A DIVINE COMITY:
A CANADIAN PERSPECTIVE ON THE BALANCE BETWEEN INTERNATIONAL COOPERATION AND THE PRESERVATION OF NATIONAL AUTONOMY

Jennifer Stam
Ogilvy Renault LLP
Royal Bank Plaza, South Tower
200 Bay Street, Suite 3800
Toronto, Ontario M5J 2Z4 CANADA
www.ogilvyrenault.com

March 2006

TABLE OF CONTENTS

INTRODUCTION

Conducting business on a global level is a trend that has been observed for years. Unfortunately, with increased international business comes increased international failure. If geography, foreign languages and different legal systems are hurdles when times are good, they become virtual roadblocks when times are bad. In response, more and more countries have been adopting legislation explicitly addressing cross-border insolvencies. Many of these regimes have been based on, or are similar to, the regime created by the Model Law, which was adopted by the United Nations Commission on International Trade Law ("UNCITRAL") in 1997. Naturally, academics and practitioners, including those of us in Canada, have gravitated towards considering issues such as the impact of new legislation on our current regimes, whether the new legislation will result in positive or negative change and how to properly advise clients on these matters.

There is no doubt that in the past, attempts at reconciling the differences in competing insolvency regimes have resulted in conflict and uncertainty. One of the main goals of the Model Law is to alleviate some of these difficulties. However, the Model Law's implementation has not been without complication and, even as more and more countries adopt the Model Law or a version of it, conflict and uncertainty will not be entirely eliminated. That is the reality of attempting to restructure businesses spanning several jurisdictions.

To date, much of the controversy arising out of the Model Law has roots in the ongoing debate of the merits of adopting a universalist approach to insolvency proceedings. Critics point to instances of blatant forum shopping and spoiled expectations of creditors. Proponents, on the

other hand, refer to the benefits of increased procedural certainty and the chaos that can result from multiple proceedings in multiple jurisdictions.

This debate is close to the hearts of nations who are seeing an increasing number of businesses that were once national icons being bought out by large conglomerates or whose only alternative to bankruptcy is to seek out foreign investors. Canada, among those nations, has always attempted to achieve a balance between preserving its national identity and recognizing the utility and commercial reality of foreign investment. This balancing act can be observed in many different areas of Canadian commerce, both in and out of the insolvency context. Within the context of an insolvency, however, the Canadian courts have become involved and have been asked to consider granting ancillary relief where a primary restructuring is taking place in another jurisdiction. Recent examples of cross-border restructurings involving Canada make it a certainty that Canadian courts will continue to provide respect and deference to foreign proceedings when merited, but also expect the same in return from other courts when the circumstances dictate.

A version of the Model Law has now been proposed in Canada by way of Bill C-55.[1] If Bill C-55 comes into force, Canada will likely be the tenth country in the world and the third country in North America to incorporate the Model Law regime into its existing insolvency legislation. In the context of insolvency, cooperation and comity are not foreign concepts to

---

[1] Bill C-55*, An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts* (1st Sess. 38th Parl., 2005) (assented to November 25, 2005) ["Bill C-55"]. Currently, the adoption of Bill C-55 has been postponed until June 30, 2006 at the earliest (Canada, Debates of the Senate, Vol. 142, No. 100, Friday, November 25, 2005).

Canadian courts. Indeed, these principles have been promoted by counsel and the courts in both inter-provincial and international matters.

If the Model Law is adopted in Canada, we will have the benefit of looking to the experience of other countries including the member States of the European Union (the "EU") and the United States of America (the "US") who have already enacted similar legislation. We will also have the benefit of a tradition of true cooperation, coordination and mutual trust. With this guidance, Canada will hopefully continue to work towards achieving an optimal balance between comity and autonomy, exercising discretion and demonstrating creativity in order to address the unique commercial realities of each international insolvency proceeding.

THE LAW IN CANADA

There are two main Canadian statutes that apply to insolvency proceedings – the *Bankruptcy and Insolvency Act* (the "BIA")[2] and the *Companies' Creditors Arrangement Act* (the "CCAA").[3] In 1997, there were significant amendments to both the BIA and the CCAA which introduced provisions related to cross-border insolvencies into both statutes. Now, and as discussed below, Bill C-55 proposes further substantial amendments to both the BIA[4] and the CCAA[5] including the adoption of a version of the Model Law. For the purposes of this paper, I

---

[2] R.S.C. 1985, c. B-3, as amended ["*BIA*"].

[3] R.S.C. 1985, c. C-36, as amended ["*CCAA*"]. The *Winding-up and Restructuring Act* R.S.C 1985, c. W-11, as amended ["*WRA*"] is a third Canadian statute related to insolvencies, but only applies to certain institutions such as trust companies, railroads and insurance companies.

[4] The existing international insolvency provisions of the *BIA* can be found at Part XIII.

[5] The existing international insolvency provisions of the *CCAA* can be found at Section 18.6.

will refer primarily to the international insolvency provisions of the CCAA which has traditionally been the preferred statute in the restructuring of multinational businesses.

The proposed amendments, although based on the Model Law, come with their own nuances in order to ensure that they preserve concepts fundamental to the existing legislation into which they are being incorporated. However, the principles and objectives behind the now impending adoption of Bill C-55 are consistent with the UNCITRAL model and those of other adopting nations, including principles of comity, cooperation and coordination.

Comity

Even absent specific legislative incorporation, the principle of "comity" is one that has a long tradition in Canadian courts. The high water mark of the principle of "comity" in Canadian jurisprudence can be found in *Morguard Investments Ltd. v. De Savoye*[6] ("*Morguard*"). At issue in *Morguard* was whether a court in the Province of British Columbia should recognize a judgment issued by an Alberta court for the purposes of enforcement. The matter was appealed to the Supreme Court of Canada (the "SCC") where it was determined that the judgment should be recognized. In coming to its decision, the SCC expressly adopted the US definition of "comity", set out as follows:

> '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

[6] (1990), 76 D.L.R. (4th) 256 (SCC) ["*Morguard*"].

> 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.[7]

The SCC recognized that as the integration of business expanded, the application of law would also have to expand. In today's world, individual states, "cannot live in splendid isolation" and "the content of comity must be adjusted in light of a changing world order".[8] The SCC further recognized:

> The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative.[9]

Ultimately, the SCC recognized that however it is defined, the legal reality had to be adjusted to address an expanding commercial arena, and in that regard, observed:

> the considerations underlying the rules of comity apply with much greater force between the units of a federal state, and I do not think it much matters whether one calls these rules of comity or simply relies directly on the reasons of justice, necessity and convenience.[10]

The SCC then went on to discuss the test for determining whether a court properly has jurisdiction to render a judgment and whether, as a result, its judgment ought to be recognized. The test asks whether there is a "real and substantial" connection between the subject matter of the proceeding and the foreign jurisdiction.

---

[7] *Ibid.* at p. 269.

[8] *Ibid.* at pp. 268 and 269.

[9] *Ibid.* at p. 270.

[10] *Ibid.*

The "real and substantial connection" test has since been affirmed and followed by a number of courts since *Morguard*. In *Hunt v. T&N plc* ("*Hunt*"),[11] the SCC expanded on the themes set out in *Morguard*, indicating that the obligation of the courts in one Province to give "full faith and credit" to the judgments of the courts in other Provinces, "is inherent in the structure of the Canadian federation".[12]

Canadian jurisprudence also makes it clear that the test set out in *Morguard* applies not only to the recognition of inter-provincial judgements but also to US and other judgements.[13] Most recently, in *Beals v. Saldhana,*[14] the SCC recognized that "international comity and the prevalence of cross-border transactions and movement call for a modernization of private international law."[15] In keeping with that spirit, the SCC then held that the "real and substantial connection" test should be applied with respect to the recognition and enforcement of foreign judgments.[16] In its decision, the SCC indicated that several factors may be considered in determining whether there is a "real and substantial" connection including attornment, location

---

[11] (1993), 109 D.L.R. (4th) 16 (SCC) ["*Hunt*"].

[12] *Ibid.* at p. 41.

[13] See, for example, *United States v. Ivey* (1995), 26 O.R. (3d) 533 (Ont. Ct. Gen. Div.), aff'd (1996), 30 O.R. (3d) 370 (C.A.).

[14] [2003] 3 S.C.R. 416 ["*Beals*"].

[15] *Ibid*. at p. 437.

[16] In his dissenting opinion, Justice LeBel expressed a concern that the development of the law in this regard would result in Canadian courts being compelled to "participate in foreign lawsuits no matter how meritless the claim or how small the amount of damages." As a result, Justice LeBel indicated that the "real and substantial" test should be significantly modified when being applied to foreign (as opposed to inter-provincial) judgements and, in particular, that "the assessment of the proprietary of the foreign court's jurisdiction should be carried out in a way that acknowledges the additional hardship imposed on a defendant who is required to litigate in a foreign country." (p. 473).

(i.e. residence) and agreement to submit.[17] Not surprisingly, although it emphasized the importance of comity, the SCC indicated that where there are issues of public policy against recognition, these factors would also be taken into consideration. This decision clearly outlines the continuing tradition of common law comity.

Courts have also been willing to recognize foreign proceedings in the context of insolvencies. One of the leading cases on common law recognition of foreign insolvency proceedings is *Roberts v. Picture Butte Municipal Hospital et. al.* ("*Roberts*").[18] In *Roberts*, Dow Corning Corporation ("Dow"), finding itself a defendant in class action litigation related to faulty breast implants, commenced proceedings under Chapter 11 ("Chapter 11")[19] of the US Bankruptcy Code.[20] The plaintiff brought an action in the Province of Alberta, Canada against Dow related to her faulty breast implants, but had also filed a proof of claim in the Chapter 11 proceedings. In response to the plaintiff's Alberta action, Dow brought a motion seeking recognition of the Chapter 11 proceedings in order to stay the Alberta litigation. In considering the application by Dow, Justice Forsyth reviewed the principles set out in *Morguard* and observed:

> 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,

---

[17] *Beals, supra* note 14 at p. 441.

[18] [1998] A.J. No. 817 (Alta. Q.B) (QL) ["*Roberts*"]. See also *Re Olympia & York Developments Ltd.* (1996), 43 C.B.R. (3d) 111 (Ont. Ct. Gen. Div.) ["*Olympia & York*"] and *Microbiz Corp. v. Classic Software Systems Inc.* (1996), 45 C.B.R. (3d) 40 (Ont. Ct. Jus.).

[19] 11 U.S.C. §1101-§1129 ["*Chapter 11*"].

[20] 11 U.S.C. ["*US Bankruptcy Code*"].

> there would be multiple proceedings, inconsistent judgments and general uncertainty.[21]

The Alberta Court granted the relief requested by Dow on a number of grounds including that: (a) the plaintiff had attorned to the jurisdiction of the US when she filed her proof of claim; (b) as such, she would have the opportunity to vote on the plan in the context of the Chapter 11 proceedings; and (c) Dow's proposed approach to dealing with the outstanding breast implant litigation appeared "logical and in the interests of all creditors as a group."[22]

While the Court placed a large degree of significance on the fact that the plaintiff had attorned to the jurisdiction of the US,[23] it also observed,

> even had there been no attornment, 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 US Bankruptcy Court.[24]

The decision in *Roberts* indicates that even absent express legislative authority, courts in Canada are willing to grant relief based on principles of comity in the insolvency context.

Despite the general attitude of the Canadian courts to act in a manner consistent with comity, there have been a few notable exceptions to this rule including SCC's ruling in *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)* ("*Holt Cargo*").[25] *Holt Cargo*

---

[21] *Roberts*, *supra* note 18 at para. 20.

[22] *Ibid.* at paras. 23, 24 and 25.

[23] *Ibid.* at para. 29.

[24] *Ibid.* at para. 31.

[25] [2001] 3 S.C.R. 907 ["*Holt Cargo*"]. See also *Re Antwerp Bulkcarriers N.V.*, [2001] 3 S.C.R. 951.

involved (a) a Belgian ship owned by a bankrupt Belgian company; (b) a US creditor seeking to enforce a maritime lien arising under US law in the Federal Court of Canada (the "FCC"); and (c) the arrest of the ship in the Province of Nova Scotia, Canada.

The trustees were appointed in the bankruptcy proceedings of the ship owner a week after the arrest of the ship and subsequently applied for recognition of the proceedings in the FCC as under Belgian law, the trustees were required to seize all of the assets of the bankrupt.[26] The trustees' application was brought on the basis of international cooperation and comity. After the FCC refused to recognize the Belgian bankruptcy proceedings, the matter was eventually brought before the SCC for a determination.

The trustees argued that the SCC should adopt a "universalist" approach in situations where insolvencies spanned more than one jurisdiction.[27] However, in *Holt Cargo*, the SCC rejected this proposal and, instead preferred a "territorialist" approach. In coming to its conclusion, the SCC made five important observations on which it based its ruling:

1. the ship owner was not placed into bankruptcy under the laws of Canada – instead, the only proceedings before the Canadian bankruptcy court were for recognition and implementation of the Belgian bankruptcy orders;

2. the bankruptcy courts in Belgium and Canada both had a legitimate interest in the *in rem* action in the FCC;

---

[26] *Ibid*. at p. 913.

[27] *Ibid*. at p. 922.

3. Canadian bankruptcy courts have a responsibility "to consider the interests of the litigants before it and other affected parties in Canada as well as the desirability of international cooperation and other relevant circumstances";

4. Canadian bankruptcy courts derive their authority from Canadian law – in this regard, when Canadian courts are called upon to assist foreign courts, Canadian law dictates that the court must consider the any "juridical advantage which those disadvantaged by deferral to the foreign court would enjoy in a Canadian court"; and

5. issues of public policy must always be a consideration.[28]

The SCC continued to observe that while international cooperation is an important consideration in these types of circumstances, it was not, in all cases, the determining factor. Courts must also have "regard to the need to do justice to the particular litigants who come before them"[29] and in that regard, observed that:

> 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 to all of the relevant facts of a particular case.[30]

---

[28] *Ibid*. at pp. 926 to 928.

[29] *Ibid*. at p. 945.

[30] *Ibid*. at p. 946.

The decision in *Holt Cargo* is a reminder that recognition of foreign proceedings in Canada is not simply a "rubber stamp" process and relief will be refused in situations where the facts mitigate against recognition.

The Legislation – Section 18.6 of the CCAA

The cross-border insolvency provisions in the CCAA can be found in Section 18.6, which consists of eight short subsections providing an outline of circumstances in which a Canadian court may provide ancillary relief in the context of "foreign proceedings". The full text of Section 18.6 is as follows:

> **18.6** (1) 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;
>
> "foreign representative" means a person, other than a debtor, holding office under the law of a jurisdiction outside Canada who, irrespective of the person's designation, is assigned, under the laws of the jurisdiction outside Canada, functions in connection with a foreign proceeding that are similar to those performed by a trustee in bankruptcy, liquidator or other administrator appointed by the court.
>
> **Powers of court**
>
> (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 co-ordination of proceedings under this Act with any foreign proceeding.
>
> **Terms and conditions of orders**
>
> (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.
>
> **Court not prevented from applying certain rules**
>
> (4) Nothing in this section prevents the court, on the application of a foreign representative or any other interested person, 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.

> **Court not compelled to give effect to certain orders**
>
> (5) 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.
>
> **Court may seek assistance from foreign tribunal**
>
> (6) The court may seek the aid and assistance of a court, tribunal or other authority in a foreign proceeding by order or written request or otherwise as the court considers appropriate.
>
> **Foreign representative status**
>
> (7) An application to the court by a foreign representative under this section does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this section conditional on the compliance by the foreign representative with any other order of the court.
>
> **Claims in foreign currency**
>
> (8) Where a compromise or arrangement is proposed in respect of a debtor company, a claim for a debt that is payable in a currency other than Canadian currency shall be converted to Canadian currency as of the date of the first application made in respect of the company under section 10 unless otherwise provided in the proposed compromise or arrangement.[31]

The inclusion of Section 18.6 created a legislative process through which a debtor, foreign representative or other stakeholder could seek ancillary relief where a recognized foreign proceeding had been commenced in another jurisdiction.

Subsections (2) and (4) are the two primary operative subsections of 18.6, both of which provide that a court may grant relief in order to facilitate or provide assistance to foreign proceedings. Although there are certain differences in procedure depending on the rules of procedure of the relevant Province, typically proceedings will be commenced by way of an issuance of a notice of application. The application hearing is then often held shortly thereafter, on little or no notice to other stakeholders.

---

[31] *CCAA*, *supra* note 3.

When Section 18.6 was added to the CCAA, it was done with the intent to codify, at a federal level, the principles of comity and cooperation and the judicial trends of promoting international business and commerce which were established at common law. As such, the use of Section 18.6 enables a debtor to make one application for foreign recognition, whereas under common law, it would have to make separate Provincial applications.

Leading Canadian Cases

The First Case: Babcock & Wilcox Canada Ltd.

Although enacted in 1997, Section 18.6 was not considered in any meaningful way until 2000 in *Babcock & Wilcox Canada Ltd.* ("*Babcock*").[32] The Babcock & Wilcox Company ("Babcock") was a company incorporated under the laws of the State of Delaware and engaged in the design, engineering, manufacturing and servicing of large industrial steam power generation systems, including boilers used to generate steam in electric power plants and factories. By the late 90's, Babcock and its affiliates (collectively, the "B&W Companies") had over 6,000 employees and conducted business on a world-wide basis, including extensive operations in both Canada and the US.

In the years prior to the commencement of the their Chapter 11 proceedings, the B&W Companies had become subject to extensive litigation based on allegations based on the B&W Companies' historical use of asbestos products. In order to seek a final resolution to this litigation, in February 2000, the B&W Companies voluntarily filed in Louisiana under Chapter 11 for protection from the ongoing asbestos-related litigation and pending claims. A

---

[32] (2000), 18 C.B.R. (4th) 157 (Ont. Sup. Ct. Jus.) ["*Babcock*"].

successful Chapter 11 plan would allow the B&W Companies to cap their exposure to asbestos claims and permit the restructured entities to be free of such litigation by the establishment of a trust fund against which litigation claims could be pursued.

Babcock & Wilcox Canada Ltd. ("B&W Canada"), Babcock's Canadian operating entity, conducted business out of five locations across Canada. At the time Babcock commenced its Chapter 11 proceedings, B&W Canada was not subject to any asbestos claims in Canada. However, claims had previously been asserted against B&W Canada in both Canada and the US. Additionally, because of the degree of integration between the US B&W Companies and B&W Canada there was a real risk that claims might be commenced against B&W in the future. B&W Canada was notionally included as one of the protected entities in the US proceedings that had been commenced. However, absent proceedings being commenced in Canada, B&W Canada would have remain exposed to asbestos claims in Canada which would have, in part, defeated the main purpose of seeking protection in the US. For this reason, the B&W Companies wanted to obtain some level of protection for its Canadian subsidiary and to ensure that at the end of the US proceeding any protection given to the Canadian subsidiary would be recognized in Canada.

It was not, however, a possibility to commence full restructuring proceedings in Canada under either the BIA or the CCAA. This was primarily because B&W Canada was clearly a solvent company. B&W Canada then considered whether it would be entitled to relief based on Section 18.6. Counsel determined that an application under Section 18.6 might be successful as the Chapter 11 proceedings would likely be considered "foreign proceedings" and the granting of limited relief would be consistent with a spirit of comity and cooperation.

In an application brought before the Ontario Superior Court of Justice (the "Ontario Court"), B&W Canada applied under Section 18.6 for recognition of the US proceedings in Canada and for the implementation of a limited stay of proceedings against it in Canada restraining any asbestos actions against B&W Canada. In its application, B&W Canada argued that subsection 18.6(4) of the CCAA operated to allow it to get the protection that it sought. As a first step, B&W Canada had to establish that the B&W Companies' Chapter 11 proceedings fell within the definition of "foreign proceedings" under the CCAA.[33]

Secondly, B&W Canada had to determine whether it could apply for relief under any of the subsections of Section 18.6. This determination was perhaps the most complicated as, until this point, most would have argued that any relief under the CCAA, whether primary or ancillary, was only open to "debtor companies."[34] As a result, B&W Canada could not seek relief under subsection 18.6(2) because, on its face, subsection 18.6(2) only permits the court to make an order with respect to debtor companies.

Unlike subsection 18.6(2), however, subsection 18.6(4) does not require the order be made with respect to a "debtor company". Instead, subsection 18.6(4) reads:

> Nothing in this section prevents the court, on application of a foreign representative or any other interested person, 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.

---

[33] *CCAA*, *supra* note 3 at Part II, S. 18.6(1).

[34] The definition of "debtor company" under the *CCAA* imposes an insolvency requirement.

The Ontario Court held that subsection 18.6(4) does not contemplate a full filing under the CCAA or that the applicant be a "debtor company". Instead, subsection 18.6(4) may be used where, notwithstanding the absence of the possibility of a full filing under the CCAA, ancillary relief is required in connection with a foreign proceeding. Thus, it was open to B&W Canada to make its application under subsection 18.6(4).

Although the relief sought was based on legislative grounds, the principles behind the request were based on existing legal and equitable doctrine relating to principles of comity. However, to seek relief on the basis of comity alone, B&W Canada would have had to seek relief in all Provinces where it carried on business. What was novel about this application was that through Section 18.6, recognition could be achieved on a national level where previous relief could only be given on a provincial level.

The Ontario Court agreed with B&W Canada and, accordingly Justice Farley ordered there to be a stay against asbestos suits brought in Canada against B&W Canada. The order also explicitly included a clause that would permit any potential claimant to apply to the court to have the stay lifted (the "Come-Back Clause").[35] The Come-Back Clause was designed such that any interested party could later argue that its claim should properly be heard in Canada. Come-back clauses are commonplace in orders made on short or no notice under the BIA and CCAA and are included to balance the need for immediate protection and lack of notice to other stakeholders.[36] In *Babcock*, relief had been sought on an expedited basis without notice to other stakeholders.

---

[35] *Babcock*, *supra* note 32 at p. 169.

[36] The utility of come-back clauses was outlined by the Ontario Court in *Algoma Steel Inc.*, [2001] O.J. No. 1943 (C.A.) (QL).

The Come-Back Clause in *Babcock* demonstrates that while Justice Farley was willing to recognize the Chapter 11 proceedings in Canada, he was mindful that a balance had to be achieved and that future situations might arise requiring a hearing in Canada.

In addition to its analysis of Section 18.6's application to B&W Canada, the Ontario Court laid down several general principles for how Section 18.6 should be used with respect to cross-border insolvencies. They can be summarized as follows:[37]

(a) encouragement of comity and cooperation between the courts of various jurisdictions;

(b) respect for the overall thrust of foreign bankruptcy and insolvency legislation, unless it is substantially different from bankruptcy and insolvency legislation in Canada;

(c) equal treatment for all stakeholders regardless of where they reside;

(d) companies should be permitted to reorganize on a global level. To the extent it is possible and practical, one jurisdiction should take charge of the principal administration of the enterprise's reorganization;

(e) the extent of the court's involvement will vary on a case by case basis. In determining the appropriate level of involvement, the court should take into consideration factors such as the geographical connection between the court and

---

[37] *Babcock*, *supra* note 32 at pp. 167-8.

the debtor as well as the court's jurisdictional ability to address the debtor's legal issues;

(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

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

(g) as effective notice as is reasonably practicable in the circumstances should be given to all affected stakeholders, and such stakeholders should be afforded the option to come back to the court to speak to any granted order.

The inclusion of these guidelines in *Babcock* is significant for a number of reasons. First, they clarified circumstances in which Section 18.6 could be applied in connection with international insolvencies. Second, they concisely summarized common law principles of recognition that had been in existence even prior to the enactment of Section 18.6. Third, and perhaps most importantly, they clearly indicated that where circumstances dictated, it was appropriate for the Ontario Court to acknowledge the primary jurisdiction of another court in the context of insolvency proceedings.

The initial relief granted in *Babcock* not only reflects the Court's extension of comity, but also the flexible nature of the Canadian insolvency regime in the nature of the relief that may be granted. In *Babcock*, it did not make sense for a full stay of proceedings to be implemented as

B&W Canada was otherwise solvent. Instead, the protection was limited to a stay against asbestos actions.

Additionally, for the first time, principles of notice and access to foreign proceedings were specifically set out in the context of ancillary relief granted pursuant to the CCAA. In that regard, the Initial Order that was granted in *Babcock* provided for the appointment of an "information officer" who, as an officer of the court, was required to provide at least quarterly reports to the Ontario Court regarding the status of the US proceedings.

Throughout the course of the last six years, the B&W Companies have worked to complete a restructuring on a global level and have now completed their Chapter 11 proceedings. On January 17, 2006 the United States District Court for the Eastern District of Louisiana issued an order sanctioning the B&W Companies' joint amended and restated plan of reorganization which, among other things, implemented a channelling injunction with respect to asbestos actions against the B&W Companies and certain non-debtor affiliates, including B&W Canada.

The cooperation of the Ontario Court throughout the duration of the Chapter 11 proceedings assisted the B&W Companies in developing a plan that contemplated a global restructuring. In its sanction order, the US Court acknowledged the cooperation of the Ontario Court stating,

> This Court would like to express its appreciation to Mr. Justice James Farley of the Ontario Superior Court of Justice for presiding over the

> ancillary proceedings in Canada and would again seek his assistance in recognizing this order and giving effect to it in Canada.[38]

On January 20, 2006 the Ontario Court granted an order recognizing the District Court's sanction order and giving effect to it in Canada. The plan then became effective on February 22, 2006.

Section 18.6 Post-*Babcock*

Babcock, and the guidelines laid out by Justice Farley therein, have since been adopted by the courts in a number of subsequent decisions. In *Re Matlack* ("*Matlack*"),[39] the Ontario Court recognized a US stay of proceedings order with respect to an action brought in Ontario against a US company. In *Matlack,* Matlack, Inc. ("Matlack") was incorporated under Pennsylvania law, but had operations in Canada. One of Matlack's Canadian creditors purported to seize some of Matlack's Canadian assets. Importantly, Matlack had no Canadian subsidiaries, but merely Canadian operations whose business had close ties with its American business. As such, the Ontario Court recognized the Chapter 11 proceedings as foreign proceedings and found that the seizure of the Canadian assets was premature and that it was justified in recognizing the foreign stay under Chapter 11.

The cross-border insolvency proceedings of The Loewen Group Inc. ("TLGI") and several of its US and Canadian subsidiaries (collectively the "Loewen Companies") are another example of the adoption of the *Babcock* principles, but for a slightly different purpose. TLGI was

---

[38] *In Re The Babcock & Wilcox Company,* (January 17, 2006) Civil Action No. 00-558 (D.LA) ["*Babcock Sanction Order*"].

[39] [2001] O.J. No. 6121 (Sup. Ct. Jus.) (QL) ["*Matlack*"].

a company incorporated under the laws of the Province of British Columbia and had extensive operations in both Canada and the US. In fact, at the time of its filing, TLGI was the largest operator of funeral homes in Canada and the second largest in the US with almost 15,000 employees across North America. In June 1999, the Loewen Companies commenced Chapter 11 proceedings as well as full restructuring proceedings under Section 11 of the CCAA. As a result of the dual filing, TLGI was required to address claims that were potentially subject to different legal treatment depending on the applicable law.

During the course of its restructuring, TLGI initiated a wide reaching US claims process which was approved and commenced in Canada. As a result, most claims, Canadian and US, were filed in the US process. A subsequent Canadian claims process was commenced but only six claims were filed, all of which were settled, disallowed or left unaffected. On this basis and in order to resolve any conflicts regarding treatment of claims, TLGI subsequently applied for relief that would allow for the following:

(a) a recognition that the US proceeding was the appropriate forum for the adjudication of all claims against TLGI and a recognition of the jurisdiction of the US court to determine, compromise or otherwise affect the interests of claimants, including claimants in Canada; and

(b) an exemption from TLGI having to file a restructuring plan under the CCAA.[40]

---

[40] (December 7, 2001) Toronto, 99-CL-3384 (Sup. Ct. Jus.) and (2002), 32 C.B.R. (4th) 56 (Sup. Ct. Jus.) [collectively, "*Loewen*"].

This application was made pursuant to subsection 18.6(2), which permits a debtor company to apply to the court 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 this Act with any foreign proceeding.

In *Babcock*, B&W Canada could not rely on subsection 18.6(2) which contemplates a "debtor company." However, Justice Farley, in *Babcock,* had noted that subsection 18.6(2) could be used in situations such as the one in *Loewen*.[41] It was appropriate for TLGI and its Canadian subsidiaries to apply under subsection 18.6(2) because they were all insolvent and thus "debtor companies".

The relief was sought on the basis that TLGI was not purporting to force claimants into the US without regard for the nature of their claims.[42] In *Loewen*, the vast majority of TLGI's Canadian creditors had elected to file their claims in the US. It was, therefore, valid for TLGI to purport to deal with them under a US plan of arrangement.

While *Loewen* followed the decision in *Babcock*, it also expanded upon the application of Section 18.6 in the context of an international insolvency. For the first time, an insolvent Canadian company that had filed for protection under both Chapter 11 and the CCAA was

---

[41] *Babcock*, *supra* note 32 at 165.

[42] This had been the downfall in *Menegon v. Phillip Services Corp.* (1999), 11 C.B.R. (4th) 262 (Ont. Sup. Ct. Jus.) ["*Phillip*"]. In *Phillip*, Phillip Services Corp. ("PSC") proposed two separate plans: one US and one Canadian. Under this scheme, PSC purported to have certain claims dealt with solely under the US Plan, which would have resulted in those claims being subordinated under Section 510(b) of the *US Bankruptcy Code*, a concept which does not exist in Canada. Simultaneously, PSC tried to use the US Plan to make the Canadian Plan binding without allowing affected creditors to vote on it. This approach was rejected by the Ontario Court. Subsequently, PSC developed an alternative plan which was ultimately approved by the Ontario Court.

permitted to file a plan of arrangement only in the US. Although aspects of *Loewen* should be restricted to its facts, it reveals another solution for companies that face potentially conflicting legislation.

Many of the principles that were set out by the Court in *Loewen* were subsequently affirmed the Ontario Court in *Re Laidlaw Inc*. ("*Laidlaw*").[43] In *Laidlaw*, proceedings had been commenced in both the US and in Canada. As in *Loewen*, a vast US claims process was approved and implemented in both the US and in Canada. Justice Farley once again saw it fit to grant an order declaring that the US court had jurisdiction to determine claims and relieved the debtors from the obligation to file a separate plan in Canada.

Another application of the *Babcock* principles can be found in *Braycon International Inc. v. Everest & Jennings Canadian Limited* ("*Braycon*").[44] In this instance, litigation had been commenced in Ontario against Everest & Jennings USA ("E&J US"), a US company, and Everest & Jennings Canadian Limited ("E&J Canada"). E&J US had filed for protection under Chapter 11, but importantly E&J Canada was not subject to any bankruptcy proceedings in Canada. E&J Canada brought an application for recognition of the foreign stay with the effect of preventing the actions against both companies from continuing.

In coming to its conclusion, the Court considered the general principle that where claims raise common issues of fact and law, they should be heard by one Court, and then went on to consider principles of international comity and the *Babcock* decision. The court determined that

---

[43] (2003), 39 C.B.R. (4th) 239 (Sup. Ct. Jus.) ["*Laidlaw*"].

[44] [2001] O.J. No. 511 (Sup. Ct. Jus.) (QL).

it should recognize the stay with respect to E&J US, but not with respect to E&J Canada. Thus, the lawsuit against E&J Canada could proceed through Ontario courts, but the suit against E&J US could not.

In 2003, United Air Lines Inc. ("UAI") commenced Chapter 11 proceedings in the US and sought to commence ancillary proceedings under Section 18.6 in Canada.[45] The Ontario Court granted the original order and implemented a stay of proceedings in Canada but again made note of the importance of the inclusion of the Come-Back Clause.[46] In a subsequent decision of the Court, Justice Farley determined that UAI was not entitled to suspend certain pension contributions in Canada, noting the difference in pension treatment in Canada and the US.[47] This finding was also coupled with Justice Farley's observation that the amounts in question were relatively insignificant and would not have a substantial affect on the overall restructuring.[48] The decision demonstrates the continuous balance that must be preserved between extensions of comity and ensuring fair treatment of creditors in an ancillary jurisdiction particularly where the impact will be inconsequential on the overall proceedings.

In addition to those restructurings previously described there have been a number of other ancillary proceedings commenced in Canada under Section 18.6 where it has been determined

---

[45] *Re United Air Lines Inc.* (2003), 43 C.B.R. (4th) 284 (Sup. Ct. Jus.) ["*United Air Lines*"].

[46] *Ibid*. at p. 285.

[47] (2005), 9 C.B.R. (8th) 159 (Ont. Sup. Ct. Jus.) ["*United Air Lines 2*"].

[48] *Ibid*. at p. 162.

that full restructuring proceedings in Canada are not necessary.[49] In both *Re Pliant Corp. of Canada* ("*Pliant*")[50] and *Re Foamex Canada Inc.* ("*Foamex*"),[51] the Ontario Court granted relief to the Canadian subsidiaries of the parent group who were US companies and subject to Chapter 11 proceedings. In both *Pliant* and *Foamex*, the primary purpose of commencing ancillary proceedings in Canada was to ensure that the debtor-in-possession financing arrangements were approved and given effect to in Canada as the Canadian entities were guarantors in those arrangements. In each of these instances (as was also the case in *Babcock*) an information officer was appointed in the Canadian proceedings for the purpose of collecting information and keeping the Canadian court apprised as to the status of the restructuring proceedings.

Contrasting Views: Singer Sewing Machine Co. of Canada Ltd.

As the vast majority of decisions in this area support the concept of foreign recognition on the basis of Section 18.6 in circumstances where foreign proceedings have been commenced, the decision in *Re Singer Sewing Machine Co. of Canada Ltd.* ("*Singer*")[52] stands out in stark contrast. Singer Company N.V. ("Singer")[53] was the parent company of a number of foreign subsidiaries, including Singer Sewing Machine Co. of Canada Limited ("Singer Canada").

---

[49] See, for example, *In the Matter of Huffy Corporation* (October 20, 2004), Toronto, 04-CL-5586 (Sup. Ct. Jus.) and *In the matter of Spiegel Group Teleservices Canada, Inc. and Eddie Bauer of Canada, Inc.* (June 16, 2003), Toronto, 03-CL-5042 (Sup. Ct. Jus.).

[50] *Re Pliant Corp. of Canada*, [2006] O.J. No. 20 (Sup. Ct. Jus.) (QL) ["*Pliant*"].

[51] *In the Matter of Foamex Canada Inc.* (October 21, 2005), Toronto, 05-CL-6084 (Sup. Ct. Jus.) ["*Foamex*"].

[52] (2000), 18 C.B.R. (4th) 127 (Alta. Q.B.) ["*Singer*"].

[53] This decision is also discussed in the context of the Model Law below.

Singer had applied for protection under Chapter 11 and had received an order that protected all foreign subsidiaries of Singer including Singer Canada. Although Chapter 11, on its face, purports to extend to all of the assets of any protected entity, wherever located, Canadian law would not have automatically recognized such an order absent formal recognition. The Murrays, who were judgment creditors of Singer Canada did not want to be forced to submit their claim in the US proceedings and objected to the recognition of the Chapter 11 order in Canada. In its application before the Alberta court, instead of relying upon Section 18.6 of the CCAA, Singer Canada cited Section 271 of the BIA as the statutory ground on which it sought relief.[54]

Registrar Funduk of the Alberta court denied Singer Canada's application for relief. In coming to his decision, Registrar Funduk briefly considered Section 271 of the BIA. He, however, dismissed it in one sentence, claiming there was "understandably no case law on s. 271."[55] Registrar Funduk concluded that the Chapter 11 order should not be recognized in Canada as enforceable against Singer Canada. The tenor of Registrar Funduk's decision indicated his disdain for circumstances in which he perceived that the US had adopted a "we can do it best" attitude.[56] He continued to state that in the circumstances, there was no real and substantial connection between the US court order and Singer Canada. Further, he noted that the Murrays had not attorned to the jurisdiction of the US and were not required to in the

---

[54] Sections 268-275 of the BIA address international insolvencies and are similar to, although not the same as Section 18.6 of the CCAA. 271 of the BIA provides that a foreign representative may, "for the purpose of effecting a composition, an extension of time or a scheme of arrangement in respect of a debtor" seek a stay of proceedings with respect to the debtor.

[55] *Singer*, *supra* note 52 at p. 131.

[56] *Ibid.* at p. 129.

circumstances, particularly in light of the fact that they were creditors of only Singer Canada and not of any other "Singer" entity. Registrar Funduk concluded by stating,

> Comity does not required me to recognize a Chapter 11 order over a Canadian company carrying on business only in Canada and whose assets are all in Canada. Who the shareholders are is irrelevant and who the creditors are is irrelevant. Under Alberta law neither gives American bankruptcy court jurisdiction over Singer Canada [*sic*].[57]

This approach seems to be the preferred approach for some including Professor Jacob Ziegel who has criticized the *Babcock* decision and lauded the finding of Registrar Funduk in *Singer*. At the heart of Professor Ziegel's objections to *Babcock* is concern that Justice Farley's analysis of Section 18.6 expanded the principle of comity to an extent that it may not be constitutionally sound and that to hear such applications *ex parte* is inappropriate. The pith and substance of Section 18.6 and the *CCAA* as a whole, however, is to assist with matters of insolvency and debt restructuring, which are arguably federal matters. In addition, while the *Babcock* application was made *ex parte*, Justice Farley explicitly left it open to any party to apply to lift the stay with his inclusion of the Come-Back Clause.[58]

Although Canadian courts have indicated that there must be a balance between cooperation and considering issues of national autonomy and public policy (such as in *United Air Lines*), there do not appear to be many other instances (except in *Holt Cargo*) where there has

---

[57] *Ibid*. at p. 133.

[58] Jacob Ziegel, "Corporate Groups and Canada-US Crossborder Insolvencies: Contrasting Judicial Visions." (2001), 25 C.B.R. (4th) 161 [Ziegel, "Corporate Groups"].

been such an absolute refusal by a Canadian court in this type of circumstance.[59] It will remain to be seen whether, through the adoption of the Model Law, the courts reconsider these types of decisions in order to act in a cooperative manner, consistent with the proposed legislation.

Grace Canada Inc. ("Grace")

One of the most recent examples of the scope of Section 18.6 and the affirmation of the principles in *Babcock* can be found in the Ontario Court's ongoing decisions in *Re Grace Canada Inc.* ("*Grace*").[60] The *Grace* proceedings were commenced in 2001, approximately a year after the proceedings in B&W Canada were commenced. Like the B&W Companies, W. R. Grace & Co. ("W. R. Grace"), a Delaware company and a number of its subsidiaries (collectively, the "Grace Debtors") filed for protection under Chapter 11 to stave off mass-asbestos liabilities. Again, like B&W Canada, Grace Canada Inc. ("Grace Canada") was the otherwise solvent Canadian operating subsidiary of W. R. Grace. Accordingly, a few days after the US proceedings were commended in the US, Grace Canada sought protection under subsection 18.6(4) of the CCAA. The reasons for the filing in *Grace* were substantially the same as those in *Babcock*. Once again, the Ontario Court found that the Chapter 11 proceedings constituted "foreign proceedings" under Section 18.6 and implemented a limited stay of proceedings against Grace Canada. In doing so, it directly followed and affirmed the decision in *Babcock*.

---

[59] Justice J.M. Farley, Bruce Leonard and John N. Birch, "Cooperation and Coordination in Cross-Border Insolvency Cases." (February 6, 2004). First Annual Insolvency Review Conference (University of British Columbia: Faculty of Law) [Farley, "Cooperation and Coordination"] at p. 26.

[60] Toronto, 01-CL-4081 (Ont. Sup. Ct. Jus.) ["*Grace*"].

However, unlike in *Babcock*, since the commencement of the proceedings in Canada, Grace Canada and the Grace Debtors have been named as defendants in proposed class action proceedings in Canada. Starting in 2004, a number of proposed class proceedings were commenced alleging personal injury and property damage from use of products containing asbestos. By the fall of 2005, certain Grace Debtors and other Canadian defendants (including the federal government) were facing multiple proposed tort class action proceedings in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec and Federally. Some of these actions named Grace Canada as a defendant, while others did not.

In November 2005, Grace Canada brought a motion to give effect to the modified preliminary injunction in the Chapter 11 proceedings in Canada thereby extending the stay against the Grace Debtors in Canada. Absent sufficient protection for the Grace Debtors in Canada, there was the possibility that the proposed Canadian class actions would be allowed to proceed while all US litigation was stayed thus having a "tail wagging the dog" effect on the restructuring proceedings.

Grace Canada's argument was, in essence, based on principles of comity and common sense. Fundamental to its argument were the following factors:

(a) all actions against the Grace Debtors' in the US had been stayed during the Chapter 11 proceedings in order to allow the debtors to focus their efforts on the restructuring process – to allow actions to proceed in an ancillary jurisdiction would defeat the purpose of the stay and allow the Canadian plaintiffs an unfair advantage over the US plaintiffs;

(b) the Grace Debtors' draft plan offered an equitable result in that it proposed to resolve not only US claims, but also Canadian claims which were to be adjudicated in accordance with Canadian substantive law;

(c) to allow all claims to be dealt with in one process would be undoubtedly more efficient and expedient than allowing multiple proposed class actions to proceed; and

(d) much of the work already completed in the US proceedings would likely be able to be used in Canada.

One of the elements that was key to Grace Canada's argument was that the draft plan specifically contemplated the treatment of Canadian claims against the Grace Debtors, Grace Canada and certain other third parties. In this regard, it was proposed that Canadian substantive law would be applied with respect to Canadian claims. However, in order to achieve the purposes of the restructuring, it was contemplated that, as with the US proceedings, such litigation would be commenced against one or more asbestos trusts upon plan implementation. Further, Grace Canada and the Grace Debtors proposed that all Canadian litigation be determined in accordance with an orderly litigation procedure, which Grace Canada submitted was likely to be more expedient and efficient than full class proceedings.

Grace Canada argued that the Ontario Court clearly had the jurisdiction to grant the relief being sought not only by relying on principles of comity, but also on legislative grounds. Section 18.6(3) of the CCAA states:

> An order of the court under this section may be made on such terms and conditions as the court considers appropriate in the circumstances.[61]

Accordingly, once a proceeding has been recognized as a foreign proceeding, Section 18.6(3) provides the court with broad jurisdiction to grant broad relief in order to facilitate the cross-border proceedings. In its motion, Grace Canada stressed the importance of comity in circumstances where highly integrated businesses have filed for protection in multiple jurisdictions and cited the principles laid out in *Roberts* and *Babcock* as examples.

Over the objections of counsel for the plaintiffs who opposed the motion, the Ontario Court agreed to support the US process and to recognize the US court's stay in Canada and held that it both could and should recognize US orders in Canada so as to stay claims and afford the plan process an opportunity to progress.[62]

In his reasons, Justice Farley expressed his reliance on representations made by counsel to Grace Canada to the effect that:

(a) the Grace Debtors intended "to emerge from their insolvency proceedings as soon as reasonably possible but under the guidelines that there be justice for all affected persons"; and

---

[61] *CCAA, supra* note 3.

[62] The Ontario Court went beyond simply recognizing the US proceedings. It also stayed independent claims that the class action plaintiffs had against the Government of Canada which related to the alleged conduct of certain of the Grace Debtors. Over the objection of certain class action plaintiffs, the court agreed that these claims too could be more fairly resolved under the US plan process to the benefit of all parties. Even had proceedings been permitted against the Government of Canada alone, the legal issues were so intertwined that Grace Canada could have been effectively forced into the trial in order to protect its own interests. The Ontario Court was also cognizant of the risk of record taint.

(b) the US Bankruptcy Court had previously recognized that the Canadian claims would "be governed by Canadian substantive law."[63]

Justice Farley further noted that the relief being granted did not prevent the plaintiffs from returning to court if the circumstances dictated.[64] The Ontario Court then cited its own decision in *Babcock* in support of the principle that comity need be respected in such circumstances.

The major substantive grounds advanced by the Ontario Court were threefold. First, the unified procedure would be more efficient than "full blown" class action proceedings. Second, allowing the Canadian plaintiffs to proceed would give them an unjust "leg up" on their US counterparts. And third, the overriding importance of having a "single control" in insolvency proceedings as mandated by the SCC in *Sam Levy & Associés v. Azco Mining Inc.*[65] A lack of a central authority controlling the reorganization would "fragment and possibly destabilize the other proceedings by other affected persons (including those claiming for personal injury including serious personal injury)".[66]

The Ontario Court's decision in *Grace* demonstrates the Court's recognition that in these circumstances, allowing the primary restructuring to be dealt with in one court simply made more sense. In granting the recognition of the stay, Justice Farley acted in a manner consistent

---

[63] *Re Grace Canada Inc*., [2005] O.J. No. 4868 (Sup. Ct. Jus.) (QL) ["*Grace 2*"] at paras. 8-9.

[64] *Ibid.* at para. 13.

[65] [2001] 3 S.C.R. 978.

[66] *Grace 2*, *supra* note 63 at para. 16.

with the respect shown by Canadian and US Courts alike in this kind of circumstance. At the same time, the Ontario Court provided a subtle reminder that while the requested relief should be granted in the circumstances, the Ontario Court would not tolerate indefinite delay and expected progress to be made sooner rather than later.[67]

Justice Farley, effectively summarizing his ruling, noted that finding for Grace Canada:

> …is in furtherance of the long standing respect for comity extended by the courts of this country for the courts of the US and vice versa. It would seem to me that the insolvency adjudicative proceedings would, at least under presently anticipated circumstances, result in a more effective efficient process than would a full-blown class action proceeding.[68]

The decision in *Grace* follows the evolution of Canadian law and, in particular, the seminal decision on cross-border insolvency, *Babcock*. These two cases demonstrate a clear recognition that restructuring in one primary jurisdiction is preferable where such continuity of administration results in increased efficiency and is "possible and practical" in the circumstances.

THE MODEL LAW AND BILL C-55

The Model Law: Introduction

In 1997, UNCITRAL adopted the Model Law on Cross-Border Insolvency (the "Model Law").[69] The Model Law was the product of a joint effort among many, including UNCITRAL

---

[67] *Ibid.* at para. 17.

[68] *Ibid.* at paras. 10-11.

[69] U.N. Comm'n on Int'l Trade Law, Model Law on Cross-Border Insolvency with Guide to Enactment, U.N. Sales No. E.99.V.3 <www.uncitral.org> ["Model Law"].

and the International Association of Insolvency Practitioners. The Model Law was intended to provide a "modern, harmonized and fair framework" to facilitate international cooperation in cross-border insolvency proceedings.[70] Designed to provide procedural, as opposed to substantive, guidelines to proceedings, the Model Law is meant to be used in conjunction with the existing insolvency laws of enacting States.[71]

The drafters of the Model Law intended for it to be employed in a number of situations, including:

> (a) the case of an inward-bound request for recognition of a foreign proceeding; (b) an outward-bound request from a court or administrator in the enacting State for recognition of an insolvency proceeding commenced under the laws of the enacting State; (c) coordination of concurrent proceedings in two or more States; and (d) participation of foreign creditors in insolvency proceedings taking place in the enacting State.[72]

To date, a version of the Model Law has been adopted in Eritrea, Japan, Mexico, Poland, Romania, South Africa, Montenegro, British Virgin Islands and the US.[73]

---

[70] Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency [the "*UNCITRAL Guidelines*"] <www.uncitral.org> at para. 1.

[71] *Ibid.* at para. 2.

[72] *Ibid.* at para. 22. See also, Model Law, *supra* note 69 at Article 1.

[73] < http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html>.

The Model Law – Main Concepts

The Model Law proposes several "solutions" to existing cross-border procedural issues, including:

(a) providing foreign representatives with access to the courts of the enacting State, thereby permitting the foreign representative to seek a temporary 'breathing space';

(b) determining when a foreign insolvency proceeding should be accorded 'recognition' and what the consequences of recognition should be;

(c) providing a temporary regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;

(d) permitting courts in the enacting State to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter;

(e) authorizing courts in the enacting State and persons administering insolvency proceedings in the enacting State to seek assistance abroad;

(f) providing for court jurisdiction and establishing rules for coordination where an insolvency proceeding in the enacting State is taking place concurrently with an insolvency proceeding in a foreign State; and

(g) establishing rules for coordination of relief granted in the enacting State in favour of two or more insolvency proceedings that may take place in foreign States regarding the same debtor.[74]

In granting recognition, the Model Law does not allow a court of an enacting State to evaluate the merits of the foreign court's decision to commence the proceeding or appoint the foreign representative. Instead, the Model Law creates a mechanism whereby debtors and foreign representatives are entitled to apply for recognition and ancillary relief related to their foreign proceedings. Once recognition is granted, certain relief will be granted, either on a mandatory or discretionary basis, depending on the classification of the original proceeding for which recognition is sought as "main" or "non-main".[75]

Underlying the regime created by the Model Law are the principles of mutual trust, comity and coordination. Chapter IV (Cooperation with Foreign Courts and Foreign Representatives) obliges the court to "cooperate to the maximum extent possible with foreign courts and foreign representatives."[76] The theory behind including provisions on cooperation was that the inclusion of this principle in the legislation would be potentially more effective than if it were left to the discretion of the courts of an enacting State.[77] This was also the theory

---

[74] *UNCITRAL Guidelines*, *supra* note 70 at para. 3.

[75] Model Law, *supra* note 69 at Articles 20 and 21.

[76] *Ibid*. at Chapter 4.

[77] *UNCITRAL Guidelines*, *supra* note 70 at para. 39.

behind the inclusion of the mandatory cooperation between the court of the enacting State and foreign representatives.[78]

The Model Law was not intended to restrict the commencement or continuation of insolvency proceedings if the debtor has assets in that jurisdiction even where a foreign proceeding has been recognized.[79] However, it is also clear that where enacting States want to limit their jurisdiction to cases where the debtor has assets and an "establishment", this will not be contrary to the policy of the Model Law.[80] As a result, the Model Law also includes provisions that address the coordination of multiple insolvency proceedings.[81]

Bill C-55: Introduction

In Canada, a version of the Model Law is being considered as part of Bill C-55, which proposes amendments to both the BIA and CCAA. If Bill C-55 is enacted and the Model Law is adopted in Canada it will demonstrate Canada's continued commitment to cooperation and comity in the context of international insolvency proceedings.

---

[78] *Ibid.*

[79] Model Law, *supra* note 69 at Article 28.

[80] *UNCITRAL Guidelines*, *supra* note 70 at para. 42.

[81] Model Law, *supra* note 69 at Articles 29 and 30.

Bill C-55 has incorporated the preamble of the Model Law setting out the purpose of the proposed regime, namely,

> to provide mechanisms for dealing with cases of cross-border insolvency and to promote:
>
> (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvency;
>
> (b) greater legal certainty for trade and investment;
>
> (c) the fair and efficient administration of cross-border insolvencies that protects the interest of creditors and other interested persons and those of debtor companies;
>
> (d) the protection and maximization of the value of the debtor company's property; and
>
> (e) the rescue of financially troubled businesses to protect investment and preserve employment.[82]

Based on the amendments proposed by Bill C-55, it is likely that a proceeding under the CCAA, will be commenced by way of a notice of application seeking relief under the proposed Section 46 of the CCAA. Applications brought under this Section will be for commencement of ancillary proceedings in Canada based on the recognition of a "foreign proceeding".

Main and Non-Main Proceedings

Like the Model Law, Bill C-55 contemplates that relief will be granted upon determining whether a "foreign proceeding"[83] exists. Once a court has made such a finding, it will then make a determination as to whether the proceeding is a "foreign main proceeding" or a "foreign non-

---

[82] Bill C-55, *supra* note 1 at Section 131 (proposed Section 44 of the *CCAA*).

[83] Bill C-55, *supra* note 1 at Section 131. A "foreign proceeding" is defined as a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency 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.

main proceeding". Importantly, under Bill C-55, the characterization of a foreign proceeding as main or non-main is the decision of the Canadian court as opposed to the court in the jurisdiction where the initial proceedings were commenced.[84] The classification as a main or non-main proceeding potentially affects the relief that will be granted by the Canadian court.

For the purposes of determining whether a proceeding is a foreign main proceeding, Bill C-55 directs courts to determine whether the foreign proceeding was commenced by the debtor in the jurisdiction of the "centre of its main interest" or "COMI". A court will find that a foreign proceeding is a foreign non-main proceeding the court determines there is a foreign proceeding that is not a foreign main proceeding.[85] There are a number of consequences associated with a finding of a main versus a non-main proceeding, which are discussed in the following paragraphs.

Mandatory Relief

In the event that the court determines that the foreign proceeding is a foreign main proceeding, a debtor is entitled to automatic relief. Proposed Section 48(1) of the CCAA states that the Court ***shall***, "subject to any terms and conditions it considers appropriate", make an order:

> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that

---

[84] This procedure is consistent with the Model Law, but differs from the mechanism created by the EU Regulation, which is discussed below.

[85] Bill C-55, *supra* note 1 at Section 131 (proposed Section 45(1) of the *CCAA*). This definition is considerably broader than the Model Law definition which requires that the debtor must have a "place of operation where [it] carries out a non-transitory economic activity with human means and goods or services." (Model Law, *supra* note 69 at Article 2).

might be taken against the debtor company under the BIA or the WRA;

(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.[86]

The automatic stay is the first evident advantage of a court finding that there is a foreign main proceeding. However, perhaps the most significant thing to note about the relief that "shall" be granted by the court is the fact that the order is always *subject to any terms and conditions the court considers appropriate*. Although it may be that in the vast majority of cases, the automatic stay is implemented, it also means that it is within the Court's discretion to impose terms and conditions on any relief that is granted. Given the highly fact based nature of any restructuring proceeding, this preserved flexibility is an essential component to ensuring that the legislation will permit debtors, creditors and other stakeholders to make their pitch as to why the relief granted should vary from the provisions in (a) through (d) above.

Discretionary Relief

In the event that a court determines that a foreign non-main proceeding exists, proposed Section 49(1) of the CCAA gives the court the discretion to grant relief including any of the relief that is automatically given upon recognition of a foreign main proceeding. Although, on

---

[86] Bill C-55, *supra* note 1 at Section 131 (proposed Section 48(1) of the *CCAA*).

first glance, it appears that there may be some disadvantage from a "relief" perspective, it is unlikely that this will, in reality, be the case.

By way of analogy, a finding that a debtor is entitled to commence full proceedings under Section 11 of the existing CCAA does not automatically entitle that debtor to a stay of proceedings. However, except in extraordinary circumstances, a stay of proceedings will be granted upon an order being made commencing the proceedings. This is because in most cases, there would be little benefit to a debtor to have a CCAA proceeding in which no stay had been granted. It is possible that where a court finds there is a foreign non-main proceeding, relief granted will be on a more narrow basis, but any variation in the relief granted will be based on the circumstances that will have very little to do with whether the debtor's COMI is in same jurisdiction as where the foreign proceeding was commenced.[87]

Proposed Section 49(1) of the CCAA also provides that upon the recognition of any foreign proceeding, main or non-main, the Court has the express discretion to grant "any order it considers appropriate, including an order":

> (a) 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

---

[87] There are a number of instances where the relief granted varied from the standard stay provisions in *CCAA* orders. For example, the Section 18.6 orders granted in *Babcock, supra* note 32 and *Grace, supra* note 60 in which the Court limited the stay of proceedings to restraining the commencement of continuation of asbestos proceedings. This was done primarily because of the fact that B&W Canada and Grace Canada were otherwise solvent operating entities. Similarly, the Section 18.6 order granted in and *Foamex, supra* note 51 limited the stay of proceedings to a restraint of actions that might have been commenced as a result of the *CCAA* proceedings, the *Chapter 11* proceedings or the DIP financing that was put into place. The limitation on the scope of the stay of proceedings in *Foamex* was in order to reflect the fact that the relief under Section 18.6 of the *CCAA* was really done in order to obtain approval of the DIP financing arrangements in Canada, pursuant to which Foamex Canada was a guarantor.

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

Again, it would seem that the most important element of that provision is the introductory words giving the court the discretion to grant "any order it considers appropriate". This principle is again reiterated in the proposed Section 50 of the CCAA, which states

> An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.[88]

This provision reminiscent of the existing Section 18.6(3) of the CCAA which provides the Canadian court with wide latitude in the nature and the scope of the relief that it may provide under that section.

It is this type of discretionary relief that has been and will continue to be relevant and useful in Canadian ancillary proceedings. The *Grace* file is an excellent example in this regard. When the proceedings were originally commenced in Canada, in part because there were no outstanding claims in Canada against any of the Grace Debtors, it was not necessary to seek any relief in Canada other than a limited stay with respect to Grace Canada. Similarly, because Grace Canada was an otherwise solvent operating entity, all that was required was a limited stay of proceedings restraining asbestos actions. Once the debtors became aware of the outstanding claims in Canada and the plaintiffs were in a position to properly reply, only then did Grace Canada seek further relief. The breadth and flexibility of the jurisdiction given to the court by Section 18.6 also allowed the Court to grant additional relief sought in connection with the

---

[88] Bill C-55*, supra* note 1 at Section 131 (proposed Section 50 of the *CCAA*).

proceedings, namely a stay with respect to the Government of Canada who had also been named in the proceedings.[89]

Preserving flexibility has always been one of the touchstones in Canadian insolvency legislation (and one of its distinguishing attributes). It now appears that with the qualifying language incorporated into Bill C-55, this flexibility will continue after the enactment of the Model Law.

Cooperation

Bill C-55 (proposed Section 52(1) of the CCAA) provides that once a foreign proceeding is recognized "the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding."[90] The Model Law also provides for the coordination of local and foreign proceedings which concern the same debtor. As it is the aim of these provisions to coordinate decisions that will achieve the objectives of all proceedings, courts are directed to cooperate to the "maximum extent possible" with foreign courts and representatives.[91]

It is a significant step that UNCITRAL has incorporated these principles into the Model Law which are now being adopted into the legislation of enacting States. In Canada, many of

---

[89] Since the recognition of the US proceedings, the Ontario Court has further exercised its jurisdiction to grant an order appointing representative counsel to act for Canadian claimants in the Canadian proceedings.

[90] Bill C-55, *supra* note 1 at Section 131.

[91] Bill C-55, *supra* note 1 at Section 131 (proposed Section 52(2) of the *CCAA*).

these principles were outlined in *Babcock* and subsequent decisions. However, it will be the first time that "cooperation" will be mandated by statute.

Obligations of the Foreign Representative upon Recognition

Proposed Section 53 of the CCAA imposes certain obligations on the foreign representative once a Canadian court has granted an order recognizing the foreign proceedings. These obligations primarily relate to disclosure of any change in the status of the foreign proceeding, the foreign representative's authority to act or any other foreign proceeding and the requirement to publish within a prescribed period of time, notice of the ancillary proceedings in one (1) or more Canadian newspapers.[92]

Multiple Proceedings

Bill C-55 provides that the recognition of foreign proceedings is not intended to preclude the commencement or continuation of full restructuring proceedings under the CCAA, the BIA or the WRA in respect of the same debtor.[93] This concept is also included in the Model Law, but on a more limited basis. Under the Model Law, where a debtor has assets in the ancillary jurisdiction, it will not be precluded from commencing other restructuring proceedings.[94] Bill C-55 does not limit the ability to commence a full proceeding to only when a debtor has assets in Canada.

---

[92] See Article 18 of the Model Law which imposes on the foreign representative the obligation to make similar disclosure to the court, but does not require the foreign representative to publish notice of the proceedings in any newspaper.

[93] Bill C-55, *supra* note 1 at Section 131 (proposed Section 48(4) of the *CCAA*).

[94] *UNCITRAL Guidelines*, *supra* note 70 at para. 42.

In this sense, Bill C-55 adopts a less "universal" approach to ancillary proceedings than the Model Law does. However, the preservation of this right may help to prevent many of the issues that have arisen in other jurisdictions and is meant to foresee circumstances in which it will be necessary, either for the protection of creditors or for the restructuring of the debtor, to commence full restructuring proceedings both in Canada and another jurisdiction. It is also meant to preserve the option for jurisdictional autonomy where the Canadian court believes it is merited. Additionally, although Bill C-55 departs somewhat from the Model Law in this way, it is not inconsistent with the overall principles of the Model Law. It is clear from the face of the Model Law that it was not meant to oblige adopting states to provide relief where, for instance, it would be contrary to public policy.[95]

Proposed Section 54 of the CCAA addresses a situation in which multiple proceedings are commenced as follows:

> If any proceedings under this Act in respect of a debtor company are commenced at any time after an order recognizing the foreign proceeding is made, the court shall review any order made under section 49 and, if it determines that the order is inconsistent with any orders made in the proceedings under this Act, the court shall amend or revoke the order.[96]

Proposed Section 49 of the CCAA is the "discretionary relief" provision discussed above. Thus, particularly where the Canadian court has determined that the foreign proceeding in question is a foreign non-main proceeding, it is clear that the Court will have the discretion to revoke the order granted under the discretionary relief provision.

---

[95] *Ibid*. at para. 20(e). Model Law, *supra* note 69 at Article 6.

[96] Bill C-55, *supra* note 1 at Section 131.

Potential Further Amendments to Bill C-55

In October 2005, the Insolvency Institute of Canada ("IIC") came out with a position paper on Bill C-55 (the "Position Paper").[97] The Position Paper recommended a number of changes to Bill C-55, including a few relating to the proposed cross-border insolvency provisions. The recommendations made by the IIC were based on the following premise:

> Canadian insolvency legislation already has a scheme for recognizing and co-ordinating with foreign insolvency proceedings. That scheme works well. Indeed there are no cross-border insolvency arrangements that work better than current Canada/U.S. arrangements. Accordingly, there is a real risk that the new scheme contained in Bill C-55 and based upon the UNCITRAL Model Law will actually be a step backwards.[98]

Accordingly, the IIC proposed two amendments to address the concerns above which related to the following: (a) providing for the appointment of a monitor or a local creditors' committee "to represent the interests of local creditors in the foreign proceeding if there is not a full proceeding in Canada, with the costs thereof being paid by the estate"; and (b) ensuring that the act of recognizing a "main proceeding" in another jurisdiction does not, in itself, restrict or prohibit "the right to bring or continue a full CCAA or BIA proposal proceeding with respect to the same debtor."[99]

These recommendations are primarily points of clarification. The language in Bill C-55 already gives the court the power to grant broad discretionary relief in any circumstance, including the appointment of a monitor or a creditors' committee. It may be, however, that in

---

[97] The Position Paper can be found on the IIC's website at <www.insolvency.ca>.

[98] *Ibid.*

[99] *Ibid.*

certain instances, it is not necessary for such appointments. Where proceedings are truly ancillary to those in another jurisdiction either because of the nature of the proceedings or because of the limited business or assets located in Canada, it could be that to appoint a monitor or a creditors' committee in those circumstances would amount to little more than unnecessary professional fees. However, in order to clarify the court's discretion to appoint such a representative, IIC has recommended that Bill C-55 include a provision to this effect.

With respect to the second recommendation, this right is also already included in the proposed legislation. The fact that the IIC has raised this issue in the Position Paper, demonstrates the concern that this right be expressly preserved.

It has yet to be determined whether these or other amendments will be made to the international provisions of Bill C-55. However, even absent the inclusion of modifications to reflect these recommendations, Bill C-55 preserves the discretion required in order to make the types of orders contemplated by the IIC.

BILL C-55 VS. SECTION 18.6

On a basic level, the Model Law provisions in Bill C-55 and Section 18.6 are intended to achieve similar goals: to provide a mechanism, on a federal level, through which ancillary relief may be sought in Canada. There are obviously a number of differences in the drafting of new the proposed international insolvency sections of the CCAA and the existing provisions. These differences may result in debtors having to alter their initial procedural approach in the relief being requested, but on a substantive basis, there will likely be little change. In this respect, lessons learned from past experience will continue to be relevant.

Definitions

Bill C-55 adopts much of the terminology included in the Model Law. As a result, the definitions of "foreign representative" and "foreign proceeding" currently found in the CCAA will be amended to adopt certain aspects of the Model Law definition.[100] Although the current definitions of "foreign representative" and "foreign proceeding" are worded differently it is unlikely that there will be any substantive difference.

Given the new regime, Bill C-55 now also incorporates definitions of for "foreign main proceedings" and "foreign non-main proceedings"[101] which do not currently exist under the CCAA for obvious reasons.

Classification of the Foreign Proceeding

On its face, Section 18.6 does not create a mechanism for distinguishing between main and non-main proceedings. Although the incorporation of this concept will be new to the legislation, many of these principles were included in the guidelines set out by Justice Farley in *Babcock* which clearly contemplated that Section 18.6 could be used to provide ancillary relief. Additionally, much like Bill C-55, the *Babcock* guidelines provide that where one jurisdiction is ancillary to the other, care should be taken to keep the ancillary court informed as to the status of the proceedings and stakeholders in the ancillary jurisdiction should be provided with access to

---

[100] It should be noted that the proposed definition of "foreign proceeding" under Bill C-55 preserves the concept in the definition of "foreign proceeding" that the proceeding must relate to the rights of "creditors generally" – this terminology is not included in the Model Law.

[101] See note 85.

the primary proceedings.[102] It is, however, significant that these principles may now be included in Canadian federal legislation.

Some have noted that the formalized status of a foreign main proceeding may result in a Canadian court tailoring its decision in a way it might not have otherwise in order to give full effect to related foreign decisions.[103] However, a more likely result is that there will be, in practice, very little effect because Bill C-55 provides the court with sufficient discretion in either case to provide or deny relief as it sees fit.

Differences in the Relief

Section 18.6 permits relief to be granted in a broad fashion under both subsections (2) and (4) on an expedited basis. Further, the CCAA also allows debtors to commence or continue bankruptcy proceedings and supports the coordination of domestic and foreign proceedings with broad provisions allowing a Canadian court to grant relief it considers "appropriate to facilitate, approve or implement arrangements that will result in a co-ordination" of such proceedings.[104] The relief can include the granting of a stay of proceedings, the approval of DIP arrangements,[105]

---

[102] *Babcock, supra* note 32 at pp. 167-8.

[103] Corporate Law Policy Directorate, "Other Business Insolvency Issues" (Industry Canada: August, 2001).

[104] *CCAA*, *supra* note 3 at s.18.6(2).

[105] See *Foamex, supra* note 51.

approval of an international claims process[106] or a declaration regarding plans of reorganization.[107]

Although the relief under Section 18.6 is entirely within the court's discretion and certain of the relief under Bill C-55 is mandatory, again there may be little practical effect. The proceedings *United Air Lines 2* are an example of a situation where a Canadian court may continue to exercise its discretion in granting initial ancillary relief, but not allowing certain payments to be suspended where the substantive law in Canada and the US are considerably different and there would be negligible effect on the overall restructuring of the debtor.

Other Differences

Bill C-55 also more clearly outlines the obligations and standing of a foreign representative which may be useful in circumstances where it was previously unclear as to what authority the foreign representative had in the Canadian court. It is also apparent, as a result of Bill C-55, that the foreign representative may act as a conduit through which courts of different jurisdictions may correspond with one another. Additionally, Bill C-55 sets out certain obligations of the foreign representative with respect to ensuring the Canadian court is kept apprised of any status change in the foreign proceedings and that notice of the ancillary proceedings is publishing in Canadian newspapers. Although these requirements were not set out in Section 18.6, they were principles that were first outlined in *Babcock* and have implemented in practice in the vast majority of 18.6 proceedings that have been commenced in the last six

---

[106] See *Loewen, supra* note 40. US claims processes were also approved in both *Grace* and *Babcock* and implemented in Canada.

[107] See *Loewen, supra* note 40 and *Babcock, supra* note 32.

years. In almost every proceeding commenced under Section 18.6, either a monitor or an information officer has been appointed who has had a range of powers and duties, but at the very least has had the responsibility of reporting to the Court on the status of the foreign proceedings.

Many of the other provisions contained in Bill C-55 are substantively a codification or a variation on principles that are already observed by Canadian courts as a matter of practice. If the introduction of Section 18.6 in 1997 was effectively a codification of existing rights, Bill C-55 goes one step further. For instance, the incorporation of principles of mandatory cooperation and coordination are not currently found in Section 18.6, but have been observed for several years in several instances. However, it may be that with the adoption of these principles into the legislation, decisions such as the one in *Singer* will not have the same result as courts will seriously consider their duty to cooperate where there are recognized foreign proceedings.

THE CENTRE OF A DEBTOR'S MAIN INTEREST

Determination of the COMI

Like the Model Law, Bill C-55 does not set out a definition or a test for determining where a debtor's COMI will be. Instead, Bill C-55 provides that absent evidence establishing otherwise, a debtors' COMI will be presumed to be the jurisdiction where its registered office is located.[108] This presumption regarding the location of a debtor's COMI is taken from the Model Law.[109]

---

[108] Bill C-55, *supra* note 1 at Section 131 (proposed, Section 45(2) of the *CCAA*).

[109] See Model Law, *supra* note 69 at Articles 2(b), and 2(c).

The location of the debtor's registered office, however, is simply a presumption that may be rebutted in the appropriate circumstances. The concept of determining a debtor's location or chief place of business or otherwise is not one that is novel and, over the years, various tests have been developed in order to make such determinations. As a result, examining jurisprudence in these contexts may be helpful in devising a guideline for determining a debtor's COMI.

Arguably, one of the most analogous scenarios is found in Canadian (and US) personal property security legislation. In Canada, the conflicts of laws rules set out in Provincial personal property security acts[110] states that in certain circumstances, perfection of a security interest will be determined by the laws of the jurisdiction in which a debtor is "located" at the time the security interest attaches.[111] Under the PPSA, where a debtor has more than one place of business, it is deemed to be located at its "chief executive office".[112] Unfortunately, there is little Canadian jurisprudence that defines the term "chief executive office" in the context of the analysis of the perfection of security interests under the PPSA. Although there is some indication that a debtor's "head office" will also be considered to be "its principal place of business"[113], in Canada, no definitive tests have emerged from the caselaw to determine a debtor's "location".

---

[110] See, for example, *Personal Property Security Act*, R.S.O. 1990, c. P.10 ["*PPSA*"], Section 7.

[111] *Ibid.*

[112] *Ibid.*, Section 7(4).

[113] *GMAC Commercial Credit Corp. v. TCT Logistics Inc.,* [2003] O.J. No. 349 (Sup. Ct. Jus.) (QL) ["*TCT*"] (This decision was subsequently affirmed by the Ontario Court of Appeal, see *Re TCT Logistics Inc.* (2004), 70 O.R. (3d) 321). In *Re Arthur Anderson Inc.*, [1994] Q.J. No. 1102 (S.C.) ("*Arthur Anderson*"), the court used "chief executive office" and "head office" interchangeably. However, neither *TCT* nor *Arthur Anderson* directly addressed the question of location.

Given the lack of Canadian jurisprudence, Canadian courts have looked to the US interpretation of Article 9 of the US Uniform Commercial Code ("UCC") on this point, as Article 9 is substantially the same as Section 7 of the PPSA.[114] As such, the criteria generally considered in the US may also be informative and relevant in Canada. Three tests appear to have arisen out of the US jurisprudence for determining a debtor's location: (a) the main volume of business test; (b) a two-part test involving an examination of where the debtor manages the main part of its business and operations and what the reasonable expectation of a representative number of creditors; and (c) the location of management test. [115]

Based on US jurisprudence, the following is a list of criteria that is persuasive in determining where a debtor is located: the location at which the debtor does most of its business, the address which appears on the debtor's contracts, its tax forms and letterhead, the location where the debtor meets with customers or suppliers, the location from which the debtor's invoices are paid, the location of the officers and directors of the debtor, the location from which the debtor purchased or leased equipment, the location where the debtor's financial records, including accounts receivables and invoices, are maintained, the location where the debtor's payroll is prepared, the location where the debtor's reports are prepared, the location of the

---

[114] *Gimli Auto Ltd. v. BDO Dunwoody Ltd.* (1998), 160 D.L.R. (4th) 373 at 377 (Alta. C.A.).

[115] See, for example, *Tatlebaum v. The Commerce Investment Company*, 262 A.2d 494 (Md. 1970), *In re J.A. Thompson & Son Inc.*, 665 F.2d 941 (9th Cir. 1982), *In re Golf Course Builders Leasing Inc.*, 768 F.2d 1167 (10th Cir. 1985) ["*Golf Course*"] and *Mellon Bank, N.A. v. Metro Communications Inc.,* 945 F.2d 635 (3d Cir. 1991) ["*Mellon*"].

debtor's accountants and the location where the debtor acquires its liability and workers' compensation insurance.[116]

The EU Regulation (discussed below), although different from Bill C-55 in many ways, also incorporates the COMI concept into its legislation. For the purposes of determining a debtor's COMI under the EU Regulation, it has been observed:

> The EU Regulation gives critical importance to two factors in determining the location of the COMI. First, the COMI is located at the place where the debtor conducts the administration of its interests on a regular basis, which essentially means the place where it administers its commercial, industrial or professional activities. Second, this is an objective test based on what is apparent to third parties, and especially to creditors. Thus a creditor's view of where the COMI is located is an important factor.[117]

The factors set out above are similar to those that have emerged as relevant in US jurisprudence under Article 9. As such, it is reasonable to expect that existing jurisprudence will act as a useful guide in determining a debtor's COMI under the new legislation. Ultimately, it is clear that a debtor's COMI will always be a question of fact.[118] Regardless of what tests or conventions are developed for determination, there will always be potential mitigating factors.

---

[116] *Golf Course, supra* note 115, and *Mellon, supra* note 115.

[117] Honorable Samuel L. Bufford "Global Venue Controls are Coming: A Reply to Professor LoPucki" (Winter 2005) 79 Am. Bankr. L.J. 105 at p. 119 [Bufford, "Global Venue Controls"].

[118] Bob Wessels. "International Jurisdiction to open Insolvency Proceedings in Europe, In Particular Against (Groups of) Companies" (2003) www.iiiglobal.org [Wessels, "International Jurisdiction"] at p. 5.

The COMI of a Corporate Group

Arguably, one of the downfalls of the Model Law, the EU Regulation (discussed below) and Bill C-55 is that none of them explicitly contemplate "corporate group" filings. In addressing the issue of proceedings that involve multiple applicants, a critic of the regime has observed,

> On the one hand, putting a single court in control of the debtor's worldwide business is the very point of universalism. The basic premise is that reorganization or liquidation of a business requires coordination that only a single court can provide. That suggests that universalism should apply to corporate groups, not corporations, and the search for the 'centre of main interests' should be for the center of the group's interests. Instead, both the EU regulation and the UNCITRAL model law direct that the search be for the home countries of individual corporations, not corporate groups.[119]

Even proponents of the Model Law and the associated legislation acknowledge that the Model Law does not directly address situations involving corporate groups.[120] Judge Samuel L. Bufford suggests that a potential solution is to amend the definition of COMI to contemplate that the:

> corporate group venue decision be based on the collective COMI of all the legal entities that operate together as an integrated economic unit. Thus, where two or more companies are economically integrated and operate as a single economic group, the COMI decision for the group would displace a decision based on the COMI of the separate legal entities.[121]

---

[119] Lynn M. LoPucki. "Global and Out of Control" (Winter 2005) 79 Am. Bankr. L.J. 79 at 93 [LoPucki, "Global and Out of Control"].

[120] See, for example, Bufford, "Global Venue Controls", *supra* note 117 at p. 136.

[121] *Ibid.* at pp. 136-7.

This suggestion would seemingly provide for increased certainty in situations where a corporate group consisting of companies incorporated in different jurisdictions were seeking immediate and expedited relief. Where the business of a corporate group is truly integrated in one jurisdiction the concept of a "collective COMI" may not only be a logical solution, but the COMI of each of those "foreign" companies may in fact, be located in the jurisdiction where the parent company (or main operating entity) has the centre of its main interests.

The provisions of Bill C-55 similarly do not directly address corporate groups. Instead, it will be up to debtors and counsel to provide an argument on a reasonable and justifiable basis as to whether corporate groups should be filed together with a main proceeding one country or otherwise. However, the restructuring of corporate groups subject to the laws of more than one jurisdiction is not a foreign concept in Canada. For instance, the Loewen Companies consisted of over 800 entities, which were incorporated under the laws of various different jurisdictions. Primary restructuring proceedings were commenced in both the US and Canada for that reason. However, in order to address the potentially different treatment of claims of creditors, ancillary relief was sought under Section 18.6 of the CCAA and such relief was granted on the basis that most Canadian creditors had filed their claims in the US claims process.

Both *Babcock* and *Grace* are examples of instances in which it was appropriate for ancillary (as opposed to main) proceedings to be commenced in Canada notwithstanding that both B&W Canada and Grace Canada were incorporated under the laws of Canadian Provinces and were arguably located in Canada. The combination of the nature of the relief being sought, the level of integration of the businesses and proposed treatment all mitigated against the locus of the companies being the determining factor for ancillary or primary relief being granted.

Further, as a result of the distinction between main and non-main proceedings, it is now clear that a court can recognize a foreign proceeding on the basis that it is a "non-main" proceeding and provide discretionary relief on that basis. Both the Model Law and Bill C-55 make it clear that where there is a non-main proceeding, when the court of the secondary jurisdiction believes it is appropriate, separate proceedings may be commenced in that jurisdiction.

LESSONS LEARNED TO DATE: THE EU EXPERIENCE

The EU adopted the European Union Regulation on Insolvency Proceedings (the "EU Regulation") in May 2000.[122] The EU Regulation was developed contemporaneously with the Model Law and accords with the Model Law in many ways. All of the EU member States (except for Denmark, who opted out of enactment) are bound by the EU Regulation. Much like the Model Law, the EU Regulation is aimed at providing guidelines for procedure in cross-border insolvency proceedings throughout the EU.[123] The EU Regulation was not meant to usurp the insolvency laws of individual countries, but simply to provide a mechanism through which the proper jurisdiction of insolvency proceedings could be determined.[124] Under the EU Regulation a regime has been created based on a universalist model whereby main proceedings may be commenced in one member State and recognized in other member States. A

---

[122] Council regulation (EC) No. 1346/2000 ["*EU Regulation*"]. The EU Regulation became effective in May, 2002.

[123] Robert van Galen, "The European Insolvency Regulation and Groups of Companies" (2003) INSOL Europe Annual Congress, Cork Ireland, October 16-18, 2003 at p.1.

[124] *Ibid.*

determination of whether a proceeding is a main proceeding is based on whether the debtor's COMI is located in that jurisdiction.[125]

Since its inception, although there appear to have been many successful filings, there have also been a handful of controversial ones. The issues that have arisen out of those problematic filings have included allegations of forum shopping, improper opening of main proceedings and mischaracterization of a COMI. Some of the issues that have been raised are as follows:

(a) At what point in time should a debtor's COMI be determined (i.e. what if the debtor has attempted, fraudulently or not, to move its COMI)?

(b) How should proceedings involving multiple related companies incorporated under different jurisdictions or with different registered offices be treated?

(c) What if "main" proceedings are commenced by different companies in different jurisdictions?[126]

One of the largest concerns that critics have raised is the increased potential for improper venue shopping as a result of the COMI approach. The potential for forum shopping has long been of concern to the courts of different jurisdictions, particularly those who anticipate

---

[125] *EU Regulation*, *supra* note 122.

[126] This is an issue that does not arise under Bill C-55. Although it may be relevant in situations where Canadian multinational corporate groups have operations in Europe, none of the Model Law, Bill C-55 or Chapter 15 include the concept of the originating country declaring itself the "main jurisdiction" or the "first in time" principle. Instead, Bill C-55 contemplates that in certain circumstances there will be "main" or "full" restructuring proceedings commenced in more than one (1) in situations where the circumstances dictate.

circumstances in which their rightful jurisdiction may be usurped by another court. A number of decisions arising out of the EU since the adoption of the EU Regulation have solidified this concern in the minds of some. These decisions generally involve companies, creditors and courts all competing for jurisdiction, rights and powers.

This battle can be seen in the proceedings commenced with respect to Eurofood ISFL Ltd. ("Eurofood") and the European "Daisytek" group of companies. In the former case, the courts of Italy and Ireland both claimed primary jurisdiction over Eurofood**,** an Irish subsidiary of the "Parmalat" group, which was already subject to insolvency proceedings in Italy at the time the petition in respect of Eurofood was filed.[127] Similarly, Daisytek has involved a jurisdictional battle between the courts of the United Kingdom and the courts of France and Germany.[128] The difficulty with the disputes in both Eurofood and Daisytek revolve around the provision in the EU Regulation that permits one member State to declare itself as the main jurisdiction in respect of debtors, which declaration seemingly binds all other member States. The situations were likely further exacerbated given the apparent lack of cooperation and communication involved.

Forum shopping is an issue over which Canadian courts have and will continue to express concern. Clearly, in making his decision in *Singer,* Registrar Funduk was mindful of this issue. Bill C-55, like the Model Law, does not contemplate that one country can declare itself as the

---

[127] A creditor of Eurofood filed an involuntary petition for the winding up of Eurofood in Ireland approximately a month after the proceedings were commenced in Italy. See Bufford, "Global Venues: *supra* note 117 at pp. 126-129 and James H.M. Sprayregan P.C. and Gordon W. Johnson "Strategies for Success when Dealing with Multi-National Insolvencies in a Changing North American Regulatory Landscape" (2006) Canadian Institute's 6th Annual Advanced Insolvency Law & Practice Conference (January 19, 2006) at p. 9 [Sprayregan, "Strategies for Success"].

[128] Proceedings had been commenced in respect of sixteen European companies three of which were incorporated under German law and one of which was incorporated under French law. See Bufford, "Global Venues" *supra* note 117 at pp. 129-130 and Sprayregan, "Strategies for Success", *supra* note 127 at p. 10.

sole main jurisdiction. This attribute of Bill C-55 will hopefully assist in ensuring that full proceedings are commenced when appropriate in Canada. In these instances, increased communication amongst all parties will be required in order to increase the chances of a successful cross-border restructuring.

Concern has also been raised regarding the ability of a debtor to "re-locate" its COMI immediately prior to commencing insolvency proceedings. This is as a result of the fact that neither the EU Regulation nor the Model Law indicates at what point in time a debtor's COMI should be determined. As an example, critics point to the US filing of Singer, a multinational company that, by the time of its insolvency had operations all over the world, and arguably, no longer had its centre of main interests in the US. Shortly before commencing restructuring proceedings, Singer relocated its headquarters to the US and subsequently filed under Chapter 11. Although Singer would not have necessarily been prohibited from commencing Chapter 11 proceedings in the US regardless of whether it had re-located its headquarters to the US, this decision has been cited as an example of improper forum shopping. Had Singer's COMI been determined at any point in time other than immediately prior to the restructuring, Singer would potentially not been able to commence "main" proceedings in the US.

Under Bill C-55, it will be open to debtors and other stakeholders to argue for a determination regarding COMI. Canadian courts are expressly entitled to consider public policy reasons for not providing relief, which would presumably include intentional evasion of the applicability of Canadian law.

Many have wondered the circumstances in which the presumption of a company's registered office as its COMI will be successfully rebutted. The decision of the UK Court in

Enron Directo Sociedad Limitada ("*Enron Directo*")[129] indicates that where it finds the "actual head office" of a company is in a jurisdiction other than the jurisdiction of its incorporation, the presumption will be rebutted.[130] In *Enron Directo*, despite the fact that the debtor, a subsidiary of the larger Enron group, was incorporated under the laws of Spain, the UK Court found that its actual head office was located in England and thus opened main proceedings within that jurisdiction.

The case in *Re BRAC Rent-A-Car International Inc.* ("*BRAC*")[131] is another example of a situation where the UK court has found that a debtor's COMI lies within the United Kingdom despite the fact that it was incorporated under the laws of another jurisdiction.[132] In *BRAC*, the debtor was incorporated under the laws of the State of Delaware. However, the vast majority of the company's operations were in the United Kingdom. In the circumstances, the debtor argued that the centre of its main interest was located in the United Kingdom and not in the US. The UK Court agreed with this argument and provided relief, commencing main proceedings in the United Kingdom.[133]

The foregoing examples represent some of the issues that have arisen and the difficulties that have been encountered under the main court system. There have also been a number of

---

[129] See Wessels, "International Jurisdiction", *supra* note 118 at p. 8.

[130] *Ibid.*

[131] [2003] EWHC (ch) 128.

[132] The EU Regulation does not address whether it is applicable to debtors that are not incorporated in a member State. See Wessels, "International Jurisdiction", *supra* note 118.

[133] *Ibid.*

instances where venue has not been an issue and restructuring proceedings have proceeded in a cooperative manner.[134] Undoubtedly, under any regime, whether territorial or universal, or a modified version of one or both of them, where there are complicated, contested cross-border proceedings, with multiple, often unhappy parties, issues will arise that cannot be anticipated by legislation.

THE UNITED STATES

Although there are many differences in between the US Bankruptcy Code and both the BIA and the CCAA,[135] the restructuring regimes created under US and Canadian law are founded on similar principles and merit comparison.

Section 304

Until June 2005, ancillary insolvency proceedings were brought under Section 304 of the US Bankruptcy Code ("Section 304").[136] Essentially, Section 304 provided a "mechanism for courts in [the United States] to provide flexible assistance to their foreign counterparts and to give effect to the principle of comity."[137] It was designed for foreign debtors, with assets in the US, who wanted to rely primarily on the legislation of its primary jurisdiction while also being

---

[134] *Ibid.* at p. 124.

[135] Some of the differences between the *CCAA* and the *US Bankruptcy Code* include: (a) lack of the "cram down" provision in Canadian legislation; (b) the codification of the doctrine of equitable subordination in the US Legislation; (c) automatic relief under *Chapter 11* vs. discretionary relief under the *CCAA*.

[136] Proceedings and judgments can also be recognized on common law principles of comity – see, for example, *In re American Sensors Inc.* (Bkrtcy. S.D.N.Y., 1997).

[137] *In Re Shavit*, 197 B.R. 763 (Bankr. S.D.N.Y 1996) at 766-7 ["*Shavit*"].

able to deal with their assets in the US. Under Section 304, "foreign representatives" [138] were entitled to apply for recognition of "foreign proceedings".[139] Upon recognition, the court was given discretion to grant relief under Section 304(b). Any relief, however, was linked to the main proceeding as Section 304, by its very nature, only provided for the granting of ancillary relief.

The US court *In Re Fracmaster*[140] expressed that the court should be willing to find that "foreign proceedings" exist in a wide variety of circumstances so as to exercise respect and comity for the insolvency regimes of other jurisdictions:

> The breadth of the definition of 'foreign proceeding' insures that issues arising from a wide range of foreign insolvency–related actions can be addressed under the auspices of section 304. Its scope encompasses administrative as well as judicial proceedings, and a proceeding need not even have been brought under the foreign country's bankruptcy laws in order to qualify. This inclusive approach is consistent with the 'perceived Congressional objective under section 304 of exercising the maximum flexibility possible in handling ancillary cases in light of principles of international comity and respect for the laws and judgements of other nations.'[141]

The granting of relief under Section 304(b), however, was always subject to the qualifier in Section 304(c), which stated that the court should be guiding in its granting of relief under

---

[138] Under Section 101(24) of the *US Bankruptcy Code*, a "foreign representative" was defined as "[a] duly selected trustee, administrator, or other representative of an estate in a foreign proceeding." US caselaw has made it clear foreign representatives are not limited to simply trustees in bankruptcy, but that courts will take a fairly expansive view on who can qualify as a foreign representative.

[139] Formerly, under Section 101(23) of the *US Bankruptcy Code*, a "foreign proceeding" was defined as "[a] proceeding whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization." This language has changed as a result of the enactment of Chapter 15, which is discussed below.

[140] 237 B.R. 627 (Bankr. E.D. Tx 1999) ["*Fracmaster*"].

[141] *Ibid* at p.14.

Section 304 by what would "best assure an economical and expeditious administration of such estate consistent with:

(a) just treatment of all holders of claims against or interests in such estate;

(b) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceedings;

(c) prevention of preferential or fraudulent dispositions of property of such estate;

(d) distribution of proceedings of such estate substantially in accordance with the order prescribed by this title;

(e) comity; and

(f) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns."[142]

These guiding points encoded into Section 304 reflected the desire of the legislature to balance the sometimes competing interest of comity, on the one hand, and protection of the rights of US creditors and other stakeholders, on the other. Over the past number of years, the US and Canada have enjoyed a relationship through which decisions have been made based on principles of international comity.[143]

---

[142] *Ibid. US Bankruptcy Code, supra* note 20 at §304(c) (repealed June 2005).

[143] See for example, *Fracmaster, supra* note 140, *In Re Irwin Toy Limited, Irwin, Toy USA Inc. and Irwin USA Inc.* (December 10, 2002), 02-80017-BKC-SHR (Bank. Ct. Fla.), *Re GT Group Telecom Inc. et. al.* (January 2, 2003),

One significant departure from this trend was the decision of the US Bankruptcy Court for the District of Delaware in the restructuring proceedings of Teleglobe Inc. ("Teleglobe"). On May 15, 2002, Teleglobe, a Canadian company, and several of its subsidiaries (collectively, the "Teleglobe Debtors") applied for protection under the CCAA.[144] Among the Teleglobe Debtors were a number of Teleglobe's US subsidiaries.[145] Instead of commencing full proceedings under Chapter 11, the Teleglobe Debtors brought a petition for the commencement of proceedings under Section 304.

The commencement of Teleglobe's Section 304 proceedings was subsequently objected to by a number of parties, including the United States Trustee (the "UST"). These objections were brought based on the grounds that the US debtors were not subject to "foreign proceedings" as a result of the fact that they were US companies and therefore "resident" in the US.

Teleglobe's primary underlying reason for having chosen Canada as the primary jurisdiction for the restructuring was the fact that management and control of all of the Teleglobe Debtors was in Canada. For this reason, Teleglobe argued that the US companies were, in fact, subject to "foreign proceedings." The US Court, however, agreed with the UST's objections and terminated the ancillary proceedings with respect to the US Companies. Termination necessarily resulted in applications for relief under Chapter 11.

02-B-13193 (RDD) (Bank. Ct. NY), *Canada 3000 Inc.* (November 9, 2001) 01-43656 (C.D. CA), *Air Canada*, (April 3, 2003) 03-11971 (PB) (S.D.N.Y.) and *Stelco Inc.* (January 29, 2004) 42401,42402 and 42403 (E.D. Mich.).

[144] (May 15, 2002), 02-M-4528 (Bankr. D. NY) ["*Teleglobe*"]

[145] Although these companies were incorporated under the laws of various of the United States, the primary business centre for all of the Teleglobe Debtors was in Canada and the relative value of the US companies' assets to those of the overall group was minimal.

Despite the ruling in *Teleglobe*, it is without a doubt that US courts had the jurisdiction under Section 304 to recognize foreign proceedings that had been commenced by US companies. *In Re Shavit* is one example of such a case. In its decision, the Court *In Re Shavit* stated:

> while the debtor must have a "substantial connection" with the host country to support a foreign rehabilitation or liquidator . . . ***it need not be formed under the laws of that country and, in the appropriate circumstances could be formed under American law***. Accordingly, the foreign liquidation of an American company, which principal place of business or principal assets exist in the foreign state, can qualify as a "foreign proceeding" for the purposes of federal bankruptcy law (emphasis added).[146]

The cases under Section 304 make it clear that US courts have, for the most part, acted in a manner consistent with promoting the principles of comity between nations, in particular Canada and the US.

Chapter 15

The US has now enacted a version of the Model Law. In June 2005, the US enacted Chapter 15 of the US Bankruptcy Code ("Chapter 15"), replacing Section 304. Professor Jay Westbrook summarizes the three most important features of Chapter 15 as follows:

(a) the attempt the follow the Model Law's language and intent as closely as possible;

(b) the emphasis on an ancillary rather than parallel approach; and

---

[146] *Shavit, supra* note 137.

(c) the exclusion of small, natural person debtors.[147]

In order to commence proceedings under Chapter 15, a "petition for recognition of a foreign proceeding" must be filed.[148] This may be done by either a debtor[149] or by a foreign representative. If recognition is granted, the court may then provide "additional assistance to a foreign representative under this title or under other laws of the United States." In deciding whether to grant "additional assistance", courts are directed to consider whether such assistance, while consistent with the principles of comity, will reasonably assure:

(a) just treatment of all holders of claims against or interests in the debtor's property;

(b) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(c) prevention of preferential or fraudulent dispositions of property of the debtor;

(d) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by Chapter 15; and

(e) if appropriate, the provision of an opportunity for a fresh start of the individual that such foreign proceeding concerns.[150]

---

[147] Jay Lawrence Westbrook, "Multinational Enterprises in General Default: Chapter 15, the ALI Principles and the EU Insolvency Regulation" (2002) 76 Am. Bankr. L.J. 1 at p. 18 [Westbrook, "Multinational Enterprises"].

[148] *US Bankruptcy Code*, *supra* note 20 at §1504.

[149] Excluded from Chapter 15 are foreign insurance companies and natural persons unless the quantum of their debt exceeds a prescribed amount.

[150] *US Bankruptcy Code*, *supra* note 20 at §1507.

The inclusion of these principles is one of the ways in which Chapter 15 strays from the Model Law and differs from Bill C-55 in order to preserve a part of the old Section 304.[151] The inclusion of these guidelines in Chapter 15 demonstrates, in part, the intention of the drafters that similar principles should be considered in granting additional relief under Chapter 15 as were considered in granting relief under Section 304. They also indicate that the nature of the relief granted by US courts will be broader or narrower than that specifically mandated by the language of the Model Law depending on the circumstances.

Like the Model Law, Chapter 15 provides for interim relief where necessary, prior to formal recognition of foreign proceedings.[152] Subsequently, upon recognition of a foreign proceeding by the Court and a determination as to whether the proceeding is a main proceeding or a non-main proceeding, permanent relief will be granted in a manner similar to that set out in the Model Law and Bill C-55.

Although there are certain apparent differences between the new Chapter 15 and its predecessor, the principle of providing a formal mechanism for recognition of foreign proceedings has not changed. For example, because the Model Law seemingly imposes mandatory relief upon recognition of a foreign main proceeding, the US Court will still have considerable discretion to tailor the relief granted in the circumstances.

---

[151] The factors outlined in the new §1507 were previously found in §304(c) of the *US Bankruptcy Code*.

[152] *US Bankruptcy Code*, *supra* note 20 at §1519.

In the coming years we will likely see whether there will be any overall substantive differences between Chapter 15 and Section 304.[153] With the inclusion of Section 1507, it is unquestionable that Section 304 cases will continue to have relevance in the consideration of new proceedings. One would hope that the adoption of mandatory cooperation provisions in Chapter 15 will assist US courts in considering applications like the one made in *Teleglobe* in the future. However, given the discretion provided to the courts under Chapter 15, it may be that there will be little affect on the relief (or lack of relief) granted in these circumstances. At the same time, however, the incorporation of the Model Law into the US Bankruptcy Code should be a signal to other countries of the willingness of the US to continue on with a trend of comity and cooperation in the context of multinational insolvency proceedings.[154]

Chapter 15 vs. Bill C-55

As both Bill C-55 and Chapter 15 are based on the Model Law, it comes as no surprise that they are quite similar. Neither of the two pieces of legislation follow the EU Regulation format of enabling one country to declare the proceedings in itself as the "main proceeding", but instead provide a mechanism for requesting ancillary relief. Both provide considerable discretion in the nature of the relief that can be granted, albeit in different ways. Whereas Bill C-55 simply provides courts with the discretion to make an order on any terms and conditions it may deem appropriate, Chapter 15 sets out guidelines for consideration when determining what relief may

---

[153] See Jay Westbrook. "Chapter 15 at Last." (Summer 2005) 79 Am. Bankr. L.J. 713. Professor Westbrook suggests that primary reason for adopting Chapter 15 was "to demonstrate the United States commitment to the Model Law and to cooperation and universalism generally, in the hope that our example would encourage other countries to follow" (p. 726).

[154] *Ibid*. at pp. 725-6.

be appropriate.[155] This is indicative, in part, of the different historical nature of the two pieces of legislation, namely that the US Bankruptcy Code is meant to be a comprehensive code governing insolvency, while the CCAA is meant to provide debtors and Courts with more flexibility in order to address the commercial realities that are not always anticipated even by comprehensive legislation.

Another difference between Chapter 15 and Bill C-55 is that Chapter 15 provides for the possibility of interim relief pending recognition of the foreign proceeding. In this regard, Chapter 15 follows the Model Law format while Bill C-55 does not. This difference is more procedural than substantive and reflects the different ways in which relief is obtained in the two jurisdictions. Under the Canadian system, the hearing for recognition will likely take place almost immediately after the notice of application has been filed. These proceedings, although sometimes made on either very short or no notice, will invariably include a come-back clause (discussed above) which will provide stakeholders the opportunity to object to the order within a period of time of receiving notice of the order. In the US, once the petition for recognition has been filed, it may be several weeks before the formal recognition hearing takes place in order to provide sufficient notice to all stakeholders.

Chapter 15 and Bill C-55 also adopt somewhat different approaches to multiple proceedings. In this regard Chapter 15 follows the Model Law more closely than Bill C-55. Section 1520(c) of Chapter 15 provides that even upon recognition of foreign main proceedings, a foreign representative is still entitled to file a petition commencing a case under that title.

---

[155] Bill C-55, *supra* note 1 at Section 131 (proposed Section 50 of the *CCAA*) and *US Bankruptcy Code*, *supra* note 20 at §1507.

Section 1529 provides that once a foreign main proceeding[156] has been recognized, proceedings under another chapter may only be commenced "if the debtor has assets in the United States" and even if that is the case, such proceedings may only be commenced for limited purposes.[157]

Bill C-55 is clear that commencement of ancillary proceedings will not prevent the continuation or subsequent commencement of full restructuring proceedings in Canada whether there is prior recognition of a main or a non-main proceeding. This right is not qualified by a requirement that the debtor have assets in Canada, but is an absolute right provided by the legislation and existing criteria under Canadian law will apply when determining whether a debtor would be entitled to such relief.

There have always been differences between the insolvency regimes of Canada and the US and there almost certainly always will be. However, the differences described above and the others embodied in the legislation itself do not mark a hugely substantive difference in philosophy or approach, but are more likely to address concerns unique to the drafters, civil procedure and necessary changes to conform the new provisions with the existing legislation.

The First Chapter 15 Cases

The first petitions under Chapter 15 have now been filed and to date, there have been eight Chapter 15 filings in the US.[158] One of the most recent Chapter 15 decisions involves a

---

[156] Chapter 15 is silent on this point as it relates to "foreign non-main proceedings". §1529 addresses situations in which proceedings under another chapter are pending concurrently with a foreign proceeding.

[157] *US Bankruptcy Code*, *supra* note 20 at §1528.

[158] Documents relating to those Chapter 15 proceedings that have been commenced to date can be found at www.chapter15.com.

Canadian debtor. This was the decision of the United States District Court of the Southern District of New York (the "NY District Court") in insolvency proceedings of Muscletech Research and Development Inc. ("Muscletech") and certain of its affiliates (collectively, the "Muscletech Group").

Muscletech was a privately held holding corporation that was incorporated under the laws of the Province of Ontario in 1997. Its principal assets consisted of the shares of its subsidiaries, all of which were also Ontario corporations and which were mostly the other members of the Muscletech Group. The Muscletech Group was owned by Iovate Group Inc. ("Iovate"), who owned not only the Muscletech Group but also a number of other smaller operating companies, most of which conducted business out of the head office facilities located in Ontario.

Over the past years, the Muscletech Group became subject to a number of product liability cases and other lawsuits in the US and Canada. This litigation arose primarily as a result of ephedra, a weight-loss supplement contained in products formerly sold by Muscletech. Accordingly, on January 18, 2006, the Muscletech Group applied for and was granted protection pursuant to Section 11 of the CCAA.[159]

Although the Ontario Court did not make a ruling on the COMI of the Muscletech Group, in his endorsement, Justice Farley noted that in addition to having their registered offices in Ontario, the following factors support the finding that the Muscletech Group's COMI was located in Ontario:

---

[159] (January 18, 2006), Toronto, 06-CL-6241 (Ont. Sup. Ct. Jus.) ["*Muscletech*"] See the endorsement of Justice Farley given on January 18, 2006. All Canadian filings in the *Muscletech* proceedings can be found at www.rsmrichter.com/current_insolvency_files.aspx.

(a) each of the members of the Muscletech Group was incorporated in Ontario;

(b) each of the members of the Muscletech Group had Ontario mailing addresses;

(c) the principals, directors and officers of the Muscletech Group were residents of Ontario;

(d) all decision-making and control in respect of the Muscletech Group, including product development, took place at the Muscletech Group's premises located in Ontario;

(e) the Muscletech Group's principal banking arrangements were conducted in Ontario through one of the major Canadian financial institutions; and

(f) all administrative functions associated with the Muscletech Group and all of the employees that perform such functions, including general accounting, financial reporting, budgeting and cash management, were conducted and situated in Ontario.[160]

Justice Farley continued on to observe:

> the courts of Canada and the US have long enjoyed a firm and ongoing relationship based on comity and commonalities as to, *inter alia*, bankruptcy and insolvency.[161]

---

[160] *Ibid.* at para. 4.

[161] *Ibid.*

Later on the same day, RSM Richter Inc., the court-appointed monitor filed petitions in the NY District Court pursuant to Chapter 15 commencing ancillary proceedings and seeking recognition of the Canadian proceedings. Temporary relief was granted by the NY District Court which was subsequently extended to April 2006. On March 2, 2006, the NY District Court heard the recognition hearing and granted an order recognizing the Canadian proceedings as foreign main proceedings thus continuing the trend of comity between Canadian and US courts.

GUIDELINES APPLICABLE TO COURT-TO-COURT COMMUNICATIONS IN CROSS-BOARDER CASES (THE "ALI GUIDELINES")[162]

In 2003 the American Law Institute finished its development of the ALI Guidelines. There are seventeen guidelines in total which were based on the premise that "one of the most essential elements of cooperation in cross-border cases is communication among the administrating authorities of the countries involved."[163] The ALI Guidelines were intended to "enhance coordination and harmonization" of cross- border insolvency proceedings in between the US and Canada and the US and Mexico and were substantially based on existing protocols. Although they are not mandatory or binding, courts are encouraged to adopt and apply the ALI Guidelines in the appropriate circumstances. Upon adoption, the ALI Guidelines are intended to provide some procedural certainty with respect to notice requirements, communication and participation.

---

[162] The American Law Institute, Transnational Insolvency: Transnational Cooperation Among the NAFTA Countries – Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases ["ALI Guidelines"].

[163] *Ibid*.

On April 4, 2004, the Ontario Superior Court of Justice (Commercial List) approved the ALI Guidelines for matters heard in that court.[164] As part of its endorsement of the ALI Guidelines, the Commercial List indicated:

> It is expected that these Guidelines will facilitate co-operative procedures for insolvency proceedings and other types of commercial disputes involving cross-border proceedings, where court-to-court communications might facilitate in harmonizing proceedings to help ensure consistent results and increase efficiency.
>
> The Guidelines will only be applied in specific cases, following adequate notice to the parties.
>
> Although the Guidelines were prepared for court-to-court communications as between Canada and the United States, the Commercial List endorses their application in court-to-court communications between Canada and other countries, and as between Ontario and the other provinces and territories.[165]

There is little doubt that Canadian courts have been, in the appropriate circumstances, recognized the benefits of court-to-court communication.[166]

The ALI Guidelines have been adopted in a number of instances to date, including in *Matlack, Re Systech Retail Systems Inc.* ("*Systech*")[167] and *Re PSINet Ltd.* ("*PSINet*").[168] In *Matlack*, Justice Farley recognized that the relief being sought was in accordance with the Transnational Insolvency Project of the American Law Institute.[169] He then noted that the ALI

---

[164] See <www.ontariocourts.on.ca/superior_court_justice/commercial/protocol.htm>.

[165] *Ibid.*

[166] See Farley, "Cooperation and Coordination" *supra* note 59.

[167] Toronto, (03-CL-4836) (Sup. Ct. Jus.) ["*Systech*"].

[168] (2001), 28 C.B.R. (4th) 95 (Ont. Sup. Ct. Jus.) ["*PSINet*"].

[169] *Matlack*, *supra* note 39 at para. 12.

Guidelines had been the most recent development and included them in his endorsement for the information and reference of those who might find them useful. More recently in *Ravelston Corp. Ltd. (Re)*,[170] Justice Farley directed the US Court judge to the ALI Guidelines in the event that she saw some benefit in court-to-court communication in those proceedings.

The mandatory communication and coordination provisions of the Model Law which have been incorporated into Ley de Concursos Mercantile (Mexico)[171] and Chapter 15 and which are proposed by Bill C-55 are consistent with the ALI Guidelines. Despite the inclusion of principles of cooperation and communication in the Model Law legislation, debtors may continue to find it useful to request that the ALI Guidelines be adopted in circumstances involving complex cross-border restructurings and extended court proceedings in more than one NAFTA country.

CROSS- BORDER PROTOCOLS

Cross-border protocols have also assisted in providing for coordination of cross-border proceedings and court-to-court communication. For the most part, protocols have been adopted to address primarily procedural issues in instances where proceedings have been commenced in both Canada and the US. The adoption of protocols are entirely voluntary on the parts of those involved in the proceedings and must be approved by the courts in all jurisdictions where proceedings have been commenced.

---

[170] [2005] O.J. No. 4011 (Sup. Ct. Jus.) (QL).

[171] D.O. 12 de Mayo 2000 (Mex).

Protocols can be used for a variety of purposes. One of the first protocols adopted was the protocol in restructuring proceedings of Maxwell Communications Corporation ("MCC") in which Chapter 11 proceedings had been commenced in the US while administration proceedings were commenced in the UK. Initially, the courts of both jurisdictions took the position that the primary proceeding had been properly commenced in its respective jurisdiction. After significant negotiation, all parties were able to successfully negotiate a protocol that addressed matters of standing in the US and UK courts. Absent the adoption of the protocol in this circumstance, the procedural confusion arising out of the two proceedings would have ensued, diminishing the chances of a successful process.[172]

The protocol adopted in *Re Olympia & York Developments Ltd.* was one of the first protocols adopted in a Canadian court and adopted for slightly different purposes. In his decision, Justice Blair noted the US judge's observation that the purpose of that protocol was:

> to bridge the gap between [the] US creditors and [the] Canadian equity [holders] and 'to harmonize' matters arising in the Canadian CCAA proceedings, on the one hand and the US 'Chapter 11' proceedings, on the other hand, respecting the corporate governance of [the debtors].[173]

There, the protocol dealt with matters primarily related to corporate governance issues. In other instances, such as *Philip*, *Loewen, Teleglobe* and *Matlack* the protocols adopted addressed broader procedural issues such as coordination of proceedings so as to avoid duplication and confusion, filing of claims, compensation of professionals, joint recognition o the stay of

---

[172] See Mark Homan, "An Insolvency Practitioner's Perspective" in Michael Bridge and Robert Stevens, eds., *Cross-Border Security and Insolvency* (Oxford: Oxford University Press, 2001) p. 243 at pp. 250-3.

[173] [1993] O.J. No. 1748 (Ont. S.C.J.) (QL).

proceedings, standing to be heard, dispute procedures, preservation of rights and requirements for providing notice.[174]

Until *Loewen*, protocols were typically implemented late in the restructuring proceedings of debtors who were trying to implement plans of arrangement in more than one jurisdiction. However, in *Loewen,* the protocol was produced and approved by both the Ontario Court and the US Court as part of the initial order and first day orders respectively. As such, the protocol from the inception of the proceedings was meant to guide the courts and other interested parties in issues of procedure.[175] Justice Farley, in one of his endorsements noted his hope in the utility of the Loewen protocol, stating,

> I am of the view that the revised Protocol will be an invaluable aid to supplement the usual cooperation, aid and comity exhibited traditionally between the courts of this country and the courts of the United States on a reciprocal basis.[176]

Additionally, it was noted that while protocols are generally implemented to deal with matters of process, there was the potential for them to also address matters of substance.[177] In part, as a result of the implementation of the protocol in *Loewen*, Justice Farley and Judge Walsh

---

[174] Protocols have also been adopted in multiple other proceedings such as *Livent Inc.* Toronto, (98-CL-3162), *Re 360networks Inc.* Vancouver (Doc. No. 1011792), *Everfresh Beverages Inc.* Toronto, (32-077978)*, Laidlaw, supra* note 43 and *Systech*, *supra* note 167.

[175] Derrick Tay and Orestes Pasparakis. "The Loewen Group Inc. Insolvencies without Frontiers: The Emergence of the Cross-Border Protocol." (1999) Institut d'insolvabilité du Canada.

[176] *Loewen, supra* note 40 (endorsement of Justice Farley made on June 30, 1999).

[177] *Ibid.*

were able to hold a joint hearing by way of videoconference which greatly reduced the potential for otherwise duplicitous hearings and wasted resources.[178]

The decision of Justice Ground in *Re Vicwest Corp.* ("*Vicwest*")[179] illustrates a circumstance in which it may have been useful for a protocol to be implemented in order to provide certain procedural clarity that was lacking. In *Vicwest*, the unsecured creditors' committee that had been appointed in the US court sought leave to appear before the Canadian court. Justice Ground denied standing to the unsecured creditors' committee, stating "in absence of any protocol adopted by the US Bankruptcy Court and this court governing the Chapter 11 proceedings and the CCAA proceedings, I must conclude the Unsecured Creditors' Committee ("UCC") has no standing to bring this motion before this court."[180]

Upon the adoption of Bill C-55, there will be substantial communication and coordination rights incorporated into the legislation, which may result in fewer protocols being developed. However, one would suspect that in any situation where complex and specific coordination among proceedings is required, protocols will continue to play a useful role in setting out file-specific guidelines for communication and administration of proceedings. Regardless of whether protocols continue to be adopted or not, one hopes that coordination and, where appropriate, productive court-to-court communication more commonplace. We have

---

[178] Farley, "Cooperation and Coordination" *supra* note 59 at p. 10. Justice Farley also observes that similar videoconferences were also held in *PSINet*, *supra* note 168 and *Systech, supra* note 167.

[179] [2003] O.J. No. 2945 (Ont. Sup. Ct. Jus.) (QL).

[180] *Ibid.* at para. 1.

already seen in the context of US/Canada cross-border restructurings the expressed gratitude of one court to another where there has been true coordination and cooperation.[181]

ALL THE WORLD'S A STAGE – THE ROLE OF COUNSEL AND THE COURTS

The ideals behind the Model Law, the ALI Guidelines, Protocols and the EU Regulation are all clear: cooperation, communication and common sense[182] are required in order for there to be any chance of success in restructuring a debtor or multiple debtors carrying on business on a multinational level. On a very basic level, these principles must be implemented by the individuals who are involved – namely, representatives of the debtor(s), creditors, court appointed officers, all of their counsel and the courts. The role of counsel and the courts and the extent to which they are able to communicate should not be underestimated or trivialized in any given circumstance.

Both Bill C-55 and Chapter 15 have now incorporated provisions providing for seemingly mandatory "cooperation". Section 1525 of the US Bankruptcy Code explicitly directs the court to "cooperate to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee." The court is also authorized to communicate directly a foreign court.[183] Bill C-55 provides that "every person who exercises

---

[181] *Babcock Sanction Order, supra* note 38. See also *Loewen, supra* note 40 (endorsement of Justice Farley made on December 7, 2001) and *Re Laidlaw, supra* note 43 (endorsement of Justice Farley made on February 28, 2003).

[182] "Communication, cooperation and common sense" are commonly known on the Commercial List as the "3 C's" and all parties are often reminded of their utility in cross-border as well as domestic matters.

[183] *US Bankruptcy Code*, *supra* note 20 at §1525(b). This right is subject to the "rights of a party in interest to notice and participation."

powers or performs duties and functions under the proceedings under" the CCAA shall cooperate with foreign representatives and foreign courts in a similar manner.

There is a significant difference, however, between mandating cooperation by law and achieving it in practice. It is only as a result of the willingness of judges, foreign representatives, counsel and the other individuals involved that productive communication can take place. The results arising out of the restructurings of *Loewen* and *Systech* are examples of the ways in which court-to-court communication and the willingness of those involved to facilitate that communication can benefit proceedings.

These are not new principles in Canada or the US. The *Babcock* guidelines, the ALI Guidelines and the employment of cross-border protocols have encouraged cross-border communication between courts in various jurisdictions. In the larger picture, however, it shows the importance of increased communication and cooperation not only between those jurisdictions that already have developed a long trend of comity, but also those who are looking to start that trend.

CONCLUSION

In the context of cross-border insolvencies in past years, there has been a continuous struggle to address the various rules created by the laws of the different jurisdictions. Overcoming this struggle has proven, at times, to be virtually impossible simply because at the very root of restructuring is the idea of compromise, which can be difficult for many to accept. There will never be any one system that will work perfectly for all parties in all circumstances. However, it would seem that establishing a mechanism through which there can be a certain

degree of procedural certainty on a global basis is a productive first step. In this regard, the Model Law provisions of Bill C-55 take great steps at attempting to achieve a balance between comity and autonomy, recognizing both that if cooperation and coordination is the general rule, territoriality may sometimes be the necessary exception.

In my view, it is the human element, the adversarial system and the competent representation of stakeholders' interest that provide for effective restructurings. The Model Law, Chapter 15, the EU Regulation and now Bill C-55 have all taken steps to propose a mechanism for determining that proper forum. However it will only be with the actual cooperation, communication and creativity of the individuals involved, that the implementation of these regimens will have any ultimate utility in the way that business are restructured.[*]

---

[*] Jennifer Stam is an associate in the insolvency and restructuring group of Ogilvy Renault LLP. She been involved as Canadian corporate counsel in the restructurings of both Babcock & Wilcox Canada Ltd. and Grace Canada Inc. Ogilvy Renault LLP (formerly Meighen Demers LLP) also acted as company counsel in *Loewen* and *Teleglobe*.

The author would like to acknowledge and thank Derrick Tay, Orestes Pasparakis, Daniel Bach (student-at-law) and Penny Adams (law clerk) for their advice and input throughout the course of the writing of this paper.