its survival as a going concern. If there was a valid objection by the Second Lien Lenders it was appropriately made in the U.S. Bankruptcy Court at a hearing to recognize this Order.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36,
U.S. Bankruptcy Code, s. 363

Counsel:

Sean Dunphy, Kathy Mah, for the Monitor.

Daniel Dowdall, Jane O. Dietrich, for the Applicants Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., Grant U.S. Holdings GP.

Kevin McElcheran, for the Toronto-Dominion Bank, Agent for First Lien Lenders.

Fred Myers, Joe Pasquariello, for Bank of New York Mellon, Agent for SLL.

Sheryl Seigel, for Georgia-Pacific LLC.

Richard Swan, for Peter Grant.

Sr. Aubrey Kauffman, for Independent Directors of Grant Forest Products Inc.

REASONS FOR DECISION

1 **C.L. CAMPBELL J.**-- This Application seeks approval of the Sale transaction and a Vesting Order to complete the transfer of the control of the business of Grant Forest Products Inc. to the purchaser Georgia-Pacific. The transaction is the culmination of the marketing process under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("CCAA"), authorized by an order of this Court dated June 25, 2009.

2 Approval of the transaction is opposed by the Second Lien Lenders ("SLL")¹ under an Inter-Creditor Agreement (the "ICA") of which Grant Forest is a party, on the basis that this Court does not have jurisdiction to, in effect, convey real property assets located in the United States.

3 An adjournment of the approval motion sought by the largest shareholder of Grant Forest, seeking time for improvement of expressions of interest by others into bids, was not granted. Consideration of the issues raised on this motion requires analysis of the many similarities and few differences between the restructuring and insolvency processes in Canada and the United States in cross-border transactions.

4 For reasons that follow, I am satisfied that this Court does have jurisdiction and it is appropriate to approve this complicated transaction. In order to deal with the objections raised, it is necessary to outline the transaction in some detail, the particulars of which are summarized in the Sixth Report of the Monitor.

5 Grant Forest Products Inc. ("GFP"), an Ontario company, and certain of its subsidiaries are privately owned corporations carrying on an Oriented Strand Board manufacturing business from facilities located in Canada and the United States. The most common uses of the companies' products are sheathing in the walls, floors and roofs in the construction of buildings and residential housing.

6 Two GFP mills are located in Ontario, one in Alberta (50% with Footner Forest Products) and two in the counties of Allendale and Clarendon in South Carolina.

7 The U.S. mills are owned indirectly through one of the Applicants, being the Grant Partnership registered in the state of Delaware. At present, due to decreased demand, only one Ontario mill and the Allendale mill in South Carolina are operating.

8 The Applicants, being the parent GFP, its Canadian subsidiaries Grant Alberta Inc. and Grant Forest Product Sales Inc., together with Grant U.S. holdings GP ("Grant U.S. Partnership") and its related entities, obtained protection under the CCAA on June 25, 2009, when a stay of proceedings was granted and Ernst and Young Inc. ("E&Y") was appointed Monitor. The Order also approved the continuation of the engagement of a chief restructuring advisor.

9 The Applicants have two levels of primary secured debt. The total debt obligations are comprised of the following facilities:

First Lien Creditor Agreement

10 As at May 31, 2009, the First Lien Lenders ("FLL")² were owed the principal amount of \$399 million plus accrued interest of approximately \$5.3 million pursuant to a credit agreement dated October 26, 2005 and amended March 21, 2007. An additional \$8.7 million was owed to one or more of the FLL pursuant to interest rate swap agreements the liability of which was secured to the FLL Agent.

Second Lien Creditor Agreement

11 The bank of New York Mellon ("BNY") as successor is the Agent for the SLL, to whom as of May 31, 2009 was owed the principal amount of approximately \$150 million plus accrued interest of approximately \$42 million pursuant to a credit agreement dated as of March 21, 2007 as amended as of April 30, 2009. GFP and the Grant U.S. Partnership are the borrowers under the FLL Agreement with all related entities as guarantors of the FLL indebtedness. The Grant U.S. Partnership is the borrower under the SLL Agreement with all related entities as guarantors of the SLL debt.

12 GFP and the Grant U.S. Partnership are in default under the FLL Agreement and the Grant U.S. Partnership is in default under the SLL Agreement. Both the FLL and SLL Agents hold various security in Canada over each of their respective property and assets.

Inter-Creditor Agreement

13 The Applicants together with the entities related to the Grant U.S. Partnership, the FLL and SLL are parties to an Agreement dated March 21, 2007, which among other things deals with the relationship between the FLL security and the SLL security. Both the FLL and the SLL rely on this Agreement in respect of the issue as between them, which affects priority over assets.

The Marketing Process

14 Prior to the filing that gave rise to the initial order, the Applicants had engaged a financial advisor and an investment banking firm to advise on capital and strategic options to address the Applicants' debt position and liquidity needs and to locate investors or sell the business. While this process did not result in a transaction that could be implemented, the Applicants were of the view that the business could be sold as a going concern or they could sponsor a plan of arrangement to be consummated in CCAA proceedings. The Initial Order, which has not been objected to since being granted on June 25, 2009, contained a six page elaborate "Investment Offering Protocol" to provide interested parties with the opportunity to offer to purchase the business and operations in whole or in part as a going concern or to offer to sponsor a plan of arrangement of the Applicants or any of them.

15 The three phases of the marketing process are described in detail in paragraphs 35 to 47 of the Sixth Report of the Monitor. The process, which commenced in July 2009, involved contact with 91 potentially interested parties, narrowed to 13 who responded with expressions of interest, with eight parties invited to phase Two to conduct further due diligence.

16 At this phase, the interested parties were provided access to the Applicants' facilities, advised of the bid process and had until August 30, 2009 to submit revised proposals. This was subsequently extended to September 11, 2009 in order to accommodate due diligence requirements, plant tour schedules and management meetings with the eight interested parties who were to submit revised proposals on or before September 11, 2009.

17 As reported by the Monitor, two of the bids were inferior by their terms or consideration and three were within a similar range. As a result of due diligence items and closing conditions which risked the completion of the transaction, revised bids were extended to October 2, 2009 for the three interested parties.

18 As of October 16, 2009, 66 2/3% of the FLL debt and the Independent Directors Committee voted in favour of the selection of the Georgia-Pacific bid, one of the world's leading manufacturers and marketers of tissue, packaging, paper pulp and building products, to proceed to Phase Three.

19 As reported in the Fifth Report of the Monitor dated November 26, 2009, SLL who were prepared to agree to certain confidentiality provisions were apprised on October 15 of the status of the marketing process.

20 An exclusivity agreement was reached with Georgia-Pacific on October 20, 2009, which required the Applicants to refrain from seeking bids, responding to or negotiating with any party other than Georgia-Pacific with respect to the items included in the bid of Georgia-Pacific during a period of exclusivity which extended through a series of extensions to January 8, 2010, when the parties finalized a purchase and sale agreement that is in the material filed with the Court.

21 I accept the conclusion of the Monitor as set out in paragraph 56 of the Sixth Report:

56. It is the Monitor's view that the Marketing Process included a structured, fair, wide and effective canvassing of the market as demonstrated by the following:
 - a. contact by the Investment Offering Advisor of 91 interested parties comprising both financial and strategic parties located in North America, South America, Europe and Asia;
 - b. the execution of 32 NDAs by interested parties who were then granted access to review the Data Room and the subsequent submission of 13 EOIs at the end of *Phase I*;
 - c. the EOIs of eight interested parties that were invited to participate in *Phase II* provided a value range which was market derived and tested, and as such, supported the conclusion that the consideration included in Georgia Pacific's bid reflected fair value;
 - d. of the eight interested parties that were invited to *Phase II*, five submitted improved bids in respect of consideration and/or closing conditions at the close of *Phase II* and of the three interested parties that

were invited through to *Phase IIb*, each party again improved its bid in terms of consideration and/or closing conditions at the end of *Phase IIb*.

- e. the selection of Georgia Pacific to negotiate a PSA was based on a thorough analysis of all of the financial and commercial terms presented in all of the bids, was recommended by the Monitor and the CRA and was approved by the First Lien Lenders Steering Committee and the Independent Directors Committee; and
- f. the Second Lien Lenders were consulted, and their views and questions were taken into account in the final selection of Georgia Pacific.

22 This approval motion was originally returnable on February 1, 2010; it was adjourned to allow the parties to respond to two additional motions. The first, brought on behalf of the FLL, seeks to add as "Additional Applicants" the U.S. entities directly related to the Grant U.S. Partnership, "Grant NewCo LLC" and various Georgia-Pacific Canadian and U.S. entities.

23 The second motion, on behalf of the SLL, was to adjourn or dismiss the Approval Vesting motion on the basis that this Court did not have jurisdiction to deal with the assets in the United States that are the subject of the transaction and such assets would have to be dealt with under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

24 On February 1 and on the adjourned date of February 8, counsel for Peter Grant Senior sought a further adjournment to enable consideration of a recently received "offer." In its Seventh Report the Monitor reported on receipt of a letter which expressed interest in the Applicants' assets by a new "bidder." In its Report, the Monitor advised that in its opinion, the expression of interest could be considered as no more than that and reported that it did not comply with the Investment Offering Protocol.

25 Counsel for the SLL sought and was granted access to the correspondence but Mr. Grant was not, due to his involvement in a bid as per the terms of the Investment Offering Protocol.

26 On February 5, with knowledge of the position taken by the SLL and the specifics of the Georgia-Pacific agreement, another expression of interest was received by the Monitor and brought to the attention of the Court. This expression of interest from a previous "bidder" whose bid was rejected, sought to amend its previous position to accommodate the concern that the SLL had with respect to the Georgia-Pacific agreement.

27 The Court ruled that both of these expressions were no more than invitations to negotiate. In neither case by their terms were they intended to create binding obligations until definitive agreements were reached.

28 The Applicants and those parties supporting the Georgia-Pacific agreement urged that the integrity of the process would be compromised if further consideration were given to nothing more than expressions of interest.

29 It is now well established in insolvency law in Canada that once a process has been put in place by Court Order for the sale of assets of a failing business, that process should be honoured, excepting extraordinary circumstances.

30 In *Re Tiger Brand Knitting Co.*, [2005] O.J. No. 1259 (S.C.J.), I noted at para. 31 that integrity of "process is integral to the administration of statutes such as the BIA and CCAA."

31 The leading case in Ontario, which confirms the importance of integrity of process, is *Royal Bank of Canada v. Soundair Corp* (1991), 7 C.B.R. (3d) 1, a decision of the Court of Appeal for Ontario. At issue was the power of the Court to review a decision of a receiver to approve one offer over another for the sale of an airline as a going concern. In reinforcing the importance of integrity of process, the Court quoted from Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 at p. 92 adopted the following:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers are obtained.
4. It should consider whether there has been unfairness in the working out of the process.

32 In this case, numerous parties participated over a number of months in a complex process designed to achieve not only maximum value of the assets of the business, but to ensure its survival as a going concern for the benefit of many of the stakeholders.

33 I am satisfied that to permit an "invitation" to reopen that process not only would destroy the integrity of the process, but would likely doom the transaction that has been achieved.

Motion to Add Applicants

34 The motion brought by the FLL Agent to add additional applicants was supported by the original Applicants, the purchasers and the Monitor, and opposed by the SLL as part of the objection to jurisdiction of this Court. The purpose of adding Additional Applicants was said to be necessary to make the transaction effective.

35 The transaction with Georgia-Pacific contemplates the transfer of certain assets that are on terms as set out in the Agreement between GFP and related Canadian entities, and to the Canadian purchaser (a Georgia-Pacific subsidiary) with the claims of any person against such transferred assets attaching to the net proceeds received from the sale of such transferred assets.

36 Additionally, the transaction contemplates that the partnership interests in Grant U.S. Partnership will be surrendered and cancelled. Grant U.S. Partnership will issue new partnership interests to the Georgia-Pacific U.S. purchaser vehicle and the additional purchaser.

37 The aggregate consideration being paid by the Canadian purchaser for the transferred assets and the U.S. purchasers for the Grant U.S. Partnership interests is \$403 million, subject to adjustment.

38 Through the U.S. purchasers' acquisition of the purchasers' partnership interests, the U.S. purchasers will acquire Grant U.S. Partnership, Southeast, Clarendon, Allendale, U.S. Sales, Newco. It is urged that through this structure the Applicants will maximize the value of their assets.

39 The agreement and transaction require that the security previously granted by the applicable U.S. applicants (the "Additional Applicants") in favour of the FLL and SLL and the indebtedness

and liability of the applicable Additional Applicants to them and the Lenders under the FLL Agreement and the SLL Agreement be released and discharged upon closing of the transaction.

40 The position of the FLL, supported by the Applicants and the Monitor, is that the only way in which the transaction can be accomplished with the price that the FLL and the Applicants are prepared to accept is with the proposed structure that would include a transfer of the Grant U.S. Partnership interests as partnership interests, rather than a direct transfer of the assets of Grant U.S. Partnership.

41 The FLL, the Applicant and the Purchasers urge that without the tax benefit that arises from the proposed structure, the Agreement of Purchase and Sale with Georgia-Pacific would not have been completed.

Position of SLL

42 The position of the SLL, both in opposing the motion to add Additional Applicants and opposing Approval of the Sale, is that the relief sought is overly broad, inappropriate and would have the effect of mandatory orders against U.S. parties which would extinguish U.S. security over U.S. realty and personalty. The effect of the extinguishment is to absolve FLL of all forms of liability when it is neither a CCAA debtor nor an officer of this Court.

43 It is urged that there is no jurisdiction on which the FLL can seek an unlimited judicial release. The FLL cannot add the SLL as a party for any purpose that is to seek avoiding prior scrutiny in the U.S. courts of the merits of its actions and of the U.S. affiliates of the Original Applicants and the SLL.³

44 The SLL Agent asserts that the effect of the Application is to ask this Court, in the guise of a motion in a CCAA proceeding concerning Canadian debtors, to allow it on behalf of U.S. FLL to sue U.S. defendants for a final declaration of right and a mandatory injunction under the Inter-Creditor Agreement that is governed by U.S. law and U.S. choice of forum.

45 This is said to occur without delivering any originating process or meeting tests for the exercise of jurisdiction of this Court over U.S. parties concerning U.S. property. SLL submits that the FLL failed to provide any of the legal and procedural safeguards required by the Rules of Civil Procedure to any foreign or proposed defendant.

46 It is further urged that the ICA specifically provides the FLL with rights only upon the sale of assets under section 363 of the U.S. bankruptcy code. Therefore, it is submitted, a motion in a CCAA proceeding by the Original Applicants is not an appropriate forum for the resolution of the interpretation of a contract between the U.S. non-parties that is to be decided under U.S. law.

47 The SLL also complain that engaging the term "center of main interest" with respect to the U.S. affiliates is not a relevant question for this Court. Rather, it is a transparent attempt to pre-empt a U.S. court from making a determination required under the U.S. Bankruptcy Code, which may affect the standard of review afforded by the U.S. court upon any recognition proceedings that the original Applicants may choose to bring before the U.S. court in the future.

48 Finally, it is suggested that what the FLL Agent seeks is contrary to the principles of comity and the common law principle that a court should decide only matters properly before it and necessary to its own decision.

49 The evidence before the Court is that on completion of the transaction, there will be a short-fall to the FLL on their debt and likely no recovery by the SLL on their debt. The SLL suggest that a separate auction sale of the U.S. mills might achieve a better price for these assets. There is no evidence before the Court to back up this assertion.

Inter-Creditor Agreement

50 The ICA, which was entered into as of March 21, 2007, binds the GFP group of companies, including Grant U.S. Partnership as well as the FLL and the SLL. The FLL and the SLL rely on the Agreement in support of their respective positions.

51 The stated purpose of the Agreement was to induce the FLL to consent to GFP incurring the second lien obligations and to induce the FLL to extend credit for the benefit of GFP.

52 By its terms and the definition of "bankruptcy code" in the ICA, the parties recognized that the Canadian statutes, being the CCAA and the BIA, as well as the U.S. Bankruptcy Code, might apply.

53 Counsel for the SLL relies on clause 9.10 of the ICA definition of "Applicable Law," which provides: "this agreement and the rights and obligations of the parties hereunder shall be governed by, and shall be construed and enforced in accordance with, the laws of the state of New York."

54 Accordingly, it is argued on behalf of the SLL that this Court should not have regard to any issues as between the FLL and SLL, but rather leave those to be litigated as between those parties in the State of New York.

55 The position of the FLL is that a Court having jurisdiction over insolvency of a Canadian entity might well be required to have regard to the ICA in dealing with legitimate and appropriate insolvency remedies in Canada. In this regard, counsel notes that clause 9.7 of the ICA identifies New York as a "non-exclusive" venue for disputes involving the Agreement.

56 The position of the Applicants and those supporting the ICA is that this Court is being asked to consider and approve a restructuring transaction in a process that has been overseen by this Court, and which includes, *inter alia*, a comprehensive marketing process involving an Ontario Court-appointed officer. This process has always expressly included the Applicants and their subsidiaries and the business that the integrated corporate group operated in North America from headquarters situated in Ontario.

57 The Applicants submit it is appropriate for this Court to deal with issues raised under the ICA between the FLL and SLL, where that is incidental to approval of this Canadian restructuring transaction.

58 I am satisfied that the issues raised by the SLL are inextricably linked to the restructuring of the Applicants and the completion of the transaction and as such are appropriate for consideration by this Court.

59 I am satisfied that, by operation of the Credit Agreement and ICA, the FLL are entitled to exercise their remedies, which they propose to do in this motion by adding the Additional Applicants as CCAA Applicants. They may then release their security over the assets to be transferred in connection with the exercise of their remedies and by doing so, the security of the SLL over the Transferred Assets is automatically and simultaneously released.

60 I am satisfied that the transaction, whereby Canadian assets are transferred to a Canadian Georgia-Pacific subsidiary and the assets of the essentially GFP-owned partnership interests in Grant U.S. Partnership are transferred to a newly created U.S. partnership by Georgia-Pacific, would not have been possible without the tax advantages that are available as a result of the form of this transaction.

61 To suggest, as does the submission of the SLL, that the entire transaction is flawed because the effect is a transfer of some assets in the United States without the sale process envisaged in section 363 of the U.S. Bankruptcy Code, would be a triumph of form over substance.

62 I accept that the effect of the transaction may indirectly be a transfer of U.S. real property assets and the release of a security over them of the SLL. The effect of the transaction is such that the claims of local creditors of the business of the U.S. mills remain unaffected. The Court was not apprised of any ordinary creditor other than the SLL that would be so affected.

Comity and U.S. Chapter 15

63 Counsel for the SLL Agent objected to the use by the Applicants of the term COMI (being Center Of Main Interest) in respect of this CCAA Application.

64 I accept that the term COMI has only been formally recognized in amendments to the CCAA, which came into effect in September 2009 after the filing of this Application. The term has gained recognition in the last few years as cross-border insolvencies have increased, particularly with the use of flexibility of the CCAA.

65 Comity, as expressed by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*⁴, is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." Comity balances "international duty and convenience" with "the rights of (a nation's) own citizens ... who are under the protection of its laws."⁵

66 Without in any way intending to intrude on the law of another jurisdiction, it is appropriate to have a look at the plain wording of the ICA.

67 It is to be noted that there is no evidence put forward by the SLL Agent to suggest that the position of the FLL in respect of the ICA is incorrect. The only response from the SLL Agent is that the matter is not for this Court.

68 The suggestion by the SLL is that the effect of the Order sought is to vest title in U.S. assets. The FLL assert that all that is being done is the enforcement of their secured creditor remedies and release of their security, which under the ICA has the effect of releasing the security of the SLL.

69 The FLL submit that Section 3.1 of the ICA recognizes the broad remedies available to the FLL to enforce their security, using all the remedies of a secured creditor under the Bankruptcy Laws of the U.S. including the CCAA, without consultation with the SLL. The submission is further that the SLL are bound by any determination made by the FLL to release its security. The SLL is to provide written confirmation on the FLL becomes the agent of the SLL for that purpose.

70 The relevant sections of the ICA are set out in Appendix A hereto. As noted above, the position of the FLL is that they are exercising contractual remedies under the ICA.

71 For the SLL, the argument is that this Court should not interfere with the obligation of the FLL to commence proceedings in the appropriate jurisdiction (New York) to enforce its obligations against the SLL. Neither the SLL nor the FLL has commenced New York actions.

72 I am satisfied that this Court does have jurisdiction to provide the relief requested, which is the product of the marketing process that was not only approved by this Court, but not objected to by any party when it was initiated.⁶

73 I do not accept the submission on behalf of the SLL that "the proposed CCAA proceedings for the U.S. Affiliates are not proper CCAA proceedings at all, but are merely proposed as a mechanism for Canadian vesting of U.S. assets."

74 The relief sought is not merely a device to sell U.S. assets from Canada. This is a unified transaction, each element of which is necessary and integral to its success. It is properly a Canadian process.

75 There are many instances in which Canadian courts have granted vesting orders in relation to assets situated in the United States. Some of the orders are referred to in the factum of the FLL, including *Re Maax Corporation et al.*,⁷ *Re Madill Equipment Canada*,⁸ *Re ROL Manufacturing (Canada) Ltd.*,⁹ *Re Bilrite Rubber Inc.*¹⁰ and *Re Pope and Talbot, Inc. et. al.*¹¹

76 Decisions on both sides of the border have recognized that the United States and Canada have a special relationship that allows bankruptcy and insolvency matters to proceed with relative ease when assets lie in both territories. As the U.S. Bankruptcy Court for the Southern District of New York acknowledged in ABCP's *Metcalf & Mansfield Alternative Investments et al.*,¹² both systems are rooted in the common law and share similar principles and procedures. Bankruptcy proceedings in the United States acknowledge international proceedings and work alongside, rather than over, foreign matters. Chapter 15 of the U.S. Bankruptcy Code exemplifies this in its foreign bankruptcy proceedings: "the court should be guided by principles of comity and cooperation with foreign courts."¹³

77 In the cross-border case of *Re Muscletech Research and Development Inc.*,¹⁴ COMI was found to be in Canada despite factors indicating the U.S. would also be a suitable jurisdiction. Particularly, most of the creditors were located in the U.S., as was the revenue stream. Most of the major decisions regarding the company were made in Canada, its directors and officers were located in Ontario, banking was done in Ontario, etc. Justice Farley noted the positive relationship between Canada and the U.S. and credited this relationship to the adherence to comity and common principles. Judge Rakoff, presiding over the Chapter 15 proceedings, agreed with Farley J.'s endorsement, specifically noting that the factors outlined in the Canadian endorsement persuaded him over the factors in favour of U.S. COMI. Farley J. noted at paragraph 4 of his endorsement, and Judge Rankoff implicitly agreed, that "the courts of Canada and the U.S. have long enjoyed a firm and ongoing relationship based on comity and commonalities of principles as to, *inter alia*, bankruptcy and insolvency."

78 As noted by counsel for the SLL at paragraph 44 of their factum:

Courts routinely enforce Canadian judgments in bankruptcy, respecting our similar common law traditions including our respect for comity and restraint. In enforcing the decision of this Honourable Court in *Metcalf & Mansfield Alternative Investments et al.*, ("ABCP") the US Bankruptcy Court for the Southern District of New York, wrote:

The U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process. U.S. federal courts have repeatedly granted comity to Canadian proceedings. *United Feature Syndicate, Inc. v. Miler Features Syndicate, Inc.*, 216 F. Supp. 2d 198, 212 (S.D.N.Y. 2002) ("There is no question that bankruptcy proceedings in Canada—a sister common law jurisdiction with procedures akin to our own—are entitled to comity under appropriate circumstances.") (internal quotation marks and citations omitted); *Tradewell, Inc. v. American Sensors Elecs., Inc.*, No. 96 Civ. 2474(DAB), 1997 WL 423075, at *1 n.3 (S.D.N.Y. 1997) ("It is well-settled in actions commenced in New York that judgments of the Canadian courts are to be given effect under principles of comity.") (internal quotation marks and citation omitted); *Cornjeld v. Investors Overseas Servs., Ltd.*, 471 F. Supp. 1255, 1259 (S.D.N.Y. 1979) ("The fact that the foreign country involved is Canada is significant. It is wellsettled in New York that the judgments of the Canadian courts are to be given effect under principles of comity. Trustees in bankruptcy appointed by Canadian courts have been recognized in actions commenced in the United States. More importantly, Canada is a sister common law jurisdiction with procedures akin to our own, and thus there need be no concern over the adequacy of the procedural safeguards of Canadian proceedings.") (internal quotation marks and citations omitted)¹⁵

79 *MAAX Corporation (MAAX)* provides some assistance on the U.S. treatment to CCAA proceedings in asset sales. The salient elements in *MAAX* included the fact that the sale was conducted prior to entering CCAA protection, only the Canadian entity ultimately sought protection under the Act and no concurrent U.S. proceedings were initiated at first. The *MAAX* companies operated extensively in the U.S. and internationally, and were eventually brought into the U.S. via Chapter 15. The Canadian court approved the move into the U.S. and granted the sale. While there were some operating companies based almost solely in the U.S. (opening bank accounts to qualify under the CCAA, as was done in the present case), the U.S. Bankruptcy Court looked at the entity as a whole and granted the petition.¹⁶ The American court approved of a flexible approach to the U.S. asset sale, allowing it to go forward without a competitive bidding process, stalking horse or auction.

80 One of the essential features of the orders sought is the requirement that recognition be sought and obtained in the U.S. Bankruptcy Court, pursuant to Chapter 15 of that Code, of the Orders sought in this Court, including the adding of Additional Applicants.

81 I am satisfied that if there is a valid objection by the SLL, it is appropriately made in the U.S. Bankruptcy Court at a hearing to recognize this Order. I do not accept the proposition that this Court, by making the Order sought, would usurp a determinative review by the U.S. Court should it be found necessary.

82 Given the purpose and flexibility of the CCAA process, it is consistent with the jurisdiction of this Court to add the Additional Applicants for the appropriate purpose of facilitating and implementing the entire transaction, which is approved.

Conclusion

83 For the foregoing reasons, I am satisfied:

1. That it is not appropriate to re-open the Marketing Process;
2. That this Court does have jurisdiction to consider a sale transaction that incidentally does affect assets of a Canadian company in the United States;
3. That in all the circumstances it is appropriate to approve the proposed transaction.

C.L. CAMPBELL J.

* * * * *

Appendix A

Applicable Provisions of the Inter-Creditor Agreement

Section 3.1

Until the Discharge of First Lien Obligations has occurred, whether or not any Insolvency or Liquidation Proceeding has been commenced by or against the Company or any other Grantor, subject to Section 3.1(a)(1), the First Lien Collateral Agent and the other First Lien Claimholders shall have the right to enforce rights, exercise remedies (including set-off and the right to credit bid their debt) and make determinations regarding the release, disposition, or restrictions with respect to the Collateral without any consultation with or the consent of the Second Lien Collateral Agent or any other Second Lien Claimholder ...

Section 5.1(a)

If in connection with the exercise of the First Lien Collateral Agent's remedies in respect of the Collateral provided for in Section 3.1, the First Lien Collateral Agent, for itself or on behalf of any of the other First Lien Claimholders, releases any of its Liens on any part of the Collateral or releases any Grantor from its obligations under its guaranty of the First Lien Obligations in connection with the sale of the stock, or substantially all the assets, of such Grantor, then the Liens, if any, of the Second Lien Collateral Agent, for itself or for the benefit of the Second Lien Claimholders, on such Collateral, and the obligations of such Grantor under its guaranty of the Second Lien Obligations, shall be automatically, unconditionally and simultaneously released ...

... The Second Lien Collateral Agent, for itself or on behalf of any such Second Lien Claimholders, promptly shall execute and deliver to the First Lien Collateral Agent or such Grantor such termination statements, releases and other documents as the First Lien Collateral Agent or such Grantor may request to effectively confirm such release.

Section 5.1(c)

Until the Discharge of First Lien Obligations occurs, the Second Lien Collateral Agent, for itself and on behalf of the Second Lien Claimholders, hereby irrevocably constitutes and appoints the First Lien Collateral Agent and any officer or agent of the First Lien Collateral Agent, with full power of substitution, as its true and lawful attorney-in-fact with full irrevocable power and authority in the place and stead of the Second Lien Collateral Agent or such holder or in the First Lien Collateral Agent's own name, from time to time in the First Lien Collateral Agent's discretion, for the purpose of carrying out the terms of this Section 5.1, to take any and all appropriate action and to execute any and all documents and instruments which may be necessary to accomplish the purposes of this Section 5.1, including any endorsements or other instruments of transfer or release.

cp/e/qllxr/qljxr/qlced/qlaxw/qlhcs

1 The appearing party on this motion is the Agent for the Second Lien Lenders, also referred to in the materials as Second Lien Creditors, hereinafter SLL.

2 Like the Second Lien Lenders, the First Lien Lenders appeared formally by their Agent, were sometimes referred to as the First Lien Creditors and will be hereinafter referred to as the FLL.

3 It is to be noted that there is no existing U.S. action of which the Court was made aware by either the SLL or the FLL.

4 [1990] 3 S.C.R. 1077 at 1096

5 Ibid.

6 Supplemental Initial Order, at paragraphs 8 and 24, Motion Record of the First Lien Lenders' Agent, at pages 10 and 18

7 *Re. Maax Corporation*, unreported, Orders of the Superior Court of Quebec, TD Supplementary Brief of Authorities, Tabs 1a-c; Order by the US Bankruptcy Court for the District of Delaware Granting Recognition and Related Relief, TD Supplementary Brief of Authorities, Tab 1d.

8 *Re Madill Equipment Canada*, Case No. 08-41426, Distribution and Vesting Orders of the Supreme Court of British Columbia; Order of the US Bankruptcy Court (Western District of Washington at Tacoma) Granting Motion Authorizing Sale of Assets, TD Supplementary Brief of Authorities, Tab 2.

9 *Re. ROL Manufacturing (Canada) Ltd., et al.*, unreported, Order of the Quebec Superior Court (Commercial Division) Approving the Sale of the PSH Division, TD Supplementary Brief of Authorities, Tab 3a; Order of the US Bankruptcy Court, Southwestern District of

Ohio, Authorizing and Approving Sale of PSH Division, TD Supplemental Brief of Authorities, Tab 3c.

10 *Re Biltrite Rubber Inc.*, Case No. 09-31423 (MAW), Sale Approval and Vesting Order and Distribution Order of the Ontario Superior Court of Justice, TD Supplemental Brief of Authorities, Tabs 4a-b; Order of the US Bankruptcy Court for the Northern District of Ohio Western Division Enforcing the Orders of the Ontario Court, TD Supplementary Brief of Authorities, Tab 4c.

11 *Re. Pope and Talbot, Inc. et al.*, Case No. 08-11933 (CSS), Orders of the US Bankruptcy Court for the District of Delaware, TD Supplementary Brief of Authorities, Tab 5.

12 United States Bankruptcy Court (S.D.N.Y.), Case No. 09-16709, January 5, 2010, Martin Glenn J.

13 *Metcalf* at 18

14 (2006), 19 C.B.R. (5th) 54 (*Muscletech*), titled *Re RSM Richter Inc. v. Aguilar* 2006 U.S. Dist. LEXIS 57595 (S.D.N.Y.) (*Re RSM Richter*)

15 See footnote 12, *supra*.

16 *In re MAAX Corp., et al.*, No. 08-11443 (Bankr. D. Del. Aug. 6, 2008)

TAB E

Case Name:
Canwest Global Communications Corp. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement
Act, R.S.C. 1985, C-36. as amended
AND IN THE MATTER OF a Proposed Plan of Compromise or
Arrangement of Canwest Global Communications Corp. and
the other applicants listed on schedule "A"**

[Editor's note:
Schedule "A" was not attached to the copy received by
LexisNexis Canada and therefore is not included in the
judgment.]

[2009] O.J. No. 4286

59 C.B.R. (5th) 72

2009 CanLII 55114

2009 CarswellOnt 6184

Court File No. CV-09-8241-OOCL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

October 13, 2009.

(60 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Affiliated debtor companies -- Application by Canwest Global for relief under the Companies' Creditors Arrangement Act and to have the stay of proceedings and other provisions extend to several partnerships allowed -- Applicant Canwest Global owned CMI which was insolvent -- CMI Entities and Ad Hoc Committee of noteholders had agreed on terms of a going concern recapitalization transaction -- Stay under Act was extended to several partnerships that were intertwined with the applicants' ongoing operations -- DIP and administration charges approved -- Applicants were also permitted to pay pre-filing liabilities to their critical suppliers.

Application by Canwest Global for relief under the Companies' Creditors Arrangement Act and to have the stay of proceedings and other provisions extend to several partnerships. The applicants were affiliated debtor companies with total claims against them exceeding \$5 million. The partnerships were intertwined with the applicants' ongoing operations. Canwest was a leading Canadian media company. Canwest Global owned 100 per cent of CMI. CMI had direct or indirect ownership interests in all of the other CMI Entities. The CMI Entities generated the majority of their revenue from the sale of advertising. Fuelled by a deteriorating economic environment, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. CMI breached certain of the financial covenants in its secured credit facility. The stay of proceedings was sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual pre-packaged recapitalization transaction. The CMI Entities and an Ad Hoc Committee of noteholders had agreed on the terms of a going concern recapitalization transaction which was intended to form the basis of the plan. The applicants anticipated that a substantial number of the businesses operated by the CMI Entities would continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. Certain steps designed to implement the recapitalization transaction had already been taken prior to the commencement of these proceedings.

HELD: Application allowed. The CMI Entities were unable to satisfy their debts as they come due and were insolvent. Absent these proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. It was just and convenient to grant the relief requested with respect to the partnerships. The operations and obligations of the partnerships were so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. The DIP charge for up to \$100 million was appropriate and required having regard to the debtors' cash-flow statement. The administration charge was also approved. Notice had been given to the secured creditors likely to be affected by the charge, the amount was appropriate, and the charge should extend to all of the proposed beneficiaries. The applicants were also permitted to pay pre-filing liabilities to their critical suppliers.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. c. 36, s. 11, s. 11(2), s. 11.2, s. 11.2(1), s. 11.52

Counsel:

Lyndon Barnes, Edward Sellers and Jeremy Dacks, for the Applicants.

Alan Merskey, for the Special Committee of the Board of Directors.

David Byers and Maria Konyukhova,> for the Proposed Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett and Robert Chadwick, for Ad Hoc Committee of Noteholders.

Edmond Lamek, for the Asper Family.

Peter H. Griffin and Peter J. Osborne, for the Management Directors and Royal Bank of Canada.

Hilary Clarke, for Bank of Nova Scotia,

Steve Weisz, for CIT Business Credit Canada Inc.

REASONS FOR DECISION

S.E. PEPALL J.:--

Relief Requested

1 Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act*.¹ The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

2 The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

3 No one appearing opposed the relief requested.

Background Facts

4 Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

5 As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

6 Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

7 Canwest Global is a public company continued under the *Canada Business Corporations Act*.² It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians.

The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

8 The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

9 Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

10 In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six occasions. On March 15, 2009, it failed to make an interest payment of US\$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated note-holders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US\$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to \$75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

11 Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of \$4.855 billion and total consolidated liabilities of \$5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling \$2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately \$954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by \$272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by \$253 million or 47%. It reported a consolidated net loss of \$1.578 billion compared to \$22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by \$8 million or 4% in the third quarter of 2009 and operating profit was \$21 million compared to \$39 million in the same period in 2008.

12 The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

13 On September 15, 2009, CMI failed to pay US\$30.4 million in interest payments due on the 8% senior subordinated notes.

14 On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US\$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US\$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US\$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of \$75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to \$23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of \$100 million.

15 Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

16 The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately \$634 million were realized. The proceeds were applied to fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of \$10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US\$393.25 million.

17 In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of \$187.3 million and an unsecured promissory note in the principal amount of \$430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

18 Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI

Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

19 The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

20 CMI has agreed to maintain not more than \$2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

21 The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of \$13.3 million as at the last valuation date and a wind up deficiency of \$32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

22 The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

23 I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

24 This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to re-

organize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshold Issues

25 Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding \$5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US\$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*³ definition and under the more expansive definition of insolvency used in *Re Stelco*⁴. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

26 Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

27 Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

28 The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

29 While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Re Lehndorff General Partners Ltd.*⁵; *Re Smurfit-Stone Container Canada Inc.*⁶; and *Re Calpine Canada Energy Ltd.*⁷. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

30 Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their

guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Re Cadillac Fairview*⁸ and *Re Global Light Telecommunications Ltd.*⁹

(c) DIP Financing

31 Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

- (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.
- (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
- (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.
- (4) In deciding whether to make an order, the court is to consider, among other things,
 - (aa) 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.

32 In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

33 Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to \$100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately \$10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

34 Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is \$10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

35 Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Enti-

ties' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

36 For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

37 While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

(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.

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

38 I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

39 As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to \$15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

40 Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be re-

quired to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

41 The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

- (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, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.
- (2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
- (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.
- (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

42 Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

43 In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made

without the consent of the Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

44 The applicants also seek a directors' and officers' ("D &O") charge in the amount of \$20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank *pari passu* with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first \$85 million payable under the secured intercompany note.

45 Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

- (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, the court may make an order declaring that all or part of the property of the company is subject to a security or charge -- in an amount that the court considers appropriate -- in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
- (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
- (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
- (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

46 I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

47 The proposed Monitor reports that the amount of \$20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for \$30 million in coverage and \$10 million in excess coverage for a total of \$40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

48 The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *Re General Publishing Co.*¹⁰ Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

49 Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of \$5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them.

50 Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Re Grant Forest*¹¹ have all been met and I am persuaded that the relief in this regard should be granted.

51 The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of*

*Canada v. Canada (Minister of Finance)*¹² provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

52 In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

53 The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

54 CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

55 The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

56 Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

57 Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from \$1000 to \$5000 so as to re-

duce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

58 This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

59 I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

60 Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

S.E. PEPALL J.

cp/e/qlafr/qljxr/qljxh/qlaxr/qlaxw/qlcal/qlced

1 *R.S.C. 1985, c. C. 36, as amended*

2 *R.S.C. 1985, c.C.44.*

3 *R.S.C. 1985, c. B-3, as amended.*

4 (2004), 48 *C.B.R. (4th)* 299; *leave to appeal refused, [2004] O.J. No. 1903, 2004 CarswellOnt 2936 (C.A.).*

5 (1993), 9 *B.L.R. (2d)* 275.

6 [2009] *O.J. No.* 349.

7 (2006), 19 *C.B.R. (5th)* 187.

8 (1995), 30 *C.B.R. (3d)* 29.

9 (2004), 33 *B.C.L.R. (4th)* 155.

10 (2003), 39 *C.B.R. (4th)* 216.

11 [2009] O.J. No. 3344. That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.

12 [2002] 2 S.C.R. 522.

TAB 2

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

**BRIEF OF AUTHORITIES OF THE
APPLICANT**

(Motion returnable July 16, 2012)

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