Court File No.: CV-22-00683820-00CL

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 VOYAGER DIGITAL LTD.

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

PROPOSED CLASS ACTION PLAINTIFF'S BOOK OF AUTHORITIES

July 14, 2022

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TO: SERVICE LIST

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LIST OF AUTHORITIES

Tab 1

Frans G. A. De Roy and Thierry Van Doosselaere, as Trustees in Bankruptcy of ABC Containerline N.V., the Owners, Charterers and all others interested in the Ship "Brussel", and the Ship "Brussel" *Appellants*

v.

Holt Cargo Systems Inc. *Respondent*

INDEXED AS: HOIT CARGO SYSTEMS INC. *v.* ABC CONTAINERIINE N.V. (TRUSTEES Of)

Neutral citation: 2001 SCC 90.

File No.: 27290.

2001: March 20; 2001: December 20.

Present: McLachlin C.J. and L'Heureux-Dubé, Gon-thier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Courts — Jurisdiction — Federal Court of Canada — Maritime law — Stay of proceedings — U.S. creditor bringing maritime law action against Belgian ship in Federal Court — Belgian shipowner subsequently adjudged bankrupt in Belgium — Quebec Superior Court making orders purporting to dispose of ship and proceeds of sale — Whether Federal Court erred in exercise of its discretion to deny trustees' application for stay of proceedings — Federal Court Act, R.S.C. 1985, c. F-7, s. 50.

In late March 1996, a Belgian ship was arrested at Halifax in connection with an *in rem* action commenced by the respondent Holt, a U.S. company, in the Federal Court claiming a maritime lien for stevedoring services provided in the U.S. The ship's Belgian owner was subsequently adjudged bankrupt by the Belgian bankruptcy court and the appellants were appointed the trustees in bankruptcy. In May the appellant trustees obtained an order of the Quebec Superior Court, Civil Chamber that "recognized and declared executory in Quebec" the Belgian bankruptcy order. Their application to the Federal Court, Trial Division for an adjournment of the *in rem* proceedings against the ship was denied,

Frans G. A. De Roy et Thierry Van Doosselaere, en qualité de syndics de faillite de ABC Containerline N.V., les propriétaires, affréteurs et toutes autres personnes ayant un droit sur le navire « Brussel », et le navire « Brussel » *Appelants*

c.

Holt Cargo Systems Inc. *Intimée*

RÉpERTORIÉ : HOIT CARGO SYSTEMS INC. *c.* ABC CONTAINERIINE N.V. (SYNDICS DE)

Référence neutre : 2001 CSC 90.

No du greffe : 27290.

2001 : 20 mars; 2001 : 20 décembre.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Tribunaux — Compétence — Cour fédérale du Canada — Droit maritime — Suspension des procédu-res — Créancier américain intentant en Cour fédérale une action fondée sur le droit maritime contre un navire belge — Faillite du propriétaire belge survenue par la suite en Belgique — Cour supérieure du Québec délivrant des ordonnances censées statuer sur le sort du navire et le produit de la vente — La Cour fédérale a-t-elle commis une erreur dans l'exercice de son pouvoir discrétionnaire de refuser la demande de suspension des procédures présentée par les syndics? — Loi sur la Cour fédérale, L.R.C. 1985, ch. F-7, art. 50.

À la fin du mois de mars 1996, un navire belge a été saisi à Halifax à la suite d'une action *in rem* que l'intimée Holt, une compagnie américaine, avait intentée devant la Cour fédérale et dans laquelle elle invoquait un pri-vilège maritime pour des services d'acconage fournis aux États-Unis. Le propriétaire belge du navire a, par la suite, été mis en faillite par le tribunal de faillite belge, et les appelants ont été désignés syndics de faillite. Au cours du mois de mai, les syndics appelants ont obtenu auprès de la Chambre civile de la Cour supérieure du Québec une ordonnance « reconn[aissant] et déclar[ant] exécutoir[e] au Québec » l'ordonnance de faillite déli-vrée en Belgique. Leur requête déposée devant la Section

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and in default of defence, judgment was awarded to Holt against the ship, with leave to the trustees to challenge the precise quantum of the judgment if done promptly. The Federal Court ordered the ship appraised and laid down the procedure for its sale. The trustees then requested a stay of proceedings from the Federal Court "pending final disposition of the matter by the Superior Court". They produced various orders from the Quebec Superior Court sitting in bankruptcy one of which purported to dispose of the ship and the proceeds of sale. The Federal Court, Trial Division declined to give effect to the orders of the Canadian bankruptcy court or to stay its own proceedings. The Federal Court of Appeal upheld that decision.

Held: The appeal should be dismissed.

A maritime lien validly created under foreign law will be recognized and given the same priority in Canada as would be given to a maritime lien created in Canada under Canadian maritime law unless opposed to some rule of domestic policy or procedure which prevents the recognition of the right. Holt was entitled to have its maritime lien recognized by the Federal Court in these proceedings.

The Federal Court did not lose jurisdiction to proceed as a result of the various orders of the Quebec Superior Court sitting in bankruptcy. The Federal Court trial judge was not exercising original, ancillary or auxiliary jurisdiction in bankruptcy, but was dealing with *in rem* claims against the ship. Having ruled that he would recognize Holt's security interest as a matter of maritime law, the trial judge rightly concluded that there was no jurisdictional barrier to the Federal Court continuing to adjudicate Holt's *in rem* action against the ship. Insofar as Holt's claim was integrally connected to maritime matters, it lay within the jurisdiction of the Federal Court and it was for that court to decide whether or not to defer to the Belgian bankruptcy court having due regard both to international comity and convenience and to the rights of its own citizens or other persons who are under the protection of our laws.

In addressing the issue of a stay, the trial judge acknowledged the importance of comity and international coordination in bankruptcy matters. Having done so, he went on to place primary emphasis on the fact he was dealing with an *in rem* action by secured creditors against a ship which at the time of the bankruptcy the Federal Court had already arrested and at the time of the

de première instance de la Cour fédérale en vue d'obtenir l'ajournement des procédures *in rem* contre le navire a été rejetée et, faute de défense, Holt a obtenu jugement contre le navire, les syndics étant autorisés à contester le montant accordé à la condition d'agir promptement. La Cour fédérale a ordonné l'évaluation du navire et établi la procédure à suivre pour le vendre. Les syndics ont alors demandé à la Cour fédérale de suspendre les procédures « en attendant le règlement définitif de l'affaire par la Cour supérieure ». Ils ont produit diverses ordonnances de la Cour supérieure du Québec siégeant en matière de faillite, dont l'une était censée statuer sur le sort du navire et le produit de la vente. La Section de première instance de la Cour fédérale a refusé de mettre à exécution les ordonnances du tribunal de faillite canadien et de suspendre ses propres procédures. La Cour d'appel fédérale a confirmé cette décision.

Arrêt : Le pourvoi est rejeté.

Un privilège maritime validement créé sous le régime d'une loi étrangère est reconnu et se voit accorder, au Canada, la même priorité qu'un privilège maritime créé au Canada sous le régime du droit maritime canadien, à moins qu'il n'aille à l'encontre d'une règle quelconque de politique ou de procédure intérieure qui en empêche la reconnaissance. Holt avait droit en l'espèce à la reconnaissance de son privilège maritime par la Cour fédérale.

La Cour fédérale n'a pas perdu compétence à la suite des diverses ordonnances délivrées par la Cour supérieure du Québec siégeant en matière de faillite. Le juge de la Section de première instance de la Cour fédérale n'exer-çait pas une juridiction de première instance, auxiliaire ou subordonnée en matière de faillite, mais était plutôt saisi de réclamations *in rem* contre le navire. Après avoir décidé de reconnaître la garantie de Holt sur le plan du droit maritime, le juge de première instance a conclu à juste titre qu'aucune entrave juridictionnelle n'empêchait la Cour fédérale de continuer d'instruire l'action *in rem* de Holt contre le navire. Dans la mesure où la réclama-tion de Holt était entièrement liée aux affaires maritimes, elle relevait de la compétence de la Cour fédérale et il appartenait à cette cour de décider si elle devait s'en remettre au tribunal de faillite belge, compte tenu à la fois de la courtoisie et des convenances internationales et des droits de ses propres citoyens ou des autres personnes qui sont sous la protection de nos lois.

En examinant la question de la suspension, le juge de première instance a reconnu l'importance de la cour-toisie et de la coordination internationale en matière de faillite. Il a ensuite insisté principalement sur le fait qu'il était saisi d'une action *in rem* intentée par des créanciers garantis contre un navire dont la Cour fédérale avait déjà ordonné la saisie au moment de la faillite, et dont il avait

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interventions of the Canadian bankruptcy court he had already ordered appraised and sold.

The appellants' strongest argument is that the parties and the subject matter of the dispute are but weakly connected to Canada. However, lack of substantive connection to any particular jurisdiction, including their home port, is a feature of ships engaged in international maritime commerce. The trial judge considered the relevant factors in reaching his conclusion that the Federal Court was the appropriate forum to resolve Holt's secured claim against the ship. He committed no error in principle and did not refuse to take into consideration any major element appropriate for the determination of the case. In the absence of such error, the exercise of his discretion should be affirmed.

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Referred to: *Antwerp Bulkcarriers, N.V. (Re)*, [2001] 3 S.C.R. 951, 2001 SCC 91; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *In re Treco*, 240 F.3d 148 (2001); *Laane and Baltser v. Estonian State Cargo & Passenger Steamship Line*, [1949] S.C.R. 530; *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683; *The Tolten*, [1946] P. 135; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165; *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17; *Roberts v. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218; *Re Walker* (1998), 5 C.B.R. (4th) 123; *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *The Strandhill v. Walter W. Hodder Co.*, [1926] S.C.R. 680; *Todd Shipyards Corp. v. Altema Compania Maritima S.A.*, [1974] S.C.R. 1248; *Marlex Petroleum Inc. v. Har Rai (The)*, [1987] 1 S.C.R. 57, aff'g [1984] 2 F.C. 345; *Riordon Co. v. Danforth Co.*, [1923] S.C.R. 319; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Galbraith v. Grimshaw*, [1910] A.C. 508; *Anantapadmanabhaswami v. Official Receiver of Secunderabad*, [1933] A.C. 394; *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752; *Zingre v. The Queen*, [1981] 2 S.C.R. 392; *Spencer v. The Queen*, [1985] 2 S.C.R. 278; *Hilton v. Guyot*, 159 U.S. 113 (1895); *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N PLC*, [1993] 4 S.C.R. 289; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Canada Southern Railway Co. v. Gebhard*, 109 U.S. 527 (1883); *Allen v. Hanson* (1890), 18 S.C.R. 667; *Re Breakwater Co.* (1914), 33 O.L.R. 65; *Re E. H. Clarke & Co.*, [1923] 1 D.L.R. 716; *Re Stewart & Matthews,*

déjà ordonné l'évaluation et la vente au moment des interventions du tribunal de faillite canadien.

L'argument le plus solide des appelants veut que les parties et l'objet du litige ne soient que faiblement liés au Canada. Cependant, l'absence de lien important avec un ressort particulier, y compris leur port d'attache, est une caractéristique des navires qui servent au commerce maritime international. Le juge de première instance a tenu compte des facteurs pertinents pour conclure que la Cour fédérale était le tribunal compétent pour régler la réclamation garantie de Holt contre le navire. Il n'a commis aucune erreur de principe et n'a pas refusé de tenir compte d'un élément prépondérant en l'espèce. En l'absence d'une telle erreur, il y a lieu de confirmer la validité de l'exercice de son pouvoir discrétionnaire.

Jurisprudence

Arrêts mentionnés : *Antwerp Bulkcarriers, N.V. (Re)*, [2001] 3 R.C.S. 951, 2001 CSC 91; *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897; *In re Treco*, 240 F.3d 148 (2001); *Laane and Baltser c. Estonian State Cargo & Passenger Steamship Line*, [1949] R.C.S. 530; *Q.N.S. Paper Co. c. Chartwell Shipping Ltd.*, [1989] 2 R.C.S. 683; *The Tolten*, [1946] P. 135; *Olympia & York Developments Ltd. c. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165; *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17; *Roberts c. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218; *Re Walker* (1998), 5 C.B.R. (4th) 123; *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157; *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061; *The Strandhill c. Walter W. Hodder Co.*, [1926] R.C.S. 680; *Todd Shipyards Corp. c. Altema Compania Maritima S.A.*, [1974] R.C.S. 1248; *Marlex Petroleum Inc. c. Har Rai (Le)*, [1987] 1 R.C.S. 57, conf. [1984] 2 C.F. 345; *Riordon Co. c. Danforth Co.*, [1923] R.C.S. 319; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Galbraith c. Grimshaw*, [1910] A.C. 508; *Anantapadmanabhaswami c. Official Receiver of Secunderabad*, [1933] A.C. 394; *ITO—International Terminal Operators Ltd. c. Miida Electronics Inc.*, [1986] 1 R.C.S. 752; *Zingre c. La Reine*, [1981] 2 R.C.S. 392; *Spencer c. La Reine*, [1985] 2 R.C.S. 278; *Hilton c. Guyot*, 159 U.S. 113 (1895); *Succession Ordon c. Grail*, [1998] 3 R.C.S. 437; *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077; *Hunt c. T&N PLC*, [1993] 4 R.C.S. 289; *Tolofson c. Jensen*, [1994] 3 R.C.S. 1022; *Canada Southern Railway Co. c. Gebhard*, 109 U.S. 527 (1883); *Allen c. Hanson* (1890), 18 R.C.S. 667; *Re Breakwater Co.* (1914), 33 O.L.R. 65; *Re E. H. Clarke & Co.*, [1923] 1 D.L.R. 716; *Re Stewart & Matthews, Ltd. and The Winding-Up Act* (1916),

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10 W.W.R. 154; *Antares Shipping Corp. c. Le navire « Capricorn »*, [1977] 2 R.C.S. 422; *The Atlantic Star*, [1973] 2 All E.R. 175; *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561; *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3.

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2001 SCC 90 (CanLII)

David G. Colford, for the appellants.

Thomas E. Hart and *Jane O'Neill*, for the respondent.

The judgment of the Court was delivered by

Binnie J. — The problems of international bankruptcies have excited much recent judicial and academic commentary. In this appeal, we are required to determine whether a maritime law proceeding by a U.S. creditor against a Belgian ship in a Canadian court ought to have been stayed in deference to a Belgian court dealing with the subsequent bankruptcy of its Belgian shipowner. Deference to the Belgian bankruptcy court, it is argued, was required by the principles of international comity. Despite the obvious benefits of international coordination of bankruptcies that spread their financial wreckage across multiple jurisdictions, the Federal Court of Canada declined to stay its proceedings under Canadian maritime law. The present appeal is from its decision. The companion case, *Antwerp Bulkcarriers, N.V. (Re)*, [2001] 3 S.C.R. 951, 2001 SCC 91, released at the same time, deals with the appeal from the Quebec Court of Appeal on the bankruptcy side of the concurrent and interconnected proceedings.

The history of this litigation, in brief summary, is as follows. On March 30, 1996, the M/V "Brus-sel" (the "Ship") was arrested in Canadian waters near the entrance to Halifax harbour by order of the Federal Court of Canada. A week later, its Belgian owner made an assignment in bankruptcy at Antwerp with debts vastly exceeding its assets. The U.S. creditor, Holt Cargo Systems Inc. ("Holt"), persisted with its *in rem* action. Four months later, after a storm of motions and applications in the Federal Court and the Superior Court of Quebec sitting in Bankruptcy, with periodic interventions by the Eleventh Chamber of the Commercial Court of the Judicial District of Antwerp (the "Belgian bankruptcy court") and a related order by a U.S. bankruptcy court, the Ship was sold over the objection of the trustees in bankruptcy. The Federal Court ruled

David G. Colford, pour les appelants.

Thomas E. Hart et *Jane O'Neill*, pour l'intimée.

Version française du jugement de la Cour rendu par

1 Le juge Binnie — Les problèmes de faillites internationales ont récemment fait l'objet de nombreux commentaires jurisprudentiels et doctrinaux. Dans le présent pourvoi, nous devons décider si des procédures en droit maritime qu'une créancière américaine a engagées contre un navire belge devant un tribunal canadien auraient dû être suspendues par déférence pour le tribunal belge saisi de la faillite subséquente du propriétaire belge du navire. Cette déférence pour le tribunal de faillite belge découlait, soutient-on, des principes de courtoisie internationale. Malgré les avantages évidents qu'offre la coordination internationale des faillites ayant des répercussions financières dans plus d'un ressort, la Cour fédérale du Canada a refusé de suspendre ses procédures en droit maritime canadien. C'est cette décision qui fait l'objet du présent pourvoi. L'arrêt connexe, *Re Antwerp Bulkcarriers, N.V.*, [2001] 3 R.C.S. 951, 2001 CSC 91, rendu simulta-nément, fait suite à l'appel interjeté contre un arrêt de la Cour d'appel du Québec portant sur l'aspect « faillite » des procédures concomitantes et étroite-ment liées.

2 Voici un bref historique du présent litige. Le 30 mars 1996, le N/M « Brussel » (le « navire ») a été saisi dans les eaux canadiennes, près de l'entrée du port de Halifax, conformément à une ordonnance de la Cour fédérale du Canada. Une semaine plus tard, le propriétaire du navire, dont le passif excédait largement l'actif, a fait cession de ses biens à Anvers, en Belgique. La créancière américaine, Holt Cargo Systems Inc. (« Holt »), a maintenu son action *in rem*. Quatre mois plus tard, après une pluie de requêtes et de demandes en Cour fédérale et en Cour supérieure du Québec siégeant en matière de faillite, ponctuée d'interventions de la part de la Onzième Chambre du Tribunal de commerce du district judi-ciaire d'Anvers (le « tribunal de faillite belge ») et d'une ordonnance connexe délivrée par un tribunal de faillite américain, le navire a été vendu malgré

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that the proceeds of the sale are eventually to be distributed to secured creditors, including the respondent, depending on the outcome of this appeal.

3 The Superior Court of Quebec sitting in Bankruptcy (the "Canadian bankruptcy court") played a potentially important role in responding to the request for assistance from the Belgian Commercial Court exercising Belgian bankruptcy jurisdiction. However, I believe the trustees asked for more assistance from the Canadian bankruptcy court than could lawfully be given, and that the Federal Court did not err in principle in refusing a stay of the maritime law proceedings.

4 I would therefore dismiss the appeal.

I. Facts

5 The Ship was arrested at Halifax under a warrant of arrest issued at the instance of Holt, a U.S. company incorporated under the laws of New Jersey. The warrant for arrest was issued in connection with an *in rem* action commenced by Holt the same day in the Federal Court of Canada against the "owners, charterers and all others interested in the ship", and the Ship itself. The M/V "Brussel" was owned by Antwerp Bulkcarriers N.V. which, with other interrelated companies, carried on the business of international carriage of goods by sea.

6 Holt's action was for unpaid fees and charges for stevedoring and other related services provided to the Ship at Gloucester City, New Jersey, in the United States between 1994 and 1996 inclusive. No part of the debt was incurred in Canada and neither the Ship nor its creditors were ordinarily resident here.

7 Following the arrest of the Ship, cargo and container owners, shippers, suppliers, insurers and others also filed claims in the Federal Court. In total, statements of claim were filed in 27 separate actions. Moreover, notices of claim were filed in

l'opposition des syndics de faillite. La Cour fédérale a décidé que le produit de la vente serait réparti ultérieurement entre les créanciers garantis, dont l'intimée, selon l'issue du présent pourvoi.

La Cour supérieure du Québec siégeant en matière de faillite (le « tribunal de faillite cana-dien ») a joué un rôle potentiellement important en répondant à la demande de concours présentée par le Tribunal de commerce belge exerçant compé-tence en matière de faillite. Cependant, j'estime que les syndics ont demandé au tribunal de faillite cana-dien un concours plus important que ce qui pouvait être accordé légalement, et que la Cour fédérale n'a commis aucune erreur de principe en refusant la suspension des procédures en droit maritime.

En conséquence, je suis d'avis de rejeter le pourvoi.

I. Les faits

Le navire a été saisi à Halifax en vertu d'un mandat de saisie décerné à la demande de Holt, une compagnie américaine constituée en vertu des lois du New Jersey. Le mandat de saisie a été décerné dans le cadre d'une action *in rem* que Holt avait intentée le même jour devant la Cour fédérale du Canada contre les « propriétaires, affréteurs et toutes autres personnes ayant un droit sur le navire », et le navire lui-même. Le N/M « Brussel » appartenait à Antwerp Bulkcarriers, N.V. qui, conjointement avec d'autres compagnies étroitement liées, exploitait une entreprise de transport maritime international de marchandises.

L'action de Holt visait le paiement des services d'acconage et autres services connexes fournis au navire à Gloucester City (New Jersey), aux États-Unis, entre 1994 et 1996 inclusivement. Aucune partie de la dette n'a été contractée au Canada, et ni le navire ni ses créanciers n'avaient leur lieu de résidence habituelle au Canada.

À la suite de la saisie du navire, les propriétaires de la cargaison et des conteneurs, les expéditeurs, les fournisseurs, les assureurs et d'autres personnes ont également déposé des réclamations en Cour fédérale. En tout, des déclarations ont été déposées

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Holt's *in rem* action against the Ship by more than 20 claimants in response to the Federal Court's order, discussed below, that the Ship be appraised and sold.

On April 5, 1996, a week after the Ship's arrest, the shipowner was adjudged bankrupt by the Belgian bankruptcy court, which appointed the appellants, T. Van Doosselaere and F. De Roy, as trustees in bankruptcy (the "Trustees"). Under Belgian law, the Trustees were required to take possession of all assets of the bankrupt holding company and its bankrupt affiliated companies, wherever situated. The major assets of the group of bankrupt companies were six cargo vessels, and at the time of the bankruptcy order at least five of these were under arrest in ports in Israel, Singapore, New Zealand, the Bahamas and, as stated, Canada. Other assets owned or leased by the debtors, including unpaid freight and shipping containers, had also been arrested, detained or threatened with seizure at various locations throughout the world. The Trustees filed applications in jurisdictions where proceedings had been commenced against the debtors seeking the release of the bankrupts' assets from arrest, preventing further seizure and arrest of their assets, and directing the submission of all claims against them to the bankruptcy proceedings in Belgium.

Faced with these difficult circumstances, the appellant Trustees urged on the Federal Court on several occasions the need for international cooperation in the resolution of bankruptcies and insolvencies that cross national boundaries. The effect of these arguments was to advocate deference to the Belgian courts, being the courts of the bankrupts' domicile. Adherence to what is sometimes called the "Grab Rule", in which each national court takes charge of assets in its own jurisdiction for the benefit of creditors who win the race to its courthouse, was said to be destructive of international order and fairness. (As will be seen, there is much merit in these submissions.)

dans le cadre de 27 actions distinctes. De plus, réagissant à l'ordonnance d'évaluation et de vente du navire délivrée par la Cour fédérale et analysée plus loin, plus de 20 réclamants ont déposé des avis de réclamation dans l'action *in rem* de Holt contre le navire.

8 Le 5 avril 1996, soit une semaine après la saisie du navire, le propriétaire du navire a été mis en faillite par le tribunal de faillite belge, qui a désigné les appelants T. Van Doosselaere et F. De Roy syndics de faillite (les << syndics >>). Sous le régime du droit belge, les syndics étaient tenus de prendre possession de tous les éléments d'actif de la société de portefeuille faillie et de ses sociétés affiliées faillies, oil qu'ils soient. Les principaux éléments d'actif du groupe de sociétés faillies étaient six cargos dont au moins cinq étaient saisis dans des ports d'Israël, de Singapour, de Nouvelle-Zélande, des Bahamas et, comme nous l'avons vu, du Canada, au moment de l'ordonnance de faillite. D'autres éléments d'actif appartenant aux débiteurs ou loués par eux, notam-ment du fret et des conteneurs d'expédition impayés, avaient également été saisis, retenus ou menacés de saisie à différents endroits dans le monde. Dans les ressorts oil des procédures avaient été engagées contre les débiteurs, les syndics ont présenté des demandes visant à faire lever la saisie des éléments d'actif des faillies, à empêcher d'autres saisies de leurs éléments d'actifs et à obtenir que toutes les réclamations les visant soient présentées dans le cadre des procédures de faillite en Belgique.

9 Aux prises avec cette situation difficile, les syndics appelants ont souligné, à maintes reprises, en Cour fédérale la nécessité de la coopération internationale pour régler les faillites et les insolvabilités qui débordent les frontières nationales. Ils prônaient ainsi la déférence pour les tribunaux belges, qui sont les tribunaux du domicile des faillies. Ils ont fait valoir que le respect de ce qu'on appelle parfois la [TRADUCTION] << règle de l'appropriation >>, suivant laquelle chaque tribunal national s'occupe des éléments d'actif situés dans son propre ressort au profit des créanciers qui obtiennent gain de cause devant lui, nuit à l'ordre et à l'équité internationales. (Comme nous le verrons, ces observations sont très justes.)

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10 The "universalist" position advocated by the appellant Trustees was put forward in a series of motions and applications before the courts of Quebec and the Federal Court of Canada. A detailed summary of the complicated procedural history of this dispute is set out in an Appendix to the judgment in the companion case, *Antwerp Bulk-carriers, N.V.*, *supra*. What follows is a summary of the motions and applications most relevant to this appeal:

May 3, 1996

The appellant Trustees appear before MacKay J. of the Federal Court, Trial Division, to support moving the Ship to a "safe berth" at Halifax and to "remain under arrest" at its new location "until further orders are given by this Court". Order granted. The Ship was moved and remained there until its sale closed on August 1, 1996.

May 9, 1996

The appellant Trustees move *ex parte* before the Quebec Superior Court, Civil Chamber (i.e., not specified to be sitting in bankruptcy) and obtain an order which "recognized and declared executory in Quebec" the Belgian bankruptcy order (emphasis added).

May 13, 1996

The appellant Trustees apply to the Federal Court to have the *in rem* proceedings against the Ship adjourned for four weeks to enable them to make further inquiries about the claims and assets of the bankrupt estate. They do not undertake to file a defence in the action, or indeed suggest that a valid defence exists. MacKay J. expresses concern that the Ship has been under arrest for six weeks and that dock charges and other expenses are mounting. He concludes that he is exercising a maritime law jurisdiction, not a bankruptcy jurisdiction. The adjournment is denied.

L'approche « universaliste » préconisée par les syndics appelants a été énoncée dans une série de requêtes et de demandes déposées devant les tribunaux du Québec et la Cour fédérale du Canada. On trouve un résumé détaillé de l'historique procédural complexe du présent litige à l'annexe de l'arrêt connexe *Antwerp Bulkcarriers, N.V.*, précité. Voici un résumé des requêtes et des demandes les plus pertinentes en l'espèce :

3 mai 1996

Les syndics appelants comparaissent devant le juge MacKay de la Section de première instance de la Cour fédérale pour appuyer le déplacement du navire vers un [TRADUCTION] « poste d'amarrage sûr » à Halifax et pour qu'il y « demeure sous saisie jusqu'à ce que notre cour en ordonne autrement ». L'ordonnance est accordée. Le navire est déplacé et reste au même endroit jusqu'à sa vente, le 1er août 1996.

9 mai 1996

Les syndics appelants déposent une requête *ex parte* devant la Cour supérieure du Québec, Cham-bre civile (c'est-à-dire non désignée comme sié-geant en matière de faillite), et obtiennent une ordonnance qui [TRADUCTION] « reconn[aît] et déclar[e] exécutoir[e] au Québec » l'ordonnance de faillite délivrée en Belgique (je souligne).

13 mai 1996

Les syndics appelants demandent à la Cour fédé-rale d'ajourner les procédures *in rem* contre le navire pour une période de quatre semaines afin de leur permettre d'obtenir plus de renseignements sur les réclamations et l'actif de la faillie. Ils ne s'engagent pas à produire une défense à l'action et n'indiquent pas non plus qu'il existe un moyen de défense valide. Le juge MacKay s'inquiète du fait que le navire est saisi depuis six semaines et que les droits de bassin et autres dépenses s'accumulent. Il conclut qu'il exerce une compétence en droit maritime et non une

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compétence en matière de faillite. L’ajournement est refusé.

May 14, 1996

In default of defence, judgment is awarded to Holt against the Ship for $572,128.06, with leave to the Trustees to challenge the precise quantum of the judgment if done promptly.

May 17, 1996

The Federal Court orders the Ship appraised and lays down the procedure for its sale. The Trustees appeal. They also seek review and reconsideration of the orders of appraisal and sale of the Ship.

June 14, 1996

The appellant Trustees request a stay of proceedings from the Federal Court "pending final disposition of the matter by the [Quebec] Superior Court". The Trustees produce an *ex parte* order dated June 11, 1996 obtained from the Quebec Superior Court sitting in Bankruptcy that purports to dispose of the Ship and the proceeds of sale. Despite the Trustees' participation in the Federal Court proceedings over the previous six weeks, no notice of the application in Montreal was given to the Federal Court litigants. It subsequently emerges that the Quebec judge hearing the *ex parte* application was not told that the Ship has been arrested and ordered sold by the Federal Court. The stay is denied for reasons eventually issued on April 9, 1997. In MacKay J.'s view, this is still a maritime law case.

July 9, 1996

The appellant Trustees return before the Federal Court seeking to have the proceeds paid to them if the sale goes ahead, as ordered, on July 12. They are now armed with a further order dated June 28, 1996 of the Quebec Superior Court sitting in Bankruptcy, in which Guthrie J. confirmed with variations the *ex parte* order of June 11, after notice to all interested parties and a full hearing on the merits. It is the June 28, 1996 order that is the centrepiece of

14 mai 1996
Faute de défense, un jugement ordonnant de verser à Holt la somme de 572 128,06 $ est rendu contre le navire, les syndics étant autorisés à contester le montant accordé à la condition d'agir prompte-ment.

17 mai 1996

La Cour fédérale ordonne l'évaluation du navire et établit la procédure à suivre pour le vendre. Les syndics interjettent appel. Ils sollicitent également la révision et le réexamen des ordonnances d'évaluation et de vente du navire.

14 juin 1996

Les syndics appelants demandent à la Cour fédé-rale de suspendre les procédures [TRADUCTION] « en attendant le règlement définitif de l'affaire par la Cour supérieure du Québec ». Les syndics produisent une ordonnance ex parte datée du 11 juin 1996, qu'ils ont obtenue auprès de la Cour supérieure du Québec siégeant en matière de faillite et qui est censée statuer sur le sort du navire et le produit de la vente. Bien que les syndics aient participé aux procédures devant la Cour fédérale au cours des six semaines précédentes, aucun avis de la requête déposée à Montréal n'a été donné aux parties devant la Cour fédérale. Il en ressort donc que le juge du Québec qui a entendu la requête ex parte n'a pas été avisé que le navire avait été saisi et que la Cour fédérale en avait ordonné la vente. La suspension est refusée pour les motifs déposés ultérieurement le 9 avril 1997. De l'avis du juge MacKay, il s'agit toujours d'une affaire de droit maritime.

9 juillet 1996

Les syndics appelants s'adressent de nouveau à la Cour fédérale dans le but d'obtenir le produit de la vente si cette dernière a lieu le 12 juillet, tel qu'ordonné. Ils sont maintenant munis d'une autre ordonnance de la Cour supérieure du Québec siégeant en matière de faillite, qui est datée du 28 juin 1996 et dans laquelle le juge Guthrie, après avoir avisé toutes les parties intéressées et avoir tenu une audience complète sur le fond, confirme l'ordon-

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the appellants' argument. I therefore reproduce its relevant portions below:

. . . THE COURT:

. . .

RECOGNIZES the Trustees as trustees in the bankruptcy of Antwerp Bulkcarriers, N.V., with the duty and power to take possession of, realise upon and confirm the assets of the Bankrupt situated anywhere in Canada, subject however to the rights, if any, of any creditors with claims secured under the laws of Canada, as by law provided;

PERMITS the sale of the ship "Brussel" to take place in accordance with the judgment rendered by the Federal Court of Canada, Trial Division, on May 17, 1996 provided that such sale is completed and the purchase price paid in full by the close of business in Halifax, Canada on July 12, 1996;

ORDERS that, in the event that the said sale is completed as aforesaid, the net proceeds of such sale (after payment of all expenses of advertisement of the sale, appraisal fees, insurance and all other costs, disbursements, commissions and other expenses necessary for the sale) be paid promptly to the Trustees for distribution amongst the creditors of the Bankrupt in observance of all their rights and in conformity with Belgian law;

ORDERS that, in the event the said sale is not so completed, the ship "Brussel" be delivered into the possession of the Trustees so that they can proceed to the sale of the said ship, locally or in any other place they consider more appropriate, and to the distribution of the net proceeds amongst the creditors of the Bankrupt in observance of all their rights and in conformity with Belgian law;

REQUESTS the aid of the Supreme Court of Nova Scotia with jurisdiction in bankruptcy, insofar as such aid may be necessary under the laws of Nova Scotia to give effect to the present judgment;

ORDERS that the present judgment be served promptly on Chief Justice of the Supreme Court of Nova Scotia, on the Marshall of the Federal Court of Canada in Halifax, on the Sheriff of the Halifax Regional Municipality, and on all parties who have asserted a claim in Canada in respect of the ship "Brussel"; . . . [Emphasis added.]

nance ex parte du 11 juin, sous réserve de certaines modifications. C'est l'ordonnance du 28 juin 1996 qui est l'élément central de l'argumentation des appelants. J'en reproduis donc ci-après les parties pertinentes :

[TRADUCTION] . . . LA COUR :

. . .

RECONNAÎT les syndics en qualité de syndics de la faillite de Antwerp Bulkcarriers, N.V., ayant l'obligation et le pouvoir de prendre possession des éléments d'actif de la faillie où qu'ils soient au Canada, de les réaliser et de les confirmer, sous réserve toutefois des droits des créanciers dont les réclamations sont garanties sous le régime des lois du Canada, conformément à la loi;

PERMET que le navire « Brussel » soit vendu conformément au jugement rendu par la Section de première instance de la Cour fédérale du Canada, le 17 mai 1996, à la condition que cette vente soit conclue et que le prix d'achat soit intégralement versé à la fin de la journée ouvrable à Halifax, au Canada, le 12 juillet 1996;

ORDONNE que, si ladite vente est conclue comme susdit, le produit net de la vente (après paiement de toutes les dépenses d'annonce de la vente, d'évaluation, d'assurance et autres coûts, débours, commissions et autres dépenses nécessaires à la vente) soit versé sans délai aux syndics en vue de sa répartition entre les créanciers de la faillie dans le respect de tous leurs droits et en conformité avec le droit belge;

ORDONNE que, si ladite vente n'est pas ainsi conclue, le navire « Brussel » soit remis aux syndics pour qu'ils le vendent, sur place ou à tout autre endroit qu'ils estiment plus convenable, et en répartissent le produit net entre les créanciers de la faillie dans le respect de tous leurs droits et en conformité avec le droit belge;

SOLLICITE le concours de la Cour suprême de la Nouvelle-Écosse ayant compétence en matière de faillite, dans la mesure où ce concours pourra être nécessaire sous le régime des lois de la Nouvelle-Écosse pour exécuter le présent jugement;

ORDONNE que le présent jugement soit signifié sans délai au juge en chef de la Cour suprême de la Nou-velle-Écosse, au prévôt de la Cour fédérale du Canada à Halifax, au shérif de la municipalité régionale de Halifax, et à toutes les parties qui ont fait valoir une réclamation au Canada à l'égard du navire « Brussel »; . . . [Je souligne.]

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It is clear from the order of June 28, 1996 that the Canadian bankruptcy court is now asserting control over the Ship and the related proceedings. It "permits" the sale ordered by MacKay J. to proceed, but only if it is completed by July 12. The proceeds of sale are to go to the appellant Trustees, not to the secured claimants who are litigating in the Federal Court. If the sale is not completed by July 12, the Ship is to be turned over to the Trustees irrespective of the orders of the Federal Court. The Supreme Court of Nova Scotia is requested to "aid" in giving effect to these directions.

As of July 1996, it will be noted, default judgment had been signed in the *in rem* action, the Ship had been appraised, and bids were being invited from potential purchasers. MacKay J. eventually ruled that the Trustees could obtain the proceeds of sale only if they posted security to answer the claims of the secured creditors. This was never forthcoming. His reasons were compendiously explained in a subsequent judgment of April 9, 1997, as will now be described.

II. Judicial History

A. *Federal Court, Trial Division*, [1997] 3 F.C. 187

MacKay J. said he accepted the principle of comity of nations but pointed out that "the Court is urged to respect jurisdiction claimed by others and to forego considering claims to relief in proceedings long established in maritime law" (para. 45). The Trustees alleged that Holt was forum shopping, but MacKay J. said he was "not persuaded it did more than seek recovery of its claim against the vessel where the ship was located" (para. 46).

MacKay J. "found no persuasive grounds . . . [for the Court] to stay its own processes which were

Il ressort clairement de l'ordonnance du 28 11 juin 1996 que le tribunal de faillite canadien exerce maintenant un contrôle sur le navire et les procédures qui y sont liées. Il << permet >> que la vente ordonnée par le juge MacKay ait lieu, mais seulement à la condition qu'elle soit conclue le 12 juillet au plus tard. Le produit de la vente doit être versé aux syndics appelants et non aux créanciers garantis ayant intenté une action en Cour fédé-rale. Si la vente n'est pas conclue le 12 juillet au plus tard, le navire doit être remis aux syndics indépendamment des ordonnances de la Cour fédérale. Le << concours >> de la Cour suprême de la Nouvelle-Écosse est sollicité pour exécuter ces directives.

Dès juillet 1996, comme nous le verrons, un jugement par défaut avait été rendu dans l'action *in rem*, le navire avait été évalué et les acquéreurs potentiels étaient invités à présenter des soumissions. Le juge MacKay a, par la suite, décidé que les syndics ne pourraient toucher le produit de la vente que s'ils constituaient un cautionnement pour satisfaire aux réclamations des créanciers garantis. Cela ne s'est jamais concrétisé. Comme nous le verrons, ses motifs ont été exposés de manière concise dans un jugement subséquent rendu le 9 avril 1997.

II. Historique des procédures judiciaires

A. *Cour fédérale, Section de première instance*, [1997] 3 C.F. 187

Le juge MacKay a dit qu'il acceptait le principe 13 de la courtoisie internationale, mais il a souligné que << la Cour est instamment priée de respecter la compétence invoquée par d'autres et d'abandonner l'examen des demandes de redressement dans des procédures longtemps établies en droit maritime >> (par. 45). Les syndics ont fait valoir que Holt était à la recherche d'un tribunal favorable, mais le juge MacKay a répondu qu'il n'était << pas persuadé qu'elle a fait plus que chercher à recouvrer sa créance contre le navire là oil il se trouvait >> (par. 46).

Le juge MacKay n'était << pas convaincu [. . .]14 du bien-fondé [pour la cour] [. . .] de suspendre

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then underway, and to permit determination of the outcome to be effectively left to the bankruptcy proceedings of the Commercial Court at Antwerp, recognized by the Superior Court of Quebec" (para. 47). He was "not persuaded that matters before this Court were those of bankruptcy" nor had it been "suggested that any bankruptcy would be based in or administered by any court in Canada" (para. 47). "[T]he balance of convenience favoured denying the stay since the majority of claimants, in Canada and the United States, appeared to be based on the east coast of North America with relatively easy access to the Court's process in Canada" (para. 48). Accordingly, the stay was refused.

15 The claim of the appellant Trustees to the proceeds of the sale of the Ship was based on their view that once the matter was before the bankruptcy court in Quebec, "it alone had jurisdiction over the assets of the bankrupt" (para. 72). MacKay J. disagreed. On the contrary, he ruled "the determinations of this Court in relation to the arrest of a ship, a judgment in default and the sale of the ship, or the determination of a claim by a secured creditor to the proceeds of the sale of the ship, [are not] proceedings in bankruptcy" (para. 74). Therefore, in his view, the involvement of the Canadian bankruptcy court did not divest the Federal Court of jurisdiction.

16 As to the Trustees' argument that the Federal Court, even if it had jurisdiction, should in any event defer to the order for the distribution of the proceeds approved by the Quebec Superior Court sitting in Bankruptcy, MacKay J. held that Canadian law "does not establish a process that in any way bars a secured creditor from realizing on the security given by the debtor before its bankruptcy" (para. 80). A maritime lien is a secured claim. Accordingly, "a maritime lien, attaching before bankruptcy of a ship's owner, may be enforced and the claim based upon it may be realized from proceeds of sale of a ship without restriction under the *Bankruptcy and Insolvency Act*, or, with respect to

ses propres procédures qui avaient alors été mises en branle et de permettre que l'issue de l'affaire soit effectivement laissée aux procédures de faillite [du Tribunal de commerce] d'Anvers qui avaient été reconnues par la Cour supérieure du Québec » (par. 47). Il n'était « pas persuadé du fait que les affaires dont la présente Cour a été saisie relevaient de la faillite », ajoutant que « personne n'a dit que la faillite relèverait d'un tribunal canadien ou serait administrée par un tribunal au Canada » (par. 47). « [L]a prépondérance des inconvénients favorisait le refus de la suspension puisque la majorité des réclamants, au Canada et aux États-Unis, semblaient être établis sur la côte est de l'Amérique du Nord, d'où ils jouissaient d'un accès relativement facile à la Cour, au Canada » (par. 48). En conséquence, la suspension a été refusée.

La réclamation des syndics appelants visant à obtenir le produit de la vente du navire reposait sur leur point de vue que le tribunal de la faillite du Québec « avait compétence exclusive à l'égard des biens de la faillite » dès qu'il était saisi de l'affaire (par. 72). Le juge MacKay n'était pas de cet avis. Au contraire, il a décidé que « les décisions de la présente Cour en matière de saisie d'un navire, de jugement par défaut et de vente du navire ou [. . .] le fait qu'elle tranche la revendication du produit de la vente du navire par un créancier garanti [ne] sont [pas] des procédures de faillite » (par. 74). Il esti-mait donc que l'intervention du tribunal de faillite canadien ne dépouillait pas la Cour fédérale de sa compétence.

Au sujet de l'argument des syndics selon lequel, même si elle avait compétence, la Cour fédérale devrait de toute façon s'en remettre à l'ordonnance de répartition du produit de la vente approuvée par la Cour supérieure du Québec siégeant en matière de faillite, le juge MacKay a conclu que la loi cana-dienne « n'établit pas de processus qui interdit de quelque façon que ce soit à un créancier garanti de réaliser la garantie constituée par le débiteur avant sa faillite » (par. 80). Un privilège maritime est une créance garantie. En conséquence, « un privilège maritime, constitué avant la faillite du propriétaire d'un navire, peut être exécuté et la réclamation qui prend appui sur celui-ci peut se réaliser sur le

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other views, by the courts acting under that Act" (para. 83). MacKay J. thus concluded that Holt and the other secured creditors should have their secured claims paid out of the proceeds of sale in priority to the Trustees. (In the end, the fund was exhausted by the secured claims.)

produit de la vente du navire sans restriction imposée soit par la *Loi sur la faillite et l'insolvabilité*, soit, avec égards pour les opinions contraires, par les tribunaux agissant sous le régime de cette Loi » (par. 83). Le juge MacKay a donc conclu que les réclamations garanties de Holt et des autres créanciers garantis devaient être payées sur le produit de la vente avant tout versement aux syndics. (Finalement, les réclamations garanties ont épuisé le fonds.)

B. *Federal Court of Appeal* (1999), 173 D.L.R. (4th) 493

B. *Cour d'appel fédérale*, [1999] A.C.F. nº 337 (QL)

Noël J.A. observed, at para. 4, that Holt would "derive a distinct legal advantage" from having its claim determined by the Federal Court. Relying on this Court's decision in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, he acknowledged that juridical advantage is but one factor to consider when determining whether a Canadian court should stay its proceedings in favour of a foreign court. However, this factor takes on "considerable significance" (para. 4) when it arises in the normal course of litigation and not as a result of forum shopping. Here there had been a finding that no such forum shopping had occurred. "Having arrested the ship where it was found, the respondent could legitimately expect that Canadian maritime law would apply" (para. 5). Using the words of this Court in *Amchem*, *supra*, Noël J.A. found that Holt's "claim had a 'real and substantial connection' with Canadian maritime law and there was a 'reasonable expectation' that the rights arising thereunder would be enforced" (para. 5). Accordingly, he concluded, MacKay J. did not err in exercising his discretion against a stay.

17 Le juge Noël a fait observer que Holt « bénéficier[ait] d'un net avantage juridique » si sa réclamation était examinée par la Cour fédé-rale (par. 4). Se fondant sur l'arrêt de notre Cour *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897, il a reconnu que l'avantage juridique n'est qu'un des facteurs dont on peut tenir compte pour décider si un tribunal canadien devrait suspendre ses procédures par déférence pour un tribunal étranger. Cependant, lorsque l'avantage résulte du cours normal du litige et non de la recherche du tribunal le plus favorable, ce facteur revêt une « importance considérable » (par. 4). On a conclu, en l'espèce, qu'une telle recherche du tribunal le plus favorable n'avait pas eu lieu. « Ayant saisi le navire là où il se trouvait, l'intimée pouvait légiti-mement s'attendre à ce que le droit maritime cana-dien s'applique » (par. 5). Reprenant les propos de notre Cour dans l'arrêt *Amchem*, précité, le juge Noël a estimé que « la réclamation [de Holt] avait un "lien réel et important" avec le droit maritime canadien et [qu']on pouvait "raisonnablement s'attendre" à ce que les droits en découlant soient exercés » (par. 5). En conséquence, a-t-il conclu, le juge MacKay n'a pas commis d'erreur en exer-çant son pouvoir discrétionnaire de refuser la suspension.

With respect to the intervention of the Quebec Superior Court sitting in Bankruptcy, Noël J.A. said "comity also extends to domestic courts" (para. 10). In his view, it was "significant that domestically at least, the secured nature of maritime liens has

En ce qui concerne l'intervention de la Cour 18 supérieure du Québec siégeant en matière de faillite, le juge Noël a dit que « [l]es tribunaux internes sont également assujettis à un devoir réciproque de courtoisie » (par. 10). À son avis,

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always been maintained in the context of bankruptcy proceedings without the need for either of the two jurisdictions to supersede one another" (para. 10). By seeking an *ex parte* order from the Quebec Superior Court for the release of the Ship, "the appellants launched what is in effect a collateral attack on MacKay J.'s decision" (para. 12). In Noël J.A.'s view, the proper approach would have been to seek "the assistance of the Federal Court which is the only Court that had jurisdiction over the arrested ship and the respondent's *in rem* claim" (para. 13). The appeal was accordingly dismissed.

il était « significatif qu'en droit interne du moins, le caractère garanti des privilèges maritimes a toujours été reconnu dans les procédures de faillite sans qu'il soit nécessaire qu'une juridiction en supplante une autre » (par. 10). En demandant à la Cour supérieure du Québec de rendre une ordonnance *ex parte* enjoignant de lever la saisie du navire, « les appelants se sont de fait lancés dans une contestation parallèle de la décision du juge MacKay » (par. 12). D'après le juge Noël, il aurait convenu davantage de « s'adresser [. . .] à la Cour fédérale, qui est la seule juridiction com-pétente sur le navire saisi et sur la réclamation *in rem* de l'intimée » (par. 13). L'appel a donc été rejeté.

III. Relevant Statutory Provisions

III. Dispositions législatives pertinentes

Federal Court Act, R.S.C. 1985, c. F-7

Loi sur la Cour fédérale, L.R.C. 1985, ch. F-7

3. The court of law, equity and admiralty in and for Canada now existing under the name of the Federal Court of Canada is hereby continued as an additional court for the better administration of the laws of Canada and shall continue to be a superior court of record having civil and criminal jurisdiction.

3. Tribunal de droit, d'equity et d'amirauté du Canada, la Cour fédérale du Canada est maintenue à titre de tribunal additionnel propre à améliorer l'application du droit canadien. Elle continue d'être une cour supérieure d'archives ayant compétence en matière civile et pénale.

17. . . .

(6) Where an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Trial Division has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on the Court.

17. . . .

(6) La Section de première instance n'a pas compétence dans les cas où une loi fédérale donne compétence à un tribunal constitué ou maintenu sous le régime d'une loi provinciale sans prévoir expressément la compétence de la Cour fédérale.

22. (1) The Trial Division has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.

22. (1) La Section de première instance a compétence concurrente, en première instance, dans les cas — opposant notamment des administrés — où une demande de réparation ou un recours est présenté en vertu du droit maritime canadien ou d'une loi fédérale concernant la navigation ou la marine marchande, sauf attribution expresse contraire de cette compétence.

50. (1) The Court may, in its discretion, stay proceedings in any cause or matter,

(a) on the ground that the claim is being proceeded with in another court or jurisdiction; or

(b) where for any other reason it is in the interest of justice that the proceedings be stayed.

50. (1) La Cour a le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :

a) au motif que la demande est en instance devant un autre tribunal;

b) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

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

2. In this Act,

. . .

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable;

Stay of Proceedings

69.3 (1) Subject to subsection (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.

(2) Subject to sections 79 and 127 to 135 and subsection 248(1), the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders . . . .

Scheme of Distribution

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows: . . .

Jurisdiction of Courts

183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

. . .

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3

2. Les définitions qui suivent s'appliquent à la présente loi.

. . .

« créancier garanti » Personne détenant une hypothèque, un nantissement, une charge, un gage ou un privilège sur ou contre les biens du débiteur ou sur une partie de ses biens, à titre de garantie d'une dette échue ou à échoir, ou personne dont la réclamation est fondée sur un effet de commerce ou garantie par ce dernier, lequel effet de commerce est détenu comme garantie subsidiaire et dont le débiteur n'est responsable qu'indirectement ou secondairement.

Suspension des procédures

69.3 (1) Sous réserve du paragraphe (2) et des articles 69.4 et 69.5, à compter de la faillite d'un débiteur, les créanciers n'ont aucun recours contre le débiteur ou contre ses biens et ne peuvent intenter ou continuer aucune action, exécution ou autre procédure en vue du recouvrement de réclamations prouvables en matière de faillite, et ce jusqu'à la libération du syndic.

(2) Sous réserve des articles 79 et 127 à 135 et du paragraphe 248(1), la faillite d'un débiteur n'a pas pour effet d'empêcher un créancier garanti de réaliser sa garantie ou de faire toutes autres opérations à son égard tout comme il aurait pu le faire en l'absence du présent article, à moins que le tribunal n'en ordonne autrement . . .

Plan de répartition

136. (1) Sous réserve des droits des créanciers garantis, les montants réalisés provenant des biens d'un failli sont distribués d'après l'ordre de priorité de paiement suivant : . . .

Compétence des tribunaux

183. (1) Les tribunaux suivants possèdent la compétence en droit et en équité qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

. . .

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(*b*) in the Province of Quebec, the Superior Court;

IV. Analysis

20 In this appeal we are urged to adopt a "universalist approach" to bankruptcies and insolvencies that affect more than one jurisdiction. I accept at the outset that bankruptcies that engage multiple jurisdictions may not be administered effectively if each national court goes its own way with the assets that happen physically to be within its control. The chaotic fact situation faced by the Trustees in this case, from Singapore to the Bahamas and Israel to New Zealand, is eloquent testimony to the need for judicial cooperation and international comity.

21 Moreover, it must also be freely acknowledged that the connection between this litigation and Canada is relatively weak. None of the parties (including the Ship) resides here. The debt was incurred in the United States. The shipowner resides in Belgium. There are no bankruptcy proceedings in Canada other than those initiated by the appellant Trustees for recognition of various orders of the Belgian bankruptcy court.

22 Canadian courts have become seized with the dispute only because the vagaries of maritime commerce carried the M/V "Brussel" into Canadian waters on March 30, 1996. It was certainly open to the Federal Court to defer in these matters to the bankruptcy court of the bankrupt's domicile. The question is whether, as contended by the appellant Trustees, the Federal Court was *obliged* to do so. If not, did the Federal Court nevertheless commit an error in the exercise of its discretion not to stay the *in rem* action in deference to the Belgian bankruptcy court?

23 For present purposes, I accept the following convenient definitions of the "universalist approach" and the "territorialist approach" (sometimes referred to as the "Grab Rule"):

b) dans la province de Québec, la Cour supérieure;

IV. Analyse

Dans le présent pourvoi, nous sommes invités à adopter une « approche universaliste » dans les affaires de faillite et d'insolvabilité ayant des répercussions dans plus d'un ressort. J'admets d'emblée que les faillites mettant en cause plus d'un ressort ne peuvent pas être administrées efficacement si chaque tribunal national gère à sa façon les biens qui sont physiquement sous son contrôle. En l'espèce, la situation factuelle chaotique avec laquelle sont aux prises les syndics, de Singapour aux Bahamas et d'Israël à la Nouvelle-Zélande, témoigne éloquemment de la nécessité de la coopération judiciaire et de la courtoisie internationale.

En outre, il faut bien reconnaître que le lien entre le présent litige et le Canada est relativement faible. Aucune des parties (y compris le navire) n'a son lieu de résidence dans notre pays. La dette a été contractée aux États-Unis. Le propriétaire du navire réside en Belgique. Il n'y a, au Canada, aucune instance en matière de faillite autre que les procédures enga-gées par les syndics appelants en vue de faire recon-naître diverses ordonnances délivrées par le tribunal de faillite belge.

Les tribunaux canadiens n'ont été saisis du litige que parce que les aléas du commerce maritime ont fait en sorte que le N/M « Brussel » s'est retrouvé en eaux canadiennes le 30 mars 1996. Il était alors certainement loisible à la Cour fédérale de s'en remettre au tribunal de faillite du domicile de la faillie. La question est de savoir si la Cour fédérale était *tenue* de le faire, comme le préten-dent les syndics appelants. Dans la négative, la Cour fédérale a-t-elle néanmoins commis une erreur lors de l'exercice de son pouvoir discré-tionnaire en ne suspendant pas l'action *in rem* par déférence pour le tribunal de faillite belge?

Aux fins de la présente affaire, je fais miennes les définitions pratiques suivantes de l'« approche universaliste » et de l'« approche territorialiste »

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(parfois appelée [TRADUCTION] « règle de l'appro-priation ») :

> . . . courts and commentators have identified two general approaches to distributing assets in such proceedings. Under the "territoriality" approach, or the "Grab Rule," the court in each jurisdiction where the debtor has assets distributes the assets located in that jurisdiction pursuant to local rules. Under the "universality" approach, a primary insolvency proceeding is instituted in the debtor's domiciliary country, and ancillary courts in other jurisdictions — typically in jurisdictions where the debtor has assets — defer to the foreign proceeding and in effect collaborate to facilitate the centralized liquidation of the debtor's estate according to the rules of the debtor's home country.
>
> (*In re Treco*, 240 F.3d 148 (2d Cir. 2001), at p. 153)

The Federal Court was clearly of the view that it was not in this case choosing between the "universalist" approach and the "Grab Rule". It was making a choice between the conflicting demands of two international systems of commercial dispute resolution, namely the rules of maritime law, with long historical roots in the practicalities of ocean shipping, and more recent legal initiatives to establish coherent rules for the administration of international bankruptcies and insolvencies. In its view, I think correctly, the choice was dictated not by some abstract rule of "universalism" but by what the Federal Court understood to be the specific circumstances and justice of this particular case.

A. *Maritime Law*

Shipping was one of the earliest activities that required international cooperation in the regulation of the rights and obligations of its participants. "For the cradle of our maritime law we must turn to the Mediterranean Sea where the sea commerce has had a continuous history for nearly five thousand years": *Benedict on Admiralty* (7th ed. (loose-leaf)), vol. 1, at p. 1-4; and see generally W. Tetley, *Maritime Liens and Claims* (2nd ed. 1998), at pp. 7-8. Maritime lawyers were forced to confront the need for rules to govern international commerce centuries before the "universalist approach" became a key issue in bankruptcy. Seamen, sal-

[TRADUCTION] . . . les tribunaux et les commentateurs ont reconnu deux approches générales applicables à la répartition des éléments d'actif dans le cadre de telles procédures. Selon l'approche territorialiste ou << règle de l'appropriation >>, le tribunal de chaque ressort dans lequel le débiteur possède des éléments d'actif répartit les éléments d'actif situés dans ce ressort conformément aux règles locales. Selon l'approche universaliste, les procédures d'insolvabilité principales sont engagées dans le pays où est domicilié le débiteur, et les tribunaux secondaires situés dans d'autres ressorts — habituellement les ressorts où le débiteur possède des éléments d'actif — s'en remettent aux procédures engagées à l'étranger et, en fait, collaborent pour faciliter la liquidation centralisée de l'actif du débiteur conformément aux règles en vigueur dans le pays où habite le débiteur.

(*In re Treco*, 240 F.3d 148 (2d Cir. 2001), p. 153)

La Cour fédérale était nettement d'avis qu'elle n'avait pas en l'espèce à choisir entre l'approche << universaliste >> et la << règle de l'appropriation >>. Elle devait plutôt faire un choix entre les exigences opposées de deux systèmes internationaux de règlement des conflits commerciaux, à savoir les règles du droit maritime, qui reposent depuis longtemps sur les considérations pratiques du transport maritime, et les plus récentes initiatives juridiques visant l'établissement de règles cohérentes pour l'administration des affaires de faillite et d'insolvabilité internationales. La Cour fédérale a estimé, à juste titre selon moi, que ce choix était dicté non par une règle abstraite d'<< universalisme >>, mais par sa propre perception de la situation particulière et de ce qui était juste en l'occurrence.

A. *Le droit maritime*

Le transport maritime est l'une des premières 25 activités ayant nécessité une coopération interna-tionale en matière de réglementation des droits et des obligations des parties qui s'y livrent. [TRA-DUCTION] << En ce qui concerne les origines de notre droit maritime, nous devons nous tourner vers la Méditerranée où le commerce maritime existe depuis près de cinq mille ans >> : *Benedict on Admiralty* (7e éd. (feuilles mobiles)), vol. 1, p. 1-4, et voir généralement W. Tetley, *Maritime Liens and Claims* (2e éd. 1998), p. 7-8. Les avocats spécialisés en droit maritime ont dû faire face à la nécessité d'établir des règles régissant le commerce

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vors, ship chandlers, repairers and other suppliers of essential goods and services to the ship in foreign ports required some assurance of payment. They looked to the ship. Common rules were essential because suppliers dealt with ships from many countries and the Masters found themselves in distant ports in an age when communications with ship owners were slow and unreliable. In maritime commerce, "rules of practical convenience commanding general assent are a virtual necessity": *Laane and Baltser v. Estonian State Cargo & Passenger Steamship Line*, [1949] S.C.R. 530, *per* Rand J., at p. 545. See also: *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683, at p. 695. Practicality required an *in rem* proceeding against the ship as distinguished from an *in personam* action against the shipowner. The need for predictability and uniformity was so strong that even the common law courts, ever protective of their own ways, ceded jurisdiction to specialized courts of admiralty applying a largely international law of maritime commerce. As Professor Tetley, *supra*, writes, at p. 56:

> [M]aritime law as we know it today is civilian in nature, finding its source in the *lex maritima* (the law maritime) which is a part of the *lex mercatoria* (the law merchant). Maritime law was codified, international law and, in England, it was apart from, and opposed to, its nearly mortal enemy, the common law.

26 The *in rem* interest in ships took many forms, some created by statute, others by mortgage, still others by possession. One of the most ancient and effective forms of security was (and is) the maritime lien. In this action, Holt claims a maritime lien for stevedoring services pursuant to the U.S. *Commercial Instruments and Maritime Liens Act*, 46 U.S.C. § 31342. Broadly speaking, a maritime lien arises without registration or other formality when debts of a specific nature are incurred by or on behalf of a ship. The lien creates a charge which "goes with

international des siècles avant que « l'approche uni-versaliste » devienne une question-clé en matière de faillite. Les marins, sauveteurs, approvisionneurs, réparateurs et autres fournisseurs de biens et services essentiels aux navires se trouvant dans des ports étrangers avaient besoin de certaines garanties de paiement. Ils comptaient sur le navire. Il était essentiel d'établir des règles communes parce que les fournisseurs transigeaient avec des navires en provenance de nombreux pays et que les capitaines se retrouvaient dans des ports éloignés à une époque où la communication avec les propriétaires des navires était lente et peu fiable. Dans le domaine du commerce maritime, [TRADUCTION] « des règles d'utilité pratique requérant un consentement général sont quasi indispensables » : *Laane and Baltser c. Estonian State Cargo & Passenger Steamship Line*, [1949] R.C.S. 530, le juge Rand, p. 545. Voir éga-lement : *Q.N.S. Paper Co. c. Chartwell Shipping Ltd.*, [1989] 2 R.C.S. 683, p. 695. Pour des raisons pratiques, il convenait d'intenter une action *in rem* contre le navire au lieu d'une action *in personam* contre le propriétaire du navire. Le besoin de pré-visibilité et d'uniformité était si fort que même les tribunaux de common law, toujours jaloux de leurs méthodes, ont cédé leur compétence aux tribunaux d'amirauté chargés d'appliquer un droit largement international en matière de commerce maritime. Comme l'écrit le professeur Tetley, *op. cit.*, p. 56 :

> [TRADUCTION] [L]e droit maritime, tel que nous le connaissons aujourd'hui, est de nature civile et émane de la *lex maritima* (droit maritime) qui fait partie de la *lex mercatoria* (droit commercial). Le droit maritime était un droit international codifié et, en Angleterre, il était séparé de la common law, son ennemi quasi mortel, et s'y opposait.

Le droit réel sur un navire revêtait maintes formes — créé par la loi dans certains cas, il décou-lait d'une hypothèque ou encore de la possession dans d'autres cas. L'une des formes de garantie les plus anciennes et efficaces était (et est toujours) le privilège maritime. Dans la présente action, Holt invoque un privilège maritime pour des services d'acconage, conformément à la *Commercial Instruments and Maritime Liens Act* américaine, 46 U.S.C. § 31342. D'une manière générale, un privi-lège maritime prend naissance sans enregistrement

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the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgages" (*The Tolten*, [1946] P. 135 (C.A.), *per* Scott L.J., at p. 150). It may be described, in that sense, as a "secret lien".

The reason for this privileged status for maritime lien holders is entirely practical. The ship may sail under a flag of convenience. Its owners may be difficult to ascertain in a web of corporate relationships (as indeed was the case here, where initially Holt named the wrong corporation as ship owner). Merchant seamen will not work the vessel unless their wages constitute a high priority against the ship. The same is true of others whose work or supplies are essential to the continued voyage. The Master may be embarrassed for lack of funds, but the ship itself is assumed to be worth something and is readily available to provide a measure of security. Reliance on that security was and is vital to maritime commerce. Uncertainty would undermine confidence. The appellant Trustees' claim to "international comity" in matters of bankruptcy must therefore be weighed against competing considerations of a more ancient and at least equally practical international system — the law of maritime commerce.

B. *Foreign Bankruptcy Orders*

The appellant Trustees take the position that once the Canadian bankruptcy court was activated on this file, its power and authority occupied the field in relation to matters pertaining to the bankrupt, so to speak, to the exclusion of courts not possessing bankruptcy jurisdiction. This proposition is, in my view, too broad.

I propose to make a few preliminary observations about the appellant Trustees' position. More detailed consideration follows.

ou autre formalité dès qu'une dette d'une nature particulière est contractée par un navire ou au nom d'un navire. Le privilège donne naissance à un droit réel [TRADUCTION] << qui suit le navire oil qu'il soit, même entre les mains d'un acquéreur à titre onéreux sans préavis, et occupe le même rang que les autres privilèges maritimes, tous ces privilèges ayant préséance sur les hypothèques >> (*The Tolten*, [1946] P. 135 (C.A.), le lord juge Scott, p. 150). Dans ce sens, il peut être décrit comme un << privilège occulte >>.

Ce statut privilégié des titulaires de privilège maritime existe pour une raison purement prati-que. Un navire peut naviguer sous pavillon de complaisance. Il peut être difficile d'en identifier les propriétaires dans un réseau complexe d'entre-prises (comme cela s'est produit dans la présente affaire oil, au départ, Holt a désigné incorrectement la société propriétaire du navire). Les marins de la marine marchande ne travailleront pas sur un navire à moins que leur salaire ne constitue une créance prioritaire sur le navire. Il en est de même pour ceux dont le travail ou les approvisionnements sont essen-tiels à la poursuite du voyage. Le capitaine peut être à court d'argent, mais on présume que le navire lui-même a une certaine valeur et qu'il peut facilement constituer une certaine garantie. Cette garantie était et est toujours essentielle au commerce maritime. L'incertitude minerait la confiance. Il faut donc soupeser l'argument de la courtoisie internationale en matière de faillite avancé par les syndics appe-lants en fonction des considérations opposées d'un système international plus ancien et au moins tout aussi pratique — le droit commercial maritime.

B. *Les ordonnances de faillite délivrées à l'étran-ger*

Les syndics appelants prétendent que, dès qu'il 28 a été saisi du présent dossier, le tribunal de faillite canadien avait, pour ainsi dire, compétence exclusive sur les questions reliées à la faillite, ce qui avait pour effet d'exclure les tribunaux n'ayant pas compétence en matière de faillite. À mon avis, cette affirmation est trop générale.

Je compte formuler quelques observations préli- 29
minaires au sujet de la position des syndics appelants. Un examen plus détaillé suivra.

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30 The first preliminary observation is that Antwerp Bulkcarriers, N.V. was not placed in bankruptcy under the laws of Canada. The only proceedings before a Canadian bankruptcy court were for the recognition and implementation of the orders of the Belgian bankruptcy court. Part XIII of the *Bankruptcy and Insolvency Act* (the "Act"), entitled "International Insolvencies", was not yet in force at the time of these events. Nevertheless, Canadian bankruptcy courts have long exercised a jurisdiction to come to the aid of foreign bankruptcy courts where it has been in their power to do so. Part XIII put the stamp of parliamentary approval on an initiative supported by judges and scholarly practitioners, both before and after enactment of Part XIII: see *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165 (Ont. Ct. (Gen. Div.)), at p. 167; *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17 (Ont. Ct. (Gen. Div.)); *Roberts v. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218 (Q.B.), at pp. 224 and 226; *Re Walker* (1998), 5 C.B.R. (4th) 123 (Ont. Ct. (Gen. Div.)); *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.); and see generally J. D. Hons-berger, "Canadian Recognition of Foreign Judicially Supervised Arrangements" (1990), 76 C.B.R. (N.S.) 204.

31 My second preliminary observation is that the bankruptcy courts in Belgium and Canada had (and have) a legitimate interest in the *in rem* action in the Federal Court. On May 9, 1996, when the Trustees obtained the order of recognition of the Belgian judgment, title to the M/V "Brussel", however heavily encumbered, was still registered in the name of the bankrupt. It is true that the market value of the Ship (ultimately sold for US$4.6 million) was a mere fraction of the first mortgage (about $68 million) held by the Belgian state bank, Société Nationale de Crédit à l'Industrie S.A. ("SNCI"). It is also true that there were maritime liens and statutory charges that ranked ahead of the first mortgage. The bankrupt company nevertheless retained legal title, and to that extent the Ship constituted part of the property of the bankrupt, at least as that term is understood in Canadian law: *Federal Business*

La première observation préliminaire est que la société Antwerp Bulkcarriers, N.V. n'a pas été mise en faillite sous le régime des lois du Canada. Les seules procédures engagées devant un tribunal de faillite canadien visaient à obtenir la reconnaissance et l'exécution des ordonnances du tribunal de faillite belge. La partie XIII de la *Loi sur la faillite et l'insolvabilité* (la « Loi »), intitulée « Insolvabilité en contexte international », n'était pas encore en vigueur à l'époque. Néanmoins, lorsqu'ils sont en mesure de le faire, les tribunaux de faillite canadiens exercent depuis longtemps leur compé-tence pour prêter concours aux tribunaux de faillite étrangers. La partie XIII constitue une approbation par le Parlement d'une initiative appuyée par les juges et les auteurs de doctrine avant et après l'adoption de cette partie de la Loi : voir *Olympia & York Developments Ltd. c. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165 (C. Ont. (Div. gén.)), p. 167; *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17 (C. Ont. (Div. gén.)); *Roberts c. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218 (B.R.), p. 224 et 226; *Re Walker* (1998), 5 C.B.R. (4th) 123 (C. Ont. (Div. gén.)); *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157 (C.S. Ont.); voir également, de façon générale, J. D. Honsberger, « Canadian Recognition of Foreign Judicially Supervised Arrangements » (1990), 76 C.B.R. (N.S.) 204.

Ma deuxième observation préliminaire est que les tribunaux de faillite en Belgique et au Canada avaient (et ont toujours) un intérêt légitime dans l'action *in rem* intentée devant la Cour fédérale. Le 9 mai 1996, lorsque les syndics ont obtenu l'ordonnance reconnaissant le jugement belge, le titre de propriété du N/M « Brussel », si lourdement grevé fût-il, était toujours enregistré au nom de la faillie. Il est vrai que la valeur marchande du navire (finalement vendu pour 4 600 000 $US) ne représentait qu'une fraction de la première hypo-thèque (d'environ 68 000 000 $) détenue par la banque d'État belge, la Société Nationale de Crédit à l'Industrie S.A. (« SNCI »). Il est également vrai qu'il existait alors des privilèges maritimes et légaux ayant priorité de rang sur la première hypothèque. La société faillie conservait néanmoins le titre de propriété et, dans cette mesure, le navire

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Development Bank v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 1061.

Counsel for the respondent appeared to consider it dispositive of the appeal to characterize the issue before us as concerning "maritime law" as opposed to "bankruptcy law". The facts here present both aspects, and in my view, with respect, the issue before the Federal Court was one of finding the proper balance of relevant factors on the stay application as opposed to trying to preempt further debate with a "pith and substance" characterization of the nature of the proceeding.

Thirdly, a Canadian bankruptcy court has a responsibility to consider the interests of the litigants before it and other affected parties in this country as well as the desirability of international cooperation and other relevant circumstances. Its function is not simply to rubber stamp commands issuing from the foreign court of the primary bankruptcy. Thus the exigencies of international cooperation were significant to both the Federal Court and the Canadian bankruptcy court, but they were not a factor that necessarily trumped all other factors.

Fourthly, the Canadian bankruptcy court derives its authority from Canadian law. When called upon to lend assistance to foreign bankruptcy courts, Canadian law requires our courts to consider as *one* of the relevant circumstances the juridical advantage which those disadvantaged by deferral to the foreign court would enjoy in a Canadian court. I appreciate that over-emphasis on juridical advantage as a factor would lead to enthronement of the "Grab Rule" because claimants in the Canadian court will inevitably have a good reason why they do not wish to take their chances in the general bankruptcy in the court of the bankrupt's domicile. Nevertheless, all of the relevant factors must be weighed in a stay application and the nature and extent of juridical

faisait partie de ses biens, du moins selon l'interprétation de ce terme en droit canadien : *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061.

32 L'avocat de l'intimée paraissait croire que le pourvoi serait réglé si on considérait que la question qui nous est soumise relève du « droit maritime » au lieu du « droit de la faillite ». Les deux aspects sont présents en l'espèce et j'estime, en toute déférence, qu'il s'agissait pour la Cour fédérale de trouver le juste équilibre entre les fac-teurs pertinents quant à la demande de suspension et non pas de tenter d'éviter tout autre débat en déterminant la nature des procédures en fonction de leur « caractère véritable ».

33 Troisièmement, un tribunal de faillite canadien doit tenir compte des intérêts des parties qui plaident devant lui et des autres parties touchées au Canada, ainsi que de l'utilité d'une coopération internationale et d'autres circonstances perti-nentes. Son rôle ne consiste pas simplement à approuver sans discussion les ordres du tribunal étranger saisi de la faillite principale. Ainsi, les exigences de la coopération internationale étaient un facteur important tant pour la Cour fédérale que pour le tribunal de faillite canadien, mais ce fac-teur n'éclipsait pas nécessairement tous les autres facteurs.

34 Quatrièmement, la compétence du tribunal de faillite canadien découle du droit canadien. Lorsqu'ils sont appelés à prêter leur concours à des tribunaux de faillite étrangers, nos tribunaux sont tenus, en vertu du droit canadien, de considérer comme étant *une* circonstance pertinente l'avan-tage juridique dont bénéficieraient devant un tribunal canadien ceux qui sont désavantagés par le recours à un tribunal étranger. Je suis conscient du fait qu'une insistance trop grande sur le facteur de l'avantage juridique mènerait à la consécration de la « règle de l'appropriation », étant donné que les réclamants devant le tribunal canadien auraient inévitablement une bonne raison de ne pas vouloir tenter leur chance dans la faillite générale devant le tribunal du domicile du failli. Toutefois, tous les

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advantage for the various parties was clearly an important factor to throw into the balance.

35 Fifthly, the public policy expressed in our own bankruptcy laws is a relevant consideration. Bankruptcy usually signals at least a temporary "cease fire" against the bankrupt's estate. However, if this had been a Canadian bankruptcy, the statutory stay of a creditor's action would have been of little practical relevance because s. 69.3 of the Act exempts from the statutory stay (with exceptions not relevant here) proceedings by secured creditors to realize on their security. Section 69.3(2)(*a*) would have authorized the Canadian bankruptcy court to order a postponement of no more than six months. The effect of the Canadian bankruptcy court's order in this case was a permanent stay of proceedings for realization of the security of the Ship in Canada.

36 I now turn to the more detailed submissions of the parties.

C. *Issues Raised by the Present Appeal*

37 It is common ground that ordinarily the Federal Court, Trial Division, would have jurisdiction to arrest the Ship, to entertain Holt's claim for debts incurred on the Ship's behalf, to assess the validity of Holt's claim to a maritime lien, to order the appraisal and sale of the Ship and to see the successful secured claimants paid out of the proceeds of sale.

38 The Trustees advance three broad submissions in support of their position that once the shipowner was declared bankrupt on April 5, 1996, the Federal Court was "bound to act in comity with the direction" given by the Belgian bankruptcy court, whose edicts were recognized and accepted by the Canadian bankruptcy court. Firstly, as already mentioned, they say that Canadian courts should follow a "universalist" rather than a "territorialist" approach to bankruptcy. Secondly, they say that a Canadian 36

facteurs pertinents doivent être soupesés dans le cas d'une demande de suspension, et la nature de même que l'étendue de l'avantage juridique pour les différentes parties constituaient nettement un facteur important qui devait être soupesé.

Cinquièmement, la politique générale énoncée dans nos lois sur la faillite est une considération pertinente. Habituellement, la faillite annonce au moins une suspension temporaire des recours contre l'actif du failli. Cependant, si la faillite était survenue au Canada, la suspension légale de l'action intentée par un créancier aurait été peu pertinente en pratique étant donné que l'art. 69.3 de la Loi soustrait à la suspension légale (sous réserve d'ex-ceptions non applicables en l'espèce) les procédures engagées par les créanciers garantis en vue de réa-liser leur garantie. L'alinéa 69.3(2)*a*) aurait permis au tribunal de faillite canadien d'ordonner un report maximum de six mois. En l'espèce, l'ordonnance du tribunal de faillite canadien a eu pour effet de suspendre de façon permanente au Canada les pro-cédures de réalisation de la garantie du navire.

J'examinerai maintenant plus en détail les arguments des parties.

C. *Les questions soulevées par le présent pourvoi*

Nul ne conteste que la Section de première instance de la Cour fédérale aurait normalement compétence pour saisir le navire, examiner la réclamation de Holt relativement aux dettes contractées au nom du navire, déterminer la validité du privilège maritime invoqué par Holt, ordonner l'évaluation et la vente du navire et veiller à ce que les créanciers garantis ayant gain de cause soient payés sur le produit de la vente.

Les syndics avancent trois arguments généraux à l'appui de leur point de vue selon lequel, dès que le propriétaire du navire a été mis en faillite le 5 avril 1996, la Cour fédérale avait [TRADUCTION] « une obligation de courtoisie envers la directive » du tribunal de faillite belge, dont les ordres ont été reconnus et acceptés par le tribunal de faillite canadien. Premièrement, comme nous l'avons vu, les syndics soutiennent que les tribunaux canadiens devraient adopter une approche « universaliste » plutôt que

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court exercising admiralty jurisdiction (the Federal Court) must defer to or at least cooperate with (which in their eyes seems to amount to the same thing) the Canadian court exercising bankruptcy jurisdiction (the Quebec Superior Court). Thirdly, the Trustees say that the response of Canadian courts should be "uniform" by which they appear to mean the Federal Court should have acceded to the request of the Belgian court because the Quebec Superior Court sitting in Bankruptcy had already done so.

In light of these preliminary observations, I think the Trustees' arguments may be conveniently addressed under the following headings:

1. Did the respondent Holt possess a valid claim to a maritime lien under Canadian law against the M/V "Brussel" prior to the Belgian bankruptcy of the owners on April 5, 1996?

2. Did Holt thereby enjoy a juridical advantage in Canada that would be in jeopardy if the Federal Court proceedings were stayed in deference to the Belgian bankruptcy court?

3. Did the Federal Court err in treating Holt as a "secured creditor" as that term is understood in Canadian bankruptcy law?

4. Did the Belgian bankruptcy of April 5, 1996 give the Belgian Trustees a valid claim to the Ship?

5. Did the Federal Court of Canada lose jurisdiction to proceed as a result of the various orders of the Quebec Superior Court sitting in Bankruptcy?

6. Even if the Federal Court retained jurisdiction, ought it nevertheless to have deferred to the Belgian bankruptcy court on the basis of "international comity" and the need for an

« territorialiste » en matière de faillite. Deuxièmement, ils affirment que le tribunal canadien ayant compétence en matière d'amirauté (à savoir la Cour fédérale) devrait s'en remettre au tribunal canadien ayant compétence en matière de faillite (à savoir la Cour supérieure du Québec) ou à tout le moins coopérer avec lui (ce qui à leurs yeux revient au même). Troisièmement, les syndics soutiennent que la réponse des tribunaux canadiens devrait être « uniforme » et, à cet égard, ils semblent vouloir dire que la Cour fédérale aurait dû faire droit à la demande du tribunal belge étant donné que la Cour supérieure du Québec siégeant en matière de faillite l'avait déjà fait.

À la lumière de ces observations préliminaires, les arguments des syndics peuvent, à mon sens, être commodément abordés sous les rubriques suivantes :

1. L'intimée Holt pouvait-elle, en droit canadien, invoquer validement un privilège maritime sur le N/M « Brussel » avant la faillite des propriétaires survenue en Belgique le 5 avril 1996?

2. Holt bénéficiait-elle au Canada d'un avantage juridique qui serait compromis si les procédures engagées devant la Cour fédérale étaient suspendues par déférence pour le tribunal de faillite belge?

3. La Cour fédérale a-t-elle commis une erreur en traitant Holt comme un « créancier garanti » selon l'interprétation de cette expression en droit canadien de la faillite?

4. La faillite survenue en Belgique le 5 avril 1996 a-t-elle conféré aux syndics belges un droit de réclamation valide à l'égard du navire?

5. La Cour fédérale du Canada a-t-elle perdu compétence à la suite des diverses ordonnances délivrées par la Cour supérieure du Québec siégeant en matière de faillite?

6. Même si la Cour fédérale avait conservé compétence, aurait-elle dû néanmoins s'en remettre au tribunal de faillite belge au nom de la « courtoisie internationale » et en raison de la nécessité d'une

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integrated "universalist" approach to the bankruptcy?

7. In light of the foregoing, did the Federal Court err in the exercise of its discretion to deny the Trustees' application for a stay of proceedings?

40 I will address each of these issues in turn.

1. Did the Respondent Holt Possess a Valid Claim to a Maritime Lien Under Canadian Law Against the M/V "Brussel" Prior to the Belgian Bankruptcy of the Owners of April 5, 1996?

41 A maritime lien validly created under foreign law will be recognized and given the same priority in Canada as would be given to a maritime lien created in Canada under Canadian maritime law "unless opposed to some rule of domestic policy or procedure which prevents the recognition of the right": *The Strandhill v. Walter W. Hodder Co.*, [1926] S.C.R. 680, *per* Newcombe J., at p. 685. The theory is that "[i]f a maritime lien exists it cannot be shaken off by changing the location of the *res*": *Todd Shipyards Corp. v. Altema Compania Maritima S.A.*, [1974] S.C.R. 1248, at p. 1252.

42 Under U.S. law, as stated, the respondent Holt acquired a maritime lien against the Ship at the moment when services were rendered in U.S. ports. All such services were rendered prior to March 30, 1996. The Ship thus arrived in Canadian waters burdened with a maritime lien. A maritime lien would not have arisen under Canadian law for similar stevedoring services rendered to a ship at a port in Canada, but the proper law giving rise to the debt was U.S. law, not Canadian law.

43 It is Canadian law, once it recognizes the right, that grants the remedy and sets the priorities. At Canadian law, a maritime lien ranks ahead of a ship's mortgage (i.e., the $68 million claim of SNCI). See *Todd Shipyards*, *supra*, at p. 1259, and

approche « universaliste » intégrée en matière de faillite?

7. À la lumière de ce qui précède, la Cour fédérale a-t-elle commis une erreur dans l'exercice de son pouvoir discrétionnaire de refuser la demande de suspension des procédures présentée par les syndics?

J'examinerai ces questions l'une après l'autre.

1. L'intimée Holt pouvait-elle, en droit canadien, invoquer validement un privilège maritime sur le N/M « Brussel » avant la faillite des propriétai-res survenue en Belgique le 5 avril 1996?

Un privilège maritime validement créé sous le régime d'une loi étrangère est reconnu et se voit accorder, au Canada, la même priorité qu'un privilège maritime créé au Canada sous le régime du droit maritime canadien, [TRADUCTION] « à moins qu'il n'aille à l'encontre d'une règle quelconque de politique ou de procédure intérieure qui en empêche la reconnaissance » : *The Strandhill c. Walter W. Hodder Co.*, [1926] R.C.S. 680, le juge Newcombe, p. 685. La théorie veut que « [l]orsqu'un privilège maritime existe, on ne [puisse] s'en débarrasser en changeant la chose de place » : *Todd Shipyards Corp. c. Altema Compania Maritima S.A.*, [1974] R.C.S. 1248, p. 1252.

Rappelons qu'en vertu du droit américain, l'intimée Holt a acquis un privilège maritime sur le navire lorsqu'elle a fourni ses services dans des ports américains. Ces services ont tous été fournis avant le 30 mars 1996. Le navire est ainsi arrivé dans les eaux canadiennes grevé d'un privilège maritime. En droit canadien, un tel privilège n'aurait pas pris naissance à la suite de services d'acconage semblables fournis à un navire se trou-vant dans un port au Canada, mais le droit qui avait donné naissance à la dette était le droit américain et non le droit canadien.

Une fois qu'il reconnaît l'existence du droit en cause, le droit canadien accorde le recours et éta-blit les priorités. En droit canadien, le privilège maritime a priorité de rang sur l'hypothèque qui grève un navire (soit la créance de 68 000 000 $

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Marlex Petroleum Inc. v. Har Rai (The), [1987] 1 S.C.R. 57, aff'g [1984] 2 F.C. 345 (C.A.).

The appellant Trustees argue that a "universalist" approach to trans-border bankruptcies is a domestic policy opposable to recognition of the U.S. maritime lien in this case within the meaning of the *Strandhill* exception, but I do not think so. Newcombe J. was looking to something offensive about the origin of the right being asserted (as was the case in *Laane and Baltser*, *supra*). There is nothing offensive about the origin of Holt's claim. If stevedoring services had not been rendered, the Ship could not have unloaded its cargo at Gloucester City, New Jersey. If Holt is to be defeated by considerations of "universalism", it will be as a result of a balancing of relevant factors under s. 50 of the *Federal Court Act* which authorizes the court, in its discretion, to stay its own proceedings.

In my view, on the existing state of the law, Holt was entitled to have its maritime lien recognized as such by the Federal Court in these proceedings.

2. Did Holt Thereby Enjoy a Juridical Advantage in Canada that Would Be in Jeopardy if the Federal Court Proceedings Were Stayed in Deference to the Belgian Bankruptcy Court?

There were clear advantages to Holt in having its claim disposed of in Canada. Firstly, at the time the Trustees intervened, Holt's *in rem* action was undefended and speeding to a successful conclusion. According to the anticipated timetable, its claim would be paid in full, plus expenses, within a matter of months. The Belgian bankruptcy was still in the early stages of organization.

Secondly, and more importantly, it seems clear that Holt's claim would not enjoy the same priority in Belgium as it enjoyed under Canadian maritime law.

de la SNCI). Voir *Todd Shipyards*, précité, p. 1259, et *Marlex Petroleum Inc. c. Har Rai (Le)*, [1987] 1 R.C.S. 57, conf. [1984] 2 C.F. 345 (C.A.).

Les syndics appelants allèguent qu'en l'espèce 44 une approche << universaliste >> en matière de faillites transfrontalières est une politique inté-rieure opposable à la reconnaissance du privilège maritime américain, au sens de l'exception prévue dans l'arrêt *Strandhill*, mais je ne crois pas que ce soit le cas. Le juge Newcombe exigeait que l'origine du droit revendiqué ait quelque chose d'inconvenant (comme c'était le cas dans l'af-faire *Laane and Baltser*, précitée). L'origine de la réclamation de Holt n'a rien d'inconvenant. Si les services d'acconage n'avaient pas été four-nis, la cargaison du navire n'aurait pas pu être déchargée à Gloucester City, au New Jersey. Si Holt doit échouer pour des considérations d'<< uni-versalisme >>, ce sera à la suite d'une évaluation de facteurs pertinents fondée sur l'art. 50 de la *Loi sur la Cour fédérale*, qui donne à la cour le pouvoir discrétionnaire de suspendre ses propres procédures.

À mon avis, compte tenu de l'état actuel du droit, 45

Holt avait droit en l'espèce à la reconnaissance de son privilège maritime par la Cour fédérale.

2. Holt bénéficiait-elle au Canada d'un avantage juridique qui serait compromis si les procédures engagées devant la Cour fédérale étaient suspen-dues par déférence pour le tribunal de faillite belge?

Holt avait manifestement avantage à ce que sa 46 réclamation soit tranchée au Canada. Première-ment, au moment de l'intervention des syndics, l'action *in rem* de Holt n'était pas contestée et se dirigeait rapidement vers une conclusion favorable. Selon l'échéancier prévu, sa réclamation, incluant les frais, serait entièrement acquittée en quelques mois. La faillite belge en était encore au stade initial de l'organisation.

Deuxièmement, et qui plus est, il semble évident 47 que la réclamation de Holt n'aurait pas la même priorité en Belgique que celle dont elle bénéficiait en droit maritime canadien.

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48 In an affidavit sworn in this action on June 5, 1996, the appellant De Roy deposed that the applicable Belgian law "prohibits the arrest or execution by creditors of the debtor's property to enforce preferential/lien claims" (para. 26). De Roy further deposed that Belgian maritime law "gives specific priorities to certain types of claims" (para. 42) but declined to state whether such "priority" claims included that of Holt and other maritime lien holders. In the hearing before Guthrie J. of the Canadian bankruptcy court, M^e^ Édouard Baudry, an experienced admiralty law practitioner arguing for the intervener, SNCI, who supported the appellant Trustees, expressed the common understanding of counsel that Holt would likely be disadvantaged if required to take its claim to Belgium:

Me ÉDOUARD BAUDRY

I would add, though, as my friend will no doubt tell you, that the possibility of an American maritime lien being recognized by Belgian Court is a . . .

THE COURT

Being maintained by the Antwerp Court is slimmer than in here?

Me ÉDOUARD BAUDRY

. . . is a lot slimmer than here.

THE COURT

I can understand that.

Me ÉDOUARD BAUDRY

I think we all . . .

THE COURT

I think that is one of the reasons, if not the major reason, why we're here.

49 Further, according to endnote 5 of the judgment of the Federal Court of Appeal, counsel for both parties conceded on the appeal that it was "unlikely that the respondent's *in rem* rights could subsist in one form or another under Belgian bankruptcy laws" (emphasis added).

Dans un affidavit daté du 5 juin 1996 et produit dans le cadre de la présente action, l'appelant De Roy a déclaré que le droit belge [TRADUCTION] « empêche la saisie des biens du débiteur par les créanciers afin de permettre l'exécution des créances prioritaires ou privilégiées » (par. 26). Monsieur De Roy a en outre déclaré que le droit maritime belge [TRADUCTION] « accorde des priorités particulières à certains types de réclamation » (par. 42), mais il a refusé de dire si la réclamation de Holt et d'autres titulaires de privilège maritime faisait partie de ces réclamations prioritaires. Lors de l'audience devant le juge Guthrie du tribunal de faillite cana-dien, M^e^ Édouard Baudry, avocat expérimenté en droit maritime, plaidant pour l'intervenante SNCI qui appuyait les syndics appelants, a déclaré que les avocats s'entendaient pour dire que Holt serait probablement désavantagée si elle devait présenter sa réclamation en Belgique :

[TRADUCTION] M^e^ ÉDOUARD BAUDRY

J'ajouterais cependant, comme mon collègue ne manquera pas de vous le dire, que la possibilité qu'un privilège maritime américain soit reconnu par le tribunal belge est . . .

LA COUR

Qu'il soit maintenu par le tribunal d'Anvers, est plus mince qu'elle ne l'est ici?

Me ÉDOUARD BAUDRY

. . . beaucoup plus mince qu'ici.

LA COUR

Je peux comprendre cela.

Me ÉDOUARD BAUDRY

Je pense que nous sommes tous . . .

LA COUR

Je pense que c'est l'une des raisons, sinon la raison principale, de notre présence ici.

En outre, selon la cinquième note de renvoi du jugement de la Cour d'appel fédérale, les avocats des deux parties ont admis en appel qu'il était « peu probable que les droits *in rem* de l'intimée puissent subsister sous une forme ou une autre sous le régime des lois belges sur la faillite » (je souli-gne).

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While the onus was on the appellant Trustees to establish the grounds for a stay of proceedings, it was up to Holt to prove Belgian law if Holt wished to rely on any difference between the expected treatment of its claim under Belgian law as opposed to Canadian law. The trial judge noted the absence of evidence on this point. However, as the parties were apparently in agreement that Belgian law would not recognize Holt's maritime lien both before Guthrie J. in the Canadian bankruptcy court, and subsequently in the present case before the Federal Court of Appeal, I do not think we should interfere with the Federal Court of Appeal on this factual point. As Guthrie J. pointed out, the reason "we're here" is that Holt's claim enjoys a juridical advantage in the Federal Court of Canada that it would not command in the Belgian bankruptcy court.

3. Did the Federal Court Err in Treating Holt as a "Secured Creditor" as that Term is Understood in Canadian Bankruptcy Law?

Canadian bankruptcy law takes an expansive view of who is a secured creditor, as confirmed by the relevant provisions in the Act. If Antwerp Bulkcarriers, N.V. had declared bankruptcy in Canada, there is no doubt that Holt would be considered "a person holding a . . . lien . . . against the property of the debtor . . . as security for a debt due" within the definition of "secured creditor" in s. 2 of the Act. Once the Federal Court had determined as a matter of Canadian maritime law that Holt's claim was secured by a maritime lien on the Ship itself, the bankruptcy court would be bound by that determination: *Riordon Co. v. Danforth Co.*, [1923] S.C.R. 319.

If this were a Canadian bankruptcy, Holt would have been entitled to realize on its security irrespective of the bankruptcy. As Gonthier J. said in *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 9, "the entire scheme of distribution is '[s]ubject to the rights of secured creditors'". The opening words of s. 136

Même s'il incombait aux syndics appelants 50 d'établir les motifs justifiant une suspension des procédures, il appartenait à Holt de faire la preuve du droit belge si elle souhaitait invoquer une différence quant à la façon dont le droit belge et le droit canadien traiteraient sa réclamation. Le juge de première instance a souligné l'absence d'élément de preuve sur ce point. Cependant, comme les parties paraissent avoir convenu, devant le juge Guthrie du tribunal de faillite canadien et ensuite devant la Cour d'appel fédérale, que le droit belge ne recon-naîtrait pas le privilège maritime de Holt, j'estime que nous ne devrions pas modifier la décision de la Cour d'appel fédérale sur cette question de fait. Comme le juge Guthrie l'a fait remarquer, la raison [TRADUCTION] « de notre présence ici » est que la réclamation de Holt bénéficie devant la Cour fédérale du Canada d'un avantage juridique dont elle ne bénéficierait pas devant le tribunal de faillite belge.

3. La Cour fédérale a-t-elle commis une erreur en traitant Holt comme un « créancier garanti » selon l'interprétation de cette expression en droit canadien de la faillite?

Le droit canadien de la faillite a une conception 51 large du créancier garanti, comme le confirment les dispositions pertinentes de la Loi. Si Antwerp Bulkcarriers, N.V. avait fait faillite au Canada, nul doute que Holt aurait été considérée comme une « [p]ersonne détenant [. . .] un privilège sur [. . .] les biens du débiteur [. . .] à titre de garantie d'une dette échue », selon la définition de « créancier garanti » figurant à l'art. 2 de la Loi. Une fois que la Cour fédérale avait décidé que la réclamation de Holt était, en droit maritime canadien, garantie par un privilège maritime sur le navire lui-même, le tribunal de faillite était lié par cette décision : *Rior-don Co. c. Danforth Co.*, [1923] R.C.S. 319.

Si la faillite était survenue au Canada, Holt aurait 52 eu le droit de réaliser sa garantie indépendamment de la faillite. Comme le juge Gonthier l'a affirmé dans *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 9, « l'en-semble du plan de répartition est appliqué "[s]ous réserve des droits des créanciers garantis" ».

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(under the heading "Scheme of Distribution") establish the priority of claims against the bankrupt's estate subject always "to the rights of secured creditors". L. W. Houlden and G. B. Morawetz state that "[t]he policy of the Act in the case of bankruptcy is not to interfere with secured creditors except in so far as may be necessary to protect the estate as to any surplus on the assets covered by the security" (*The 2001 Annotated Bankruptcy and Insolvency Act* (2000), at p. 346). See also: L. M. LoPucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach" (1999), 84 *Cornell L. Rev.* 696.

53 I appreciate, of course, that "universalism" will not work if every jurisdiction only defers to the law of the primary bankruptcy where that law coincides precisely with the domestic law of the deferring court. The fact remains, however, that Canadian public policy, expressed through the Act, strongly supports the rights of claimants whom we would regard as secured creditors. Our law considers it in the interests of commercial activity generally that secured rights be protected. It seems to me that MacKay J. correctly regarded Holt as a "secured creditor" in bankruptcy terms, and in the exercise of his discretion under s. 50 of the *Federal Court Act*, he was entirely justified in putting considerable weight on that factor.

4. Did the Belgian Bankruptcy of April 5, 1996 Give the Belgian Trustees a Valid Claim to the Ship?

54 Under the Belgian bankruptcy court's order of April 5, 1996, the Trustees were given the duty and power to take possession of the assets of the bankrupt wherever located. At that stage, the Ship was no longer in the possession of the bankrupt shipowner. It was in the possession of the Marshal of the Federal Court at Halifax and subject to further orders of that court.

Le préambule de l'art. 136 (sous la rubrique << Plan de répartition >>) établit l'ordre de priorité des créan-ces grevant l'actif du failli, toujours sous réserve << des droits des créanciers garantis >>. Selon L. W. Houlden et G. B. Morawetz, [TRADUCTION] << [l]a politique de la loi en matière de faillite est de ne pas faire obstacle aux créanciers garantis sauf dans la mesure où il peut être nécessaire de protéger l'ac-tif quant à tout excédent sur les biens affectés à la garantie >> (*The 2001 Annotated Bankruptcy and Insolvency Act* (2000), p. 346). Voir également : L. M. LoPucki, << Cooperation in International Bankruptcy : A Post-Universalist Approach >> (1999), 84 *Cornell L. Rev.* 696.

Certes, j'estime que << l'universalisme >> ne fonctionnera pas si un tribunal s'en remet au droit en vigueur dans le ressort où survient la faillite principale uniquement lorsque ce droit coincide exactement avec le droit en vigueur dans le ressort où est situé le tribunal en question. Il reste cependant que la politique générale du Canada, énon-cée dans la Loi, est très favorable aux droits des réclamants que nous considérerions comme des créanciers garantis. Notre droit considère qu'il est généralement dans l'intérêt de l'activité commerciale que les droits garantis soient protégés. Il me semble que le juge MacKay a eu raison de considérer Holt comme un << créancier garanti >> en matière de faillite. Ainsi, lorsqu'il a exercé le pou-voir discrétionnaire que lui conférait l'art. 50 de la *Loi sur la Cour fédérale*, le juge MacKay était tout à fait justifié d'accorder une importance considéra-ble à ce facteur.

4. La faillite survenue en Belgique le 5 avril 1996 a-t-elle conféré aux syndics belges un droit de réclamation valide à l'égard du navire?

En vertu de l'ordonnance du tribunal de faillite belge datée du 5 avril 1996, les syndics se sont vu attribuer l'obligation et le pouvoir de prendre possession des éléments d'actif de la faillie où qu'ils soient. Dès lors, le navire n'était plus en la possession de son propriétaire failli. Il était en la possession du prévôt de la Cour fédérale à Halifax

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et était assujetti à d'autres ordonnances de ce tribunal.

In Canada, the bankruptcy order pronounced by the court of the domicile operated as an assignment by operation of law of the moveable assets of the bankrupt shipowner located in Canada, including its interest in the M/V "Brussel", but this assignment is subject to any prior charges upon it recognized by *Canadian* law (J.-G. Castel, *Canadian Conflict of Laws* (4th ed. 1997), at pp. 564-65).

In this respect, our conflict of laws rule is the same as the English rule set out by the editors of *Dicey and Morris on the Conflict of Laws* (13th ed. 2000), vol. 2, at p. 1184:

> The general principle of English law is that bankruptcy, or any proceeding in the nature of bankruptcy, in a foreign country whose courts have jurisdiction over a debtor operates as an assignment to the trustee, assignees, curators, syndics or others, who under the law of that country are entitled to administer his property, of all his movables in England, if that is its effect under the foreign law.

See also I. F. Fletcher, *Insolvency in Private International Law* (1999), at pp. 61-62.

As in Canada, the assignment by operation of law of the debtor's property is subject to a number of limitations, one of which as noted is that the property passes subject to existing charges recognized under English law:

> The property in England passes subject to any existing charges upon it recognised by the law of England, even if these charges would be postponed under the law of the place of bankruptcy to the claim of the creditors, and even if under the English bankruptcy the charges would be defeated by the title of the trustee in bankruptcy.

(*Dicey and Morris on the Conflict of Laws*, *supra*, at pp. 1184-85)

An illustration of the proposition that the trustee cannot obtain more of an interest than it was in the power of the debtor to assign is in *Galbraith v. Grimshaw*, [1910] A.C. 508 (H.L.). In that case, creditors had obtained judgment in Scotland against a Scottish company and, having had the judgment extended to England, served a garnishee order

Au Canada, l'ordonnance de faillite délivrée par
55 le tribunal du domicile a eu l'effet d'une cession légale des biens meubles du propriétaire failli du navire qui sont situés au Canada, y compris son droit sur le N/M « Brussel », mais cette cession est faite sous réserve de toutes charges antérieures qui peuvent grever les biens en vertu du droit *canadien* (J.-G. Castel, *Canadian Conflict of Laws* (4e éd. 1997), p. 564-565).

À cet égard, notre règle de conflit des lois est identique à la règle anglaise énoncée par les éditeurs de *Dicey and Morris on the Conflict of Laws* (13e éd. 2000), vol. 2, p. 1184 :

56

[TRADUCTION] Le principe général du droit anglais veut que la faillite ou toute autre procédure de même nature, survenue dans un pays étranger où les tribunaux ont compétence à l'égard d'un débiteur, agisse comme une cession de tous ses biens meubles situés en Angleterre, en faveur du syndic, des cessionnaires, des curateurs ou des autres personnes qui, suivant le droit en vigueur dans ce pays, ont le droit d'administrer ses biens, si c'est là l'effet du droit étranger.

Voir également I. F. Fletcher, *Insolvency in Private International Law* (1999), p. 61-62.

Comme c'est le cas au Canada, la cession légale des biens du débiteur est sujette à certaines restrictions dont l'une, comme nous l'avons vu, veut que les biens soient transmis sous réserve des charges existantes reconnues par le droit anglais :

[TRADUCTION] Les biens situés en Angleterre sont transmis sous réserve de toute charge qui les grève en vertu du droit anglais, même si cette charge était subordonnée, en vertu de la loi du lieu de la faillite, à la réclamation des créanciers, et même si en vertu de la faillite anglaise, elle était annulée par le titre du syndic de faillite.

(*Dicey and Morris on the Conflict of Laws*, *op. cit.*, p. 1184-1185)

On trouve, dans l'arrêt *Galbraith c. Grimshaw*, 57 [1910] A.C. 508 (H.L.), un exemple de la proposition selon laquelle le syndic ne peut obtenir plus de droits que ceux qui pouvaient être cédés par le débiteur. Dans cette affaire, les créanciers avaient eu gain de cause en Écosse contre une société écos-saise et, après avoir obtenu que le jugement soit

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on an English firm that was indebted to the Scottish debtor. Two weeks later, the Scottish debtor became bankrupt. The trustee sought to take possession of the garnisheed debt, but was refused by the House of Lords on the principle that the trustee "could not have it unless the bankrupt could himself have assigned it" (p. 511). Accordingly, the trustee was not entitled to receive the debt free of the garnishee order "because the bankrupt could only have assigned it on November 12, subject to the garnishee order" (p. 511). In *Anantapadmanabhas-wami v. Official Receiver of Secunderabad*, [1933] A.C. 394, the Privy Council extended the *Galbraith* analysis to debts that were the subject of collection proceedings in progress provided that at the date of the bankruptcy the bankrupt could not have assigned the debt clear of the plaintiff's claim.

58 While such a rule may be modified by statute, it has not been so modified in Canada in any way relevant to the question of the foreign bankruptcy before us.

59 I conclude therefore that on April 5, 1996, the Belgian Trustees acquired under Canadian law the interest of the bankrupt shipowner in the M/V "Brussel" but that its interest was and remained subject to the prior claim of the secured creditors, including the maritime lienholders, who were seeking relief in the Federal Court, Trial Division.

5. Did the Federal Court of Canada Lose Jurisdiction to Proceed as a Result of the Various Orders of the Quebec Superior Court Sitting in Bankruptcy?

60 The Trustees argue that once the Belgian bankruptcy court issued its order on April 5, 1996, or, at the very latest, when the request for assistance was accepted by the Canadian bankruptcy court, the matter before MacKay J. became one of bankruptcy and thus within the *exclusive* jurisdiction of the Canadian bankruptcy court. I have already rejected the Trustees' notion that once a foreign bankruptcy

exécutoire en Angleterre, ils avaient signifié une ordonnance de saisie-arrêt à une entreprise anglaise endettée envers le débiteur écossais. Deux semai-nes plus tard, le débiteur écossais faisait faillite. Le syndic a cherché à prendre possession de la créance saisie, mais s'est heurté au refus de la Chambre des lords qui s'est fondée sur le principe selon lequel le syndic [TRADUCTION] « ne pourrait l'obtenir que si le failli lui-même avait pu la céder » (p. 511). En conséquence, le syndic n'avait pas le droit d'obte-nir la créance exempte de l'ordonnance de saisie-arrêt [TRADUCTION] « parce que le failli n'aurait pu la céder que le 12 novembre, sous réserve de l'ordonnance de saisie-arrêt » (p. 511). Dans *Anantapadmanabhaswami c. Official Receiver of Secunderabad*, [1933] A.C. 394, le Conseil privé a étendu l'analyse faite dans *Galbraith* aux créances qui faisaient l'objet d'une procédure de recouvre-ment pourvu que, à la date de la faillite, le failli n'ait pas été en mesure de céder la créance exempte de la réclamation du demandeur.

Bien qu'une telle règle puisse être modifiée par un texte législatif, elle n'a subi au Canada aucune modification pertinente quant à la question de la faillite étrangère dont nous sommes saisis.

Je conclus donc que, le 5 avril 1996, les syndics belges ont, en vertu du droit canadien, acquis le droit que le propriétaire failli du navire avait sur le N/M « Brussel » mais que ce droit était et demeu-rait assujetti à la réclamation antérieure des créan-ciers garantis, y compris les titulaires du privilège maritime qui cherchaient à obtenir réparation devant la Section de première instance de la Cour fédérale.

5. La Cour fédérale du Canada a-t-elle perdu com-pétence à la suite des diverses ordonnances délivrées par la Cour supérieure du Québec sié-geant en matière de faillite?

Les syndics font valoir qu'une fois que le tribunal de faillite belge a délivré l'ordonnance sollici-tant le concours des tribunaux canadiens le 5 avril 1996 ou, au plus tard, lorsque le tribunal de faillite canadien a accueilli cette requête, l'affaire soumise au juge MacKay est devenue une affaire de faillite relevant de la compétence *exclusive* du tribunal de faillite canadien. J'ai déjà rejeté l'idée des syndics

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court is activated it necessarily occupies the field in relation to matters pertaining to the bankrupt in this country. I have also rejected the idea that "international coordination" necessitates the rubber stamping of orders made by the foreign bankruptcy court.

The appellant Trustees nevertheless contend that the Federal Court lost jurisdiction because of the combined operation of s. 183(1) of the *Bankruptcy and Insolvency Act* and s. 17(6) of the *Federal Court Act*. Section 183(1) reads as follows:

183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

. . .

(*b*) in the Province of Quebec, the Superior Court;

(The Trustees commenced their proceedings in Montreal, Quebec, because that was the place of business of the shipowner's agents in Canada.)

Section 17(6) of the *Federal Court Act* provides:

17. . . .

(6) Where an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Trial Division has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on the Court.

The Trustees do not contend that the arrest of the Ship and the adjudication of claims under maritime law are bankruptcy matters. Their position is that the bankruptcy order of the Belgian bankruptcy court, and the follow-up orders of the Canadian bankruptcy court, transformed a maritime matter into one of bankruptcy. The corollary to this argument is that the Federal Court, which has no

que, dès qu'un tribunal de faillite étranger est saisi d'un dossier, il a nécessairement compétence exclusive sur les questions concernant le failli dans notre pays. J'ai également rejeté l'idée que la « coordination internationale » exige l'approbation sans discussion des ordonnances délivrées par le tribunal de faillite étranger.

61 Les syndics appelants affirment néanmoins que la Cour fédérale a perdu compétence en raison de l'effet conjugué du par. 183(1) de la *Loi sur la faillite et l'insolvabilité* et du par. 17(6) de la *Loi sur la Cour fédérale*. Le paragraphe 183(1) se lit ainsi :

183. (1) Les tribunaux suivants possèdent la compétence en droit et en équité qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

. . .

b) dans la province de Québec, la Cour supérieure;

(Les syndics ont engagé leurs procédures à Montréal (Québec), parce que c'était le lieu d'affaires des

62 Le paragraphe 17(6) de la *Loi sur la Cour fédérale* prévoit ce qui suit :

17. . . .

(6) La Section de première instance n'a pas compétence dans les cas où une loi fédérale donne compétence à un tribunal constitué ou maintenu sous le régime d'une loi provinciale sans prévoir expressément la compétence de la Cour fédérale.

63 Les syndics ne prétendent pas que la saisie du navire et le règlement des réclamations en vertu du droit maritime sont des questions de faillite. Ils estiment que l'ordonnance de faillite délivrée par le tribunal de faillite belge et les ordonnances complémentaires du tribunal de faillite canadien ont transformé une question de droit maritime en une question de faillite. Cet argument a pour corollaire que

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bankruptcy jurisdiction, thereby lost subject-matter jurisdiction in the case.

64 In my view MacKay J. was not exercising original, ancillary or auxiliary jurisdiction in bankruptcy. If he had, he would have been without jurisdiction and it would not be necessary to have recourse to s. 17(6) of the *Federal Court Act*. This is because s. 17(6) presupposes that the Federal Court *would* have jurisdiction but for that subsection. In *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, at p. 766, this Court concluded that the Federal Court has jurisdiction only if certain conditions are satisfied, including a statutory grant of jurisdiction by the federal Parliament. There has been no such statutory grant of bankruptcy jurisdiction to the Federal Court.

65 The subject matter of the dispute before MacKay J. was the maritime lien asserted by Holt and the claims of other creditors to security in the Ship. He was dealing with *in rem* claims against the Ship, not *in personam* claims against the shipowner. It was apparent from the SNCI's intervention that its mortgage claim of $68 million would, if allowed, swallow whatever funds might be left after the claims of the maritime lienholders had been satisfied. There was therefore no realistic possibility of any residual funds to which the Trustees could properly lay claim.

66 The bankruptcy was certainly not irrelevant to the Federal Court proceedings. The Trustees rightly demanded (and were accorded) rights of participation in the proceedings to protect the interest of the bankrupt shipowner. There was a continuing bankruptcy aspect throughout the Federal Court proceedings after April 5, 1996 which MacKay J. acknowledged in his various orders. Nevertheless, having ruled that he would recognize Holt's security interest as a matter of maritime law, and having regard to the priority accorded to secured creditors in the order of the Canadian bankruptcy court dated June

la Cour fédérale, qui n'a pas compétence en matière de faillite, a de ce fait perdu sa compétence *ratione materiae* dans l'affaire.

À mon avis, le juge MacKay n'exerçait pas une juridiction de première instance, auxiliaire ou subordonnée en matière de faillite. Si cela avait été le cas, il n'aurait pas eu compétence et il ne serait pas nécessaire de recourir au par. 17(6) de la *Loi sur la Cour fédérale*, parce que ce paragra-phe présuppose que la Cour fédérale *serait* a priori compétente. Dans l'arrêt *ITO—International Terminal Operators Ltd. c. Miida Electronics Inc.*, [1986] 1 R.C.S. 752, p. 766, notre Cour a conclu que la Cour fédérale a compétence seulement si certaines conditions sont remplies, notamment s'il y a attribution de compétence par une loi du Parlement fédéral. La Cour fédérale ne s'est pas vu attribuer pareille compétence en matière de faillite.

Le litige soumis au juge MacKay concernait le privilège maritime invoqué par Holt ainsi que les réclamations par d'autres créanciers d'une garan-tie sur le navire. Le juge MacKay était saisi de réclamations *in rem* contre le navire et non pas de réclamations *in personam* contre le propriétaire du navire. Il ressortait de l'intervention de la SNCI que sa créance hypothécaire de 68 000 000 $ englouti-rait, si on y faisait droit, tous les fonds qui pour-raient rester après l'acquittement des réclamations des titulaires de privilège maritime. Il n'y avait donc aucune possibilité réaliste qu'il reste des fonds auxquels les syndics pourraient régulièrement pré-tendre.

La faillite n'était certainement pas dépourvue de pertinence dans le cadre des procédures engagées devant la Cour fédérale. Les syndics ont à bon droit demandé (et obtenu) le droit de participer aux pro-cédures afin de protéger les intérêts du propriétaire failli du navire. Après le 5 avril 1996, les procédu-res devant la Cour fédérale ont comporté un aspect « faillite » dont le juge MacKay a tenu compte dans ses diverses ordonnances. Néanmoins, après avoir décidé de reconnaître la garantie de Holt sur le plan du droit maritime et avoir tenu compte de la priorité accordée aux créanciers garantis dans l'ordonnance

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28, 1996, he rightly concluded that there was no jurisdictional barrier to the Federal Court continuing to adjudicate Holt's *in rem* action against the Ship.

6. Even If the Federal Court Retained Jurisdiction, Ought It Nevertheless to Have Deferred to the Belgian Bankruptcy Court on the Basis of "International Comity" and the Need for an Integrated "Universalist" Approach to the Bankruptcy?

I should first of all address the issue of "international comity" as it pertains to the present appeal and then move on to consider some of the more specific approaches that have been devised to solve problems arising from international bankruptcies. I will then outline what I believe is the preferred approach in cases of this kind.

(a) *The Role of International Comity*

In *Zingre v. The Queen*, [1981] 2 S.C.R. 392, Dickson J. (as he then was) commented at p. 401 that "the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect".

Subsequently, in *Spencer v. The Queen*, [1985] 2 S.C.R. 278, at p. 283, Estey J. accepted as accurate the following definition of international comity:

> "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, 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 protection of its laws: *Hilton v. Guyot*, 159 U.S. 113 (1895), at pp. 163-64.

The Canadian bankruptcy court in this case did not have a monopoly in the determination of what level of "deference and respect" was owed to the Belgian bankruptcy court. Within its own

du tribunal de faillite canadien en date du 28 juin 1996, il a conclu à juste titre qu'aucune entrave juridictionnelle n'empêchait la Cour fédérale de continuer d'instruire l'action *in rem* de Holt contre le navire.

6. Même si la Cour fédérale avait conservé compétence, aurait-elle dû néanmoins s'en remet-tre au tribunal de faillite belge au nom de la « courtoisie internationale » et en raison de la nécessité d'une approche « universaliste » intégrée en matière de faillite?

67 Je vais examiner d'abord la question de la « courtoisie internationale » qui s'applique au présent pourvoi. Par la suite, j'analyserai certaines approches plus particulières qui ont été conçues pour régler les problèmes résultant des faillites internationales. Je vais enfin exposer l'approche qui, selon moi, doit être privilégiée en pareils cas.

a) *Le rôle de la courtoisie internationale*

68 Dans l'arrêt *Zingre c. La Reine*, [1981] 2 R.C.S. 392, p. 401, le juge Dickson (plus tard Juge en chef) affirme que « les tribunaux d'un ressort donneront effet aux lois et aux décisions judiciaires d'un autre, non parce qu'ils y sont tenus, mais par déférence et respect mutuels ».

69 Subséquemment, dans l'arrêt *Spencer c. La Reine*, [1985] 2 R.C.S. 278, p. 283, le juge Estey reconnaît la justesse de la définition suivante de la courtoisie internationale :

> [TRADUCTION] La « courtoisie » au sens juridique n'est ni une question d'obligation absolue d'une part ni de simple politesse et bonne volonté de l'autre. Mais c'est la reconnaissance qu'une nation accorde sur son terri-toire aux actes législatifs, exécutifs ou judiciaires d'une autre nation, compte tenu à la fois des obligations et des convenances internationales et des droits de ses propres citoyens ou des autres personnes qui sont sous la protection de ses lois : *Hilton v. Guyot*, 159 U.S. 113 (1895), aux pp. 163 et 164.

70 En l'espèce, le tribunal de faillite canadien n'avait pas le monopole pour ce qui était de décider quelle mesure « de déférence et de respect » était due le tribunal de faillite belge. Certes, il pouvait

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bankruptcy jurisdiction, of course, it could and did make that determination. Insofar as Holt's claim was "integrally connected to maritime matters", it lay within the jurisdiction of the Federal Court (*Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 73) and it was for that court to decide whether to defer to the Belgian bankruptcy court "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 protection of its laws".

71 In *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, the Court expanded on the definition of international comity by noting that the twin objectives sought by private international law in general and the doctrine of international comity in particular were order and fairness. This was reiterated in *Hunt v. T&N PLC*, [1993] 4 S.C.R. 289, at p. 325, and again in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1058, where the Court gave pre-eminence to the objective of order:

> While, no doubt, as was observed in *Morguard*, the underlying principles of private international law are order and fairness, order comes first. Order is a precondition to justice.

72 It has been, of course, the objective of international maritime law for centuries to create conditions of order and fairness for those engaged in maritime commerce.

(b) *The "Universalist" Approach*

73 The Trustees argue that to achieve the twin objectives of order and fairness in an international insolvency, it is necessary to adopt the "universalist" approach because in fairness "the claims of creditors can be finally determined only by the court of the debtor's domicile in accordance with the law of that place" (Castel, *supra*, at p. 553). They advocate a "close networking between courts on an international level" (factum, at para. 36).

prendre cette décision en vertu de sa propre compétence en matière de faillite, et il l'a fait. Dans la mesure où la réclamation de Holt était « entiè-rement liée aux affaires maritimes », elle relevait de la compétence de la Cour fédérale (*Succession Ordon c. Grail*, [1998] 3 R.C.S. 437, par. 73) et il appartenait à cette cour de décider si elle devait s'en remettre au tribunal de faillite belge « compte tenu à la fois des obligations et des convenances internationales et des droits de ses propres citoyens ou des autres personnes qui sont sous la protection de ses lois ».

Dans l'arrêt *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077, la Cour a élargi la définition de la courtoisie internationale en soulignant que le droit international privé, en général, et la règle de la courtoisie internationale, en particulier, poursuivaient un double objectif d'ordre et d'équité. Cela a été réitéré dans l'arrêt *Hunt c. T&N PLC*, [1993] 4 R.C.S. 289, p. 325, et de nouveau dans l'arrêt *Tolofson c. Jensen*, [1994] 3 R.C.S. 1022, p. 1058, où la Cour a donné préséance à l'ordre :

> S'il ne fait aucun doute, ainsi qu'il a été souligné dans l'arrêt *Morguard*, que l'ordre et l'équité sont les principes fondamentaux du droit international privé, l'ordre vient en premier. L'ordre est une condition préalable de la justice.

Bien sûr, le droit maritime international vise, depuis des siècles, à créer un climat d'ordre et d'équité pour ceux qui se livrent au commerce maritime.

b) *L'approche « universaliste »*

Les syndics allèguent que, pour réaliser ce double objectif d'ordre et d'équité en matière d'insolvabilité internationale, il est nécessaire d'adopter l'approche « universaliste » parce qu'en toute équité [TRADUCTION] « les réclama-tions des créanciers ne peuvent être définitivement réglées que par le tribunal du domicile du débiteur conformément au droit en vigueur à cet endroit » (Castel, *op. cit.*, p. 553). Ils préconisent [TRADUCTION] « l'établissement entre les tribunaux d'un

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réseau serré d’entraide internationale >> (mémoire, par. 36).

In the case at bar the debtor's domicile was Belgium, and the Trustees contend that the Federal Court erred in not requiring Holt and the other secured creditors to pursue their claims in that country. The Trustees also argue that as the Quebec Superior Court decided to come to the aid of the Belgian bankruptcy court, the Federal Court ought, as a matter of "domestic" comity, to have deferred to that decision.

There is much to be said for the proposition that primary insolvency proceedings having been instituted in Belgium, other jurisdictions where the bankrupt possessed assets should cooperate to the extent permitted by their respective laws with the Belgian courts. The need for such international cooperation in bankruptcy and insolvency has been evident for a very long time, though the ever-continuing ascendency of multi-national enterprises and acceleration towards a global economy have made the underlying problems more acute. As long ago as 1883, in the case of *Canada Southern Railway Co. v. Gebhard*, 109 U.S. 527 (1883), the United States Supreme Court said, at p. 539:

> Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries.

The essence of the universalist approach advocated by the Trustees is that there ought to be a primary bankruptcy proceeding, title to assets locally situated should be vested in the foreign representative of the bankrupt estate, creditors should not be permitted to realize on a foreign debtor's assets in the local courts outside the framework of the primary bankruptcy, and orders made in foreign bankruptcy proceedings should be recognized and enforced elsewhere.

Professor J. S. Ziegel contrasts the "universalist" approach to the "territorialist" approach, ear-

En l'espèce, le débiteur était domicilié en 74 Belgique, et les syndics soutiennent que la Cour fédérale a commis une erreur en n'exigeant pas que Holt et les autres créanciers garantis déposent leurs réclamations dans ce pays. Les syndics font également valoir que, puisque la Cour supérieure du Québec avait décidé de prêter son concours au tribunal de faillite belge, la Cour fédérale devait, par courtoisie << nationale >>, s'en remettre à cette décision.

Il y a beaucoup à dire au sujet de la proposition selon laquelle, étant donné que les procédures principales d'insolvabilité ont été engagées en Belgique, les autres ressorts oil la faillie possède des éléments d'actif devraient coopérer avec les tribunaux belges dans la mesure permise par leurs lois respectives. La nécessité d'une telle coopération internationale en matière de faillite et d'insolvabilité se fait sentir depuis fort longtemps, même si la montée constante des entreprises multinationales et l'accélération de la mondialisation de l'économie ont accentué les problèmes sous-jacents. Dès 1883, dans l'affaire *Canada Southern Railway Co. c. Gebhard*, 109 U.S. 527 (1883), la Cour suprême des États-Unis affirmait, à la p. 539 : 75

[TRADUCTION] À moins que toutes les parties en cause, oil qu'elles résident, ne puissent être liées par l'entente qu'on cherche à légaliser, l'initiative peut échouer. Tous les créanciers du pays peuvent être liés. Ce qu'il faut, c'est lier ceux qui sont à l'étranger. Dans ces circons-tances, l'esprit véritable de la courtoisie internationale commande que des initiatives de cette nature, légalisées au pays, soient reconnues dans d'autres pays.

L'approche universaliste préconisée par les 76 syndics veut essentiellement qu'il y ait des procé-dures principales en matière de faillite, que le titre de propriété des biens situés sur place soit dévolu au représentant étranger de l'actif du failli, que les créanciers ne soient pas autorisés à réaliser les biens d'un débiteur étranger devant les tribunaux locaux en dehors du cadre de la faillite principale, et que les ordonnances délivrées dans le cadre de procédures de faillite à l'étranger soient reconnues et mises à exécution ailleurs.

Le professeur J. S. Ziegel oppose l'approche 77 << universaliste >> à l'approche << territorialiste >>,

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lier referred to as the "Grab Rule", and concludes that most jurisdictions exhibit elements of both approaches:

> International insolvency jurists have long classified countries and their conflict of laws rules according to their willingness to recognize and give effect to foreign insolvency orders and judgments. Those regimes that are hospitable to extending such recognition are labelled universalist; those that deny such recognition are classified as territorialist. Common law countries are often described as belonging among the universalist families, while civil law systems are believed to be territorialist.
>
> However, the pigeonholing is misleading. Common law countries differ as widely in their international insolvency rules as do civil law jurisdictions. On closer examination it will be found that some of the jurisdictions that claim to be universalist only practise a very diluted form of universalism while countries labelled as territorialist in fact extend varying measures of recognition to foreign insolvency orders and foreign insolvency representatives.

("Ships at Sea, International Insolvencies, and Divided Courts" (1998), 50 C.B.R. (3d) 310. See also *In re Treco*, *supra*, and Castel, *supra*, at pp. 553-54.)

78 Traditionally, only some of the key components of the universalist approach have been reflected in Canadian law. While our courts generally favour a process of universal distribution and recognize a foreign trustee's title to property, they also permit concurrent bankruptcies and protect the vested rights of what we regard as secured creditors under Canadian law. With respect to the latter, the usual Canadian position has been that a foreign trustee in bankruptcy should have no higher claim on the secured assets of a bankrupt than if the bankruptcy had occurred here. In a true universalist system the question of encumbrances would be settled by the law of the place of the bankruptcy (which may, as in this case, produce a result contrary to Canadian maritime law).

79 Further, Canadian law has always recognized that initiation of foreign bankruptcy proceedings

désignée plus haut comme étant la « règle de l'appropriation », et conclut que des éléments des deux approches se retrouvent dans la plupart des res-sorts :

> [TRADUCTION] Les juristes spécialisés en insolvabilité internationale classent depuis longtemps les pays et leurs règles de conflit des lois en fonction de leur volonté de reconnaître et de mettre à exécution les ordonnances et les jugements en matière d'insolvabilité rendus à l'étranger. Les régimes qui sont favorables à cette reconnaissance sont dits universalistes, et ceux qui sont contre sont dits territorialistes. Les pays de common law sont souvent considérés comme faisant partie de la famille des universalistes, alors que les régimes de droit civil ont la réputa-tion d'être territorialistes.
>
> Toutefois, cette catégorisation est trompeuse. Les pays de common law se distinguent autant entre eux par leurs règles d'insolvabilité internationale que le font les pays de droit civil. Un examen plus attentif montrera que certains pays qui se disent universalistes ne pratiquent qu'une forme très diluée d'universalisme alors que les pays dits territorialistes reconnaissent plus ou moins les ordonnances en matière d'insolvabilité délivrées à l'étranger et les représentants étrangers en la matière.

(« Ships at Sea, International Insolvencies, and Divided Courts » (1998), 50 C.B.R. (3d) 310. Voir aussi *In re Treco*, précité, et Castel, *op. cit*., p. 553-554.)

Traditionnellement, seuls quelques éléments-clés de l'approche universaliste ont marqué le droit canadien. Bien que nos tribunaux favorisent géné-ralement une procédure de répartition universelle et reconnaissent le titre de propriété d'un syndic étranger, ils permettent également les faillites con-comitantes et protègent les droits acquis de ce que nous considérons comme des créanciers garantis en droit canadien. Dans ce dernier cas, on estime habituellement au Canada qu'un syndic de faillite étran-ger ne doit pas avoir plus de droits sur les éléments d'actif garantis d'un failli que si la faillite était sur-venue dans notre pays. Dans un véritable régime universaliste, la question des charges serait réglée par la loi du lieu de la faillite (ce qui peut, comme en l'espèce, entraîner un résultat contraire au droit maritime canadien).

En outre, le droit canadien a toujours reconnu que l'engagement de procédures de faillite à

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does not prevent concurrent insolvency proceedings in Canada: see Castel, *supra*, at p. 565; *Allen v. Hanson* (1890), 18 S.C.R. 667; *Re Breakwater Co.* (1914), 33 O.L.R. 65 (H.C.), and *Re E. H. Clarke & Co.*, [1923] 1 D.L.R. 716 (Ont. S.C.). The existence of two sets of proceedings obviously raises the spectre of conflicting decisions or approaches, although as noted in 1890 by Ritchie C.J. of this Court in *Allen*, *supra*, at p. 674, it is "the duty of the courts of both countries to see no conflict should arise". Conflict avoidance can take many forms, including dismissing or staying Canadian proceedings. Section 43(7) of the *Bankruptcy and Insolvency Act* permits the court to dismiss a petition if it has "sufficient cause". This requirement may be satisfied if the debtor has been declared bankrupt elsewhere. In fact, the courts have stayed liquidation proceedings where bankruptcy proceedings are on foot in a foreign jurisdiction: *Re Stewart & Matthews, Ltd. and The Winding-Up Act* (1916), 10 W.W.R. 154 (Man. K.B.). Similarly, in an appropriate case, the Federal Court can avoid conflict by staying its proceedings pursuant to s. 50 of the *Federal Court Act*.

In short, Canada has adhered to a middle position (dignified by the name "plurality approach") which recognizes that different jurisdictions may have a legitimate and concurrent interest in the conduct of an international bankruptcy, and that the interests asserted in Canadian courts may, but not necessarily must, be subordinated in a particular case to a foreign bankruptcy regime. The general approach reflects a desire for coordination rather than subordination, with deference being accorded only after due consideration of all the relevant circumstances rather than automatically accorded because of an abstract "universalist" principle. As pointed out by Professor Castel, *supra*, at pp. 554-55:

> Under the doctrine of plurality which prevails in Canada, each country has the right, if it deems it advisable, to allow bankruptcy proceedings to begin in its territory by virtue of its bankruptcy law. The court applies its

l'étranger n'empêche pas l'engagement de pro-cédures d'insolvabilité concomitantes au Canada : voir Castel, *op. cit.*, p. 565; *Allen c. Hanson* (1890), 18 R.C.S. 667; *Re Breakwater Co.* (1914), 33 O.L.R. 65 (H.C.), et *Re E. H. Clarke & Co.*, [1923] 1 D.L.R. 716 (C.S. Ont.). L'existence de deux séries de procédures fait naître mani-festement le spectre de décisions ou d'appro-ches contradictoires même si, comme le faisait remarquer, en 1890, le juge en chef Ritchie de notre Cour dans l'arrêt *Allen*, précité, p. 674, [TRADUCTION] « les tribunaux des deux pays [sont] tenus de veiller à ce qu'aucun conflit ne survienne ». Les conflits peuvent être évités de plusieurs façons, notamment par le rejet ou la suspension des pro-cédures au Canada. Le paragraphe 43(7) de la *Loi sur la faillite et l'insolvabilité* autorise le tribunal à rejeter une pétition pour une « cause suffisante ». Cette condition peut être remplie si le débiteur a été mis en faillite ailleurs. En fait, les tribunaux ont suspendu des procédures de liquidation au moment où des procédures de faillite étaient en cours dans un ressort étranger : *Re Stewart & Matthews, Ltd. and The Winding-Up Act* (1916), 10 W.W.R. 154 (B.R. Man.). De même, lorsqu'une affaire s'y prête, la Cour fédérale peut éviter un conflit en sus-pendant ses procédures conformément à l'art. 50 de la *Loi sur la Cour fédérale*.

Bref, le Canada a adopté un point de vue inter-
80 médiaire (qualifié d'« approche pluraliste ») qui consiste à admettre que différents ressorts peuvent avoir un intérêt légitime et concomitant dans le déroulement d'une faillite internationale, et que les droits réclamés devant les tribunaux canadiens peu-vent mais ne doivent pas nécessairement être subor-donnés à un régime de faillite étranger dans un cas particulier. Cette approche générale témoigne d'un désir de coordination plutôt que de subordination, où l'on ne fait preuve de déférence qu'après avoir bien examiné toutes les circonstances pertinentes, et non pas automatiquement en fonction d'un principe « universaliste » abstrait. Comme l'a souligné le professeur Castel, *op. cit.*, p. 554-555 :

[TRADUCTION] Selon la règle de la pluralité appliquée au Canada, chaque pays a le droit, s'il le juge utile, de permettre que des procédures de faillite soient engagées sur son territoire sous le régime de sa loi

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own substantive law. Thus, bankruptcies may be initiated in a number of countries with respect to the same debtor. In Canada, this rigid doctrine is partially tempered by close cooperation with foreign courts.

81 The question is whether, as argued by the appellant Trustees, this orientation in Canada ought now to be changed to a more "universalist" approach.

(c) *The 1997 Amendments to the Act*

82 In April 1997 Parliament enacted Part XIII of the *Bankruptcy and Insolvency Act*, entitled "International Insolvencies". It applies only to bankruptcy proceedings initiated after September 30, 1997, and thus has no direct application here. Nevertheless, it is worth noting that Parliament has continued the diluted universalism (or "plurality approach") adopted by Canadian courts under the common law. There is now, under Part XIII, specific authority to come to the aid of foreign courts and "foreign representatives" in the administration and adjudication of insolvencies that have international dimensions. There is also authority for Canadian courts, under s. 271(1), to request "the aid and assistance of a court, tribunal or other authority in a foreign proceeding". The objective of these provisions is to facilitate the coordination of foreign and domestic insolvency proceedings. Nevertheless, there is no rule requiring Canadian courts to refrain from entertaining concurrent proceedings. On the contrary, concurrent proceedings are anticipated as Canadian courts are given authority under s. 268(3) to make orders that will result in a *coordination* of domestic and foreign proceedings, not the *elimination* of one in preference to the other. By authorizing a Canadian court under subs. (2) to limit the domestic trus-tee's authority to property situated in Canada, Parliament obviously anticipated that in certain cases a territorialist approach would be acceptable. The amendments provide specifically that a court is not compelled to enforce any order made by a foreign court: s. 268(6).

sur la faillite. Le tribunal applique ses propres règles de fond. Ainsi, des procédures de faillite peuvent être engagées dans plusieurs pays à l'égard du même débiteur. Au Canada, cette règle rigide est partiellement tempérée par une étroite collaboration avec les tribunaux étrangers.

La question est de savoir si cette orientation canadienne doit maintenant céder le pas à une approche plus « universaliste », comme l'ont fait valoir les syndics appelants.

c) *Les modifications apportées à la Loi en 1997*

En avril 1997, le législateur a adopté la partie XIII de la *Loi sur la faillite et l'insolvabilité*, inti-tulée « Insolvabilité en contexte international ». Cette partie ne s'applique qu'aux procédures de faillite engagées après le 30 septembre 1997 et n'a donc aucun impact direct en l'espèce. Il importe néanmoins de souligner que le législateur a main-tenu l'universalisme dilué (ou « approche plura-liste ») adopté par les tribunaux canadiens sous le régime de la common law. Il existe désormais, en vertu de la partie XIII, une autorisation particulière de prêter concours aux tribunaux étrangers et aux « représentants étrangers » dans l'administration et le règlement des insolvabilités ayant des dimensions internationales. Les tribunaux canadiens sont égale-ment autorisés, en vertu du par. 271(1), à demander « le concours d'une cour, d'un tribunal ou d'une autre autorité à l'étranger ». Ces dispositions ont pour objet de faciliter la coordination des procédu-res d'insolvabilité engagées à l'étranger et au pays. Néanmoins, aucune règle n'empêche les tribunaux canadiens d'instruire des procédures concomitantes. Au contraire, les procédures concomitantes sont prévues étant donné que le par. 268(3) habilite les tribunaux canadiens à rendre des ordonnances qui entraîneront une *coordination* des procédures enga-gées au pays et à l'étranger, et non l'*élimination* des unes au profit des autres. En autorisant, au par. (2), le tribunal canadien à limiter le pouvoir du syndic canadien aux biens situés au Canada, le législateur s'attendait visiblement à ce que l'approche territo-rialiste soit acceptable dans certains cas. Les modifications prévoient spécifiquement qu'un tribunal n'est pas tenu de mettre à exécution les

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ordonnances délivrées par un tribunal étranger : par. 268(6).

Moreover, s. 269 explicitly denies extraterritorial reach to foreign stay orders. It says that a foreign stay of proceedings "does not apply in respect of creditors who reside or carry on business in Canada with respect to property in Canada unless the stay of proceedings is the result of proceedings taken in Canada".

It thus appears that Canadian public policy, expressed as recently as 1997 by Parliament, endorses the plurality approach developed over the years by the courts.

(d) *The Preferred Approach*

Given the almost infinite variations in circumstances that can occur in an "international bankruptcy", the pragmatism of the "plurality" approach continues to recommend itself. International coordination is an important factor, but it is not necessarily a controlling factor.

Where a stay is sought of Canadian proceedings in deference to a foreign bankruptcy court, the Canadian court before which the stay application is made (in this case the Federal Court) ought to be mindful of the difficulties confronting the bankruptcy trustees in the fulfilment of their public mandate to bring order out of financial disorder and the desirability of maximizing the size of the bankrupt estate. These objectives are furthered by minimizing the multiplicity of proceedings, and the attendant costs, and the possibility of inconsistent decisions in relation to the same claims or assets.

Nevertheless, courts must have regard to the need to do justice to the particular litigants who come before them as well as to the public interest in the efficient administration of bankrupt estates. It would be inappropriate to elevate any one consideration to a controlling position in the exercise of a bankruptcy court's discretion to dismiss a petition under s. 43(7) *or* to stay proceedings under Part XIII of the Act *or* in the Federal Court's decision to stay proceedings under s. 50 of

De plus, l'art. 269 prévoit explicitement que 83 les ordonnances de suspension des procédures à l'étranger n'ont aucune portée extraterritoriale. Aux termes de ce paragraphe, la suspension des procédures à l'étranger « n'est opposable aux créanciers qui résident ou font affaires au Canada en ce qui touche les biens du débiteur situés au Canada que si elle résulte de procédures intentées au Canada ».

Il appert donc que la politique générale du Canada, énoncée dès 1997 par le législateur, entérine l'approche pluraliste établie au fil des ans par les tribunaux.

d) *L'approche privilégiée*

Vu la variété quasi infinie des circonstances qui peuvent entourer une « faillite internationale », le pragmatisme de l'approche pluraliste continue de s'imposer. La coordination internationale est un facteur important, mais elle ne constitue pas nécessairement un facteur déterminant.

Lorsqu'un tribunal canadien (en l'occurrence 86 la Cour fédérale) est saisi d'une demande de suspension de ses procédures par déférence pour un tribunal de faillite étranger, il doit être conscient des difficultés auxquelles sont confrontés les syndics de faillite dans l'accomplissement de leur mandat public de rétablir l'ordre dans un désordre financier, et de l'intérêt de maximiser la taille de l'actif du failli. Ces objectifs peuvent être atteints en réduisant au minimum la multiplicité des pro-cédures et les coûts qui s'y rattachent, ainsi que la possibilité que les mêmes réclamations ou les mêmes éléments d'actif fassent l'objet de décisions incompatibles.

Toutefois, les tribunaux doivent tenir compte 87 de la nécessité de rendre justice aux parties qui se présentent devant eux, ainsi que de l'intérêt qu'a le public dans l'administration efficace de l'actif du failli. Il ne conviendrait pas qu'une considération soit qualifiée de déterminante par un tribunal de faillite qui exerce son pouvoir discrétionnaire de rejeter une pétition fondée sur le par. 43(7) *ou* de suspendre des procédures en vertu de la partie XIII de la Loi, *ou encore* par la Cour fédérale lorsqu'elle

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the *Federal Court Act*. Discretion should not be thus predetermined. The desirability of international coordination is an important consideration. In some cases, it may be the controlling consideration. The courts nevertheless have to exercise their discretion to stay or not to stay domestic proceedings according to all of the relevant facts of a particular case.

décide de suspendre des procédures en vertu de l'art. 50 de la *Loi sur la Cour fédérale*. Le pouvoir discrétionnaire ne doit pas être ainsi prédéterminé. L'utilité de la coordination internationale est certes une considération importante. Dans certains cas, elle peut être déterminante. Les tribunaux doivent néanmoins exercer leur pouvoir discrétionnaire de suspendre ou de ne pas suspendre les procédures engagées au pays en tenant compte de tous les faits pertinents de l'affaire.

7. In Light of the Foregoing, Did the Federal Court Err in the Exercise of its Discretion to Deny the Trustees' Application for a Stay of Proceedings?

7. À la lumière de ce qui précède, la Cour fédérale a-t-elle commis une erreur dans l'exercice de son pouvoir discrétionnaire de refuser la demande de suspension des procédures présentée par les syndics?

88 The dollars and cents issue in this case should not be obscured entirely by the scholarly debate between universalists, pluralists and territorialists. The Trustees advocate a "universalist" approach because it is in their interest, acting on behalf of all creditors, to take the proceeds of sale of the Ship home to Belgium for distribution according to Belgian law. It is clearly not in the respondent's interest, because it appears that Holt's claim would not enjoy under Belgian law the priority it has under Canadian law. If Holt is obliged to defend variations of the "territorialist" position, it is because it seems that is the only way its claim will be paid in full on a timely basis or perhaps at all.

La question monétaire en l'espèce ne doit pas être totalement éclipsée par le débat doctrinal entre les universalistes, les pluralistes et les territorialis-tes. Les syndics préconisent une approche « universaliste » parce que, du fait qu'ils agissent pour le compte de tous les créanciers, il est dans leur intérêt de rapatrier en Belgique le produit de la vente du navire pour le répartir conformément au droit belge. Une telle mesure n'est manifestement pas dans l'intérêt de l'intimée puisqu'il appert que, en droit belge, la réclamation de Holt ne bénéficierait pas de la priorité dont elle bénéficie en droit canadien. Si Holt doit défendre des variantes de l'approche « territorialiste », c'est parce qu'il semble que ce soit la seule façon de voir sa réclamation acquittée en totalité en temps opportun ou peut-être même tout simplement acquittée.

89 The Federal Court's authority to stay proceedings is found, as noted, in s. 50 of the *Federal Court Act*:

50. (1) The Court may, in its discretion, stay proceedings in any cause or matter,

(a) on the ground that the claim is being proceeded with in another court or jurisdiction; or

(b) where for any other reason it is in the interest of justice that the proceedings be stayed.

Le pouvoir de la Cour fédérale de suspendre des procédures est, comme nous l'avons vu, conféré par l'art. 50 de la *Loi sur la Cour fédérale* :

50. (1) La Cour a le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :

a) au motif que la demande est en instance devant un autre tribunal;

b) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

The principles on which the discretion should be exercised in this type of case were authoritatively settled in *Amchem*, *supra*. Sopinka J., speaking

Les principes qui doivent sous-tendre l'exercice du pouvoir discrétionnaire dans ce type d'af-faire ont été établis péremptoirement dans l'arrêt

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for the Court, posed the question at p. 920, "is there a more appropriate jurisdiction based on the relevant factors", to which he added at p. 921, "the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff" (emphasis in original).

Amchem was a purely private piece of litigation involving product liability claims related to exposure to asbestos. International bankruptcies have a public aspect, because it is in the public interest to facilitate the speedy resolution of the fallout from a financial collapse. This does not change the *Amchem* analysis. It is simply to emphasize an important public aspect of this case that was not present in the *Amchem* fact situation.

The "natural forum" is the one to which the action has the most real and substantial connection (*Amchem*, at pp. 916 and 935). Relevant circumstances include not only issues of public policy (as in this case) but also the potential loss to the plaintiff of a juridical advantage sufficient to work an injustice if the proceedings were stayed, the place or places where the parties carry on their business, the convenience and expense of litigating in one forum or the other, and the discouragement of forum shopping. In short, within the overall framework of public policy, any injustice to the plaintiff in having its action stayed must be weighed against any injustice to the defendant if the action is allowed to proceed. What is required is that these factors be carefully weighed in the balance.

In addressing the issue of a stay, MacKay J. acknowledged the importance of comity and international coordination in a proper case. Having done so, he went on to place primary emphasis on the fact he was dealing with an *in rem* action by secured creditors against a ship which at the time of the bankruptcy the Federal Court had already arrested

Amchem, précité. Le juge Sopinka, s'exprimant au nom de la Cour, s'est demandé, à la p. 920, si « un autre tribunal serai[t] plus approprié, compte tenu des facteurs pertinents », ce à quoi il a ajouté, à la p. 921, qu'« il faut établir clairement qu'un autre tribunal est plus approprié pour que soit écarté celui qu'a choisi le demandeur » (souligné dans l'original).

L'affaire *Amchem* était un litige purement privé où il était question d'actions en responsabilité du fait du produit liées à une exposition à l'amiante. Les faillites internationales comportent un aspect public, car il est dans l'intérêt public de faciliter le règlement rapide des retombées d'un effondrement financier. Cela ne change rien à l'analyse prévue dans l'arrêt *Amchem*. Il s'agit simplement de souligner que la présente affaire comporte un aspect public important, qui était absent dans l'affaire *Amchem*.

Le « ressort logique » est celui avec lequel
91 l'action a le lien le plus réel et le plus important (*Amchem*, précité, p. 916 et 935). Les circonstances pertinentes comprennent non seulement les questions de politique générale (comme en l'espèce) mais également la possibilité que la suspension des procédures fasse perdre au demandeur un avantage juridique à tel point qu'il en résulterait une injustice, le ou les endroits où les parties exploitent leur entreprise, l'avantage de soumettre un litige dans un ressort ou un autre et les frais qui s'y rattachent, et la nécessité de dissuader les parties de rechercher un tribunal favorable. Bref, dans le contexte global d'une politique générale, toute injustice que subirait le demandeur si son action était suspendue doit être appréciée en fonction de toute injustice qui serait causée au défendeur si l'action pouvait suivre son cours. Ces facteurs doivent soigneusement être sou-pesés.

En examinant la question de la suspension, le
92 juge MacKay a reconnu l'importance de la courtoisie et de la coordination internationale lorsqu'une affaire s'y prête. Il a ensuite insisté principalement sur le fait qu'il était saisi d'une action *in rem* intentée par des créanciers garantis contre un navire dont la Cour fédérale avait déjà ordonné la saisie au moment de

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and at the time of the interventions of the Canadian bankruptcy court (June 11 and June 28, 1996) he had already ordered appraised and sold. Moreover, the order dated June 28 had expressly made the interest of the appellant Trustees subject "to the rights, if any, of any creditors with claims secured under the laws of Canada, as by law provided".

93 The appellants' strongest argument is that the dispute is but weakly connected to Canada. This Court, however, in *Antares Shipping Corp. v. The Ship "Capricorn"*, [1977] 2 S.C.R. 422, recognized that lack of substantive connections to *any* particular jurisdiction, including its home port, is a feature of ships engaged in international maritime commerce. In that case, the Court refused to stay proceedings *in rem* in which three Liberian corporations contested in Canada the ownership of a Liberian registered ship. Liberia, of course, is a flag of convenience. Ships registered there may never have occasion to "go home". In *Antares Shipping*, the only connection to Canada was that the ship was arrested at the suit of one of the Liberian corporations while it was in Canadian waters. Ritchie J., speaking for the majority, recognized that ocean-going ships present a particular problem. At p. 453, he adopted the following observations of Lord Simon, dissenting, in *The Atlantic Star*, [1973] 2 All E.R. 175 (H.L.), at p. 197:

> Ships are elusive. The power to arrest in any port and found thereon an action in rem is increasingly required with the custom of ships being owned singly and sailing under flags of convenience. A large tanker may by negligent navigation cause extensive damage to beaches or to other shipping: she will take very good care to keep out of the ports of the 'convenient' forum. If the aggrieved party manages to arrest her elsewhere, it will be said forcibly (as the appellants say here): 'The defendant has no sort of connection with the forum except that she was arrested within its jurisdiction.' But that will frequently be the only way of securing justice.

la faillite, et dont il avait déjà ordonné l'évaluation et la vente au moment des interventions du tribunal de faillite canadien (11 juin et 28 juin 1996). En outre, l'ordonnance du 28 juin avait expressément assujetti l'intérêt des syndics appelants aux [TRADUCTION] « droits des créanciers dont les réclamations sont garanties sous le régime des lois du Canada, conformément à la loi ».

L'argument le plus solide des appelants veut que le litige ne soit que faiblement lié au Canada. Cependant, dans l'arrêt *Antares Shipping Corp. c. Le navire « Capricorn »*, [1977] 2 R.C.S. 422, notre Cour a reconnu que l'absence de lien important avec *un* ressort particulier, y compris leur port d'attache, est une caractéristique des navires qui servent au commerce maritime international. Dans cette affaire, la Cour a refusé de suspendre les procédures *in rem* dans lesquelles trois socié-tés libériennes contestaient au Canada la propriété d'un navire immatriculé au Libéria. Bien entendu, le pavillon du Libéria est un pavillon de complaisance. Les navires qui y sont immatriculés n'auront peut-être jamais l'occasion de « rentrer à la maison ». Dans *Antares Shipping*, le seul lien qui existait avec le Canada était que le navire avait été saisi à la demande d'une des sociétés libé-riennes, alors qu'il était en eaux canadiennes. Le juge Ritchie, s'exprimant au nom de la majorité, a reconnu que les navires de haute mer posent un problème particulier. À la page 453, il a fait sien-nes les observations suivantes de lord Simon, dissident, dans *The Atlantic Star*, [1973] 2 All E.R. 175 (H.L.), p. 197 :

> [TRADUCTION] Les navires se dérobent facilement. Le pouvoir de les saisir dans n'importe quel port et d'intenter une action in rem est de plus en plus nécessaire, compte tenu de la coutume de la propriété unique des navires et l'usage des pavillons de complaisance. Un grand pétro-lier, naviguant avec négligence, peut causer des dom-mages considérables aux plages ou à d'autres navires; il évitera soigneusement les ports situés dans le ressort d'un tribunal « compétent ». Si la partie lésée parvient à le saisir ailleurs, on opposera énergiquement (comme le font les appelantes en l'espèce) que : « Le défendeur n'a aucun lien avec le tribunal, si ce n'est qu'il a été saisi dans son ressort. » Mais souvent, ce sera la seule façon d'obtenir justice.

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Belgium is not a "flag of convenience" like Liberia but the principle remains the same. The "real and substantial connection" test must take into account the special lifestyle of ocean-going freighters.

As to the appellants' allegation that Holt was engaged in "forum shopping", the further observations of Lord Simon quoted in *Antares Shipping*, at p. 453, are also apposite:

> 'Forum-shopping' is, indeed, inescapably involved with the concept of maritime lien and the action in rem. Every port is automatically an admiralty emporium. This may be very inconvenient to some defendants; but the system has unquestionably proved itself on the whole as an instrument of justice.

With respect to juridical advantage, the trial judge stated that "there simply was no evidence of the comparative status of the plaintiff's claim under Belgian and Canadian law" (para. 76). On appeal, as mentioned, the Federal Court of Appeal noted that "both parties concede [that it was] unlikely that [Holt's] *in rem* rights could subsist in one form or another under Belgian bankruptcy laws" (endnote 5). The apparent concession at the hearing before the Federal Court of Appeal only adds to the weight of the arguments earlier accepted by MacKay J. to allow the *in rem* action to proceed.

If, contrary to the concession in the Federal Court of Appeal, we were to assume in the Trustees' favour that there was no juridical advantage to Holt or other secured creditors in keeping alive the *in rem* action in Canada, it means that there would equally be no advantage to the Trustees in moving the proceedings to Belgium. The same secured creditors would (on that assumption) exhaust the proceeds of the sale of the Ship, but pay the additional penalty of the cost of duplicative proceedings in Belgium. To talk of the benefits of the "universalist" approach to international bankruptcies in such circumstances is illusory.

Le pavillon de la Belgique n'est pas un « pavillon de complaisance » comme l'était le pavillon du Libéria, mais le principe demeure le même. Le critère du « lien réel et important » doit tenir compte du « mode de vie » particulier des cargos.

94 Quant à l'allégation des appelants selon laquelle Holt était à la « recherche du tribunal le plus favorable », les observations suivantes de lord Simon, citées dans *Antares Shipping*, p. 453, sont également pertinentes :

> [TRADUCTION] La « recherche d'un tribunal » est de fait inévitablement liée au concept du privilège maritime et à l'action *in rem*. Chaque port constitue automatiquement un choix possible en matière d'amirauté. Cela peut être très ennuyeux pour certains défendeurs; mais de façon générale, le système sert incontestablement les fins de la justice.

En ce qui a trait à l'avantage juridique, le juge de 95 première instance a dit que « la Cour n'a été saisie d'aucun élément de preuve comparant le statut de la réclamation de la demanderesse en droit belge et en droit canadien » (par. 76). En appel, comme nous l'avons vu, la Cour d'appel fédérale a fait remarquer que les « deux parties admettent [qu'il était] peu probable que les droits *in rem* de [Holt] puissent subsister sous une forme ou une autre sous le régime des lois belges sur la faillite » (note de renvoi 5). Cette concession manifeste lors de l'audience devant la Cour d'appel fédérale ne fait que s'ajouter au poids des arguments précédemment acceptés par le juge MacKay pour autoriser la poursuite de l'ac-tion *in rem*.

Si, contrairement à la concession faite devant la 96 Cour d'appel fédérale, nous devions présumer, au profit des syndics, que Holt ou les autres créanciers garantis n'avaient aucun avantage juridique à poursuivre l'action *in rem* au Canada, cela signifierait que les syndics n'auraient également aucun avan-tage à déplacer les procédures en Belgique. Les mêmes créanciers garantis (selon cette présomp-tion) épuiseraient le produit de la vente du navire, mais devraient assumer les frais additionnels liés à la répétition des mêmes procédures en Belgique. Dans ces circonstances, parler des avantages de l'approche

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<< universaliste >> en matière de faillites internationales est illusoire.

97 The trial judge also placed reliance on the convenience to the U.S. creditors of litigating in Canada rather than Belgium. This factor is relevant (*Amchem*, *supra*, at p. 917) but would not, I think, be of great weight if the appellant Trustees had been able to show that justice required deference to the court of the domicile of the bankrupt.

98 In summary, the trial judge considered the relevant factors in reaching his conclusion that the Federal Court was the appropriate forum to resolve the respondent's claim. He committed no error of principle and did not refuse "to take into consideration a major element for the determination of the case": *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at p. 588; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 77. In the absence of error, we are not entitled to interfere with the exercise of his discretion.

V. Conclusion

99 The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Brisset Bishop, Montréal.

Solicitors for the respondent: McInnes Cooper & Robertson, Halifax, Nova Scotia.

Le juge de première instance a également souligné qu'il était avantageux pour les créanciers américains d'engager des procédures au Canada plutôt qu'en Belgique. Ce facteur est pertinent (*Amchem*, précité, p. 917), mais je ne pense pas qu'il aurait une grande importance si les syndics appelants avaient pu établir que la justice exigeait de s'en remettre au tribunal du domicile de la faillie.

En résumé, le juge de première instance a tenu compte des facteurs pertinents pour conclure que la Cour fédérale était le tribunal compétent pour régler la réclamation de l'intimée. Il n'a commis aucune erreur de principe et n'a pas refusé « de tenir compte d'un élément prépondérant en l'espèce » : *Harel-kin c. Université de Regina*, [1979] 2 R.C.S. 561, p. 588; *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, p. 77. En l'absence d'erreur, nous n'avons pas le droit d'intervenir dans l'exercice de son pouvoir discrétionnaire.

V. Conclusion

Le pourvoi est rejeté avec dépens.

Pourvoi rejeté avec dépens.

Procureurs des appelants : Brisset Bishop, Montréal.

Procureurs de l'intimée : McInnes Cooper & Robertson, Halifax, Nouvelle-Écosse.

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Tab 2

CITATION: Massachusetts Elephant & Castle Group, Inc. (Re), 2011 ONSC 4201
COURT FILE NO.: CV-11-9279-00CL
DATE: 20110711

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MASSACHUSETTS EASTERN DIVISION WITH RESPECT TO THE COMPANIES LISTED ON SCHEDULE "A" HERETO (THE "CHAPTER 11 DEBTORS")

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

RE: **MASSACHUSETTS ELEPHANT & CASTLE GROUP, INC., Applicant**

BEFORE: MORAWETZ J.

COUNSEL: Kenneth D. Kraft, Sara-Ann Wilson, for the Applicant

Heather Meredith, for the GE Canada Equipment Financing GP

HEARD &
ENDORSED: July 4, 2011
REASONS: July 11, 2011

ENDORSEMENT

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

(a) an Initial Recognition Order declaring that:

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

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

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

(b) a Supplemental Order:

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

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

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

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

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

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

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

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

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

[8] MECG also included in its materials the declaration of Mr. David Dobbin filed in support of the first-day motions in the Chapter 11 Proceeding. Mr. Dobbin, at paragraph 19 of the declaration outlined the sale efforts being entered into by MECG. Mr. Dobbin also outlined the purpose of the Chapter 11 Proceeding, namely, to sell the Chapter 11 Debtors' businesses as a

going concern on the most favourable terms possible under the circumstances and keep the Chapter 11 Debtors' business intact to the greatest extent possible during the sales process.

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

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

> 44. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote
>
> (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
>
> (b) greater legal certainty for trade and investment;
>
> (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
>
> (d) the protection and the maximization of the value of debtor company's property; and
>
> (e) the rescue of financially troubled businesses to protect investment and preserve employment.

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

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

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

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

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

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

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(a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or

(b) act as a representative in respect of the foreign proceeding.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[26] Counsel to the Applicant referenced *Re Angiotech Pharmaceuticals Limited*, 2011 CarswellBC 124 where the court listed a number of factors to consider in determining the COMI including:

(a) the location where corporate decisions are made;

(b) the location of employee administrations, including human resource functions;

(c) the location of the debtor's marketing and communication functions;

(d) whether the enterprise is managed on a consolidated basis;

(e) the extent of integration of an enterprise's international operations;

(f) the centre of an enterprise's corporate, banking, strategic and management functions;

(g) the existence of shared management within entities and in an organization;

(h) the location where cash management and accounting functions are overseen;

(i) the location where pricing decisions and new business development initiatives are created; and

(j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

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

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

[29] For example:

(a) the location from which financing was organized or authorized or the location of the debtor's primary bank would only be important where the bank had a degree of control over the debtor;

(b) the location of employees might be important, on the basis that employees could be future creditors, or less important, on the basis that protection of employees is more an issue of protecting the rights of interested parties and therefore is not relevant to the COMI analysis;

(c) the jurisdiction whose law would apply to most disputes may not be an important factor if the jurisdiction was unrelated to the place from which the debtor was managed or conducted its business.

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

(a) the location of the debtor's headquarters or head office functions or nerve centre;

(b) the location of the debtor's management; and

(c) the location which significant creditors recognize as being the centre of the company's operations.

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

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

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

> 48. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,
>
> (*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the

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> debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
>
> (d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

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

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

> 49. (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order
>
> (a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);
>
> (b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and
>
> (c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

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

> (a) the Foreign Representative Order;
>
> (b) the U.S. Cash Collateral Order;
>
> (c) the U.S. Prepetition Wages Order;
>
> (d) the U.S. Prepetition Taxes Order;

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(e) the U.S. Utilities Order;

(f) the U.S. Cash Management Order;

(g) the U.S. Customer Obligations Order; and

(h) the U.S. Joint Administration Order.

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

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

> 50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.
>
> ...
>
> 61. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.
>
> (2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

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

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

MORAWETZ J.

Date: July 11, 2011

2011 ONSC 4201 (CanLII)

SCHEDULE "A"

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

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Tab 3

Ontario Supreme Court
Babcock & Wilcox Canada Ltd.,
Date: 2000-02-25

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.

2000 CanLII 22482 (ON SC)

Ontario Superior Court of Justice [Commercial List] Farley J.

Heard: February 25, 2000

Judgment: February 25, 2000

Docket: 00-CL-3667

Derrick Toy, for Babcock & Wilcox Canada Ltd.

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

***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;

( ) 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

(a) and for other ancillary relief.

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[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.

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[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 slate 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.

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[0] 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.

[1] 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.

[2] 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

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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).

[0] 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 Plaintiffs attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding... (emphasis added)

[1] 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]).

[2] 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

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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

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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

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under the definition of s. 18.6. I therefore declare that those proceedings are to be recognized as a “foreign proceeding” for the purposes of s. 18.6 of the CCAA.

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

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

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

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

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

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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

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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.

(d) 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.

(b) 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.

(c)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

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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;

( ) the location of the debtor's stakeholders;

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

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

(iii) 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

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

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

[24] Order to issue accordingly.

Application granted.

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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

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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 properly 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.

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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

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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

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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) 9775239).

DATED this day of, 2000 at Toronto, Canada

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Court File No. 00-CL-3667

IN THE MATTER OF S. 18.6 of THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

	SUPERIOR COURT OF JUSTICE COMMERCIAL LIST PROCEEDINGS
INITIAL ORDER	
	MEIGHEN DEMERS Barristers & Solicitors Suite 1100, Box 11 Merrill Lynch Canada Tower Sun Life Centre 200 King Street West Toronto, Ontario M5H 3T4 DERRICK C. TAY ORESTES PASPARAKIS Tel: (416) 340-6000 Fax:(416)977-5239 Solicitors for the Applicant

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Tab 4

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Probe Resources Ltd. (Re)***,
2011 BCSC 552

Date: 20110331
Docket: S112111
Registry: Vancouver

In Bankruptcy and Insolvency

And:

In the Matter of the Companies' Creditors Arrangement Act
Part IV Cross-Border Insolvencies
R.S.C. 1985, C. C-36, as amended

And:

In the Matter of Probe Resources Ltd.

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

Counsel for the Petitioner:	P.J. Reardon
Place and Date of Hearing:	Vancouver, B.C. March 31, 2011
Place and Date of Judgment:	Vancouver, B.C. March 31, 2011

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[1] THE COURT: This is an application pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"), and, specifically Part IV entitled "Cross-Border Insolvencies", to recognize certain cross-border insolvency proceedings relating to the petitioner, Probe Resources Ltd. ("Probe Canada").

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[2] By way of background, Probe Canada is a British Columbia corporation incorporated pursuant to the *Business Corporations Act*, S.B.C. 2002, c.57 (the "*BCA*"). Its registered office is located in Vancouver, British Columbia. It is listed as a public company on the TSX Venture Exchange. As at December 10, 2010, Probe Canada had approximately 106 million issued and outstanding common shares. At present, Probe Canada is subject to a cease trade order issued by securities regulators.

[3] Probe Canada operates through four wholly owned subsidiaries, all of which are incorporated in the U.S. Its business operations include oil and natural gas exploration and production. I am advised that those subsidiaries operate businesses near the Gulf of Mexico in Texas and Louisiana. None of the business operations take place in Canada.

[4] The impetus behind the restructuring proceedings, discussed in more detail below, arises from the secured debt owing by Probe Canada and its U.S. subsidiaries in the amount of approximately $27 million.

[5] In November 2010, Mr. T. Coy Gallatin was engaged by the board of Probe Canada to become the chief restructuring officer of Probe Canada and its subsidiaries. Mr. Gallatin is a resident of Texas. Shortly after Mr. Gallatin's appointment, on November 16, 2010, the Probe U.S. subsidiaries commenced proceedings in the United States Bankruptcy Court for the Southern District of Texas Houston Division (the "U.S. Bankruptcy Court") pursuant to Chapter 11 of the *United States Bankruptcy Code*. The Chapter 11 proceedings of Probe Canada followed shortly thereafter, on December 10, 2010. I understand that joint administration of

the bankruptcy cases for all five companies has been ordered by the U.S. Bankruptcy Court.

[6] It appears that the Chapter 11 proceedings have progressed at a fairly rapid rate. Various orders have been granted in those proceedings approving the disclosure requirements relating to the joint plan of arrangement that was proposed, and approving the voting procedures so that the stakeholders could consider the plan. On March 18, 2011, Probe Canada and its subsidiaries confirmed to the U.S. Bankruptcy Court that the plan had been approved by the requisite majorities of the classes of creditors. Ultimately, on March 21, 2011, the Honourable Judge Karen Brown of the U.S. Bankruptcy Court granted an order confirming the joint plan as presented by Probe Canada and its U.S. subsidiaries.

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[7] The provisions of the *CCAA* relating to cross-border insolvencies that Probe Canada seeks to rely on have been in place for many years now. They were recently amended in late 2009 to, in large part, adopt the *United Nations Commission on International Trade Law* ("*UNCITRAL*") Model Law on cross-border insolvencies. I am advised by Mr. Reardon, counsel for the applicant, that there has been little judicial consideration of these new provisions.

[8] The application is brought specifically under s. 46(1), which provides:

> A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

[9] The first question is whether or not the requirement of there being a "foreign representative" has been met. Section 45(1) defines a "foreign representative" as:

> ... a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to
>
> (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or
>
> (b) act as a representative in respect of the foreign proceeding.

[10] I have been referred to Judge Brown's order in the U.S. Bankruptcy Court on March 21, 2011, which specifically authorizes Probe Canada to act as a foreign

representative on behalf of itself and the U.S. subsidiaries in any judicial or other proceeding held in a foreign country. Accordingly, I am satisfied that Probe Canada stands before the Court today as a foreign representative as that term is defined in the *CCAA*.

[11] The next question is whether there is a "foreign proceeding". Section 45(1) defines a foreign proceeding as meaning:

> ... a judicial or an administrative 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.

[12] It is clear in this case that the foreign proceedings are those under Chapter 11 of the *United States Bankruptcy Code*. I am satisfied that those proceedings were commenced in the U.S. Bankruptcy Court by Probe Canada and its U.S. subsidiaries, as I have earlier described. Proceedings under the *United States Bankruptcy Code* are well known in this Court and in other superior courts across Canada, and I do not believe that there is any controversy that those proceedings would constitute a foreign proceeding in this Court.

[13] The *CCAA* provides that the foreign representation must submit certain documents in its application materials to prove both the existence of the foreign proceeding and also the foreign representative's authority to act as such. Subsections 46(2)(a) and (b) of the *CCAA* provide that an application must be accompanied by a certified copy of the instrument that both commences the foreign proceeding and that authorizes the foreign representative to act. In the alternative, the foreign representation must provide a certificate from the foreign court affirming the existence of the foreign proceedings and affirming the foreign representative's authority to act. Lastly, s. 46(2)(c) provides that the foreign representative must provide a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative. These documents may be accepted by the Court as evidence without further proof: s. 46(3).

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[14] In this case, certified copies of those U.S. Bankruptcy Court documents have not been provided. Nor has the U.S. Bankruptcy Court provided a certificate as required. Appended to Mr. Gallatin's affidavit are simply copies of the various court documents.

[15] Counsel for Probe Canada made submissions regarding the manner of proof provided. Counsel for Probe Canada has referred me to s. 46(4) of the *CCAA* which provides that the Court may, in the absence of those documents, accept any other evidence of the existence of the foreign proceeding and the foreign representative's authority that it considers appropriate. I am satisfied on the basis of the affidavit evidence and copies of documents provided that the necessary evidentiary basis has been brought before this Court to establish both the commencement of the foreign proceeding and the authority of the foreign representative.

[16] I would say, however, as a matter of practice, that s. 46(2) is clear in the sense of dictating the ideal evidence that should be brought before courts on these types of proceedings: the certified copies, or the certificate from the foreign court. In respect of future applications, however, it is my view that there must be some basis upon which courts would resort to s. 46(4) in considering a potential alternate form of proof of those matters. For example, I would have expected and will expect in future cases that if certified copies or court certificates are not available, there will be some reasonable explanation provided by the moving party as to why those are not available and why the alternate form of proof should be accepted.

[17] Accepting that the evidentiary basis under s. 46 of the *CCAA* has been met, the next question to be considered is whether this is a "foreign main proceeding" or a "foreign non-main proceeding", as those terms as defined in s. 45. This determination is important in two respects. Firstly, the *CCAA* dictates under s. 47(2) that the Court shall specify in the order whether it is one or the other, i.e., either a main proceeding or a foreign non-main proceeding. Secondly, that finding is not necessarily determinative of what relief might be granted by the Court under Part IV

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of the *CCAA*, but it does dictate whether certain provisions are mandatory or, alternatively, within the discretion of the Court.

[18] Section 45(1) of the *CCAA* defines a "foreign main proceeding" as "a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests." This definition derives in large part from the *UNCITRAL* Model Law and is known colloquially before this Court and other courts around the world as establishing where the "COMI" is.

[19] Section 45(2) of the *CCAA* provides that:

> For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

The registered office of Probe Canada is in British Columbia. Nevertheless, counsel for Probe Canada takes the position that the COMI of Probe Canada is in fact in the U.S. and that the recognition order should be granted by the Court on that basis.

[20] As I said earlier, the 2009 amendments have been sparsely considered by Canadian courts to date. In particular, the definition of "foreign main proceeding" has received little judicial attention in Canada.

[21] I have been referred by Probe Canada's counsel to Dr. Janis P. Sarra's text, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007) at 295-296. There, Professor Sarra states that the *UNCITRAL Legislative Guide on Insolvency Law* defines centre of main interest as "the place where the debtor conducts the administration of its interests on a regular basis and that is therefore ascertainable by third parties." Professor Sarra also states that the presumption that the centre of main interest is the registered office of the debtor company can be rebutted if there are factors which, viewed objectively by third parties, would lead to the conclusion that the centre of main interest is other than at the location of the registered office.

[22] I also note the statement in Kevin P. McElcheran's text, *Commercial Insolvency in Canada*, 2nd ed., (Markham, Ont: LexisNexis Inc., 2011), at 376:

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> Case law decided under other statutes based on the Model Law, such as the European Union *Insolvency Proceedings Regulation* [footnote omitted] and Chapter 15 of the U.S. *Bankruptcy Code*, provide guidance to Canadian courts in interpreting the meaning of COMI. European Union and American precedents suggest that COMI will be determined by reference to criteria that are objective and ascertainable by third parties. Such relevant factors include:
>
> (1) the location of headquarters;
>
> (2) the location of those who manage the debtor's business;
>
> (3) the location of primary assets and operations, and
>
> (4) the location of majority of creditors.
>
> In deciding whether the debtor has proven that its COMI is in the jurisdiction of the foreign proceeding, Canadian courts, as the U.S. courts have done, may consider the connections between the debtor and the foreign jurisdiction comprehensively in order to give effect to the legitimate expectations of the debtor's constituents as to which substantive laws will apply to their relationship with the debtor.

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[23] In *Xerium Technologies Inc. (Re)*, 2010 ONSC 3974 (Ont. S.C.J.), Justice Campbell referenced an earlier recognition order that he had granted under Part IV of the *CCAA*. In that case, the applicant was Xerium, a Delaware company which had various direct and indirect subsidiaries, including one in Canada. The Delaware Chapter 11 proceedings were recognized in Ontario as a foreign main proceeding. Among other things, Justice Campbell noted that Xerium and its subsidiaries operated a highly integrated business and were managed centrally from the United States.

[24] In this case, Mr. Gallatin has provided certain evidence in support of his contention that the U.S. is the COMI of Probe Canada and its subsidiaries. Probe Canada and its subsidiaries operate within Texas and Louisiana near the Gulf of Mexico. All of Probe Canada's business operations are through the U.S. subsidiaries. I was referred to consolidated financial statements of Probe Canada and its subsidiaries which indicate that all of the group's revenues are derived in the U.S. and that all of the operating assets are located in the U.S. Only nominal assets are located in Canada. All of the operations of Probe Canada, other than administration and organization matters, are in the U.S.

[25] During counsel's submission, it was not apparent what the connection to British Columbia was, apart from Probe Canada's incorporation under the *BCA*. Although there was no evidence on these matters, I am prepared to accept the submissions of Mr. Reardon on these points. There does not appear to be any physical presence of Probe Canada in British Columbia, or in Canada. I was advised that the registered office of Probe Canada is in fact Mr. Reardon's law offices. Only one of the directors resides in British Columbia. I was not, unfortunately, advised as to where other directors might be located. Finally, I was also advised that the Chief Executive Officer and Chairman of Probe Canada, who was terminated shortly after the appointment of Mr. Gallatin, resided in Texas.

[26] Mr. Gallatin also gave evidence that the operations of this group in the Gulf of Mexico are heavily regulated, particularly by the United States Bureau of Ocean Energy Management, Regulation and Enforcement.

[27] Mr. Gallatin in his affidavit states, quite presumptively in my opinion, that he believes that the centre of main interest of Probe Canada is in the U.S. Mr. Reardon quite properly pointed out that the decision on that matter is within the Court's bailiwick and not Mr. Gallatin's.

[28] In any event, I do agree with Mr. Gallatin. I conclude that, in all of the circumstances, the centre of main interest, or COMI, of Probe Canada and its subsidiaries is in the U.S. and that the Chapter 11 proceedings should be recognized on that basis. Looking objectively at the factors present in this case, I conclude that the legitimate expectations of third parties dealing with the group would consider that U.S. law would govern. These are the stakeholders who stand to be materially affected by the restructuring proceedings in the U.S. Accordingly, I find that the presumption in s. 45(2) of the *CCAA* has been rebutted in respect of Probe Canada.

[29] Having concluded that the U.S. proceedings are a foreign main proceeding, ss. 48(1) and (2) of the *CCAA* dictate that I must make certain orders staying or prohibiting certain proceedings or dealing with the debtor company's assets:

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Order relating to recognition of a foreign main proceeding

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

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

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

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

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

Scope of order

(2) The order made under subsection (1) must be consistent with any order that may be made under this Act.

[30] The terms of the order proposed by Probe Canada are consistent with these provisions. I note that the proposed order is also consistent with the same type of terms contained in British Columbia's model *CCAA* initial order and therefore it complies with s. 48(2).

[31] Even if I had concluded that the U.S. bankruptcy proceedings were not a foreign main proceeding, but a "foreign non-main proceeding", this Court has the jurisdiction to consider a recognition order. A "foreign non-main proceeding" is defined as a foreign proceeding other than a foreign main proceeding. If, for example, the COMI of Probe Canada and its subsidiaries was other than the U.S., the Court may exercise its discretion to essentially order the same relief in appropriate circumstances. Section 49(1)(a) provides:

Other orders

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> 49 (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order
>
> (a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);
>
> (b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and
>
> (c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

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[32] If necessary, and if the U.S. proceedings were a “foreign non-main proceeding”, I would have considered the same relief relating to a “foreign main proceeding” to be appropriate in these circumstances. Probe Canada seeks the relief relating to the stays of proceedings in order to allow the U.S. proceedings to be finalized in an orderly fashion. There are substantial factors connecting Probe Canada and its subsidiaries to the U.S. as noted above. To that extent, these provisions would be necessary for the protection of Probe Canada and its subsidiaries’ property, and the interests of their creditor or creditors, whether in the U.S., Canada or elsewhere.

[33] Probe Canada also seeks various ancillary orders pursuant to s. 49 of the *CCAA* which it says are appropriate in this case.

[34] Probe Canada is seeking specific recognition of various court orders of Judge Brown granted in the U.S. bankruptcy proceedings, and orders allowing implementation of those orders, as follows:

(a) Order Approving Joint Disclosure Statement regarding Joint Chapter 11 Plan of Reorganization of Probe Canada and the U.S. Subsidiaries made March 1, 2011; and

(b) Amended Order approving:

(i) the Confirmation Hearing Notice, the contents of the Solicitation Package, and the manner of mailing and service of the Solicitation Package and Confirmation Hearing Notice;

(ii) the procedures for voting and tabulation of ballots;

(iii) the form of ballot; and

(iv) the procedures for allowing claims for voting purposes only made March 1, 2011; and

(c) Order confirming Joint Chapter 11 Plan and Reorganization of Probe Canada and the U.S. Subsidiaries made March 21, 2011. (By this order, Judge Brown confirmed that all requirements under the *United States Bankruptcy Code* had been met, that the joint plan was fair and reasonable, that the requisite number and value of claims had approved the joint plan and that the joint plan was to be implemented. This order has been filed with the U.S. Bankruptcy Court but has not yet been signed by Judge Brown.)

[35] Mr. Reardon has referred me to the plan that has been approved by the U.S. Bankruptcy Court. I will briefly summarize the provisions in that plan. Basically, they provide for new common shares of Probe Canada to be issued to various classes of creditors whose claims are to be impaired by the plan. There are three classes of creditors whose claims will be impaired:

1. the senior secured creditor, who, as I said earlier, is owed in excess of $27 million;

2. certain creditors whose claims arise from a debt restructuring agreement (I am advised that these are essentially akin to administrative charges); and

3. the general creditors.

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[36] Under the joint plan, the senior secured creditor is to receive 90% of the new common stock and the class of debt restructuring creditors are to receive 10%. In essence, the majority of the new shares will be held by those two parties, and the existing shareholders of Probe Canada are to hold no more than 3% of the shares in the reorganized company.

[37] The general creditors, which are the third class of creditors, are to receive a *pro rata* share of distributions from recoveries under certain avoidance actions available to restructured companies in the U.S.

[38] Consistent with the requirement under s. 46(2)(c) of the *CCAA*, Mr. Gallatin states that a Canadian creditor, Cypress Acquisitions Ltd., just recently, on March 21, 2011, filed a notice of civil claim in this Court against Probe Canada, seeking recovery of approximately $70,600. I am advised that the general creditors under the joint plan in the U.S. include Cypress Acquisitions Ltd. In fact, I am advised by Mr. Reardon that the Chapter 11 proceedings in the U.S. have included all of the Canadian creditors of either Probe Canada or any of its subsidiaries and that those proceedings were equally available to the Canadian creditors, including Cypress Acquisitions Ltd.

[39] The further ancillary relief sought by Probe Canada relates to the manner in which the new common shares are to be issued towards effecting the restructuring of the shareholdings in Probe Canada. Probe Canada seeks an order allowing its board of directors to take certain steps to effect the transactions. Those steps would include:

- Firstly, continuing Probe Canada under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44;

- Secondly, changing the name of Probe Canada to a name identified by the board; and,

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- Thirdly, consolidating the common shares of Probe Canada in a ratio determined by the board, all pursuant to duly passed resolutions of the board.

All of these matters are consistent with the joint plan of arrangement as approved by the U.S. Bankruptcy Court on March 21, 2011.

[40] The jurisdiction to grant such ancillary relief is found in s. 6(2) of the *CCAA*:

> If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

The applicability of that provision in the context of cross-border proceedings follows from s. 48(2) of the *CCAA*, which provides that an order under Part IV must be consistent with any order that may be made under the *CCAA*. Accordingly, to the extent that this Court may have granted this relief in other types proceedings under the *CCAA*, that relief is equally available in the context of recognition proceedings such as this one. I also note that to the extent that this provision allows the Court to override what might be requirements under provincial legislation in that respect (for example, under the *BCA*), the paramountcy doctrine might be invoked under the *CCAA*: see *Re Loewen Group Inc. (Re)* (2001), 32 C.B.R. (4th) 54 (Ont. S.C.J.).

[41] In conclusion, I am satisfied that I have the jurisdiction under Part IV of the *CCAA* to grant the order sought. In my view, a recognition order such as is sought here is consistent with the purpose of Part IV the *CCAA*, as articulated in s. 44:

> **Purpo**se
>
> 44 The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote
>
> (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
>
> (b) greater legal certainty for trade and investment;
>
> (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

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(d) the protection and the maximization of the value of debtor company's property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

[42] In *Xerium*, at para. 27, Justice Campbell quotes certain factors from *Babcock and Wilcox Canada Ltd. (Re)* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J.), which may be considered in a recognition application. In *Xerium*, the Court was considering recognition of the final order of a U.S. Bankruptcy court approving a plan, having earlier granted an order recognizing the foreign proceeding and the authority of the foreign representative. Similar factors are at play here. The Probe companies are a highly integrated business that is managed centrally from the U.S. The confirmation of the U.S. proceedings and the joint plan is sought in accordance with standard and well-established procedures and practices from the U.S. Bankruptcy Court. Probe Canada is a full participant in those proceedings. Recognition of the U.S. proceedings is necessary to ensure that there is a fair and efficient administration of this insolvency proceeding. This is a situation where there is no prejudice to Canadian interests. Canadian creditors have had, and will enjoy, full rights of participation, along with the U.S. creditors, in those proceedings.

[43] Mr. Reardon, I have one point on your draft form of order that I wish to address with you, unless you wish to take me through the order in some detail.

[44] MR. REARDON: I'm happy to, My Lady. I was going to say the only thing that I would suggest is – I can't say it's out of the ordinary but what caused me a little concern – is the service of the material, which is at para. 12, page 5. All Part IV says about the obligation of the foreign representative is that it will advertise twice. We've asked for one advertisement. These advertisements are fairly expensive. It doesn't say anything else about serving anybody. Now, all of the creditors, of course, pursuant to the orders made in the U.S. have received notice of the U.S. bankruptcy proceeding, and so I have asked in the order that we comply with s. 53, which is placing at least one ad in either of the national papers but that there be no other necessity of notification, but then ask for an order about how to effect service if we

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have to, and I had in mind, particularly with para. 13, serving the one company that has started the action.

[35] THE COURT: Well, I think that would certainly be the minimum, to serve Cypress Acquisitions Ltd. without delay. Section 53(b) of the *CCAA* requires that the foreign representation must publish once a week for two consecutive weeks, unless otherwise directed by the courts. In light of the lateness of the recognition proceeding, I am going to make you comply with publication for two consecutive weeks, and you can choose between the *Globe* or the *Post* in addition to, as I have said, serving Cypress Acquisitions Ltd.

[36] I also wish to address the filing of this order in the U.S. Bankruptcy Court. What happens typically in these U.S. proceedings, of course, is that there is an internet portal through which interested parties can look at documents. I do not know if it is the same here as what has happened in cases where I was involved, but in my experience what typically happens is that the debtors retain an entity to post all of the court documents and allow people access to those documents over the internet. You have to sign up and then you get access to all of these documents, because there is typically a myriad of these documents that are filed and it is an ongoing process. So I am going to order that if there is such a posting of the documents in the U.S. proceedings, that this order be similarly posted. I do not know whether that can arise directly or whether you have to file this order with the U.S. Bankruptcy Court in the first place. I am assuming that you are going to file this in the Chapter 11 proceedings in any event.

[37] MR. REARDON: That will be up to counsel in the U.S. I will deliver the order to them and they will do, I guess, what they're supposed to do with it. I don't know, but certainly if you order that we post it, if this service exists, then that's easy. I mean, I will deliver it to them. I'm not sure we can order that it be filed in the Chapter 11 proceeding.

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[45] THE COURT: I do not know the answer to that either. What I am saying is that if there is this type of a process where you can post documents so that the public is aware of it, I am also ordering that it happen.

[46] THE COURT: Regarding para. 6 of the draft order, I find it a bit odd that this Court would be asked to declare that "[t]he U.S. Court has the jurisdiction to determine, compromise or otherwise affect the interests of claimants, including creditors and shareholders of Probe Canada, against Probe Canada". The U.S. Bankruptcy Court's order approving the joint plan on March 21, 2010 specifically finds that that court has jurisdiction under the *United States Bankruptcy Code* in that respect. The order sought from this Court is simply to recognize the taking of that jurisdiction by the U.S. Bankruptcy Court and to grant ancillary relief to allow an orderly implementation of that approval order in Canada on the basis of comity. I do not see that it is necessary or desirable for this Court to make declarations on matters not within the purview of these recognition proceedings. It seems to me that it is implicit from this Court recognizing the U.S. orders that have been granted that the taking of that jurisdiction is to be recognized and enforced in Canada. I do not frankly think you need this provision.

[47] Accordingly, the order sought is approved with the changes as discussed above.

The Honourable Madam Justice S. Fitzpatrick

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Tab 5

2.1.4 Voyager Digital Ltd.

Headnote

Multilateral Instrument 11-102 Passport System and National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – Relief from the takeover bid requirements in Part 2 of NI 62-104 to allow for takeover bid thresholds to be calculated based on the aggregate number of shares outstanding, as opposed to on a per-class basis – dual-class share structure among common shares and variable voting shares was implemented solely to ensure the issuer's continued status as a "foreign private issuer" under U.S. securities laws; all classes of shares are freely tradable, trade under the same trading symbol, have identical economic attributes and are automatically and mandatorily inter-convertible based on the shareholder's status as a U.S. Resident – relief granted to allow offerors to calculate their ownership position by combining the outstanding classes of shares for the purposes of determining whether take-over bid requirements are triggered.

Relief from the early warning requirements to allow early warning thresholds to be calculated based on the aggregate number of shares outstanding, as opposed to on a per-class basis – dual-class share structure among common shares and variable voting shares was implemented solely to ensure the issuer's continued status as a "foreign private issuer" under U.S. securities laws; all classes of shares are freely tradable, trade under the same trading symbol, have identical economic attributes and are automatically and mandatorily inter-convertible based on the shareholder's status as a U.S. Resident – relief granted to allow acquirors to calculate their ownership position by combining the outstanding classes of shares for the purposes of determining whether early warning requirements are triggered.

Relief from the requirement to issue and file a news release in section 5.4 of NI 62-104 to provide that the threshold triggering the requirement for an acquiror to file a news release during a take-over bid or an issuer bid is to be calculated based on the aggregate number of shares outstanding, as opposed to on a per-class basis – dual-class share structure among common shares and variable voting shares was implemented solely to ensure the issuer's continued status as a "foreign private issuer" under U.S. securities laws; all classes of shares are freely tradable, trade under the same trading symbol, have identical economic attributes and are automatically and mandatorily inter-convertible based on the shareholder's status as a U.S. Resident – relief granted to allow acquirors to calculate their ownership position by combining the outstanding classes of shares for the purposes of determining whether the requirement to file a news release during a take-over bid or issuer bid is triggered.

Relief so that the issuer can provide disclosure on significant shareholders in its information circular on a combined basis among shares, rather than for each class of shares – to be calculated based on the aggregate number of shares outstanding, as opposed to on a per-class basis – dual-class share structure among common shares and variable voting shares was implemented solely to ensure the issuer's continued status as a "foreign private issuer" under U.S. securities laws; all classes of shares are freely tradable, trade under the same trading symbol, have identical economic attributes and are automatically and mandatorily inter-convertible based on the shareholder's status as a U.S. Resident – relief granted to allow issuer to provide disclosure on holders of its shares on a combined basis in its information circular.

Issuer granted relief from requirements under National Instrument 41-101 General Prospectus Requirements, National Instrument 51-102 Continuous Disclosure Requirements and OSC Rule 56-501 Restricted Shares to refer to Variable Voting Shares using prescribed restricted security term – relief subject to condition that specified alternate term is used.

Applicable Legislative Provisions

National Instrument 62-104 Take-Over Bids and Issuer Bids, Part 2, ss. 5.2, 5.4 and 6.1.
National Instrument 62-103 The Early Warning System and Related Take-Over Bid and Insider Reporting Issues, ss. 4.1, 4.5 and 11.1.
National Instrument 51-102 Continuous Disclosure Obligations, s. 13.1.
National Instrument 41-101 General Prospectus Requirements, s. 19.1.
Ontario Securities Commission Rule 56-501 Restricted Shares, s. 4.2.

December 17, 2021

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the "Jurisdiction")

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS
IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
VOYAGER DIGITAL LTD.
(the "Filer")

DECISION

Background

The principal regulator in the Jurisdiction has received an application (the "**Application**") from the Filer for a decision under the securities legislation of the Jurisdiction of the principal regulator (the "**Legislation**") that:

1. in connection with National Instrument 62-104 *Take-Over Bids and Issuer Bids* ("**NI 62-104**") and National Instrument 62-103 *The Early Warning*

System and Related Take-over Bid and Insider Reporting Issues ("**NI 62-103**"):

(a) an offer to acquire outstanding variable voting shares ("**Variable Voting Shares**") or common shares ("**Common Shares**", and collectively with the Variable Voting Shares, the "**Shares**") of the Filer, as the case may be, which would constitute a take-over bid under the Legislation as a result of the securities subject to the offer to acquire, together with the offeror's securities, representing in the aggregate 20% or more of the outstanding Variable Voting Shares or Common Shares, as the case may be, at the date of the offer to acquire, be exempt from the requirements set out in Part 2 of NI 62-104 applicable to take-over bids (the "**TOB Relief**"),

(b) an acquiror who triggers the disclosure and filing obligations pursuant to the early warning requirements contained in the Legislation with respect to the Variable Voting Shares or Common Shares, as the case may be, be exempt from such requirements (the "**Early Warning Relief**"),

(c) an acquiror who acquires, during a take-over bid or an issuer bid, beneficial ownership of, or control or direction over, Variable Voting Shares, or Common Shares, as the case may be, that, together with the acquiror's securities of that class, would constitute 5% or more of the outstanding Variable Voting Shares or Common Shares, as the case may be, be exempt from the requirement to issue and file a news release set out in section 5.4 of NI 62-104 (the "**News Release Relief**" and together with the TOB Relief and Early Warning Relief, the "**Bid Relief**");

2. the Filer be exempt from the disclosure requirements in Item 6.5 of Form 51-102F5 *Information Circular* ("**Form 51-102F5**") (the "**Alternative Disclosure Relief**", and together with the Bid Relief, the "**Aggregation Relief**"); and

3. the requirements under:

(a) subsections 12.2(3) and 12.2(4) of National Instrument 41-101 *General Prospectus Exemptions* ("**NI 41-101**"), (ii) Item 1.13(1) of Form 41-101 F1 *Information Required in a Prospectus* ("**Form 41-101F1**"), and (iii) item 1.12(1) of Form 44-101F1 *Short Form Prospectus* (including in respect of any equivalent disclosure in a prospectus or supplement filed pursuant to National Instrument 44102 *Shelf Distributions* ("**NI 44-102**"))

relating to the use of restricted security terms,

(b) subsections 10.1(1)(a), 10.1(4) and 10.1(6) of NI 51-102 *Continuous Disclosure Obligations* ("**NI 51-102**") relating to the use of restricted security terms, and

(c) subsections 2.3(1)(1.), 2.3(1)(3.) and 2.3(2) of Ontario Securities Commission Rule 56-501 *Restricted Shares* ("**OSC Rule 56-501**") relating to the use of restricted share terms,

shall not apply to the Variable Voting Shares (the "**Nomenclature Relief**", and together with the Aggregation Relief, the "**Exemption Sought**").

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission is the principal regulator for this Application, and

(b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* ("**MI 11-102**") is intended to be relied upon in Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Quebec, Saskatchewan and the Yukon Territory.

Interpretation

Terms defined in National Instrument 14-101 *Definitions*, MI 11-102, NI 62-103 and NI 62-104, including without limitation, "offeror", "offeror's securities", "offer to acquire", "acquiror", "acquiror's securities", "eligible institutional investor", and "security-holding percentage", have the same meaning if used in this decision, unless otherwise defined herein.

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer is a corporation incorporated under the *Business Corporations Act* (British Columbia) (the "**BCBCA**").

2. The Filer is a reporting issuer in each of the provinces and territories of Canada and is not in default of the securities legislation in any of these jurisdictions.

3. The Filer's head office is located at 33 Irving Plaza, Suite 3060 New York, NY 10003.

4. The Filer's authorized share capital consists of (i) an unlimited number of Common Shares and (ii) an unlimited number of Variable Voting Shares.

5. As of December 16, 2021, 170,022,827 Shares are issued and outstanding.

6. The Common Shares and Variable Voting Shares will be listed on the Toronto Stock Exchange ("**TSX**") under the symbol "VOYG" on or about December 23, 2021.

7. The Filer is a publicly traded cryptocurrency platform in the United States. The Filer has implemented procedures in order to prevent residents in the provinces and territories of Canada from becoming clients or customers of its crypto-asset trading and investing business. These measures include KYC procedures and geofencing the availability of the Voyager app. To the best of the Filer's knowledge, the Filer does not have any clients or customers who are ordinarily resident in, or have immigrated to, Canada.

Aggregation Relief

8. As at December 31, 2020, the Filer believes it qualified as a "foreign private issuer" ("**FPI**") under Rule 405 of the *U.S. Securities Act of 1933*, as amended, and Rule 3b-4(b) of the U.S. *Securities Exchange Act of 1934*, as amended, as:

   (a) the Filer is continued under the laws of British Columbia; and

   (b) based on reasonable enquiry, less than 50% of the Filer's outstanding voting securities are held directly or indirectly by residents of the United States (the "**FPI Threshold**").

9. For the purposes of the FPI Threshold "voting securities" are defined as those securities that entitle the holders to vote for the election of directors at the time of such determination.

10. As (a) a majority of the Filer's executive officers and directors are U.S. citizens or residents, (b) more than 50% of the Filer's assets are located in the United States, and (c) the Filer's business is administered primarily in the United States, the Filer will not qualify as an FPI should it exceed the FPI Threshold at the applicable time.

11. The Filer derives material benefits from its status as an FPI.

12. On December 15, 2021, the Filer amended its articles (the "**Amendments**") to (i) create and set the terms of a new class of shares of the Filer, being the Variable Voting Shares, including applying coattail terms to such shares; and (ii) amend the terms of the Common Shares, including without limitation, by including constraints on who may hold the Common Shares and applying coattail terms to such shares.

13. The Filer received the shareholder approvals required under applicable corporate and securities laws to implement the Amendments at the annual general and special meeting of the Filer held on December 14, 2021.

14. The Amendments are intended to ensure that the Filer maintains its FPI status under applicable U.S. securities laws and thereby avoids a commensurate material increase in its ongoing costs. This is to be accomplished by implementing a mandatory conversion mechanism in the Filer's share capital to decrease the number of shares eligible to be voted by U.S. Residents in connection with the election of directors of the Filer if the Filer's FPI Threshold would be exceeded.

15. For the purposes of the Amendments, a "U.S. Resident" means a resident of the United States, determined as set forth in Rule 405 under the U.S. Securities Act. Without limiting the foregoing but for greater clarity, a security holder is a U.S. Resident if such person's address appears on the records of the Filer (i.e., a registered holder) as in the United States; provided that (i) the Filer is required to "look through" the record ownership of brokers, dealers, banks or nominees located in (A) the United States, (B) Canada, and (C) the Filer's primary trading market (if different from Canada) who hold securities for the accounts of their customers, to determine the residency of those customers, and the Filer is also required to take into account information regarding U.S. ownership derived from beneficial ownership reports that are provided to the Filer or filed publicly, as well as information that otherwise is provided to the Filer and a "Non-U.S. Resident" means a person or entity that is not a U.S. Resident. At the request of the Filer, beneficial shareholders and actual or proposed transferees will be required to respond to enquiries regarding their status as U.S. Residents or Non-U.S. Residents, and shall be required to provide declarations or other documents with respect thereto, as may be necessary or desirable, in the discretion of the Filer, failing which they would, in the Filer's discretion, be deemed to be U.S. Residents.

16. Except as provided in Item 19 below, the Common Shares may only be held, beneficially owned or controlled by Non-U.S. Residents, and will carry one vote per share for the election of directors (and for all other purposes). The Common Shares will be automatically converted, without further act or formality, on a one-for one basis into Variable Voting Shares if they become held, beneficially owned or controlled by a U.S. Resident.

17. Except as provided in Item 19 below, the Variable Voting Shares may only be held, beneficially owned or controlled by U.S. Residents. The Variable Voting Shares will carry one vote per share for the election of directors (and for all other purposes), except where the number of votes that may be exercised in connection with the election or removal of directors, in respect of all issued and outstanding

Variable Voting Shares exceeds 49.9% of the total number of votes that may be exercised, in connection with the election or removal of directors, in respect of all issued and outstanding Shares. In such case the votes attached to each Variable Voting Share in respect of the election or removal of directors will decrease automatically and pro rata and without further act or formality to equal the maximum permitted vote per Variable Voting Share. The Variable Voting Shares as a class cannot carry more than 49.9% of the aggregate votes, in connection with the election or removal of directors, attached to all issued and outstanding Shares of the Filer. The Variable Voting Shares will be automatically converted, without further act or formality, on a one-for-one basis into Common Shares if they become held, beneficially owned or controlled by a Non-U.S. Resident.

18. All Shares shall rank equally with the other Shares as to dividends on a share-for-share basis, without preference or distinction, except that, subject to applicable regulatory and stock exchange approvals, stock dividends or distributions may be declared by the Filer's board of directors that are payable in Common Shares on the Common Shares and in Variable Voting Shares on the Variable Voting Shares, provided an equal number of shares is declared as a dividend or distribution on a per-share basis in each case. All Shares will rank *pari passu* on a per-share basis in the event of the Filer's liquidation, dissolution or winding-up, or a distribution of assets of the Filer for the purposes of a dissolution or winding-up of the Filer. All holders of Shares will be entitled to receive notice of, to attend (if applicable, virtually) and vote at all meetings of the Filer's shareholders, except that they will not be able to vote (but will be entitled to receive notice of, to attend (if applicable, virtually) and to speak) at those meetings at which the holders of a specific class are entitled to vote separately as a class under the BCBCA.

19. The Amendments contain coattail provisions, pursuant to which each class of Shares may be converted into another class of Shares in the event an offer is made to purchase such other class of Shares and the offer is one which is required to be made to all or substantially all the holders in Canada of such other class of Shares (assuming that the offeree was resident in Ontario).

20. Aside from the differences in (a) who may hold Common Shares and Variable Voting Shares as between U.S. Residents and Non-U.S. Residents, and (b) the voting rights attributable to each class of Shares set out above, the Shares are the same in all respects and are mandatorily inter-convertible (continuously and without formality) based on (i) the holder's status as a U.S. Resident and Non-U.S. Resident, and (ii) the Filer's FPI status.

21. The Filer's dual class share structure has been implemented solely to ensure the Filer's continued status as an FPI and thereby reduce compliance costs; it has no other purpose.

22. Under the terms of the Amendments, (i) only Non-U.S. Residents may own the Common Shares, (ii) only U.S. Residents may own the Variable Voting Shares, (iii) the Variable Voting Shares as a class cannot carry more than 49.9% of the aggregate votes, in connection with the election or removal of directors, attached to all issued and outstanding Shares of the Filer, and (iv) the Variable Voting Shares will carry one vote per share held, except where the number of votes that may be exercised in connection with the election or removal of directors, in respect of all issued and outstanding Variable Voting Shares exceeds 49.9% of the total number of votes that may be exercised, in connection with the election or removal of directors, in respect of all issued and outstanding Shares. In such case the votes attached to each Variable Voting Share will decrease automatically and pro rata and without further act or formality to equal the maximum permitted vote per Variable Voting Share. Further, if a Non-U.S. Resident sells his or her Common Shares to a U.S. Resident, whether or not on the TSX, upon settlement the Filer's articles will automatically deem the shares acquired by the U.S. Resident to be converted into Variable Voting Shares at the relevant time.

23. An investor will not control or choose which class of Shares it acquires and holds. There are no unique features of any class of Shares which an existing or potential investor will be able to choose to acquire, exercise or dispose of. The class ultimately available to an investor will be a function of such investor's status as a U.S. Resident or Non-U.S. Resident and the Filer's FPI status only. Moreover, if after having acquired Shares a holder's status as a U.S. Resident or Non-U.S. Resident changes, such Shares will convert accordingly and automatically, without formality or regard to any other consideration.

Nomenclature Relief

24. Section 1.1 of NI 41-101 and Section 1.1 of NI 51-102 defines "restricted security terms" to mean each of the terms "non-voting security", "subordinate voting security" and "restricted voting security".

25. Section 1.1 of OSC Rule 56-501 defines "restricted share terms" to mean "non-voting shares", "subordinate voting shares", "restricted voting shares" or any other term deemed appropriate by the Director.

26. The Variable Voting Shares may be considered restricted securities and restricted shares, as applicable, under NI 41-101, NI 51-102 and OSC Rule 56-501 as there will be another class of shares that carries a disproportionate vote per share relative to the Variable Voting Shares.

27. The Filer desires to use the term "variable voting" to describe the Variable Voting Shares in any offering documents, in any future prospectuses and in all future continuous disclosure documents of the Filer given that (i) in the event the Variable Voting Shares as a class would carry more than 49.9% of the aggregate votes in connection with the election or removal of directors attached to all issued and outstanding Shares of the Filer, the votes attached to each Variable Voting Share will decrease automatically and pro rata and without further act or formality to equal the maximum permitted vote per Variable Voting Share and (ii) other TSX listed issuers with similar capital structures use the term "Variable Voting Shares".

28. The features of the Variable Voting Shares will be set out in disclosure documents pursuant to NI 41-101, National Instrument 44-101 *Short Form Prospectus Distributions*, NI 44-102 and NI 51-102, as applicable, in compliance with the form requirements of such instruments.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted provided that:

1. the Filer publicly discloses the Exemption Sought and the terms and conditions of this decision in a news release filed on SEDAR promptly following the issuance of this decision;

2. the Filer discloses the Exemption Sought and the terms and conditions of this decision in each of its annual information forms and management information circulars filed on SEDAR following the issuance of this decision and in any other filing where the characteristics of the Shares are described;

3. with respect only to the TOB Relief, the securities subject to the offer to acquire, together with the offeror's securities, would not represent in the aggregate 20% or more of the outstanding Variable Voting Shares and Common Shares, as the case may be, calculated using (a) a denominator comprised of all of the outstanding Variable Voting Shares and Common Shares, determined in accordance with subsection 1.8(2) of NI 62-104 on a combined basis, as opposed to a per-class basis, and (b) a numerator including as offeror's securities all of the Variable Voting Shares and Common Shares, as applicable, that constitute offeror's securities;

4. with respect only to the News Release Relief, the Variable Voting Shares or Common Shares, as the case may be, that the acquiror acquires beneficial ownership of, or control or direction over, when added to the acquiror's securities of that class, would not constitute 5% or more of the outstanding Variable Voting Shares or Common Shares, as the case may be, calculated using (a) a denominator comprised of all of the outstanding Variable Voting Shares and Common Shares, determined in accordance with subsection 1.8(2) of NI 62-104 on a combined basis, as opposed to a per-class basis, and (b) a numerator including as acquiror's securities, all of the Variable Voting Shares and Common Shares that constitute acquiror's securities;

5. with respect only to the Early Warning Relief:

   (a) the acquiror complies with the early warning requirements, except that, for the purpose of determining the percentage of outstanding Variable Voting Shares or Common Shares, as the case may be, that the acquiror has acquired or disposed of beneficial ownership, or acquired or ceased to have control or direction over, the acquiror calculates the percentage using (i) a denominator comprised of all of the outstanding Variable Voting Shares and Common Shares, determined in accordance with subsection 1.8(2) of NI 62-104, on a combined basis, as opposed to a per-class basis, and (ii) a numerator including, as acquiror's securities, all of the Variable Voting Shares and Common Shares, as applicable, that constitute acquiror's securities; or

   (b) in the case of an acquiror that is an eligible institutional investor, the acquiror complies with the requirements of the alternative monthly reporting system set out in Part 4 of NI 62-103 to the extent it is not disqualified from filing reports thereunder pursuant to section 4.2 of NI 62-103, except that, for purposes of determining the acquiror's securityholding percentage, the acquiror calculates its securityholding percentage using (i) a denominator comprised of all of the outstanding Variable Voting Shares and Common Shares determined in accordance with subsection 1.8(2) of NI 62-104 on a combined basis, as opposed to a per-class basis, and (ii) a numerator including all of the Variable Voting Shares and Common Shares, as applicable, beneficially owned or controlled by the eligible institutional investor;

6. with respect only to the Alternative Disclosure Relief, the Filer provides the disclosure required by Item 6.5 of Form 51-102F5 except that for purposes of determining the percentage of voting rights attached to the Variable Voting Shares or Common Shares, the Filer calculates the voting percentage using (a) a denominator comprised of all of the

outstanding Variable Voting Shares and Common Shares on a combined basis, as opposed to a per-class basis, and (b) a numerator including all of the Variable Voting Shares and Common Shares beneficially owned, or over which control or direction is exercised, directly or indirectly, by any person who, to the knowledge of the Filer's directors or executive officers, beneficially owns, controls or directs, directly or indirectly, voting securities carrying 10% or more of the voting rights attached to the outstanding Variable Voting Shares, and Common Shares on a combined basis, as opposed to a per-class basis; and

7. with respect only to the Nomenclature Relief, the Variable Voting Shares are referred to as "Variable Voting Shares".

"David Mendicino"
Manager, Office of Mergers & Acquisitions
Ontario Securities Commission

2.2 Orders

2.2.1 Prairie Storm Resources Corp.

Headnote

National Policy 11-206 Process for Cease to be a Reporting Issuer – issuer deemed to be no longer a reporting issuer under securities legislation.

Applicable Legislative Provisions

Securities Act, R.S.A., 2000, c.S-4, s. 153.

Citation: *Re Prairie Storm Resources Corp.*, 2021 ABASC 184

December 15, 2021

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ALBERTA AND
ONTARIO
(the Jurisdictions)

AND

IN THE MATTER OF
THE PROCESS FOR CEASE TO BE
A REPORTING ISSUER APPLICATIONS

AND

IN THE MATTER OF
PRAIRIE STORM RESOURCES CORP.
(the Filer)

ORDER

Background

The securities regulatory authority or regulator in each of the Jurisdictions (each a **Decision Maker**) has received an application from the Filer for an order under the securities legislation of the Jurisdictions (the **Legislation**) that the Filer has ceased to be a reporting issuer in all jurisdictions of Canada in which it is a reporting issuer (the **Order Sought**).

Under the Process for Cease to be a Reporting Issuer Applications (for a dual application):

(a) the Alberta Securities Commission is the principal regulator for this application;

(b) the Filer has provided notice that subsection 4C.5(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia; and

(c) this order is the order of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Tab 6

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
VOYAGER DIGITAL HOLDINGS, INC. *et al.*,[1]	)	Case No. 22-10943 (_)
Debtors.	)	(Joint Administration Requested)

JOINT PLAN OF REORGANIZATION OF VOYAGER DIGITAL HOLDINGS, INC. AND ITS DEBTOR AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

Joshua A. Sussberg, P.C.
Christopher Marcus, P.C.
Christine A. Okike, P.C.
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NOTHING CONTAINED HEREIN SHALL CONSTITUTE AN OFFER, ACCEPTANCE, COMMITMENT, OR LEGALLY BINDING OBLIGATION OF THE DEBTORS OR ANY OTHER PARTY IN INTEREST, AND THIS PLAN IS SUBJECT TO APPROVAL BY THE BANKRUPTCY COURT AND OTHER CUSTOMARY CONDITIONS. THIS PLAN IS NOT AN OFFER WITH RESPECT TO ANY SECURITIES.

1 The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Voyager Digital Holdings, Inc. (7687); Voyager Digital, LTD. (N/A); and Voyager Digital, LLC (8013). The location of the Debtors' principal place of business is 33 Irving Place, Suite 3060, New York, NY 10003.

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INTRODUCTION

Voyager Digital Holdings, Inc. and its affiliated debtors and debtors in possession in the above-captioned chapter 11 cases (each a "Debtor" and, collectively, the "Debtors") propose this joint plan of reorganization (the "Plan") for the resolution of the outstanding Claims against and Interests in the Debtors pursuant to chapter 11 of the Bankruptcy Code. Capitalized terms used in the Plan and not otherwise defined shall have the meanings set forth in Article I.A of the Plan. Although proposed jointly for administrative purposes, the Plan constitutes a separate Plan for each Debtor for the resolution of outstanding Claims and Interests pursuant to the Bankruptcy Code. Each Debtor is a proponent of the Plan within the meaning of section 1129 of the Bankruptcy Code. The classifications of Claims and Interests set forth in Article III of the Plan shall be deemed to apply separately with respect to each Plan proposed by each Debtor, as applicable. The Plan does not contemplate substantive consolidation of any of the Debtors. Reference is made to the Disclosure Statement for a discussion of the Debtors' history, business, properties and operations, projections, risk factors, a summary and analysis of this Plan, and certain related matters.

ALL HOLDERS OF CLAIMS OR INTERESTS ENTITLED TO VOTE ON THE PLAN ARE ENCOURAGED TO READ THE PLAN AND THE DISCLOSURE STATEMENT IN THEIR ENTIRETY BEFORE VOTING TO ACCEPT OR REJECT THE PLAN.

ARTICLE I.

DEFINED TERMS, RULES OF INTERPRETATION, COMPUTATION OF TIME, GOVERNING LAW, AND OTHER REFERENCES

A. Defined Terms

Capitalized terms used in this Plan have the meanings ascribed to them below.

1. "*3AC*" means Three Arrows Capital, Ltd.

2. "*3AC Liquidation Proceeding*" means that certain liquidation proceeding captioned *In the Matter of Three Arrows Capital Ltd. and in the Matter of Sections 159(1) and 162(1)(a) and (b) of the Insolvency Act 2003*, Claim No. BVIHC(COM)2022/0119 before the Eastern Caribbean Supreme Court in the High Court of Justice in the British Virgin Islands and the chapter 15 foreign recognition proceeding captioned *In re Three Arrows Capital, Ltd.*, No. 22-10920 (Bankr. S.D.N.Y. Jul. 1, 2022).

3. "*3AC Loan*" means that loan of 15,250 Bitcoins and 350 million USDC to 3AC pursuant to that certain master loan agreement dated March 4, 2022 by and between 3AC, as borrower, and OpCo and HTC Trading, Inc., as lenders.

4. "*3AC Recovery*" means the recovery, if any, of the Debtors from 3AC on account of the 3AC Loan.

5. "*3AC Recovery Allocation*" means the 3AC Recovery, if any, to be distributed to Holders of Allowed Account Holder Claims.

6. "*Account*" means any active account at OpCo held by an Account Holder, which contains Coin as of the Petition Date.

7. "*Account Holder*" means any Person or Entity who maintains an Account with OpCo as of the Petition Date.

8. "*Account Holder Claim*" means any Claim against OpCo that is held by an Account Holder on account of such Holder's Account.

9. "*Administrative Claim*" means a Claim against a Debtor for the costs and expenses of administration of the Chapter 11 Cases arising on or prior to the Effective Date pursuant to section 503(b) of the Bankruptcy Code and entitled to priority pursuant to sections 507(a)(2), 507(b), or 1114(e)(2) of the Bankruptcy Code, including: (a) the actual and necessary costs and expenses incurred on or after the Petition Date until and including the Effective Date of preserving the Estates and operating the Debtors' business and (b) Allowed Professional Fee Claims.

10. "*Administrative Claims Bar Date*" means the deadline for Filing requests for payment of Administrative Claims (other than requests for payment of Administrative Claims arising under section 503(b)(9) of the Bankruptcy Code), which: (a) with respect to Administrative Claims other than Professional Fee Claims, shall be thirty days after the Effective Date; and (b) with respect to Professional Fee Claims, shall be forty-five days after the Effective Date.

11. "*Affiliate*" has the meaning set forth in section 101(2) of the Bankruptcy Code. With respect to any Person that is not a Debtor, the term "Affiliate" shall apply to such Person as if the Person were a Debtor.

12. "*Alameda*" means Alameda Ventures Ltd., along with its affiliates and subsidiaries.

13. "*Alameda Loan Agreement*" means that certain unsecured loan agreement, dated as of June 21, 2022, as amended, restated, amended and restated, modified, or supplemented from time to time, by and among Voyager Digital Holdings, Inc., as the borrower, Voyager, as the guarantor, and Alameda, as the lender thereto.

14. "*Alameda Loan Facility"* means that certain unsecured loan facility provided for under the Alameda Loan Agreement.

15. "*Alameda Loan Facility Claims*" means any Claim against any Debtor derived from, based upon, or arising under the Alameda Loan Agreement and any fees, costs, and expenses that are reimbursable by any Debtor pursuant to the Alameda Loan Agreement.

16. "*Allowed*" means, with respect to any Claim or Interest, except as otherwise provided herein: (a) a Claim or Interest that is evidenced by a Proof of Claim timely Filed by the Bar Date or a request for payment of Administrative Claim timely Filed by the Administrative Claims Bar Date (or for which Claim or Interest under the Plan, the Bankruptcy Code, or a Final Order of the Bankruptcy Court a Proof of Claim or a request for payment of Administrative Claim is not or shall not be required to be Filed); (b) a Claim or Interest that is listed in the Schedules as not contingent, not unliquidated, and not disputed, and for which no Proof of Claim has been timely Filed; (c) a Claim or Interest Allowed pursuant to the Plan, any stipulation approved by the Bankruptcy Court, any contract, instrument, indenture, or other agreement entered into or assumed in connection with the Plan, or a Final Order of the Bankruptcy Court, or (d) a Claim or Interest as to which the liability of the Debtors and the amount thereof are determined by a Final Order of a court of competent jurisdiction other than the Bankruptcy Court; *provided* that, with respect to a Claim or Interest described in clauses (a) and (b) above, such Claim or Interest shall be considered Allowed only if and to the extent that with respect to such Claim or Interest no objection to the allowance thereof has been interposed within the applicable period of time fixed by the Plan, the Bankruptcy

Code, the Bankruptcy Rules, or the Bankruptcy Court, or if such an objection is so interposed, such Claim or Interest shall have been Allowed by a Final Order. Any Claim or Interest that has been or is hereafter listed in the Schedules as contingent, unliquidated, or disputed, and for which no Proof of Claim is or has been timely Filed, is not considered Allowed and shall be expunged without further action by the Debtors and without further notice to any party or action, approval, or order of the Bankruptcy Court. Notwithstanding anything to the contrary herein, no Claim of any Entity subject to section 502(d) of the Bankruptcy Code shall be deemed Allowed unless and until such Entity pays in full the amount that it owes. A Proof of Claim Filed after and subject to the Bar Date or a request for payment of an Administrative Claim Filed after and subject to the Administrative Claims Bar Date, as applicable, shall not be Allowed for any purposes whatsoever absent entry of a Final Order allowing such late-Filed Claim or Interest. "Allow" and "Allowing" shall have correlative meanings.

0. "*Avoidance Actions*" means any and all actual or potential avoidance, recovery, subordination, or other Causes of Action or remedies that may be brought by or on behalf of the Debtors or their Estates or other parties in interest under the Bankruptcy Code or applicable non-bankruptcy law, including Causes of Action or remedies under sections 502, 510, 542, 544, 545, 547–553, and 724(a) of the Bankruptcy Code or under other similar or related local, state, federal, or foreign statutes and common law, including fraudulent transfer laws.

1. "*Bankruptcy Code*" means title 11 of the United States Code, 11 U.S.C. §§ 101–1532, as now in effect or hereafter amended.

2. "*Bankruptcy Court*" means the United States Bankruptcy Court for the Southern District of New York, or any other court having jurisdiction over the Chapter 11 Cases, including to the extent of the withdrawal of reference under section 157 of the Judicial Code, the United States District Court for the Southern District of New York.

3. "*Bankruptcy Rules*" means the Federal Rules of Bankruptcy Procedure, as applicable to the Chapter 11 Cases, promulgated by the United States Supreme Court under section 2075 of the Judicial Code and the general, local, and chambers rules of the Bankruptcy Court.

4. "*Bar Date*" means the applicable deadline by which Proofs of Claim must be Filed, as established by: (a) the Bar Date Order; (b) a Final Order of the Bankruptcy Court; or (c) the Plan.

5. "*Bar Date Order*" means [●].

6. "*Board*" means the board of directors of Voyager.

7. "*Business Day*" means any day, other than a Saturday, Sunday, or a "legal holiday" (as defined in Bankruptcy Rule 9006(a)).

8. "*Cash*" or "*$*" means the legal tender of the United States of America or the equivalent thereof, including bank deposits and checks.

9. "*Causes of Action*" mean any action, Claim, cross-claim, third-party claim, damage, judgment, cause of action, controversy, demand, right, action, suit, obligation, liability, debt, account, defense, offset, power, privilege, license, Lien, indemnity, interest, guaranty, or franchise of any kind or character whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, contingent or non-contingent, liquidated or unliquidated, disputed or undisputed, secured or unsecured, assertable directly or derivatively, matured or unmatured, suspected or unsuspected, in contract or in tort, at law or in equity, or pursuant to any other theory of law or otherwise. For the avoidance of doubt, "Causes

of Action" include: (a) any right of setoff, counterclaim, or recoupment and any claim arising from any contract or for breach of duties imposed by law or in equity; (b) any claim based on or relating to, or in any manner arising from, in whole or in part, tort, breach of contract, breach of fiduciary duty, violation of local, state, federal, or foreign law, or breach of any duty imposed by law or in equity, including securities laws, negligence, and gross negligence; (c) any right to object to or otherwise contest Claims or Interests; (d) any claim pursuant to section 362 or chapter 5 of the Bankruptcy Code; (e) any claim or defense, including fraud, mistake, duress, usury, and any other defenses set forth in section 558 of the Bankruptcy Code; and (f) any Avoidance Action.

17. "*Certificate*" means any instrument evidencing a Claim or an Interest.

18. "*Chapter 11 Cases*" means (a) when used with reference to a particular Debtor, the case pending for that Debtor in the Bankruptcy Court under chapter 11 of the Bankruptcy Code and (b) when used with reference to all Debtors, the procedurally consolidated cases filed for the Debtors in the Bankruptcy Court under chapter 11 of the Bankruptcy Code.

19. "*Claim*" has the meaning set forth in section 101(5) of the Bankruptcy Code.

20. "*Claims Allocation Pool*" means [●].

21. "*Claims Equity Allocation*" means New Common Stock in an amount equal to 100% of all New Common Stock, subject to dilution by the Management Incentive Plan, to be distributed to Holders of Account Holder Claims.

22. "*Claims, Noticing, and Solicitation Agent*" means Bankruptcy Management Solutions, Inc. d/b/a Stretto, in its capacity as the claims, noticing, and solicitation agent in the Chapter 11 Cases for the Debtors and any successors appointed by an order of the Bankruptcy Court.

23. "*Claims Objection Bar Date*" means the deadline for objecting to a Claim, which shall be on the date that is the later of (a) (i) with respect to Administrative Claims (other than Professional Fee Claims and Administrative Claims arising under section 503(b)(9) of the Bankruptcy Code), sixty days after the Administrative Claims Bar Date or (ii) with respect to all other Claims (other than Professional Fee Claims),180 days after the Effective Date and (b) such other period of limitation as may be specifically fixed by the Debtors or the Reorganized Debtors, as applicable, or by an order of the Bankruptcy Court for objecting to such Claims.

24. "*Claims Register*" means the official register of Claims against and Interests in the Debtors maintained by the Clerk of the Bankruptcy Court or the Claims, Noticing, and Solicitation Agent.

25. "*Class*" means a class of Claims against or Interests in the Debtors as set forth in Article III of the Plan in accordance with section 1122(a) of the Bankruptcy Code.

26. "*Coin*" or "*Coins*" means the specific Cryptocurrency(ies) deposited by, or purchased for, an Account Holder and held by, or on behalf of, OpCo as of the Petition Date.

27. "*Coin Allocation*" means all Coins to be distributed to Holders of Account Holder Claims.

28. "*Coin Election*" means the election by an eligible Holder of an Allowed Account Holder Claim to increase its share of the Coin Allocation by exchanging New Common Stock for additional Coin from a Holder of an Allowed Account Holder Claim that makes the Equity Election. The Coin Election shall not exceed [•]% of each Holder's Pro Rata share of the Coin Allocation. To the extent that the total

Coin Election is greater than the total Equity Election, each Holder's Coin Election shall be reduced Pro Rata.

29. "*Confirmation*" means the Bankruptcy Court's entry of the Confirmation Order on the docket of the Chapter 11 Cases within the meaning of Bankruptcy Rules 5003 and 9021.

30. "*Confirmation Date*" means the date on which Confirmation occurs.

31. "*Confirmation Hearing*" means the hearing before the Bankruptcy Court pursuant to section 1128 of the Bankruptcy Code at which the Debtors will seek Confirmation of the Plan.

32. "*Confirmation Order*" means the Bankruptcy Court's order confirming the Plan pursuant to section 1129 of the Bankruptcy Code.

33. "*Consummation*" means the occurrence of the Effective Date.

34. "*Cryptocurrency*" means any digital token based on a publicly accessible blockchain.

35. "*Cure*" or "*Cure Claim*" means a Claim (unless waived or modified by the applicable counterparty) based upon a Debtor's default under an Executory Contract or an Unexpired Lease assumed by such Debtor under section 365 of the Bankruptcy Code, other than a default that is not required to be cured pursuant to section 365(b)(2) of the Bankruptcy Code.

36. "*D&O Liability Insurance Policies*" means all unexpired insurance policies maintained by the Debtors, the Reorganized Debtors, or the Estates as of the Effective Date that have been issued (or provide coverage) regarding directors', managers', officers', members', and trustees' liability (including any "tail policy") and all agreements, documents, or instruments relating thereto.

37. "*Debtor Release*" means the releases set forth in Article VIII.B of the Plan.

38. "*Debtors*" means, collectively, each of the following: Voyager Digital Holdings, Inc.; Voyager Digital Ltd.; and Voyager Digital, LLC.

39. "*Definitive Documents*" means (a) the Plan (and any and all exhibits, annexes, and schedules thereto); (b) the Confirmation Order; (c) the Disclosure Statement and the other Solicitation Materials; (d) the Disclosure Statement Order; (e) all pleadings filed by the Debtors in connection with the Chapter 11 Cases (or related orders), including the First Day Filings and all orders sought pursuant thereto; (f) the Plan Supplement; (g) the New Organizational Documents; (h) any key employee incentive plan or key employee retention plan; (i) all documentation with respect to any post-emergence management incentive plan; (j) any other disclosure documents related to the issuance of the New Common Stock; (k) any new material employment, consulting, or similar agreements; and (l) any and all other deeds, agreements, filings, notifications, pleadings, orders, certificates, letters, instruments or other documents reasonably desired or necessary to consummate and document the transactions contemplated by the Restructuring Transactions (including any exhibits, amendments, modifications, or supplements made from time to time thereto).

40. "*Disclosure Statement*" means the *Disclosure Statement Relating to the Joint Plan of Reorganization of Voyager Digital Holdings, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code*, as may be amended, supplemented, or otherwise modified from time to time, including all exhibits and schedules thereto and references therein that relate to the Plan.

41. "*Disclosure Statement Order*" means [●].

42. "*Disputed*" means a Claim or an Interest or any portion thereof: (a) that is not Allowed; (b) that is not disallowed under the Plan, the Bankruptcy Code, or a Final Order; and (c) with respect to which a party in interest has Filed a Proof of Claim, a Proof of Interest, or otherwise made a written request to a Debtor for payment.

43. "*Disputed Claims Reserve*" means an appropriate reserve in an amount to be determined by the Reorganized Debtors for distributions on account of Disputed Claims that are subsequently Allowed after the Effective Date, in accordance with Article VII.D hereof.

44. "*Distribution Agent*" means, as applicable, the Reorganized Debtors or any Entity or Entities designated by the Reorganized Debtors to make or to facilitate distributions that are to be made pursuant to the Plan.

45. "*Distribution Date*" means, except as otherwise set forth herein, the date or dates determined by the Reorganized Debtors, on or after the Effective Date, upon which the Distribution Agent shall make distributions to Holders of Allowed Claims entitled to receive distributions under the Plan.

46. "*Distribution Record Date*" means the record date for purposes of determining which Holders of Allowed Claims against the Debtors are eligible to receive distributions under the Plan, which date shall be the Effective Date, or such other date as is determined by the Debtors or designated by an order of the Bankruptcy Court.

47. "*DTC*" means the Depository Trust Company.

48. "*Effective Date*" means the date that is the first Business Day after the Confirmation Date on which (a) all conditions precedent to the occurrence of the Effective Date set forth in Article IX.A of the Plan have been satisfied or waived in accordance with Article IX.B of the Plan, (b) no stay of the Confirmation Order is in effect, and (c) the Debtors declare the Plan effective.

49. "*Entity*" has the meaning set forth in section 101(15) of the Bankruptcy Code.

50. "*Equity Election*" means the election by an eligible Holder of an Allowed Account Holder Claim to increase its share of the Claims Equity Allocation by exchanging Coin for additional New Common Stock from a Holder of an Allowed Account Holder Claim that makes the Coin Election. The Equity Election shall not exceed [•]% of each Holder's Pro Rata share of the Claims Equity Allocation. To the extent that the total Equity Election is greater than the total Coin Election, each Holder's Equity Election shall be reduced Pro Rata.

51. "*ERISA*" means the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1301-1461 (2012 & Supp. V 2017), and the regulations promulgated thereunder.

52. "*Estate*" means, as to each Debtor, the estate created on the Petition Date for the Debtor in its Chapter 11 Case pursuant to sections 301 and 541 of the Bankruptcy Code and all property (as defined in section 541 of the Bankruptcy Code) acquired by the Debtor after the Petition Date through and including the Effective Date.

53. ["*Exculpated Parties*" means, collectively, and in each case in its capacity as such: (a) each of the Debtors; (b) each of the Reorganized Debtors; and (c) each Related Party of each Entity in clauses (a) through (b).][1]

54. "*Executory Contract*" means a contract to which one or more of the Debtors is a party that is subject to assumption or rejection under section 365 or 1123 of the Bankruptcy Code.

55. "*Existing Equity Interests*" means any Interest in Voyager existing immediately prior to the occurrence of the Effective Date.

56. "*Federal Judgment Rate*" means the federal judgment interest rate in effect as of the Petition Date calculated as set forth in section 1961 of the Judicial Code.

57. "*File*," "*Filed*," or "*Filing*" means file, filed, or filing, respectively, in the Chapter 11 Cases with the Bankruptcy Court or its authorized designee, or, with respect to the filing of a Proof of Claim or Proof of Interest, file, filed, or filing, respectively, with the Claims, Noticing, and Solicitation Agent.

58. "*Final Decree*" means the decree contemplated under Bankruptcy Rule 3022.

59. "*Final Order*" means, as applicable, an order or judgment of the Bankruptcy Court or other court of competent jurisdiction with respect to the relevant subject matter that has not been reversed, stayed, modified, or amended, and as to which the time to appeal, petition for certiorari, or move for a new trial, reargument, reconsideration, or rehearing has expired and no appeal, petition for certiorari, or motion for a new trial, reargument, reconsideration, or rehearing has been timely taken or filed, or as to which any appeal that has been or may be taken or any petition for certiorari or any motion for a new trial, reargument, reconsideration, or rehearing that has been or may be made or filed has been resolved by the highest court to which the order or judgment could be appealed or from which certiorari could be sought or the motion for a new trial, reargument, reconsideration, or rehearing shall have been denied, resulted in no modification of such order (if any such motion has been or may be granted), or have otherwise been dismissed with prejudice; *provided* that the possibility that a motion under rule 60 of the Federal Rules of Civil Procedure or any comparable Bankruptcy Rule may be filed relating to such order or judgment shall not cause such order or judgment to not be a Final Order.

60. "*First Day Filings*" means the "first-day" filings that the Debtors made upon or shortly following the commencement of the Chapter 11 Cases.

61. "*General Unsecured Claim*" means any Claim against a Debtor that is not Secured and is not: (a) paid in full prior to the Effective Date pursuant to an order of the Bankruptcy Court; (b) an Administrative Claim; (c) a Secured Tax Claim; (d) a Priority Tax Claim; (e) an Other Priority Claim; (f) a Professional Fee Claim; (g) an Account Holder Claim; (h) an Alameda Loan Facility Claim; (i) an Intercompany Claim; or (j) a Section 510(b) Claim. For the avoidance of doubt, all (i) Claims resulting from the rejection of Executory Contracts and Unexpired Leases, and (ii) Claims that are not Secured resulting from litigation, other than 510(b) Claims, against one or more of the Debtors are General Unsecured Claims.

62. "*Governmental Unit*" has the meaning set forth in section 101(27) of the Bankruptcy Code.

~~1 This definition and any related~~ provision in this Plan remain subject to an ongoing investigation.

63. "*Holder*" means an Entity holding a Claim against or an Interest in any Debtor.

64. "*Impaired*" means, with respect to a Class of Claims or Interests, a Class of Claims or Interests that is impaired within the meaning of section 1124 of the Bankruptcy Code.

65. "*Indemnification Provisions*" means the provisions in place before or as of the Effective Date, whether in a Debtor's bylaws, certificates of incorporation, limited liability company agreement, partnership agreement, management agreement, other formation or organizational document, board resolution, indemnification agreement, contract, or otherwise providing the basis for any obligation of a Debtor as of the Effective Date to indemnify, defend, reimburse, or limit the liability of, or to advance fees and expenses to, any of the Debtors' current and former directors, equity holders, managers, officers, members, employees, attorneys, accountants, investment bankers, and other professionals, and each such Entity's respective affiliates, as applicable.

66. "*Intercompany Claim*" means any Claim held by a Debtor or a Debtor's Affiliate against a Debtor.

67. "*Intercompany Interest*" means, other than an Interest in Voyager, an Interest in one Debtor held by another Debtor or a Debtor's Affiliate.

68. "*Interest*" means any equity security (as such term is defined in section 101(16) of the Bankruptcy Code) including all issued, unissued, authorized, or outstanding shares of capital stock and any other common stock, preferred stock, limited liability company interests, and any other equity, ownership, or profit interests of an Entity, including all options, warrants, rights, stock appreciation rights, phantom stock rights, restricted stock units, redemption rights, repurchase rights, convertible, exercisable, or exchangeable securities, or other agreements, arrangements, or commitments of any character relating to, or whose value is related to, any such interest or other ownership interest in an Entity whether or not arising under or in connection with any employment agreement and whether or not certificated, transferable, preferred, common, voting, or denominated "stock" or a similar security, and including any Claim against the Debtors subject to subordination pursuant to section 510(b) of the Bankruptcy Code arising from or related to the foregoing.

69. "*Interim Compensation Order*" means [●].

70. "*Judicial Code*" means title 28 of the United States Code, 28 U.S.C. §§ 1–4001 and the rules and regulations promulgated thereunder, as applicable to the Chapter 11 Cases.

71. "*Lien*" has the meaning set forth in section 101(37) of the Bankruptcy Code.

72. "*Litigation Agent*" has the meaning ascribed to it in Article IV.I herein.

73. "*Management Incentive Plan*" means the post-emergence management incentive plan to be implemented with respect to Reorganized Voyager by the New Board, as applicable, on or as soon as reasonably practicable after the Effective Date, which shall be set forth in the Plan Supplement.

74. "*Money Transmitter Licenses*" means any license or similar authorization of a Governmental Unit that an Entity is required to obtain to operate as a broker of Cryptocurrency.

75. "*New Board*" means the initial board of directors of Reorganized Voyager immediately following the occurrence of the Effective Date, to be appointed in accordance with the Plan and the New Organizational Documents.

76. "*New Common Stock*" means the common stock of Reorganized Voyager to be issued on the Effective Date.

77. "*New Organizational Documents*" means the organizational and governance documents for the Reorganized Debtors and any subsidiaries thereof, including, as applicable, the certificates or articles of incorporation, certificates of formation, certificates of organization, certificates of limited partnership, or certificates of conversion, limited liability company agreements, operating agreements, or limited partnership agreements, stockholder or shareholder agreements, bylaws, the identity of proposed members of the board of Reorganized Voyager, indemnification agreements, and Registration Rights Agreements (or equivalent governing documents of any of the foregoing).

78. "*OpCo*" means Voyager Digital, LLC.

79. "*OSC*" means the Ontario Securities Commission.

80. "*Other Priority Claim*" means any Claim against a Debtor, other than an Administrative Claim or a Priority Tax Claim, entitled to priority in right of payment under section 507(a) of the Bankruptcy Code.

81. "*Person*" has the meaning set forth in section 101(41) of the Bankruptcy Code.

82. "*Petition Date*" means July 5, 2022.

83. "*Plan*" means this joint chapter 11 plan and all exhibits, supplements, appendices, and schedules hereto, as may be altered, amended, supplemented, or otherwise modified from time to time in accordance with Article X.A hereof, including the Plan Supplement (as altered, amended, supplemented, or otherwise modified from time to time), which is incorporated herein by reference and made part of the Plan as if set forth herein.

84. "*Plan Supplement*" means the compilation of documents and forms of documents, agreements, schedules, and exhibits to the Plan (in each case, as may thereafter be amended, supplemented, or otherwise modified from time to time in accordance with the terms of the Plan, the Bankruptcy Code, the Bankruptcy Rules, and applicable law), to be Filed by the Debtors no later than seven days before the Confirmation Hearing or such later date as may be approved by the Bankruptcy Court, and additional documents Filed with the Bankruptcy Court prior to the Effective Date as amendments to the Plan Supplement. The Plan Supplement may include the following, as applicable: (a) the New Organizational Documents; (b) to the extent known, the identity and members of the New Board; (c) the Schedule of Rejected Executory Contracts and Unexpired Leases; (d) the Schedule of Retained Causes of Action; (e) the Restructuring Transactions Memorandum; and (f) any additional documents necessary to effectuate the Restructuring Transactions or that is contemplated by the Plan.

85. "*Priority Tax Claim*" means any Claim of a Governmental Unit against a Debtor of the kind specified in section 507(a)(8) of the Bankruptcy Code.

86. "*Pro Rata*" means the proportion that an Allowed Claim or an Allowed Interest in a particular Class bears to the aggregate amount of Allowed Claims or Allowed Interests in that Class or the proportion of the Allowed Claims or Allowed Interests in a particular Class and other Classes entitled to share in the same recovery as such Allowed Claim or Allowed Interests under the Plan, unless otherwise indicated.

10. "*Professional*" means an Entity: (a) employed in the Chapter 11 Cases pursuant to an order of the Bankruptcy Court in accordance with sections 327, 363, or 1103 of the Bankruptcy Code and to be compensated for services rendered and expenses incurred pursuant to sections 327, 328, 329, 330, 331, and 363 of the Bankruptcy Code or (b) for which compensation and reimbursement has been Allowed by Final Order of the Bankruptcy Court pursuant to section 503(b)(4) of the Bankruptcy Code.

11. "*Professional Fee Claim*" means any Administrative Claim by a Professional for compensation for services rendered or reimbursement of expenses incurred by such Professional through and including the Effective Date to the extent such fees and expenses have not been paid pursuant to an order of the Bankruptcy Court. To the extent the Bankruptcy Court denies or reduces by a Final Order any amount of a Professional's requested fees and expenses, then the amount by which such fees or expenses are reduced or denied shall reduce the applicable Professional Fee Claim.

12. "*Professional Fee Escrow Account*" means an escrow account funded by the Debtors with Cash no later than the Effective Date in an amount equal to the Professional Fee Escrow Amount.

13. "*Professional Fee Escrow Amount*" means the aggregate amount of Professional Fee Claims and other unpaid fees and expenses the Professionals have incurred or will incur in rendering services in connection with the Chapter 11 Cases prior to and as of the Confirmation Date projected to be outstanding as of the anticipated Effective Date, which shall be estimated pursuant to the method set forth in Article II.B of the Plan.

14. "*Proof of Claim*" means a written proof of Claim Filed against any of the Debtors in the Chapter 11 Cases.

15. "*Proof of Interest*" means a written proof of Interest Filed against any of the Debtors in the Chapter 11 Cases.

16. "*Registration Rights Agreement*" means any agreement providing registration rights to any parties with respect to the New Common Stock.

17. "*Related Party*" means, with respect to any Entity, in each case in its capacity as such with respect to such Entity, such Entity's current and former directors, managers, officers, investment committee members, special committee members, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, managed accounts or funds, predecessors, participants, successors, assigns, subsidiaries, affiliates, partners, limited partners, general partners, principals, members, management companies, fund advisors or managers, employees, agents, trustees, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, and other professionals and advisors.

18. ["*Released Parties*" means, collectively, in each case in its capacity as such: (a) the Debtors; (b) the Reorganized Debtors; (c) Alameda; (d) the Releasing Parties; and (e) each Related Party of each Entity in clauses (a) through (d); *provided* that any Holder of a Claim against or Interest in the Debtors that is not a Releasing Party shall not be a "Released Party."][2]

19. ["*Releasing Parties*" means, collectively, in each case in its capacity as such: (a) the Debtors; (b) the Reorganized Debtors; (c) Alameda, (d) all Holders of Claims that vote to accept the Plan; (e) all Holders of Claims that are deemed to accept the Plan and who do not affirmatively opt out of the

2 This definition and any related provision in this Plan remain subject to an ongoing investigation.

releases provided by the Plan; (f) all Holders of Claims or Interests that are deemed to reject the Plan and who do not affirmatively opt out of the releases provided by the Plan; (g) all Holders of Claims who abstain from voting on the Plan and who do not affirmatively opt out of the releases provided by the Plan; (h) all Holders of Claims who vote to reject the Plan and who do not affirmatively opt out of the releases provided by the Plan; and (i) each Related Party of each Entity in clauses (a) through (h).][3]

87. "*Reorganized Debtor*" means a Debtor, or any successor or assign thereto, by merger, consolidation, reorganization, or otherwise, in the form of a corporation, limited liability company, partnership, or other form, as the case may be, on and after the Effective Date, including Reorganized Voyager and any intermediary holding company formed in the Restructuring Transactions through which Reorganized Voyager holds any other Reorganized Debtor.

88. "*Reorganized Voyager*" means the Entity that will be the issuer of the New Common Stock, which Entity shall be either (a) a Debtor (including, for the avoidance of doubt, potentially Voyager), or any successor or assign thereto, by merger, consolidation, reorganization, or otherwise, in the form of a corporation, limited liability company, partnership, or other form, as the case may be, or (b) a newly formed corporation, limited liability company, partnership, or other entity that may be formed to, among other things, directly or indirectly acquire substantially all of the assets and/or stock of the Debtors, in each case, in accordance with the Restructuring Transactions Memorandum, on or after the Effective Date.

89. "*Restructuring Transactions*" means those mergers, amalgamations, consolidations, reorganizations, arrangements, continuances, restructurings, transfers, conversions, dispositions, liquidations, dissolutions, or other corporate transactions that the Debtors reasonably determine to be necessary to implement the transactions described in this Plan, as described in more detail in Article IV.B herein and the Restructuring Transactions Memorandum.

90. "*Restructuring Transactions Memorandum*" means that certain memorandum as may be amended, supplemented, or otherwise modified from time to time, describing the steps to be carried out to effectuate the Restructuring Transactions, the form of which shall be included in the Plan Supplement.

91. "*Schedule of Rejected Executory Contracts and Unexpired Leases*" means a schedule that may be Filed as part of the Plan Supplement at the Debtors' option of certain Executory Contracts and Unexpired Leases to be rejected by the Debtors pursuant to the Plan, as the same may be amended, modified, or supplemented from time to time by the Debtors or Reorganized Debtors, as applicable, in accordance with the Plan.

92. "*Schedule of Retained Causes of Action*" means the schedule of certain Causes of Action of the Debtors that are not released, waived, or transferred pursuant to the Plan, as the same may be amended, modified, or supplemented from time to time by the Debtors, which shall be included in the Plan Supplement.

93. "*Schedules*" means, collectively, the schedules of assets and liabilities, Schedule of Rejected Executory Contracts and Unexpired Leases, and statements of financial affairs Filed by each of the Debtors pursuant to section 521 of the Bankruptcy Code, as such schedules and statements may have been or may be amended, modified, or supplemented from time to time.

94. "*SEC*" means the United States Securities and Exchange Commission.

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3 This definition and any related provision in this Plan remain subject to an ongoing investigation.

20. "*Section 510(b) Claim*" means any Claim against a Debtor subject to subordination under section 510(b) of the Bankruptcy Code.

21. "*Secured*" means, when referring to a Claim: (a) secured by a Lien on property in which the applicable Estate has an interest, which Lien is valid, perfected, and enforceable pursuant to applicable law or by reason of a Bankruptcy Court order, or that is subject to a valid right of setoff pursuant to section 553 of the Bankruptcy Code, to the extent of the value of the creditor's interest in such Estate's interest in such property or to the extent of the amount subject to setoff, as applicable, as determined in accordance with section 506(a) of the Bankruptcy Code or (b) Allowed pursuant to the Plan as a secured Claim.

22. "*Secured Tax Claim*" means any Secured Claim against a Debtor that, absent its Secured status, would be entitled to priority in right of payment under section 507(a)(8) of the Bankruptcy Code (determined irrespective of time limitations), including any related Secured Claim for penalties.

23. "*Securities Act*" means the U.S. Securities Act of 1933, 15 U.S.C. §§ 77a–77aa, as now in effect or hereafter amended, and the rules and regulations promulgated thereunder.

24. "*Security*" has the meaning set forth in section 2(a)(1) of the Securities Act.

25. "*Solicitation Materials*" means all solicitation materials with respect to the Plan.

26. "*Stand-Alone Restructuring*" means the transactions and reorganization contemplated by, and pursuant to, this Plan in accordance with Article IV.C of this Plan, which shall occur on the Effective Date.

27. "*Third-Party Release*" means the releases set forth in Article VIII.C of the Plan.

28. "*Transfer of Control*" means the transfer of control of the Money Transmitter Licenses held by Voyager or any of its subsidiaries as a result of the issuance of the New Common Stock to Holders of Account Holder Claims.

29. "*Unclaimed Distribution*" means any distribution under the Plan on account of an Allowed Claim or Allowed Interest to a Holder that, within six months of outreach, has not: (a) accepted a particular distribution or, in the case of distributions made by check, negotiated such check, (b) given notice to the Reorganized Debtors of an intent to accept a particular distribution, (c) responded to the Debtors' or Reorganized Debtors' requests for information necessary to facilitate a particular distribution, or (d) taken any other action necessary to facilitate such distribution.

30. "*Unexpired Lease*" means a lease to which one or more of the Debtors is a party that is subject to assumption or rejection under section 365 or section 1123 of the Bankruptcy Code.

31. "*Unimpaired*" means, with respect to a Class of Claims or Interests, a Class of Claims or Interests that is unimpaired within the meaning of section 1124 of the Bankruptcy Code.

32. "*U.S. Trustee*" means the United States Trustee for the Southern District of New York.

33. "*Voting Deadline*" means the date that is twenty-eight (28) days after Solicitation Launch (as defined in the Disclosure Statement).

95. "*Voyager*" means Voyager Digital Ltd., a Canadian corporation that is publicly traded on the Toronto Stock Exchange.

96. "*Voyager Tokens*" means that certain cryptocurrency token issued by Voyager.

97. "*Voyager Token Allocation*" means the Voyager Tokens held by the Debtors as of the Petition Date to be distributed to Holders of Allowed Account Holder Claims.

B. Rules of Interpretation

For purposes of this Plan: (1) in the appropriate context, each term, whether stated in the singular or the plural, shall include both the singular and the plural, and pronouns stated in the masculine, feminine, or neuter gender shall include the masculine, feminine, and the neuter gender; (2) capitalized terms defined only in the plural or singular form shall nonetheless have their defined meanings when used in the opposite form; (3) unless otherwise specified, any reference herein to a contract, lease, instrument, release, indenture, or other agreement or document being in a particular form or on particular terms and conditions means that the referenced document shall be substantially in that form or substantially on those terms and conditions; (4) unless otherwise specified, any reference herein to an existing document, schedule, or exhibit, whether or not Filed, having been Filed, or to be Filed, shall mean that document, schedule, or exhibit, as it may thereafter have been or may thereafter be validly amended, amended and restated, supplemented, or otherwise modified; (5) unless otherwise specified, any reference to an Entity as a Holder of a Claim or Interest, includes that Entity's successors and assigns; (6) unless otherwise specified, all references herein to "Articles" are references to Articles hereof or hereto; (7) unless otherwise specified, all references herein to exhibits are references to exhibits in the Plan Supplement; (8) unless otherwise specified, the words "herein," "hereof," and "hereto" refer to the Plan in its entirety rather than to any particular portion of the Plan; (9) captions and headings to Articles are inserted for convenience of reference only and are not intended to be a part of or to affect the interpretation of the Plan; (10) unless otherwise specified, the rules of construction set forth in section 102 of the Bankruptcy Code shall apply; (11) any term used in capitalized form herein that is not otherwise defined but that is used in the Bankruptcy Code or the Bankruptcy Rules shall have the meaning assigned to that term in the Bankruptcy Code or the Bankruptcy Rules, as applicable; (12) references to docket numbers of documents Filed in the Chapter 11 Cases are references to the docket numbers under the Bankruptcy Court's CM/ECF system; (13) unless otherwise specified, all references to statutes, regulations, orders, rules of courts, and the like shall mean as amended from time to time, and as applicable to the Chapter 11 Cases; (14) any effectuating provisions may be interpreted by the Debtors or the Reorganized Debtors in such a manner that is consistent with the overall purpose and intent of the Plan all without further notice to or action, order, or approval of the Bankruptcy Court or any other Entity; (15) any references herein to the Effective Date shall mean the Effective Date or as soon as reasonably practicable thereafter; (16) all references herein to consent, acceptance, or approval shall be deemed to include the requirement that such consent, acceptance, or approval be evidenced by a writing, which may be conveyed by counsel for the respective parties that have such consent, acceptance, or approval rights, including by electronic mail; (17) references to "shareholders," "directors," and/or "officers" shall also include "members" and/or "managers," as applicable, as such terms are defined under the applicable state limited liability company laws; and (18) the use of "include" or "including" is without limitation unless otherwise stated.

C. Computation of Time

Unless otherwise specifically stated herein, the provisions of Bankruptcy Rule 9006(a) shall apply in computing any period of time prescribed or allowed herein. If the date on which a transaction may occur pursuant to the Plan shall occur on a day that is not a Business Day, then such transaction shall instead occur on the next succeeding Business Day.

D. Governing Law

Unless a rule of law or procedure is supplied by federal law (including the Bankruptcy Code and Bankruptcy Rules) or unless otherwise specifically stated, the laws of the State of New York, without giving effect to the principles of conflict of laws, shall govern the rights, obligations, construction, and implementation of the Plan and any agreements, documents, instruments, or contracts executed or entered into in connection with the Plan (except as otherwise set forth in those agreements, documents, instruments, or contracts, in which case the governing law of such agreement shall control); *provided* that corporate, limited liability company, or partnership governance matters relating to the Debtors or the Reorganized Debtors, as applicable, shall be governed by the laws of the jurisdiction of incorporation or formation of the relevant Debtor or Reorganized Debtor, as applicable.

E. Reference to Monetary Figures

All references in the Plan to monetary figures refer to currency of the United States of America, unless otherwise expressly provided.

F. Reference to the Debtors or the Reorganized Debtors

Except as otherwise specifically provided in the Plan to the contrary, references in the Plan to the Debtors or to the Reorganized Debtors mean the Debtors and the Reorganized Debtors, as applicable, to the extent the context requires.

G. Nonconsolidated Plan

Although for purposes of administrative convenience and efficiency the Plan has been filed as a joint plan for each of the Debtors and presents together Classes of Claims against and Interests in the Debtors, the Plan does not provide for the substantive consolidation of any of the Debtors.

ARTICLE II.

ADMINISTRATIVE AND PRIORITY CLAIMS

In accordance with section 1123(a)(1) of the Bankruptcy Code, Administrative Claims, Professional Fee Claims, and Priority Tax Claims have not been classified and thus are excluded from the Classes of Claims and Interests set forth in Article III of the Plan.

A. Administrative Claims

Except as otherwise provided in this Article II.A and except with respect to Administrative Claims that are Professional Fee Claims or subject to 11 U.S.C. § 503(b)(1)(D), unless previously Filed, requests for payment of Allowed Administrative Claims (other than Administrative Claims arising under section 503(b)(9) of the Bankruptcy Code) must be Filed and served on the Reorganized Debtors pursuant to the procedures specified in the Confirmation Order and the notice of entry of the Confirmation Order no later than the Administrative Claims Bar Date. Holders of Administrative Claims that are required to, but do not, File and serve a request for payment of such Administrative Claims by such date shall be forever barred, estopped, and enjoined from asserting such Administrative Claims against the Debtors or their property, and such Administrative Claims shall be deemed discharged as of the Effective Date without the need for any objection from the Reorganized Debtors or any notice to or action, order, or approval of the Bankruptcy Court or any other Entity. Objections to such requests, if any, must be Filed and served on the Reorganized Debtors and the requesting party by the Claims Objection Bar Date for Administrative Claims.

Notwithstanding the foregoing, no request for payment of an Administrative Claim need be Filed with respect to an Administrative Claim previously Allowed by Final Order of the Bankruptcy Court.

Except with respect to Administrative Claims that are Professional Fee Claims, and except to the extent that an Administrative Claim or Priority Tax Claim has already been paid during the Chapter 11 Cases or a Holder of an Allowed Administrative Claim and the applicable Debtor(s) agree to less favorable treatment, each Holder of an Allowed Administrative Claim shall receive an amount of Cash equal to the amount of the unpaid or unsatisfied portion of such Allowed Administrative Claim in accordance with the following: (1) if such Administrative Claim is Allowed on or prior to the Effective Date, no later than thirty (30) days after the Effective Date or as soon as reasonably practicable thereafter (or, if not then due, when such Allowed Administrative Claim is due or as soon as reasonably practicable thereafter); (2) if such Administrative Claim is not Allowed as of the Effective Date, no later than thirty (30) days after the date on which an order Allowing such Administrative Claim becomes a Final Order, or as soon as reasonably practicable thereafter; (3) if such Allowed Administrative Claim is based on liabilities incurred by the Debtors in the ordinary course of their business after the Petition Date, in accordance with the terms and conditions of the particular transaction or course of business giving rise to such Allowed Administrative Claim, without any further action by the Holder of such Allowed Administrative Claim; (4) at such time and upon such terms as may be agreed upon by the Holder of such Allowed Administrative Claim and the Debtors or the Reorganized Debtors, as applicable; or (5) at such time and upon such terms as set forth in a Final Order of the Bankruptcy Court.

Objections to requests for payment of such Administrative Claims, if any, must be Filed with the Bankruptcy Court and served on the Reorganized Debtors and the requesting Holder no later than the Claims Objection Bar Date for Administrative Claims. After notice and a hearing in accordance with the procedures established by the Bankruptcy Code, the Bankruptcy Rules, and prior Bankruptcy Court orders, the Allowed amounts, if any, of Administrative Claims shall be determined by, and satisfied in accordance with, an order that becomes a Final Order of the Bankruptcy Court.

B. Professional Fee Claims

1. Final Fee Applications and Payment of Professional Fee Claims

All final requests for payment of Professional Fee Claims for services rendered and reimbursement of expenses incurred prior to the Confirmation Date must be Filed no later than forty-five days (45) after the Effective Date. The Bankruptcy Court shall determine the Allowed amounts of such Professional Fee Claims after notice and a hearing in accordance with the procedures established by the Bankruptcy Code and Bankruptcy Rules. The Reorganized Debtors shall pay Professional Fee Claims in Cash to such Professionals in the amount the Bankruptcy Court allows, including from funds held in the Professional Fee Escrow Account as soon as reasonably practicable after such Professional Fee Claims are Allowed by entry of an order of the Bankruptcy Court; *provided* that the Debtors' and the Reorganized Debtors' obligations to pay Allowed Professional Fee Claims shall not be limited or deemed limited to funds held in the Professional Fee Escrow Account.

2. Professional Fee Escrow Account

No later than the Effective Date, the Reorganized Debtors shall establish and fund the Professional Fee Escrow Account with Cash equal to the Professional Fee Escrow Amount. The Professional Fee Escrow Account shall be maintained in trust solely for the Professionals and for no other Entities until all Professional Fee Claims Allowed by the Bankruptcy Court have been irrevocably paid in full to the Professionals pursuant to one or more Final Orders of the Bankruptcy Court. No Liens, claims, or interests shall encumber the Professional Fee Escrow Account or Cash held in the Professional Fee Escrow Account

in any way. No funds held in the Professional Fee Escrow Account shall be property of the Estates of the Debtors or the Reorganized Debtors. When all Professional Fee Claims Allowed by the Bankruptcy Court have been irrevocably paid in full to the Professionals pursuant to one or more Final Orders of the Bankruptcy Court, any remaining funds held in the Professional Fee Escrow Account shall be turned over to the Reorganized Debtors without any further notice to or action, order, or approval of the Bankruptcy Court or any other Entity.

3. Professional Fee Escrow Amount

The Professionals shall deliver to the Debtors a reasonable and good-faith estimate of their unpaid fees and expenses incurred in rendering services to the Debtors before and as of the Confirmation Date projected to be outstanding as of the anticipated Effective Date, and shall deliver such estimate no later than five Business Days prior to the anticipated Effective Date. For the avoidance of doubt, no such estimate shall be considered or deemed an admission or limitation with respect to the amount of the fees and expenses that are the subject of a Professional's final request for payment of Professional Fee Claims Filed with the Bankruptcy Court, and such Professionals are not bound to any extent by the estimates. If a Professional does not provide an estimate, the Debtors may estimate the unpaid and unbilled fees and expenses of such Professional. The total aggregate amount so estimated to be outstanding as of the anticipated Effective Date shall be utilized by the Debtors to determine the amount to be funded to the Professional Fee Escrow Account; *provided* that the Reorganized Debtors shall use Cash on hand to increase the amount of the Professional Fee Escrow Account to the extent fee applications are Filed after the Effective Date in excess of the amount held in the Professional Fee Escrow Account based on such estimates.

4. Post-Confirmation Fees and Expenses

Except as otherwise specifically provided in the Plan, from and after the Confirmation Date, the Debtors shall, in the ordinary course of business and without any further notice to or action, order, or approval of the Bankruptcy Court, pay in Cash the reasonable and documented legal, professional, or other fees and expenses related to implementation of the Plan and Consummation incurred by the Debtors or the Reorganized Debtors. Upon the Confirmation Date, any requirement that Professionals comply with sections 327 through 331, 363, and 1103 of the Bankruptcy Code in seeking retention or compensation for services rendered after such date shall terminate, and the Debtors may employ and pay any Professional in the ordinary course of business for the period after the Confirmation Date without any further notice to or action, order, or approval of the Bankruptcy Court.

C. Priority Tax Claims

Except to the extent that a Holder of an Allowed Priority Tax Claim agrees to a less favorable treatment, in full and final satisfaction, compromise, settlement, release, and discharge of, and in exchange for, each Allowed Priority Tax Claim, each Holder of such Allowed Priority Tax Claim shall be treated in accordance with the terms set forth in section 1129(a)(9)(C) of the Bankruptcy Code.

ARTICLE III.

CLASSIFICATION, TREATMENT, AND VOTING OF CLAIMS AND INTERESTS

A. Classification of Claims and Interests

Except for the Claims addressed in Article II of the Plan, all Claims against and Interests in the Debtors are classified in the Classes set forth in this Article III for all purposes, including voting,

Confirmation, and distributions pursuant to the Plan and in accordance with section 1122 and 1123(a)(1) of the Bankruptcy Code. A Claim or an Interest is classified in a particular Class only to the extent that the Claim or Interest qualifies within the description of that Class and is classified in other Classes to the extent that any portion of the Claim or Interest qualifies within the description of such other Classes. A Claim or an Interest also is classified in a particular Class for the purpose of receiving distributions under the Plan only to the extent that such Claim or Interest is an Allowed Claim or Allowed Interest in that Class and has not been paid, released, or otherwise satisfied prior to the Effective Date.

B. Summary of Classification

A summary of the classification of Claims against and Interests in each Debtor pursuant to the Plan is summarized in the following chart. The Plan constitutes a separate chapter 11 plan for each of the Debtors, and accordingly, the classification of Claims and Interests set forth below applies separately to each of the Debtors. All of the potential Classes for the Debtors are set forth herein. Certain of the Debtors may not have Holders of Claims or Interests in a particular Class or Classes, and such Claims or Interests shall be treated as set forth in Article III.E hereof. Voting tabulations for recording acceptances or rejections of the Plan will be conducted on a Debtor-by-Debtor basis as set forth above.[4]

Class	Claim or Interest	Status	Voting Rights
1	Secured Tax Claims	Unimpaired	Not Entitled to Vote (Deemed to Accept)
2	Other Priority Claims	Unimpaired	Not Entitled to Vote (Deemed to Accept)
3	Account Holder Claims	Impaired	Entitled to Vote
4	Alameda Loan Facility Claims	Impaired	Not Entitled to Vote (Deemed to Reject)
5	General Unsecured Claims	Impaired	Entitled to Vote
6	Section 510(b) Claims	Impaired	Not Entitled to Vote (Deemed to Reject)
7	Intercompany Claims	Unimpaired / Impaired	Not Entitled to Vote (Presumed to Accept)
8	Intercompany Interests	Unimpaired / Impaired	Not Entitled to Vote (Presumed to Accept)
9	Existing Equity Interests	Impaired	Not Entitled to Vote (Deemed to Reject)

4 The Debtors reserve the right to separately classify Claims or Interests to the extent necessary to comply with any requirements under the Bankruptcy Code or applicable law.

C. Treatment of Classes of Claims and Interests

Subject to Article VI hereof, each Holder of an Allowed Claim or Allowed Interest, as applicable, shall receive under the Plan the treatment described below in full and final satisfaction, compromise, settlement, release, and discharge of, and in exchange for, such Holder's Allowed Claim or Allowed Interest, except to the extent different treatment is agreed to by the Debtors or Reorganized Debtors, as applicable, and the Holder of such Allowed Claim or Allowed Interest, as applicable.

1. Class 1 —Secured Tax Claims

(a) *Classification*: Class 1 consists of all Secured Tax Claims.

(b) *Treatment*: Each Holder of an Allowed Secured Tax Claim shall receive, in full and final satisfaction of such Allowed Secured Tax Claim, at the option of the applicable Debtor, payment in full in Cash of such Holder's Allowed Secured Tax Claim or such other treatment rendering such Holder's Allowed Secured Tax Claim Unimpaired.

(c) *Voting*: Class 1 is Unimpaired under the Plan. Holders of Allowed Secured Tax Claims are conclusively presumed to have accepted the Plan under section 1126(f) of the Bankruptcy Code. Therefore, Holders of Allowed Secured Tax Claims are not entitled to vote to accept or reject the Plan.

2. Class 2 — Other Priority Claims

(a) *Classification*: Class 2 consists of all Other Priority Claims.

(b) *Treatment*: Each Holder of an Allowed Other Priority Claim shall receive, in full and final satisfaction of such Allowed Other Priority Claim, at the option of the applicable Debtor, payment in full in Cash of such Holder's Allowed Other Priority Claim or such other treatment rendering such Holder's Allowed Other Priority Claim Unimpaired.

(c) *Voting*: Class 2 is Unimpaired under the Plan. Holders of Allowed Other Priority Claims are conclusively presumed to have accepted the Plan under section 1126(f) of the Bankruptcy Code. Therefore, Holders of Allowed Other Priority Claims are not entitled to vote to accept or reject the Plan.

3. Class 3 — Account Holder Claims

(a) *Classification*: Class 3 consists of all Account Holder Claims.

(b) *Treatment*: Each Holder of an Allowed Account Holder Claim will receive in full and final satisfaction, compromise, settlement, release, and discharge of such Allowed Account Holder Claim, its Pro Rata share of:

(i) the Coin Allocation;

(ii) the Claims Equity Allocation;

(iii) the Voyager Token Allocation; and

(iv) the 3AC Recovery Allocation;

provided that subclauses (i) and (ii) shall be subject to such Holder's Coin Election or Equity Election, as applicable.

(c) *Voting:* Class 3 is Impaired under the Plan. Holders of Allowed Account Holder Claims are entitled to vote to accept or reject the Plan.

4. Class 4 — Alameda Loan Facility Claims

(a) *Classification*: Class 4 consists of all Alameda Loan Facility Claims.

(b) *Treatment*: Alameda Loan Facility Claims shall be cancelled, released, discharged and extinguished as of the Effective Date, and will be of no further force or effect, and Holders of Alameda Loan Facility Claims will not receive any distribution on account of such Alameda Loan Facility Claims.

(c) *Voting*: Class 4 is Impaired under the Plan. Holders of Alameda Loan Facility Claims are conclusively deemed to have rejected the Plan under section 1126(g) of the Bankruptcy Code. Therefore, Holders of Alameda Loan Facility Claims are not entitled to vote to accept or reject the Plan.

5. Class 5 — General Unsecured Claims

(a) *Classification*: Class 5 consists of all General Unsecured Claims.

(b) *Treatment*: Each Holder of an Allowed General Unsecured Claim shall receive, in full and final satisfaction, compromise, settlement, release, and discharge of such Allowed General Unsecured Claim, its Pro Rata share of the Claims Allocation Pool.

(c) *Voting*: Class 5 is Impaired under the Plan. Holders of Allowed General Unsecured Claims are entitled to vote to accept or reject the Plan.

6. Class 6 — Section 510(b) Claims

(a) *Classification*: Class 6 consists of all Section 510(b) Claims.

(b) *Allowance*: Notwithstanding anything to the contrary herein, a Section 510(b) Claim, if any such Section 510(b) Claim exists, may only become Allowed by Final Order of the Bankruptcy Court.

(c) *Treatment*: Allowed Section 510(b) Claims, if any, shall be cancelled, released, discharged, and extinguished as of the Effective Date, and will be of no further force or effect, and Holders of Allowed Section 510(b) Claims will not receive any distribution on account of such Allowed Section 510(b) Claims.

(d) *Voting*: Class 6 is Impaired under the Plan. Holders (if any) of Allowed Section 510(b) Claims are conclusively deemed to have rejected the Plan under section 1126(g) of the Bankruptcy Code. Therefore, Holders (if any) of Allowed Section 510(b) Claims are not entitled to vote to accept or reject the Plan.

7. Class 7 — Intercompany Claims

(a) *Classification*: Class 7 consists of all Intercompany Claims.

(b) *Treatment*: On the Effective Date, all Intercompany Claims shall be, at the option of Reorganized Voyager, either (a) Reinstated or (b) converted to equity, otherwise set off, settled, distributed, contributed, cancelled, or released, in each case, in accordance with the Restructuring Transactions Memorandum.

(c) *Voting*: Holders of Intercompany Claims are either Unimpaired or Impaired, and such Holders of Intercompany Claims are conclusively presumed to have accepted the Plan under section 1126(f) of the Bankruptcy Code. Therefore, Holders of Intercompany Claims are not entitled to vote to accept or reject the Plan.

8. Class 8 — Intercompany Interests

(a) *Classification*: Class 8 consists of all Intercompany Interests.

(b) *Treatment*: On the Effective Date, all Intercompany Interests shall be, at the option of Reorganized Voyager, either (a) Reinstated in accordance with Article III.G of the Plan or (b) set off, settled, addressed, distributed, contributed, merged, cancelled, or released, in each case, in accordance with the Restructuring Transactions Memorandum.

(c) *Voting*: Holders of Intercompany Interests are either Unimpaired or Impaired, and such Holders of Intercompany Interests are conclusively presumed to have accepted the Plan under section 1126(f) of the Bankruptcy Code. Therefore, Holders of Intercompany Interests are not entitled to vote to accept or reject the Plan.

9. Class 9 — Existing Equity Interests

(a) *Classification*: Class 9 consists of all Existing Equity Interests.

(b) *Treatment*: On the Effective Date, all Existing Equity Interests will be cancelled, released, and extinguished, and will be of no further force or effect, and Holders of Existing Equity Interests will not receive any distribution on account of such Existing Equity Interests.

(c) *Voting*: Class 9 is Impaired under the Plan. Holders of Existing Equity Interests are conclusively deemed to have rejected the Plan under section 1126(g) of the Bankruptcy Code. Therefore, Holders of Existing Equity Interests are not entitled to vote to accept or reject the Plan.

D. Special Provision Governing Unimpaired Claims

Except as otherwise provided in the Plan, nothing under the Plan shall affect the Debtors' or the Reorganized Debtors' rights in respect of any Unimpaired Claim, including all rights in respect of legal and equitable defenses to or setoffs or recoupments against any such Unimpaired Claim.

E. Elimination of Vacant Classes; Presumed Acceptance by Non-Voting Classes

Any Class of Claims or Interests that does not have a Holder of an Allowed Claim or Allowed Interest or a Claim or Interest temporarily Allowed by the Bankruptcy Court in an amount greater than zero as of the date of the Confirmation Hearing shall be considered vacant and deemed eliminated from the Plan for purposes of voting to accept or reject the Plan and for purposes of determining acceptance or rejection of the Plan by such Class pursuant to section 1129(a)(8) of the Bankruptcy Code. If a Class contains Claims or Interests eligible to vote and no Holders of Claims or Interests eligible to vote in such Class vote to accept or reject the Plan, the Holders of such Claims or Interests in such Class shall be presumed to have accepted the Plan.

F. Subordinated Claims

Except as expressly provided herein, the allowance, classification, and treatment of all Allowed Claims against and Allowed Interests in the Debtors and the respective distributions and treatments under the Plan take into account and conform to the relative priority and rights of the Claims and Interests in each Class in connection with any contractual, legal, and equitable subordination rights relating thereto, whether arising under general principles of equitable subordination, section 510(b) of the Bankruptcy Code, or otherwise. Pursuant to section 510 of the Bankruptcy Code, the Debtors and the Reorganized Debtors reserve the right to reclassify any Allowed Claim or Allowed Interest in accordance with any contractual, legal, or equitable subordination relating thereto.

G. Intercompany Interests

To the extent Reinstated under the Plan, distributions (if any) on account of Intercompany Interests are not being received by Holders of such Intercompany Interests on account of their Intercompany Interests but for the purposes of administrative convenience and due to the importance of maintaining the corporate structure given the existing intercompany systems connecting the Debtors and their Affiliates, and in exchange for the Debtors' and Reorganized Debtors' agreement under the Plan to make certain distributions to the Holders of Allowed Claims.

H. Controversy Concerning Impairment

If a controversy arises as to whether any Claims or Interests, or any Class of Claims or Interests, are Impaired, the Bankruptcy Court shall, after notice and a hearing, determine such controversy on or before the Confirmation Date.

I. Confirmation Pursuant to Sections 1129(a)(10) and 1129(b) of the Bankruptcy Code

Section 1129(a)(10) of the Bankruptcy Code is satisfied for purposes of Confirmation by acceptance of the Plan by at least one Impaired Class of Claims or Interests. The Debtors shall seek Confirmation of the Plan pursuant to section 1129(b) of the Bankruptcy Code with respect to any rejecting Class of Claims or Interests. The Debtors reserve the right to modify the Plan in accordance with Article X of the Plan to the extent, if any, that Confirmation pursuant to section 1129(b) of the Bankruptcy Code requires modification, including by modifying the treatment applicable to a Class of Claims or Interests to render such Class of Claims or Interests Unimpaired to the extent permitted by the Bankruptcy Code and the Bankruptcy Rules.

ARTICLE IV.

PROVISIONS FOR IMPLEMENTATION OF THE PLAN

A. General Settlement of Claims and Interests

As discussed in detail in the Disclosure Statement and as otherwise provided herein, pursuant to section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, and in consideration for the classification, distributions, releases, and other benefits provided under the Plan, on the Effective Date, the provisions of the Plan shall constitute a good-faith compromise and settlement of all Claims, Interests, Causes of Action, and controversies released, settled, compromised, discharged, or otherwise resolved pursuant to the Plan. The Plan shall be deemed a motion to approve the good-faith compromise and settlement of all such Claims, Interests, Causes of Action, and controversies pursuant to Bankruptcy Rule 9019, and the entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of such compromise and settlement under section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019 of all such Claims, Interests, Causes of Action, and controversies, as well as a finding by the Bankruptcy Court that such compromise and settlement is fair, equitable, reasonable, and in the best interests of the Debtors, their Estates, and Holders of Claims and Interests. Subject to Article VI of the Plan, all distributions made to Holders of Allowed Claims in any Class are intended to be and shall be final.

B. Restructuring Transactions

On or before the Effective Date, the applicable Debtors or Reorganized Debtors will take any action as may be necessary or advisable to effectuate the Restructuring Transactions described in the Plan and Restructuring Transactions Memorandum, including: (1) the execution and delivery of any New Organizational Documents, including any appropriate agreements or other documents of merger, amalgamation, consolidation, restructuring, conversion, disposition, transfer, formation, organization, dissolution, or liquidation, in each case, containing terms that are consistent with the terms of the Plan, and that satisfy the requirements of applicable law and any other terms to which the applicable Entities may agree, including the documents comprising the Plan Supplement; (2) the execution and delivery of appropriate instruments of transfer, assignment, assumption, or delegation of any asset, property, right, liability, debt, or obligation on terms consistent with the terms of the Plan; (3) the filing of any New Organizational Documents, including any appropriate certificates or articles of incorporation, reincorporation, merger, amalgamation, consolidation, conversion, or dissolution pursuant to applicable state law; (4) such other transactions that are required to effectuate the Restructuring Transactions, including any sales, mergers, consolidations, restructurings, conversions, dispositions, transfers, formations, organizations, dissolutions, or liquidations; and (5) all transactions necessary to provide for the purchase of substantially all of the assets or Interests of any of the Debtors by one or more Entities to be wholly owned by Reorganized Voyager, which purchase may be structured as a taxable transaction for United States federal income tax purpose; and (6) all other actions that the applicable Entities determine to be necessary or appropriate, including making filings or recordings that may be required by applicable law.

The Confirmation Order shall, and shall be deemed to, pursuant to sections 1123 and 363 of the Bankruptcy Code, authorize, among other things, all actions as may be necessary or appropriate to effect any transaction described in, approved by, contemplated by, or necessary to effectuate the Plan, including the Restructuring Transactions.

C. The Stand-Alone Restructuring

The Debtors shall effectuate the Stand-Alone Restructuring, which shall be governed by the following provisions.

1. Sources of Consideration for Plan of Reorganization Distributions

The Reorganized Debtors shall fund distributions under the Plan with: (a) Cash, (b) Coins (c) the Voyager Tokens, (d) the 3AC Recovery, and (e) the New Common Stock. The Reorganized Debtors will be entitled to transfer funds between and among themselves as they determine to be necessary or appropriate to enable the Reorganized Debtors to satisfy their obligations under the Plan. Except as set forth herein, any changes in intercompany account balances resulting from such transfers will be accounted for and settled in accordance with the Debtors' historical intercompany account settlement practices and will not violate the terms of the Plan.

From and after the Effective Date, the Reorganized Debtors, shall have the right and authority without further order of the Bankruptcy Court to raise additional capital and obtain additional financing as the boards of directors of the applicable Reorganized Debtors deem appropriate.

2. Sale and Distribution of Coins.

On, or as soon as reasonably practicable after, the Effective Date, the Reorganized Debtors shall distribute Coins to the Holders of applicable Claims in exchange for such Holders' respective Claims against the Debtors as set forth in Article III.C hereof and consistent with the Restructuring Transactions Memorandum. The Debtors or the Reorganized Debtors shall be authorized to sell [●]% of the Coins for purposes of effectuating the Stand-Alone Restructuring.

3. Issuance and Distribution of the New Common Stock

On, or as soon as reasonably practicable after, the Effective Date, Reorganized Voyager shall issue the New Common Stock, the Existing Equity Interests in Voyager shall be cancelled, and the New Common Stock (along with the other consideration described in this Plan) shall be transferred to the Holders of applicable Claims in exchange for such Holders' respective Claims against the Debtors as set forth in Article III.C hereof and consistent with the Restructuring Transactions Memorandum. The issuance of the New Common Stock by Reorganized Voyager and the transfer of the New Common Stock to the Holders of applicable Claims is authorized without the need for any further corporate action and without the need for any further action by Holders of any Claims.

All of the New Common Stock issued pursuant to the Plan shall be duly authorized, validly issued, fully paid, and non-assessable. Each distribution and issuance of the New Common Stock under the Plan shall be governed by the terms and conditions set forth in the Plan applicable to such distribution or issuance and by the terms and conditions of the instruments evidencing or relating to such distribution or issuance, which terms and conditions shall bind each Entity receiving such distribution or issuance. For the avoidance of doubt, the acceptance of New Common Stock by any Holder of any Claim shall be deemed such Holder's agreement to the New Organizational Documents, as may be amended or modified from time to time following the Effective Date in accordance with their terms.

[It is intended that the New Common Stock will be publicly traded and Reorganized Voyager will seek to obtain a listing for the New Common Stock on a recognized U.S. or Canadian stock exchange as promptly as reasonably practicable on or after the date on which such New Common Stock is issued. However, Reorganized Voyager shall have no liability if it does not or is unable to do so. In the event the New Common Stock is listed on a recognized U.S. stock exchange, recipients accepting distributions of New Common Stock shall be deemed to have agreed to cooperate with Reorganized Voyager's reasonable requests to assist in its efforts to list the New Common Stock on a recognized U.S. stock exchange.]

4. Distribution of the Voyager Tokens

On, or as soon as reasonably practicable after, the Effective Date, the Voyager Tokens shall be transferred to the Holders of applicable Claims in exchange for such Holders' respective Claims against the Debtors as set forth in Article III.C hereof and consistent with the Restructuring Transactions Memorandum. Such transfer of the Voyager Tokens is authorized without the need for any further corporate action and without the need for any further action by Holders of any Claims.

All of the Voyager Tokens transferred pursuant to the Plan shall be duly authorized, validly issued, fully paid, and non-assessable. Each distribution of the Voyager Tokens under the Plan shall be governed by the terms and conditions set forth in the Plan applicable to such distribution and by the terms and conditions of the instruments evidencing or relating to such distribution, which terms and conditions shall bind each Entity receiving such distribution.

5. 3AC Recovery Allocation

The Plan provides that Allowed Holders of Account Holder Claims shall receive their Pro Rata share of the 3AC Recovery Allocation. The Debtors shall distribute the 3AC Recovery Allocation to Allowed Holders of Account Holder Claims as soon as reasonably practicable after receiving any 3AC Recovery in the 3AC Liquidation Proceeding.

D. Corporate Existence

Except as otherwise provided in the Plan, each Debtor shall continue to exist after the Effective Date as a separate corporate entity, limited liability company, partnership, or other form, as the case may be, with all the powers of a corporation, limited liability company, partnership, or other form, as the case may be, pursuant to the applicable law in the jurisdiction in which each applicable Debtor is incorporated or formed and pursuant to the respective certificates or articles of incorporation, certificates of formation, certificates of organization, or certificates of limited partnership and bylaws, operating agreements, limited liability company agreements, or limited partnership agreements (or other formation documents) in effect prior to the Effective Date, except to the extent such certificates or articles of incorporation, certificates of formation, certificates of organization, or certificates of limited partnership and bylaws, operating agreements, limited liability company agreements, or limited partnership agreements (or other formation documents) are amended pursuant to the Plan or otherwise, and to the extent such documents are amended, such documents are deemed to be amended pursuant to the Plan and require no further action or approval (other than any requisite filings under applicable state or federal law). After the cancellation of the Existing Equity Interests in Voyager, the former equityholders of Voyager shall not, on account of their former ownership of Existing Equity Interests in Voyager, own or be deemed to own any interest, directly or indirectly, in Voyager, any Reorganized Debtor, or any of their assets.

E. New Organizational Documents

To the extent advisable or required under the Plan or applicable non-bankruptcy law, on or prior to the Effective Date, except as otherwise provided in the Plan or the Restructuring Transactions Memorandum, the Reorganized Debtors will file their respective New Organizational Documents with the applicable Secretary of State and/or other applicable authorities in the state, province, or country of incorporation or formation in accordance with the applicable corporate or formational laws of the respective state, province, or country of incorporation. The New Organizational Documents of Reorganized Voyager shall, among other things: (1) authorize the issuance of the New Common Stock; and (2) pursuant to and only to the extent required by section 1123(a)(6) of the Bankruptcy Code, prohibit the issuance of non-voting equity securities. After the Effective Date, the Reorganized Debtors may amend, amend and

restate, supplement, or modify the New Organizational Documents, and the Reorganized Debtors may file their respective certificates or articles of incorporation, certificates of formation, certificates of organization, certificates of limited partnership, or certificates of conversion, limited liability company agreements, operating agreements, or limited partnership agreements, or such other applicable formation documents, and other constituent documents as permitted by the laws of the respective states, provinces, or countries of incorporation or formation and the New Organizational Documents.

F. Directors and Officers of the Reorganized Debtors

1. The New Board

As of the Effective Date, the terms of the current members of the board of directors of Voyager shall expire, and, without further order of the Bankruptcy Court, the New Board shall be appointed. For the avoidance of doubt, the existing board of directors of Voyager will approve the appointment of the New Board.

Pursuant to section 1129(a)(5) of the Bankruptcy Code, to the extent known, the identity of the members of the New Board will be disclosed in the Plan Supplement or prior to the commencement of the Confirmation Hearing. The directors of each of the subsidiary Debtors shall consist of either existing directors of such Debtor or such persons as designated in the Plan Supplement or prior to the commencement of the Confirmation Hearing, and remain in such capacities as directors of the applicable Reorganized Debtor until replaced or removed on or after the Effective Date in accordance with the New Organizational Documents of the applicable Reorganized Debtor; *provided* that, in the event a director of a subsidiary Debtor also holds a management position and is replaced or removed from such management position prior to the Effective Date, then any such director may be replaced or removed from his or her subsidiary director role prior to the Effective Date.

From and after the Effective Date, each director (or director equivalent) of the Reorganized Debtors shall serve pursuant to the terms of the respective Reorganized Debtor's charters and bylaws or other formation and constituent documents, and applicable laws of the respective Reorganized Debtor's jurisdiction of formation.

G. Transfer of Control of Money Transmitter Licenses and Other Related Approvals

The Plan and the Confirmation Order shall provide the Debtors or the Reorganized Debtors, as applicable, with the requisite authority to proceed with any Transfer of Control required under the Money Transfer Licenses and any other requirements for similarly situated state and/or federal regulatory approvals.

H. Corporate Action

Upon the Effective Date, all actions contemplated under the Plan shall be deemed authorized and approved in all respects, and, to the extent taken prior to the Effective Date, ratified without any requirement for further action by Holders of Claims or Interests, directors, managers, managing-members, limited or general partners, or officers of the Debtors, the Reorganized Debtors, or any other Entity, including: (1) selection of the directors, managers, members, and officers for the Reorganized Debtors, including the appointment of the New Board or any directors of a subsidiary Debtor; (2) the issuances, transfer, and distribution of the New Common Stock and Voyager Tokens; (3) the formation of any entities pursuant to and the implementation of the Restructuring Transactions and performance of all actions and transactions contemplated hereby and thereby; (4) adoption and filing of the New Organizational Documents; (5) the rejection, assumption, or assumption and assignment, as applicable, of Executory Contracts and

Unexpired Leases; and (6) all other acts or actions contemplated by the Plan or reasonably necessary or appropriate to promptly consummate the Restructuring Transactions (including effectuating the Restructuring Transactions Memorandum) (whether to occur before, on, or after the Effective Date). All matters provided for in the Plan involving the corporate structure of the Debtors or the Reorganized Debtors, as applicable, and any corporate action required by the Debtors or the Reorganized Debtors, as applicable, in connection with the Plan shall be deemed to have occurred on, and shall be in effect as of, the Effective Date, without any requirement of further action by the security holders, directors, managers, or officers of the Debtors or the Reorganized Debtors, as applicable. On or, as applicable, prior to the Effective Date, the appropriate officers of the Debtors or the Reorganized Debtors, as applicable, shall be authorized and, as applicable, directed to issue, execute, and deliver the agreements, documents, Securities, certificates of incorporation, certificates of formation, bylaws, operating agreements, and instruments contemplated under the Plan (or necessary or desirable to effect the transactions contemplated under the Plan) in the name of and on behalf of the Reorganized Debtors, including the Coins, New Common Stock, Voyager Tokens, 3AC Recovery, if applicable, and the New Organizational Documents, and any and all other agreements, documents, Securities, and instruments relating to the foregoing. The authorizations and approvals contemplated by this Article IV.G shall be effective notwithstanding any requirements under non-bankruptcy law.

I. Vesting of Assets in the Reorganized Debtors

Except as otherwise provided in the Plan (including, for the avoidance of doubt, the Restructuring Transactions), or in any agreement, instrument, or other document incorporated in the Plan, notwithstanding any prohibition of assignability under applicable non-bankruptcy law and in accordance with section 1141 of the Bankruptcy Code, on the Effective Date, all property in each Debtor's Estate, all Causes of Action of the Debtors (unless otherwise released or discharged pursuant to the Plan), and any property acquired by any of the Debtors under the Plan shall vest in each respective Reorganized Debtor, free and clear of all Liens, Claims, charges, or other encumbrances. On and after the Effective Date, except as otherwise provided herein, each Reorganized Debtor may operate its business and may use, acquire, or dispose of property and compromise or settle any Claims, Interests, or Causes of Action without supervision or approval by the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules.

Notwithstanding the above, the 3AC Recovery shall not revest with the Reorganized Debtors. The 3AC Recovery will be assigned on the Effective Date to an assignee of the Debtors (the "Litigation Agent") as determined by the Debtors, in their sole discretion, to be pursued by the Litigation Agent in the name and right of the Debtors or Reorganized Debtors, as applicable. Pursuit of any 3AC Recovery in accordance with the 3AC Liquidation Proceeding is solely for the benefit of Holders of Allowed Account Holder Claims. Any 3AC Recovery in the 3AC Liquidation Proceeding shall be segregated from general corporate funds of the Reorganized Debtors and held for the benefit of Holders of Allowed Account Holder Claims. Notwithstanding the foregoing, to the extent the Reorganized Debtors or Litigation Agent incur costs and expenses in connection with the pursuit of the 3AC Recovery, such costs and expenses shall be reimbursed first before any other distribution of the proceeds of the 3AC Proceeding. After payment of such costs and expenses, as well as any tax amounts associated with 3AC Recovery Allocation (if applicable), the net remaining proceeds shall be distributed by the Litigation Agent, Pro Rata, in proportion to the distributable value under this Plan allocated to each Holder of an Allowed Account Holder Claim capped at the Allowed amount of the Claim as of the Petition Date.

J. Cancellation of Notes, Instruments, Certificates, and Other Documents

On the later of the Effective Date and the date on which distributions are made pursuant to the Plan (if not made on the Effective Date), except for the purpose of evidencing a right to and allowing Holders of Claims and Interests to receive a distribution under the Plan or to the extent otherwise specifically

provided for in the Plan, the Confirmation Order, or any agreement, instrument, or other document entered into in connection with or pursuant to the Plan or the Restructuring Transactions, all notes, bonds, indentures, certificates, Securities, shares, purchase rights, options, warrants, collateral agreements, subordination agreements, intercreditor agreements, or other instruments or documents directly or indirectly evidencing, creating, or relating to any indebtedness or obligations of, or ownership interest in, the Debtors, giving rise to any Claims against or Interests in the Debtors or to any rights or obligations relating to any Claims against or Interests in the Debtors shall be deemed cancelled without any need for a Holder to take further action with respect thereto, and the duties and obligations of the Debtors or the Reorganized Debtors, as applicable, any non-Debtor Affiliates shall be deemed satisfied in full, cancelled, released, discharged, and of no force or effect.

K. Effectuating Documents; Further Transactions

On and after the Effective Date, the Reorganized Debtors, and the directors, managers, partners, officers, authorized persons, and members thereof, are authorized to and may issue, execute, deliver, file, or record such contracts, Securities, instruments, releases, and other agreements or documents and take such actions as may be necessary or appropriate to effectuate, implement, and further evidence the terms and conditions of the Plan, the Restructuring Transactions, the New Common Stock, the New Organizational Documents, and any other Securities issued pursuant to the Plan in the name of and on behalf of the Reorganized Debtors, without the need for any approvals, authorizations, or consents except for those expressly required under the Plan.

L. Section 1145 Exemption

The shares of New Common Stock being issued under the Plan will be issued without registration under the Securities Act or any similar federal, state, or local law in reliance upon (a) section 1145 of the Bankruptcy Code (except with respect to an entity that is an "underwriter" as defined in subsection (b) of section 1145 of the Bankruptcy Code) or (b) only to the extent that such exemption under section 1145 of the Bankruptcy Code is not available (including with respect to an entity that is an "underwriter") pursuant to section 4(a)(2) under the Securities Act and/or Regulation D thereunder.

Securities issued in reliance upon section 1145 of the Bankruptcy Code are exempt from, among other things, the registration requirements of section 5 of the Securities Act and any other applicable U.S. state or local law requiring registration prior to the offering, issuance, distribution, or sale of securities and (a) are not "restricted securities" as defined in Rule 144(a)(3) under the Securities Act and (b) are freely tradable and transferable by any holder thereof that, at the time of transfer, (1) is not an "affiliate" of the Reorganized Debtors as defined in Rule 144(a)(1) under the Securities Act, (2) has not been such an "affiliate" within ninety (90) days of such transfer, (3) has not acquired such securities from an "affiliate" within one year of such transfer and (4) is not an entity that is an "underwriter."

To the extent any shares of New Common Stock are issued in reliance on section 4(a)(2) of the Securities Act or Regulation D thereunder, they will be "restricted securities" subject to resale restrictions and may be resold, exchanged, assigned, or otherwise transferred only pursuant to registration, or an applicable exemption from registration under the Securities Act and other applicable law.

Should the Reorganized Debtors elect on or after the Effective Date to reflect any ownership of the New Common Stock to be issued under the Plan through the facilities of DTC, the Reorganized Debtors need not provide any further evidence other than the Plan or the Confirmation Order with respect to the treatment of the New Common Stock to be issued under the Plan under applicable securities laws. DTC shall be required to accept and conclusively rely upon the Plan and Confirmation Order in lieu of a legal opinion regarding whether the New Common Stock to be issued under the Plan are exempt from

registration and/or eligible for DTC book-entry delivery, settlement, and depository services. Notwithstanding anything to the contrary in the Plan, no Entity (including, for the avoidance of doubt, DTC) may require a legal opinion regarding the validity of any transaction contemplated by the Plan, including, for the avoidance of doubt, whether the New Common Stock to be issued under the Plan are exempt from registration and/or eligible for DTC book-entry delivery, settlement, and depository services.

M. Section 1146(a) Exemption

To the fullest extent permitted by section 1146(a) of the Bankruptcy Code, any transfers (whether from a Debtor to a Reorganized Debtor or to any other Entity) of property under the Plan or pursuant to: (1) the issuance, distribution, transfer, or exchange of any debt, equity security, or other interest in the Debtors or the Reorganized Debtors; (2) the Restructuring Transactions; (3) the creation, modification, consolidation, termination, refinancing, and/or recording of any mortgage, deed of trust, or other security interest, or the securing of additional indebtedness by such or other means; (4) the making, assignment, or recording of any lease or sublease; or (5) the making, delivery, or recording of any deed or other instrument of transfer under, in furtherance of, or in connection with, the Plan, including any deeds, bills of sale, assignments, or other instrument of transfer executed in connection with any transaction arising out of, contemplated by, or in any way related to the Plan, shall not be subject to any document recording tax, stamp tax, conveyance fee, intangibles or similar tax, mortgage tax, real estate transfer tax, mortgage recording tax, sales or use tax, Uniform Commercial Code filing or recording fee, regulatory filing or recording fee, or other similar tax or governmental assessment, and upon entry of the Confirmation Order, the appropriate state or local governmental officials or agents shall forgo the collection of any such tax or governmental assessment and accept for filing and recordation any of the foregoing instruments or other documents without the payment of any such tax, recordation fee, or governmental assessment. All filing or recording officers (or any other Person with authority over any of the foregoing), wherever located and by whomever appointed, shall comply with the requirements of section 1146(a) of the Bankruptcy Code, shall forgo the collection of any such tax or governmental assessment, and shall accept for filing and recordation any of the foregoing instruments or other documents without the payment of any such tax or governmental assessment.

N. Preservation of Rights of Action

In accordance with section 1123(b) of the Bankruptcy Code, the Reorganized Debtors shall retain and may enforce all rights to commence and pursue any and all Causes of Action of the Debtors, whether arising before or after the Petition Date, including any actions specifically enumerated in the Schedule of Retained Causes of Action, and the Reorganized Debtors' rights to commence, prosecute, or settle such Causes of Action shall be preserved notwithstanding the occurrence of the Effective Date, other than the Causes of Action released by the Debtors pursuant to the releases and exculpations contained in the Plan, including in Article VIII of the Plan, which shall be deemed released and waived by the Debtors and Reorganized Debtors as of the Effective Date.

The Reorganized Debtors may pursue such Causes of Action, as appropriate, in accordance with the best interests of the Reorganized Debtors. **No Entity may rely on the absence of a specific reference in the Plan, the Plan Supplement, the Disclosure Statement, or the Schedule of Retained Causes of Action to any Cause of Action against it as any indication that the Debtors or the Reorganized Debtors, as applicable, will not pursue any and all available Causes of Action of the Debtors against it. The Debtors and the Reorganized Debtors expressly reserve all rights to prosecute any and all Causes of Action against any Entity, except as otherwise provided in the Plan, including Article VIII of the Plan.** Unless any Cause of Action of the Debtors against an Entity is expressly waived, relinquished, exculpated, released, compromised, or settled in the Plan or pursuant to a Final Order, the Reorganized Debtors expressly reserve all such Causes of Action for later adjudication, and, therefore, no preclusion

doctrine, including the doctrines of res judicata, collateral estoppel, issue preclusion, claim preclusion, estoppel (judicial, equitable, or otherwise), or laches, shall apply to such Causes of Action upon, after, or as a consequence of Confirmation or Consummation.

The Reorganized Debtors reserve and shall retain such Causes of Action of the Debtors notwithstanding the rejection or repudiation of any Executory Contract or Unexpired Lease during the Chapter 11 Cases or pursuant to the Plan. In accordance with section 1123(b)(3) of the Bankruptcy Code, any Cause of Action that a Debtor may hold against any Entity shall vest in the applicable Reorganized Debtor, except as otherwise provided in the Plan, including Article VIII of the Plan. The applicable Reorganized Debtors, through their authorized agents or representatives, shall retain and may exclusively enforce any and all such Causes of Action. The Reorganized Debtors shall have the exclusive right, authority, and discretion to determine and to initiate, file, prosecute, enforce, abandon, settle, compromise, release, withdraw, or litigate to judgment any such Causes of Action, or to decline to do any of the foregoing, without the consent or approval of any third party or any further notice to or action, order, or approval of the Bankruptcy Court.

O. Closing the Chapter 11 Cases

On and after the Effective Date, the Debtors, or the Reorganized Debtors shall be permitted to classify all of the Chapter 11 Cases of the Debtors except for the Chapter 11 Case of [Voyager Digital, LLC], or any other Debtor identified in the Restructuring Steps Memorandum as having its Chapter 11 Case remain open following the Effective Date, as closed, and all contested matters relating to any of the Debtors, including objections to Claims and any adversary proceedings, shall be administered and heard in the Chapter 11 Case of [Voyager Digital, LLC], or any other Debtor identified in the Restructuring Steps Memorandum as having its Chapter 11 Case remain open following the Effective Date, irrespective of whether such Claim(s) were Filed or such adversary proceeding was commenced against a Debtor whose Chapter 11 Case was closed.

P. Employee Arrangements

After the Effective Date, the Debtors shall be permitted to make payments to employees pursuant to employment programs then in effect, and to implement additional employee programs and make payments thereunder, without any further notice to or action, order, or approval of the Bankruptcy Court; *provided* that such payments shall not adversely affect any distributions provided for under this Plan.

ARTICLE V.
TREATMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES

A. Assumption and Rejection of Executory Contracts and Unexpired Leases

Except as otherwise provided herein, each Executory Contract and Unexpired Lease shall be deemed assumed, without the need for any further notice to or action, order, or approval of the Bankruptcy Court, as of the Effective Date, pursuant to sections 365 and 1123 of the Bankruptcy Code, unless such Executory Contract or Unexpired Lease (a) was previously assumed, assumed and assigned, or rejected by the Debtors; (b) previously expired or terminated pursuant to its own terms; (c) is the subject of a motion to assume, assume and assign, or reject Filed on or before the Confirmation Date that is pending on the Effective Date; or (d) is designated specifically, or by category, as an Executory Contract or Unexpired Lease on the Schedule of Rejected Executory Contracts and Unexpired Leases, if any. The assumption of Executory Contracts and Unexpired Leases hereunder may include the assignment of certain of such contracts to Affiliates. The Confirmation Order will constitute an order of the Bankruptcy Court approving the above-described assumptions and assignments, all pursuant to sections 365(a) and 1123 of the

Bankruptcy Code and effective on the occurrence of the Effective Date. Notwithstanding anything to the contrary in the Plan, the Debtors or the Reorganized Debtors, as applicable, shall have the right to alter, amend, modify, or supplement the Schedule of Rejected Executory Contracts and Unexpired Leases at any time through and including 45 days after the Effective Date.

Except as otherwise provided herein or agreed to by the Debtors and the applicable counterparty, each assumed Executory Contract or Unexpired Lease shall include all modifications, amendments, supplements, restatements, or other agreements related thereto. To the extent any provision in any Executory Contract or Unexpired Lease assumed pursuant to the Plan restricts or prevents, or purports to restrict or prevent, or is breached or deemed breached by, the assumption of such Executory Contract or Unexpired Lease (including any "change of control" provision), then such provision shall be deemed modified such that the transactions contemplated by the Plan shall not entitle the non-Debtor party thereto to terminate such Executory Contract or Unexpired Lease or to exercise any other default-related rights with respect thereto. Modifications, amendments, supplements, and restatements to prepetition Executory Contracts and Unexpired Leases that have been executed by the Debtors during the Chapter 11 Cases shall not be deemed to alter the prepetition nature of the Executory Contract or Unexpired Lease or the validity, priority, or amount of any Claims that may arise in connection therewith.

B. Preexisting Obligations to the Debtors Under Executory Contracts and Unexpired Leases

Rejection of any Executory Contract or Unexpired Lease pursuant to the Plan or otherwise shall not constitute a termination of preexisting obligations owed to the Debtors or the Reorganized Debtors, as applicable, under such Executory Contract or Unexpired Lease. Without limiting the general nature of the foregoing, and notwithstanding any non-bankruptcy law to the contrary, the Debtors and Reorganized Debtors expressly reserve and do not waive any right to receive, or any continuing obligation of a counterparty to provide, warranties or continued maintenance obligations on goods previously purchased by the Debtors contracting from non-Debtor counterparties to any rejected Executory Contract or Unexpired Lease.

C. Claims Based on Rejection of Executory Contracts or Unexpired Leases

Counterparties to Executory Contracts or Unexpired Leases listed on the Schedule of Rejected Executory Contracts and Leases, if any, shall be served with a notice of rejection of Executory Contracts and Unexpired Leases with the Plan Supplement. Unless otherwise provided by a Final Order of the Bankruptcy Court, all Proofs of Claim with respect to Claims arising from the rejection of Executory Contracts or Unexpired Leases, pursuant to the Plan or the Confirmation Order, if any, must be Filed with the Claims, Noticing, and Solicitation Agent and served on the Debtors or Reorganized Debtors, as applicable, no later than thirty days after the date of entry of an order of the Bankruptcy Court (including the Confirmation Order) approving such rejection. **Any Claims arising from the rejection of an Executory Contract or Unexpired Lease not Filed with the Bankruptcy Court within such time will be automatically disallowed, forever barred from assertion, and shall not be enforceable against the Debtors or the Reorganized Debtors, the Estates, or their property without the need for any objection by the Reorganized Debtors or further notice to, or action, order, or approval of the Bankruptcy Court or any other Entity, and any Claim arising out of the rejection of the Executory Contract or Unexpired Lease shall be deemed fully satisfied, released, and discharged, and be subject to the permanent injunction set forth in Article VIII.E of the Plan, including any Claims against any Debtor listed on the Debtors' schedules as unliquidated, contingent, or disputed.** All Allowed Claims arising from the rejection by any Debtor of any Executory Contract or Unexpired Lease shall be treated as a General Unsecured Claim in accordance with Article III.C of the Plan.

D. Cure of Defaults for Executory Contracts and Unexpired Leases Assumed

The Debtors or the Reorganized Debtors, as applicable, shall pay Cures, if any, on the Effective Date, with the amount and timing of payment of any such Cure dictated by the Debtors' ordinary course of business. The Debtors shall provide notice of the amount and timing of payment of any such Cure to the parties to the applicable assumed Executory Contracts or Unexpired Leases no later than the Effective Date. Unless otherwise agreed upon in writing by the parties to the applicable Executory Contract or Unexpired Lease, all requests for payment of Cure that differ from the ordinary course amounts paid or proposed to be paid by the Debtors or the Reorganized Debtors shall be dealt with in the ordinary course of business and, if needed, shall be Filed with the Claims, Noticing, and Solicitation Agent on or before thirty days after the Effective Date. **If any counterparty to an Executory Contract or Unexpired Lease does not receive a notice of assumption and applicable cure amount, such counterparty shall have until on or before thirty days after the Effective Date to bring forth and File a request for payment of Cure.** Any such request that is not timely Filed shall be disallowed and forever barred, estopped, and enjoined from assertion, and shall not be enforceable against any Reorganized Debtor, without the need for any objection by the Reorganized Debtors or any other party in interest or any further notice to or action, order, or approval of the Bankruptcy Court. Any Cure shall be deemed fully satisfied, released, and discharged upon payment by the Debtors or the Reorganized Debtors of the Cure in the Debtors' ordinary course of business or upon and in accordance with any resolution of a Cure dispute (whether by order of the Bankruptcy Court or through settlement with the applicable Executory Contract or Unexpired Lease counterparty); *provided*, *however*, that nothing herein shall prevent the Reorganized Debtors from paying any Cure Claim despite the failure of the relevant counterparty to File such request for payment of such Cure. The Reorganized Debtors may also settle any Cure Claim without any further notice to or action, order, or approval of the Bankruptcy Court. In addition, any objection to the assumption of an Executory Contract or Unexpired Lease under the Plan must be Filed with the Bankruptcy Court on or before thirty days after the Effective Date. Any such objection will be scheduled to be heard by the Bankruptcy Court at the Debtors' first scheduled omnibus hearing for which such objection is timely Filed. Any counterparty to an Executory Contract or Unexpired Lease that fails to timely object to the proposed assumption of any Executory Contract or Unexpired Lease will be deemed to have consented to such assumption.

In the event of a dispute regarding: (1) the amount of any Cure Claim, (2) the ability of the Reorganized Debtors or any assignee to provide "adequate assurance of future performance" (within the meaning of section 365 of the Bankruptcy Code) under the Executory Contract or Unexpired Lease to be assumed (or assumed and assigned, as applicable), or (3) any other matter pertaining to assumption or assignment, then any disputed Cure payments required by section 365(b)(1) of the Bankruptcy Code shall be made as soon as reasonably practicable following, and in accordance with, the entry of a Final Order of the Bankruptcy Court resolving such dispute or as may be agreed upon by the Debtors or the Reorganized Debtors, as applicable, and the counterparty to the Executory Contract or Unexpired Lease, and any such unresolved dispute shall not prevent or delay implementation of the Plan or the occurrence of the Effective Date.

Assumption of any Executory Contract or Unexpired Lease pursuant to the Plan or otherwise and full payment of any applicable Cure pursuant to this Article V.D, in the amount and at the time dictated by the Debtors' ordinary course of business, or upon and in accordance with any resolution of a Cure dispute (whether by order of the Bankruptcy Court or through settlement with the applicable Executory Contract or Unexpired Lease counterparty), shall result in the full release and satisfaction of any Cures, Claims, or defaults, whether monetary or nonmonetary, including defaults of provisions restricting the change in control or ownership interest composition or other bankruptcy-related defaults, arising under any assumed Executory Contract or Unexpired Lease at any time prior to the effective date of assumption. **Any and all Proofs of Claim based upon Executory Contracts or Unexpired Leases that have been assumed in the Chapter 11 Cases, including pursuant to the Confirmation Order, and for which any Cure has been**

fully paid pursuant to this Article V.D, in the amount and at the time dictated by the Debtors' ordinary course of business or upon and in accordance with any resolution of a Cure dispute (whether by order of the Bankruptcy Court or through settlement with the applicable Executory Contract or Unexpired Lease counterparty), shall be deemed disallowed and expunged as of the Effective Date without the need for any objection thereto or any further notice to or action, order, or approval of the Bankruptcy Court. For the avoidance of doubt, in the event that any counterparty to an Executory Contract or Unexpired Lease receives a notice of assumption and applicable proposed Cure amount, and disputes the Debtors' proposed Cure amount, such party shall not be required to File a Proof of Claim with respect to such dispute. Any counterparty to an Executory Contract or Unexpired Lease that does not receive a notice or applicable proposed Cure amount, and believes a Cure amount is owed, shall have thirty days after the Effective Date to File a Proof of Claim with respect to such alleged Cure amount, which Claim shall not be expunged until such Cure dispute is resolved.

E. Indemnification Provisions

On and as of the Effective Date, the Indemnification Provisions will be assumed by the Debtors, and shall be reinstated and remain intact, irrevocable, and shall survive the Effective Date. The Reorganized Debtors' governance documents shall provide for indemnification, defense, reimbursement, and limitation of liability of, and advancement of fees and expenses to, the Reorganized Debtors' current and former directors, managers, officers, members, employees, attorneys, accountants, investment bankers, and other professionals of the Debtors to the fullest extent permitted by law and at least to the same extent as provided under the Indemnification Provisions against any Cause of Action whether direct or derivative, liquidated or unliquidated, fixed or contingent, disputed or undisputed, matured or unmatured, known or unknown, foreseen or unforeseen, asserted or unasserted; *provided* that the Reorganized Debtors shall not indemnify any Person for any Cause of Action arising out of or related to any act or omission that is a criminal act or constitutes actual fraud, gross negligence, bad faith, or willful misconduct. None of the Reorganized Debtors will amend or restate their respective governance documents before, on, or after the Effective Date to terminate or materially adversely affect any of the Reorganized Debtors' obligations to provide such rights to indemnification, defense, reimbursement, limitation of liability, or advancement of fees and expenses. Entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of the Debtors' foregoing assumption of each of the Indemnification Provisions.

F. Insurance Policies and Surety Bonds

Each D&O Liability Insurance Policy (including, without limitation, any "tail policy" and all agreements, documents, or instruments related thereto) shall be assumed, in their entirety, without the need for any further notice to or action, order, or approval of the Bankruptcy Court, as of the Effective Date, pursuant to sections 105 and 365 of the Bankruptcy Code.

The Debtors or the Reorganized Debtors, as applicable, shall not terminate or otherwise reduce the coverage under any D&O Liability Insurance Policy (including, without limitation, any "tail policy" and all agreements, documents, or instruments related thereto) in effect prior to the Effective Date, and any current and former directors, officers, managers, and employees of the Debtors who served in such capacity at any time before or after the Effective Date shall be entitled to the full benefits of any such policy for the full term of such policy subject to the terms thereof regardless of whether such directors, officers, managers, and employees remain in such positions after the Effective Date. Notwithstanding anything to the contrary in the Plan, the Debtors or the Reorganized Debtors shall retain the ability to supplement such D&O Liability Insurance Policy as the Debtors or Reorganized Debtors may deem necessary.

The Debtors shall continue to satisfy their obligations under their surety bonds and insurance policies in full and continue such programs in the ordinary course of business. Each of the Debtors' surety bonds and insurance policies, and any agreements, documents, or instruments relating thereto shall be treated as Executory Contracts under the Plan. On the Effective Date: (a) the Debtors shall be deemed to have assumed all such surety bonds and insurance policies and any agreements, documents, and instruments relating thereto in their entirety; *provided* that the Debtors have assumed all indemnity agreements and cash collateral agreements related to the surety bonds and (b) such surety bonds and insurance policies and any agreements, documents, or instruments relating thereto shall revest in the applicable Reorganized Debtor(s) unaltered.

G. Reservation of Rights

Nothing contained in the Plan or the Plan Supplement (unless otherwise explicitly provided) shall constitute an admission by the Debtors or any other party that any contract or lease is in fact an Executory Contract or Unexpired Lease or that any Reorganized Debtor has any liability thereunder. If there is a dispute regarding whether a contract or lease is or was executory or unexpired at the time of assumption or rejection, the Debtors or the Reorganized Debtors, as applicable, shall have forty-five days following entry of a Final Order resolving such dispute to alter their treatment of such contract or lease, including by rejecting such contract or lease effective as of the Confirmation Date.

H. Nonoccurrence of Effective Date

In the event that the Effective Date does not occur, the Bankruptcy Court shall retain jurisdiction with respect to any request to extend the deadline for assuming or rejecting Unexpired Leases pursuant to section 365(d)(4) of the Bankruptcy Code.

I. Contracts and Leases Entered into After the Petition Date

Contracts and leases entered into after the Petition Date by any Debtor, including any Executory Contracts and Unexpired Leases assumed under section 365 of the Bankruptcy Code, will be performed by the applicable Debtor or Reorganized Debtor liable thereunder in the ordinary course of its business. Such contracts and leases that are not rejected under the Plan shall survive and remain unaffected by entry of the Confirmation Order.

ARTICLE VI.

PROVISIONS GOVERNING DISTRIBUTIONS

A. Timing and Calculation of Amounts to Be Distributed

Except (1) as otherwise provided herein, (2) upon a Final Order, or (3) as otherwise agreed to by the Debtors or the Reorganized Debtors, as the case may be, and the Holder of the applicable Claim, on the Effective Date or as soon as reasonably practicable thereafter (or if a Claim is not an Allowed Claim on the Effective Date, on the next Distribution Date after such Claim becomes, as applicable, an Allowed Claim, or as soon as reasonably practicable thereafter), each Holder of an Allowed Claim shall receive the full amount of distributions that the Plan provides for Allowed Claims in the applicable Class from the Distribution Agent. In the event that any payment or distribution under the Plan is required to be made or performed on a date that is not a Business Day, then the making of such payment or distribution may be completed on the next succeeding Business Day, but shall be deemed to have been completed as of the required date. Except as specifically provided in the Plan, Holders of Claims shall not be entitled to interest,

dividends, or accruals on the distributions provided for in the Plan, regardless of whether such distributions are delivered on or at any time after the Effective Date.

B. Rights and Powers of Distribution Agent

1. Powers of the Distribution Agent

The Distribution Agent shall be empowered to: (a) effect all actions and execute all agreements, instruments, and other documents necessary to perform its duties and exercise its rights under the Plan; (b) make all distributions contemplated under the Plan; (c) employ professionals to represent it with respect to its responsibilities and powers; and (d) exercise such other powers as may be vested in the Distribution Agent by order of the Bankruptcy Court, pursuant to the Plan, or as deemed by the Distribution Agent to be necessary and proper to implement the provisions of the Plan.

2. Expenses Incurred on or after the Effective Date

Except as otherwise ordered by the Bankruptcy Court, the amount of any reasonable fees and expenses incurred by the Distribution Agent on or after the Effective Date and any reasonable compensation and expense reimbursement claims (including reasonable attorney and/or other professional fees and expenses) made by such Distribution Agent shall be paid in Cash by the Reorganized Debtors.

C. Delivery of Distributions and Undeliverable or Unclaimed Distributions

1. Distributions Generally

Except as otherwise provided in the Plan (including in the next paragraph), the Distribution Agent shall make distributions to Holders of Allowed Claims at the address for each such Holder as indicated on the applicable register or in the Debtors' records as of the date of any such distribution (as applicable), including the address set forth in any Proof of Claim filed by that Holder; *provided* that the manner of such distributions shall be determined at the discretion of the Reorganized Debtors.

Distributions of New Common Stock shall be made through the facilities of DTC in accordance with DTC's customary practices. For the avoidance of doubt, DTC shall be considered a single Holder for purposes of distributions.

2. Distributions on Account of Obligations of Multiple Debtors

For all purposes associated with distributions under the Plan, all guarantees by any Debtor of the obligations of any other Debtor, as well as any joint and several liability of any Debtor with respect to any other Debtor, shall be deemed eliminated so that any obligation that could otherwise be asserted against more than one Debtor shall result in a single distribution under the Plan. Any such Claims shall be released and discharged pursuant to Article VIII of the Plan and shall be subject to all potential objections, defenses, and counterclaims, and to estimation pursuant to section 502(c) of the Bankruptcy Code.

3. Record Date of Distributions

On the Distribution Record Date, the various transfer registers for each Class of Claims as maintained by the Debtors or their respective agents shall be deemed closed, and there shall be no further changes in the record Holders of any Claims. The Distribution Agent shall have no obligation to recognize any transfer of Claims occurring on or after the Distribution Record Date. In addition, with respect to payment of any Cure amounts or disputes over any Cure amounts, neither the Debtors nor the Distribution

Agent shall have any obligation to recognize or deal with any party other than the non-Debtor party to the applicable Executory Contract or Unexpired Lease as of the Effective Date, even if such non-Debtor party has sold, assigned, or otherwise transferred its Claim for a Cure amount.

4. Special Rules for Distributions to Holders of Disputed Claims

Notwithstanding any provision otherwise in the Plan and except as otherwise agreed to by the Reorganized Debtors, on the one hand, and the Holder of a Disputed Claim, on the other hand, or as set forth in a Final Order, no partial payments and no partial distributions shall be made with respect to a Disputed Claim until all of the Disputed Claim has become an Allowed Claim or has otherwise been resolved by settlement or Final Order; *provided* that, if the Reorganized Debtors do not dispute a portion of an amount asserted pursuant to an otherwise Disputed Claim, the Distribution Agent may make a partial distribution on account of that portion of such Claim that is not Disputed at the time and in the manner that the Distribution Agent makes distributions to similarly situated Holders of Allowed Claims pursuant to the Plan. Any dividends or other distributions arising from property distributed to Holders of Allowed Claims, as applicable, in a Class and paid to such Holders under the Plan shall also be paid, in the applicable amounts, to any Holder of a Disputed Claim, as applicable, in such Class that becomes an Allowed Claim after the date or dates that such dividends or other distributions were earlier paid to Holders of Allowed Claims in such Class.

5. De Minimis Distributions; Minimum Distributions

No fractional shares of New Common Stock, Coin, Voyager Token or 3AC Recovery shall be distributed, and no Cash shall be distributed in lieu of such fractional amounts and such fractional amounts shall be deemed to be zero. When any distribution pursuant to the Plan on account of an Allowed Claim would otherwise result in the issuance of a number of shares of New Common Stock that is not a whole number, the actual distribution of shares of New Common Stock shall be rounded as follows: (a) fractions of greater than one-half shall be rounded to the next higher whole number and (b) fractions of one-half or less shall be rounded to the next lower whole number with no further payment thereto. The total number of authorized shares of New Common Stock to be distributed to Holders of Account Holder Claims may (at the Debtors' discretion) be adjusted as necessary to account for the foregoing rounding; *provided* that DTC will be considered a single holder for purposes of distributions.

The Distribution Agent shall not make any distributions to any Holder of an Allowed Claim pursuant to Art. III.C.1-9 of this Plan on account of such Allowed Claim of Coin, New Common Stock, Cash, Voyager Token or 3AC Recovery if such distribution is valued, in the reasonable discretion of the Distribution Agent, at less than $[●], and each Holder of an Allowed Claim to which this limitation applies shall be discharged pursuant to Article VIII of the Plan and its Holder shall be forever barred pursuant to Article VIII of the Plan from asserting that Allowed Claim against the Reorganized Debtors or their property.

6. Undeliverable Distributions and Unclaimed Property

In the event that either (a) a distribution to any Holder is returned as undeliverable (other than a distribution to or through DTC) or (b) the Holder of an Allowed Claim does not respond to a request by the Debtors or the Distribution Agent for information necessary to facilitate a particular distribution, no distribution to such Holder shall be made unless and until the Distribution Agent has determined the then-current address of such Holder or received the necessary information to facilitate a particular distribution, at which time such distribution shall be made to such Holder without interest, dividends, or other accruals of any kind; *provided* that such distributions shall be deemed unclaimed property under section 347(b) of the Bankruptcy Code on the date that is six months after the Effective Date. After such date, all unclaimed

property or interests in property shall revert to the Reorganized Debtors automatically and without need for a further order by the Bankruptcy Court (notwithstanding any applicable local, state, federal, or foreign escheat, abandoned, or unclaimed property laws to the contrary), and the Claim of any Holder to such property or interest in property shall be discharged and forever barred.

7. Manner of Payment Pursuant to the Plan

At the option of the Distribution Agent, any Cash payment to be made hereunder may be made by check, wire transfer, automated clearing house, or credit card, or as otherwise provided in applicable agreements.

D. Compliance Matters

In connection with the Plan, to the extent applicable, the Debtors, the Reorganized Debtors, any Distribution Agent, and any other applicable withholding and reporting agents shall comply with all tax withholding and reporting requirements imposed on them by any Governmental Unit, and all distributions pursuant to the Plan shall be subject to such withholding and reporting requirements. Notwithstanding any provision in the Plan to the contrary, the Debtors, the Reorganized Debtors, the Distribution Agent, and any other applicable withholding and reporting agents shall be authorized to take all actions necessary or appropriate to comply with such withholding and reporting requirements, including liquidating a portion of the distribution to be made under the Plan to generate sufficient funds to pay applicable withholding taxes, withholding distributions pending receipt of information necessary to facilitate such distributions, or establishing any other mechanisms that are reasonable and appropriate; *provided* that the Reorganized Debtors and the Distribution Agent, as applicable, shall request appropriate documentation from the applicable distributees and allow such distributees a reasonable amount of time to respond. The Debtors, the Reorganized Debtors, the Distribution Agent, and any other applicable withholding and reporting agents reserve the right to allocate all distributions made under the Plan in compliance with all applicable wage garnishments, alimony, child support, and other spousal awards, liens, and encumbrances.

E. Foreign Currency Exchange Rate

Except as otherwise provided in a Bankruptcy Court order, as of the Effective Date, any Claim, other than any Account Holder Claim, asserted in currency other than U.S. dollars shall be automatically deemed converted to the equivalent U.S. dollar value using the exchange rate for the applicable currency as published in The Wall Street Journal, National Edition, on the Effective Date.

F. Claims Paid or Payable by Third Parties

1. Claims Paid by Third Parties

The Debtors or the Reorganized Debtors, as applicable, shall reduce a Claim, and such Claim (or portion thereof) shall be disallowed without an objection to such Claim having to be Filed and without any further notice to or action, order, or approval of the Bankruptcy Court, to the extent that the Holder of such Claim receives a payment on account of such Claim from a party that is not a Debtor or Reorganized Debtor (or other Distribution Agent), as applicable. To the extent a Holder of a Claim receives a distribution on account of such Claim and receives payment from a party that is not a Debtor or a Reorganized Debtor (or other Distribution Agent), as applicable, on account of such Claim, such Holder shall, within ten Business Days of receipt thereof, repay, return, or deliver any distribution held by or transferred to the Holder to the applicable Reorganized Debtor to the extent the Holder's total recovery on account of such Claim from the third party and under the Plan exceeds the amount of such Claim as of the date of any such distribution under the Plan. The failure of such Holder to timely repay, return, or deliver such distribution

shall result in the Holder owing the applicable Reorganized Debtor annualized interest at the Federal Judgment Rate on such amount owed for each Business Day after the ten-Business Day grace period specified above until the amount is repaid.

2. Claims Payable by Third Parties

No distributions under the Plan shall be made on account of an Allowed Claim that is payable pursuant to one of the Debtors' insurance policies until the Holder of such Allowed Claim has exhausted all remedies with respect to such insurance policy. To the extent that one or more of the Debtors' insurers agrees to satisfy in full or in part a Claim (if and to the extent adjudicated by a court of competent jurisdiction or otherwise settled), then immediately upon such satisfaction, such Claim may be expunged on the Claims Register by the Claims, Noticing, and Solicitation Agent to the extent of any such satisfaction without an objection to such Claim having to be Filed and without any further notice to or action, order, or approval of the Bankruptcy Court.

3. Applicability of Insurance Policies

Except as otherwise provided herein, payments to Holders of Claims shall be in accordance with the provisions of any applicable insurance policy. Nothing contained in the Plan shall constitute or be deemed a release, settlement, satisfaction, compromise, or waiver of any rights, defenses, or Cause of Action that the Debtors or any other Entity may hold against any other Entity, including insurers, under any policies of insurance, agreements related thereto, or applicable indemnity, nor shall anything contained herein constitute or be deemed a waiver by such insurers of any rights or defenses, including coverage defenses, held by such insurers under the applicable insurance policies, agreements related thereto, and applicable non-bankruptcy law.

G. Setoffs and Recoupment

Except as otherwise expressly provided for herein, each Debtor, Reorganized Debtor, or such Entity's designee as instructed by such Debtor or Reorganized Debtor, as applicable, may, pursuant to the Bankruptcy Code (including section 553 of the Bankruptcy Code), applicable non-bankruptcy law, or as may be agreed to by the Holder of a Claim, set off against or recoup from an Allowed Claim and any distributions to be made pursuant to the Plan on account of such Allowed Claim, any Claims, rights, and Causes of Action of any nature whatsoever that the Debtor or Reorganized Debtor, as applicable, may have against the Holder of such Allowed Claim, to the extent such Claims, rights, or Causes of Action have not been otherwise compromised, settled, or released on or prior to the Effective Date (whether pursuant to the Plan or otherwise). Notwithstanding the foregoing, except as expressly stated in Article VIII of this Plan, neither the failure to effect such a setoff or recoupment nor the allowance of any Claim pursuant to the Plan shall constitute a waiver or release by the Debtors or the Reorganized Debtors of any such Claims, rights, or Causes of Action the Debtors or Reorganized Debtors may possess against such Holder.

H. Allocation between Principal and Accrued Interest

Except as otherwise provided herein, the aggregate consideration paid to Holders with respect to their Allowed Claims shall be treated pursuant to the Plan as allocated first to the principal amount of such Allowed Claims (to the extent thereof and as determined for federal income tax purposes) and second, to the extent the consideration exceeds the principal amount of the Allowed Claims, to the remaining portion of such Allowed Claim, if any.

ARTICLE VII.

PROCEDURES FOR RESOLVING DISPUTED, CONTINGENT, AND UNLIQUIDATED CLAIMS AND INTERESTS

A. Disputed Claims Process

After the Effective Date, each of the Reorganized Debtors shall have and retain any and all rights and defenses the applicable Debtor had with respect to any Claim immediately before the Effective Date. Except as expressly provided in the Plan or in any order entered in the Chapter 11 Cases before the Effective Date (including the Confirmation Order), no Claim shall become an Allowed Claim unless and until such Claim is deemed Allowed under the Plan or the Bankruptcy Code, or the Bankruptcy Court has entered a Final Order, including the Confirmation Order (when it becomes a Final Order), in the Chapter 11 Cases allowing such Claim. If a Holder of a Claim in Class disputes the amount of their Claim as listed in the Schedules, the Holder should notify of the Debtors of such dispute. If the Debtors and the Holder agree to an amended Claim amount prior to the Effective Date, the Debtors shall file amended Schedules prior to the Effective Date. If between the Confirmation Date and the Effective Date, the dispute cannot be consensually resolved, the Holder may seek (by letter to the Court) to have the claim dispute resolved before the Bankruptcy Court (and, with the consent of the Debtors, before any other court or tribunal with jurisdiction over the parties). After the Effective Date, the creditor may seek to have the claim dispute resolved before the Bankruptcy Court or any other court or tribunal with jurisdiction over the parties.

Unless relating to a Claim expressly Allowed pursuant to the Plan, all Proofs of Claim filed in these Chapter 11 Cases shall be considered objected to and Disputed without further action by the Debtors. Upon the Effective Date, all Proofs of Claim filed against the Debtors, regardless of the time of filing, and including Proofs of Claim filed after the Effective Date, shall be deemed withdrawn and expunged, other than as provided below. Notwithstanding anything in this Plan to the contrary: (1) all Claims against the Debtors that result from the Debtors' rejection of an Executory Contract or Unexpired Lease; (2) Claims filed to dispute the amount of any proposed Cure pursuant to section 365 of the Bankruptcy Code; and (3) Claims that the Debtors seek to have determined by the Bankruptcy Court, shall in all cases be determined by the Bankruptcy Court, if not otherwise resolved through settlement with the applicable claimant.

On the Effective Date, the Debtors or Reorganized Debtors, as applicable, may establish one or more accounts or funds to hold and dispose of certain assets, pursue certain litigation (including with respect to the 3AC Recovery), and/or satisfy certain Claims (including Claims that are contingent or have not yet been Allowed). For any such account or fund, the Debtors may take the position that grantor trust treatment applies in whole or in part. To the extent such treatment applies to any such account or fund, for all U.S. federal income tax purposes, the beneficiaries of any such account or fund would be treated as grantors and owners thereof, and it is intended, to the extent reasonably practicable, that any such account or fund would be classified as a liquidating trust under section 301.7701-4 of the Treasury Regulations. Accordingly, subject to the immediately foregoing sentence, if such intended U.S. federal income tax treatment applied, then for U.S. federal income tax purposes the beneficiaries of any such account or fund would be treated as if they had received an interest in such account or fund's assets and then contributed such interests (in accordance with the Restructuring Transactions Memorandum) to such account or fund. Alternatively, any such account or fund may be subject to the tax rules that apply to "disputed ownership funds" under 26 C.F.R. 1.468B–9. If such rules apply, such assets would be subject to entity-level taxation, and the Debtors and Reorganized Debtors would be required to comply with the relevant rules.

B. Objections to Claims

Except as otherwise specifically provided in the Plan, after the Effective Date, the Reorganized Debtors, shall have the sole authority to: (1) File, withdraw, or litigate to judgment, any objections to Claims; and (2) settle or compromise any Disputed Claim without any further notice to or action, order, or approval by the Bankruptcy Court. For the avoidance of doubt, except as otherwise provided herein, from and after the Effective Date, each Reorganized Debtor shall have and retain any and all rights and defenses such Debtor had immediately prior to the Effective Date with respect to any Disputed Claim, including the Causes of Action retained pursuant to Article IV.N of the Plan.

Any objections to Claims shall be Filed on or before the Claims Objection Bar Date. For the avoidance of doubt, the Bankruptcy Court may extend the time period to object to Claims set forth in this paragraph at any time, including before or after the expiration of one hundred eighty days after the Effective Date, in its discretion or upon request by the Debtors or any party in interest.

C. Estimation of Claims

Before or after the Effective Date, the Debtors or the Reorganized Debtors, as applicable, may (but are not required to), at any time, request that the Bankruptcy Court estimate any Disputed Claim that is contingent or unliquidated pursuant to applicable law, including pursuant to section 502(c) of the Bankruptcy Code, for any reason, regardless of whether any party previously has objected to such Disputed Claim or whether the Bankruptcy Court has ruled on any such objection, and the Bankruptcy Court shall retain jurisdiction under sections 157 and 1334 of the Judicial Code to estimate any such Disputed Claim, including during the litigation of any objection to any Disputed Claim or during the pendency of any appeal relating to such objection. Notwithstanding any provision otherwise in the Plan, a Disputed Claim that has been expunged from the Claims Register, but that either is subject to appeal or has not been the subject of a Final Order, shall be deemed to be estimated at zero dollars, unless otherwise ordered by the Bankruptcy Court. In the event that the Bankruptcy Court estimates any contingent or unliquidated Claim, that estimated amount shall constitute a maximum limitation on such Claim for all purposes under the Plan (including for purposes of distributions and discharge) and may be used as evidence in any supplemental proceedings, and the Debtors or the Reorganized Debtors may elect to pursue any supplemental proceedings to object to any ultimate distribution on such Claim. Notwithstanding section 502(j) of the Bankruptcy Code, in no event shall any Holder of a Disputed Claim that has been estimated pursuant to section 502(c) of the Bankruptcy Code or otherwise be entitled to seek reconsideration of such estimation unless such Holder has Filed a motion requesting the right to seek such reconsideration on or before fourteen days after the date on which such Disputed Claim is estimated.

D. No Distributions Pending Allowance

Notwithstanding any other provision of the Plan, if any portion of a Claim is a Disputed Claim, no payment or distribution provided hereunder shall be made on account of such Claim unless and until such Disputed Claim becomes an Allowed Claim; *provided* that if only a portion of a Claim is Disputed, such Claim shall be deemed Allowed in the amount not Disputed and payment or distribution shall be made on account of such undisputed amount.

E. Distributions After Allowance

To the extent that a Disputed Claim ultimately becomes an Allowed Claim, distributions (if any) shall be made to the Holder of such Allowed Claim in accordance with the provisions of the Plan. As soon as reasonably practicable after the date that the order or judgment of the Bankruptcy Court Allowing any Disputed Claim becomes a Final Order, the Distribution Agent shall provide to the Holder of such Allowed

Claim the distribution (if any) to which such Holder is entitled under the Plan as of the Effective Date, without any interest, dividends, or accruals to be paid on account of such Allowed Claim unless required under applicable bankruptcy law.

F. No Interest

Unless otherwise specifically provided for herein or by Final Order of the Bankruptcy Court, postpetition interest shall not accrue or be paid on Claims against the Debtors, and no Holder of a Claim against the Debtors shall be entitled to interest accruing on or after the Petition Date on any such Claim. Additionally, and without limiting the foregoing, interest shall not accrue or be paid on any Disputed Claim with respect to the period from the Effective Date to the date a final distribution is made on account of such Disputed Claim, if and when such Disputed Claim becomes an Allowed Claim.

G. Adjustment to Claims and Interests without Objection

Any Claim or Interest that has been paid, satisfied, amended, superseded, cancelled, or otherwise expunged (including pursuant to the Plan) may be adjusted or expunged on the Claims Register at the direction of the Reorganized Debtors without the Reorganized Debtors having to File an application, motion, complaint, objection, or any other legal proceeding seeking to object to such Claim or Interest and without any further notice to or action, order, or approval of the Bankruptcy Court. Additionally, any Claim or Interest that is duplicative or redundant with another Claim or Interest against the same Debtor may be adjusted or expunged on the Claims Register at the direction of the Reorganized Debtors without the Reorganized Debtors having to File an application, motion, complaint, objection, or any other legal proceeding seeking to object to such Claim or Interest and without any further notice to or action, order, or approval of the Bankruptcy Court.

H. Time to File Objections to Claims

Any objections to Claims shall be Filed on or before the Claims Objection Bar Date.

I. Disallowance of Claims

Any Claims held by Entities from which property is recoverable under sections 542, 543, 550, or 553 of the Bankruptcy Code or that is a transferee of a transfer avoidable under sections 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of the Bankruptcy Code, shall be deemed Disallowed pursuant to section 502(d) of the Bankruptcy Code, and Holders of such Claims may not receive any distributions on account of such Claims until such time as such Causes of Action against that Entity have been settled or a Bankruptcy Court order with respect thereto has been entered and all sums due, if any, to the Debtors by that Entity have been turned over or paid to the Debtors or the Reorganized Debtors, as applicable. All Proofs of Claim Filed on account of an indemnification obligation shall be deemed satisfied and expunged from the Claims Register as of the Effective Date to the extent such indemnification obligation is assumed (or honored or reaffirmed, as the case may be) pursuant to the Plan, without any further notice to, or action, order, or approval of, the Bankruptcy Court.

Except as otherwise provided herein or as agreed to by the Debtors or the Reorganized Debtors, any and all Proofs of Claim Filed after the Bar Date shall be deemed Disallowed and expunged as of the Effective Date without any further notice to, or action, order, or approval of, the Bankruptcy Court, and Holders of such Claims may not receive any distributions on account of such Claims, unless such late Proof of Claim has been deemed timely Filed by a Final Order.

J. Amendments to Proofs of Claim

On or after the Effective Date, except as provided in the Plan or the Confirmation Order, a Proof of Claim or Proof of Interest may not be Filed or amended without the prior authorization of the Bankruptcy Court or the Reorganized Debtors, and any such new or amended Proof of Claim or Proof of Interest Filed shall be deemed disallowed in full and expunged without any further action, order, or approval of the Bankruptcy Court.

ARTICLE VIII.

EFFECT OF CONFIRMATION OF THE PLAN

A. Discharge of Claims and Termination of Interests

As provided by section 1141(d) of the Bankruptcy Code, and except as otherwise specifically provided in the Plan or in any contract, instrument, or other agreement or document created pursuant to the Plan, the distributions, rights, and treatment that are provided in the Plan shall be in complete satisfaction, discharge, and release, effective as of the Effective Date, of Claims (including any Intercompany Claims resolved or compromised after the Effective Date by the Reorganized Debtors), Interests, and Causes of Action of any nature whatsoever, including any interest accrued on Claims or Interests from and after the Petition Date, whether known or unknown, against, liabilities of, Liens on, obligations of, rights against, and Interests in, the Debtors or any of their assets or properties, regardless of whether any property shall have been distributed or retained pursuant to the Plan on account of such Claims and Interests, including demands, liabilities, and Causes of Action that arose before the Effective Date, any liability (including withdrawal liability) to the extent such Claims or Interests relate to services performed by current or former employees of the Debtors prior to the Effective Date and that arise from a termination of employment, any contingent or non-contingent liability on account of representations or warranties issued on or before the Effective Date, and all debts of the kind specified in sections 502(g), 502(h), or 502(i) of the Bankruptcy Code, in each case whether or not: (1) a Proof of Claim or Proof of Interest based upon such debt, right, or Interest is Filed or deemed Filed pursuant to section 501 of the Bankruptcy Code; (2) a Claim or Interest based upon such debt, right, or Interest is Allowed pursuant to section 502 of the Bankruptcy Code; or (3) the Holder of such a Claim or Interest has accepted the Plan. Any default by the Debtors or their Affiliates with respect to any Claim or Interest that existed immediately prior to or on account of filing of the Chapter 11 Cases shall be deemed cured (and no longer continuing) on the Effective Date. The Confirmation Order shall be a judicial determination of the discharge of all Claims and Interests subject to the occurrence of the Effective Date.

B. Releases by the Debtors

Notwithstanding anything contained in the Plan to the contrary, on and after the Effective Date, in exchange for good and valuable consideration, the adequacy of which is hereby confirmed, each Released Party is hereby conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged by each and all of the Debtors, the Reorganized Debtors, and their Estates, in each case on behalf of themselves and their respective successors, assigns, and representatives, and any and all other Entities who may purport to assert any Cause of Action, directly or derivatively, by, through, for, or because of, the foregoing Entities, from any and all Causes of Action, including any derivative claims, asserted or assertable on behalf of any of the Debtors, whether known or unknown, foreseen or unforeseen, matured or unmatured, existing or hereafter arising, in law, equity, contract, tort, or otherwise, that the Debtors would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the Holder of any Claim against, or Interest in, a Debtor, based on or relating to, or in any manner arising from, in whole or in part, the

Debtors (including the management, ownership, or operation thereof), their capital structure, the purchase, sale, or rescission of the purchase or sale of any Security of the Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual arrangements between any Debtor and any Released Party, the Chapter 11 Cases and related adversary proceedings, the Alameda Loan Facility, the Debtors' out-of-court restructuring efforts, intercompany transactions between or among a Debtor and another Debtor, the formulation, preparation, dissemination, negotiation, filing, or consummation of the Definitive Documents, or any Restructuring Transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Definitive Documents, the pursuit of consummation of the Plan, the administration and implementation of the Restructuring Transactions, or upon any other act or omission, transaction, agreement, event, or other occurrence related to the Debtors taking place on or before the Effective Date.Entry of the Confirmation Order shall constitute the Bankruptcy Court's approval, pursuant to section 1123(b) and Bankruptcy Rule 9019, of the releases described in this Article VIII.B by the Debtors, which includes by reference each of the related provisions and definitions contained in this Plan, and further, shall constitute the Bankruptcy Court's finding that each release described in this Article VIII.B is: (1) in exchange for the good and valuable consideration provided by the Released Parties; (2) a good-faith settlement and compromise of such Causes of Action; (3) in the best interests of the Debtors and all Holders of Claims and Interests; (4) fair, equitable, and reasonable; (5) given and made after due notice and opportunity for hearing; (6) a sound exercise of the Debtors' business judgment; and (7) a bar to any of the Debtors or Reorganized Debtors or their respective Estates asserting any Cause of Action related thereto, of any kind, against any of the Released Parties or their property.

C. Releases by Holders of Claims and Interests

Except as expressly set forth in the Plan, effective on the Effective Date, in exchange for good and valuable consideration, the adequacy of which is hereby confirmed, each Released Party is hereby conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged by each and all of the Releasing Parties, in each case on behalf of themselves and their respective successors, assigns, and representatives, and any and all other Entities who may purport to assert any Cause of Action, from any and all Causes of Action, whether known or unknown, foreseen or unforeseen, matured or unmatured, existing or hereafter arising, in law, equity, contract, tort, or otherwise, including any derivative claims asserted or assertable on behalf of any of the Debtors, that such Entity would have been legally entitled to assert in its own right (whether individually or collectively or on behalf of the Holder of any Claim against, or Interest in, a Debtor or other Entity), based on or relating to, or in any manner arising from, in whole or in part, the Debtors (including the management, ownership, or operation thereof), their capital structure, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual arrangements between any Debtor and any Released Party, the Alameda Loan Facility, the Debtors' out-of-court restructuring efforts, intercompany transactions between or among a Debtor and another Debtor, the formulation, preparation, dissemination, negotiation, filing, or consummation of the Definitive Documents, or any Restructuring Transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Definitive Documents, the pursuit of consummation of the Plan, the administration and implementation of the Restructuring Transactions, or upon any other act or omission, transaction, agreement, event, or other occurrence related to the Debtors taking place on or before the Effective Date.

Entry of the Confirmation Order shall constitute the Bankruptcy Court's approval, pursuant to Bankruptcy Rule 9019, of the releases described in this Article VIII.C, which includes by reference each of the related provisions and definitions contained in this Plan, and further, shall constitute the

Bankruptcy Court's finding that each release described in this Article VIII.C is: (1) in exchange for the good and valuable consideration provided by the Released Parties; (2) a good-faith settlement and compromise of such Causes of Action; (3) in the best interests of the Debtors and all Holders of Claims and Interests; (4) fair, equitable, and reasonable; (5) given and made after due notice and opportunity for hearing; (6) a sound exercise of the Debtors' business judgment; and (7) a bar to any of the Releasing Parties or the Debtors or Reorganized Debtors or their respective Estates asserting any Cause of Action related thereto, of any kind, against any of the Released Parties or their property.

D. Exculpation

Effective as of the Effective Date, to the fullest extent permissible under applicable law and without affecting or limiting either the Debtor release or the third-party release, and except as otherwise specifically provided in the Plan, no Exculpated Party shall have or incur, and each Exculpated Party is released and exculpated from any Cause of Action for any act or omission in connection with, relating to, or arising out of, the Chapter 11 Cases, the formulation, preparation, dissemination, negotiation or filing, or consummation of the Disclosure Statement, the Plan, any Definitive Documents, or any Restructuring Transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Disclosure Statement or the Plan, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of consummation of the Plan, the administration and implementation of the Plan, including the issuance of Securities pursuant to the Plan, or the distribution of property under the Plan or any other related agreement (including, for the avoidance of doubt, providing any legal opinion requested by any Entity regarding any transaction, contract, instrument, document, or other agreement contemplated by the Plan or the reliance by any Exculpated Party on the Plan or the Confirmation Order in lieu of such legal opinion), except for Causes of Action related to any act or omission that is determined in a Final Order of a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence, but in all respects such Entities shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan.

The Exculpated Parties have, and upon Consummation of the Plan shall be deemed to have, participated in good faith and in compliance with the applicable laws with regard to the solicitation of votes and distribution of consideration pursuant to the Plan and, therefore, are not, and on account of such distributions shall not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or such distributions made pursuant to the Plan.

E. Injunction

Except as otherwise provided in the Plan or the Confirmation Order, all Entities who have held, hold, or may hold Claims, Interests, Causes of Action, or liabilities that: (a) are subject to compromise and settlement pursuant to the terms of the Plan; (b) have been released pursuant to Article VIII.B of this Plan; (c) have been released pursuant to Article VIII.C of this Plan, (d) are subject to exculpation pursuant to Article VIII.D of this Plan, or (e) are otherwise discharged, satisfied, stayed, or terminated pursuant to the terms of the Plan, are permanently enjoined and precluded, from and after the Effective Date, from commencing or continuing in any manner, any action or other proceeding, including on account of any Claims, Interests, Causes of Action, or liabilities that have been compromised or settled against the Debtors, the Reorganized Debtors, or any Entity so released or exculpated (or the property or estate of any Entity, directly or indirectly, so released or exculpated) on account of, or in connection with or with respect to, any discharged, released, settled, compromised, or exculpated Claims, Interests, Causes of Action, or liabilities.

Upon entry of the Confirmation Order, all Holders of Claims and Interests and their respective current and former directors, managers, officers, principals, predecessors, successors, employees, agents, and direct and indirect Affiliates shall be enjoined from taking any actions to interfere with the implementation or Consummation of the Plan. Each Holder of an Allowed Claim or Allowed Interest, as applicable, by accepting, or being eligible to accept, distributions under or Reinstatement of such Claim or Interest, as applicable, pursuant to the Plan, shall be deemed to have consented to the injunction provisions set forth in this Article VIII.E.

F. Release of Liens

Except as otherwise provided in the Plan, the Plan Supplement, or any contract, instrument, release, or other agreement or document created pursuant to the Plan or Confirmation Order on the Effective Date, and concurrently with the applicable distributions made pursuant to the Plan, all mortgages, deeds of trust, Liens, pledges, or other security interests against any property of the Estates shall be fully released, settled, compromised, and discharged, and all of the right, title, and interest of any holder of such mortgages, deeds of trust, Liens, pledges, or other security interests against any property of the Debtors shall automatically revert to the applicable Debtor or Reorganized Debtor, as applicable, and their successors and assigns, in each case, without any further approval or order of the Bankruptcy Court and without any action or Filing being required to be made by the Debtors. Any Holder of such Secured Claim (and the applicable agents for such Holder) shall be authorized and directed to release any collateral or other property of any Debtor (including any cash collateral and possessory collateral) held by such Holder (and the applicable agents for such Holder), and to take such actions as requested by the Debtors or Reorganized Debtors to evidence the release of such Lien, including the execution, delivery, and filing or recording of such documents evidencing such releases. The presentation or filing of the Confirmation Order to or with any local, state, federal, or foreign agency or department shall constitute good and sufficient evidence of, but shall not be required to effect, the termination of such Liens.

G. OSC and SEC

Notwithstanding any language to the contrary herein, no provision shall (a) preclude the OSC or the SEC from enforcing its police or regulatory powers; or (b) enjoin, limit, impair or delay the OSC or SEC from commencing or continuing any claims, causes of action, proceeding, or investigations against any non-Debtor person or non-Debtor entity in any forum.

H. Protection against Discriminatory Treatment

As provided by section 525 of the Bankruptcy Code, and consistent with paragraph 2 of Article VI of the United States Constitution, no Entity, including Governmental Units, shall discriminate against any Reorganized Debtor or deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, or discriminate with respect to such a grant against, any Reorganized Debtor, or any Entity with which a Reorganized Debtor has been or is associated, solely because such Reorganized Debtor was a debtor under chapter 11 of the Bankruptcy Code, may have been insolvent before the commencement of the Chapter 11 Cases (or during the Chapter 11 Cases but before such Debtor was granted or denied a discharge), or has not paid a debt that is dischargeable in the Chapter 11 Cases.

I. Document Retention

On and after the Effective Date, the Reorganized Debtors may maintain documents in accordance with their standard document retention policy, as may be altered, amended, modified, or supplemented by the Reorganized Debtors.

. Reimbursement or Contribution

If the Bankruptcy Court disallows a Claim for reimbursement or contribution of an Entity pursuant to section 502(e)(1)(B) of the Bankruptcy Code, then to the extent that such Claim is contingent as of the time of allowance or disallowance, such Claim shall be forever disallowed and expunged notwithstanding section 502(j) of the Bankruptcy Code, unless prior to the Confirmation Date: (1) such Claim has been adjudicated as non-contingent; or (2) the relevant Holder of a Claim has Filed a non-contingent Proof of Claim on account of such Claim and a Final Order has been entered prior to the Confirmation Date determining such Claim as no longer contingent.

A. Term of Injunctions or Stays

Unless otherwise provided in the Plan or in the Confirmation Order, all injunctions or stays in effect in the Chapter 11 Cases pursuant to sections 105 or 362 of the Bankruptcy Code, or any order of the Bankruptcy Court, and extant on the Confirmation Date (excluding any injunctions or stays contained in the Plan or the Confirmation Order), shall remain in full force and effect until the Effective Date. **All injunctions or stays contained in the Plan or the Confirmation Order shall remain in full force and effect in accordance with their terms.**

ARTICLE IX.

CONDITIONS PRECEDENT TO THE EFFECTIVE DATE

A. Conditions Precedent to the Effective Date.

It shall be a condition to the Effective Date that the following conditions shall have been satisfied or waived pursuant to Article IX.B of the Plan:

1. The Bankruptcy Court shall have entered the Confirmation Order, and such order shall be a Final Order and in full force and effect.

2. The Debtors shall have obtained all authorizations, consents, regulatory approvals, rulings, or documents that are necessary to implement and effectuate the Plan.

3. The Debtors shall have sold [●]% of the Coins for purposes of effectuating the Plan.

4. Each Definitive Document and each other document contained in any supplement to the Plan, including the Plan Supplement and any exhibits, schedules, amendments, modifications or supplements thereto or other documents contained therein, shall have been executed or Filed, as applicable, in form and substance consistent in all respects with the Plan, and shall not have been modified in a manner inconsistent therewith;

5. The Professional Fee Escrow Account shall have been established and funded with Cash in accordance with Article II.B.2 of the Plan.

6. The Restructuring Transactions shall have been consummated or shall be anticipated to be consummated concurrently with the occurrence of the Effective Date in a manner consistent with the Plan, and the Plan shall have been substantially consummated or shall be anticipated to be substantially consummated concurrently with the occurrence of the Effective Date.

B. Waiver of Conditions Precedent

The Debtors may waive any of the conditions to the Effective Date set forth in Article IX.A of the Plan at any time, without any notice to any other parties in interest and without any further notice to or action, order, or approval of the Bankruptcy Court, and without any formal action other than proceeding to confirm and consummate the Plan.

C. Effect of Non-Occurrence of Conditions to Consummation

If the Effective Date does not occur, then the Plan will be null and void in all respects and nothing contained in the Plan or the Disclosure Statement shall: (1) constitute a waiver or release of any Claims, Interests, or Causes of Action held by any Debtor or any other Entity; (2) prejudice in any manner the rights of any Debtor or any other Entity; or (3) constitute an admission, acknowledgment, offer, or undertaking of any sort by any Debtor or any other Entity in any respect.

ARTICLE X.

MODIFICATION, REVOCATION, OR WITHDRAWAL OF THE PLAN

A. Modification of Plan

Subject to the limitations and terms contained in the Plan, the Debtors reserve the right to (1) amend or modify the Plan before the entry of the Confirmation Order, in accordance with the Bankruptcy Code and the Bankruptcy Rules and (2) after the entry of the Confirmation Order, the Debtors or the Reorganized Debtors, as applicable, may, upon order of the Bankruptcy Court, amend or modify the Plan, in accordance with section 1127(b) of the Bankruptcy Code, remedy any defect or omission, or reconcile any inconsistency in the Plan in such manner as may be necessary to carry out the purpose and intent of the Plan consistent with the terms set forth herein.

B. Effect of Confirmation on Modifications

Entry of the Confirmation Order shall constitute approval of all modifications or amendments to the Plan occurring after the solicitation thereof pursuant to section 1127(a) of the Bankruptcy Code and a finding that such modifications to the Plan do not require additional disclosure or resolicitation under Bankruptcy Rule 3019.

C. Revocation or Withdrawal of Plan

The Debtors reserve the right to revoke or withdraw the Plan with respect to any or all Debtors before the Confirmation Date and to File subsequent chapter 11 plans. If the Debtors revoke or withdraw the Plan, or if Confirmation or the Effective Date does not occur, then: (1) the Plan will be null and void in all respects; (2) any settlement or compromise not previously approved by Final Order of the Bankruptcy Court embodied in the Plan (including the fixing or limiting to an amount certain of the Claims or Classes of Claims), assumption or rejection of Executory Contracts or Unexpired Leases effectuated by the Plan, and any document or agreement executed pursuant to the Plan will be null and void in all respects; and (3) nothing contained in the Plan shall (a) constitute a waiver or release of any Claims, Interests, or Causes of Action by any Entity, (b) prejudice in any manner the rights of any Debtor or any other Entity, or (c) constitute an admission, acknowledgement, offer, or undertaking of any sort by any Debtor or any other Entity.

ARTICLE XI.

RETENTION OF JURISDICTION

Notwithstanding the entry of the Confirmation Order and the occurrence of the Effective Date, the Bankruptcy Court shall retain exclusive jurisdiction over all matters arising out of, or related to, the Chapter 11 Cases and the Plan pursuant to sections 105(a) and 1142 of the Bankruptcy Code, including jurisdiction to:

1. Allow, disallow, determine, liquidate, classify, estimate, or establish the priority, Secured or unsecured status, or amount of any Claim or Interest, including the resolution of any request for payment of any Administrative Claim and the resolution of any and all objections to the Secured or unsecured status, priority, amount, or allowance of Claims or Interests;

2. decide and resolve all matters related to the granting and denying, in whole or in part, of any applications for allowance of compensation or reimbursement of expenses to Professionals authorized pursuant to the Bankruptcy Code or the Plan;

3. resolve any matters related to Executory Contracts or Unexpired Leases, including: (a) the assumption, assumption and assignment, or rejection of any Executory Contract or Unexpired Lease to which a Debtor is party or with respect to which a Debtor may be liable and to hear, determine, and, if necessary, liquidate, any Cure Claims or other Claims arising therefrom, including pursuant to section 365 of the Bankruptcy Code; (b) any potential contractual obligation under any Executory Contract or Unexpired Lease that is assumed or assumed and assigned; and (c) any dispute regarding whether a contract or lease is or was executory, expired, or terminated;

4. ensure that distributions to Holders of Allowed Claims and Allowed Interests are accomplished pursuant to the provisions of the Plan and adjudicate any and all disputes arising from or relating to distributions under the Plan;

5. adjudicate, decide, or resolve any motions, adversary proceedings, contested or litigated matters, and any other matters, and grant or deny any applications involving a Debtor or the Estates that may be pending on the Effective Date;

6. enter and implement such orders as may be necessary or appropriate to execute, implement, or consummate the provisions of (a) contracts, instruments, releases, and other agreements or documents approved by Final Order in the Chapter 11 Cases and (b) the Plan, the Confirmation Order, and contracts, instruments, releases, and other agreements or documents created in connection with the Plan; *provided* that the Bankruptcy Court shall not retain jurisdiction over disputes concerning documents contained in the Plan Supplement that have a jurisdictional, forum selection, or dispute resolution clause that refers disputes to a different court;

7. enter and enforce any order for the sale of property pursuant to sections 363, 1123, or 1146(a) of the Bankruptcy Code;

8. grant any consensual request to extend the deadline for assuming or rejecting Unexpired Leases pursuant to section 365(d)(4) of the Bankruptcy Code;

9. issue injunctions, enter and implement other orders, or take such other actions as may be necessary or appropriate to restrain interference by any Entity with Consummation or enforcement of the Plan;

10. hear, determine, and resolve any cases, matters, controversies, suits, disputes, or Causes of Action in connection with or in any way related to the Chapter 11 Cases, including: (a) with respect to the repayment or return of distributions and the recovery of additional amounts owed by the Holder of a Claim or an Interest for amounts not timely repaid pursuant to Article VI of the Plan; (b) with respect to the releases, injunctions, and other provisions contained in Article VIII of the Plan, including entry of such orders as may be necessary or appropriate to implement such releases, injunctions, and other provisions; (c) anything that may arise in connection with the Consummation, interpretation, implementation, or enforcement of the Plan and the Confirmation Order; or (d) related to section 1141 of the Bankruptcy Code;

11. enter and implement such orders as are necessary or appropriate if the Confirmation Order is for any reason modified, stayed, reversed, revoked, or vacated;

12. adjudicate any and all disputes arising from or relating to distributions under the Plan or any transactions contemplated therein;

13. consider any modifications of the Plan, to cure any defect or omission, or to reconcile any inconsistency in any Bankruptcy Court order, including the Confirmation Order;

14. enforce all orders, judgments, injunctions, releases, exculpations, indemnifications, and rulings entered in connection with the Chapter 11 Cases with respect to any Entity, and resolve any cases, controversies, suits, or disputes that may arise in connection with any Entity's rights arising from or obligations incurred in connection with the Plan;

15. hear and determine matters concerning local, state, federal, and foreign taxes in accordance with sections 346, 505, and 1146 of the Bankruptcy Code;

16. enter an order or Final Decree concluding or closing the Chapter 11 Cases;

17. enforce all orders previously entered by the Bankruptcy Court; and

18. hear and determine any other matters related to the Chapter 11 Cases and not inconsistent with the Bankruptcy Code or the Judicial Code.

Nothing herein limits the jurisdiction of the Bankruptcy Court to interpret and enforce the Plan and all contracts, instruments, releases, and other agreements or documents created in connection with the Plan, or the Disclosure Statement, without regard to whether the controversy with respect to which such interpretation or enforcement relates may be pending in any state or other federal court of competent jurisdiction.

If the Bankruptcy Court abstains from exercising, or declines to exercise, jurisdiction or is otherwise without jurisdiction over any matter arising in, arising under, or related to the Chapter 11 Cases, including the matters set forth in this Article XI, the provisions of this Article XI shall have no effect on and shall not control, limit, or prohibit the exercise of jurisdiction by any other court having competent jurisdiction with respect to such matter.

Unless otherwise specifically provided herein or in a prior order of the Bankruptcy Court, the Bankruptcy Court shall have exclusive jurisdiction to hear and determine disputes concerning Claims against or Interests in the Debtors that arose prior to the Effective Date.

ARTICLE XII.

MISCELLANEOUS PROVISIONS

A. Immediate Binding Effect

Notwithstanding Bankruptcy Rules 3020(e), 6004(h), or 7062 or otherwise, upon the occurrence of the Effective Date, the terms of the Plan shall be immediately effective and enforceable and deemed binding upon the Debtors, the Reorganized Debtors, and any and all Holders of Claims or Interests (irrespective of whether such Claims or Interests are deemed to have accepted the Plan), all Entities that are parties to or are subject to the settlements, compromises, releases, discharges, exculpations, and injunctions described in the Plan, each Entity acquiring property under the Plan, and any and all non-Debtor parties to Executory Contracts and Unexpired Leases with the Debtors. All Claims against and Interests in the Debtors shall be as fixed, adjusted, or compromised, as applicable, pursuant to the Plan regardless of whether any Holder of a Claim or Interest has voted on the Plan.

B. Additional Documents

On or before the Effective Date, the Debtors may File with the Bankruptcy Court such agreements and other documents as may be necessary or appropriate to effectuate and further evidence the terms and conditions of the Plan. The Debtors or the Reorganized Debtors, as applicable, and all Holders of Claims and Interests receiving distributions pursuant to the Plan and all other parties in interest shall, from time to time, prepare, execute, and deliver any agreements or documents and take any other actions as may be necessary or advisable to effectuate the provisions and intent of the Plan.

C. Payment of Statutory Fees

All fees and applicable interest payable pursuant to section 1930 of the Judicial Code and 31 U.S.C. § 3717, as applicable, as determined by the Bankruptcy Court at a hearing pursuant to section 1128 of the Bankruptcy Code, shall be paid by each of the Reorganized Debtors (or the Distribution Agent on behalf of the Reorganized Debtors) for each quarter (including any fraction thereof) until the Chapter 11 Cases are converted, dismissed, or a Final Decree is issued, whichever occurs first.

D. Dissolution of Statutory Committees

On the Effective Date, any statutory committee appointed in the Chapter 11 Cases shall dissolve, and the members thereof shall be released and discharged from all rights and duties arising from, or related to, the Chapter 11 Cases.

E. Reservation of Rights

Except as expressly set forth herein, the Plan shall have no force or effect unless the Bankruptcy Court shall enter the Confirmation Order, and the Confirmation Order shall have no force or effect if the Effective Date does not occur. None of the Filing of the Plan, any statement or provision contained in the Plan, or the taking of any action by any Debtor with respect to the Plan, the Disclosure Statement, or the Plan Supplement shall be or shall be deemed to be an admission or waiver of any rights of any Debtor with respect to the Holders of Claims or Interests, unless and until the Effective Date has occurred.

F. Successors and Assigns

The rights, benefits, and obligations of any Entity named or referred to in the Plan shall be binding on, and shall inure to the benefit of any heir, executor, administrator, successor or assign, Affiliate, officer, director, agent, representative, attorney, beneficiary, or guardian, if any, of each such Entity.

G. Service of Documents

After the Effective Date, any pleading, notice, or other document required by the Plan to be served on or delivered to the Reorganized Debtors shall be served on:

Reorganized Debtors	**Voyager Digital Holdings, Inc.** 33 Irving Place New York, New York 10003 Attention: David Brosgol General Counsel, E-mail address: dbrosgol@investvoyager.com with copies for information only (which shall not constitute notice) to:
Counsel to the Debtors	**Kirkland & Ellis LLP** **Kirkland & Ellis International LLP** 601 Lexington Avenue New York, New York 10022 Attention: Joshua A. Sussberg, P.C., Christopher Marcus, P.C., Christine A. Okike, P.C., and Allyson B. Smith

H. Entire Agreement; Controlling Document

Except as otherwise indicated, on the Effective Date, the Plan supersedes all previous and contemporaneous negotiations, promises, covenants, agreements, understandings, and representations with respect to the subject matter of the Plan, all of which will have become merged and integrated into the Plan. Except as set forth in the Plan, in the event that any provision of the Disclosure Statement, the Plan Supplement, or any order (other than the Confirmation Order) referenced in the Plan (or any exhibits, schedules, appendices, supplements, or amendments to any of the foregoing), conflict with or are in any way inconsistent with any provision of the Plan, the Plan shall govern and control. In the event of any inconsistency between the Plan and the Confirmation Order, the Confirmation Order shall control.

I. Plan Supplement

All exhibits and documents included in the Plan Supplement are incorporated into and are a part of the Plan as if set forth in full in the Plan. After the exhibits and documents are Filed, copies of such exhibits and documents shall be made available upon written request to the Debtors' counsel at the address above or by downloading such exhibits and documents from the website of the Claims, Noticing, and Solicitation Agent at https://cases.stretto.com/Voyager or the Bankruptcy Court's website at http://www.nysb.uscourts.gov. Unless otherwise ordered by the Bankruptcy Court, to the extent any exhibit or document in the Plan Supplement is inconsistent with the terms of any part of the Plan that does not constitute the Plan Supplement, such part of the Plan that does not constitute the Plan Supplement shall control.

J. Non-Severability

If, prior to Confirmation, any term or provision of the Plan is held by the Bankruptcy Court to be invalid, void, or unenforceable, the Bankruptcy Court, at the request of the Debtors, shall have the power to alter and interpret such term or provision to make it valid or enforceable, consistent with the original purpose of the term or provision held to be invalid, void, or unenforceable, and such term or provision shall then be applicable as altered or interpreted. Notwithstanding any such holding, alteration, or interpretation, the remainder of the terms and provisions of the Plan will remain in full force and effect and will in no way be affected, impaired, or invalidated by such holding, alteration, or interpretation. The Confirmation Order shall constitute a judicial determination and shall provide that each term and provision of the Plan, as it may have been altered or interpreted in accordance with the foregoing, is: (1) valid and enforceable pursuant to its terms; (2) integral to the Plan and may not be deleted or modified without the Debtors' consent, consistent with the terms set forth herein; and (3) non-severable and mutually dependent.

K. Votes Solicited in Good Faith

Upon entry of the Confirmation Order, the Debtors will be deemed to have solicited votes on the Plan in good faith and in compliance with the Bankruptcy Code, and pursuant to section 1125(e) of the Bankruptcy Code, the Debtors, and each of their respective Affiliates, agents, representatives, members, principals, shareholders, officers, directors, managers, employees, advisors, and attorneys will be deemed to have participated in good faith and in compliance with the Bankruptcy Code in the offer, issuance, sale, and purchase of Securities offered and sold under the Plan and any previous plan, and, therefore, neither any of such parties nor individuals or the Reorganized Debtors will have any liability for the violation of any applicable law, rule, or regulation governing the solicitation of votes on the Plan or the offer, issuance, sale, or purchase of the Securities offered and sold under the Plan or any previous plan.

L. Waiver or Estoppel

Each Holder of a Claim or an Interest shall be deemed to have waived any right to assert any argument, including the right to argue that its Claim or Interest should be Allowed in a certain amount, in a certain priority, Secured or not subordinated by virtue of an agreement made with the Debtors or their counsel, or any other Entity, if such agreement was not disclosed in the Plan, the Disclosure Statement, or papers Filed prior to the Confirmation Date.

Dated: July 6, 2022

VOYAGER DIGITAL HOLDINGS, INC.
on behalf of itself and all other Debtors

/s/ Stephen Ehrlich
Stephen Ehrlich
Co-Founder and Chief Executive Officer
Voyager Digital Holdings, Inc.

Tab 7

Ontario Supreme Court
Menegon v. Phillip Services Corp.
Date: 1999-08-27

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

In the Matter of the Courts of Justice Act, R.S.O. 1990 c. C-43, as Amended

In the Matter of a Plan of Compromise or Arrangement of Philip Services Corp. and the Applicants Listed on Schedule "A"

Application Under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Joseph Menegon, Plaintiff and Philip Services Corp., Salomon Brothers Canada Inc., Merill Lynch Canada Inc., CIBC Wood Gundy Securities Inc., Midland Walwyn Capital Inc., First Marathon Securities Limited, Gordon Capital Corporation, RBC Dominion Securities Inc., TD Securities Inc., and Deloitte & Touche, Defendants

Ontario Superior Court of Justice [Commercial List] Blair J.

Judgment: August 27, 1999

Docket: 99-CL-3442, 4166CP/98

David R. Byers, Sean Dunphy and Colleen Stanley, for Philip Services Corp. et al.

John McDonald, for the Class Proceedings Plaintiffs.

J.L. McDougall, Q.C. and B.R. Leonard, for Deloitte & Touche.

B. Zarnett, for Merrill Lynch Canada Inc., Midland Walwyn Capital Inc.,

First Marathon Securities Limited, Gordon Capital Corporation and Salomon Brothers Canada Inc. ("The Underwriters)".

Hilary Clarke, for Royal Bank of Canada.

Pamela Huff and Susan Grundy, for Lenders under the Credit Agreement.

Joseph Groia and Subrata Bhattacharjee, for certain Directors.

E.A. Sellers, for CIBC as Account Intermediary.

Steven Graff, for PHH Vehicle Leasing.

Blair J. **:**

1999 CanLII 15004 (ON SC)

I—Facts

Background

[1] The issues raised on these Motions touch upon difficult areas in the burgeoning field of cross-border insolvencies.

[2] Philip Services Corp. is the ultimate parent company of a network of approximately 200 directly and indirectly owned subsidiaries in Canada, the United States and elsewhere. The operations of this international conglomerate of companies are service oriented, with a primary focus on what are referred to as “Metals Services” and “Industrial Services”. The former involves the collection, processing and recycling of scrap metal for steel mills and for the foundry and automotive industries. The latter entails providing such things as cleaning and maintenance services, waste collection and transportation, emergency response services and tank cleaning for major industries (“outsourcing services”), and providing “by-products recovery services”, with heavy emphasis on chemicals and fuel and polyurethane recycling, for the same industries.

[3] The Philips conglomerate—with consolidated revenues in 1998 of U.S. $2 billion, but a consolidated, net loss of U.S. $1,587 billion for the period ending December 31, 1998—has fallen into insolvent circumstances. On June 25, 1999, Philip Services Corp. and its Canadian subsidiaries sought and obtained the protection of this Court under the provisions of the CCAA to enable them to attempt to restructure their affairs. On the same date, Philip Service Corp. and its primary subsidiary for its U.S. operations, Philip Services (Delaware) Inc., together with other U.S. subsidiaries, filed for Chapter 11 protection under the *U.S. Bankruptcy Code* in United States Bankruptcy Court (District of Delaware). On July 12, 1999, a “Disclosure Statement and a Plan of Reorganization” was filed in the U.S. Bankruptcy Proceedings (“the U.S. Plan”). On July 15th, a Plan of Compromise and Arrangement was filed in the CCAA Proceedings (“the Canadian Plan”).

[4] As the parties and counsel have done, I shall refer to Philip Services Corp. as “Philip” and to Philip Services (Delaware) Inc. as “PSI”. I shall refer to the conglomerate as a whole as “Consolidated Philip”.

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[5] Philip is an Ontario corporation with head offices in Hamilton, Ontario. It is a public company with stock trading on the Toronto Stock Exchange, the Montreal Exchange, and the

New York Stock Exchange. Although trading is suspended at the present time, the bulk of trading occurred on the New York Stock Exchange. Eighty-two percent of Philip's issued and outstanding shares are owned by U.S. residents. Moreover, it appears, the majority of Philip's operating assets, and of its operations, are located in the United States. Consolidated Philip carries on business at more than 260 locations, and employs more than 12,000 employees, primarily in North America. Its customer list includes more than 40,000 industrial and commercial customers world-wide. In Canada, there are 94 locations, about 2,000 employees, and annual revenues in the neighbourhood of U.S. $333 million.

[6] Philip expanded very rapidly in the past few years—perhaps too rapidly, as it turns out. Consolidated Philip grew by more than 40 new businesses acquisitions in 1996 and 1997. Associated with this expansion was the negotiation of a U.S. $1.5 billion Credit Agreement between Philip and PSI as borrowers and a syndicate of more than 40 lenders (the "Lenders"). Under the Credit Agreement Philip guaranteed the borrowings of PSI, and PSI guaranteed the borrowings of Philip. In addition, certain subsidiaries of Philip and PSI guaranteed all of the liabilities of Philip and PSI to the lenders, and the guarantees from the subsidiaries were secured by general agreements and specific assignments of assets. In short, the Lenders have security over virtually all of the assets of Consolidated Philip. Moreover, subject to certain specific exceptions, it is first security.

[7] During this same period of expansion, Philip raised about U.S. $362 million through a public offering in the U.S. and Canada. Seventy-five percent of these shares were sold in the U.S. As events transpired, these public offerings have led to a series of class actions against Philip both in the U.S. and in Canada. They arose out of certain discrepancies between copper inventory as shown on the books and records of Philip and actual inventory on hand, which were revealed in audits in early 1998. Publicity surrounding the discrepancies led to a drop in the price of Philip shares, which led to various class actions. Eventually, it was determined that Philip's liabilities had been understated by approximately U.S. 35 million. As a result, it was required to file an Amended Form 10-K with the U.S. Securities and Exchange Commission restating its financial results for 1997 to show an additional loss of $35 million. It was also required to revise the amount of pre-tax special and non-recurring charges for that same year.

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[8] It is said that the unsettling effects of the financial irregularities and the class action proceedings, in conjunction with a general uncertainty in the markets serviced by Consolidated Philip, caused Philip's earnings to drop dramatically. It could not refinance its long-term debt under the Credit Agreement. Its trade credit was curtailed. It lost contracts and, because its bonding capacity was impaired, it was further hampered in its ability to win new contracts. In spite of concerted efforts over a period of nearly a year, Philip was not able to re-finance its debt or to restructure its affairs outside of the court restructuring context. Cash conservation measures in late 1998 led to defaults under the Credit Agreement. Debt restructuring negotiations with *the Lenders* since that time led ultimately to the parallel insolvency proceedings in Canada and the U.S. to which I have referred above.

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The Class Proceedings

[9] Developments in the class action proceedings are what have led specifically to the Motions which are presently before this Court.

[0] In February and March of 1998 various class actions were filed in the United States against Philip, certain of its past and present directors and officers, the underwriters of the Company's November 1997 public offering, and the Company's auditors (Deloitte & Touche)[1]. The actions, now consolidated, alleged that Philip's financial disclosure for various time periods between 1995 and 1997 contained material misstatements or omissions in violation of U.S. federal securities laws.

[1] In May, 1998, a class proceeding was also commenced in Ontario, under the *Class Proceedings Act,* 1992 ("the CPA Proceeding"). The plaintiff is Joseph Menegon, a retired school teacher living in Hamilton, who had purchased 300 common shares of Philip on the TSE in November, 1998. The CPA Proceedings is an action for misrepresentation, negligent misrepresentation and recission relating to the purchase of shares of Philip by people in Canada between February 28 and May 7, 1998. The defendants are Philip, the various Underwriters, and Deloitte & Touche.

[10] At the instance of Philip and Deloitte & Touche, however, a motion was brought for an order dismissing the U.S. Class Action on the grounds that the United States Court was not the proper Court for the disposition of the claims, but that the Ontario Court was. This motion

was successful and on May 4, 1999 the U.S. Class Action was dismissed. A motion to reconsider was also dismissed. Although the U.S. Class Action plaintiffs have appealed, the present status of those proceedings is that they have been dismissed.

[0] Nonetheless, the U.S. claims persist, and there have been negotiations between counsel for the U.S. and Canadian Class Action plaintiffs and Philip since early 1999 with a view to arriving at a settlement of the class action claims against Philip. Because of the nature of these claims, and the potential quantum of any judgments that might be obtained, a resolution of the Class Action proceedings, according to Philip, is an essential element of any successful restructuring. On June 23, 1999, the parties to the negotiations entered into a Memorandum of Understanding which outlined a proposed settlement between Philip and the U.S. Class Action and CPA Proceedings plaintiffs.

[1] Philip and the CPA Proceeding plaintiff now seek certification of the CPA Proceeding and approval of the Settlement by the Court. Philip, separately, seeks approval of this Court under the CCAA to enter into the proposed Settlement. These motions have triggered the series of matters that are now to be disposed of. Deloitte & Touche not only opposes the Motions, but seeks separate declaratory relief on its own part touching upon the Settlement itself and as well the overall "fairness" and "reasonableness" of the proposed Canadian Plan. I shall return to the specifics of the competing Motions and the relief sought shortly. First, however, some brief reference to the controversial aspects of the Canadian and U.S. Plans, and to the terms of the Settlement, is required.

The Controversial Aspects of the Plans, and the Settlement

[2] The principle terms and conditions of the U.S. and Canadian Plans, as they presently stand, were hammered out in a "Lock-Up Agreement" entered into in April, 1999 and later amended on June 21st, between Philip (as Canadian borrower), PSI (as U.S. borrower), and a Steering Committee representing the Lenders. There were also negotiations with certain of Philip's major unsecured creditors and with counsel for the U.S. and Canadian class action plaintiffs. The Lock-Up Agreement is variously described as the result of "heavy" negotiations and "very hard bargaining". No doubt that is indeed the case.

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[1] These various actions were eventually consolidated and transferred to the United States District Court, Southern District of New York, by order dated June 2, 1998.

[16] The amended Lock-Up Agreement provides in substance that the Lenders will become the holders of 91% of the equity in the newly restructured Philip, and that they will as well receive U.S. $300 million of senior secured debt (now reduced to $250 million through asset sales) and $100 million of secured "payment in kind" notes. Under the U.S. Plan the remaining 9% of the equity in the restructured Philip is to be made available to other stakeholders, on the following basis: 5% (plus U.S. $60 million in junior notes) is to be for the compromised unsecured creditors; 2% for the existing shareholders; 1.5% for the Canadian and U.S. class action plaintiffs; and, 0.5% for the holders of other securities claims. The formula is conditional upon cross-approvals of the U.S. and Canadian Plans.

[17] From Philip's perspective the Plans filed in both the U.S. and in Canada are interdependent and form a single Plan from a "business point of view". The general concept of the overall plan is that each class of stakeholders in the Consolidated Philip with similar characteristics are to be treated similarly whether they are located in the U.S. or in Canada. With this in mind, and having regard to the need for a coordinated restructuring of claims and interests against Philip, PSI, and the Canadian and U.S. subsidiaries, the Plans provide that,

a) creditors with claims against *Philip's Canadian subsidiaries but not against Philip itself* are to file their claims in the CCAA proceedings in Canada, and are to be dealt with in the Canadian Plan; and,

b) creditors with claims *against Philip* or its U.S. subsidiaries are to have their claims processed in the U.S. proceedings and are to be dealt with in the U.S. Plan.

[18] The result of this is that the claims of *Philip's* creditors, whether Canadian or U.S., are to be dealt with under the U.S. Plan and governed by Chapter 11 of the *U.S. Bankruptcy Code.* This includes the claims of Deloitte & Touche and of the Underwriters, and of certain former officers and directors, for contribution and indemnity in relation to the U.S. and Canadian class proceedings. It also includes the claims of certain creditors, such as Royal Bank of Canada, in relation to personal property leases.

[19] Not surprisingly, those so affected take umbrage at this treatment. They submit that it contravenes the provisions of the CCAA and their substantive rights under Canadian law, and should not be countenanced. It renders the Canadian Plan unfair and unreasonable, in their submission, and should not be sanctioned. Philip argues, on the other hand, that matters

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relating to whether or not the Plan is fair and reasonable are matters to be dealt with at the sanctioning hearing, when the Plan is brought before the Court for approval after it has received the earlier approval of the Company's creditors. Counsel for Philip—supported by counsel for the Lenders and counsel for the Canadian class action plaintiff—submits that it is premature at this stage to consider such contentions. Counsel for Deloitte & Touche and for the Underwriters and for Royal Bank counter this argument, however, by asserting that the certification and approval of the Settlement as sought raises the very same issues and that they are so "inextricably linked" that they must be dealt with together. In an earlier endorsement, I agreed with this latter submission. It fails now to consider the two matters together.

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The Proposed Settlement

[20] Under the proposed Settlement the Canadian and U.S. class action plaintiffs are to receive 1.5% of the common shares of a restructured Philip, as noted above. The shares are to be distributed *pro rata* amongst the Canadian and U.S. plaintiffs. There is to be, in addition, an amount of up to U.S. $575,000 for costs of counsel for the U.S. and Canadian class action plaintiffs. The Settlement is embodied in the U.S. Plan as "Allowed Class 8B Claims". It includes the right of persons caught by the class proceedings to opt out; however, any member of the class who elects to opt out of the proposed settlement is also to be dealt with in the U.S. Plan as a Class 8B claimant.

[21] The proposed Settlement is conditional upon its being approved by the Courts in Canada and in the U.S. and, according to Philip, upon the successful implementation of both the Canadian and the U.S. Plan. Philip has made it clear that it and its professional advisors do not believe that a restructuring of Philip can be accomplished without resolution of the class action claims in Canada and the U.S. Philip, counsel in the Canadian class action, and the Lenders all argue that in the event of liquidation, the plaintiffs will get nothing because—even if they are successful on liability—they will have no chance of recovering a damage award against the insolvent Philip. The Settlement is also recommended by Ernst & Young, the court appointed Monitor for Philip in the CCAA proceedings.

[22] What, then, are the specific issues that the Court is asked to determine on the pending Motions?

II—The Issues Raised

[23] The following Motions, as summarized, are before the Court:

1) A Motion by Philip pursuant to the CCAA for authorization and direction to enter into the proposed Settlement of the proceeding pending against it under the *Class Proceeding Act*;

2) A joint Motion by Philip and Mr. Menegon, the representative plaintiff in the CPA Proceedings, for certification of the class proceeding as against the defendant Philip only, and for approval of the Settlement Agreement together with directions regarding notification of members of the proposed class;

3) A cross-Motion by Deloitte *&* Touche—one of Philip's co-defendants in the CPA Proceedings, supported by the other co-defendant Underwriters—for declaratory relief in the nature of an order:

a) declaring, pursuant to s. 5.1(3) of the CCAA and s. 97 of the *Courts of Justice Act* that the Canadian Plan is not fair and reasonable in the circumstances, having regard to those provisions in the Canadian Plan which compromise the ability of Deloitte & Touche to claim contribution and indemnity against Philip and certain of its directors, officers and employees;

b) precluding the compromise of the Deloitte & Touche claims and amending both the Canadian Plan and the U.S. Plan so that Deloitte & Touche's rights are to be determined under the Canadian Plan alone, and in accordance with Canadian law and without unfairly prejudicing its rights.

4) A Motion by Royal Bank of Canada for an order,

a) declaring that the claim of Royal Bank against Philip under certain leases shall be determined with reference to Canadian law and in the Canadian proceedings;

b) declaring that the Canadian Plan is not fair and reasonable because it seeks to compromise the Bank's claims in the U.S. Plan, thus adversely affecting the Bank's rights and circumventing Philip's obligations under Canadian law;

c) amending the Canadian Plan so that the Bank's claim is not dealt with in the U.S. Plan; and,

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d) amending sub-paragraph 14(d) of the initial Order granted in the CCAA proceeding on June 25, 1999—which presently permits Philip to terminate any and all arrangements entered into by them—by providing that the sub-paragraph does not apply to leases of personal property; and, finally,

5) A Motion on behalf of certain former officers and directors of Philip seeking to have the Canadian Plan and the U.S. Plan declared not fair and reasonable in the circumstances, having regard to those provisions,

a) which attempt to compromise or otherwise limit the ability of the Moving Parties to claim contribution and indemnity from Philip without compensation whatsoever;

b) which call for releases to be provided to current directors and officers of Philip, but not to former directors and officers;

c) which deprive the Moving Parties of their rights as creditors to vote on the Canadian Plan.

III—Law and Analysis

The Class Proceedings

[24] There is little difference in substance between the joint Motion of Philip and the Canadian class action plaintiff under the *Class Proceedings Act,* and that of Philip alone, under the CCAA. Both ultimately seek approval and implementation of the proposed Settlement. However, the CCAA proceeding provides the context in which this approval is sought and, indeed—as I have already mentioned—Philip and others are of the view that a successful restructuring of Consolidated Philip is not possible without the implementation of the proposed Settlement, and that the converse is also true. Thus, there *is* a close link between the two, and in my opinion the issue of settlement approval cannot be viewed in isolation from the CCAA/restructuring environment in the context of which it was developed.

Certification

[25] I have little hesitation in certifying—and do certify—the CPA Proceeding as a class proceeding pursuant to subsection 5(1) of the *Class Proceedings Act,* as requested. That is, the proceeding is certified as a class proceeding as against the defendant Philip only and for settlement purposes only. It is without prejudice to any arguments the other defendants to the

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CPA Proceedings may wish to make in opposition to any element of the plaintiff's claim, including, but not limited to, certification of a class as against them.

[26] For those purposes, however, I am satisfied that the tests set out in subsection 5(1) have been met. The statement of claim discloses a cause of action based upon faulty disclosure. There is an identifiable class, as articulated in the materials, and a common issue, as therein very broadly defined[2]. A class proceeding makes sense, and is the preferable procedure for the resolution of the common issue in the circumstances, and Mr. Menegon constitutes a representative plaintiff as called for in the subsection. An Ontario Court has jurisdiction pursuant to the *Class Proceedings Act* to certify a Canada-wide opt out class where the action has a "real and substantial" connection to Ontario, as is the case here: see, *Carom v. Bre-X Minerals Ltd.,* February 11, 1999, unreported, Court file No. 99-02614 (Ont. Gen. Div.) [reported at 43 O.R. (3d) 441]; *Nantais v. Telectronics Proprietary (Canada) Ltd.,* (1995), 25 O.R. (3d) 331 (Ont. Gen. Div.), leave to appeal refused (1995), 25 O.R. (3d) 331 at 347 (Ont. Gen. Div.).

Approval and Notice

[27] I have concluded, however, that Notice should be given at this time to the members of the class as certified, in accordance with the provisions of section 17 of the *Class Proceedings Act,* but that the proposed Settlement ought not to be approved at this time and at this stage of the restructuring proceedings.

[28] This conclusion is based not so much on the issue of whether notification under the *Act* may be given jointly for certification *and* approval, and not so much of the question of the merits of the proposed Settlement as between the class action plaintiffs and Philip. The former issue has not yet been settled, but need not be determined in this case. The latter is supported by the recommendations of the Monitor and seasoned U.S. representative counsel, and by the "reality check" that if there is no settlement it is unlikely that the class action plaintiffs will ever recover anything from Philip.

[29] Rather, my conclusion is based upon my sense that it is *premature* to approve a settlement of the U.S. and Canadian class action proceedings at this stage of the restructuring process. Philip and the Lenders have made it clear that the settlement of those

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claims forms a central underpinning to the ability of Consolidated Philip to reorganize successfully. But the reverberations of the class actions extend to more than merely the relations between Philip and the class action plaintiffs. They affect the relations between Philip and the co-defendants in the proceedings, and between the class action plaintiffs and the co-defendants as well. The class action plaintiffs and the co-defendants are all unsecured claimants of Philip in the restructuring process—the claims of the co-defendants for contribution and indemnity against Philip and its former officers and directors arise out of the same "nucleus of operative facts"[3] as the claims of the class action plaintiffs against Philip; and one follows from the other. It has frequently been noted that the full name of the CCAA is "An Act to facilitate compromises and arrangements between companies and their creditors". In the bare-knuckled ring of commercial restructuring negotiations, this cannot be accomplished if one group of unsecured claimants is given an unwarranted advantage over another.

[30] To grant approval to the proposed Settlement of the class action plaintiffs with Philip at this stage would in effect immunize both those plaintiffs and Philip from the need to have regard to the co-defendants in resolving their dispute. It may well be that a plaintiff in an action with multi-party defendants can settle unilaterally with one of those defendants without creating other repercussions in the lawsuit. It may also be, however, that such a settlement cannot be effected without taking into account some aspects of the "other party" issues— things such as the impact of the settlement on the co-defendants' claims for contribution and indemnity, including the quantum of or a cap on recovery and questions of releases, to take only some examples.

[31] For instance, Philip is contractually bound under the terms of its Underwriting Agreement with the Underwriters to indemnify and hold the Underwriters harmless against all claims based on allegations of untrue statements or alleged untrue statements in a prospectus. More to the point, Philip *is not entitled without the consent of the Underwriters,* under the terms of the same Agreement, *to settle* any action in which such claims are made against it and unless the settlement includes an unconditional release in favour of the Underwriters. Approval of the proposed Settlement at this stage of the restructuring proceedings would deprive the Underwriters of that contractual right. What is significant at this point is not the attempt to

[2] The common issue is very broadly and vaguely defined, and while such a definition has received approval in other cases, I do not mean to be taken as having approved such a definition for any purposes other than those of this particular case.

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compromise the claim, including the contractual right to the release, but rather the loss of the bargaining chip on the part of the Underwriters in the process as a result of the *unilateral* settlement as between Philip and the plaintiffs.

[32] Philip, the Lenders, and counsel for the class action plaintiffs have mounted an adamant chorus that if the proposed Settlement is not approved the U.S. and Canadian class action plaintiffs will get nothing because Philip will be liquidated and, in addition, that there is simply no room for the class action plaintiffs to receive anything more than the 1.5% share distribution in the restructured Philip which is currently on the table. The Lenders point out that they are fully secured and that they need not leave available even that 1.5% interest (not to mention the 9% equity interest which they have agreed to leave available to other stakeholders generally). These pronouncements may well reflect the final reality of the situation. However, I am somewhat less inclined to accept them at face value than the parties are to make them, particularly at this stage of the proceedings. It would not be the first time in restructuring negotiations where an adamant chorus turned into a more harmonious melody before the end of the day. Only the final moments of the process will tell the tale. In the meantime, as many negotiating options as possible should be kept open as amongst claimants of equal status in the restructuring, in my view.

[33] I do not say that this proposed Settlement, in its present or some other form, will not ultimately be approved. It is simply premature at this stage in the restructuring process to give it that imprimatur, in my opinion—if the imprimatur is to be given—for the reasons I have articulated. Accordingly, the question of approval of the proposed Settlement is adjourned to a date to be fixed which is more contemporaneous with the sanctioning hearing. In the meantime, Notice of certification and of the *pending* motion for approval is to be sent to all members of the class.

The Fairness Issues Regarding the Canadian Plan.

[34] Much of the foregoing reasoning applies to the conclusions I have reached with respect to the issues raised by Deloitte & Touche and others respecting the Canadian Plan and its nexus with the proposed Settlement.

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[3] To use the phrase adopted by the parties.

[35] The claim of the plaintiffs in the CPA Proceedings as against Deloitte & Touche and the Underwriters includes a claim for the difference between the value received by the plaintiffs as a result of the settlement and their actual loss. If the Settlement and the Canadian and U.S. Plans are approved, however, these co-defendants will lose their rights to claim contribution and indemnity from Philip in the class action. This, in itself, is not a reason for impugning the fairness and reasonableness of the Plans, because the ability to compromise claims against it is essential to the ability of a debtor corporation to restructure its affairs. Nonetheless, where the proposed structure of the reorganization affects the substantive rights of claimants in a fashion which treats them differently than they would otherwise be treated under Canadian law, and where the effect of that treatment is to place the claimants in a position where their ability to engage in full and complete negotiations with the debtor company are impaired, there is cause for concern on the part of the Court. That, in my view, is the case here.

[36] The effect of the Canadian Plan, as presently structured, is to deprive Deloitte & Touche, the Underwriters and others such as the former directors and officers of Philip who may have claims of contribution and indemnity as against Philip arising out of the same "nucleus of operative facts" pertaining to the class action claims, from pursuing those contribution claims in the Canadian CCAA proceeding. The same is true, but for different reasons, of the claim of Royal Bank with respect to its equipment leases. This is accomplished by carving out the claims in question from the CCAA proceedings and providing that they are to be dealt with under the U.S. Plan in U.S. Bankruptcy Court in accordance with the provisions of the *U.S. Bankruptcy Code. All claims against Philip* are to be dealt with in that fashion, notwithstanding that it was Philip which set in motion the CCAA proceedings in the first place and which sought and obtained the stay of proceedings preventing these very same claimants from pursuing their claims in Canada against it. At the same time, the Canadian Plan, but its very terms, is to be binding upon all holders of claims against Philip—including those which are subject to the Canadian Plan: see section 9.15 of the Canadian Plan. This is to be accomplished without even according the right to those claimants to vote on the Plan.

[37] The binding nature of the Canadian Plan has the effect of requiring the responding claimants to provide releases in favour of Philip while they are at the same time not released by Philip from claims that might be subsequently asserted against them. Furthermore, as the Plan presently stands, Deloitte & Touche and the Underwriters will be deemed to have

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released former directors and officers from claims for contribution and indemnity. The Class Action plaintiffs have chosen not to pursue the directors and officers, at the present time, and there is apparently upwards of $100 million in insurance that might be available to satisfy such claims. This is a matter of considerable concern for Deloitte & Touche and for the Underwriters. Philip has advised, during the course of these motions and before, that it does not intend the proposed Settlement or the Plan to preclude the ability of Deloitte & Touche and of the Underwriters to pursue the former officers and directors. For the present, however, the Plan is worded in such a way that they will be so precluded. The real point is that all of this is being visited upon the responding claimants without there being entitled to any say in the Canadian proceedings as to their willingness or lack of willingness to be so treated.

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[38] In my opinion it is the loss of the right to vote in the Canadian Plan which lies at the heart of the present dilemma. The mere fact that a Canadian creditor's rights are to be dealt with and affected by single or parallel insolvency proceedings in the U.S. Bankruptcy Court—or that the reverse may be the case (U.S. creditor/Canadian Court)—is not necessarily sufficient, in itself, to undermine the fairness and reasonableness of a proposed Plan: see, for example *Roberts v. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218 (Alta. Q.B.); *Re Starcom Services Corp.,* Bankr. W.D. Wash., case no. M-98-60005, Nov. 20, 1998. In Canadian insolvency proceedings under the CCAA, however, it is the right to vote on the compromise or arrangement which the debtor company proposes to make with them which is the central counterpart, on the part of the creditors, to the debtors right to attempt to make that compromise or arrangement. In my view, having chosen to initiate and take advantage of the CCAA proceedings, Philip cannot now evade the implications and statutory requirements of those proceedings by seeking to carve out certain pesky—and potentially large— contingent claimants, and to require them to be dealt with under a foreign regime (where they will be treated less favourably) while at the same time purporting to bind them to the provisions of the Canadian Plan. All of this without the right to vote on the proposal.

[39] While the fact that their treatment under U.S. Bankruptcy law will apparently be considerably less favourable than their treatment under Canadian law is not determinative, it is certainly a factor for consideration when taken in conjunction with the loss of voting rights in the Canadian Plan. As counsel have presented it, contribution claimants such as Deloitte &

Touche, the Underwriters and the directors and officers will have the status equivalent to *equity* holders under the U.S. Plan. Their claims will not be considered as unsecured *debt*

claims in terms of priority ranking. Pursuant to the "cram down" provisions of the *U.S. Bankruptcy Code,* the Bankruptcy Court can approve a plan of reorganization even if a class of creditors votes not to accept the plan provided no junior-ranking class receives a distribution and the plan is otherwise fair and reasonable. Moreover, the U.S. Bankruptcy Court may on motion deem such a class of stakeholders to have voted to reject the plan in order to dispense with the necessity of having such a vote amongst its members. While Philip's deponents and its counsel have not said so expressly, it is the clear inference from the materials filed that that is precisely the route which Philip proposes to follow *vis à vis* the contribution claimants whose claims have been left to be dealt with under the *U.S. Bankruptcy Code.*

[40] For purposes of the CCAA the claim of an unsecured creditor includes a claim in respect of any indebtedness, obligation or liability which would be a claim provable in bankruptcy, and therefore includes a contingent claim for unliquidated damages. Thus, Deloitte & Touche, the Underwriters, the officers and directors, and Royal Bank are all entitled to assert claims in the CCAA proceedings. They are Canadian claimants, asserting claims against a Canadian company in a Canadian proceeding. In respect of the claims for contribution and indemnity those claims arise out of a "nucleus of operating facts" which the U.S. Courts—at the urging of Philip, amongst others—have already determined are more conveniently litigated in Canadian class action proceedings.

[41] In respect of the Royal Bank, the claim relates to some 57 equipment leases entered into between the Bank and Philip under lease agreements governed by the laws of Ontario and with respect to equipment located (with one exception) in Ontario. However, under U.S. Bankruptcy laws, Philip would be entitled to "reject" leases, which it is not entitled to do under Ontario law, although it may of course "break" the leases if it is prepared to suffer the legal consequences. Again the attempt by Philip is to treat the claims under a regime which is more favourable to it and less so to the claimant. That attempt may not in itself be objectionable, but to the extent that it is accomplished by depriving the creditor of its right to vote and to participate in the Canadian proceedings which were initiated for the purposes of shielding Philip against the claim, it is troubling.

[42] The rights of creditors under the CCAA cannot be compromised unless,

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a) the creditor has been given a right to vote, in the appropriate class, on the proposed compromise;

b) the creditor's vote is in accordance with a value ascribed to the claim by a Court approved procedure;

c) the class in which the creditor has been appropriately placed has voted by a majority in number and two-thirds in value in favour of the compromise; and,

d) the Court has sanctioned the compromise on the basis that it is fair and reasonable (with considerable deference being given by the Court in this regard to the votes of the creditors).

43 See CCAA, section 4,6 and 12; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 510.

[44] Here, for the reasons I have outlined, what Philip proposes is inconsistent with the foregoing.

[45] Philip and the Lenders argue that the issues raised in this regard by the Respondents go entirely to the fairness find reasonableness of the U.S. and Canadian Plans, and that such considerations should be reserved for determination at the sanctioning hearings. I agree that generally speaking matters relating to fairness and reasonableness are better considered in the overall context of the final sanctioning hearing. Where, as here, however, the debtor company has acted earlier to obtain approval of a step in the restructuring process—in this case, the Class Action Settlement—which gives rise to issues that are inextricably linked to the overall fairness of the proposed Plan, and its compliance with statutory requirements, the consideration of those issues may be called for. This is one of those cases, in my opinion, because the reverberations of approving the proposed Settlement—in conjunction with the manner in which the debtor intends to treat other claimants directly affected by the settlement, have the effect of requiring those claimants to participate in the subsequent restructuring negotiations without a full deck of cards.

[46] Philip and the Lenders also argue that "comity" demands that this Court defer to the U.S. Bankruptcy Court in allowing the claims of Deloitte & Touche, the Underwriters, the former directors and officers, and the Royal

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Bank to be dealt with in the U.S. Plan. They point out that in its Initial Order in the CCAA proceedings this Court approved an international Protocol which provides for co-operation between the U.S. and Canadian Courts, to the extent possible. I do not think that either comity or the question of whether the claims will be dealt with ultimately under the U.S. Plan, are the issues here. In addition, the effect of the Protocol as I read it—given the circumstances outlined above—is to provide some protection to claimants on either side of the border from being swept into the rigours of the other countries regimes where to do so might prevent them from asserting their substantive rights under the applicable laws of their own jurisdiction.

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[47] In this regard, the following provisions of the Protocol are worthy of note:

> **(C) Comity and Independence of the Courts**
>
> 7. The approval and implementation of this Protocol shall not divest or diminish the U.S. Court's and the Canadian Court's independent jurisdiction over the subject matter of the U.S. Cases and the Canadian Case, respectively. By approving and implementing the Protocol, neither the U.S. Court, the Canadian Court, the Debtors nor any creditors or interested parties shall be deemed to have approved or engaged in any infringement on the sovereignty of the United States or Canada.
>
> 8. The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct and hearing of the U.S. Cases. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct and hearing of the Canadian Cases.
>
> 9. In accordance with the principles of comity and independence established in paragraphs 7 and 8 above, nothing contained herein shall be construed to:
>
> - increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the U.S. Court, the Canadian Court or any other court or tribunal in the United States or Canada...;
> - *preclude any creditor or other interested party from asserting such party's substantive rights under the applicable laws of the United States, Canada* or any other jurisdiction including, without limitation, the rights of interested parties or affected persons to appeal from the decisions taken by one or both of the Courts.
>
> (emphasis added)
>
> **(J) Preservation of Rights**
>
> 27. *Neither the terms of this Protocol nor any actions taken under the terms of this Protocol shall prejudice or affect the* powers, rights, *claims* and defenses *of* the Debtors and their estates, the Committee, the Estate Representatives, the U.S. Trustee *or any of the Debtors' creditors under applicable law, including the Bankruptcy Code and the CCAA.*
>
> (emphasis added)

[48] The extension of comity as between Courts in cross-border insolvency situations, and co-operation generally in such matters, are matters of great importance, to be sure, in order to facilitate the successful and orderly implementation of insolvency arrangements in such circumstances. Nothing I have said in these Reasons is intended to counter that ethic. However, comity and international co-operation do not mean that one Court must cede its authority and jurisdiction over its own process or over the application of the substantive laws of its own jurisdiction, whenever any kind of differences between the two jurisdictions may arise. Both the Protocol and the provisions of subsection 18.6(2) of the CCAA—which gives this Court authority "to 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 [the CCAA] with any foreign proceeding"—confirm this. Subsection 18.6(5) of the CCAA provides that "nothing in this section requires the Court to make any order that is *not in compliance with the laws of Canada* or to enforce any order made by a foreign court" (emphasis added).

[49] Here, there is yet no order of the U.S. Court, or treatment of the Claimants or Debtor to which comity may be extended, but there is—as I have outlined above—a failure to comply with the requirements of insolvency laws and procedure of Canada, as stipulated in the CCAA. I conclude, therefore, that the Canadian Plan as it presently stands is flawed because it seeks to exclude Canadian claimants from participation in its process by providing that their claims against Philip itself are to be governed by and treated in the U.S. proceedings while at the same time seeking to bind them to the provisions of the Canadian Plan, all without affording those claimants any right to vote.

[50] There was much debate in argument over whether the issue of treatment of the claims in the Canadian or U.S. proceedings was a function of the "real and substantial connection" of Philip with the U.S. jurisdiction, or a function of the "real and substantial connection" of the responding claimants and their claims to the Canadian proceedings. There is no doubt that Philip has a substantial connection with the United States in terms of the residence of the majority of shareholders and the location of the majority of operating assets. This connection certainly justifies the U.S. Chapter 11 proceedings. However, Philip also has a substantial connection to Canada, with its headquarters in Ontario, its Canadian subsidiaries, and its 94

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locations and 2,000 employees throughout the country. This connection, together with its array of Canadian creditors, sustains the resort to the CCAA proceedings.

[51] I do not think that the analysis falls to be made, in these particular circumstances, on purely *foreign conveniens* grounds. There is more to the situation than that. Philip initiated the CCAA proceedings and sought and accepted the benefits flowing from that step. The responding claimants seek to assert claims in the Canadian proceeding against the Canadian company which instituted those proceedings, in relation to matters arising out of a Canadian class proceeding or (in the case of Royal Bank) out of Canadian contracts and equipment largely located in Canada. The substantive law of Canada under the CCAA, and the procedures therein laid down, entitle them to assert those claims in the Canadian proceedings and to have a vote on the "Plan" which is set forth by the debtor company to compromise them. They should not be deprived of those substantive and procedural rights without having any say in the matter. Putting it another way, I am satisfied that the unquestioned "juridical advantage" which Philip seeks to achieve through its proposed treatment of the responding claimants is outweighed by the unquestioned "juridical disadvantage" on the part of the latter, given that the juridical scales would otherwise be tipped towards Philip through the resort to a stratagem which in my view is not sanctioned under the CCAA.

[52] Philip and the Lenders argue that there is great urgency to effect the restructuring process, and that requiring Philip to adhere to the procedures relating to classification, the valuation of claims, and voting—with the numerous issues that may have to be determined in that context—may well doom the process from the beginning. The Lenders are truculent, as their secured position leads them to be; they say that if the reorganization is not completed quickly they may simply abandon the process and exercise their rights to realize on their security, and the entire restructuring process will fail, with dire consequences for all concerned. Mr. McDougall, on behalf of Deloitte & Touche, characterized this as "the cry of doom".

[53] I am very aware of the need for timeliness in situations such as these—particularly given the sensitive nature of Consolidated Philip's service oriented business. However, I do not think that the need for a timely resolution alone is justification for depriving claimants of their substantive rights under Canadian law, and for abrogating their right to vote which lies at the very heart of the Canadian restructuring process from the creditor's perspective. It is the tool which gives them ultimate leverage in the bargaining process, and without it their practical rights—as well as their substantive and procedural ones—are greatly diminished.

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III—Conclusion

[54] An order will therefore go in terms of the foregoing.

The Class Proceedings

[55] As indicated, an Order is granted certifying the CPA Proceeding as a class proceeding, pursuant to subsection 5(1) of the *Class Proceedings Act,* as against Philip only and for settlement purposes only. The certification is without prejudice to any arguments the other defendants in the CPA Proceeding may wish to make in opposition to any element of the plaintiffs' claim including, but not limited to, certification of a class as against them. In addition, notice of the certification and of the pending motion for approval of the proposed Settlement is to given to members of the class as certified, in accordance with the provisions of section 17 of the *Act.* The question of approval of the Settlement, in its present form or some other form as may be advised, is adjourned to a date to be fixed which is more contemporaneous with the sanctioning hearing.

The Fairness/Substantive Law Issues

[56] Notwithstanding the observations in these Reasons about the Canadian Plan and the treatment of claims in the U.S. proceedings, I am reluctant to grant the sweeping declaratory relief sought by the Respondents. Whether the Plan is ultimately found to be fair and reasonable and in accordance with all necessary requirements remains still a matter for determination in the sanctioning hearing, after all the negotiations have been concluded and the votes counted. As much as is reasonably possible should be left to that process.

[57] I am prepared to make an Order, however—and do—declaring that the Canadian Plan as it is presently constituted fails to comply with the procedural and statutory requirement of the CCAA regime in that it seeks to exclude the responding claimants from participation in its process by providing that their claims against Philip itself are to be governed by and treated in the U.S. proceedings while at the same time seeking to bind them to the provisions of the Canadian Plan, all without affording those claimants any right to vote. Anything further in this respect, it seems to me, should be left to the negotiation arena.

[58] The position of the Royal Bank is slightly different. It is entitled, in addition, to an order,

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a) declaring that the claim of Royal Bank against Philip under certain leases shall be determined with reference to Canadian law and in the Canadian proceedings;

b) amending the Canadian Plan so that the Bank's claim is not dealt with in the U.S. Plan; and,

c) amending sub-paragraph 14(d) of the Initial Order granted in the CCAA proceeding on June 25, 1999—which presently permits Philip to terminate any and all arrangements entered into by them—by providing that the sub-paragraph does not apply to the Royal Bank leases of personal property.

[59] There will be no order as to costs.

[60] Order accordingly.

Orders accordingly.

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Tab 8

In the Matter of MtGox Co., Ltd.
[Indexed as: MtGox Co., Ltd. (Re)]

Ontario Reports

Ontario Superior Court of Justice,

Newbould J.

October 6, 2014

122 O.R. (3d) 465 | 2014 ONSC 5811

2014 ONSC 5811 (CanLII)

Case Summary

Bankruptcy and insolvency — Foreign proceedings — Japanese company with registered head office in Japan operating online exchange for purchase and sale of bitcoins — Bankruptcy proceedings in respect of company commenced in Japan following loss of large number of bitcoins — Bankruptcy trustee applying under s. 269 of Bankruptcy and Insolvency Act ("BIA") for recognition of foreign bankruptcy proceedings as a foreign main proceeding — Application allowed — Trustee entitled under s. 271 of BIA to automatic stay of actions or proceedings against company in Canada — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 269, 271.

M Ltd., a Japanese company with a registered head office in Japan, operated an online exchange for the purchase and sale of bitcoins. It suspended trading after discovering that approximately 850,000 bitcoins were missing. Bankruptcy proceedings in respect of M Ltd. were commenced in Japan. The bankruptcy trustee brought an application under the *Bankruptcy and Insolvency Act* ("*BIA*") for a declaration that the Japanese bankruptcy proceedings were a "foreign main proceeding" for the purposes of the *BIA* and for related relief.

Held, the application should be allowed.

A "foreign main proceeding" is defined in s. 268(1) of the *BIA* as a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests. Section 268(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. The evidence established that M Ltd. had the centre of its main interests in Japan. The Japanese bankruptcy proceeding was a foreign main proceeding. The trustee was entitled under s. 271(1) of the *BIA* to an automatic stay of actions or proceedings against M Ltd. in Canada.

Cases referred to

Babcock & Wilcox Canada Ltd. (Re), [2000] O.J. No. 786, [2000] O.T.C. 135, 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157, 95 A.C.W.S. (3d) 608 (S.C.J.); *Braycon International Inc. v. Everest & Jennings*

Canadian Ltd., [2001] O.J. No. 511, 26 C.B.R. (4th) 154, 103 A.C.W.S. (3d) 56 (S.C.J.); *Lear Canada (Re)*, [2009] O.J. No. 3030, 55 C.B.R. (5th) 57, 179 A.C.W.S. (3d) 46

(S.C.J.); *Lightsquared LLP (Re)*, [2012] O.J. No. 3184, 2012 ONSC 2994, 92 C.B.R. (5th) 321 (S.C.J.); *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, J.E. 91-123, 52 B.C.L.R. (2d) 160, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1

Statutes referred to

Bankruptcy Act of Japan, Act No. 75 of June 2, 2004

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2, Part XIII [as am.], ss. 267-284 [as am.], 268(1), (2), 269 [as am.], (1), 270 [as am.], (1), 271(1), (*a*)

Bankruptcy Code, 11 U.S. Code, c. 11, 15

Civil Rehabilitation Act (Japan), arts. 21(1), 25(iii)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [as am.] [page466]

Authorities referred to

Sarra, Janis, "Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings", 44 Tex. Intl. L.J. 547

UNCITRAL Model Law on Cross Border Insolvency

APPLICATION for an initial recognition order under Part XIII of the *Bankruptcy and Insolvency Act*.

Margaret R. Sims, for applicant.

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[1] **NEWBOULD J.**: — Nobuaki Kobayashi, in his capacity as the bankruptcy trustee of MtGox Co., Ltd., applied on October 3, 2014 for an initial recognition order pursuant to Part XIII (ss. 267 to 284) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 2, as amended ("*BIA*"):

(a) declaring and recognizing the bankruptcy proceedings commenced in respect of MtGox pursuant to the *Bankruptcy Act of Japan*, Act No. 75 of June 2, 2004 before the Tokyo District Court, Twentieth Civil Division as a foreign main proceeding for the purposes of s. 270 of the *BIA*;

(b) declaring that the trustee is a foreign representative pursuant to s. 268(1) of the *BIA*, and is entitled to bring this application pursuant to s. 269 of the *BIA*; and

(c) staying and enjoining any claims, rights, liens or proceedings against or in respect of MtGox and the property of MtGox.

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[2] I concluded at the hearing that the relief sought should be granted, for reasons to follow. These are my reasons.

[3] MtGox is a Japanese corporation formed in 2011. It is, and always has been, located and headquartered in Tokyo, Japan. From April 2012 to February 2014, its business was the operation of an online exchange for the purchase and sale of bitcoins through its website located at <http://www.mtgox.com>. Bitcoins are a form of digital currency. At one time, the MtGox exchange was reported to be the largest online bitcoin exchange in the world.

[4] On or about February 10, 2014, MtGox halted all bitcoin withdrawals by its customers after it was subject to what appears to have been a massive theft or disappearance of bitcoins held by it. MtGox suspended all trading on or about February 24, 2014, after it was discovered that approximately 850,000 bitcoins were missing. These events caused, among [page467] other things, MtGox to become insolvent and ultimately led to the Japan bankruptcy proceeding.

[5] On February 28, 2014, MtGox filed a petition for the commencement of a civil rehabilitation proceeding in the Tokyo Court pursuant to art. 21(1) of the Japanese *Civil Rehabilitation Act* ("*JCRA*"), reporting that it had lost almost 850,000 bitcoins. A civil rehabilitation proceeding under the *JCRA* is analogous to a restructuring proceeding in Canada pursuant to the *BIA* or the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

[6] Following the filing of the Japan civil rehabilitation petition, MtGox commenced an investigation with regard to the circumstances that led to the Japan civil rehabilitation. However, by mid-April 2014, the Tokyo Court decided to dismiss the Japan civil rehabilitation petition pursuant to art. 25(iii) of the *JCRA*, recognizing that under the circumstances it would be very difficult for MtGox to successfully prepare and obtain approval of a rehabilitation plan or otherwise successfully carry out the Japan civil rehabilitation.

[7] On April 24, 2014, the Tokyo Court entered the Japan bankruptcy order, formally commencing MtGox's Japan bankruptcy proceeding and appointing the applicant as bankruptcy trustee.

[8] MtGox has approximately 120,000 customers who had a bitcoin or fiat currency balance in their accounts as of the date of the Japan petition. The customers live in approximately 175 countries around the world.

[9] MtGox has been named as a defendant in a pending class action filed in the Ontario Superior Court of Justice. The notice of action and statement of claim were provided to the trustee under the Hague Convention on August 29, 2014.

Applicable Law

[10] Various theories as to how multinational bankruptcies should be dealt with have long existed. Historically, many countries adopted a territorialism approach under which insolvency proceedings had an exclusively national or territorial focus that allowed each country to distribute the assets located in that country to local creditors in accordance with its local laws. Universalism is a theory that posits that the bankruptcy law to be applied should be that of the debtor's home jurisdiction, that all of the assets of the insolvent corporation, in whichever

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country they are situated, should be pooled together and administered by the court of the home country. Local courts in other countries would be expected, under universalism, to recognize

and enforce [page468] the judgment of the home country's court. This theory of universalism has not taken hold.

[11] There is increasingly a move towards what has been called modified universalism. The notion of modified universalism is court recognition of main proceedings in one jurisdiction and non-main proceedings in other jurisdictions, representing some compromise of state sovereignty under domestic proceedings to advance international comity and co-operation. It has been advanced by the United Nations Commission on International Trade Law ("UNCITRAL") *UNCITRAL Model Law on Cross Border Insolvency* (the "Model Law"), which Canada largely adopted by 2009 amendments to the *CCAA* and the *BIA*.[1] Before this amendment, Canada had gone far down the road in acting on comity principles in international insolvency. See *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786, 18 C.B.R. (4th) 157 (S.C.J.) and *Lear Canada (Re)*, [2009] O.J. No. 3030, 55 C.B.R. (5th) 57 (S.C.J.).

[12] In the *BIA*, the Model Law was introduced by the enactment of Part XIII. Section 267 sets out the policy objectives of Part XIII as follows:

> 267. The purpose of this Part is to provide mechanisms for
>
> dealing with cases of cross-border insolvencies and to promote
>
> *(a)* cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
>
> (*b*) greater legal certainty for trade and investment;
>
> (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtors;
>
> (d) the protection and the maximization of the value of debtors' property; and
>
> (e) the rescue of financially troubled businesses to protect investment and preserve employment.
>
> *(f) Recognition of foreign proceeding*

[13] Section 269(1) of the *BIA* provides for the application by a foreign representative to recognize a foreign proceeding. Pursuant to s. 270(1) of the *BIA*, the court shall make an order recognizing the foreign proceeding if (i) the proceeding is a foreign [page469] proceeding and (ii) the applicant is a foreign representative of that proceeding.

[14] A foreign proceeding is broadly defined in s. 268(1) to mean a judicial or an administrative proceeding in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

[15] The Japan bankruptcy proceeding is a judicial proceeding dealing with creditors' collective interests generally under the *Bankruptcy Act of Japan*, which is a law relating to bankruptcy and insolvency, in which MtGox's property is subject to supervision by the Tokyo

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District Court, Twentieth Civil Division. As such, the Japan bankruptcy proceeding is a foreign proceeding pursuant to s. 268(1) of the *BIA*.

[16] Section 268(1) of the *BIA* defines a foreign representative as a person or body who is authorized in a foreign proceeding in respect of a debtor company to (a) administer the debtor's property or affairs for the purpose of reorganization or liquidation or (b) act as a representative in respect of the foreign proceeding.

[17] The trustee has authority, pursuant to the Japan Bankruptcy Act and the bankruptcy order made by the Tokyo District Court in the Japan bankruptcy proceeding, to administer MtGox's property and affairs for the purpose of liquidation and to act as a foreign representative. Thus, the trustee is a foreign representative pursuant to s. 268(1) of the *BIA*.

[18] In the circumstances, it is appropriate to recognize the Japan bankruptcy proceeding as a foreign proceeding.

(b) *Foreign main proceeding*

[19] A foreign proceeding can be a foreign main proceeding or a foreign non-main proceeding. If the foreign proceeding is recognized as a main proceeding, there is an automatic stay provided in s. 271(1) against lawsuits concerning the debtor's property, debts, liabilities or obligations, and prohibitions against selling or disposing of property in Canada. If the foreign proceeding is recognized as a non-main proceeding, there is no such automatic stay and prohibition and it is necessary for an application to be made to obtain such relief. For that reason, it is advantageous for a foreign representative to seek an order recognizing the foreign proceeding as a main proceeding. The trustee in this case has made such a request.

[20] A foreign main proceeding is defined in s. 268(1) as a foreign proceeding in a jurisdiction where the debtor company has [page470] the centre of its main interests ("COMI"). Section 268(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.

[21] In considering whether the registered office presumption has been rebutted, a court should consider the following factors in determining COMI: (i) the location is readily ascertainable by creditors; (ii) the location is one in which the debtor's principal assets and operations are found; and (iii) the location is where the management of the debtor takes place. See *Lightsquared LLP* (*Re)*, [2012] O.J. No. 3184, 92 C.B.R. (5th) 321 (S.C.J.).

[22] The trustee relies on the following facts in support of his position that the COMI of MtGox is in Japan and not in Canada:

(1) MtGox has no offices in Canada, there are no Canadian subsidiaries and no assets in located in Canada;

(2) MtGox is and has always been organized under the laws of Japan;

(3) MtGox's registered office and corporate headquarters are, and have always been, located in Japan, and its books and records are located at its head office in Japan;

(4) the debtor's sole director and representative director, Mr. Karpeles, resides, and at all relevant times has resided, in Japan;

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(5) most of the MtGox's bank accounts are located in Japan, including the primary account for operating its business;

(0) MtGox's parent company, Tibanne, provided operational and administrative services to it, including the provision of its primary workforce, in Japan;

(1) MtGox's website clearly disclosed to customers and other third parties that it is a Japanese corporation that is located in Japan;

(2) upon the filing of the Japan petition, MtGox commenced an investigation in Japan with regard to the circumstances that led to the Japan civil rehabilitation, which investigation was subject to the oversight of the Tokyo Court.

[23] Taking into account this evidence, I am satisfied that the COMI of MtGox is its registered head office in Japan and that the Japan bankruptcy proceeding is a foreign main proceeding. [page471]

Stay of Proceedings

[24] The effect of recognition of a foreign main proceeding is an automatic grant of the relief set out under s. 271(1) of the *BIA*:

271(1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding,

(a) no person shall commence or continue any action, execution or other proceedings concerning the debtor's property, debts, liabilities or obligations;

(b) if the debtor carries on a business, the debtor shall not, outside the ordinary course of the business, sell or otherwise dispose of any of the debtor's property in Canada that relates to the business and shall not sell or otherwise dispose of any other property of the debtor in Canada; and

(c) if the debtor is an individual, the debtor shall not sell or otherwise dispose of any property of the debtor in Canada.

[25] The trustee seeks recognition of the Japan bankruptcy proceeding in an effort to maximize recoveries to, and provide for an equitable distribution of value among, all creditors. In particular, the trustee believes that the enjoining of the ongoing litigation against MtGox in Canada, in conjunction with the protections afforded by the Japan bankruptcy proceeding, is essential to this effort.

[26] In *Braycon International Inc. v. Everest & Jennings Canadian Ltd.*, [2001] O.J. No. 511, 26 C.B.R. (4th) 154 (S.C.J.), prior to the adoption of the Model Law in Canada, a stay of an action in Ontario against a United States corporation subject to bankruptcy proceedings in the U.S. under c. 11 of the U.S. *Bankruptcy Code*, 11 U.S. Code, c. 15, in which there was a stay of all proceedings against it was ordered pursuant to the comity principles recognized in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135.

[27] The Model Law, which was adopted in Japan in 2000, provides a transparent regime for the right of foreign creditors to commence or participate in an insolvency proceeding in another state. See Dr. Janis Sarra, *supra*, at footnote 1. Section 271(1)(*a*) of the *BIA* provides for an automatic stay in furtherance of that objective. As the Japanese foreign proceeding is a foreign

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main proceeding, the trustee is entitled to that automatic stay. The Tokyo Court has order ordered a process for claims to be made with a filing date of no later than May 29, 2015.

[28] There have been two class actions commenced against MtGox in the U.S. The trustee has obtained recognition of the Japan bankruptcy proceedings in the U.S. under c. 15 of the [page472] U.S. *Bankruptcy Code* as a foreign main proceeding, resulting in an automatic stay of the U.S. litigation. The trustee is entitled to the same relief in Canada relating to the class action filed in Ontario.

[29] At the conclusion of the hearing on October 3, 2014, I signed an order reflecting these reasons.

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Application allowed.

Notes

1 See Dr. Janis Sarra, "Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings", 44 Tex. Intl. L.J. 547.

End of Document

Tab 9

SUPREME (.`,7JURT
OF NOVA SCOTIA

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HALIFAX, N.S.

2019 Hfx No. 484742

IN THE SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF:

Application by Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. d/b/a Quadriga CX and Quadriga Coin Exchange (collectively referred to as the **"Companies"** and the **"Applicants"),** for relief under the *Companies' Creditors Arrangement Act*

ORDER
(Representative Counsel Appointment Order)

BEFORE THE HONOURABLE JUSTICE MICHAEL J. WOOD

UPON MOTION, in the proceedings of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation, and 0984750 B.C. Ltd. dba Quadriga CX and Quadriga Coin Exchange (collectively, the **"Applicants"),** under the *Companies' Creditors Arrangement Act* (the **"CCAA Proceedings"),** by certain of the users of the Quadriga platform holding significant balances in their personal accounts, representing obligations payable in the form of: (i) cash obligations; and (ii) obligations to hold cryptocurrency coins (the **"Affected Users")** for an order, among other things, appointing counsel to represent the interests of the Affected Users and establishing an official committee of Affected Users;

UPON READING the Affidavit of Xitong Zou sworn February 4, 2019, the Affidavit of Amanda McLachlan sworn February 11, 2019, the Affidavit of Parham Pakjou sworn February 7, 2019, the Affidavit of Giuseppe Burtini sworn February 8, 2019, the Affidavit of Ryan Kneer sworn February 8, 2019, the Affidavit of Richard Kagerer sworn February 11, 2019, and the First Report of Ernst & Young Inc., in its capacity as Court-appointed Monitor of the Applicants (the **"Monitor");**

AND UPON HEARING counsel to the Applicants, counsel for the Monitor, Bennett Jones LLP and McInnes Cooper, Miller Thomson LLP and Cox & Palmer, and Osler, Hoskin & Harcourt LLP and Patterson Law, each as proposed representative counsel for the Affected Users and such other individuals who appeared and were heard on the Motion;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. If necessary, the service of the Notice of Motion, the Motion Record and supporting documents are hereby abridged and service is hereby deemed adequate notice so that the Motion is properly returnable today and further service thereof is hereby dispensed with.

2. Miller Thomson LLP, as lead counsel, and Cox & Palmer, as local counsel, are hereby appointed as representative counsel (collectively, **"Representative Counsel")** to represent the interests of the Affected Users (the **"Purpose")** by discharging the following duties and activities:

   (a) communicating with the Official Committee of Affected Users and the Affected Users regarding the CCAA Proceedings through any medium of communication in Representative Counsel's discretion, including, the establishment of a website located at www.millerthomson.com/en/quadriga (the **"Representative Counsel's Website"),** conference calls, email, Reddit, or other form of electronic communication;

   (b) communicating and liasing with the Applicants, the Monitor or other third parties (as the case may be) in respect of the CCAA Proceedings and the interests of Affected Users therein;

   (c) representing and advocating for the interests of Affected Users (other than Opt-out Individuals), including, Affected Users' privacy interests, preparing court materials and attending any court hearings in respect of these CCAA Proceedings, negotiating and commenting on behalf of Affected Users on any plan of arrangement of the Applicants, and representing and assisting Affected Users (other than Opt-out Individuals) in any claims process commenced by the Applicants;

   (d) identifying potential conflicts of interest among Affected Users and taking any steps necessary to address such conflicts of interest; and

   (e) such other activities and duties that ancillary to the Purpose, with the consent of the Monitor or as otherwise ordered by this Court.

3. Without a further Order of this Court, the following activities are not consistent with the Purpose:

   (a) undertaking an independent investigation with respect to the Applicants and their assets; and

   (b) commencing legal proceedings against the Applicants' directors and officers. For greater certainty, Representative Counsel may, subject to receiving instructions from the Official Committee of Affected Users and the appropriateness thereof, oppose any relief sought within these CCAA Proceedings.

4. Representative Counsel shall not be required to perform or complete any instruction, activity or duty unless, in the Representative Counsel's view, such activity or duty is consistent with or ancillary to the Purpose. Representative Counsel shall have no obligation to consult with, follow the instructions of, or provide an opinion to any individual Affected User in connection with the discharge of its mandate under this Order.

5. A committee of Affected Users (the **"Official Committee of Affected Users"),** comprised of a minimum of five (5), and no more than seven (7), individuals holding claims against the Applicants (the **"Committee Members")** shall be determined by Representative Counsel, in consultation with the Monitor, to act as representatives of all Affected Users (excluding Opt-Out Individuals (as defined below), if any) in the CCAA Proceedings, to act in the overall best interests of the Affected Users, and to advise and where appropriate instruct Representative Counsel. Representative Counsel may rely upon the advice and instructions received from the Official Committee of Affected Users in carrying out the mandate of the Representative Counsel without further communication with or instructions from Affected Users, except as may be recommended by Representative Counsel or ordered by this Court.

6. The Representative Counsel and Monitor are directed to make best efforts to appoint at least five (5) Committee Members to the Official Committee of Affected Users without delay. Prior to the appointment of the Official Committee of Affected Users, Representative Counsel is hereby authorized to take steps or actions on behalf of the Affected Users consistent with the Purpose in their sole discretion and without instruction from the Official Committee of Affected Users or any Committee Members.

7. The Committee Members shall be identified to the Court by the Monitor as soon as practicable following the selection of the Committee Members by Representative Counsel, in consultation with the Monitor, and such report shall be posted on the Monitor's case website located at www.ey.comica/quadriga (the **"Monitor's Website").**

8. Any Committee Member may resign from the Official Committee of Affected Users by giving seven (7) calendar days' notice to Representative Counsel. In consultation with the Monitor, Representative Counsel shall select a replacement Committee Member following any such resignation. If the number of Committee Members falls below five (5) due to resignations or otherwise, Representative Counsel may continue to receive instruction from the remaining Committee Members.

9. Subject to the provisions of this Order or any further Order of this Court, the Official Committee of Affected Users shall establish procedures with Representative Counsel for its own governance, including, procedures for instructing Representative Counsel and for the removal and addition of Committee Members provided that any addition of new Committee Members shall be determined in consultation with the Monitor.

10. With the exception of Opt-Out Individuals, (a) the Official Committee of Affected Users and Representative Counsel shall represent all Affected Users in the CCAA Proceedings; (b) the Affected Users shall be bound by the actions of the Official Committee of

Affected Users and Representative Counsel in the CCAA Proceedings; and (c) the Official Committee of Affected Users shall be entitled, on advice of Representative Counsel, to reach any settlement agreements, advocate on behalf of the Affected Users and compromise any rights, entitlements or claims of the Affected Users, subject to approval of the Court.

11. The Applicants shall provide to Representative Counsel, subject to confidentiality arrangements satisfactory to the Applicants and the Monitor, each acting reasonably, without charge, in machine-readable format, the names, last known addresses and last known email addresses (if any) of all the Affected Users (the **"Affected User Information"),** excluding Opt-Out Individuals, if any, who have opted out prior to delivery of the Affected User Information. The Affected User Information shall be kept confidential by Representative Counsel and shall not be disclosed to any other person, including the Official Committee of Affected Users and the Committee Members, unless ordered otherwise by the Court.

12. Subject to confidentiality arrangements satisfactory to the Applicants and the Monitor, each acting reasonably, and any claim of privilege by the Applicants or the Monitor, the Applicants and the Monitor have the obligation to provide Representative Counsel with such documents and data as may be reasonably relevant to matters relating to the issues affecting the Affected Users in the CCAA Proceedings (the **"Information"),** without charge.

13. The provision of the Information to the Representative Counsel pursuant to paragraph 12 of this Order constitutes a limited waiver of any applicable privilege which may attach to the Information in respect of the Representative Counsel only (the **"Limited Waiver").**

14. The Limited Waiver is solely for the purpose of permitting the Representative Counsel to access the Information and for no other purpose.

15. The Limited Waiver applies only in respect of the Representative Counsel and shall under no circumstances be extended to, or apply to any other person or for any other purpose, and any privilege of the Monitor and any persons attaching to the Information is expressly confirmed and preserved as against any other persons and for any other purpose.

16. In providing the Affected User Information and the Information, the Applicants are not required to obtain express consent from such Affected Users authorizing disclosure of the Affected User Information or the Information to Representative Counsel and, further, in accordance with section 7(3) of the *Personal Information Protection and Electronic Documents Act,* this Order shall be sufficient to authorize the disclosure of the Affected User Information or the Information, without knowledge or consent of the individual Affected Users. The Affected User Information and Information shall only be used for the Purpose in the CCAA Proceedings and for no other or improper purpose.

17. Notice of the granting of this Order substantially in the form attached hereto as Schedule "A" **("Notice")** shall hereby be:

(a) posted by the Monitor or the Applicants on (i) the Monitor's Website; (ii) the Applicants' website located at www.quadrigacx.com; and (iii) the Applicants' subreddit located at www.reddit.com/r/quadrigacx, in each case, within two (2) business days of the date of this Order;

(b) published by the Monitor, in the Globe and Mail, within seven (7) calendar days of the date of this Order; and

(c) sent by the Monitor to Affected Users who have claims against the Applicants in excess of $1,000 according to the Applicants' books and records via email at the last known email addresses for such Affected Users in the Applicants' books and records, within seven (7) calendar days of the date of this Order.

18. Any individual Affected User who does not wish to be represented by Representative Counsel and the Official Committee of Affected Users shall, within sixty (60) calendar days of the date of this Order, notify the Monitor, in writing, that he or she is opting out of representation by the Official Committee of Affected Users and Representative Counsel by delivering to the Monitor an English or French opt-out notice substantially in the form attached hereto as Schedule "B" (each an **"Opt-Out Notice"),** and shall thereafter not be bound by the actions of the Official Committee of Affected Users or Representative Counsel and shall represent himself of herself or be represented by any counsel that he or she may retain exclusively at his or her own expense in the CCAA Proceedings (any such persons who deliver an Opt-Out Notice in compliance with the terms of this paragraph, **"Opt-Out Individuals").** The Monitor shall keep confidential the identity of the Opt-Out Individuals but shall deliver copies of all Opt-Out Notices received to counsel for the Applicants and Representative Counsel as soon as practicable following receipt of the Opt-Out Notices. In accordance with section 7(3) of the *Personal Information Protection and Electronic Documents Act,* this Order shall be sufficient to authorize the disclosure of the Opt-Out Notices to counsel for the Applicants and Representative Counsel, without knowledge or consent of the Opt-Out Individuals. For greater certainty, the Official Committee of Affected Users and Representative Counsel have no obligation to represent the interests of the Opt-Out Individuals.

19. The form of Opt-Out Notice shall be posted by the Monitor or the Applicants on (i) the Monitor's Website; (ii) the Applicants' website located at www.quadrigacx.com; (iii) the Representative Counsel's Website located at www.millerthomson.com/en/quadrigacx and (iii) Applicants' subreddit located at www.reddit.com/r/quadrigacx, in each case, within two (2) business days of the date of this Order.

20. All written notices required to be given to the Monitor and/or Representative Counsel shall be given by hand delivery, courier or email as follows:

(b) to the Monitor:

Ernst & Young Inc.
Court-appointed Monitor of the Applicants
RBC Waterside Centre

1871 Hollis Street Suite 500
Halifax, Nova Scotia B3J 0C3
Attn: George Kinsman
Email: george.c.kinsman@ca.ey.com

with a copy to:

Stikeman Elliot LLP
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Attn: Liz Pillon / Lee Nicholson
Email: 1pillon@stikeman.com / leenicholson@stikeman.com

(c) to Representative Counsel:

Miller Thomson LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, ON M5H 3S1

Attn: Asim Iqbal / Greg Azeff
Email: aiqbal@millerthomson.com / gazeff@millerthomson.com

0. Representative Counsel shall be given notice of all motions in these CCAA Proceedings and notice of any motion provided to Representative Counsel shall be deemed to be notice to all of the Affected Users except for the Opt-Out Individuals.

1. With the consent of the Monitor or further order of the Court, the Official Committee of Affected Users and Representative Counsel may retain advisors, experts and consultants **("Advisors")** to provide advice to and to assist the Official Committee of Affected Users and Representative Counsel in the exercise of their duties in relation to the Purpose.

2. Subject to funding being available in the Disbursement Account (as defined in the Initial Order of Justice Wood dated February 5, 2019 (the **"Initial Order")),** and without prejudice to any claim of Representative Counsel against the Applicants and their property for unpaid fees and disbursements, Representative Counsel shall be paid its reasonable and documented fees and disbursements (including disbursements relating to Advisors retained by Representative Counsel) by the Applicants to an aggregate maximum of $250,000, excluding disbursements (the **"Initial Fee Cap"),** which shell subject to adjustments in accordance with paragraph 24 of this Order. Representative Counsel shall be paid on a weekly or bi-weekly basis upon rendering its accounts to the Monitor for fulfilling its mandate in accordance with this Order, and subject to such redactions to the invoices as are necessary to maintain solicitor-client privilege between Representative Counsel and the Official Committee of Affected Users. Representative Counsel or the Monitor are at liberty to bring another motion before the Court at any time

to seek any amendment or modification to the funding arrangements set forth in this Order. In the event of any disagreement with respect to such fees and disbursements, such disagreement may be remitted to this Court for determination.

21. In consultation with the Monitor, Representative Counsel shall prepare a budget from time to time (or as requested by the Monitor or directed by this Court) for anticipated fees and disbursements (the **"Budget"),** and, as necessary or desirable, the Budget shall be provided to the Monitor and the Court for the purpose of determining whether the Initial Fee. Cap or other funding arrangements should be amended or modified. A motion for the modification of the Initial Fee Cap may be conducted by way of teleconference on seven (7) calendar days' notice to the Service List.

22. Nothing contained in this Order shall require Representative Counsel to incur any disbursement unless Representative Counsel is satisfied that funds are available for reimbursement of the same.

23. Representative Counsel shall pass their accounts from time to time before a judge of the Court or a referee appointed by a judge of the Court.

24. Representative Counsel shall be entitled to the benefit of the Administration Charge (as defined in the Initial Order) and shall rank *pro-rata* with the other beneficiaries of the Administrative Charge.

25. Payments made by the Applicants pursuant to this Order do not and will not constitute preferences, fraudulent conveyances, transfers of undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable laws.

26. Representative Counsel and the Official Committee of Affected Users are hereby authorized to take all steps and do all acts necessary or desirable to carry out the terms of this Order, including, posting relevant non-confidential information and documents to the Representative Counsel's Website for the Affected Users.

27. The Applicants, the Monitor and Representative Counsel shall be at liberty, and are hereby authorized, at any time, to apply to this Court for advice and directions in respect of the fulfillment and scope of the duties of Representative Counsel under the provisions of this Order or any variation of the powers and duties of Representative Counsel under this Order, which shall be brought on notice to the Applicants, the Monitor, Representative Counsel and other interested parties listed on the service list posted on the Monitor's Website, unless this Court orders otherwise.

28. Representative Counsel and the Committee Members shall have no personal liability or obligations as a result of the performance of their duties in carrying out the provisions of this Order and any subsequent orders of the Court in the CCAA Proceedings, save and except for liability arising out of negligence or actionable misconduct.

29. No action or other proceeding may be commenced against Representative Counsel or the Official Committee of Affected Users in respect of the performance of their duties under this Order without leave of this Court on seven (7) calendar days' notice to the

Applicants, the Monitor, Representative Counsel and the Official Committee of Affected Users.

30. The aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States is requested to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

31. Costs to the Representative Counsel for the motion to appoint representative counsel shall be fixed at $25,000 plus disbursements and applicable taxes and shall not form part of the fees and disbursements addressed under the Initial Fee Cap.

32. This Order and all of its provisions are effective as of 12:01 a.m. Atlantic Standard Time on the 19th day of February, 2019. For greater certainty, any timelines set out in this Order by when actions or notices must be performed or delivered shall commence from the date that this Order is issued.

Issued at Halifax, Province of Nova Scotia, this are, day of February, 2019.

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A NDA HAWBOLDT
Deputy Prothonotary

SCHEDULE "A"

NOTICE **OF REPRESENTATIVE COUNSEL ORDER**

QUADRIGA FINTECH SOLUTIONS CORP., WHITESIDE CAPITAL CORPORATION, AND 0984750 B.C. LTD. D/B/A QUADRIGA CX AND QUADRIGA COIN EXCHANGE (COLLECTIVELY, THE **"APPLICANTS")**

NOTICE TO AFFECTED USERS:

On February 5, 2019, the Applicants commenced proceedings under the *Companies' Creditors Arrangement Act* **("CCAA")** pursuant to an Order (the **"Initial Order")** of the Supreme Court of Nova Scotia (the **"Court").** Ernst & Young Inc. has been appointed by the Court as monitor in the Applicants' CCAA proceedings (the **"Monitor").**

TAKE NOTICE THAT, pursuant to an Order of the Court, Miller Thomson LLP, as lead counsel, and Cox & Palmer, as local counsel (collectively, **"Representative Counsel"),** were appointed as representative counsel to represent the interests of users of the Applicants' cryptocurrency exchange platform (the **"Affected Users")** in the CCAA proceedings.

IF YOU WISH TO SERVE on the committee of Affected Users (the **"Official Committee of Affected Users")** which will provide information to and instruct Representative Counsel in connection with the CCAA proceedings, please deliver a package containing (i) your name and address; (ii) your client-ID for the Applicants' cryptocurrency exchange platform (iii) the amount of your claim against the Applicants, (iv) the nature of such claim (fiat currency, cryptocurrency, "pending" withdrawal and/or "completed" withdrawal) owed to you by the Applicants; (v) a statement of no more than 200 words expressing your interest in becoming a Committee Member and summarizing your qualifications; and (v) your resume or PDF copy of your Linkedln profile, and (vi) such other information or documentation as may be requested by Representative Counsel or the Monitor, to Representative Counsel by email at CommitteeApplications@millerthomson.com by •, 2019. **IF YOU SERVE ON THE OFFICIAL COMMITTEE OF AFFECTED USERS YOUR NAME WILL BE PUBLICALLY IDENTIFIED TO THE COURT AND OTHER AFFECTED USERS.** Service on the Official Committee of Affected Users will also be a significant time commitment.

IF YOU DO NOT WISH TO BE REPRESENTED by Representative Counsel and the Official Committee of Affected Users, you must, before •, 2019, provide an Opt-Out Notice (a copy of which can be obtained from the Monitor's website located at www.ey.com/ca/quadriga) indicating that you wish to opt-out of such representation and send the completed Opt-Out Notice to:

To the Monitor:

Ernst & Young Inc. acting in its capacity as Court-appointed Monitor of the Applicants

RBC Waterside Centre
1871 Hollis Street Suite 500
Halifax, Nova Scotia B3J 0C3

Fax: 902-420-0503

With a copy to Representative Counsel:

Miller Thomson LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, ON M5H 3S1

Attn: Asim Iqbal / Greg Azeff
Email: quadrigaCX@millerthomson.com

Email: quadriga.monitor@ca.ey.com

Persons requiring further information should review the website established by the Monitor at www.ey.com/ca/quadriga or email the Monitor at quadriga.monitor@ca.ey.com.

SCHEDULE "B"

OPT-OUT NOTICE

QUADRIGA FINTECH SOLUTIONS CORP., WHITESIDE CAPITAL CORPORATION, AND 0984750 B.C. LTD. D/B/A QUADRIGA CX AND QUADRIGA COIN EXCHANGE (COLLECTIVELY, THE "APPLICANTS")

TO: Ernst & Young Inc. acting in its capacity as Court-appointed Monitor of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd.
RBC Waterside Centre
1871 Hollis Street Suite 500
Halifax, Nova Scotia B3J 0C3

Fax: 902-420-0503
Email: quadriga.monitor@ca.ey.com

I hereby provide written notice that I do not wish to be represented by Miller Thomson LLP and Cox & Palmer, representative counsel ("Representative Counsel") for users of the Applicants' cryptocurrency exchange platform (the "Affected Users") in their proceedings under the *Companies' Creditors Arrangement Act* before the Supreme Court of Nova Scotia (the "CCAA Proceedings"). I understand that, by opting out of representation, if I wish to take part in the CCAA Proceedings, I would need to do so as an independent party. I am responsible for retaining my own legal counsel should I choose to do so, and that I would be personally liable for the costs of my own legal representation.

I understand that a copy of this Opt-Out **Notice will be provided to the Representative Counsel and to the Applicants.**

_____ _____
Date Signature

Name (please print): _____

Address: _____

_____

_____

Telephone: _____

E-mail _____

Tab 10

FORM 78.05

SUPREME COURT
OF NOVA SCOTIA

MAR 1 9 2019

HALIFAX, N.S.

2019 Hfx No. 484742

IN THE SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF:

Application by Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. dba Quadriga CX and Quadriga Coin Exchange (collectively referred to as the "Companies" and the "Applicant"), for relief under the Companies' Creditors Arrangement Act

Sgd.
MJW, J.

ORDER
(Appointing the Official Committee of Affected Users)

BEFORE THE HONOURABLE JUSTICE MICHAEL J. WOOD IN CHAMBERS

WHEREAS on February 28, 2019 the Court issued its Order appointing Miller Thomson LLP and Cox & Palmer as Representative Counsel (the **"Representative Counsel Order");**

AND WHEREAS the Representative Counsel Order required, among other things, that Representative Counsel, in consultation with Ernst & Young Inc. in its capacity as court-appointed Monitor of the Applicants, establish the Official Committee of Affected Users (the **"Official Committee")** comprising of five to seven users affected by the shutdown of the QuadrigaCX cryptocurrency exchange platform **("Affected Users");**

AND WHEREAS, Representative Counsel, in consultation with the Monitor, conducted a process (the "Selection Process") to call for applications from Affected Users wishing to serve on the Official Committee, to interview applicants and to select the Committee Members (as defined below) for approval by the Monitor;

AND WHEREAS through the Selection Process, Representative Counsel has identified seven candidates for appointment to the Official Committee, as well as two alternate candidates, which are identified on Schedule "2" (the **"Committee Members"** or **"Alternates",** as the context requires);

AND WHEREAS the Monitor has approved the Committee Members and the Alternates;

AND UPON MOTION OF Representative Counsel to appoint the Official Committee; **IT IS**

HEREBY ORDERED AND DECLARED THAT:

1. Terms used but not otherwise defined herein are defined in the Representative Counsel Order, attached at Schedule "1".

2. The Official Committee is hereby constituted.

3. The Committee Members may change from time to time, including by resignation or, with the consent of the Monitor or further order of the Court, removal and replacement from the nffici·i! Committee.

4. Representative Counsel, the Official Committee and the Committee Members shall have no personal liability or obligations as a result of the performance of their duties in carrying out the provisions of

the Representative Counsel Order and any subsequent orders of the Court in the CCAA Proceedings, save and except for liability arising out of negligence or actionable misconduct.

5. A Committee Member shall not disclose any data, communication or information that either Representative Counsel or the Monitor advises is confidential or privileged.

6. Committee Members shall be paid their reasonable out-of-pocket expenses provided such expenses are necessary in order to fulfill the duties of such Committee Member and are approved by the Monitor in advance.

7. No action or other proceeding may be commenced against Representative Counsel or the Official Committee or a Committee Member in respect of the performance of their duties without leave of this Court on seven (7) calendar days' notice to the Applicants, the Monitor, and Representative Counsel.

8. This Order and all of its provisions are effective as of 12:01 Atlantic Standard Time on the 18th day of March, 2019.

Issued at Halifax, Province of Nova Scotia, this 18th day of March, 2019.

f r ' s 1 A .
DEPUTY PROTHONOTARY

TANYA MCCARTHY
Deputy Prothonotary

iN fHE SUPHEME COURT OF I'·10VA SCo·flA
I hereby cercify that the foregoing document, identified by the Seas of the Court, is a true copy of the original document on file herein.
Dated the ft-t^V\- day of Kkav-6-\. A.D. 25311

SCHEDULE "I"

2019

Hfx No. 484742

IN THE SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF:

Application by Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. d/b/a Quadriga CX and Quadriga Coin Exchange (collectively referred to as the "Companies" and the "Applicants"), for relief under the *Companies' Creditors Arrangement Act*

ORDER
(Representative Counsel Appointment Order)

EFORE THE HONOURABLE JUSTICE MICHAEL J. WOOD

UPON MOTION, in the proceedings of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation, and 0984750 B.C. Ltd. dba Quadriga CX and Quadriga Coin Exchange (collectively, the "Applicants"), under the *Companies' Creditors Arrangement Act* (the "CCAA Proceedings"), by certain of the users of the Quadriga platform holding significant balances in their personal accounts, representing obligations payable in the form of: (i) cash obligations; and (ii) obligations to hold cryptocurrency coins (the "Affected Users") for an order, among other things, appointing counsel to represent the interests of the Affected Users and establishing an official committee of Affected Users;

UPON READING the Affidavit of Xitong Zou sworn. February 4, 2019, the Affidavit of Amanda McLachlan sworn February 11, 2019, the Affidavit of Parham Pakjou sworn February 7, 2019, the Affidavit of Giuseppe Burtini sworn February 8, 2019, the Affidavit of Ryan Kneer sworn February 8, 2019, the Affidavit of Richard Kagerer sworn February 11, 2019, and the First Report of Ernst & Young Inc., in its capacity as Court-appointed Monitor of the Applicants (the "Monitor");

AND UPON HEARING counsel to the Applicants, counsel for the Monitor, Bennett Jones LLP and McInnes Cooper, Miller Thomson LLP and Cox & Palmer, and Osier, Hoskin & Harcourt LLP and Patterson Law, each as proposed representative counsel for the Affected Users and such other individuals who appeared and were heard on the Motion;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. If necessary, the service of the Notice of Motion, the Motion Record and supporting documents are hereby abridged and service is hereby deemed adequate notice so that the Motion is properly returnable today and further service thereof is hereby dispensed with.

2. Miller Thomso❑ LLP, as lead counsel, and Cox & Palmer, as local counsel, are hereby appointed as representative counsel (collectively, **"Representative Counsel")** to represent the interests of the Affected Users **(the "Purpose") by discharging the following** duties and activities:

   (a) communicating with the Official Committee of Affected Users and the Affected Users regarding the CCAA Proceedings through any medium of communication in Representative Counsel's discretion, including, the establishment of a website located at www.millerthomson.cornien/quadriga (the **"Representative Counsel's Website"),** conference calls, email, Reddit, or other form of electronic communication;

   (b) communicating and !lasing with the Applicants, the Monitor or other third parties (as the case may be) in respect of the CCAA Proceedings and the interests of Affected Users therein;

   (c) representing and advocating for the interests of Affected Users (other than Opt-out Individuals), including, Affected Users' privacy interests, preparing court materials and attending any court hearings in respect of these CCAA Proceedings, negotiating and commenting on behalf of Affected Users on any plan of arrangement of the Applicants, and representing and assisting Affected Users (other than Opt-out Individuals) in any claims process commenced by the Applicants;

   (d) identifying potential conflicts of interest among Affected Users and taldng any steps necessary to address such conflicts of interest; and

   (e) such other activities and duties that ancillary to the Purpose, with the consent of the Monitor• or as otherwise ordered by this Court.

3. Without a further Order of this Court, the following activities are not consistent with the Purpose:

   (a) undertaking an independent investigation with respect to the Applicants and their assets; and

   (b) commencing legal proceedings against the Applicants' directors and officers. For greater certainty, Representative Counsel may, subject to receiving instructions from the Official Committee of Affected Users and the appropriateness thereof, oppose any relief sought within these CCAA Proceedings.

4. Representative Counsel shall not be required to perform or complete any instruction, activity or duty unless, in the Representative Counsel's view, such activity or duty is consistent with or ancillary to the Purpose. Representative Counsel shall have no obligation to consult with, follow the instructions of, or provide an opinion to any individual Affected User in connection with the discharge of its mandate under this Order.

5. A committee of Affected Users (the "Official Committee of Affected Users"), comprised of a minimum of five (5), and no more than seven (7), individuals holding claims against the Applicants (the "Committee Members") shall be determined by Representative Counsel, in consultation with the Monitor, to act as representatives of all Affected Users (excluding Opt-Out Individuals (as defined below), if any) in the CCAA Proceedings, to act in the overall best interests of the Affected Users, and to advise and where appropriate instruct Representative Counsel. Representative Counsel may rely upon the advice and instructions received from the Official Committee of Affected Users in carrying out the mandate of the Representative Counsel without further communication with or instructions from Affected Users, except as may be recommended by Representative Counsel or ordered by this Court.

6. The Representative Counsel and Monitor are directed to make best efforts to appoint at least five (S) Committee Members to the Official Committee of Affected Users without delay. Prior to the appointment of the Official Committee of Affected Users, Representative Counsel is hereby authorized to take steps or actions on behalf of the Affected Users consistent with the Purpose in their sole discretion and without instruction from the Official Committee of Affected Users or any Committee Members.

7. The Committee Members shall be identified to the Court by the Monitor as soon as practicable following the selection of the Committee Members by Representative Counsel, in consultation with the Monitor, and such report shall be posted on the Monitor's case website located at www.ey.comica/quadriga (the "Monitor's Website").

8. Any Committee Member may resign from the Official Committee of Affected Users by giving seven (7) calendar days' notice to Representative Counsel. In consultation with the Monitor, Representative Counsel shall select a replacement Committee Member following any such resignation. If the number of Committee Members falls below five (5) due to resignations or otherwise, Representative Counsel may continue to receive instruction from the remaining Committee Members,

9. Subject to the provisions of this Order or any further Order of this Court, the Official Committee of Affected Users shall establish procedures with Representative Counsel for its own governance, including, procedures for instructing Representative Counsel and for the removal and addition of Committee Members provided that any addition of new Committee Members shall be determined in consultation with the Monitor.

10. With the exception of Opt-Out Individuals, (a) the Official Committee of Affected Users and Representative Counsel shall represent all Affected Users in the CCAA Proceedings; (b) the Affected Users shall be bound by the actions of the Official Committee of

Affected Users and Representative Counsel in the CCAA Proceedings; and (c) the Official Committee of Affected Users shall be entitled, on advice of Representative Counsel, to reach any settlement agreements, advocate on behalf of the Affected Users and compromise any rights, entitlements or claims of the Affected Users, subject to approval of the Court.

11. The Applicants shall provide to Representative Counsel, subject to confidentiality arrangements satisfactory to the Applicants and the Monitor, each acting reasonably, without charge, in machine-readable format, the names, last known addresses and last known email addresses (if any) of all the Affected Users (the **"Affected User Information"),** excluding Opt-Out Individuals, if any, who have opted out prior to delivery of the Affected User Information. The Affected User Information shall be kept confidential by Representative Counsel and shall not be disclosed to any other person, including the Official Committee of Affected Users and the Committee Members, unless ordered otherwise by the Court.

12. Subject to confidentiality arrangements satisfactory to the Applicants and the Monitor, each acting reasonably, and any claim of privilege by the Applicants or the Monitor, the Applicants and the Monitor have the obligation to provide Representative Counsel with such documents and data as may be reasonably relevant to matters relating to the issues affecting the Affected Users in the CCAA Proceedings (the **"Information"),** without charge.

13. The provision of the Information to the Representative Counsel pursuant to paragraph 12 of this Order constitutes a limited waiver of any applicable privilege which may attach to the Information in respect of the Representative Counsel only (the **"Limited Waiver").**

14. The Limited Waiver is solely for the purpose of permitting the Representative Counsel to access the Information and for no other purpose.

15. The Limited Waiver applies only in respect of the Representative Counsel and shall under no circumstances be extended to, or apply to any other person or for any other purpose, and any privilege of the Monitor and any persons attaching to the Information is expressly confirmed and preserved as against any other persons and for any other purpose.

16. In providing the Affected User Information and the Information, the Applicants are not required to obtain express consent from such Affected Users authorizing disclosure of the Affected User Information or the Information to Representative Counsel and, further, in accordance with section 7(3) of the *Personal Information Protection and Electronic Documents Act,* this Order shall be sufficient to authorize the disclosure of the Affected User Information or the Information, without knowledge or consent of the individual Affected Users. The Affected User Information and Information shall only be used for the Puipose in the CCAA Proceedings and for no other or improper purpose.

17. Notice of the granting of this Order substantially in the form attached hereto as Schedule "A" ("Notice") shall hereby be:

(a) posted by the Monitor or the Applicants on (i) the Monitor's Website; (ii) the Applicants' website located at www.quadrigacx.com; and (iii) the Applicants' subreddit located at www.reddit.corn/r/quadrigacx, in each case, within two (2) business days of the date of this Order;

(b) published by the Monitor, in the Globe and Mail, within seven (7) calendar days of the date of this Order; and

(c) sent by the Monitor to Affected Users who have claims against the Applicants in excess of $1,000 according to the Applicants' books and records via email at the last known email addresses for such Affected Users in the Applicants' hooks and records, within seven (7) calendar days of the date of this Order.

18. Any individual Affected User who does not wish to be represented by Representative Counsel and the Official Committee of Affected Users shall, within sixty (60) calendar days of the date of this Order, notify the Monitor, in writing, that he or she is opting out of representation by the Official Committee of Affected Users and Representative Counsel by delivering to the Monitor an English or French opt-out notice substantially in the form attached hereto as Schedule "13" (each an "Opt-Out Notice"), and shall thereafter not be bound by the actions of the Official Committee of Affected Users or Representative Counsel and shall represent himself of herself or be represented by any counsel that he or she may retain exclusively at his or her own expense in the CCAA Proceedings (any such persons who deliver an Opt-Out Notice in compliance with the terms of this paragraph, **"Opt-Out** Individuals"). The Monitor shall keep confidential the identity of the Opt-Out Individuals but shall deliver copies of all Opt-Out Notices received to counsel for the Applicants and Representative Counsel as soon as practicable following receipt of the Opt-Out Notices. In accordance with section 7(3) of the *Personal Information Protection and Electronic Documents Act,* this Order shall be sufficient to authorize the disclosure of the Opt-Out Notices to counsel for the Applicants and Representative Counsel, without knowledge or consent of the Opt-Out Individuals. For greater certainty, the Official Committee of Affected Users and Representative Counsel have no obligation to represent the interests of the Opt-Out Individuals.

19. The form of Opt-Out Notice shall be posted by the Monitor or the Applicants on (i) the Monitor's Website; (ii) the Applicants' website located at www.quadrigacx.com; (iii) the Representative Counsel's Website located at www.millerthornson.com/en/quadrigacx and (iii) Applicants' subreddit located at www.reddit.com/r/quadrigacx, in each case, within two (2) business days of the date of this Order.

20, All written notices required to be given to the Monitor and/or Representative Counsel shall be given by hand delivery, courier or email as follows:

(b) to the Monitor:

Ernst & Young Inc.
Court-appointed Monitor of the Applicants
RBC Waterside Centre

1871 Hollis Street Suite 500
Halifax, Nova Scotia B3J 0C3
Attn: George Kinsman
Email: george.c.kinsman@ca.ey.com

with a copy to:

Stikeman Elliot LLP
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Attn: Liz Pillon / Lee Nicholson
Email: lpillon@stikeman.com / leenicholson@stikemmcom

(c) to Representative Counsel:

Miller Thomson LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, ON M5H 3S1

Attn: Asim lqbal / Greg Azeff
Email: aiqbal@millerthomson.com / gazeff@millerthomson.com

21. Representative Counsel shall be given notice of all motions in these CCAA Proceedings and notice of any motion provided to Representative Counsel shall be deemed to be notice to all of the Affected Users except for the Opt-Out Individuals.

22. With the consent of the Monitor or further order of the Court, the Official Committee of Affected Users and Representative Counsel may retain advisors, experts and consultants ("Advisors") to provide advice to and to assist the Official Committee of Affected Users and Representative Counsel in the exercise of their duties in relation to the Purpose.

23. Subject to funding being available in the Disbursement Account (as defined in the Initial Order of Justice Wood dated February 5, 2019 (the **"Initial Order")),** and without prejudice to any claim of Representative Counsel against the Applicants and their property for unpaid fees and disbursements, Representative Counsel shall be paid its reasonable and documented fees and disbursements (including disbursements relating to Advisors retained by Representative Counsel) by the Applicants to an aggregate maximum of $250,000, excluding disbursements (the **"Initial Fee Cap"),** which shall subject to adjustments in accordance with paragraph 24 of this Order. Representative Counsel shall be paid on a weekly or 13i-weekly basis upon rendering its accounts to the Monitor for fulfilling its mandate in accordance with this Order, and subject to such redactions to the invoices as are necessary to maintain solicitor-client privilege between Representative Counsel and the

Official Committee of Affected Users. Representative Counsel or the Monitor are at liberty to bring another motion before the Court at any time

to seek any amendment or modification to the funding arrangements set forth in this Order. In the event of any disagreement with respect to such fees and disbursements, such disagreement may be remitted to this Court for determination.

18. In consultation with the Monitor, Representative Counsel shall prepare a budget from time to time (or as requested by the Monitor or directed by this Court) for anticipated fees and disbursements (the **"Budget"),** and, as necessary or desirable, the Budget shall be provided to the Monitor and the Court for the purpose of determining whether the Initial Fee Cap or other funding arrangements should be amended or modified. A motion for the modification of the Initial Fee Cap may be conducted by way of teleconference on seven (7) calendar days' notice to the Service List.

19. Nothing contained in this Order shall require Representative Counsel to incur any disbursement unless Representative Counsel is satisfied that funds are available for reimbursement of the same.

20. Representative Counsel shall pass their accounts from time to time before a judge of the Court or a referee appointed by a judge of the Court.

27, Representative Counsel shall be entitled to the benefit of the Administration Charge (as defined in the Initial Order) and shall rank *pro-rata* with the other beneficiaries of the Administrative Charge.

28. Payments made by the Applicants pursuant to this Order do not and will not constitute preferences, fraudulent conveyances, transfers of undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable laws.

29. Representative Counsel and the Official Committee of Affected Users are hereby authorized to take all steps and do all acts necessary or desirable to carry out the terms of this Order, including, posting relevant non-confidential information and documents to the Representative Counsel's Website for the Affected Users.

30. The Applicants, the Monitor and Representative Counsel shall be at liberty, and are hereby authorized, at any time, to apply to this Court for advice and directions in respect of the fulfillment and scope of the duties of Representative Counsel under the provisions of this Order or any variation of the powers and duties of Representative Counsel under this Order, which shall be brought on notice to the Applicants, the Monitor, Representative Counsel and other interested parties listed on the service list posted on the Monitor's Website, unless this Court orders otherwise.

31. Representative Counsel and the Committee Members shall have no personal liability or obligations as a result of the performance of their duties in carrying out the provisions of this Order and any subsequent orders of the Court in the CCAA Proceedings, save and except for liability arising out of negligence or actionable misconduct.

32. No action or other proceeding may be commenced against Representative Cow-Isel or the Official Committee of Affected Users in respect of the performance of their duties under this Order without leave of this Court on seven (7) calendar days' notice to the

Applicants, the Monitor, Representative Counsel and the Official Committee of Affected Users.

33. The aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States is requested to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

34. Costs to the Representative Counsel for the motion to appoint representative counsel shall be fixed at $25,000 plus disbursements and applicable taxes and shall not form part of the fees and disbursements addressed under the Initial Fee Cap.

35. This Order and all of its provisions are effective as of 12:01 a.m. Atlantic Standard Time on the 19th day of February, 2019. For greater certainty, any timelines set out in this Order by when actions or notices must be performed or delivered shall commence from the date that this Order is issued.

Issued at Halifax, Province of Nova Scotia, this ZS day of February, 2019.

ANDA HAINBOLDT
Deputy Prothonotary

SCHEDULE "A"

NOTICE OF REPRESENTATIVE COUNSEL ORDER

QUADRIGA FINTECH SOLUTIONS CORP., WHITESIDE CAPITAL CORPORATION, AND 0984750 B.C. LTD. D/B/A QUADRIGA CX AND QUADRIGA COIN EXCHANGE (COLLECTIVELY, THE **"APPLICANTS")**

NOTICE TO AFFECTED USERS:

On February 5, 2019, the Applicants commenced proceedings under the *Companies' Creditors Arrangement Act* ("CCAA") pursuant to an Order (the **"Initial Order")** of the Supreme Court of Nova Scotia (the **"Court").** Ernst & Young Inc. has been appointed by the Court as monitor in the Applicants' CCAA proceedings (the **"Monitor").**

TAKE NOTICE THAT, pursuant to an Order of the Court, Miller Thomson LLP, as lead counsel, and Cox & Palmer, as local counsel (collectively, **"Representative Counsel"),** were appointed as representative counsel to represent the interests **of** users of the Applicants' cryptocurrency exchange platform (the "Affected Users") in the CCAA proceedings.

IF YOU WISH TO SERVE on the committee of Affected Users (the **"Official Committee of Affected Users")** which will provide information to and instruct Representative Counsel in connection with the CCAA proceedings, please deliver a package containing (i) your name and address; (ii) your client-ID for the Applicants' cryptocurrency exchange platform (iii) the amount of your claim against the Applicants, (iv) the nature of such claim (fiat currency, cryptocurrency, "pending" withdrawal and/or "completed" withdrawal) owed to you by the Applicants; (v) a statement of no more than 200 words expressing your interest in becoming a Committee Member and summarizing your qualifications; and (v) your resume or PDF copy of your Linkedln profile, and (vi) such other information or documentation as may be requested by Representative Counsel or the Monitor, to Representative Counsel by email at CommitteeApplications@millerthomson.com by *, 2019. **IF YOU SERVE ON THE OFFICIAL COMMITTEE OF AFFECTED USERS YOUR NAME WILL BE PUBLICALLY IDENTIFIED TO THE COURT AND OTHER AFFECTED USERS.** Service on the Official Committee of Affected Users will also be a significant time commitment.

IF YOU DO NOT WISH TO BE REPRESENTED by Representative Counsel and the Official Committee of Affected Users, you must, before 0, 2019, provide an Opt-Out Notice (a copy of which can be obtained from the Monitor's website located at www.ey.comica/quadriga) indicating that you wish to opt-out of such representation and send the completed Opt-Out Notice to:

To the Monitor:

Ernst & Young Inc. acting in its capacity as Court-appointed Monitor of the Applicants

RBC Waterside Centre
1871 Hollis Street Suite 500
Halifax, Nova Scotia B31 0C3

Fax: 902-420-0503

With a copy to Representative Counsel:

Miller Thomson LLP
Scotia Plaza
40 King Stnet West, Suite 5800
P.O. Box 1011
Toronto, ON M.511 3S1

Attn: Asim Iqbal / Greg Azeff
Email: quadrigaCX@millerthomson.com

Email: quadriga.monitor@ea.ey.com

Persons requiring further information should review the website established by the Monitor at www.ey.comica/quadriga or email the Monitor at quadrigamoni tor ca.ey.com.

SCHEDULE "B"

OPT-OUT NOTICE

QUADRIGA FINTECII SOLUTIONS CORP., WIIITESIDE CAPITAL CORPORATION, AND 0984750 B.C. LTD. D/B/A QUADRIGA CX AND QUADRIGA COIN EXCHANGE (COLLECTIVELY, THE "APPLICANTS")

TO: Ernst & Young Inc. acting in its capacity as Court-appointed Monitor of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd.
RBC Waterside Centre
1871 Hollis Street Suite 500
Halifax, Nova Scotia B3J 0C3

Fax: 902-420-0503
Email: quadriga.monitor®ca.ey.com

I hereby provide written notice that I do not wish to be represented by Miller Thomson LLP and Cox & Palmer, representative counsel ("Representative Counsel") for users of the Applicants' cryptocurrency exchange platform (the "Affected Users") in their proceedings under the *Companies' Creditors Arrangement Act* before the Supreme Court of Nova Scotia (the "CCAA Proceedings"). I understand that, by opting out of representation, if I wish to take part in the CCAA Proceedings, I would need to do so as an independent party. I am responsible for retaining my own legal counsel should I choose to do so, and that I would be personally liable for the costs of my own legal representation.

I understand that a copy of this Opt-Out Notice will be provided to the Representative Counsel and to the Applicants.

_____ _____

Date Signature

Name (please print): _____

Address: _____

_____

_____

Telephone: _____

E-mail

SCHEDULE "2"

Committee Members

	Full Name	Summary
	Parham Pakjou	Mr. Pakjou is an account executive at a highly specialized cyber-security consulting firm, with nine years of experience in sales management in technology and finance. l-le•studied at Queens' University in business, and has a certificate in Key Account Management and Client Development from the Schulich School of Business at York University.
2.	David Ballagh	Mr. Ballagh is a retired professional engineer who formerly worked for SaskPower. Mr. Ballagh's experience includes .a placement at the Department of the Environment where he sat on a number of national committees. Mr. Ballagh also has experience stakeholder consultations with NGOs and affected organizations. Mr. Ballagh has approximately five years of governance experience.
3.	Eric Bachour	Mr. Bachour worked in financial services as a banker and at one point was a senior executive at one of Australia's largest banks. Mr. Bachour has experience with risk management through his career. He retired early and, post-retirement, has worked full-time as a cryptocurrency trader. Mr. Bachour is also a creditor of Mt. Gox in 2013, and has direct experience with arbitrage and market trading in cryptocurrency. Through the Mt. Gox process he gained exposure to the legal side of bankruptcy and insolvency.
4.	Ryan Kneer	Mr. Kneer is a professional market-maker in the cryptocurrency industry, and has used QuadrigaCX daily since April 2017, trading in volume over 50 million CAD. Prior to his interest in algorithmic software, he completed a partial computer science degree. Ile has followed news sources on the QuadrigaCX matter and is familiar with the proceedings.
5.	Magdalena Gronowska	Ms. Gronowska has 10 years of advisory experience in economic policy development for the Government of Ontario. She is a member of a blockchain consultancy, MetaMesh Group, has helped build a cryptocurrency start-up, and volunteers with the National Crowd funding and Fintech Association, and the Blockchain for Climate Institute. She has spoken at conferences and events across Canada on cryptocurrency and blockchain, and has used cryptocurrency since May 2017.
6.	Eric Stevens	Mr. Stevens is the founder of a software development company that specializes in blockchain integration and web development, with an emphasis on Ethercum technology. He has worked with clients ranging from NGOs to Fortune 500s to architect and build blockchain based enterprise systems. He has extensive experience with cryptocurrencies, distributed ledgers, and blockchains.
7	Nicolas Deziel	Mr. Deziel has experience investing in QuadrigaCX and through other various exchanges. During the cryptocurrency bull run he built three mining rigs, and by 20! 8 learned how to trade technically by using short sells. He works as a professional VFX artist but is a cryptocurrency trader on the side. He accumulated experience with risk management through his participation in the Montreal Trading Group. He was also involved with the management committee of a condominium complex for several years.

Alternates

1.	Richard Kagerer	Mr. Kagerer holds a Bachelor of Electrical Engineering from Carleton University, and founded a software consultancy business with experience in product design, project management and business analysis. He has prior experience with the Mt. Gox insolvency proceedings
2.	Marian Drumea	Mr. Drumea began using QuadrigaCX in 2017. He is currently a Senior Consultant with InRule Technology and has worked previously for companies like Deloitte, Ceridian, Telus. and BCIV1S. Mr. Drumea holds a Bachelor of Computer Science and has over twenty years of experience with Information Technology. As a consultant, he has been working with large companies around the world and has a good understanding of legal matters relevant to this case.

MILLER THOMSON
AVOCATS 1 LAWYERS

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Astim lithal
Direct Line: 416.597.6008
niqbal#millertlionisun.com

March 18, 2019

Delivered via Letter

The Honorable Justice Michael J. Wood
Judges Reception Office
The Law Courts
1815 Upper Water St.
Halifax. NS 83J 1S7

Dear Mr. Justice Wood:

Re: Docket: **HFX484742 (the "CCAA Proceedings")**
Quadriga Fintcch Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. (dba QuadrigaCX and Quadriga Coin Exchange) (collectively, the "Applicants")

Pursuant to the Order of the Honourable Mr. Justice Michael J. Wood of the Supreme Court of Nova Scotia (the **"Court") dated** February 5, 2019, among other things, Ernst & Young inc. was appointed as Monitor (in such capacity, the **"Monitor") of** the Applicants in the CCAA Proceedings.

Pursuant to the Order of the Court dated February 19, 2019 **(the "Representative Counsel Appointment Order"): (i) Miller** Thomson LLP and Cox & Palmer were appointed as representative counsel (together, "Representative **Counsel") to** the approximately 115,000 users affected by the shutdown of the QuadrigaCX cryptocurrency exchange platform (collectively, the **"Affected Users"); and** (ii) Representative Counsel was directed, in consultation with the Monitor, to establish the Official Committee of Affected Users **(the "Official Committee").**

Representative Counsel, in consultation with the Monitor, developed a process (the **"Selection Process") to** call for applications from Affected Users who wished to be considered for a spot on the Official Committee, to interview applicants and to select successful candidates. The purpose of this letter is to report to the Court about the results of the Selection Process, A detailed summary of the Selection Process is set out below.

Following the Selection Process, Representative Counsel sent to the Monitor a shortlist of successful candidates (the **"Shortlist Caudidatcs")for approval.** The Monitor approved nine (9) Shortlist Candidates. From these approved Shortlist Candidates, Representative Counsel selected seven (7) candidates to serve of the Official Committee of Affected Users (the **"Committee Members") and two** (2) alternate Committee Members (the **`"Alternates").**

The purpose of having, Alternates is to streamline the selection process in the future should any of the Committee Members resign or be duly removed from the Official Committee. Alternates will still be required to execute the same confidentiality agreements and other committee documents as Committee Members; however, Alternates will only receive meeting minutes summarizing the contents of Official Committee meetings and will not participate in the meetings themselves.

Representative Counsel, with the approval of the Monitor, submits to this Court for approval the following Affected Users to serve as Committee Members on the Official Committee:

- Parham Pakjou;
- David Ballagh;
- Eric Bachour;
- Ryan Kneel;
- Magdalena Gronowska;
- Eric Stevens; and
  Nicolas Deziel.

Representative Counsel, with the Monitor's approval, submits Marian Drumea and Richard Kagerer as Alternates.

Chronology of the Selection Process

Representative Counsel sent by email and posted on its website (www.millcrthomson.com/en/quadrigacx) two (2) communications calling for applications ("Official Committee Applications") from Affected Users wishing to be considered for a spot on the Official Committee (the "Official Committee Applicants").

In addition, we understand the Monitor posted the prescribed notice calling for Official Committee Applications in accordance with the Representative Counsel Appointment Order.

The deadline to submit an application was 5:00 p.m. (EST) on March 8, 2019 (the "Application Deadline"). Representative Counsel received a total of 119 Official Committee Applications. Out of these Official Committee Applications, Representative Counsel received nine (9) after the Application Deadline (the "Late Applications"). Representative Counsel reviewed all Official Committee Applications, including the Late Applications.

Representative Counsel created a short list of 27 candidates who were extended invitations for an interview. The interviews were conducted by teleconference or videoconference between March 9 and March 12, 2019 (the "Interviews"). For consistency in evaluating Official Committee Applications: (i) all of the interviews followed the same structure and were approximately the same length (about half an hour); and (ii) substantially similar questions were posed to each interviewee.

Following the Interviews, Representative Counsel selected 10 Official Committee Applicants (the "Shortlist Candidates") who, in Representative Counsel's judgment, were the best candidates to serve as either Committee Members or Alternates. In determining the Shortlist Candidates, Representative Counsel considered, among other things, the following factors: (i) experience withgovernance, cryptocurrency or formal Canadian insolvency proceedings; (ii) education; (iii) answers to interview questions; and (iv) the nature and quantum of the Official Committee Applicants' respective claims against the Applicants.

On March 13, 2019, Representative Counsel submitted to the Monitor for approval the Shortlist Candidates along with each candidate's Official Committee Application. The Monitor approved nine (9) of the Shortlist Candidates. From these nine (9) Shortlist Candidates, Representative Counsel selected seven (7) Committee Members and two (2) Alternates. A summary of each Committee Member and Alternate and their respective qualifications is enclosed at Schedule "A".

Should this Honourable Court require anything further in order to finalize the Committee Members, Representative Counsel is available to assist.

Yours truly,

MEl R THOMSON LLP

Per:

Grego Azeff
Partner
GAins

SCHEDULE "A"

Committee Members

	Full Name	Summary
	Parham Pakjou	Mr. Pakjou is an account executive at a highly specialized cyber-security consulting firm, with nine years of experience in sales management in technology and finance. He studied at Queens' University in business, and has a certificate in Key Account Management and Client Development from the Schulich School of Business at York University.
2.	David Ballagh	Mr. Ballagh is a retired professional engineer who formerly worked for SaskPower. Mr. Ballagh's experience includes a placement at the Department of the Environment where he sat on a number of national committees. Mr. Ballagh also has experience stakeholder consultations with NGOs and affected organizations. Mr. Ballagh has approximately five years of governance experience.
3.	Eric Bachour	Mr. Bachour worked in financial services as a banker and at one point was a senior executive at one of Australia's largest banks. Mr. Bachour has experience with risk management through his career. He retired early and. post-retirement, has worked full-time as a cryptocurrency trader. Mr. Bachour is also a creditor of Mt. Gox in 2013, and has direct experience with arbitrage and market trading in cryptocurrency. Through the Mt. Gox process he gained exposure to the legal side of bankruptcy and insolvency,
4.	Ryan Kneer	Mr. Kneer is a professional market-maker in the cryptocurrency industry, and has used QuadrigaCX daily since April 2017, trading in volume over 50 million CAD. Prior to his interest in algorithmic software, he completed a partial computer science degree. He has followed news sources on the QuadrigaCX matter and is familiar with the proceedings,
5.	Magdalena Gronowska*	Ms. Gronowska has 10 years of advisory experience in economic policy development for the Government of Ontario. She is a member of a blockchain consultancy, MetaMesh Group. has helped build a cryptocurrency start-up, and volunteers with the National Crowd funding and Fintech Association, and the Blockchain for Climate Institute. She has spoken at conferences and events across Canada on cryptocurrency and blockchain, and has used cryptocurrency since May 2017.
6.	Eric Stevens	Mr. Stevens is the founder of a software development company that specializes in blockchain integration and web development, with an emphasis on Ethereum technology. He has worked with clients ranging from NGOs to Fortune 500s to architect and build blockchain based enterprise systems. He has extensive experience with cryptocurrencies, distributed ledgers, and blockchains.

Full Name	Summary
7. Nicolas Deziel	Mr. Deziel has experience investing in QuadrigaCX and through other various exchanges. During the cryptocurrency bull run he built three mining rigs, and by 2018 learned how to trade technically' by using short sells. He works as a professional VFX artist but is a cryptocurrency trader on the side. He accumulated experience with risk management through his participation in the Montreal Trading Group. He was also involved with the management committee of a condominium complex for several years.

Alternates

Full Name	Summary
1. Richard Kagerer*	**Mr.** Kagerer holds a Bachelor of Electrical Engineering from Carleton University, and founded a software consultancy business with experience in product design, project management and business analysis. lie has prior experience with. the Mt. Gox insolvency proceedings
0. Marian Drumea	Mr. Drumea began using QuadrigaCX in 2017. He is currently a Senior Consultant with InRule Technology and has worked previously for companies like Deloitte, Ceridian, Telus, and BCMS. Mr. Drumea holds a Bachelor of Computer Science and has over twenty years of experience with Information Technology. As a consultant, he has been working with large companies around the world and has a good understanding of legal matters relevant to this case,

**Note that A-A. Grono►+ska and Air Kagerer describe themselves as "partners" in a personal sense. Howei?er, each has a separate account with the Applicants and submitted a separate application. Representative Counsel does not consider this to he problematic*

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

Court File No.: CV-22-00683820-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceedings commenced at Toronto

BOOK OF AUTHORITIES

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Securities Class Action and Insolvency Co- Counsel to the Proposed Class Action Plaintiff