

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

SemCanada Crude Company, *et al.*,

Applicants in Foreign Proceedings.

Chapter 15

Case No. 09-12637 (BLS)

Jointly Administered

**MEMORANDUM OF LAW IN SUPPORT OF CHAPTER 15 PETITIONS
FOR RECOGNITION OF FOREIGN PROCEEDINGS AND RELATED RELIEF**

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Ernst & Young Inc. is the court-appointed monitor (the "**Monitor**") and authorized foreign representative of SemCanada Crude Company ("**SemCanada Crude**"), SemCAMS ULC ("**SemCAMS**") and SemCanada Energy Company ("**SemCanada Energy**") and certain of its subsidiaries, A.E. Sharp Ltd. ("**Sharp**") and CEG Energy Options, Inc. ("**CEG**" and, together with SemCanada Energy and Sharp, the "**SemCanada Energy Group**" and, together with SemCAMS, SemCanada Crude, SemCanada Energy and Sharp, the "**SemCanada Group**") in proceedings (the "**Canadian Proceedings**") under Canada's *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") pending before the Court of Queen's Bench of Alberta, Judicial District of Calgary (the "**Calgary Court**").

The Monitor has commenced these chapter 15 cases ancillary to the Canadian Proceedings and respectfully filed the Verified Petitions For Recognition of the Canadian Proceedings (together, the "**Chapter 15 Petitions**") with the documentation required by sections 1504 and 1515 of title 11 of the United States Code (the "**Bankruptcy Code**") on July 27, 2009, seeking the entry of orders (the "**Proposed Orders**"):

(i) recognizing the Canadian Proceedings as "foreign main proceedings" and enforcing in the United States the Canadian Creditors' Meetings Order (the "**Canadian Meetings Order**") issued by the Calgary Court August 7, 2009;¹

(ii) enforcing in the United States the Canadian Plan Sanction Order relating to the Plan of Arrangement and Reorganization for SemCAMS (the "**Canadian CAMS Order**"), subject

¹ A copy of the Canadian Meetings Order was filed with this Court on August 7, 2009 [Docket No. 14] and is available on the Monitor's website, www.ey.com/ca/semcanadagroup.

to the issuance of such Canadian CAMS Order following the joint hearing in the Calgary Court and this Court now scheduled for September 16, 2009;

(iii) enforcing in the United States the Canadian Plan Sanction Order relating to the Plan of Arrangement and Reorganization for SemCanada Crude (the "**Canadian Crude Order**"), subject to the issuance of such Canadian Crude Order following the joint hearing in the Calgary Court and this Court now scheduled for September 16, 2009;

(iv) enforcing in the United States the Canadian Plan Sanction Order relating to the Consolidated Plan of Distribution for the SemCanada Energy Group (the "**Canadian Energy Order**" and, together with the Canadian Meetings Order, the Canadian CAMS Order and the Canadian Crude Order, the "**Canadian Orders**"), subject to the issuance of such Canadian Energy Order following the joint hearing in the Calgary Court and this Court now scheduled for September 16, 2009;² and

(v) granting such other and further relief as is appropriate under the circumstances.

The Monitor respectfully files this Memorandum of Law in support of the Chapter 15 Petitions.

FACTUAL BACKGROUND

The Court is respectfully referred to the Chapter 15 Petitions, the Affidavit of David Keay dated July 29, 2008 and submitted to the Calgary Court July 30, 2008 (the "**Keay Affidavit**"), the Affidavit of Brent Brown dated July 21, 2008 and submitted to the Calgary Court July

² Copies of the proposed Canadian CAMS Order, proposed Canadian Crude Order and proposed Canadian Energy Order will be filed with this Court prior to the hearing on those orders and will be available on the Monitor's website, www.ey.com/ca/semcanadagroup.

22, 2008 (the "**Brown Affidavit**") and the Affidavit of Darren Marine dated July 22, 2008 and submitted to the Calgary Court July 22, 2008 (the "**Marine Affidavit**") in support of the applications of the SemCanada Group under the CCAA and the Combined First Report of the Monitor dated July 30, 2008 (the "**Monitor's Report**"). The Keay Affidavit, Brown Affidavit, Marine Affidavit and Monitor's Report are annexed as Exhibits A, B, C and D respectively to the affidavit of Ken Coleman sworn to August 11, 2009 (the "**Coleman Affidavit**") and filed contemporaneously herewith. A copy of the Amended and Restated Initial Order of the Calgary Court issued July 30, 2008 (the "**Amended and Restated Initial Order**") is annexed to the Coleman Affidavit as Exhibit E. The foregoing documents are also available on the Monitor's website at www.ey.com/ca/semcanada.

ARGUMENT

The purpose of the Canadian Proceedings is to facilitate the reorganization of the SemCanada Group for the benefit of all creditors. As proceedings under the CCAA in the Calgary Court, the Canadian Proceedings are entitled to the recognition and relief provided by chapter 15 of the Bankruptcy Code. Further, the Monitor is informed and believes that granting the relief sought herein will best assure the fair and efficient administration of the Canadian Proceedings consistent with the principles set forth in chapter 15 of the Bankruptcy Code.

THE CANADIAN PROCEEDINGS ARE ENTITLED TO RECOGNITION AS FOREIGN MAIN PROCEEDINGS

The Canadian Proceedings are entitled to recognition as foreign main proceedings under chapter 15 of the Bankruptcy Code because, among other things:

- (A) the Canadian Proceedings are foreign proceedings within the meaning of section 101(23) of the Bankruptcy Code, and are foreign main proceedings within the meaning of section 1502(4) of the Bankruptcy Code, because the Canadian Proceedings are pending in the location of each member of the SemCanada Group's center of main interest;

(B) the Monitor is a person within the meaning of section 101(41) of the Bankruptcy Code;

(C) the Monitor is a foreign representative within the meaning of section 101(24) of the Bankruptcy Code;

(D) the Chapter 15 Petitions were filed in accordance with section 1504 of the Bankruptcy Code with respect to each member of the SemCanada Group; and

(E) the Chapter 15 Petitions meet the requirements of section 1515 of the Bankruptcy Code with respect to each member of the SemCanada Group.

A. The Court has Jurisdiction to Recognize the Canadian Proceedings and Grant the Relief Requested

This Court has jurisdiction to hear and determine cases commenced under the Bankruptcy Code and all core proceedings arising thereunder pursuant to 28 U.S.C. §§ 157 and 1334 and section 1501 of the Bankruptcy Code. A case under chapter 15 is a "case" under the Bankruptcy Code. Recognition of foreign proceedings and other matters under chapter 15 of the Bankruptcy Code have expressly been designated as core proceedings pursuant to 28 U.S.C. § 157(b)(2)(P).

Venue is proper in this District, given that the chapter 11 cases for SemCrude, L.P. and its affiliates are pending in this District. It is respectfully submitted that venue in this District is consistent with the interests of justice and the convenience of the parties, having regard to the relief sought by the Chapter 15 Petitions, as provided by 28 U.S.C. § 1410 (3).

B. These Cases are Properly Commenced under Chapter 15

Chapter 15 applies where, as here, assistance is sought in the United States by a foreign representative, such as the Monitor, in connection with a foreign proceeding. 11 U.S.C. §1501(b)(1). These chapter 15 cases have been commenced for the purpose of obtaining the assistance of this Court to give effect in the United States through sections 1520, 1521 and 1507 of the

Bankruptcy Code to the Canadian Orders for the purpose of facilitating the reorganization of the SemCanada Group for the benefit of all creditors.

C. These Cases Concern Foreign Proceedings

Bankruptcy Code section 101(23) provides in pertinent part, as follows:

The term "foreign proceeding" means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

The Canadian Proceedings under the CCAA provide a statutory means for the SemCanada Group to restructure its business under the supervision of the Calgary Court. As such, the Canadian Proceedings are collective judicial proceedings in a foreign country under a law relating to insolvency and adjustment of debt in which the assets and affairs of the SemCanada Group are subject to control or supervision by the Calgary Court for the purpose of reorganization or liquidation. Indeed, since the passage of chapter 15, a number of Canadian proceedings under the CCAA have been recognized by U.S. Courts. *See, e.g., In re Converpro*, No. 08-51482C-15W (Bankr. M.D.N.C. Oct. 2, 2008)³; *In re Pope & Talbot, Inc., et al*, No. 08-11933 (Bankr. D. Del. Oct. 16, 2008); *In re MAAZ Corporation*, No. 08-11443 (Bankr. D. Del. Aug 5, 2008); *In re Destinator Technologies, Inc.*, No. 08-11003 (Bankr. D. Del. June 6, 2008); *In re: ROL Manufacturing (Canada) Ltd., et al.*, No. 08-31022 (Bankr. S.D. Ohio Apr. 17, 2008); *In re Baronet U.S.A. Inc. et al.*, No. 07-13821 (Bankr. S.D.N.Y. Jan. 10, 2008); *In re G.T.T. - Stats International, Inc.*, No. 07-11886 (Bankr. N.D.N.Y. Sept. 21, 2007); *In re Hollinger Inc., et al.*, No. 07-11029 (Bankr. D. Del. August 28, 2007) (Walsh, J.); *In re Creative Building Maintenance, Inc. et al.*, No. 06-03586 (Bankr. W.D.N.Y. Dec. 29, 2006); *In re Muscletech*

³ Copies of unpublished decisions and orders referred to herein are attached for the Court's convenience as Exhibit F to the Coleman Affidavit filed contemporaneously herewith.

Research and Development Inc. et al., Nos. 06 CIV 538 and 539 (S.D.N.Y. March 2, 2006). Accordingly, the chapter 15 cases concern a foreign proceeding within the meaning of section 101(23) of the Bankruptcy Code.⁴ Likewise, the Canadian Proceedings are entitled to recognition.

D. These Cases were Commenced by a Foreign Representative

These chapter 15 cases were commenced by the "foreign representative" of the SemCanada Group duly authorized in the Canadian Proceedings within the meaning of section 101(24) of the Bankruptcy Code, which defines a "foreign representative" in pertinent part as a "person or body...authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 101(24).

The Amended and Restated Initial Order of the Calgary Court dated July 30, 2008 evidences that the Monitor was appointed to act as the Monitor and is duly authorized to act as the foreign representative with respect to the SemCanada Group and the Canadian Proceedings. Amended and Restated Order ¶ 34. By virtue of such appointment, the Monitor is a "foreign representative" within the meaning of section 101(24) of the Bankruptcy Code. *See, e.g., In re MAAZ Corporation*, No. 08-11443 (Bankr. D. Del Aug. 5, 2008) (recognizing CCAA Proceeding as a "foreign proceeding" and court-appointed monitor as "foreign representative" under the Bankruptcy Code); *In re Destinator Technologies, Inc.*, No. 08-11003 (Bankr. D. Del. June 6, 2008) (same); *In re Baronet U.S.A. Inc. et al.*, No. 07-13821 (Bankr. S.D.N.Y. Jan. 10, 2008) (same); *In re Muscletech Research and Development Inc. et al., supra*, (same). Furthermore, the court is entitled under section 1516(a) of the Bankruptcy Code to presume that the foreign representative identified in the Amended and Restated Initial Order is a foreign representative.

⁴ Further, under former section 304 of the Bankruptcy Code, the statutory predecessor to chapter 15, Canadian proceedings, including insolvency proceedings, were regularly granted comity. *See, e.g., Smith v. Dominion Bridge Corp.*, No. 96-7580, 1999 WL 111465, at *3 (E.D. Pa. March 2, 1999) ("As a sister common law jurisdiction, courts have consistently extended comity to Canadian Bankruptcy proceedings."); *In re Davis*, 191 B.R. 577, 587 (Bankr. S.D.N.Y. 1996) ("Courts in the United States uniformly grant comity to Canadian proceedings"); *Cornfeld v. Investors Overseas Servs. Ltd.*, 471 F. Supp. 1255, 1260-62 (S.D.N.Y. 1979), *aff'd*, 614 F.2d 1286 (2d Cir. 1979); *Caddel v. Clairton Corp.*, 105 B.R. 366 (N.D. Tex. 1989).

Further, under former section 304 of the Bankruptcy Code, monitors authorized or appointed under the CCAA by Canadian courts in CCAA proceedings were considered "foreign representatives." *See, e.g., In re Air Canada*, No. 03-11971 (Bankr. S.D.N.Y. Sept. 28, 2004) (recognizing CCAA proceeding as a "foreign representative" under the Bankruptcy Code).

E. The Chapter 15 Cases were Properly Commenced

These chapter 15 cases were duly and properly commenced as required by section 1504 of the Bankruptcy Code by the filing of the Chapter 15 Petitions for recognition of foreign proceedings under section 1515(a) of the Bankruptcy Code for each member of the SemCanada Group accompanied by all documents and information required by sections 1515(b) and (c) of the Bankruptcy Code, including: (i) a copy of the Amended and Restated Initial Order and (ii) a statement identifying all foreign proceedings with respect to the SemCanada Group that are known to the foreign representative.⁵ Having filed the above-referenced documents and because the Court is entitled under section 1516(b) of the Bankruptcy Code to presume the authenticity of the Amended and Restated Initial Order, the requirements of section 1515 have been met.

F. The Canadian Proceedings Should be Recognized as Foreign Main Proceedings

The Bankruptcy Code provides that a foreign proceeding for which chapter 15 recognition is sought must be recognized as a "foreign main proceeding" if it is pending in the country where the debtor has its center of its main interests. 11 U.S.C. §1517(b)(1). The Bankruptcy Code further provides that, in the absence of evidence to the contrary, the debtor's registered office is presumed to be the center of the debtor's main interests, but such presumption may be rebutted by evidence to the contrary. 11 U.S.C. § 1516(c); *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 48 (Bankr. S.D.N.Y. 2008).

⁵ The Monitor is not aware of any other foreign proceedings pending with respect to the SemCanada Group.

While the SemCanada Group's corporate parent is based in the United States, the SemCanada Group's center of main interests is in Canada. All of the SemCanada Group are organized under provincial Canadian law and headquartered in Canada (notwithstanding the extent to which the SemCanada Energy Group no longer have any headquarters as a consequence of their liquidation). Consequently, Canada is the group's presumptive center of main interest pursuant to section 1516 of the Bankruptcy Code.

This presumption is amply supported by the SemCanada Group's contacts with Canada as described in the Chapter 15 Petitions. All SemCAMS and SemCanada Crude managers reside in Canada, as did the managers of the SemCanada Energy Group when those companies still had management. Relatedly, Canada is and, for the SemCanada Energy Group, was the location of strategic decision-making and corporate management functions. Canada is where all SemCanada Group books and records are maintained. All SemCAMS employees live and work in Canada, and, moreover, are unionized there pursuant to a Canadian collective bargaining agreement. The vast majority of SemCanada Crude's employees work and reside in Canada, supplemented by only a handful of employees in the United States, as did all employees of the SemCanada Energy Group prior to the companies' liquidation. Canada is also the location of the lion's share of the SemCanada Group's operations, including all operations of SemCAMS, all former operations of the SemCanada Energy Group and the bulk of SemCanada Crude's operations. In addition, SemCAMS' and SemCanada Crude's regulatory permits are mainly issued by Canadian federal and provincial regulatory entities. With respect to assets, neither SemCAMS nor SemCanada Crude owns physical property outside Canada, nor did the SemCanada Energy Group during its period of operation. All of the SemCanada Group's bank accounts, including the SemCanada Energy Group's liquidation accounts, are held in

Calgary, Alberta. The SemCanada Energy Group's only assets other than the cash proceeds of liquidation are accounts receivable, which are primarily Canadian.

The majority the SemCanada Group's trade creditors are Canadian. While the group companies share substantial obligations to BoA as guarantors under the Credit Agreement, BoA has appeared and continues to appear in the Canadian Proceedings with respect to those interests. Likewise, HSBC Bank USA, National Association has appeared and continues to appear in the Canadian Proceedings with respect to SemCAMS', SemCanada Crude's and SemCanada Energy's guarantor obligations under the Bond Indenture. Third parties generally, including customers, are believed to recognize that key governance and decision-making for the SemCanada Group takes place in Canada and would understand that Canada is the center of operations for the companies. Moreover, given that the Canadian Proceedings, which have included a stay pursuant to the Amended and Restated Initial Order and subsequent extensions of that stay, have been ongoing for nearly a year, the practical reality is that the SemCanada Group's center of main interest could not be anywhere else. Beyond doubt, all of the SemCanada Group's center of main interest is in Canada. Accordingly, the Canadian Proceedings are pending in the center of main interest of each member of the SemCanada Group and constitute "foreign main proceedings" as defined in section 1502(4) of the Bankruptcy Code.

G. The Monitor is Entitled to an Order Granting Recognition and Enforcing the Canadian Orders

As evidenced by the Chapter 15 Petitions, the Canadian Proceedings are "foreign main proceedings" within the meaning of section 1502 of the Bankruptcy Code, the Monitor applying for recognition is a "foreign representative" within the meaning of section 101(24) of the Bankruptcy Code, and the Chapter 15 Petitions meet the requirements of section 1515 of the Bankruptcy Code with

respect to each member of the SemCanada Group. Accordingly, the Monitor respectfully submits that the Court is required to enter an Order recognizing the Canadian Proceedings pursuant to section 1517 of the Bankruptcy Code.⁶

The Monitor also seeks enforcement in the U.S. of the Canadian Orders. The Monitor submits that the relief requested herein is authorized pursuant to section 1507(b) of the Bankruptcy Code because enforcement of the Canadian Orders in the United States is consistent with the principles of comity and will reasonably assure:

(a) just treatment of all holders of claims against or interests in the SemCanada Group's property because the laws of Canada and the United States share both the same common law traditions and fundamental insolvency principles, and the Monitor believes that the Canadian CAMS Order, Canadian Crude Order and Canadian Energy Order justly and fairly distributes the property of the respective companies and the Canadian Meetings Order justly and fairly sets forth a process for considering and voting on such Plans;

(b) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in the Canadian Proceedings because Canadian law does not prefer the claims of Canadian citizens over others and because the inconvenience faced by U.S.

⁶ Section 1517. Order granting recognition

- (a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding **shall** be entered if -
- (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
 - (2) the foreign representative applying for recognition is a person or body; and
 - (3) the petition meets the requirements of section 1515.

11 U.S.C. § 1517 (emphasis added).

The Legislative History of this section provides that the "decision to grant recognition is not dependent upon any findings about the nature of the foreign proceedings of the sort previously mandated by section 304(c) of the Bankruptcy Code. The requirements of this section, which incorporates the definitions in section 1502 and sections 101(23) and (24), are all that must be fulfilled to attain recognition." H.R. Rep. 109-31(1), 109 Cong., Sess. 2005, *reprinted in* 2005 U.S.C.C.A.N. 88, 169 at 175.

creditors in the Canadian Proceedings is no greater than the inconvenience faced by foreign creditors bringing claims in the United States;

(c) prevention of preferential or fraudulent dispositions of property of the SemCanada Group because in the absence of enforcement, U.S. creditors could proceed against the SemCanada Group's assets without regard for the Canadian Proceedings, leading to unequal treatment of certain creditors, which would be contrary to the fundamental purpose of U.S. bankruptcy laws; and

(d) distribution of proceeds of the SemCanada Group's property substantially in accordance with the order prescribed by the Bankruptcy Code.

Moreover, recognizing the Canadian Proceedings and enforcing the Canadian Orders in the U.S. would not be manifestly contrary to the public policy of the United States as prohibited by section 1506 of the Bankruptcy Code.⁷ To the contrary, granting such recognition furthers the U.S. public policy respecting foreign proceedings as articulated, among other ways, through the objectives set forth in sections 1501(a) and 1508 of the Bankruptcy Code.

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⁷ As the legislative history explains, "11 U.S.C. § 1506 follows of the [UNCITRAL] Model Law [on Cross-Border Insolvency (1997)] article 5 exactly, [which] is standard in UNCITRAL texts, and has been narrowly interpreted on a consistent basis in courts around the world. The word manifestly in international usage restricts the public policy exception to the most fundamental policies of the United States." HR. Rep. 109-31(1), 109 Cong., 1st Sess. 2005, *reprinted in* 2005 U.S.C.C.A.N. 88, 169 at 172.

CONCLUSION

For the foregoing reasons, the Monitor respectfully requests that this Court grant the relief requested in the Chapter 15 Petitions and such other relief as is appropriate in the circumstances.

Dated: Wilmington, Delaware
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