

**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 ROCKPORT BLOCKER, LLC, THE ROCKPORT GROUP  
HOLDINGS, LLC, TRG 1-P HOLDINGS, LLC, TRG INTERMEDIATE HOLDINGS,  
LLC, TRG CLASS D, LLC, THE ROCKPORT GROUP, LLC, THE ROCKPORT  
COMPANY, LLC, DRYDOCK FOOTWEAR, LLC, DD MANAGEMENT SERVICES  
LLC AND ROCKPORT CANADA ULC (THE "DEBTORS")**

**APPLICATION OF ROCKPORT BLOCKER, LLC, UNDER SECTION 46 OF THE  
*COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED**

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**BRIEF OF AUTHORITIES**  
**OF THE APPLICANT, ROCKPORT BLOCKER, LLC**  
**(Re: Motion Returnable July 30, 2018)**

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July 26, 2018

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TRG 1-P HOLDINGS, LLC, TRG INTERMEDIATE HOLDINGS, LLC, TRG CLASS D, LLC, THE  
ROCKPORT GROUP, LLC, THE ROCKPORT COMPANY, LLC, DRYDOCK FOOTWEAR, LLC, DD  
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*CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED**

**I N D E X**

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1.	<i>Horsehead Holding Corp. (Re)</i> , 2016 ONSC 958 (Ont. S.C.J. [Commercial List])
2.	<i>Massachusetts Elephant &amp; Castle Group Inc. (Re)</i> , 2011 ONSC 4201 (Ont. S.C.J. [Commercial List])
3.	Order and Endorsement of Morawetz J. dated March 28, 2011, <i>Application of TerreStar Networks Inc.</i>
4.	Order of Masuhara J. dated March 14, 2017 (B.C. Sup. Ct.), <i>Application of CHC Group Ltd.</i>
5.	<i>Babcock &amp; Wilcox Canada Ltd. (Re)</i> , 2000 CarswellOnt 704 (Ont. S.C.J. [Commercial List])
6.	Order of Newbould J. dated January 25, 2017, <i>In the Matter of Modular Space Intermediate Holdings Inc. et al.</i>
7.	<i>Xerium Technologies Inc., Re</i> , 2010 ONSC 3974 (Ont. S.C.J. [Commercial List])

# Tab 1

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

Horsehead Holding Corp., Re

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

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

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

Newbould J.

Heard: February 5, 2016

Judgment: February 8, 2016

Docket: CV-16-11271-00CL

Counsel: Sam Babe, Martin E. Kovnats, Jeffrey Merk, J. Nemers, for Applicant

Ryan Jacobs, Jane Dietrich, Natalie Levine, for DIP lenders

Christopher G. Armstrong, Sydney Young, Caroline Descours, for Richter Advisory Group as proposed Information Officer

Linc A. Rogers, Christopher Burr, for PNC Bank, National Association

Denis Ellickson, for UNIFOR Local 591G

Subject: Insolvency

**Related Abridgment Classifications**

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.5 Miscellaneous

**Headnote**

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

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

**Table of Authorities**

**Cases considered by Newbould J.:**

*Crystalex International Corp., Re* (2012), 2012 ONSC 2125, 2012 CarswellOnt 4577, 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — followed

*Crystalex International Corp., Re* (2012), 2012 ONCA 404, 2012 CarswellOnt 7329, 91 C.B.R. (5th) 207, 293 O.A.C. 102, 4 B.L.R. (5th) 1 (Ont. C.A.) — referred to

*Indalex Ltd., Re* (2009), 2009 CarswellOnt 1998, 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List]) — followed

*Lightsquared LP, Re* (2012), 2012 ONSC 2994, 2012 CarswellOnt 8614, 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List]) — considered

*MtGox Co., Re* (2014), 2014 ONSC 5811, 2014 CarswellOnt 13871, 122 O.R. (3d) 465, 20 C.B.R. (6th) 307 (Ont. S.C.J. [Commercial List]) — considered

*820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113, 1991 CarswellOnt 141 (Ont. Div. Ct.) — followed

**Statutes considered:**

*Bankruptcy Code*, 11 U.S.C.

Chapter 11 — referred to

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

Generally — referred to

s. 224 — considered

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

Pt. IV — referred to

s. 45(1) "foreign main proceeding" — considered

s. 45(1) "foreign proceeding" — considered

s. 45(1) "foreign representative" — considered

s. 45(2) — considered

ss. 46-49 — referred to

s. 46(1) — considered

s. 47 — considered

s. 47(2) — considered

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

***Newbould J.:***

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

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

3 The debtors operate in the zinc and nickel-bearing waste industries through three business units: Horsehead Corporation and its subsidiaries (collectively, "Horsehead"), Zochem, and INMETCO. Horsehead is a prominent

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

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

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

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

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

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

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

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

11 Zochem operates a cash management system whereby:

- a. all receipts flow into a collection account at PNC in the United States, in part via a lockbox maintained at PNC;
- b. funds from the PNC collection account are transferred daily into an operating account at PNC in the United States; and

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

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

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

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

- (a) Joint Administration Order;
- (b) Foreign Representative Order;
- (c) Interim Cash Management Order;
- (d) Interim Wages and Benefits Order;
- (e) Interim Shippers and Lien Claimants Order;
- (f) Interim Utilities Order;
- (g) Interim Insurance Order;
- (h) Interim Prepetition Taxes Order;
- (i) Interim Critical Vendors Order; and
- (j) Interim Financing Order.

#### Analysis

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

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

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

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

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

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

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

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

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

- (1) the location is readily ascertainable by creditors,
- (2) the location is one in which the debtor's principal assets or operations are found; and
- (3) the location is where the management of the debtor takes place.

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

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

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

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

- (i) all the debtors other than Zochem, comprising Zochem's corporate family, are incorporated, and have their registered head office, in the United States;
- (ii) all the debtors, including, Zochem are managed from Pittsburgh, Pennsylvania;

- (iii) all three of Zochem's "inside" directors (comprising 75% of the board) are residents of Pennsylvania;
- (iv) all of Zochem's officers are Pennsylvania residents, with the one exception of its general manager who is a former Pennsylvania resident and employee of the other debtors;
- (v) most of Zochem's officers are also officers of each of the other debtors;
- (vi) Zochem is operational in its focus and all local functions associated with managing and operating the Zochem facility are performed from the debtors' Pittsburgh headquarters;
- (vii) Zochem's communications decisions, pricing decisions, and business development decisions are made in Pittsburgh;
- (viii) Zochem's accounts receivable, accounts payable and treasury departments are located in Pittsburgh;
- (ix) Zochem's cash management system is centred in the United States;
- (x) Zochem's existing credit facilities are with a bank in Pittsburgh; and
- (xi) the debtors are all managed in the United States as an integrated group from a corporate, strategic, financial and management perspective.

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

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

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

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

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

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

32 Under the Proposed DIP Facility, the maximum amount permitted to be advanced on an interim basis was \$40 million, and it was contemplated that all of the debtors would be jointly and severally liable for all advances made. The contemplated uses of the initial \$40 million DIP advance were approximately \$18.5 million to pay out the Zochem Facility (including a \$1 million forbearance fee), with the balance of the advances being used to fund the operations and

restructuring activities of the Debtors during the interim period until a final order approving the Proposed DIP Facility is sought from the U.S. Court in late February.

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

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

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

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

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

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

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

38 In the circumstances I made the order recognizing the U.S. interim financing order, and granting the security requested for the DIP, which in my view met the tests as enunciated in the authorities, including the factors set out in *Indalex Ltd., Re* (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List]) for the guarantee of a Canadian debtor of its U.S. parent's obligations under the DIP facility, and as set out in *Crystallex International Corp., Re* (2012), 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]); aff'd (2012), 4 B.L.R. (5th) 1 (Ont. C.A.).

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

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

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

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

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

*Application granted.*

# Tab 2

2011 ONSC 4201  
Ontario Superior Court of Justice

Massachusetts Elephant & Castle Group Inc., Re

2011 CarswellOnt 6610, 2011 ONSC 4201, 205 A.C.W.S. (3d) 25, 81 C.B.R. (5th) 102

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

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

MASSACHUSETTS ELEPHANT & CASTLE GROUP, INC. (Applicant)

Morawetz J.

Heard: July 4, 2011

Oral reasons: July 4, 2011

Written reasons: July 11, 2011

Docket: CV-11-9279-00CL

Counsel: Kenneth D. Kraft, Sara-Ann Wilson for Applicant  
Heather Meredith for GE Canada Equipment Financing GP

Subject: Insolvency; Corporate and Commercial

**Related Abridgment Classifications**

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.5 Miscellaneous

**Headnote**

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

Recognition of foreign main proceeding — Debtor companies were integrated business involving locations in U.S. and Canada — Each of debtors, including debtor companies with registered offices in Canada (Canadian Debtors), were managed centrally from U.S. — Debtors brought proceedings in U.S. pursuant to Chapter 11 of United States Bankruptcy Code — U.S. Court appointed applicant as foreign representative of Chapter 11 Debtors — Applicant applied to have U.S. Chapter 11 proceedings recognized as foreign main proceeding in Canada under Companies' Creditors Arrangements Act (Act) — Application granted — It was appropriate to recognize foreign proceeding — Foreign proceeding in present case was foreign main proceeding — "Foreign main proceeding" is defined in s. 45(1) of Act as foreign proceeding in jurisdiction where debtor company has centre of its main interest (COMI) — There was sufficient evidence to rebut presumption in s. 45(2) of Act that COMI is registered office of debtor company — For purposes of application, each entity making up Chapter 11 Debtors, including Canadian Debtors, had their COMI in U.S. — Location of debtors' headquarters or head office functions or nerve centre was in U.S. — Debtor's management was located in U.S. — Significant creditor did not oppose relief sought — Mandatory stay ordered under s. 48(1) of Act — Discretionary relief recognizing various orders of U.S. Court, appointing information officer, and limiting quantum of administrative charge, was appropriate and was granted.

**Table of Authorities**

**Cases considered by Morawetz J.:**

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

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

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

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

**Statutes considered:**

*Bankruptcy Code*, 11 U.S.C.

Chapter 11 — referred to

ss. 1101-1174 — referred to

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

Generally — referred to

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

Generally — referred to

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

Generally — referred to

Pt. IV — referred to

s. 44 — considered

s. 45 — considered

s. 45(1) — considered

s. 45(2) — considered

s. 46 — considered

s. 46(1) — considered

s. 46(2) — referred to

ss. 46-49 — referred to

s. 47(1) — considered

s. 47(2) — considered

s. 48 — considered

s. 48(1) — considered

s. 49 — considered

s. 50 — considered

s. 61 — considered

s. 61(2) — considered

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

**Morawetz J.:**

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

(a) an Initial Recognition Order declaring that:

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

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

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

(b) a Supplemental Order:

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

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

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

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

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

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

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

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

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

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

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

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

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

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
- (d) the protection and the maximization of the value of debtor company's property; and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.

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

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

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

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

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

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

- (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or
- (b) act as a representative in respect of the foreign proceeding.

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

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

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

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

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

20 Section 45(2) of the *CCAA* provides that, in the absence of proof to the contrary, the debtor company's registered office is deemed to be the COMI. As such, the determination of COMI is made on an entity basis, as opposed to a corporate group basis.

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

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

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

(a) the location of the corporate head offices for all of the Chapter 11 Debtors, including the Canadian Debtors, is in Boston, Massachusetts;

(b) the Chapter 11 Debtors including the Canadian Debtors function as an integrated North American business and all decisions for the corporate group, including in respect to the operations of the Canadian Debtors, is centralized at the Chapter 11 Debtors head office in Boston;

(c) all members of the Chapter 11 Debtors' management are located in Boston;

(d) virtually all human resources, accounting/finance, and other administrative functions associated with the Chapter 11 Debtors are located in the Boston offices;

(e) all information technology functions of the Chapter 11 Debtors, with the exception of certain clerical functions which are outsourced, are provided out of the United States; and

(f) Repechage is also the parent company of a group of restaurants that operate under the "Piccadilly" brand which operates only in the U.S.

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

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

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

(a) the location where corporate decisions are made;

- (b) the location of employee administrations, including human resource functions;
- (c) the location of the debtor's marketing and communication functions;
- (d) whether the enterprise is managed on a consolidated basis;
- (e) the extent of integration of an enterprise's international operations;
- (f) the centre of an enterprise's corporate, banking, strategic and management functions;
- (g) the existence of shared management within entities and in an organization;
- (h) the location where cash management and accounting functions are overseen;
- (i) the location where pricing decisions and new business development initiatives are created; and
- (j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

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

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

29 For example:

- (a) the location from which financing was organized or authorized or the location of the debtor's primary bank would only be important where the bank had a degree of control over the debtor;
- (b) the location of employees might be important, on the basis that employees could be future creditors, or less important, on the basis that protection of employees is more an issue of protecting the rights of interested parties and therefore is not relevant to the COMI analysis;
- (c) the jurisdiction whose law would apply to most disputes may not be an important factor if the jurisdiction was unrelated to the place from which the debtor was managed or conducted its business.

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

- (a) the location of the debtor's headquarters or head office functions or nerve centre;
- (b) the location of the debtor's management; and
- (c) the location which significant creditors recognize as being the centre of the company's operations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) the Foreign Representative Order;

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

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

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

(e) the U.S. Utilities Order;

- (f) the U.S. Cash Management Order;
- (g) the U.S. Customer Obligations Order; and
- (h) the U.S. Joint Administration Order.

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

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

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

.....

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

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

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

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

#### Schedule "A"

1. Massachusetts Elephant & Castle Group Inc.
2. Repechage Investments Limited
3. Elephant & Castle Group Inc.
4. The Elephant and Castle Canada Inc.
5. Elephant & Castle, Inc. (a Texas Corporation)
6. Elephant & Castle Inc. (a Washington Corporation)
7. Elephant & Castle International, Inc.
8. Elephant & Castle of Pennsylvania, Inc.
9. E & C Pub, Inc.
10. Elephant & Castle East Huron, LLC

11. Elephant & Castle Illinois Corporation
12. E&C Eye Street, LLC
13. E & C Capital, LLC
14. Elephant & Castle (Chicago) Corporation

*Application granted.*

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End of Document

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# Tab 3



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

THE HONOURABLE )  
JUSTICE MORAWETZ )  
 )  
 )  
 )

MONDAY, THE 28<sup>th</sup> DAY  
OF MARCH, 2011

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

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

**RECOGNITION ORDER  
(March 28, 2011)**

**THIS MOTION**, made by TerreStar Networks Inc. ("TSNI") in its capacity as the foreign representative (the "Foreign Representative") of each of TSNI, TerreStar National Services Inc., TerreStar License Inc., 0887729 B.C. Ltd. ("088 B.C."), TerreStar Networks Holdings (Canada) Inc. ("Holdings Canada") and TerreStar Networks (Canada) Inc. ("TerreStar Canada") (collectively, the "Debtors") pursuant to section 49(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("CCAA"), for an Order, substantially in the form attached to the Foreign Representative's notice of motion dated March 21, 2011 (the "Notice of Motion"), recognizing certain orders granted by the United States Bankruptcy Court for the Southern District of New York (the "U.S. Bankruptcy Court") in the chapter 11 cases commenced by the Debtors, lead case number 10-15446 (SHL), was heard this day at Toronto, Ontario.

**ON READING** the Notice of Motion, the Affidavit of Douglas Brandon and Jarvis Hetu sworn on March 21, 2011 and March 25, 2011, respectively, the Fifth Report of Deloitte and Touche Inc., in its capacity as Court-appointed Information Officer (the "Information Officer") dated March 18, 2011 (the "Fifth Report") and on hearing submissions of counsel for the Foreign Representative, counsel for the Information Officer, counsel for

EchoStar Corporation, as lender under, *inter alia*, the senior secured superpriority debtor in possession credit agreement dated October 18, 2010 (as amended), with TSNI, as borrower, and the other Debtors as guarantors, and that certain senior secured paid in kind notes due 2014 issued by TSNI on February 14, 2007 and February 7, 2008, those other parties present, and no one appearing for any other person on the service list, although served as appears from the Affidavit of Service of Lynn Mattes sworn March 22, 2011, filed.

### **SERVICE**

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and that further service of the Notice of Motion and the Motion Record upon any interested person not served is dispensed with.

### **RECOGNITION OF ORDERS OF THE U.S. BANKRUPTCY COURT**

2. **THIS COURT ORDERS AND DECLARES** that, without in any way limiting or impairing the Initial Recognition Order and the Supplemental Order of this Court, each dated October 21, 2010, save and except as may be provided pursuant to, and in order to give effect to, the terms of the U.S. Bankruptcy Orders (as defined herein), the following orders of the U.S. Bankruptcy Court dated March 23, 2011:

- (a) Order Authorizing TerreStar Networks (Canada) Inc.'s Entry Into a Purchase Agreement with Data Sales Co.;
- (b) Order Granting the Debtors' Motion to Reject Certain Agreements with Elektrobit, Inc. Pursuant to Bankruptcy Code Section 365(a); and
- (c) Order Authorizing the Debtors Pursuant to Section 365 of the Bankruptcy Code to Reject the Executory Contracts Pursuant to Debtors' Omnibus Motion *Nunc Pro Tunc* to February 9, 2011;

(collectively, the "U.S. Bankruptcy Orders") each as attached as Schedules "A to C" hereto, are hereby recognized and given full force and effect in all provinces and

territories of Canada pursuant to Section 49(1) of the CCAA, and shall be implemented and become effective in all provinces and territories of Canada upon the issuance of this Order in accordance with their terms.

**INFORMATION OFFICER'S REPORT**

3. **THIS COURT ORDERS** that the Fifth Report and the activities of the Information Officer as described therein be and are hereby approved.



A handwritten signature in black ink, appearing to read "A. D. Ramirez", is written over a horizontal line.

ENTERED AT / INSCRIT À TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO.:

MAR 28 2011

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**SCHEDULE "A"**

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re:	)	Chapter 11
	)	
TERRESTAR NETWORKS INC., <i>et al.</i> , <sup>1</sup>	)	Case No. 10-15446 (SHL)
	)	
Debtors.	)	Jointly Administered

---

**ORDER AUTHORIZING TERRESTAR NETWORKS (CANADA) INC.'S  
ENTRY INTO A PURCHASE AGREEMENT WITH DATA SALES CO. INC.**

Upon the motion (the "*Motion*")<sup>2</sup> of the above-captioned debtors (collectively, the "*Debtors*") for entry of an order authorizing TSN Canada's entry into a purchase agreement (the "*Purchase Agreement*") with Data Sales Co. ("*Data Sales*") pursuant to section 363(b) of title 11 of the United States Code and Rule 6004 of the Federal Rules of Bankruptcy Procedure; and it appearing that the relief requested is in the best interests of the Debtors' estates, their creditors and other parties in interest; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and notice of the Motion appearing to be adequate and appropriate under the circumstances; and after due deliberation and sufficient cause appearing therefor, IT IS HEREBY ORDERED that:

1. The Motion is granted to the extent set forth herein.

---

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal taxpayer identification number, are: TerreStar Networks Inc. (3931); TerreStar License Inc. (6537); TerreStar National Services Inc. (6319); TerreStar Networks Holdings (Canada) Inc. (1337); TerreStar Networks (Canada) Inc. (8766) and 0887729 B.C. Ltd. (1345).

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Motion.

2. Pursuant to Bankruptcy Code section 363(b), TSN Canada is authorized to enter into and perform all obligations under the Purchase Agreement with Data Sales.

3. TSN Canada's entry into the Purchase Agreement is an exercise of its sound business judgment and is in the best interest of its estate and creditors.

4. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

5. Nothing in this order shall constitute or be construed as approval of assumption or rejection of the Lease.

6. This Court shall retain jurisdiction with respect to all matters arising from or relating to the implementation of this Order.

7. Notwithstanding the possible applicability of Rule 6004(h) of the Federal Rules of Bankruptcy Procedure, the terms and conditions of this order shall be immediately effective and enforceable upon its entry.

New York, New York  
Date: **March 23, 2011**

/s/ Sean H. Lane  
Honorable Sean H. Lane  
United States Bankruptcy Judge

**SCHEDULE "B"**

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

_____ )	
In re: )	Chapter 11
TERRESTAR NETWORKS INC, <i>et al.</i> , <sup>1</sup> )	Case No. 10-15446 (SHL)
Debtors. )	Jointly Administered
_____ )	
In re: )	Chapter 11
TERRESTAR CORPORATION, <i>et al.</i> , <sup>2</sup> )	Case No. 11-10612 (SHL)
Debtors. )	Jointly Administered
_____ )	

**ORDER GRANTING DEBTORS' MOTION TO REJECT  
CERTAIN AGREEMENTS WITH ELEKTROBIT, INC.  
PURSUANT TO BANKRUPTCY CODE SECTION 365(a)**

Upon the motion (the "*Motion*")<sup>3</sup> of the Debtors for entry of an order authorizing the Debtors to reject the Agreements by and among the Debtors and Elektrobit; and it appearing that the relief requested in the Motion is in the best interests of the Debtors' estates, their stakeholders and all other parties in interest; and this Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper

<sup>1</sup> The debtors in the *TerreStar Networks Inc., et al.* chapter 11 cases, along with the last four digits of each debtor's federal taxpayer-identification number, are: TerreStar Networks Inc. [3931] ("*TSN*"); TerreStar License Inc. [6537]; TerreStar National Services Inc. [6319]; TerreStar Networks Holdings (Canada) Inc. [1337]; TerreStar Networks (Canada) Inc. [8766]; and 0887729 B.C. Ltd. [1345] (collectively, the "*TSN Debtors*").

<sup>2</sup> The debtors in the *TerreStar Corporation, et al.* chapter 11 cases, along with the last four digits of each debtor's federal taxpayer-identification number, are: (a) TerreStar Corporation [6127] ("*TSC*") and TerreStar Holdings Inc. [0778] (collectively, the "*February Debtors*"); and (b) TerreStar New York Inc. [6394]; Motient Communications Inc. [3833]; Motient Holdings Inc. [6634]; Motient License Inc. [2431]; Motient Services Inc. [5106]; Motient Ventures Holding Inc. [6191]; and MVH Holdings Inc. [9756] (collectively, the "*Other TSC Debtors*" and, collectively with the February Debtors, the "*TSC Debtors*").

<sup>3</sup> All capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Motion.

notice of the Motion having been provided, and it appearing that no other or further notice need be provided; and upon the arguments presented at the hearing before the Court, and any objections to the Motion having been withdrawn or resolved; and after due deliberation and sufficient cause appearing therefore; it is **ORDERED** that:

1. The Motion is granted to the extent set forth herein.
2. The Debtors' rejection of the Agreements set forth on Exhibit 1 attached hereto (including, for the avoidance of doubt, all associated purchase orders), is hereby approved.<sup>4</sup>
3. The Debtors' rejection of the Agreements pursuant to Bankruptcy Code section 365(a) is an exercise of the Debtors' sound business judgment and is in the best interest of their estates and stakeholders.<sup>5</sup>
4. Elektrobit will have until the later of (a) the applicable Bar Date set in each of the Debtors' respective chapter 11 cases or (b) 30 days after service of this Order to file a proof of claim for any rejection damages resulting from the rejection of the Agreements.
5. Upon service of this Order on Elektrobit, the Agreements shall be deemed rejected as of the date of entry of this Order.
6. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.
7. Nothing contained in the Motion or this Order shall be deemed or construed as directing or otherwise effecting a substantive consolidation of the Debtors' chapter 11 cases.

---

<sup>4</sup> Although certain of the Debtors are not party to certain of the Agreements, to the extent that any of the Debtors are or could be construed as parties to the Agreements, such Agreements are hereby rejected.

<sup>5</sup> For the avoidance of doubt, nothing contained herein shall modify the executory or non-executory nature of any of the Agreements.

8. The relief granted herein shall be binding upon any chapter 11 trustee appointed in these chapter 11 cases and upon any chapter 7 trustee appointed in the event of a subsequent conversion of these chapter 11 cases to cases under chapter 7.

9. This Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

New York, New York  
Dated: **March 23, 2011**

/s/ Sean H. Lane  
The Honorable Sean H. Lane  
United States Bankruptcy Judge

**EXHIBIT A**

Contract Counterparty	Contract Counterparty Address	Contract Description	Effective Date	Debtor Counterparty
Elektrobit, Inc.	22745 29th Drive SE Suite 200 Bothell, WA 98021 USA	Sublicense under which TerreStar provides sublicense for Elektrobit to use the DVSI codec software under the TerreStar-DVSI Vocoder Technology and Software License Agreement.	8/5/2008	TerreStar Networks Inc.
Elektrobit, Inc.	22745 29th Drive SE Suite 200 Bothell, WA 98021 USA	Letter Agreement between TerreStar Networks Inc. and Elektrobit regarding license and support agreement between Infineon Technologies AG and Elektrobit	1/8/2008	TerreStar Networks Inc.
Elektrobit, Inc.	22745 29th Drive SE Suite 200 Bothell, WA 98021 USA	Letter Agreement regarding certain understandings between TerreStar and Elektrobit with regard to Elektrobit's Software License Agreement with Feescale Semiconductor Inc.	12/8/2008	TerreStar Networks Inc.
Elektrobit, Inc.	22745 29th Drive SE Suite 200 Bothell, WA 98021 USA	Product Loan and Test Use Agreement: Contract to allow TerreStar to use Elektrobit products for testing and evaluation purposes.	6/18/2008	TerreStar Networks Inc.
Elektrobit, Inc.	22745 29th Drive SE Suite 200 Bothell, WA 98021 USA	Letter Agreement between TerreStar Networks Inc. and Elektrobit regarding Software Development License Agreement for WinMobile OS between STMicroelectronics NV and Elektrobit Inc.	5/5/2008	TerreStar Networks Inc.
Elektrobit, Inc.	22745 29th Drive SE Suite 200 Bothell, WA 98021 USA	Development and Licensing Agreement under which Elektrobit designed and developed the GENUS handset for use on the TerreStar satellite network.	8/10/2007	TerreStar Networks Inc.
Elektrobit, Inc.	22745 29th Drive SE Suite 200 Bothell, WA 98021 USA	Master Supply Agreement: Agreement under which TerreStar purchases GENUS handsets from Elektrobit	12/1/2009	TerreStar Corporation [FN1]
Elektrobit, Inc.	22745 29th Drive SE Suite 200 Bothell, WA 98021 USA	Letter Agreement between TerreStar Networks Inc. and Elektrobit supplementing Master Development and License Agreement dated 8/10/2007 and Statement of Work dated 9/19/2007	7/31/2008	TerreStar Networks Inc.

**SCHEDULE "C"**

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re:	)	Chapter 11
TERRESTAR NETWORKS INC., <i>et al.</i> , <sup>1</sup>	)	Case No. 10-15446 (SHL)
Debtors.	)	Jointly Administered

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ORDER AUTHORIZING THE DEBTORS PURSUANT TO SECTION 365 OF THE  
BANKRUPTCY CODE TO REJECT THE EXECUTORY CONTRACTS PURSUANT  
TO DEBTORS' OMNIBUS MOTION *NUNC PRO TUNC* TO FEBRUARY 9, 2011

Upon the motion (the "*Motion*")<sup>2</sup> of the above-captioned debtors (collectively, the "*Debtors*") for entry of an order authorizing the Debtors to reject the Rejected Agreements identified more fully in Exhibit A attached hereto *nunc pro tunc* to February 9, 2011; and it appearing that the relief requested is in the best interests of the Debtors' estates, their creditors and other parties in interest; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and notice of the Motion appearing to be adequate and appropriate under the circumstances; and any objections to the requested relief having been withdrawn or resolved; and after due deliberation and sufficient cause appearing therefor, IT IS HEREBY ORDERED that:

1. The Motion is granted to the extent set forth herein.

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal taxpayer-identification number, are: TerreStar Networks Inc. (3931), TerreStar License Inc. (6537), TerreStar National Services Inc. (6319), TerreStar Networks Holdings (Canada) Inc. (1337), TerreStar Networks (Canada) Inc. (8766); and 0887729 B.C. Ltd. (1345).

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Motion.

2. The Debtors' rejection of the Rejected Agreements *nunc pro tunc* to February 9, 2011, and more fully identified in Exhibit A, is hereby approved pursuant to section 365(a) of the Bankruptcy Code.

3. The Debtors' rejection of the Rejected Agreements pursuant to section 365(a) of the Bankruptcy Code is an exercise of the Debtors' sound business judgment and is in the best interest of the Debtors' estates and creditors.

4. The non-Debtor counterparties to the Rejected Agreements will have 30 days after service of this Order to file a proof of claim for any rejection damages resulting from the rejection of the Rejected Agreements.

5. The non-Debtor counterparties to the Rejected Agreements are prohibited from setting off any amount owed to the Debtors by any of the contract counterparties under the Rejected Agreements, or other agreements between the same parties, against any amounts owed by the Debtors to such counterparties, without further order of this Court.

6. Upon service of this Order on the counterparties to the Rejected Agreements, the Rejected Agreements shall be deemed rejected *nunc pro tunc* to February 9, 2011, the Original Notice Date.

7. For the avoidance of doubt, neither the rejection by TerreStar Networks Inc. ("*TSN*") of the Letter Agreement re: Receipt Lease Prepayment and Acknowledgement of Prepayment Terms, dated January 26, 2010, amongst One Dot Four Corp.; Harbinger Capital Partners Master Fund I, Ltd.; Harbinger Capital Partners Special Situations Fund, L.P.; HGW Holding Company, L.P.; TerreStar 1.4 Holdings LLC; TerreStar Corporation; and TSN (the "*Prepayment Letter*") nor any provision of this Order shall (i) effect a rejection of the Prepayment Letter by any other Debtor, TerreStar Corporation and/or TerreStar 1.4 Holdings

LLC, or (ii) reduce, modify, limit, amend or otherwise affect in any way any obligations of TerreStar Corporation and/or TerreStar 1.4 Holdings LLC under either the Prepayment Letter or that certain Spectrum Manager Lease Agreement, dated September 17, 2009 (as amended), by and among TerreStar 1.4 Holdings LLC, TerreStar Corporation, and One Dot Four Corp.

8. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

9. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

New York, New York  
Date: **March 23, 2011**

/s/ Sean H. Lane  
The Honorable Sean H. Lane  
United States Bankruptcy Judge

IN RE TERRESTAR NETWORKS INC.  
Case No. 10-15446

LIST OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Contract Counterparty	Contract Counterparty Address	Contract Description	Effective Date	Debtor Counterparty
3390853 Canada Inc.	Attn: Michel Paquette, 697 6E Rang St-Felix-De-Kingsev, Quebec J0B 2T0	Consulting Agreement	12/28/2009	TerreStar Networks (Canada) Inc.
9157-9268 Quebec Inc.	Attn: Guy Vallieres 3601 Rue Sainte-Famille, Ste 1207 Montreal, Quebec H2Y 2L6	Consulting Agreement - Accounting services	8/11/2009	TerreStar Networks (Canada) Inc.
Access Intelligence	4 Choke Cherry Road, Second Floor Rockville, MD 20850	Lease of exhibition space at SATELLITE 2011 show at the Washington Convention Center March 15-17, 2011	3/17/2010	TerreStar Networks Inc.
ADGraphics	2393 South Dove St Alexandria, VA 22314-0000	Purchase Agreement	3/8/2010	TerreStar Networks Inc.
Alcatel Lucent USA Inc. and SkyTerra Communications Inc.	3400 M/S Ss01 West Plano Parkway Plano, TX 75082	Development Agreement: Satellite base station development agreement	3/31/2009	TerreStar Networks Inc.
Alexandra Field	12010 Sunset Hills Road 6th Fl Reston, Va 20190	Employment Agreement	1/15/2008	TerreStar Networks Inc.
Allied Telecom Group LLC	1120 20th Street, NW Suite 500 South Washington, DC 20036 USA	Service Agreement: Internet Dedicated Ethernet Services	5/18/2010	TerreStar Networks Inc.
Archer Technologies	13200 Metcalf Ave., Suite 300 Overland Park, Kansas 66213	Master License Agreement	2/18/2010	TerreStar Networks Inc.
Broadsoft Inc.	9737 Washingtonian Blvd Suite 350 Gaithersburg, MD 20878	License Agreement for Broadsoft software	12/8/2006	TerreStar Networks Inc.
Broadsoft Inc.	9737 Washingtonian Blvd Suite 350 Gaithersburg, MD 20878	Software and maintenance agreement for Broadsoft software	12/8/2006	TerreStar Networks Inc.
CSC Consulting Inc.	266 Second Ave Waltham, MA 02451-0000	Purchase order for SAP Production Support ABAP Offshore	11/25/2009	TerreStar Networks Inc.
Dennis Matheson	12010 Sunset Hills Road 6th Fl Reston, Va 20190	Employment Agreement	1/15/2008	TerreStar Networks Inc.
Douglas Brandon	12010 Sunset Hills Road 6th Fl Reston, Va 20190	Employment Agreement	4/9/2009	TerreStar Networks Inc.
Downlink Technologies II, Inc.	1411 LeMay Drive, Suite 207 Carrollton, TX 75007	Purchase Agreement - Install/equipment DirecTV Service	6/8/2007	TerreStar Networks Inc.
Flextronics Sales & Marketing (A-P) Ltd.	Alexander House, Level 3 35 Cybercity Ebene Mauritius	Sublicense under which TerreStar provides sublicense for Flextronics to use the DVSI codec software under the TerreStar-DVSI Vocoder Technology and Software License Agreement.	12/23/2008	TerreStar Networks Inc.

IN RE TERRESTAR NETWORKS INC.  
Case No. 10-15446

LIST OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Contract Counterparty	Contract Counterparty Address	Contract Description	Effective Date	Debtor Counterparty
Foster Electric Co, (Hong Kong) Ltd.	41 Man Yue Street, Kaiser Estate Block D, 12th Floor Kowloon Hong Kong	Trademark License Letter Agreement: Letter agreement authorizing Foster Electric to use the TERRESTAR trademark and logo so long as the agreement between Elektrotbit Wireless Communications Oy and Foster Electric Co. Ltd permission to use agreement remains in place	11/13/2009	TerreStar Networks Inc.
Genesys Associates, LLC dba the Genesys Group	Attn: Mark Embry, Partner 2600 Network Blvd, Suite 330 Frisco, TX 75034	Agreement for provision of contract engineering staffing support	10/24/2007	TerreStar Networks Inc.
Going Consulting	Attn: Tony Going Suite 2604, 38 Metropole Private Ottawa, Ontario K1Z 1E9	Consulting Agreement - media relations services	2/1/2010	TerreStar Networks (Canada) Inc.
HGW Holding Company LP	Attn: General Counsel 450 Park Avenue, 30th Floor New York, NY 10022	Lease Prepayment Letter Agreement	1/26/2010	TerreStar Networks Inc.
Hughes Networks Systems LLC	11717 Exploration Lane Germantown, MD 20876	Development Agreement: Contract for Design and Development of GMR1-3G Software components	3/31/2009	TerreStar Networks Inc.
Infineon Technologies AG and LightSquared LP (formerly SkyTerra LP)	Am Campeon 1-12, 85579 Neubiberg 11717 Germany	Agreement to suspend certain work under the SDR development contract and for Infineon to enter into an evaluation phase under this Interim Agreement	7/14/2010	TerreStar Networks Inc.
InfoVista Corporation	12950 Worldgate Drive Suite 250 Herndon VA 20170 USA	License Agreement for Software and Services: Performance management software that enables the TerreStar NOC to monitor performance of the TerreStar IP network.	8/15/2007	TerreStar Networks Inc.
Intelsat Corporation	3400 International Drive, NW Washington DC 20008 USA	Master Consulting Services Agreement: Consulting agreement for monitoring of TS-1 and TS-2 construction.	3/17/2008	TerreStar Networks Inc.
Intrado, Inc.	1601 Day Creed Drive Longmont, CO 80503 USA	Intrado Agreement for Services: 911 services for the TerreStar satellite network.	11/27/2006	TerreStar Networks Inc.
Jeffrey Epstein	12010 Sunset Hills Road 6th Fl Reston Va 20190	Employment Agreement	1/15/2008	TerreStar Networks Inc.
Larson & Toubro Infotech Ltd	Shil - Mahape Road Plot No. EL-200, TTC Electric Zone, Block IINavi Mumbai 400701 India	Sublicense Agreement under TerreStar's license with Digital Voice Systems Inc (DVS) to use DVS's voice codec software in conjunction with Larson and Toubro's development work as a subcontractor to Elektrotbit.	8/26/2008	TerreStar Networks Inc.

IN RE TERRESTAR NETWORKS INC.  
Case No. 10-15446

LIST OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Contract Counterparty	Contract Counterparty Address	Contract Description	Effective Date	Debtor Counterparty
Moventis Conseils Inc.	Attn: Sophie Pelletier 281, Rue Des Laurier Bromont, Quebec J2L 0H5	Consulting Agreement	4/1/2010	TerreStar Networks (Canada) Inc.
NextG - Com Limited	Knyvett House, The Causeway Staines TW18 3BA UK	Sublicense Agreement	11/5/2009	TerreStar Networks Inc.
Nisga'a Data Systems LLC	12020 Sunrise Valley Drive Reston VA 20190 United States; and 21434 Falling Rock Ter Ashburn VA 20148 United States	Consulting Agreement: Tier III Support for Corporate and NOCC infrastructure and systems	1/4/2010	TerreStar Networks Inc.
Nokia Siemens Networks US LLC	1040 Crown Pointe Parkway Suite 900 Crispin Vicars Atlanta, GA 30338	Network Equipment and Services Agreement Purchase of network equipment, software and services in connection to the build out of terrestrial based portion of the TerreStar Network	8/22/2007	TerreStar Networks Inc.
Patni Computer Systems Ltd	Akruti Softech Park, MDIC Cross Road, No. 21 Andheri East Mumbai Maharashtra India 400093 Inida	Sublicense Agreement	5/6/2009	TerreStar Networks Inc.
Qualcomm Incorporated	5775 Morehouse Drive San Diego CA 92121 United States	3GPP2 Standards Initiative Agreement	11/5/2009	TerreStar Networks Inc.
RSA Security, LLC	174 Middlesex Turnpike Bedford, MA 01730	Purchase Order: Standard Support Package	6/17/2010	TerreStar Networks Inc.
Ruder Finn	301 East 57th Street New York, NY 10022	Public Relations Contract	1/1/2010	TerreStar Networks Inc.
Sarantel Limited	Unit 2 Wendel Pointe, Ryle Drive, Park Earm South Welling bourough United Kingdom NN8 6BA United Kingdom	Consulting Agreement: Satellite Antenna Feasibility	11/25/2009	TerreStar Networks Inc.
Sequoia Communications Corporation	15050 Avenue of Science Suite 100 San Diego, CA 92128-0000	Consulting Services Agreement	9/14/2007	TerreStar Networks Inc.
SIC Consulting, LLC	11718 Bowman Green Drive Suite 220 Reston, VA 20190	Consulting Agreement: Project Management Support to COE	1/7/2008	TerreStar Networks Inc.
Spirent Communications	26750 Aguora Road Casablanca, CA 91302 United States	Professional Services Agreement: Benchmark the performance of multiple vendors' products that would make up the next generation mobile network to ensure the performance is as expected	9/27/2008	TerreStar Networks Inc.
Thomson Financial Corporate Services (Thomson Reuters)	3 Times Square 15th Floor New York, NY 10036	Client Agreement: Maintains/hosts investor relations web page	2/12/2010	TerreStar Networks Inc.

IN RE TERRESTAR NETWORKS INC.  
Case No. 10-15446

LIST OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Contract Counterparty	Contract Counterparty Address	Contract Description	Effective Date	Debtor Counterparty
THOMSON REUTERS	195 Broadway New York, NY 10007	Purchase Order: WSSU - RIA MULTI-STATE SALES & USE TAXES	6/22/2010	TerreStar Networks Inc.
Vincent Loiacono	12010 Sunset Hills Road 6th Fl Reston, Va 20190	Employment Agreement	9/15/2009	TerreStar Networks Inc.

AMENDED

APPLICATION OF TERRESTAR NETWORKS INC. UNDER SECTION 46 AND FOLLOWING  
OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS  
AMENDED

Court File No. CV-10-2944-00CL

MAR 28 11

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

Proceeding Commenced At Toronto

MOTION RECORD

(returnable March 28, 2011)

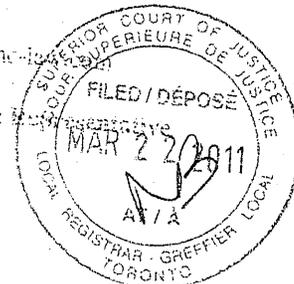
FRASER MILNER CASGRAIN LLP  
77 King Street West, Suite 400  
Toronto-Dominion Centre  
Toronto, Ontario M5K 0A1

Alex MacFarlane  
LSUC# 28133Q  
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Tel: 416-862-3407  
Fax: 416-863-4592  
Email: ryan.jacobs@fmc-law.com

Counsel to the Foreign Representative



A. MacFarlane for the Foreign Rep.

B. O'Neill for DIP lender.

L. Cassey for Informant Officer.

The motions for recognition were not opposed. Counsel advises that, the after resolution of a limited object, the proceedings in the U.S. Court are not opposed.

I am satisfied, having reviewed the record that it is appropriate to give recognition to the US Order pursuant to the USCA.

An ~~order~~ order shall issue -  
the form presented.

A. W. Sawyer

# Tab 4



No. S-169079  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA  
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,  
R.S.C. 1985, c. C36, AS AMENDED

AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE  
UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS  
WITH RESPECT TO THE COMPANIES LISTED ON SCHEDULE "A" HERETO

APPLICATION OF CHC GROUP LTD.  
UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,  
R.S.C. 1985, c. C 36, AS AMENDED

ORDER MADE AFTER APPLICATION

(RECOGNITION OF U.S. BANKRUPTCY COURT ORDERS)

BEFORE THE HONOURABLE	)	TUESDAY, THE 14TH DAY
JUSTICE MASUHARA	)	OF MARCH, 2017.
	)	

UPON THE APPLICATION of CHC Group Ltd., in its capacity as the foreign representative (the "Foreign Representative") of CHC Global Operations Canada (2008) ULC, CHC Global Operations International ULC, CHC Global Operations (2008) ULC, Heli-One Leasing ULC, and Heli-One Canada ULC (together, the "Canadian Debtors") and the other companies listed on **Schedule "A"** hereto (together with the Canadian Debtors, the "Debtors"), pursuant to Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), coming on for hearing at Vancouver, British Columbia, on the 14th day of March, 2017, and on hearing William C. Kaplan, Q.C., counsel for the Foreign Representative, and those other counsel listed on **Schedule "B"** hereto; AND UPON READING the material filed, including Affidavits #4 and #5 of the Debtors' Chief Restructuring Officer, Robert A. Del Genio, Affidavits #1, #6 and #7 of Hoa Ung and Affidavit #4 of Sandra Brown-John, each filed; AND UPON HEARING the submissions of counsel for the Foreign Representative, and counsel for those other parties listed on **Schedule "B"**;



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**THIS COURT ORDERS AND DECLARES that:**

**INITIAL RECOGNITION ORDER**

1. Any capitalized terms not otherwise defined herein shall have the meanings given to such terms in the Initial Order (Foreign Main Proceeding) dated October 13, 2016 (the "Initial Recognition Order") and the Supplemental Order (Foreign Main Proceeding) ("Supplemental Recognition Order") dated October 13, 2016.
2. The provisions of this Order shall be interpreted in a manner complementary and supplementary to the provisions of the Initial Recognition Order and the Supplemental Recognition Order, provided that in the event of a conflict between the provisions of this Order and the provisions of the Initial Recognition Order, the Initial Recognition Order shall govern.

**RECOGNITION OF FOREIGN ORDERS**

3. The following orders of the U.S. Bankruptcy Court, made in the Foreign Proceeding, are hereby recognized and given full force and effect in all provinces and territories of Canada, provided, however, that in the event of any conflict between the terms of the Foreign Orders and the Orders of this Court made in the within proceedings, the Orders of this Court shall govern with respect to Property in Canada:
  - (a) Order Granting Debtors' Motion to Reject a Certain Nonresidential Real Property Lease Pursuant to Section 365 of the Bankruptcy Code, attached as Schedule "C";
  - (b) Order Granting Debtors' Sixth Omnibus Motion to Reject Certain Equipment Leases and Subleases Pursuant to Section 365 of the Bankruptcy Code, attached as Schedule "D";
  - (c) Findings of Fact, Conclusions of Law, and Order Confirming the Debtor's Fourth Amended Joint Chapter 11 Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code, attached as Schedule "E";

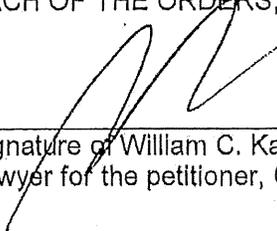
**GENERAL**

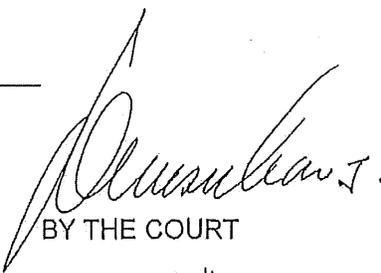
4. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist the Debtors and the Foreign

Representative, and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Debtors and the Foreign Representative, as may be necessary or desirable to give effect to this Order, or to assist the Debtors and the Foreign Representative, and their respective agents, in carrying out the terms of this Order.

5. Each of the Debtors and the Foreign Representative be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.
6. Any interested party may apply to this Court to vary or amend this Order or seek other relief on not less than seven (7) days' notice to the Debtors and the Foreign Representative and their respective counsel, and to any other party or parties likely to be affected by the order sought, or upon such other notice, if any, as this Court may order.
7. Approval of this Order as to form by counsel appearing on this application, other than counsel for the Petitioner, is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

  
\_\_\_\_\_  
Signature of William C. Kaplan, Q.C.  
Lawyer for the petitioner, CHC Group Ltd.

  
BY THE COURT

  
\_\_\_\_\_  
REGISTRAR



# Tab 5

2000 CarswellOnt 704  
Ontario Superior Court of Justice [Commercial List]

Babcock & Wilcox Canada Ltd., Re

2000 CarswellOnt 704, [2000] O.J. No. 786, 18 C.B.R. (4th) 157, 5 B.L.R. (3d) 75, 95 A.C.W.S. (3d) 608

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

In the Matter of Babcock & Wilcox Canada Ltd.

Farley J.

Heard: February 25, 2000

Judgment: February 25, 2000

Docket: 00-CL-3667

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

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

Subject: Corporate and Commercial; Insolvency

**Related Abridgment Classifications**

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.1 General principles

XIX.1.c Application of Act

XIX.1.c.iv Miscellaneous

**Headnote**

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

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

**Table of Authorities**

**Cases considered by Farley J.:**

*Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407, 29 C.P.C. (3d) 65 (Ont. Gen. Div.) — applied  
*ATL Industries Inc. v. Han Eol Ind. Co.* (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div. [Commercial List]) — applied  
*Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*) [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

*Hunt v. T & N plc* (1993), [1994] 1 W.W.R. 129, 21 C.P.C. (3d) 269, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée*) 37 B.C.A.C. 161, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée*) 60 W.A.C. 161, (sub nom. *Hunt v. T&N plc*) [1993] 4 S.C.R. 289, (sub nom. *Hunt v. T&N plc*) 109 D.L.R. (4th) 16, 85 B.C.L.R. (2d) 1, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée*) 161 N.R. 81 (S.C.C.) — referred to

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

*Loewen Group Inc. v. Continental Insurance Co. of Canada* (1997), 48 C.C.L.I. (2d) 119, 44 B.C.L.R. (3d) 387 (B.C. S.C.) — considered

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

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

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

*Pacific National Lease Holding Corp. v. Sun Life Trust Co.*, 34 C.B.R. (3d) 4, 10 B.C.L.R. (3d) 62, [1995] 10 W.W.R. 714, (sub nom. *Pacific National Lease Holding Corp., Re*) 62 B.C.A.C. 151, (sub nom. *Pacific National Lease Holding Corp., Re*) 103 W.A.C. 151 (B.C. C.A.) — referred to

*Roberts v. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218, 23 C.P.C. (4th) 300, 227 A.R. 308, [1999] 4 W.W.R. 443 (Alta. Q.B.) — considered

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

*Tradewell Inc. v. American Sensors & Electronics Inc.* (U.S. S.D. N.Y. 1997)

*Westar Mining Ltd., Re*, 70 B.C.L.R. (2d) 6, 14 C.B.R. (3d) 88, [1992] 6 W.W.R. 331 (B.C. S.C.) — referred to

**Statutes considered:**

*Bankruptcy Amendment Code*, (U.S.), 1994

Generally — considered

*Bankruptcy Code*, 11 U.S.C. 1982

Chapter 11 — considered

s. 524(g) — considered

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

Pt XIII [en. 1997, c. 12, s. 118] — referred to

s. 267 "debtor" [en. 1997, c. 12, s. 118] — considered

ss. 267-275 [en. 1997, c. 12, s. 118] — referred to

*Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the*, S.C. 1997, c. 12

Generally — referred to

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

Generally — referred to

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

s. 2 "debtor company" — considered

s. 3 — considered

s. 4 — considered

s. 5 — considered

s. 17 — referred to

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

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

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

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

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

s. 18.6(8) [en. 1997, c. 12, s. 125] — considered

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

**Farley J.:**

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

(a) that the proceedings commenced by BW Canada's parent U.S. corporation and certain other U.S. related corporations (collectively "BWUS") for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with mass asbestos claims before the U.S. Bankruptcy Court be recognized as a "foreign proceeding" for the purposes of s. 18.6;

(b) that BW Canada be declared a company which is entitled to avail itself of the provisions of s. 18.6;

(c) that there be a stay against suits and enforcements until May 1, 2000 (or such later date as the Court may order) as to asbestos related proceedings against BW Canada, its property and its directors;

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

(e) and for other ancillary relief.

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

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

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

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

Bankruptcy Court on confirmation of a plan of reorganization under Chapter 11 with a view towards rehabilitation in the sense of avoiding insolvency in a mass torts situation to:

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

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

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

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

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

Allow me to start off by stating that I agree with the analysis of MacPherson J. in *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.) when in discussing *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, 52 B.C.L.R. (2d) 160, 122 N.R. 81, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, he states at p.411:

The leading case dealing with the enforcement of "foreign" judgments is the decision of the Supreme Court of Canada in *Morguard Investments, supra*. The question in that case was whether, and the circumstances in which, the judgment of an Alberta court could be enforced in British Columbia. A unanimous court, speaking through La Forest J., held in favour of enforceability and, in so doing, discussed in some detail the doctrinal principles governing inter-jurisdictional enforcement of orders. I think it fair to say that the overarching theme of La Forest J.'s reasons is the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure. He expressed this theme in these words, at p. 1095:

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

*Morguard Investments* was, as stated earlier, a case dealing with the enforcement of a court order across provincial boundaries. However, the historical analysis in La Forest J.'s judgment, of both the United Kingdom and Canadian jurisprudence, and the doctrinal principles enunciated by the court are equally applicable, in my

view, in a situation where the judgment has been rendered by a court in a foreign jurisdiction. This should not be an absolute rule - there will be some foreign court orders that should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process. (my emphasis added)

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

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

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

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

In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.

.....

Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.

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

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

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

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

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

. . . I find that common sense dictates that these matters would be best dealt with by one court, and in the interest of promoting international comity it seems the forum for this case is in the U.S. Bankruptcy Court. Thus, in either case, whether there has been an attornment or not, I conclude it is appropriate for me to exercise my discretion and apply the principles of comity and grant the Defendant's stay application. I reach this conclusion based on all the circumstances, including the clear wording of the U.S. Bankruptcy Code provision, the similar philosophies and procedures in Canada and the U.S., the Plaintiff's attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding . . . (emphasis added)

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

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

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

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

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

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

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

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

In this section,

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

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

s. 267 In this Part,

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

I think it a fair observation that the BIA is a rather defined code which goes into extensive detail. This should be contrasted with the CCAA which is a very short general statute which has been utilized to give flexibility to meet what might be described as the peculiar and unusual situation circumstances. A general categorization (which of course is never completely accurate) is that the BIA may be seen as being used for more run of the mill cases whereas the CCAA may be seen as facilitating the more unique or complicated cases. Certainly the CCAA provides the flexibility to deal with the thornier questions. Thus I do not think it unusual that the 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 *Westar Mining Ltd., Re* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.), at pp. 93-4; *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* (1995), 34 C.B.R. (3d) 4 (B.C. C.A.), at p. 2; *Lehndorff General Partner Ltd.* at p. 30.

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

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

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

- (a) The recognition of comity and cooperation between the courts of various jurisdictions are to be encouraged.

- (b) Respect should be accorded to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada.
- (c) All stakeholders are to be treated equitably, and to the extent reasonably possible, common or like stakeholders are to be treated equally, regardless of the jurisdiction in which they reside.
- (d) The enterprise is to be permitted to implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis of the enterprise and to the extent reasonably practicable, one jurisdiction should take charge of the principal administration of the enterprise's reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of the stakeholders and does not inappropriately detract from the net benefits which may be available from alternative approaches.
- (e) The role of the court and the extent of the jurisdiction it exercises will vary on a case by case basis and depend to a significant degree upon the court's nexus to that enterprise; in considering the appropriate level of its involvement, the court would consider:
  - (i) the location of the debtor's principal operations, undertaking and assets;
  - (ii) the location of the debtor's stakeholders;
  - (iii) the development of the law in each jurisdiction to address the specific problems of the debtor and the enterprise;
  - (iv) the substantive and procedural law which may be applied so that the aspect of undue prejudice may be analyzed;
  - (v) such other factors as may be appropriate in the instant circumstances.
- (f) Where one jurisdiction has an ancillary role,
  - (i) the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments in respect of that debtor's reorganizational efforts in the foreign jurisdiction;
  - (ii) stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.
- (g) As effective notice as is reasonably practicable in the circumstances should be given to all affected stakeholders, with an opportunity for such stakeholders to come back into the court to review the granted order with a view, if thought desirable, to rescind or vary the granted order or to obtain any other appropriate relief in the circumstances.

22 Taking these factors into consideration, and with the determination that the Chapter 11 proceedings are a "foreign proceeding" within the meaning of s. 18.6 of the CCAA and that it is appropriate to declare that BW Canada is entitled to avail itself of the provisions of s. 18.6, I would also grant the following relief. There is to be a stay against suits and enforcement as requested; the initial time period would appear reasonable in the circumstances to allow BWUS to return to the U.S. Bankruptcy Court. Assuming the injunctive relief is continued there, this will provide some additional time to more fully prepare an initial draft approach with respect to ongoing matters. It should also be recognized that if such future relief is not granted in the U.S. Bankruptcy Court, any interested person could avail themselves of the "comeback" clause in the draft order presented to me and which I find reasonable in the circumstances. It appears

appropriate, in the circumstances that BW Canada guarantee BWUS' obligations as aforesaid and to grant security in respect thereof, recognizing that same is permitted pursuant to the general corporate legislation affecting BW Canada, namely the *Business Corporations Act* (Ontario). I note that there is also a provision for an "Information Officer" who will give quarterly reports to this Court. Notices are to be published in the *Globe & Mail* (National Edition) and the *National Post*. In accordance with my suggestion at the hearing, the draft order notice has been revised to note that persons are alerted to the fact that they may become a participant in these Canadian proceedings and further that, if so, they may make representations as to pursuing their remedies regarding asbestos related claims in Canada as opposed to the U.S. As discussed above the draft order also includes an appropriate "comeback" clause. This Court (and I specifically) look forward to working in a cooperative judicial way with the U.S. Bankruptcy Court (and Judge Brown specifically).

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

24 Order to issue accordingly.

*Application granted.*

#### APPENDIX

Court File No. 00-CL-3667

#### SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

THE HONOURABLE  
MR. JUSTICE FARLEY

FRIDAY, THE 25{TH} DAY OF  
FEBRUARY, 2000

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

#### INITIAL ORDER

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

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

#### SERVICE

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

#### RECOGNITION OF THE U.S. PROCEEDINGS

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

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

#### APPLICATION

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

#### PROTECTION FROM ASBESTOS PROCEEDINGS

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

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

#### DIP FINANCING

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

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

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

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

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

#### REPORT AND EXTENSION OF STAY

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

- (a) the Applicant shall appoint Victor J. Manica, or such other senior officer as it deems appropriate from time to time, as an information officer (the "Information Officer");
- (b) the Information Officer shall deliver to the Court a report at least once every three months outlining the status of the U.S. Proceeding, the development of any process for dealing with asbestos claims and such other information as the Information Officer believes to be material (the "Information Reports"); and
- (c) the Applicant and the Information Officer shall incur no liability or obligation as a result of the appointment of the Information Officer or the fulfilment of the duties of the Information Officer in carrying out the provisions of this Order and no action or other proceedings shall be commenced against the Applicant or Information Officer as an result of or relating in any way to the appointment of the Information Officer or the fulfilment of the duties of the Information Officer, except with prior leave of this Court and upon further order securing the solicitor and his own client costs of the Information Officer and the Applicant in connection with any such action or proceeding.

#### SERVICE AND NOTICE

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

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

#### MISCELLANEOUS

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

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

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

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

#### Schedule "A"

#### NOTICE

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

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

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

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

DATED this day of, 2000 at Toronto, Canada

# Tab 6

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

THE HONOURABLE

)

WEDNESDAY THE 25<sup>TH</sup>

)

MR. JUSTICE NEWBOULD

)

DAY OF JANUARY, 2017

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

**AND IN THE MATTER OF MODULAR SPACE INTERMEDIATE HOLDINGS, INC.,  
MODULAR SPACE CORPORATION, RESUN MODSPACE, INC., MODSPACE  
GOVERNMENT FINANCIAL SERVICES, INC., MODSPACE FINANCIAL SERVICES  
CANADA, LTD., RESUN CHIPPEWA, LLC AND MODULAR SPACE HOLDINGS,  
INC. (THE "DEBTORS")**

**APPLICATION OF MODULAR SPACE CORPORATION UNDER SECTION 46 OF  
THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS  
AMENDED**

**ORDER**

**THIS MOTION**, made by Modular Space Corporation ("**MSC**"), in its capacity as the foreign representative (the "**Foreign Representative**") of the Debtors, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form enclosed in the Motion Record was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** the affidavit of David Orlofsky sworn January 20, 2017 and the exhibits thereto (the "**Orlofsky Affidavit**"), the first report of Alvarez & Marsal Canada Inc. ("**A&M**") in its capacity as the Court-appointed information officer (the "**Information Officer**") dated January 20, 2017 (the "**First Report**"), and on hearing the submissions of counsel for the

Debtors, counsel for the Information Officer, counsel for Bank of America, N.A., as Administrative Agent for the lenders under the Debtors' Post-Petition Credit Agreement (collectively, the "**DIP Lender**"), counsel for the Ad Hoc Group of Noteholders and such other counsel as may be present, and upon reading the affidavit of service of Evita Ferreira sworn January 20, 2017, filed,

### **SERVICE**

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Motion and the Motion Record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

### **APPROVAL OF A&M'S ACTIVITIES AND REPORTS**

2. **THIS COURT ORDERS** that the Preliminary Report dated December 24, 2016 (the "**Preliminary Report**") and the activities of A&M in its capacity as the proposed Information Officer, as described in the Preliminary Report, be and are hereby approved.

3. **THIS COURT ORDERS** that the First Report and the activities of A&M in its capacity as the Information Officer, as described in the First Report, be and are hereby approved.

### **RECOGNITION OF FOREIGN ORDERS**

4. **THIS COURT ORDERS** that the following orders (the "**Second Day Orders**") of the United States Bankruptcy Court for the District of Delaware made in the insolvency proceedings of the Debtors under Chapter 11 of Title 11 of the United States Code are hereby recognized and

given full force and effect in all provinces and territories of Canada pursuant to Section 49 of the CCAA:

- a. a final order (i) authorizing the Debtors to obtain post-petition financing (the “**DIP Financing**”); (ii) granting liens and super-priority administrative expense claims to the DIP Lenders; (iii) authorizing use of the DIP Financing proceeds to pay certain outstanding US pre-filing obligations; (iv) providing adequate protection to certain of the Debtors’ pre-filing credit parties; (v) modifying the automatic stay as necessary to give effect to the DIP Financing order (the “**Final DIP Order**”);
- b. an order authorizing the Debtors’ assumption of and performance under the restructuring support agreement dated as of December 20, 2016 (the “**RSA Order**”);
- c. an order approving the Debtors’ entry into and performance under a stock purchase and backstop agreement dated as of December 28, 2016 and authorizing them to pay certain fees and expenses in connection with that agreement (the “**SPBA Order**”);
- d. a final order authorizing the Debtors to pay pre-Petition wages, compensation and employee benefits (the “**Final Wages Order**”);
- e. a final order: (i) authorizing, but not directing, the Debtors to maintain their existing bank accounts; (ii) authorizing the continued use of existing cash management systems; (iii) authorizing continued use of existing business forms; (iv) authorizing the continuation of (and administrative expense priority status of) intercompany transactions; and (iv) extending the time for the Debtors’

compliance under section 345(b) of the United States Bankruptcy Code to February 28, 2017 (the “**Final Cash Management Order**”);

- f. a final order with respect to utility providers: (i) approving the Debtors’ form of adequate assurance of payment; (ii) establishing procedures to resolve objections by utility companies; and (iii) restraining utility companies from discontinuing, alternating or refusing service (the “**Final Utilities Order**”);
- g. a final order establishing notification procedures and approving restrictions on certain transfers of or claims for worthlessness with respect to equity securities (the “**Final NOL Order**”); and
- h. an order authorizing the Debtors to employ and pay professionals utilized in the ordinary course of business, *nunc pro tunc*, to December 21, 2016 and waiving certain information requirements (the “**OCP Order**”).

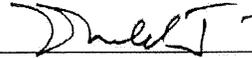
provided, however, that in the event of any conflict between the terms of the Second Day Orders and the Orders of this Court made in these proceedings, the Orders of this Court shall govern with respect to the Property (as defined in the Supplemental Order (Foreign Main Proceeding) of this Court made in these proceedings on December 27, 2016) in Canada. Copies of the Second Day Orders are attached as Exhibits D to K of the Orlofsky Affidavit.

**GENERAL**

5. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Foreign Representative, the Debtors, the Information Officer and their respective agents in carrying out the terms of this Order. All courts, tribunals,

regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Foreign Representative, the Debtors, the Information Officer, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Foreign Representative, the Debtors, the Information Officer and their respective agents in carrying out the terms of this Order.

6. **THIS COURT ORDERS** that each of the Foreign Representative, the Debtors and the Information Officer be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.



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ENTERED AT / INSCRIT À TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO:

JAN 25 2017

PER / PAR: 

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

AND IN THE MATTER OF MODULAR SPACE INTERMEDIATE HOLDINGS, INC., MODULAR SPACE CORPORATION, RESUN MODSPACE, INC., MODSPACE GOVERNMENT FINANCIAL SERVICES, INC., MODSPACE FINANCIAL SERVICES CANADA, LTD., RESUN CHIPPEWA, LLC AND MODULAR SPACE HOLDINGS, INC. (THE "DEBTORS")

APPLICATION OF MODULAR SPACE CORPORATION UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

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

PROCEEDINGS COMMENCED AT TORONTO

**ORDER**

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**Lawyers for Modular Space Holdings, Inc., Modular  
Space Intermediate Holdings, Inc., Modular Space  
Corporation, Resun ModSpace, Inc., ModSpace  
Government Financial Services, Inc., ModSpace  
Financial Services Canada, Ltd. and  
Resun Chippewa, LLC**

# Tab 7

2010 ONSC 3974

Ontario Superior Court of Justice [Commercial List]

Xerium Technologies Inc., Re

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

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

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

C. Campbell J.

Heard: May 14, 2010

Judgment: September 28, 2010

Docket: 10-8652-00CL

Counsel: Derrick Tay, Randy Sutton for Applicants

Subject: Insolvency

**Related Abridgment Classifications**

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.5 Miscellaneous

**Headnote**

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

Foreign Proceedings — Debtors commenced proceedings in U.S. under Chapter 11 of U.S. Bankruptcy Code ("U.S. Code") — Recognition order was granted in Canada recognizing Chapter 11 Proceedings as foreign main proceeding in respect of Debtors, pursuant to Pt. IV of Companies' Creditors Arrangements Act ("CCAA") — U.S. Bankruptcy Court made various orders in respect of Debtors' ongoing business operations ("Orders") and confirmed Debtors' Joint Plan of Reorganization ("Plan") under U.S. Code ("Confirmation Order") — Applicant company, Foreign Representative of Debtors, brought motion to have Orders, Confirmation Order and Plan recognized and given effect in Canada — Motion granted — Provisions of Plan were consistent with purposes set out in s. 61(1) of CCAA — Plan was critical to restructuring of Debtors as global corporate unit — Recognition of Confirmation Order was necessary to ensure fair and efficient administration of cross-border insolvency — U.S. Bankruptcy Court concluded Plan complied with U.S. Bankruptcy principles, and that Plan was made in good faith; did not breach any applicable law; was in interests of Debtors' creditors and equity holders; and would not likely be followed by need for liquidation or further financial reorganization of Debtors — Such principles also underlay CCAA, and thus dictated in favour of Plan's recognition and implementation in Canada.

**Table of Authorities**

**Cases considered by C. Campbell J.:**

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

**Statutes considered:**

*Bankruptcy Code*, 11 U.S.C. 1982

Generally — referred to

Chapter 11 — referred to

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

Generally — referred to

Pt. IV — referred to

s. 44 — considered

s. 53(b) — referred to

s. 61(1) — considered

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

**C. Campbell J.:**

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

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

3 On April 1, 2010, this Court granted the Recognition Order sought by, *inter alia*, the Applicant, Xerium Technologies Inc. ("Xerium") as the "Foreign Representative" of the Chapter 11 Debtors and recognizing the Chapter 11 Proceedings as a "foreign main proceeding" in respect of the Chapter 11 Debtors, pursuant to Part IV of the CCAA.

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

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

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

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

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

9 Due to a drop in global demand for paper products and in light of financial difficulties encountered by the Company due to the drop in demand in its products and is difficulty raising funds, the Company anticipated that it would not be in compliance with certain financial covenants under the Credit Facility for the period ended September 30, 2009. The Chapter 11 Debtors, their lenders under the Credit Facility, the Administrative Agent and the Secured Lender Ad

Hoc Working Group entered into discussions exploring possible restructuring scenarios. The negotiations progressed smoothly and the parties worked toward various consensual restructuring scenarios.

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

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

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

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

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

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

16 The Plan provides for a comprehensive financial restructuring of the Chapter 11 Debtors' institutional indebtedness and capital structure. According to its terms, only Secured Swap Termination Claims, claims on account of the Credit Facility, Unsecured Swap Termination Claims, and Equity Interests in Xerium are "impaired" under the Plan. Holders of all other claims are unimpaired.

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

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

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

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

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

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

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

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

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

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

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
- (d) the protection and the maximization of the value of debtor company's property; and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.

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

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

26 In *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) at para. 21, this Court held that U.S. Chapter 11 proceedings are "foreign proceedings" for the purposes of the CCAA's cross-border

insolvency provisions. The Court also set out a non exclusive or exhaustive list of factors that the Court should consider in applying those provisions.

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

- (a) The Plan is critical to the restructuring of the Chapter 11 Debtors as a global corporate unit;
- (b) The Company is a highly integrated business and is managed centrally from the United States. The Credit Facility which is being restructured is governed by the laws of the State of New York. Each of the Chapter 11 Debtors is a borrower or guarantor, or both, under the Credit Facility;
- (c) Confirmation of the Plan in the U.S. Court occurred in accordance with standard and well established procedures and practices, including Court approval of the Disclosure Statement and the process for the solicitation and tabulation of votes on the Plan;
- (d) By granting the Initial Order in which the Chapter 11 Proceedings were recognized as Foreign Main Proceedings, this Honourable Court already acknowledged Canada as an ancillary jurisdiction in the reorganization of the Chapter 11 Debtors;
- (e) The Applicant carries on business in Canada through a Canadian subsidiary, Xerium Canada, which is one of Chapter 11 Debtors and has had the same access and participation in the Chapter 11 Proceedings as the other Chapter 11 Debtors;
- (f) Recognition of the U.S. Confirmation Order is necessary for ensuring the fair and efficient administration of this cross-border insolvency, whereby all stakeholders who hold an interest in the Chapter 11 Debtors are treated equitably.

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

- (a) it is made in good faith;
- (b) it does not breach any applicable law;
- (c) it is in the interests of the Chapter 11 Debtors' creditors and equity holders; and
- (d) it will not likely be followed by the need for liquidation or further financial reorganization of the Chapter 11 Debtors.

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

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

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

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

*Motion granted.*

Footnotes

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

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End of Document

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**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED  
AND IN THE MATTER OF ROCKPORT BLOCKER, LLC, THE ROCKPORT GROUP HOLDINGS, LLC, TRG 1-P HOLDINGS, LLC, TRG  
INTERMEDIATE HOLDINGS, LLC, TRG CLASS D, LLC, THE ROCKPORT GROUP, LLC, THE ROCKPORT COMPANY, LLC, DRYDOCK  
FOOTWEAR, LLC, DD MANAGEMENT SERVICES LLC AND ROCKPORT CANADA ULC (THE "DEBTORS")**

**APPLICATION OF ROCKPORT BLOCKER, LLC, UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985,  
c. C-36, AS AMENDED**

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

PROCEEDINGS COMMENCED AT TORONTO

**BRIEF OF AUTHORITIES OF THE  
APPLICANT,  
ROCKPORT BLOCKER, LLC  
(Re: Motion Returnable July 30, 2018)**

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Drydock Footwear, LLC, DD Management Services LLC  
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