COURT FILE NUMBER	1001-13659
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
MATTER	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c. C-36, AS AMENDED AND IN THE MATTER OF PETROFLOW ENERGY LTD.
DOCUMENT	**BRIEF OF THE APPLICANTS, LOUIS G. SCHOTT and PETROFLOW ENERGY LTD.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	PARLEE McLAWS LLP Barristers and Solicitors 3400 Petro-Canada Centre 105-6th Avenue SW Calgary, Alberta T2P 3Y7 Attention: G. Scott Watson Telephone: (403) 294-7038 Facsimile: (403) 265-8263 File Number: **68789-3/GSW**

INTRODUCTION

1. This application is brought by Petroflow Energy Ltd ("Petroflow") and the foreign representative, Louis G. Schott, seeking the recognition and enforcement in Canada of an Order granted by the United States Bankruptcy Court on September 14, 2011, confirming the First Amended Joint Chapter 11 Plan of North American Petroleum Corporation USA, et al.

The Debtors

2. Petroflow was incorporated pursuant to the laws of Canada, as Atlantic Gold Mines Limited on July 26, 1994. Its registered office is located at 3400, 150 6th Ave SW, Calgary, Alberta, T2P 3Y7. Petroflow's principal place of business is Tulsa, Oklahoma; it maintains its headquarters and business records there. At present, Petroflow is a reporting issuer under the securities laws of British Columbia, Alberta and Ontario and the securities of Petroflow have been cease traded by the British Columbia Securities Commission, the Alberta Securities Commission and the Ontario Securities Commission.

3. Petroflow is the parent company of North American Petroleum Corporation USA ("NAPCUS") and directly owns 100% of its equity interests. NAPCUS was incorporated pursuant to the laws of the State of Delaware in April 2005, with its principal place of business in Tulsa, Oklahoma. Its registered office is located at 1209 Orange Street, Wilmington, Delaware, 19801.

4. NAPCUS has one wholly owned subsidiary: Prize Petroleum, LLC ("Prize"). Prize is an Oklahoma limited liability company (incorporated pursuant to the laws of the state of Oklahoma in September 2006) with its principal place of business in Tulsa, Oklahoma. Its registered office is located at 1800 Canyon Park Circle, Suite 201, Edmond, Oklahoma, 73013.

5. Petroflow's assets consist almost exclusively of its equity interests in NAPCUS.

6. Petroflow, NAPCUS, and Prize are hereinafter referred to collectively as "the Debtors".

History of the Proceedings

7. On May 25, 2010, each of NAPCUS and Prize filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Bankruptcy Code ("Chapter 11"). Concurrently, NAPCUS and Prize filed a motion seeking joint administration of the Chapter 11 proceedings pursuant to Rule 1015(b) of the Federal Bankruptcy Procedure.

8. On May 28, 2010, the U.S. Court entered an order directing the joint administration and procedural consolidation of the Chapter 11 proceedings.

9. After filing under Chapter 11, the Debtors and their advisors subsequently determined that in order to fully restructure the Debtors' debt obligations and strengthen their going forward operations, Petroflow should also file protection under Chapter 11. Accordingly,

on August 20, 2010, Petroflow filed a voluntary petition with the U.S. Court under Chapter 11.

10. By way of a Joint Motion filed August 20, 2010, the Debtors, as debtor and debtor in possession, requested entry of an order, pursuant to section 105(a) of the Bankruptcy Code, directing that certain orders entered in respect of the First Filed Petition be made applicable to Petroflow (the "Joint Motion"). The Order on the Joint Motion was filed under Certification of Counsel with the U.S. Court on September 10, 2010 and the requested order was entered on September 10, 2010.

11. By Order of Romaine J, dated September 17, 2010, the Chapter 11 proceedings with respect to Petroflow were recognized as a "foreign main proceeding" under s. 47 of the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 ("*CCAA*"). Since that time, Petroflow has appeared before this Court periodically seeking recognition and enforcement in Canada of Orders made by the United States Bankruptcy Court, as well as advice and directions in relation to this matter.

12. On June 24, 2011, the Debtors filed a Joint Chapter 11 Plan and the disclosure statement for the Plan ("Disclosure Statement") with the United States Bankruptcy Court. Under Chapter 11 procedures, the Plan remained open to amendments for a minimum period of 30 days.

13. On July 29, 2011, the United States Bankruptcy Court approved the Plan as amended ("Amended Plan") and the Disclosure Statements, to be sent out to creditors. The voting deadline for classes of creditors entitled to vote on the Amended Plan was September 2, 2011.

14. 100% of the creditors who voted on the Amended Plan voted in favour of implementing the Amended Plan.

15. On September 15, 2011, the United States Bankruptcy Court granted an Order confirming the Amended Plan.

Summary of the Amended Plan

16. The Amended Plan contemplates that only one entity ("Reorganized NAPCUS") will emerge from the Chapter 11 proceedings, and that the Debtors will otherwise be wound up.

17. The Amended Plan recognizes 5 classes of interest-holders in the Debtors, each of which is entitled to different treatment.

18. Class 1 creditors are secured creditors. At the option of the Debtors or Reorganized NAPCUS, their claims will either be reinstated and rendered unimpaired, paid in full, or the secured creditors will receive the collateral securing their claims. Under the Bankruptcy Code, the claims of the Class 1 creditors are classified as unimpaired, and they are deemed to have accepted the Amended Plan; they were not entitled to vote on the Amended Plan.

19. Holders of Class 2 claims, other priority claims, are to be paid in cash for the full amount of their claims under the Amended Plan. These claims are also considered unimpaired, and the claimants in this class are deemed to have accepted the Amended Plan without a vote.

20. Class 3 creditors, Petroflow's general unsecured creditors, are to receive convertible preferred stock in Reorganized NAPCUS of a value equal to their claims. They were entitled to vote on the Amended Plan, and 100% of the creditors who participated in the vote were in favour of the Amended Plan.

21. NAPCUS's general unsecured creditors make up Class 4. They are entitled, at their election, either to receive convertible preferred stock in Reorganized NAPCUS for the

full amount of their claims, or to be paid in cash for their claims, so long as the aggregate claims receiving cash do not exceed $500 000. These creditors were also entitled to vote, and 100% of the voting creditors in this class approved the Amended Plan.

22. Under the Amended Plan, Petroflow's shareholders were divided into two classes, Class 5A and Class 5B. Petroflow has only one shareholder class at present.

23. Class 5A members are those who currently hold more than 250,000 common shares in Petroflow. Upon the Effective Date of the Amended Plan, members of Class 5A will be issued one Reorganized NAPCUS share for each Petroflow share held.

24. Members of Class 5B, those who currently hold less than 250,000 Petroflow common shares, are not entitled to receive shares in Reorganized NAPCUS on the Effective Date of the Amended Plan, and their shares in Petroflow will be cancelled. At a Determination Date (as defined in the Amended Plan) to be no more than two years following the Effective Date of the Amended Plan, however, these former Petroflow shareholders will be entitled to receive, at the option of Reorganized NAPCUS, either one Reorganized NAPCUS share per cancelled Petroflow share, or the fair value of same in cash, provided that, if an Acquisition Event (as defined in the Amended Plan) occurs, members of Class 5 shall receive consideration of the same form and amount that is payable to holders of Reorganized NAPCUS common stock.

25. The members of Class 5A and Class 5B were deemed by the United States Bankruptcy Court to have rejected the Amended Plan without a vote. These classes, however, are subject to "cram-down" provisions in the United Stated Bankruptcy Code, permitting the Amended Plan to be confirmed in spite of their deemed rejection.

ISSUES

26. Should this Court recognize and enforce the Order granted by the United States Bankruptcy court on September 14, 2011?

(a) Are the provisions of the Amended Plan consistent with Canadian public policy?

(b) Is the process used to confirm the Amended Plan consistent with CCAA practice and procedure?

LAW & ANALYSIS

Should this Court recognize and enforce the Order granted by the United States Bankruptcy court on September 14, 2011?

27 This Court, by virtue of the September 17, 2010 Order of Justice Romaine, has already recognized the proceedings before the United States Bankruptcy Court as a "foreign main proceeding" under the *CCAA*.

28. The effect of that recognition was set out in *Re Babcock & Wilcox Canada Ltd* [2000] OJ No. 786 **[TAB 1]**, and has since been incorporated into the *CCAA* itself. The role of this Court is not to exhaustively re-examine the Amended Plan that has already been approved by the Court with primary jurisdiction in this case, but to facilitate the American proceedings while ensuring that the resulting plan of reorganization does not unduly prejudice Canadian interests or violate Canadian public policy: *Re Xerium Technologies Inc*, 2010 ONSC 3974 **[TAB 2]**.

(a) Are the provisions of the Amended Plan consistent with Canadian public policy?

29. An assessment by Roy Sudhin of Kinetic Advisors LLC, attached to the Fifth Report of the Information Officer, demonstrates that the proposed treatment of all classes under the Plan is equal or favourable to their likely treatment in a liquidation scenario, particularly given the nature of the undeveloped lands that form much of the Debtors' assets.

30. On July 25, 2011, this Court considered the division of Petroflow's shareholders into classes 5A and 5B in order to accommodate Reorganized NAPCUS's need to remain below certain reporting thresholds in Canadian and American securities legislation and found that the approach taken in the Amended Plan is not at odds with Canadian law or in violation of Canadian public policy.

31. In response to queries from the Court on the number of shareholders involved, the Applicants can confirm that there are approximately 4,235 shareholders in Petroflow at present, some 1,335 of which reside in Alberta. It is expected that, upon emergence, 70% of Reorganized NAPCUS's common shares will be issued to Canadians.

32. In the Order confirming the Amended Plan, the United States Bankruptcy Court made several findings of fact about the effect of the Amended Plan. In particular, the Amended Plan was found to comply with all applicable provisions of the Bankruptcy Code, including having properly classified the claims and interests under the Amended Plan, not discriminating against claims or interests in each class, and providing adequate means for the implementation of the Amended Plan. Most critically, the United States Bankruptcy Court found that the Amended Plan is in the best interests of holders of claims and interests.

33. Petroflow submits that there is nothing in the Amended Plan's treatment of the various classes on interest-holders that violates Canadian public policy or unduly prejudices the interests of Canadian creditors or shareholders.

(b) Is the process used to confirm the Amended Plan consistent with CCAA practice and procedure?

34. Under the United States Bankruptcy Code, the Amended Plan was filed, its form and the form of the Disclosure Statements, ballots and other information material was approved by the United States Bankruptcy Court, sent to creditors, and voted on. In sum, the procedure used was quite similar to that available to a debtor company under the *CCAA*.

35. The United States Bankruptcy Court found that adequate notice was provided to all parties as required under the United States Bankruptcy Code.

36. Only classes of creditors and interest-holders whose claims are classified as "impaired" are generally entitled to vote on a plan under the United States Bankruptcy Code. Under the Amended Plan, Classes 3, 4, 5A, and 5B's claims were rendered impaired.

(a) Classes 3 and 4

37. These classes are comprised of the unsecured creditors of both Petroflow and NAPCUS. They voted on the Amended Plan and, as laid out in the Declaration of Jane Sullivan, attached to the Fifth Report of the Information Officer, voted overwhelmingly in favour of the Amended Plan.

(b) Classes 5A and 5B

38. Under section 1129 of the United States Bankruptcy Code **[TAB 3]**, a plan can be confirmed without being accepted by a class of creditors or interest-holders if the Court determines that the plan does not unfairly discriminate and is fair and equitable with respect to that class; this is colloquially referred to as a "cram-down" provision. In the case of an interest-holding class, the Court must consider whether the plan provides each interest-holder with value equal or greater than what it would be entitled to in a liquidation scenario, and whether any junior class of interests will receive anything under the plan.

39. In the present case, the United States Bankruptcy Court has determined that the Plan proposed by the Debtors does not unfairly discriminate against the members of classes 5A and 5B, and that it is fair and equitable with respect to those classes. As set out in the Declaration of Roy Sudhin, it is likely that the Class 5A and 5B shareholders would receive approximately $0.05 to $0.07 per share in a liquidation scenario; by contrast, the

value of the equity in Reorganized NAPCUS is estimated at $0.344 per share. In addition, no junior classes of interests were entitled to receive any value under the Amended Plan.

40. Given that, under the United States Bankruptcy Code, the Plan could be confirmed even if it was rejected by classes 5A and 5B, the Debtors were excused from incurring the costs associated with holding a vote for the members of those classes. Instead, those classes were deemed to have rejected the Amended Plan. The members of classes 5A and 5B were, however, sent packages of materials in substantially the same form as the voting classes.

41. Additionally, other measures were put in place to protect the interests of shareholders in Petroflow and NAPCUS. Under section 1102 of the United States Bankruptcy Code, the United States trustee appointed an Equity Committee. The members of the committee bear a fiduciary duty to the classes that they represent, and their primary role is to relay information to the equity holders and solicit and receive comments from them.

42. The Equity Committee in the present case was closely involved in the development of the Amended Plan, including enhancing the protections offered to Class 5B interest-holders in the initial drafts of the Plan. The impact of these amendments to the Plan and the endorsement of the Equity Committee are detailed in the Statement filed by the Equity Committee, attached to the Fifth Report of the Information Officer.

43. Admittedly, the "cram-down" process permitted by the United States Bankruptcy Code is unlike anything that is found in the *CCAA*. Plans of reorganization using the provisions have, however, been recognized and enforced by the Canadian courts in the past: *Re Laidlaw Inc.* [2003] OJ No 865 **[TAB 4].**

44. In the present case, the classes being "crammed down" are not classes of creditors, but shareholders in Petroflow. Under the *CCAA*, these individuals would not usually be entitled to vote on a plan of arrangement in any event: s. 6. The application of the cram-down provisions in the present proceedings does not, therefore, prejudice any rights that

the members of classes 5A and 5B would be entitled to in Canadian proceedings. Under these circumstances, Petroflow submits that the deemed rejection of the Plan by classes 5A and 5B without a vote should pose no obstacle to this Court's recognition of the United States Bankruptcy Court Order confirming the Plan.

CONCLUSION

45. The Amended Plan is a reorganization of three closely-related entities that benefits all interest-holders. Its provisions are consistent with the principles underlying Canadian insolvency law and the method used to develop and approve the Amended Plan is also in accordance with the public policy objectives of the CCAA.

46. Based on the foregoing, it is the Applicants' submission that the Order granted by the United States Bankruptcy Court on September 14, 2011, confirming the Amended Plan, should be recognized and enforced in Canada by this Honourable Court.

DATED at the City of Calgary, in the Province of Alberta, this 16th day of September, 2011.

PARLEE McLAWS LLP

Per: ______________________________
G. Scott Watson
Solicitors for Petroflow Energy Ltd.

TO: THE CLERK OF THE COURT
Calgary, Alberta

TAB 1

Indexed as:

Babcock & Wilcox Canada Ltd. (Re)

IN THE MATTER OF Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended AND IN THE MATTER OF Babcock & Wilcox Canada Ltd.

[2000] O.J. No. 786

[2000] O.T.C. 135

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

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

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

Court File No. 00-CL-3667

Ontario Superior Court of Justice
Commercial List

Farley J.

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

(24 paras.)

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

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

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

Statutes, Regulations and Rules Cited:

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

Business Corporations Act (Ontario).

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

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

Counsel:

Derrick Tay, for Babcock & Wilcox Canada Ltd.
Paul Macdonald, for Citibank North America Inc. Lenders under the Post-Petition Credit Agreement.

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

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

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

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

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

(e) and for other ancillary relief.

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

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

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

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

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

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

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

> "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and 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 Inc. Co. (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div.) at pp. 302-3 I noted the following:

> Allow me to start off by stating that I agree with the analysis of MacPherson J.

in Arrowmaster Inc. v. Unique Forming Ltd. (1993), 17 O.R. (3d) 407 (Gen. Div.) when in discussing Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, 52 B.C.L.R. (2d) 160, 122 N.R. 81, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, he states at p. 411:

> The leading case dealing with the enforcement of "foreign" judgments is the decision of the Supreme Court of Canada in Morguard Investments, supra. The question in that case was whether, and the circumstances in which, the judgment of an Alberta court could be enforced in British Columbia. A unanimous court, speaking through La Forest J., held in favour of enforceability and, in so doing, discussed in some detail the doctrinal principles governing inter-jurisdictional enforcement of orders. I think it fair to say that the overarching theme of La Forest J.'s reasons is the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure. He expressed this theme in these words, at p. 1095:
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>> "Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment in rem, such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given has power over the litigants, the judgments of its courts should be respected." (emphasis added in original)
>
> Morguard Investments was, as stated earlier, a case dealing with the enforcement of a court order across provincial boundaries. However, the historical analysis in La Forest J.'s judgment, of both the United Kingdom and Canadian jurisprudence, and the doctrinal principles enunciated by the court are equally applicable, in my view, in a situation where the judgment has been rendered by a court in a foreign jurisdiction. This should not be an absolute rule - there will be some foreign court orders that should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process. (my emphasis added)

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

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

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

LaForest J. went on to observe in Morguard at pp. 269-70:

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

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

8 While Morguard was an interprovincial case, there is no doubt that the principles in that case are equally applicable to international matters in the view of MacPherson J. and myself in Arrowmaster and ATL respectively. Indeed the analysis by LaForest J. was on an international plane. As a country whose well-being is so heavily founded on international trade and investment, Canada of necessity is very conscious of the desirability of invoking comity in appropriate cases.

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

10 In Roberts, Forsythe J. at pp. 5-7 noted that steps within the proceedings themselves are also subject to the dictates of comity in recognizing and enforcing a U.S. Bankruptcy Court stay in the Dow Corning litigation as to a debtor in Canada so as to promote greater efficiency, certainty and consistency in connection with the debtor's restructuring efforts. Foreign claimants were provided for in the U.S. corporation's plan. Forsyth J. stated:

> Comity and cooperation are increasingly important in the bankruptcy context. As internationalization increases, more parties have assets and carry on

> activities in several jurisdictions. Without some coordination there would be multiple proceedings, inconsistent judgments and general uncertainty.
>
> ... I find that common sense dictates that these matters would be best dealt with by one court, and in the interest of promoting international comity it seems the forum for this case is in the U.S. Bankruptcy Court. Thus, in either case, whether there has been an attornment or not, I conclude it is appropriate for me to exercise my discretion and apply the principles of comity and grant the Defendant's stay application. I reach this conclusion based on all the circumstances, including the clear wording of the U.S. Bankruptcy Code provision, the similar philosophies and procedures in Canada and the U.S., the Plaintiff's attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding ... (emphasis added)

11 The CCAA as remedial legislation should be given a liberal interpretation to facilitate its objectives. See Re Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at p. 320; Re Lehndorff General Partners Ltd. (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.).

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

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

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

> The Olympia & York re-organization involves proceedings in three different jurisdictions: Canada, the United States and the United Kingdom. Insolvency 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 co-operate amongst themselves, in my view, in facilitating the trans-border resolution of such disputes as a whole, where that can be done in a fashion consistent with their own fundamental principles of jurisprudence. The interests of international co-operation and comity, and the interests of developing at least some degree of certitude in international business and commerce, call for nothing less.

Blair J. then proceeded to invoke inherent jurisdiction to implement the Protocol between the U.S.

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

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

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

In this Section,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Respect should be accorded to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada.

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

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

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

(i) the location of the debtor's principal operations, undertaking and assets;
(ii) the location of the debtor's stakeholders;
(iii) the development of the law in each jurisdiction to address the specific problems of the debtor and the enterprise;
(iv) the substantive and procedural law which may be applied so that the aspect of undue prejudice may be analyzed;
(v) such other factors as may be appropriate in the instant circumstances.

(f) Where one jurisdiction has an ancillary role,

(i) the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments in respect of that debtor's reorganizational efforts in the foreign jurisdiction;
(ii) stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.

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

22 Taking these factors into consideration, and with the determination that the Chapter 11 proceedings are a "foreign proceeding" within the meaning of s. 18.6 of the CCAA and that it is appropriate to declare that BW Canada is entitled to avail itself of the provisions of s. 18.6, I would also grant the following relief. There is to be a stay against suits and enforcement as requested; the initial time period would appear reasonable in the circumstances to allow BWUS to return to the U.S. Bankruptcy Court. Assuming the injunctive relief is continued there, this will provide some additional time to more fully prepare an initial draft approach with respect to ongoing matters. It should also be recognized that if such future relief is not granted in the U.S. Bankruptcy Court, any interested person could avail themselves of the "comeback" clause in the draft order presented to me and which I find reasonable in the circumstances. It appears appropriate, in the circumstances that BW Canada guarantee BWUS' obligations as aforesaid and to grant security in respect thereof, recognizing that same is permitted pursuant to the general corporate legislation affecting BW Canada, namely the Business Corporations Act (Ontario). I note that there is also a provision for an "Information Officer" who will give quarterly reports to this Court. Notices are to be published in the Globe & Mail (National Edition) and the National Post. In accordance with my suggestion at the hearing, the draft order notice has been revised to note that persons are alerted to the fact that they may become a participant in these Canadian proceedings and further that, if so, they may make representations as to pursuing their remedies regarding asbestos related claims in Canada as opposed to the U.S. As discussed above the draft order also includes an appropriate "comeback" clause. This Court (and I specifically) look forward to working in a cooperative judicial way with the U.S. Bankruptcy Court (and Judge Brown specifically).

23 I am satisfied that it is appropriate in these circumstances to grant an order in the form of the revised draft (a copy of which is attached to these reasons [Quicklaw note: See [2000] O.J. No. 787] for the easy reference of others who may be interested in this area of s. 18.6 of the CCAA).

24 Order to issue accordingly.

FARLEY J.

cp/d/qlrme/qlkra

TAB 2

Case Name:

Xerium Technologies, Inc. (Re)

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

[2010] O.J. No. 4395

2010 ONSC 3974

71 C.B.R. (5th) 300

2010 CarswellOnt 7712

Court File No. 10-8652-00CL

Ontario Superior Court of Justice
Commercial List

C.L. Campbell J.

Heard: May 14, 2010.
Judgment: September 28, 2010.

(31 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- International insolvencies -- Motion by Xerium Technologies to have a US Confirmation Order and a Plan recognized and given effect in Canada allowed -- Xerium was a global manufacturer of paper products -- In April 2010 this Court granted an order recognizing the US Chapter 11 proceedings as a foreign main proceeding -- The Plan benefited the stakeholders and reflected a global settlement of competing claims -- Furthermore, recognition of the Confirmation Order was necessary to the fair and efficient administration of the cross-border insolvency -- Finally, the Plan was consistent with the purpose of the Companies' Creditors Arrangement Act.

Conflict of laws -- Foreign judgments -- Recognition of judgments of foreign state or territory -- Motion by Xerium Technologies to have a US Confirmation Order and a Plan recognized and given effect in Canada allowed -- Xerium was a global manufacturer of paper products -- In April 2010 this Court granted an order recognizing the US Chapter 11 proceedings as a foreign main proceeding -- The Plan benefited the stakeholders and reflected a global settlement of competing claims -- Furthermore, recognition of the Confirmation Order was necessary to the fair and efficient administration of the cross-border insolvency -- Finally, the Plan was consistent with the purpose of the Companies' Creditors Arrangement Act.

Creditors and debtors law -- Conflict of laws -- Enforcement of foreign judgments and orders -- Motion by Xerium Technologies to have a US Confirmation Order and a Plan recognized and given effect in Canada allowed -- Xerium was a global manufacturer of paper products -- In April 2010 this Court granted an order recognizing the US Chapter 11 proceedings as a foreign main proceeding -- The Plan benefited the stakeholders and reflected a global settlement of competing claims -- Furthermore, recognition of the Confirmation Order was necessary to the fair and efficient administration of the cross-border insolvency -- Finally, the Plan was consistent with the purpose of the Companies' Creditors Arrangement Act.

Statutes, Regulations and Rules Cited:

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 44, s. 47(2), s. 53(b), s. 61(1)

United States Bankruptcy Code, s. 362

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11,

Counsel:

Derrick Tay, Randy Sutton for the Applicants.

ENDORSEMENT

1 **C.L. CAMPBELL J.**:-- 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")[1] 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 *Re Babcock & Wilcox Canada Ltd.*, 18 C.B.R. (4th) 157 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 *Re Babcock and Wilcox* 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.

C.L. CAMPBELL J.

cp/e/qllqs/qljxr/qljyw

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.

TAB 3

Case Name:

Laidlaw Inc. (Re)

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF The Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended
AND IN THE MATTER OF The Business Corporations Act (Ontario), R.S.O. 1990 c. B. 16, as amended
Re: Laidlaw Inc. and Laidlaw Investments Ltd.

[2003] O.J. No. 865

39 C.B.R. (4th) 239

2003 CarswellOnt 787

2003 CanLII 8003

Court File No. 01-CL-4178

Ontario Superior Court of Justice
Commercial List

Farley J.

Heard: February 28, 2003.
Judgment: February 28, 2003.

(11 paras.)

Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation -- Arrangement, judicial approval -- Foreign orders.

Application by the debtor Laidlaw Inc. for an order recognizing and implementing an American confirmation order regarding a plan of reorganization, and for an order allowing it to change its articles. The plan was with regard to Laidlaw USA and its debtor affiliates. The voting in all classes of creditors had been overwhelmingly in favour of the reorganization. The American court had found that the reorganization was proposed in good faith, was feasible, and was in the best interests of the creditors. A protocol for proceeding had been approved by the Canadian court and had been followed. The American court had already been found to be the appropriate forum for adjudicating, determining, compromising, or otherwise affecting all claims against Laidlaw.

HELD: Application allowed. Confirming the reorganization was a fair and reasonable result vis-à-vis all affected persons on either side of the American-Canadian border in providing an equitable solution.

Statutes, Regulations and Rules Cited:

Canada Business Corporations Act, ss. 173, 173(o), 176(1)(b), 191, 191(2).
Companies' Creditors Arrangement Act, ss. 18.6(1), 18.6(2), 20.

Counsel:

J. Carfagnini and B. Empey, for the Laidlaw applicants.
D. Tay, for Ernst & Young Inc., monitor.
S.R. Orzy and K.J. Zych, for Bondholders Subcommittee.
D. Byers, for Bank Subcommittee.
J. Marin, for Safety Kleen Corporation.
R. Jaipargas, for Federal Insurance Company and Chubb Insurance Company.

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1 **FARLEY J.** (endorsement):-- The applicants sought an order as follows:

a. an order pursuant to section 18.6(2) of the Companies' Creditors Arrangement Act (the "CCAA") recognizing and implementing in Canada the Order (the "U.S. Confirmation Order") of the Honourable Judge Kaplan of the United States Bankruptcy Court for the Western District of New York (the "U.S. Court") providing for, inter alia, confirmation of the Third Amended Joint Plan of Reorganization of Laidlaw USA, Inc. and its Debtor Affiliates, as may be amended from time to time prior to the date of the U.S. Confirmation Order (the "POR");

b. an order pursuant to section 18.6(2) of the CCAA recognizing and implementing in Canada the POR;

c. an order, pursuant to section 191 of the Canada Business Corporations Act ("CBCA"), authorizing the amendment of LINC's articles in accordance with articles of reorganization substantially in the form attached as Schedule "A" hereto;

d. an order extending the stay of proceedings.

2 The facts in this matter have been appropriately summarized in the factum of the applicants as follows:

PART II - THE FACTS

A. The Cross Border Reorganization

...

3. On June 28, 2001, the Applicants, together with Laidlaw USA, Inc., Laidlaw One, Inc., Laidlaw International Finance Corporation and Laidlaw

Transportation, Inc. (collectively, the "Debtors") commenced proceedings under chapter 11 of the United States Bankruptcy Code in the U.S. Court, which proceedings are jointly administered under Case Nos. 01-14099 K through 01-14104 K (the "U.S. Proceedings").

4. Pursuant to the order of this Honourable Court dated June 28, 2001 (the "June 28 Order"), this Honourable Court, among other things, ordered that the Applicants were entitled to relief under the CCAA and granted a stay of proceedings.
5. Pursuant to the June 28 Order, this Court also recognized the U.S. Proceedings as foreign proceedings for the purposes of the CCAA.
6. By Order dated August 10, 2001 (the "August 10 Order"), this Honourable Court, among other things, approved a cross-border insolvency protocol (which has also been approved by the U.S. Court) (the "Protocol") to assist in coordinating activities in these proceedings and the U.S. Proceedings.
7. The Protocol was developed to promote the following mutually desirable goals and objectives:

   (a) harmonize, coordinate and minimize and avoid duplication of activities in the proceedings before the U.S. Court and this Court;
   (b) promote the orderly and efficient administration of the proceedings in the U.S. Court and this Court to, inter alia, reduce the costs associated therewith and avoid duplication of effort, all in order to allow the businesses operated by LINC's subsidiaries to be reorganized as a global enterprise; and
   (c) promote international cooperation and respect for comity among the Courts.

8. For the past several years, United States-based operations have generated more than 90% of LINC's revenue on a consolidated basis.

B. Single Claims Process

9. Pursuant to the August 10 Order, this Honourable Court also recognized and approved, as the single claims process applicable to and binding on all creditors, wherever located, of the Debtors, a claims process approved by Order of the U.S. Court on August 7, 2001, (the "Claims Process").
10. Notice of the Claims Process was (i) published in the national editions of the National Post and The Globe and Mail and, in French, in La Presse, as well as in The Wall Street Journal and The New York Times, (ii) mailed to addresses of known creditors of the Debtors in the United States, Canada and elsewhere and (iii) posted on LINC's website.
11. Approximately 950 proofs of claim were received in response to the Claims Process. The Debtors have entered into settlement agreements involving many of the largest unliquidated claims.

C. POR and Disclosure Statement

(a) Previous Versions of the POR and Disclosure Statement

12. Previous versions of the POR and a Disclosure Statement for the POR (the "Disclosure Statement") have been filed with the U.S. Court and with this Honourable Court at the commencement of the respective proceedings in June, 2001 and on August 6, 2002 and September 20, 2002 (the "September Disclosure Statement").

(b) Initial Solicitation Process

13. On September 24, 2002, the U.S. Court entered an order (the "September 24 Order") which, among other things: (a) approved the September Disclosure Statement; (b) approved a form of confirmation hearing notice (the "September Confirmation Hearing Notice"); (c) scheduled the hearing for the confirmation of the POR by the U.S. Court (the "November Confirmation Hearing"); and (d) required the Debtors to publish a notice substantially in the form of the September Confirmation Hearing Notice not less than 25 days before the November Confirmation Hearing.
14. On September 27, 2002, this Honourable Court granted an Order (the "September 27 Order") which, among other things: (a) declared that the U.S. Court has the jurisdiction to compromise claims against the Applicants; (b) recognized, and declared to be effective in Canada, the September 24 Order; (c) relieved the Applicants from any obligation to file a separate plan in Canada under the CCAA; (d) provided for the Applicants to publish a notice of the granting of such relief (the "Canadian Notice") in various newspapers in Canada; and (e) allowed interested persons to bring a motion to apply to this Court to vary or rescind the September 27 Order within 14 days after the publication of the Canadian Notice.
15. The Canadian Notice was published on Friday, October 4, 2002 in the National Post, The Globe and Mail and La Presse. No person has brought a motion to vary the September 27 Order.

(c) Amended POR and Disclosure Statement

16. Following the granting of the September 24 Order and the September 27 Order, the Debtors and their advisors continued their efforts to resolve certain outstanding issues before the September Confirmation Hearing Notice could be published and before the September Disclosure Statement could be printed. Included in those efforts were discussions with the Pension Benefit Guaranty Corporation (the "PBGC") of the United States which contacted the Debtors after the Orders had been granted and advised that it had concerns about the impact of the POR on certain claims that the PBGC had or may assert.
17. As discussions continued, the Debtors and their advisors determined that the September Disclosure Statement would not be printed and the September Confirmation Hearing Notice would not be published until the material issues were resolved. As a result, the Confirmation Hearing did not take place as scheduled.
18. An agreement in principle had been reached between the Debtors and PBGC. The POR and Disclosure Statement have been amended to reflect the discussions and settlement reached among the Debtors and PBGC.
19. The POR provides for, among other things: (a) cancellation of approximately

U.S. $3.4 billion of indebtedness in exchange for cash or newly-issued common stock (the "New Common Stock") of Reorganized LIL ("New LINC"), which will, through a series of restructuring transactions, become the ultimate parent holding company of the remaining Reorganized Debtors and their non-debtor affiliates; (b) the cancellation of the Old Common Stock and Old Preferred Stock of LINC; (c) the assumption, assumption and assignment or rejection of certain Executory Contracts and Unexpired Leases to which one or more of the Debtors is a party; (d) settlements of certain disputes between or among the Debtors and various creditor groups; and (e) implementation of the Laidlaw Bondholders' Settlement and the Safety-Kleen Settlement, each of which has previously been approved by this Honourable Court and the U.S. Court.

(d) Amended Solicitation Process

20. As a result of the amendments to the POR and the Disclosure Statement, on January 23, 2003 amended versions of the POR and the Disclosure Statement were filed with the U.S. Court and the U.S. Court granted a further Order (the "January 23 Order") approving the form of Disclosure Statement, establishing procedures for solicitation and tabulation of votes, setting 5:00 p.m., Eastern Time, February 24, 2003, as the Voting Deadline for the submission of ballots, scheduling the Confirmation Hearing before the U.S. Court for February 27, 2003 at 10:00 a.m., Eastern Time, and approving the Form of Notice of the Voting Deadline and the Confirmation Hearing (the "February Confirmation Hearing Notice").

21. Other than the necessary changes to dates involved in the process, neither the January 23 Order nor the February Confirmation Hearing Notice are substantially different from the September 24 Order and November Confirmation Hearing Notice which were recognized by this Honourable Court pursuant to the September 27 Order. No party was prejudiced by the subsequent delay in the voting process.

D. Approval of POR

22. The February Confirmation Hearing Notice was published on or about January 31, 2003 in the following newspapers in Canada and the United States: (a) the National Post; (b) The Globe and Mail; (c) La Presse; (d) The Wall Street Journal; and (e) The New York Times.

23. The Voting Deadline set out in the January 23 Order has now passed. The voting in all relevant Classes has been overwhelmingly in favour of the POR.

24. Prior to the objection deadline established by the U.S. Court and after distribution of over 100,000 copies of the POR and Disclosure Statement to parties in interest, only 6 objections to confirmation of the POR were filed. The Debtors and their advisors expect that these objections (to the extent not resolved or withdrawn) will be overruled at the Confirmation Hearing.

25. On February 27, 2003, the U.S. Court issued the U.S. Confirmation Order. The U.S. Court found, among other things, that the POR complied in all respects with the requirements of the United States Bankruptcy Code and related rules. In particular, the U.S. Court found that:

(a) the POR contained all provisions required by law;
(b) the POR was proposed in good faith;
(c) the POR was in the best interests of the creditors of the Debtors;
(d) the POR was feasible; and
(e) the POR satisfied the "cram-down" requirements of the United States Bankruptcy Code.

26. The POR, as approved by the U.S. Confirmation Order, expressly contemplates and requires that the Applicants will seek an order effecting and implementing in Canada certain elements of the Restructuring Transactions and the POR.

3 Allow me now to turn to the law as it applies to this particular fact situation. Section 18.6(2) of the CCAA provides the Court with authority of latitude to coordinate proceedings under the CCAA with any "foreign proceeding" (that term being defined in s. 18.6(1) to mean "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").

s. 18.6(2) The Court may, in respect of a debtor, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding.

The applicants are debtor companies entitled to relief pursuant to the CCAA and the U.S. Proceedings have been recognized by the June 28 Order as a "foreign proceeding" for the purposes of the CCAA.

4 The purpose of s. 18.6(2) is to give the Court broad and flexible jurisdiction to facilitate cross-border insolvency proceedings which involve concurrent filings in Canada under the CCAA and in a foreign jurisdiction under the insolvency laws of that latter jurisdiction. The discretion given to a Canadian judge thereby must be exercised judicially. In appropriate circumstances, this may include a Canadian Court making an order which recognizes and gives effect to insolvency proceedings in foreign Courts and orders thereby emanating from those foreign Courts. As I observed in Re Babcock & Wilcox Canada (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J.) at pp. 107-8, factors which reasonably ought to be considered under the "recognition of comity and cooperation between the courts of various jurisdictions are to be encouraged" and that an enterprise should be permitted to "reorganize as a global unit."

5 Given that in this case, there are the following facts:

(a) the Protocol has been implemented by both this Court and the U.S. Court;
(b) the U.S. Proceedings are foreign proceedings for the purposes of the CCAA;
(c) the stakeholders of the Applicants (and the other Debtors) have been subject to a single claims process which treats them equally regardless of the jurisdiction in which they reside;
(d) the global nature of the restructuring proposed by the POR;
(e) ample notice has been given of the existence of these proceedings and the U.S. Proceedings;
(f) over 90% of revenues for the Debtors are produced by operations in the United States; and

(g) this Court has been apprised of developments relating to the U.S. Proceedings on a regular basis.

and further that in applying the guidelines set out in Babcock & Wilcox I granted the September 27 Order providing inter alia:

(a) ordering and declaring that the U.S. Court has the jurisdiction to determine, compromise or otherwise affect the interest of claimants against, including creditors and shareholders of, the Applicants; and
(b) relieving the Applicants from the obligation to file a Plan of Compromise in Canada under the CCAA unless and until the proposed POR was rejected or refused by the U.S. Court.

and further given that I have already determined that the U.S. Court is the appropriate forum for adjudicating, determining, compromising or otherwise affecting all claims against the applicants and given that I have relieved the applicants (in the particular circumstances of this case) of the obligation to file a CCAA plan, it seems to me that it is appropriate in the circumstances to recognize and give full force and effect in Canada, to the Confirmation Order and the POR pursuant to s. 18.6(2). I note in that respect that the POR has now been approved by the creditors of the Debtors, including the creditors of the applicants and confirmed by the U.S. Court following a Confirmation Hearing. That approval by the creditors of the applicants was by an overwhelming vote of over 96% in number and over 99% in value of each of the classes of creditors, which creditors had the benefit of fulsome disclosure.

6 The POR expressly contemplates that the Canadian Court would be asked for a s. 18.6(2) order recognizing and implementing in Canada the Confirmation Order and the POR. In my view in the circumstances of this case that would be a fair and reasonable result vis-à-vis all affected persons on either side of the U.S. - Canadian border in providing an equitable solution. See Re Loewen Group Inc. (2002), 32 C.B.R. (4th) 54 (Ont. S.C.J.) for a case of quite similar circumstances.

7 In addition the applicants sought an order pursuant to s. 191 of the CBCA amending LINC's articles. Section 191 of the CBCA permits the court to order necessary amendments to the articles of a corporation without shareholder or dissent rights.

191(1) In this section, "reorganization" means a court order made under

(a) section 241;
(b) the Bankruptcy and Insolvency Act approving a proposal; or
(c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

(2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might lawfully be made by an amendment under section 173.
(3) If a court makes an order referred to in subsection (1), the court may also

(a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms thereof; and

(b) appoint directors in place of or in addition to all or any of the directors then in office.

(4) After an order referred to in subsection (1) has been made, articles of reorganization in the form that the Director fixes shall be sent to the Director together with the documents required by section 19 and 113, if applicable.

(5) On receipt of articles of reorganization, the Director shall issue a certificate of amendment in accordance with section 262.

(6) A reorganization becomes effective on the date shown in the certificate of amendment and the articles of incorporation are amended accordingly.

(7) A shareholder is not entitled to dissent under section 190 if an amendment to the articles of incorporation is effected under this section.

8 The CCAA is an "other Act of Parliament that affects the rights among the corporation, its shareholders and creditors". See s. 20 of the CCAA; Re Beatrice Foods Inc. (October 21, 1996), No. 295-96 (Ont. Gen. Div.), Houlden J.A., unreported.

9 The amendment to the articles would effect a cancellation of all presently outstanding shares of LINC. This is appropriate in the circumstances since:

(a) such shares do not have value and are not likely to have value in the foreseeable future;

(b) subsection 191(2) of the CBCA, which permits the Court to amend articles to effect any change that might be made under section 173 of the CBCA, grants substantive, and not simply procedural, powers to amend the articles of a CBCA corporation;

(c) paragraph 173(o) of the CBCA provides that articles may be amended to "add, change or remove any other provision that is permitted by the [CBCA] to be set out in the articles"; and

(d) Section 173 of the CBCA is supported by paragraph 176(1)(b) of the CBCA, which contemplates amendments to the articles of a corporation to effect the cancellation of all or part of the shares of a class of shares.

See Beatrice; Re Algoma Steel Inc. (2002), 30 C.B.R. (4th) 1 (Ont. S.C.J.), R. Dickerson, L. Getz and J. Howard, Proposals for a New Business Corporations Law for Canada, vol. 1 (Ottawa: Information Canada, 1971) at p. 124.

10 The requested relief is granted. Order to issue as per my fiat.

11 I would wish to reiterate my comments at the end of today's hearing as to my appreciation to counsel on all sides throughout these CCAA proceedings and to Judge Kaplan of the U.S. Bankruptcy Court who shouldered so well the bulk of the burden of these coordinated U.S./Canadian proceedings.

FARLEY J.

cp/e/nc/qw/qlgkw/qlmlt

TAB 4

11 U.S.C. § 1129 : US Code - Section 1129: Confirmation of plan

Search 11 U.S.C. § 1129 : US Code - Section 1129: Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:
(1) The plan complies with the applicable provisions of this title.
(2) The proponent of the plan complies with the applicable provisions of this title.
(3) The plan has been proposed in good faith and not by any means forbidden by law.
(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.
(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and
(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and
(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.
(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests -

(A) each holder of a claim or interest of such class -
(i) has accepted the plan; or
(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or
(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.
(8) With respect to each class of claims or interests -
(A) such class has accepted the plan; or
(B) such class is not impaired under the plan.
(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that -
(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;
(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive -
(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;
(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash -

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;
(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and
(iii) in a manner not less favorable than the most favored

nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the pla by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan -

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16) All transfers of property of the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section ot than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan d not discriminate unfairly, and is fair and equitable, with respe to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a pla be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides -

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims -

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests -
(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or
(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.
(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court m confirm only one plan, unless the order of confirmation in the c has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determin which plan to confirm.
(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the pla is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under th subsection, the governmental unit has the burden of proof on the issue of avoidance.
(e) In a small business case, the court shall confirm a plan tha complies with the applicable provisions of this title and that i filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).

[Notes]

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Confirmation hearing

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The plan