Court File No. CV-10-8692-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF JAPAN AIRLINES CORPORATION, JAPAN AIRLINES INTERNATIONAL CO., LTD., AND JAL CAPITAL CO., LTD.

Applicants

APPLICATION UNDER PART IV OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

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Case Name:

Tucker v. Aero Inventory (UK) Ltd.

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
Between
James Robert Tucker, Richard Heis and Allan Watson Graham of KPMG LLP as Joint Administrators, Applicants, and Aero Inventory (UK) Limited and Aero Inventory PLC, Respondents

[2009] O.J. No. 4797

Court File No. 09-CL-8456-00CL

Ontario Superior Court of Justice
Commercial List

F.J.C. Newbould J.

Heard: November 11, 2009.
Judgment: November 12, 2009.

(34 paras.)

Bankruptcy and Insolvency Law -- Proceedings -- Practice and procedure -- Courts -- Jurisdiction -- CCAA matters -- International insolvencies -- Orders -- Assisting foreign court -- Application by foreign trustees for order recognizing foreign administration proceedings in respect of foreign debtors allowed -- As administrators appointed by English High Court, proceeding was foreign proceeding within meaning of CCAA, s. 45(1) and conditions of s. 47(1) met -- Information officer appointed as appropriate to have someone in Canada to deal with matters and provide information to foreign administrators -- Temporary stay of right of set-off granted as foreign debtors had substantial inventory in Canada and protection required to enable foreign debtors to attempt to continue as going concern -- Companies' Creditors Arrangement Act, s. 47(1).

Application by foreign trustees for order recognizing administration proceedings commenced in High Court of Justice of England and Wales as a foreign main proceeding in respect of foreign debtors. The foreign trustees were appointed by the High Court of Justice of England and Wales as administrators over Aero Inventory (UK) Limited and Aero Inventory plc. Both foreign debtors were located in the United Kingdom and their operations were managed and administered in the United Kingdom. The companies operated globally and had customers in Canada. In addition, while Aero Inventory (UK) Limited had a registered address in Quebec, it had no physical presence or employees in Canada. The entire inventory owned by the foreign debtors in Canada was located at various warehouses operated by a company with whom they had signed a 10-year sole supplier agreement and was inseparable from inventory owned by that company and not within the foreign debtors' control.

HELD: Application allowed. As the administrators were appointed by the English High Court, the proceeding was a foreign proceeding within the meaning of s. 45(1) of the CCAA and the conditions of s. 47(1) had been

met. Although the foreign debtors had a registered office in Quebec, they had business interests globally and their head office, from where they were managed and administered, was in the United Kingdom. An information officer was appointed as it was appropriate to have someone in Canada to deal with matters as they arose and to provide information and advice to the foreign administrators. A temporary stay of any right of set-off was also granted as the foreign debtors had substantial inventory in Canada, which was not in the foreign debtors' control and required protection to enable foreign debtors to attempt to continue as a going concern.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 9(1), s. 21, s. 44, s. 45(1), s. 45(2), s. 47, s. 47 (1), s. 47(2), s. 49(1), s. 50

Insolvency Act, 1986,

Counsel:

Orestes Pasparakis and Virginie Gauthier, for the Applicants.

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1 F.J.C. NEWBOULD J.:-- This application was made on November 11, 2009 under s. 47(1)[1] of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") for an order recognizing the administration proceedings (the "foreign proceedings") commenced in respect of each of Aero Inventory (UK) Limited and Aero Inventory plc (the "foreign debtors") in the High Court of Justice of England and Wales as a "foreign main proceeding" for the purposes of section 47 of the CCAA, and for other consequential relief. At the conclusion of the hearing I made the order sought for reasons to follow. These are my reasons.

Factual background

2 On November 11, 2009, the applicants were appointed by the High Court of Justice of England and Wales (Chancery Division, Companies Court) as administrators (the "Administrators") over Aero Inventory (UK) Limited ("Aero Inventory (UK)") and Aero Inventory plc ("Aero plc").

3 Aero Inventory (UK) provides procurement and inventory management services in the aerospace industry. These services are provided with regard to consumable and expendable parts required for aerospace maintenance and related activities, such as nuts, bolts and gaskets. Aero plc is the corporate parent of Aero Inventory (UK) and has been listed on the Alternative Investment Market (AIM) of the London Stock Exchange since 2000.

4 The foreign debtors are both located in New Barnet, Hertfordshire, United Kingdom. Their business operations are managed and administered in the United Kingdom. Aero Inventory (UK) has customers and/or supplies products from the following countries and regions: England, The Republic of Ireland, Australia, Bahrain, El Salvador, Canada, China, Hong Kong, Indonesia, Japan, Switzerland and the United States.

5 Aero Inventory (UK) has conducted business in Canada since 2007. It provides inventory and procurement services to two Canadian customers, Air Canada and Aveos Fleet Performance Inc. ("Aveos").

6 While it has a registered address in Quebec, Aero Inventory (UK) has no physical presence in Canada. The property at this address is in fact leased by the foreign debtors' Canadian affiliate, Aero Inventory (Canada) Inc. ("Aero (Canada)"). The foreign debtors have no premises and no employees in Canada. The inventory of Aero Inventory (UK) is physically located at the premises of its customer.

7 Aero (Canada) provides services in Canada to the foreign debtors pursuant to a management arrangement. Aero (Canada) has employees but no customers or inventory and no source of revenues other than through its management arrangement.

8 In November 2007, Aero Inventory (UK) signed a 10-year sole supplier agreement for consumable aircraft parts with ACTS Technical Support & Services Inc., which was later renamed Aveos. This agreement covers the procurement and management of all parts required by Aveos for its operations in Canada and, through its subsidiary Aeroman, in El Salvador.

9 The entire inventory owned by the foreign debtors in Canada, whether bound for Air Canada or for Aveos, is located at various warehouses across Canada operated by Aveos These warehouses are located in Ontario, Quebec, Manitoba and British Columbia. This inventory is not physically segregated from inventory owned by Aveos and is not within the foreign debtors' control. Further, inventory bound for Air Canada is not segregated from inventory bound for Aveos.

10 According to the Aveos accounting systems, approximately Cdn. $130 million in inventory owned by the foreign debtors is currently held at Aveos sites across Canada. This represents a supply of over nine months worth of inventory based upon traditional turnover rates.

11 As stated, on November 11, 2009, James Robert Tucker, Richard Heis and Allan Watson Graham of KPMG LLP were appointed Administrators of the foreign debtors by orders of the High Court of England and Wales. These orders were made pursuant to the *Insolvency Act 1986*. Pursuant to these orders, the Administrators are responsible for managing the affairs, business and property of the foreign debtors. They are required to perform their functions with the objective of: (a) rescuing the foreign debtors as a going concern or in the alternative, winding up or realizing upon the property of the foreign debtors in order to make a distribution to one or more secured or preferential creditors.

Recognition of the UK Proceeding

(a) Jurisdiction

12 Pursuant to section 9(1) of the CCAA, where a company does not have a place of business in Canada it may file an application in any province in which it has assets. Neither of the foreign debtors appears to have a place of business in Canada. Given that the foreign debtors have assets located within Ontario, this Court has jurisdiction to deal with this application.

(b) Recognition

13 Under s. 47 of the CCAA, a court shall make an order recognizing a foreign proceeding if it is satisfied that the application for such recognition "relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding." Section 47(1) states:

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

14 Section 45(1) of the CCAA defines "foreign proceeding" as:

> a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to

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

15 As the Administrators were appointed by the English High Court pursuant to the *Insolvency Act 1986*, there can be no doubt that the foreign proceeding is a "foreign proceeding" within the meaning of s. 45(1) of the CCAA.

16 It is to be noted that under s. 47(1), the order sought is mandatory if the conditions in that section are met. This is in keeping with the purpose of the new cross-border provisions of the CCAA as set out in s. 44 to promote cooperation with foreign jurisdictions in cases of cross-border insolvencies. This statutory recognition of comity follows the principles of international comity in insolvency situations recognized in such cases as *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165, *Re United Air Lines Inc.* (2003), 43 CBR (4th) 284 and *Re Lear Canada* (2009), 55 C.BR. (5th) 57.

17 In this case as the conditions of s. 47(1) have been met, an order recognizing the foreign proceedings shall go. It is to be noted that Lloyds TSB Commercial Finance Limited, which holds a debenture and is owed approximately $500 million, supports the appointment of the Administrators and this application in Canada. The only other party with a registered security interest in Canada is Air Canada, but nothing is owed by the foreign debtors to it. Rather, there is a receivable of approximately $9.6 million owed by Air Canada to Aero Inventory UK.

18 Under s. 47(2) of the CCAA, a court making an order recognizing a foreign proceeding must specify whether such proceeding is the "foreign main proceeding" or the "foreign non-main proceeding". Under s. 45 (1), a "foreign main proceeding" is a "foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests." Section 45(2) provides that in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

19 Aero Inventory UK has a registered office in Quebec. Thus by virtue of section 45(2), in the absence of proof to the contrary, Quebec is deemed to be the centre of its main interest. However, the foreign debtors have business interests globally and their head office is in the United Kingdom from where they are managed and administered. Aero plc is publicly listed on the AIM of the London Stock Exchange. I am satisfied that this evidence is sufficient to conclude that the main interests of the foreign debtors are centred in the United Kingdom and thus the foreign proceeding should be specified as the "foreign main proceeding".

Other relief sought

(a) Appointment of an Information Officer

20 The applicants have requested an order appointing KPMG Inc. as an information officer in respect of these proceedings. While the CCAA does not expressly provide for the appointment of an information officer, such an officer is sometimes appointed under the Court's general powers to make appropriate orders in the circumstances. In the case of an application such as this in connection with a cross-border insolvency, the Court is expressly given the power to make such order as it considers appropriate in section 49(1), so long as the order is consistent with any other order that may be made under the Act, and in section 50 which provides:

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

21 The order sought would authorize, but not require, the information officer to provide such assistance to the Foreign Representative as might be required, and authorize the information officer to respond to reasonable requests for information from stakeholders. The information officer would be required to report to the Court at least once every three months regarding the proceedings and other information the information officer believes

material.

22 In the circumstances of this case, in which the foreign debtors have no place of business or employees in Canada, it is particularly appropriate to have an information officer appointed who can deal with matters as they arise in Canada and who can also provide information and advice to the Foreign Representative as needed. The order sought shall go.

(b) Stay of Set-Off Rights

23 In this case, because of the fact that the foreign debtors do not have physical control of their inventory in Canada as the inventory is in warehouses operated by Aveos, a concern has been raised that set-off could adversely impact the foreign proceeding and impact the recoveries available to creditors. Although Aveos is a purchaser from Aero Inventory (UK), it apparently is owed approximately $1 million and its contract with Aero Inventory (UK) contains a liquidated damage clause.

24 As stated, a court on an application under the CCAA in cross-border insolvencies has the power under sections 49(1) and 50 to make an order considered appropriate in the circumstances.

25 The provisions regarding set-off in section 21 must, however, be considered in the request for relief regarding a stay of set-off. Section 21 provides:

> 21. The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

26 The applicants submit that while the provisions of section 21 of the CCAA may prevent a court from permanently barring all claims of set-off, it does not prevent a court from making an order in appropriate circumstances temporarily staying the determination and enforcement of a person's rights of set-off pending leave of the court. They rely on *Re Air Canada* (2003), 45 C.B.R. (4th) 13. In that case, Farley J. reviewed in some detail the law of set-off and struck from the Initial Order a provision that no person could set off any obligations of Air Canada to such person which arose prior to the Initial Order. Farley J. held that while the Initial Order should recognize the rights of set-off permitted under section 18.1 of the CCAA (now section 21), such rights could be temporarily stayed pending further order of the Court. In that case there was no opposition to such a temporal stay. He stated:

> With respect to the question of what I have described as a temporal stay, there does not appear to be any opposition by the Moving Creditors to the proposition that whatever their rights of set-off in substance are determined to be, that such determination and enforcement of such determined rights should await until a convenient time when AC has stabilized (or I suppose, alternatively cratered). It would seem to me that the likely time for this would be in conjunction with the formation of a reorganization plan of arrangement and compromise. However I leave that question open pending future submissions and further order of the court emanating as a result thereof.

27 I accept that a court may temporarily stay the right of set-off protected in section 21 of the CCAA. How temporary that stay should be will obviously depend on the circumstances existing at the relevant time.

28 In his witness statement provided to the High Court in England, Mr. Trupp, a director of the foreign debtors, discussed concerns relating to the fact that the inventory is out of their control. He stated:

> 19. The Companies are, in their current financial position, extremely distressed with the threat of creditor enforcement action in key countries.

and

29. This matter is now urgent and there are a number of reasons for this urgency, including:

(a) the supply of airline, parts is time critical and must continue uninterrupted;
(c) there is a risk that if the stock is not secured quickly it will disappear or become very difficult to access, particularly as it is not in the physical control of the Companies. There is therefore a risk of significant loss to the secured creditors and creditors generally if there is any delay in getting the administration orders made. Customers have direct control of the stock and could seize it if concerned about the solvency of the Companies;

29 The applicants submit that no party is unreasonably prejudiced by the proposed set-off relief which is intended to operate only to prevent fresh inventory of the foreign debtors from being appropriated by third parties without an ensuing payment. The proposed relief does not affect the position of the parties on the date of the recognition order but ensures that no further prejudice is caused to the foreign debtors' estate. If the foreign debtors' inventory were in their possession rather than in the possession of third parties, they could control and minimize such potential prejudice by obtaining assurances of payment ahead of providing new supplies.

30 The applicants are concerned that as Aveos has physical control of the foreign debtors' inventory, any refusal to supply their inventory without assurances of payment might lead to the grounding of several airplanes, thereby causing prejudice to the foreign debtors' customers. They submit that in the circumstances, the better option to ensure continued supply to customers and payment for fresh inventory is by the granting of a temporal stay of any right of set-off

31 It seems to me that at this stage the relief sought should be granted. The amount of inventory in Canada, $130 million, is substantial. The consolidated interim financial statements of the foreign debtors as at December 30, 2008 indicate that there are total inventories of U.S. $751 million, although Mr. Trupp believes these are inaccurate and may be overstated. It is apparent that the Canadian inventory comprises a substantial portion of the total inventory. That inventory should be properly protected to enable the foreign debtors to attempt to continue as a going concern.

32 Taking into account the purposes of part IV if the CCAA relating to cross-border insolvencies, as set out in section 44, including co-operation between the courts of the jurisdictions involved and the maximization of the value of the debtor company's property, it is appropriate in this circumstances of this case to stay set-off rights pending further order of this Court. How long that stay should be is a matter of conjecture at this stage. The proceedings have just commenced and what the outcome will be is not possible to know. Thus the length of any stay of set-of rights is an unknown.

33 The order contains a 4 days notice come-back clause and any person concerned with the order thus has the ability to make application to vary or rescind the order.

34 The application is granted in accordance with these reasons.

F.J.C. NEWBOULD J.

cp/e/qlrpv/qljxr/qlaxw

1 This section and the other sections dealing with cross-border insolvencies in part IV of the CCAA came into effect on September 18, 2009.

[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

In the Matter of Babcock & Wilcox Canada Ltd.

Ontario Superior Court of Justice [Commercial List]

Farley J.

Heard: February 25, 2000

Judgment: February 25, 2000

Docket: 00-CL-3667

Derrick Tay, for Babcock & Wilcox Canada Ltd.

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

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

Cases considered by *Farley J.*:

Arrowmaster Inc. v. Unique Forming Ltd. (1993), 17 O.R. (3d) 407, 29 C.P.C. (3d) 65 (Ont. Gen. Div.) — applied

ATL Industries Inc. v. Han Eol Ind. Co. (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div. [Commercial List]) — applied

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Hunt v. T & N plc (1993), [1994] 1 W.W.R. 129, 21 C.P.C. (3d) 269, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 37 B.C.A.C. 161, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 60 W.A.C. 161, (sub nom. *Hunt v. T&N plc)* [1993] 4 S.C.R. 289,

(sub nom. *Hunt v. T&N plc)* 109 D.L.R. (4th) 16, 85 B.C.L.R. (2d) 1, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 161 N.R. 81 (S.C.C.) — referred to

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

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

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

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

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

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

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

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

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

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

Statutes considered:

Bankruptcy Amendment Code, (U.S.), 1994
Generally — considered

Bankruptcy Code, 11 U.S.C. 1982
Chapter 11 — considered
s. 524(g) — considered

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Pt XIII [en. 1997, c. 12, s. 118] — referred to
s. 267 "debtor" [en. 1997, c. 12, s. 118] — considered
ss. 267-275 [en. 1997, c. 12, s. 118] — referred to

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

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
s. 2 "debtor company" — considered
s. 3 — considered
s. 4 — considered
s. 5 — considered
s. 17 — referred to
s. 18.6 [en. 1997, c. 12, s. 125] — considered
s. 18.6(1) "foreign proceeding" [en. 1997, c. 12, s. 125] — considered

s. 18.6(2) [en. 1997, c. 12, s. 125] — considered
s. 18.6(3) [en. 1997, c. 12, s. 125] — considered
s. 18.6(4) [en. 1997, c. 12, s. 125] — considered
s. 18.6(8) [en. 1997, c. 12, s. 125] — considered

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

Farley J.:

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

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

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

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

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

(e) and for other ancillary relief.

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

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

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

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

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

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

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

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

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

> Allow me to start off by stating that I agree with the analysis of MacPherson J. in *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407

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

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

> should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process. (my emphasis added)

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

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

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

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

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

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

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

9 In the context of cross-border insolvencies, Canadian and U.S. Courts have made efforts to complement, coordinate and where appropriate accommodate the proceedings of the other. Examples of this would include *Olympia & York Developments Ltd.*, *Ever fresh Beverages Inc.* and *Loewen Group Inc. v. Continental Insurance Co. of Canada* (1997), 48 C.C.L.I. (2d) 119 (B.C. S.C.). Other examples involve the situation where a multi-jurisdictional proceeding is specifically connected to one jurisdiction with that jurisdiction's court being allowed to exercise principal control over the insolvency process: see *Roberts v. Picture Butte Municipal Hospital* (1998), 23 C.P.C. (4th) 300 (Alta. Q.B.), at pp.

5-7 [[1998] A.J. No. 817]; *Microbiz Corp. v. Classic Software Systems Inc.* (1996), 45 C.B.R. (3d) 40 (Ont. Gen. Div.), at p. 4; *Tradewell Inc. v. American Sensors Electronics, Inc.*, 1997 WL 423075 (S.D.N.Y. 1997).

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

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

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

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

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

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

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

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

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

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

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

Certainly a U.S. Chapter 11 proceeding would fit this definition subject to the question of "debtor". It is important to note that the definition of "foreign proceeding" in s. 18.6 of the CCAA contains no specific requirement that the debtor

be insolvent. In contrast, the BIA defines a "debtor" in the context of a foreign proceeding (Part XIII of the BIA) as follows:

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

I think it a fair observation that the BIA is a rather defined code which goes into extensive detail. This should be contrasted with the CCAA which is a very short general statute which has been utilized to give flexibility to meet what might be described as the peculiar and unusual situation circumstances. A general categorization (which of course is never completely accurate) is that the BIA may be seen as being used for more run of the mill cases whereas the CCAA may be seen as facilitating the more unique or complicated cases. Certainly the CCAA provides the flexibility to deal with the thornier questions. Thus I do not think it unusual that the 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 re-

spect of a debtor company . . .". I note that "debtor company" is not otherwise referred to in s. 18.6; however "debtor" is referred to in both definitions under s. 18.6(1).

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) The enterprise is to be permitted to implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis of the enterprise

and to the extent reasonably practicable, one jurisdiction should take charge of the principal administration of the enterprise's reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of the stakeholders and does not inappropriately detract from the net benefits which may be available from alternative approaches.

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

(i) the location of the debtor's principal operations, undertaking and assets;

(ii) the location of the debtor's stakeholders;

(iii) the development of the law in each jurisdiction to address the specific problems of the debtor and the enterprise;

(iv) the substantive and procedural law which may be applied so that the aspect of undue prejudice may be analyzed;

(v) such other factors as may be appropriate in the instant circumstances.

(f) Where one jurisdiction has an ancillary role,

(i) the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments in respect of that debtor's reorganizational efforts in the foreign jurisdiction;

(ii) stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.

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

22 Taking these factors into consideration, and with the determination that the Chapter 11 proceedings are a "foreign proceeding" within the meaning of s. 18.6 of the CCAA and that it is appropriate to declare that BW Canada is entitled to avail itself of the provisions of s. 18.6, I would also grant the following relief. There is to be a stay against suits and enforcement as requested; the initial time period would appear reasonable in the circumstances to allow BWUS to return to the U.S. Bankruptcy Court. Assuming the injunctive relief is continued there, this will provide some additional time to more fully prepare an initial draft ap-

proach with respect to ongoing matters. It should also be recognized that if such future relief is not granted in the U.S. Bankruptcy Court, any interested person could avail themselves of the "comeback" clause in the draft order presented to me and which I find reasonable in the circumstances. It appears appropriate, in the circumstances that BW Canada guarantee BWUS' obligations as aforesaid and to grant security in respect thereof, recognizing that same is permitted pursuant to the general corporate legislation affecting BW Canada, namely the *Business Corporations Act* (Ontario). I note that there is also a provision for an "Information Officer" who will give quarterly reports to this Court. Notices are to be published in the Globe & Mail (National Edition) and the National Post. In accordance with my suggestion at the hearing, the draft order notice has been revised to note that persons are alerted to the fact that they may become a participant in these Canadian proceedings and further that, if so, they may make representations as to pursuing their remedies regarding asbestos related claims in Canada as opposed to the U.S. As discussed above the draft order also includes an appropriate "comeback" clause. This Court (and I specifically) look forward to working in a cooperative judicial way with the U.S. Bankruptcy Court (and Judge Brown specifically).

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

24 Order to issue accordingly.

Application granted.

Appendix

Court File No. 00-CL-3667

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR. JUSTICE FARLEY — FRIDAY, THE 25TH DAY OF FEBRUARY, 2000

IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

INITIAL ORDER

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

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

SERVICE

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

RECOGNITION OF THE U.S. PROCEEDINGS

2. *THIS COURT ORDERS AND DECLARES* that the proceedings commenced by the Applicant's United States corporate parent and certain other related corporations in the United States for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with asbestos claims before the U.S. Bankruptcy Court (the "U.S. Proceedings") be and hereby is recognized as a "foreign proceeding" for purposes of Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended, (the "CCAA").

APPLICATION

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

PROTECTION FROM ASBESTOS PROCEEDINGS

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

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

DIP FINANCING

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

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

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

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

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

REPORT AND EXTENSION OF STAY

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

(a) the Applicant shall appoint Victor J. Manica, or such other senior officer as it deems appropriate from time to time, as an information officer (the "Information Officer");

(b) the Information Officer shall deliver to the Court a report at least once every three months outlining the status of the U.S. Proceeding, the development of any process for dealing with asbestos claims and such other information as the Information Officer believes to be material (the "Information Reports"); and

(c) the Applicant and the Information Officer shall incur no liability or obligation as a result of the appointment of the Information Officer or the fulfilment of the duties of the Information Officer in carrying out the provisions of this Order and no action or other proceedings shall be commenced against the Applicant or Information Officer as an result of or relating in any way to the appointment of the Information Officer or the fulfilment of the duties of the Information Officer, except with prior leave of this Court and upon further order securing the solicitor and his own client costs of the Information Officer and the Applicant in connection with any such action or proceeding.

SERVICE AND NOTICE

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

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

MISCELLANEOUS

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

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

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

15. *THIS COURT ORDERS AND REQUESTS* the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada (including the assistance of any court in Canada pursuant to Section 17 of the CCAA) and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the

Parliament of Canada or the legislature of any province and any court or any judicial, regulatory or administrative body of the United States and the states or other subdivisions of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

Schedule "A"

NOTICE

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

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

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

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

DATED this day of, 2000 at Toronto, Canada

Court File No. 00-CL-3667

IN THE MATTER OF S. 18.6 of THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
PROCEEDINGS COMMENCED AT TORONTO

INITIAL ORDER

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A Roadmap for Future Foreign Insolvency Proceedings

Derrick Tay

Orestes Pasparakis

Shauna Flynn*

In *Re Babcock & Wilcox Canada Ltd.*, 2000 CarswellOnt 704, 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]), the Honourable Mr. Justice Farley used section 18.6 of the *Companies' Creditors Arrangement Act* (the "CCAA"), to permit a solvent Canadian company to participate in and benefit from the global restructuring of the U.S. corporate parent. For the first time, the Court considered and provided guidance in relation to section 18.6 of the CCAA. In addition, the Court took the opportunity to outline certain key principles which govern the role of the Court in international insolvency proceedings. The practical and purposive approach taken by the Court in *Re Babcock & Wilcox Canada Ltd.* will likely have a significant impact on future jurisprudence as cross-border restructurings increasingly become the norm.

The 1997 Amendments

In 1997, amendments were made to both the *Bankruptcy and Insolvency Act* (the "BIA") and the CCAA to address the rising number of international insolvencies (the "1997 Amendments"). The 1997 Amendments were intended to codify, at a federal level, the principles of comity and cooperation and the judicial trend of promoting international business and commerce which were established at common law in recent major multi-national insolvencies. Until this year and the application by Babcock & Wilcox Canada Ltd. ("B & W Canada") under section 18.6 of the CCAA, the 1997 Amendments had not been considered or commented on by the Courts in a meaningful way.

The Babcock & Wilcox Companies — The History

On February 22, 2000, The Babcock & Wilcox Company and certain of its U.S. affiliates (collectively the "B & W Companies") voluntarily filed in Louisiana under Chapter 11 of the U.S. Bankruptcy Code for protection from a mass of asbestos related litigation and pending claims.

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*Meighen Demers

The B & W Companies are industry leaders in the design and manufacture of boiler systems. Although the B & W Companies never produced or manufactured asbestos, asbestos had been used in certain of their boiler systems as an insulator. At the time the B & W Companies used asbestos to insulate their boilers, asbestos was an accepted industry product which was often required by their industrial and government customers.

Notwithstanding the B & W Companies' limited use of asbestos and their lack of specialized knowledge of the hazards of asbestos, the B & W Companies faced a multitude of asbestos related claims. Despite their lack of culpability, the B & W Companies had adopted a resolution to settle outstanding claims given the high cost and arbitrary nature of the U.S. tort system. However, even after settling more than 340,000 asbestos related claims and making payments in respect of those settlements in excess of U.S. $1.6 billion, the tide of claims did not subside. By 1999, a total of 400,000 asbestos related claims had been made against the B & W Companies.

As a result of the fact that the tort system in the U.S. was not able to address the resolution of asbestos related claims in a rational manner, the United States Congress enacted provisions for the resolution of asbestos claims within Chapter 11 of the bankruptcy system. These provisions offer otherwise strong and healthy companies an effective solution for dealing with mass asbestos claims. Under section 524 of Chapter 11 of the Bankruptcy Code, a debtor may apply to establish and fund a trust against which the debtor's future asbestos related liability could be channelled. The debtor, in this case the B & W Companies, would thereby be able to cap their exposure to asbestos claims and bring about an end to their involvement in asbestos litigation.

[Indexed as: **Laidlaw, Re**]

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

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as Amended

In the Matter of the Business Corporations Act (Ontario), R.S.O. 1990 c. B. 16, as Amended

In the Matter of Laidlaw Inc. and Laidlaw Investments Ltd.

Ontario Superior Court of Justice

Farley J.

Heard: February 28, 2003

Judgment: February 28, 2003

Docket: 01-CL-4178

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

Corporations — Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues — Applicant debtors and others commenced proceedings under chapter 11 of United States Bankruptcy Code — Joint plan of reorganization for debtors was confirmed by U.S. judge — Debtors brought application for order pursuant to s. 18.6(2) of Companies' Creditors Arrangement Act recognizing and implementing order confirming plan and for order pursuant to s. 18.6(2) of Act recognizing and implementing plan in Canada — Application granted — Section 18.6(2) of Act provides court with authority to coordinate proceedings under Act with any foreign proceeding — Applicant debtors were entitled to relief under Act and U.S. proceedings had been recognized as foreign proceeding for purposes of Act — Global nature of plan of restructuring was appropriate consideration on application — Over 90% of revenues for debtors were produced by operations in United States — Ontario court had been apprised of developments relating to U.S. proceedings on regular basis — In these circumstances, full force and effect should be given in Canada to confirmation order and to plan of reorganization pursuant to s. 18.6(2) of Act.

Cases considered by *Farley J.*:

Algoma Steel Inc., Re, 2001 CarswellOnt 4640, 30 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — referred to

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

Beatrice Foods Inc., Re (October 21, 1996), Doc. 295-96 (Ont. Gen. Div.) — considered
Loewen Group Inc., Re, 2001 CarswellOnt 4910, 32 C.B.R. (4th) 54, 22 B.L.R. (3d) 134 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Generally — referred to
Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to
s. 173 — considered
s. 173(1)(o) — considered
s. 176(1)(b) — considered
s. 191 — considered
s. 191(2) — considered
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to
s. 18.6(1) [en. 1997, c. 12, s. 125] — referred to
s. 18.6(2) [en. 1997, c. 12, s. 125] — considered
s. 20 — referred to

APPLICATION by debtors for order recognizing and implementing United States order confirming plan of reorganization and for order recognizing and implementing plan in Canada.

Farley J.:

1 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 recoganized 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 con-

cerns 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 US$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 *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) 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 Canada Ltd.* 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 credi-

tors 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 *Loewen Group Inc., Re* (2001), 32 C.B.R. (4th) 54 (Ont. S.C.J. [Commercial List]) 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; *Beatrice Foods Inc., Re* (October 21, 1996), Doc. 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 Foods Inc., Re*; *Algoma Steel Inc., Re* (2001), 30 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]), 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.

Application granted.